APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2008

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

Special Appeal No. [556] of 2008

Hasib Ahmad ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri. Arvind Srivastava
Sri. Krishna Kumar Singh

Counsel for the Respondents:
S.C.

High Court Rules-Chapter VIII Rule 5-Special Appeal-against the judgement of Single Judge-writ petition against the order passed by appellate authority under the provision of Statutory Rule 28 of U.P. Scheduled Commodities Distribution Order,2004-held-special appeal not maintainable-facts in case of Ram Dhyan Singh are distinguishable.

Held: Para 7

The Division Bench held as quoted above that the order of the learned Single Judge was not against an order passed in exercise of appellate or revisional jurisdiction conferred by some Act and in fact the appellate jurisdiction was conferred by a Government Order and not by an Act. Thus the reason for holding the Special Appeal maintainable in the case before the Division Bench was that the appellate power was exercised by the Commissioner under the Government Order dated 03.07.1990 and not under an Act. In the present case, the appellate power had been exercised by the Commissioner under Rule 28 of U.P. Scheduled Commodities Distribution Order, 2004 which had been framed under Section 3 of the Essential Commodities Act, 1955. Thus the appellate power exercised by the Commissioner in the present case referable to an appellate power conferred under an Act. Thus according to the ratio of the Division Bench in the case of Ram Dhyan Singh (Supra), the present appeal is not maintainable under chapter VIII Rule 5 of the Rules of the Court. The Special Appeal having been filed against a judgment of learned Single Judge arising out of a writ petition in which appellate order passed by the Commissioner was challenged which appellate order was passed in exercise of appellate jurisdiction under an Act is not maintainable under Chapter VIII Rule 5 of the Rules of the Court.

Case law discussed:
2004 (3) AWC

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

1. This is an appeal against the judgment and order dated 28.02.2008 passed by the learned Single Judge by which the writ petition filed by the petitioner challenging the order dated 13.07.07 canceling the fair price agreement as also the appellate order dated 28.02.2008 was dismissed.

2. The Stamp Reporter has submitted a report that the Appeal is not maintainable under Chapter VIII Rule 5 of the Rules of the Court.

3. Learned counsel for the appellant contends that this Appeal is maintainable under Chapter VIII Rule 5 of the Rules of the Court. He has placed reliance upon the Division Bench judgment of this Court reported in **2004 (3) AWC; Ram Dhyan Singh v. State of U.P.**

4. The writ petition giving rise to this appeal filed by the appellant was

against the cancellation order as also against an appellate order passed under Rule 28 of the U.P. Scheduled Commodities Distribution Order, 2004. The U.P. Scheduled Commodities Distribution Order, 2004 has been framed under Section 3 of the Essential Commodities Act, 1955. The said 2004 order is thus a statutory order, Rule 28 providing for appeal is quoted herein below:

"28. Appeal (1) All appeals shall lie before the Concerned Divisional Commissioner who shall hear and dispose of the same may by order delegate his/her powers to the Assistant Commissioner Food for hearing and disposing of the appeal."

5. The appeal filed before the Divisional Commissioner under the said provision is, therefore, a statutory appeal. The writ petition having been filed against an appellate order, Special appeal is barred under Chapter VIII Rule 5. The Division Bench judgment in the case of Ram Dhyan Singh (Supra) relied upon by the learned counsel for the appellant was a case where the appeal was not under the above mentioned 2004 statutory rules. The appeal in the said case was filed under the Government Order dated 03.07.1990 and, therefore, the Division Bench took the view that the Special Appeal was maintainable as the appeal was held to be non-statutory.

6. The Division Bench in paragraph 4 of the judgment has given reasons for holding the Special Appeal maintainable in that case. Following was observed by the Division Bench in paragraph 4 which is quoted below:

"**There is an office report that the Special Appeal is not maintainable in view of the decisions of this Court in Vajara Yojna Seed Farm Kalyanpur (M/s) and others v. Presiding Officer, Labour Court-II, U.P. Kanpur and another, 2003 UPLBEC 496 and Sita Ram Lal v. District Inspector of Schools, Azamgarh and others, 1994 ACJ 180. These decisions hav referred to Chapter VIII, Rule 5 of the Allahabad High Court Rules which states that an appeal lies against the judgment of a learned Single Judge under Article 226 of the Constitution except when the writ petition was filed against such judgment or order or award (a) of a Tribunal, Court of authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act mentioned in Chapter VIII, Rule 5. In this case, the writ petition filed before the learned single Judge was against the order of the Commissioner who decided the appeal provided for under the Government Order dated 03.07.1990. Thus, the impugned judgment before the learned single Judge, was not against an order of a Tribunal or Court or statutory arbitrator. It was also not against an order passed in exercise of appellate or revisional jurisdiction 'conferred by some Act'. In fact, the appellate jurisdiction was conferred by a Government Order and not by an Act. Hence, in our opinion this special appeal is maintainable."**

7. The Division Bench held as quoted above that the order of the learned Single Judge was not against an order passed in exercise of appellate or

revisional jurisdiction conferred by some Act and in fact the appellate jurisdiction was conferred by a Government Order and not by an Act. Thus the reason for holding the Special Appeal maintainable in the case before the Division Bench was that the appellate power was exercised by the Commissioner under the Government Order dated 03.07.1990 and not under an Act. In the present case, the appellate power had been exercised by the Commissioner under Rule 28 of U.P. Scheduled Commodities Distribution Order, 2004 which had been framed under Section 3 of the Essential Commodities Act, 1955. Thus the appellate power exercised by the Commissioner in the present case referable to an appellate power conferred under an Act. Thus according to the ratio of the Division Bench in the case of Ram Dhyan Singh (Supra), the present appeal is not maintainable under chapter VIII Rule 5 of the Rules of the Court. The Special Appeal having been filed against a judgment of learned Single Judge arising out of a writ petition in which appellate order passed by the Commissioner was challenged which appellate order was passed in exercise of appellate jurisdiction under an Act is not maintainable under Chapter VIII Rule 5 of the Rules of the Court.

8. Special Appeal is dismissed as not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2008

BEFORE
THE HON'BLE VINOD PRASAD, J.
THE HON'BLE AJAI KUMAR SINGH, J.

Criminal Misc. Writ Petition No. 18016 of 2007

Smt. Leena Katiyar ...Petitioner
Versus.
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Prem Prakash
Sri A.N. Srivastava
Km. Akanksha Srivastava
Sri Murlidhar

Counsel for the Respondents:
Sri V.P. Srivastava
Sri Lav Srivastava
Sri Jag Narayan

Constitution of India, Article 226-Writ of Mandamus-seeking direction to the authorities concerned to submit charge sheet against individuals-sole dominion of authorities-interference of Court not required-informant can approach to investigation officer writ petition held-misconceived.

Held: Para 9

Yet another facts which way heavily against grant of relief sought by the petitioner in this writ petition is that the offences are being further investigated. It is now well settled by a catena of decisions by this court as well as by the apex court that courts can not interfere in already progressing investigation. Informant petitioner call seek redressal of her grievances before the investigating officer conducting further investigation but, under Article 226 of The Constitution, we are not inclined to

interfere in the already progressing investigation specially when the relief sought in this petition is beyond the scope of writ power.

Case Law discussed:

AIR 2004 SC 536, AIR 2004 SC 1890, AIR 2000 SC 740, AIR 1998 SC 3148, AIR 1955 SC 196, AIR 1968 SC 117, AIR 2007 SC 351, AIR 1980 SC 326, AIR 1963 SC 447, AIR 1970 SC 786, AIR 1972 SC 484, AIR 1945 P.C. 18

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

1. Smt. Leena Katiyar Informant of crime number 467 of 2007, under sections 364A, 302,201, IPC, Police station Kotwali Fatehgarh. District Farrukhabad has invoked our extra ordinary jurisdiction, under Article 226 of The Constitution Of India, with the prayers to issue a writ of mandamus commanding respondents no.1 to 8 to submit charge sheet against Sunil Katheria and Haplu, respondents no.9 and 10 in the aforesaid crime number, relating to SST No. 40 of 2007, pending before Special Judge, (DAA), Farrukhabad. Second prayer made is to issue a writ of mandamus commanding the aforesaid respondents 1 to 8 to send the tapes and CDs recorded between 22.4.2007 and 1.5.2007 by the Superintendent of Police and Additional Superintendent of Police for sound spectrography to voice recording experts. Another payer is to issue a writ of mandamus commanding those very respondents to record voice sample of the accused persons through Special Judge (DAA), Farrukhabad for being compared and examined through sound Spectrography from the taps and CDS mentioned above.

2. Relevant facts are that the son of the informant Madhusudan @ Madhu is allegated to have been kidnapped and murdered for ransom by the accused persons who are eight in number including respondents no. 9 and 10. Police investigated the offence and to decipher the crime resorted to electronic surveillances to tap the phone conversations between informant and accused persons and also inter-se between them. After completion of investigation the police submitted the charge sheet against the accused for the aforementioned offences on the basis of which SST No. 40 of 2007 was registered in the court of Special Judge (DAA). Farrukhabad which is still pending.

3. Father of one of the accused Happy @ Shivam, who now has been declared to be a Juvenile, rued false implication of his minor son and, being a person of SC/ST caste, approached SC/ST Commission who recommended for further investigation and·on such a recommendation Director General Of Police and other Higher Police officers ordered for further investigation by Special Enquiry Cell. The investigating officer of Special Enquiry Cell approached the court of Special Judge (DAA) Farrukhabad. Seeking his approval for further investigation and the court approved the same vide it's order dated 30.5.2007 and therefore further investigation in the crime is ongoing under section 173 (8) Cr.P.C. It is important to note that order for further investigation has been challenged by the informant petitioner in connected writ petition no. 7318 of 2008 Smt. Leena Katiyar versus State of U.P. and others which is being disposed off to day itself by passing a separate order for the sake of convenience. Since the police did not charge sheet respondents no. 9 and 10

Sunil Katheria and Haplu hence informant has filed the present writ petition.

4. We have heard Sri Murlidhar learned Senior counsel as well as Sri A.N. Srivastava in support of this writ petition and Sri V.P. Srivastava, learned Senior counsel assisted by Sri Lav Srivastava and learned AGA in opposition and have gone through the averments made in this writ petition.

5. From the record it is not disputed that the civil police after investigation has submitted charge sheet against the accused persons except respondents no. 9 and 10. Informant is aggrieved by non charge sheeting of aforesaid respondents. This can now been done only under section 173(8) Cr.P.C. as there is no other provision in the Code of Criminal Procedure for the same. Special Judge (DAA) has also taken the cognizance of the offences and had summoned the charge sheeted accused excluding those two respondents. The only sections under Cr.P.C. now left with the court to add accused in the trial is section 319 Cr.P.C., after some evidence of commission of offence is brought on record during trial by the prosecution witnesses recorded during the trial. But for the aforesaid section there is no other provision to add/any person as an accused in the case. See **Vidyadharan vs. State of Kerala, AIR 2004 SC 536; Moley and another vs. State of Kerala AIR 2004 SC 1890; Gangula Ashok vs. State of A.P., AIR 2000 SC 740; Ranjit Singh vs. State of Punjab AIR 1998 SC 3148.**

6. For the police only section 173(8) Cr.P.C. can be resorted to add an accused. The dichotomy of the whole situation lies in filing of two writ petitions with contradictory reliefs. In the instant writ petition petitioner informant has prayed for addition of accused which can be done only under section 173(8) Cr.P.C. through further investigation as the charge sheet has already been laid in court by the local police and, on the other hand, in the connected writ petition 7318 of 2007 the same petitioner has prayed for quashing of order for further investigation. Thus the prayer made in the two writ petitions run counter to each other in as much as if, either of the writ petition is allowed the other writ petition will automatically become infractuous. Since we have taken a view in the other writ petition that further investigation can not be quashed therefore we are of the opinion that the petitioner for the relief sought in the present writ petition can convince investigating officer making further investigation for the relief prayed in the instant writ petition.

7. There is yet another aspect for us for not granting relief sought in this petition and that is that the prayer made in this writ petition is beyond the domain of writ power of this court. Under Article 226 of the Constitution this court can not direct submission of charge sheet against an individual anointing him with the status of an accused and snatching his liberty away. Whether a person is to be charge sheeted or not, on the facts of each case for alleged offence or offences, is the sole domain of the officer in charge of police station concerned under section 173 (2) Cr.P.C. He can not delegate that power. No doubt investigation of offence/ offences can be done by any officer subordinate to that officer in charge of police station concerned but the final opinion under section 173 (2) Cr.P.C. or under section 169 Cr.P.C. has to be that of

the officer in charges of the police station concerned. This aspect of the matter no longer remains res integra and has been dealt exhaustively by the apex court in the case of ***H.N. Rishbud and Inder Singh v. The State of Delhi :AIR 1955 SC 196*** where in the apex Court has held as under:-

"Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure, of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

The scheme of the Code also shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for everyone of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in Section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. ***It is also clear that the final step in the investigation, viz., the formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision*** *entitling superior officers to supervise or participate under Section 551."*

8. Thus what is unambiguously clear is that for sending a person or trial or not, the opinion has to be that of the officer in charge of the police station concerned and of no body else. Resultantly the courts also can not direct for submission of charge sheet against an individual as the aforementioned passage oust the power of the court also to direct officer in charge of a police station to send an accused for trial by submitting a charge sheet against him. In this connection we may also refer the view of the apex court in the case of **Abhinandan Jha and Ors. v. Dinesh Mishra: AIR 1968 SC 117** where in the apex court has observed thus:-

"If the report is of the action taken under Section 169, then the Magistrate may agree with the report and close the proceedings. If he disagrees with the report, he can give directions to the police under Section 156(3) to make a further investigation. If the police, after further investigation submits a charge-sheet, the Magistrate may follow the procedure where the charge-sheet under Section 170 is filed: but if the police are still of the opinion that there was no sufficient evidence against the accused, the Magistrate may or may not agree with it. Where he agrees, the case against the accused is closed. Where he disagrees and forms an opinion that the facts mentioned in the report constitute an offence, he can take cognizance under Section 190(1)(c). ***But the Magistrate***

cannot direct the police to submit a charge-sheet, because the submission of the report depends entirely upon the opinion formed by the police and not on the opinion of the Magistrate. If the Magistrate disagrees with the report of the police he can take cognizance of the offence under Section 190(1)(a) or (c), but, he cannot compel the police to form a particular opinion on investigation and submit a report according to such opinion.

This judgement shows the importance of the opinion to be formed by the officer in charge of the police station. The opinion of the officer in charge of the police station is the basis of the report. Even a competent Magistrate cannot compel the concerned police officer to form a particular opinion. The formation of the opinion of the police on the material collected during the investigation as to whether judicial scrutiny is warranted or not is entirely left to the officer in charge of the police station. There is no provision in the Code empowering a Magistrate to compel the police to form a particular opinion. This Court observed that, although the Magistrate may have certain supervisory powers under the Code, it cannot be said that when the police submits a report that no case has been made out for sending the accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet. The formation of the said opinion, by the officer in charge of the police station, has been held to be a final step in the investigation, and that final step has to be taken only by the officer in charge of the police station and by no other authority."

(Emphasis on under line portion)

9. Yet another facts which way heavily against grant of relief sought by the petitioner in this writ petition is that the offences are being further investigated. It is now well settled by a catena of decisions by this court as well as by the apex court that courts can not interfere in already progressing investigation. Informant petitioner call seek redressal of her grievances before the investigating officer conducting further investigation but, under Article 226 of The Constitution, we are not inclined to interfere in the already progressing investigation specially when the relief sought in this petition is beyond the scope of writ power. Supreme court has held in the case of **Shashikant versus Central Bureau Of Investigation: AIR 2007 SC 351** as under:-

"28. The First Respondent is a statutory authority. It has a statutory duty to carry out investigation in accordance with law. ***Ordinarily, it is not within the province of the court to direct the investigative agency to carry out investigation in a particular manner. A writ court ordinarily again would not interfere with the functioning of an investigative agency. Only in exceptional cases, it may do so. No such case has been made out by the appellant herein. The nature of relief prayed for in the writ petition also is beyond the domain of a writ court save and except, as indicated herein before, an exceptional case is made out.****"*

10. Further in the case of **State of Bihar v. J.A.C. Saldanna. AIR 1980 SC 326** : it has been held by the apex court as under:-

"There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is all obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating Officer submits report to the Court requesting the Court to take cognizance of the offence under S. 190 of the Code its duty comes to an end On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in S.173 (8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate".

11. Supreme court has expressed the same view in the case of **State of West Bengal v. S.N. Basak, AIR 1963 SC 447** : wherein it was held:-

"The powers of investigation into cognizable offences are contained in Ch. XIV of the Code of Criminal Procedure. S. 154 which is in that Chapter deals with information in cognizable offences and S.156 with investigation into such offences and under these Section the police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of the police to investigate cannot be interfered with by the exercise of power under S. 439 or under the inherent power of the Court under S.561A of the Criminal Procedure Code".

12. Some other judgements of the apex court countenancing the same view are **S.N. Sharma v. Bipen Kumar Tewari AIR 1970 SC 786 ; Hazari Lal Gupta v. Rameshwar Prasad AIR 1972 SC 484**. Here we recollect that decades ago Privy Council in the case of **Emperor v. Khawaja Nazir Ahmad, AIR 1945 PC 18** has held as under:-

"*Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly as acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their providence and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of are alleged cognizable crime without requiring an, authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result*

if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under S.491, Criminal P.C., to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then."

13. For the reasons above, we don't find any merit in this writ petition as the reliefs prayed for can not be allowed and hence we dismiss the writ petition as merit less.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.07.2008

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

Criminal Revision No. 3228 of 2007

Maheswh Chandra Dwivedi ...Revisionist
Versus
State of U.P. and another ...Respondents

Counsel for the Revisionist:
Sri. K.M. Asthana

Counsel for the Revisionist:
Sri. Bal Mukund
Smt. Arti Singh
A.G.A.

Code of Criminal Procedure-Section 125-Maintenance claimed by wife-divorced by mutual consent-even after divorce her status as wife continued till remarriage-rejection of claim for enhancement of maintenance or the ground of compromise before family court about not claiming maintenance-held-being against public policy hit by Section 23 of Indian Contract Act-illegal-consequential direction issued.

Held: Para 10

In view of this position, I come to the conclusion that even if there was any divorce by mutual agreement and the husband Mahesh Chandra Dwivedi had made lumpsum payment to Smt Manorama, she was not debarred from claiming maintenance under Section125 Cr.P.C. In the circumstances, the order passed under Section 125 Cr.P.C. on 12.4.1994 and the enhancement order passed on 26.7.1996 can not be said to be illegal or without jurisdiction. Learned Judge, family court, who rejected he application filed by Smt Manorama for enhancement was not justified in rejecting that application on the ground that parties had compromised in Civil Suit and Smt Manorama had agreed not to claim any maintenance in future.

Case law discussed:
(1995) 5 SCC 299, (2000) 3 SCC 180, (1987) 2 Hindu LR 334 (Kerala High Court), 2004, Crl.L.J., 3690, (Punjab & Haryana High Court).

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

1. Criminal Revision No. 1145 of 2005 has been filed by Smt. Manorama for setting aside the order dated 18.1.2005 passed by Principal Judge, Family Court, Kanpur Nagar, in Misc. Case No. 33 of 2002 whereby he rejected the application filed by Smt. Manorama under Section 127 Cr.P.C. for enhancement of the maintenance amount awarded under Section 125 Cr.P.C. by order dated 12.4.1994 @ Rs.200/-per month and earlier enhanced to Rs.300/- by order

dated 26.7.1996 under Section 127 Cr.P.C. Criminal Revision No. 3228 of 2007 has been filed by Mahesh Chandra Dwivedi for setting aside the order dated 19.7.2007 passed by Principal Judge, Family Court, Kanpur in Misc. Case No. 35 of 2006 whereby he rejected the application filed by husband Mahesh Chandra Dwivedi against Smt. Manorama under Section 127 Cr.P.C. for cancelling the order dated 26.7.1996 whereby the maintenance amount was enhanced from Rs.200/- to Rs.300/- per month under Section 127 Cr.P.C. Since these two revisions arise between the same parties and the facts are common they have been heard together and are being decided by one order.

2. I have heard Sri Bal Mukund, learned counsel for Smt. Manorama, Sri K.M. Asthana. learned counsel for Mahesh Chandra Dwivedi, learned A.G.A. and perused the material on record.

3. Brief facts of the case are that Smt. Manorama filed an application under Section 125 Cr.P.C. for maintenance and the same was allowed by order dated 12.4.1994 and maintenance was awarded @ Rs.200/- per month. Later on Smt. Manorma filed an application for enhancement of the maintenance amount under Section 127 CR.P.C. and by order dated 26.7.1996 same was enhanced to Rs.300 per month. Again Smt. Manorama filed an application for enhancement under Section 127 Cr.P.C. as cost of living had increased and it had become difficult for her to maintain herself. According to Smt. Manorama her husband Mahesh Chandra Dwivedi a Class IV employee in a college, was getting Rs.6000/- per month as salary and was also earning from private tuition and had agricultural income and she prayed that amount be enhanced to Rs.1000/- per month. In reply Mahesh Chandra Dwivedi pleaded that it was wrong to say that Smt. Manorama was not able to maintain herself because of poverty. She is living with her father and he has no son and also has agricultural land as well as works in a private job. Smt. Manorama was also working in a private company and had good financial condition. Mahesh Chandra Dwivedi also pleaded that he was hardly getting Rs.4600/- per month and had to maintain his wife, children and aged mother. He also pleaded that in original suit no. 97 of 1989, Mahesh Candra Dwivedi Vs. Smt. Manoram, parties had entered into a compromise in the Court of Civil Judge, which was accepted and the suit for divorce was decreed. It was also agreed that they would have no concern with each other and at that time he had also paid Rs.10,000/- as maintenance allowance in lumpsum and Smt. Manorama had agreed that she would never file any claim in future regarding maintenance. In that matter learned Judge, Family Court held that there was a compromise between the parties and the application for enhancement was filed against the terms and conditions of the compromise and therefore he rejected the application under Section 127 Cr.P.C.

