ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2009

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 49968 of 2007

Shri Radha Govind Mahavidyalaya Heerapur (Gopi) Aligarh, U.P. and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh
Sri V.K. Singh
Sri R.N. Singh
Sri S.B. Singh

Counsel for the Respondents:
Sri Sanjay Kumar Singh
S.C.

State Universities Act- 1972 Section 17(B) readwith National Council For Teachers Education Act 1993- Section 14(b)- Recognition to run B.Ed. Classes given by N.C.E.T. Recognition withdrawn–by Registrar without following the procedure prescribed in statutory provision on complain of M.L.A.-Held-unless recognition withdrawn by NCET-University can not revoke application order impugned set-a side.

Held: Para 16 & 20

In view of aforesaid provision, it is clear that power of withdrawal of affiliation is only to Executive Council of University, therefore, the authority as per direction by this Court, Executive Council of University has passed an order. Since N.C.T.E is not a affiliating body and has no power to grant affiliation, as such, N.C.T.E has got no power to withdraw the affiliation of the college. Under Section 14(3)(a) of the Act, N.C.T.E is the authority to grant recognition on certain conditions. The recognition and affiliation are entirely different things. For granting affiliation, recognition by N.C.T.E is not only condition but one of the condition. Recognition is granted under N.C.T.E Act while affiliation is granted under the U.P. Universities Act by the State Government on the recommendation of the University after making spot inspection by panels of inspector as per provisions of the statutes, therefore, power of withdrawal of affiliation vest only to the Executive Council as per Section 37(8) of the State Universities Act.

In view of aforesaid fact, I am of opinion that order impugned cannot be sustained as from the record it appears that Executive Council has not taken a decision in a proper manner as provided and if University authority on the basis of complaint and inspection has come to the conclusion that petitioners' institution does not fulfil the criteria, as required, after making inspection should have submitted a report to the National Council of Teachers Education for passing the appropriate orders. Once recognition has been given, affiliation can be withdrawn in a proper manner provided under the statute. If it has not been adopted, the order passed by respondents will not be just and proper.
Case law discussed:
(2006)9 Supreme Court Cases, 1, 1975 Supreme Court Cases, 915, 2005(3) ESC, 1610.

(Delivered by Hon'ble Shishir Kumar, J.

1. This writ petition as well as W.P. No. 49973 of 2007 and W.P. No.49970 of 2007 have been filed for quashing the decision of the Executive Council dated 11.3.2007 communicated by the Registrar vide its letter dated 25.5.2007. Further a writ in the nature of mandamus commanding the respondent-University to permit the students of petitioners'

institution to appear in the examination of B.Ed which are being conducted by the University in near future.

2. The facts arising out of the writ petition are that petitioners in Writ Petition No.49968 of 2007, on 27.12.2002 'No Objection Certificate' was issued by the State Government for setting up an institution for running B.Ed course under the Self Financing Scheme with effect from the academic session 2003-04. No Objection Certificate was subject to the condition that recognition was granted by the National Council for Teachers Education. The National Council for Teacher Education granted recognition to petitioners' institution for running B.Ed course for one year duration with effect from academic session 2003-04. On 30.1.2004, the Chancellor passed an order granting affiliation to the aforesaid college with effect from 1.7.2004 for a period of one year. An application was made for extension of affiliation with effect from 1.7.2005. On 5.12.2005, Chancellor passed an order refusing to extend the affiliation for the Session 2005-06. The said communication was communicated to petitioners vide its letter dated 10.1.2006. A representation to that effect was made stating therein that objections taken for refusing extension does not exist and appears to be misconceived. Before any order is passed one Amar Singh Yadav, a member of Legislative Assembly made a complaint before the Vice Chancellor in respect of grant of affiliation to the colleges run by petitioner No.2 which was followed by filing Public Interest Litigation as Writ Petition No.46708 of 2006. The aforesaid writ petition was disposed of finally to consider the matter by an appropriate authority. In compliance, the Vice Chancellor directed the Registrar to proceed with the matter and a Three Member Committee is constituted for inquiring into the allegations against petitioners' college. The Three Member Committee submitted their report on 27.10.2006, then a show cause notice was issued by the Registrar. Petitioners have submitted reply and an order was communicated to petitioners by the Registrar withdrawing the affiliation of petitioners' college. Hence, the present writ petition.

3. The facts of the other connected writ petitions mentioned above are also the same, therefore, it is not necessary to mention it again.

4. Sri G.K. Singh, learned Advocate appearing for petitioners has submitted before this Court that affiliation granted to petitioners' college could not be withdrawn by respondent-University. The Colleges in question were granted affiliation by National Council for Teachers Education as per Section 14(1) of the National Council for Teachers Education Act, 1993. Section 14(6) of the aforesaid Act clearly provides that every examining body shall on receipt of order under Sub-Section (4) grant affiliation to the institutions, where recognition has been granted or cancel the affiliation of the institution, where recognition has been refused. From the aforesaid facts and circumstances, it is therefore, clear that where college is recognised by the National Council for Teachers Education (NCTE), examining body i.e. the University is bound to give affiliation to the said college. If for some reason, it is felt by the governing body that the college in question was not entitled to have such recognition or affiliation it can always

bring the relevant facts and circumstances to the knowledge of the NCTE for its consideration and based upon the aforesaid information. NCTE can always withdraw recognition which would automatically result in withdrawal of the recognition of the University. Section 17 of the National Council for Teachers Education Act, 1993 clearly provides that the Regional Committee of the aforesaid council on its own motion or on any representation received from any person on being satisfied that the recognised institution has contravened any provision of the Act, Rules, Regulations or orders made by it or any condition subject to which recognition under the Act was granted, may withdraw recognition of such recognised institution.

5. In case of the respondent-University was of the view that college in question was not entitled to have recognition or affiliation it could have referred the matter to N.C.T.E for necessary action under Section 17(1) of the Act. N.C.T.E Act 1993 being a Central Act would have an over-riding effect upon the State Universities Act, 1973. The submission to this effect relied by respondents that order of recognition granted by N.C.T.E, as the college in question failed to fulfil the conditions mentioned therein, it is always open to the examining body to withdraw the affiliation granted to the college. Clause 3 (f) of the order of recognition granted by N.C.T.E provides that non-compliance of the conditions mentioned, an action can be initiated under Section 17(1) of the Act to withdraw recognition. In view of aforesaid provision, if respondent-University was of opinion that college in question does not fulfil the requisite conditions for grant of recognition or affiliation, the matter could have been referred to N.C.T.E for appropriate action as provided under Section 17(1) of the Act. Further submission has been made by learned counsel for petitioners that it is for this reason that this Court while disposing of the writ petition filed by Sri Amar Singh Yadav has issued a direction to the Vice-Chancellor to refer the matter to appropriate authority and according to the direction, matter would have been placed before the appropriate authority i.e. N.C.T.E. The Executive Council of the University on its own has no jurisdiction to withdraw the affiliation in favour of petitioners because as per Section 14 (6) of the N.C.T.E Act, examining body is bound to grant affiliation to a college which has been given recognition by the N.C.T.E. In **(2006) 9 Supreme Court Cases, 1, State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others**, the Apex Court has held that provision of NCTE Act will have an over-riding effect upon the State Universities Act and the State Government and the Examining Body are bound by the orders passed by N.C.T.E. Paragraphs 63 and 74 are relevant for the said purposes. The same is reproduced below:-

"63*. In the instant case, admittedly, Parliament has enacted the 1993 Act, which is in force. The preamble of the Act provides for establishment of National Council for Teacher Education (NCTE) with a view of achieving planned and coordinated development of the teacher-education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith. With a view of achieving that object, the National*

Council for Teacher Education has been established at four places by the Central Government. It is thus clear that the field is fully and completely occupied by an Act of Parliament and covered by Entry 66 of List I of Schedule VII. It is, therefore, not open to the State Legislature to encroach upon the said field. Parliament alone could have exercised the power by making appropriate law. In the circumstances, it is not open to the State Government to refuse permission relying on a State Act or on "policy consideration'.

74. *It is thus clear that the Central Government has considered the subject of secondary education and higher education at the national level. The Act of 1993 also requires Parliament to consider teacher -education system "throughout the country". NCTE, therefore, in our opinion, is expected to deal with applications for establishing new Bed colleges or allowing increase in intake capacity, keeping in view the 1993 Act and planned and coordinated development of teacher-education system in the country. It is neither open to the State Government nor to a university to consider the local conditions or apply "State policy" to refuse such permission. In fact, as held by this Court in cases referred to hereinabove, the State Government has no power to reject the prayer of an institution or to overrule the decision of NCTE. The action of the State Government, therefore, was contrary to law and has rightly been set aside by the High Court."*

6. Further submission has been made by the learned counsel for petitioners that while withdrawing the affiliation, provisions of the State Universities Act has not been followed, as such, the order is liable to be quashed.

7. Section 37 of the Universities Act deals with the affiliation. Sub-Section (7) of the aforesaid provision provides that Executive Council may direct an affiliated college so inspected to take such action as may appear to it to be necessary within a specific period. Sub Section (8) provides that, in case, the affiliated college fails to comply any of the direction of the Executive Council under Sub Section (7) or to fulfil the conditions of affiliation may, after obtaining a report from the Management of the College and with the previous sanction of the Chancellor, be withdrawn or curtailed by the Executive Council in accordance with the provisions of the statutes. The Executive Council shall get the college inspected and thereafter it shall give a direction as may appear to be necessary and it is only when the college fails to comply with the said direction given by the Executive council or to fulfil the conditions of the affiliation, then Executive Council will proceed to withdraw or curtail the affiliation but it has to be after giving an opportunity of hearing to the management and with the previous sanction of the Chancellor.

8. In the present case, upon complaint made by one Sri Amar Singh Yadav and in view of the order of this Court, an inquiry was initiated by the Vice Chancellor and a Three Member Committee was constituted. The Vice-Chancellor constituted Three Member Committee and this was not done by the Executive Council. The report of the enquiry officer was submitted on 27.10.2006 and based upon aforesaid report a show cause notice was issued by the Registrar on 28.10.2006. The said report was also not placed before the Executive Council before issuance of the said show cause notice. The Executive

council has not given any direction to petitioners' college after considering the report of the Three Member Committee. The matter was placed directly before the Executive Committee on 11.3.2007 and it was decided to withdraw the affiliation and the same was communicated to petitioners through Registrar and no reasons have been recorded. The reasons given by Executive Council that Executive Council has applied its mind has also not been brought on record. There is no prior sanction of Chancellor before withdrawing the affiliation of the petitioners' college. The letter of Chancellor dated 7th August, 2006 also finds reference of letter of Registrar dated 25.5.2007 which is impugned in the writ petition. The letter dated 7.8.2006 would show that by means of the aforesaid order, a simple direction has been given by the Chancellor to initiate proceedings under Section 37(8) of the Act, in respect of affiliation of aforesaid colleges and to take action in accordance with law. This cannot be said to be an order of sanction by the Vice-Chancellor. After enquiry report of the Three Member Committee was received by the University, a letter was sent to the Chancellor on 14.11.2006. By this letter, approval of the Chancellor was sought. However, without waiting for an order from Vice Chancellor granting or disapproving the approval, matter was placed before Executive Council and the decision withdrawing the affiliation of colleges was taken. From this it appears that no prior approval of the Chancellor was ever obtained by Executive Council before withdrawing the affiliation. Therefore, there cannot be any proper procedure adopted by respondents as provided under Section 33(8) of the Act.

9. A submission has been made by the learned counsel for petitioners that it is well settled principle of law that law requires a thing to be done in a particular manner. Section 37 of the Act laid down the procedure which has to be followed by respondent- authorities. The same has not been followed. Reliance has been placed upon a judgement of the Apex Court reported in **1975, Supreme Court Cases, 915 Ramchandra Keshav Adke (Dead) by Lrs. Appellants Vs. Govind Joti Chavare and others**. Para 25 of the said judgement is relevant for this purpose. The same is being quoted below:-

"25. A century ago, in Taylor v. Taylor, (1875) 1 Ch D 426 Jessel M. R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. This rule has stood the test of time. It was applied by the Privy Council, in Nazir Ahmed v. Emperor, 63 Ind App 372 = (AIR 1936 PC 253 (2)) and later by this Court in several cases, Shiv Bahadur Singh v. State of V. P., (1954) SCR 1098 = (AIR 1954 SC 322 = 1954 Cri LJ 910)'; Deep Chand v. State of Rajasthan. (l962) SCR 662 = (AIR 1961 SC 1527 = 1961 (2) Cri LJ 705) to a Magistrate making a record under Sections 164 and 364 of the Code of Criminal Procedure, 1898. This rule squarely applies "where indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other. Maxwell's Interpretation of Statutes, 11th Edn.pp.362-363."The rule will be attracted with full force in the present case, because non-verification of

the surrender in the requisite manner would frustrate the very purpose of this provision. Intention of the legislature to prohibit the verification of the surrender in a manner other than the one prescribed is implied in these provisions. Failure to comply with these mandatory provisions, therefore had vitiated the surrender and rendered it non est for the purpose of S. 5 (3) (b)."

10. Another Division Bench judgement has been reported in **2005(3) ESC, 1610 M/s Ram Ashrey Lal Rajendra Kumar Vs. State of U.P. and others**. Paragraph 5 of the said judgement is being reproduced below:-

*"**5**. When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. (Vide Taylor v. Taylor, **(1876) 1 Ch.D.426;** Nazir Ahmad v. King Emperor, **AIR 1936 PC 253**; Deep Chand v. State of Rajasthan, **AIR 1961 SC 1527**; Patna Improvement Trust v. Shrimati Lakshmi Devi and others, **AIR 1963 SC 1077**; State of Uttar Pradesh v. Singhara Singh and others, **AIR 1964 SC 358**; Nika Ram v. State of Himachal Pradesh, **AIR 1972 SC 2077;** Ramchandra Keshav Adke (Dead) by Lrs. V. Govind Joti Chavare and others, **AIR 1975 SC 915**; Chettiam Veettil Ammad and another v. Taluk Land Board and others, **AIR 1979 SC 1573**; State of Bihar and another v. J.A.C. Saldanha and others, **AIR 1980 SC 326**; A.K. Roy and another V. State of Punjab and others, **(1986) 4 SCC 326**; State of Mizoram v. Biakchhawana **(1995) 1 SCC 156**; J.N.Ganatra v. Morvi Municipality Morvi, **AIR 1996 SC 2520**; and Babu Verghese and others v. Bar Council of Kerala and others, **AIR 1999 SC 1281**)."*

11. Further submission has been made that resolution of Executive Council does not disclose any reason. The decision dated 11.3.2007 has been communicated by the Registrar vide its letter dated 25.5.2007. The said letter does not contain any reason based upon which respondent-University has proceeded to withdraw the affiliation of three colleges run by petitioners. Further a copy of the resolution passed by the Executive Council dated 11.3.2007 has also not been appended along with the reply submitted by the respondents. However, no document has been filed by respondents or University has produced any document to show therein that application of mind by Executive Council in the matter. Further the reply submitted by petitioners have not been taken into consideration by respondents. The case of respondents is that no reply has ever been submitted by petitioners' college. The fact mentioned herein is totally incorrect. As it is apparent that the complete proceeding against petitioners were politically motivated, therefore, reply submitted by petitioners has been ignored and order has been passed without considering the reply filed by petitioners.

12. In view of aforesaid fact, learned counsel for petitioners submits that order impugned is liable to be quashed.

13. On the other hand, counter affidavit has been filed on behalf of

respondents Nos. 2 and 3 and learned Standing Counsel has put an appearance on behalf of respondent No.1.

14. Learned counsel for respondent-University submits that as withdrawal of affiliation proceeding under Section 37 (8) of the U.P. State Universities Act, 1973 was initiated against all three institutions on the basis of complaint of one Amar Singh Yadav, the State Government on this complaint has constituted high level Committee of three officers to inquire the allegations of the complaint. A spot inspection of the institutions was made by Committee and a report was submitted separately for three institutions mentioning that rooms are not constructed as per norms and on the spot, basic required infrastructure as per norms are not available. On the basis of the aforesaid report, Chancellor sent a letter to Registrar directing to ensure proceeding in accordance with Section 37(8) of the U.P. Universities Act for withdrawal of the affiliation. The Registrar submitted a detailed report before the Vice-Chancellor. The Registrar of the University has issued an order dated 22.8.2006 to Three Members Committee of the Executive Council nominated by the Vice Chancellor to examine and to study the relevant record of the institution. The Secretary Higher Education has also sent a letter dated 17.10.2006 to the Vice Chancellor enclosing the enquiry report of the Committee. A joint report was submitted to the Vice-Chancellor and various short comings and irregularities were found and recommended to ask explanation from institutions. A permission was sought for sending of show cause notice/explanation to institutions. Show cause notice was given to institutions and various informations were sought for on 28.10.2006. After expiry of seven days of the aforesaid show cause notice dated 28.10.2006, a reminder was also sent for asking explanation within three days. Then the matter was placed before Executive Council for its meeting dated 11.3.2007 and after discussing the entire aspect of the matter and report it was decided to withdraw the affiliation of institution with effect from 11.3.2007. The decision was communicated by Registrar to the institutions.

15. Learned counsel for respondents submits that there are two different procedure and provisions for granting affiliation and for withdrawal of granting affiliation. The affiliation is granted under Section 37(2) of the Universities Act, while affiliation can be withdrawn under section 37(8) of the Act. If the college fails to comply any direction of Executive Council under Section 37(7) of the Act, the provisions of withdrawal of affiliation can be initiated by competent authority. The provisions and procedure of withdrawal of affiliation has also been specifically been mentioned in the statute from para 12.28 to 12.33 which is fully in consonance of the provisions of Section 49 (m) of the U.P. State Universities Act. The same is being quoted below:-

*"**12.28** - Continuance of affiliation shall depend on continued fulfilment of conditions laid down by the University.*
***12.29** - An affiliated college shall be deemed to have been dis-affiliated if it fails to send up any candidate for an examination conducted by the University for three successive years.*
***12.30** - The Executive Council may direct a college not to admit students to a particular class if the conditions laid*

down for starting the class have, in the opinion of the Executive Council, been disregarded by the college concerned. The classes may, however, be restarted with the prior permission of the Executive Council when the conditions are fulfilled to its satisfaction.

12.31 *- If a college disregards the requirements of the University regarding the fulfilment of the conditions of affiliation and fails to fulfil the conditions in spite of notice issued by the University, the Executive Council may, with the previous sanction of the Chancellor, suspend the affiliation till the conditions are fulfilled to the satisfaction of the Executive Council.*

12.32 *- (1) The Executive Council may, with the prior sanction of the Chancellor, deprive an affiliated college of the privileges of affiliation either wholly or for any degree or subject, if it fails to comply with the directions of the Executive Council or to fulfil the conditions of affiliation or for gross mismanagement, or if for any reason the Executive Council is opinion that the college should be deprived of such affiliation.*

(2) If the salaries of the staff are not paid regularly, or if the teachers are not paid their salaries to which they were entitled under the Statutes or the Ordinances, the college concerned would be liable to withdrawal of affiliation within the meaning of this Statute.

12.33 *- The Executive Council shall, before taking any action under the preceding Statutes, call upon a college to take, within a specified period, such action as may appear to be necessary in respect of any of the matters referred to in the conditions of affiliation."*

16. In view of aforesaid provision, it is clear that power of withdrawal of affiliation is only to Executive Council of University, therefore, the authority as per direction by this Court, Executive Council of University has passed an order. Since N.C.T.E is not a affiliating body and has no power to grant affiliation, as such, N.C.T.E has got no power to withdraw the affiliation of the college. Under Section 14(3)(a) of the Act, N.C.T.E is the authority to grant recognition on certain conditions. The recognition and affiliation are entirely different things. For granting affiliation, recognition by N.C.T.E is not only condition but one of the condition. Recognition is granted under N.C.T.E Act while affiliation is granted under the U.P. Universities Act by the State Government on the recommendation of the University after making spot inspection by panels of inspector as per provisions of the statutes, therefore, power of withdrawal of affiliation vest only to the Executive Council as per Section 37(8) of the State Universities Act.

17. In N.C.T.E Act there is no provision of withdrawal of the affiliation. There is a proviso for withdrawal of recognition only. In the present case, **controversy is relating to withdrawal of affiliation not withdrawal of recognition**. Under the present facts and circumstances of the case, it is for withdrawal of affiliation under the provisions of Section 37(8) of the State Universities Act. If the recognition has been granted by N.C.T.E, it does not mean that University or State Government has got no power to inspect the institution regarding fulfilment of terms and conditions and norms of the affiliation by the State Government in addition to the N.C.T.E. This cannot be accepted that in

case after granting recognition by the NCTE, the State Government is bound to grant affiliation to the petitioners' institution. Before granting affiliation by the State Government, recognition of the institution by the NCTE is one of the conditions. The object of Section 14 (6) of NCTE Act does not mean that after granting recognition to any institution, State Government cannot refuse to grant affiliation if it is found that required norms laid down by the State Government for affiliation are not fulfilled by the institution. The Supreme Court Judgement relied upon by the learned counsel for petitioner is not applicable to the present case. In the aforesaid case, the issue was to grant affiliation after recognition while the present writ petition is relating to withdrawal of affiliation after granting recognition and affiliation.

18. It is also incorrect to state that petitioners were not afforded full opportunity of hearing by issuance of show cause notice and reminders before passing the order impugned. All relevant provisions have been followed, therefore, writ petition is liable to be dismissed.

19. After hearing learned counsel for the parties and after perusal of the relevant record, it appears that on scrutiny of applications, N.C.T.E has granted recognition to the institution. On the said basis, Chancellor of the University vide its order dated 30.1.2003 has granted affiliation for B.Ed course for the session 2004. It appears that somebody was having enmity with petitioners and made certain complaints as well as filed a Public Interest Litigation before the Court. The said writ petition was disposed of by this Court with a direction to the State Government and other relevant authorities to make proper inspection regarding complaint and to make an enquiry in accordance with law and to pass appropriate orders. It also appears from the record that Vice Chancellor of the University directed the Registrar to proceed with the matter and Three Member Committee was constituted inquiring into the allegation made against petitioner's college. The Three Member Committee submitted a report and a show cause notice was issued to petitioners. Petitioners submitted a reply and the order was passed for withdrawal of affiliation and the same was communicated by Vice Chancellor vide its order dated 25.5.2007. Section 14 (1) of the National Council for Teachers Education Act 1993 provides regarding the recognition on the basis of certain norms provided under the Act. From perusal of the aforesaid provision it appears that where the college is recognised by N.C.T.E, unless and until something is found otherwise, as affiliation is to be granted by the examining body. While considering the claim after recognition given by N.C.T.E, if the University is of the opinion that particular institution is not fulfilling the norms, as provided, then Section 17 provides that on the basis of representation or suo-moto, recognition can be withdrawn. Under the State Universities Act, Sub Section 7 of Section 37 provides that Executive Council may direct affiliated college to inspect or to take action, if necessary, within a specific period and to give a notice to that effect and if direction of the Executive Council under Sub Section 7 is not fulfilled then action can be taken under Sub Section 8 of Section 37 of the Act. Section 37 itself provides regarding the procedure which is to be adopted by respondent-University while withdrawing affiliation of the

college. Sub-Section 7 of Section 37 provides that after inspection, if something is found lacking, Executive Council may direct an affiliated college to take necessary steps accordingly. Sub-Section 8 provides that if the college fails to comply the direction of Executive Council, after obtaining the report from the management and with the prior sanction of the State Government, affiliation can be withdrawn. But from the record it appears that procedure prescribed has not been followed by respondents. The order impugned has been communicated by the Registrar only stating the fact that the decision has been taken by Executive Council to withdraw the affiliation. Further it has to be noted that the Division Bench of this Court while disposing of the writ petition has directed that the matter be enquired and a final decision in the matter in pursuance of the report of the Enquiry Committee dated 24.4.2006 and 19.5.2006 be taken expeditiously and to refer the matter for further action to the appropriate statutory authority. The contention of petitioners to this effect appears to be correct that intention of the Court was regarding reference to the authority under Section 17 of the National Council for Teachers Education Act, 1973 but it has not been done so and decision has been taken by respondent No.1. From the record, it does not appear that matter was referred to Executive Council for taking a decision in an appropriate manner. It also appears that from the office of the Governor, a letter was sent on 7th August, 2006 to the Registrar of the University to take action against petitioners' institution under section 17(8) of the Universities Act after making an enquiry. On that basis it appears that Registrar of the University sent a letter dated 28.10.2006 to the institution for submitting a reply. Reply was submitted by petitioners but in the meantime, on 14.11.2006, Registrar of the University has requested the Chancellor to cancel the affiliation of petitioners' institution and it appears that on the basis of that recommendation, the order impugned has been passed and communicated to petitioners. There is nothing on record to show that decision on the basis of relevant report submitted by the Enquiry Committee was considered by Executive Council who is the relevant authority to pass the appropriate orders. From the perusal of Clause-8, it also appears that order can be passed withdrawing or curtailment with the previous sanction of Chancellor by the Executive Council in accordance with provisions of the statute. From the perusal of the order impugned it does not appear that proper procedure has been followed. Further the Apex Court judgement relied upon by petitioners in State of Maharashtra (Supra) held that in case, recognition has been granted by N.C.T.E., the University was bound to grant affiliation whenever permission was granted under Section 14. the University authorities are bound to grant affiliation. The Apex Court has further held that once the recognition has been granted by N.C.T.E. Under Section 14(6) of the Act, every University (examining body) is obliged to grant affiliation to such institution.

20. In view of aforesaid fact, I am of opinion that order impugned cannot be sustained as from the record it appears that Executive Council has not taken a decision in a proper manner as provided and if University authority on the basis of complaint and inspection has come to the conclusion that petitioners' institution

does not fulfil the criteria, as required, after making inspection should have submitted a report to the National Council of Teachers Education for passing the appropriate orders. Once recognition has been given, affiliation can be withdrawn in a proper manner provided under the statute. If it has not been adopted, the order passed by respondents will not be just and proper.

21. In view of aforesaid fact, writ petition is allowed. The order dated 11.3.2007 is hereby quashed and the matter is remanded back to appropriate respondent to pass the appropriate orders in accordance with law after affording full opportunity to petitioners by a speaking and reasoned order, if possible, within a period of three months from the date of production of certified copy of this order.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE SANJAY MISRA, J.

Special Appeal No. 1519 of 2009

Roshan Lal ...Appellant
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Appellant:
Sri Kripa Shanker Singh

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

Constitution of India, Act-226
Alternative Remedy-After exchange of Counter and Rejoinder affidavits-after long time of interval-dismissal on ground of alternative remedy-held-not proper.

Held: Para 14&15

Bearing in mind the aforesaid principle, when we consider the facts of the case, we are of the opinion that the learned Judge, after having entertained the writ petition, directed the parties to file counter and rejoinder affidavits and that having already been done, at such a distance of time, ought not to have dismissed the writ petition on the ground of alternative remedy.

We hasten to add that after exchange of pleadings, the Court may not be in a position to decide the disputed question of fact, for the reason that for deciding the same, evidence may be required to be laid, and in such circumstance the writ petition cannot be dismissed on the ground of alternative remedy but on the ground that the issue of fact cannot be decided in a writ petition.

Case law discussed:
AIR 2002 SC 2225, AIR 1971 SC 33, (2004) 13 SCC 665, (1998)2 UPLBEC 1154, (2006) 1 UPLBEC 1012, 2006(8) ADJ 646.

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

1. This intra-Court appeal, at the instance of the writ petitioner-appellant, under Rule 5 Chapter VIII of the Allahabad High Court Rules, 1952, arises out of an order dated 24.07.2009 passed by a learned Judge in Civil Misc. Writ Petition No. 39776 of 2001.

2. Shorn of unnecessary details, facts giving rise to the present appeal are that the writ petitioner-appellant, hereinafter referred to as the 'petitioner', filed the writ petition, inter alia, praying for quashing the order dated 19.06.2000

passed by the Commissioner, Gorakhpur Division, Gorakhpur whereby the prayer made by the petitioner to appoint him on the post of Clerk treating him as a retrenched employee, had been rejected. Petitioner earlier approached this Court by filing Civil Misc. Writ Petition No. 18201 of 1998, inter alia, contending that he is a retrenched employee and, therefore, fit to be considered for appointment on a Class-III post as a retrenched employee. The said writ petition was disposed off by this Court by order dated 21.01.2000 and while doing so, it directed as follows:-

"In case the Commissioner comes to the conclusion that the petitioner is in fact a retrenched employee of Food and Civil Supply Department in that event the question of appointment of the petitioner on Class III post as retrenched employee shall be considered by the competent authority according to law and Government orders on the point."

3. In the light of the aforesaid order, the Commissioner had passed the order impugned in the writ petition, which was filed on 27.11.2001. The writ petition was posted for consideration before this Court on 03.12.2001, and at the request of the Standing Counsel representing respondents, the writ petition was adjourned by granting one month's time to the respondents to file counter affidavit and two weeks' time thereafter to the petitioner to file rejoinder affidavit. As directed by the Court, the respondents filed counter affidavit on 15.01.2002 and the petitioner filed rejoinder affidavit on 16.04.2002. Thereafter, the matter was taken up on 24.07.2009 when the learned Judge, relying on a Full Bench decision of this Court in the case of Chandrama Singh Vs. Managing Director, U.P. Co-operative Union, Lucknow & Ors., (1991) 2 UPLBEC 898, dismissed the writ petition on the ground of alternative remedy and it is this order, which has been impugned in the present appeal.

4. As the order of the learned Judge is founded on the Full Bench decision of this Court in the case of Chandrama Singh (supra), we deem it expedient to reproduce the ratio of the said case, which reads as follows:-

"14. On the pleadings contained in the instant petition the petitioner should not be allowed to invoke the jurisdiction of this Court under Article 226 of the Constitution of India. The petitioner has complained violation of the provisions of Section 25-F of the Industrial Disputes Act, 1947 and for redressal of his grievance an adequate and efficacious remedy of reference under the provisions of Section 10 of the said Act itself exists. The petitioner has neither pleaded nor proved the said remedy to be inadequate or inefficacious. He has also not demonstrated the existence of any exceptional or extraordinary circumstances to permit him to by-pass the alternative remedy available to him under the Industrial Disputes Act, 1947. The petition deserves to be dismissed on the ground of availability of alternative remedy to the petitioner."

5. In fairness, Mr. Kripa Shanker Singh, counsel for the petitioner, submits that the petitioner had the remedy under the U.P. Industrial Disputes Act, but once the writ petition was entertained and the parties had exchanged their pleadings, at such distance of time, the learned Judge ought not to have dismissed the writ

petition on the ground of alternative remedy.

6. Mr. M.S. Pipersenia, Standing Counsel, appearing on behalf of the respondents, however, submits that in the face of the alternative remedy, the learned Judge did not err in dismissing the writ petition. In support of the submission, he has placed reliance on a decision of the Supreme Court in the case of Secretary, Minor Irrigation and Rural Engineering Services, U.P. & Ors. Vs. Sahngoo Ram Arya & Anr., AIR 2002 SC 2225, and our attention has been drawn to paragraph 12 of the judgment, which reads as follows:-

"12. Mr. Sunil Gupta, learned counsel appearing for the petitioner, contended that the remedy before the tribunal under the U.P. Public Service Tribunal Act is wholly illusory inasmuch as the tribunal has no power to grant an interim order. Therefore, he contends that the High Court ought not to have relegated the petitioner to a fresh proceeding before the said tribunal. We do not agree with these arguments of the learned counsel. When the statute has provided for the constitution of a tribunal for adjudicating the disputes of a Government servant, the fact that the tribunal has no authority to grant an interim order is no ground to by-pass the said tribunal. In an appropriate case after entertaining the petitions by an aggrieved party if the tribunal declines an interim order on the ground that it has no such power then it is possible that such aggrieved party can seek remedy under Article 226 of the Constitution but that is no ground to by-pass the said tribunal in the first instance itself. Having perused the impugned order, we find no infirmity whatsoever in the said order and the High Court was justified in directing the petitioner to approach the tribunal. In the said view of the matter, the appeals are dismissed. No costs."

7. It is well settled that existence of alternative remedy does not bar the jurisdiction of this Court. It is a matter of discretion and not jurisdiction. It is self imposed discipline, wherein when an Act provides for a complete machinery for seeking redress, the writ Court declines to interfere in the matter and relegate a litigant to the remedy provided under the Statute. Power under Article 226 of the Constitution is not intended to circumvent statutory procedure but it is not an absolute bar and merely a factor, which requires consideration while exercising the power. Dismissal of the writ petition on the ground of alternative remedy long after its filing and exchange of pleadings, may lead to shutting the door of alternative remedy itself. Provisions of alternative remedy in many of the cases provide for limitation and in case writ petitions are dismissed after exchange of pleadings after a long time, the damage cannot be countenanced.

