ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2009

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

Civil Misc. Writ Petition No. 66072 of 2009

Chandra Singh Dhama ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ram Raj Pandey

Counsel for the Respondents:
C.S.C.

Practice & Procedure-suspension of conviction-can not be treated innocence of petitioner-petitioner working as Class IVth employee retired on 31.7.07-claimed retiring benefits-on basis of stay order granted in pending criminal Appeal-held-while admitting Criminal Appeal-suspension of conviction being contrary to the provision of section 389 Cr.P.C. can not be treated be passed by exercising inherent powers in compelling circumstances-concern authority directed to take appropriate decision in light of observation made by Court.

Held: Para 5 & 6

The provision has been considered and explained in this regard in several cases and two latest decisions are that of Navjot Singh Sidhu Vs. State of Punjab and another reported in (2007) 2 SCC 574 paragraphs 4 to 6 and in the case of Sanjay Dutt Vs. State of Maharashtra through CBI Bombay reported in (2009) 5 SCC 787 and others where the inherent power of the High Court under the Cr.P.C. has been acknowledged and it has been held that in rare cases such an order for compelling reasons can be passed whereby the conviction itself can be suspended. The High Court in the instant case has not exercised its inherent powers as above and has only suspended the execution of the sentence.

Keeping in view the said pronouncement and in the peculiar facts of this case, it will be open to the petitioner to approach the District Inspector of Schools, who shall examine the claim of the petitioner in the light of the aforesaid position of law and pass an appropriate order within 8 weeks from the date of production of a certified copy of this order before him.

Case law discussed:
(2007) 2 SCC 574, (2009) 5 SCC 787.

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

1. The prayer made is to consider the representation dated 05.10.2009 which has been filed before the District Inspector of Schools praying for release of certain benefits of the petitioner. The petitioner claims that he retired as a Class-IV employee on 31.07.2007 and, therefore, he is entitled to his retiral benefits.

2. The petitioner, while in service, was convicted in a criminal case. The said conviction has been questioned by the petitioner in a criminal appeal before this Court which has been admitted on 03.08.2007 and the execution of sentence as against the petitioner has been suspended.

3. On the strength of the aforesaid position, learned counsel for the petitioner contends that the petitioner was merely impleaded in a criminal case and once the sentence has been suspended by this Court, the natural legal consequence is that the petitioner should be presumed to

be an innocent person and all his benefits should be released.

4. The position in law is that there is no power conferred under Section 389 of the Criminal Procedure Code to stay the conviction itself and it is only the execution of the sentence which can be suspended. The order dated 03.08.2007, a copy whereof is annexure 2 to the writ petition, is inconsonance with the provisions of Section 389 Cr.P.C.

5. The provision has been considered and explained in this regard in several cases and two latest decisions are that of **Navjot Singh Sidhu Vs. State of Punjab and another** reported in **(2007) 2 SCC 574** paragraphs 4 to 6 and in the case of **Sanjay Dutt Vs. State of Maharashtra** through CBI Bombay reported in **(2009) 5 SCC 787** and others where the inherent power of the High Court under the Cr.P.C. has been acknowledged and it has been held that in rare cases such an order for compelling reasons can be passed whereby the conviction itself can be suspended. The High Court in the instant case has not exercised its inherent powers as above and has only suspended the execution of the sentence.

6. Keeping in view the said pronouncement and in the peculiar facts of this case, it will be open to the petitioner to approach the District Inspector of Schools, who shall examine the claim of the petitioner in the light of the aforesaid position of law and pass an appropriate order within 8 weeks from the date of production of a certified copy of this order before him.

With the aforesaid observations, the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2009

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE ASHOK SRIVASTAVA, J.

Civil Misc. Writ Petition No. 28351 of 2009
And:
Civil Misc. Application No. 190089 of 2009
Connected with:
Civil Misc. Writ Petition No. 37581 of 2009

Vipin Bihari Singh & others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel or the Petitioners:
Dr. R.G. Padia, Sr. Advocate,
Sri Prakash Padia
Sri Vikas Budhwar.

Counsel for the Respondents:
Sri Ashok Khare, Sr. Advocate
Sri Ravi Shanker Prasad, (Addl.C.S.C.)
Sri V.P. Varshney.
Sri V.P. Mathur
Sri Siddharth Nandan.
Sri Siddharth Khare
Sri A.K. Mishra
Sri Saroj Yadav

U.P. Public Works Department Group 'B' Civil Engineering Service Rules 2004-Rule 15 (2)-selection of Civil Engineer-held on basis of interview-petitioner participated but fail selection of validity challenged on ground in electrical and Mechanical Engineering selection is mad after written examination and interview-no national basis to adopt separate mode-after participation in selection-unsuccessful candidate has not right to question the made of selection-even if constitutional validity can not be

challenged after 5 years-petition dismissed.

Held: Para 15

Against this background, if we analyse the whole issue, we can get two aspects of the matter. Firstly, whether a person after participating in the interview can turn round and challenge the same; and secondly, whether the Rules, 2004 made for selection process in the year 2004 can be challenged after becoming unsuccessful in the year 2009 by way of this writ petition. We are of the definite conclusion on the strength of facts and law as well as analysis thereof that the petitioners' claim is totally contrary to the settled position of law, therefore, they are not entitled to any relief as claimed herein either for declaration of Rule-15 (2) of the Rules, 2004 as ultra vires in nature or for any relief in connection with selection process, in which they have participated but failed.

Case law discussed:

AIR 2001 SC 152, AIR 1955 SC 19, 2003 (2) LBESR 899 (All), 2009 (1) AWC 239, 1997 (9) SCC 527, AIR 1989 SC 903, 2007 (8) SCC 100, 2009 (5) SCC 515, 2008 (4) SCC 171, 2008 (2) ADJ 205 (DB), 2002 (2) SCC 712, 1986 (Supp) SCC 285, 1985 (4) SCC 417 : 1986 SCC (L&S) 88,,1994 (1) SCC 150, 2003 (2) SCC 132, 2003 (11) SCC 559, 2008 (4) SCC 619, (2000 (7) SCC 719, 1998 (2) SCC 566, AIR 1964 SC 1823, 1981 (4) SCC 159, 2007 (6) SCC 236, 1996 (3) SCC 709.

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

1. Since both the aforesaid writ petitions involving similar controversy are connected with each other, therefore, the same are being decided by this common judgement having binding effect upon both the matters, taking Civil Misc. Writ Petition No. 28351 of 2009 as leading one.

2. This writ petition, being Civil Misc. Writ Petition No. 28351 of 2009, has been filed by the petitioners praying inter alia as follows:

"i. Issue a writ order or direction in the nature of mandamus declaring the Rule 15 (2) of the Uttar Pradesh Public Works Department Group "B" Civil Engineering Service Rules, 2004, as notified on 3.1.2004 as ultra-vires of Article 14 read with Article 16 of the Constitution of India.

ii. Issue a writ order or direction in the nature of Mandamus commanding the rule making authority to provide for the criteria of written examination followed by viva-voce for the purposes of direct recruitment on the post of Assistant Engineer in Public Works Department.

iii. Issue a writ order or direction in the nature of certiorari calling for the record and quash the advertisement published in the Employment News dated 7-13th June, 2008 being Advertisement No. 1/2008-09 dated 7.6.2008 in so far as it pertains to the post of Assistant Engineer in Public Works Department in the pay scale of Rs.8000-275-13500.

iv. Issue a writ order or direction in the nature of certiorari calling for the record and quashing the entire selection held in pursuance of the advertisement published in the Employment News dated 7-13th June, 2008 being Advertisement No. 1/2008-09 dated 7.6.2008 on the post of Assistant Engineer in Public

Works Department in the pay scale of Rs.8000-275-13500.

v. Issue a writ order or direction in the nature of certiorari calling for the record and quashing the result published in pursuance of the advertisement so offloaded from the Internet (Annexure No. 4 to the writ petition).

vi. Issue a writ order or direction in the nature of mandamus commanding the respondents to conduct the selection afresh on the post of Assistant Engineer in Public Works Department in the pay scale of Rs.8000-275-13500 in pursuance of the advertisement published in the Employment News dated 7-13th June, 2008 being Advertisement No. 1/2008-09 dated 7.6.2008, after resorting to written examination followed by viva-voce examination.

vii. Issue any other suitable writ, order or direction, as this Hon'ble Court may deem fit and proper under the facts and circumstances existing in the present case.

viii. Award the costs of this writ petition in favour of the petitioners."

3. Virtually the petitioners have challenged the advertisement, which has been meant for selection only by way of interview but not written examination followed by interview. Contentions of the petitioners are strongly opposed by the State and the private parties i.e. selected candidates.

4. Admittedly, the petitioners have participated in the selection process, which includes examination/interview as per the advertisement, and came out unsuccessfully and thereafter challenged the selection process. Therefore, by virtue of well settled principle there is no necessity to interfere with such selection process, which has been conducted by the experts. But since vires of Rule- 15(2) of the Uttar Pradesh Public Works Department Group "B" Civil Engineering Service Rules, 2004 (hereinafter in short called as the 'Rules, 2004') has been challenged, we are constrained to enter into merit of the matter to come to a definite conclusion in this respect. The Rules, 2004 was made in the year 2004 for civil engineering services. The procedure for recruitment as provided under such Rule is as follows:

"**14. Determination of vacancies**--The appointing authority shall determine and intimate to the Commission the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under Rule 6. The vacancies to be filled by direct recruitment and promotion through the Commission shall be intimated to them.

15. Procedure for direct recruitment--(1) Application for being considered for selection by direct recruitment shall be invited by the Commission in the prescribed proforma published in the advertisement issued by the Commission.

(2) The Commission shall, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with Rule 6, call for interview such number of

candidates, who possess the requisite qualifications as they consider proper.

(3) The Commission shall prepare a list of candidates in order to their proficiency, as disclosed by the marks obtained by each candidate in the interview. If two or more candidates obtain equal marks, the candidate senior in age shall be placed higher in the list. The Commission shall forward the list to the appointing authority.

16. Procedure for recruitment by promotion through the Commission-- Recruitment by promotion through the Commission shall be made on the basis of seniority subject to the rejection of the unfit in accordance with the Uttar Pradesh Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970 as amended from time to time.

17. Combined select list-- If in any year of recruitment appointments are made both by direct recruitment and by promotion, a combined select list shall be prepared by taking names of the candidates from the relevant lists, in such manner that the prescribed percentage is maintained, the first name in the list being of the person appointed by promotion."

5. The Rules, 2004 has been made in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and notified on 03rd January, 2004. The advertisement in question issued as per said Rules is available on pages-66 & 67 of the writ petition. The petitioners have contended that while procedure of written examinations is being followed in respect of electrical and mechanical branches under the Public Works Department of the State, there is only deviation in respect of civil engineering branch. Relying upon the judgement reported in **AIR 1973 SC 930 (Janki Prasad Parimoo and others Vs. State of Jammu & Kashmir and others)** Dr. R.G. Padia, learned Senior Counsel appearing for the petitioners, wanted to establish that the interview can not be made the sole test in cases of efficiency test, which is otherwise dependable upon several considerations. When in the selection the merit takes first place, it is implicit in such selection that the persons must not be just average. Dr. Padia has relied upon various other rules in support of his contention. He has also relied upon the judgement reported in **AIR 2001 SC 152 (Praveen Singh Vs. State of Punjab and others)** to establish that interview should not be the only method of assessment of the merits of candidates. The vice of manipulation can not be ruled out in viva voce test. Though interview undoubtedly is a significant factor in the matter of appointments, it plays a strategic role but it also allows creeping of a lacuna rendering the appointments illegitimate. Obviously it is an important factor but ought not to be the sole guiding factor since reliance thereon only may lead to a "sabotage of the purity of the proceedings". In such judgement it has been further held that while it is true that the administrative or quasi-judicial authority clothed with the power of selection and appointment ought to be left unfettered in adaptation of procedural aspect but that does not, however, mean and imply that the same would be made available to an employer at the cost of fair play, good conscience and equity. While we go through the factual aspect of the matter, we find that, in the referred case, the essentiality of viva voce test, however, stands established by reason of express narration under the scheme of examination viz. "followed by viva voce

test". In the event of there being a written test for elimination, the scheme of the examination would not have been detailed in the manner, as it has been so stated. In the instant case, there is no such thing. Not only in the advertisement but also in the Rules, 2004 it has been categorized that selection will be made on the basis of interview. Therefore, no question of abrupt decision by the authority is available to establish the more fair play, good conscience and equity on the part of the authority.

6. By filing an application under Article 215 of the Constitution of India an incidental issue has also been raised by the petitioners saying that on 09th July, 2009 though this Court verbally observed not to issue any appointment letter in respect of the appointment on the post of Assistant Engineer pursuant to the selection, which is under challenge, but the same was done by the appropriate authority. Therefore, there is a clear case of contempt and unless the contempt is purged, writ petition can not be required to be heard and disposed of. To such application, Sri Kapil Dev, Principal Secretary, Department of Public Works Department, Government of Uttar Pradesh, Lucknow has filed a counter affidavit by saying that in another writ petition, being Writ Petition No. 918 (S/B) of 2009 (Om Prakash and another Vs. State of U.P. and others) the Lucknow Bench of this High Court has passed an order on 02nd July, 2009 directing the respondents that the vacancies of Assistant Engineers (Civil) meant for the promotional quota through direct recruitment will not be filled up but it shall be open for the respondents to fill up the vacancies falling within the quota of direct recruitment. Against this background, the desire of order dated 09th July, 2009 passed by this Division Bench was to examine the stand of the State on exchange of affidavits. The respondents have also taken a preliminary objection in this writ petition to the effect that after making participation in the selection process it is not open for the petitioners to challenge the same. Therefore, whatever has been done by the State, the same has been done in compliance of the order passed on 02nd July, 2009 i.e. prior to the oral observation made by this Court on 09th July, 2009. However, since Dr. Padia has repeatedly insisted for purging the contempt first before going into the merit of the writ petition, we have carefully considered the respective submissions of the contesting parties to arrive at a conclusion under Article 215 of the Constitution of India and found that issuance of appointment letter, if any, by the State can not be held to be wilful and deliberate flouting of the order dated 09th July, 2009. The reason behind the same is that this Court on 09th July, 2009 might have made a stray observation without knowing the fact that there is a prevailing interim order passed by a parallel Division Bench of this Court on 02nd July, 2009. Secondly, both the Division Benches are the Court so far as the respondents are concerned. Had the case been that the respondents did not comply with the order dated 02nd July, 2009, in such a situation they could have faced a direct contempt of Court for flouting an order. It would have been proper for the learned Standing Counsel appearing before this Court on 09th July, 2009 to inform the Court that there is an order existing from 02nd July, 2009, but that might be a mistake on the part of the Counsel and for that it can not be held by this Court that there is a clear case of

wilful and deliberate contempt of order of the Court by the respondent authority. Hence, the explanation with apology as made by the deponent (Sri Kapil Dev) in support of his defence can be accepted as an appropriate explanation and thus, the cause of contempt is purged.

7. Dr. Padia has cited a Constitution Bench judgement of the Supreme Court reported in **AIR 1955 SC 19 (M.Y. Shareef and another Vs. Hon'ble Judges of the Nagpur High Court and others)** to establish that the proposition is well settled and self-evident that there can not be both justification and an apology. Two things are incompatible. Again an apology is not a weapon of defence to purge the guilty of their offence, nor is it intended to operate as a universal panacea, but it is intended to be evidence of real contriteness.

8. According to us, interpretation of law as propounded by the Constitution Bench of the Supreme Court can not be applicable herein in view of the facts and circumstances of the case. To maintain the rigour of the Court, the Court seeks for apology but when it is merged with the available justification, it seems to be additional. The justification, which has been given by the respondent authority herein, is neither illogical nor mere or bare defence, so that we shall ignore the justification and only accept the apology upon holding that there is a clear intentional violation of the order of the Court. We do not require any further discussion in the matter in view of the facts and circumstances of this case and as such, once again we hold and say that the cause of contempt is purged and the **contempt application is treated to be disposed of** on the basis of such observations and order, however, without imposing any cost.

9. So far as the question of locus standi of the petitioners to maintain the writ petition is concerned, we have come across several decisions of the Supreme Court and this High Court. In **2003 (2) LBESR 899 (All) (Anand Narain Singh Vs. U.P. Secondary Education Services Selection Board, Allahabad & ors.)** a Division Bench of this Court has held that once a candidate has taken a chance by appearing in interview, it is not open for him to challenge the advertisement or to challenge the rules. This Court as well as the Supreme Court have in various cases held that once a candidate has taken a chance of appearing before the Board at the time of selection then it is not open for him to challenge the selection proceedings or to challenge the rules or advertisement under which he has appeared and as such the candidates have no locus standi. However, it has also been held that in case of palpably arbitrary exercise of power the Court can interfere and declare the same as void. Further, a Division Bench of this Court in **2009 (1) AWC 239 (Rajesh Kumar Srivastava and others Vs. State of U.P. and others)** has held that when selection as per the advertisement is to be made on the basis of performance of candidates in written test and interview but the selection is made only on the basis of the interview, the same is vitiated in law and, therefore, writ petition is maintainable. In **1997 (9) SCC 527 (Raj Kumar and others Vs. Shakti Raj and others)** it has been held by the Supreme Court that when the Government has committed glaring illegalities in the procedure to get the candidates for examination under the rules, the principle of estoppel by conduct

or acquiescence has no application. From **AIR 1989 SC 903 (Deepak Sibal Vs. Punjab University and another)** we find that it is now well settled that Article 14 of the Constitution forbids class legislation, but does not forbid reasonable classification. Whether a classification is a permissible classification or not, two conditions must be satisfied, namely, (i) that the classification must be founded on an intelligible differentia, which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that the differentia must have a rational nexus to the object sought to be achieved by the statute in question. In the instant case, the Rules, 2004 is made in the year 2004, which relates to civil engineering alone, and the advertisement has not been issued contrary to such Rule. In the advertisement the mode of selection through either examination or interview was prescribed. The Commission adopted the process of interview. Therefore, there is nothing to be said that the same is an arbitrary action on the part of the authority. Secondly, the Rules, 2004 is not made for the entire selection of engineering, be it civil or be it mechanical or be it electrical. Thus, the candidates of the civil engineering are differentiated from others. In this case, the Rules, 2004 itself has been made for the purpose of civil engineering and civil engineering alone. Therefore, there is no question of any discrimination from one to others in making such selection by the Selection Board consisting of several persons being experts not an individual. The rules of plurality in making selection is always appreciated by the Courts of law unless, of course, any allegation is made against any member of such Selection Board. But no such case is available herein. In **2007 (8) SCC 100 (Union of India and others Vs. S. Vinodh Kumar and others)** it has been held that the candidates who appear for examination do not have any vested right for appointment. It is well settled that even wait-listed candidates have no legal right to be appointed. It is well known that even selected candidates do not have any legal right in this behalf. Ultimately it has been held by the Supreme Court in such judgement that it is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein are not entitled to question the same and, like the present case, it was held therein that the Court is not oblivious that there are certain exceptions to the Rules. But in the present case the Court is not concerned with the same.

10. Mr. Ravi Shanker Prasad, learned Additional Chief Standing Counsel appearing for the State, has contended that it has been held by the Supreme Court in **2009 (5) SCC 515 (K.A. Nagamani Vs. Indian Airlines and others)** that when Corporation did not violate the right to equality guaranteed under Articles 14 and 16 of the Constitution and the candidates having participated in the selection process along with the contesting respondents therein without any demur or protest, they can not be allowed to turn round and question the very same process having failed to qualify. In **2008 (4) SCC 171 (Dhananjay Malik and others Vs. State of Uttaranchal and others)** it was also similarly held by the Supreme court that once the candidates participated in the selection process without any demur, they are estopped from complaining that the selection process was not in accordance

with the rules. If they think that the advertisement and selection process were not in accordance with the rules, they could have challenged the advertisement and selection process without participating in the selection process. This has not been done. A Division Bench of this Court, in which one of us (Amitava Lala, J.) was a member, has held in the judgement reported in **2008 (2) ADJ 205 (DB) (Dr. U.S. Sinha Vs. State of U.P. and others)**, as follows:

"15. Last, but not the least, point pertains to locus standi of the writ petitioners. Since they have participated in the selection process and become unsuccessful, can not challenge the discretion of the selectors in respect of the experience, as categorically held in ***2007 (7) Supreme 433, Trivedi Himanshu Ghanshyambhai v. Ahmedabad Municipal Corporation and others,*** therefore, such latest view of the Supreme Court which is clearly applicable in these writ petitions, can not be avoided under any circumstance."

11. In **2002 (2) SCC 712 (G.N. Nayak Vs. Goa University and others)** the Supreme Court has held that when a candidate was aware about the eligibility criteria for the post yet applied and appeared at the interview without protest, he can not be allowed to contend that the eligibility criteria were wrongly framed. In **1986 (Supp) SCC 285 (Om Prakash Shukla Vs. Akhilesh Kumar Shukla and others)** the Supreme Court discouraged the challenge to the examination after participating in the same without protest.

12. So far as merit is concerned, we find that in **1985 (4) SCC 417 : 1986 SCC (L&S) 88 (Ashok Kumar Yadav and others Vs. State of Haryana and others)** a Constitution Bench of the Supreme Court has held that the written examination which is definitely more objective in its assessment than the viva voce test will lose all meaning and credibility and the viva voce test, which is to some extent subjective and discretionary in its evaluation, will become the decisive factor in the process of selection. But on the question of viva voce examination it has been held by the Constitution Bench that suspicion can not take the place of proof and can not strike down the selections made on the ground that the evaluation of the merits of the candidates in the viva voce examination might be arbitrary. It is necessary to point out that the Court can not sit in judgement over the marks awarded by the interviewing bodies unless it is proved or obvious that the marking is plainly and indubitably arbitrary or affected by oblique motives. It is only if the assessment is patently arbitrary or the risk of arbitrariness is so high that a reasonable person would regard arbitrariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrariness. In **1994 (1) SCC 150 (Anzar Ahmad Vs. State of Bihar and others)** it has been held by the Supreme Court that the question of weightage to be attached to viva voce would not arise where the selection is to be made on the basis of interview only. **From 2003 (2) SCC 132 (Jasvinder Singh and others Vs. State of J&K and others)** we find the Supreme Court has held that what ultimately required to be ensured is as to whether any oblique intention or arbitrariness is reflected or not.

13. It has been pointed out by Mr. Ashok Khare, learned Senior Counsel appearing for the private respondents, by citing the judgement reported in **2003 (11) SCC 559 (State of Punjab and others Vs. Manjit Singh and others)** that it is certainly the responsibility of the Commission to make the selection of efficient people amongst those who are eligible for consideration. The unsuitable candidates could well be rejected in the selection by interview. It is not the question of subservience but there are certain matters of policies, on which the decision is to be taken by the Government. Independent and fair working of the Commission is of utmost importance. In **2008 (4) SCC 619 (Sadananda Halo and others Vs. Momtaz Ali Sheikh and others)** the Supreme Court has held that it is also a settled position that unsuccessful candidates can not turn back and assail the selection process. In **2000 (7) SCC 719 (Kiran Gupta and others Vs. State of U.P. and others)** it has been held by the Supreme Court that it is difficult to accept the omnibus contention that selection on the basis of viva voce only is arbitrary and illegal. In **1998 (2) SCC 566 (Siya Ram Vs. Union of India and others)** it has been held that sometimes, only interview is considered to be best method for certain posts. In **AIR 1964 SC 1823 (R. Chitralekha Vs. State of Mysore and others)** a Constitution Bench of the Supreme Court has held that if there can be manipulation or dishonesty in allotting marks at interviews, there can equally be manipulation in the matter of awarding marks in the written examinations. In the ultimate analysis, whatever method is adopted its success depends on the moral standards of the members constituting the selection committee and their sense of objectivity and devotion to duty. In **1981 (4) SCC 159 (Lila Dhar Vs. State of Rajasthan and others)** it has been held that ordinarily, recruitment to public service is regulated by the rules made under the proviso to Article 309 of the Constitution and it is not for the Courts to redetermine the appropriate method of selection and the relative weight to be attached to the various tests, unless exaggerated weight has been given with proven or obvious oblique motives. The written examination assesses the man's intellect and the interview tests the man himself and "the twin shall meet" for a proper selection. But there can not be any rule of thumb regarding the precise weight to be attached respectively to the written test and the interview. It must vary from service to service according to the requirement of the service, to which recruitment is made, the source-material available for recruitment, the composition of the Interview Board and several like factors.

14. On a question of vires of the rule, we would like to place here the ratio of the judgement reported in **2007 (6) SCC 236 [Greater Bombay Coop. Bank Ltd. Vs. United Yarn Tex (P) Ltd. and others]**, whereunder it has been held that the constitutional validity of an Act can be challenged only on two grounds viz. (i) lack of legislative competence; and (ii) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. No third ground can invalidate a piece of legislation. In considering the validity of a statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of

constitutional principles. For sustaining the constitutionality of an Act, the Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which are relevant. It must always be presumed that the legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. It is also well settled that the Courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on authority can be construed in conformity with legislative intent of exercise of power within constitutional limitations. Where a statute is silent or is inarticulate, the Court would attempt to transmutate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. While examining the challenge to the constitutionality of an enactment, the approach of the Court is to start with the presumption of constitutionality. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, must less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment. The Court must recognise the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executives are expected to show due regard and deference to the judiciary. After all an Act made by the legislature represents the will of the people and that can not be lightly interfered with. The unconstitutionality must be plainly and clearly established before enactment is declared as void. The same approach holds good while ascertaining intent and purpose of an enactment or its scope and application. In **1996 (3) SCC 709 (State of A.P. And others Vs. McDowell & Co. and others)** it has been observed by the Supreme Court that no enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. The Court can not sit in judgement over their wisdom.

15. Against this background, if we analyse the whole issue, we can get two aspects of the matter. Firstly, whether a person after participating in the interview can turn round and challenge the same; and secondly, whether the Rules, 2004 made for selection process in the year 2004 can be challenged after becoming unsuccessful in the year 2009 by way of this writ petition. We are of the definite conclusion on the strength of facts and law as well as analysis thereof that the petitioners' claim is totally contrary to the settled position of law, therefore, they are not entitled to any relief as claimed herein either for declaration of Rule-15 (2) of the Rules, 2004 as ultra vires in nature or for any relief in connection with selection process, in which they have participated but failed.

16. Hence, in totality the writ petitions can not be sustained and, therefore, the same are dismissed, however, without imposing any cost. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.12.2009

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No. 33524 of 2009

Nazma ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Pankaj Bharti

Counsel for the Opposite Party:
Govt. Advocate

Code of Criminal Procedure-Section 319-Application for summoning the accused-not named in FIR-on basis of evidence recorded under Section 244-refusal on ground that statement recorded is evidence can be considered by the Trail Court and can not be basis for summoning-held-illegal-word 'evidence' used under Section 319 means the statement recorded by Court in accordance with provisions of evidence Act while the word evidence used under Section 244 C.P.C.-as recorded by Court during Trail.

Held: Para 3

The opinion by A.C.J.M. Court No. 1, Muzaffarnagar is wholly illegal. If a person has not been summoned under Section 204 Cr.P.C. and his name subsequently appears in statement recorded by the Court under Section 244 Cr.P.C. then application under Section 319 Cr.P.C. is maintainable. The statement under Section 244 Cr.P.C. recorded by the Court is an "evidence". The Court can always rely on such a statement and, therefore, prosecution can always utilize the said statement under Section 244 Cr.P.C. to add any person as an accused to stand trial along with the already trying accused. Merely because Sabina, who was desired to be summoned by the prosecution under Section 319 Cr.P.C., was not summoned under Section 204 Cr.P.C. is no ground not to summon her under Section 319 Cr.P.C. and ask her to stand trial. It is only the merit of the statement under Section 244 Cr.P.C. which is relevant for utilizing power under Section 319 Cr.P.C.

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

1. A.C.J.M. Court No. 1, Muzaffarnagar has passed an illegal order on 16.7.2009 in Case No. 3351/9 of 2008 (Nazma Vs Nawab Arshad) under Sections 406, 506 I.P.C., P.S. Kotwali Nagar, District Muzaffar Nagar. It has rejected the prayer of the prosecution to summon Shabina under Section 319 Cr.P.C. for the reason that under Section 204 Cr.P.C. she was not summoned. A.C.J.M. has observed that if a person has not been summoned under Section 204 Cr.P.C. then, if his/her name appears in statement under Section 244 Cr.P.C., then the application under Section 319 Cr.P.C. is not maintainable in his/her respect.

2. I have heard learned counsel for the applicant and learned A.G.A.

3. The opinion by A.C.J.M. Court No. 1, Muzaffarnagar is wholly illegal. If a person has not been summoned under Section 204 Cr.P.C. and his name subsequently appears in statement recorded by the Court under Section 244 Cr.P.C. then application under Section 319 Cr.P.C. is maintainable. The statement under Section 244 Cr.P.C. recorded by the Court is an "evidence". The Court can always rely on such a statement and, therefore, prosecution can always utilize the said statement under

Section 244 Cr.P.C. to add any person as an accused to stand trial along with the already trying accused. Merely because Sabina, who was desired to be summoned by the prosecution under Section 319 Cr.P.C., was not summoned under Section 204 Cr.P.C. is no ground not to summon her under Section 319 Cr.P.C. and ask her to stand trial. It is only the merit of the statement under Section 244 Cr.P.C. which is relevant for utilizing power under Section 319 Cr.P.C.