4. Mahesh Chandra Dwivedi filed an application under Section 127 Cr.P.C. on 6.3.2006 and prayed that on the basis of the compromise decree passed in the Original Suit No. 97 of 1989 recovery warrant issued against him as well as the enhancement order dated 26.07.1996 passed in Case No. 64 of 1996 be cancelled. He contended that the parties

had agreed in the divorce case and that was decided on the basis of mutual consent and Smt. Manorama had taken Rs.10,000/- as final payment for maintenance and was not entitled to claim any thing in future. He has also contended that in petition under Section 125 Cr.P.C. an order was passed on 12.4.1994 and an amount of Rs.200 was fixed for maintenance and due to his ignorance he started making payment of that amount and also paid the enhanced amount till 2005 whereas Smt. Manorama has good financial condition. Smt. Manorama filed objection in this case and contended that the application under Section 125 Cr.P.C. was decided on merits and the order enhancing the amount was also justified. There was no ground to cancel the earlier order and also there was no ground to cancel the recovery warrant. It had also been contended that the compromise entered in the divorce proceedings did not effect the proceedings under Section 125 Cr.P.C.

5. Learned Judge, Family Court by order dated 19.7.2007 held that earlier it was held in the case between the parties that the right under Section 125 Cr.P.C. would not be curtailed on the basis of the compromise entered into between the parties and that the order passed under Section 125 Cr.P.C. and the order dated 26.7.1996 under Section 127 Cr.P.C. had become final as the same were not challenged. Therefore learned Judge rejected the application filed by Mahesh Chandra Dwivedi, under Section 127 Cr.P.C.

6. Feeling aggrieved the revisions have been filed by both the parties. The main question involved in these revisions is whether the wife is entitled to claim maintenance under Section 125 Cr.P.C. even after the compromise decree has been passed between them wherein the wife accepts the lump sum amount for her maintenance and agrees not to file any claim for maintenance in future.

7. Learned counsel for Mahesh Chandra Dwivedi has contended that the compromise was based on mutual consent and therefore in view of Section 125 (4) Cr.P.C. Smt. Manorama is not entitled for any maintenance or enhanced maintenance under Section 125 Cr.P.C. or 127 Cr.P.C . As against it learned counsel for Smt. Manorama has contended that the provisions of Section 125 Cr.P.C. are independent of divorce proceedings and the words "living separately by mutual consent" do not cover divorce or settlement for maintenance in divorce case by mutual consent.

Section 125 (4) Cr.P.C. reads as under:-

"No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceedings as the case may be from her husband under this Section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

8. In the case of **Vanamala Vs. H.M. Ranganatha Bhatta (1995) 5 SCC 299**, it has been held by Hon'ble Apex Court that a wife who obtains divorce by mutual consent cannot be denied maintenance by virtue of Section 125(4) of the Code. If the marriage between the parties is terminated by a decree of consent divorce, that would not amount to

live separately by mutual consent. In the case of **Rohtash Singh Vs. Ramendri (Smt), (2000) 3 SCC 180**, Hon'ble Apex Court has held that on account of explanation (b) to Sub section 1 of Section 125 of the Code, a woman, who has been divorced by her husband on account of a decree passed by the Family Court under the Hindu Marriage Act, continues to enjoy the status of a wife for the limited purpose of claiming maintenance allowance from her ex-husband. The claim of maintenance under Section 125 of the Code by a divorced wife is based on the foundation provided under explanation (b) to Sub Section 1 of Section 125 of the Code. If the divorced wife is unable to maintain herself, and if she has not re-married, she will be entitled to claim maintenance allowance. A woman after divorce becomes a destitute. If she is not able to maintain herself and remains unmarried, the man who was once her husband continues to be under a statutory duty and obligation to provide maintenance to her. Therefore I am of the view that even if compromise decree has been passed between the parties, it is not effected by Section 125 (4) of the Code and Smt. Manorama is entitled to claim maintenance from Mahesh Chandra Dwivedi till she re-marries and is unable to maintain herself.

9. Now it has to be seen whether Smt. Manorama is debarred or stopped from claiming the said maintenance on the plea that at the time of granting of divorce decree by mutual consent she had agreed not to claim maintenance from the petitioner in future. Right to claim maintenance by the wife, children and the old parents who are not capable to maintain themselves has been provided under Section 125 of the Code as public policy by the State. Definition of wife has also been given extended meaning by the Statute in order to provide the security in life to a wife whose marriage has been dissolved by a decree of divorce and who being destitute is unable to maintain herself. This is matter of public policy and not of an individual. In such circumstances, the statutory right which has been conferred on a person under public policy cannot be waived by the said person by mutual agreement. It is also well settled that any contract which is opposed to public policy is void under Section 23 of the Indian Contract Act 1872, and the same cannot be enforced in a Court of Law. If the object or consideration of an agreement would defeat the provisions of any law, and if it is against the public policy, the agreement will be treated as unlawful and void. In a similar situation in the case of **Sadasivan Pillai Vs. Vijayalakshmi, (1987) 2 Hindu LR 334 (Kerala High Court), and Sushil Kumar Vs. Neelam 2004, Crl. L. J., 3690, (Punjab & Haryana High Court)** it has been held that inspite of any such agreement wife could not be debarred from claiming maintenance under Section 125 Cr.P.C.

10. In view of this position, I come to the conclusion that even if there was any divorce by mutual agreement and the husband Mahesh Chandra Dwivedi had made lumpsum payment to Smt. Manorama, she was not debarred from claiming maintenance under Section125 Cr.P.C. In the circumstances, the order passed under Section 125 Cr.P.C. on 12.4.1994 and the enhancement order passed on 26.7.1996 can not be said to be illegal or without jurisdiction. Learned Judge, family court, who rejected he application filed by Smt. Manorama for

enhancement was not justified in rejecting that application on the ground that parties had compromised in Civil Suit and Smt. Manorama had agreed not to claim any maintenance in future. Therefore the impugned order dated 18.1.2005 is to be set aside and the Criminal Revision No. 1145 of 2005 is to be allowed. The Judge, family court has rightly rejected the application filed by Mahesh Chandra Dwivedi under Section 127 Cr.P.C. and the Criminal Revision No. 3228 of 2007 being devoid of merits is liable to be dismissed.

11. Criminal Revision No. 1145 of 2005 is hereby allowed. Order dated 18.1.2005 is set aside and the case is remanded to learned Trial Judge, Family Court, Kanpur Nagar, who shall decide the application under Section 127 Cr.P.C. for enhancement of maintenance allowance on merits. Parties are directed to appear in the Trial Court for further orders on 11.8.2008.

12. Criminal Revision No. 3228 of 2007 is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2008

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

First Appeal From Order No. 1791 of 2008

National Insurance Company Ltd.
...Appellant
Versus
Riyasat Ali and others ...Respondents

Counsel for the Appellant:
Sri. K.S. Amist

Counsel for the Respondents:
Sri. Nigamendra Shukla

Motor vehicle Act 1988- Rule2(44)- Tractor for agricultural purpose-accident caused due to hit by train-Tribunal fixed joint liability-appeal by insurance company-disputing the use of tractor for purpose other than agriculture-total non consideration of this aspect-case remitted back for fresh consideration.

Held: Para 8

Hence in totality, we dispose of the appeal at the stage of admission without imposing any costs giving liberty to the appellant to make an application before the Tribunal which would be heard upon notice and giving opportunity of hearing to all the parties but under no circumstances the payment of compensation to the claimants should be stalled

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

1. This appeal is arising out of a judgment and order passed by the concerned Motor Accident Claims Tribunal, Bulandshahar, dated 20.2.2008 in M.A.C. No. 152 of 2000. Two persons died and one injured when the Tractor was hit by a Train on the way. It has been contended by the learned counsel appearing for the insurance Company here as well as in the court below that the Tractor is meant for agricultural purpose but when it was carrying some household material like cement and sands etc. for the construction of the house, it has been proceeded in contravention of the insurance Policy for which either the owner has to pay the compensation or the insurance Company will pay with the right of recovery of the same from the owner. The claimants are represented by Sri Nigamendra Shukla, the learned

counsel present before the court. The insurance Company further contended that although right of recovery has been given thereunder but the same is restricted only with regard to the verification of the driving licence which he does not want to agitate before us in view of the availability of such document.

2. It appears to us that the Tractor and Train both were fastened with the liability of 50% each. Now the main question has been raised before us for which a 'Tractor' is made particularly upon going through provisions of the Motor Vehicles Act read with the Central Motor Vehicles Rules 1989 and U.P. Zamindari Abolition and Land Reforms Act, 1950 to find out the meaning of agricultural purpose.

3. It appears to us, the definition of Tractor has been given under section 2 (44) of the Motor Vehicles Act 1988, which is as follows:-

"2 (44). "tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller."

Therefore, a very wide meaning has been given under the Act. No where the propose and use is described.

"Rule 2 (b) under the Central Motor Vehicles Rules 1989 speaks about the meaning of Agricultural Tractor as follows:

"2 (b). "agricultural tractor" means any mechanically propelled 4-wheel vehicle designed to work with suitable implements for various **field operations** and/or trailers to transport **agricultural materials**. Agricultural tractor is a non-transport vehicle."

4. Therefore as per the Rules meaning of tractor is narrowed down by putting an additional word 'agricultural tractor'. Now it is to be seen whether the insurance coverage is meant for 'tractor' or 'agricultural tractor'. On the other hand if the statute interpreted, it will be known that when the Act is silent, vacuum will be filled up by the Rule laid down under the Act.

5. Section 142 (2) of The U.P. Zamindari Abolition and Land Reforms Act, 1950 gives a coverage of the use of agriculture under the Heading ' use of land and improvements' as follows:-
"142 (2). A bhumidhar with non-transferable rights shall, subject to the provisions of this Act, have the right to exclusive possession of all land of which he is bhumidhar and to use such land for any purpose connected with agriculture, , horticulture or animal husbandry which includes pisciculture, poultry farming and social forestry."

6. Therefore, we get extended meaning of 'agriculture'. However we do not get any clue from the aforesaid discussions whether use of tractor for any domestic purpose is absolutely barred or not.

7. Therefore in totality, we cannot say that there is no case for consideration as agitated by the learned counsel on behalf of the insurance Company in presence of the learned counsel appearing for the claimants at all. Thus, we modify the order impugned by saying that the right of recovery as given for restricted

purpose can be expanded for reconsideration by the court on the application of the insurance Company and giving opportunity of hearing to all the parties to arrive at a right conclusion independently without being influenced by the, prima facie, observation of the Court.

8. Hence in totality, we dispose of the appeal at the stage of admission without imposing any costs giving liberty to the appellant to make an application before the Tribunal which would be heard upon notice and giving opportunity of hearing to all the parties but under no circumstances the payment of compensation to the claimants should be stalled.

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

Appeal disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 4009 of 2003

Amir Hasan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. M.A. Quadeer

Sri. Shamim Ahmad

Counsel for the Respondents:
S.C.

Land Acquisition Act 1894-Section 54-Applicability of the provisions of C.P.C.-during pendency of reference proceeding-applicant died-brother of the applicant doing hotel business at Bombay-rarely visits his home town-after getting information moved substitution application with application for condonation of delay-rejection by District Judge as provisions of Limitation Act not applicable-held-illegal contrary to view settled by High Court as well as Supreme Court-liberal view ought to have adopted-instead of remitting the matter before Court below-delay in filing substitution condoned-reference Court directed to decide substitution application on merit.

Held: Para 18

Now coming to the fact of the case, it appears that the impugned order was passed by the court below/reference court rejecting the delay condonation application of petitioner moved along with substitution application under Order XXII Rule 3 for bringing the legal representative and heir of the claimant Sabbir Hasan on record on the ground that the same was not maintainable before the court, in my opinion, view taken by the court below is contrary to the view taken by me, therefore, cannot be sustained. The rejection of delay condonation application of the petitioner moved along with substitution application on merits too appears to be erroneous. I am of the considered opinion that liberal view ought to have been taken by the court below while considering the cause shown by the petitioner in moving such belated application. The specific case taken by the petitioner was that he was residing in Bombay in connection of his Hotel business and rarely visits his home town

at Tilhar in district Shahjahanpur and he was not aware of the proceeding pending in court below, therefore, in absence of rebuttal of his statement made in affidavit on oath and in absence of contrary material brought on record, the correctness of his statement could not be doubted by the court below. In my opinion, the view taken contrary to it cannot be sustained. In given facts and circumstances of the case, the cause shown in moving the belated substitution application by the petitioner appears to be sufficient and, therefore, the delay caused in moving such application ought to have been condoned. Accordingly, the delay caused in moving substitution application by the petitioner is hereby condoned. The impugned order dated 8.11.2002 passed by the court below is hereby quashed. The court below is directed to decide the substitution application moved by the petitioner on merit by restoring the aforesaid reference proceeding on file.

Case law discussed:

A.I.R. 1970 Madras 184, A.I.R. 1967 Gujarat 118, A.I.R. 1982 Alld. 394, AIR 1978 Delhi 129, AIR 1989 Delhi 97, AIR 1991 Alld. 241, A.I.R. 1979 SC 404, AIR 2003 SC 2302.

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

1. This petition is directed against the judgment and order dated 8.11.2002 passed by Special Judge/Additional District Judge, Shahjahanpur in Reference No.62 of 1997 ***Sabbir Hasan Vs. State of U.P. and others***, whereby delay condonation application moved by the petitioner along with substitution application in pending reference has been rejected.

2. The reliefs sought in the writ petition rest on the assertions that the plot No.76/1, 82/1, 89/1, 90, 74 situated in Village Tilhar Qasba, District Shahjahanpur belonging to Sabbir Hasan were acquired under the provisions of Land Acquisition Act, 1894, for which the award was given by the Collector on 14.1.1997. Feeling aggrieved against the aforesaid award Sabbir Hasan had moved application under Section 18 of the Land Acquisition Act requiring the Collector to make reference for enhancement of compensation, which was registered as L.A. Reference No.62 of 1997 and was pending in the Court of 9th Additional District Judge, Shahjahanpur. During the pendency of reference Sabbir Hasan had died on 25.4.2001 as issue-less. The petitioner being his brother and sole heir and legal representative had no knowledge or information about the pendency of the aforesaid reference. The petitioner is residing in Bombay since 1981 where he is engaged in hotel business and rarely visits to his permanent home town Tilhar, District Shahjahanpur. On 1.8.2002 one Gopal Babu who was Mukhtare-aam and pairokar of Sabbir Hasan has met him and told about the pendency of aforesaid reference. On that day for the first time the petitioner came to know about it. Thereafter the petitioner filed application for substitution of his name in place of Sabbir Hasan on 2.8.2002 supported by an affidavit. The petitioner has also filed an application supported by an affidavit for condoning the delay under Section 5 of the Limitation Act in moving the aforesaid substitution application. The application and affidavit are on record as Annexures 4 and 5 of the writ petition. It is also stated that due to typing error in the affidavits, the date of death of Sabbir Hasan was wrongly typed as 16.1.2001 instead of 25.4.2001, therefore, an application for amendment along with affidavit dated 16.9.2002 was filed for correction of date of death incorrectly

mentioned in the substitution application and delay condonation application. It is further stated that although the D.G.C. (Civil) has filed objection dated 24.9.2002 but neither any affidavit was filed in support thereof nor any counter affidavit in opposition to the affidavits filed by the petitioner referred above was filed. Despite, thereof the court below vide impugned order dated 8.11.2002 has wrongly rejected the delay condonation application and substitution application of the petitioner on merits and on the ground of maintainability also. Hence this petition.

3. Sri M.A. Qadeer, learned senior counsel appearing for the petitioner has submitted that by virtue of the provisions of Section 53 of the Land Acquisition Act, 1894 the provisions of Code of Civil Procedure are applicable to all proceedings before the Court under the Land Acquisition Act, unless they are inconsistent with any provisions contained under the said Act. He further submitted that the provisions of Order XXII of the Code of Civil Procedure which pertains to substitution of heirs and legal representatives of parties cannot be said to be in any manner inconsistent or contrary to any provisions of Land Acquisition Act, therefore, the same will apply with its full force. He further contended that any substitution application, if moved after expiry of period of limitation as prescribed under Article 120 of the Schedule appended to the Limitation Act 1963, the delay condonation application under Section 5 of the Limitation Act can be moved along with such substitution application. Besides this, since the reference proceeding is a proceeding before the court contemplated under the Land Acquisition Act, therefore, there can be no doubt about the applicability of the provisions of Section 5 of the Limitation Act in moving such substitution application in reference proceedings before the Court. Accordingly, the same can be admitted after the prescribed period of limitation, if the applicant satisfies the court that he had sufficient cause for not making such application within prescribed period of limitation. Thus, learned counsel for the petitioner has submitted that the impugned order passed by the court below is highly misconceived and erroneous, as such is not sustainable in the eye of law.

4. In view of the aforesaid contention of the learned counsel for the petitioner, the question which arises for consideration before this Court is whether the provision of Order XXII C.P.C. are applicable in reference proceeding pending before the Court and whether the provisions of the Limitation Act would also apply to such proceeding before the Court under the Land Acquisition Act?

5. In order to answer the aforesaid questions, it is necessary to examine relevant provisions of the Land Acquisition Act 1894 hereinafter referred to as "the Act" and Section 5 of the Limitation Act. Section 3 (d) of the Act defines the expression 'court' and Section 53 of the Act provides that the provisions of the Code have been made applicable to the proceedings before the court. Therefore, the said provisions are extracted as under:-

*"**3 (d)** the expression "Court" means a principal Civil Court of original jurisdiction, unless the [appropriate Government] has appointed (as it is*

hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the Court under this Act;"

53. Code of Civil Procedure to apply to proceedings before Court- *Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the [Code of Civil Procedure, 1908], shall apply to all proceedings before the Court under this Act."*

6. At this juncture it would also be useful to extract the provisions of Section 5 of the Limitation Act, 1963, which empowers the court to admit an appeal or application moved beyond prescribed period as under:-

"5. Extension of prescribed period in certain cases.- *Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."*

Explanation.- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

7. At this juncture, it is also necessary to point out that the question in issue has drawn attention of various High Courts and this Court also at several occasions, it would be useful to refer some of them, hereinafter.

8. In ***State of Madras Vs. Alameluthayammal A.I.R. 1970 Madras 184***, a Division Bench of Madras High Court has held that in view of Section 53 of the Act the Court hearing reference under Section 18 of the Act has power to allow the amendment of the pleadings in reference to certain extent. The pertinent observations made in para 13 of the decision are extracted as under:-

"13. ..... Section 53 of the Act provides that save in so far as they may be inconsistent with anything contained in the Act, the provisions of the Civil Procedure Code shall apply to all proceedings before the Court under the Act. The Court hearing a reference under Section 18 of the Act has power to allow an amendment of the pleadings in a reference. But the jurisdiction to allow such amendment cannot extend to increasing the claim to a figure beyond that which was claimed before the Collector, as it would be against the provisions of Section 25 (1) of the Act. The appellants did not take any objection to the reference under Section 18 of the Act and the learned Government Pleader took exception only to the grant of compensation in excess of the amounts claimed in the counter statement of the claimants."

9. Similar view has been taken by Gujarat High Court in case of ***Alihusain Abbasbhai and others Vs. Collector, Panch Mahals A.I.R. 1967 Gujarat 118***, wherein it was held that by virtue of Section 53 of the Act the provisions of C.P.C. are applicable to all proceedings before Court under the Act unless such provisions in the Code are inconsistent with anything contained in Land Acquisition Act. The aforesaid

observation was made in context of applicability of the provisions of Order XXII Rule 3 of the Civil Procedure Code and it was held that there is nothing under the Act contrary to the aforesaid provisions of the Code. The pertinent observations made in paras 4 and 5 of the decision are extracted as under:-

"4. ..... The reference becomes a proceeding before the Court as soon as it is received, taken on file and numbered and it is because it is a proceeding already initiated before the Court that the Court can fix a day for its hearing and give notice of such date to the various persons mentioned in Section 20. Moreover, it is difficult to appreciate how notice of a reference can go to the collector who is in the position of a defendant before the reference has commenced. Ordinarily notice of a proceeding would go to the opposite party after the proceeding has commenced before the Court: unless the proceeding is before the Court, there would be no question of giving notice of the proceeding by the Court to the opposite party. The contention of the petitioners that the proceeding in the reference had not commenced at the date of the death of Abbasbhai since no notice was served on him before his death is, therefore, clearly unsustainable and it must be concluded that the proceeding in the reference commenced before the Court as soon as the reference was received, taken on file and numbered and it was pending when Abbasbhai died.

5. The next question that arises is whether Order 22 Rule 3 applied to the Reference for it is only if that provision applied to the reference that the question of abatement could arise. Now Section 53 which is reproduced above clearly declares that save in so far as they may be inconsistent with anything contained in the Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under the Act and since a reference under Section 18 is a proceeding before the Court under the Act, Order 22 Rule 3 must apply to the reference unless that provision is inconsistent with anything contained in the Act. The question which, therefore, calls for consideration is whether there is anything in the Act which is inconsistent with Order 22 Rule 3. ..... It is, therefore, clear that the nature of a reference under Section 18 is not such that it must necessarily result in the making of an award by the Court and when I use the word "award" I mean it in the sense of an award determining the amount of compensation for the land. The reference is not different from an ordinary civil proceeding in which the applicant who is in the position of a plaintiff objects to the amount of compensation offered in the award of the Collector and claims additional compensation. If the applicant fails to appear at the hearing of the reference, the reference must by force of Order 9 Rule 8 which is made applicable by Section 53 be dismissed for want of appearance like any other civil proceeding and in the same way if the applicant does not produce evidence in support of the objection, the reference must be dismissed just as any other civil proceeding would be dismissed for want of evidence in support of the claim. When the reference is dismissed the award of the Collector stands and the applicant can always accept the offer contained in such award. Now if the reference can be dismissed for default of appearance of the applicant or for want of evidence before

the Court, there is no reason why Order 22 Rule 3 should not be applicable to the reference. If Order 22 Rule 3 does not apply to the reference, what is to happen when the applicant dies during the pendency of the reference? The right to claim additional compensation which the applicant is agitating in the reference would certainly survive to his heirs from making an application to the Court for bringing themselves on record in place of the applicant. It is difficult to see why instead of permitting the heirs to follow the ordinary and simple procedure of applying to the court for bringing themselves on record in place of the applicant and proceeding with the reference, the law should insist that the Collector who is the opposite party must supply the names of the heirs to the Court and the Court should issue notices to heirs as persons interested in the objection and then proceed with the reference. There is clearly nothing in the nature of the reference which is inconsistent with Order 22 Rule 3 sub-rule (1) and the provision contained in Order 22 Rule 3 sub-rule (1) can be applied to the reference without causing any anomaly or inconsistency. Order 22 Rule 3 sub-rule (2) provides for abatement of the proceeding if no application for bringing the heirs on record is made within the time limited by law and the question may, therefore, well arise whether there is any time limited by law for the making of an application to bring the heirs of a deceased applicant on record in a pending reference. If there is a time prescribed by law for making such application and such application is not made within the time so prescribed, the reference would abate leaving the award of the Collector unaffected. But if no time for making such application is prescribed by law, the application can obviously be made at any time and there would be no abatement of the reference & in that event as soon as the application is made, the Court would bring the heirs of the deceased applicant on record and proceed with the reference. Order 22 Rule 3 sub-rule (2) is also, therefore, not in any way inconsistent with the nature of the reference. The provision enacted in both the sub-rules of Order 22 Rule 3 can be made applicable without creating any inconsistency or disharmony and it must, therefore, be concluded that Order 22 Rule 3 applies to a reference under Section 18."