8. In the present case, we proceed on an assumption that the petitioner has alternative remedy, but the question which falls for determination is as to whether in the facts of the present case, wherein the writ petition filed on 27.11.2001 was entertained and respondents and petitioner granted time to file counter affidavit and rejoinder and they having exchanged the pleadings, the learned Judge was right in dismissing the writ petition on 24.07.2009 on the ground of alternative remedy.

9. Having given our anxious consideration to the question involved, we are of the opinion that the learned Judge erred in dismissing the writ petition on the ground of existence of alternative remedy at such a distance of time. The point in issue is no more res integra, as the Supreme Court had the occasion to consider the same in the case of L. Hirday Narain Vs. Income-Tax Officer, Bareilly, AIR 1971 SC 33, in which it has been held as follows:-

"12. An order under Section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits." ... ... (Underlining ours)

10. The Supreme Court had also considered this issue in the case of Durga Enterprises (P) Ltd. & Anr. Vs. Principal Secretary, Govt. of U.P. & Ors., (2004) 13 SCC 665 in which, in categorical terms, it has been held that the High Court having entertained the writ petition in which pleadings were also complete, ought to have decided the case on merits instead of relegating the parties to a civil suit. Relevant portion of the judgment of the Supreme Court in this regard, reads as follows:-

"2. By the impugned order the writ petition, which was pending for a long period of thirteen years, has been summarily dismissed on the ground that there is remedy of civil suit. The dispute between the parties was concerning exercise of the respondents' alleged right of re-entry on the disputed property in accordance with sub-rules (2) and (3) of Rule 5 of the Land Acquisition (Companies) Rules, 1963. The aforesaid Rules contain a mechanism for adjudication of a dispute relating to the alleged breach of terms of the agreement and the manner in which it is to be resolved.

3. The High Court, having entertained the writ petition, in which pleadings were also complete, ought to have decided the case on merits instead of relegating the parties to a civil suit.

4. We, therefore, set aside the impugned order of the High Court and remit the matter to it for taking a decision on merits, after hearing the parties, within the earliest possible period." (Underlining ours).

11. A Division Bench of this Court had also the occasion to consider this question in the case of Diwakar Dutt Bhatt Vs. Life Insurance Corporation of India & Anr., (1998) 2 UPLBEC 1154, in which it has been held that the bar of alternative remedy is nothing but a matter of self-imposed discipline and in a case in which the petition was entertained and pleadings have been exchanged, it would be inexpedient to dismiss the writ petition on the ground of alternative remedy.

Paragraph 12 of the judgment, which is relevant for the purpose, reads as follows:-

"12. As far as the first ground is concerned the writ-petition was filed on 29.10.1997. The petition was entertained and the respondents were directed to file the counter-affidavit. The counter affidavit has been filed. The rejoinder affidavit has also been filed. The case was heard today. No doubt the administrative instructions provide for filing of an appeal but the question which remains to be decided is, as to whether, on the ground of availability of an alternative remedy the writ-petition, which has been entertained can be thrown out and the petitioner be relegated to the appellate authority. The bar of the alternative remedy is nothing but a matter of self-imposed discipline which the Courts have imposed upon themselves for the reason that the jurisdiction of Article 226 of the Constitution of India, should be invoked after exhausting the alternative remedies available to an aggrieved person."

12. This question also fell for consideration before a learned Single Judge of this Court in the case of Indra Narain Tripathi Vs. Union of India & Ors., (2006) 1 UPLBEC 1012, in which it has been held that after exchange of pleadings and four years of presentation of the writ petition, it would not be appropriate to throw out the petition on the ground of alternative remedy. Relevant portion of the said judgment reads as follows:-

"3. Learned Counsel for the respondent has raised a preliminary objection that a statutory revision lies against the impugned orders and in fact the petitioner has alleged that he had preferred the revision on 24.5.2001, therefore, the petition is not maintainable. The respondents in their counter affidavit have denied that any memo of revision was received by the Competent Authority. The appeal of the petitioner was decided after about a decade of the removal order. This petition has remained pending for the last about 4 years and pleadings have been exchanged between the parties. Thus, on these facts it would not be appropriate to throw out the petition on the ground of alternative remedy."

13. Same view has been taken by this Court in the case of Lokman Singh Vs. Deputy General Manager U.P.S.R.T.C. Meerut & Ors., 2006 (8) ADJ 646, in which dismissal of the writ petition after exchange of pleadings after long distance of time on the ground of alternative remedy under the Industrial Disputes Act, was found to be unsustainable. Paragraph 4 of the judgment, which is relevant for the purpose, reads as follows:-

"4. No doubt, the petitioner has a remedy of raising a dispute under the U.P. Industrial Disputes Act. However, since the petition was entertained in the year 1997 and counter and rejoinder affidavits have been exchanged, it would not be proper for the Court to relegate the petitioner to an alternative remedy under the Industrial Disputes Act at this stage, and that too, after a period of almost 10 years. Consequently, the preliminary objection made by the learned Counsel for the respondents is rejected."

14. Bearing in mind the aforesaid principle, when we consider the facts of the case, we are of the opinion that the

learned Judge, after having entertained the writ petition, directed the parties to file counter and rejoinder affidavits and that having already been done, at such a distance of time, ought not to have dismissed the writ petition on the ground of alternative remedy.

15. We hasten to add that after exchange of pleadings, the Court may not be in a position to decide the disputed question of fact, for the reason that for deciding the same, evidence may be required to be laid, and in such circumstance the writ petition cannot be dismissed on the ground of alternative remedy but on the ground that the issue of fact cannot be decided in a writ petition.

16. When we test the order of the learned Judge from the aforesaid angle, we are of the opinion that the order cannot be be sustained in the eyes of law.

17. Accordingly, the appeal succeeds and is allowed. The order dated 24.07.2009 passed in Civil Misc. Writ Petition No. 39776 of 2001 is set aside and the matter is remitted back to the learned Judge for reconsideration on merits in accordance with law.

18. In the facts and circumstances of the case, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2009

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

Civil Misc. Writ Petition No. 50096 of 2009

V.C. Mishra, Senior Advocate President, High Court Bar Association, Allahabad and another ...Petitioners
Versus
The Bar Council of U.P. and another ...Respondents

Counsel for the Petitioners:
Sri T.P. Singh
Sri V.C. Mishra (In Person)
Sri Uma Shanker Mishra

Counsel for the Respondents:

Advocate Act 1961, Section-35-Shaw Cause Notice-debarring the petitioner from practice for 10 years-without decision taken by the disciplinary authority-No material produced before the Court-regarding decision of 20.09.09-held-without decision of disciplinary authority-erring officer who issued show cause Notice-Bar Council to take legal action against such person.

Held: Para 6

In any event we are of the view that the proceeding which wanted to be initiated or initiated was not in a proper manner. The Bar Council of Uttar Pradesh being a statutory body should be law abiding but not to act on the basis of personal animosity with any member of the Bar or for helping any office bearer of the Bar Association. Against this background we are of the view that it is open for the Bar Council to take any decision in accordance with law under Section 35 of the Advocates Act, 1961 if at all the Bar Council of Uttar Pradesh is not satisfied

with any conduct of the petitioner but not to act in the manner as it has been done. It is further significant to note that if there is no recording available with regard to decision of 20.9.2009, then the authority of the Bar Council of Uttar Pradesh is also authorised to take legal action against such person who has committed such mistake. We are of the view that no body is above law and should not take law in his own hands to subserve any purpose.

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

1. This writ petition has been made by the President, High Court Bar Association, Allahabad by appearing in person.

2. By this writ petition he wants quashing of the show-cause notice dated 30.8.2009 issued by the Vice Chairman of the Bar Council of Uttar Pradesh. As per the notice the petitioner was called upon to give reply to show cause as to why a disciplinary proceeding should not be proceeded against him under Section 35 of the Advocates Act, 1961.

3. The contention of the petitioner is that the notice is unsustainable in nature since any decision has not been taken by the Bar Council of Uttar Pradesh to issue the notice but the same is an individual action on the part of the Vice Chairman of the Bar Council of Uttar Pradesh.

4. Normally the court does not interfere with the issuance of notice to show cause but when such show cause notice seems to be barred under any law, there is no embargo on the writ jurisdiction of this court with regard to interference of the notice. The petitioner has called upon to substantiate such facts on which, being prima satisfied, we have called upon Sri Pankaj Naqvi, learned counsel appearing for the Bar Council of Uttar Pradesh to take appropriate instruction and make submission before this court to which Mr. Naqvi has come forward with a communication of the Chairman of the Bar Council of Uttar Pradesh dated 29.9.2009 addressed to he Secretary of Bar Council of Uttar Pradesh from which it transpires that there was a proceeding on 20.9,.2009 debarring the petitioner from acting as an advocate for 10 years but the same has been kept in abeyance. However, Mr. Pankaj Naqvi is not in a position to submit any resolution of such nature or meeting or communication excepting the communication dated 29.9.2009 and the earlier show cause dated 30.8.2009. Against this background we are surprised to the conduct of the Bar Council of Uttar Pradesh in proceeding with the matter.

5. According to the petitioner non communication of the order, if any, and keeping it in the file cannot be deemed to be an order at all. Moreover, the order is to be passed by the disciplinary authority under Section 35 of the Act not individually? and before passing such order an opportunity should be given for placing the case. However, Mr. Naqvi has contended before this court that since by the letter dated 29.9.2009, the Chairman kept the proceeding in abeyance, therefore, non communication will not come in the way.

6. In any event we are of the view that the proceeding which wanted to be initiated or initiated was not in a proper manner. The Bar Council of Uttar Pradesh being a statutory body should be law abiding but not to act on the basis of personal animosity with any member of

the Bar or for helping any office bearer of the Bar Association. Against this background we are of the view that it is open for the Bar Council to take any decision in accordance with law under Section 35 of the Advocates Act, 1961 if at all the Bar Council of Uttar Pradesh is not satisfied with any conduct of the petitioner but not to act in the manner as it has been done. It is further significant to note that if there is no recording available with regard to decision of 20.9.2009, then the authority of the Bar Council of Uttar Pradesh is also authorised to take legal action against such person who has committed such mistake. We are of the view that no body is above law and should not take law in his own hands to subserve any purpose.

7. With the above observation, we dispose of the writ petition by quashing the notice dated 30.8.2009.

8. No order is passed as to cost.

However, it is open to the Bar Council of Uttar Pradesh to proceed in accordance with law.

So far as prayer no. ii and iii (iii has been written as ii twice) are concerned, they are not pressed by the petitioner. However, it is open for the petitioner to proceed in accordance with law for such prayer in some other proceeding.

Copy of communication dated 29.9.2009 supplied by Sri Pankaj Naqvi, learned counsel appearing on behalf of Bar Council of Uttar Pradesh is kept on record.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2009

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

Civil Misc. Writ Petition No. 50894 of 2009

Ramesh Chandra Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.C. Sharma

Counsel for the Respondents:
S.C.

Constitution of India Article-226-Petitioner being senior most lecturer surrender his right of officiating Principal-by letter dated 4.5.07-can not be allowed to put claim again being senior most teacher-recital being full and complete-No ambiguity-order impugned denying to work as officiating principal-held proper.

Held: Para 6

Having heard learned counsel for the parties, I have carefully perused the letter dated 4.5.2007 which clearly demonstrates that the petitioner surrendered and resigned from the duties as officiating Principal coupled with a recital to the effect that he should be continued and allowed to function as Assistant Teacher in the institution. The recital being full and complete, there is no ambiguity in the same and as such the contention advanced by the learned counsel for the petitioner cannot be accepted.

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

1. Heard learned counsel for the petitioner and learned Standing Counsel.

2. The contention advanced is that the letter which was sent by the petitioner on 4.5.2007 did not amount to a complete surrender of the rights of the petitioner to function as officiating Principal of the institution.

3. Learned counsel for the petitioner contends that the impugned orders dated 17.6.2009 and 1.10.2008 interfered with the rights of the petitioner to function as officiating Principal of the institution inspite of the fact that the petitioner is the senior most Teacher.

4. Learned counsel for the petitioner contends that in view of the aforesaid position, it was not open to the respondents to have denied the right claimed by the petitioner to continue to function inspite of the letter which has been appended as Annexure-3.

5. Learned Standing Counsel Sri K.K. Chand, on the other hand, contends that the letter dated 4.5.2007 (Annexure-3) is a voluntarily resignation tendered by the petitioner himself. There is no dispute about the contents, veracity and probity of the said document. In view of this, since the document is not under challenge, the petitioner cannot now reclaim the post inasmuch as he had already been appointed as officiating Principal and, he voluntarily surrendered his rights as such. Sri Chand relies on the decision of Satya Vir Singh Vs. District Inspector of schools, Bulandshahr, and others, 1995 (25) ALR 139, to substantiate his submission. Reference may be had to the decision in the case of Ashok Kumar Jain Vs. State of U.P. and others, (2008) 2 UPLBEC 1159.

6. Having heard learned counsel for the parties, I have carefully perused the letter dated 4.5.2007 which clearly demonstrates that the petitioner surrendered and resigned from the duties as officiating Principal coupled with a recital to the effect that he should be continued and allowed to function as Assistant Teacher in the institution. The recital being full and complete, there is no ambiguity in the same and as such the contention advanced by the learned counsel for the petitioner cannot be accepted.

7. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 52133 of 2009

Satish Pal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri H.R. Misra
Sri K.M. Misra

Counsel for the Respondents:
S.C.

Constitution of India Article-226-Transfer U.P. Registration department(District Establishment) ministerial Service Rule 1978- Rule 28 read with fundamental Rule-Rule 15-Transfer **petitioner working Sub Registrar-III-Transferred from Gautam Buddhanagar to Pilibhit-Transfer order challenged-on ground of authority-instead of I.G. Registration directly, state government passed order-held-No bar order passed**

in public interest can not be interfered- even otherwise No bar to exercise the power of Transfer by higher authority than the appointing authority.

Held: Para 65

The submission of learned counsel for the petitioner that there was no adverse material nor enquiry etc. against him and, therefore, he ought not to have been transferred is noted to be rejected for the simple reason that the order of transfer is not punitive, but is a general order whereby about 191 Registration Clerks have been shifted from one place to another. Therefore, the submission that in the absence of any adverse material he ought not to have been transferred is wholly misconceived. If an order of transfer is passed in public interest or due to some administrative exigency, there is no requirement or condition precedent that the same can only be passed if there is some complaint or enquiry against the person concerned.

Case law discussed:

AIR 1974 SC 555, 1977(4) SCC193, 1986(1) SC 249, AIR 1989 SC 1433, AIR 1991 SC 532, JT 1992 (6) SC 732, 1993 (1) SCC 148, 1993 Suppl. (1) SCC 704, JT 1994 (5) SC 298, 1995 suppl. (4) SCC 169, 2001 (8) SCC 574, 2003 (4) SCC 104, 2004 (11) SCC 402, JT 2004 (2) SC 371, 2005 (7) SCC 227, Special Appeal No. 1296 of 2005, 2007 (8) SCC 793, JT 2007 (12) SC 467, 2007 (9) SCC 539, 2009 (11) SCALE 416, JT 2009 (10) SC 187, AIR 1993 SC 2444, 1992 (1) SCC 306, 2005 (2) ESC 1224, Writ Petition No. 52249 of 2000, (Special Appeal No. 769 of 2005), Writ Petition No. 243 (SB) of 2007, 2009 (4) ALJ 372., JT 1993 (4) SC, 2007 (3) ESC 1730 (All); 2008 (3) UPLBEC 2290; Writ Petition No. 4405 (SS) of 2008, W.P. No. 35254 of 2009.

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

1. Heard Sri H.R. Misra, learned Senior Advocate, assisted by Sri K.M. Misra, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner is aggrieved by the order dated 30.9.2009 (Annexure 8 to the writ petition) whereby the State Government has transferred him from district Gautambudh Nagar to Bulandshahar.

3. The facts in brief giving rise to the present dispute are that the petitioner was appointed as Registration Clerk in the Registration Department of the State of U.P. on 24.11.1981. district Gautambudh Nagar was created vide notification dated 6.5.1997 issued under Section 11 of U.P. Land Revenue Act, 1901 bifurcating district Ghaziabad and district Bulandshahar. Thereafter, the petitioner was transferred and posted in district Gautambudh Nagar on 28.6.1997. On 13.7.2004, he was posted as Sub-Registrar III, Noida (district Gautambudh Nagar) and since then, is working as such till date.

4. It is not disputed that home district of the petitioner is Ghaziabad. The recruitment and conditions of service of Registration Clerk are governed by U.P. Registration Department (District Establishment) Ministerial Service Rules, 1978 (hereinafter referred to as '1978 Rules') framed under proviso to Article 309 of the Constitution of India. Vide 1978 Rules, the appointing authority of Registration Clerk is Inspector General, Registration, U.P., Allahabad. It appears that Minister, Institutional Finance, Stamp, Court Fees and Registration, U.P. Government during the course of review of work at Bareilly, Meerut and Aligarh divisions found that there existed surplus Registration Clerks in some districts

while in others they are deficit. Therefore, he sought information from the concerned Assistant Inspector General, Registration, U.P. to give the details of the sanctions strength of Registration Clerks in the concerned district, the persons actually working as also the requirement of the staff in the said district along with the detail of the home district etc. In compliance thereof, the Assistant Inspector General, Registration, Gautambudh Nagar vide his letter dated 25.6.2009 informed the Inspector General, Registration, U.P., Allahabad that the sanctioned strength of Registration Clerks at Gautambudh Nagar was 14 while actual number of Registration Clerks working in the said District was 22. He gave details of the 22 Registration clerks working in the District Gautambudh Nagar which included the name of the petitioner also. He also submitted that considering increase in the work etc., staff in District Gautambudh Nagar cannot be said to be in excess. However, for some Registration Clerks, he suggested rearrangement in different offices of District Gautambudh Nagar, which included the name of the petitioner also. He recommended that instead of office of Sub-Registrar III, Noida, he may be posted in the office of Sub-Registrar I, Noida.

5. Besides, the State Government, took a policy decision communicated by order dated 6.6.2009 (Government transfer policy for session 2009-10) stating therein that the session 2009-10 has been declared a 'zero transfer session', hence, no person of any category should be transferred in the said session. However, if any transfer is necessary, prior approval of the Chief Minister shall be obtained for the same. It is averred that neither there was any complaint against the petitioner nor any enquiry was ever initiated against him, yet all of a sudden the impugned order has been issued by the State Government transferring the petitioner from District Gautambudh Nagar to District Bulandshahar.

6. Sri H.R. Misra, learned Senior Counsel appearing for the petitioner contended that the impugned order of transfer is illegal, arbitrary and without jurisdiction for the following reasons :

1. Impugned order of transfer has been passed by the State Government though under 1978 Rules, the appointing authority of the petitioner is Inspector General, Registration and, therefore, the State Government cannot pass the order of transfer.
2. It has been passed in utter violation and transgression of Government transfer policy for the session 2009-10 as contained in the Government Order dated 6.6.1009.
3. He submitted that a decision was taken by the Government to transfer those employees who have completed more than 15 years in a District and the petitioner has completed only 12 years, yet he has been transferred by means of the impugned order and, hence, it is wholly arbitrary and illegal.
4. There is neither any complaint nor enquiry, disciplinary or otherwise, initiated against the petitioner, yet he has been transferred from one place to another.
5. The impugned order of transfer has been passed on the dictates of the Minister concerned.

7. Having heard learned Senior Counsel at length and given my serious thoughts to the issues raised by him, I, however, do not find myself in agreement with any of the above submissions and, in my view, the writ petition deserves to be dismissed.

8. The first question is whether the order of transfer has been passed by the competent authority, i.e., whether the petitioner could have been transferred only by the Inspector General, Registration, U.P., Allahabad, the appointing authority under 1978 Rules or even by the State Government, who is a higher authority to the Inspector General, Registration and under the rules applicable for disciplinary proceedings etc. is the appellate authority.

9. 1978 Rules defines appointing authority vide Rule 3 (b) as under :

"(b) "Appointing Authority" in respect of the post of the Chief Registration Clerk means the Inspector-General of Registration, Uttar Pradesh, and in respect of the post of Registration Clerk the District Registrar of the district where the post exists;"

10. The District Registrar and Inspector General have also been defined under Rule 3 (f) and (i) as under :

"(f) "District Registrar" means the officer appointed as Registrar under Section 6 of the Act;"

"(i) "Inspector General" means the Inspector General of Registration, Uttar Pradesh, appointed under sub-section (1) of 3 of the Act;"

11. A perusal of the Rule 5 read with Rule 4(2) and Appendix-A shows that the said Rules apply to the following categories of service:

(1) Registration Clerk;
(2) Chief Registration Clerk

12. It is no doubt true that 1978 Rules by itself do not provide for transfer of the Registration Clerk or Chief Registration Clerk from one district to another but Rule 28 provides for such matter as are not governed by the 1978 Rules and reads as under:

"28. Regulation of other matters.- *In regard to the matters not specifically covered by these rules or special orders, persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government servants serving in connection with the affairs of the State."*

13. Learned counsel for the petitioner could not dispute that the general power of transfer of a Government servant is contained in Fundamental Rule 15, which reads as under :

"15. *(a) A Government servant may be transferred from one post to another; provided that, except-*

(1) on account of inefficiency of misbehaviour; or

(2) on his written request,

a Government servant shall not be transferred substantively to, or except in a case covered by Rule 49, appointed to officiate in, a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien had his lien not been suspended under Rule 14.

(b) Notwithstanding anything to the contrary contained in these rules, the Governor may in the public interest transfer a Government servant to a post in another cadre or to an ex-cadre post.

(c) Nothing contained in Clause (a) of this rule or in Clause (13) of Rule 9 shall operate to prevent the retransfer of a Government servant to the post on which he would hold a lien, had it not been suspended in accordance with the provisions of Clause (a) of Rule 14."

14. He also could not dispute that in view of Rule 28 of 1978 Rules, the petitioner's service is transferable under Fundamental Rule 15 since the petitioner is also a Government servant.

15. Fundamental Rule 15 does not confer power of transfer only on the appointing authority. A perusal of Fundamental Rule 15 shows that an order of transfer can be passed by an authority, who is competent to transfer a Government servant. Clause (b) empowers specifically the Governor to transfer a Government servant in public interest even outside the cadre. The provision under Clause (b) confers power upon the Governor which is not to be exercised by the Governor himself, but has to be exercised in accordance with provision of the Constitution meaning thereby on the advice of the Council of the Ministers. Thus the above provision confer power upon the Government to transfer an employee from his cadre even to another cadre. This provision shows that not only the appointing authority but even the higher authorities, i.e., the authorities who have appellate or revisional power against the order passed by the appointing authority can also exercise power of transfer. Such power can be exercised even by an authority subordinate to the appointing authority, if such power has been delegated to such subordinate authority.

16. In the case in hand, learned counsel for the petitioner could not dispute that in the disciplinary matters etc., the orders of the Inspector General, Registration are appealable before the State Government. He also could not dispute that the State Government is an authority higher to the Inspector General, Registration. Further, since the approval of the Chief Minister has also been obtained, in the case in hand, it appears that the order accordingly has been issued by the Government. In respect to all such matters of transfer of Registration Clerks in the State of U.P., where approval has been given by the Chief Minister, it appears that the order of transfer has been issued by the State Government itself. In the absence of any provision authorizing only the appointing authority to transfer the petitioner from one place to another, in my view, it cannot be said that the order passed by the higher authority, i.e., State Government is vitiated in law.

17. Now coming to the next question, i.e. transgression and violation of transfer policy for the session 2009-10 as contained in the Government Order dated 6.6.2009, whether an order of transfer can be interfered by the Court on the Ground that it violates guidelines issued by the Government in the matter of transfer, i.e., the transfer policy.

18. In order to appreciate the above submission, it would be necessary to consider the nature of the order of transfer in relation to a Government servant. Whether an order of transfer affects any

right of the Government servant, whether it causes disadvantage to him etc. At the pain of repetition, it may be reminded that the petitioner's service is transferable and he is holding a transferable post, hence, can be transferred from one place to another.

19. Consistently, transfer of an employee and in particular a Government employee has been held to be an incident of service, which does not affect any of his legal rights whatsoever.

20. Initially, in **E. P. Royappa Vs. State of Tamilnadu AIR 1974 SC 555** the Apex Court said that it is an accepted principle that in a public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in this matter. The Government is the best judge to decide how to distribute and utilize the services of its employees.

21. Thereafter, dealing with the transfer of the Hon'ble Judges of High Court, in **Union of India Vs. Sankalchand Himatlal Sheth 1977 (4) SCC 193** the Apex Court observed that transfer is an incident of service. It was further held that once a person has entered service he is bound by the conditions imposed either by the Service Rules or the Constitutional provisions. No person after having joined the service can be heard to say that he shall not be transferred from one place to another in the same service without his consent. Having accepted the service, the functionary has no choice left in the administrative action that can be taken by empowered authorities namely, transfer from one place to another, assignment of work and likewise.

22. In **B. Varadha Rao Vs. Vs. State of Karnataka JT 1986 (1) SC 249** the Court said that it is now well settled that a Government servant is liable to be transferred to a similar post in the same cadre. It is a normal feature and incident of Government service. No Government servant can claim to remain at a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post.

23. In **B. Varadha Rao (supra)** an attempt was made to argue that since in **E. P. Royappa (supra)** it was held that the transfer is an implied condition of service, therefore, the transfer affecting the petitioner must be treated to have altered the service conditions to his disadvantage and such an order would be deemed to be an adverse order appealable under the provisions applicable in the rules pertaining to disciplinary action, but was rejected by the Court observing that transfer is always understood and construed as an incident of service. It does not result in alteration of any of the conditions of service to the disadvantage of the employee concerned. In the reference of **E. P. Royappa (supra)** with respect to observation "an implied condition of service" the Apex Court in **B. Varadha Rao (supra)** held as "just an observation in passing" and it was held that it cannot be relied upon in support of the contention that an order of transfer ipso facto varies to the disadvantage of a Government servant, any of his conditions of service making the impugned order appealable.

24. In **Gujarat Electricity Board Vs. Atmaram Sungomal Poshani AIR 1989 SC 1433**, the Apex Court further said that transfer from one place to

another is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules.

25. In **Shilpi Bose & Vs. State of Bihar AIR 1991 SC 532,** it was held *"A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department."*

26. In the said judgment of Shilpi Bose the Hon'ble Apex Court also held that a transfer order, even if, is issued to accommodate a public servant to avoid hardship, the same can not and should not be interfered by the Court merely because transfer orders were passed on the request of the concerned employees. No person has a vested right to remain posted to a particular place, and unless the transfer order is passed in violation of any mandatory rule, the High Court had no jurisdiction to interfere with the transfer orders. Relevant extract is quoted as under:

"If the competent authority issued transfer orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the court merely because the transfer order were passed on the request of the employees concerned. The respondents have continued to be posted at their respective places for the last several years, they have no vested right to remain posted at one place. Since they hold transferable posts they are liable to be transferred from one place to the other. The transfer orders had been issued by the competent authority, which did not violate any mandatory rule, therefore, the High Court had no jurisdiction to interfere with the transfer orders. " (Para-3)

27. In **Rajendra Roy Vs. Union of India & another JT 1992 (6) SC 732**, it was said "in a transferable post an order of transfer is a normal consequence and personal difficulties are matters for consideration of the department."

28. In **Rajendra Rai Vs. Union of India 1993 (1) SCC 148** and **Union of India Vs. N.P. Thomas 1993 Suppl. (1) SCC 704** it was said that the Court should not interfere with the transfer orders unless there is a violation of some statutory rule or where the transfer order was mala fide.

29. In **N.K. Singh Vs. Union of India JT 1994 (5) SC 298**, the Court said, *"Unless the decision is vitiated by mala fides or infraction of any professed norm of principle governing the transfer, which alone can be scrutinised judicially, there are no judicially manageable standards for scrutinising all transfers....."*

30. In **Abani Kanta Ray Vs. State of Orissa & others 1995 suppl. (4) SCC 169** the Court observed "It is settled law that a transfer which is an incident of service is not to be interfered with by the Courts unless it is shown to be clearly arbitrary or vitiated by mala fides or infraction of any professed norm or principle governing the transfer."

31. In **National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan 2001 (8) SCC 574,** the Apex Court held that transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration.

32. In **Public Service Tribunal Bar Association Vs. State of U.P. & another 2003 (4) SCC 104** the Court said, "Transfer is an incident of service and is made in administrative exigencies. Normally it is not to be interfered with by the Courts. This Court consistently has been taken a view that orders of transfer should not be interfered with except in rare cases where the transfer has been made in a vindictive manner."

33. In **State of U. P. Vs. Gobardhan Lal 2004 (11) SCC 402,** the Court said *"Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra in the law governing or conditions of service."*

34. In **Union of India VS. Janardhan Debanath JT 2004 (2) SC 371,** the Apex Court said, *"No Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the Courts or the Tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management...."*

35. Thus, the scope of judicial review in the matter of transfer is restricted inasmuch if an order of transfer is challenged on the ground of violation of statutory provision or lack of competence of person who has passed the order or mala fide, only then the Court should interfere otherwise it is not liable to be interfered in judicial review. The reason for such a view taken by the Courts repeatedly is that no Government servant has a right to be posted in a particular post or position once appointed in service. He cannot claim that he should

continue at same place as long as he desire.

36. Noticing distinction in respect to the transgression of civilian employee or those working in public sector undertakings and those of disciplined forces, in **Major General J.K. Bansal Vs. Union of India 2005 (7) SCC 227**, the Apex Court said "The scope of interference by courts in regard to members of armed forces is far more limited and narrow. It is for the higher authorities to decide when and where a member of the armed forces should be posted. The Courts should be extremely slow in interfering with an order of transfer of such category of persons and unless an exceptionally strong case is made out, no interference should be made."

37. Considering **J.K. Bansal (supra)**, a Division Bench of this Court in **Special Appeal No. 1296 of 2005 (Guljar Singh Vs. State of U.P. & others)** decided on 7.11.2005 in respect to member of police force observed as under :

"The present case, if not strictly identical to the case of Major General J.K.Bansal Versus Union of India and others (Supra), is quite nearer to the same. The petitioner-appellant in the present case is a member of a discipline force, namely, U.P. Police. His requirement and urgency as well as the exigency regarding posting would be totally different than other civil employees. There may be numerous factors on account whereof the competent authority has to post a particular member of Police Force at a particular place and unless and until a case of mala fide is made out or there is violation of statutory provision, there would be no occasion for this Court to interfere in the case of transfer of a member of a Police Force. The scope of judicial interference would definitely be limited and narrow in case of a disciplined Force comparing to scope available in the case of other civil servants. It is not the case of the petitioner-appellant that the impugned order of transfer is in contravention of any statutory mandatory provision."

38. In **Prabir Banerjee Vs. Union of India 2007 (8) SCC 793,** transfer of a member of central service, namely, Central Excise, from one zone to another zone was challenged on the ground that inter zonal transfer was prohibited in the department of Central Excise and Customs pursuant to the circular dated 19.2.2004 issued by the department of Revenue, Ministry of Finance, Government of India. The Court held that it is no doubt true that transfer is an incident of service in all India service under the Central Service Rules, but in the absence of any direct rule relating to transfer between the two collectorates, the field may be covered by the administrative instructions.

39. In **Mohd. Masood Ahmad Vs. State of U.P. & others JT 2007 (12) SC 467**, the Apex Court said "Transfer is an exigency of service and is an administrative decision. Interference by the Courts with transfer order should only be in very rare cases." It further held "This Court has time and again expressed its disapproval of the Courts below interfering with the order of transfer of public servant from one place to another. It is entirely for the employer to decide when, where and at what point of time a

public servant is transferred from his present posting. Ordinarily the Courts have no jurisdiction to interfere with the order of transfer."

40. In **Prasar Bharti Vs. Amarjeet Singh 2007 (9) SCC 539**, the Court said that an order of transfer is an administrative order. There cannot be any doubt that the transfer being an incident of service should not be interfered except some cases where, inter alia, mala fide on the part of the authorities is proved.

41. In **Union of India & another Vs. Murlidhar Menon & others 2009 (11) SCALE 416** the Court observed that even if the conditions of service are not governed by the statutory rules, yet the transfer being an incident of service, an employee can be transferred which may be governed by the administrative instruction since an employee has no right to be posted at a particular place.

42. Recently, in **Rajendra Singh & others Vs. State of U.P. & others JT 2009 (10) SC 187**, the Court observed that a Government servant holding a transferable post has no vested right to remain posted at one place or other, he is liable to be transferred from one place to other.

43. The Court in Rajendra Singh (supra) also observed that the transfer orders issued by the competent authority do not violate any of the legal rights of the concerned employee. If a transfer order is passed in violation of a executive instruction or order, the Court ordinarily should not interfere with the order and the affected party should approach the higher authority in the department.