4. Phraseology of the said Section 319 Cr.P.C. clearly indicates that the power to summon any person as an accused to face the trial along with already trying accused clearly indicates that during trial if it appears from the evidence that any person not been an accused has committed any offence for which such person can be tried together with the accused, the Court may proceed against such person for the offence which he appears to have been committed. The word "evidence" as has been used in Section 319 Cr.P.C. means the statement recorded in the Court in accordance with the provisions of the Evidence Act. The statement under Section 244 Cr.P.C is one of such statement which is an "evidence" as it has been recorded by a Court during a trial.

5. In such a view, the impugned order dated 16.7.2009 passed by A.C.J.M. Court No. 1, Muzaffarnagar in Case No. 3351/9 of 2008 (Nazma Vs Nawab Arshad)under Sections 406, 506 I.P.C. cannot be sustained and has to be set aside.

6. I have not heard Sabina in this application for the reason that prior to her summoning, she has got no right to be heard.

7. This criminal miscellaneous application is allowed. The impugned order dated 16.7.2009 is set aside. Case is remanded back to the A.C.J.M. Court No. 1, Muzaffarnagar to re decide the prayer of the prosecution for summoning Sabina as an accused under Section 319 Cr.P.C.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2009

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

Civil Misc. Writ Petition No. 65951 of 2009

Ashwarya Pal Singh ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Rajjan Lal

Counsel for the Respondent:
,J.N. Maurya, C.S.C.

U.P. Secondary Education Service Selection Board Rules 1998-Rule-13-Life of penal of selected list-petitioner was given offer to join the post three times by the management-by one pretext to other petitioner refused to join-on life of panel confined to one year-can not be extended for endless period-attitude of petitioner being illogical against the larger interest of student-deserve no sympathy-can not be allowed to abuse such privilege.

Held: Para 6

This exercise of seeking extension cannot be permitted endlessly, that too even after the expiry of the period of the panel itself. The Statute provides for a

period of joining and the power of extension cannot be construed to stretch for more than the life of the panel itself. The attitude of the petitioner is to avail extensions as a luxury which is against the intention of the Statute. Reasonableness has to be assessed keeping in view the life of the panel and the period provided for joining. Anything beyond would be unreasonable. From the common man's point of view, it can be said that the institution cannot be placed in the position of a bride's father to unendingly wait for the grooms procession to arrive, as if there is no option or alternative available. The petitioner has crossed all limits of the "Indian Standard Time" compelling the management and the authority to run out of patience. This in my opinion apart from being illogical, is against the larger interest of the institution and the students for whose benefit the petitioner was offered appointment. The petitioner seems to have no regard for the same and therefore does not deserve any further sympathy or indulgence.

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

1. Heard learned counsel for the petitioner and Sri Maurya for the Board.

2. It is submitted that the petitioner is a selected candidate and it would be unreasonable to deny him the benefit of extension of the period for joining for which he has prayed in his application. The petitioner contends that he is still ready to join and that the impugned order dated 15.10.2009 deserves to be set aside.

3. Sri S.R. Singh learned counsel for the Board contends that the period of joining is prescribed under the rules and he has invited the attention of the Court to Rule 13 of the U.P. Secondary Education Service Selection Board Rules, 1998. The same is quoted below:

"13. Intimation of names of selected candidates-(1) The Inspector shall, within ten days of the receipt of the panel and the allocation of institution under Rule 12-

(i) notify it on the notice-board of his office;
(ii) intimate the name of selected candidate to the Management of the institution, which has notified the vacancy, with the director, that , on authorization under resolution of the management, **an order of appointment, in the proforma given in Appendix "E" be issued to the candidate by registered post within fifteen days of the receipt of intimation requiring him to join duty within fifteen days of the receipt of the order or within such extended time, as maybe allowed to him by the Management, and also intimating him that on his failure to join within the specified time, his appointment will be liable to be cancelled;**
(iii) send an intimation to the candidate, referred to in clause (ii), with the direction to report to the Manager **within fifteen days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him, by the Management.**
....."

Sri Singh on the strength of the aforesaid rule contends that as a matter of fact the petitioner was granted ample time and he failed to join and further from a perusal of his application dated 7.9.2009 he has prayed for further six months time. He submits that after having waited for a reasonable period the impugned order has been passed which does not suffer from any infirmity and does not call for interference under Article 226 of the Constitution of India.

4. I have heard learned counsel for the petitioner and the learned counsel for the Board and perused the rules. The same provides that the proforma as provided under Appendix E has to be filled up by the management and the letter of appointment has to be issued with an intimation to the candidate to join within a period of 15 days or within such extended time as may be allowed him by the management in the institution. It is the admitted position that the petitioner had been unable to join on account of his family circumstances. He has further prayed for six months time to join the institution. The Court does not find any valid reason except a bald and vague averment of family circumstances so as to justify further extension of time. Further the time earlier provided has to be reasonably construed.

5. According to the letters of the management as referred to in the impugned order dated 15.10.2009, the management had offered the post to the petitioner thrice after the panel was declared way back on 24.10.2008. The petitioner has voluntarily delayed his joining for the past more than a year. The life of the panel itself is one year. In view of the provisions quoted above, the management has already discharged its obligation under the Statute and it is the petitioner who has voluntarily disabled himself.

6. This exercise of seeking extension cannot be permitted endlessly, that too even after the expiry of the period of the panel itself. The Statute provides for a period of joining and the power of extension cannot be construed to stretch for more than the life of the panel itself. The attitude of the petitioner is to avail extensions as a luxury which is against the intention of the Statute. Reasonableness has to be assessed keeping in view the life of the panel and the period provided for joining. Anything beyond would be unreasonable. From the common man's point of view, it can be said that the institution cannot be placed in the position of a bride's father to unendingly wait for the grooms procession to arrive, as if there is no option or alternative available. The petitioner has crossed all limits of the "Indian Standard Time" compelling the management and the authority to run out of patience. This in my opinion apart from being illogical is against the larger interest of the institution and the students for whose benefit the petitioner was offered appointment. The petitioner seems to have no regard for the same and therefore does not deserve any further sympathy or indulgence.

7. The petitioner cannot be permitted to abuse a privilege which is not an absolute right. The petitioner is to act reasonably. In the opinion of the Court the petitioner has taken undue advantage of his selection and therefore the impugned order dated 15.10.2009 does not require any interference.

The writ petition therefore lacks merit and it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 33358 of 2007

Akhilesh Kumar Kardham and another ...Petitioners
Versus
Zila Basic Shiksha Adhikari and another ...Respondents

Constitution of India Article 226-Post retirement benefits-petitioner's father working as Head Master died in harness on 27.08.2004-since than retire dues like Provident Fund, Gratuity, Insurance and arrears of family pension with held-crime and corruption thrive and prosper in society due to lack of public resistance-Court expressed its great concern-having onerous responsibility to generate confidence and strength in common man-direction issued to give entire amount with 10% interest per annum from the date of filling of Writ Petition to till the date of actual payment with cost of Rs.10,000/-.

Held: Para 11

In view of the above the writ petition is allowed. The respondents are directed to release the retiral dues of the deceased employee to the petitioners within a period of two months from the date of production of a certified copy of this order alongwith interest at the rate of 10% per annum which shall be payable from the date of filing of the present writ petition, i.e., 23.07.2007 till the amount is actually paid. The petitioner shall also be entitled to cost which is quantified to Rs. 10,000/-. However, the respondent no. 2 shall be at liberty to make appropriate disciplinary inquiry in the matter and to find out the officials responsible for such extraordinary delay in payment of retiral benefits of the deceased employee to the petitioners and to realize the amount of interest and cost awarded under this order from such officer(s)/ employee(s) as the case may be.

Case law discussed:
1972 AC 1027, 1964 AC 1129, JT 1993 (6) SC 307, (1996) 6 SCC 530, (1996) 6 SCC 558, AIR 1996 SC 715, 1985 (50) FLR 145.

(Delivered Hon'ble Sudhir Agarwal, J.)

1. The sole grievance of the petitioners is that the father of petitioner no. 1 and husband of petitioner no. 2 Late Sri Jagat Singh, who was working as Headmaster in Primary School died on 27.08.2004 and since then the petitioners are requesting the respondents to pay retiral dues of the deceased employee like, provident fund, gratuity, insurance and arrears of family pension etc. but till date nothing has been done by the respondents.

2. In the counter affidavit filed by respondents the only defence taken is that the matter is under consideration. It also appears from the counter affidavit that for the first time in 2005 the respondents initiated the matter regarding payment of retiral dues of the deceased employee, passing the order dated 30.11.2005, declaring that the suspension of the deceased employee stands terminated on 27.08.2004 and he will be deemed to have been reinstated on the said date for the purpose of retiral benefits but without any salary. Thereafter, the only factum mentioned in the counter affidavit is that an objection was raised by the Finance and Accounts Officer, Basic Education, Moradabad about the status of the deceased employee which was clarified by letter dated 29.08.2008 and since then

the matter is pending and under consideration.

3. Virtually there is no defence at all. It is evident that the respondents are simply sitting tight over the matter which cannot be for any bona fide reasons. Once it is not disputed that the deceased employee was entitled for retiral dues and the same were liable to be paid, inaction on the part of the respondents in clearing the dues and that too for almost more than five years is really very serious and deserves to be dealt with strictly.

4. The respondents should not forget that they are employees of a statutory body constituted under an Article of the State Legislation. The body, constituted 'State', under Article 12 of the Constitution. The employees are the servants of the people. Use of their power must always be subordinate to their duty of service. If a public functionary acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but it is abuse. The same would apply to a case of inaction also i.e. where it is bound to exercise its power but fail to do so. An ordinary citizen or a common man is hardly equipped to match the might of the State, its instrumentalities or authorities. It is the duty of the Court, therefore, to check such arbitrary, capricious action on the part of the public functionaries to rescue the common man. It is a matter of common knowledge and judicial cognizance can be taken of the fact that in most of the matters where the sufferance is minor, the common man does not even complain and silently suffer it. He takes it as destiny or fate. The time has come when this Court has to remind the public authorities that harassment of a common man is socially abhorring and legally impermissible. It may harm the common man personally but injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. The ordinary citizen instead of complaint and fight normally succumbs and surrender to the undesirable functioning instead of standing against it. He has to be given a confidence and strength enough to stand and expose such illegality and apathy of public functionaries. The Courts have onerous responsibility to generate such confidence and strength in common man.

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

6. Regarding harassment of a Government employee, referring to observations of **Lord Hailsham in Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027** and **Lord Devlin In Rooks Vs. Barnard 1964 AC 1129** the Apex Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307** held as under;

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law.....public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous."

7. In **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex Court held as under:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

8. In **Shiv Sagar Tiwari Vs.l Union of India (1996) 6 SCC 558** the Apex Court held as follows:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

9. In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** the Apex Court held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

10. Where, the authorities have acted negligently showing laxity and apathy to the need of the legal heirs of the deceased employee or the retired employees and have delayed payment of statutory and rightful dues, they are liable to pay interest compensatory in nature for the reason that such delay is nothing but culpable delay warranting liability of interest. In **State of Kerala & others Vs. M. Padmanabhan Nair, 1985 (50) FLR 145**, the Apex Court considering delay in payment of retiral dues to a government servant and liability of interest of the Government in such matter held as under:

"Since the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed atleast a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following months. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasized and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should commence at the

expiry of two months from the date of retirement."

11. In view of the above the writ petition is allowed. The respondents are directed to release the retiral dues of the deceased employee to the petitioners within a period of two months from the date of production of a certified copy of this order alongwith interest at the rate of 10% per annum which shall be payable from the date of filing of the present writ petition, i.e., 23.07.2007 till the amount is actually paid. The petitioner shall also be entitled to cost which is quantified to Rs.10,000/-. However, the respondent no. 2 shall be at liberty to make appropriate disciplinary inquiry in the matter and to find out the officials responsible for such extraordinary delay in payment of retiral benefits of the deceased employee to the petitioners and to realize the amount of interest and cost awarded under this order from such officer(s)/ employee(s) as the case may be.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2009

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail No. 26985 of 2009.

Smt. Munni ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri V.M. Zaidi
Sri S.M.G. Asghar

Counsel for the Opposite Party:
Sri Kameshwar Singh
A.G.A.

Code of Criminal Procedure Section 439-Bail-offence under Section 498-A, 304-B-readwith ¾ Dowry Prohibition Act-un natural death within 7 years from marriage-deceased was expelled out from her in laws application house applicant is Jethani-No specific roll assigned plea of alibi-High Court had already directed to be considered as the time of Trail-husband of applicant being class I Officer under his influence twice final report submitted without proper investigation-three anti mortem injuries-for fair Trail-not entitled for bail.

Held: Para 6

Considering the facts, circumstances of the case, submission made by learned counsel for the applicant, learned A.G.A. and learned counsel for the complainant and from the perusal of the record it appears that it is case in which without doing the proper investigation, the final report was submitted by the I.O., the same has been rejected by the learned Magistrate concerned, the death of the deceased has taken place within 7 years of her marriage, it was unnatural death, the deceased has sustained 3 ante mortem injuries, to ensure the fair trial and without expressing any opinion on the merits of the case, the applicant is not entitled for bail. The prayer for bail is refused.

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

1. Heard Sri V.M. Zaidi, Senior Counsel, assisted by Sri S.M.Asghar, learned counsel for the applicant, learned A.G.A. for the State, Sri Kameshwar Singh, learned counsel appearing on behalf of the complainant and perused the record.

2. This bail application has been moved by the applicant Smt. Munni with a prayer that she may be released on bail in case crime No. 247 of 2005 under

sections 498A, 304-B I.P.C. and section ¾ Dowry Prohibition Act, Police Station Surajpur, District Gautam Budh Nagar.

3. The facts, in brief, of this case are that the FIR has been lodged by Harpal Singh on 14.10.2005 at 5.00 a.m. in respect of the incident which had occurred on 13.10.2005. It is alleged that the marriage of the deceased Munesh was solemnized on 30.6.2001 with the co-accused Mukesh, from their wedlock, a female child was born, on the day of incident, she was aged about 3 years. The in-laws of the deceased were not satisfied with the dowry given in the marriage, they were demanding a car, on account of non-fulfilment of the dowry, the deceased was expelled from her house, she resided at the house of the first informant for many months, thereafter, a panchayat was arranged in which the applicant and other co-accused persons asked to fulfil the demand of dowry, any how, they were pressurised to keep the deceased at their house, thereafter, the deceased was subjected to cruelty. On 13.10.2005 at about 2.00 p.m., the uncle of the first informant namely Bijendra Singh, Raj Singh and Anil went to meet the deceased at her residence, they saw that the deceased was lying on her bed in a bad condition, she disclosed that poison was forcibly administered to her by her husband Mukesh, co-accused Veer Singh, applicant Munni and co-accused Shimla, she asked to bring the hospital, thereafter, she was taken to Naveen Hospital, Greater Noida from where she was referred to Fortes Hospital where she died during treatment. According to the post mortem examination report, the deceased has sustained 3 ante mortem injuries, the cause of death could not be ascertained, hence viscera was preserved. The applicant applied for bail before the Sessions Judge, Gautam Budh Nagar, the same was rejected on 7.9.2009.

4. It is contended by learned counsel for the applicant that the applicant is jethani of the deceased, she was having no concern with the demand of dowry and she was having no concern with the family affairs of the deceased, the allegation regarding demand of dowry and subjecting the deceased to the cruelty is absolutely false and baseless, the husband of the deceased is a class -1 officer, he is Deputy Commissioner, Trade Tax, he was posted at Moradabad, the applicant along with her minor daughter was living with her husband at Moradabad, she was living separately with the deceased and her husband, she was not living at Noida where the alleged occurrence had taken place. The matter initially investigated by the local police, who collected the evidence of separate living, it was found that on the day of alleged incident, she was in Assam but the investigation was transferred to CB-CID who recorded the statement of Dr. Amit Saxena of Naveen Hospital who stated that the deceased was brought by Nitin Bhati in the hospital where she admitted on 13.10.2005 at 2.45 p.m. it was told by Nitin Bhati that the deceased had taken white powder at that time no injury was seen on her person. At that time she was conscious, she was referred to the Fortis Hospital, Noida, the viscera was sent to Forensic Science Laboratory for its examination, the report dated 16.4.2006 shows that poison was not found in the viscera. There is no evidence that the deceased was subjected to cruelty by the applicant and other co-accused persons. The parents of the applicant are resident of Assam State, the applicant visited the

house of her parent on the eve of Durga Pooja, the husband of the applicant has also applied for station leave and casual leave to visit Assam on 7.10.2005, they travelled on 8.10.2005 in North East Express from Aligarh to Rangia Station (Assam) where she lived upto 16.10.2005 at her parental house. The husband of the applicant get the information regarding the death of the deceased on 13.10.2009. On 14.10.2005, the applicant came to know that she had been the main accused in the present case, the I.O. has collected the evidence regarding plea of alibi taken by husband of the applicant Veer Singh, the calls detail have also been collected by the I.O. showing that the applicant and her husband were in Assam. Thereafter, the final report dated 23.10.2006 was submitted by the I.O. mentioning therein that the applicant and other co-accused were falsely implicated whereas the deceased had committed suicide but the final report submitted by the I.O. was protested by the first informant. Considering the same, the learned magistrate concerned rejected the final report and directed for further investigation. After further investigation also, the final report was submitted but the learned magistrate concerned has rejected the final report without any proper reason and summoned the applicant to face the trial. The applicant is in jail since 3.9.2009, she is an innocent lady, she may be released on bail.

5. In reply of the above contention, it is submitted by learned A.G.A. and learned counsel appearing on behalf the complainant that in this case, the deceased has been killed by the applicant and other co-accused persons by administering the poison forcibly. According to the post mortem examination report, the deceased had sustained 3 ante mortem injuries in which injury no. 1 was abrasion on the left arm, injury no.2 was contusion over the left side neck and injury no.3 was radish contusion on chest. It shows that the force was used in administering the poison. On the same day she was admitted in Naveen Hospital, the statement of Dr. Amit Saxena was recorded, who stated that the deceased had taken white powder. In final diagnosis of Naveen Hospital, the case of poisoning has been clearly mentioned. The husband of the applicant is very powerful person, he is Deputy Commissioner, Trade Tax since very beginning, he was influencing the investigation, he successfully obtained the report of Public Analyst that no poison was found in the viscera, the same was objected, the remaining part of the viscera was again sent to Vidhi Vigyan Prayog Shala, Uttar Pradesh, Lucknow but the report dated 10.5.2007 of Joint Director shows that in the said sample, no tissue was sent, only 5 mg. dirty liquid was sent. It shows that the influence of the husband of the applicant was working every where. It is also surprising that in this case due to influence of the applicant and her family members, the I.O. submitted the final report, the same was rejected by learned Magistrate concerned and order for further investigation was passed, even then the final report was submitted, after further investigation, the same has been rejected by the learned CJM Gautam Budh Nagar on 23.10.2007 and summoned the applicant and other co-accused to face the trial. The order of the trial court dated 23.10.2007 has been challenged by the applicant and other co-accused Veer Singh, Smt. Shimla before this court by way of filing Criminal Misc. Application No. 1887 of 2008, the order dated 23.10.2007 was affirmed by this

Court and application filed by the applicant and other co-accused persons was disposed of. So far as the plea of alibi is concerned, the same may be taken at the time of the trial. In this case the death of the deceased has occurred within 7 years of marriage of the deceased, the death was unnatural, therefore, the applicant may not be released on bail.

6. Considering the facts, circumstances of the case, submission made by learned counsel for the applicant, learned A.G.A. and learned counsel for the complainant and from the perusal of the record it appears that it is case in which without doing the proper investigation, the final report was submitted by the I.O., the same has been rejected by the learned Magistrate concerned, the death of the deceased has taken place within 7 years of her marriage, it was unnatural death, the deceased has sustained 3 ante mortem injuries, to ensure the fair trial and without expressing any opinion on the merits of the case, the applicant is not entitled for bail. The prayer for bail is refused.

Accordingly this application is rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 73502 of 2005

Nabi Jan Qureshi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi

Counsel for the Respondents:
Sri R.N. Yadav
Sri P.K. Pandey
S.C.

(A) U.P. Nagar Palika Centerlised Service Rules, 1968 (as amended in 2004)-Rule 73 (3)-suspension of executive officer-order passed as per dictation of superior authority without application of mind not sustainable.

(B) Words and Phrauges-misconduct-Petitioner working as executive officer-during inspection, Commissioner noticed-non supply of drinking water, sanitation, sewage and drainage arrangements-can be treated as inefficiency but can not be termed as misconduct suspension order wholly unwarranted.

Held: Para 12 & 16

The responsibility of Executive Officer is to carry out the functions as per policy decision taken by elected representative of the local body. Unless there is material to so that the writ petitioner in a particular manner was to act or omit but he defied and failed to do so, it cannot be said that some deficiency in observing certain statutory functions of the local body would per se constitute misconduct

Thus an act does not amount to misconduct on the part of the concerned employee unless it could be shown that he is guilty of acting or omitting his duty deliberately which he is otherwise liable to perform. Hence also, I do not find that any departmental inquiry could have been initiated against the petitioner on the allegations as contained in the impugned order of suspension. In my view, for this reason also, the writ petition deserves to sustain.

(C) Constitution of India Article 226- Prolong Suspension-without serving charge sheet-without appointing Enquiry Officer-not sustainable.

Held: Para 11

The statutory power conferred upon the disciplinary authority to keep an employee under suspension during contemplation or pending disciplinary enquiry cannot thus be interpreted in a manner so as to confer an arbitrary, unguided and absolute power to keep an employee under suspension without enquiry for unlimited period or by prolonging enquiry unreasonably, particularly when the delinquent employee is not responsible for such delay. Therefore, I am clearly of the opinion that a suspension, if prolonged unreasonably without holding any enquiry or by prolonging the enquiry itself, is penal in nature and cannot be sustained.

Case law discussed:

2006(3) ESC 1755, 2004 (3) UPLBEC 2934, AIR 1979 SC 1022, (1992) 4 SCC 54, Writ Petition No. 39528 of 2006 decided on 29.11.2007.

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

1. Counter affidavit has already been filed in this case by the respondents.

2. Heard Sri Anoop Trivedi for the petitioner and learned Standing Counsel for the respondents. Sri Trivedi does not propose to file any rejoinder affidavit. As requested and agreed by the learned counsel for the parties this Court proceeds to hear and decide the matter finally under the Rules of the Court.

3. The present writ petition has been filed challenging the order of suspension dated 30.6.2005 passed by respondent no.2, the Director, Local Bodies, U.P., Lucknow placing the petitioner under suspension. It appears that the petitioner was working as Executive Officer, Nagarpalika Parishad Puranpur, Pilibhit at the relevant time when the impugned order of suspension was passed. There was a visit by Commissioner, Bareilly Division of the aforesaid Nagarpalika Parishad wherein he found mismanagement regarding supply of drinking water, cleaning, sewer and drainage arrangements for which he held the Executive Officer, i.e., the petitioner prima facie responsible and sent his report to the Government pursuant whereto a letter dated 27.6.2005 issued by the State Government directing respondent no.2 to place petitioner under suspension and hold departmental inquiry against him. Pursuant thereto respondent no.2 has passed the impugned order.

4. It is contended by learned counsel for the petitioner that respondent no.2, the disciplinary authority has passed the impugned order not on his own application of mind but under the dictates of respondent no.1 and, therefore, there is no independent application of mind by respondent no.2. It is further contended that the allegations upon which the impugned order of suspension has been passed do not amount to misconduct inasmuch as, it says that there was deficiency in supply of pure drinking water, cleaning, sewer and drainage arrangement which at the best may result or show lack of efficiency of the petitioner in functioning but in the absence of anything more, would not constitute "misconduct' on the part of the petitioner warranting any disciplinary action whatsoever. Hence he could not have been placed under suspension in exercise of powers under Rule 37(3) of

U.P. Nagar Palika (Centralised Service) Rules, 1968 as amended in 2004. He lastly contended that till date no chargesheet was served upon the petitioner and no departmental inquiry at all has seen the light of the day which itself shows that the impugned order of suspension is punitive since neither any departmental inquiry is contemplated nor pending pursuant whereto the impugned order of suspension has been passed, hence it is liable to be set aside.

5. Learned Standing Counsel relying on the counter affidavit submitted that the Commissioner, Bareilly Division, Bareilly made a spot inspection with respect to the matter of drinking water, sanitation, sewage and drainage arrangements of the aforesaid Nagarpalika Parishad and found the above aspects being maintained very poorly for which he found the petitioner guilty and recommended for his suspension pursuant whereto the State Government sent a letter dated 27.6.2005 recommending suspension of the petitioner and make departmental inquiry against him pursuant whereto the impugned order of suspension has been passed and, therefore, it is correct.

6. The counter affidavit has been filed on 23.1.2008 but there is no whisper about the stage of departmental inquiry as to whether any chargesheet has been served upon the petitioner and inquiry proceeded further or not.

7. Having considered the rival submissions of the parties and perused the record, in my view, the petition deserves to be allowed.

8. A bare perusal of the impugned order shows that it has been passed by observing that the departmental proceedings are being initiated against the petitioner but in the absence of issuance of any chargesheet even after four years, it cannot be said that any departmental inquiry was in contemplation when the impugned order was passed. It is no doubt true that the order of suspension pending contemplated inquiry or during pendency of inquiry by itself is not a punishment but where no inquiry is initiated at all for years together and the employee continues under suspension, such a suspension cannot be said to be non-punitive. By efflux of time and otherwise such a suspension becomes punitive. It also affects the reputation of the employee concerned amongst own colleagues, society etc. This Court has considered this aspect in **Ayodhya Rai and others Vs. State of U.P. and others 2006(3) ESC 1755** wherein it has been held as under:

"The questions deal with the prolonged agony and mental torture of an employee under suspension where inquiry either has not commended or proceed with snail pace. This is a different angle of the matter, which is equally important and needs careful consideration. A suspension during contemplation of departmental inquiry or pendency thereof by itself is not a punishment but is resorted to by the competent authority to enquire into the allegations levelled against the employee giving him an opportunity of participation to find out whether the allegations are correct or not. In case, allegations are not found correct, the employee is reinstated without any loss towards salary, etc., and in case the charges are proved, the disciplinary authority passes such order as provided under law. However, keeping an employee under suspension, either

without holding any enquiry, or by prolonging the enquiry is unreasonable and is neither just nor in larger public interest. A prolonged suspension by itself is penal. Similarly an order of suspension at the initial stage may be valid fulfilling all the requirements of law but may become penal or unlawful with the passage of time, if the disciplinary inquiry is unreasonably prolonged or no inquiry is initiated at all without there being any fault or obstruction on the part of the delinquent employee. No person can be kept under suspension for indefinite period since during the period of suspension he is not paid full salary. He is also denied the enjoyment of status and therefore admittedly it has some adverse effect in respect of his status, life style and reputation in Society. A person under suspension is looked with suspicion in the Society by the persons with whom he meets in his normal discharge of function."

9. A Division Bench of this Court in **Gajendra Singh Vs. High Court of Judicature at Allahabad- 2004 (3) UPLBEC 2934** also observed as under-

"We need not forget that when a Government officer is placed under suspension, he is looked with suspicious eyes not only by his collogues and friends but by public at large too."

10. Disapproving unreasonable prolonged suspension, the Apex Court has also observed in **Public Service Tribunal Bar Association Vs. State of U.P. & others- 2003 (1) UPLBEC 780 (S.C.)** as under-

"if a suspension continues for indefinite period or the order of suspension passed is mala fide, then it would be open to the employee to challenge the same by approaching the High Court under Article 226 of the Constitution." . . . . (Para 26).

11. The statutory power conferred upon the disciplinary authority to keep an employee under suspension during contemplation or pending disciplinary enquiry cannot thus be interpreted in a manner so as to confer an arbitrary, unguided and absolute power to keep an employee under suspension without enquiry for unlimited period or by prolonging enquiry unreasonably, particularly when the delinquent employee is not responsible for such delay. Therefore, I am clearly of the opinion that a suspension, if prolonged unreasonably without holding any enquiry or by prolonging the enquiry itself, is penal in nature and cannot be sustained.