10. In ***Smt. Katori Devi and other Vs. Collector, Aligarh A.I.R. 1982 Alld. 394***, a Division Bench of this Court has held that while disposing of a reference under Section 18 of the Act the District Judge functions as court. The provisions of C.P.C. have been specifically made applicable to the proceeding before the court by Section 53 in so far as they are not inconsistent with anything contained in the Land Acquisition Act. While dealing with the applicability of the provisions of Order IX Rule 8 C.P.C. it was held that there is no provision in Land Acquisition Act which may be inconsistent with the provisions of Order IX C.P.C., therefore, Order 9 C.P.C. applies to the proceedings before the District Judge on a reference made under Section 18 of the Act and as such District Judge has power to dismiss the reference for default of appearance by the claimant and consequently when the reference is so dismissed, an application under Order IX Rule 9 to set aside the order of dismissal would be maintainable. For ready reference the pertinent observations made by the Division Bench of this Court in

paras 6, 7 and 11 of the decision are extracted as under:-

"6. It is thus evident that the learned District Judge functions as a Court while disposing of a reference under Section 18 of the Act The provisions of the Civil P.C have specifically been made applicable to such proceedings by Section 53 of the Act. Ex facie the provisions of O.IX C.P.C. will be applicable to these proceedings. We have gone through the provisions of the L.A. Act and we do not find any provision anywhere which may be inconsistent with the provisions of O.IX C.P.C."

7. With due respect to the Hon'ble Court, we are unable to subscribe to the views expressed by the Karnataka High Court in the aforesaid decision. S.26 of the Act comes into operation only when the reference is to be decided on merits after considering the evidence led by the parties and the provisions of S.23 of the Act. S.26 of the Act does not say anything which may be inconsistent with the courts power under O.IX. R.8 C.P.C. to dismiss a reference for default of appearance by the claimants. Since there is nothing inherently inconsistent in Sec.26 of the Act with the existence of O.IX R.8 C.P.C. we fail to see on what principle can the provisions of O.IX, R.8 C.P.C. be excluded when Sec.53 of the Act specifically makes them applicable.

11. We are in respectful agreement with the views expressed by the Madras, Madhya Pradesh and Gujarat High Courts. In our opinion the provisions of O.IX, C.P.C. are applicable to proceedings on a reference under Sec.18 of the L.A. Act. We are further of the opinion that there is nothing in the L.A. Act which may be inconsistent with the provisions of O.IX, C.P.C."

11. Somewhat identical question as involved in this case has come for consideration before Full Bench of Delhi High Court in ***Mst. Ram Piari and others Vs. The Union of India and others AIR 1978 Delhi 129*** (Full Bench), wherein after dealing in detail about the scheme of the provisions of the Act in paras 19, 20 and 21of the decision Full Bench has held as under:-

"19. As noted earlier S. 21 of the Act restricts the scope of the enquiry to a consideration of the interests of the persons at whose behest the Collector makes the reference on their applying to the Collector to make the reference. That being so, it is incumbent on them to pursue their claim as provided under the Act. In the event of the death of a person at whose instance the reference was made the right to continue the reference survives to his legal representatives. It is for the legal representatives if they choose to pursue the reference to apply to the Court for being brought on the record to enable them to prosecute the reference. No obligation is cast on the Collector to furnish the names and addresses of the legal representatives of a deceased claimant to keep the reference alive. The reference is to be answered and an award given by the Court only on evidence being produced before it by the claimant who challenges the award given by the Collector." If no evidence is led the reference has to be declined. The provisions of the Act do not cast any obligation on the Collector to justify his award. It is only when a claimant produces evidence before the Court and succeeds in showing that the award made

by the Collector is inadequate that the Collector is to lead evidence in rebuttal. The Act itself does not prescribe the procedure applicable to the proceedings before the Court while hearing a reference application. Sec. 53 of the Act, however, makes the provisions of the Code applicable to these proceedings. Accordingly the procedure laid down in the Code has to be followed by the Court in deciding a reference application.

20. The procedure laid down in the Code being applicable to these proceedings, it cannot be urged that the applicability of the provisions of Order 9 and Order 22 of the Code are not attracted to the proceedings in the Court.

21. An application under O. 22 requiring the legal representatives to be brought on the record has to be moved within the period prescribed for moving such application. In case the application is not moved within time the reference would abate and the Court is not obliged to answer such a reference. It is no doubt true that a reference application is not a suit, however because of the applicability of the procedure prescribed in the Code to the proceedings before the Court in such applications, the proceedings before the Court partake the nature of a suit. During the proceedings before the Court in the reference application the claimants will partake the status of plaintiffs while the non-claimants and Collector would occupy the position of defendants."

12. While considering the applicability of provisions of Order 22 C.P.C. and those of Limitation Act before the reference court made under Section 30/31 of the Land Acquisition Act a Full Bench of Delhi High court in ***Chander and others Vs. Mauji and others reported in AIR 1989 Delhi 97*** in para 16 of the decision has observed as under:-

"16. Whether the proceedings have been initiated on a reference under S.18 or under S.30, the dispute to be settled is as to the persons to whom the compensation is payable or the apportionment of the compensation among the persons interested. The conflicting claims to the compensation money is the dispute which has been referred either under S.18 or under S.30 of the Act. The lis between the parties is identical whether the proceedings are under S.18 or under S.30. An adjudication on the title to receive compensation on a reference under S.18 stands on the same footing as an adjudication on a reference under S.30 or for that matter on a deposit under S.31(2) of the Act. The scheme of the Act is that the Collector has to pay compensation to the rightful owners about whom he gives his award. The disputes could be settled either on a reference under S.18 or on a reference under S.30 to enable the Collector to disburse the compensation to the rightful owners. All questions relating to the dispute as to title to compensation, whether on a reference under S.18 or on a reference under S.30, traverse the same field. we can see no fundamental difference in the proceedings under S.18 and S.30/31 of the Act. The two operate in the same arena. The procedure before the Court on a reference under S.30 would also be governed by the provisions contained in the Code of Civil Procedure. Section 30 does not contain any provision expressly or by necessary implication that the provisions of the Code of Civil Procedure are not applicable. The Full Bench in Ram Piari's case (AIR 1978 Delhi 129) said that a

reference under S.18 of the Act partakes the nature of a suit. Similarly any dispute as to the apportionment of compensation or as to the persons to whom the same is payable on a reference, whether under S.18 or under S.30, is really in the nature of an inter- pleader suit initiated by the Collector either on a petition or suo motu. The persons interested are directed to establish their title to the acquired land. There is no reason for not making the provisions of the code of Civil Procedure O.22 and for that matter the limitation contained therein, applicable to the proceedings under S.30 for the same reasons as are applicable to the proceedings under S.18 of the Act."

13. In ***Gorakhpur Development Authority, Gorakhpur Vs. District Judge, Gorakhpur and others AIR 1991 Alld. 241*** a Division Bench of this Court has, however, held that Order 1 Rule 10 C.P.C. has no application to reference proceeding under Section 18 of the Land Acquisition Act, its applicability is excluded by the context of the Act i.e. by necessary implication. The pertinent observations made by Hon'ble Mr. Justice B.P. Jeevan Reddy (as he then was the Chief Justice of this Court) in para 17 of the decision are as under:-

"17. ..... Accordingly, and for the reasons given hereinbefore, we hold that O.1, R.10, C.P.C. has no application to reference proceedings under Section 18 of the Land Acquisition Act. Its application is excluded by the context of the Act, that is, by necessary implication. A beneficiary (local authority or company for whose benefit the land is being acquired and who is ultimately liable to bear the burden of paying the compensation) cannot apply for impleading, nor can it be impleaded as a party - respondent under O.1, R.10, C.P.C. read with S.53 of the Land Acquisition Act. Its right is only the one recognised by S.50(2) of the Act. It can appear in such a reference and adduce evidence in support of its case and also to contradict the evidence produced by the claimants. It can also cross-examine the witnesses produced by the claimants. It cannot either ask for a reference under S.18, nor can it file an appeal against the judgment and award of the Civil Court as a matter of right under S.54 of the Act. It can file such an appeal with the leave of the Court and, as observed hereinbefore (see F.B. decision of this Court in Gaurdham (1980 All CJ 345) (supra). Such leave should, normally, be granted to a beneficiary, who has appeared and participated in the reference proceedings. Even where it did not so appear and participate, it may well be entitled to apply for such leave and the Court should consider such a request sympathetically for the simple reason that the ultimate burden of paying the compensation falls upon such beneficiary."

14. Thus, in view of statement of law enunciated hereinbefore, there can be no scope for doubt to hold that by virtue of Section 53 of the Act the provisions of C.P.C. are made applicable in proceeding before the reference court constituted under the Act, so far as they are not inconsistent or contrary to any provisions of the Act. In other words, the provisions of C.P.C. cannot be held applicable if such provisions are excluded by necessary implication in context of the provisions of the Act or if they are found contrary or inconsistent with any provisions of the Act or application of such provisions creates anomalous situation or leads to an

absurdity or creates disharmony with the provisions of the Act. Therefore, before applying the provisions of Civil Procedure Code in a reference proceeding before Court it has to be examined as to whether the said provision of Code is anyway inconsistent or contrary to the provisions of the Act or as to whether the applicability of such provisions of Code has been excluded in context of provisions of the Act by necessary implication or the applicability of any provision of the Code causes any anomaly or disharmony with any provisions of the Act. If it is found that the provision of Code has been excluded in context of the provisions of the Act by necessary implication or the provisions of Code are anyway inconsistent or contrary to the provisions of the Act or its application creates anomalous situation or leads to an absurdity, in that eventuality the applicability of such provisions of the Code should be taken to be excluded, otherwise it shall apply to the reference proceeding before the court, accordingly any broad proposition with regard to the universal application of the provisions of the Code can not be laid down and the court has to examine every individual case of applicability of the provisions of the Code in context of the provisions of the Act.

15. Now before proceeding further it is also necessary to make it clear that the jurisdiction of the court while dealing with the reference cases under the Act is of special nature. It has no original jurisdiction like a civil court dealing with civil suit in reference cases, wherein the civil court has jurisdiction to try all the suit of civil nature unless such suits are expressly barred by statute or impliedly barred by necessary implication. However, in reference cases before the court its jurisdiction is limited and is circumscribed by the reference made to it either under Section 18 or 30 of the Act. Having regard to the statutory scheme underlying in the aforesaid provisions of the Act, the court functioning under the Act being a tribunal of special jurisdiction, can assume its jurisdiction only where a valid reference is made to it either under the provisions of Section 18 or 30 of the Act and the requisite conditions for making such reference are satisfied before the Collector while making such reference to the court. If the requisite conditions while making reference are not satisfied, the court can not assume its jurisdiction if the reference is not validly made to it by the Collector under the Act, as held by Hon'ble Apex Court in ***Mohd. Hansuddin Vs. State of Maharashtra A.I.R. 1979 SC 404***. In other words before the tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen. Similar view has also been taken by Hon'ble Apex Court in ***Prayag Upniwas Awas Nirman Sahkari Samiti Litd. Vs. Allahabad Vikas Pradhikaran and other AIR 2003 SC 2302***, wherein the Hon'ble Apex Court in para 7 of the decision has observed that the reference court gets jurisdiction only if the matter is referred to it under Section 18 or 30 of the Act by Land Acquisition Officer and that civil court has got jurisdiction and authority only to decide the objections referred to it. The reference court cannot enlarge the scope of jurisdiction or decides the matter which are not referred to it. Therefore, while examining the applicability of the provisions of Code of Civil Procedure in reference proceeding before the court, the context of the

provisions of Act has to be examined scrupulously and strictly in individual cases having regard to the nature of jurisdiction conferred upon the reference court and no broad proposition having universal application of the provisions of the Code can be laid down in this regard.

16. It is no doubt true that a reference application is not a suit, but because of applicability of procedure prescribed in the Code of civil procedure before the court, in such applications the proceedings before the court partake the nature of suit. During the proceedings before the court in the reference application, the claimants will partake the status of plaintiff while the non claimants and Collector would occupy the position of defendant. Having regard to the scheme of the Act, I do not find any provision therein which is inconsistent or contrary to the provisions of Order XXII of the Code of Civil Procedure which deals with regard to bringing the legal representatives and heirs of deceased party on record of the court. Therefore, in my opinion, the aforesaid provisions of Code of Civil Procedure does not appear to be excluded by necessary implication in context of the provisions of the Act. In such situation, there can be no scope for doubt to hold that the provisions of Order XXII of the Code of Civil Procedure have full application in the reference proceeding pending before the Court. Accordingly, an application under Order XXII C.P.C. requiring the legal representatives to be brought on record has to be moved within the period prescribed for moving such application. In case, the application is not moved within time prescribed, the reference would be abated and dismissed and the court would not be obliged to answer such reference.

17. Once it is held that the provisions of Order XXII C.P.C. are applicable for bringing the legal representatives and heirs of claimant on record before the court in reference proceeding, the applicability of provisions of the Limitation Act can also not be doubted atleast for two reasons firstly it is proceeding before the court where the provisions of Section 5 of the Limitation Act have full application and secondly under the provisions of Order 22 Rule-3 of the C.P.C. if the application for substitution of legal representative and heir of deceased plaintiffs or appellants is not moved within prescribed period, the proceeding shall stand abated. For moving such application although no period of limitation has been provided under Order 22 of the C.P.C. but under article 120 of Schedule appended to the Limitation Act, the period of limitation prescribed is 90 days from the date of death of plaintiff, appellant, defendant or respondent, as the case may be and under Article 121 of the schedule 60 days' period of limitation has been prescribed for setting aside the order of abatement from the date of abatement. And by virtue of Order 22 Rule 9(2) and (3) of C.P.C. the provisions of Section 5 of the Limitation Act have also been made applicable, therefore, if the applicant satisfies the court that he had sufficient cause for not making the substitution application within such period prescribed under the provisions of the Limitation Act, the court is fully empowered to set aside the abatement order and admit such application by extending the prescribed period for limitation in moving such application under Order 22 C.P.C..

18. Now coming to the fact of the case, it appears that the impugned order

was passed by the court below/reference court rejecting the delay condonation application of petitioner moved along with substitution application under Order XXII Rule 3 for bringing the legal representative and heir of the claimant Sabbir Hasan on record on the ground that the same was not maintainable before the court, in my opinion, view taken by the court below is contrary to the view taken by me, therefore, cannot be sustained. The rejection of delay condonation application of the petitioner moved along with substitution application on merits too appears to be erroneous. I am of the considered opinion that liberal view ought to have been taken by the court below while considering the cause shown by the petitioner in moving such belated application. The specific case taken by the petitioner was that he was residing in Bombay in connection of his Hotel business and rarely visits his home town at Tilhar in district Shahjahanpur and he was not aware of the proceeding pending in court below, therefore, in absence of rebuttal of his statement made in affidavit on oath and in absence of contrary material brought on record, the correctness of his statement could not be doubted by the court below. In my opinion, the view taken contrary to it cannot be sustained. In given facts and circumstances of the case, the cause shown in moving the belated substitution application by the petitioner appears to be sufficient and, therefore, the delay caused in moving such application ought to have been condoned. Accordingly, the delay caused in moving substitution application by the petitioner is hereby condoned. The impugned order dated 8.11.2002 passed by the court below is hereby quashed. The court below is directed to decide the substitution application moved by the petitioner on merit by restoring the aforesaid reference proceeding on file.

19. Before parting with the judgement, it is necessary to point out that vide impugned order dated 8.11.2002 passed by the reference court, since the delay condonation application moved alongwith the substitution application of the petitioner has been rejected, therefore, it shall be tentamounted to be an order under Rule 9 of Order XXII C.P.C. refusing to set aside the abatement or dismissal of a suit which is appealable under Order 43 Rule 1(k) of the Code. But since I have heard and decided the case on merit as indicated herein before, as the writ petition is pending since the year 2003, therefore, I do not think it proper either to reject the petition on the ground of alternative remedy or to direct the office to register and convert the same as F.A.F.O. at this stage. However, the same should be treated to be decided as F.A.F.O..

20. In view of the aforesaid observation and direction, writ petition succeeds and is allowed to the extent indicated herein before.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 37901of 2003

Prem Prasad Gupta ...Petitioner
Versus
The State of U.P. & others Respondents

Counsel for the Petitioner:
Sri Arvind Kumar Srivastava

Counsel for the Respondents:
Sri Satish Chandra Rai
Sri M.H. Chauhan
S.C.

Constitution of India Article 226- Regularisation-petitioner working on the post of driver mechanic since 1980-junior to petitioner regularised-when claimed for regularisation and regular salary-the principal of institution put condition to withdraw the petition and forgo the salary of previous time-only then be appointed on class 4th post-held working of long period of 20 years cannot be ignored-authorities to create post and regularise the petitioner within three months-keeping it open to take action against erring Officer.

Held: Para 6 & 7

Admittedly, the petitioner has been working since 1980 and there is a requirement of work which has not been denied by the respondents. Consequently, it is not open to the respondents to allege that the petitioner is not entitled for the regular salary or for the minimum pay-scale on the post of Driver-cum-Mechanic on the ground that there is no sanctioned post. The fault is not of the petitioner and lies solely with the Principal of the College and its institution. The State Government in its counter affidavit has categorically stated that the appointment was made by the institution without there being a sanctioned post.

Be that as it may. The petitioner having worked for more than 20 years since 1980 continuously, cannot be deprived of his employment on the sole ground that there does not exist a sanctioned post. The respondents have never alleged that the work of a Driver-cum-Mechanic is not required in the institution. If there is requirement of work, the respondents are required to create a post of a Driver-cum-Mechanic. Simultaneously, the service of the petitioner cannot be dispensed with at this stage and he is liable to be regularised and be paid the regular salary on the post of Driver-cum-Mechanic.

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

1. Heard Shri Arvind Kumar Srivastava, the learned counsel for the petitioner and Shri M.H. Chauhan, the learned counsel, holding the brief of Shri Satish Chandra Rai, the learned counsel for respondent nos. 3, 4 and 5 and the learned Standing Counsel for the remaining respondents.

2. The petitioner was appointed as a Driver-cum-Mechanic on 1st of August, 1980, as is clear from paragraph 3 of the writ petition and Annexure '1' to the writ petition. The petitioner contends that he is working on that post, since then, without any break in service. The petitioner alleged that from 7th March, 1998 onwards, the respondents stopped his salary and that juniors to the petitioner were also regularised in service and that the same benefit was not extended to the petitioner. Accordingly, the petitioner filed a writ petition, which was disposed of with a direction to the authorities to consider and decide his representation. Based on the said order, the authorities rejected the claim of the petitioner for regularisation of his service and payment of regular salary on the post of Driver-cum-Mechanic, by an order dated 28th September, 1999, on the ground that there was no sanctioned post of Driver-cum-Mechanic. The petitioner, being aggrieved by the said order, filed Writ Petition No. 29999 of 2000. During the pendency of the said writ petition, the respondents passed another order dated 4th March, 2002 stating therein that the petitioner

would be absorbed as a Class IV employee, provided he gives up his claim on the post of Driver-cum-Mechanic and withdraws his earlier writ petition. The petitioner, being aggrieved by the said order, filed the present Writ Petition No. 37901 of 2003.

3. The learned counsel for the respondents submitted that there is no sanctioned post of Driver-cum-Mechanic, and therefore, his services cannot be regularised on a non-existing post, nor can he be paid the salary of a Driver-cum-Mechanic. The learned counsel submitted that the management had rightly issued the order of 4th March, 2002 offering the petitioner for the regularisation of his service on a class IV post. The respondents in the counter affidavit have admitted that the petitioner was appointed as Driver-cum-Mechanic even though there was no sanctioned post, and therefore, the appointment letter should be treated to be a void appointment letter. The State Government in their counter affidavit have admitted that the petitioner was appointed as a Driver-cum-Mechanic on a non-existing post.

4. Having considered the submissions of the learned counsel for the parties, this Court is appalled by the issuance of the letter dated 4th March, 2002, issued by the Principal of the Town Polytechnic, Ballia (respondent no. 5). The audacity of the authority in threatening the petitioner to withdraw his writ petition and withdraw his claim for the post of Driver-cum-Mechanic, and only then he would be absorbed on a class IV post, is writ large and speaks volume of the arbitrariness and feudal approach of the authorities in matters of public employment.

5. Admittedly, the petitioner was appointed in the year 1980 as a Driver-cum-Mechanic and his services were utilised by the respondent no. 5 continuously for 20 long years, and during this period, the respondents never batted their eyelids even for a single second in permitting the petitioner to work on a non-existing post, and now when the petitioner asked for regularisation of his services and payment of regular salary, the authorities stopped his salary and further promised to appoint him on a class IV post, provided the petitioner withdraws his claim on the post of driver. This attitude of the respondent is nothing but an unfair labour practice, which is violative of Articles 14 and 16 of the Constitution of India.

6. Admittedly, the petitioner has been working since 1980 and there is a requirement of work which has not been denied by the respondents. Consequently, it is not open to the respondents to allege that the petitioner is not entitled for the regular salary or for the minimum pay-scale on the post of Driver-cum-Mechanic on the ground that there is no sanctioned post. The fault is not of the petitioner and lies solely with the Principal of the College and its institution. The State Government in its counter affidavit has categorically stated that the appointment was made by the institution without there being a sanctioned post.