44. Thus, from the above it is evident that since an employee holding a transferable post has no right to continue at a particular place or position, an order of transfer does not violate any of his legal right whatsoever. That being so, an order of transfer cannot be interfered except of the contingency of mala fide, vviolation of Rule and competence since it cannot be said to be an order affecting the legal rights of an employee. The limited scope of interference in a judicial review, therefore, has been left to the cases where the order is either violative of statutory provision or is vitiated on account of mala fide or has been issued by a person incompetent. The transgression of administrative guidelines at the best provide an opportunity to the employee concerned to approach the higher authorities for redressal but its consequences would not go to the extent to vitiate the order of transfer. The question as to whether violation of transfer policy or guide lines relating to transfer contained in an executive order or executive insturcitoins or policy for a particular period laid down by the Government would result in vitiating the order of transfer has also been considered repeatedly in past by Apex Court as well as this Court.

45. The enforceability of a guideline laid down for transfer specifically came to be considered by the Apex Court in **Shilpi Bose (supra)** and it was held that even if transfer order is passed in violation of the executive instructions or orders, the Courts ordinarily should not interfere with the order and instead affected arty should approach the higher authorities in the Department.

46. Again in **Union of India & others Vs. S.L. Abbas AIR 1993 SC 2444** a similar argument was considered and in para 7 of the judgment the Court said, "The said guidelines, however, does not confer upon the Government employee a legally enforceable right."

47. Referring its earlier judgment in **Bank of India Vs. Jagjit Singh Mehta 1992 (1) SCC 306** the Apex Court in **S.L. Abbas (supra)** observed as under :

"The said observations in fact tend to negative the respondents contentions instead of supporting them. The judgment also does not support the Respondents' contention that if such an order is questioned in a Court or the Tribunal, the authority is obliged to justify the transfer by adducing the reasons therefor. It does not also say that the Court or Tribunal can quash the order of transfer, if any of the administrative instructions/guidelines are not followed, much less can it be characterized as mala fide for that reason. To reiterate, the order of transfer can be questioned in a Court or Tribunal only where it is passed mala fide or where it is made in violation of the statutory provisions."

48. Same thing has been reiterated by the Apex Court in **Gobardhan Lal (supra)** in the following words :

"Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments."

49. Besides the judgments of the Apex Court, this Court has also considered the same time and again and has reiterated that the order of transfer made even in transgression of administrative guidelines cannot be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision. Some of such authorities are as under.

50. In **Rajendra Prasad Vs. Union of India 2005 (2) ESC 1224**, a Division Bench observed, "Transfer policy does not create legal right justiciable in the Court of law."

51. In Division Bench of this Court in **Civil Misc. Writ Petition No. 52249 of 2000 (Dr. Krishna Chandra Dubey Vs. Union of India & others)** decided on 5.9.2009 said, "It is clear that transfer policy does not create any legal right in favour of the employee. It is well settled law that a writ petition under article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by an employee that there is a breath of statutory duty on the part of the employer."

52. In **Gulab Singh (supra)** and **Ram Niwas Pandey & others Vs. Union of India & others (Special Appeal No. 769 of 2005)** decided on 29.11.2005 also this Court held that transgression of

transfer policy or executive instructions does not give a legally enforceable right to challenge an order of transfer.

53. In **Civil Misc. Writ Petition No. 243 (SB) of 2007 Uma Shankar Rai Vs. State of U.P. & others** decided on 31.7.2007 this Court observed as under:

"Dr L.P. Misra, learned counsel for the petitioner seriously contended that though the transfer of Government servant is made in exigencies of service, yet where transfer policy has been framed, the same is expected to be adhered to and cannot be defied in a discriminatory and selective manner. Any action of the authorities, even in respect of the matter of transfer, if is inconsistent to such policy would vitiate the order of transfer since it would render the same arbitrary and illegal. Referring to para 2 and 3 of the transfer policy dated 11.5.2006, he contended that the respondent no. 4 having completed his tenure of six years in the District and ten years in the Commissionery even at Mirzapur yet he has again been sought to be posted at Mirzapur to accommodate him and the petitioner has been transferred to Varanasi, therefore, the impugned order is patently illegal. In support of the submission that order of transfer, if has been issued in violation of transfer policy, the same can be assailed since the transfer policy was laid down to adhere to and not to violate, reliance has been placed on the apex Court's decision in ***Home Secretary, U.T. of Chandigarh and another Vs. Darshjit Singh Grewal & others*** *(1993) 4 SCC-25****; N.K. Singh vs. Union of India and others*** *(1994) 6 SCC- 98****; R. vs. Secretary of State*** *(1985) 1 All. ER 40; and a Division Bench decision of this Court in* ***Smt. Gyatri Devi vs. State of U.P. and others*** *(1998 (16) LCD- 17). In other words the learned counsel for the petitioner contends that even through the order of transfer may not be challenged on the ground of mere violation of transfer policy, yet such order can be interfered with if the authorities who are supposed to adhere with the guidelines, have failed to do so.*

In our view the submission is mutually destructive and self contradictory. What the petitioner in fact has sought to argue is that the Executive once has laid down certain standards for guidance in its functioning, it must adhere to and any deviation thereof would vitiate the consequential action, which may be challenged in writ jurisdiction. The argument though attracting but in the matter of transfer, however, in our view, the same has no application. Transfer of Govt. servants in the State of U.P. is governed by the provisions contained in Fundamental Rule- 15, which reads as under :-

…………..

It is not disputed that the post held by the petitioner is transferable and he is liable to be transferred from one place to another. The employer once possess right to transfer an employee from one place to another, in our view, there is no legal or otherwise corresponding obligation upon him to inform his employee as to why and in what circumstance an employee is being transferred from one place to another. Shifting and transferring of the employee from one place to another involves more than thousand reasons and it is difficult to identify all of them in black and white. The commonest reason may be a periodical shifting of person from one place to another, which does not require any special purpose; the other reasons include necessity of a particular

officer at a particular place; avoidance of disturbance or inconvenience in working of the officer on account of a person at a particular place; unconfirmed complaints and to avoid any multiplication thereof; transfer may be resorted to and so on. These are all illustrations. The question as to whether in any of the circumstances when a person is transferred from one place to another without casting any stigma on him, does it infringe, in any manner, any right of such employee which may cause corresponding obligation or duty upon the employer to do something in such a reasonable manner which may spell out either from its action or from the record and when challenged in a Court of law, he is supposed to explain the same, In our view, the answer is emphatic no."

54. It further held :

"In view of the aforesaid well settled principles governing the matter of transfer, the consistent opinion of the Courts in the matter of judicial review of the transfer orders has been that the order of transfer is open for judicial review on very limited grounds; namely if it is in violation of any statutory provisions or vitiated by mala-fides or passed by an authority holding no jurisdiction. Since the power of transfer in the hierarchical system of the Government can be exercised at different level, sometimes for the guidance of the authorities for exercise of power of transfer, certain executive instructions containing guidelines are issued by the Government so that they may be taken into account while exercising power of transfer. At times orders of transfer have been assailed before the Court on the ground that they have been issued in breach of the conditions of such guidelines or in transgression of administrative guidelines. Looking to the very nature of the power of transfer, the Courts have not allowed interference in the order of transfer on the ground of violation of administrative guidelines and still judicial review on such ground is impermissible unless it falls within the realm of malice in law. The reason behind appears to be that the order of transfer does not violate any right of the employee and the employer has no corresponding obligation to explain his employee as to why he is being transferred from one place to another."

55. The Division Bench judgment in **Uma Shanker Rai (supra)** has been followed in another Division bench of this Court in **Jitendra Singh Vs. State of U.P. & another 2009 (4) ALJ 372**.

56. Learned counsel for the petitioner placed reliance on the Apex Court decision in **JT 1993 (4) SC Home Secretary, U.T. of Chandigarh & another Vs. Darshjit Singh Grewal & others** and certain judgments of this Court in **Akash Sharma Vs. State of U.P. & others 2007 (3) ESC 1730 (All)**; **Mohd. Zeeshan Vs. State of U.P. & others 2008 (3) UPLBEC 2290; Writ Petition No. 4405 (SS) of 2008 Satya Dev Pandey Vs. State of U.P. & others** decided on 6.8.2009 and **W.P. No. 35254 of 2009 Gulab Singh Vs. State of U.P. & others** decided on 16.7.2009 in support of the submission that the transfer in violation of executive instructions can be challenged since the authorities cannot ignore the executive instructions or the policy laid down by themselves and must observe the same. Disregard of the transfer policy without any proper justification would render the order of

transfer arbitrary. Once the guidelines have been laid down by the Government in the form of transfer policy, they are bound to follow and observe the same in words and spirit and in any case in substantial manner.

57. This Court finds that in **Darshjit Singh Grewal (supra)**, the case before the Apex Court was not of transfer of Government servant but transfer of students from one affiliated College to another. In order to govern migration of students from one college to another, certain rules were framed by Syndicate of Punjab University in exercise of its power under Section 20 of the Punjab University Act, 1947. Similarly for migration of students in various technical/ profession college under the control of Chandigarh Administration, since Chandigarh Administration provides finance to the engineering colleges within the union territory of Chandigarh, it has issued a policy vide letter dated 6.9.1991 governing such migration. It was found that said guideline was not inconsistent with the Rules and Regulations made under the Punjab University Act, 1947 but contains similar provisions. The students for Medical Colleges are normally not liable to be transferred from one College to another during the Course they are studying in particular College and in a particular discipline since it has various repercussions. Students while seeking admission in Medical Colleges are entitled to give their option for admission against a seat in a particular Medical College and allotment is normally made on the basis of the merit of the students concerned. Migration, if allowed in a routine course, would be destructive to the said scheme where the students are given admission in a particular Medical College based on their merit position and their option etc. The rules, regulations and scheme for migration, thus, were bound to affect the right of the concerned students of one or the other Medical College or those students who were seeking admission in a particular Medical College, but may not get due to migration allowed by the authorities concerned to that College. The rules and regulations, therefore, had the effect of directly effecting the rights of the students community undergoing medical education in the State of Punjab or otherwise. Thus, in the absence of any otherwise right of seeking transfer to some extent the same was allowed by the rules and regulations which were found statutory and the policy guidelines issued by the Chandigarh Administration, which, therefore, conferred a limited right upon a student studying in a particular College to seek migration in given certain circumstances and following the conditions laid down therein. Thus, here was a case where the executive instructions conferred though limited but a right upon the student community and in these context, the executive order was held to be binding upon the administration. It is in these circumstances, the Court held that the policy of general application having been enunciated and communicated to all, the administration was bound by it and until changed, it is bound to adhere to it. Thereafter, considering the validity of the order of transfer i.e. migration of the students from one college to another, the Court found the same to be contrary to the statutory rules and, therefore, judgment in **Darshjit Singh Grewal (supra),** in my view, has no application at all to the cases of the transfer of Government servants. In the matter of transfer of Government servant, since they have no legal right

whatsoever to seek their posting at a particular place. The order of transfer does not affect their legal rights, this question does not arise at all. The executive orders and guidelines which were available in the case of **Darshjit Singh Grewal (supra)** cannot be placed at par with the guidelines pertaining to transfer of Government servants issued by the State Government though by an executive order. When the Government Servant has no right in the matter of posting etc. the guidelines cannot create something which was not already existed and, therefore, will not result in creating a better right to the Government servant which otherwise is not there even though the matter of transfer is governed by the statutory rules.

58. In **Mohd. Zeeshan (supra)**, the Court found that the order of transfer vitiated since it was passed at the instance of politicians who were not representative of the people at the relevant time. I do not find it as a proposition of law that this Court nowhere in the above judgment held that the transfer policy, if not followed, would confer a legally enforceable right to challenge an order of transfer.

59. Similarly, in **Akash Sharma (supra)**, the Court after analysing the facts of a particular case found that the petitioner Akash Sharma within a short span of time was frequently transferred and sometimes the order of transfer was changed within few days. Further not being satisfied with the stand taken by the Government the Court perused the record of the State Government and based on the facts recorded the following finding :

"The transfer orders has been amended, cancelled at the whims of the local politician who did not want the government employee to be transferred. The cancellation, modification or amendment in the transfer orders was not in public interest or on administrative grounds, but on account of personal interest of the politician or of the government employee itself."

60. It is, therefore, in the particular facts and circumstances of the case, the Court directed the Government to abide by its policy of transfer of the employees who have completed a particular period at a particular place, but it has not been said anywhere that a mere non compliance of observations of transfer policy would vitiate the order of transfer.

61. In **Satya Dev Pandey (supra)** again the Court found that the decision of transfer was not taken in public interest or administrative exigencies and though by the Government Order dated 10.6.2008 clerical cadre, paramedical cadre and nurse cadre were exempted from transfer, though were transferred without looking into the said order. In the said judgment also, I do not find any proposition of law laid down by the Hon'ble Single Judge that an order of transfer would be vitiated in law and cannot be changed unless on the ground that it has violated the transfer policy.

62. In **Gulab Singh (supra)** without referring to any binding precedent or authority of the Apex Court or this Court the Hon'ble Single Judge disposed of the writ petition by keeping the order of transfer suspended till prior approval as provided in the policy decision dated 6.6.2009 of the Chief Minister is

obtained. In the absence of any discussion on the question as to whether the policy decision is enforceable in law, the above augment cannot be said to be a binding precedent on the subject. On the contrary, as already discussed, the Apex Court as well as several Division Bench of this Court have clearly held that an order of transfer is not assailable in a Court of law only on the ground that it is in transgression of an transfer policy. Learned counsel for the petitioner could not place any other authority, wherein a different view has been taken and which is binding on this Court. In any case, the entire argument, in my view his wholly academic for the reason that the petitioner himself has admitted in para 22 of the writ petition that prior approval of the Chief Minister has been obtained before passing the impugned order of transfer, that being so even on facts in the present case, the impugned order cannot be said to be violative of the Government Order dated 6.6.2009.

63. The next submission is that the impugned order has been passed at the dictates of the Minister concerned. Firstly no such material has been placed on record and secondly in view of the fact that the transfer has been effected in the case in hand with the prior approval of the Chief Minister in accordance with the Government Order dated 6.6.2009 which is sheet anchor of the petitioner himself, the submission that the order of transfer is at the behest of the Minister, or at the dictates of Minister is wholly misconceived and has to be rejected outright.

64. Besides, the averments in respect to the allegations which according to the counsel for petitioner are in regard to his plea of malice in law are contained in paras 19, 20, 21, 22 and 23. The same were read before this Court by Sri Misra. It is interesting to notice that all these paragraphs have been sworn on legal advice. The plea of malice in law based on the facts which are extraneous and co-lateral for the purpose sought to be achieved and that is how an executive order can be said to be vitiated on account of malice in law. Those facts, thus, have to be pleaded or sworn either on the basis of personal knowledge or record or informations received as the case may be. Whether those facts collectively would constitute malice in law or not is a legal issue but existence of facts has to be pleaded as fact existed and in my view cannot be sworn on the basis of legal advice. Besides, learned counsel for the petitioner could not explain as to how he could advise his client about the existence of facts contained in paras 19, 20, 21, 22 and 23 though the petitioner himself neither knew about them nor has undertaken any responsibility to swear it on personal knowledge. Thus also the plea of malice in law, being not substantiated, is liable to be rejected.

65. The submission of learned counsel for the petitioner that there was no adverse material nor enquiry etc. against him and, therefore, he ought not to have been transferred is noted to be rejected for the simple reason that the order of transfer is not punitive, but is a general order whereby about 191 Registration Clerks have been shifted from one place to another. Therefore, the submission that in the absence of any adverse material he ought not to have been transferred is wholly misconceived. If an order of transfer is passed in public interest or due to some administrative

exigency, there is no requirement or condition precedent that the same can only be passed if there is some complaint or enquiry against the person concerned.

66. At this stage, learned counsel for the petitioner submitted that it is a mid session transfer and cause some hardship to the petitioner on account of his illness. So far as the matter of personal hardship etc. is concerned, it is well settled that it is always open to the concerned employee, who has been transferred from one place to another to approach the higher authorities of the department appraising them of the hardship, if any, being faced by the employee concerned on account of transfer from one place to another and it is always open to the higher authorities to look into grievance of the concerned employee and pass appropriate order. This Court, however, can take judicial notice of the fact that from Gautambudh Nagar, six person have been transferred and five has been posted in the adjoining District Bulandshahar while one has been posted in District Bijnor since he belong to District Bulandshahar itself. Out of these six persons, three, namely, the petitioner, Sri K.K. Garg and Sri S.K. Tyagi have their own District as Ghaziabad, two, namely, Vaseek Ahmad and Ramesh Chandra Gaur have their home districts at Bulandshahar and one Thomas Ram Tyagi belong to District Meerut. The petitioner has been transferred to the adjoining area only.

67. In view of the above discussions, I do not find any merit in the writ petition. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.10.2009

BEFORE
THE HON'BLE RAKESH SHARMA, J.

Civil Misc. Writ Petition No. 51713 of 2009

Panna Lal and others ...Petitioners
Versus
District Magistrate, Gautam Buddh Nagar and others ...Respondents

Constitution of India- Article-226- Encrochment upon public Chak road, direction of Court District Magistrate as well other Revenue Authorities-after measurement found encroachment-accordingly passed consequential impugned order-can not be questioned or entrained by Writ Court-considering growing tendency of encroachments upon public utility land general Mandamus issued to all the district Magistrate for strict compliance-petition dismissed.

Held: Para-8

Hon'ble Rakesh Sharma, J. The District Magistrates shall also direct the Sub Divisional Magistrates and the Assistant Collectors of the Districts that whenever any such complaint is brought to the notice of the concerned Sub Divisional Magistrate or the Assistant Collector, the concerned Sub Divisional Magistrate or the Assistant Collector shall take immediate steps in compliance of this Court's order, failing which the concerned Sub Divisional Magistrate or the Assistant Collector shall be held responsible.

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

1. Heard learned counsel for the petitioners as well as learned Standing Counsel and perused the record.

2. It emerges from perusal of the records that a Writ Petition No. 1611 of 2009, Smt. Triveni Vs. State of U.P. and others was filed in this Court, which was disposed of vide a judgment and order rendered on 21.1.2009. The petitioner in Writ Petition No. 1611 of 2009, Smt. Triveni Devi, had raised a grievance that she had made an application to the District Magistrate, Gautam Buddh Nagar with regard to illegal activities of the respondents, namely, Panna Lal, Chandra Pal, Amar Pal, Moti Lal, Natthi, Babu, Binnami, Shish Pal, Mahesh, Kehar, Banwai and Murari, all reisdents of Village-Rampur Bangar, Tehsil Jewar, District Gautam Buddh Nagar, who were encroaching upon the public utility land, that is, the Chakroad and Drain.

3. The Court had taken note of the submissions put-forth by the petitioner and had directed the Collector, Gautam Buddh Nagar to look into the matter, decide the application of the petitioner and take appropriate action. Accordingly, the District Magistrate, Gautam Buddh Nagar had directed the Sub Divisional Magistrate, Jewar, District Gautam Buddh Nagar to make spot inspection. In pursuance thereof, the Sub Divisional Magistrate, on 13.8.2009 had visited the spot along with a team consisting of the concerned Lekhpal and other Lekhpals, Supervisor Kanunago and the local Police. He had also gone through the revenue records, Sazra and revenue map. On spot inspection, the Sub Divisional Magistrate found that the Gata No. 216 was recorded as Chakroad and Gata No. 217 was recorded as Drain (Nali) in the revenue records. The measurements were carried out by the revenue authorities according to Sazra, Revenue Map of the area and other documents. The team of the revenue officials carried out measurements from the permanent mark and had taken into account the map plan of the area, Sazra, Revenue Map of the Chakroad, Nali and abutting plots. On measurement, the southern side was found in accordance with the revenue map/Sazra, but on the western side, the Chakroad and Drain was found encroached by the petitioners.

4. In accordance with the Survey/spot inspection and the measurements, the Chakroads and Drains were duly defined, marked and restored on the spot and as such the Chakroad and Drainage was put in order. Whatever action was taken by the Sub Divisional Magistrate, Jewar and the District Magistrate, Gautam Buddh Nagar, it was taken in compliance of the order passed by the Court in Writ Petition No. 1611 of 2009. The petitioners were parties to the said writ petition. The impugned order dated 13.8.2009 is, in fact, a consequential order, which has been passed in compliance of the directions contained in the judgment and order passed by this Court. The said action has been taken by the Revenue authorities after making spot inspection, carrying out measurements and demarcation etc. In the circumstances, there appears to be no justification in interfering with such an order, which is a consequential order passed in furtherance of this Court's order.

5. While carving out the Chaks of the farmers, provisions of the Chakroads and Nalis (Drains) are made in order to make pathway for Tractors, Bullockcarts and to approach the fields so that the farming work may be carried out easily and smoothly, farmers may reach their fields by using the Chakroads and the

Tractors or other agricultural equipments may reach to the fields of the farmers. The Drains are left for irrigations facilities so that the water may reach to the fields and surplus water may be drained out during rainy season to avoid flooding in the fields. Likewise the Public utility lands are also left for the benefit of the villagers. The Chakroads or Drains or Public utility lands etc. are left for the benefits of the farmers and for none else. Thus, it is the duty of the State as well as of the farmers to protect the Chakroads, Dains (Nalis) from encroachments.

6. It is being noticed by the Court that in a large number of cases, encraochments on Chakroads, Drains and other public utility lands are being reported. Now a days it has become a regular feature in the Villages of Uttar Pradesh that the interested powerful Villagers and the anti social elements encraoch upon the Chakroads, Drains and Public utility lands etc. In carrying out encroachments on Chakroads, Drains and Public utility lands, the villagers and antisocial elements are taking law in their hands. Due to encroachments on Chakroads, it has become difficult for two vehicles, Bullock-carts or two Tractors to pass through the Chakroads. A large number of Chakroads have been encroached by the erring Villagers in the State of Uttar Pradesh. Day by day, the fields of the powerful and influential villagers are eating the width and length of the Chakroads. The situation in the rural India has become alarming and as such Survey operations are urgently required in the villages to demarcate the Chakroads in order to save the Chakroads, Drains and other Public utility lands etc. meant to be protected for rural population including farmers.

7. In these circumstances, the Principal Secretary to Government of U.P., Revenue Department, State of U.P. is hereby directed to issue necessary directions to all the District Magistrates of the State of Uttar Pradesh to ensure that the encroachments on Chakroads, Drains and other Public utility lands etc. are removed immediately after Survey and regular spot inspection by the Revenue authorities. The District Magistrates of the Districts shall direct the Sub Divisional Magistrates or the Assistant Collectors to act instantly on receiving the complaints regarding encroachments on Chakroads, Drains and Public utility lands etc. and remove the encroachments on Chakroads, Drains and Public utility lands etc. immediately by making spot inspections and after going through the relevant records. The District Magistrates shall also direct the Sub Divisional Magistrates and Assistant Collectors to decide the disputes/complaints regarding encroachments within a month from the date of receipt of such applications/complaints from any corner and take stringent and strict action with the help of the Police to remove the encroachments. The Sub Divisional Magistrates and the Assistant Collectors shall also make necessary and effective arrangements to stop future encroachments on Chakroads, Drains and Public utility lands by keeping constant vigil.

8. The District Magistrates shall also direct the Sub Divisional Magistrates and the Assistant Collectors of the Districts that whenever any such complaint is brought to the notice of the concerned Sub Divisional Magistrate or the Assistant Collector, the concerned Sub Divisional Magistrate or the Assistant Collector shall

take immediate steps in compliance of this Court's order, failing which the concerned Sub Divisional Magistrate or the Assistant Collector shall be held responsible.

9. With the above observations and directions, the writ petition is dismissed.

10. Office is directed to send a copy of this judgment and order to the Principal Secretary to Government of U.P., Revenue Department, State of U.P. to issue necessary directions/orders to all the District Magistrates of the State of Uttar Pradesh for strict compliance of the judgment and order passed by the Court today.

11. Office is also directed to supply copies of this judgment and order to the Chief Standing Counsel, State of U.P. and Sri S.P. Misra, learned Standing Counsel, State of U.P. for its onward transmission to the Principal Secretary to Government of U.P., Revenue Department, State of U.P. for its compliance and taking necessary action.
7.10.2009

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2009

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 42612 of 2009

Dhirendra Nath Dubey ...Petitioner
Versus
State of U.P. and others ...Respondents

Constitution of India Article-30 **Appointment of L.T. Grade teacher-contrary to provision of Intermediate Education Act-illegal-protection of Article 30 in minority institution to ignore the provision of 16 E(2) not available-the method of fair selection provided in 16 FE of the Act-went for good administration of college-can not be ignored-any appointment contrary to that illegal.**

Held: Para-22

Having arrived at aforesaid conclusion, this Court may record that under Section 16E for making appointment on the post of teachers, which applies to minority institution also, vacancy is required to be published in at least two newspapers, having adequate circulation in the State. In the facts of the present case, advertisement was admittedly published in only one newspaper, and therefore, there has been violation of Section 16 E (2) of Act, 1921.

Case law discussed:
AIR 1997 Alld. 44, (2001) 4 SCC 296 Paragraph-7, (2002) 8 SCC 4811, (2003) 6 SCC 697, (2004) 6 SCC 224.

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri Vikesh Chaudhary, learned Senior Advocate assisted by Sri Arvind Srivastava, learned counsel for the petitioner, Sri M.A. Qadeer, learned Senior Advocate assisted by Sri M.Y. Khan, learned counsel for respondent nos. 6 and learned Standing Counsel for the State-respondents.

2. This writ petition has been filed for quashing of the order dated 14th July, 2009 and the advertisement dated 20th July, 2009.

3. The facts in short giving rise to the present writ petition are as follows:

4. Abdul Hakeem Agriculture Intermediate College, Ujiyar, Dudhara, Sant Kabir Nagar is a recognised and

aided intermediate college. The college has been declared as a recognised minority institution. Provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act, 1921') and Regulations framed thereunder, as also those of U.P. High School and Intermediate Colleges (Payment of Salaries to the Teachers and other Employees) Act, 1971 (U.P. Act No. 24 of 1971) (hereinafter referred to as the 'Act, 1971') are fully applicable to the teachers and staffs of the institution.

5. An advertisement was published by the institution inviting applications for appointment as L.T. Grade teachers in the subject of Hindi and Sanskrit on 8th July, 1994. Petitioner applied in pursuance thereof. He was selected and is stated to have been issued an appointment letter by the Committee of Management dated 24th August, 1994. Petitioner joined on 1st September, 1994. Petitioner was paid a meagre salary of a sum of Rs. 750/- per month. Petitioner was however restrained from discharging his duties w.e.f. 3rd July, 2001 by the Management of the institution. He therefore, filed writ petition no. 42057 of 2001, wherein an interim mandamus was granted on 4th December, 2001 requiring the respondents to allow the petitioner to function and to pay him salary regularly or to show cause by filing counter affidavit. It appears that cause was shown and after exchange of affidavits the writ petition was decided vide order dated 28th May, 2008 directing the petitioner to move a representation before the Regional Joint Director of Education, Basti Region, Basti, who inturn was required to decide the same within the period specified.

6. Petitioner accordingly made his representations dated 16/26th August, 2008 and dated 26th June, 2009. The Regional Joint Director of Education vide order dated 14th July, 2009 rejected the representation made by the petitioner. The Committee of Management advertised the vacancies of L.T. Grade teachers again on 1st October, 1997 and lastly on 20th July, 2009. Petitioner has also approached the Secretary, Secondary Education, U.P. Lucknow against the order of the Regional Joint Director of Education.

7. The order passed by the Regional Joint Director of Education dated 14th July, 2009 is being challenged on the ground that it is in violation of principles of natural justice, inasmuch as no opportunity of personal hearing was afforded and that case set up by the Management was considered behind the back of the petitioner. Written submissions have also submitted in support of contentions raised.

8. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present writ petition.

9. From the order of the Regional Joint Director of Education dated 14th July, 2009 impugned, following facts emerge:

10. Institution in question was granted recognition initially as a High School under Section 7A of Act, U.P. Intermediate Education Act, 1921 . The State Government vide order dated 13th March, 1995 declared the institution as minority institution with reference to the provisions of the U.P. Intermediate Education Act, 1921 w.e.f. 13th March,

1995. From the said date the provisions pertaining to appointment of teachers in a minority institution, i.e. Section 16FF of Act, 1921 stood attracted to the said institution. Prior to the said date provisions of U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as the 'Act, 1982') and the rules framed thereunder were applicable. The institution in question was granted recognition/affiliation as an Intermediate College under Section 7AA of Act, 1921 i.e. 'Under Self Finance'.

11. According to the petitioner, he was offered appointment under letter of the Management of the institution dated 24th August, 1994 and in pursuance thereof he joined on 1st September, 1994 as Assistant Teacher (Hindi) (i.e. much prior to the institution being declared as a minority institution).

12. The Regional Joint Director of Education after referring to the factual issues has recorded a categorically finding that on 1st September, 1994, no post of assistant teacher in Hindi subject in L.T. Grade was vacant in the institution. Even otherwise, from 14th July, 1992, (in view of the amendments made and applicable on the date in the Act, 1982), appointment on the post of assistant teachers in recognised highs schools even on ad hoc basis could be made by Selection committee of which the District Inspector of Schools was to be the Chairman. Since the institution was declared a minority institution on 13th March, 1995, the provisions of Act, 1982 will seize to be applicable only from the said date. Lastly it has been recorded that even assuming without admitting that the institution in question was a minority institution, appointment on the post of assistant teacher in minority institution has to be made on the recommendation of a Selection Committee as per Section 16FF of Act, 1921 , which is to comprise of a nominee appointed by the Department. It has therefore, been held that on both grounds claim set up for appointment cannot be accepted.

13. On behalf of the petitioner the impugned order dated 14th July, 2009 is being challenged basically on five points, which are being tabulated as under:

(a) provisions of Section 16FF of Act, 1921 are not applicable qua appointment of teaches in recognised and aided minority intermediate colleges in view of the enforcement of U.P. Act No. 5 of 1982,

(b) the procedure infact applicable under Section 16FF had been followed and therefore, the order which records otherwise is factually incorrect,

(c) full and fair opportunity of hearing to controvert the allegations made by the Management had not been afforded to the petitioner and therefore, the order is in violation of principles of natural justice,

(d) If Section 16FF of Act, 1921 is taken to be applicable qua appointment of L.T. Grade teachers, the appointment of other teachers is also liable to be struck down on the same ground.

(e) factual findings recorded by the Regional Joint Director of Education qua working of the petitioner are perverse.

14. This Court may at the very outset record that in the present writ petition, neither the learned counsel for the petitioner disputed the correctness of the statement of fact recorded in the impugned order qua institution being

granted minority status under notification of the State Government dated 13th March, 1995 nor it has been disputed that prior to 13th March, 1995, the provisions of Act, 1982 were applicable qua appointment on the post of assistant teachers in a recognised and aided intermediate college. It is not in dispute that on the date the petitioner claims selection/appointment in the institution i.e. 1st September, 1994, the Committee of Management of the institution had no power to make any ad hoc appointment against substantive vacancy existing in the institution. Power in that regard vested in Selection Committee to be presided over by the District Inspector of Schools, as has been noticed in the impugned order of Regional Joint Director of Education. As a matter of fact vide notification dated 16th July, 1992 published in official gazette of the State of Uttar Pradesh dated 4th September, 1993, Section 9A was added to the U.P. Secondary Education Services Commission Rules, 1983 (hereinafter referred to as the 'Rules, 1983'), which laid down a detail procedure for appointment on Ad-hoc basis by direct recruitment on the post of L.T. Grade teachers in a recognised intermediate college. The power in that regard was directly vested in the District Inspector of Schools. The District Inspector of Schools is required to publish an advertisement, after receiving information of the number of vacancies existing in the institutions, under his control. After receipt of the applications along with full particulars, selection committee comprising of the officers of the State has to process the same and prepare a select panel for appointment in various institutions. Name of the selected candidate is to be transmitted to the Committee of Management for offering appointment under its resolution. It is admitted in the facts of the present case that the statutory procedures as was applicable on the date, the petitioner claims appointment in the institution i.e. 1st September, 1994, under Rule 9A (as added in the year 1992 to Rules, 1983) had not been followed. In view of the aforesaid reasons alone, entire case set up by the petitioner has to fall, more so when the aforesaid findings of the Regional Joint Director of Education have not been challenged in the present writ petition. Normally this Court would have closed the chapter at this stage itself, however, since other issues have been raised, it would be worthwhile to deal with the same also.