12. Besides even the allegations pursuant whereto the impugned order of suspension has been passed, assuming the same to be correct, in absence of anything further, I find that the same cannot be read as constituting misconduct entitling the respondents to hold departmental enquiry. The mismanagement in supply of drinking water, sewer, drainage arrangements etc. which are the statutory functions of a local body are matters to be condemned by one and all but the same by itself can not be said to be a misconduct of an Executive Officer who alone is not responsible for such functions. The responsibility of Executive Officer is to carry out the functions as per policy decision taken by elected representative of the local body. Unless there is material to so that the writ petitioner in a particular manner was to

act or omit but he defied and failed to do so, it cannot be said that some deficiency in observing certain statutory functions of the local body would per se constitute misconduct

13. Learned Standing Counsel also could not show as to how and in what manner it was the sole responsibility of the petitioner to take steps for removal or effective arrangements in respect to the above matters. Failure to perform in a better or satisfactory manner may reflect upon the efficiency of the employee concerned but is not a misconduct as held by the Apex Court in **Union of India Vs. J. Ahmed, AIR 1979 SC 1022**, wherein, explaining the term 'misconduct' the Hon'ble Court held as under :

"It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the contest of disciplinary proceedings entailing penalty." (para 10)

"Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pearce v. Foster) (1988) 17 QBD 536 (at p.542). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspaper)]. (1959) 1 WLR 698. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Supdt., Central Railway, Nagpur Divn., Nagpur, 61 Bom LR 1596: (AIR 1961 Bom 150) and Satubha K. Vaghela v. Moosa Razaf, (1969) 10 Guj LR 23. The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under:-

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

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Management, Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik, (1966) 2 SCR 434: (AIR 1966 SC 1051), in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In S. Govinda Menon v. Union of India, (1967) 2 SCR 566: (AIR 1967 SC 1274), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H. Kalyani v. Air France, Calcutta, (1964) 2 SCR 104: (AIR 1963 SC 1756), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office

would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar (examples) instances of which (are) a railway cabinman signalling in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intraveious injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashing causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co.-op. Department Stores Ltd., (1978) 19 Guj LR 108 at p.120). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty." (para 11)

14. Again in the case of **State of Punjab and others vs. Ram Singh Ex-Constable, (1992) 4 SCC 54** the Hon'ble Apex Court has held as under:-

"Thus it could be seen that the word "misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order." (para 6)

15. The same view has been taken by this Court also in **Civil Misc. Writ Petition No. 39528 of 2006 (Dhirendra Singh Vs. The Collector, Kanpur Dehat, and another)** decided on 29.11.2007.

16. Thus an act does not amount to misconduct on the part of the concerned employee unless it could be shown that he is guilty of acting or omitting his duty deliberately which he is otherwise liable to perform. Hence also, I do not find that any departmental inquiry could have been initiated against the petitioner on the

allegations as contained in the impugned order of suspension. In my view, for this reason also, the writ petition deserves to sustain.

17. In the result, the writ petition succeeds and is allowed. The impugned order of suspension dated 30.6.2005 passed by respondent no.2 is hereby quashed. The petitioner shall be entitled to all consequential benefits. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2009

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

Civil Misc. Writ Petition No. 53992 of 2009

Jagmohan Shukla ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Upadhyaya

Counsel for the Respondents:
Sri Pradeep Kumar
C.S.C.

U.P. Intermediate Education Act, 1921-Section 16 E(10)-Power of Review-petitioner was regularized as lecturer by the Board on 21.12.1994-Joint Director revised by order dated 24.09.2009-No allegation of fraud or concealment of facts on part of petitioner-wholly without jurisdiction-except Director-Joint Director has no role to play after 19 years.

Held: Para 18

Learned counsel for the Committee of Management and the learned counsel for the respondent no. 5 have urged that it was not open to the petitioner to question the regularisation of the respondent nos. 5 and 6, inasmuch as, the Regional Joint Director of Education has no power to review the same as there was no fraud or misrepresentation and secondly even if the regularisation order was infirm on any count, then the same could have set aside only by the Director of Education under Section 16-E(10) or their removal could have been given effect to through an approval by the U.P. Secondary Education Services Selection Board. This argument need not detain this Court, inasmuch as, while considering the case of the petitioner on the question of regularisation herein above, it has been held that the Regional Joint Director of Education has no power to review the regularisation order of the petitioner, and as such, similarly on the same reasoning the said authority had no power to review the claim of regularisation of the respondent nos. 5 and 6, which was not obtained by any fraud or misrepresentation.

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

1. The dispute relates to the regularisation of the petitioner as a Lecturer in Mathematics and his seniority in that cadre as against the respondent nos. 5 and 6. The provisions governing the dispute are contained in the U.P. Secondary Education Services Selection Board Act, 1982 and the U.P. Intermediate Education Act, 1921.

2. This writ petition has been filed questioning the order dated 24.09.2009 whereby the Regional Joint Director of Education has annulled the regularisation of the petitioner, which was granted on 21.12.1994. The other order under challenge is dated 6th October, 2009, whereby the seniority has been determined between the petitioner and the respondent nos. 5 and 6.

3. Shri Ramesh Upadhyaya, learned counsel for the petitioner contends that the order dated 24.09.2009 has been passed without there being any occasion to do so and further the same is without jurisdiction as the regularisation order dated 21.12.1994 could not have been annulled by way of a review by the Regional Joint Director of Education nor the Joint Director of Education could have cancelled the appointment as such power, according to the petitioner, is possessed with the Director of Education under Section 16-E(10) of the U.P. Intermediate Education Act, 1921. Shri Upadhyaya contends that the petitioner once having been regularised under the provisions of the statutes is an employee in a substantive capacity and therefore cancellation of his appointment does not fall within the jurisdiction of the Regional Joint Director of Education.

4. So far as, the question of seniority is concerned, Shri Upadhyaya contends that the petitioner was appointed on 1st October, 1989 in an ad hoc capacity and his appointment was also approved by the District Inspector of Schools, as such he will be deemed to be senior than the respondent nos. 5 and 6.

5. Counter affidavits have been filed on behalf of the respondent nos. 4 and 5 and the learned standing counsel for the respondent nos. 1, 2 and 3.

6. The impugned order dated 24.09.2009 has been supported by the learned counsel for the respondents contending that the petitioner's regularisation could not have been granted in view of the fact that Section 33-B of the U.P. Secondary Education Selection Board, 1982 was not attracted.

7. Shri B.P. Singh, learned Senior Counsel and Shri Pradeep Kumar for the respondent-Committee of Management contend that Section 33-B was introduced w.e.f. 7th August, 1993 and in view of the provisions of the said section, the petitioner could not have claimed either regularisation in service or any claim of substantive appointment prior to his actual regularisation under the said section. They urge that the procedure provided therein is that the selection has to be processed under Section 33-B where after the Management has to appoint the concerned candidate and it is from the date of such appointment that the candidate will be presumed to have been appointed in substantive capacity. Shri Singh contends that the petitioner was admittedly considered for such appointment under the order of the Competent Authority dated 21st December, 1994 and therefore there is no occasion for the petitioner to claim his substantive appointment prior to that date.

8. Learned standing counsel and Shri Uma Nath Pandey, learned counsel for the respondent no. 5 also adopted the same argument and urged that the claim of the petitioner has to be assessed on the strength of the provisions of Section 33-B which clearly lay down that the date of appointment of the petitioner would be the date as noticed hereinabove.

9. Having heard learned counsel for the parties, the question that arises for determination is as to whether the petitioner could have been regularised or not. The petitioner was appointed in an ad hoc capacity and his regularisation could have been considered only in terms of U.P. Act No. 1 of 1993, which was enforced w.e.f. 7th August, 1993. The date

of enforcement of the Act is therefore clear and the claim of the petitioner cannot precede the said date. Apart from this, the procedure provided under Section 33-B is amply clear, which narrates that each region there shall be a Selection Committee and the claim for a person for regularisation shall be processed by the said Selection Committee where after the appointment will be offered in a substantive capacity.

10. In the instant case, it is undisputed that the petitioner was considered by the Selection Committee and the said consideration crystallized into the order dated 21.12.1994. Accordingly, he petitioner cannot claim any substantive appointment prior to 21.12.1994. This Court is therefore of the opinion that the petitioner stood regularised under the order dated 21.12.1994.

11. The impugned order dated 24.09.2009 proceeds on the presumption that the petitioner could not have been regularised as the post against which he had been appointed on ad hoc basis became substantively vacant on 16.08.1994 upon the regularisation of Shri Man Mohan Singh Chaturvedi. The aforesaid reasoning does not appear to be correct in law, inasmuch as, Shri Man Mohan Singh was appointed on ad hoc basis as a Principal on 1st July, 1985. He was regularised in his services as a Principal and such regularisation is permissible in terms of Section 33-A (1-C). However, this Court need not go into that, inasmuch as, treating the post to have become vacant in the substantive capacity, the services of the petitioner have been regularised by the Authority on 21.12.1994 itself.

12. There was no fraud or misrepresentation relating to the fact of claim of regularisation of the petitioner.

13. In this view of the matter, the Regional Joint Director of Education was not empowered to review the same, inasmuch as, it is only on the limited ground of fraud or misrepresentation that such review was permissible. The Court is supported in its view by two Division Bench decisions in the case of Havaldar Singh Vs. U.P. Shiksha Nideshak, VII Mandal, Gorakhpur and others 1976 AWC 123 and in the case of Radhey Shyam Chaube Vs. The District Inspector of Schools, Jaunpur and others 1978 AWC 40.

14. In the absence of any such jurisdiction to review the regularisation order of the petitioner, in my opinion, the impugned order is in excess of jurisdiction to that extent. The order dated 24.09.2009, insofar as, it annuls the regularisation of the petitioner cannot be sustained and is accordingly quashed. The resolution of the Committee of Management to that effect is also set aside as the same Management itself had proposed the promotion of the petitioner and it therefore was estopped from reviewing its earlier decision. Even otherwise the Committee had no power to sit in appeal over the regularisation order passed by the authorities.

15. Apart from this, once the petitioner was continuing, having been substantively appointed under Section 33-B of the 1982 Act, he could not have been removed by the Committee except on an approval by the Selection board under Section 21 of the 1982 Act or by an order of the Director of Education under

Section 16-E (10) of the 1921 Act. In this view of the matter also, the Joint Director has travelled beyond the powers prescribed under the Statute as such the action is unsustainable on that score as well.

16. The dispute relating to seniority between the petitioner and the respondent nos. 5 and 6 was sought to be agitated by the petitioner by questioning the regularisation of the said respondent nos. 5 and 6 as being against law. As a matter of fact, the petitioner who was sailing in the same boat, sought to dislodge the seniority by questioning the regularisation of the respondent nos. 5 and 6 and for this the petitioner filed a Civil Misc. Writ Petition No. 37282 of 2009, which was disposed of on 28th July, 2009. A copy of the said judgment has been filed as annexure 15 to the writ petition. The petitioner was given the liberty to ventilate his grievances through a representation before the Regional Joint Director of Education whereupon the said authority proceeded to examine the claim of the petitioner as well.

17. Shri Ramesh Upadhyaya, learned counsel for the petitioner contends that the dispute of seniority required determination in the light of the fact that the regularisation of the respondent nos. 5 and 6 was illegal and consequently if their regularisation is found to be against law their claim to substantive appointment will fall through and the petitioner would automatically become senior. The said dispute relating to seniority has been decided by the authority under the order dated 06.10.2009, which has been challenged in the present petition through an amendment application, which was allowed on 21.10.2009.

18. Learned counsel for the Committee of Management and the learned counsel for the respondent no. 5 have urged that it was not open to the petitioner to question the regularisation of the respondent nos. 5 and 6, inasmuch as, the Regional Joint Director of Education has no power to review the same as there was no fraud or misrepresentation and secondly even if the regularisation order was infirm on any count, then the same could have set aside only by the Director of Education under Section 16-E(10) or their removal could have been given effect to through an approval by the U.P. Secondary Education Services Selection Board. This argument need not detain this Court, inasmuch as, while considering the case of the petitioner on the question of regularisation herein above, it has been held that the Regional Joint Director of Education has no power to review the regularisation order of the petitioner, and as such, similarly on the same reasoning the said authority had no power to review the claim of regularisation of the respondent nos. 5 and 6, which was not obtained by any fraud or misrepresentation.

19. The respondent no. 5 was appointed as a lecturer of Commerce on ad hoc basis, which was approved on 30.11.1988. The said approval was cancelled on 02.01.1990. During the pendency of the said writ petition, the claim of the respondent no. 5 was examined for regularisation and the same was extended in his favour vide order dated 27.10.1994. After the said regularisation order had been passed a statement was made on behalf of the said

respondent in Writ Petition No. 1157 of 1990 that in view of the order of regularisation passed in his favour the writ petition be consigned to records. Taking notice of the said facts, this Court dismissed the writ petition as infructuous on 28.09.2004. A copy of the said order has been brought on record through the counter affidavit filed on behalf of the respondent no. 5. It is further evident that the respondent no. 5 stood regularised and the dismissal of the writ petition as infructuous was coupled by noticing the fact that the services had been regularised.

20. In this view of the matter, the question of regularisation of the respondent no. 5 stood foreclosed. Thus there was no occasion to review the regularisation of the respondent no. 5. However, the order of the Joint Director of Education in relation to the respondent no. 5 that the said regularisation would take effect under Section 33-B of the Act appears to be justified as he could not have been given the benefit of regularisation under Section 33-A. However no final opinion is expressed thereon as the regularisation of the respondent no. 5 is still in jeopardy in Special Appeal No. 1603 of 2004, which is stated to be pending at the instance of one Shri R.N. Sharma.

21. So far as, the respondent no. 6 is concerned, it is evident from the records that he was regularised w.e.f. 29.05.1992. In view of this, the regularisation of the respondent also cannot be now reopened after 17 years at the behest of the petitioner, who has been given the benefit of regularisation under the order dated 21.12.1994.

22. The order dated 6th October, 2009 however incorrectly records the reason for placing the petitioner to be junior namely that the regularisation order has been cancelled. To that extent the order dated 06.10.2009 is erroneous.

23. Accordingly, the order dated 06.10.2009 is set aside to the aforesaid extent and the Regional Joint Director of Education shall pass orders in the light of the observations made hereinabove within a period of 6 weeks from the date of presentation of a certified copy of this order before the said respondent and after perusing the respective contentions of the parties.

24. The writ petition is allowed subject to the directions contained hereinabove.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2009

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE PANKAJ MITHAL, J.

Special Appeal No. 1967 of 2009

Committee of Management, Rashtreey Uchhatar Madhyamik Vidyalay, Rudauli, Auraiya and another ...Appellants

Versus

Sri Ram Babu Dwivedi and others ...Respondents

Counsel for the Appellants:
Shri H.R. Mishra
Sri Uma Nath Pandey

Counsel for the Respondents:
Shri M.D. Singh 'Shekhar'
Sri D.P. Mishra
C.S.C.

Constitution of India Article 226-Practice and Procedure-interim order without disclosing any reason-not soundful practice-although recording exhaustive reason not required but it must appear in face of order itself-interim order passed by Single Judge set-a side-with liberty to pass fresh interim order if required.

Held: Para 12 & 13

In view of the decisions of this Court, referred to above, there is no escape from the conclusion that while passing an interim order, the Court is required to indicate the reason, which weighed with it while granting the interim relief, the reason may not be exhaustive and may be basic or short, but it must appear in the face of the order.

When tested on the anvil of the aforesaid pronouncements of this Court, we find that the learned Single Judge while passing the interim order, as reproduced above, has not recorded any reason, whatsoever, at all.

(Delivered by Hon'ble C.K. Prasad, C.J.)

1. Respondents 3 and 4 - appellants, aggrieved by order dated 17.11.2009 passed by a learned Single Judge in Civil Misc. Writ Petition No. 57084 of 2009, have preferred this appeal under Rule 5 Chapter VIII of the Allahabad High Court Rules, 1952.

2. The order impugned is interim in nature. It reads as follows:-

"Till next date of listing the effect and operation of the impugned order dated 17.8.2009 passed by the Deputy Registrar (Firms, Societies and Chits), Kanpur Region, Kanpur shall remain stayed and the consequential elections held on 3.9.2009 shall be kept in abeyance."

3. Mr. H.R. Mishra, Senior Advocate, appearing on behalf of the appellants, submits that in view of the inter se finding between the parties in Special Appeal No. 1486 of 2008, the writ petition itself was not maintainable and, hence, the learned Single Judge ought not to have passed any order.

4. However, Mr. M.D. Singh 'Shekhar', appearing on behalf of writ petitioners, respondents 1 to 3 herein, submits that the writ petition is maintainable and the learned Single Judge did not err in passing the interim order.

5. Expression of any opinion by us at this stage shall prejudice either party and, therefore, we are not inclined to go into the submissions advanced by the counsel for the parties in this regard.

6. Mr. Mishra, then, submits that the learned Single Judge, while passing the impugned order, has not indicated any reason.

7. Mr. Shekhar, in answer thereto, submits that the reasons do exist, but mere its non-mentioning in the impugned order shall not vitiate the same.

8. Ordinarily, this Court in special appeal does not interfere with an interim order, but it is not a rule of law.

9. True it is that no detailed reason is required to be given while granting interim relief. However, what weighs with the learned Judge while granting the interim relief needs to be briefly indicated. A Division Bench of this Court had the occasion to consider this question in the case of Union of India & Anr. Vs. Rama Dental College & Anr., 2006 (10)

ADJ 7, in which it has been held as follows:-

"2. We find that the impugned order is a very short one, and does not contain any reasons. It is essential that some reasons, however basic or however short, be given even while passing an interim order. This prevents the order from being criticised as arbitrary, and also gives the Court of appeal essential information as to what was uppermost in the mind of the first Court in the first place. An order becomes legally infirm, it is supposed to contain reasons and yet it does not. On the basis of this legal infirmity, the impugned order under appeal is set aside. Although we have heard parties at some length, yet we have not entered into the merits of the case in any final way, and are not in a position to make any pronouncement in that regard."

10. Yet, another decision in which this question fell for consideration is the Division Bench decision of this Court in the case of Committee of Management Vs. District Inspector of Schools, Deoria & Ors., 2007 (3) ADJ 119, in which on a review of earlier decision on the issue, it was held as follows:-

"5. We, therefore, in the absence of any reason in the order for grant of such interim relief are not inclined to accept the contention of Sri I.R. Singh, learned Counsel for the petitioner-respondents. Since the order under appeal does not contain any reason whatsoever, in view of the aforesaid exposition of law the order under appeal cannot sustain and therefore, set aside. However, since the matter is fixed on 8.1.2007 i.e. Monday next before the Hon'ble Single Judge, we hope that the Hon'ble Single Judge will hear the application for interim relief again and thereafter pass the order, or the Hon'ble Single Judge may decide the writ petition itself on merit subject to other business of the Court. With the above observations this special appeal stands disposed of."

11. Further, this question pointedly came up for consideration before a Division Bench of this Court in the case of Kuldeep Kumar Tripathi Vs. Rang Bahadur & Ors., (2008) 2 UPLBEC 1971, in which it has been held as follows:-

"22. A perusal of the impugned order indicates that in passing the order staying the effect of the motion no reason was recorded by the learned Single Judge. Learned Counsel for the respondents submitted that unless the motion was not signed by more than half of the members, no meeting could have been convened by the District Magistrate. Learned Single Judge while passing order has not recorded any reason for such grant. This Court as well as the Apex Court time and again has laid down that in granting an interim order reasons are necessary to be recorded [See 2006 (10) ADJ 7, Union of Vs. Rama Dental College.]"

12. In view of the decisions of this Court, referred to above, there is no escape from the conclusion that while passing an interim order, the Court is required to indicate the reason, which weighed with it while granting the interim relief, the reason may not be exhaustive and may be basic or short, but it must appear in the face of the order.

13. When tested on the anvil of the aforesaid pronouncements of this Court, we find that the learned Single Judge while passing the interim order, as

reproduced above, has not recorded any reason, whatsoever, at all.

14. In that view of the matter, we are left with no option than to set aside the order impugned.

15. Accordingly, we set aside the impugned order passed by the learned Single Judge.

16. As we have set aside the impugned order passed by the learned Single Judge on the aforesaid ground alone, nothing shall prevent the learned Judge from passing fresh order bearing in mind the observations aforesaid.

17. The petition shall be listed on 4th January, 2010 as directed by the learned Single Judge in the impugned order.

18. In the result, the appeal is allowed and the impugned order passed by the learned Single Judge is set aside with the observation aforesaid.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2009

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

Civil Misc. Writ Petition No. 56761 of 2008

Smt. Reena Devi ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri M.R. Khan
Sri Rajendra Prasad
Sri V.K. Mishra

Counsel for the Respondents:
Sri Anuj Kumar
Sri Ramesh Kumar
C.S.C.

Constitution of India Article 226-Cancellation of Appointment-petitioner was appointed as Shiksha Mitra-on long term observe of R-6-Gaon Sabha passed resolution in favour of petitioner she continually worked and renewal of her tenure also given by order dated 22.7.2008-by impugned order dated 15.10.2008 the B.S.A. reviewed its earlier order behind the back of petitioner-held-the appointment of R-6 was confined for 11 month only-No provision of long period of leave-B.S.A. acted beyond its jurisdiction apart from order passed in utter violation of principle of Natural Justice-not sustainable.

Held: Para 6

It is, therefore, evident that the respondent no.6 was absent for more than a year and the entire tenure of a Shiksha Mitra in a session is 11 months. Accordingly, the order passed by the Basic Education Officer on 22nd July, 2008 was in accordance with the said government order. It did not require any review at his hand. The order dated 15.10.2008 proceeds on an erroneous assumption and is untenable in the eyes of law. Even otherwise also it has been passed in violation of principles of natural justice.

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

1. The petitioner claims that she was selected and appointed as Shiksha Mitra against the post which had fallen vacant on account of the absence of Smt. Gyanti Devi, respondent no.6. The petitioner contends that since Smt. Gyanti Devi was absent for more than a year, the Village Education Committee had passed a

resolution in her favour. A letter of appointment was issued on 29.9.2007. After having been appointed the petitioner claims that she was performing her duties and renewal of her appointment was also resolved by the Committee on 10.5.2008.

It is urged that in these circumstances there was no occasion to allow respondent no.6 to come back and rejoin her post after such a long absence. The claim of respondent no.6 was rejected by the Basic Education Officer on 22nd July, 2008 (a copy of the said order is Annexure-13 to the writ petition).

It appears that the matter was sought to be reviewed at the instance of respondent no.6 and the Basic Education Officer reviewed the earlier order on 15.10.2008 which is under challenge in this petition.

2. Learned counsel for the petitioner contends that, firstly, the Basic Education Officer has no power to review his earlier order and, secondly, the long absence of respondent no.6 was neither permissible nor could be condoned by the the Basic Education Officer. It is provided in the government order dated 15.6.2007 that maternity leave can be sanctioned only for three months at a time and that too even for two child biths only. Learned counsel contends that the aforesaid provision was not even applicable in the present case. Even otherwise, there was no other provision under which the respondent no.6 could have sought leave and abandoned her teaching job as Shiksha Mitra.

The matter was entertained and an interim order was granted but the same was vacated on the ground that the caveator was not informed inspite of a caveat application having been filed. Learned counsel contends thereafter affidavits have been exchanged and it is evident that the impugned order had been passed without notice or opportunity to the petitioner and without having any power to review the same.

3. A counter affidavit has been filed on behalf of respondent no.6 in which it has been asserted that the selection of the petitioner was not in accordance with Rules and as a matter of fact there was no valid resolution in her favour on the basis whereof she performed her duties as Shiksha Mitra. A rejoinder Affidavit denying the said allegations has been filed. Learned counsel for the petitioner further informs that the learned counsel for the respondent no.6 has been informed in writing that the matter is unlisted and is running in this Court in the computer list from 2.12.2009. Inspite of the aforesaid knowledge learned counsel for the respondent no.6 is not present.

4. I have heard learned counsel for the petitioner, learned counsel for Gaon Samaj and learned Standing Counsel for the State Authorities.

5. The contention raised is that the Government Order dated 15.6.2007 does not extend any benefit of leave of the nature which has been impliedly sanctioned in favour of respondent no.6. The aforesaid claim appears to be correct. The government order does not empower the authorities to condone the absence beyond what has been provided for in the government order. The respondent no.6 according to the impugned order itself was absent from 1.11.2005 till 25.2.2007.

6. It is, therefore, evident that the respondent no.6 was absent for more than a year and the entire tenure of a Shiksha Mitra in a session is 11 months. Accordingly, the order passed by the Basic Education Officer on 22nd July, 2008 was in accordance with the said government order. It did not require any review at his hand. The order dated 15.10.2008 proceeds on an erroneous assumption and is untenable in the eyes of law. Even otherwise also it has been passed in violation of principles of natural justice.

7. The writ petition is, therefore, allowed and the order dated 15.10.2008 is set-aside. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2009

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 64215 of 2009

M/s. Mahabir Jute Mills Ltd.
...Defendant/Petitioner
Versus
Additional District Judge, Gorakhpur and others ...Plaintiffs/Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
Sri Ashish Agarwal
Sri A.K. Gupta

U.P. Zamindari and Land Reform Act-Section 3 (14)-Nature of land-agricultural land-lease for running factory in the year 1950-on non payment of premium Civil Suit before Civil Court up to Second Appeal finalized between the parties-now objection so long the user of land is not declared otherwise under provisions of law it will remain agricultural land-held-misconceived-even subsequent suit is barred by principle of res-judicate.

Held: Para 7

The revisional court has recorded a categorical finding that in the land a factory and buildings have been constructed and it is no more land. It ceases to be the land prior to the commencement of the U.P.Z.A. & L.R. Act and, therefore, the provision of the U.P.Z.A. & L.R. Act does not apply and in the circumstances the revisional court has rightly held that the nature of the property was not the land for agricultural purposes and, therefore, there was no question of referring the matter to the revenue court for deciding the nature of the land.

Case law discussed:
1971 R.D. 160, 1992 R.D. 258 (S.C.).

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

1. The present writ petition is directed against the order of the Additional District Judge, Court No. 8, Gorakhpur, dated 8.9.2009, passed in Civil Revision No. 158 of 2008, filed against the order of the Civil Judge (Jr. Divn.), Gorakhpur, dated 10.1.1996.

2. The brief facts of the case are that the plaintiff-respondents filed a Suit No. 94 of 1988 claiming relief for the decree of possession over the property in dispute. The defendant-petitioner filed a written statement in the year 1995. The trial court has framed 12 issues, out of which issue no. 8 was framed as a preliminary issue to the effect as to whether the court has jurisdiction to try the suit. When the trial court proceeded to decide issue no. 8, referred herein above, it was felt that it is necessary to decide whether the property

in dispute is the land as defined under Section 3(14) of the U.P. Zamindari Abolition and Land Reforms Act (called the U.P.Z.A. & L.R. Act' only) because the same could not be decided by the civil court and could only be decided by the revenue court. The trial court, vide order dated 10.1.1996, instead of deciding issue no. 8, framed a fresh issue no. 13 to the effect that as to whether the land in suit is the land as defined under Section 3 (14) of the U.P.Z.A. & L.R. Act and referred the matter to the Assistant Collector, Gorakhpur, for giving the finding in this regard and it has been observed that issue no. 8 will be decided after receipt of finding on issue no. 13. Against the said order, the respondents filed revision on 9.11.2001 along with an application under Section 5 of the Limitation Act, which was registered as Case No. 499 of 2001. The case was transferred to the Additional District Judge, Court No. 11, Gorakhpur, for disposal. The petitioner filed a detailed objection against the application under Section 5 of the Limitation Act. The Additional District Judge allowed the application and condoned the delay, vide order dated 2.8.2008 and sent back the record to the District Judge, Gorakhpur, for hearing on admission. On receipt of the record, the case has been registered as Civil Revision No. 158 of 1988 in the court of District Judge, Gorakhpur, and the hearing for admission was fixed. The said revision has been admitted on 12.1.2009 after hearing both the parties. After admission the revision was listed for hearing on merit. The said revision was again transferred to the court of Additional District Judge, Gorakhpur, for hearing and disposal.

3. The Additional District Judge has allowed the revision, vide impugned order dated 8.9.2009 and set aside the order dated 10.1.1996. The revisional court has held that the nature of the property was not land, inasmuch as the building of the factory has been constructed. It is further held that the Allahabad High Court in a proceeding relating to the eviction and recovery of arrears of land revenue has held that the property in dispute consists of mill and buildings and its nature is not land and, therefore, there was no question of referring the matter to the revenue court for decision.

Being aggrieved by the order the petitioner filed the present writ petition.

4. Heard Sri Arvind Srivastava, learned counsel for the petitioner and Sri A.K. Gupta, learned counsel, appearing on behalf of the respondents.

5. Learned counsel for the petitioner submitted that the revision itself was not maintainable against the order dated 10.1.1996 as by the said order the case has not been decided. He further submitted that the land was recorded as agricultural land in a revenue record and unless a declaration is made under Section 143 of the U.P.Z.A. & L.R. Act changing the land use, it continues to be agricultural land and to adjudicate the issue it was necessary to consider whether the nature of the property is the land as defined under the U.P.Z.A. & L.R. Act and the trial court has rightly referred the matter to the revenue court for the decision. He submitted that the revisional court has not considered whether the revision against the order dated 10.1.1996 is maintainable or not. In respect of the contention he relied upon the decision of this Court in the case of ***Alauddin alias Makki v. Hamir Khan*** reported in 1971 R.D. 160

and the case of ***Chandrika Singh & others v. Raja Vishwanath Pratap Singh & another*** reported in 1992 R.D. 258 (S.C.).