7. Be that as it may. The petitioner having worked for more than 20 years since 1980 continuously cannot be deprived of his employment on the sole ground that there does not exist a sanctioned post. The respondents have never alleged that the work of a Driver-cum-Mechanic is not required in the

institution. If there is requirement of work, the respondents are required to create a post of a Driver-cum-Mechanic. Simultaneously, the service of the petitioner cannot be dispensed with at this stage and he is liable to be regularised and be paid the regular salary on the post of Driver-cum-Mechanic.

8. In view of the aforesaid, the Writ Petition No. 29999 of 2000 is allowed. The order dated 28th November, 1999, passed by the respondent no. 2 is quashed. The respondents are directed to pay the salary to the petitioner since March, 1998 on the post of Driver-cum-Mechanic.

9. Consequently, the Writ Petition No. 37901 of 2003 is also allowed. The impugned order dated 4th March, 2002, issued by the respondent no. 5 is quashed.

10. A writ of mandamus is issued to the respondents to create a post of Driver-cum-Mechanic within three months from the date of the production of a certified copy of this order and regularise the services of the petitioner on that post. In the mean while, the petitioner would be paid the regular salary payable on the post of Driver-cum-Mechanic. It would be open to the State Government to initiate an enquiry against the erring officer/official and recover the amount vis-a-vis the wrongful appointment initially made in favour of the petitioner on the post of Driver-cum-Mechanic.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2008

BEFORE
THE HON'BLE BHARTI SAPRU, J.

Civil Misc. Writ Petition No. 3374 of 1988

Phool Chand Tewari ...Petitioner
Versus
A.D.J., Jaunpur & others Respondents

Counsel for the Petitioner:
Sri D.S.M. Tripathi

Counsel for the Respondents:
Sri H.S.N. Tripathi
S.C.

Code of Civil Procedure Section 151- Inherent Power of the Court-can be exercised for doing substantial justice- where no appeal or revision lie-it cannot be invoked simultaneously-appeal under statutory provision.

Held: Para 27

Taking into consideration the entire facts and circumstances of the case, I am of the opinion that the inherent powers as conferred under section 151 C.P.C. may only be invoked in certain situations but not in a case where the party has a right of filing an appeal or of revision under the Code itself.

Case law discussed:
AIR 1973 Madras 135,.AIR 1987 Karnataka 264, AIR 1966 SC 1899, 2002 ACJ 1092 SC, 1999 ACJ 1462 SC, 2000 ACJ 51, 1998 RD 607.

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

1. Heard Sri. D.S.M. Tripathi for the petitioner and Sri H.S.N. Tripathi for the respondents.

2. This writ petition has been filed by the petitioner seeking writ of certiorari to quash the impugned order dated 5.1.1988 passed by the respondent no.1 and to quash the order 24.9.1985 passed by the respondent no.2. A second prayer has been made for the grant of writ of mandamus directing the respondent no.2 to dismiss the application of the respondent no.3 and to restore the order dated 14.3.1983 passed by the Munsif City, Jaunpur in suit no.113 of 1978 by which the suit itself was decided.

3. The brief facts of the case are that the petitioner is defendant in the suit no.113 of 1978 filed by one Kewala Prasad-respondent no.3 for specific performance of the contract on the basis of an unregistered agreement dated 5.5.1976.

4. The defendant-petitioner filed written statement denying the allegations in the plaint and asserted that Ram Lakhan, respondent no. 4 was the owner of the disputed plot who had executed a registered sale deed In his favour on 9.11.1978 and from that date onwards, the petitioner had been in actual possession of the land in dispute. The petitioner further averred in the written statement that the alleged agreement dated 5.5 1976 was a forged document, which was never executed by the respondent no.4 and the respondent no. 3 Kewala Prasad had no concerned with the land and trees in dispute nor was he in possession of the land in dispute at any given time.

5. The respondent no.4 also filed written statement and denied the allegations in the plaint and said that the agreement dated 5.5.1976 was forged document and he was the original owner of the land. He had sold the land and had executed a registered sale deed in favour of the petitioner on 9.11.1978.

6. The respondent no.3, as said earlier, filed suit no.113 of 1978. After filing of the suit, the respondent no.3 filed no evidence, even though he was granted more than 30 times to file his evidence. It is alleged in the writ petition that on 3.3.1983 the Court gave time to the respondent no.3 to file evidence but on that date also, he asked for deferment of the date and a date was fixed on 14.3.1983.

7. On 14.3.1983 the respondent no.3 failed to give evidence but moved an application for giving expert opinion. This application was rejected on that date itself. As the plaintiff failed to give evidence on that date, the case was closed against him and the trial court proceeded under Order 17 Rule 3 C.P.C. and dismissed the suit of the plaintiff holding that there was no evidence whatsoever in support of the plaintiff.

8. Once the suit was dismissed, the plaintiff filed an appeal. At the time when the appeal was filed, there was deficiency in the court fee but the plaintiff appellant did not make good deficiency of the court fee and the appeal was dismissed on 1.10.1983.

9. After the appeal was dismissed, neither the plaintiff-respondent filed any restoration application in the said appeal nor had he filed any second appeal or any writ petition against the order dated 1.10.1983. In fact nothing has been filed by the plaintiff-respondents against the order dated 1.10.1983.

10. However during the pendency of the appeal, the plaintiff-respondents took recourse of filing of an application under section 151 C.P.C. On 1.7.1983 with the prayer that the order dated 14.3.1983 be recalled. The application dated 1.7.1983 is on record of the writ petition as Annexure 3. The application for recall does not mention that the plaintiff respondents had also moved an appeal for setting aside the impugned order dated 14.3.1983. The application for recall is completely salient on this point.

11. The petitioner appeared and opposed the application under section 151 C.P.C. which had been filed along with the application under section 5 of the Limitation Act. The application for condonation of the delay under section 5 of the Limitation Act was allowed on 24.9.1985, which is one of the orders impugned and thereafter the application under section 151 C.P.C. was allowed on 25.3.1986. Against the order dated 25.3.1986 and the order dated 24.9.1985, the petitioner filed a revision. The revision of petitioner was dismissed on 5.1.1988. As a result of which the suit of the plaintiff was restored to its original number.

12. Learned counsel for the petitioner argued that the application under section 151 C.P.C. against the order dated 14.3.1983 was not legally maintainable and was wrongly allowed by the court below.

13. It is the contention of the petitioner that the order dated 14.3.1983 dismissing the suit was passed on merits and in the presence of the respondent no. 3 while proceeding under Order 17 Rule 3 C.P.C. and as such only an appeal would be maintainable against such an order or at the most review application may be filed.

14. Learned counsel for the petitioner has argued that by the order dated 14.3.1983 the suit had been concluded and it had become final and therefore the application under Section 151 C.P.C. was completely misconceived and not maintainable as the application under Section 151 C.P.C. is only moved or restored to wherein matters is pending and not concluded.

15. Learned counsel for the petitioner has argued that the inherent jurisdiction of this Court is only invoked in the circumstances where the matter is not concluded and not in circumstances where the order is passed against which the litigant has a statutory or other proper remedy available.

16. Learned counsel for the petitioner has further argued that in fact the plaintiff respondent had taken recourse to the filing of an appeal against the order dated 14.3.1983 but did not pursue the appeal vigilantly and allowed the appeal also to be dismissed on 1.10.1983 and thereafter took no steps against the order dated 1.10.1983.

17. Learned counsel for the petitioner has further argued that in any case the suit of the plaintiff had been dismissed for want of evidence, therefore no purpose would be fulfilled in getting the suit decided without evidence and for this reason, the impugned orders passed by the court below were bad.

18. In order substantiate the argument as made by him, the learned

counsel for the petitioner has cited several decisions of various Courts. He has relied on a decision of Madras High Court rendered in the case of ***H.J. Dorairaj versus Vishwanatha Rupa and Co.*** reported in ***AIR 1973 Madras 135***. In this case the Madras High Court has held that the application under section 151 C.P.C. was not maintainable when the appellant's remedy was to file an appeal against the final order.

19. The second decision cited by the learned counsel for the petitioner was ***M/s. Maruthi Enterprises versus Smt. Muniyanjamma and others*** reported in ***AIR 1987 Karnataka 264*** in which Karnataka High Court came to the conclusion that inherent jurisdiction of the Court can only be exercised subject to the rules that if the Code did not provide any specific provision which would meet the necessities of the case in question, there being a specific remedy under the Code by way of an appeal or review, it was not open for the litigant to invoke the inherent jurisdiction under section 151 C.P.C. The Karnataka High Court came to the conclusion while relying on a decision of the Hon'ble Apex Court in the case of ***Ram Chand and Sons Sugar MilIs Pvt. Ltd. Versus Kanhayalal Bhargava,*** reported in ***AIR 1966 SC 1899*** wherein Hon'ble Apex Court observed that the inherent power of the Court "is in addition to and complimentary to the powers expressly conferred under the Civil Procedure Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code."

20. Learned counsel for the petitioner further placed reliance on a decision of Hon'ble Apex Court rendered in the case of ***State of W.B. and others versus Karan Singh Binayak and others***, reported in ***2002 ACJ 1092 SC*** wherein the Hon'ble Apex Court held that the inherent powers of the court could not be exercised to reopen the settled matters and cannot be resorted to when there is specific provisions in the Act to meet the situation.

21. Learned Counsel for the petitioner also relied on another decision of Hon'ble Supreme Court in the ***Budhia Swain and others versus Gopinath Deb and others***, reported in ***1999 ACJ 1462 SC***, in which also the Hon'ble Apex Court laid down the parameters when the inherent powers of the Court can be invoked.

22. Learned counsel for the petitioner also placed reliance on a decision of the Allahabad High Court in the case of ***Lalji and others versus VII Additional District Judge*** reported in ***2000 ACJ 51***. In this case, the Allahabad High Court discussed at length the circumstances when the provision of section 151 C.P.C. can be invoked and came to the conclusion that it cannot be invoked when the matter is concluded and there is remedy available to challenge the same as provided in the Code itself. Allahabad High Court further held that where the remedies are available under the Act, inherent powers cannot be invoked simply because such remedies have become time barred and has further held that the party who is not diligent and who had wasted his chances in not availing the remedies available, is

precluded from invoking inherent powers of the Court.

23. Here I may add that in view of the fact that the plaintiff had availed the remedy by filing an appeal against the order dated 14.3.1983 and the appeal was dismissed on 1.10.1983 it cannot be said that the appellant was not aware of his statutory rights. The application under section 151 C.P.C. filed on 1.7.1983 was in addition to his invoking his statutory rights and was filed as an after thought. The plaintiff was simultaneously taking recourse to two remedies one by filing an appeal and another by filing application under section 151 C.P.C. Once the party had invoked proper remedy under the Code. his application under section 151 C.P.C. was clearly misconceived and deserved to be rejected being not maintainable.

24. In reply to all these arguments, learned counsel for the respondents has argued that once the Court has exercised discretion for the hearing of the matter on merits, the superior court should not disturb such finding and has placed reliance on a decision of the Hon'ble Apex Court in the case of ***N. Balakrishnan versus M. Krishnamurthy***, reported in **1998 RD 607**.

25. Having heard learned counsel for the parties at length and having examined the material on record, I am of the opinion that the arguments as advanced by the learned counsel for the petitioner have substance and are liable to be accepted by this Court for the reasons that the plaintiff firstly allowed the suit itself to be dismissed without giving evidence. Thereafter the plaintiff filed a revision, which too was dismissed being deficiency of court fee and he did not peruse it. If the litigant had been serious at all. he would have sought to get the appeal restored, which was dismissed on 1.10.1983 or at least would have filed a second appeal against the same.

26. The litigant on the other hand was playing hide and seek with the Court. He was pursuing two remedies simultaneously - on one hand he had filed an statutory appeal which it was not pursued by him diligently and on other hand, he had filed an application under section 151 C.P.C. which was clearly not a remedy in the matter, especially when the suit itself had been concluded finally and was decreed also.

27. Taking into consideration the entire facts and circumstances of the case, I am of the opinion that the inherent powers as conferred under section 151 C.P.C. may only be invoked in certain situations but not in a case where the party has a right of filing an appeal or of revision under the Code itself.

28. In the present case, it seems that the litigant was well-informed about the remedies available to him and therefore had taken recourse to two remedies simultaneously. In my opinion the application under section 151 C.P.C. was wrongly allowed by the court below as well and the revisional order also suffers from error of law, which are hereby set aside.

29. The writ petition is allowed as above. The impugned orders dated 5.1.1988, 25.3.1986 and 24.9.1985 are quashed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2008

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

Special Appeal No. 666 of 2008

Ramesh Gaur ...Appellant
Versus
Mahanideshak, Karagar Prashashan Evam Sudhar Sevaen, U.P. and others Respondents

Counsel for the Appellant:
Sri. B.L. Yadav
Sri. K.K. Kanojiya

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

Constitution of India-Article 226, Article 341-appointment of petitioner as Bandi Rakshak cancellation-on ground of forge caste certificate-reliance based upon State Government Notification dated 31.03.1986-held-any executive action contrary to the predetermined list-violative of Article 341-apart from the fact-fraud vitiates every thing-termination order-proper-warrants no interference

Held: Para 12

Therefore any executive action or legislative enactment of the State which interferes, disturbs, re-arranges, re-groups or re-classifies the various castes found in the Presidential List will be violative of scheme of the Constitution and will be violative of Article 341 of the Constitution.

Case law discussed:
(1994) 6 SCC 241, 2004 AI R SCW 6419, Special Appeal No. 89 of 2005 decided on 4th February-2005.

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

1. Sri B.L. Yadav, learned counsel for appellant and learned Standing Counsel for the respondents.

2. This special appeal has been preferred against the judgment and order passed by the learned Single Judge dated 29th April, 2008 dismissing the writ petition filed by the appellant. The writ petition was directed against the order passed by the Senior Superintendent, Divisional/District Jail, Gorakhpur dated 9th April, 2008 terminating/cancelling the appointment of the appellant as Bandi Rakshak.

3. Brief facts necessary for deciding the special appeal are that in response to the advertisement dated 14th May, 2003, for filling up the backlog vacancies belonging to the Scheduled Caste category, petitioner-appellant made an application claiming himself to be a member of Scheduled Caste category. On the basis of caste certificate submitted by the appellant, he was selected as Bandi Rakshak on 31st July, 2003. The caste certificates, which were submitted by the appellant and other selected candidates were sent for verification to the respective districts and Tehsils from where such caste certificates were obtained. Report was submitted by the Tehsildar Sadar, Gorakhpur on 7th January, 2008 to the effect that the caste certificate submitted by the petitioner was never issued by the Tehsil-authority. Thereafter a show-cause notice dated 15th January, 2006 was issued to the petitioner calling for his explanation. The appellant submitted his reply stating that the caste certificate was issued by the Tehsildar concerned on 4th July, 1989, therefore, re-verification be

made. The papers were again forwarded to the Tehsildar concerned for re-verification, he submitted his report on 7th March, 2008 recording that such certificate (as claimed by the appellant) was never issued by his office on 4th July, 1989. Thereafter appellant was called for personally on 7th April, 2008. Not being satisfied with the reply submitted by the appellant qua the validity of the caste certificate dated 4th July, 1989, the Senior Superintendent, Divisional/District Jail, Gorakhpur vide order dated 9th April, 2008 has cancelled the appoint of the petitioner-appellant. This order was challenged before this Court by means of writ petition no. 21499 of 2008. The learned Single Judge has recorded that the appellant having been failed to prove that he belongs to Scheduled Caste Category and since the caste certificate submitted by the petitioner was found forged, no error has been committed in cancelling the appointment of the petitioner.

4. Learned counsel for the petitioner-appellant questioning the order of Hon'ble Single Judge contends that State Government has issued a notification dated 31st March, 1986, in which caste 'Gond' is included in the list of Scheduled Caste. On the strength of said notification, the appellant was issued the caste certificate. He further contends that procedure for cancelling the caste certificate has not been followed. He has placed reliance upon the judgment of the Hon'ble Supreme Court of India in the case of Kumari Madhuri Patil & Anr vs. Addl. Commissioner, Tribal Development & Ors.; (1994) 6 SCC 241.

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

6. It is not in dispute that the caste certificate which was submitted by the petitioner-appellant for his being a Scheduled Caste category candidate dated 4th July, 1989, (brought on record as Annexure-1 to the writ petition), has not been verified by the Tehsildar, Sadar, Gorakhpur. His report records that no such certificate was ever issued by the Tehsil-authority in favour of the appellant. After receiving the report, an opportunity was afforded to the petitioner to prove that the caste certificate submitted by him was genuine. Petitioner could not prove the authenticity of such certificate. The respondents, therefore, did not commit any error in coming to the conclusion that the certificate submitted by the appellant was forged and hence rightly set aside his selection/appointment.

7. The learned counsel for the appellant has vehementally argued that the caste 'Gond' is included in the list of Scheduled Caste as per the notification dated 31st March, 1986 issued by the State Government.

8. Suffice is to point out in the facts of the case that the caste certificate which was submitted by the appellant has been found to be forged, it is, therefore, not necessary for this Court to express any opinion on the aforesaid contention. However, in view of the fact that the appellant has pressed his submission, we proceeded to consider the same also:

9. Article 341 of the Constitution of India provides for various castes, races,

tribes, to be treated as Scheduled Caste in relation to a State and reads as follows:

***"341. Scheduled Castes**.-(1) The president [may with respect to any State [or Union Territory], and where it is a State, after consultation with the Governor thereof], by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State (or Union Territory, as the case may be].*
(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. "

10. According to the constitutional provision, it is the power of the President to issue the notification after consultation with the Governor of the State, specifying the castes, races or tribes, which shall for the purposes of the constitution be deemed to be Scheduled Caste in relation to the State concerned. Thereafter it is the power of the Parliament to include or exclude from the list of Scheduled Castes specified in a notification. The bare reading of Article 341 of the Constitution indicates that State Government has no power to amend the Scheduled Castes list by a notification as claimed in the facts of the present case vide notification dated 31st March, 1986.

11. In E.V. Chenniah Vs. State of Andhra Pradesh, 2004 AI R SCW 6419, the Apex Court examined a similar issue and held as under-

"Article 341 which is found in Part XVI of the Constitution refers to special provisions relating to certain classes which includes the Scheduled Castes. This Article provides that the President may with respect to any State or Union Territory after consultation with the Governor thereof by Public Notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory. This indicates that there can be only one List of Scheduled Caste in regard to a State and that List should include all specified castes, races or tribes or part or groups notified in that Presidential List. Any inclusion or exclusion from the said list can only be done by the Parliament under Article 341 (2) of the Constitution of India. In the entire Constitution wherever reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any sub-classification or division in the said list except, may be, for the limited purpose of Article 330, which refers to reservation of seats for Scheduled Castes in the House of People, which is not applicable to the facts of this case. ***It is also clear from the above Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to sub-divide, sub-classify. or sub-group these castes which are found in the Presidential List of Scheduled Castes.***

This part of the Constituent Assembly Debate coupled with the fact that Article 341 makes it clear that the State Legislature or its executive has no power

of "disturbing" (term used by Dr. Ambedkar) the Presidential List of Scheduled Castes for the State.

---

12. Therefore any executive action or legislative enactment of the State which interferes, disturbs, re-arranges, re-groups or re-c1assifies the various castes found in the Presidential List will be violative of scheme of the Constitution and will be violative of Article 341 of the Constitution."

13. The Division Bench of this Court in the case of Vijay Prakash vs. State of U.P. & Ors, passed in Special Appeal No. 89 of 2005 decided on 4th February, 2005, has held that the State Government has no power to include or exclude any Caste from the list of Scheduled Castes notified under Article 341 of the Constitution. The Division Bench has held as follows:

"The scheme of the Constitution makes it clear that the persons only who had been included under the aforesaid Orders, Constitution (Scheduled Tribes) Order 1950 and Constitution (Scheduled Tribes) Order 1950, are entitled to the benefit and privileges available for Scheduled Caste and Scheduled Tribes, and it is the parliament of India alone which is competent to amend the said Orders, following the procedure prescribed in Articles 341 and 342 of the Constitution. Once the President of India issued the Scheduled Castes/Scheduled Tribes order in relation to a State in exercise of the powers under Article 341 (1) and 342 (1) of the Constitution, even the President cannot include or exclude any caste in that order. It is the Parliament alone which can amend the said order by law. The Courts are also devoid of any power to include or exclude, to vary or substitute or declare any person to a Scheduled Caste or Scheduled Tribes. The purpose of enacting the provisions of Articles 341 and 342 seems to be uplifting certain classes of the society who have been depressed, oppressed and suffered from backwardness in all walk of life. "

14. Thus the notification issued by the State Government dated 31st March, 1986 does not help the petitioner-appellant.

15. So far as the judgment of the Hon'ble Supreme Court in the case of Kumari Madhuri Patil (Supra) is concerned, it may be noticed that the said case deals with the procedure for issuance of a certificate of Scheduled Caste or Other Backward Class category to be submitted for admission. The said judgement does not help the appellant.

16. It is also pertinent to mention that under the provisions of Uttar Pradesh Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 in Definition clause (b), it is provided that other backward classes of citizens means the backward classes citizens specified in Schedule to the Act of 1994. The State may amend Schedule-I of 1994, Act by exercising the power under sub-Section 2 (b) of Act, 1994 but it does not empower the State to issue notification with regard to the Scheduled Castes. Hence there is no power with the State Government to amend the list of Scheduled Castes exercising any power under Act, 1994.

17. In view of the aforesaid, there is no illegality or infirmity in the judgement and order passed by the learned Single Judge.

18. The special appeal lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Application No. 231 of 2005

U.P.S.R.T.C. ... Petitioner
Versus.
Chhakauri Lal and others Respondents

Counsel for the Petitioner:
Sri Rahul Anand Gaur

Counsel for the Respondents:
Sri S.N. Dubey
Sri A.R. Dwivedi
Sri. Prabhakar Chandel
S.C.

Constitution of India, Article 226- Termination of services-on allegation the workman being driver under influence of liquor found on duty-Labour court recorded specific finding-about any piece of evidence in support of allegation, nor any medical examination report produced-no illegality shown in the award given by Labour Court-cannot be interfered under writ jurisdiction.