15. In support of the first contention, the Senior Advocate on behalf of petitioner submitted that a Full Bench of this Court in the case of **Smt. J.K. Kalra vs. Regional Inspectress of Girls Schools, Meerut & Ors**. reported in *AIR 1997 Alld. 44*, had held that since the provisions of U.P. Act No. 5 of 1982 will not be applicable to minority institution, provisions of Section 16FF of Act, 1921 would become applicable. The law so declared stands overruled under judgment and order of the Hon'ble Supreme Court of India in the case of **Committee of Management, St. John Inter College vs. Girdhari Singh & Ors.** reported in *(2001) 4 SCC 296* Paragraph-7, wherein it has been held as follows:

"7. The second submission of Mr. Rao on the basis of the coming into force of the U.P. Secondary Education Services Commission and Selection Board Act, 1982, is also of great force. The Statement of Objects and Reasons of the aforesaid U.P. Act No. 5 of 1982, unequivocally

indicates that the earlier provisions contained under Section 16-G(3) (a) of the Intermediate Education Act, 1921 were found to be inadequate, where the Management proposed to impose the punishment of dismissal, removal or reduction in rank. In other words, the legislature though that the power of approval or disapproval to an order of punishment imposed by the management should not be vested with a lower educational authority like the District Inspector of Schools but should be vested with an independent commission or board which could function as an independent and impartial body. With the aforesaid objective in view, the legislature having enacted the U.P. Secondary Education Services Commission and Selection Board Act, 1982 and the Services Selection board having been brought into existence in exercise of power under Section of the aforesaid Act, the power of the Inspector/Inspectress under Section 16-G(3) (a) of the Intermediate Education Act, 1921 no longer could be exercised, as it would be inconsistent with the provisions of U.P. Act 5 of 1982 and would frustrate the very object for which the legislation has been enacted. Section 32 of U.P. Act 5 of 1982 provides:

"32. Applicability of U.P. Act 2 of 1921.---The provisions of the Intermediate Education Act, 1921 and the Regulations made thereunder insofar as they are not inconsistent with the provisions of this Act or the Rules or Regulations made hereunder shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal termination or reduction in rank of a teacher."

Mr. Sharma, appearing for the respondents, vehementally urged before us that though for all other institutions, the power of approval or disapproval against an order of termination of an employee of an aided educational institution had been vested with the Selection Board under U.P. Act 5 of 1982, but in respect of the minority institution, it must be held to have been vested with the Inspector/Inspectress and that power still vested with those authorities notwithstanding the coming into force of U.P. Act 5 of 1982. ***We are unable to accept this submission, as in our view, there cannot be any rationale for conferring the power of approval or disapproval of an order of termination of an employee of a minority institution with the Inspector/Inspectress and for all other institutions with the Services Selection Board. Having conferred the power of approval/disapproval with the Selection Board under U.P. Act 5 of 1982, the legislature made it crystal clear by inserting Section 30 therein which states****:*

"30. Nothing in this Act shall apply to an institution established and ***administered by a minority referred to in clause (1) of Article 30 of the Constitution of India****."*

The legislature intent is thus apparent that the legislature never intended to subject the order of termination of an employee of a minority institution to the approval/disapproval of the Selection Board. In this view of the matter, it is difficult for us to hold that an order of termination of an employee of a minority institution cannot be given effect to, unless approved by either the Inspector/Inspectress, as provided in Section 16-G(3)(a) or by the Selection Board, as provided under U.P. Act 5 of 1982*. Under the provisions, as they stand, the conclusion is irresistible that the question of prior approval of the*

competent authority in case of an order of termination of an employee of a minority institution does not arise. In the aforesaid premises, the majority view in the Full Bench judgment of the Allahabad High Court is set aside and this appeal is allowed. The writ petition filed, stands dismissed."

16. In the opinion of the Court the contention raised on behalf of the petitioner is totally misconceived. The Hon'ble Supreme Court of India in the case of **Committee of Management, St. John Inter College (Supra)** was considering the matter with regard to grant of prior approval to the punishment proposed to be inflicted by a minority institution on its employee. Such provisions of seeking prior approval was held to be hit by Article 30 of the Constitution of India and it is in that background only that the Court held that once legislature declared that the provisions of Act No. 5 of 1982 will not apply to a minority institution, falling back upon the provisions of Act, 1921, i.e. Section 16-G(3)(a) for the same purpose was not called for.

17. The facts before this Court are clearly distinguishable. The issue up for consideration is as to what procedure is to be applied qua appointment of teachers in minority intermediate college. In view of Section 30 of Act, 1982, the provisions of Commission/Board Act will not apply qua appointment of teachers in minority high school/ intermediate college. No change has been made vis-a-vis the provisions which were applicable under Act, 1921 prior to the enforcement of U.P. Act No. 5 of 1982 qua the minority institutions. The procedure for appointment of teachers in minority intermediate college continues to be regulated by Section 16E read with Section 16FF of Act, 1921. Such provisions and procedures prescribed thereunder have continued in operation for decades together and at no point of time such provisions which regulates the mode and manner of selection and appointment of teachers in a minority institution have been found to be hit by Article 30 of the Constitution of India.

18. I am of the considered opinion that procedures prescribed under Section 16E read with Section 16FF of Act, 1921 have the effect of laying down a fair and reasonable method of selection which leads to good administration of intermediate college and has the effect of avoiding mal- administration because of wrongful selection of undeserving candidates as teachers. Therefore, such procedure cannot be said to be hit by Article 30 of the Constitution of India. The Hon'ble Supreme Court of India in the case of **T.M.A. Pai Foundation v. State of Karnataka** reported in *(2002) 8 SCC 4811* as well as in the case of **Islamic Academic of Education & Anr. vs. State of Karnatka & Ors.** reported in *(2003) 6 SCC 697* has repeatedly held that any provision, which helps in better administration of minority institution and has the effect of avoiding mall administration will not be voilative of Article 30 of the Constitution of India.

In the opinion of the Court, if the contention raised on behalf of the petitioner is accepted, i.e. because of Section 30 of the U.P. Act No. 5 of 1982, none of the provisions of the Act, U.P. Intermediate Education Act, 1921, qua their appointment as assistant teachers in minority institution will apply, it will lead to serious consequences. The essential

minimum qualification prescribed for appointment of assistant teachers. In intermediate colleges, under Appendix-A of Chapter-II of the Regulations framed under Act, 1921 would also cease to be applicable for the same reason and therefore, anybody can be appointed in minority institution, irrespective of the qualification being possessed by him. The contention raised on behalf of the petitioner is too broadly stated to be accepted by any Court of law. It is held that provisions of Section 16E read with Section 16FF, which lays down the procedure for appointment of assistant teachers in a minority institution hold good and apply with full force qua appointment of assistant teachers in a minority institution irrespective of the enforcement of U.P. Act No. 5 of 1982.

19. At this stage, this Court may also refer to the judgment of the Hon'ble Supreme Court of India in the case of **Brahmo Samaj Education Society & Ors. vs. State of W.B. & Ors.**, reported in *(2004) 6 SCC 224*, specifically paragraphs-5 and 6 relied upon by the learned counsel for the petitioner. I am of the considered opinion that said judgment of the Hon'ble Supreme Court of India is clearly distinguishable on facts, inasmuch as in the said case power of the Committee of Management of a minority institution to appoint a teacher of its choice was withdrawn and conferred upon the Selection Board/Commission. Such provision was struck down as being voilative of fundamental right guaranteed under Article 30 of the Constitution of India, on the ground that authority to administer a minority institution cannot be totally restricted and the institution cannot be treated as a government-owned one, merely because aid is provided by the Government.

20. In the case of **Brahmo Samaj Education Society (Supra)** itself it has been held that "*Of course the State can impose such conditions as are necessary for the proper maintenance of standards of education and to check maladministration."*

21. The aforesaid judgement only takes forward the law laid down by the Constitution Bench of the Hon'ble Supreme Court of India in the case of T.M.A. Pai Foundation (Supra), and therefore, in paragraph-7 of its judgment in the case of **Brahmo Samaj Education Society (Supra)**, the Apex Court has stated as follows:

"7. But that control cannot extend to the day-to-day administration of the institution. ***It is categorically stated in T.M.A. Pai (SCC at p. 551, para 72) that the State can regulate the method of selection and appointment of teachers after prescribing requisite qualification for the same. Independence for the selection of teachers among the qualified candidates is fundamental to the maintenance of the academic and administrative autonomy of an aided institution.*** *....."*

22. Having arrived at aforesaid conclusion, this Court may record that under Section 16E for making appointment on the post of teachers, which applies to minority institution also, vacancy is required to be published in at least two newspapers, having adequate circulation in the State. In the facts of the present case, advertisement was admittedly published in only one

newspaper, and therefore, there has been violation of Section 16 E (2) of Act, 1921.

23. So far as the plea of the petitioner qua the impugned order being in violation of principles of natural justice, is concerned, this Court is of the considered opinion that for the facts and reasons recorded and for the legal principles as noticed herein above, only one view is possible in the facts of the present case. The factual issue raised by the Committee of Management need not be gone into any further. This Court is of the considered opinion that the plea of violation of principles justice as raised by the learned counsel for the petitioner is futile, inasmuch as non-compliance of the statutory provisions qua appointment claimed are admitted on records.

24. So far as the last but one plea raised by the learned counsel for the petitioner, is concerned, this Court may only provide that if any other appointment has been made contrary to the statutory provisions applicable, it is left open for the petitioner to make a representation, ventilating all his grievances, supported by such documents, as he may be advised before the Director, Secondary Education, U.P. Lucknow qua such appointees along with a certified copy this judgement. On such representation being made the Director shall call for the records and after affording opportunity of hearing to the parties concerned, shall pass a reasoned speaking order, within 8 weeks thereafter.

25. It is needless to emphasise that petitioner cannot claim any negative equality, inasmuch as if appointment as alleged by the petitioner qua other teachers are illegal, he cannot be permitted to obtain an order from this Court that the same illegality be perpetuated by granting relief prayed for by the petitioner.

26. So far as the last point issue on behalf of the petitioner is concerned, this Court feels that the issue has become more or less infructuous, in view of the conclusions arrived at on admitted facts on issues nos. a to c.

27. The present writ petition is therefore, dismissed. No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2009

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

Civil Misc. Writ Petition No.52816 of 2009

Ajai Kumar Mishra ...Petitioner
Versus
District Magistrate, Fatehpur and others ...Respondents

Counsel for the Petitioner:
Sri Ashutosh Mishra
Sri Indra Raj Singh

Counsel for the Respondents:
Sri Ravi Shankar Prasad
S.C.

<u>Constitution of India Article 226</u>
Cancellation of appointment of Shiksha Mitra-petitioner passed High School Examination in the year 1988-again appeared in High School Examination 1995 and the Intermediate examination in 2005-on aggregate of marks of High School 88, and Intermediate examinations got selected- once the petitioner himself forgo 88 examination-

can not be allowed to take any benefit-held-intentional concealment of relevant facts cancellation of selection held proper.

Held: Para 4

In this view of the matter, it is the marks of the high school exams of 1995 and the Intermediate exams of 2005 combined, as contemplated under the Government Order dated 10.10.2005, that a calculation has to be made and not on the basis of the high school examination that the petitioner passed out in the year 1988. The Government Order clearly prescribes that the marks have to be calculated on the basis of the aggregate marks of the high school and the intermediate examinations. As pointed out herein above, the intermediate examination which have been passed by the petitioner can be co-related to the high school examination of 1995 only and not to the high school examination of 1988.

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

1. Heard Shri Indra Raj Singh, learned counsel for the petitioner, Shri Ravi Shankar Prasad for the respondent no. 4-U.P. Basic Education Board and the learned standing counsel for the State.

2. Shri Indra Raj Singh contends that the impugned order dated 24.08.2009 proceeds on an erroneous assumption of fact, inasmuch as, the petitioner has been rightly selected on the basis of marks obtained by him in the High School examination, in which he had appeared in the year 1988. It is urged that the petitioner's marks of the high school examination therefore had been rightly calculated along with the marks of his Intermediate examination by the Gram Shiksha Samiti while considering the candidature of the petitioner for appointment as Shiksha Mitra. He contends that the impugned order deserves to be set aside as there was no occasion for the District Magistrate, Fatehpur to proceed ex-parte against the petitioner and pass the impugned order on the strength of report available relating to the two mark sheets of the petitioner of High School Examination.

3. I have perused the impugned order and also the averments contained in the writ petition. The petitioner has not disputed the fact of having attempted the high school examination for a second time in the year 1995. In the said examination the petitioner had obtained only 266 marks out of 600 as against the marks obtained by him earlier in the year 1988. The petitioner did not apply for appearing in the intermediate examination on the strength of the high school mark sheet of 1988. On the contrary, the petitioner applied and appeared in the Intermediate examination of 2005 on the strength of his high school examination of 1995. This fact has not been disputed before this Court. It is therefore evident that the petitioner was able to succeed in the Intermediate examination only upon his having attempted the examination having been allowed to appear in the same on the strength of the high school mark sheet obtained in the year 1995.

4. In this view of the matter, it is the marks of the high school exams of 1995 and the Intermediate exams of 2005 combined, as contemplated under the Government Order dated 10.10.2005, that a calculation has to be made and not on the basis of the high school examination that the petitioner passed out in the year 1988. The Government Order clearly prescribes that the marks have to be

calculated on the basis of the aggregate marks of the high school and the intermediate examinations. As pointed out herein above, the intermediate examination which have been passed by the petitioner can be co-related to the high school examination of 1995 only and not to the high school examination of 1988.

5. In this view of the matter, the impugned order does not deserve any interference as the petitioner himself has not disputed the facts aforesaid.

6. Since the petitioner had deliberately not disclosed the facts of the results of High School in 1995 the same having been discovered by the authorities disentitles the petitioner from seeking any appointment on the post in question.

7. Accordingly the writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2009

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

Civil Misc. Writ Petition No. 52316 of 2009

Smt. Mamta Srivastava ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.S. Verma
Sri Narendra Mohan

Counsel for the Respondents:
Sri R.S. Prasad
Sri D.D. Chauhan
S.C.

Constitution of India- Article 226- Appointment of Shiksha Mitra Challenged made on ground the village Pradhan is 'Chachia Sas' of R.5 restriction made in clause 3 of 9.0.1.7.2000- R 7 disqualify for being appointed- held disruption given in G.O. Can not be enlarged by the court- petition misconceived dismissed.

Held: Para-4

The pronouncement of this Court in the case of Gyan Pratap Singh Vs. State of U.P. and others reported in 2005 (2) ESC 1199 and in the case of Sher Singh Vs. State of U.P. and others reported in 2006 (1) ESC 4 support the aforesaid conclusion drawn by the Court.The Government Order under consideration was presumably brought about to clarify the meaning of the word 'relative' as the earlier Government Order on the subject issued in the year 1999 was subjected to challenge the validity whereof was upheld by this Court in the decision reported in 2002 (4) AWC 3065 Rashmi Dwivedi Vs. State of U.P. and others.

Case law discussed:
2005(2)ESC 1199
2006(1) ESC 4
2002(4) AWC 3065

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

1. Heard Shri Narendra Mohan, learned counsel for the petitioner, Shri R.S. Prasad, learned counsel for the respondent no. 5, learned counsel for the Gaon Sabha and the learned standing counsel.

2. The contention raised on behalf of the petitioner is that the respondent no. 7- Smt. Arti cannot be appointed as Shiksha Mitra on the post in question, inasmuch as, she happens to be a relative of the Gram Pradhan and is therefore disqualified in terms of Clause 3 of the government Order dated 1st July, 2000. It

is urged that the Gram Pradhan of the village is the 'Chachiya Sas' of the respondent no. 7. Translated this means that the Gram Pradhan is the wife of the Uncle-in-law of the respondent no. 7. The enumeration of relatives which have been mentioned in Clause 3 of the Government Order, are exhaustive, inasmuch as, the word relative is followed by a transitive verb "means", the objects whereof are the specific relations defined therein.

3. In view of the same there is no scope for this Court to include any other relative apart from those defined in the said Clause 3.

4. The pronouncement of this Court in the case of Gyan Pratap Singh Vs. State of U.P. and others reported in 2005 (2) ESC 1199 and in the case of Sher Singh Vs. State of U.P. and others reported in 2006 (1) ESC 4 support the aforesaid conclusion drawn by the Court.The Government Order under consideration was presumably brought about to clarify the meaning of the word 'relative' as the earlier Government Order on the subject issued in the year 1999 was subjected to challenge the validity whereof was upheld by this Court in the decision reported in 2002 (4) AWC 3065 Rashmi Dwivedi Vs. State of U.P. and others.

5. Accordingly there is no merit in the contention raised on behalf of the petitioner and the writ petition is accordingly dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.10.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Revision No. 2457 of 2004

Vijai Pandey and others ...Revisionists
Versus
State of U.P. and others ...Respondents

Counsel for the Revisionists:
Sri P.N. Tripathi
Sri M. Sarwar Khan

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

Code of criminal Procedure-section-309- during trail of case under section 147, 148, 323, 325, 504, 506,IPC- on mere application of prosecution framed charge additional for defense under section 302, 307,IPC-framed held- illegal- without taking any evidence- No additional charges can be framed -order liable to set a side.

Held: Para 8

Therefore, in my opinion, in present case also, after framing charges against the accused persons, the court below was not justified to frame additional charges under section 302/149 and 307/149, without taking any evidence.

Case law discussed:
2007 (1) ALL JIC 37, 2002 CBC 354.

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

1. By means of this revision under section 397 of the Code of Criminal Procedure (in short 'the Cr.P.C.'), dated 19.05.2004, passed by Spl. Judge (E.C. Act), Jaunpur, in S.T. No. 462 of 1999

(State vs. Vijay Pandey & others), under section 147, 148, 149, 323, 325, 304, 504, 506 IPC has been challenged.

2. By the impugned order, the learned court below has allowed the application 45-B moved on behalf of complainant to frame alternate charge under section 302 & 307 IPC.

3. The facts leading to the filing of this revision, in brief, are that an FIR was lodged on 02.06.1998 by Rajesh Kumar (O.P. No.2 herein) at P.S. Pawara, District Jaunpur, where a case at crime No. 82 of 1998, under sections 147, 148, 149, 323, 504, 506, 304 IPC was registered against Vijay Pandey, Akhilesh @ Lala, Vimlesh, Subhash, Chintamani, Sankatha, Shatrughan and Lakshmi Kant. The allegations made in the FIR, in brief, are that the accused persons having lathi, danda and hockey came on the door of the house of the complainant on 02.06.1998, at about 5.00 p.m. and caused marpeet, thereby causing injuries to the father of the complainant, due to which he died in the hospital. Injuries are said to have been caused to the complainant, his brother Rakesh and mother Smt. Ladawati also. After investigation, charge sheet was submitted under aforesaid sections. On the case being committed to the court of session for trial, S.T. No. 462 of 1999 was registered, in which charges under sections 147, 148, 323/149, 325/149, 304/149, 504 & 506 IPC were framed against the accused persons on 07.11.2000. Prior to leading any evidence, an application was moved on behalf of complainant that alternate charge under section 302 and 307 IPC be framed against the accused persons. The court below vide impugned order has allowed that application and order to frame additional charge under section 302/149 and 307/149 IPC in the alternative has been passed. Hence this revision.

4. I have heard arguments of Sri M.S. Khan, Advocate, appearing for the revisionists, Sri V.K. Mishra, counsel for the O.P. No. 2 and AGA for the State.

5. The main submission made by learned counsel for the revisionists was that without taking any evidence the court below could not frame additional charge under section 302/307 read with section 149 IPC and hence the impugned order being illegal, deserves to be quashed. For this submission, reliance has been placed on ***Ishwarchand Amichand Govadia vs. State of Maharashtra & another 2007 (1) ALL JIC 37 and Munna Lal Agrawal vs. State of U.P. & others 2002 CBC 35***4.

6. In response, it was submitted by learned counsel for the complainant and AGA that charge can be altered or added at any stage before pronouncing the judgment and hence interference by this Court in the impugned order would not be justified, as the said order does not suffer from any illegality or jurisdictional error.

7. I have given my thoughtful consideration to the submissions made by learned counsel for the parties and perused the entire material on record. As stated herein-above, on the basis of the material available in the case diary, the court below had framed charge under section 147, 148, 323/149, 325/149, 304/149, 504, 506 IPC, vide order dated 07.11.2000 passed in S.T. No. 462 of 1999 (State vs. Vijay Pandey & others). The record shows that without leading any evidence by the prosecution in support of the charges framed against the

accused persons, an application was moved on 14.10.2003 on behalf of the prosecution to frame alternate charges under section 302 and 307 IPC. On the basis of that application, the impugned order has been passed to frame additional charges under section 302/149 and 307/149 in the alternative without any additional evidence or material. Therefore, in view of the observations made by this Court in the case of ***Munna Lal Agrawal vs. State of U.P. (supra)*** the impugned order can not be said to be justified. The following observations made in para 5 are worth-mentioning:-

"Regarding Section 216 and 323 together it appears that Magistrate is empowered to alter or add any charge at any stage of the case or may commit the case to the Court of Sessions before the judgment is pronounced. However, it does not mean that the charge can be altered or added or the case can be committed without any additional evidence or without any additional circumstance. Once the charge is framed, in my opinion there must be some additional evidence of additional circumstance to alter or add the charge or to order that the case may be committed to the Court of Sessions. The additional circumstance, for example may be that there may be clerical mistake, accidental omission or mistake apparent on the face of the record in framing of the charge. If it is so the charge can be altered or added under section 216 Cr.P.C. and the case may also be committed under Section 323 Cr.P.C."

8. In the case of ***Ishwarchand Amichand Govadia vs. State of Maharashtra (supra)***, charge under section 304B IPC was added without examination of doctor. The charge was held to be unjustified by the Hon'ble Apex Court. Therefore, in my opinion, in present case also, after framing charges against the accused persons, the court below was not justified to frame additional charges under section 302/149 and 307/149, without taking any evidence.

9. Consequently, the revision is allowed and impugned order dated 19.05.2004 is set aside. However, the court below is at liberty to alter or add charge after taking evidence of doctors.

10. The trial court concerned is directed to conclude the trial of the accused persons within a period of six months applying the provisions of section 309 Cr.P.C. and avoiding unnecessary adjournments. In case the accused persons do not co-operate and cause delay in trial, then their bail may be cancelled and after sending them to jail, sincere efforts will be made to conclude the trial within aforesaid period.

11. SSP Jaunpur also is directed to depute special messenger to procure the attendance of witnesses after obtaining their summons from the court concerned and it must be ensured that all the witnesses are produced for evidence in S.T. No. 462 of 1999 without causing any delay.

12. The Office is directed to send a copy of this order within a week to the trial court concerned and SSP Jaunpur for necessary action.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.10.2009

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Revision No. 4151 of 2009

Abdul Raheem @ Kalloo ...Revisionists
Versus
State of U.P. and another ...Respondent

Counsel for the Revisionists:
Sri Shahroze Khan

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

Code of Criminal Procedure-Section 319-Summoning Order-offence under Section 304/34 IPC-contentions that what stated in FIR by informant-totally different facts hence stated during cross examination- summoning order bad-held-death caused in side the house-in post mortem report-cause of death reported as result of smothering-onus lie upon all the accused persons including revisionist only consideration for summoning requires "which he appears to have committed" nothing more-No illegality in summoning order pointed out- can not be interfered.

Held: Para 9

In such circumstances, it is not very material if some doubts are cast about whether the witness has been able to establish that he was an eyewitness of the incident. Also under section 319 Cr.P.C., it has basically to be seen from the evidence where a person not being an accused could be tried with another for an offence "which he appears to have committed." The section requires nothing more.

Case law discussed:
(2009) 1 SCC (Cri) 844, (2008) 1 SCC (Cri) 708, (2009) 1 SCC (Cri) 1006, 2009(1) JIC 362 (SC), (2007)1 SCC (Cri) 80, (2007) 10 SCC 433.

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

1. Heard learned counsel for the revisionist and learned Additional Government Advocate.

2. By means of this criminal revision the revisionist has challenged an order dated 11.9.2009 passed by the Special/Additional Sessions Judge, Siddharthnagar summoning the revisionist in a case under section 304/34 IPC in exercise of powers under section 319 Cr.P.C.

3. It is argued by the learned counsel for the revisionist that as per the FIR there was no sufficient evidence for summoning the revisionist because as per the FIR the informant was not an eyewitness as he has stated that when he reached the home of the revisionist and the co-accused Nafis, when he received information on mobile that his daughter had died, but he falsely stated in Court in his examination-in-chief that when he reached the place, then he saw quarrel taking place and Rahim, the revisionist was kicking the deceased, Shakir Jahan, whilst Reshma had given fist blow and initially summoned accused Nafis pressing her neck. By the time, he reached, the deceased had died and the revisionist and co-accused had left the dead body and had disappeared from there.

4. Learned counsel has placed reliance upon the decisions of Hon'ble Apex Court in ***Lal Suraj alias Suraj Singh and another Vs. State of Jharkhand, (2009) 1 SCC (Cri) 844, Anil***

Singh and another Vs. State of Bihar and others, (2008) 1 SCC (Cri) 708 and Kailash Vs. State of Rajasthan and another, (2009) 1 SCC (Cri) 1006 for the proposition that the powers under section 319 Cr.P.C. should be exercised sparingly and the probability of conviction needs to be assessed.

5. It is noteworthy that in the case of Hardeep Singh Vs. State of Punjab and others, 2009(1) JIC 362 (SC), the matter has been referred to the Larger Bench where the view taken in some decisions of the Apex Court that probability of conviction is required to be considered at the stage when an order is passed under section 319 Cr.P.C. has been questioned.

6. The revisionists, who are father-in-law and mother-in-law of the deceased are also residing in the same house, along with already summoned accused Nafis (husband of the deceased) where the dead body of the deceased was found. The cause of death, according to the post-mortem report, was asphyxia as a result of smothering.

7. As the death has taken place in the house where the revisionists used to reside, the onus lay on all the accused persons, i.e. the two revisionists and Nafis to explain as to how Smt. Sakir Jahan had died in their house.

8. It has been held in ***Trimukh Maroti Kirkan Vs. State of Maharashtra (2007)1 SCC (Cri) 80*** and ***Raj Kumar Prasad Tamarkar Vs. State of Bihar, (2007) 10 SCC 433*** that when the death takes place inside the house, the burden is cast on the accused to explain in view of section 106 of the Evidence Act as to how the person has died in the house.

9. In such circumstances, it is not very material if some doubts are cast about whether the witness has been able to establish that he was an eyewitness of the incident. Also under section 319 Cr.P.C., it has basically to be seen from the evidence where a person not being an accused could be tried with another for an offence "which he appears to have committed." The section requires nothing more.

10. I, therefore, find no illegality in the impugned order.

The revision is accordingly dismissed.

11. However, it is provided that if the revisionists appear before the court concerned in pursuance of the aforesaid order and apply for bail, within three weeks their prayer for bail shall be heard and disposed of expeditiously in accordance with the decision of Full Bench of this Court in Amrawati and another Vs. State of UP, 2004 (57) ALR 290.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 14.10.2009

BEFORE
THE HON'BLE RAN VIJAY SINGH, J.

Civil Misc. Writ Petition No. 52549 of 2009

Rajpat Singh and others **...Plaintiffs/Petitioners**
Versus
Veer Singh **...Respondents**

Counsel for the Petitioner:
Sri Ramendra Asthana

Counsel for the Respondents:

Limitation Act, Section 5-Condonation of delay-exparte decree passed-application under order 9 Rule 13-rejected due to non-appearance recall application duly supported by affidavit-rejected as cause of non appearance not properly explained-Revisional Court allow the revision-held-court are ment for imparting justice and not for raising technicality-even if cause not properly shown-considering the merit- Trail Court ought to have Condon the delay-legal fixation explained.

Held: Para 8

In view of the decision of the Apex Court it is abundantly clear that while considering the delay condonation application the court has to see the merit of the case also as the law of limitation is not meant to take away the right of Appeal. The courts are known for imparting justice and not to scuttle the process of justice on technicalities. The length of delay is also not very much material if there is a substance on merit. Further once the discretion has been exercised in positive manner then it should not be interfered with unless it is perverse and based on no material.

Case law discussed:

(JT 1987 (1) SC 537 = 1987, JT 2000 (5) 389.

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. This writ petition has been filed against the judgment and order dated 4.7.2009 passed by learned Additional District Judge, Court No. 2 Agra in Civil Revision No. 27 of 2008, Sri Rajpat Singh and others Vs. Sri Veer Singh.

2. Sri Ramendra Asthana, learned counsel for the petitioners while assailing the impugned order has submitted that the impugned order is totally illegal as the learned judge while allowing the Revision, on the one hand has observed that there is no sufficient explanation for condonation of delay and on the other hand has condoned the delay and allowed the Revision and set aside the order dated 30.11.2007 by which the defendant/respondents' recall application was rejected as barred by time.

3. I have heard learned counsel for the petitioners.

The facts giving rise to this case are that the petitioners/plaintiffs have filed suit seeking permanent injunction. This suit was decreed exparte on 25.9.2004. Thereafter the defendant/respondent has filed an application under Order 9 Rule 13 of the Code of Civil Procedure stating the reason for non appearance before the Court. This application was rejected on 20.5.2009. For recall of the said order an application was filed in April 2006 along with an application under Section 5 of the Indian Limitation Act. The said application was rejected by the trial court on 30th November, 2007 on the ground that the delay has not been properly explained. Against that, the defendant/respondent has filed Revision which has been allowed by the impugned order.

Sri Ramendra Asthana, learned counsel for the petitioner has submitted that the trial court has rejected the application for condonation of delay on the cogent reasons and the revisional court has found that there was no proper explanation for condonation of delay even then condoned the delay, therefore, the court erred in law in allowing the Revision and condoning the delay in filing the application for setting aside the exparte decree.

5. The law relating to the delay condonation has been dealt with by the Apex Court in numerous cases. The Apex Court in the case of **Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors. (JT 1987 (1) SC 537 = 1987**
(2) SCR 387) has given following guidelines while dealing with the delay condonation application :-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. 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

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

4. 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.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

6. Again the Apex Court in the case of State of Bihar and others Vs. Kameshwar Singh and others reported in JT 2000 (5) 389 after considering various cases of the Apex Court on condonation of delay application has held :

Para 12............ " The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice -oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause".

Para 13............. " It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter,acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. ***Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on***

wholly untenable grounds or arbitrary or perverse*. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court".*

7. This view has further been affirmed by the Apex Court in the case of Gangadeep Pratisthan Private Ltd. and others Vs. Messrs. Mechano and others reported in A.I.R. 2005 Supreme Court Page 1958

8. In view of the decision of the Apex Court it is abundantly clear that while considering the delay condonation application the court has to see the merit of the case also as the law of limitation is not meant to take away the right of Appeal. The courts are known for imparting justice and not to scuttle the process of justice on technicalities. The length of delay is also not very much material if there is a substance on merit. Further once the discretion has been exercised in positive manner then it should not be interfered with unless it is perverse and based on no material.

9. Here in the present case, the Revisional court has condoned the delay in the interest of justice holding it that even if there was no satisfactory explanation to the condonation of delay even then the Justice demand to condone the delay.

I do not wish to interfere with the impugned order.

10. The writ petition lacks merit and it is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 15.10.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 51998 of 2009

Constable 289 CP Tahsildar Singh and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri C.B. Yadav
Sri Nisheeth Yadav

Counsel for the Respondents:

Constitution of India, Article 226-Transfer-Petitioner one working as Police Constable for the last 10 years-transfer challenged on ground colorable exercise of power-being prejudice with concern particular cost-held-wholly misconceived-without giving complete particulars-collecting Transfer Order of particular cost can not be basis for interferes-No malafide allegation made-personal hardship can be considered by higher authorities and not by writ court-petition dismissed.

Held: Para 56

Besides, the petitioners have also not placed relevant material on record to show as to what is strength of the police force in the State of U.P., what is the strength of the members of police force belong to the caste to which the petitioners belong etc. In the absence of adequate relevant on vague pleading, in my view, such a serious issue ought not to have been raised and it would not appropriate for this Court to adjudicate the same.

Case law discussed:

(2006) 8 SCC-1, JT 1993 (4) SC, (1993) 3 SCC 696, (2001) 2 UPLBEC 2559, 1994 Supp (2) SCC 666, AIR 1974 SC 555, 1977 (4) SCC 193, 1986 (1) SC 249, AIR 1989 SC 1433, AIR 1991 SC 532, JT 1992 (6) SC 732, 1993 (1) SCC 148 and Union of India Vs. N.P. Thomas 1993 Suppl. (1) SCC 704, JT 1994 (5) SC 298, 1995 suppl. (4) SCC 169, 2001 (8) SCC 574, 2003 (4) SCC 104, 2004 (11) SCC 402, JT 2004 (2) SC 371, 2005 (7) SCC 227, Special Appeal No. 1296 of 2005, 2007 (8) SCC 793, JT 2007 (12) SC 467, 2007 (9) SCC 539, 2009 (11) SCALE 416, JT 2009 (10) SC 187, AIR 1993 SC 2444, 1992 (1) SCC 306, 2005 (2) ESC 1224, W.P. No. 52249 of 2000 decided on 5.9.2009, (Special Appeal No. 769 of 2005) decided on 29.11.2005, Writ Petition No. 243 (SB) of 2007 decided on 31.7.2007, (1993) 4 SCC-25; (1985) 1 All. ER 40, (1998 (16) LCD- 17), 2009 (4) ALJ 372, AIR 1997 SC 597, 2008 (2) ADJ 484 (SC), 2008 (5) ESC 3052=2008 (9) ADJ 267, AIR 2002 SC 2322, 2005 (2) AWC 1191 (FB).