6. Sri A.K. Gupta, learned counsel for the respondents, submitted that the property has been leased out on 15.2.1935 for manufacturing purposes. He submitted that when the suit was filed for eviction and arrears of rent, a dispute has been raised by the present petitioner that the civil court had no jurisdiction to entertain the suit as the land was for agricultural purposes. The plea of the petitioner has been rejected in the suit. The first appeal filed by the petitioner has been rejected and thereafter the petitioner filed Second Appeal No. 302 of 1953 before this Court. This Court, vide order dated 7.1.1964, has rejected the plea of the petitioner. The said order has become final between the parties and, therefore, it was not open to the petitioner to raise the same plea in the present suit. He further submitted that at no stage the petitioner has raised any plea that the revision against the order dated 10.1.1996 is not maintainable. The petitioner has been heard at the stage of admission and at the stage of final hearing of the revision. In both the stages this plea has not been taken. This plea has also not been taken in the memorandum of revision and, therefore, it is not open to the petitioner to raise such plea and the same cannot be entertained. He submitted that the nature of the property ceases to be land in the year 1935 itself prior to the commencement of the U.P.Z.A. & L.R. Act and, therefore, the provision of the U.P.Z.A. & L.R. Act does not apply.

7. Having heard learned counsel for the parties, I have considered the rival submissions and perused the impugned order. I do not find substance in the argument of learned counsel for the petitioner. It is not in dispute that the property in dispute has been given on lease on 15.2.1935 for manufacturing purposes and it authorised the petitioner to put up a mill or a factory on a land, if so desired. On the said land the factory and the building was constructed. When the rent was not paid for the period from January, 1950 to 15.1.1951, the suit was filed in the year 1951. In the suit it was pleaded by the petitioner that the suit was not maintainable as the nature of the property was agricultural land and the civil court has no jurisdiction to entertain the suit. Such plea has been rejected by the trial court, in the first appeal and in the second appeal by this Court. This Court in the order dated 7.1.1964 has observed that the land was leased out for manufacturing purposes and the land in dispute was not "land" as the lease was obviously not for agricultural purposes, the suit was properly filed in the civil court. The order of this Court is between the same parties and, therefore, binding upon the petitioner. In the circumstances, it is not open to the petitioner to raise the same plea, viz. that the suit is not maintainable as the property in dispute is the land for agricultural purposes. The revisional court has recorded a categorical finding that in the land a factory and buildings have been constructed and it is no more land. It ceases to be the land prior to the commencement of the U.P.Z.A. & L.R. Act and, therefore, the provision of the U.P.Z.A. & L.R. Act does not apply and in the circumstances the revisional court has rightly held that the nature of the property was not the land for agricultural purposes and, therefore, there was no question of referring the

matter to the revenue court for deciding the nature of the land.

8. So far as the question of maintainability is concerned, I find that no ground has been taken in the memorandum of revision in this regard. The petitioner has not taken this plea at the time of admission of the revision and even at the time of hearing of the revision and, therefore, such plea cannot be entertained at this belated stage and is, accordingly, rejected.

9. For the reasons stated above, I do not find any merit in this writ petition. In the result the writ petition fails and is dismissed. However, the trial court is directed to decide the suit preferably within one year from the date of presentation of a certified copy this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2009

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE KASHI NATH PANDEY, J.

Civil Misc. Writ Petition No. 32682 of 2009

Union of India and others ...Petitioners
Versus
Ishwari Narayan Singh ...Respondent

Counsel for the Petitioner:
Sri Ashok Nigam (Addl. Solicitor General)
Sri K.C. Sinha (Asstt. Solicitor General)
Sri Rakesh Sinha
Sri Ajay Bhanot

Counsel for the Respondents:
Sri Avnish Tripathi

(A) Central Civil Services (Classification Control & Appeal Rules 1965-Rule 10(1)-(6)-Review of suspension order-prior to expiry of the period of 90 days-held-mandatory-period of 90 days will count from the date of release on from the date of communication of release-date of release is 6.7.2005 90 day expired on 5.10.2005-Committee reviewed the suspension on 5.9.2005-well within time suspension order requires no interference-Tribunal committed wrong by setting a-side the same.

Held: Para 19 & 23

In view of the foregoing discussions, we are satisfied that requirement of review within 90 days as required by sub-rule (6) and the provisions that the suspension order shall not be valid after a period of 90 days unless it is extended for a further period before expiry of 90 days, clearly makes the requirement of review mandatory and in breach of which the suspension becomes invalid.

From the papers brought on record, it is clear that suspension dated 21.12.2004 was required to be reviewed within 90 days i.e. before 21.3.2005 which was not done. Suspension thus, in view of what we have said above, became invalid after 21.3.2005.

Case law discussed:
(1995) 1 UPLBEC 460, (2003) 6 SCC 516, 2006 (3) Administrative Total Judgments 11, AIR 1957 S.C. 917, 2001 (6) SCC, (1994) 1 Supreme Court Cases 754.

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

1. Heard Dr. Ashok Nigam, learned Additional Solicitor General of India, assisted by Sri Ajay Bhanot for the petitioners and Sri Avnish Tripathi, learned counsel appearing for the respondent.

2. Counter and rejoinder affidavits having been exchanged between the parties, with the consent of the learned

counsel for the parties, the writ petition is being finally decided.

3. By means of present writ petition, the Union of India has challenged the order dated 6.3.2009 of the Central Administrative Tribunal allowing the original Application No. 1561 of 2008 filed by Ishwari Narayan Singh challenging his suspension order dated 21.1.2004 as well as the order dated 9.9.2005, rejecting the representation of the respondent for revocation of his suspension order.

4. Brief facts necessary for deciding the issues raised in the writ petition are that; the respondent, while was working as Sub Post Master at Teliabagh, Post Office West Division, Varanasi, complaints were received in October, 2004 that at Sub Post Office, Teliabagh there was embezzlement of crores of rupees. The Sub Post Master, Kashi Vidyapith wrote a letter to the higher authorities on 3.12.2009, making serious allegations. An order dated 3.12.2004 was passed by the Superintending of Post Office West Division, Varanasi placing the petitioner under suspension in exercise of power under sub-rule (1) of Rule 10 of Central Civil Services (Classification, Control & Appeal) Rules, 1965 (hereinafter referred to as '1965 Rules') in contemplation of disciplinary inquiry. The Director, Postal Services, Allahabad Region sent a letter to the DIG, CBI requesting for lodging a first information report and to inquire into a fraud case committed at Teliabagh post office, Varanasi. The CBI conducted an investigation and lodged a first information report on 4.3.2005 under section 120 read with section 409 I.P.C and Sections 13(2), 13(i) of Prevention of Corruption Act, 1988. The respondent was also arrested by the CBI on 6.4.2005 and was released on bail by order of Special judge, Anti-Corruption Act, Lucknow dated 6.7.2005. A chargesheet dated 31.8.2005 was issued to the respondent, which could be delivered on 13.9.2005. The respondent after being released from detention on 6.7.2005, appears to have submitted a representation on 20.7.2005 against the suspension order. Again he submitted a further representation for revocation of suspension on 22.8.2005. The representation dated 22.8.2005 of the respondent was rejected. The Review Committee met on 5.9.2005 to review the suspension of the respondent and took the view that the suspension continue in view of the CBI inquiry being continuing, letter dated 9.9.2005 was sent to the petitioner informing continuance of his suspension by Superintendent of Post Office, West Division Varanasi. Another letter dated 8.9.2009 was sent to the petitioner by Post Master General, Allahabad informing that his representation dated 22.8.2005 has been rejected and the review Committee decided to continue the suspension. The respondent filed an Original Application under section 19 of the Administrative Tribunals Act, 1985 before the Central Administrative Tribunal, Allahabad praying for following reliefs.

"In view of the facts and reasons mentioned in paragraph no. 4 above, it is therefore, most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to grant the following reliefs:-

(i) to issue an order, rule or direction for quashing and setting aside the impugned order dated 21.12.2004 passed by the respondent no. 3 placing the

applicant under suspension (Annexure No. A-1 in compilation No. Part I).
(ii) to issue an order, rule or direction for quashing and setting aside the impugned order dated 9.9.2005 passed by the respondent no. 2 communicated by the respondent no. 3 rejecting the representation /appeal of the applicant for revocation of suspension order passed by the respondent No. 3 (Annexure No. A-2 in compilation no. and Part i).
(iii) to issue an order, rule, or direction in the nature of mandamus directing the respondent no. 5 to revoke the suspension of the applicant and reinstate him on his post.
(iv) to issue any other order, rule or direction as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case."

5. A counter affidavit was filed by the petitioner refuting the claim of the respondent. It was stated by the petitioner that the respondent was suspended on the allegation of misappropriation of huge amount of sale proceeds of Kisan Vikas Patra and N.S.C. by the respondent. It was further stated that representation of the respondent for revocation of suspension was rejected and decision was intimated to him vide letter dated 9.9.2005. It was stated that chargesheet had already been served and departmental inquiry was proceeding. It was also stated that the suspension of the respondent was required to be extended as such it was reviewed regularly by the competent authority from time to time.

6. The Tribunal vide its judgment and order dated 6.3.2009 allowed the application quashing the suspension order dated 21.12.2004 and order dated 9.9.2005 (rejecting the request of the respondent for revocation of the suspension). The petitioners have come up in this Court challenging the order of the Tribunal dated 6.3.2009. The Tribunal gave the following reasons for quashing the suspension order in paragraph 10 of the judgment:

(i) The order of suspension passed against the respondents has not at all been reviewed by the competent authority before expiry of the 90 days and as such the same should be treated as null and void.

(ii) The reason assigned by the Superintendent of Post Offices, West Division, Varanasi for non holding review, in its order dated 9.9.2005, is also wholly non speaking and cryptic. A perusal of the letter clearly indicates that there is no mention as to when the review had taken place.

(iii) Under Rule it is clearly provided that extension of suspension shall not be for a period extending 180 days at a time.

(iv) "As discussed above, first review has been prescribed to be undertaken at the end of three months from the date of suspension which has not at all been done in the present case. It is also seen from the record that the suspension order has been passed without taking any follow up action either to complete the departmental/CBI enquiry and the applicant has been put under suspension for indefinite period."

7. Dr. Ashok Nigam, Additional Solicitor General of India challenging the order of Central Administrative Tribunal dated 6.3.2009 has made following submissions:

(i) The sub-rule (6) and sub-rule (7) of Rule 10 of 1965 Rules which require review by the authority concerned before expiry of 90 days from the effective date of susension, is not mandatory and is directory. The intendent of rule is only to impress the authorities that review of suspension be done within the time limit and failure to review within 90 days does not vitiate the suspension.

(ii) The review of the suspension having been made after expiry of 90 days deciding to continue the suspension the suspension shall revive in view of the law laid down by the Full Bench of this Court in **Chandra Bhushan Misra Vs. District Inspector of Schools, Deoria and others (1995) 1 UPLBEC 460**.

(iii) There being serious allegations of misappropriation against the respondent and a first information report having already been lodged by the CBI as well as departmental inquiry having been under process, the Tribunal erred in setting aside the suspension order.

8. Sri Avnish Tripathi, learned counsel for the respondent refuting the submissions of learned counsel for the petitioner contended that the requirement of review of suspension within 90 days under sub Rule (6) and (7) of Rule 10 of 1965 Rule is mandatory and non review of such suspension within 90 days would invalidate the suspension. It is contended that no details of the review were brought on record before the Tribunal and the application dated 6.3.2009 and the affidavit dated 5.3.2009 filed in support thereof which have been filed along with writ petition as Annexure-11 to the writ petition, were never filed before the Tribunal. There being no details of the review of the suspension, the Tribunal was not obliged to consider the submission, which are now sought to be raised before this Court.

9. Learned Counsel for the parties placed reliance on several judgments of this Court as well as of the apex court in support of their submissions, which shall be referred to, while considering their submissions in details.

10. The first issue which has arisen in this case is as to whether the requirement of review of suspension order within 90 days from the effective date of suspension, is a mandatory requirement or a directory. For appreciating the above submission, it is necessary to consider the reason for bringing the amendments in the rule by which sub Rules (6) and (7) were added in Rule 10 of 1965 Rules. Rule 10 of 1965 Rules before its amendment was as follows:

"Rule 10. Suspension.- (1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authorities empowered in that behalf by the President, by general or special order, may place a Government servant under suspension-

(a) where a disciplinary proceeding against him is contemplated or is pending; or
(aa) where, in the opinion of the authority aforesaid, he has engaged himself in activities prejudicial to the interest of the security of the State; or
(b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial :

Provided that, except in the case of an order of suspension made by the Comptroller and Auditor-General in regard to a member of the Indian Audit and Accounts Services and in regard to an Assistant Accountant-General or equivalent (other than a regular member of the Indian Audit and Accounts Services), where the order of suspension is made by an authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made.

(2) A Government servant shall be deemed to have been placed under suspension by an order of appointing authority-
(a) with effect from the date of his detention, if he is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty eight hours;
(b) with effect from the date of his conviction, if, in the event of a conviction for an offence, he is sentenced to a term of imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed or compulsorily retired consequent to such conviction.

EXPLANATION *- The period of forty-eight hours referred to in clause (b) of this sub-rule shall be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment, if any, shall be taken into account.*
(3) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant under suspension is set aside in appeal or on review under these rules and the case is remitted for further inquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force on and from the date of the original order of dismissal, removal or compulsory retirement and shall remain in force until further orders.

(4) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of Law and the disciplinary authority. On a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the Appointing Authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders :

Provided that no such further inquiry shall be ordered unless it is intended to meet a situation where the Court has passed an order purely on technical grounds without going into the merits of the case.

(5)(a) An order of suspension made or deemed to have been made under this rule shall continue to remain in force until it is modified or revoked by the authority competent to do so.

5(b) Where a Government servant is suspended or is deemed to have been suspended (whether in connection with any disciplinary proceeding or otherwise), and any other disciplinary

proceeding is commenced against him during the continuance of that suspension, the authority competent to place him under suspension may, for reasons to be recorded by him in writing, direct that the Government servant shall continue to be under suspension until the termination of all or any of such proceedings.
5(c) An order of suspension made or deemed to have been made under this rule may at any time be modified or revoked by the authority which made or is deemed to have made the order or by any authority to which that authority is subordinate."

11. In context of unamended rule, the question of interpretation of Rule 10(2) which provided for deemed suspension of a Government servant, came for consideration before the apex Court in (2003) 6 SCC 516 **Union of India Vs. Rajiv Kumar**. In the said case, the government servant was arrested on 26.3.1998 and was released on bail on 2.4.1998. It was contended for the employee that after release of the government servant, the deemed suspension under rule 10(2) automatically came to an end. Rule 10(5) (a) also fell for consideration which provided that an order of suspension made or deemed to have been made shall continue to remain in force until it is modified or revoked by the authority competent to do so. The apex Court in the said judgment considered Rules of statutory interpretation and laid down following in paragraph 15:

"Thus, it is clear that the order of suspension does not lose its efficacy and is not automatically terminated the moment the detention comes to an end and the person is set at large. It could be modified and revoked by another order as envisaged under Rule 10(5)(c) and until that order is made, the same continues by the operation of Rule 10(5)(a) and the employee has no right to be reinstated to service. This position was also highlighted in Balvantrai Ratilal Patel v. State of Maharashtra (AIR 1968 SC 880). Indication of expression "pending further order" in the order of suspension was the basis for aforesaid view."

12. The apex Court took the view that suspension does not lose its efficacy the movement detention comes to an end and until an order is passed under Rule 10(5) (c), the suspension continues. The apex Court in the said judgment held that Court cannot read anything into a statutory provision or rewrite a provision which is plain and unambiguous.

13. It appears that after the aforesaid judgment, the Government decided to amend Rule 10. Rule 10 was amended by O.M. dated 19.3.2004 by adding Sub rule (6) and (7) which are quoted as below:

"(6) An order of suspension made or deemed to have been made under this rule shall be reviewed by the authority competent to modify or revoke the suspension, before expiry of ninety days from the effective date of suspension, on the recommendation of the Review Committee constituted for the purpose and pass orders either extending or revoking the suspension. Subsequent reviews shall be made before expiry of the extended period of suspension. Extension of suspension shall not be for a period exceeding one hundred and eighty days at a time.

(7) An order of suspension made or deemed to have been made under sub-rules (1) or (2) of this rule shall not be valid after a period of ninety days unless it is extended after review, for a further period before the expiry of ninety days:

Provided that no such review of suspension shall be necessary in the case of deemed suspension under sub-rule (2), if the Government servant continues to be under suspension at the time of completion of ninety days of suspension and the ninety days period in such case will count from the date the Government servant detained in custody is released from detention or the date on which the fact of his release from detention is intimated to his appointing authority, whichever is later."

14. The clear intendment of the amendment in Rule 10 by adding Sub-rules (6) and (7) was to limit the suspension order or a deemed suspension order for a fixed period and to necessitate review of such suspension within 90 days of the suspension with a further requirement that suspension could not by one stretch be continued for more than 180 days. The apex Court in **Union of India Vs. Rajiv Kumar** (supra), while considering the same Rule 10 laid down following principles for interpretation of Statutes. Paragraphs 18,19,22,23 and 24 being relevant are quoted as below:

*"**18.** It is well settled principle in law that the Court cannot read anything into a statutory provision or rewrite a provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute or any statutory provision is the determinative factor of legislative intent of policy makers.*

***19.** Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute or any statutory provision is to ascertain the intention of the Legislature or the Authority enacting it. (See Institute of Chartered Accountants of India v. M/s. Price Waterhouse and another (AIR 1998 SC 74)). The intention of the maker is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner (1846 (6) Moore PC 1), Courts, cannot aid the Legislatures, defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (Also See The State of Gujarat and others v. Dilipbhai Nathjibhai Patel and another (1998 (2) JT (SC) 253)). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See Stock v. Frank Jones (Liptan) Ltd. (1978) 1 All ER 948 (HL). Rules of interpretation do not permit Courts to do so, unless the provisions as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn L.C. in Vickers Sons and Maxim Ltd. v. Evans, quoted in Jamma Masjid, Mercara v. Kodimaniandra Deyiah)"*

22. *While interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Commissioner of Sales Tax, M.P. v. Popular Trading Company, Ujjain (2000 (5) SCC 515). The legislative casus omissus cannot be supplied by judicial interpretative process.*

23. *Two principles of construction - one relating to casus omissus and the other in regard to reading the statute/statutory provision as a whole - appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. But, at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danackwerts, L.J. in Artemiou v. Procopiou (All ER p. 544), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. (Per Lord Reid in Luke v. IRC where at p. 577 he also observed: "this is not a new problem, though our standard of drafting is such that it rarely emerges".*

24. *It is then true that, "when the words of a law extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is casus omissus, and that the law intended quae frequentius accidunt."*

"But, on the other hand, it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom" (See Fanton v. Hampton).

A casus omissus ought not to be created by interpretation, save in some case of strong necessity. Where, however, a casus omissus does really occur, either through the inadvertence of the legislature, or on the principle quod semel) aut bis existit proetereunt legislatores, the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute - Casus omissus et oblivioni datus dispositioni communis juris relinquitur; "a casus omissus," observed Buller, J. in Jones v. Smart (ER p.967), "can in no case be supplied by a Court of law, for that would be to make laws."

15. Learned counsel for the respondent has also placed reliance on a Full Bench judgment of Central Administrative Tribunal New Delhi

reported in 2006 (3) Administrative Total Judgments 11 **D.R. Rohilla Vs. Union of India & others** in which case amended sub-rule (6) and (7) fell for consideration and the Full Bench of the Tribunal took the view that the suspension, if not reviewed within 90 days, shall become invalid.

16. The object and purpose of amending Rule 10 by adding sub rules (6) and (7) is apparent from the Rule itself. Sub-rule (6) uses the words *"shall be reviewed by the authority competent to modify or revoke the suspension before expiry of ninety days"*. Further sub Rule (7) lays down that an order of suspension "*shall not be valid after a period of ninety days unless it is extended after review, for a further period before the expiry of ninety days*" .

The use of word "shall" raises a presumption that a particular provision is imperative as laid down by the apex Court in AIR 1957 S.C. 917 **State of U.P. Vs. Manbodhan Lal Srivastava**. A perusal of the above rule indicates that sub rule (6) provides review before expiry of 90 days from the suspension and sub rule (7) provides the consequence of not being reviewed within 90 days. The apex Court on 2001 (6) SCC **Rajesekhar Gogoi Vs. State of Assam** laid down that consequence of nullification or failure to apply within a prescribed requirement provided by Statute there can be no manner of doubt that such statutory requirement must be interpreted as mandatory. Following was laid down by the apex Court in paragraph 11:

"....We do not agree with the observations of the High Court that Rule 206 is not mandatory. The language of the said rule is clear and unambiguous. It not only says that the tenders must be in their required Form but also stipulates the consequences of non compliance thereto, the consequence being that the tenders not containing all the particulars 'shall be liable to be rejected.'"

17. The submission of Dr. Ashok Nigam, learned Additional Solicitor General of India is that requirement of review within 90 days is to be taken only as directory since the only intendment of Rule was to impress the authority to carry on review within 90 days. Reliance has been placed by learned counsel for the petitioner on the judgment of the apex Court in (1994) 1 Supreme Court Cases 754 **T.V. Usman Vs. Food Inspector, Tellicherry Municipality**. In the said case, Rule 7(3) of Prevention of Food Adulteration Rule came up for consideration which required sending of the report within period of 45 days. The apex Court laid down following in paragraphs 11 and 12:

"***11***. *In Rule 7(3) no doubt the expression "shall" is used but it must be borne in mind that the Rule deals with stages prior to launching the prosecution and it is also clear that by the date of receipt of the report of the Public Analyst the case is not yet instituted in the court and it is only on the basis of this report of the Public Analyst that the concerned authority has to take a decision whether to institute a prosecution or not. There is no time limit prescribed within which the prosecution has to be instituted and when there is no such limit prescribed then there is no valid reason for holding the period of 45 days as mandatory. Of course that does not mean that the Public Analyst can ignore the time limit*

prescribed under the Rules. He must in all cases try to comply with the time limit. But if there is some delay, in a given case, there is no, reason to hold that the very report is void and on that basis to hold that even prosecution cannot be launched. may be, in a given case, if there is inordinate delay, the court may not attach any value to the report but merely because the time limit is prescribed, it cannot be said that even a slight delay would render the report void or inadmissible in law. In this context it must be noted that Rule 7(3) is only a procedural provision meant to speed up the process of investigation on the basis of which the prosecution has to be launched. No doubt, sub-sec. (2) of S. 13 of the Act confers valuable right on the accused under which provision the accused can make an application to the court within a period of 10 days from the receipt of copy of the report of Public Analyst to get the samples of food analysed in the Central Food Laboratory and in case the sample is found by the said Central Food Laboratory unfit for analysis due to decomposition by passage of time or for any other reason attributable to the lapses on the side of prosecution, that valuable right would stand denied. This would constitute prejudice to the accused entitling him to acquittal but mere delay As such will not per se be fatal to the prosecution case even in cases where the sample continues to remain fit for analysis in spite of the delay because the accused is in no way prejudiced on the merits of the case in respect of such delay. Therefore it must be shown that the delay has led to the denial of right conferred u/ S. 13(2) and that depends on the facts of each case and violation of the time limit given in sub-rule (3) of Rule 7 by itself cannot be a ground for the prosecution case being thrown out.

***12**. In this context it is useful to refer to the judgment of this Court in Dalchand v. Municipal Corporation, Bhopal AIR 1983 SC 303 wherein the question was whether Rule 90) of Prevention of Food Adulteration Rules under which report of the public analyst has to be supplied within ten days, is mandatory or directory and it was held as under (para 1):*

"There are no ready tests or invariable formulas to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequence of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non compliance of the provision is necessary to invalidate the act complained of. It is well to remember that quite often many rules, though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit. The negligence of those to whom public duties are entrusted cannot be statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object

of the statute. It is as well to realise that every prescription of a period within which an act must be done, is not the prescription of a period of limitation with painful consequences if the act is not done within that period."

In this view of the matter this Court held that Rule 90(j) is only directory and not mandatory. Regarding the effect of non-compliance of Rule 9(j) it was further held that:

"Where the effect of non-compliance with the rule was such as to wholly deprive the right of the person to challenge the Public Analyst's Report by obtaining the report of the Director of the Central Food Laboratory, there might be just cause for complaint, as prejudice would then be writ large. Where no prejudice was caused there could be no cause for complaint. I am clearly of the view that Rule 9(j) of the Prevention of Food Adulteration Rules was directory and not mandatory."

18. In the present case, the obligation for reviewing the suspension within 90 days, has been placed on the public authority and if it is held that such requirement is only directory, the purpose and object for which the rule was amended shall be defeated and cause prejudice to the person for whose benefit the rule was amended. The judgment of the apex Court in the case of **T.V. Usman** (supra) was in the background of a particular purpose in which the report had to be analysed and was required to be submitted within 45 days. The said case is clearly distinguishable and has no application in the present case.

19. In view of the foregoing discussions, we are satisfied that requirement of review within 90 days as required by sub-rule (6) and the provisions that the suspension order shall not be valid after a period of 90 days unless it is extended for a further period before expiry of 90 days, clearly makes the requirement of review mandatory and in breach of which the suspension becomes invalid.

20. The judgment of Full Bench of this Court in **Chandra Bhushan Misra** (supra) also needs to be considered. In the aforesaid case, Section 16 G (7) of U.P. Intermediate Education Act, 1921 fell for consideration. Section 16-G(7) provides as under:

"16-G (7) No such order of suspension shall, unless approved in writing by the Inspector, remain in force for more than sixty days from the date of commencement of Uttar Pradesh Secondary Education Laws(Amendment) Act, 1975, or as the case may be , from the date of such order, and the order of the Inspector shall be final and shall not be questioned in any Court."

21. The Full Bench judgment considered the statutory provisions which uses different expression i.e. "in force", whereas sub rule (7) of Rule 10 clearly contemplates that suspension shall not be valid after period of 90 days unless it is extended before expiry of 90 days. However, in view of the fact of the present case, we do not consider it necessary to express any concluded opinion on the submission that after review of the suspension even after expiry of 90 days, the suspension revives and continues. In view of the facts of the

present case, it can be decided leaving the above issue.

22. One of the submissions of the learned counsel for the respondent is that the details of the review of suspension was not on the record before the Tribunal hence, Tribunal was not required to consider the review of the submission. It is emphatically submitted that application dated 6.3.2009 supported by affidavit of Kameshwar Prasad Pandey dated 5.3.2009, filed as Annexure-11 to the writ petition was never filed before the Tribunal. Although in the main counter affidavit, no specific denial was made to the filing of the application dated 5.3.2009 but the respondent has subsequently filed an affidavit stating therein that said application and affidavit were not on record before the Tribunal. The petitioner has filed the copy of the order dated 9.9.2009 as Annexure-7 to the writ petition which order was issued by Superintendent Post Office informing the respondent that the review Committee in its meeting dated 5.9.2005 has continued the suspension. The said order dated 9.9.2005 was also challenged before the Tribunal. The decision of the Review Committee dated 5.9.2005 to continue the suspension was communicated to the respondent and the said decision dated 5.9.2005 was also under challenge before the Tribunal. Thus, it cannot be said that review of suspension dated 5.9.2005 was not an issue. In so far as proceedings of the Review Committee which are said to be brought on record before the Tribunal by application dated 6.3.2009, which is being disputed by the respondent, suffice it to say that along with supplementary affidavit dated 18.11.2009, which has been filed in the writ petition all the proceedings from 5.9.2005 till 20.10.1999 has been brought on record which has been looked into and perused by us. As noticed above, the Tribunal held that suspension of the applicant had not been reviewed before expiry of 90 days hence, the same has become null and void. It is further observed by the Tribunal in paragraph 10 that a perusal of the letter dated 9.9.2005 does not indicate any mention of the date when the review had was taken place. We have perused the letters filed as Annexures-7 and 8. Both the letters, which were communication sent to the respondent mentions rejection of the representation dated 22.8.2005 and the date of the review committee which was held on 5.9.2005. Thus, the Tribunal has committed error in observing that no date of the review of suspension has been given.

23. From the papers brought on record, it is clear that suspension dated 21.12.2004 was required to be reviewed within 90 days i.e. before 21.3.2005 which was not done. Suspension thus, in view of what we have said above, became invalid after 21.3.2005.

24. One relevant fact, which escaped notice of the Tribunal is now to be noted. The respondent was arrested by the C.B.I. on 6.4.2005 and was released from detention on 6.7.2005. By virtue of Rule 10(2), the respondent shall be deemed to have been placed under suspension w.e.f. the date of detention, even though earlier suspension dated 21.12.2004 had come to an end. The petitioner according to his own case has submitted representation on 22.7.2005 and thereafter on 22.8.2005 for revocation of suspension. The proviso to sub rule (7) of Rule 10 provides as follows:

"Provided that no such review of suspension shall be necessary in the case of deemed suspension under sub-rule (2), if the Government servant continues to be under suspension at the time of completion of ninety days of suspension and the ninety days period in such case will count from the date the Government servant detained in custody is released from detention or the date on which the fact of his release from detention is intimated to his appointing authority, whichever is later."

25. According to the proviso, the 90 days period in the case of deemed suspension due to detention will count from the date the Government servant is released from detention or from the date on which the fact of his release is intimated, which ever is later. In the present case, the date of the release of the respondent was dated 6.7.2005. Counting 90 days from the date of his detention, the suspension could have been reviewed up to 5.10.2005. The review Committee reviewed the suspension in its meeting dated 5.9.2005, which is clearly mentioned in Annexure-7 to the writ petition. Thus, the letter dated 9.9.2005 communicating the continuance of suspension do not suffer from any error and the Tribunal committed error in quashing the order dated 9.9.2005 by which the respondent was continued under suspension. The order of the Tribunal in so far as it quashes the order dated 9.9.2005 deserves to be and is hereby set aside.