Held: Para 12 & 13

The workman was not even got medically examined in this regard and no medical record was produced in the domestic inquiry proceedings or even before the labour court.

In my opinion that if bus driver person falls ill or sick in route to destination, it cannot be said that he has committed a misconduct by not taking the bus to its terminal. Since the employer has failed to prove their case and to show any illegality or infirmity in the award of the labour court I am not inclined to interfere in the findings facts recorded by the labour court in this case.

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

1. Heard learned counsel for the petitioner, learned counsel for respondent and Sri S.N. Dubey.

2. The petitioner-Regional Manager, UPSRTC, Jhansi Region, Jhansi has filed this writ petition.

3. The facts of the case are that respondent no. 1, Chhakauri Lal was a driver in the Corporation. His services were terminated w.e.f. 21.9.2001 after holding domestic enquiry on charge of driving bus under influence of liquor.

4. In the domestic inquiry the stand of the workman stated that his services have not been terminated for any corrupt practice; that he does not ever take liquor or intoxicating drink and no medical certificate has been produced by the employer in the enquiry to establish that he was under the influence of liquor while driving the bus for which alleged act of misconduct, his services has been terminated. In his defence he also submitted that while he was the driving bus on 3.1.1993 on Kanpur Manoba route, he became very sick and therefore stopped the bus at Maudha. Thereafter he requested the conductor to get a reliever driver.

5. The workman specifically denied the suggestion of the employer in the proceeding before the Labour Court that he was under the influence of liquor as alleged by the employees. The Labour Court on basis of pleading and on appreciation of evidence and record came to the conclusion that employers have failed to prove their case that workman was not ill and could not drive the bus being under the influence of liquor. The Labour Court also noted that workman was allegedly found in the bus by several persons with symptom similar to a person under the influence of liquor but those independent persons were neither produced nor summoned by the employers either in the domestic inquiry proceedings nor they were produced in the labour court.

6. The relevant extract of the impugned award in this regard is as under:-

"इस मामले में जिसके आधार पर वाद का कारण उत्पन्न हुआ है वह है पत्र इग्जि०ई०-11 जो केन्द्र प्रभारी, महोबा द्वारा सीनियर फोनमैन महोबा डिपो को लिखा गया है जिसमें उन्होंने लिखा है कि ..... बस की वापसी दिनांक 3.1.93 को थी किंतु श्री छकौडी लाल चालक ने बहुत अधिक नशा कर रखा था जिससे मोदहा के पास बस दुर्घटना होते होते बची किंतु किसी हालत से वह बस को मौदहा में लाकर खड़ी कर दी। दिनांक 4.1.93 को मौदहा के ही कुछ सम्भ्रान्त व्यक्ति आये तथा दिनांक 3.1.93 की घटना कि छकौडी चालक अंधाधुन्ध नशे में था तथा यदि यह चालक मार्ग पर चलाया जाता रहा तो निश्चित ही बहुत भयंकर दुर्घटना हो जायेगी जिससे तमाम जानें भी जा सकती हैं इसमें अनुरोध किया गया है कि बस जो मौदहा में खडी है अन्य चालक भेजकर महोबा मंगवाने की व्यवस्था करने का कष्ट करें। इस रिपोर्टकर्ता श्री कृष्ण का बयान ई०डबलू-2 की हैसियत से इस न्यायालय में करवाया गया है जिसने अपने मुख्य बयान में कहा है कि इग्जि० ई०-11 रिपोर्ट मेरे द्वारा की गयी है यह रिपोर्ट उसने छकौडी लाल चालक के विरूद्ध दी है इसमें जो कुछ लिखा है वह सही लिखा है तथा इग्जि० ई०-6 उसकी जानकारी में नहीं है। जिरह के दौरान इस गवाह ने कहा है कि "मैंने संबंधित श्रमिक को शराब पिये हुए नहीं पाया मैंने लोगों के बताने पर रिपोर्ट इग्जि० ई०-11 की थी। दण्डाधिकारी ने मेरा बयान नहीं लिया था"। रिपोर्ट कर्ता की रिपोर्ट दूसरों के बयान पर आधारित है। जिनके बयान के आधार पर यह रिपोर्ट उन्होंने की थी उन व्यक्तियों को न्यायालय में नहीं पेश किया गया है जबकि जो व्यक्ति उनके पास एतद् संबंध में सूचना देने के लिये गये थे। मामले में बहुत महत्वपूर्ण व्यक्ति थे उनका नाम पता तथा सूचना देने के संबंध में उनके हस्ताक्षर प्राप्त करना चाहिए था और न्यायालय में प्रार्थना-पत्र देकर इन्हें गवाह के रूप में तलब कराया जा सकता था अथवा सेवायोजक उन्हें गवाह के रूप में तलब कराया जा सकता था अथवा सेवायोजक उन्हें स्वयं ही न्यायालय में पेश कर सकते थे। रिपोर्ट कर्ता स्वयं प्रत्यक्षदर्शी नहीं हैं। इस प्रकार की दी गयी सूचना असत्य हो सकती है अतः मैं पाता हूँ कि रिपोर्ट कर्ता की रिपोर्ट संदिग्ध है और उस पर विश्वास पूर्ण रूपेण नहीं किया जा सकता है और ऐसी रिपोर्ट के आधार पर दिनांक 21.9.2001 से सेवा समाप्ति का दिया गया दण्ड किसी भी दशा में उचित एवं वैधानिक नहीं कहा जा सकता है। फिर भी यदि वादी अपनी ड्यूटी के समय शराब पीने के मामले में भविष्य में पाया जाय तो उसे कठोर से कठोर दण्ड जिसमें उसकी सेवा समाप्ति भी सम्मिलित है, दिये जाने में कोताही न बरती जाय क्योंकि चालक का पद बहुत महत्वपूर्ण पद है जिसके बस संचालन के समय तमाम यात्रियों की जाने उसके हाथ में होती हैं और शराब पीकर बस का संचालन करना गम्भीर दुराचरण है। चूँकि वर्तमान मामले में जैसा कि ऊपर उल्लिखित किया जा चुका है, आरोप विवादित श्रमिक के विरूद्ध प्रभावित नहीं है अतः उसे दिया गया दण्ड निरस्त किये जाने योग्य है।

उपरोक्त समस्त तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुए मैं इस निष्कर्ष पर पहुँचता हूँ कि सेवायोजको द्वारा श्रमिक छकौडी लाल पुत्र श्री शिव बालक राम की सेवाएं आदेश दिनांक 21.9.2001 से समाप्त किया जाना उचित एवं वैधानिक नहीं है। मैं आदेश देता हूँ कि सेवायोजक विवादित श्रमिक को तत्काल उसकी सेवाओं की अखण्डता के साथ सेवा में ले और सेवा से निकाले जाने के दिनांक से सेवा में पुनः लिये जाने के दिनांक तक की अवधि का सम्पूर्ण वेतन मय अनुमन्य हितलाभों सहित इस अभिनिर्णय के लागू होने के दिनांक से एक माह के अन्दर भुगतान करें।

सेवायोजकों का यह भी निर्देश दिया जाता है कि विवादित श्रमिक को सेवा में लेने के पश्चात, जैसाकि ऊपर कहा गया है, चेतावनी पत्र अलग से निर्गत कर दें ताकि वह यदि किसी प्रकार शराब पीने का लती है तो भविष्य के लिये सचेत रहे।

मैं यह भी आदेश देता हूँ कि सेवायोजक पक्ष श्रमिक पक्ष को 300/- रूपया (तीन सौ रूपया) केवल वाद व्यय के रूप में अदा करेंगे।

ह०
(नियाज अहमद)
पीठासीन अधिकारी।"

7. Aggrieved by the aforesaid award the petitioner filed this writ petition.

8. At the time of admission following ad interim order was passed, which is as under:-

"Sri S.N. Dubey has appeared for the respondent no. 1. He prays for and is allowed one month's time to file counter affidavit.

Subject to compliance of provisions of Section 17-B of the Industrial Disputes, 1947 the impugned award dated 27.3.2004 published on 27.9.2004 shall remain stayed."

9. Interim order was granted to the petitioner at the time of admission. He has clearly stated that the petitioner was reinstated and now retired from service.

10. Learned counsel for the petitioner submits that the services of the workman concerned was terminated illegally unjustifiably and illegally and the Labour Court has given specific findings of fact that employer have failed to prove their case and have also has not been able to produce any evidence to the effect that the petitioner was driving the bus in state of intoxication.

11. The counsel for the respondents does not deny that no independent witnesses were produced by the department to establish the fact that the workman concerned had driven the bus in a state of intoxication or was found in such state.

12. The workman was not even got medically examined in this regard and no medical record was produced in the domestic inquiry proceedings or even before the labour court.

13. In my opinion that if bus driver person falls ill or sick in route to destination, it cannot be said that he has committed a misconduct by not taking the bus to its terminal. Since the employer has failed to prove their case and to show any illegality or infirmity in the award of the labour court I am not inclined to interfere in the findings facts recorded by the labour court in this case.

14. The writ petition is dismissed. As a consequence learned counsel for the respondents will pay arrears of salary to the workman under the impugned award and shall also to make payment of his retiral benefit within a period of three months from today.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2008

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

Civil Misc. Writ Petition No. 25024 of 2008

Surendra Yadav ...Petitioner
Versus.
Ram Naresh Lal @ Thakur and others ...Respondents

Counsel for the Petitioner:
Sri. P.P. Chaudhary

Counsel for the Respondents:
Sri. R.K. Srivastava

U.P. Urban Building(Regulation of letting Rent and Eviction) Act, 1972- Section 16(9)-allotment of residential

house-without declaration of vacancy - without notice to landlord-without fixing any amount of rent-even possession taken by the allottee forcibly-allottee a sitting M.P.-held-wholly illegal-direction issued to the District Magistrate to recover the arrear of rent as land revenue-in extraordinary circumstances exceptional direction given for misuse of power and process.

Held: Para 12 & 13

Allottee Surendra Yadav is directed to pay damages to the landlord for use and occupation of the accommodation in dispute since 22.05.1997 till the date of actual vacation at the rate of Rs.2,500/- per month. This amount shall be recovered from him by the District Magistrate like arrears of land revenue within three months and handed over to the landlord Ram Naresh Lal. In this regard also the Court hopes that the District Magistrate will not provide the opportunity to the landlord to file an application in this writ petition complaining non-compliance of this direction.

As misuse of power and abuse of process of law was extraordinary in the allotment hence extraordinary directions for redressal have been issued.

Case law discussed:

AIR 1985 SC 1635, 1985 (2) ARC 73,. 2003 (2) ARC 629, 2004 (2) ARC 349. 2004 (2) ARC 789. 2008 (2) ARC 613.

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

1. The first Writ Petition No. 25024 of 2008 has been filed by the tenant-allottee Surendra Yadav. In that writ petition landlord- respondent Ram Naresh Lal had filed caveat through Sri R.K. Srivastava, learned counel. When the case was taken up as fresh, Sri A.K. Gupta learned counsel for Ram Naresh Lal, the landlord- petitioner in the second writ petition pointed out that the said writ petition was also connected with the first writ petition, accordingly both the writ petitions were heard together.

2. In the first writ petition petitioner, allottee tenant, Surendra Yadav has described himself as Ex. Member of Parliament, Khalilabad.

3. The writ petitions arise out of allotment proceeding. House in dispute was allotted to Surendra Yadav in 1997 and he immediately took possession thereof. On pointed enquiry by the Court from the learned counsel for him regarding payment of rent, it was categorically stated that till date no rent had been paid. However, learned Counsel stated that allottee- tenant Surendra Yadav was ready to pay the rent. There is a world of difference between actual payment and readiness to pay.

4. Allotment application was filed on 10.1 .1997 and on the same date report was called for from Rent Control Inspector, who submitted the report on 27.1.1997. Inspection was made without any notice to the landlord, contrary to the mandatory requirement of Rule 8(2) of the Rules framed under U.P. Urban Building (Regulation' of Letting, Rent and Eviction) Act. Thereafter Rent Control and Eviction Officer through order dated 19.05.1997 allotted the house in dispute to Surendra Yadav. At the time of allotment Sri. Surendra Yadav was sitting M.P. In the allotment order, there is no mention regarding any notice at any stage to the landlord. In the allotment order absolutely no rent was fixed. No. of allotted house is 572 and it is situate in Ward No.5 Mohalla Indira Nagar, Basti. Landlord in his writ petition (para 33) has stated that

house in dispute is spread over an area of 3000 sq. yard and is situate in the main market of Basti and contains four rooms, two verandas, latrine, bathroom and kitchen, open court yard and a lawn and can easily be let out on monthly rent of Rs.6,000/-. After allotment, procedure is prescribed under the Act and the Rules for taking possession. However the allottee took possession within 3 days i.e. on 22.05.1997 by himself and gave an intimation to that effect on 23.05.1997. In that intimation it was mentioned that in pursuance of allotment order, the allottee Surendra Yadav started residing in the house since 22.05.1997. The version of the landlord that the possession of the house was forcibly taken stands proved by the said letter. Landlord's allegation is that locks were also broken open while taking possession. Thereafter landlord filed revision against the allotment order (Revision No.157 of 2001). District Judge, Basti through order dated 04.02.2002 allowed the revision and remanded the matter to the Rent Control and Eviction Officer. Thereafter petitioner filed objection before Rent Control and Eviction Officer and also filed application for restoration of the possession on 12.08.2005. Thereafter fresh report was called for from Rent Control Inspector, who on 05.10.2005 reported that house was in possession of Surendra Yadav. Rent Control and Eviction Officer through order dated 30.09.2006 dismissed the application of the landlord for possession. Thereafter release application was filed by the landlord. It was also stated that landlord was employed at Gorakhpur and had taken a house at the rent of Rs.2,200/- per month. Rent Control and Eviction Officer through order dated 27.01.2008 released the accommodation in favour of the landlord. Against the said order allottee-tenant filed revision no. 10 of 2008. Revision filed by the allottee tenant against the release order (Civil Revision No.10 of 2008) has been dismissed on 19.04.2008 by District Judge Basti which order has been challenged through first writ petition by Surendra Yadav allottee-tenant.

5. The allotment order was utterly illegal and without jurisdiction as none of the following mandatory notices were issued to the landlord.

i) Before inspection (rule 8(2) of the Rules)
ii) Before declaration of vacancy (vide ***Ganpat Roy Vs. ADM AIR 1985 SC 1635: 1985 (2) ARC 73.***
iii) After declaration of vacancy and before allotment (rule 9(3) of the Rules)

I have discussed all these aspects in detail in ***R.L. Paddar Vs. ADJ 2003 (2) ARC 629, C.K. Nagarkar Vs. ADJ 2004 (2) ARC 349 and K.L. Yadav Vs. ADJ 2004 (2) ARC 789***

6. In fact no order for declaration of vacancy was passed by the Rent Control and Eviction Officer. The report of R.C.I. did not disclose any vacancy. It only stated that at the time of inspection house was locked. If house is found locked, it does not mean that it is vacant. Occupant may have temporarily gone out after locking the house. Moreover in the aforesaid authorities I have also held that allotment order is without jurisdiction if no rent is fixed therein. By virtue of definition of lease given under Section 105, Transfer of Property Act there cannot be any tenancy/lease without rent. Moreover under Section 16 (9) of the U. P. Rent Control Act it is mandatory for

Rent Control and Eviction Officer to direct the tenant to pay presumptive rent. obtained allotment order by virtue of his being sitting M. P. Public

7. From the above facts it is more than clear that Surendra Yadav obtained allotment order by virtue of his being sitting M.P. Public figures are supposed to act in more reasonable manner than ordinary citizens. People tend to follow the things done by their rulers.

8. In the above scenario, para 17 of a recent authority of ***Supreme Court reported in R.K. Shukla Vs. S.N. Anand 2008 (2) ARC 613*** requires to be quoted and is quoted below:-

"17. There is another aspect of this matter for which in the facts and circumstances of the case we would not exercise our discretionary power under Article 136 of the Constitution. The vacancy declaration order and the consequent allotment in favour of the appellant was made in the manner indicated herein earlier and the appellant stormed into the disputed premises more than two decades back and started enjoying the same without paying a single penny in respect of the same. It was only after the judgment of the High Court that he had deposited the amount as directed by the High Court. Therefore, we do not find any reason to interfere with the impugned judgment of the High Court under Article 136 of the Constitution in the facts and circumstances of the present case."

9. The prayer in the writ petition by the landlord is for quashing the admission order passed by the Revisional Court. However, thereafter the Revisional Court has dismissed the revision. The second prayer in the landlord's writ petition is for a writ of mandamus commanding the Rent Control and Eviction Officer, Sadar, Basti to restore possession. Third prayer is for a direction to allottee to pay damages at the rate of Rs.6,000/- per month from the date of possession i.e. 22.05.1997.

10. I do not find least error in the judgment and order of the Revisional Court dated 19.04.2008 and release order dated 7.1.2008. The need of the landlord has rightly been found to be bonafide as he has got no other house. Moreover as held in 1986 (1) ARC 1 Talib Hasan vs. ADJ (FB) and R.N. Sharma vs. S. Gaur A.I.R. 2002 SC 2204, allottee can not question the need of landlord in proceedings under Section 16 of the Act. Accordingly, first writ petition filed by allottee Surendra Yadav is dismissed. Second Writ petition by the landlord Ram Naresh Lal is allowed in part.

11. Allottee Sri Surendra Yadav is granted one months' time to vacate, failing which, District Magistrate, Basti shall positively restore the possession of the house in dispute to the landlord by 31.8.2008. In the process of delivery of possession, Rent Control and Eviction Officer shall not be involved in any manner. Copy of this judgment shall immediately be sent to District Magistrate. It may be sent through fax also. Any laxity or latitude on the part of the District Magistrate in this regard will not at all be appreciated by this Court. District Magistrate must realise that his delegatee i.e. Rent Control and Eviction Officer has already crossed all the limits. It may be appropriate for the District Magistrate to take action/recommend to

take action on the administrative side against the erring Rent Control and Eviction Officer, who made the allotment in most illegal manner. Rent Control and Eviction Officer played the role of willing tool in the hands of sitting M.P. and abject surrender to his whims on the part of Rent Control and Eviction Officer.

12. Allottee Surendra Yadav is directed to pay damages to the landlord for use and occupation of the accommodation in dispute since 22.05.1997 till the date of actual vacation at the rate of RS.2,500/- per month. This amount shall be recovered from him by the District Magistrate like arrears of land revenue within three months and handed over to the landlord Ram Naresh Lal. In this regard also the Court hopes that the District Magistrate will not provide the opportunity to the landlord to file an application in this writ petition complaining non-compliance of this direction.

13. As misuse of power and abuse of process of law was extraordinary in the allotment hence extraordinary directions for redressal have been issued.

14. Office is directed to supply a copy of this judgment to learned Chief Standing Counsel free of cost within three days.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2008

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

Second Appeal No. 1618 of 1989

Smt Urmila Devi ...Appellant
Versus
Ram Dhani and others ...Respondents

Counsel for the Appellant:
Sri. V.K. Singh
Counsel for the Respondents:
Sri. Sushil Kumar Mehrotra
Sri. R.J. Shahi

(A) Code of Civil Procedure-Section100- Second Appeal-Suit for permanent injunction-on the basis of registered sale deed-using the same by raising construction for 40 years-if the injunction refused-right of egress and ingress shall be effected-both the Courts below recorded finding of facts about two different means of egress and ingress-cannot be interfered by the appellate Court in second appeal-against the concurrent finding of facts-particularly in absence of pleadings of easementry rights.

Held: Para 4

Thus it is evident that the claim of the plaintiff that she has no other entrance or exit to her house constructed in the year 1985, has also not been accepted by the trial court though the suit was decreed injuncting the defendants from interfering in the exit and entry towards north side. This part of the finding stands confirmed by the lower appellate court and thus I am of the considered view that this finding by the two courts is a finding of fact and can not be interfered in exercise of jurisdiction under Section 100 C.P.C.

(B) Code of Civil Procedure-Section100-Second Appeal-substantial question of law-must be debatable-not previously settled-must have material bearing on decision-dependent upon particular facts of cases.

Held: Para 6

To be 'substantial' question of law it must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case, or not? The same view has been expressed by the Apex Court in the cases of *Rajeshwari Vs. Puran Indoria, (2005) 7 Supreme Court Cases, 60*.

Case law discussed:

(2001) 3 SCC 179, (2005) 2 Supreme Court Cases, 500, (2005) 7 Supreme Court Cases, 60.

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

1. Heard Sri V.K. Singh, learned counsel for the plaintiff-appellant and Sri S.K. Mehrotra Advocate for the defendant-respondents.

2. The plaintiff instituted a suit for permanent injunction to restrain the defendant-respondents from interfering in the rights of plaintiff in use of the land as passage as well as for removal of Charan, Nad etc, which was kept by the defendants-respondents on the disputed land. The case of the plaintiff is that the disputed land i.e. Plot No. 1254 was purchased in the year 1983 and thereafter a house was constructed in the year 1985. The disputed land was only, passage for egress and ingress to the plaintiff's house. It was also pleaded that the defendants have started collecting building material i.e. sand, bricks etc. with an intention to make construction and completely stop the passage which will cause irreparable loss to the plaintiff. The defendants disputed the claim of the plaintiff. The land which was appurtenant to the defendants' house was used since a very long time much before the plaintiff purchased plot No. 1254 and constructed a house. In fact they are owners and the plaintiff has no right whatsoever.

3. During the pendency of the suit, a commission was issued to make spot inspection. Oral statements were adduced from both sides. Lalji Lekhpal was examined as DW-1. On consideration of oral and documentary testimony as well pleadings on behalf of either parties, the trial court recorded a finding that the plaintiff has not perfected her easementary right of 20 years user since the admitted case is that the land in question was purchased only in the year 1983. The house was constructed in the year 1985 and, thereafter original suit No. 534 of 1985-Smt. Urmila Devi Vs. Ram Dhani and others was instituted. However, the trial court decreed the suit in favour of the plaintiff to a limited extent that the plaintiff has a right of egress and ingress otherwise the house constructed by the plaintiff will be rendered useless without any passage. The defendants preferred a civil appeal No. 10 of 1987 against the judgment and decree dated 5.1.1987 passed by Vth Additional Munsif, Mirzapur. The lower appellate court did not agree with the reasonings and findings of the trial court. The lower appellate court was of the view that as averred in the written statement by the

defendants, the disputed land is abadi of the defendants and they are in possession of the land in dispute since more than 40 years. Nad and Khunta are also in existence since a very very long time. The lower appellate court did not agree with the findings of the trial court regarding egress and ingress, since no easementary right accrued to the plaintiff. Besides, it is not disputed that the plaintiff is using the disputed land only since last two years. Besides, on perusal of the evidence on record, it is established that there are two doors in the house, one opens towards north of the disputed land and another opens towards south of the house. PW-l admitted in his statement that the disputed land is not part of the land which was purchased by him in the year 1983 and this admission stands corroborated by PW-2. The defendants are in occupation of the land in question prior to the Zamindari Abolition and, therefore, the plaintiff has no claim over it and not entitled for relief of injunction.