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

1. Fifteen petitioners working as Constable posted in District Etah have been transferred by means of the impugned orders dated 18.9.2009, 20.9.2009 and 22.9.2009, copy whereof has been filed collectively as Annexure-3 to the writ petition. The aforesaid orders of transfer have been passed in public interest by the Superintendent of Police (Establishment), acting on behalf of Deputy Inspector General of Police (Establishment), U.P. Police Head Quarters, Allahabad. It is also evident from the impugned orders that the same have been issued after concurrence of the Police Establishment Board which has been obtained in view of the Apex Court decision in **Prakash Singh & others Vs. Union of India & others (2006) 8 SCC 1**. It is clearly averred in para 5 of the writ petition that the petitioners are posted in District Etah for the last more than ten years.

2. Sri Nisheeth Yadav, Advocate has assailed the impugned orders of transfer contending:

(A) The transfer of all the members of police officers of subordinate rank is governed by the Government Orders dated 7.2.1980, 27.6.1984 and 25.3.1995, but ignoring the same the impugned orders have been passed.

(B) All the petitioners belong to a particular community who have been shifted from Etah to Baghpat, Meerut and Muzaffarnagar. it is a clear case of victimization of the petitioners on caste lines and the impugned order is not a simple order of transfer, but malicious in law.

(C) By Government Order dated 6.6.2009, transfer policy for the session 2009-10 has been laid down and it is provided therein that no transfer in the session shall be made but ignoring the same, the impugned orders of transfer have been passed in violation of the said Government policy and, therefore, are liable to be set aside. He contended that the transfer policy has been laid down by the respondents themselves and they are bound to observe the same as held by the Apex Court in **JT 1993 (4) SC Home Secretary, U.T. of Chandigarh & another Vs. Darshjit Singh Grewal & others, Virendra S. Hooda & others Vs. State of Haryana (1993) 3 SCC 696 and Union of India Vs Mamta Anurag Sharma & another (2001) 2 UPLBEC 2559**.

(D) The petitioners are all constables belong to lowest rung of the police force and, hence, being petty members of police force would be in great difficulty in

maintaining their family at far flung places if their transfer is allowed in such a usual, casual and routine manner.

(E) The transfer orders have been passed in mid session causing great difficulty to the family since the children of the petitioners are studying and, therefore, it would not be prudent to disturb the entire family of the petitioners in mid session. The respondents without applying mind to all these difficulties have illegally passed the impugned orders. In view of the law laid down by the Apex Court in **Director of School Education, Madras and others Vs. O. Karuppa Thevan and another 1994 Supp (2) SCC 666**, till the end of the session, the petitioners should be allowed to continue at the present place of posting.

3. Though, learned counsel for the petitioners has canvassed all the above points at length arguing the matter with great labour, diligence and ability, but having given my anxious and deepest thought to the matter, I find myself unable to accept any of the above submission. In my view, this writ petition does not call for any interference.

4. It is no doubt true that an employee and in particular a Government servant is entitled to be treated fairly, impartially, free from any external influence and strictly in accordance with his service conditions, and rules and regulations framed in this regard. Like any other person, various fundamental rights are applicable to the Government servants also and in particular Article 14, 16 and 21 of the Constitution. If there is a case demonstrating that a Government servant has been dealt with unfairly or has been discriminated on one or the other ground, which are impermissible under Article 16 (2) of the Constitution like, caste, religion, race, sex, descent place of birth etc. this Court would not hesitate to interfere and restrain the State from doing so immediately. However, all these question pre conceive one fact that the Government employee has some kind of right which is being interfered either by singling him out or on account of mala fide etc. There are several aspects in service and in particular Government service. Some arise out of the rights of the Government servant and in some he has no right but exist there merely because one is a Government servant holding a position and status and by virtue thereof such incident of service has fallen upon him. Further, there are a number of incidents of service, some of which confer a legal right upon the Government servant and some do not result in a legal right. For example once a person is appointed as Government servant, his seniority by virtue of his date of entering the service is an incident of service. It confers a legal right upon him to claim that his seniority should be determined in accordance with the rules or the executive instruction in the absence of the statutory rules laying down the criteria for determining seniority. Similarly, another incident of service is that he is entitled to claim salary or wages as prescribed under statutory rules or executive orders. This also confer upon him a legally enforceable right whether flows from statutory rules or from executive instructions. Then if there is a hierarchy of posts and the rules allow a Government servant working on a particular post to be considered for promotion to a higher post, in certain circumstances, in such a case consideration for promotion is also an incident of service and here also it confers a legally enforceable right whether it

emerges from rules or executive instructions. Simultaneously there are certain aspects which though are incidents of service but do not result in conferring any legal right upon the Government servant concerned, Enforceability in later cases varies from case to case. In some matters to a limited extent they may be enforceable and in some matters they may not be enforced at all. For example if by an executive order it is provided that a Government servant holding a particular post will have to show his performance upto a particular level, compliance thereof on the part of the Government servant is also an incident of service but its enforceability varies from case to case. For example the executive higher authorities may take action against such Government servants who fail to perform upto the desired level and such failure may result in adverse consequences in the matter of promotion, crossing of efficiency bar etc. Similarly such matter may also be considered by an executive higher authority at the time of considering whether the Government servant concerned has rendered a dead wood necessitating compulsory retirement or not but Government servant cannot challenge the said standard in a Court of law on the ground that those standards according to capacity of the Government servant are excessive etc. and cannot be followed uniformly by all the Government servant since the capacity of every person varies depending on various aspects of the matter. Similarly another Government servant or the people at large may not claim something in his favour on the ground that a particular Government servant has not been able to discharge as per desired the level. For example if in a territorial jurisdiction of a particular Police Station, number of offenses in a particular period are more than another Police Station, the citizens residing in the former Police Station cannot come to a Court of law and say that in view of the executive instructions issued by the State Government, the Officer In-charge of the Police Station having failed to achieve the target or show his performance according to desired level and, therefore, he should be proceeded against in one or the other manner or should be removed from his office or from that Police Station. Similarly, if a member of a Subordinate Judiciary, who is supposed to decide certain number of cases in a month, fails to achieve the target, no litigant or advocate can come to a Court of law to ask that such judicial officer is not able to hold the office and should be removed or should be transferred to some other place. The executive orders, in this regard though require performance upto a particular standard for the public benefit and interest but non achievement thereof is not enforceable. In the administrative side, the executive authority higher in office may take into consideration the above executive instructions and the performance of the Government servant concerned while assessing his performance, but otherwise the executive instructions of the nature stated above are not enforceable since they do not result in creating a legally enforceable right. The executive instructions providing certain monetary benefit to Government servants or their family members are enforceable. However, the executive instructions constituting guidelines for the authority competent to transfer a Government servant from one place to another do not fall in the same category i.e. enforceable as they do not confer any legal right upon a Government servant. This is what the law has been in the matter of transfer

throughout in the light of the authorities of the Apex Court as well as this Court. I will not burden this judgment with number of authorities on this subject but would like to come straightway on the main issue but before doing so, I propose to refer certain authorities to show how the matter of transfer of a Government servant has been treated by the Courts in India. After having in-depth study on the subject I find it beyond doubt that throughout it has been held that transfer is an incident of service, which does not affect any legal right of a Government servant holding a transferable post.

5. Initially, in **E. P. Royappa Vs. State of Tamilnadu AIR 1974 SC 555** the Court said that it is an accepted principle that in a public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in this matter. The Government is the best judge to decide how to distribute and utilize the services of its employees.

6. Thereafter, dealing with the transfer of the Hon'ble Judges of High Court, in **Union of India Vs. Sankalchand Himatlal Sheth 1977 (4) SCC 193** the Apex Court observed that transfer is an incident of service. It was further held that once a person has entered service he is bound by the conditions imposed either by the Service Rules or the Constitutional provisions. No person after having joined the service can be heard to say that he shall not be transferred from one place to another in the same service without his consent. Having accepted the service, the functionary has no choice left in the administrative action that can be taken by empowered authorities namely, transfer from one place to another, assignment of work and likewise.

7. In **B. Varadha Rao Vs. Vs. State of Karnataka JT 1986 (1) SC 249** the Court said that it is now well settled that a Government servant is liable to be transferred to a similar post in the same cadre. It is a normal feature and incident of Government service. No Government servant can claim to remain at a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post.

8. In **B. Varadha Rao (supra)** an attempt was made to argue that since in E. P. Royappa (supra) it was held that the transfer is an implied condition of service, therefore, the transfer affecting the petitioner must be treated to have altered the service conditions to his disadvantage and such an order would be deemed to be an adverse order appealable under the provisions applicable in the rules pertaining to disciplinary action, but was rejected by the Court observing that transfer is always understood and construed as an incident of service. It does not result in alteration of any of the conditions of service to the disadvantage of the employee concerned. In the reference of **E. P. Royappa (supra)** with respect to observation "an implied condition of service" the Apex Court in B. **Varadha Rao (supra)** held as "just an observation in passing" and it was held that it cannot be relied upon in support of the contention that an order of transfer ipso facto varies to the disadvantage of a Government servant, any of his conditions of service making the impugned order appealable.

9. In **Gujarat Electricity Board Vs. Atmaram Sungomal Poshani AIR 1989 SC 1433**, the Apex Court further said that transfer from one place to another is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules.

10. In **Shilpi Bose & Vs. State of Bihar AIR 1991 SC 532,** it was held *"A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department."*

11. In the same judgment the Hon'ble Apex Court also held that a transfer order, even if, is issued to accommodate a public servant to avoid hardship, the same can not and should not be interfered by the Court merely because transfer orders were passed on the request of the concerned employees. No person has a vested right to remain posted to a particular place, and unless the transfer order is passed in violation of any mandatory rule, the High Court had no jurisdiction to interfere with the transfer orders. Relevant extract is quoted as under:

"If the competent authority issued transfer orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the court merely because the transfer order were passed on the request of the employees concerned. The respondents have continued to be posted at their respective places for the last several years, they have no vested right to remain posted at one place. Since they hold transferable posts they are liable to be transferred from one place to the other. The transfer orders had been issued by the competent authority, which did not violate any mandatory rule, therefore, the High Court had no jurisdiction to interfere with the transfer orders. " (Para-3)

12. In **Rajendra Roy Vs. Union of India & another JT 1992 (6) SC 732,** it was said "in a transferable post an order of transfer is a normal consequence and personal difficulties are matters for consideration of the department."

13. In **Rajendra Rai Vs. Union of India 1993 (1) SCC 148** and Union of India Vs. N.P. Thomas 1993 Suppl. (1) SCC 704 it was said that the Court should

not interfere with the transfer orders unless there is a violation of some statutory rule or where the transfer order was mala fide.

14. In **N.K. Singh Vs. Union of India JT 1994 (5) SC 298,** the Court said, "Unless the decision is vitiated by mala fides or infraction of any professed norm of principle governing the transfer, which alone can be scrutinised judicially, there are no judicially manageable standards for scrutinising all transfers....."

15. In **Abani Kanta Ray Vs. State of Orissa & others 1995 suppl. (4) SCC 169** the Court observed "It is settled law that a transfer which is an incident of service is not to be interfered with by the Courts unless it is shown to be clearly arbitrary or vitiated by mala fides or infraction of any professed norm or principle governing the transfer."

16. In **National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan 2001 (8) SCC 574**, the Apex Court held that transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration.

17. In **Public Service Tribunal Bar Association Vs. State of U.P. & another 2003 (4) SCC 104** the Court said, "Transfer is an incident of service and is made in administrative exigencies. Normally it is not to be interfered with by the Courts. This Court consistently has been taken a view that orders of transfer should not be interfered with except in rare cases where the transfer has been made in a vindictive manner."

18. In **State of U. P. Vs. Gobardhan Lal 2004 (11) SCC 402,** the Court said "Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra in the law governing or conditions of service."

19. In **Union of India VS. Janardhan Debanath JT 2004 (2) SC 371,** the Apex Court said, *"No Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the Courts or the Tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management...."*

20. Thus, the scope of judicial review in the matter of transfer is restricted inasmuch if an order of transfer is challenged on the ground of violation of statutory provision or lack of competence of the person who has passed the order or mala fide, only then the Court should interfere otherwise it is not liable to be interfered in judicial review. The

reason for such a view taken by the Courts repeatedly is that no Government servant has a right to be posted in a particular post or position once appointed in service. He cannot claim that he should continue at same place as long as he desire.

21. Noticing distinction in transfer of civilian employee including those working in public sector undertakings and those of disciplined forces, in **Major General J.K. Bansal Vs. Union of India 2005 (7) SCC 227,** the Apex Court said *"The scope of interference by courts in regard to members of armed forces is far more limited and narrow. It is for the higher authorities to decide when and where a member of the armed forces should be posted. The Courts should be extremely slow in interfering with an order of transfer of such category of persons and unless an exceptionally strong case is made out, no interference should be made."*

22. Considering **J.K. Bansal (supra),** a Division Bench of this Court in **Special Appeal No. 1296 of 2005 (Gulzar Singh Vs. State of U.P. & others)** decided on 7.11.2005 in respect to member of police force observed as under :

"The present case, if not strictly identical to the case of Major General J.K.Bansal Versus Union of India and others (Supra), is quite nearer to the same. The petitioner-appellant in the present case is a member of a discipline force, namely, U.P. Police. His requirement and urgency as well as the exigency regarding posting would be totally different than other civil employees. There may be numerous factors on account whereof the competent authority has to post a particular member of Police Force at a particular place and unless and until a case of mala fide is made out or there is violation of statutory provision, there would be no occasion for this Court to interfere in the case of transfer of a member of a Police Force. The scope of judicial interference would definitely be limited and narrow in case of a disciplined Force comparing to scope available in the case of other civil servants. It is not the case of the petitioner-appellant that the impugned order of transfer is in contravention of any statutory mandatory provision."

23. In **Prabir Banerjee Vs. Union of India 2007 (8) SCC 793,** transfer of a member of central service, namely, Central Excise, from one zone to another zone was challenged on the ground that inter zonal transfer was prohibited in the department of Central Excise and Customs pursuant to the circular dated 19.2.2004 issued by the department of Revenue, Ministry of Finance, Government of India. The Court held that it is no doubt true that transfer is an incident of service in all India service under the Central Service Rules, but in the absence of any direct rule relating to transfer between the two collectorates, the field may be covered by the administrative instructions.

24. In **Mohd. Masood Ahmad Vs. State of U.P. & others JT 2007 (12) SC 467**, the Apex Court said "Transfer is an exigency of service and is an administrative decision. Interference by the Courts with transfer order should only be in very rare cases." It further held "This Court has time and again expressed its disapproval of the Courts below

interfering with the order of transfer of public servant from one place to another. It is entirely for the employer to decide when, where and at what point of time a public servant is transferred from his present posting. Ordinarily the Courts have no jurisdiction to interfere with the order of transfer."

25. In **Prasar Bharti Vs. Amarjeet Singh 2007 (9) SCC 539**, the Court said that an order of transfer is an administrative order. There cannot be any doubt that the transfer being an incident of service should not be interfered except some cases where, inter alia, mala fide on the part of the authorities is proved.

26. In **Union of India & another Vs. Murlidhar Menon & others 2009 (11) SCALE 416** the Court observed that even if the conditions of service are not governed by the statutory rules, yet the transfer being an incident of service, an employee can be transferred which may be governed by the administrative instruction since an employee has no right to be posted at a particular place.

27. Recently, in **Rajendra Singh & others Vs. State of U.P. & others JT 2009 (10) SC 187**, the Court observed that a Government servant holding a transferable post has no vested right to remain posted at one place or other, he is liable to be transferred from one place to other.

28. The Court in **Rajendra Singh (supra)** also observed that the transfer orders issued by the competent authority do not violate any of the legal rights of the concerned employee. If a transfer order is passed in violation of a executive instruction or order, the Court ordinarily should not interfere with the order and the affected party should approach the higher authority in the department.

29. Thus, from the above it is evident that since an employee holding a transferable post has no right to continue at a particular place or position, an order of transfer does not violate any of his legal right whatsoever. That being so, an order of transfer cannot be interfered except of the contingency of mala fide, violation of Rule and competence since it cannot be said to be an order affecting the legal rights of an employee. The limited scope of interference in a judicial review, therefore, has been left to the cases where the order is either violative of statutory provision or is vitiated on account of mala fide or has been issued by a person incompetent. The transgression of administrative guidelines at the best provide an opportunity to the employee concerned to approach the higher authorities for redressal but its consequences would not go to the extent to vitiate the order of transfer. The question as to whether violation of transfer policy or guide lines relating to transfer contained in an executive order or executive insturcitoins or policy for a particular period laid down by the Government would result in vitiating the order of transfer has also been considered repeatedly in past by Apex Court as well as this Court.

30. The enforceability of a guideline laid down for transfer specifically came to be considered by the Apex Court in **Shilpi Bose (supra)** and it was held that even if transfer order is passed in violation of the executive instructions or orders, the Courts ordinarily should not interfere with the order and instead affected arty should

approach the higher authorities in the Department.

31. Again in **Union of India & others Vs. S.L. Abbas AIR 1993 SC 2444** a similar argument was considered and in para 7 of the judgment the Court said, "The said guidelines, however, does not confer upon the Government employee a legally enforceable right."

32. Referring its earlier judgment in **Bank of India Vs. Jagjit Singh Mehta 1992 (1) SCC 306** the Apex Court in **S.L. Abbas (supra)** observed as under :

"The said observations in fact tend to negative the respondents contentions instead of supporting them. The judgment also does not support the Respondents' contention that if such an order is questioned in a Court or the Tribunal, the authority is obliged to justify the transfer by adducing the reasons therefore. It does not also say that the Court or Tribunal can quash the order of transfer, if any of the administrative instructions/guidelines are not followed, much less can it be characterized as mala fide for that reason. To reiterate, the order of transfer can be questioned in a Court or Tribunal only where it is passed mala fide or where it is made in violation of the statutory provisions."

33. Same thing has been reiterated by the Apex Court in **Gobardhan Lal (supra)** in the following words :

"Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments."

34. Besides the judgments of the Apex Court, this Court has also considered the same time and again and has reiterated that the order of transfer made even in transgression of administrative guidelines cannot be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision. Some of such authorities are as under.

35. In **Rajendra Prasad Vs. Union of India 2005 (2) ESC 1224**, a Division Bench observed, *"Transfer policy does not create legal right justiciable in the Court of law."*

36. In Division Bench of this Court in Civil Misc. **Writ Petition No. 52249 of 2000 (Dr. Krishna Chandra Dubey Vs. Union of India & others) decided on 5.9.2009** said, "It is clear that transfer policy does not create any legal right in favour of the employee. It is well settled law that a writ petition under article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by an employee that there is a breath of statutory duty on the part of the employer."

37. In **Gulab Singh (supra)** and **Ram Niwas Pandey & others Vs. Union**

of India & others (Special Appeal No. 769 of 2005) decided on 29.11.2005 also this Court held that transgression of transfer policy or executive instructions does not give a legally enforceable right to challenge an order of transfer.

38. In **Civil Misc. Writ Petition No. 243 (SB) of 2007 Uma Shankar Rai Vs. State of U.P. & others decided on 31.7.2007** this Court observed as under:

"Dr L.P. Misra, learned counsel for the petitioner seriously contended that though the transfer of Government servant is made in exigencies of service, yet where transfer policy has been framed, the same is expected to be adhered to and cannot be defied in a discriminatory and selective manner. Any action of the authorities, even in respect of the matter of transfer, if is inconsistent to such policy would vitiate the order of transfer since it would render the same arbitrary and illegal. Referring to para 2 and 3 of the transfer policy dated 11.5.2006, he contended that the respondent no. 4 having completed his tenure of six years in the District and ten years in the Commissionery even at Mirzapur yet he has again been sought to be posted at Mirzapur to accommodate him and the petitioner has been transferred to Varanasi, therefore, the impugned order is patently illegal. In support of the submission that order of transfer, if has been issued in violation of transfer policy, the same can be assailed since the transfer policy was laid down to adhere to and not to violate, reliance has been placed on the apex Court's decision in ***Home Secretary, U.T. of Chandigarh and another Vs. Darshjit Singh Grewal & others (1993) 4 SCC-25; N.K. Singh vs. Union of India and others (1994) 6 SCC- 98; R. vs. Secretary of State (1985) 1 All. ER 40;*** *and a Division Bench decision of this Court in* ***Smt. Gyatri Devi vs. State of U.P. and others (1998 (16) LCD- 17****). In other words the learned counsel for the petitioner contends that even through the order of transfer may not be challenged on the ground of mere violation of transfer policy, yet such order can be interfered with if the authorities who are supposed to adhere with the guidelines, have failed to do so.*

In our view the submission is mutually destructive and self contradictory. What the petitioner in fact has sought to argue is that the Executive once has laid down certain standards for guidance in its functioning, it must adhere to and any deviation thereof would vitiate the consequential action, which may be challenged in writ jurisdiction. The argument though attracting but in the matter of transfer, however, in our view, the same has no application. Transfer of Govt. servants in the State of U.P. is governed by the provisions contained in Fundamental Rule- 15, which reads as under :-

....

It is not disputed that the post held by the petitioner is transferable and he is liable to be transferred from one place to another. The employer once possess right to transfer an employee from one place to another, in our view, there is no legal or otherwise corresponding obligation upon him to inform his employee as to why and in what circumstance an employee is being transferred from one place to another. Shifting and transferring of the employee from one place to another involves more than thousand reasons and it is difficult to identify all of them in black and white. The commonest reason may be a periodical shifting of person

from one place to another, which does not require any special purpose; the other reasons include necessity of a particular officer at a particular place; avoidance of disturbance or inconvenience in working of the officer on account of a person at a particular place; unconfirmed complaints and to avoid any multiplication thereof; transfer may be resorted to and so on. These are all illustrations. The question as to whether in any of the circumstances when a person is transferred from one place to another without casting any stigma on him, does it infringe, in any manner, any right of such employee which may cause corresponding obligation or duty upon the employer to do something in such a reasonable manner which may spell out either from its action or from the record and when challenged in a Court of law, he is supposed to explain the same, In our view, the answer is emphatic no."

39. It further held :

"In view of the aforesaid well settled principles governing the matter of transfer, the consistent opinion of the Courts in the matter of judicial review of the transfer orders has been that the order of transfer is open for judicial review on very limited grounds; namely if it is in violation of any statutory provisions or vitiated by mala-fides or passed by an authority holding no jurisdiction. Since the power of transfer in the hierarchical system of the Government can be exercised at different level, sometimes for the guidance of the authorities for exercise of power of transfer, certain executive instructions containing guidelines are issued by the Government so that they may be taken into account while exercising power of transfer. At times orders of transfer have been assailed before the Court on the ground that they have been issued in breach of the conditions of such guidelines or in transgression of administrative guidelines. Looking to the very nature of the power of transfer, the Courts have not allowed interference in the order of transfer on the ground of violation of administrative guidelines and still judicial review on such ground is impermissible unless it falls within the realm of malice in law. The reason behind appears to be that the order of transfer does not violate any right of the employee and the employer has no corresponding obligation to explain his employee as to why he is being transferred from one place to another."

40. The Division Bench judgment in **Uma Shanker Rai (supra)** has been followed by another Division bench in **Jitendra Singh Vs. State of U.P. & another 2009 (4) ALJ 372**.

41. Now coming to the authorities cited by Sri Nisheeth Yadav, this Court finds that in **Darshjit Singh Grewal (supra)**, the case before the Apex Court was not of transfer of Government servant but transfer of students from one affiliated College to another. In order to govern migration of students from one college to another, certain rules were framed by Syndicate of Punjab University in exercise of its power under Section 20 of the Punjab University Act, 1947. Similarly for migration of students in various technical/ profession college under the control of Chandigarh Administration, since Chandigarh Administration provides finance to the engineering colleges within the union territory of Chandigarh, it has issued a policy vide letter dated 6.9.1991

governing such migration. It was found that said guideline was not inconsistent with the Rules and Regulations made under the Punjab University Act, 1947 but contains similar provisions. The students for Medical Colleges are normally not liable to be transferred from one College to another during the Course they are studying in particular College and in a particular discipline since it has various repercussions. Students while seeking admission in Medical Colleges are entitled to give their option for admission against a seat in a particular Medical College and allotment is normally made on the basis of the merit of the students concerned. Migration, if allowed in a routine course, would be destructive to the said scheme where the students are given admission in a particular Medical College based on their merit position and their option etc. The rules, regulations and scheme for migration, thus, were bound to affect the right of the concerned students of one or the other Medical College or those students who were seeking admission in a particular Medical College, but may not get due to migration allowed by the authorities concerned to that College. The rules and regulations, therefore, had the effect of directly effecting the rights of the students community undergoing medical education in the State of Punjab or otherwise. Thus, in the absence of any otherwise right of seeking transfer to some extent the same was allowed by the rules and regulations which were found statutory and the policy guidelines issued by the Chandigarh Administration, which, therefore, conferred a limited right upon a student studying in a particular College to seek migration in given certain circumstances and following the conditions laid down therein. Thus, here was a case where the executive instructions conferred though limited but a right upon the student community and in these context, the executive order was held to be binding upon the administration. It is in these circumstances, the Court held that the policy of general application having been enunciated and communicated to all, the administration was bound by it and until changed, it is bound to adhere to it. Thereafter, considering the validity of the order of transfer i.e. migration of the students from one college to another, the Court found the same to be contrary to the statutory rules and, therefore, judgment in **Darshjit Singh Grewal (supra)**, in my view, has no application at all to the cases of the transfer of Government servants. In the matter of transfer of Government servant, since they have no legal right whatsoever to seek their posting at a particular place. The order of transfer does not affect their legal rights, this question does not arise at all. The executive orders and guidelines which were available in the case of **Darshjit Singh Grewal (supra)** cannot be placed at par with the guidelines pertaining to transfer of Government servants issued by the State Government though by an executive order. When the Government Servant has no right in the matter of posting etc. the guidelines cannot create something which was not already existed and, therefore, will not result in creating a better right to the Government servant which otherwise is not there even though the matter of transfer is governed by the statutory rules.

42. In **Virendra S. Hooda (supra),** the matter pertains to appointment to the post of Haryana Public Service Commission. A circular was issued by Haryana Government that if the vacancies

arise within six months from receipt of recommendation of Public Service Commission, they have to be filled in out of waiting list recommended by the Commission. 12 vacancies arose but the said circular was not given effect to and in these circumstances a two-Judge Bench of the Apex Court considered the issue. It was held in para 4 of the judgment that when a policy has been declared by the State as to the manner of filling of the post, so long these instructions are not contrary to the rules, the respondents ought to have followed the same. Here we find that a right to be considered for appointment of a person was under consideration. The said right is enforceable in a Court of law in accordance with the rules and regulations. Since, there was a right, if an executive order or policy also support such right, the same ought to have been followed unless found otherwise inconsistent with law. Here was not a case where enforcement of a policy was sought to be enforced in a matter where the person has no legal right at all to the real issue. In my view, the judgment in **Hooda' case (supra)** therefore has no application.

43. It would also be prudent to refer at this stage that under Article 16 (4) the provision for reservation can be made by the State and it is now well settled in the light of the Constitution Bench judgment in **Indira Sawhney Vs. Union of India AIR 1997 SC 597** that such reservation can be provided even by an executive order and such an executive order relating to appointments in service is enforceable as it does confer a legally enforceable right. The enforceability of executive orders thus would depend on the existence of a right and that too a legal right.

44. The case of **Mamta Anurag Sharma (supra)** deserve special attention since apparently, it appears to be a case of transfer of a member of All India service, but it has to be considered in the light of the statute dealing with the members of All India Services. The matter pertains allotment of cadre in Indian Police Service. Smt. Mamta Anurag Sharma joined Indian Police Service (hereinafter referred to as "IPS" in short) on 1.9.1982 and was allotted West Bengal cadre of IPS, though her home State was Andhra Pradesh. In the year 1985, she got married to Mr. Anurag Sharma who was also an IPS officer in Andhra Pradesh Cadre. After marriage, Smt. Mamta requested for change of her cadre from West Bengal to Andhra Pradesh on the ground of marriage with a IPS officer of Andhra Pradesh cadre. This request was rejected. Later on both were transferred to IPS cadre of Karnataka by order dated 2.2.1994. Some officers of Karnataka cadre objected to that order and filed an application before the Central Administrative Tribunal at Bangalore challenging the aforesaid allocation to Karnataka cadre. The order was stayed by the Tribunal. Thereafter, the Government of Karnataka withdrew its concurrence to the allocation of Smt. Mamta Sharma and her husband to IPS cadre Karnataka. The Government of India sought further option from Smt. Mamta Sharma and her husband, but they declined to indicate any other option and insisted for change in IPS cadre from West Bengal to Andhra Pradesh. The Government of India by order dated 10.3.1998 permitted transfer of husband of Smt. Mamta Sharma from Andhra Pradesh to West Bengal. But this order was declined by Sri Anurag Sharma. Smt. Mamta Sharma filed an Original Application before the Tribunal

at Hyderabad contending that she ought to have been transferred to Andhra Pradesh IPS cadre but application was rejected by the Tribunal on 15.9.1999. The High Court, however, in the writ petition filed by Smt. Mamta Sharma directed the Central Government to consider her request for transfer to Andhra Pradesh and it is this order of the High Court, which was taken in appeal by the Union of India. The Apex Court found that the High Court's direction was contrary to the policy of the Government of India regarding inter-cadre transfer of All India Service which prohibit transfer of spouse to their home State and, thus, set aside the jdugment of the High Court. Here was not a case of a transfer of a Government servant in his own cadre in a routine manner.

45. It would be necessary to notice at this stage that the members of Indian Police Service are governed by the provisions of All India Services Act, 1951 and various rules and regulations framed thereunder. Though it is an all India service and appointing authority of a member of All India Service is President of India but Indian Police Service (Cadre) Rules, 1954 (hereinafter referred to as "Cadre Rules, 1954") constitute State level cadres of the members of Indian Police Service. After appointment in the service, every officer is allocated a particular State cadre where he remains throughout his service career and all his matter of seniority, promotion etc. are governed in that very State cadre only. Once an officer is allotted a particular State cadre, his transfer from one place to another can be made by the State Government concerned in that very State but if he is posted outside the State, despite of he being a member of All India Service, even the Central Government suo moto cannot do so unless the consent is given by the concerned State, the cadre whereof the officer belong. Therefore a particular cadre allotted to a number of All India Police Service becomes his real cadre in service. Change of cadre under the rules is permitted and it required consent of not only the concerned State where the officer concerned is working but also of that State where the officer concerned seeks his/her transfer and also the consent of the officer concerned. This is all provided in Cadre Rules, 1954. For effecting such change in the cadre consistent with the scheme of the Rules, the Government of India has issued executive orders laying down certain conditions wherein such change of cadre can normally be allowed. It is not a case where the incumbent has no legally enforceable right inasmuch without the consent of the officer concerned, his cadre cannot be changed suo moto by the Central Government. A member of Indian Police Service has an enforceable right to continue in the cadre in which he was allotted at the time of appointment and if any change is made therein, contrary to the rules, he can challenge the same on the ground that he is entitled to continue in the cadre. Therefore, right to continue in a cadre of a member of IPS is a legal right and in that matter, if any executive order or policy decision has been taken, which affect or support the right of the concerned Government servant in one or the other manner, the same can be enforced and the authorities may be directed to adhere to the same. However that would not help a case where the incumbent has no right to the place of the posting and the same can be changed by the Government without any intervention

or consent of the Government servant concerned.

46. No authority of this Court or the Apex Court has been placed before me which has considered this question in the matter of transfer and has taken a different view and is binding on me. In the absence of any otherwise binding precedent, I feel myself bound to follow the law laid down by the Apex Court **in Shilpi Bose (supra), S.L. Abbas (supra), Gobardhan Lal (supra)** etc. and this Court's Division Bench judgments as discussed above.

47. The matter can be considered from another angle. Here is a case dealing with transfer of a member of the police force. The transfer of the members of police force is governed by the provisions made in the Police Regulations. The service conditions of petitioners are admittedly governed by the provisions of Police Act, 1861 (hereinafter referred to as "1861 Act") and rules and regulations framed thereunder. Considering the provisions of 1861 Act, this Court in Civil Misc. Writ Petition No. 29506 of 2009 (Ashok Kumar Tiwri Vs. State of U.P. & others) and other connected matters decided on 9.6.2009 in para 22 of the judgment has found that the terms "police officer" includes a "constable". This is also evident from Regulations 397 and 398 which shows that the Officers of police force are divided in two categories namely Gazetted Officers and Non-gazetted Officers and the said provision reads as under :

***"397.** The gazetted officers of the Force are-*
1. *Inspector-General.*
2. *Deputy Inspectors-General.*
3. *Superintendents.*
4. *Assistant Superintendents.*
5. *Deputy Superintendent.*

***398.** The non-gazetted officers of the Force are-*
1. *Inspectors.*
2. *Sub-Inspectors.*
3. *Head Constables.*
4. *Constables."*

48. Chapter XXXIV of Police Regulations contains Regulations 520 to 526 and deals with transfer of police officers. It would be necessary to reproduce the same as under :

"520. Transfer of Gazetted officers are made by the Governor in Council.