26. The submission has also been made by learned counsel for the respondent that even according to the proceedings of the Review Committee, which has been brought on the record by the respondent, it is not established that the review was made as required by sub rule (6) and (7) of Rule 10 subsequent to 5.9.2005. The issue as to whether the respondent is still continuing under suspension and whether the review was made as per sub-rule (6), (7) of Rule 10 does not fell for consideration before us since the main issue before us is with regard to correctness of the order of the Tribunal by which suspension dated 21.12.2008 and the order 9.9.2005 were quashed. It shall be open for the respondent to represent to the competent authority with regard to his period during which he is to be treated as suspended and as to whether he is still validly continuing under suspension and it is for the competent authority to take appropriate decision thereon.

27. In the result, the writ petition is partly allowed. The order of the Tribunal dated 6.3.2009 insofar as it quashes the order dated 9.9.2005, passed by the Director, Postal Services, Allahabad informing the respondent that his suspension has been continuing, is set aside. The respondent is at liberty to represent to the competent authority with regard to his continuance under suspension and different periods of suspension which may be considered by the competent authority in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 52518 of 2009

Pati Ram Gangwar & another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Asutosh Shukla

Counsel for the Respondents:
C.S.C.

U.P. Temporary Government Servant (Termination of Service) Rules 1975-Rule 1 (3)-Temporary appointment-not confirmed-held- no lien-order itself not punitive in nature-opportunity of hearing or show cause notice not required.

Held: Para 2

I find no substance in the submission. So far as the appointment of the petitioners is concerned, the appointment letter dated 26.8.2008 (Annexure 1 to the writ petition) shows that it was purely a temporary appointment liable to be terminated at any point of time. Whether the appointment is made on a permanent post or temporary post would not be relevant since the nature of appointment of the petitioners is purely 'temporary'. To attract provisions of 1975 Rules, it would be evident from Rule 1(3) that the same shall apply to all the persons holding a civil post in connection with the affairs of Uttar Pradesh and who are under the rule-making control of Governor, but who do not hold a lien on a permanent post under the Government of Uttar Pradesh.

Case law discussed:
AIR 1958 SC 36, AIR 1992 SC 496, JT 1989 (3) SC 430, 2003 (11) SCC 632, W.P. No.21442 of 2002 decided on 26.5.2006, No. 4467 of 1990 decided on 1.12.2006, 2006 (101) RD 675, 1999 (1) UPLBEC 54.

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

1. The petitioners are aggrieved by the order of termination dated 5.9.2009 which has been passed in purported exercise of power under U.P. Temporary Government Servants (Termination of Service) Rules, 1975 (hereinafter referred to as '1975 Rules') and have filed the present writ petition seeking a writ of certiorari for quashing the same. It is submitted that though initially the petitioners were sought to be appointed temporarily but before issuance of the order of appointment, the posts became permanent, therefore, the appointment of the petitioners must be deemed to be 'substantive' and 'permanent' and 1975 Rules would not apply to their case and, hence, the impugned order is illegal.

2. I find no substance in the submission. So far as the appointment of the petitioners is concerned, the appointment letter dated 26.8.2008 (Annexure 1 to the writ petition) shows that it was purely a temporary appointment liable to be terminated at any point of time. Whether the appointment is made on a permanent post or temporary post would not be relevant since the nature of appointment of the petitioners is purely 'temporary'. To attract provisions of 1975 Rules, it would be evident from Rule 1(3) that the same shall apply to all the persons holding a civil post in connection with the affairs of Uttar Pradesh and who are under the rule-making control of Governor, but who do not hold a lien on a permanent post under the Government of Uttar Pradesh.

3. In **Purshotam Lal Dhingra Vs. Union of India AIR 1958 SC 36**, the Apex Court said that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. It was also held that a Government Servant holding a post 'temporarily' has no right to hold the said post. The same thing was reiterated in **Triveni Shankar Saxena Vs. State of U.P. AIR 1992 SC 496.**

4. The word "lien" has been defined by the Apex Court in **Ram Lal Khurana Vs. State of Punjab & others JT 1989 (3) SC 430** as under:

"Lien is not a word of art. It just connotes the right of a civil servant to hold the post substantively to which he is appointed. Generally when a person with a lien against a post is appointed substantively to another post, he acquires a lien against the latter post. Then the lien against his previous post automatically disappears. It is a well accepted principle of service jurisprudence that no Government servant can have simultaneously two liens against two posts in two different cadres."

5. In **Ali M.K. & others Vs. State of Kerala & others 2003 (11) SCC 632** again the Apex Court held that it is well settled position of law that a persons can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier.

6. A Division Bench of this Court in **Civil Misc. Writ Petition No.21442 of 2002 (Raj Nath Ram v. State of U.P. and others)** decided on 26.5.2006, in para 15 and 28 of the judgment held that since the petitioner on the post of Assistant Employment Officer has not been confirmed till he joined the post of Registrar, he cannot be said to hold a lien on the post of Assistant Employment Officer.

7. Following the aforesaid authorities, a Single Judge of this Court (Hon'ble Pankaj Mithal, J.) in **Civil Misc. Writ Petition No. 4467 of 1990 (Aizaz Ahmad Vs. The Principal, Industrial Training Institute, Bulandshahar & others)** decided on 1.12.2006 has taken the same view.

8. Counsel for petitioners, at this stage, sought to argue that it is not the temporary appointment on a permanent post which is included within the term "temporary service" under Rule 2 of 1975 Rules, but it is the officiation on a permanent post which is mentioned therein. A similar argument came to be considered before this Court in **Pushkar Nath Tripathi Vs. State of U.P. & others 2006 (101) RD 675** wherein this Court held :

"Reading the word "officiating" in the light of the above observations as defined under Fundamental Rule 9 (19) would mean that if a person is already appointed to a post on regular basis may officiate on a higher post where some person has a lien, but he may also officiate on a post where no person has a lien but before officiation, the appointment must be in accordance with Rules. In my view, the word "officiate" in the aforesaid Government Order is an appointment made in accordance with rules after following due procedure, the appointment is though not "substantive" or permanent but on officiating basis, i.e, in the nature of a temporary appointment but made in accordance with Rules."

9. In **Kumari Mamta Jauhari Vs. State of U.P. 1999 (1) UPLBEC 54,** a Full Bench of the Court in para 38 of the judgment held:

"A Government servant appointed to hold a post, temporary or substantive, on temporary basis, acquires no right to or lien upon the post."

10. It is thus evident that Rule 1 (3) makes 1975 Rules applicable in the case of the petitioners which is also covered by the terms "temporary service" as defined in Rule 2 of 1975 Rules. I, therefore, find no reason to interfere with the order impugned in the writ petition, which is an order of termination simplicitor showing ex facie no reason to treat the same to be penal and hence there was no requirement of any opportunity or show cause notice before passing the same. I, therefore, do not find any merit in this writ petition. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2009

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 4831 of 2009

Barkhu Ram ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam

Counsel for the Respondents:
S.C.

U.P. Police offers of Subordinate Ranks (Punishment & Appeal) Rules, 1991-Rule 8 (a)(b)-Dismissal Order-dispensing with holding enquiry-without recording reason of satisfaction-do not satisfy the test to exercise such power-order not sustainable.

Held: Para 10

The mere mention of fact that the petitioner would prove to be danger to fellow policemen and public life and property without there being reference of any material in the order for recording such satisfaction and there being nothing in the counter affidavit to demonstrate that the petitioner had become dangerous or caused damage to the property or indulged into any offence against any person or the State, the satisfaction recorded by the Superintendent of Police, Azamgarh for invoking Rule 8(2)(b) of Rules of 1991 and dispensing with the disciplinary inquiry do not satisfy the test of exercise of such power. The order, therefore, suffers from gross error of law and deserves to be set aside.

Case law discussed:
AIR 1985 SC 1416, 2006(1) ESC 374(All) (DB), 2008(3) ADJ 689 (DB), AIR 1991(1) SC 385.

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

1. Heard Sri Vijay Gautam learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The petitioner who is constable in civil police has filed this petition for a writ of certiorari to quash the order dated 20.8.2008 passed by the Superintendent of Police, Azamgarh dismissing him from service exercising powers conferred by Rule 8(2)(b) of the U.P. Police Officers of Sub-ordinate Ranks (Punishment & Appeal) Rules, 1991 (hereinafter referred to as 'Rules of 1991'). Writ of mandamus has also been prayed for to command the respondents to pay all consequential benefits including arrears of salary. The

order of dismissal was passed by the Superintendent of Police dispensing with the departmental inquiry on the ground that it was not reasonably practicable to hold the inquiry for the reason that the petitioner was earlier suspended on the allegation of some scuffle between him and Om prakash on 20.5.2003 and was later on reinstated. He again misbehaved with the clerk and other assistant clerks in the department for which a case was registered against him under Section 352, 504 & 506 I.P.C. read with Section 7 of the Criminal Law Amendment Act and Section 29 of the Police Act and he was arrested and sent to jail. Further allegations are that on 11.5.2007 he misbehaved with the Additional Superintendent of Police and was again suspended and was reinstated on 14.9.2007. On 18.12.2007 he again misbehaved with A.S.I. for which he was awarded a censor entry to be recorded in his service record. It is further stated in the order that on 10.6.2008 he was found wandering in a confused state near the Chief Minister's residence. He was sent for medical examination and was diagnosed to be suffering from mental disease and since he is habitual of misbehaving with other police personnel his retention in public service shall tarnish the image of the police force in the eyes of general public.

3. Learned counsel for the petitioner submitted that the order of dismissal from the service is arbitrary, discriminatory and has been passed in violation of the principle of natural justice. It has further been submitted that no reason has been assigned in the order for dispensing with the departmental inquiry nor there is any material brought on record in the counter affidavit which may go to show it was not reasonably practicable to hold inquiry. It has further been pointed out by learned counsel for the petitioner that the petitioner was admitted in the mental hospital at Varanasi on 17.1.2008 by the respondents authorities and was treated for mental illness and the Visitors Board of the Hospital declared him to be mentally fit on 12.9.2008 and the Director and Chief Superintendent of Mental Hospital Varanasi vide letter dated 7.10.2008 informed the Superintendent of Police, Azamgarh that the petitioner has been declared fit by the Medical Board and has been discharged but the impugned order was passed on 20.8.2008 much before the petitioner was discharged from the hospital.

4. The sole question for consideration in the case is as to whether the order of dismissal fulfills the conditions precedent before passing the order prescribed by the Rules of 1991. The relevant Rule 8 of Rules 1991 reads as under :

*"**8**. Dismissal and removal ? (1) no police officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.*

2. No police officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules :

Provided that this rule shall not apply :

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or
(c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry.

5. The aforesaid Rule (8) is pari materia with Article 311(1) & (2) of the Constitution of India which confers constitutional protection upon a person who is a member of civil service of the Union or the State.

The normal rule is that no punitive action entailing consequences of dismissal, removal or reduction of rank would be taken without holding a disciplinary enquiry against an incumbent unless and until he has been informed of the charges and provided a reasonable opportunity of being heard in respect of those charges. However, the second proviso to the Article 311(2) carves exception in respect of certain cases where holding of departmental inquiry would not be possible may be either due to not being reasonably practicable or holding any disciplinary inquiry is not in the interest of the security of the State.

6. The Hon'ble Apex Court in the case of ***Union of India vs. Tulsiram Patel,*** AIR 1985 SC 1416 while considering the provision of Article 311(2) of the Constitution of India has held that two conditions must be satisfied to sustain any action taken thereunder. These are (1) there must exist a situation which renders holding of an inquiry not reasonably practicable; (2) the disciplinary authority must record in writing the reason in support of its satisfaction. The Hon'ble Apex Court also held that although clause (3) of Article 311 makes the decision of the disciplinary authority final but the same can be tested in a court of law and interfered with if the action is found to be arbitrary, malafide, motivated by extraneous consideration or merely ruse to dispense with the regular departmental inquiry.

7. The exception carved out by proviso to Article 311(2) of the Constitution are embodied in Rule 8(2) of the Rules of 1991 and both are pari materia. Various Division Benches of this Court have followed the aforesaid principle of law laid down by the Hon'ble Apex Court while considering the validity of the orders passed in exercise of powers conferred by Rule 8(2) of Rules of 1991. Reference may be made to the case of ***State of U.P. & others vs. Chandrika Prasad***, 2006(1) ESC 374(All) (DB), ***Pushpendra Singh (CP 2187) and another vs. State of U.P. & others***, 2008(3) ADJ 689 (DB).

8. In the case in hand, after referring various acts and omissions on the part of the petitioner only reason assigned for dispensing with the inquiry is that in case the inquiry is held there may be danger to fellow policemen and public life and property.

9. The words 'reasons to be recorded in writing that it is not reasonably practicable to hold inquiry' implies that there must be some material for satisfaction of the authority that it is not reasonably practicable to hold the inquiry. The decision to dispense with the departmental inquiry not based on

material and solely on the ipse dixit of the concerned authority cannot be sustained. The material on which the subjective satisfaction of the authority is based should either be reflected from the order or be brought on record when such satisfaction of the concerned authority is questioned in a court of law. The Hon'ble Apex Court in the case of ***Jaswant Singh v. State of Punjab***, AIR 1991(1) SC 385 has observed as under:

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

10. The mere mention of fact that the petitioner would prove to be danger to fellow policemen and public life and property without there being reference of any material in the order for recording such satisfaction and there being nothing in the counter affidavit to demonstrate that the petitioner had become dangerous or caused damage to the property or indulged into any offence against any person or the State, the satisfaction recorded by the Superintendent of Police, Azamgarh for invoking Rule 8(2)(b) of Rules of 1991 and dispensing with the disciplinary inquiry do not satisfy the test of exercise of such power. The order, therefore, suffers from gross error of law and deserves to be set aside.

11. The writ petition is allowed. The order dated 20.8.2008 passed by the Superintendent of Police, Azamgarh is set aside.

12. However, liberty is given to the respondent authorities, if they so desire, to hold a departmental inquiry against the petitioner in accordance with the law and the procedure prescribed under the Rules of 1991.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 5512 of 1992

Krishna Chand ...Petitioner
Versus
District Magistrate, Maharajganj and others ...Respondent

Counsel for the Petitioner:
Sri J.P. Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Termination order-passed without holding enquiry without notice in utter violation of principle of Natural justice-initial appointment itself made against the provision of section 19 of Group "D" Employees Service Rules, 1985-No question of granting any indulgence once the very basis of right goes-validity of subsequent order can not be adjudged-as fraud vitiates every thing.

Held: Para 13

In my view once it is evident that the appointment of petitioner was illegal and

fraudulent, no question of indulgence granting any relief to petitioner would arise for the simple reason that fraud vitiates everything. If that is so, question of considering the order cancelling fraudulent order, whether having passed in accordance with law, may not be necessary to be considered since the very basis on which the appointment is claimed by an incumbent is a nullity in the eyes of law and once the very basis of the right of an incumbent goes, the subsequent order passed by the authority of mere declaration of such fraudulent order to be illegal would not confer any life to such fraudulent order if the subsequent order passed by the authority even if found to be not in accordance with law.

Case law discussed:

2009(5) ADJ 563, (1956) 1 All E.R. 855, (1956) 1 QB 702, (1986-90) All E.R. Reporter 1, (1996) 5 SCC 550, (2000) 3 SCC 581, (2002) 1 SCC 100, 2004 (3) SCC 1, (1992) 1 SCC 534.

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

1. Writ petition has been restored to its original number vide order of date passed on restoration application. Since pleadings are complete, as requested by learned counsel for the parties, the writ petition is taken up for hearing and is being disposed of finally.

2. It is contended that the petitioner was appointed on officiating basis by District Development Officer, Maharajganj on 11.12.1991 and was regularised by order dated 13.01.1992 but by means of the impugned order dated 16.01.1992 passed by the District Magistrate, Maharajganj it was directed that all Class-III and Class-IV appointments made in the last six months in the office of District Development Officer shall stand cancelled. It is contended that the impugned order is in utter violation of principle of natural justice and hence is liable to be set aside. It is also stated that the petitioner was appointed pursuant to the recommendation made by selection committee and having been regularised on Class-IV post ought not to have been terminated abruptly by such an order and hence the impugned order is illegal and liable to be set aside. Reliance is placed on a Single Judge judgement of this Court in **Rakesh Kumar Singh and others Vs. District Magistrate, Maharajganj and others, 2009(5) ADJ 563**.

3. The respondents have filed a counter affidavit stating that the recruitment to Class-IV post in the State is governed by the Group "D" Employees Service Rules, 1985 (hereinafter referred to as the "1985 Rules") as amended in 1986. A detail procedure for recruitment is provided in the said Rules but without following the said procedure, in a wholly fraudulent manner, the District Development Officer initiated the proceedings and made such appointments. Actually it so happened that the District Development Officer get an advertisement published in daily newspaper "Dainik Jagran" dated 05.12.1991 for clerical post, i.e., Junior Clerk and Junior Accounts Clerk. Last date for submitting applications provided therein was 07.12.1991 and date of interview was shown as 23rd and 24th December, 1991. The District Magistrate, however, observing that a very short time was given for submitting applications, deferred the interview and allowed receipt of the applications till 30.12.1991 after giving a fresh advertisement in the newspaper by his order dated 19.12.1991. However, subsequently by order dated 21.12.1991 the District Magistrate

cancelled the entire selection proposed in clerical posts. It appears that thereafter a suit was filed being Suit No. 21 of 1992 in the court of Munsif wherein an injunction was granted restraining the respondents from proceeding with the selection and not to make any further selection on the post in question. The District Magistrate accordingly passed an order dated 13.01.1992 restraining the District Development Officer from making any appointment.

4. However, in the case in hand, the District Development Officer without making any advertisement or requisition to the employment exchange, made certain officiating appointments and also on his own passed order for regular appointment without there being any regular selection made in accordance with 1985 Rules. A complain to this effect was received by the District Magistrate. He passed the impugned order particularly considering one more fact that State Government by order dated 17.07.1991 has imposed ban for making any appointment. It is further stated that the petitioner never appeared before any selection committee either on 01.10.1991 or 13.09.1991. Besides, there was no post of Messenger sanctioned nor any advertisement was ever issued and the entire appointment was wholly illegal and fraudulent. It is said that the District Development Officer proceeded wholly illegally and departmental action has been initiated against him.

5. In the rejoinder affidavit the petitioner has reiterated what has been said in the writ petition stating that the selection committee made recommendations of several persons but has not given any detail as to how and in what manner vacancies were advertised, when the selection was made and the details of the constitution of selection committee.

6. Having heard learned counsel for the parties and perusing the record, I find that the petitioner is not entitled for any relief.

7. From the pleadings it is evident that Class-IV post on which the petitioner claims to have been appointed were never advertised. Rule 19 of 1985 Rules provides procedure for selection which reads as under:

***"19. Procedure for Selection**--(1) The appointing authority shall determine the number of vacancies to be filled during the Course of the year as also the number of the vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories. The vacancies shall be notified to the Employment Exchange. The appointing authority may also invite application directly from the persons who have their names registered in the Employment Exchange. For this purpose, the appointing authority shall issue an advertisement in a local daily newspaper besides posting the notice for the same on the notice board. All such applications shall be placed before the Selection Committee.*

(2) When the names both of the general candidates and reserve candidates for whom vacancies are required to be reserved under the orders of the Government have been received by the Selection Committee it shall interview and select the candidates for various posts.

(3) In making selection the Selection Committee shall give weightage to the retrenched employees awarding marks in the following manner:

(i) For the first complete year .. 5 marks

(ii) For the next and every completed year of service .. 5 marks

Provided that the maximum marks awarded to a retrenched employee under this sub-rule shall not exceed 15 marks.

(4) The number of the candidates to be selected will be larger (but not larger by more than 25 per cent) than the number of vacancies for which the selected has been made. The names in the select list shall be arranged according to the marks awarded at the interview."

8. There is nothing on record that the vacancy was ever advertised in the newspaper and any requisition sent to employment exchange. There is also nothing on record to show that any selection committee as provided in 1985 Rules was ever constituted. The petitioner was appointed on purely officiating basis as Messenger (Patravahak) in the scale of Rs.750-940 by order dated 11.12.1991 passed by the District Development Officer with the condition that the same is liable to be terminated at any point of time and the petitioner was posted in Development Block Partawal. Pursuant whereof the petitioner claims to have joined on 12.12.1991. Thereafter the District Development Officer transferred him to Awas Vikas Parishad, Maharajganj by order dated 13.12.1991 pursuant whereof the petitioner claims to have joined on 01.01.1992. The above officiating arrangement claims to be regularised by order dated 13.01.1992 passed by the District Development Officer, Maharajganj allegedly pursuant to the approval of the selection committee. In the entire writ petition there is nothing on record to show as to when the above selection committee made selection and whether the petitioner ever appeared before the selection for interview etc. On the contrary, from para 18 of the rejoinder affidavit it appears to be admitted by the petitioner that there was no question of any advertisement or facing selection committee since the above recommendation was for regularisation and not for making any selection.

9. Even from the judgement relied on by learned counsel for the petitioner it is evident that Hon'ble Single Judge has recorded a finding of fact, after considering entire matter on merits that all appointments made by the District Development Officer were utterly illegal and fraudulent as is evident from the following:

"Accordingly, as held above, on the one hand, all the appointments were utterly illegal and fraudulent; the then D.D.O., Shiv Ram Bhatt made the appointment for extraneous considerations and no rule was followed. Appointments were made in spite of restraint order by the D.M. No interview was held for these posts. Reasonable opportunity to apply was not provided to the general public. Accordingly, all the appointments were illegal."

10. Having said so, the Hon'ble Single Judge thereafter has noticed that since the order of cancellation impugned in the writ petition passed by the District Magistrate does not give a reason as a result whereof the petitioners in that matter were able to get interim order and

continued to work. In these circumstances, His Lordship has observed that the order dated 16.01.1992 is not in accordance with law and disposed of the writ petition with the following directions:

"All the petitioners must be permitted to continue to work on the posts on which they were appointed until they attain the age of superannuation. However they must be paid the salary at the lowest level of the same pay scale on which they were appointed. They must not be entitled for any increment or any revision of pay subsequently affected. Petitioners of the first three writ petitions were appointed in the pay scale Rs.950-1500/-. Accordingly, they must be continued to be paid only the basic pay of Rs.950/- basic without any increment or benefit of revision of pay apart from dearness allowance admissible on Rs.950/- pay. No other allowances shall be given to them. They shall not be entitled for any promotion. If any promotion has already been granted, the same shall stand withdrawn with immediate effect. They shall not be entitled for any retiral benefit apart from the amount which they may have contributed towards provident fund. However, salaries and other benefits paid to the petitioners till date shall not be refundable.

Sri Shiv Ram Bhatt, the then D.D.O. is liable to pay damages of Rs.1 lac for each of the petitioners (total Rs.21 lacs). This amount shall be recovered from him like arrears of land revenue. If he has died, the amount shall be recovered from the property left behind by him. Recovery shall positively be made by the Collector concerned within four months and the amount shall be deposited in the government treasury. The other two members of selection committee are also liable to pay Rs.25,000/- each per petitioner as damages to the State (5.25 lacs each) as they were equal partners in illegal design of D.D.O., Sri Shiv Ram Bhatt. . The said amount shall also be recovered from them in the same manner.

Compliance report shall be filed within six months.

Office is directed to supply a copy of this judgment to learned Chief Standing Counsel within a week."

11. It is not in dispute that against the aforesaid judgement dated 05.05.2009 of the Hon'ble Single Judge, Special Appeal No. (1185) of 2009, State of U.P. and others Vs. Daya Shanker Upadhyay was filed wherein the operation of the judgement dated 05.05.2009 has been stayed by Hon'ble Division Bench.

12. Counsel for the petitioner submitted that despite of the stay having been granted to the above judgement the petitioner is also entitled for similar relief.

13. In my view once it is evident that the appointment of petitioner was illegal and fraudulent, no question of indulgence granting any relief to petitioner would arise for the simple reason that fraud vitiates everything. If that is so, question of considering the order cancelling fraudulent order, whether having passed in accordance with law, may not be necessary to be considered since the very basis on which the appointment is claimed by an incumbent is a nullity in the eyes of law and once the very basis of the right of an incumbent goes, the subsequent order passed by the authority of mere declaration of such fraudulent order to be illegal would not confer any life to such fraudulent order if

the subsequent order passed by the authority even if found to be not in accordance with law.

14. It is now well known that the fraud vitiate all solemn acts. In **Smith Vs. East Ellos Rural District Council, (1956) 1 All E.R. 855**, it was held that the effect of fraud would normally be to vitiate all acts and orders. In **Lazarus Estate Ltd. Vs. Beasely, (1956) 1 QB 702**, Lord Denning , I.J. said:

"no judgment of Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. "Fraud unravels everything".

15. In the same judgment, Lord Parkar-CJ said:

"Fraud vitiate all transactions known the law to whatever high degree of solemnity".

16. In **Derry Vs. Peek-(1986-90) All E.R. Reporter 1,** what constitute fraud was described as under:

"Fraud is proved when it is shown that the a representation has been made (1) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false".

17. It is stated when a document has been forged, it amounts to a fraud. In **Webster's Comprehensive Dictionary, International Edn.,** "forgery' is defined as:

"The act of falsely making or materially altering, with intent to defraud; any writing which, if genuine, might be of legal efficacy or the foundation of a legal liability."

18. Thus forgery is the false making of any written document for the purpose of fraud or deceit. Its definition has been quoted with approval by Apex Court In **Indian Bank Vs. Satyam Fibres (India) Pvt Ltd. (1996) 5 SCC 550** (Paras 26 and 27). The Apex Court in para 28 has said that fraud is an essential ingredient of forgery. It further held:

"since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practiced upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a part, the court has the inherent power to recall its order."

19. Extending the said principle to the tribunal, in **United India Insurance Co. Ltd. Vs. Rajendra Singh, (2000) 3 SCC 581**, the Apex Court held:

"We have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation....."

20. Similar is the view taken in **Roshan Deen Vs. Preeti Lal, (2002) 1 SCC 100**, It was held that the Commissioner under the workmen

Compensation Act can recall an order which was a result of a fraud played upon him. It cannot be said that he would be helpless in such a situation and the party who has suffered would also be helpless except to succumb to such fraud.

21. In **Ashok Layland Ltd. Vs. State of Tamil Nadu and others, 2004 (3) SCC 1,** it was held that an order obtained by fraud, collusion, misrepresentation, suppression of material facts or giving or furnishing false particulars would be vitiated in law and cannot be reopened. The Apex Court following the proposition laid down earlier in the case of **Shrisht Dhawan Vs. Shaw Bros, (1992) 1 SCC 534,** held:

"Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false."

22. It is well settled that where an order of appointment is wholly illegal and void ab initio, neither the principles of natural justice would be attracted in such a case nor any irregularity in the order passed by the authorities concerned declaring the fraudulent orders to be illegal would make it valid for any purpose whatsoever.

23. Even otherwise, the petitioner having invoked equitable extraordinary jurisdiction of this court under Article 226 of the Constitution cannot seek the revival of an illegal order by stressing that since the order cancelling such illegal order is in violation of principle of natural justice or without reason, therefore, this court is under an obligation to revive an illegal order of his appointment. It is well settled that this Court shall be justified in refusing to grant any indulgence in a case where setting aside of an order would result in revival of another illegal order.

24. In view of the above discussion, I find no merit in the writ petition. Dismissed. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2009

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

Civil Misc. Writ Petition No. 65941 of 2009

Tulsi Ram and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.D. Tripathi

Counsel for the Respondents:
C.S.C.

Constitution of India-Article 226-Appointment of Class 4th employee-D.I.O.S. refused to approve on two grounds-appointment being out of sanctioned strength secondly appointing authority has no power-ad-hoc-principal working till end of academic Session can not be treated working as Head of the institution-order passed by DIOS perfectly justified-However power of approval or disapproval-within the ambit of regional level committee-petitioner may approach there-who shall take decision without being influenced with order of Court.

Held: Para 8 & 9

In view of this, the then ad hoc Principal Shri Mool Chand Pandey could not have functioned as dejure Principal so as to empower him to exercise his discretion

to make appointments against Class-IV posts after the date on which he attained the age of superannuation. The second argument therefore also cannot stand the test of scrutiny. Accordingly, this Court cannot declare the findings recorded by the District Inspector of Schools to be incorrect.

It is however to be noted that the question of approval or disapproval of such appointments is now under the jurisdiction and scrutiny of the Regional Level Committee under the Government Order dated 19.12.2000. In case the petitioners are aggrieved it is open to them to approach the Regional Level Committee for the redressal of their grievances. In case such a representation is filed, it shall be open to the Regional Level Committee to arrive at its own finding without being influenced by this orde but of course, only in accordance with law.

Case law discussed:

2007 (1) ESC 193.

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

1. Heard Shri P.D. Tripathi, learned counsel for the petitioners and the learned standing counsel.

2. The contention raised is that the impugned order proceeds on erroneous assumptions of fact and law, inasmuch as, the petitioners were validly appointed against posts, which had fallen vacant on account of the retirement of the incumbents, who were earlier working as approved employees. It is further submitted that the appointment of the petitioners were made by the then Principal who for all practical purposes was functioning as the Principal of the institution. Sri Tripathi therefore submits that the two findings recorded on the aforesaid issues deserves to be set aside and the petitioners deserve to be granted the benefit of payment of salary.