4. I have considered the argument of the respective counsels and perused the entire record. It is true that the plaintiff has not pleaded or claimed any easementary right whatsoever in the plaint. She has unequivocally admitted that the house-constructed on the plot was purchased only in the year 1983. The house was completed in the year 1985 and the suit was instituted in that very year. Thus no easementary right accrued to the plaintiff. Besides, there is complete absence of pleadings of easementary right. Learned counsel for the defendant-respondents has placed the judgment of the trial court. No doubt the suit was decreed so far the right of egress and ingress was concerned and the defendants were injuncted from interfering in the said right but there is clear cut finding that there are two entrance and exit to the house, one towards disputed land and the other on the back side. This finding is confirmed by the lower appellate court in the appeal preferred by the defendant-respondents. Neither any appeal nor cross objection was preferred by the plaintiff regarding the findings to the effect that there are two passage for egress and ingress, one on the south and the other on the north side. The specific finding by the trial court is that the plaintiff can also use the passage on the south side which connects with chakroad and passage on the north side which is through the disputed land. Thus it is evident that the claim of the plaintiff that she has no other entrance or exit to her house constructed in the year 1985, has also not been accepted by the trial court though the suit was decreed injuncting the defendants from interfering in the exit and entry towards north side. This part of the finding stands confirmed by the lower appellate court and thus I am of the considered view that this finding by the two courts is a finding of fact and can not be interfered in exercise of jurisdiction under Section 100 C.P.C.

5. Learned counsel for the appellant has tried to emphasize on three substantial questions of law which he has framed but was not able to substantiate that the judgment of the lower appellate court suffers from any substantial error formulated in the memo of appeal. The finding of the trial court that the plaintiff has two passage for egress and ingress was neither challenged nor set aside by the lower appellate court and I do not think that this Court can interfere in the findings arrived at by the courts below which is based on sound reasonings. The

argument of the learned counsel for the appellant that the plaintiff has acquired easementary right is without any basis. There is no such claim in the plaint and it is not disputed that the suit was instituted within two years from the date of purchase of the land and, therefore, the courts below were absolutely correct in refusing the claim of easementary right specially in absence of any pleadings to that effect.

6. The Apex Court in the recent cases of ***Santosh Hazari Vs. Purshottam Tiwari, (2001) 3 SCC, 179 and Govinda Raju Vs. Mariamman (2005) 2 Supreme Court Cases, 500***, ruled that a point of law which admits of no two opinions may be a preposition of law but can not be a substantial question of law. To be 'substantial' question of law it must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case, or not? The same view has been expressed by the Apex Court in the cases of ***Rajeshwari Vs. Puran Indoria, (2005) 7 Supreme Court Cases, 60***.

7. In view of the touchstone and principles laid down by the Apex Court in the aforesaid decisions, I do not find any substantial error of law and a fit case for interference in exercise of jurisdiction under Section 100 C.P.C. The judgment of the lower appellate court do not call for any interference. The appeal lacks merit and is accordingly dismissed. Cost on parties.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2008

BEFORE
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 38657 of 2005

Prashant Ranjan Singh ...Petitioner
Versus.
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava

Counsel for the Respondents:
S.C.

Payment of Gratuity Act, 1972-Section 4(6)-Recovery from Gratuity-amount discovered after death of employee-recovery against alleged deficiency of items in store-while the deceased employee was working as store in charge-held-cannot be recovered without issuing show cause notice-without affording an opportunity of hearing-illegal.

Held: Para 20

Under the circumstances, I am of the opinion that the recovery of Rs.21,416-00 sought to be made in respect of the alleged deficiency in the items in the Office Store from the amount of gratuity payable in respect of the deceased Awadhesh Singh is against the provisions of the said Government Order dated 28-7-1989 and the said recovery cannot be made from the gratuity payable in respect of the deceased Awadhesh Singh

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The present writ petition has been filed under Article 226 of the Constitution of India, interalia, praying for quashing

the order dated 6-2-2002 passed by the District Agriculture Raksha Adhikari, Ballia (respondent no.3).

2. The counter affidavit and the rejoinder affidavit have been exchanged, and the writ petition is being disposed of finally with the consent of the learned counsel for the parties.

3. From a perusal of the averments made in the writ petition, as also in the counter affidavit and the rejoinder affidavit, the relevant facts, as noted hereinafter, emerge.

4. Awadhesh Singh, father of the petitioner was working on the post of senior clerk in the office of the respondent no.3. The said Awadhesh Singh (father of the petitioner) expired on 9-9-2000 while he was in service. After the death of the said Awadhesh Singh, the petitioner was appointed as junior clerk on 13-11-2000 on compassionate grounds.

5. It appears that consequent upon the death of the said Awadhesh Singh, payment of the gratuity payable in respect of the said Awadhesh Singh was claimed by the petitioner. 90% of the gratuity amount payable in respect of the said Awadhesh Singh, amounting to Rs.2,15,000-00, was paid to the petitioner. However, 10% of the gratuity payable in respect of the said Awadhesh Singh was withheld by the respondents.

6. In the circumstances, the petitioner made representation dated 30-1-2002 before the respondent no.3 whereupon the respondent no.3 passed an order dated 6-2-2002, copy whereof has been filed as Annexure No.2 to the writ petition. It is stated in the said order dated 6-2-2002 passed by the respondent no.3, that the District Agriculture Officer, Basti (Respondent no.4) by the letter dated 29-8-2001 had intimated that the amount of Rs.21,416-00 was to be recovered from the said Awadhesh Singh, but the petitioner had not deposited the said amount. The said order dated 6-2-2002 further directed the petitioner to deposit the said amount of Rs.21,416-00 as required by the District Agriculture Officer, Basti.

7. Copy of the letter dated 29-8-2001 of the District Agriculture Officer, Basti, referred to in the above order dated 6-2-2002, has been filed as Annexure No.3 to the writ petition as well as Annexure No.CA 2 to the counter affidavit filed on behalf of the respondents. It is, interalia, stated in the said letter dated 29-8-2001 that the said Awadhesh Singh was having charge of the Office Store and after the death of said Awadhesh Singh, certain items in the Office Store were found to be deficient and accordingly Rs.21,416-00 was payable in respect of the said deficiency. A list of the items allegedly found deficient has also been annexed as part of Annexure No.CA-2 to the counter affidavit. It further appears that in view of the said order dated 6-2-2002, the petitioner made representations before the respondent no.3 against the alleged recovery of Rs.21,416-00 sought to be recovered in respect of the alleged deficient items in the Office Store after the death of the said Awadhesh Singh. Copy of the last representation dated 9-2-2005 has been filed as Annexure No.4 to the writ petition. As nothing was done on the representation of the petitioner, the petitioner has filed the present writ petition.

8. I have heard Sri Arvind Kumar Srivastava, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents, and perused the record.

9. Sri Arvind Kumar Srivastava, learned counsel for the petitioner submits that no show-cause notice was issued to the said Awadhesh Singh (father of the petitioner) during his life-time and it is only after the death of the said Awadhesh Singh that the respondents have alleged that there was deficiency in the items in the Office Store to the tune of Rs.21,416-00. It is submitted that in view of the provisions of the Government Order dated 28-7-1989 (Annexure No.6 to the writ petition), the said amount cannot be recovered from the gratuity payable in respect of the said Awadhesh Singh after his death as no show- cause notice was issued to the said Awadhesh Singh during his life-time in regard to the alleged deficiency in the items in the Office Store, under the charge of the said Awadhesh Singh. Sri Srivastava submits that it is only in respect of the advances such as for house, motor-car, motorcycle etc. that the recovery can be made from the gratuity payable in respect of a deceased employee.

10. In reply, the learned Standing Counsel submits that the deficiency in the items in the Office Store was discovered after the death of the said Awadhesh Singh, and the amount of Rs.21,416-00 in respect of such deficiency may be recovered from the gratuity payable in respect of the said Awadhesh Singh. It has, however, not been disputed by the learned Standing Counsel that no show-cause notice was issued to the said Awadhesh Singh in regard to the alleged deficiency in the items in the Office Store during the life-time of the said Awadhesh Singh and it is only after the death of the said Awadhesh Singh that the deficiency in the items in the Office Store was discovered, and thereupon, a recovery of Rs.21,416-00 was sought to be made from the gratuity payable in respect of the said Awadhesh Singh.

11. The Government Order dated 28-7-1989 has been issued for simplifying the procedure for the payment of superannuation pension, family pension, death/ retirement gratuity and commutation amount in order to avoid delay in payment of the said amounts. The said Government Order, as noted above, has been filed as Annexure No.6 to the writ petition.

12. Clause (5)2(kha)(3) of the said Government Order (occurring at page 36 of the paper-book of the writ petition), interalia, provides that in case any departmental/ judicial enquiry is going on against a government servant, on the date of his retirement, he will be paid provisional pension but the entire amount of gratuity will be withheld till the result of the enquiry is not received. However, clause (5)2(kha)(5) of the said Government Order (occurring at page 36 of the paper-book of the writ petition) provides that in case of the death of the concerned government servant, such departmental /judicial enquiry would be deemed to have abated as the concerned government employee would not be able to place his version and the exparte proceeding would not be justified from the legal point of view. Clause (5)2(kha)(10) of the said Government Order (occurring at page 38 of the paper-book of the writ petition), interalia,

provides that in case an employee dies while in service, the entire family pension would be released immediately and excepting for the amounts which are compulsorily recoverable from the death-gratuity such as advances in respect of the house, motor-car, motorcycle etc., the remaining death-gratuity would also be immediately released. However, in case, before the death of the concerned government employee, departmental proceedings have been concluded or he has been given opportunity to present his version after giving show-cause notice, the amounts sought to be recovered consequent to such proceedings may also be recovered form the death-gratuity. Clause (8)2 of the said Government Order (occurring at page 41 of the paper-book of the writ petition), makes similar provisions as are contained in clause (5)2(kha)(10) of the said Government Order.

13. It is, thus evident that out of the amounts of gratuity payable in respect of the government servant who has died while in service, only the following amounts can be recovered :-

1. Such advances which are compulsorily recoverable from the death-gratuity such as advances in respect of house, motor-car, motorcycle etc.
2. In case the departmental proceedings against the concerned government servant have been concluded in his life-time or he was given opportunity to place his version after giving show-cause notice during his life-time, and certain amount is recoverable as consequence of such proceedings.

After deducting the amounts, if any, payable in respect of the aforesaid two items, the remaining gratuity must be paid.

14. In the present case, no advances made to the said Awdhesh Singh are being sought to be recovered from the gratuity payable in respect of the said Awadhesh Singh after his death. What is being sought to be recovered here is the amount in respect of the alleged deficiency in the items in the Office Store. It has not been disputed that no departmental proceedings were taken in the life-time of the said Awadhesh Singh nor was any show-cause notice given to the said Awadhesh Singh during his life-time in respect of the alleged deficiency in the items in the Office Store. It is only after the death of the said Awadhesh Singh that the alleged deficiency in the items in the Office Store was discovered and the recovery has been sought to be made from the gratuity payable in respect of the said Awadhesh Singh.

15. Such recovery can not evidently be made in view of the provisions of the aforesaid Government Order dated 28-7-1989. The learned Standing Counsel has not placed any rule or Government Order containing any contrary provision to that contained in the said Government Order dated 28-7-1989.

16. It is relevant to note that sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 deals with the forfeiture of gratuity. The said sub-section (6) is quoted below :-

"4 Payment of Gratuity *--- (1) to (5).....*

(6) Notwithstanding anything contained in sub-section (1),---

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may be wholly or partially forfeited] –

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

17. Sub-section (6) of section 4 of the Payment of Gratuity Act, 1972, thus, provides for forfeiture of gratuity to the extent mentioned in the said provision in case the services of an employee have been terminated on account of the circumstances mentioned in the said provision. The said provision is, therefore, not applicable in the present case where the employee (father of the petitioner) died while in service, and the alleged deficiency in the items in the Office Store was discovered after the death of such employee.

18. As regards Article 351-A of the Civil Services Regulations, the same is as follows:

"351-A *The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or Judicial proceedings to have been guilty of grave mis-conduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement;*

Provided that—

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re- employment--

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings; and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

[Provided further that if the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings (Administrative

Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission].

Explanation--For the purposes of this article—

(a) Departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted :

(i) in the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to a Civil court.

***Note--**As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."*

19. The above provision, thus, deals with the right of the Governor to withhold or withdraw a pension or part of it and to order the recovery from a pension of the whole or part of any pecuniary loss caused to the Government in the circumstances mentioned in the above provision. The above provision does not apply in the case of recovery from gratuity, and as such, the same is not relevant in the present case.

20. Under the circumstances, I am of the opinion that the recovery of Rs.21,416-00 sought to be made in respect of the alleged deficiency in the items in the Office Store from the amount of gratuity payable in respect of the deceased Awadhesh Singh is against the provisions of the said Government Order dated 28-7-1989 and the said recovery cannot be made from the gratuity payable in respect of the deceased Awadhesh Singh.

21. The order dated 6-2-2002 is evidently illegal being contrary to the provisions of the Government Order dated 28-7-1989.

22. In view of the above, the writ petition deserves to be allowed, and the order dated 6-2-2002 is liable to be quashed. Accordingly, the writ petition is allowed and the order dated 6-2-2002 (Annexure No.2 to the writ petition) is quashed. The respondent no.3 is directed to release the balance 10% of the gratuity payable in respect of the said Awadhesh Singh alongwith interest payable at the rate prescribed in the relevant rules and the orders, within three months of the production of certified copy of this order before the respondent no.3. However, in the facts and circumstances of the case, there will be no order as to costs

Petition allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.07.2008

BEFORE
THE HON'BLE SURENDRA SINGH, J.

Criminal Misc. Writ Petition No. 12766 of 2008

Sanjay Kumar Chaurasia ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. D.R. Azad

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 200 and 203-complaint duly supported by the statements of witness-rejection by Magistrate on ground of absence of any documentary evidence-held-committed manifest error of law-at this stage Magistrate to see prima faice case and not the chances of conviction-order quashed with fresh direction.

Held: Para 9

Having given my thoughtful consideration to the aforesaid submissions and the cases cited by the learned counsel for the petitioner in support of his contention as well as on the perusal of the material placed on record of the case, I am of the complete in agreement with the contention raised by the learned counsel for the petitioner that ACJM has committed gross manifest error of law and gross illegality in dismissing the complaint

Case law discussed:
2008(60) ACC 780, 1973(10) ACC 181 SC, 1976 (13) ACC 225 SC, 2002 (44) ACC 168.

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

1. Aggrieved by the order dated 10.4.2008 passed by ACJM Sant Ravidas Nagar (Bhadohi), in case no. 209 of 2008, the revisionist preferred a revision which was numbered as 54 of 2008, before the Sessions Judge, Bhadohi which was also dismissed by the revisional court by order dated 23.6.2008. Thus, the present writ petition has been filed before this Court.

2. Heard learned counsel for the petitioner and learned AGA and have also perused the entire materials placed on record.

3. Notices to respondent nos. 2 to 8 are not required to be sent as no adverse order has been passed against them by the courts below.

4. Encapsulated facts of the case are that a complaint was filed by the complainant, Sanjai Kuamr Chaurasiya (hereinafter referred to the petitioner) on 24.1.2008 in the court of ACJM Bhadohi, at Gyanpur against the opposite party nos. 2 to 8 which was registered as criminal case no. 209 of 2008. It was alleged in the complaint that despite the order of the status quo passed by the Hon'ble High Court, on 16.12.2007 at about 6.30 p.m., the opposite party nos. 2 to 8 with the common intention came on the bhumidhari land of the petitioner having armed with motely weapons such as axe, lathi, danda etc started cutting the trees and bushes and when the petitioner stopped them from doing so, on the instigation of the opposite party no. 2, all of them entered into the house of the petitioner and caused injuries with lathi, danda, kicks and fists and thereupon when the mother of the petitioner and brother, Munna Lal and Ajai Kumar came for his rescue, they too were assaulted. The opposite party no.2, Hari Shanker thereafter, fired with his country made pistol causing panic terror in the family. It has been further alleged that soon after, the father of the petitioner also arrived there and he was also beaten by Suresh, Mahesh, Ajit and Awadesh Kumar and a sum of Rs.7000/-(a day's sale amount) was snatched from his pocket and co-accused Algoo, thereafter, attacked upon his father with knife albeit, he was saved unhurt. It has further been alleged that co-

accused Kamla Devi and Sarita Devi opposite party nos. 4 and 7 with the connivance of rest of the accused persons destroyed the furniture and other domestic articles of the house causing huge monetary loss to the petitioner. It has also been alleged that opposite party no. 8, Algoo made an assault upon the petitioner causing head injury by the butt of the knife and snatched his golden chain.

5. In support of the complaint, the petitioner got himself examined under Section 200 Cr.P.C. on 24.1.2008 and thereafter, the statement of Indrajit (pw-1), Raj Kumar (pw-2), Jagdish Kumar Chaurasiya (pw-3), Sushila (pw-4), Ghanshyam (pw-5) and Dr. K.S. Rai (pw-6) was recorded under Section 202 Cr.PC. After hearing the counsel for the complainant, learned ACJM vide his impugned order dated 10.4.2008 dismissed the complaint holding that the allegations made in complaint and in the statement of the witnesses are wholly improper and are not supported by the documentary evidence. Thus, the ground to summon the accused persons/ the opposite parties are not sufficient.

6. It was contended by the learned counsel for the revisionist that learned ACJM has committed gross illegality in making detail assessment of the evidence and dismissing the complaint on the basis of non production of the documentary evidence in support of the allegations made, as well as the improbability of the allegations contained therein.

7. It has also been contended that at the stage of Section 202 Cr.PC. only prima facie case to proceed against the accused persons is to be seen and the evidence led by the complainant is not to be assessed with a view of possibility of the conviction of the accused likely to be summoned.

8. Learned counsel for the revisionist in support of his assertion relied upon the below noted cases;

1. Ghanshyam Singh vs. State of U.P 2008(60) ACC 780.
2. Nirmal Jit Singh Hoom Vs. State of West Bengal and another 1973(10) ACC 181 SC.
3. Smt. Nagwa vs. Veeranna Shivalinguppa Konglgi and other 1976 (13) ACC 225 SC.

9. Having given my thoughtful consideration to the aforesaid submissions and the cases cited by the learned counsel for the petitioner in support of his contention as well as on the perusal of the material placed on record of the case, I am of the complete in agreement with the contention raised by the learned counsel for the petitioner that ACJM has committed gross manifest error of law and gross illegality in dismissing the complaint.

10. It is settled position that at the stage of passing order under Section 203 or 204 Cr.P.C. only prima facie offence is to be seen and not that the court must arrive to the satisfaction that there exists a possibility of conviction of the accused persons so summoned. It has been held in the case of SW Panikkar Vs. State of Bihar 2002 (44) ACC 168.

"In case of complaint under Section 200, Cr.PC. or IPC a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses if any, to ascertain whether

prima faice case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The word 'sufficient ground' used under Section 203 Cr.P.C. have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction."

11. It is true that often, complaints are filed under Section 200 Cr.P.C. with a motive or to cause unnecessary harassment, to wreck vengeance, to pressurise the opponent to bring them to their own terms etc instead of preferring an alternative remedy by way of approaching civil court. Thus to meet out with these situation before issuing the process a Magistrate has to essentially keep in mind the scheme contained in the provision of Section 200 to 204 Cr.P.C. Therefore, a Magistrate should pass an order judicially and not mechanically or in routine manner.

12. In view of the legal position herein above and having regard to the facts stated above, it is clear that after the enquiry as contemplated under Section 200 and 203 Cr.P.C. if the Magistrate is satisfied that there is sufficient evidence to proceed against the accused, he may issue summon or warrants as the case may be and it is settled, that at this stage the court is no required to appraise or evaluate the evidence as if it was finally deciding the case.

13. Thus, in my view, having considered to the facts stated and the legal position framed above, the Magistrate has committed a serious error in law.

14. The petition is hereby allowed.

15. The order dated 10.4.2008 passed by ACJM Sant Ravidas Nagar (Bhadohi) and the order dated 23.6.2008 passed by the revisional court are hereby set aside. The Magistrate concerned is directed to make a fresh look into the matter keeping in view of the observations made above and then pass order judiciously. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2008

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

Civil Misc. Recall/ Modification Application No. 7046 of 2004

Bahraich Deen ...Petitioner
Versus
Board of Revenue, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Hari Shanker Mishra

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

Land Revenue Act-Section 28-correction of map-by Chief Revenue Officer-objection regarding power of collectors-held-misconceived-by G.O. dated 07.03.1996 the post of CRO re designated as Addl. District Magistrate-in view of full bench decision of Brahm Singh case-Addl Collectors entitled to exercise the power of Collector under section 14(A)14 of LR Act.

Held: Para 7 & 8

From the above it is quite clear that Chief Revenue Officer have been re-designated as C.R.O.- A.D.M. (Land Revenue). This clearly amounts to conferring the power upon them to hear the cases under Land Revenue Act. In fact by virtue of the aforesaid G.O. it is evident that the main duty of Chief Revenue Officer is to hear the cases under Land Revenue Act.

In a recent full bench authority in Civil Misc. writ petition No.40986 of 2001 Brahm Singh Vs. Board of Revenue and others decided on 29.4.2008 it has been held that all Additional Collectors are entitled to exercise the power of Collector under Section 14-A of U.P. Land Revenue Act.