The Inspector General may transfer police officers not above the rank of inspector throughout the province.

The Deputy Inspector General of Police of the range may transfer inspectors, sub-inspectors, head constables and constables, within his range; provided that the postings and transfers of inspectors and reserve sub-inspectors in hill stations will be decided by the Deputy Inspector-General of Police, Headquarters.

Transfers which result in officers being stationed far from their homes should be avoided as much as possible. Officers above the rank of constable should ordinarily not be allowed to serve in districts in which they reside or have landed property. In the case of constables the numbers must be restricted as far as possible.

Sub-inspectors and head constables should not be allowed to stay in a

particular district for more than nine years and ten years respectively and in a particular police station not more than three years and five years respectively. In the Tarai area (including the Tarai and Bhabar Estates) the period of stay of sub-inspectors, head constables and constables should not exceed five years.

521. The Inspector-General may, without the sanction of Government—

(a) transfer to—

(i) foreign service within the province other than to service in an Indian State, and

(ii) another department of Provincial Government, any Government servant whom he can without reference to Government appoint or transfer in the ordinary course of administration and may also fill any post so vacated by promotion and enlistment when necessary.

(b) and subject to the same restrictions as in clause (a) transfer as Government servant to a temporary appointment outside the province for a period not exceeding two years in the first instance and may extend the period of such temporary transfer up to a period of two years.

522. The Superintendent when proposing a transfer from the district should send the character and service roll of the officer to be transferred.

With the consent of the Superintendents concerned mutual exchanges may be arranged by head constables or constables. The proposed exchanges shall be reported to the Deputy Inspector General. Travelling allowance will not be payable on the occasion of such transfers.

523. On receipt of an order of transfer of a subordinate officer to another district the Superintendent will arrange to relieve him of his duties within ten days.

Officers transferred are entitled to joining time, but the Superintendent may not grant leave to an officer under order of transfer.

An inspector relieved on transfer from another district is entitled to sign a certificate of taking over charge from the date of arrival in the new district. If the officers to be relieved cannot be present at headquarters, the charge certificate should be signed for him by the Superintendent of Police, or, in his absence, by an Assistant Superintendent of Police or Deputy Superintendent of Police. The effect of this will be that an officiating officer will be considered to have been reverted, and permanent incumbent's joining time or leave or discharge, will be counted from the date on which the relieving officer takes over charge.

524. The Superintendent may, within his district, transfer all officers of and below the rank of inspector. In the case of inspectors and officers in charge of police stations, he must before passing orders obtain the approval of the District Magistrate. Should the District Magistrate, and Superintendent of Police be unable to agree in regard to the transfer of any officer, the matter may be referred to the Deputy Inspector General of range for decision:

Provided that in the district where the Collector/Deputy Commissioner is Collector/Deputy Commissioner-in-

charge of the Division, his functions under this sub-paragraph will be exercised by the Additional District Magistrate (Executive).

Officers-in-charge of police stations shall ordinarily be retained in their charges for at least two years. Subordinate officers at police stations should not be transferred without good reason. No officer liable to station duty shall be withdrawn from that duty for a longer period than one year, except in Kumaun where the withdrawal of head constable for two years at a time from station duties is permitted.

525. Constable of less than two years' service may be transferred by the Superintendent of Police from the armed to the civil police or vice versa. Foot Police constables may be transferred to the mounted police at their own request. Any civil police constable of more than two and less than ten years' service may be transferred to the armed police and vice versa by the Superintendent for a period not exceeding six months in any one year. All armed police constables of over two years' service and civil police constables of over two and under ten years' service may be transferred to the other branch of the force for any period with the permission of the Deputy Inspector General.

In all other cases the transfer of police officers from one branch of the force to another or from the police service of other Provinces to the Uttar Pradesh Police requires the sanction of the Inspector General.

526. Village chaukidars may not be transferred except with their own consent."

49. The Apex Court in **Jasveer Singh Vs. State of U.P. and others 2008 (2) ADJ 484 (SC)** has held that Regulations 525 Chapter XXXIV of the Police Regulations are statutory. Following the decision in **Jasveer Singh (supra)** this Court in **Jay Narayan Prasad Vs. State of U.P. & others 2008 (5) ESC 3052=2008 (9) ADJ 267** held in para 56 that all the provision under Chapter XXXIV are statutory being part and parcel of the same Chapter in the Police Regulations. Para 66 of the judgement in **Jay Narayan Prasad (supra)** reads as under:

*"66. In **Jasveer Singh (supra)** the Apex Court held Regulation 525 statutory. Since Regulation 525 is a part and parcel of Chapter XXXIV of the Regulations which deals with "transfer" it cannot be said that only one part of Chapter is statutory and not rest of the provisions. In my view, therefore, all the provisions under Chapter XXXIV are statutory in view of the law laid down by the Apex Court in **Jasveer Singh (supra)**."*

50. Without diluting the provisions of Chapter XXXIV of the Police Regulations, in order to save the members of police force, the Apex Court in Prakash Singh (supra), in para 31 (5) observed that there shall be a Police Establishment Board which shall decide all transfers, postings, promoting and other service matters relating to the officers below the rank of Deputy Superintendent of Police. It is evident from the impugned order of transfers that the directions of the Apex Court in **Prakash Singh (supra)** have

been observed and the petitioners have been transferred after a decision has been taken by the Police Establishment Board for their transfer. In view of the existing statutory provisions, can it be said that an executive order can empower any another authority to affect the discretion of the competent authority under the rules to decide whether a particular police officer of subordinate rank should be transferred or not and can such an executive instruction would be binding and will it not amount to give overriding effect to an executive order over the statutory provisions. It is well settled that an executive instruction or order cannot prevail over statutory provision and has to be sub surveyed thereto. Besides, if a power or discretion has been conferred upon a particular authority under the rules, the same cannot be required to depend upon the orders or directions of another authority and that too by means of an executive order. Considering from that angle, if I try to impress upon the Government Order dated 6.6.2009 over and above the statutory rules under Chpater XXXIV of the Police Regulations, apparently to me it appears to be inconsistent thereto and, therefore, would be inoperative being ultra vires. However, the vires of the Government Order dated 6.6.2009 may not be necessary to be considered in this case since there is another more substantial question up for consideration is whether the Government Order dated 6.6.2009 is applicable to the members of police force at all. I would consider both these aspects separately.

51. From the facts stated in the writ petition itself, it is also evident that whenever an executive decision was taken by the Government in respect to police officers of subordinate rank, a Government Order was issued clearly mentioning that the decision has been taken in supercession of the provisions contained in the Police Regulations and it further provides to take steps for making amendment in the Police Regulations. From a perusal of the Government Order dated 7.2.1980 (Page 38 of the writ petition) it is evident and para 5 of the said Government Order shows that a direction was issued to make a proposal to the Home Department for making appropriate amendment in the Regulations. Similarly, the Government Order dated 27.6.1984 which seeks to make some amendment in the earlier Government Order dated 7.2.1980 also provides in para 3 thereof that proposal for making appropriate amendment in the Police Regulations should be made. Whether the aforesaid Government Orders have resulted in amendment in the Regulations could not be shown by the learned counsel for the petitioners but the facts remains that these two Government Orders are evident to show that in the matter of the police officers of subordinate ranks, the Government Orders have been issued separately referring to the Police Regulations. Meaning thereby that in respect to members of subordinate rank of police officers, since they are governed by the provisions of 1861 Act, the matter has been dealt separately and their conditions of service have not been treated to be covered or governed by the rules and regulations applicable generally to the Government servants or the executive orders which are applicable to all other Government servants in general This is consistent to the law laid down by the Apex in **Chandra Prakash Tiwari Vs. Shakuntala Shukla AIR 2002 SC 2322**

and by a Full Bench judgement of this Court in **Vijay Singh & others Vs. State of U.P. & others 2005 (2) AWC 1191 (FB)**.

52. The Government Order dated 25.3.1995 a copy whereof has been placed on record as Annexure-2 to the writ petition is also in similar line. In view of the above, the Government Order dated 6.6.2009 apparently can be said to be applicable to the members of the police force of subordinate rank, who are governed by the provisions of 1861 Act and the rules and regulations framed thereunder.

53. If the said Government Order is sought to apply to the police officers of subordinate rank as discussed above, that would be inconsistent with the provisions of Police Regulations and, therefore, would be ultra vires to that extent and cannot be applied even otherwise.

54. I may also consider this aspect by analysing various Regulations. Regulation 520 provides that all gazetted officers are transferable by the Government. The police officers upto the rank of Inspector throughout the province can be transferred by the Inspector General. Learned Standing Counsel pointed out and as admitted by the learned counsel for the petitioners that the Inspector General, as it then was, is now Director General of Police since the power of Inspector General is now restricted to a Police Zone concerned and not the entire State of U.P. Similarly, Deputy Inspector General of Police within his range can transfer the police officers of subordinate rank. For the time being, I am not taking specific cases provided under Rule 520 of the Police Regulations since for my purpose, the general description of the rules would be suffice. Regulation 524 empowers a Superintendent of Police to transfer a police officer below the rank of Inspector within a District. In respect to the Inspectors and officers- In-charge of a Police Station, the Superintendent of Police within his District may transfer but before that he has to obtain approval of the District Magistrate since under the Police Regulations, District Magistrate is the authority principally responsible for criminal administration within the district. The aforesaid powers are statutory and do not admit of any interference of any other authority. Considering the nature of the service, it is well understandable. Within the zone, a Inspector General of Police is responsible for the administration of Police force and same is the position in respect to the Deputy Inspector General of Police posted in a range and Superintendent of Police and Senior Superintendent of Police in a district as the case may be as is evident from Section 4 of 1861 Act. If there is any disturbance or deficiency in of law and order situation etc. it is not only the individual lowest police officer in the rank would be responsible but even the officers in the hierarchy would be responsible. In order to ensure the law and order and proper administration, if higher authority finds transfer and posting of a police officer at a particular place necessary, under the statute he can be transferred by such an authority and so long as the decision is bona fide, I do not find as to how such exercise of power by such authority under the statute can be set at naught by referring to an executive order introducing a third authority. That would amount to interference in the discretion of the authority in exercise of statutory

power on the basis of an executive order though not provided by the Statute. This would vitiate the executive order itself. It is well settled that an executive order cannot be enforceable if it is inconsistent with the statutory provisions. Similarly, a discretion conferred by a statute on a particular authority cannot be made dependent upon the direction and dictates of higher authorities by means of an executive order unless and until the statutory rules are amended. Such an inclusion of third, may be a higher authority, is impermissible as that would amount to enforcing executive order which are in the teeth of the statutory rules. Considering from this angle also, in my view, the Government Order dated 6.6.2009 cannot be enforced in the matter of members of police officers of subordinate rank whose matters of transfer are governed by the statutory rules contained in Chapter XXXIV of the Police Regulations. Moreover, the Apex Court has made it clear that the transfer of police officers below the rank of Deputy Superintendent of Police would be approved by a Police Establishment Board. If the government Order dated 6.6.2009 is made applicable to the police force, that would also infringe the Apex Court's decision in **Prakash Singh (supra)** since the very reason for giving such direction in **Prakash Singh (supra)** was to protect the members of police force of subordinate rank from political influence.

55. So far as the contention of the petitioners that only members of a particular caste have been transferred, suffice is to mention that each and every order is in respect to an individual petitioner. The petitioners have not stated that to how many orders of transfer have been issued and whether all such persons, who have been transferred belong to any particular caste. There is nothing to show that the transfers which have been effected are only that of a police offices of a particular caste and not otherwise. By simply collecting transfer orders of persons belong to a particular caste and filing a single writ petition challenging them collectively on the ground that the transfers of officers of only a particular caste have been effected would neither be proper nor would prove that the impugned orders of transfer have been issued only to victimize the police officers of subordinate rank of a particular caste.

56. Besides, the petitioners have also not placed relevant material on record to show as to what is strength of the police force in the State of U.P., what is the strength of the members of police force belong to the caste to which the petitioners belong etc. In the absence of adequate relevant on vague pleading, in my view, such a serious issue ought not to have been raised and it would not appropriate for this Court to adjudicate the same.

57. So far as the Government Orders dated 7.2.1980, 27.6.1984 and 25.3.1995 are concerned, as already noticed, I do not find that they resulted in amending the provisions of Police Regulations relating to transfer and unless the Police Regulations are amended, mere Government Orders would not result in amendment of the Police Regulations which are statutory in nature as held by the Apex Court in **Jasveer Singh (supra).**

58. Lastly, so far as the plea pertaining to personal hardship is concerned, it is suffice to mention that

now it is well settled that the issue of personal hardship, if any, must be raised by the employee concerned before the higher authorities in the department and it is for the departmental authorities to consider this aspect and take appropriate decision. This observation also apply to the petitioners' complaint of mid session transfer inasmuch the judgments of the Apex Court in **O. Karuppa Thevan (supra)** has been considered by this Court in **Gulzar Singh (supra)** and this Court observed as under :

"The case before the Hon'ble Apex Court pertains to education department and while granting indulgence clearly took into consideration the factum of absence of any urgent exigency of service in the case before it as is apparent from the following;

"We are of the view that in effecting transfer, the fact that the children of an employee are studying should be given due weight, if the exigencies of the service are not urgent." (Para-2)"

"Even otherwise the Hon'ble Apex Court in the above case observed that the children of an employee are studying should be given due weight. This shows that the matter is to be examined by the employer as to whether the transfer of an employee can be deferred till the end of the current academic session or not and not by the Court. The Court has neither any means nor sufficient material to assess as to whether there is any rule or urgency of administrative exigencies for necessitating immediate transfer or that such transfer can be deferred in a particular case. Therefore, the Hon'ble Single Judge has rightly allowed liberty to the petitioner-appellant to raise this grievance before the authority concerned by making a representation, who will consider and pass a reasoned order thereupon."

59. So far as the last submission that the petitioner are petty members belong to the lowest rank of the police force and, therefore, should not be transferred, suffice is to mention that under the Regulations, the Constables are non gazetted officers and being members of a disciplined force, they hold a transferable post, liable to be transferred from one place to another in accordance with the rules. It is not the case of the petitioners that the transfer of the petitioners is in violation of statutory rules. No pleading of mala fide has been raised. It is also not the case that the authority concerned, who has issued the order is not competent to pass the order under the rules. Hence, I do not find any reason which may warrant interference in the orders of transfer of the petitioners. However, if the petitioners have any grievance on account of personal hardship etc., it is always open to the petitioners to approach higher authorities by making representation and this Court hope and trust that if any such representation is made, the competent authority would consider the same sympathetically and pass appropriate order.

60. In the result, in view of above discussions and observations, I find no merit in the writ petition. It is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.10.2009

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 2252 of 2008

M/s. Amar & Sons ...Petitioner
Versus
The State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Girish Chandra Yadav

Counsel for the Respondents:
Sri B.D. Mandhyan
Sri Satish Mandhyan
Sri Tarun Gaur

U.P. Krishi Utpadan Mandi Adhiniyam 1964-Section 17 (iii) (a)-Power of Mandi Samiti to levy and collect fee-petitioners sold chili during Jan. 08 to March 08-fee paid in presence of Inspector-demand of further amount by Mandi Samiti-held-proper liberty given to file objection before secretary-who will decide the same-whether objections earlier filed or not order impugned set a side.

Held: Para 10 & 11

In Civil Appeal Nos. 1769-1773 of 1998 Krishi Utpadan Mandi Samiti Vs. M/s Sarswati Cane Crusher & others (unreported judgment), the Apex Court observed as follows:

"We are satisfied that the orders of this Court afore-referred to would need some repair work. We treat the said order to be conceiving of a provisional assessment where-after doors are opened for a final assessment. We conceive that when demands are raised by the Krishi Utpadan Mandi Samiti against a trader before he could ask for transit of goods outside the market area, the trader would be entitled to tender a valid rebuttal to say that no sale had taken place within the notified area and that if the explanation is accepted there and then by the Mandi Samiti, no question of payment would arise as also of withholding the gate passes. If prima facie evidence led by the trader is not acceptable by the Mandi Samiti, the trader or the dealer can be compelled to pay the market fees demanded before issuance of gate pass. If the trader makes the payment without demur, the matter ends and the assessment finalized. But in case he does so and arises protest, then the assessment shall be taken to be provisional in nature making it obligatory on the trader to pay the fee before obtaining the requisite gate pass. After protest has been lodged and the provisional assessment has been made, a funo-frame would be needed to deviso making the final assessment. We, therefore, conceive that innately be read in the order of this Court that a final assessment has to be made within a period of two months after provisional assessment so that the cute transition in that respect is over enabling the aggrieved party, if any to challenge the final assessment in the manner provided under the afore Act or under the general law of the land in appropriate form. Having added this concept in this manner in the two-Judge Bench decision of this Court, we declare that what repair has been done instantly would add to the orders of the High Court and the instant corrective decision shall be the governing rule. The Civil Appeal thus stand disposed of."

In the absence of any machinery provision for the purposes of assessment, the Division Bench of this Court in the case of Shri Mahalaxmi Sugar Works Farid Nagar and others Vs. State of Uttar Pradesh and others (Supra) has issued the following direction:

"For this purpose we are constrained to observe that due to

apathy of State Government in framing the necessary rules and making provision for assessment etc. this Court considers it appropriate to issue following directions to protect the interest of traders and safeguard payment of fee in accordance with law.

(1) Every trader proposing to take out the goods manufactured or produced in the market area shall be entitled to issue of gate passes from the Mandi Samiti if he produces documents to establish that the goods were being taken out of the market area. Necessary entries shall be made by Mandi Samiti in records maintained by it.

(2) A trader taking out goods shall file a statement before the Mandi Samiti within six weeks indicating therein that the goods were sold by the Commission agent or by the petitioners themselves inside or outside the market area.

(3) In case the traders do not file the statement the Mandi shall issue notice to the traders after expiry of six weeks to file the statement within 10 days of receipt of notice.

(4) If the return is filed the same shall be scrutinized by the Mandi Samiti and if it is satisfied about its correctness, then it shall pass appropriate orders levying fee. If the sale has been made in the market area and exempting in case, it has been made outside the market area.

(5) In case the return of trader is found to be incorrect or he omits to file his return despite notice by Mandi Samiti then the Mandi Samiti shall levy market fee on trader on the goods which had been taken out and for which gate pass had been issued."

Case law discussed:

1996 All CJ-577,
UPLBEC-957,
A.I.R. 1980 SC-1124,
(1994) 2 UPLBEC-1405,

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

1. These are the bunch of cases involving common questions arising from the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (hereinafter referred to as the "Act") and, therefore, all the writ petitions are being disposed of together by a common order.

2. All the petitioners were carrying on the business of Chillies. Chillies was one of the notified agriculture produce. All the petitioners were the licensees under the Act. Admittedly the petitioners sold chillies during the period January, 2008 to March, 2008 in a up-mandi area, Phoolpur which comes under the principal mandi of Shahganj, Jaunpur. On the sales of chillies, the petitioners had paid mandi fees on the value shown in 6R. There is no dispute in this regard.

3. The Secretary, U.P. Krishi Utpadan Mandi Samiti Shahganj, Jaunpur issued an order dated 30.4.2008 asking the petitioners to pay additional mandi fees on the sales of chillies during the period January, 2008 to March, 2008 on the ground that in 6R the value of chillies was shown much less than the prevailing value with the view to evade the mandi fees. In the order, mandi fees had been demanded on the value of Rs.600/- for the month of January and February and at the rate of Rs.800/- for the month of March, 2008. The petitioners claimed to have filed an objection on 21.5.2008, which is Annexure-5 to the writ petition, disputing the demand on the ground that mandi fees were paid through the Mandi Samiti Inspector at the time of sales itself who was present, on the prevalent market rate on which no objection has been raised by the Inspector and, therefore, the demand

is wholly unjustified. It appears that no cognizance has been taken by the Secretary, U.P. Krishi Utpadan Mandi Samiti Shahganj, Jaunpur to the letter of the petitioners. Therefore, the petitioners filed the revision against the order dated 30.4.2008 before the Deputy Director, Rajya Krishi Utpadan Mandi Parishad, U.P., Varanasi. The revisions of the petitioners have been rejected by the impugned orders dated 20.9.2008.

4. Heard Sri Girish Chandra Yadav, learned counsel appearing on behalf of the petitioners and Sri B.D. Mandhyan, Senior Advocate, assisted by Sri Satish Mandhyan, learned counsel for the respondents.

5. Learned counsel for the petitioners submitted that on the prevailing market price, the goods were sold against 6R on which mandi fees were paid in the presence of Inspector, who had not raised any objection. He submitted that the selling rate depends upon the quality of the goods and there was no fixed price. He submitted that once the mandi fees have been accepted by the Inspector, who was present at the time of sales, without any objection, it was not open to the Secretary, U.P. Krishi Utpadan Mandi Samiti Shahganj, Jaunpur to raise the demand on the ground that prevailing market rate was much higher than on which the chillies were sold by the petitioners during the period January, 2008 to March, 2008. He submitted that the Secretary, U.P. Krishi Utpadan Mandi Samiti Shahganj, Jaunpur has no power to pass a re-assessment order merely on the surmises and conjectures. Learned counsel for the petitioners submitted that the order has been passed without giving any show cause notice and any opportunity of hearing.

6. In support of the contention, he relied upon the decisions of this Court in the case of **M/s. Madan Sugar Works Vs. Chairman, Krishi Utpadan Mandi Samiti Kichcha and another, reported in 1996 All CJ-577** and in the case of **Maha Laxmi Sugar Works and others Vs. State of U.P. and others**, reported in **UPLBEC-957**.

7. Sri B.D. Mandhyan, Senior Advocate, appearing on behalf of Krishi Utpadan Mandi Samiti submitted that the market yard of Phoolpur is about 25 kilometres from Shahganj wherein the average selling rate of chillies during the period involved was three times to the rate disclosed by the petitioners as per report of Senior Agriculture Marketing Inspector. He submitted that Senior Agriculture Marketing Inspector, Azamgarh has given the report that selling rate per quintal of chillies in Azamgarh were between Rs.1400/- to Rs.1600/- per quintal and the Senior Agriculture Marketing Inspector of Jaunpur has given report that during the relevant period the selling rate of chillies was between Rs.700/- to Rs.1000/-. Therefore, the selling rate disclosed by the petitioners at Rs.200/- to Rs.276/- during the year under consideration were highly on a lower side and,therefore, the Secretary, Mandi Samiti has passed the order and raised the demand on the basis of the average selling rate of Rs.600/- for the months of January and February and Rs.800/- for the month of March, 2008 which was very reasonable. He submitted that if the petitioners were aggrieved, they should file the objection but no such objection has been filed. He further submitted that

under Section 17 of the Act, the authorities have a right to levy mandi fees, which includes both imposition of tax as well as assessment and by way of order dated 30.4.2008, the Secretary, Mandi Samiti has passed an assessment order. He submitted that it is not the case of re-assessment but is a case of original assessment inasmuch as before the order dated 30.4.2008 no other demand has been raised by the Secretary, Mandi Samiti. He submitted that Secretary, Mandi Samiti has issued the order in the month of April relating to the transactions of January, 2008 to March, 2008 within a reasonable period. He submitted that it is true that no machinery has been provided for the assessment under the Act but even in the absence of such machinery the validity of the Act has been upheld by the Apex Court in the case of **Ram Chandra Kailash Kumar & Company and others Vs. State of U.P. and others, reported in A.I.R. 1980 SC-1124** and the Division Bench of this Court in the case of Shri Mahalaxmi Sugar Works Farid Nagar and others Vs. State of Uttar Pradesh and others, reported in 1987 UPLBEC-957 has upheld the validity of the explanation added to Section 17 of the Act and has issued the direction relating to the assessment. He submitted that a further direction has been issued by the Division Bench of this Court in the case of **Ram Karan Vs. Krishi Utpadan Mandi Samiti, Saharanpur, reported in (1994) 2 UPLBEC-1405**. He submitted that if the petitioners would have any grievance against the order dated 30.4.2008, the petitioners would have filed the objection before the Secretary, Mandi Samiti itself.

8. Having heard learned counsel for the parties, I have perused the impugned orders and the material available on record.

The relevant parts of Section 17 read as follows:

"**17. Powers of the Committee-** A Committee shall, for the purposes of this Act, have the power to-

(iii) levy and collect,-
(a) such fees as may be prescribed for the issue or renewal of licences; and

(b) market-fee which shall be payable on transactions of sale of specified agricultural produce in the market area at such rates, being not less than one percentum and not more than two and a half percentum of the price of the agricultural produce so sold as the State Government may specify by notification, and development cess which shall be payable on such transactions of sale at the rate of half percentum of the price of the agricultural produce so sold and such fee or development cess shall be realised in the following manner-

(1) if the produce is sold through, a Commission Agent, the Commission Agent, may realise the market-fee and the development cess from the purchaser and shall be liable to pay the same to the Committee;

(2) if the produce, is purchased directly by a trader from a producer, the trader shall be liable to pay the market-fee and development cess to the Committee;

(3) if the produce is purchased by a trader from another trader, the trader selling the produce may realise it from the purchaser

and shall be liable to pay the market-fee and development cess to the Committee:

Provided that notwithstanding anything to the contrary contained in any judgment, decree or order of any Court, the trader selling the produce shall be liable and be deemed always to have been liable with effect from June 12, 1973 to pay the market-fee to the Committee and shall not be absolved from such liability on the ground that he has not realised it from the purchaser:

Provided further that the trader selling the produce shall not be absolved from the liability to pay the development cess on the ground that he has not realised it from the purchaser;

(4) in any other case of sale of such produce, the purchaser shall be liable to pay the market fee and development cess to the Committee:

Provided that no market-fee or development cess shall be levied or collected on the retail sale of any specified agricultural produce where such sale is made to the consumer for his domestic consumption only:

Provided further that notwithstanding anything contained in this Act, the Committee may at the option of, as the case may be, the Commission Agent, trader or purchaser, who has obtained the licence, accept a lump sum in lieu of the amount of market-fee or development cess that may be payable by him for an agricultural year in respect of such specified agricultural produce, for such period, or such terms and in such manner as the State Government may, by notified order specify:

Provided also that no market-fee or development cess shall be levied on transactions of sale specified agricultural produce on which market-fee or development cess has been levied in any Market Area if the trader furnishes in the from and manner prescribed, a declaration or certificate that on such specified agricultural produce market-fee or development cess has already been levied in any other Market Area.

(iii-a)..
(iv)...
(v)...
(v-a)..
(v-b)..
(vi)...
(vii)..
(viii)..

Explanation.- For the purpose of clause (iii), unless the contrary is proved, any specified agricultural produce taken out or proposed to be taken out of a Market Area by or on behalf of a licensed trader shall be presumed to have been sold within such area and in such case, the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed."

Rules 66 and 68 of the U.P. Krishi Utpadan Mandi Niyamawali, 1965 (hereinafter referred to as the "Rule") read as follows:

"Rule 66. Market Fee and Cess (Section 17 (iii)).- (1) The market Committee shall levy and collect market fee and development cess in the Market Area in accordance with the provisions of sub-clause (b) of clause (iii) of Section 17

of the Act at such rate as may be specified in the bye-laws:

Provided that no market fee and development cess shall be levied and charged prior to the date on which provisions of Section 10 of the Act are enforced:

Provided further that when the specified agricultural produce is presumed to have been sold in accordance with the explanation given under clause (viii) of Section 17 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964, the price of such produce shall be the price which prevailed for that type of produce in that market just on the previous working day.

(2) No market fee or development cess shall be levied more than once on any consignment of the specified agricultural produce brought for sale in the Market Yard if the market fee or development cess has already been paid on it in any Market Yard of the same Market Area and in respect of which a declaration has been made and a certificate has been given by the seller in Form No. V.

Rule 68. Recovery of fees (Section 17 (iii)).- (1) The market fee and development cess on specified agricultural produce shall be payable as soon as such produce is sold in the market area in accordance with the terms and conditions specified in the bye-laws.

(2) The market fee and development cess shall be realised in the manner laid down in sub-clause (b) of clause (iii) of Section 17.

(3) The Licence-fee shall be paid along with the application for licence:

Provided that in case, the Market Committee refuses to issue a licence, the fee deposited by the applicant shall be refunded to him.

(4) The payment of the market fee and Licence fee shall be made to the Committee in cash and in special circumstances by bank draft of nationalised bank."

9. In the case of **Ram Chandra Kailash Kumar & Company and others Vs. State of U.P. and others** (Supra), the question was raised that in the absence of any machinery provision, the provision of levy is inoperative. The Apex Court upheld the validity of the Act and observed as follows "A machinery for adjudication of disputes is necessary to be provided under the Rules for the proper functioning of the Market Committees. We have already observed and expressed our hope for bringing into existence such machinery in one form or the other. But it is not correct to say that in absence of such a machinery no market fee can be levied or collected. If a dispute arises then in the first instance the Market Committee itself or any Sub-Committee appointed by it can give its finding which will be subject to challenge in any court of law when steps are taken for enforcement of the provisions for realisation of the market fee."

10. In Civil Appeal Nos. 1769-1773 of 1998 Krishi Utpadan Mandi Samiti Vs. M/s Sarswati Cane Crusher & others (unreported judgment), the Apex Court observed as follows:

"We are satisfied that the orders of this Court afore-referred to would need some repair work. We treat the said order to be conceiving of a provisional assessment where-after doors are opened for a final assessment. We conceive that when demands are raised by the Krishi Utpadan Mandi Samiti against a trader before he could ask for transit of goods outside the market area, the trader would be entitled to tender a valid rebuttal to say that no sale had taken place within the notified area and that if the explanation is accepted there and then by the Mandi Samiti, no question of payment would arise as also of withholding the gate passes. If prima facie evidence led by the trader is not acceptable by the Mandi Samiti, the trader or the dealer can be compelled to pay the market fees demanded before issuance of gate pass. If the trader makes the payment without demur, the matter ends and the assessment finalized. But in case he does so and arises protest, then the assessment shall be taken to be provisional in nature making it obligatory on the trader to pay the fee before obtaining the requisite gate pass. After protest has been lodged and the provisional assessment has been made, a funo-frame would be needed to deviso making the final assessment. We, therefore, conceive that innately be read in the order of this Court that a final assessment has to be made within a period of two months after provisional assessment so that the cute transition in that respect is over enabling the aggrieved party, if any to challenge the final assessment in the manner provided under the afore Act or under the general law of the land in appropriate form. Having added this concept in this manner in the two-Judge Bench decision of this Court, we declare that what repair has been done instantly would add to the orders of the High Court and the instant corrective decision shall be the governing rule. The Civil Appeal thus stand disposed of."

11. In the absence of any machinery provision for the purposes of assessment, the Division Bench of this Court in the case of **Shri Mahalaxmi Sugar Works Farid Nagar and others Vs. State of Uttar Pradesh and others** (Supra) has issued the following direction :

"For this purpose we are constrained to observe that due to apathy of State Government in framing the necessary rules and making provision for assessment etc. this Court considers it appropriate to issue following directions to protect the interest of traders and safeguard payment of fee in accordance with law.

(1) Every trader proposing to take out the goods manufactured or produced in the market area shall be entitled to issue of gate passes from the Mandi Samiti if he produces documents to establish that the goods were being taken out of the market area. Necessary entries shall be made by Mandi Samiti in records maintained by it.
(2) A trader taking out goods shall file a statement before the Mandi Samiti within six weeks indicating therein that the goods were sold by the Commission agent or by the petitioners themselves inside or outside the market area.
(3) In case the traders do not file the statement the Mandi shall issue notice to the traders after expiry of six weeks to file the statement within 10 days of receipt of notice.

(4) If the return is filed the same shall be scrutinized by the Mandi Samiti and if it is satisfied about its correctness, then it shall pass appropriate orders levying fee. If the sale has been made in the market area and exempting in case, it has been made outside the market area.

(5) In case the return of trader is found to be incorrect or he omits to file his return despite notice by Mandi Samiti then the Mandi Samiti shall levy market fee on trader on the goods which had been taken out and for which gate pass had been issued."

12. In the case of **Ram Karan Vs. Krishi Utpadan Mandi Samiti, Saharanpur** (Supra), the Division Bench of this Court has issued some more direction in addition to the direction issued in the case of **Shri Mahalaxmi Sugar Works Farid Nagar and others Vs. State of Uttar Pradesh and others** (Supra) as follows:

"(1) Every trader proposing to take out the goods manufactured or produced in the market area shall be entitled to issue of gate passes from the Mandi Samiti if he produces documents to establish that the goods were being taken out of the market area. Necessary entries shall be made by Mandi Samiti in records maintained by it;
(2) A trader taking out goods shall file a statement before the Mandi Samiti within twelve weeks indicating therein that the goods were sold by the Commission agent or by the petitioners themselves inside or outside the market area;
(3) In case the traders do not file the statement, the Mandi Samiti shall issue notice to the traders after expiry of twelve weeks to file the statement within 10 days of receipt of notice;
(4) If the return is filed, the same shall be scrutinized by the Mandi Samiti within 3 months of its Filing and if it is satisfied about its correctness, then it shall pass appropriate orders levying fee. If the sale has been made in the market area and exempting in case. It has been made outside the market area;
(5) In case the return of trader is found to be incorrect or he omits to file his return despite notice by Mandi Samiti then the Mandi Samiti shall levy market fee on trader on the goods which had been taken out and for which gate-pass had been issued;
(6) A Mandi Samiti shall have a right to make reassessment in case some material comes into its possession after assessment within six months of passing of the order of assessment for which it shall issue a show cause notice mentioning the grounds therein on the basis of which reassessment is proposed to be made."