3. I have perused the impugned order. The same recites that in view of the Government Order dated 28th November, 1977, the posts which are in excess of the norms, could not have been offered for fresh appointment by the Principal as it would violate the provisions of the Government Order dated 20.11.1977. The second finding recorded is that the Principal of the institution Shri Mool Chand Pandey had already attained the age of superannuation, and therefore he was not entitled to make the appointments. Shri Tripathi has relied on the decisions in the case of Krishna Kumar Vs. District Inspector of Schools and in the case of Mohd. Ayub Vs. District Inspector of Schools, Moradabad and others reported in 1995 ALR 1996 and 2005 (1) UPLBEC 763 respectively.

4. On the strength of the said decisions learned counsel contends that so long as the appointments have been made against the posts for which salary has been disbursed earlier, there is no occasion to deny the said benefit to the petitioners. He further submits that the appointment once having been approved cannot be invalidated subsequently.

5. Having perused the aforesaid judgments, I do not find any consideration of the impact of the Government Order dated 20.11.1977 in the said judgments. The Government Order dated 20.11.1977 has the force of law, inasmuch as, the State Government has the power to issue such orders in exercise of the powers vested in it under section 9(4) of the U.P. Intermediate Education Act, 1921. The same provides for the norms that are fixed

for the maximum number of employees to be engaged in the category available in the institution. According to the said norms it has been found that there are three Class-IV employees in excess of the maximum limit prescribed. Applying the aforesaid principle, it cannot be said that the District Inspector of Schools, Jaunpur has committed any illegality.

6. So far as, the question of the appointment of the petitioners by Shri Mool Chand Pandey is concerned, it would be appropriate to mention that there is no dispute that the said Principal had already attained the age of superannuation. Shri Tripathi, however, contends that he was continuing on extended employment and for all practical purposes he was the Principal of the institution. In view of this, his authority to proceed to make the appointments cannot be questioned.

7. The aforesaid argument cannot be accepted in view of the Division Bench judgment of this Court in the case of ***Hari Om Taesat Brahma Shukla Vs. State of U.P. and others*** reported in ***2007 (1) ESC 193*** wherein, it has been held that a person appointed on ad hoc basis as the head of the institution, upon attaining the age of superannuation, shall continue on his substantive post till the end of the session, and not as a Principal.

8. In view of this, the then ad hoc Principal Shri Mool Chand Pandey could not have functioned as dejure Principal so as to empower him to exercise his discretion to make appointments against Class-IV posts after the date on which he attained the age of superannuation. The second argument therefore also cannot stand the test of scrutiny. Accordingly, this Court cannot declare the findings recorded by the District Inspector of Schools to be incorrect.

9. It is however to be noted that the question of approval or disapproval of such appointments is now under the jurisdiction and scrutiny of the Regional Level Committee under the Government Order dated 19.12.2000. In case the petitioners are aggrieved it is open to them to approach the Regional Level Committee for the redressal of their grievances. In case such a representation is filed, it shall be open to the Regional Level Committee to arrive at its own finding without being influenced by this orde but of course, only in accordance with law.

10. The writ petition is dismissed with the aforesaid observation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.12.2009

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE K.N. PANDEY, J.

Civil Misc. Writ Petition No. 56383 of 2009

Dr. Ram Kinkar Singh ...Petitioner
Versus
U.P. Public Service Commission and others ...Respondents

Counsel for the Petitioner:
Sri Sanjiv Singh
Sri Namwar Singh

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

C.S.C.

Constitution of India, Article 226- Selection of Principle in Medical Colleges-eligibility criteria-5 years experience as professor-petitioner already discharging duty head of Department E.N.T. w.e.f. 1.2.2004- selected as professor by commission on 21.07.2004 delay caused in issuance of appointment letter by Govt.-can not come in way of counting the period of actual working-held-petitioner fulfill the eligibility of principal-entitled for consideration.

Held: Para 14 & 15

In the facts of the present case, it is not the case of the respondents that there was any other professor after 1.4.2004 from which date, the petitioner was working as Head of Department E.N.T. After selection of the petitioner on 21.7.2004 by the U.P. Public Service Commission on the post of Professor, the petitioner was discharging all the duties including the teaching of the medical college. It is not the case of the respondents that on the date when the petitioner was declared selected as Professor or thereafter the petitioner was not performing teaching work. The above case is thus, clearly distinguishable from the facts of the present case.

Taking into consideration over all facts and circumstances of the present case and discussions made as above, we are satisfied that the petitioner fulfils the eligibility for the post of Principal and was entitled to be considered for selection by the Commission, which Commission has actually done after an interim order of this Court. As noted above, the petitioner has already been selected on the post of Principal.

Case law discussed:

(2008) 1 SCC (L& S) 308, (1994) 2 SCC 723, (1996) 9 Supreme Court Cases 209, (2000) 5 SCC 262, (2007) 10 Supreme Court Cases 269.

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

1. Heard Sri Sanjiv Singh, learned counsel for the petitioner, Sri R.N. Singh, learned Senior Advocate, assisted by Sri G.K. Singh for the respondent no. 5, Sri P.S. Baghel, learned Senior Advocate appearing for the respondents no. 1 and 2 as well as learned Standing Counsel appearing for the State respondents No. 3 and 4.

2. Counter affidavit on behalf of respondent No. 5 has been filed in the writ petition to which rejoinder affidavit has also been filed. With the consent of learned Counsel for the parties, the writ petition is being disposed of.

3. By this writ petition, the petitioner has prayed for quashing the order dated 8.10.2009, issued by the U.P. Public Service Commission, rejecting the candidature of the petitioner for the post of Principal, Government Medical College on the ground that the petitioner does not possess five years experience as professor. The petitioner has also prayed for a mandamus, directing the respondents no. 1 and 2 to permit the petitioner to appear in the interview for the post of Principal, Government Medical College (Allopathic) and to consider the candidature of the petitioner for the appointment to the post of Principal.

4. Brief facts of the case necessary for deciding the writ petition are that the petitioner was appointed as Lecturer in Medical College, Kanpur on 5.9.1985. The petitioner was promoted on the post of Assistant Professor on 4.1.1988 and functioned as such till 4.3.1999. He worked as Associate Professor from 5.3.1999. The petitioner was working as

Associate Professor in G.S.V.M. Medical College Kanpur where the Head of Department retired on 31.3.2004 whereafter w.e.f. 1.4.2004, the petitioner has been working as Head of the Department of E.N.T. there being no Professor in the Department. Several posts of professors in different Government Medical Colleges of the State were advertised by the U.P. Public Service Commission. The petitioner as well as one Dr. S.P. Singh another associate professor applied against the post of Professor. The petitioner as well as Dr. S.P. Singh were interviewed by the Commission on 17.7.2004. The result of the post of Professor was declared on 21.7.2004, declaring both the petitioner and Dr. S.P. Singh selected on the post of professor. Although appointment letter was issued to Dr. S.P. Singh on 6.8.2004 as professor Opthalmology but the appointment letter to the petitioner could be issued on 6.11.2004 as Professor E.N.T., in pursuance of which he could join the post of Professor on 16.11.2004. 8 posts of Principals in different Government Medical Colleges (Allopathy) were advertised by advertisement dated 27.8.2009. The qualifications for the post of Principal as provided in the advertisement were; (1) M.D/M.S. Or an equivalent qualification recognised by Medical Council of India, (2) Atleast ten years teaching experience as Professor/Associate Professor in a recognised Medical College out of which atleast five years should be as professor.

5. The petitioner submitted his application in response to the aforesaid advertisement. In his application, the petitioner claimed experiences as follows:

(a) Associate Professor (in society) 5.3.1999 to 19.11.2002
(b) Associate Professor (From U.P. Public Service Commission) from 20.11.2002.
(c) Professor (From Public Service Commission) from 17.7.2004
(d) Head of Department E.N.T. w.e.f. 1.4.2004.

6. The petitioner's application has been rejected by the U.P. Public Service Commission by order dated 8.10.2009 on the ground that the petitioner does not possess five years experience as Professor. The petitioner filed the present writ petition challenging the aforesaid order dated 8.10.2009. This Court vide order dated 28.10.2009 passed following interim order, directing the respondents to provisionally permit the petitioner to appear in the interview.

"Heard, learned counsel for the petitioner and Shri P.S. Baghel for the respondent no.2.

By this petition, petitioner has prayed for quashing the order dated 08/10/2009, passed by Commission by which the petitioner's candidature has been rejected on the ground that he does not have 5 years experience as a Professor. Petitioner's case in the writ petition is that he appeared for selection before the Commission on the post of Professor and he was declared selected on 21/7/2004. He submits that due to delay on the part of the respondents, appointment letter could not be issued on 06/11/2004. Placing the reliance on the judgment of the Supreme Court in (2008) 1 SCC (L&S) 308, Union of India Vs. Sadhana Khanna (SMT), learned counsel for the petitioner contends that the mere issuance of delayed appointment letter

cannot defeat the rights of the petitioner and from the date he was declared selected as Professor he had completed requisite number of service. Petitioner has made out a prima-facie case for permitting him to appear in the interview which is schedule to take place today. The respondent no.2 is directed to permit the petitioner to appear in the interview provisionally. Shri P.S. Baghel, learned counsel appearing for the respondent no.2 shall communicate this order. Shri P.S. Baghel may file counter affidavit within three weeks.

List thereafter."

7. The petitioner was interviewed by the Commission and the U.P. Public Service Commission declared its result on 6.11.2009 provisionally selecting the petitioner as Principal subject to result of the writ petition. The respondent no. 5, who was not a party to the writ petition, moved an application seeking his impleadment as one of the respondents in the writ petition on the ground that respondent no. 5 also applied and was interviewed for the post of Principal but could not be selected due to selection of the petitioner against the second post reserved for Other Backward Classes. The case of the respondent no. 5 is that the petitioner being not eligible for the post of Principal, his candidature as well as selection on the post of Principal deserves to be cancelled, which shall result in selection of respondent no. 5, who is the next Other Backward Class candidate.

8. Learned counsel for the petitioner in support of the writ petition contended that the petitioner fulfils the five years' experience as professor and was wrongly treated as ineligible by the Commission in rejecting his candidature. It is submitted that the petitioner had appeared in the selection on the post of Professor before the Commission on 17.7.2004, result of which was declared on 21.7.2004, declaring the petitioner selected on the post of Professor. It is submitted that in case the date of selection of the petitioner is treated to be the date from which the petitioner can count his experience as professor, he becomes clearly eligible. It is submitted that both the petitioner as well as Dr. S.P. Singh were interviewed for the post of professor on 17.7.2004, the result of which was declared on 21.7.2004, but Dr. S.P. Singh was issued appointment letter for the post of Professor on 4.8.2004, whereas the petitioner's appointment letter was issued with delay on 6.11.2004, which fact cannot prejudice the rights or claim of the petitioner to claim his experience atleast from the date when he was declared selected i.e. 21.7.2004. It is submitted that the petitioner infact had been working as Head of Department E.N.T. from 1.4.2004 after retirement of the earlier Head of Department and there was no other professor working in the E.N.T. Department and it was the petitioner, who while functioning as Associate Professor was working as Head of Department and teaching the students. In the last, it is submitted that the petitioner has represented to the State Government claiming benefit of appointment as professor from the date Dr. S.P. Singh, another professor was given appointment as Professor and the State Government vide order dated 26.11.2009 has modified the earlier appointment order dated 6.11.2004, giving appointment to the petitioner also w.e.f. 6.8.2004. A copy of the order of the State Government dated 26.11.2009 has been brought on record as

Annexure-1 to the Supplementary affidavit.

9. Sri R.N. Singh, learned Senior Advocate appearing for the respondent no. 5, submits that the petitioner cannot count his experience as professor earlier to 16.11.2004, when he joined as professor in pursuance of appointment letter dated 6.11.2004. It is contended that the experience as Professor can count only after joining on the post. He submits that there cannot be any deemed experience without actual joining on the post. The petitioner does not have experience as Professor for five years. It is further submitted that the petitioner accepted the delayed appointment and never agitated regarding issuance of the his delayed appointment letter and the petitioner was paid salary from the date of appointment. Sri P.S. Baghel, learned Senior Advocate appearing for the U.P. Public Service Commission has supported the order of Commission by submitting that the petitioner having not fulfilled the qualification of five years' experience as professor, his candidature was rightly rejected by the Commission. Learned Counsel for the parties have also referred to and relied on various decisions of the apex Court which shall be referred to, while considering their submissions in details.

10. The only issue which has arisen for consideration in the present case is as to whether the petitioner possesses experience of five years as professor, which was the qualification required for selection on the post of Principal. The petitioner's case is that he being working as Head of the Department E.N.T. from 1.4.2004, he is entitled to reckon his experience from the date when he was declared selected as Professor by the U.P. Public Service Commission i.e. 21.7.2004. He submits that the petitioner was already working as Head of the Department E.N.T., when he was declared selected for the post of Professor and for all practical purpose issuance of the appointment letter and joining of the petitioner as Professor was mere formality hence, the working of the petitioner after 21.7.2004 has to be treated as working and experience on the post of Professor. Learned counsel for the petitioner submits that the fact that the State Government took unduly long time in issuing the appointment letter, cannot defeat the rights of the petitioner. Learned counsel for the petitioner has pleaded that the petitioner as well as Dr. S.P. Singh, who was also applicant for the post of Professor were interviewed by the Commission on the same date i.e. 17.7.200 and results were declared on the same day i.e. 21.7.2004. The appointment letter was issued to Dr. S.P. Singh on 6.8.2004, and he having been treated as Professor from 6.8.2004 has been treated eligible for the post of selection in question and ultimately has been selected. It is submitted that the petitioner is entitled to be given the similar treatment regarding the counting of the experience as was done in the case of Dr. S.P. Singh. The petitioner has placed reliance on the judgment of the apex Court in the case of **Union of India Vs. Sadhana Khanna** (2008) 1 SCC (L& S) 308. In the case of Sadhna Khanna also she was selected as Assistant Grade but there was some delay in issuing the appointment letter dated 5.7.1983, while considering the next promotion 1.7.1983 was treated as the date of eligibility and the petitioner having not been there on 1.7.1983 was not treated eligible for consideration. Sadhna

Khanna filed a claim petition before the Central Administrative Tribunal which was allowed. Union of India filed writ petition in Delhi High Court which was dismissed. Appeal was filed before the apex Court which too was dismissed. Following was laid down by the ape Court in paragraph 11:

"11. It may be noted that the respondent was offered appointment vide letter dated 5-7-1983 which is after 1-7-1983 from which the eligibility was to be counted. Hence, it is the Department which is to blame for sending the letter offering appointment after 1-7-1983. In fact, some of the candidates who were juniors to the respondent were issued letters offering appointment prior to 1-7-1983. Hence it was the Department which is to blame for this. Moreover, in view of the Office Memorandum of the Department of Personnel and Training dated 18-3-1988 and 19-7-1989 the respondent was also to be considered, otherwise a very incongruous situation would arise namely that the junior will be considered for promotion but the senior will not."

11. The present is a case where the petitioner was interviewed as a professor by the U.P. Public Service Commission along with other candidate namely; Dr. S.P.Singh on 17.7.2004, the result of which was declared on 21.7.2004, declaring both the persons selected on the post of professor. Appointment letter to Dr. S.P. Singh was given on 6.8.2004, whereas in the case of the petitioner appointment letter was issued on 6.11.2004. In the present case advertisement having been issued on 29.8.2009 and the last date for submitting the application being 22.9.2009, the eligibility had to be considered according to the advertisement.

12. Had the petitioner been issued appointment letter on 6.8.2004, when Dr. S.P. Singh was issued appointment letter, the petitioner would have completed five years' experience as Professor even before the date of advertisement but the appointment letter was given to the petitioner on 6.11.2004. There are following two reasons for treating the petitioner fulfilling the experience of five years as Professor.

(i) The petitioner was interviewed for the post of Professor by U.P. Public Service Commission on 17.7.2004 and was declared selected for the post of Professor on 21.7.2004. The petitioner was already working as Head of Department E.N.T. from 1.4.2004, there being no professor in the Department of E.N.T. after 31.3.2004. The petitioner was declared selected on 21.7.2004 as Professor and mere formal appointment letter by the State Government was to be issued which issuance took more than three months' period. The petitioner, who was working as Head of Department after being declared selected as Professor on 21.7.2004 was performing teaching work, whose experience of teaching after declaration of his result declaring him selected as Professor, can very well be treated his experience as Professor. The judgment in the case of **Union of India Vs. Sadhana Khanna** (supra) fully supports the claim of the petitioner. The delay in issuance of the appointment letter in the case of the petitioner, cannot be allowed to defeat the rightful claim of the petitioner. Dr. S.P. Singh who was interviewed and selected on the same date, was issued appointment letter on

6.8.2004, whereas the petitioner was issued the appointment letter on 16.11.2004.

(ii) The petitioner had represented to the State Government claiming him also to be treated to be appointed on the same day when Dr. S.P. Singh was appointed i.e. 6.8.2004, which representation has been allowed and the State Government has issued an order on 26.11.2009, also appointing the petitioner w.e.f. 6.8.2004, modifying the earlier order dated 6.11.2004. The order dated 26.11.2009 has been permitted to be brought on record after hearing the parties. The order of the State Government dated 26.11.2009, appointing the petitioner from 6.8.2004 has clearly made the petitioner eligible to count his experience of Professor from 6.8.2004. It is not disputed that counting the experience of Professor from 6.8.2004, the petitioner became eligible for the post of Principal.

13. Sri R.N. Singh, learned Senior Advocate appearing for the respondent no. 5 has placed reliance on the judgment of the apex Court in (1994) 2 SCC 723 **U.P. Public Service Commission U.P. and another Vs. Alpana**. In the above case, the apex Court laid down that the relevant date for fulfilment of the eligibility conditions i.e. educational qualification is the last date of the receipt of the application by the U.P. Public Service Commission. It was held that subsequent attainment even before commencement of the written examination does not entitle the respondent to be appointed. There cannot be any dispute to the above proposition laid down by the apex Court in **Alpana's** case. In the present case, the petitioner fulfills all the eligibility of educational qualification before the last date of the receipt of the application. The judgment of the apex Court in (1996) 9 Supreme Court Cases 209 **State of Haryana & others Vs. Balwant Singh and others** was in a case where the apex Court laid down that it is settled law that seniority of the candidate has to be reckoned from the date from which they join the services and started discharging the duties of the post to which they claim to be entitled. In the said case, the apex court laid down that seniority cannot be given with retrospective effect. There cannot be any dispute to the above proposition laid down by the apex Court. The present is not a case where the question of seniority is in issue or the date when the seniority is to be reckoned. Another case relied by counsel for the respondent no. 5 is (2000) 5 SCC 262 **Bhupendrapal Singh and others Vs. State of Punjab and others**. In the said case also the apex Court considered the cut-off date for determination of eligibility. Advertisement was issued on 12.1.1996, inviting applications by 15.2.1996. Subsequently corrigendum was issued permitting the candidates who were 36 years of age as on 1.1.1996 to apply by 30.10.1996. The High Court held that State of Punjab was following a wrong practise for determining the eligibility conditions as on the date of interview. The apex Court also approved the view of the High Court that determination of eligibility with regard to date of interview was a wrong practice. However, the apex Court exercised its power under Article 142 of Constitution of India and saved the appointment. The issues which were there in **Bhupender Pal's** case (supra) has no application in the facts of the present case. The last case relied by Sri R.N. Singh, learned Senior Advocate appearing for the

respondent no. 5 is (2007) 10 Supreme Court Cases 269 **V.B. Prasad Vs. Manager P.M.D. Upper Primary School And others**. In the above case, the apex Court was considering the teaching experience under Kerala Education Rules. It was held that the condition of five years' teaching experience after acquisition of B.Ed. Degree was also applicable to the candidates mentioned in the 'Note'. It was held that teaching experience had to be actually teaching experience and not deemed teaching experience. The candidates mentioned in the 'Note' did not have five years' experience therefore, they were not eligible for appointment as headmaster. It was further held that study leave period in fact did not count towards experience. Paragraphs 8 and 9 of the aforesaid judgment being relevant are quoted herein below:

*"**8**. Before embarking upon the contentions raised by the learned counsel for the parties, we may notice the admitted fact. Respondent No. 2 joined the School on 16.07.1969. Appellant herein joined the school as a Drawing teacher on 17.07.1978 and has been working on a regular basis only with effect form 02.06.1980. He was declared a protected teacher from 01.06.1989. While discharging his duties as a teacher, Appellant applied for and granted study leave for higher studies for two years with effect from 01.06.1991. He remained on leave upto 28.02.1993. It is accepted that he was not a candidate who was considered for appointment to the post of Headmaster. He indisputably gave consent for appointment of Respondent No. 2. His case, therefore, never fell for consideration either by the management of the school or by the Government or by the High Court. Rule 45 of the Kerala Education Rules in the aforementioned context, interpretation whereof falls for our consideration may now be noticed :*

*"**45**. Subject to rule 44, when the post of Headmaster of complete U.P. School is vacant or when an incomplete U.P. School becomes a complete U.P. School, the post shall be filled up from among the qualified teachers on the staff of the school or schools under the Educational Agency. If there is a Graduate teacher with B.Ed. or other equivalent qualification and who has got at least five years' experience in teaching after acquisition of B.Ed. degree he may be appointed as Headmaster provided he has got a service equal to half of the period of service of the senior most undergraduate teacher. If graduate teachers with the aforesaid qualification and service are not available in the school or schools under the same Educational Agency, the senior most primary school teacher with S.S.L.C. or equivalent and T.T.C. issued by the Board of Public Examination, Kerala or T.C.H. issued by the Karnataka Secondary Education Examination Board, Bangalore or a pass in Pre-degree Examination with pedagogy as an elective subject conducted by the University of Kerala or any other equivalent training qualification prescribed for appointment as primary school assistant may be appointed.*

***Note :** The language/specialist teachers, according to their seniority in the combined seniority list of teachers shall also be appointed as Headmaster of U.P. School or Schools under an Educational Agency provided the teacher possesses the prescribed qualifications for promotion as Headmaster of U.P. School on the date of occurrence of vacancy."*

The said rule, thus, provides for essential qualification. Rule 45 is in three parts. The first part provides for the qualification of a teacher who can be appointed in the post of Headmaster. He must be graduate with B.Ed. or other equivalent qualification and must have at least five years' experience in teaching after acquisition of B.Ed. degree. The second part of the rule provides for consideration of such teachers only in the event a graduate teacher is not available. Indisputably, Respondent No. 6 fulfils the educational qualification as also five years' experience in teaching after acquisition of B.Ed. degree. Ignoring her claim, Respondent No. 2 was appointed whose case comes within the purview of the second part of Rule 45, as she did not have the qualification specified in the first part thereof. Appellant was a Drawing teacher. He, therefore, was a specialist teacher. According to him his case comes within the purview of the 'note' appended to Rule 45.

9. *For the time being, we may assume that in view of fact that he had also acquired the qualification of B.Ed. in April 1989, his case also could be considered in terms of Rule 45; although it is well-settled principles of law that the note appended to a statutory provision or the subordinate legislation must be read in the context of the substantive provision and not in derogation thereof. Five years' teaching experience for appointment to the post of Headmaster was a sine qua non. Such teaching experience was to be 'teaching experience' and not a deemed teaching experience."*

14. In the facts of the present case, it is not the case of the respondents that there was any other professor after 1.4.2004 from which date, the petitioner was working as Head of Department E.N.T. After selection of the petitioner on 21.7.2004 by the U.P. Public Service Commission on the post of Professor, the petitioner was discharging all the duties including the teaching of the medical college. It is not the case of the respondents that on the date when the petitioner was declared selected as Professor or thereafter the petitioner was not performing teaching work. The above case is thus, clearly distinguishable from the facts of the present case.

15. Taking into consideration over all facts and circumstances of the present case and discussions made as above, we are satisfied that the petitioner fulfils the eligibility for the post of Principal and was entitled to be considered for selection by the Commission, which Commission has actually done after an interim order of this Court. As noted above, the petitioner has already been selected on the post of Principal.

16. In the result, the writ petition is allowed. The impugned order dated 8.10.2009 is set aside. However, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2009

BEFORE
THE HON'BLE RAKESH SHARMA, J.

Civil Misc. Writ Petition No. 65928 of 2009

Dharam Pal Singh ...Petitioner
Versus
Deputy Director of Consolidation, Bulandshahr and others ...Respondents

Counsel for the Petitioner:
Sri Brajesh Shukla

Counsel for the Respondents:
Sri Ramesh Chandra Mishra
Sri D.D. Chauhan (S.C.-Gaon Sabha)

Constitution of India-Article 226-Practice & Procedure-entertaining Revision without deciding delay condonation Application-petitioner encroached public land-Revision before D.D.C. filed along with Section 5 (Limitation Act)application-petitioner same how desirous to continue illegal possessor in garb of technically-while revision still pending before DDC-instead of filing objection filing Writ petition-highly dis-appreciated-petition dismissed.

Held: Para 17

In the present case, as it appears from the ordersheet, the Deputy Director of Consolidation has merely entertained the revision and as such it is still open for the petitioner to raise any objection, factual or legal, whatever he desires and if the same is raised it can be dealt with by the revisional authority. In fact, no cause of action has accrued to the petitioner for filing the present writ petition under Article 226 of the Constitution of India.

Case law discussed:
1987 RD 89, 1989 RD 214, 1998 (98) RD 607, 1987 (13) ALR 306 (SC), 1998 (89) RD 80,

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

1. Heard Sri Brajesh Shukla, learned counsel for the petitioner and Sri Ramesh Chandra Misra, holding brief of Sri D.D. Chauhan, learned counsel for Gaon Sabha, respondent no.3 as well as learned Standing Counsel, who has put in appearance on behalf of Respondent nos. 1 and 2. Perused the records also.

2. Through this writ petition, the petitioner has sought for quashing of the proceedings of Revision No. 1134/2009 pending before the Deputy Director of Consolidation, Bulandshahr and the orders dated 21.10.2009 and 29.10.2009, passed by the Deputy Director of Consolidation.

3. According to learned counsel for the petitioner, the Deputy Director of Consolidation, without condoning delay, as required under the provisions of U.P. Consolidation of Holdings Act and Section 5 of the Indian Limitation Act, has entertained the revision and proceeded with the same. The Settlement Officer, Consolidation had rendered a judgment in favour of the petitioner on 12.6.2009. Assailing the said judgment, a revision was preferred on 28.8.2009. The Deputy Director of Consolidation could not have entertained the revision without dealing with the application for condonation of delay. No proper application and affidavit seeking condonation of delay was filed. The learned counsel for the petitioner has relied upon two judgments as reported in 1989 RD 214, Mst. Bilqees Vs. Deputy Director of Consolidation and 1987 RD 89, Ram Baran Vs. Deputy Director of Consolidation, Gonda and others in support of his submissions that the revisional court must have taken into account the point of limitation while proceeding with the case.

4. While opposing the motion, learned counsel for Gaon Sabha and learned Standing Counsel, have submitted that the petitioner has not even filed a objection raising question of limitation before the Deputy Director of Consolidation. The Deputy Director has

not passed any substantial order affecting the rights of the petitioner and it is still open for the petitioner to raise his grievance before the Deputy Director of Consolidation about maintainability of the revision on the ground of limitation. Therefore, the writ petition is not maintainable.

5. Having heard learned counsel for the parties and perused the record.

6. It is evident from perusal of the record that the appeal was disposed of by the Settlement Officer, Consolidation on 12.6.2009. The State of U.P. and Gaon Sabnha etc. had admittedly preferred the revision on 28.8.2009. An application, under Section 5 of the Indian Limitation Act, duly signed by the D.G.C.(Revenue) seeking condonation of delay has also been filed on 28.8.2009. This application discloses that the authorities learnt about this order for the first time on 24.8.2009 during the proceedings in Revision No. 123/2009. On learning about the said order, certified copy of the order was immediately obtained and the revision was preferred. It was further submitted in the application seeking condonation of delay that the land in dispute is Gaon Sabha's property. It is a public land and as a result of the appellate order, the public land will be misappropriate and encroached upon by the petitioner.

7. Copies of the order-sheet dated 3.9.2009, 25.9.2009 and 15.10.2009 have been annexed alongwith the writ petition. These orders only indicate that the file was produced and the lower court's record was ordered to be summoned fixing 29.10.2009. Thereafter, 20.11.2009 was fixed. No copy of the objection, raised by the petitioner before the Deputy Director of Consolidation, has been filed nor any plea to that effect has been taken in the writ petition. If the petitioner was aggrieved by mere entertainment of the revision by the Deputy Director of Consolidation, he ought to have reacted immediately before the Deputy Director of Consolidation by filing an objection regarding maintainability of the revision or made a categorical statement taking a stand before the revisional court that the revision is barred by limitation. In the absence of any such written objection, it cannot be said that this plea was ever raised before the Deputy Director of Consolidation and the objections made were not considered or the request of the petitioner was rejected. There is nothing on record to show that the Deputy Director of Consolidation had declined to entertain any such objection/application alleged to have been submitted by the petitioner.