Case law discussed:

Civil Misc. writ petition No.40986 of 2001 Brahm Singh Vs. Board of Revenue and others decided on 29.4.2008

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

1. Heard learned counsel for the parties.

2. Original restoration application was mis-placed hence this duplicate copy of restoration application filed alongwith Listing Application No.106584 of 2004 was directed to be treated as original restoration application.

3. This restoration application has been filed for recall of my order dated 18.9.2004. The operative portion of my judgment dated 18.9.2004 is quoted below:

"The writ petition is disposed of with liberty to the petitioner to file the order of Collector dated 26.3. 1999 before the trial court. The trial court shall call for a fresh report from L.R. Inspector on the basis of the order of Collector dated 26.3.1999, which is annexure 14 to the writ petition. Copy of the corrected map is on page 70 of the writ petition."

4. In-fact I did not decide anything finally through my aforesaid judgment. However in my judgment I mentioned that the Collector, Allahabad passed final order on 26.3.1999 in proceedings for correction of map under Section 28 of Land Revenue Act.

5. The only argument of learned counsel for applicant in this recall/modification application is that Annexure-14 to the writ petition order dated 26.3.1999 has been passed by Chief Revenue Officer, Allahabad and under Uttar Pradesh Land Revenue Act Chief Revenue Officer has got no power to discharge the functions of Collector. In this regard a letter dated 29.05.1986 written by Secretary, Board of Revenue U.P., Lucknow to all District Magistrates has been shown. In the said letter it is mentioned that in order to streamline the administration of revenue different posts have been sanctioned including 15 posts in 15 districts of Chief Revenue: Officer through Government Order dated 12:-2.1986. Some other posts were also created through the said Government Order. In the letter dated 29.5.1986 functions of different newly created post holders were enumerated. In respect of functions of Chief Revenue Officer under clause-II it was mentioned that Chief Revenue Officer (C.R.O.) would decide revenue suits and appeals. Thereafter it was mentioned that approval of the Government was being sought for conferring the powers of Additional Collector under Land Revenue Act upon the Chief Revenue Officer. The main

argument of learned counsel for applicant is that thereafter the government never conferred the said power upon C.R.O. Learned counsel for the applicant has also relied upon Section 234 of Uttar Pradesh Land Revenue Act wherein it has been mentioned that Board may with the previous sanction of the Government make rules.

6. In this regard reference may be made to a Government Order dated.07.03.1996 no.1805/1I-(2) 1996 communicated by Kalika Prasad Secretary Government of Uttar Pradesh to different authorities including Commissioners and D.M. The first para of the said Communication/Government Order translated in English reads as under:

"On the above subject, I have been directed to say that Governor was pleased to grant permission for change of designation of those P.C.S. Officers who were appointed on the post of Chief Revenue Officer in a District to Chief Revenue Officer-Additional District Magistrate (land revenue)."

7. From the above it is quite clear that Chief Revenue Officer have been re-designated as C.R.O.- A.D.M. (Land Revenue). This clearly amounts to conferring the power upon them to hear the cases under Land Revenue Act. In fact by virtue of the aforesaid G.O. it is evident that the main duty of Chief Revenue Officer is to hear the cases under Land Revenue Act.

8. In a recent full bench authority in **Civil Misc. writ petition No.40986 of 2001 Brahm Singh Vs. Board of Revenue and others** decided on 29.4.2008 it has been held that all Additional Collectors are entitled to exercise the power of Collector under Section 14-A of U.P. Land Revenue Act.

9. Accordingly I do not find any force in the contention of learned counsel for the applicant in recall/modification application that Chief Revenue Officer is not Additional Collector and can not exercise the powers of Collector in respect of matters under Section 28 Land Revenue Act.

10. Recall/Modification application is therefore dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2008

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE SHASHI KANT GUPTA, J.

Civil Misc. Application No. 8617 of 2003

U.P.S.R.T.C. ...Petitioner
Versus.
Bulaki Das and another ...Respondents

Counsel for the Petitioner:
Sri Samir Sharma

Counsel for the Respondents:
Sri Brij Raj Singh
Sri R.P. Singh
S.C.

(A) Constitution of India, Article 226-Service Law-forfeiture of future salary-workman working as driver allowed the cleaner to play the bus-which resulted death of 3 passengers-disciplinary authority while passing dismissal order forfeited the balance salary of suspension period-no opportunity of hearing required in absence of statuary provision.

Held: Para 13

The order forfeiting the balance salary and allowance for the suspension period is a consequential order. Respondent has further failed to show that any prejudice has been caused to him due to non issuance of notice for forfeiting the balance salary and allowances of the suspension period. Respondent has failed to place any service rules applicable at the relevant time requiring the issuance of any notice before forfeiting the balance salary of the employee while passing the order of termination. In view of the above, we do not find any illegality in the order of disciplinary authority forfeiting the balance salary and allowances of the suspension period of the respondent.

(B) service Law-Misconduct-delinquent employee a driver-allowed an unskilled person to drive the passenger bus-amounts to gross misconduct termination held-proper considering his past conduct also-cannot be interfered by Tribunal.

Held: Para 16

The omission and misconduct on the part of the respondent to delegate the authority to an unskilled cleaner to drive the bus, is sufficient to hold him guilty and the act of the respondent is so grossly negligent that he could not have been retained as a driver.

Case Law discussed:

AIR 1976 Supreme Court 2490, (1998) 4 SCC 39, AIR 1962 SC 1.

(Delivered by Hon'ble Shashi Kant Gupta, J.)

1. The present writ petition is directed against the judgment and order dated 26.9.2002 (Annexure-4 to the writ petition) passed by U.P. Public Services Tribunal, Lucknow (in short "Tribunal") whereby it allowed the reference of Claim No.403/1989 made by the respondent no.1 (in short "Respondent") arising out of the orders dated 4-5-1988 and 1.6.1989 passed by the disciplinary and the appellate authority respectively terminating the services of the respondent.

Background facts in a nutshell essentially are as follows:-

2. The respondent was initially appointed on the post of driver in the erstwhile U.P. Government Roadways and on creation of U.P. State Road Transport Corporation (in short "Corporation"), he was sent on deputation with the Corporation. The respondent was deputed on Corporation bus no.URT 9834, plying on Agra- Bareilly route. However, on reaching Tundla Bus Station the respondent allowed the cleaner of a bus. Kali Charan to drive the bus even though he was not authorised to make any such delegation. While driving the bus, Sri Kali Charan lost control over the bus and the bus after hitting the tree fell into a ditch resulting in the death of three passengers on the spot and serious injuries to 39 passengers travelling in the bus. The Corporation suffered a loss of about rupees one lac as a result of damage caused to the bus.

3. On the basis of the aforesaid incident, the respo1dent was placed under suspension pending the conclusion of the inquiry and a charge sheet dated 27-6-1986 was issued against him. A reply was submitted by the respondent which was not found satisfactory and after the completion of the departmental inquiry, the Inquiry Officer submitted its inquiry report to the disciplinary authority to the effect that the charges of serious misconduct stood fully proved against the respondent. Accordingly, a show cause

notice dated 15-10-1987 along with a copy of the inquiry report was served on the respondent, requiring him to show cause as to why he may be not removed from service. The disciplinary authority after considering the reply submitted by the respondent and perusing the records of the inquiry was satisfied that it was not in the interest f the Corporation to retain the respondent in service and vide order dated 04-5-1988 respondent was terminated from service.

4. The respondent filed a departmental appeal. It was dismissed vide order dated 1.6.1989. Thereafter respondent filed a reference of Claim No.403/4/1989 before the Tribunal challenging the aforesaid orders and the same was allowed on 26-9-2002 by the Tribunal holding that:

(i) The balance salary and the allowances of the respondent no.1 of the suspension period were forfeited without giving any opportunity of hearing.

(ii) The inquiry has not been conducted in accordance with law and no reasonable opportunity was given to the respondent employee.

5. Aggrieved by and dissatisfied with the aforesaid judgment and order of the tribunal, the petitioner has filed the present writ petition.

6. Learned counsel for the petitioner has contended that there was neither any illegality in conducting the disciplinary inquiry nor in the findings. It was further contended that reasonable opportunity to cross examine the departmental witnesses and to produce evidence in his own defence was afforded to the respondent but the respondent himself stated before the Inquiry Officer that he did not want to cross examine any witness or produce any evidence or defence witness and also refused to give any reason/ justification for the accident and hence in such circumstances the conclusion drawn by the Enquiry officer was just and proper.

7. It was further contended that the work and conduct of the respondent had been utterly dissatisfactory as he had caused several accidents on earlier occasions as a driver. Adverse entries had been recorded in his character roll for several years. He was also given a warning and his two years increments were also stopped on 13-4-1967. On four other occasions recovery was directed to be made against the respondent for causing damage on account of the accident.

8. It has been further argued that the tribunal erroneously held that the departmental inquiry was not proper on the ground that no explanation was called before forfeiting the balance pay and allowances of the suspension period and reasonable opportunity was not given to the respondent. It was further argued that the statements of all the relevant witnesses were recorded including the statement of conductor of the bus.

9. On the other hand counsel for the respondent has contended that no reasonable opportunity had been afforded to the respondent in the departmental inquiry and the inquiry was neither just and fair nor the explanation was called before forfeiting the balance salary and allowance of the suspension period.

10. We have heard learned counsels for the parties and perused the record.

The following points arise for deciding the case:-

(i) Whether an order for forfeiting the balance salary and allowances of the suspension period can be passed without calling for an explanation by the disciplinary authority while passing the punishment order terminating the services of the respondent.

(ii) Whether the inquiry resulting in the termination of the service of the respondent has been conducted in accordance with law after affording reasonable opportunity of hearing to the respondent.

POINT No.1: FORFEITING THE BALANCE SALARY AND ALLOWANCES OF THE SUSPENSION PERIOD WITHOUT CALLING FOR AN EXPLANATION.

11. Respondent was placed under suspension and after the completion of the departmental inquiry, the inquiry report was submitted by the Inquiry Officer before the disciplinary authority and the disciplinary authority agreed with the findings of the Inquiry Officer and passed the order of termination and forfeited the balance salary and allowances of the suspension period.

12. **The Hon'ble Apex Court in "Baldev Raj Guliani Vs. The Punjab & Haryana High Court and others" (AIR 1976 Supreme Court 2490)** has help as follows:-

'The character of the order of dismissal and that of the order of reinstatement in a departmental enquiry is absolutely different. Suspension is a step to dismissal and may culminate in dismissal. When an officer is suspended no work is taken from him but he does not cease to be in service. When he is dismissed the link with the service is snapped and naturally the order of suspension merges in dismissal. Nothing remains to be done about his suspension. When however, a suspended officer is reinstated an order which is different in content and quality from that of suspension takes effect. The suspended officer, on reinstatement, goes back to service. A further order may have to be passed by the authority as to in what manner the period of suspension will be treated. That will be, therefore, a distinct and separate proceedings apart from the earlier departmental proceeding in which the order of reinstatement was passed. If therefore, the order of reinstatement is set-aside, the officer is bound to revert to immediate anterior status of suspension."

13. In the present case disciplinary authority found the respondent guilty and consequently terminated the service of the respondent. The suspension order passed earlier while initiating the disciplinary proceedings against the respondent merged with the order of termination dated 4.5.1988 and the respondent ceased to be in service and nothing remained to be done about his suspension. Had the disciplinary authority exonerated the respondent then he would further have had to decide whether the order of suspension was valid and during the period it was in force the respondent could recover arrears of salary. In that eventuality the decision as to pay the

allowance of the suspension period of the concerned employee and also whether the said period shall be treated spent on duty or not was required to be taken by the disciplinary authority after giving the notice to the concerned employee and calling for his explanation within a specified period. However, in the present case respondent has been dismissed and his link with the service is snapped and naturally the order of suspension merges in dismissal. That being so; the balance pay and allowance could be forfeited without calling any explanation or issuing any prior notice to the respondent. The order forfeiting the balance salary and allowance for the suspension period is a consequential order. Respondent has further failed to show that any prejudice has been caused to him due to non issuance of notice for forfeiting the balance salary and allowances of the suspension period. Respondent has failed to place any service rules applicable at the relevant time requiring the issuance of any notice before forfeiting the balance salary of the employee while passing the order of termination. In view of the above, we do not find any illegality in the order of disciplinary authority forfeiting the balance salary and allowances of the suspension period of the respondent.

POINT NO. 2: NO REASONABLE OPPORTUNITY

14. The main plank of the argument of the counsel for the respondent is with regard to the alleged violation of principle of natural justice. It is an admitted fact that on 27.5.1986, the petitioner was deputed to ply bus no. URT-9834 on Agra- Bareillly route, however on reaching Tundla Bus Station the respondent no.1 unauthorizely allowed the cleaner Kali Charan to drive the bus and while Kali Charan was driving the bus he lost control over the bus and the bus after hitting the tree, fell into a ditch resulting in death of three passengers on the spot and caused serious injuries to 39 passengers. In the said accident the bus was also badly damaged and corporation suffered a loss of Rs.1 lac. Since the respondent was a driver of the bus he cannot be permitted to delegate his duties to a third person who is not a driver. The basic and primary responsibility is of respondent in permitting Kali Charan cleaner of a bus to drive the bus. The duty of driving the bus was delegated by the respondent to Kalicharan, the cleaner of a bus, with the knowledge that Kalicharan was incapable and unauthorized to perform the duties of a driver. Delegating the responsibility to another with a knowledge that other person is incompetent, unskilled, unqualified and incapable to perform his duties properly, would amount to gross misconduct and in such a situation even the **principles of Res ipsa loquitur** can be applied as it has been held by Apex Court in **Spring meadows Hospital Vs Harjit Alhuwalia (1998) 4 SCC 39**, wherein the Doctor delegated the task of injection to an unqualified nurse.

15. The Apex Court in **Gobald Motor Service Ltd. Vs. R.M.K. Veluswami (AIR 1962 SC 1)** has held as follows:-

"An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of

was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim ***res ipsa loquitur*** *applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being r show how the act complained of could reasonably happen without negligence on his part, therefore, therefore, there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care, no risk would, in the ordinary course of events ensue, the burden is in the first instance on the defendant to disprove his liability. In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable."*

16. The circumstances established in this case speak for themselves and candidly point towards the respondent's misconduct. The omission and misconduct on the part of the respondent to delegate the authority to an unskilled cleaner to drive the bus, is sufficient to hold him guilty and the act of the respondent is so grossly negligent that he could not have been retained as a driver.

17. Also, the past history of the respondent does not support his case as it has specifically been stated in paragraph 6 of the writ petition that even earlier the respondent caused several accidents on 25-7-1964, 4-7-1970, 20-12-1977 and 27-5-1986; an adverse entry had been recorded in his character roll for the years 1965-66, 1966-67 and 1971-72, besides a warning was also given to him on 11-12-1965 and his two annual increments were also stopped on 13-4-1967. Moreover on four occasions recovery was directed to be made against the respondent for causing damages to the Corporation for the accidents. It is worthwhile to state that the contents of paragraph 6 of the writ petition stating the past misconduct of the respondent have not been denied by the respondent in his counter affidavit. A bare perusal of the inquiry report clearly reveals that respondent himself stated before the Enquiry Officer that he did not want to cross examine any witness or produce any defence witness and also refused to give any reason/ justification for the accident and hence in such circumstances the conclusion drawn by the Enquiry officer and disciplinary authority was just and proper. It has also been stated in paragraph 12 of the petition that the entire record of the departmental proceeding was produced before the Tribunal. The factum of producing the entire record before the Tribunal is not denied by the respondent in his counter affidavit, however, the tribunal without considering the entire record of departmental proceeding, chose to consider only few paragraphs of the reply given by the Corporation to the Claim Petition and skirted the relevant and central question arose for adjudication i.e. entrusting illegally the bus to cleaner Kalicharan for driving. The Tribunal while passing the impugned order applied superficial and casual approach in reaching to an abrupt conclusion while holding that proper opportunity was not afforded.

18. The disciplinary authority, after setting out the entire facts, agreed with the findings recorded by the Inquiry officer and affirmed the same. In case the appointing authority agrees with the finding of the Inquiry officer while passing the order of punishment it is not necessary to give detailed reasons, particularly when nothing new is added in reply to show cause notice issued by the disciplinary authority. Disciplinary authority vide order dated 4-5-1988 has clearly stated that the respondent in reply to the show cause notice, has merely reiterated the averments which were made in reply to the charge sheet and have added nothing new in reply to the show cause notice.

19. The appellate authority has also held that the respondent in allowing the bus to be driven by a cleaner Kalicharan which led to the death of three persons and causing injuries to 39 passengers would amount to a gross misconduct and have further held that the reasonable opportunity was given to respondent but he failed to prove his innocence.

20. The gross misconduct of the respondent in allowing an unauthorized person to drive the bus and putting the lives of a large number of innocent passengers in danger cannot be condoned and he could not have been permitted to continue in service, particularly when he had been found guilty of committing gross misconduct on earlier occasions as well.

21. The impugned order passed by the Tribunal is based on complete misreading of the case and misconception of the legal position relevant to the matter. The Tribunal has not recorded any cogent, satisfactory and convincing reasons to set aside the order of termination. Bare perusal of the inquiry report and the order passed by the disciplinary and appellate authority clearly indicates that proper and reasonable opportunity was granted to the respondents. In view of the above, we do not find any illegality in conducting the inquiry nor in the findings.

22. No other point has been pressed.

In view of our conclusions the writ petition is allowed. The order dated 26.9.2002 passed by the Tribunal is accordingly quashed. In the facts and circumstances of this case, there shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2008

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

First Appeal From Order No. 1663 of 2008

U.P.S.R.T.C. ...Appellant
Versus
Smt. Alka and others ...Respondents

Counsel for the Appellant:
Sri. J.N. Singh
Sri. S.C. Srivastava
Sri. Manish Kumar Nigam

Counsel for the Respondents:

Workmen's Compensation Act 1923-Section 4A(3) with Section 30(1)-liability

to pay interest by the insurance company-without discussing fault of employer or any contract between the employer and company-held-wholly misconceived, illegal-Court expressed its great concern about discharge of Judicial function by such administrative officer-having no knowledge of law-matter remitted back for fresh decision in light of aforesaid discussion.

Held: Para 5

We are of the view that there is other reason for which the interest and/or penalty can not be directed to be paid by the insurance company. Section 4-A(3) of the Act, 1923 says that where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall direct the employer to pay the interest on the amount of arrears. In addition thereto, if there seems to have no justification for the delay in paying the amount of arrears and interest, a further sum by way of penalty will be directed to be paid. Therefore, the Court has to see whether any such occurrence is available on the part of the employer or not. The payment of interest and/or penalty is arising out of the fault of the employer and without determination of such fault the insurance company can not be held liable. Even when an agreement of insurance coverage is made by the employer with the insurance company it will be the prime duty of the Commissioner to ascertain at whose fault the interest and/or penalty is liable to be paid.

Case law discussed:

(2006) 5 SCC 192

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

All the appeals are analogously heard because a common question is involved herein. The common question is whether insurance company is liable to pay interest and/or penalty to the claimants even in absence of contract between the employer and insurance company or not. According to us, it is obviously a substantial question of law which requires consideration at the threshold.

1. First proviso to sub-section (1) of Section 30 of the Workmen's Compensation Act, 1923 (hereinafter called as Act, 1923) categorically says that **no appeal shall lie against any order unless any substantial question of law is involved in the appeal.** Therefore, no appeal can be said to be maintainable as a matter of course unlike the other law or laws available in this field.

2. Very often we come across the appeals from such type of orders passed by respective Commissioners under Workmen's Compensation Act, 1923 (hereinafter called as the Commissioner) under which the insurance companies are fastened with the liabilities to pay the interest and/or penalty irrespective of payment of compensation without verification of the contractual obligation between the employers and insurance companies. In the State of Uttar Pradesh, the posts of Commissioners under the Act, 1923 are being filled up by the members of the executives not by the members of the judiciary unlike other States. Instead of being proud position emerges to irrationality. It is not very far to say about ignorance of law but presently we say that the attitude prevailing in the field is mechanical. Hence, we want to give it top priority even at the stage of admission.

3. In (2006) 5 SCC 192 (New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and another) the Supreme Court held that by reason of the

provisions of the Act, an employer is not statutorily liable to enter into a contract of insurance unlike Section 147 of the Motor Vehicles Act, 1988. However, Section 17 of the Act, 1923 does not limit or make any restriction from contracting out between the employer and insurer. The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance Act, an insured is bound to pay premium which is to be calculated in the manner provided therein. With a view to minimise his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute. Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in law. The entitlement of the claimant under the Act, 1923 is to claim the compensation from the employer. As between the employer and the insurer the rights and obligations would depend upon the terms of the insurance contract.

4. According to us, irrespective of the question of applicability of Section 17 with full force in this respect, we are of the view the Supreme Court has laid down the principle that insurance coverage is not mandatory under the Act, 1923, like other law or laws prevailing in the field but there is no prohibition in contracting out either for the principal sum or for interest and/or penalty. In other words, in absence of any clause in the contract regarding interest and/or penalty, the insurance company is not liable to pay any sum on account of interest and/or penalty. Therefore, payability to that extent lies with the employer.

5. We are of the view that there is other reason for which the interest and/or penalty can not be directed to be paid by the insurance company. Section 4-A(3) of the Act, 1923 says that where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall direct the **employer** to pay the **interest** on the amount of arrears. In addition thereto, if there seems to have no justification for the delay in paying the amount of arrears and interest, a further sum by way of **penalty** will be directed to be paid. Therefore, the Court has to see whether any such occurrence is available on the part of the employer or not. The payment of interest and/or penalty is arising out of the fault of the employer and without determination of such fault the insurance company can not be held liable. Even when an agreement of insurance coverage is made by the employer with the insurance company it will be the prime duty of the Commissioner to ascertain at whose fault the interest and/or penalty is liable to be paid. If there is no coverage it will be paid by the employer and if coverage is there then after determination of the fault so that payment and recovery of the amount by the insurance company can not be extinguished. Firstly, it is under whose fault and secondly whether the insurance company will pay the said sum on account of fault of the employer or not. When an employer is statutorily liable, the same will be strictly determined to give respect to the statute. Even if by virtue of the contract it is directed that the insurance company is liable to pay, it has to be ascertained by the appropriate court

that the employer was not at fault. Thus, the inference is that in case the coverage if it is evidently proved that the employer is liable to pay the amount of compensation to the ultimate sufferer without delaying the cause, the insurance company will be directed to pay and recover it since the statutory duty lies with the employer. Therefore, it requires further consideration by the appropriate court and as such matters are remitted back to the appropriate court to reconsider the issue in presence of the parties upon notice and giving adequate opportunity of hearing and to come to an appropriate finding thereof. If it is done, the principle of *audi alteram partem* will be fulfilled in its true sense before the Court where not only substantial question of law but factual ascertainment is needed to be considered. Keeping the appeal pending for the sake of pendency is a matter of futility and therefore, orders are required to be set aside and are set aside hereunder and the matters are remitted back hereunder, however, without imposing any cost and with a caution that in the garb of the decision to be taken by the appropriate court the payment of principal sum to the ultimate sufferer would not be stalled.