13. It is significant that under Section 17 (iii) (a) of the Adhiniyam every Mandi Samiti has been empowered to 'levy and collect ' fees. The Supreme Court in the case of Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Company of India Limited, (1972) 2 SCC 560 has interpreted the word 'levy' to include both imposition of tax as well as Assessment. According to the said decision the word 'levy' does not include Collection but, as observed above. Mandi Samitis have been empowered under Section 17 (iii) (a) to collect fees also. Similarly, the Supreme Court in the case of Bharat Steel Tubes Limited and another v. State of Haryana and another, (1988) 3 SCC 478 has laid down that where no period of limitation is prescribed under the Statute, assessment should be completed expeditiously within

a reasonable time which would depend upon the circumstances of each case. In these circumstances, it is imperative that adequate provisions should be made in this behalf for hearing and redressal of the grievances etc. of the persons who are required to pay the fees.

14. Section 17 (iii) of the Act gives the power to levy and collect which also includes the assessment. The explanation to Section 17 provides that "the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed." The proviso of Rule 66 (1) says that when the specified agricultural produce is presumed to have been sold in accordance with the explanation given under clause (viii) of Section 17 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964, the price of such produce shall be the price which prevailed for that type of produce in that market just on the previous working day. Therefore, the mandi fee was payable on the price of such produce which prevailed in that market just on the previous working day. In case, if it is found that the mandi fee has not been paid on the price which was prevailed in the market just on the previous working day, the Committee has a authority to issue notice and pass assessment order and raise the demand. Such order may be considered as a provisional order in view of the Division Bench decision of this Court. If the licensee accepts the order, the mandi fee shall be deposited and in case if he disputes the same then it has a right to file the objection and then on a consideration of the said objection, the final assessment order is to be passed.

15. It is true that at the time of transactions when the gate passes are being issued on the payment of mandi fee in the presence of the Inspector, it would be more reasonable that the objection can be raised about the rate and the market price on the basis of which the assessment may take place subsequently. It is not necessary that at the time of objection the gate pass may be denied on this ground. In the present case, it appears that no objection has been raised, at the time of transactions, by the Inspector ,who was present at the time of transactions and mandi fee has been paid on the price mentioned in 6R but in my view, mere not raising the objection will not preclude the Committee to raise the objection subsequently on the basis of the material on record. Although, it would be more appropriate that the objection should be raised at the time of transactions itself. Therefore, in my view, the demand raised by the Secretary, Mandi Samiti on the ground that the mandi fee has not been paid on a prevalent price was within his jurisdiction. Present is not the case of any reassessment. Learned counsel for the petitioners are not able to show that before 30.4.2008 any other demand has been raised. Therefore, it is a case of original assessment. In the absence of any machinery being provided, in view of the direction given by the Division Bench of this Court in the case of **Ram Karan Vs. Krishi Utpadan Mandi Samiti, Saharanpur** (Supra), the order passed by the Secretary, Mandi Samiti dated 30.4.2008 can be considered only as a provisional assessment. The case of the petitioners are that they have filed the objection to the aforesaid assessment while the case of the respondents is that no objection has been filed. However, there is no dispute that no final

assessment order has been passed after the order dated 30.4.2008. In the circumstances, I am of the view that the objection of the petitioners requires to be considered by the Secretary, Mandi Samiti and on a consideration of the said objection, the final assessment order to be passed. In this view of the matter without going into the controversy whether the petitioners have filed objection or not, the petitioners are directed to file a fresh objection within a period of one month and the Secretary, Mandi Samiti is directed to decide the objection and pass the final assessment order.

16. Before parting, I would say that it is unfortunate that despite the direction given by the Apex Court and two Division Benches of this Court, referred to hereinabove, the machinery provisions have not been provided in the Act like the other taxing statutes. In the circumstances, State Government is directed to take appropriate steps within a period of three months to provide machinery provisions in the Act for the assessment, collection, recovery, reassessment etc.

In the result, the writ petitions are allowed. The impugned order dated 20.9.2008 passed by the revisional authority is set aside. The petitioners are directed to file objection within a period of 30 days to the order dated 30.4.2008 and the Secretary, Mandi Samiti is directed to pass the final assessment order after considering the objection of the petitioners in accordance to law expeditiously.

Copy of this order be provided to learned Standing Counsel within 10 days to serve the Principal Secretary, Agricultural Product, Lucknow, U.P. for the compliance of aforesaid directions.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.10.2009

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE K.N. PANDEY, J.

Criminal Capital Appeal No. 4696 of 2008
Reference No. 7 of 2008

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

Counsel for the Appellant:
Sri D.K. Tyagi
Sri Abhishek Pandey
Amicus Curiae

Counsel for the Opposite Party:
Sri D.R. Chaudhary
Sri Arunendra Singh
Sri M.S. Yadav
Sri V.K. Mishra
A.G.A.

Code of Criminal Procedure Section 304-Criminal Trail concluded-all prosecution witnesses examined-Amicus curiae appointed on belated stage-application to cross examine the prosecution witness rejected-held-Trail Court committed great illegality conviction set a side with direction to examine and cross examine all witness.

Held: Para 15

The crux that boils down from the discussion of the aforesaid decisions is that the court is under a duty to ensure that accused person before it is represented or not and whether he requires the services of a lawyer from State through Legal Aid Scheme on account of his indigent conditions or

otherwise and should take up the matter as prefatory to further proceeding in the trial. We have scanned the entire record and there is nothing on record that the trial court ever addressed itself to this issue and after all the witnesses were examined in the case, he passed the orders appointing the lawyer that too pursuant to a request from the accused Harveer and played down the right of the accused by stating that all the witnesses were examined in the presence of the accused. In our considered view, the trial court proceeded perfunctorily unmindful of the fact that the right of the accused was further impinged upon seriously when the trial court rejected the request of the lawyer assigned to accused at a belated stage for recall of certain ocular witnesses for cross examination.

Case law discussed:

1994 Supp (3) SCC 321, 1981 SCC (Crl. 228, 1986 SCC (Crl.) 166, (1986) 2 SCC 401.

(Delivered by Hon'ble Imtiyaz Murtaza J.).

1. Present Criminal appeal has its genesis in impugned judgement and order dated 5.6.2008 rendered in S.T. No. 108 of 2006 (State v Harveer and another). The trial of accused in the case culminated in conviction of the appellant Harveer under section 302, 324, 120 B IPC and he was visited with penalty of death.

2. The appeal aforesaid, it would appear was admitted by this Court on 24.7.2008. Thereafter, the appeal, it would appear, was listed on 10.7.2009 and again on 13.7.2009. On 14.7.2009, it transpired that the appellant was not represented and therefore, the Court appointed Sri Raghuraj Kishore Advocate as Amicus Curiae and directed that the appellant be informed whether he would like to be represented by Amicus curiae or would prefer to engage lawyer of his own choice. After the compliance report had been received, the appeal was heard on merit and judgement was reserved on 8.9.2009.

3. The author of the F.I.R in the case is one Ghasitu resident of village Nagal P.S.Chhaprauli Distt Baghpat. The report submitted to the police is to the effect that on 5.6.2005 at about 7 a.m, his brother Harveer had murdered his eldest daughter namely Km. Brijbala aged about 14 years by cutting her throat by Khurpi (a flat bladed tool) and he roamed about around the village with truncated head. It is further stated that the village people tried to catch hold of him but he fled away by throwing the truncated head near the dead body. It is also stated that he also left behind his blood smeared cloths. It is also stated that the deceased was ailing for the last three months and it was believed by the accused that she was possessed by some evil spirit. At times, she fell unconscious and at times, she used to prattle talking nonsense. It is further stated that she had been murdered on account of superstition induced by some sorcerer. It is also stated that the incident was witnessed by Shimla mother of the deceased and she also tried to ward off the blow inflicted on deceased by the appellant but she was also assaulted and as a result she suffered injuries on her hands.

4. The investigation of the case was taken over by S.I. Indra Pal Singh who prepared site plan Ex.ka 8, and also collected blood stained earth and simple earth Ex. ka. 9. He also recorded statements of the witnesses. The accused Peru was thereafter arrested. Subsequently, the investigation was made over to S.O. Mehar Singh who arrested

accused Harveer and submitted charge sheet in the court.

5. The prosecution examined P.W. 1 Ghasitu who is author of the F.I.R., P.W. 2 Arvind Kumar, Scriber of the report, P.W.3 Smt. Shimla, mother of the deceased and ocular witness, P.W.4, Rajpal, ocular witness of the occurrence, P.W. 5 Sukhpal, ocular witness of the occurrence, P.W. 6 Constable Subhash Solanki who prepared the G.D. entry, P.W. 7 Dr. Krishna Kumar, who conducted post mortem report, P.W. 8 S.I Gaje Singh who prepared inquest report, P.W. 9 S.I.Indra Pal Singh first investigating officer, P.W. 10 S.O.Mehar Singh Investigating officer who submitted charge sheet and P.W. 11 Dr. Ramesh Chandra who examined P.W.3 Smt. Shimla mother of the deceased.

We have heard Sri Raghuraj Kishore Amicus curiae, Sri D.R. Chaudhary G.A and Sri Arunendra Singh and Sri M.S. Yadav, A.G.A for the State.

6. To begin with, learned counsel advanced an argument having complexion of preliminary argument stating that the appellant was considerably prejudiced as he was unrepresented by any counsel during the trial of the matter. The learned counsel in order to prop up his argument, drew attention to statute and substantially argued that the conviction of the accused has been recorded without appointing counsel for the accused under the legal aid scheme was not represented by a pleader and it was amply clear to the court below that the accused was not possessed of sufficient means to engage a pleader.

7. The appointment of a counsel under the Legal Aid Scheme is meant to avoid or prevent miscarriage of justice and a conviction on the basis of a plea of guilty by an accused person who did not understand the law. However, it is settled in law that where the accused has pleaded guilty or where the facts which constitute the offence are unmistakably admitted, there would be no miscarriage of justice and the conviction would not be vitiated.

8. We have scrutinised the record vis-a-vis the submission of the learned counsel for the appellant. From a scrutiny of the order sheet it would appear that on 12.5.2008, D.W. 1 was examined and Harveer accused stated in the court that he was incarcerated in jail and has not been assigned any lawyer to defend him and the same day, the trial court directed to assign amicus curiae out of enlisted lawyers. On 29.5.2008, Sri Ram Kumar Tomar was appointed as amicus curia. On 31.5.2008, the amicus curiae appointed by the trial court made an application quintessentially stating therein to recall P.W.3 whose statement was recorded on 13.11.2007 and 8.1.2008. However, the trial court disallowed the application on the premises that the statement of afore-stated was recorded in the presence of the accused and that the learned counsel did not press into service any point of pivotal significance on which the witness should be recalled for cross examination. We have also gone over the testimonies of witnesses examined by the prosecution and there is nothing discernible anywhere in the entire statement that accused Harveer was afforded opportunity to cross examine any of the witnesses relied upon by the prosecution. We have also gone the statements and it leaves no manner of doubt that if there is any cross examination, it is of accused Peru who has since been purged of the charges and

has been granted clean acquittal by the court below. It is thus amply clear that all the witnesses had already been examined before the amicus curiae could be assigned to accused Harveer for defending him. To be precise, P.W. 1 Ghasitu was examined and cross examined by the accused Pheru on 21.8.2006, P.W. Arvind Kumar was examined on 5.8.2005, P.W. 3 Smt. Shimla, mother of the deceased was examined and cross examined by accused Pheru on 13.11.2007 and again on 8.1.2008, P.W. 4 was examined and cross examined by accused Pheru on 14.2.2008, P.W. 5 Sukhpal was examined and cross examined by accused Pheru on 14.2.2008, P.W. 6 examined and cross examined by accused Pheru on 27.2.2008, P.W. 7 was examined and cross examined by accused Pheru on 12.3.2008, P.W. 8 S.I. Gaje Singh was examined and cross examined by accused Pheru on 26.3.2008, P.W. 9 S.I.Indra Pal Singh was examined and cross examined by accused Pheru on 10.4.2008, P.W. 10 was examined and cross examined by accused Pheru on 1.5.2008 and lastly, P.W. 11, Dr. Ramesh Chandra was examined and cross examined on behalf of accused Pheru on 1.5.2008. As stated supra, the accused moved an application for assigning lawyer on 12.5.2008 and on 31.5.2008, amicus curiae was appointed.

9. Right to make cross examination means right to cross examine through a lawyer of accused's choice. This right has to be read in the backdrop of Article 22 of the Constitution of India. The doctrine audi alteram partem has to come into play which means that no man should be condemned unheard. A part of this doctrine is that if any reliance is placed on evidence or record against a person then that evidence or record must be placed before him for his information, comment and criticism. It is all that is meant by the doctrine of audi alteram partem. It is well enunciated that formal cross examination is procedural justice and it is governed by rules of evidence. It is the creation of courts and of legal and statutory justice. The aforesaid doctrine certain includes that any statement of a person before it is accepted against somebody else that somebody else should have an opportunity of meeting it whether by way of interrogation or by way of comment. So far as that somebody else has had a fair and reasonable opportunity to see, comment and criticise the evidence, the tests of doctrine aforesaid stands satisfied.

10. There is nothing on record to suggest that it was a case in which counsel appearing for the accused declined to cross examine the witnesses. Every noon and corner of the record gives manifestation of the fact that the accused Harveer Singh was not properly represented by the counsel and therefore, the conclusion is irresistible that he was prejudiced in his defence and entire trial therefore stands vitiated.

11. Yet another aspect to be reckoned with is whether it would suffice if the testimonies are recorded in the presence of an accused who is unaided by the services of a counsel. Section 304 Cr.P.C clearly envisages that where in a trial before the court of session, the accused is not represented by a pleader and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State. We would not make an idle parade of learning by citing decisions on

the point which it would suffice to say are legion. The crux of various decision is that the entitlement to free legal aid is not dependent on the accused making an application to that effect and the court is obliged to inform the accused of his right to obtain free legal aid. We may revert to the facts of the case. As stated supra, it is quite clear that only co accused pheru was represented and appellant Harveer was unrepresented till the last witness was examined in the case. The learned Sessions Judge tried to explain away the matter by stating that the statements of the witnesses were recorded in the presence of the accused Harveer.

12. Few of the decisions shedding light on the aspect under discussion may be noticed. The ex-cathedra decisions are Tyron Nazareth v. State of Goa 1994 Supp (3) SCC 321, Khatri (11) v. State of Bihar 1981 SCC (Crl. 228 and Sukh Das v. Union Territory of Arunachal Pradesh 1986 SCC (Crl.) 166. The aforesaid aspect of providing legal aid to the accused was also considered by the Apex Court in Tyron Nazareth (supra) emanating from a decision of Bombay High Court in which the Court noticed with approval the decision of the Apex Court in Sukh Das (supra) and also Khatri II's case (supra). The Apex Court in the said decision held as under:

"We have also perused the decisions of this Court in Khatrai (II) v. State of Bihar and Sukh Das v. Union Territory of Arunachal Pradesh. We find that the appellant was not assisted by any lawyer and perhaps he was not aware of the fact that the minimum sentence provided under the statute was 10 years rigorous imprisonment and a fine of Rs. 1 lakh. We are, therefore, of the opinion that in the circumstances, the matter should go back to the tribunal. The appellant if not represented by a lawyer may make a request to the court to provide him with a lawyer under section 304 of the Criminal Procedure Code or under any other legal aid scheme and the court may proceed with the trial afresh after recording a plea on the charges. The appeal is allowed accordingly. The order of conviction and sentence passed by the Special court and confirmed by the High Court are set aside and de novo trial is ordered hereby."

13. The ex-cathedra decision on the point is **Khatrai v. State of Bihar (supra)** in which the Apex Court substantially held that free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused for the first time is produced before the Magistrate. The Apex Court also relied upon in this decision the decision of the Apex Court in Hussainara Khatoon's case (AIR 1979 SC 1369) in which the right to free legal services was held to be an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and also held implicit in the guarantee of Article 21 of the Constitution of India. The relevant paragraphs being 4 and 5 are quoted as under:

"The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it is implicit in the guarantee of Article 21. The State Government cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free

legal aid to an accused person who is unable to secure legal services on account indigence and whatever is necessary for this purpose has to be done by the State. AIR 1979 SC 1369, Foll. (Para 4)

Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable fair and just which denies legal advice and representation to him at this stage. (Para 4)

The Magistrate or the Sessions Judge before whom the accused appears, is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Necessary directions to Magistrates, Sessions Judges and the State Government with guidelines given."

14. Another decision on the point is Suk Das v. Union Territory of Arunachal Pradesh (1986) 2 SCC 401. The aforesaid decision has carried the dictum of Khatri's case (supra) a step further and it is clearly laid down that unless refused, failure to provide free legal aid to such accused person would vitiate their trial, entailing setting aside of the conviction and sentence against them. In para 5, the substance of what has been held is that free legal assistance at state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. Again the Apex Court held that the exercise of this fundamental right is not conditional upon the accused apply for free legal aid and hence cannot be denied if the accused failed to apply for it. Illiteracy, poverty and ignorance of rights and entitlements under the law abounds leading to deception, exploitation and deprivation of rights and benefits under the law. It would be a mockery of the legal aid programme if it were to be left to the poor, ignorant and illiterate accused to ask for free legal services. In the aforesaid case, the Apex Court set aside the conviction and sentence observing that the result of our quashing the conviction of the appellant would be that the appellant would have to be tried again in accordance with law after providing free legal assistance to him at State cost and that would mean that the appellant would continue to be exposed to the risk of conviction and imprisonment and the possibility cannot be ruled out that the offence charged may ultimately be proved against him and he might land up in jail..........". However, in the peculiar facts and circumstances of that case, the Apex Court prohibited trial afresh and reinstated the appellant in service but without back wages. It would appear that offence for which the appellant was tried was under section 506 read with section 34 of the IPC on the allegation that the appellant and others threatened Asstt Engineer C.P.W.D with a view to compelling him to cancel the transfer orders which had been passed against him.

15. The crux that boils down from the discussion of the aforesaid decisions is that the court is under a duty to ensure

that accused person before it is represented or not and whether he requires the services of a lawyer from State through Legal Aid Scheme on account of his indigent conditions or otherwise and should take up the matter as prefatory to further proceeding in the trial. We have scanned the entire record and there is nothing on record that the trial court ever addressed itself to this issue and after all the witnesses were examined in the case, he passed the orders appointing the lawyer that too pursuant to a request from the accused Harveer and played down the right of the accused by stating that all the witnesses were examined in the presence of the accused. In our considered view, the trial court proceeded perfunctorily unmindful of the fact that the right of the accused was further impinged upon seriously when the trial court rejected the request of the lawyer assigned to accused at a belated stage for recall of certain ocular witnesses for cross examination.

16. In view of the above, the conviction and sentences recorded against the appellant are set aside and the matter is remanded to the trial court for trial de novo. It needs hardly be said that the witnesses would be recalled and examined and cross examined formally in the spirit of procedural justice. The trial court, it is expected, would proceed expeditiously and take the matter to finality within a period not exceeding six months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2009

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No.49192 of 2009

Vijay Chand ...Defendant
Versus
Baijnath Prasad Gupta and others ...Plaintiffs

Counsel for the Petition:
Sri Syed Wajid Ali

Counsel for the Respondents:
Sri B.K. Tripathi
Sri Salil Kumar Rai

<u>Judge Small Cause Court Act-Section 23</u>-Return of Plaint-Suit for ejectment on ground of arrears of rent-tenant not deposited any amount on first date of hearing-denied the title of land lord itself-on basis of will which was never acted upon-held-finding regarding default in rent-recorded by Courts below-need no interference ejectment.

Held: Para 20

In view of the aforesaid fact, in my opinion, the findings recorded by the Courts below are finding of fact, no interference is required by this Court while exercising the power under Article 226 of the Constitution of India. The writ petition is devoid of merit and is hereby dismissed. No order as to cost.
<u>Case law discussed:</u>
1988, A.W.C 1057, 1998 (3) A.W.C 1616, 2003, AWC 1195, 1991 ALJ 1065, 2000 (42) ALR 171.

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

1. Heard Syed Wajid Ali, learned counsel for the petitioner and Sri Salil

Kumar Rai, holding brief of Sri B.K. Tripathi, learned counsel appearing for the respondent.

2. The present writ petition has been filed for quashing the orders dated 28.5.09 passed by Additional District & Sessions Judge, Court No.3, Gorakhpur in S.C.C Revision No.1 of 2008, Annexure No.4 and order dated 18.12.2007 passed by Judge, Small Causes Court, Gorakhpur in S.C.C Suit No.29 of 2005, filed as Annexure No.3 to the writ petition.

3. The facts emerged in the writ petition are, that the respondents filed a suit before the Judge, Small Causes Court, as suit No.29 of 2005 against the petitioner for ejectment and arrears of rent amounting to Rs.3000/-. The petitioner filed a written statement denying the ownership of the respondents on the ground that the property belongs to one Ram Das Gupta and after his death, his wife became landlady of the premises in question and during her lifetime, Smt. Sudhan Devi and her son Srinath used to take the rent from the petitioner. A Will was executed on 21.2.1993 in her favour by husband, Sri Ram Das Gupta and subsequently, Smt. Sudhan Devi has also executed a Will dated 12.10.1996 in favour of her son, Srinath regarding the house in dispute. The rent was being paid to him. Subsequently, when he refused to take his rent, it was being deposited in the Court under Section 30 of the U.P. Urban Building (Regulation of Letting Rent & Eviction) Act, 1972 (hereinafter referred to as Act No.13 of 1972).

4. The trial court without considering this issue, was pleased to decree a suit vide its judgment and order dated 18.12.2007. The revision filed by the petitioner has also been dismissed vide its order dated 28.5.2009.

5. Sri Wajid Ali, learned counsel appearing for petitioner submitted that as the specific plea was raised before the Courts below that the respondents are not the landlords and title has been denied. Therefore, in view of the provision of Section 23 of the Judge, Small Causes Court Act, the suit ought to have been transferred by the Courts below to the Court of having its competent jurisdiction.

6. In view of the Will Deed executed by the mother of the respondent, the respondent was not a landlord, therefore, he has no right to institute the same. The reliance placed upon the judgment of the Apex Court reported in **1988, A.W.C 1057, Budhu Mal vs. Mahabir Prasad and others**, and placed reliance in paragraph No.10 of the said judgment which is reproduced below;

"It is true that Section 23 does not make it obligatory on the Court of Small Causes to invariably return the plaint once a question of title is raised by the tenant. It is also true that in a suit instituted by the landlord against the tenant on the basis of contract of tenancy, a question of title could also incidentally be gone into and that any finding recorded by a Judge, Small Causes in this behalf could not be res judicata in a suit based on title. It cannot, however, be gainsaid that in enacting section 23 the Legislature must have had in contemplation some cases in which the discretion to return the plaint ought to be the instant cases we feel that these are such cases in which in order to do complete justice between the parties the plaints ought to have been return for presentation to a court having jurisdiction

to determine the title. In case, the plea set up by a appellants that by the deed dated 8th December, 1966 the benefit arising out of immovable property which itself constituted immovable property was transferred and in pursuance of the information conveyed in this behalf by Mahabir Prasad to them the appellants started paying rent to Smt. Sulochna Devi and that the said deed could not be unilaterally cancelled, is accepted, it is likely not only to affect the title of Mahabir Prasad to realise rent from the appellants but will also have the effect of snapping even the relationship of landlord and tenant, between Mahabir Prasad and the appellants which could not be revived by the subsequent unilateral cancellation by Mahabir Prasad of the said deed dated 8th December, 1966. In that event it may not be possible to treat the suits filed by Mahabir Prasad against the appellants to be suits between landlord and tenant simplicitor based on contract of tenancy in which an issue of title was incidentally raised. If the suits cannot be construed to be one between landlord and tenant they would not be cognizable by a court of small causes and it is for these reasons that we are of the opinion that these are appropriate court so that none of the parties was prejudiced."

7. Further reliance has been placed upon a judgment by this Court reported in **1998 (3) A.W.C 1616, Banke Bihari Vs. Surya Narain alias Munnoo,** placed reliance in paragraph No.13 of the said judgment, which is being reproduced below;

"I was then urged that even assuming that registration of the document was required, it can still be admissible in evidence for a collateral purpose. I do not find any force in this submission either. It has been held in the case of Ratan Lal vs. Hari Shankar, AIR 1980 All 180, that collateral purpose referred to under Section 49 of the Registration Act has a limited scope and meaning. The term would not permit the party to establish that the deed created or declared or assigned or limited or extinguished a right to immovable property. Therefore, a family arrangement needed to be registered and an unregistered one could not be used even to prove that there was a partition and oral evidence regarding partition on the basis of such document could not be led as it was barred by Section 91 of the Evidence Act. Learned counsel for the appellant has, however, placed reliance upon the observations made by the Supreme Court in the case of Kale (supra), wherein it was observed that even if the family arrangement was not registered it could be used for collateral purpose, namely, for the purpose of showing the nature and character of possession of the parties in pursuance of the family settlement. So far as the observation is concerned, it was made in the facts of the said case where the antecedent family arrangement which had been orally arrived at between the parties had been acted upon for several years. The petition was filed before the Assistant Commissioner that the dispute between the parties has been settled amicably between the members of the family and it no longer required determination and, therefore, mutation be affected in accordance with that since the petition itself did not create or declare any rights in the immovable property, it was not hit by Section 17(1)(b) of the Registration Act and was not compulsorily registerable. It is in that background that observations were made in the said case.

As this Court has already held that by the document of family arrangement some right in immovable property has been created and some right has been extinguished, the term 'collateral purposes' would not permit the party to establish any of these facts from the deed. There is, therefore, no substance in this submission of the learned counsel as well."

8. Further reliance has been placed upon a judgment of the Court reported in **2003, AWC 1195, Pratap Singh vs. IX Additional District Judge, Fatehpur and others**.

9. Placed upon these judgments, the learned counsel for the petitioner submits that in view of the plea taken by the petitioner that Will was executed by the mother in favour of her two sons and the respondent was excluded from the property in question, therefore, he cannot became the landlord and owner of the property. Therefore, once the title of respondent landlord was denied, the Courts below was obliged to return the plaint to the competent court. The document submitted by the petitioner was to be considered because once the Will has been executed and that has to be taken into consideration for collateral purposes.

10. Further from the allegation made in the plaint, there is no averments that in partition between the parties was acted upon, therefore, the finding recorded by the Courts below is based on evidence and is erroneous.

11. I have considered the submissions made on behalf of parties and perused the record.

12. In paragraph No.9 of the application filed before the Judge, Small Causes Court for arrears of rent and ejectment, it has clearly been stated that there was a partition between the parties and they are in possession of their respective shares. The property in dispute has come in the possession of the respondent landlord, therefore, being a landlord, he has filed a suit. This fact has been intimated by a notice dated 18.9.2000. The Judge, Small Causes Court as well as the Revisional Court has recorded a finding on issue No.7 that the house in dispute after the partition, has come in the share of the respondents and as such, there is a relationship of landlord and tenant. Further, finding has been recorded that the execution of the Will has not been proved. If such document has not been acted upon, then the question for consideration is whether the Courts below was obliged to take into consideration the said document. As regards, the document of the family partition has been placed before the Court.

13. The Revisional Court has also after considering the submission and the documents filed in support of the petitioner, has recorded a finding that there is a relationship of landlord and tenant, and therefore, there is no occasion to transfer the suit under Section 23 of the Judge Small Causes Court Act.

14. Further in the **Buddhu Mal** (supra), the Apex Court while considering the issue and question regarding transfer of the plaint to the competent court under Section 23 of the Act, in case, there is a denial by the tenant that a person who had filed suit for ejectment and arrears of rent, is not landlord. It does not make

obligatory on the part of the Court to invariably return the plaint. Once a question of title is raised by the tenant, the Court has to see that whether there is a relationship of landlord tenant are not and whether the Judge, Small Causes Court is having jurisdiction to decide the same. The power under Section 23 of the Act has to be exercised not in a casual manner. It has to be executed judicially after coming to confirm opinion that suit is not triable by the Court. In 2006 (62) ALR 583, this Court has held that return of plaint, power of Court of Judge, Small Causes Court, not to be exercised in a mechanical manner. Court is not bound to return the plaint merely because the tenant has raised a dispute with regard to title under Section 23 of the Judge, Small Causes Court Act. It is a discretionary power to be exercised by the Court. In **1991 ALJ 1065, Budhu Mal vs. Ramphal,** Apex Court has held that return of plaint is not obligatory on the Court if it involves question of title, however, in some cases discretion to return of plaint ought to be exercised to do complete justice between the parties.

15. Section 23 of the Judge, Small Causes Court Act gives the power " to return the plaint" for being presented before the Court having jurisdiction to determine the title in the event if it is specified that when the right of the plaintiff and the relief claimed by him depending upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine.

16. The powers so vested under Section 23 of 1887 Act is not to be exercised in a mechanical manner and the Judge, Small Causes Court is not bound to return the plaint merely because the tenant has raised the dispute with regard to the title. The word used is title depending upon proof or disproof with regard to the immovable property. The Judge, Small Causes Court can very well examine, as to whether, there is a real dispute with regard to the title which it cannot decide either incidentally or prima facie and only then it may return the plaint while exercising the powers under Section 23 of 1887 Act.

17. In **Shamim Akhtar vs. Iqbal Ahmad and another, 2000 (42) ALR 171,** the Court has held that Section 23(1) provides that when the right of a plaintiff and the relief claimed by him in the Court of Small Causes depends upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title. Power so vested is discretionary, it has to be exercised only when the relief claimed by the plaintiff in a proceeding before the Court depends upon the proof or disproof.

18. In the present case, the petitioner has challenged the alleged Will which was alleged to be executed by the mother of the respondent without any proof to this effect whether it was acted upon or not.

19. In the opinion of the Court, petitioner being a tenant, cannot deny the title of the landlord only on the basis of an alleged Will that too executed by the mother of the respondent, though it has been denied that Will was never acted upon by the respondents. As regard, the finding recorded that admittedly, the

petitioner has not paid the rent on the first date of hearing and he was in arrears and has not deposited the same on the immediately within a period of one month from the date of notice. In such circumstances, the Court below has passed an order holding that the petitioner was defaulter and as such, is liable for ejectment.

20. In view of the aforesaid fact, in my opinion, the findings recorded by the Courts below are finding of fact, no interference is required by this Court while exercising the power under Article 226 of the Constitution of India. The writ petition is devoid of merit and is hereby dismissed. No order as to cost.

21. In the last, Sri Wajid Ali, learned counsel appearing for the petitioner submitted that some reasonable time be granted to the petitioner to vacate the premises. Petitioner is granted three months' time to vacate the said shop subject to condition that he will file an affidavit before the Judge, Small Causes Court in the shape of undertaking within a period of two weeks from today that he will vacate the premises in dispute within a period of three months from today and will not induct any third person and hand over peaceful possession immediately on or before the three months. If, such an undertaking is given, the Judge, Small Causes Court will grant three months' time to vacate the said premises. It is also made clear that arrears, if any, payable month to month shall also payable to the landlord.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 57721 of 2007

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

Counsel for the Petitioner:
Sri Dev Brat Mukherjee

Counsel for the Respondents:
Sri Jeevan Prakash Sharma
S.C.

U.P. Intermediate Education Act 1921-Regulation 2, Chapter III-Promotion-4 posts of clerk including Head Clerk duly sanctioned 50%-Head Clerk being promotional post amongst clerks-can not be treated similar to clerk-held-submission wholly misconceived-out of four posts-two already occupied from promotion quota-decision of management to fill up the vacancy by direct recruitment-proper but the same can not be under O.B.C. quota-petition partly allowed.

Held: Para 10 & 12

One person having already been promoted from the post of Clerk to Head Clerk and another promoted from Class-IV to Class-III, two persons are already working against the promotion quota out of the total strength of four. Therefore, remaining two posts are to be filled in by direct recruitment. Therefore, I do not find any error or illegality in the decision of respondent no. 4 to fill in the vacancy in question by direct recruitment.

In view of above exposition of law, unless there being four posts of Class III available for direct recruitment,

reservation under 1994 Act for O.B.C. can not be applied against any of the posts in Class III. The decision of the Management to the extent they propose to fill in the post in question by keeping it reserved for O.B.C. is, therefore, illegal and liable to be set aside.

Case law discussed:

(2006) 3 UPLBEC 2391, 2007 (4) AWC 4180, Civil Misc. Writ Petition No. 7591 of 2006, 2009(2) ADJ 90.