8. This Court has taken note of the fact that the State of U.P. and Gaon Sabha had acted within two months, which according to the Court, appears to be a reasonable time. When counsel of Gaon Sabha or Pradhan of the Village or other concerned Officer could have gathered the knowledge only thereafter they might have processed the file and taken a decision to file a revision, therefore, it cannot be said that the revision was highly belated or there was any deliberate delay on the part of the State of U.P. or Gaon Sabha in approaching the revisional court.

9. In the present set of facts and circumstances, the judgments relied upon by the learned counsel for the petitioner have no bearing on this case.

10. In the case reported in 1987 RD 89 (supra), the Deputy Director of Consolidation had finally disposed of the revision and the same was challenged whereas in the present case the revision has yet to be heard on merits and yet to be decided finally, but instead of raising objection before the Deputy Director of Consolidation about maintainability of the revision on the ground of limitation, the petitioner has immediately rushed to this Court even without raising any preliminary objection before the Deputy Director of Consolidation regarding limitation. In fact, the petitioner wants to save his illegal encroachment over the land in dispute and, therefore, he is taking pre-emptive measures.

11. In the other case reported in 1989 RD 214 (supra) also the similar situation exists.

12. In these cases, with great respect to the observations made by their Lordships in these judgments, it is relevant to mention that in the decisions of the Hon'ble Apex Court and this Court, it has been repeatedly held that the Courts must refrain from taking too technical or hyper technical view in the case of limitation. In the cases where objections regarding limitation have been raised, the Courts have to dispense substantial justice and the Courts should not be guided by the mere technicalities of law.

13. In the judgment of the Hon'ble Apex Court reported in ***1987 (13) ALR 306 (SC), Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others***, it has been observed as follows:-

"Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

"Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hours delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay."

14. In yet another judgment of the Hon'ble Apex Court reported in 1998 (98) RD 607, N Balakrishnan Vs. M. Krishnamurthy, the Hon'ble Apex Court has observed as under:-

"..... ....

Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object for providing a legal remedy is to repair the damage caused by reason of legal injury....."

This Court, in a judgment reported in ***1998 (89) RD 80, Smt. Nirmala Tandon and others Vs. H.N. Tandon*** has observed as follows:-

"..... ....

6(3) It may also be added that the courts are expected to decide the case as they are not to indulge in technicality and there is

no stage of filing application under Section 5 of the Limitation Act."

15. According to learned counsel for the petitioner, the State of U.P. and the Gaon Sabha were expected to act with a lightening speed and instantly approaching the revisional court.

16. The Hon'ble Apex Court has also observed that in the matter of State litigation, it takes some time in taking a decision to challenge an order in Appeal or Revision, therefore, the Courts must not take a rigid view while condoning the delay.

17. In the present case, as it appears from the ordersheet, the Deputy Director of Consolidation has merely entertained the revision and as such it is still open for the petitioner to raise any objection, factual or legal, whatever he desires and if the same is raised it can be dealt with by the revisional authority. In fact, no cause of action has accrued to the petitioner for filing the present writ petition under Article 226 of the Constitution of India.

18. In view of the discussions made above, the writ petition, being devoid of merits, is dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2009

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

Civil Misc. Writ Petition No. 67878 of 2009

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

Counsel for the Petitioner:
Sri A.B. Saran
Sri Vinod Kumar Rai

Counsel for the Respondents:
Sri Ashok Khare
Sri S.P. Singh
Sri A.K. Yadav
C.S.C.

U.P. Secondary Selection Board Act, 1982-appointment of principal petitioner claiming his right to be interviewed being senior most lecturer-G.O. dated 25.10.2000 provide benefit of lecturer to Physical Education Training teacher-benefit extended on 8.7.2006-benefit of salary can not be ground to treat the status of lecturer prior to 08.07.2006-held-petitioner did have any experience "as a lecturer" prior to that-in view of lack of experience of four years-can not claim for interviewed.

Held: Para 6 & 7

The petitioner therefore did not have any experience "as a lecturer" prior to 08.07.2006. The petitioner can be treated to have been acknowledged as a lecturer only after the said date and his experience has to be counted in this capacity.

Accordingly, the petitioner after 08.07.2006 does not have a minimum experience of four years as held by the Apex Court in Balbir Kaur's case (supra).

Case law discussed:
2008 (3) ESC 409,

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

1. Heard Shri A.B. Saran, learned Senior Counsel for the petitioner assisted by Shri Vinod Kumar Rai, Advoate, Shri Ashok Khare, learned Senior Counsel for the respondent no. 6 assisted by Shri S.P. Singh, Advocate and the learned standing counsel.

2. The contention of the petitioner is that he deserves to be interviewed as a senior most lecturer keeping in view the fact that he has teaching experience of Class 11 and 12 in the institution and therefore in terms of the Rules framed under the U.P. Secondary Services Selection Boards Act, 1982, the petitioner has to be called for interview.

3. Shri Ashok Khare has taken a preliminary objection to the said claim of the petitioner on the ground that the petitioner does not have an experience in the lecturer grade in view of the law laid down in the case of Balbir Kaur and another Vs. U.P. Secondary Education Services Selection Board, Allahabad and others reported in 2008 (3) ESC 409. He submits that in the absence of requisite teaching experience as defined under the aforesaid judgment of the Apex Court, the petitioner is not entitled for being interviewed.

4. The matter was adjourned on 14.12.2009 to enable the learned counsel for the petitioner to substantiate his claim of teaching experience and a supplementary affidavit has been filed today bringing on record the Government Order dated 25th October, 2000, under which the petitioner was granted the benefit of the pay scale of a lecturer. The petitioner was admittedly a Physical Education Training teacher. The said cadre was extended benefits of pay scale in the lecturers grade under the relevant Government Orders. There are certain queries with regard to the status of such teachers, which came to be clarified under the Government Order dated 25th October, 2000. The said Government Order in Clause 7 specifically recites that a person claiming such benefit would be entitled to the same after he assumes charge as a lecturer upon being granted the said benefit. It is further provided therein that any service rendered prior to such grant would be treated to be in the L.T. Grade and seniority also cannot been claimed by such a teacher.

5. It is undisputed that the petitioner has been extended the benefit under the said order dated 8th July, 2006, a copy whereof is annexure 2 to the writ petition. The said order recites that the petitioner was being extended the benefit under the Government Order dated 25.10.2000 and he is entitled to the said pay scale in view of his having completed 10 years. The said pay scale was being given w.e.f. 29.01.2001.

6. In view of the aforesaid position, it is clear that the petitioner has been extended the benefit under the order dated 8th July, 2006 and therefore he can claim experience as a lecturer only with effect from the said date and not any date prior to that. Apart from this, the benefit under the Government Order dated 25.10.2000 does not appear to bring a teacher so benefited, within the regular cadre of lecturers. The post however gets upgraded for being converted into the lecturers grade later on. This transitory nature of the post therefore cannot confer any benefit as lecturer so long as an order is not passed, as in the present case, on 08.07.2006. The petitioner therefore did not have any experience "as a lecturer" prior to 08.07.2006. The petitioner can be treated to have been acknowledged as a lecturer only after the said date and his experience has to be counted in this capacity.

7. Accordingly, the petitioner after 08.07.2006 does not have a minimum experience of four years as held by the Apex Court in Balbir Kaur's case (supra).

8. The writ petition therefore lacks merit and is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2009

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE K.N. PANDEY, J.

Special Appeal No.1748 of 2009

U.P. Cement Vetanbhogi Sahkari Rin Samiti Ltd. ...Appellant
Versus
Official Liquidator & another...Respondents

Counsel for the Petitioner:
Sri W.H. Khan
Sri J.H. Khan
Sri Ravi Prakash Srivastava

Counsel for the Respondents:
Sri Ashok Mehta

<u>High Court rules-Chapter VIII, Rule-5</u>- Special Appeal-order passed by Single Judge under Section 438 of companies Act-exercising Appellate jurisdiction-clearly bar under Section 100-A C.P.C.-law laid down in K.K. Dutta's Case by Apex Court-fully applicable-Special Appeal-held-not maintainable.

Held: Para 20 & 22

In view of the foregoing discussion, it is clear that even if under Section 483, there was no condition prohibiting an appeal against an order of the learned Single Judge passed in appellate exercise of jurisdiction, the said exclusion has been now specifically provided in by the Legislature under Section 100-A C.P.C. The judgment of the Apex Court in Kamal Kumar Dutta (supra) applies with full force in the facts of the present case.

The application moved for correction in the order passed in the appellate exercise of jurisdiction by the learned Single Judge clearly bars further appeal under Section 483 of the Companies Act, as well as Letters Patent as laid down by the Apex Court in the case of Kamal Kumar Dutta (supra).

<u>Case law discussed:</u>
AIR 1965 SC, 507; AIR 1988 SC, 325, AIR 2004 Bombay, 38, 2004 (11) SCC 672, 2006 (7) SCC 613.

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

1. Heard Shri W.H. Khan, learned Senior Advocate assisted by Shri J.H. Khan for the appellant and Shri Ashok Mehta for the respondents.

2. This Special Appeal under Chapter VIII Rule 5 of the High Court Rules has been filed against the judgment and order of the learned Single Judge of this Court dated 26/5/2009 deciding the Application for Correction in an earlier order dated 27/4/2007 passed by learned Single Judge in Civil Misc. Company Appeal/Objection No.85/2007 in Company Application No. 4/97. The application has been rejected by a learned Single Judge vide its order dated 26/5/2009. The order dated 27/4/2007 was passed by learned Single Judge under Rule 164 of the Companies (Court) Rules, 1959 (hereinafter called the "Rules 1959"). In the matter of the report of the Official Liquidator, Uttar Pradesh adjudicating on the "proof of debts' and proposing to distribute the sale proceeds of the assets of the "U.P. State Cement

Corporation Limited (in liquidation) wound up by the Court on 08/12/1999.

3. Shri Ashok Mehta learned counsel appearing for the respondents raised a preliminary objection regarding the maintainability of this Special Appeal under Chapter VIII Rule 5 of the High Court Rules. He submits that the order which has been impugned is an order passed in appellate proceedings before the learned Single Judge under Rule 164 of Rules, 1959 hence both the Letters Patent Appeal as well as appeal under Section 483 of the Companies Act, 1956 ("hereinafter called the Act 1956") is barred. Shri Ashok Mehta learned counsel appearing for the respondents contends that the Special Appeal against the order of learned Single Judge passed in appellate jurisdiction is not maintainable. He contends that under Chapter VIII Rule 5 of the High Court Rules the Special Appeal is barred against an order passed by learned Single Judge in exercise of appellate jurisdiction. He submits that appeal under Section 483 of the Companies Act also cannot be entertained against an order passed by learned Single Judge passed in appellate exercise of jurisdiction. He submits that Section 100-A C.P.C. also clearly bars any further appeal after order of learned Single judge in exercise of appellate jurisdiction.

4. Shri W.H. Khan, learned Senior Counsel appearing for the appellant refuting the submission of learned counsel for the respondents contends hat this appeal is clearly maintainable under Section 483 of the Companies Act, 1956. He submits that under Section 483 of the Companies Act, any order passed by learned Company Judge is appeallable. He has placed reliance on the judgement of the Apex Court in Shankerlal Aggarwala & Ors. Vs. Shankerlal Poddar & Ors, AIR 1965 SC, 507; Smt. Arati Dutta Vs. M/s. Eastern Tea Estate (P) Ltd., AIR 1988 SC, 325 and Maharashtra Power Development Corporation Ltd. Vs. Dabhol Power Co. & Ors., AIR 2004 Bombay, 38.

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

6. We proceed to decide the preliminary objection raised by the leaned counsel for the respondents.

7. Learned counsel for the appellant has placed reliance under Section 483 of the Companies Act, 1956 for maintainability of the appeal . Section 483 provides as follows:

"483. Appeals from orders.- Appeals from [any order made or decision given before the commencement of the Companies (Second Amendment) Act, 2002], in the matter of the winding up of a company by the Court shall lie to the same Court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order of decision of the Court in cases within its ordinary jurisdiction."

8. Learned counsel for the appellant submits that the words used in Section 483 to the effect "in the same manner... and subject to the same conditions" cannot be interpreted to exclude the appeal under Section 483 and the above words only regulate procedure of filing the appeal. Reliance has been placed on the judgement of the Apex Court in Shankerlal Aggarwala's case (supra). The

Apex Court in the aforesaid judgment had occasion to interpret Section 202 of the Companies Act, 1913 which was a provision parimateria to the provision to Section 483.

9. Following was laid down in para 18 of the judgment:

"18. The question that would arise is as to what is meant by "ordinary jurisdiction" of the Court. Plainly the words would only exclude jurisdiction vested in the Court by special statutes as distinguished from the statutes constituting the Court. Undoubtedly, in the case of a High Court the limits of whose jurisdiction are governed by its Letters Patent, the Letters Patent would determine what the "ordinary jurisdiction" is. But that Letters Patent is not immutable and has been the subject of several alterations. Thus when the Companies Act was passed in 1913, an appeal lay from every "judgment" of a Single Judge of the High Court. But in March, 1919 it was amended so as to exclude the rights of appeal from judgment passed in exercise of revisional jurisdiction and in exercise of the power of superintendence under S. 107 of the Government of India Act, 1915. There can be no doubt either that the exercise of revisional or supervisory jurisdiction is as much "ordinary jurisdiction" of the High Court as its original or appellate jurisdiction and it cannot be that there has been any alteration in the law as regards the appealability of decisions of a High Court under S.202 of the Companies Act by reason of the amendment of the Letters Patent. Again, the Letters Patent were amended in January, 1928 when appeals against decisions in second appeals were made subject to the grant of leave by Judges rendering such decisions. If the decision in a second appeal were in the exercise of "ordinary jurisdiction", and there can be no controversy about it, then the construction of S. 202 of the Companies Act in relation to a High Court which is the primary Court exercising jurisdiction under the Companies Act (vide S. 3(1) of the Act) would lead to anomalous results as judgments or decisions rendered in different types of cases, though all of them are in the exercise of "ordinary jurisdiction", are subject to different conditions as regards appealability. We thus agree with Chagla, C.J. that the second part of the section which refers to "the manner" and "the conditions subject to which appeals may be had" merely regulates the procedure to be followed in the presentation of the appeal and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which appeal would lie and does not restrict or impair the substantive right of appeal which has been conferred by the opening words of that section. We also agree with the learned Judges of the Bombay High Court that the words "order or decision" occurring in the lst part of S. 202 though wide, would exclude merely procedural orders or those which do not affect the rights or liabilities of parties. Learned Counsel for the appellant did not suggest that if this test were applied the order of the learned Company Judge would be an order or decision merely of a procedural character from which no appeal lay."

10. Another judgment relied on by the learned counsel for the appellant is Smt. Arati Dutta (supra) which was a case where the Apex Court following its earlier judgment in Shakeral Aggarwala's case

held that the appeal would lie in the same manner to the same Court.

11. In Smt. Arati Dutta's case an order was passed on a petition under Sections 397 and 398 of the Companies Act against which order an appeal was filed in the High Court which appeal was decided by the Division Bench. Special Leave Petition was filed in the Supreme Court in which the question was considered as to whether the appeal before the Division Bench under Section 483 was maintainable or not.

12. Following was laid down in paragraphs 6, 7 and 8 of the judgment which is quoted below:

"6. The Court further held that there was nothing in S. 483 of the Companies Act 1956, which took away or curtailed the right of appeal provided by S. 5(l) of the Delhi High Court Act, 1966, and Cl. 10 of the Letters Patent (Punjab) as applicable to the Delhi High Court; and that the jurisdiction conferred on the Company Judge of the High Court under S. 10 of the Companies Act was none other than its ordinary civil jurisdiction and appeal lay also under Cl. 10 of the Letters Patent to a Division Bench from the order of the Company Judge.

7. In this case in the High Court of Gauhati, however, unlike the Bombay High Court or the Calcutta High Court or the Delhi High Court, no Letters Patent was applicable to the Gauhati High Court. It was therefore held that there was no provision for an appeal to the judgment of the learned single Judge of the High Court. In our opinion the decision in Shankar Lal Aggarwal v. Shankar Lal Poddar, (AIR 1965 SC 507) (supra) of this Court indicated the true position where this Court held in S. 202 of the Companies Act, 1913 was in pari materia with the present section. This Court preferred the view of the Chief Justice Chagla of the Bombay High Court reported in Bachharaj Factories Ltd. v. Hirjee Mills Ltd., AIR 1955 Bom 355 to the view expressed by the Calcutta High Court in Madan Gopal Daga v. Sachindra Nath Sen, AIR 1928 Cal 295 wherein it was held that an order or the decision made or given in the matter of winding up of a company to be appealable had to satisfy the requirements of Cl. 15 of the Letters Patent. This interpretation was not accepted by other High Courts and the Bombay High Court held differently. The view of the Bombay High Court was preferred by this Court in the aforesaid decision and it was observed as follows:

"We thus agree with Chagla C.J., that the second part of the section which refers to 'the manner' and 'the conditions subject to which appeals may be had' merely regulates the procedure to be followed in the presentation of the appeals and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which appeal would lie and does not restrict or impair the substantive right of appeal which has been conferred by the opening words of that section."

8. In our opinion this position is clear from the observation of this Court in Shankar Lal Aggarwal v. Shankar Lal Poddar (supra) that the appeal lies to the same High Court irrespective of the powers under the Letters Patent. Sections 397 and 398 read with S. 483 indicate that the appeal would lie in the same manner to the same court and naturally and logically an appeal from the decision of the single Judge would lie to the Division Bench. This in our opinion follows

logically from the ratio of decision of this Court in Shankarlal Aggarwal v. Shankarlal Poddar (supra) as well as other decisions referred hereinbefore. It is true that there is perhaps no procedure to file an appeal from the decision of the learned single Judge of the Gauhati High Court. If that is so rules should be framed by the High Court in its jurisdiction of Rule making power for filing and disposal of such appeals. But absence of the procedure rules do not take away a litigant's right to file such appeals when the statute confers such a right specifically and the jurisdiction of the High Court to dispose of such an appeal if so filed."

13. Arati Dutta's case was not a case where the learned Company Judge has exercised any appellate jurisdiction.

14. The Division Bench judgment of the Bombay High Court in Maharashtra Development Power Corporation (supra) was a case where the Company Law Board had passed an order against which an appeal was filed before the learned Single Judge under "Section 10 F of the Companies Act. Learned Single Judge decided the appeal against which an appeal was filed before the Division Bench under Section 483 of the Companies Act. Before the Division Bench of the Bombay High Court, reliance was placed under Section 100A C.P.C. which was amended w.e.f. July, 2002 excluding certain appeals. The Division Bench of the Bombay High Court relying on Section 4 C.P.C. held that appeal was not barred. Following was laid down in paragraphs 22 and 23 of the judgment which is quoted below:

"22. We are also not inclined to accept that Section 100-A of the Code of Civil Procedure is the specific provision to the contrary within the meaning of Section 4(1) of the said code which limits or otherwise affects the right of appeal provided under Section 483 of the Companies Act which would be the special law applicable. Firstly, what Section 100-A bars is an appeal from the judgment and decree of a single judge. In the present case, the Company Court exercising power under Section 10-F, passes no judgment and decree. The Company Court exercising jurisdiction under Section 10-F, in the first place, is not sitting in appeal from an original decree and order as is the first requirement of Section 100-A. The term order in this context must mean an order defined under Section 2(14) of the Code which requires it to be that of the Civil Court. The Company Law Board exercising jurisdiction under Section 397 and 398 of the Companies Act is not a Civil Court. Secondly, the order of the company Judge in a 10-F Appeal is not a judgment and decree within the meaning of the Code of Civil Procedure. No other provision to limit or affect the rights under Section 483 is shown to us.

23. For the reasons stated above, we do not find any merit on the objection to the maintainability of this Appeal on the points raised by Mr. Sibal. On other other hand, on the merits of the appeal we find arguable points. Hence, the Appeal is admitted. "

15. The Apex Court recently had an occasion to consider the provisions of Section 100-A C.P.C. A Constitution Bench of the Apex Court had occasion to consider Section 104(1) and (2) and Section 100-A C.P.C. as amended in P.S.

Sathappan Vs. Andhra Bank Ltd. 2004 (11) SCC 672. The question for consideration was as to whether Section 100-A also excluded Letters Patent Appeal which was expressly saved under Section 100 (4) (1) C.P.C. Following was laid down in paragraphs 30 and 67 of the judgment which are quoted below:

"30. As such an appeal is expressly saved by Section 104(1). Sub-clause (2) cannot apply to such an appeal. Section 104 has to be read as a whole. Merely reading sub-clause (2) by ignoring the saving clause in sub-section (1) would lead to a conflict between the two sub-clauses. Read as a whole and on well established principles of interpretation it is clear that sub-clause (2) can only apply to appeals not saved by sub-clause (1) of Section 104. The finality provided by sub-clause (2) only attaches to Orders passed in Appeal under Section 104, i.e. those Orders against which an Appeal under "any other law for the time being in force' is not permitted. Section 104(2) would not thus bar a Letters Patent Appeal. Effect must also be given to Legislative Intent of introducing Section 4, C.P.C. and the words 'by any law for the time being in force" in Section 104(1). This was done to give effect to the Calcutta, Madras and Bombay views that Section 104 did not bar a Letters Patent. As Appeals under 'any other law for the time being in force' undeniably include a Letters Patent Appeal, such appeals are now specifically saved. Section 104 must be read as a whole and harmoniously. If the intention was to exclude what is specifically saved in sub-clause (1), then there had to be a specific exclusion. A general exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a Letters Patent Appeal. However when Section 104(1) specifically saves a Letters Patent Appeal then the only way such an appeal could be excluded is by express mention in 104(2) that a Letters Patent Appeal is also prohibited. It is for this reason that Section 4 of the Civil Procedure Code provides as follows:

"4. Savings.- (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land."

As stated hereinabove, a specific exclusion may be clear from the words of a statute even though no specific reference is made to Letters Patent. But where there is an express saving in the statute/section itself, then general words to the effect that 'an appeal would not lie" or 'order will be final' are not sufficient. In such case, i.e. where there is an express saving, there must be an express exclusion. Sub-clause (2) of Section 104 does not provide for any express exclusion. In this context reference may be made to Section 100A. The present Section 100A was amended in 2002. The earlier Section 100A, introduced in 1976, reads as follows:

"100A. No further appeal in certain cases.- Notwithstanding anything

contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal."

It is thus to be seen that when the Legislature wanted to exclude a Letters Patent Appeal is specifically did so. The words used in Section 100A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the Legislature knew that in the absence of such words a Letters Patent Appeal would not be barred. The Legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 in the C.P.C. Thus now a specific exclusion was provided. After 2002, section 100A reads as follows:

"100A. No further appeal in certain cases.- Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

To be noted that here again the Legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100A no Letters Patent Appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100A nor Section 104(2) barred a Letters Patent Appeal.

67. Once, however, a right of appeal either in terms of sub-section (1) of Section 104 or Letters Patent is availed of, there would not be any further right of appeal from the appellate order in view of sub-section (2) of Section 104, for the simple reason, that Letters Patent also provides for only one appeal, i.e. from a single Judge of a High Court to a Division Bench. It may be true that in certain cases, Letters Patent Appeals are available even from an appellate order passed by a learned single Judge of the High Court to a Division Bench but the same was permissible only when there was no bar thereto and subject to the condition laid down in clause 15 itself. We may notice that when a first appeal or second appeal was disposed of by a single Judge, a Letters Patent Appeal had been held to be maintainable therefrom only because there existed no bar in relation thereto. Such a bar has now been created by reason of Section 100-A of the Code. No appeal would, therefore, be maintainable when there exists a statutory bar. When the Parliament enacts a law it is presumed to know the existence of other statutes. Thus, in a given case, bar created for preferring an appeal expressly cannot be circumscribed by making a claim by finding out a source thereof in another statute."

16. The Apex Court in the above judgment clearly laid down that Section 100-A as amended by 2002, Amendment Act clearly indicated that legislature which wanted to exclude Letters Patent Appeal it specifically did so. Section 100-A is also quoted below:

"100A. No further appeal in certain cases.- Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal."

17. A perusal of Section 100-A indicates that Section begins with non-obstante clause. Section provides (i) Notwithstanding anything contained in any Letters Patent for any High Court (ii) or any other instrument having the force of law and (iii) or in any other law for the time being in force. The Section indicates that where any appeal from an original or appellate decree or order is heard and decided by the learned Single Judge of the High Court no further appeal shall lie notwithstanding the above three situations mentioned. The words "any other law for the time being in force" shall also cover the appeal under Section 483 of the Companies Act. Thus, even if nothing can be read in Section 483 excluding an appeal against an order of learned Single Judge of the High Court passed in exercise of appellate jurisdiction before the Division Bench, appeal against an order of the learned Single Judge passed in exercise of appellate jurisdiction is excluded under Section 100-A Civil Procedure Code. The Apex Court has recently occasion to consider both Section 483 of the Companies Act as well as Section 100-A C.P.C. in Kamal Kumar Dutta & Anr. Vs. Ruby General Hospital Ltd & Ors, 2006 (7) SCC 613.

18. In the above case, a petition under Sections 397 and 398 of the Companies Act was filed before the Company Law Board. Company Law Board issued several directions on 29/10/1999. Against which an appeal was filed before the learned Company Judge under Section 10 F of the Companies Act. Learned Company Judge allowed the appeal. Learned Single Judge set-aside the order of the Company Law Board against which order of the learned Single Judge, Special Leave to Appeal was filed in the Apex Court. One of the preliminary objection was raised before the Apex Court that the appellant had a right of appeal under Clause 15 of the Letters Patent Appeal before the High Court, hence the appeal before the Supreme Court be not entertained. In the above context, the Apex Court examined the preliminary objection. The Apex Court noticed both the contentions that the appeal before the Division Bench shall lie under Section 483 of the Companies Act as well as Clause 15 of the Letters Patent Appeal. Following was laid down in paragraph 23 which is quoted below:

"23.Therefore, where appeal has been decided from an original order by a single Judge, no further appeal has been provided and that power which used to be there under the Letters Patent of the High Court has been subsequently withdrawn. The present order which has been passed by the CLB and against that appeal has been provided before the High Court under Section 10 F of the Act that is an appeal from the original order. Then in that case no further Letters Patent Appeal shall lie to the Division Bench of the same High Court. This amendment has taken away the power of the Letters Patent in the matter where learned single Judge

hears an appeal from the original order. Original order in the present case was passed by the CLB exercising the power under Sections 397 and 398 of the Act and appeal has been preferred under section 10F of the Act before the High Court. Learned single Judge having passed an order, no further appeal will lie as the Parliament in its wisdom has taken away its power. Learned counsel for the respondents invited our attention to a letter from the then Law Minister. That letter cannot override the statutory provision. When the statute is very clear, whatever statement by the Law Minister made in the floor of the House, cannot change the words and intendment which is borne out from the words. The letter of the Law Minister cannot be read to interpret the provisions of Section 100A. The intendment of the Legislature is more than clear in the words and the same has to be given its natural meaning and cannot be subject to any statement made by the Law Minister in any communication. The words speak for itself. It does not require any further interpretation by any statement made in any manner. Therefore, the power of the High Court in exercising Letters Patent in a matter where a single Judge has decided the appeal from original order, has been taken away and it cannot be invoked in the present context. There is no two opinion in the matter that when the CLB exercises its power under Sections 397 and 398 of the Act, it exercised its quasi-judicial power as original authority. It may not be a court but it has all the trapping of a court. Therefore, the CLB while exercising its original jurisdiction under Sections 397 and 398 of the Act passed the order and against that order appeal lies to the learned single Judge of the High Court and thereafter no further appeal could be filed."

19. The Division Bench of the Bombay High Court in Maharashtra Power Development Corporation Ltd., on which the learned counsel for the appellant has placed reliance was specifically considered by the Apex Court in the case of **Kamal Kumar Dutta** (supra). In paragraph 25 it was laid down that the said judgment does not lay down the correct law. Following was laid down in paragraph 25 which is quoted below:

"25. In this connection, our attention was invited to a decision of the Bombay High Court in Maharashtra Power Development Corpn. Ltd. Vs. Dabhol Power Co. In that case, the High Court took the view that despite the amendment in Section 100-A of the Code of Civil Procedure, order passed by the Single Judge in appeal arising out of the order passed by CLB under Sections 397 and 398 of the Act, appeal lay to the Division Bench and in that connection, the Division Bench invoked Section 4 (1) of the Code of Civil Procedure which says that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force and, therefore, the Division Bench concluded that the letters patent appeal is a statutory appeal and special enactment. Therefore, appeal shall lie to the Division Bench. We regret to say that this is not the correct position of law. We have already explained the facts above and we have explained Section 100-A of the Code of

Civil Procedure to indicate that the power was specifically taken away by the legislature. Therefore, the view taken by the Bombay High Court in Maharashtra Power Development Corpn. cannot be said to be the correct proposition of law."

20. In view of the foregoing discussion, it is clear that even if under Section 483, there was no condition prohibiting an appeal against an order of the learned Single Judge passed in appellate exercise of jurisdiction, the said exclusion has been now specifically provided in by the Legislature under Section 100-A C.P.C. The judgment of the Apex Court in **Kamal Kumar Dutta** (supra) applies with full force in the facts of the present case.