6. Accordingly, the appeals are treated to be disposed of even at the stage of admission, however, without imposing any cost.

7. All the pending matters on such ground are reviewed hereunder. Therefore, all such appeals are bound by this order subject to passing of a formal order as and when those will appear in the cause list. Appeal disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 62220 of 2006

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

Counsel for the Petitioner:
Sri S.P. Singh Parmar
Sri V.K. Singh

Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act, 1921- Chapter III Regulation 101 - Appointment of class 4th employee-no prior permission to advertise the vacancy taken-within 11 days of notifying vacancy-selection made-DIOS refused financial approval-held-prior permission not mandatory-giving 11 days time to apply the prospective candidates-not illegal but mere irregular-State Government to make necessary provision in this connection-till amendment made Secretary to issue circular by forthwith.

Held: Para 6

In so far as the time factor is concerned, this Court finds that no period is prescribed under Regulation 101 for giving a time factor to the prospective candidates to apply for the post in question. Normally 15 days' time is considered sufficient for a prospective candidate to apply for the post. In the present case, only 11 days' time was granted but, by giving only 11 days' time will not make the selection process illegal on the ground that sufficient time was not granted since there is no complaint from any prospective candidates in this regard. Consequently,

this Court is of the opinion that 11 days' time given in the advertisement for applying for the post could at best be a mere irregularity and is not fatal to the selection process. It is however, made clear that in future all appointments made under Regulation 101, a minimum of 15 days' time should be given in the advertisement for applying for the post for the proposed candidate. In this regard the State Government is directed to amend the Regulations. However, till such time the Regulations are not amended, the Secretary, Secondary Education will issue a circular to all the educational institutions in the State of U.P. bringing this fact to their knowledge so that in future a minimum of 15 day's time is granted in the advertisement for the prospective candidate to apply for the post in question.

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

1. Heard Sri V.K.Singh, the learned counsel for the petitioner and the learned Standing Counsel for the respondents.

2. A Class-IV post became vacant in the institution upon the retirement of Sri Jawahar on 31.3.2006. The Principal, being the competent authority, issued an advertisement in a daily newspaper on 17.6.2006 inviting applications for filling up the said post. The Principal also wrote a letter to the District Inspector of Schools seeking permission to fill up the said post. The District Inspector of Schools, by an order dated 19.6.2006, granted permission to the institution to fill up the vacancy. Based on the aforesaid advertisement, the petitioner also applied and was selected by the competent authority and, an appointment letter dated 28.6.2006 was issued. The necessary papers were forwarded by the Principal to the District Inspector of Schools for financial approval. The District Inspector of Schools, by an order dated 19.9.2006, refused to accord financial sanction to the appointment of the petitioner on the ground that previous permission had not been obtained by the institution before advertising the post and that only 11 days' time was given to the applicant to apply for the said post instead of 15 days. The petitioner, being aggrieved by the said order, has filed the present writ petition.

3. Regulation 101 of Chapter III of the Regulations framed under the Intermediate Education Act provides as under:-

"101. Appointing Authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognized aided institution:

Provided that filling of the vacancy on the post of Jamadar may be granted by the Inspector."

4. The provision contemplates that prior approval of the Inspector is required before filling up any vacancy. The moot question which arises for consideration is, whether prior approval is required before advertising the said post or before issuing the appointment letter. A Division Bench of this Court in **Jagdish Singh vs. State of U.P. and others, 2006(2) UPLBEC 1851**, has held as under:-

"The observation of the learned Single Judge in Ram Dhani's case

(supra) that previous approval under Regulation 101 is required to be taken before issuing advertisement for filling up vacancy does not lay down correct law. We, however, make it clear that although prior approval is required from the District Inspector of Schools after completion of process of selection but there is no prohibition in the Principle/Management to seek permission of the District Inspector of Schools for filling up vacancy by direct recruitment. The permission may or may not be granted by the District Inspector of Schools but even if such permission to start the selection process or to issue advertisement is granted that is not akin to prior approval as contemplated under Regulation 101.

In view of the aforesaid, we are of the considered opinion that prior approval contemplated under Regulation 101 is prior approval by the District Inspector of Schools after completion of process of selection and before issuance of appointment letter to the selected candidate."

5. The Division Bench held that it is not necessary that permission is sought by the institution seeking permission to issue an advertisement for filling up the post and that it is mandatory that prior approval is obtained from the Inspector before issuing an appointment letter. In the present case, the advertisement was issued on 17.6.2006 and permission was granted by the Inspector on 19.6.2006. No doubt the advertisement was issued prior to seeking permission and in view of the Division Bench decision (supra), the issuance of the advertisement prior to seeking permission was not fatal to the selection process. Further, after the selection process, the Principal sought financial approval of the appointment of the petitioner which was in accordance with the provisions of Regulation 101 of the aforesaid Regulations. In view of the aforesaid, this Court holds that there is no defect in the procedure adopted by the Principal in advertising the post on 17.6.2006.

6. In so far as the time factor is concerned, this Court finds that no period is prescribed under Regulation 101 for giving a time factor to the prospective candidates to apply for the post in question. Normally 15 days' time is considered sufficient for a prospective candidate to apply for the post. In the present case, only 11 days' time was granted but, by giving only 11 days' time will not make the selection process illegal on the ground that sufficient time was not granted since there is no complaint from any prospective candidates in this regard. Consequently, this Court is of the opinion that 11 days' time given in the advertisement for applying for the post could at best be a mere irregularity and is not fatal to the selection process. It is however, made clear that in future all appointments made under Regulation 101, a minimum of 15 days' time should be given in the advertisement for applying for the post for the proposed candidate. In this regard the State Government is directed to amend the Regulations. However, till such time the Regulations are not amended, the Secretary, Secondary Education will issue a circular to all the educational institutions in the State of U.P. bringing this fact to their knowledge so that in future a minimum of 15 day's time is granted in the advertisement for the prospective

candidate to apply for the post in question.

7. In view of the aforesaid, the impugned order cannot be sustained and is quashed. The writ petition is allowed.

8. The matter is remitted again to the District Inspector of Schools to pass fresh orders in accordance with the observations made aforesaid within six weeks from the date of the production of a certified copy of this order.

9. A certified copy of this order shall be made available to Sri Amit Kumar, the learned standing counsel to forward the same to the Secretary, Secondary Education for necessary action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2008

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 23072 of 2008

Sudhir Kumar Jain ...Petitioner
Versus.
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Chetan Chatterji

Counsel for the Respondents:
Sri. Arjun Singhal
S.C.

Constitution of India, Article 226-cancellation of allotment-petitioner was allotted flat C-type by Saharanpur Development Authority on 05.05.2006-total amount Rs.93,500/- payable upto 30.05.2008-petitioner deposited all quarterly instalments-in default of one instalment-allotment cancelled with condition that if the petitioner desirous to regularize the allotment-deposit entire amount as per enhanced rate-petitioner submitted draft of Rs.25,350/- on 19.03.2008-prior to cut of date total amount of Rs.89,511/- already paid-substantial amount already deposited-the same be adjusted against the total amount be fixed within one month by the development authority being a model State-expected to act fairly-cancellation of allotment without notice liable to be quashed-Development Authority shall conclude entire amount as per rate of allotment order after adjusting Rs.25,350/- also.

Held: Para 7

Keeping in view that the last date for payment of last installment has not yet expired even today and the petitioner has made substantial deposit prior to the passing of the impugned order, even though there has been default in payment of some installments by the petitioner, cancellation order could have been passed only after notice to the petitioner to make such payment alongwith normal or penal interest, if any. In such view of the matter, we are of the firm view that the order dated 26.3.2008 is unjustified and arbitrary. We accordingly quash the same. In case the respondents have not encashed the draft dated 19.3.2008 for a sum of Rs.25,350/-, the same may be encashed or returned to the petitioner and in case, if it has been encashed by the Development Authority, the said amount shall be adjusted towards the payment made by the petitioner. Whatever amount is then found due from the petitioner, that may be intimated to the

petitioner within 15 days from today and the petitioner be provided an opportunity to make such payment within a month thereafter. It is made clear that the amount so demanded from the petitioner shall be in terms of the allotment order dated 5.5.2006 and not on the enhanced rate, which the respondents may now be charging from the new allottees.

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

1. Heard Sri Chetan Chatterji, learned counsel for the petitioner as well as Sri Arjun Singhal appearing for respondents no.2 to 4. Affidavits have been exchanged between the parties and with the consent of learned counsel for parties, the writ petition is disposed of at the admission stage itself.

2. The petitioner was allotted C type plot no. 686 by the respondents-Saharanpur Development Authority vide order dated 5.5.2006. The said allotment was initially made in favour of petitioner after the petitioner had completed all the necessary formalities. As per the terms of allotment, the petitioner was required to deposit a total sum of Rs.93,500/- for the said plot. The said amount was to be deposited in twelve easy quarterly installments, payable by 30.9.2008. The petitioner paid six installments but there was some default of payment of four installments. The installments so fixed were ranging around 6,000/- to 7000/-, to be paid quarterly. On such default the allotment of the petitioner was cancelled by the order dated 26.3.2008. In the said order, a condition was imposed that in case if the petitioner so wishes, then he may pay the price of the plot at enhanced rates within fifteen days and get his allotment regularized. It is this order dated 26.3.2008, which is under challenge in this writ petition.

3. The submission of learned counsel for the petitioner is that though there was some default in payment of certain installments but prior to the passing of impugned order, the petitioner had got prepared a bank draft dated 19.3.2008 for Rs.25,350/-, which was deposited with the respondents-Development Authority. After including the said amount of Rs.25,350/- the total amount paid by the petitioner comes to Rs.89,511/-, as against the total amount payable by 30.9.2008, which was Rs.93,500/-.

4. Sri Singhal contends that as per the terms of allotment order, any default of payment by three months would warrant cancellation of the allotment and as such the impugned order is fully justified and is in terms of the allotment order.

5. Be that as it may, the respondents do not dispute that the last installment was to be paid by 30th September 2008, and the impugned order is of 5.5.2008. The bank draft for a sum of Rs.25,350/- (which according to the respondents was tendered to them but they refused to accept) had been prepared a week prior to the passing of the impugned order. The Development Authorities are instrumentalities of the State and as a model State, they are expected to act fairly and not like profit making business companies or builders. The purpose for establishment of Development Authorities is to provide housing facilities to the common man.

It is this object which is to be fulfilled. The allotment order itself indicates that in case of any default, the authorities would be entitled to charge penal interest.

6. The normal interest payable as per the allotment order is 15% per annum. The authorities could have charged such interest, or any penal interest, on default, if any, of the allottee, for which the petitioner should have been given notice, and in case he still defaulted in payment of the said amount, the allotment could then have been cancelled by the authorities. A reasonable opportunity has to be given to the allottee prior to the cancellation of allotment. Imposition of such condition that after the cancellation of allotment, fresh allotment shall be made on payment of the entire amount at enhanced rates within 15 days, is wholly unreasonable and arbitrary, as the same clearly shows that the respondent authorities are acting like profit making bodies or land dealers/builders.

7. Keeping in view that the last date for payment of last installment has not yet expired even today and the petitioner has made substantial deposit prior to the passing of the impugned order, even though there has been default in payment of some installments by the petitioner, cancellation order could have been passed only after notice to the petitioner to make such payment alongwith normal or penal interest, if any. In such view of the matter, we are of the firm view that the order dated 26.3.2008 is unjustified and arbitrary. We accordingly quash the same. In case the respondents have not encashed the draft dated 19.3.2008 for a sum of Rs.25,350/-, the same may be encashed or returned to the petitioner and in case, if it has been encashed by the Development Authority, the said amount shall be adjusted towards the payment made by the petitioner. Whatever amount is then found due from the petitioner, that may be intimated to the petitioner within 15 days from today and the petitioner be provided an opportunity to make such payment within a month thereafter. It is made clear that the amount so demanded from the petitioner shall be in terms of the allotment order dated 5.5.2006 and not on the enhanced rate, which the respondents may now be charging from the new allottees.

8. Accordingly, the writ petition stands allowed to the extent indicated above.

No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2008

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

Criminal Misc. IInd Bail Application No. 13238 of 2008

Yudhveer @ Bata ...Applicant
Versus.
State of U.P. ...Respondent

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

Counsel for the Respondents:
Sri Mewa Lal Shukla

A.G.A.

High Court Rules -Chapter V rule 10(2)- Second Bail Application-the bench who earlier rejected first bail application-in absence of Counsel ordered for listing with previous papers-during vacation-the senior most Judge nominated another Hon'ble Judge-cannot be treated to be tied up with the Judge who heard first Bail Application.

Held: Para 7 & 9

The case, therefore, stood automatically released from my Bench with the aforesaid fresh nomination. There was no point in treating the case to be tied up to this Bench. It was a 2nd Bail Application and for which a special request was made by the learned counsel to hear it during vacation.

It appears that the aforesaid rule of Chapter V of The Allahabad High Court Rules was not brought to the notice of the learned Single Judge nor the decisions in this regard that the Chief Justice is the master of the roster and he can resume the matter from any Bench and nominate it to another Hon'ble Judge. There was no occasion for me to pass any fresh orders for release after the fresh nominations referred to hereinabove.

Case Law discussed:

AIR 1998 SC 1344, 2000(1) AWC 392 (S.C.), 2006 (8) SCC 294 Pr 19, 2008 (1) AWC 673, 2008 (1) AWC 1050.

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

1. Heard Sri D.S. Mishra learned counsel for the applicant and Sri Mewa Lal Shukla, learned A.G.A. for the State.

2. The first bail application was rejected by me on 29.4.2008 whereafter this second bail application was moved and came before me on 19.5.2008 on which date the learned counsel for the applicant was not present and therefore, the case was listed with previous papers before the appropriate Bench in the next cause list. Learned counsel for the applicant moved an urgency application in the matter and it is stated that the Hon'ble Senior Vacation Judge Hon'ble Justice Rafat Alam passed an order for listing it before the appropriate Bench on 3rd June, 2008. During vacations, the Bench dealing with minor bails was presided over by Hon'ble Justice Surendra Singh, who passed an order to list the case before the appropriate Bench, whereafter the matter was listed before Hon'ble Justice Arun Tandon. On 3rd June, 2008 an order was passed calling upon Government Advocate to seek instructions on the second bail application. On 6th June, 2008, Hon'ble Arun Tandon passed an order that it would be appropriate that the records be placed before the Senior Vacation Judge for examining as to whether the second bail application is to be heard by me or by some other Judge nominated by Hon'ble the Senior Vacation Judge, as I was not sitting during vacations.

3. In the aforesaid circumstances, the then Senior Vacation Judge, who exercises the powers of Hon'ble Chief Justice during vacations, passed an order for nomination, nominating Hon'ble Justice S.K. Jain and fixed the case for 18th June, 2008. The aforesaid powers are exercisable under Chapter V Rule 10(2) of the Allahabad High Court Rules. The rule is quoted herein below:-

"Subject to any general or special order of the Chief Justice, the senior most vacation Judge at Allahabad or Lucknow, as the case may be, shall in the absence of the Chief Justice exercise jurisdiction at Allahabad or Lucknow, as the case may be, in connection with the arrangement of Benches, listing of cases and other like matters."

4. It is now well settled by the Apex Court that the power to nominate or decide the jurisdiction of Hon'ble Judges of the Court vests in the Chief Justice as he is the master of the roster. This stands reflected in following judgments of the Apex Court:-

1. State of Rajasthan Vs. Prakash Chand, AIR 1998 SC 1344.

2. A.H. Ansari & others Vs. High Court of Judicature at Allahabad, 2000(1) AWC 392 (S.C.)

3. Jasbir Singh Vs. State of Panjab, 2006 (8) SCC 294 Pr 19

5. Apart from the above, our Court has reiterated the said view in the following two decisions:-

1. Awadh Naresh Sharma Vs. State, 2008 (1) AWC 673

2. Sanjai Mohan Vs. State 2008 (1) AWC 1050

6. It is in exercise of such powers that the Senior Vacation Judge passed the orders for nomination.

7. The case, therefore, stood automatically released from my Bench with the aforesaid fresh nomination. There was no point in treating the case to be tied up to this Bench. It was a 2nd Bail Application and for which a special request was made by the learned counsel to hear it during vacation.

8. Not only this, the matter was nominated to Hon'ble Justice S.K. Jain and Hon'ble Justice A.K. Roopanwal who also released the matter. It is, thereafter, that the order has been passed for being placed before Hon'ble Justice Shiv Shankar, who has passed a detailed order on 2nd July, 2008 treating the matter as to be still tied up to this Bench in view of the two Supreme Court decisions referred to therein.

9. It appears that the aforesaid rule of Chapter V of The Allahabad High Court Rules was not brought to the notice of the learned Single Judge nor the decisions in this regard that the Chief Justice is the master of the roster and he can resume the matter from any Bench and nominate it to another Hon'ble Judge. There was no occasion for me to pass any fresh orders for release after the fresh nominations referred to hereinabove.

10. In view of this, the order dated 2nd July 2008 may require reconsideration by Hon'ble the Chief Justice for passing fresh orders keeping in view the face that I am regularly sitting in a Division Bench.

Let the papers be placed before Hon'ble the Chief Justice/Senior Judge for passing appropriate orders.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2008

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

First Appeal from Order No. 1702 of 2008

The New India Assurance Co. Ltd.
...Appellant
Versus
Smt. Kamlesh @ Nangi and others
...Respondents

Counsel for the Appellant:
Sri Arun Kumar Shukla

Counsel for the Respondents:

(A) Workmen Compensation Act 1923-Section 21(1)-Territorial jurisdiction of Commissioner-order passed by Addl. Commissioner Firozabad-accident took place at Mainpuri-admittedly Firozabad being integral part of Agra Division-technical objection unsustainable.

Held: Para 2

Hence, by virtue of distribution of work the Assistant Commissioner sitting at Firozabad being integral part of the Agra Division has rightly taken up the matter. This allocation of business is not in contravention of proviso to sub-section (1) of Section 21 of the Act, which speaks for notice to the Commissioner having jurisdiction where the accident took place. This provision specifically deals with different Commissioners not with regard to different Assistant Commissioners under one Commissioner when distribution of works will be regulated under the general or special order of the State.

(B) Practice of Procedure-Application by legal representation of deceased workman-presumption of legal heirs always there-unless proved otherwise.

Held: Para 6

We are of the view that whenever any application for compensation is made by heirs and legal representatives of the deceased, it shall be presumed that they are heirs and legal representatives of the deceased until and unless it has been challenged by anyone. Therefore, the onus is lying upon the contesting party to prove that the claimants are not the legal heirs and legal representatives of the deceased which they failed to do before the Commissioner. Hence, we can not accept such submission.

Case law discussed:
2006 (108) FLR 351 2006

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

1. This appeal has been filed challenging the impugned judgment and order dated 24th April, 2008 passed by the concerned Workmen's Compensation Commissioner, Agra. The awarded amount is Rs.2,61,965.00. The specific point has been taken by the learned Counsel appearing in support of the insurance Company that by virtue of proviso to sub-section (1) of Section 21 of Workmen's Compensation Act, 1923 (hereinafter called "the Act") no matter shall be processed before or by the Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, without giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concerned. He

also relied upon proviso to sub-rule (1) of Rule 3 of Workmen's Compensation (Venue of Proceedings) Rules, 1996. The same set of provision is available there as in proviso to sub-section (1) of Section 21 of the Act. However, in the Rules there is provision of giving notice under From A. We do not find any objection with regard to venue of proceeding in the court of Commissioner so that there should be notice under Form A. However, since it is a question of law, we have extensively gone through it.

2. Admittedly the place of death is Mainpuri which comes under the Agra Division, if Section 2(b) is read with Section 20 (2), the definition of Commissioner will be understood. Where more than one Commissioner has been appointed for any area, the State Government may, by general or special order, regulate the distribution of business between themselves. Therefore, although the actual venue is Mainpuri where the accident was caused yet being part of Agra Division such place can be considered as a part of Agra so far as this Act is concerned. Hence, by virtue of distribution of work the Assistant Commissioner sitting at Firozabad being integral part of the Agra Division has rightly taken up the matter. This allocation of business is not in contravention of proviso to sub-section (1) of Section 21 of the Act, which speaks for notice to the Commissioner having jurisdiction where the accident took place. This provision specifically deals with different Commissioners not with regard to different Assistant Commissioners under one Commissioner when distribution of works will be regulated under the general or special order of the State.

3. Therefore, we do not find any cogent reason to admit the case on such ground.

4. Learned Counsel appearing for the appellant has cited judgment of the learned Single Judge reported in **2006 (108) FLR 351 2006 (M/s Chawla Techno Construction Ltd. and another Vs. State of U.P. and others)** and it has also been contended that this Division Bench also remitted other matters to the Workmen's Compensation Commissioner for the purpose of consideration of cause. As the distinguishable feature is available in this case, such ratio can not be applicable herein. Even in the reported case the jurisdiction of Delhi and Allahabad was considered by applying Section 21 of the Act which is different scenario altogether. Therefore, we do not find any genuine cause to interfere with the impugned judgment and order on such issue.

5. In addition to such ground, the learned Counsel has also argued that no documentary proof of heirs and legal representative of the deceased was considered by the Commissioner.

6. We are of the view that whenever any application for compensation is made by heirs and legal representatives of the deceased, it shall be presumed that they are heirs and legal representatives of the deceased until and unless it has been challenged by anyone. Therefore, the onus is lying upon the contesting party to prove that the claimants are not the

legal heirs and legal representatives of the deceased which they failed to do before the Commissioner. Hence, we can not accept such submission.

Therefore, in totally the appeal is dismissed, however, without imposing any cost.