21. In the present case, the order impugned was passed by the learned Single Judge in Civil Misc. Appeal/Objection 85/2007. An application for correction was moved in the order which has also been rejected. The learned Single Judge decided the appeal/objection against the report of the Official Liquidator exercising power under Rule 164 of the Company Rules.

Rule 164 of the Company Rules is quoted below:

"164. Appeal by creditor.-If a creditor is dissatisfied with the decision of the Liquidator in respect of his proof, the creditor may, not later than 21 days from the date of service of the notice upon him of the decision of he Liquidator, appeal to the Court against the decision. The appeal shall be made by a Judge's summons, supported by an affidavit which shall set out the grounds of such appeal, and notice of the appeal shall be given to the Liquidator. On such appeal, the Court shall have all the powers of an appellate Court under the Code."

22. The application moved for correction in the order passed in the appellate exercise of jurisdiction by the learned Single Judge clearly bars further appeal under Section 483 of the Companies Act, as well as Letters Patent as laid down by the Apex Court in the case of Kamal Kumar Dutta (supra).

23. In view of the foregoing discussion, the preliminary objection raised by Shri Ashok Mehta is upheld and this appeal is dismissed as not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.67796 of 2009

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

Counsel for the Petitioner:
Sri Rakesh Bahadur
Sri Praful Bahadur

Counsel for the Respondents:
Sri A.K. Saxena
Sri Gautam Baghel

U.P. Intermediate Education Act, 1921-Chapter III, Regulation 4 & 22-appointment of R-6-challenged after 8 years-ground of challenge being relative of manager-admittedly R-6 is senior to petitioner-only for purposes of deprivation from promotion-can not be

allowed on highly belated stage-petition dismissed.

Held: Para 5 & 7

Once the appointment is made and continue for a sufficient time, the appointee is entitled for all consequences flowing by virtue of such appointment as are permissible under the Rules and Regulations, governing conditions of service which includes promotion etc.

I find no substance in the submission inasmuch as in the absence of any challenge to such appointment the respondent no. 6, for such a long time and even in this case, he would be entitled to all such consequences flowing from his status as a result of his appointment in a Class-IV post and the same cannot be denied to him for a limited purpose only.

Case law discussed:

1986 UPLBEC 44, 2004(5) ESC (All) 234, 2008(2)ESC 911, J.T.2007(4) SC 253, J.T. 1994(6) SC 71, 1995(5) SCC 628, AIR 1961 SC 993, AIR 1976 SC 2617, 1976(3) SCC 579, AIR 2007 SC 1330= 2007(1) Supreme 455, 2008(4) ESC 2423, 2009(1) SCC 297,. 2009(2) SCC 479, 2009(3) SCC 281, (1874) 5 PC 239.

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

1. Heard Sri Rakesh Bahadur, learned counsel for the petitioner, learned Standing Counsel for respondents no. 1 to 3 and Sri Gautam Baghel, Advocate for respondent no. 6.

2. This writ petition is directed against the order dated 11/12.11.2009 passed by the District Inspector of Schools, Etawah (Annexure-1 to the writ petition) whereby, in accordance with Chapter III, Regulation 2(2) of the Regulations framed under U.P. Intermediate Education Act, 1921 (*hereinafter referred to as the "1921 Act"*) the promotion of respondent no. 6 on class-IV post has been approved.

3. Learned counsel for the petitioner submitted that the respondent no. 6 was appointed as a Class-IV employee on 20.01.2000 when one Sri Shiv Shanker Verma was the president of the committee of management. The respondent no. 6 was his cousin (Mamera Bhai) and thus his appointment was invalid from the very inception in view of Regulation 22 read with Regulation 4, Chapter-III of the Regulations framed under 1921 Act which prohibits the appointment of a relative of any member of the committee of management in the College.

4. It is not in dispute that since the date of appointment, on Class-IV post respondent no. 6 is continuously working in the College and at no point of time his appointment was ever disputed by petitioner in any proceedings. It is only for the first time when a representation was filed on 30.10.2009 while the appointment of respondent no. 6 on Class-IV post made on 20.01.2000 was challenged by the petitioner on the above ground only for the purpose of depriving him promotion under the Regulations.

5. In fact the order of appointment of respondent no. 6 has not been challenged even in this writ petition and there is no relief seeking writ of certiorari for quashing the appointment letter of respondent no. 6. When certain persons are eligible to be considered for promotion, in order to deny a promotion or right to be considered for promotion, their appointment made long back cannot be disputed particularly when no steps were taken by the person concerned assailing the appointment before the

competent authority in accordance with law within a reasonable time. Once the appointment is made and continue for a sufficient time, the appointee is entitled for all consequences flowing by virtue of such appointment as are permissible under the Rules and Regulations, governing conditions of service which includes promotion etc.

6. Sri Rakesh Bahadur, learned counsel for the petitioner stated that even today he is not aggrieved by the mere appointment of respondent no. 6 on Class-IV post but his grievance is that the respondent no. 6 cannot be considered for promotion to a Class-III post since his appointment in Class-IV was not valid.

7. I find no substance in the submission inasmuch as in the absence of any challenge to such appointment the respondent no. 6, for such a long time and even in this case, he would be entitled to all such consequences flowing from his status as a result of his appointment in a Class-IV post and the same cannot be denied to him for a limited purpose only.

8. In **Vijay Narain Sharma Vs. District Inspector of Schools, Etawah and others, 1986 UPLBEC 44,** this Court in paragraphs 25 and 26 of the judgment held as under:

"25. On a reading of Regulation 3 of Chapter II, it is clear that it nowhere contemplated that the teacher who challenges the seniority list can again challenge the validity of the appointment or promotion of a teacher in the college. He can only be aggrieved by the factors, if wrongly decided, as mentioned in Regulation 3. The dispute can be taken in appeal under Clause (1) of Regulation 3 quoted above. In my opinion, it is clear that while disputing the validity of the seniority list, it is not open to a teacher to challenge the appointment and promotion which had already been done. The challenge to the appointment and promotion has been specifically provided. If no challenge is made at that stage then the appointment and promotion becomes final. If the Legislature intended that the appointment and promotion can be challenged at the time of determining seniority, the Legislature would have specifically provided in the Regulations. This has not been done.

26. There is another aspect of the matter that once the appointment or promotion becomes final, a vested right is created in favour of a teacher. A colleague of his in the institution having acquiesced to the appointment and promotion cannot be, subsequently, permitted to raise the dispute."

9. Similar View was taken in **Smt. Manju Keshi Dixit Vs. State of U.P. and others, 2004(5) ESC (All) 234** and in paragraph 13 this Court held:

"13. Thus, the consistent view of this Court is that the appointment cannot be challenged while determining the seniority and if the appointment has been made and is continued for long period, it should not be disturbed or set aside on some technicalities or procedural irregularities."

10. Both the above judgements have been followed recently in ***Smt. Bharti Roy Vs. Deputy Director of Education, II, Kanpur and others, 2008(2)ESC 911***.

11. Moreover, no reason has been assigned by learned counsel for the petitioner as to why for the last almost 9

years the appointment of respondent no. 6 on Class-IV post was not challenged in a proper forum.

12. Delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India. In **New Delhi Municipal Council Vs. Pan Singh and others J.T. 2007(4) SC 253**, the Apex Court observed that after a long time the writ petition should not have been entertained even if the petitioners are similarly situated and discretionary jurisdiction may not be exercised in favour of those who approached the Court after a long time. It was held that delay and laches were relevant factors for exercise of equitable jurisdiction. In **M/S Lipton India Ltd. And others vs. Union of India and others, J.T. 1994(6) SC 71** and **M.R. Gupta Vs. Union of India and others 1995(5) SCC 628** it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ petition should be filed within reasonable time. In **K.V. Rajalakshmiah Setty Vs. State of Mysore, AIR 1961 SC 993,** it was said that representation would not be adequate explanation to take care of delay. Same view was reiterated in **State of Orissa Vs. Pyari Mohan Samantaray and others AIR 1976 SC 2617** and **State of Orissa and others Vs. Arun Kumar Patnaik and others 1976(3) SCC 579** and the said view has also been followed recently in **Shiv Dass Vs. Union of India and others AIR 2007 SC 1330= 2007(1) Supreme 455** and **New Delhi Municipal Council** (supra). The aforesaid authorities of the Apex Court has also been followed by this Court in **Chunvad Pandey Vs. State of U.P. and others, 2008(4) ESC 2423**. This has been followed in **Virender Chaudhary Vs. Bharat Petroleum Corporation & Ors., 2009(1) SCC 297**. In **S.S. Balu and another Vs. State of Kerala and others, 2009(2) SCC 479** the Apex Court held that it is well settled principle of law that delay defeats equity. It is now a trite law that where the writ petitioners approaches the High Court after a long delay, reliefs prayed for may be denied to them on account of delay and laches irrespective of the fact that they are similarly situated to other candidates who have got the benefit. In **Yunus Vs. State of Maharashtra and others, 2009(3) SCC 281** the Court referred to the observations of Sir Barnes Peacock in **Lindsay Petroleum Company Vs. Prosper Armstrong Hurde etc. (1874) 5 PC 239** and held as under:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. . . . . Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

13. Once it is not in dispute that the respondent no. 6 is senior to the petitioner

as a Class-IV employee and he is otherwise eligible for promotion, I do not find it a fit case warranting interference at this stage in extraordinary equitable jurisdiction under Article 226 of the Constitution. The writ petition lacks merit, and, is accordingly dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2009

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.
THE HON'BLE S.C. NIGAM, J.

Civil Misc. Writ Petition No.155 of 2005

Smt. Nirmal Devi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Govind Krishna

Counsel for the Respondent:
Sri C.B. Yadav, C.S.C.

U.P. Entertainment and Betting Tax Act 1979-Section 3-Entertainment Tax exemption from Tax liability for 5 years by G.O. dated 11.8.2000-petitioner inspite of total exemption realized Rs.19,95,890/- from cinema goers-it would be travesty of justice if cinema owner allowed to appropriate the huge amount from cinema goers-direction issued to pay the amount collected unauthorisedly with cost of Rs.5000/-.

Held: Para 15

In the above case the Apex Court has held that in such a situation where the cinema goers had lost huge amount, it would be travesty of justice if the owners of the cinema theaters become eligible to appropriate the amount for its own benefits. To the aforementioned extent, the doctrine of unjust enrichment may be held to be applicable. A person who unjustly enriches himself cannot be permitted to retain the same for its benefit except enrichment. Such licencee/picture hall owners cannot and could not collect any entertainment tax from the cinema goers and if collected, they are liable to deposit the same with the State treasury, otherwise it would amount unjust enrichment.

Case law discussed:
2009 NTN (Vol. 41) 33

Additional Note- with all respect to the view taken by Court if amount of entertained tax unauthorisdly realized by the cinema owner from cinema viewers, how it can be deposited towards entertainment Tax lead except in head of Pradhan Mantri Rahat Kosh.

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

1. By means of the present petition, the petitioner has challenged the order of the District Magistrate, Azamgarh dated 10-1-2005 whereby the District Magistrate has asked the petitioner to deposit a sum of Rs.19,95,890/- as the same was unauthorisedly realised by her from the cinema goers.

2. The State Government, in order to provide entertainment and boost up cinema in the villages and remote areas promulgated schemes from time to time known as 'grant-in-aid facility' to new cinema halls. By the Government orders dated 9-11-2004, 7-12-1998 and 11-8-2000, the State Government provided grant-in-aid facility to newly constructed permanent cinema buildings subject to the fulfillment of terms and conditions mentioned therein. The petitioner herein, applied for and was granted exemption from deposit of entertainment tax under the scheme dated 11-8-2000. In pursuance

of the said scheme, the petitioner was provided grant-in -aid facility by order dated 10-9-2001 for a period of five years under the scheme dated 11-8-2000, whereby the petitioner's cinema hall was granted complete exemption from payment of entertainment tax for a period of five years. The licence having been granted to the petitioner, she started exhibition of films being lincencee of Raj Palace Phoolpur, Azamgarh under U.P. Cinematograph Rules, 1951. She was served with a notice dated 31-7-2004 by the Entertainment Tax Officer, Azamgarh asking her to pay a sum of Rs.19,95,890/-, the sum realised by her from the cinema goers as entertainment tax. The said notice was given on the ground that under the G.O. dated 11-8-2000, the petitioner was not authorised to collect entertainment tax from the cinema goers and the entertainment tax was unauthorisedly collected by her. A reply dated 9-9-2004 was submitted on the pleas inter alia that there is no fault on her part and the statements of realisation of entertainment tax were duly submitted to the officer concerned with Entertainment Department from time to time but no objection was raised there at any point of time. This being so, the amount thus realised by the petitioner from the cinema goers cannot be recovered from her and the matter be reconsidered. The said reply/representation was dismissed by the Entertainment Tax Commissioner on 23-12-2004. In consequence of the order passed by the Entertainment Tax Commissioner, a fresh demand notice dated 10-1-2005, impugned herein, was served on the petitioner by the District Magistrate, Azamgarh.

3. In the counter affidavit, the stand taken is that under the G.O. dated 11-8-2000, the cinema owners were granted total exemption from payment of entertainment tax, but under the said G.O. such cinema owners were not entitled to realise the entertainment tax from the cinema goers. There being no provision with respect to entertainment tax realised by the cinema owners from the cinema goers by making adjustment entry in the treasury, the petitioner is not entitled to retain the entertainment tax realised by her. The petitioner has unauthorisedly realised a sum of Rs. 19,95,890/- as entertainment tax from the cinema goers and the said amount is refundable to the State exchequer. The impugned demand notice has been sought to be justified in the light of the provisions contained in the G.O. dated 11-9-2000 as also the provisions as contained in U.P. Entertainments & Betting Tax Act, 1979 (hereafter referred to as the Act).

4. In the rejoinder affidavit, it is contended that on a close scrutiny of grant-in-aid scheme dated 11-8-2000, under which the petitioner has been permitted to raise complete construction of permanent cinema building, the petitioner is not liable to deposit the entertainment tax for the period mentioned therein. The petitioner has been provided the benefit of the said scheme by virtue of the order dated 10-9-1991. A conjoint reading of the scheme and the order clearly establishes that the benefit of grant-in-aid has been provided to the new entrepreneurs who have constructed cinema buildings after fulfilling the conditions laid down therein, besides reiteration of the pleased raised in the writ petition.

5. Sri Govind Krishna, learned counsel for the petitioner submits that on

a true and correct interpretation of the government order dated 11-8-2000, the petitioner is entitled to retain the entertainment tax realised from the cinema goers. He submits that the proforma of ticket showing the admission fee and the entertainment tax was approved by the department. The petitioner realised the entertainment tax as per the approved proforma on form 'B' and as such, the department cannot take a turn around and ask the petitioner to pay the entertainment tax realised by her. We were taken through the scheme dated 11-8-2000 as also the order dated 10-9-2001 granting exemption for a period of five years under Section 11(2) of the Act and form 'B' as provided under Rule 13 of the Rules framed under the Act.

6. Sri A.C. Tripathi, learned Standing Counsel, on the other hand, submits that the petitioner was granted grant-in-aid under G.O. dated 11-8-2000. Under the said G.O., the cinema owners were not authorised to collect the entertainment tax and total exemption from entertainment tax for five years was granted thereunder, which was not so in the earlier G.Os. dated 9-11-1994 and 7-12-1998. Under G.O. dated 11-8-2000, there being no such provision permitting a cinema owner to realise entertainment tax from cinema goers or permitting a cinema owner whose picture hall has been exempted from levy of entertainment tax, to realise the entertainment tax from the cinema goers, the petitioner is not authorised to keep the entertainment tax realised from the cinema goers.

7. Considered the respective submissions of the learned counsel for the parties and perused the record.

8. The controversy in the present case centres round the interpretation of G.O. dated 11-8-2000, but before coming to the said G.O., earlier G.Os. dated 9-11-1994 and 7-12-1998 may be noticed. G.O. dated 9-11-1994 provides certain benefit to the permanent picture halls constructed under the said scheme subject to the fulfillment of terms and conditions laid down therein, with which we are not presently concerned. It provides incentives by way of grant of exemption to such picture halls by granting aid to the extent of 50% of entertainment tax collected for the first three years subject to the maximum limit of 50% cost of construction excluding the cost of the land. It provides that while preparing form 'B', as required under Rule 13 of U.P. Entertainments & Betting Tax Rules, 1981, the respective amounts mentioned therein should be shown separately. It further provides a mechanism for making adjustment entry in the account books of the treasury which would show the payment of grant-in-aid amount given by the Government to the cinema owners without actually depositing the entertainment tax with the Government treasury and its repayment to the cinema goers. Emphasis in the scheme is on payment of certain amount by way of grant to the cinema goers out of the entertainment tax collected by it. Similarly, in the subsequent G.O. dated 7-12-1998, it is provided that the cinema owners shall collect the entertainment tax and will be entitled for specified percentage from the entertainment tax so collected by way of grant for a period of three years upto maximum limit of 50% of the entertainment tax realised by it.

9. Now, we consider the G.O. dated 11-8-2000 involved in the writ petition.

The said G.O. grants total exemption to a new cinema hall constructed in a place having less than one lac population on the basis of 1991 census to the extent of 100% exemption from entertainment tax for a period of five years. In respect of the other picture halls i.e. constructed in an area having more than one lac population, 100% exemption has been granted for the first three years and 50% for the next two years. It may be noted that in this G.O. there is no corresponding provision for payment of any grant by way of aid to such picture hall owners. There is a conscious departure in the G.O. dated 11-8-2000 from the earlier G.Os. in this regard. The Government took a conscious decision under the said G.O. dated 11-8-2000 to grant total or partial exemption from entertainment tax to such new picture halls instead of giving any amount as grant-in-aid to the owners.

10. Entertainment tax is a tax, as is well known, a compulsory extraction. The State Government has been authorised to levy entertainment tax in pursuance of the powers conferred on it by Entry 62 of State List of Seventh Schedule of Constitution of India.

11. The whole emphasis of the petitioner is on the fact that there has been no concealment or misrepresentation by the licencee, the impugned demand is illegal. It was submitted that the petitioner prepared form 'B' during the period of grant-in-aid facility as per direction given by the officials of the entertainment tax department and prescribed by them. He submits that under the said form, the petitioner has clearly mentioned the entertainment tax realised by her from time to time, but no objection was raised by the department. It was also submitted that no prudent businessman will establish a cinema hall in an area having population less than one lac or in remote areas if the grant-in-aid facility, as was granted by earlier G.Os., is not made available to such entrepreneurs, otherwise the business would not be viable. We are not at all impressed by the said argument. The G.O. should be read as it is. Nothing can be added in it nor anything can be subtracted from it. Learned counsel for the petitioner could not point out any provision therefrom permitting a licencee to retain the entertainment tax wholly or in part by way of grant-in-aid. This being so, it cannot be provided by means of any interpretative process. The petitioner, like other licencees, preferred to establish a cinema hall with wide open eyes after fully understanding the contents of the G.O. dated 11-8-2000. So far as the inaction on the part of the officials of the respondent department in permitting the petitioner to realise the entertainment tax from the cinema goers is concerned, it will not in any manner entitle the petitioner to retain the entertainment tax unauthorisedly realised by her. There cannot be any estoppel against a statute. If a licencee, like the petitioner, under law is not entitled to realise and retain the entertainment tax, the said tax cannot be pocketed by her.

12. Section 3 of the Act, which is charging section, provides tax on payment for admission to entertainment. It says that there shall be levied and paid on all payments for admission to any entertainment, other than an entertainment to which Section 4 or Section 4-A or Section 4-B applies. Sections 4-A and 4-B relate to tax on video cinema and tax on video show in public service vehicle or hotels with which we are not concerned

presently. Section 3 further provides that the entertainment tax shall be collected by the proprietor from the person making the payment for admission and paid to the Government in the manner prescribed. It follows that a proprietor of cinema has been authorised to collect entertainment tax from the cinema goers and to deposit the same to the Government in the prescribed manner. A proprietor of cinema is not entitled to pocket the entertainment tax and he has to deposit it with the State Government.

13. In view of Section 3 of the Act, when a proprietor of cinema collects tax by way of entertainment tax from the cinema goers, it would be entitled to collect such tax which is subject to levy and collection by the State. The authority in this behalf is implicit. Only for the aforesaid purpose, the statute provides for the mode and manner in which the tax is to be collected. This being so, there is no reason for appropriation of entertainment tax by the proprietor of cinemas. The Government order under consideration was issued in conformity with the above principle and that is the reason that there was a conscious departure from the earlier Government orders.

14. It is not out of place to mention here that the Apex Court examined the scheme of a cognate Act namely, Bombay Entertainment Duty Act, 1923 and the Rules framed thereunder in the case of ***State of Maharashtra & others Vs. Swanstone Multiplex Cinema (P) Ltd. 2009 NTN (Vol. 41) 33*** and held that the State Government is entitled to recover entertainment tax collected by a proprietor of cinema from the cinema goers, subject to such exemption and concession as have been given to them. A proprietor of cinema when collects tax by way of entertainment tax from the cinema goers, it would be entitled to collect such tax which is subject to levy and collection by the State. Paragraph-24 of the judgment is reproduced below:-

"24- *In absence of any express statutory provision, allowing the proprietors of the multiplex theatre to retain the benefit, it is difficult for us to arrive at such an inference. The State has power to impose tax. The State has a power to grant exemption or concession in respect of payment of tax. It has no power in terms of the provisions of the Constitution or otherwise to allow an assessee to collect the tax and retain the same. We will assume that to that effect the provisions are not very clear but the superior courts will not interpret the statute in such a way which will confer an unjust benefit to any of the parties, i.e., either the taxpayer or tax collector or the State. The statute must be interpreted reasonably. It must be so interpreted so that it becomes workable. Interpretation of a statute must subserve a constitutional goal."*

15. In the above case the Apex Court has held that in such a situation where the cinema goers had lost huge amount, it would be travesty of justice if the owners of the cinema theaters become eligible to appropriate the amount for its own benefits. To the aforementioned extent, the doctrine of unjust enrichment may be held to be applicable. A person who unjustly enriches himself cannot be permitted to retain the same for its benefit except enrichment. Such licencee/picture hall owners cannot and could not collect any entertainment tax from the cinema goers and if collected, they are liable to

deposit the same with the State treasury, otherwise it would amount unjust enrichment.

16. This being so, the petitioner is liable to pay the amount unauthorisedly collected from the cinema goers as entertainment tax as per the impugned demand notice. There is no merit in the writ petition.

The writ petition is dismissed with costs of Rs.5,000/-

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2009

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No.25273 of 2007

Shakeel Ahmad ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri I.M. Khan
Sri Rahul Kumar Tripathi
Sri R.J. Alvi
Sri Shahabuddin

Counsel for the Opposite Party:
Sri Deepak Dubey
Sri R.B. Sahai
A.G.A.

Code of Criminal Procedure Section-439-Parity-offence under Section 302 IPC-the role of applicant as well as the co-accused-discharging shots which death of deceased-post Mortem report two gun shots injury noticed-Trail in progress-considering conviction of life imprisonment of applicant and progress of Trail-ensure fair Trail-can not be released on Bail.

Held: Para 6

Considering the facts, circumstances of the case, submission made by learned counsel for the applicant, learned A.G.A., learned counsel appearing on behalf of the complainant, the allegation against the applicant and co-accused Sahab is that they discharged the shots consequently, the deceased sustained injury. According to the post mortem examination report, the deceased had sustained two fire arm wounds of entry, the motive has also been attributed to the applicant, the applicant is having criminal antecedent, he is having criminal back ground and he has been convicted by the Sessions Court for life imprisonment, the trial is in progress, with having all respect to the order dated 20.9.2007, passed by another bench of this Court granting bail to the co-accused Sahab, I do not feel it proper to extend the benefit of the parity to the applicant because he has been convicted for life imprisonment by the Sessions Court and is involved in some other criminal cases also, the benefit of parity may not be given as a rule. The trial is in progress to ensure the fair trial, it is not proper to release the applicant on bail. The prayer for bail is refused.

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

1. Heard Sri I.M. Khan, Sri R.K. Tripathi, Sri R.J. Alvi and Sri Shahab Uddin, learned counsel for the applicant, learned A.G.A. for the State of U.P., Sri Deepak Dubey, Sri R.B. Sahai, learned counsel for the complainant and perused the record.

2. This Bail application has been filed by the applicant Shakeel Ahmad with a prayer that he may be released on bail in case crime no. C-6 of 2005, under

section 302 I.P.C., Police Station Khakreru, District Fatehpur.

3. The facts, in brief, of this case are that FIR has been lodged by Chandra Kumar on 16.7.2005 at 12.10 p.m. in respect of the incident which had occurred on 31.5.2005 at 3.00 p.m., the applicant and two other co-accused persons are named as accused in the FIR, the FIR has been lodged in pursuance of the order passed by learned Magistrate concerned in exercise of powers conferred under section 156(3) C.P.C.. It is alleged that on 31.8.2005, the first informant and his brother Govardhan were going to meet his sister, who was married in Fatehpur, at about 3.00 p.m. when they reached near village Inayatpur, Shankar dacoit along with Muskan Miyan, Anwar, Balaghat Ali, Asif Jama, Mohd. Ahmad, Amaldar ,Zahir, Sahab , Atiq Ahmad, applicant Shakeel, Naim, Madau, Amin, Satosh and 3 or 4 unknown persons armed with weapons, met them and at the exhortation of co-accused Shanker, the applicant an other co-accused Sahab discharged shots , consequently, the brother of the first informant, namely, Govardhan sustained gun shot injury, who died on spot. The firing was done at the fist informant also but he could not sustain, the injury because, he ran away to village Inayatpur. Prior to the alleged incident, Shanker and other co-accused had committed the murder of the uncle of the first informant, namely, Santa and his dead body was disappeared. According to post mortem examination report, the deceased had sustained two fire wounds of entry, having the exit wound, the applicant applied for bail before the learned Additional Sessions Judge, Fatehpur who rejected the same on 9.10.2007.

4. It is contended by learned counsel for the applicant that FIR is too much delayed, without having any plausible explanation. The presence of the first informant at the alleged place of occurrence is highly doubtful because the first informant was having equal enmity as the deceased was having with the accused persons. The accused persons were many in numbers, it was not possible for the first informant to escape from the place of occurrence as unhurt. The inquest report of the deceased was prepared on 1.6.2005 as of unknown deceased, its information was given to police station by Atiq Ahmad, the witness of the inquest report is Ram Gopal also, who is father of the first informant. Even then, it was not informed that the deceased has been murdered by the applicant and other co-accused persons. It is also surprising that the dead body was has not been identified. The accused persons named in the FIR were having inter-se enmity. The FIR lodged by co-accused Atiq Ahmad on 16.7.2005 in respect of the same incident which is not reliable. It has been lodged in defence. The co-accused Sahab whose case is based on the same footing with the case of the applicant has been released on bail by another bench of this Court on 20.9.2007 in criminal misc. bail application No. 18179 of 2007.

5. In reply of the above contention, it is submitted by learned A.G.A. and counsel appearing on behalf of the complainant that according to the prosecution version, the role of causing injuries has been assigned to the applicant and co-accused Sahab, the deceased has sustained two gunshot injuries, prior to the alleged incident, uncle of the first informant was also murdered by co-

accused Shanker and others , that inquest report was deliberately prepared on the basis of the information given by the co-accused Atiq Ahmad, the cross version is not reliable, it has been brought to create a defence. The co-accused Atiq Ahmad is father of the applicant, he himself is a hardened criminal, the applicant and his father has been convicted for life imprisonment by the Sessions Judge, Fatehpur in another case, its appeal is pending before the high court in which applicant has been released on bail, after releasing on bail, he is involved in another case. The applicant is history sheeter, the benefit of parity may not be given to the applicant because the applicant remained absconded for period of about 2 years. He is in jail since 10.5.2007, the applicant was granted bail in case crime no. 146-A of 2006 under sections 302, 147, 148, 149 I.P.C., police station Khakhreru, District Fatehpur on 3.9.2007 by another bench of this Court in criminal misc. application No. 15073 of 2007, the applicant was convicted for life on 23.11.2005 under section 302 I.P.C., he has preferred Criminal Appeal No. 291 of 2006, which is pending. The trial of this case is at the conclusion stage, therefore, the applicant may not be released on bail. The benefit of parity may not be provided to the applicant.

6. Considering the facts, circumstances of the case, submission made by learned counsel for the applicant, learned A.G.A., learned counsel appearing on behalf of the complainant, the allegation against the applicant and co-accused Sahab is that they discharged the shots consequently, the deceased sustained injury. According to the post mortem examination report, the deceased had sustained two fire arm wounds of entry, the motive has also been attributed to the applicant, the applicant is having criminal antecedent, he is having criminal back ground and he has been convicted by the Sessions Court for life imprisonment, the trial is in progress, with having all respect to the order dated 20.9.2007, passed by another bench of this Court granting bail to the co-accused Sahab, I do not feel it proper to extend the benefit of the parity to the applicant because he has been convicted for life imprisonment by the Sessions Court and is involved in some other criminal cases also, the benefit of parity may not be given as a rule. The trial is in progress to ensure the fair trial, it is not proper to release the applicant on bail. The prayer for bail is refused.

7. Accordingly, this application is rejected.