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

1. Heard Sri D.B. Mukharji for the petitioner, learned Standing Counsel representing respondents no. 1, 2, and 3 and Sri Jeevan Prakash Sharma for respondent no. 4.

2. The petitioner, already working as a Class IV employee in Neta Subhash Krishi Sainik Inter College, Banki, Vinod Nagar, Maharajganj (hereinafter referred to as "College"), has filed the present writ petition seeking the following reliefs :

"(i) To issue a writ, order or direction in the nature of certiorari to quash the Notice Dt. 01.11.2007 published in Daily News Paper "Amar Ujala" by which Respondent No. 4 is going to direct recruit the promotion quota post of Asstt. Clerk of the Institution.

(ii) To issue a Writ, order of direction in the nature of mandamus directing to Respondent No. 2 & 3 to promote the petitioner as Asstt. Clerk in the Institution, as he is only Class-IV employees who has requisite qualification for the post of Asstt. Clerk.

(iii) To issue any other writ, order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(iv) To award costs of the Writ Petition to the Petitioner against the Respondents."

3. The case of the petitioner is that there are four sanctioned posts of Class III, i.e., three posts of Clerk and one post of Head Clerk in the College out of which one post (Head Clerk) is already occupied by one Sri Hira Lal, promoted from the post of Clerk and another post of Clerk is occupied by Sri Surendra Lal Srivastava, a Class-IV employee promoted in promotion quota to Class III post. Another post, which fell vacant, he contended, in view of Regulation 2 Chapter III of the Regulations framed under U.P. Intermediate Education Act, 1921 ought to have been filled in by promotion inasmuch for the purpose of determining promotion quota, the post of Head Clerk has to be excluded and there being only three posts of Clerk, 50% have to be filled in by promotion. Since 50% of 3 posts of Clerk comes to 1.5 and fraction will go for promotion, therefore, two posts of Clerk have to be filled in by promotion and one by direct recruitment.

4. In the case in hand, the respondents have decided to fill in the post in question by direct recruitment and that too keeping it reserved for Other Backward Classes (in short "OBC"). Sri D.B. Mukharji submits that the advertisement published by respondent no. 4 for filling in the post in question by direct recruitment is illegal. He further submitted that in any case, the post of Clerk sought to be filled in by direct recruitment, cannot not be kept reserved for OBC as that would exceed the quota of reservation prescribed for OBC which is only 27% under U.P. Public Services (Reservation for Scheduled Castes,

Scheduled Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as "1994 Act").

5. Learned counsel for the respondents, on the other hand, submitted that the present writ petition at the instance of the petitioner is not maintainable inasmuch the petitioner having been appointed as a Class-IV employee only on 5.6.2003, on the date of occurrence of vacancy he has served for less than five years therefore, was not eligible for promotion to Class-III post. He further submitted that in Regulation 2 (2) Chapter III, 50% post of Clerk and Head Clerk both have to be filled in by promotion and out of four posts, two are already occupied by persons promoted, the rest two are to be filled in by direct recruitment. Hence, the respondents have proceeded to fill in the post in question by direct recruitment. He further submitted that the cadre consists of four posts, one has been kept reserved for OBC since there is no OBC candidate in Class -III in the College.

6. Heard learned counsel for the parties and perused the record. Regulation 2 Chapter III which provides Reservation to Class III and Class IV posts reads as under :

"2. (1) For the purpose of appointments of clerks and Forth Class employees the minimum educational qualification would be the same as has been fixed from time to time for the equivalent employees of Government Higher Secondary Schools.

(2) Fifty per cent of the total number of sanctioned posts of head clerk and clerks shall be filled among the serving clerks and employees through promotion. If employees possesses prescribed eligibility and he has served continuously for 5 years on his substantive post and his service record is good, then promotion shall be made on the basis of seniority, subject to reject of the unfit.

If any employee is aggrieved by any decision or order of the management committee in this respect then he can made representation against it to the Inspector within two weeks from the date of such decision or order. Inspector on such representation can make such orders as he thinks fit. Decision of the Inspector would be final and promptly executed by the management.

Note--In calculating fifty per cent of posts parts less than half would be left and half or more than half post would be deemed as one."

7. Regulation 2(2) clearly says that out of total sanctioned posts of Head Clerk and Clerks, 50% shall be filled in by promotion by already working Class III and Class IV employees provided the concerned employee possess requisite qualification and has completed five years' continuous substantive service. The criteria for promotion is good service report and seniority subject to rejection of unfit.

8. This Court, in **Jai Bhagwan Singh vs. District Inspector of Schools, Gautambudh Nagar and others (2006) 3 UPLBEC 2391** and **Munna Lal Vs. Devendra Bahadur Singh Chandel & others 2007 (4) AWC 4180** after considering Regulation 2 (2) held where the total sanctioned posts of Clerks and Head Clerk is three, the fraction of the post would go for the benefit of promotion and, therefore, out of three sanctioned posts, two shall be filled in by

promotion and one by direct recruitment. However, that question would not be relevant for the purpose of this case since here the number of Class III posts is four and, therefore, two would fall in promotion quota and rest two for direct recruitment.

9. The question up for consideration is slightly different. The submission of learned Counsel for petitioner is that the post of Head Clerk being 100% a promotion post under the Regulations has to be excluded for the purpose of determining respective quota of promotion on the post of Clerk and this question I have to consider in the light of the relevant Regulation 2 Chapter III. It is clear from Regularization 2 (2) that in order to determine 50% promotion quota, the posts of Clerk and Head Clerk both have to be considered as a single unit. Promotion of a Clerk to the post of Head Clerk is also to be treated in promotion quota like promotion from Class IV to Class III. The submission of Sri Mukherji that the Head Clerk, being a different cadre, is available only for the persons working as Clerk and same cannot be treated at par with the post available for promotion to Class-IV to Class-III and, therefore, in order to form 50% quota for promotion, the post of Head Clerk has to be excluded is thoroughly misconceived and in the teeth of clear language of Regulation 2 (2) which provides that 50% promotion quota has to be filled in not only from Class-IV employees but also from Class-III employees and, therefore, if a Class III employees, i.e., a Clerk is promoted as Head Clerk, it is to be treated as a vacancy filled in by promotion and shall count while calculating 50% promotion quota in the entire cadre. It is no doubt true that for the purpose of pay scale etc. Head Clerk constitute a different cadre than the post of Clerk but for the purpose of determining promotion quota, Regulation 2(2) clearly provides that it is the entire sanctioned strength of Head Clerk and Clerks which would be taken into account for the purpose of determining 50% promotion quota. Accepting the submission of Sri Mukherji would mean that certain words in Regulation 2 (2) have to be treated redundant, which is not permissible. It is well settled principle of interpretation that if the statute is unambiguous, clear and does not admit of any doubt, the Court should interpret the same in a manner so as to give effect to each and every word contained therein without either adding or omitting any word therefrom. It is a harmonious and plain reading of the statute particularly when the language does not admit of any doubt.

10. One person having already been promoted from the post of Clerk to Head Clerk and another promoted from Class-IV to Class-III, two persons are already working against the promotion quota out of the total strength of four. Therefore, remaining two posts are to be filled in by direct recruitment. Therefore, I do not find any error or illegality in the decision of respondent no. 4 to fill in the vacancy in question by direct recruitment.

11. Now coming to the second aspect of the matter with respect to keeping the post in question reserved for OBC, I find that the vacancy cannot be kept reserved for OBC. For the purpose of reservation under 1994 Act, one has to keep the vacancies available for direct recruitment and promotion separately and the two cannot be clubbed together for the purpose of applying reservation under

1994 Act. This aspect has recently been considered in **Civil Misc. Writ Petition No. 7591 of 2006 Nem Singh Vs. State of U.P. and others** decided on decided on 2.9.2009 wherein following earlier judgment of this Court in **Smt. Pholpati Devi Vs. Smt. Asha Jaiswal and others 2009(2) ADJ 90** and after referring to relevant passages therefrom, this Court held as under :

*"**13**. In view of the above exposition of law the clubbing of vacancies which were to be filled in by promotion alongwith those which were to be filled in by direct recruitment was impermissible in law and the impugned order having been passed ignoring this aspect of the matter is wholly illegal."*

12. In view of above exposition of law, unless there being four posts of Class III available for direct recruitment, reservation under 1994 Act for O.B.C. can not be applied against any of the posts in Class III. The decision of the Management to the extent they propose to fill in the post in question by keeping it reserved for O.B.C. is, therefore, illegal and liable to be set aside.

13. In view of the above, the writ petition succeeds partly. The impugned advertisement insofar as it reserved the vacancy in question for O.B.C. is hereby quashed. The respondent no. 4 is directed to advertise the vacancy afresh for making recruitment treating the vacancy unreserved. However, the petitioner being not entitled for promotion, no effective relief can be granted to him.

14. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.42992 of 1992

Deo Dutt Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ranjit Saxena

Counsel for the Respondent:
Sri Kripa Shanker Singh
S.C.

Constitution of India-Article 27-Pension-petitioner retired from post of Naib Tehsildar-25 years regular working-w.e.f. October, 1976 pension with held-No proper reply given for non-payment-held-arbitrary and unconstitutional-entire amount be paid within 4 months, with 8% interest-cost of Rs.50,000/- awarded.

Held: Para 7

In the entire counter affidavit there is no averment providing any justification whatsoever, for non-payment of pension within a reasonable time to the petitioner. Once it is not disputed that the employee after getting voluntary retirement from service was entitled for pension and other retiral benefits and non payment thereof without any reason or justification is ex facie arbitrary, it entitled the incumbent covered, interest which is compensatory in nature.
Case law discussed:
1983 (1) SCC 305, AIR 2003 SC 2189, 1972 AC 1027, 1964 AC 1129, JT 1993 (6) SC 307, JT 2004 (5) SC 17, (1996) 6 SCC 530, (1996) 6 SCC 558, AIR 1996 SC 715, 2007(8) ADJ 553.

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

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

2. The only grievance of the petitioner is that he retired on 21st October, 1976 from the post of Naib Tehshildar seeking voluntary retirement from service after about 25 years but his pension and other retiral benefits were not paid by the respondents at all.

3. In the counter affidavit the respondents have said that interim pension was paid to the petitioner pursuant to the order dated 21.01.1994 passed by the Board of Revenue along with interim gratuity of Rs.5148/-. (The period of interim pension mentioned in para 16 does not appear to be correct in as much as the same is mentioned as 23.10.1976 to 22.10.1976 though the petitioner himself has retired voluntarily on 21st October, 1976).

4. The learned counsel for the petitioner submitted that as per his instructions some further amount of pension was paid in the year 1996. He contended that not only there was extra ordinary delay in making payment of the pension which the petitioner was legally entitled to but there is also no justification for such extreme delayed payment. Therefore, the petitioner is also entitled to interest @ 18% on the amount of pension up to the day of actual payment.

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

"pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. (Para 20).
In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability, State obligation to provide security in old age, an escape from underserved want was recognized and as a first steps pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The guid pro quo was that when the employee was physically and mentally alert, he rendered not master the best, expecting him to look after him in the fall of life. A retirement system therefore exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount. (Para 22).
Pensions to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past. (Para 28).
Summing up it can be said with confidence that pension is no only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back

on savings. One such saving in kind is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. (Para 29)" (emphasis added)

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

7. In the entire counter affidavit there is no averment providing any justification whatsoever, for non-payment of pension within a reasonable time to the petitioner. Once it is not disputed that the employee after getting voluntary retirement from service was entitled for pension and other retiral benefits and non payment thereof without any reason or justification is ex facie arbitrary, it entitled the incumbent covered, interest which is compensatory in nature.

8. 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 and others 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....... A 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." (para 10)

9. The above observation as such has been reiterated in **Ghaziabad Development Authorities Vs. Balbir Singh JT 2004 (5) SC 17**.

10. In the case of **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex court said 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".

11. In the case of **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558** the Apex Court has 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."

12. In the case of **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** has 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."

13. A Division Bench (Lucknow Bench) of this Court (in which I was a member) in **Kunwar Bahadur Saxena Vs. State of U.P. and others, 2007(8) ADJ 553** held as under:

"Interest on the amount of retiral benefits is not only compensatory but is a statutory liability of the respondents to pay the same for the reason that the amount deducted from the petitioner's salary remain with the respondents and they may have utilized the same for their own purpose hence entitling the petitioner for payment of interest on the said amount. Had the amount of retiral benefits been paid in time to the petitioner, he could have invested the same for better utilization so as to live an honerable life after retirement in the absence of any other source of earning livelihood . The attitude and conduct of the respondents borne out from the record is nothing but is reprehensible and should be condemned in strongest words. It is no doubt true that an employer for just and valid reasons and in exercise of power vested in it can defer or deny pension and other retiral benefits to an employee provided the action of the employer is in accordance with the procedure prescribed in law and such a power also emanates from statute or the relevant provisions having force of law. In our system, the Constitution being supreme, yet the real power vest in the people of India since the Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own ex-employee who has served for a long time and has earned certain benefits under the rules recoverable after attaining the age of superannuation. Pension and retiral benefits are not bounty but right of an employee crystallized in deferred wages to which he is entitled under the rules after retirement and non payment thereof is clearly violative of Article 21 of the Constitution of India. Therefore, it becomes more important for the public functionaries and the authorities to act with better sense of responsibility so that their ex-employee

may not be subject to harassment at the old age when they have already retired and have to survive and maintain themselves and their family with the meagre amount payable in the form of retiral benefits. The respondents being a State Government and function through its officers appointed in various department is suppose to discharge his duty strictly in accordance with law as observed under our Constitution, sovereignty vest in the people. Every limb of the constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind the respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees like the petitioner. The respondents have the support of the entire machinery and the various powers of the statute and an ordinary citizen or a common man is hardly equipped to match such might of the State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to the occasion otherwise the confidence of the common man would shake. It is the responsibility of the Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain the arbitrary and arrogant unlawful inaction or illegal exercise of power on the part of the public functionaries.

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

14. In the result the writ petition succeeds and is allowed with the following directions:

1. The amount of pension and other retiral benefits if not already paid to the petitioner, shall be paid finally to petitioner within three months.

2. On the amount of pension and other retiral benefits already paid and would be paid pursuant to the above direction, the petitioner shall be entitled to interest at the rate of 8% commencing from the date after one month from the date of his retirement till actual payment. This amount shall also be determined by the respondents and paid to the petitioner within three months from the date of production of copy of this order.

3. The petitioner shall also be entitled to cost which is quantified to Rs.50,000/-. (Rs. Fifty Thousand Only)

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD O7.10.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No.18612 of 1992.

Dinesh Kumar Pandey ...Appellant
Versus
District Judje, Ballia ...Opposite Party

Counsel for the Applicant:
Sri S.N.Srivastava
Sri Awdhesh Tiwari
Sri G.P.Tripathi
Sri Ram Gopal Tripathi

Counsel for the Opposite Party:
S.C.

Constitution of India Art 226-civil court ministerial Establishment rules 1947-Rule 9-Termination Order-appointment of petitioner as stenographer-on adhoc basis without advertisement-without considering the availability of post subsequent appointment on probation basis-regular working for considerable period- in garb of interim order – illegal-held termination order requires no interference.

Held Para 18

The learned counsel for the petitioner submitted that since he has continued for almost 17 years pursuant to the interim order passed by this Court, therefore, it would be extremely harsh at this fag end to tell him that his continuance in service is bad and hence this Court should permit him to continue. I am afraid that such relief is also impermissible in this case. This Court would be failing in its constitutional obligation of ensuring that the fundamental rights are not infringed at all when it comes before the Court that the fundamental rights have been infringed by the State authorities with impunity. This Court is under the oath to act and implement rule of law. It cannot permit continuance of its breach any more. This Court must straightway come forward for observance of the constitutional provisions and in particular fundamental rights instead of acting in a manner which would encourage such infringement further.

Case law discussed:
2007 (2) ESC 987

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

1. Heard Sri Ram Gupta Tripathi, learned counsel for the petitioner. Despite of the case having been taken in the revised list, none appeared on behalf of the respondent.

2. The order dated 11.5.1992, passed by the District Judge, Ballia (Annexure-4 to the writ petition) has given rise to the present writ petition filed under Article 226 of the Constitution. The petitioner has sought a writ of certiorari for quashing the order dated 11.5.1992. He petitioner has also sought a writ of mandamus commanding the respondents to allow the petitioner to work with Sri Moti Lal, IV Addl. Munsif Magistrate, Ballia where the petitioner was working or to any other person as District Judge considers proper and not to cease the petitioner to work on the basis of the impugned order.

3. The petitioner claims to have been selected in a written test and interview conducted by a selection committee constituted by the respondent District Judge, Ballia in 1990 and regularized with effect from 3.12.1990. Prior to the above selection the Government Order dated 4.8.1990 created 85 temporary posts of Stenographers in the pay scale of Rs. 1200-2040 for Munsif Magistrates. It appears that the High Court by letter dated 6.9.1990 requested the Government to create more number of posts since number of Munsif Magistrates, Judicial Magistrates, Railway Magistrates and Metropolitan Magistrates was 228 besides Addl. Chief Judicial Magistrates and Addl Chief Metropolitan Magistrates, whose list was provided to the Government. The then District Judge on his own taking note of the said Government Order dated 4.8.1990 proceeded to engage Stenographers, appointed the petitioner initially on ad hoc basis and attached him with Sri Moti Lal, IV Addl. Munsif Magistrate, Ballia. Thereafter he held a selection as said above and made the petitioner regular with effect from 3.12.1990. Vide impugned order dated 11.5.1992, the District Judge has directed the petitioner to cease to work on the ground that there is no order of High Court for providing facility of stenographer to Sri Moti Lal and a few other Munsif Magistrates working in the Ballia Judgeship. It is this order whereby the petitioner has ceased to work which is under challenge.

4. The petitioner has filed two supplementary affidavits bringing on record some further facts. Supplementary affidavit dated 26.7.2006 contain two documents, one is the order dated 3.12.1990 of the District Judge approving list of certain candidates found successful for appointment to the post of Hindi Stenographer in Ballia Judgeship, which included the name of the petitioner at Sl. No. 6. Second is the order dated 22.1.1992 allowing increments to the petitioner considering his service in continuity from the date of ad hoc appointment, i.e. 16.7.1990.

5. Another supplementary affidavit III is dated 8.9.2009 which has been filed in order to satisfy the query made by this Court as to how and in what manner the process of selection commenced, whether the vacancies were advertised and other relevant facts. The petitioner has categorically stated in paragraph 6 of the supplementary affidavit-III that he came to know that a post of Stenographer is vacant in the Judgeship, hence, moved an application on 13.7.1990. Thereupon, pursuant to the Government Order dated 4.8.1990 (though the said Government Order was not in existence in July 1990, the then District Judge appointed him for two months on ad hoc basis as Hindi Stenographer. The said ad hoc appointment was extended from time to

time. On 16.7.1990, the District Judge sent a letter to the District Employment Officer, Ballia requisitioning names of ten qualified persons to be appointed on the post of Hindi Stenographers and in pursuance to the said letter, District Employment Officer, Ballia sent names of ten persons. A written test was held on 16.9.1990 wherein 23 candidates appeared including the petitioner. The said 23 candidates included certain persons who were already working on ad hoc basis which included the petitioner, as well as, ten candidates whose names were recommended by the District Employment Officer and some others. Pursuant to the written test, candidates who were found successful were sought to be interviewed on 1.12.1990 and, thereafter the candidates who were recommended by the selection committee were approved by the District Judge by his order dated 3.12.1990. Pursuant to the said order, the services of the petitioner stood regularized with effect from 16.7.1990, i.e. the date of his initial appointment. He has also placed on record a copy of the order dated 3.12.1990 passed by the District Judge, Ballia whereby, pursuant to his selection, he ceased to be an ad hoc employee and was appointed temporarily to work as Hindi Stenographer in the pay scale of 1200-2040 on a vacant post on probation for three months along with other newly selected candidates. By another order dated 4.2.1990 passed by District Judge, Ballia, the service books of the newly selected Stenographers were directed to be prepared. A copy of the Government order dated 17.4.1995 has been filed which converts 204 temporary post of Stenographer for Munsif Magistrate in the State of U.P., permanent.

6. Learned counsel for the petitioner submits that he was appointed on regular basis and having been selected and appointed in accordance with rules, he could not have been terminated by a simple order of termination passed by the District Judge Ballia impugned in this writ petition and the said order is patently illegal. He further submitted that at present there are 33 sanctioned post of Stenographer in Ballia Judgeship whereagainst only 28 persons are working and 5 posts are still vacant, therefore, there is no justification in terminating the petitioner particularly when pursuant to the interim order dated 29.5.1992 passed by this Court, he is still continuing.

7. I have heard learned counsel for the petitioner at length and perused the record.

8. It is really unfortunate that here is a case where an Officer holding a responsible post of District Judge has acted in such a disarrayed and whimsical manner and even without caring as to whether any sanctioned post was avaialbe or not and whether the selection is being made in accordance with rules or not. In his own pick and choose manner, firstly he made ad hoc appointments, continued them and, thereafter, in a so called selection, made appointments on probation claiming that appointments are being made against vacant posts, though sanctioned posts were not available. This illegality continued till this matter was checked and noticed by his successor in office in 1992, and noticing the discrepancies, he issued the order of termination.

9. The record apparently shows shocking state of affairs on the part of the

then District Judge which has to be condemned outright.

10. Annexure 2 to the supplementary affidavit-III is a copy of the Government Order dated 17.4.1995 which shows that Government Order dated 8.12.1989 created 65 temporary posts of Hindi Stenographer, Government Order dated 4.8.1990 created 85 such posts and Government Order dated 18.2.1991 created 54 posts on temporary basis and that is how the total number of posts of Stenographers came to 204. All such posts were made permanent with effect from 1.3.1995 by the Government Order dated 17.4.1995.

11. The petitioner claims his appointment against a vacant sanctioned post pursuant to the Government Order dated 4.8.1990. A copy of the aforesaid Government Order is Annexure-2 to the writ petition. A perusal thereof shows that it was issued by the Joint Secretary, U.P. Government and addressed to Registrar, High Court, Allahabad. While communicating the decision of the Government for creation of 85 temporary posts of Stenographer in the pay scale of 1200-2040, it further provided that these poses shall be allotted to only those Courts where the Presiding Officers have been posted and on such allotment, special pay of Rs. 25/- admissible to Munsarin Reader pursuant to the Government Order dated 25.8.1976 shall stand abolished. The Government Order did not result in suo motu creation of posts of Stenographers in all the existing Courts of Munsif Magistrates etc. in various Judgeships but as a consequence of the said Government Order, first the High Court was to allot sanctioned posts of Stenographer to the concerned Courts of Munsif Magistrate etc. in various District Judgeships and only thereafter, the process of appointment could have been initiated by the concerned District Judges. The Government Order dated 4.8.1992 resulted in creation of posts of Stenographers in lump sum but since the number of Munsif Magistrates etc. was much larger in the State of U.P., the Courts wherein those posts would stand allocated was an exercise to be undertaken by the High Court. In absence of such exercise by the High Court, no District Judge at all, of his own, could have take some posts out of the Government Order in his District and posted. That would be wholly without jurisdiction since no District Judge had such power. This is evident from Annexure-3 to the writ petition which is a letter dated 6.9.1990 sent by the High Court to all the District Judges. A perusal thereof shows that a list of 85 Addl. Chief Judicial Magistrates/ Munsif Magistrates/ Judicial Magistrates was circulated on 6.2.1990 but since most of the officers mentioned in the said list were promoted as Civil Judge or working as Civil Judge or Chief Judicial Magistrate, the High Court informed that there is a necessity of preparing a fresh list of 85 officers in order of seniority since only 85 posts of Stenographers were created by the Government so that the aforesaid facility may be provided to the concerned officers in order of seniority. The above letter also shows that the revised list sent by the High Court contains the names of 442 Magistrates, Judicial Magistrates, Railway Magistrates, Metropolitan Magistrates and Addl. Chief Metropolitan Magistrates.

12. The then District Judge, Ballia without looking to this, on his own

proceeded to make first ad hoc appointment on just getting an application received from the individual candidate like the petitioner and, thereafter, adopted a very strange method of selection in order to camouflage the ad hoc appointees as well as some more as regularly selected candidates.

13. Admittedly, recruitment to the ministerial posts in District Judgeship is governed by Civil Courts Ministerial Establishment Rules, 1947 (hereinafter referred to as "1947 Rules") read with U.P. Rules for Recruitment of Ministerial Staff of the Subordinate Offices in Uttar Pradesh, 1950 (hereinafter referred to as "1950 Rules"). Rule 9 of 1947 Rules obliges a District Judge to first determine the vacancies likely to occur in the course of year and Rule 10 provides that application for recruitment shall be invited by the District Judge by advertising the vacancies in the news papers circulated in the locality concerned. Rule 6 of 1950 Rules provides for written test and oral test as well as typing test. From the facts placed on record by the petitioner, it is evident that neither any vacancy was advertised in the news paper as contemplated under Rule 10 nor there is anything to show that the District Judge determined the vacancies existing in the Judgeship where against the selection was to be made. Appointment letter dated 3.12.1990 shows that all 8 candidates said to have been selected in the above selection were appointed as Stenographer. It means that at least 8 vacancies of stenographer on that day were available. Besides, the so called written test did not include written test in various subjects as provided in Rule 6 of 1950 Rules but it was only a short hand and typing test as is evident from Page 35 (N) of the supplementary affidavit-III. Learned counsel for the petitioner admitted that no written test in the subjects like simple drafting in Hindi, essay and precis writing in Hindi and simple drafting and precis writing in English besides oral test in general knowledge, personality etc. was held but only a short hand and typing test was held on 16.10.1990. Evidently, the alleged written test was also not held as per the statutory rules.

14. There is another interesting aspect of the matter. On the one hand, the then District Judge issued appointment orders of eight stenographers selected by him and appointed them on probation, but, later on, his successor District Judge, on 28.6.1991 passed an order observing therein that the eight candidates including the petitioner, who were appointed as per the select list dated 5.12.1990 and placed on probation for a period of three months, have satisfactorily worked, therefore, are retained in service and be given appointment in future according to their seniority against the post of Stenographer as and when fall vacant. This order of the then District Judge is on page 35(Q) of the supplementary affidavit-III filed by the petitioner. This evidently shows that no sanctioned and vacant post of Stenographer was available even on 28.6.1991, yet ignoring all canons of service jurisprudence, the then District Judge treated as if a person can be appointed on probation though vacancy or post is not available and can complete probation without there being a post at all. His strange order is like this:

"They are, therefore, ordered to be retained in service and given appointment

in future according to their seniority on the post of as and when they fall vacant."

15. It is really pitiable that highest Judicial Officer in Subordinate Court i.e. the District Judges passed such type of order ignoring all known principles of service law. He actually acted in a wholly illegal manner. The officer had caused certain advantages conferred upto the persons who have come by simple pick and choose and not after a valid selection wherein the public at large had an opportunity of consideration for selection and appointment as guaranteed under Article 16 of the Constitution. The earlier illegality is bolted down by successor in office, who passed the impugned order when found that pursuant to the Government Order dated 4.8.1990, High Court had not allocated the post of Hindi Stenographers to three Munsif Magistrates including Sri Moti Lal, in whose Court the petitioner claims to have been attached to work.

16. It is also evident that an attempt has been made in this case to give colour of a valid selection and appointment so as to confer better rights upon the petitioner and probably for this reason when the writ petition was entertained by this Court, an ex parte interim order was passed. Now on deeper consideration of the matter and after looking to all the orders which the petitioner has placed on record, it is evident that there was no selection at all in the eyes of law i.e. in accordance with the rules and whatever was done was only a colourable exercise so as to confer undue benefit upon certain chosen candidates and that is how the petitioner is also a beneficiary of such illegal acts.

17. These things have happened almost 18 to 19 years back and today, this Court can only express its anguish and displeasure knowing it well that on administrative side, the officers responsible for such illegal acts are immune from any action. It is really unfortunate what this Court has witnessed in this case. The highest judicial officers in the subordinate judiciary have proceeded in such a whimsical and arbitrary manner and their illegal action would have justified a stern disciplinary action against them but due to passage of long time, now it is not possible.

18. The learned counsel for the petitioner submitted that since he has continued for almost 17 years pursuant to the interim order passed by this Court, therefore, it would be extremely harsh at this fag end to tell him that his continuance in service is bad and hence this Court should permit him to continue. I am afraid that such relief is also impermissible in this case. This Court would be failing in its constitutional obligation of ensuring that the fundamental rights are not infringed at all when it comes before the Court that the fundamental rights have been infringed by the State authorities with impunity. This Court is under the oath to act and implement rule of law. It cannot permit continuance of its breach any more. This Court must straightway come forward for observance of the constitutional provisions and in particular fundamental rights instead of acting in a manner which would encourage such infringement further.

19. So far as the continuance of the petitioner under the interim order is concerned, it is well settled that no benefit

can be claimed by a person based on an interim order. This aspect has been considered by a Division Bench of this Court in **Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools, Region-I, Meerut & others 2007 (2) ESC 987,** wherein this Court having considered several authorities of the Apex Court and this Court, has observed as under :

"If a person has enjoyed certain benefits under the interim order, he/she would not be allowed to claim any further benefit due to change in law pursuant to enjoyment of certain benefit under an interim order of the Court. A benefit under the interim order is tentative and subject to final decision in the matter and cannot go beyond the final decision."

20. In view of the above discussion and considering the exposition of law as well as the statutory provisions applicable to this case, I do not find any illegality in the order impugned in this writ petition. The writ petition is devoid of merit. Dismissed.

21. Interim order, if any, stands vacated.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.10 2009

BEFORE
THE HON'BLE ARUN TANDON, J.

Second Appeal No.1727 of 1976

Rahul Sondhi ...Applicant
Versus
Amritsar Sugar Mills Co.Ltd. and others ...Opposite parties

Counsel for the Appellant:
Sri N.C. Rajvanshi
Sri P.C. Shukla

Counsel for the Opposite Parties:
Sri H.S. Nigam

Code of Civil Procedure- Section 100- Second appeal- suit for return of gun along with Cost- DBBL gun auctioned after ceasure by order passed by session judge under section 458 Cr.P.C.- remained unchallenged can not be questioned in civil suit nor the civil court has jurisdiction judgment and so for it relates to returned is decree concern-set a side by but direction for payment of value of gun as well as cost maintained.

Held: Para 9

From the fact as they exist on record it is apparently clear that after the gun was seized and orders for sale of the same were issued. Such orders for sale of the property seized during criminal proceedings are referable to Section 458 Cr. P.C. Section 458 (2) provides for an Appeal against an order of the Magistrate directing sale of the property. It is apparent from the records of this Court on 25.08.1971 when proceedings under Section 458 Cr.P.C. For sale of the gun had already taken place on 22.06.1970. It is therefore, obligatory upon the plaintiff company to have got the order of sale passed under Section 458 Cr.P.C. Set aside and then only any direction for the return of the gun could be given effect to. The plaintiff for reasons best known to it has not brought to the knowledge of the Court in his Criminal Misc. Application resulting in the order dated 25.08.1971, the fact um of the order for sale passed under Section 458 Cr. P.C. And the actual sale which had taken place on 22.06.1970 i.e. much prior to the date of the order of the High Court dated 25.08.1971 setting aside the forfeiture.

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Shri P.C.Shukla, Advocate on behalf of the appellant. Nobody is present on behalf of the defendant even in the revised reading of the cause list. This second appeal is of the year 1976. Facts in short giving rise to the present second appeal are as follows :--

2. A double barrel gun bearing no. 213347 is stated to have been stolen from the guard of M/s. Amritsar Sugar Mills Company on 11.02.1966 by one accused Ghissu. The proceedings resulted in Sessions Trial No. 95 of 1967. The accused was convicted of an offence under Section 399, 402 IPC by the Sessions Judge. His conviction was however set aside by the learned Sessions judge, Muzzaffarnagar. The order for forfeiture of the gun was upheld. The Company made an application for return of the gun, not being successful filed Criminal Misc. Case No. 1327 of 1971 before the Hon'ble High Court. The High Court passed an order on 25.08.1971 which reads as follows :

"There appears no controversy about the facts that the gun belongs to the applicant. The gun went out of their possession when it was in the custody of their Chowkidar and for reason beyond his control. The circumstances of the case warrant that the gun be restored to the applicant who certainly had no (sic) in the commission of the offence under Sections 399/402 IPC.

It is therefore, directed that the DBBL Gun No. 213347 which was directed to be forfeited by the Assistant Sessions Judge in S.T. No. 95 of 1967 and which order was confirmed in Appeal by the Sessions Judge, shall be returned to the applicant. The order of forfeiture recorded by the Trial Court and Court of Appeal is set-aside."

3. While the proceedings were pending, it appears that the gun was put to auction on 05.01.1970 under orders of the Magistrate concerned. One Shah Alam Zaidi, defendant/respondent no. 5 in the present Appeal is stated to have purchased the said gun in the auction held for a sum of Rs. 240/-. Shah Alam Zaidi subsequently sold the gun in favour of the present appeallnt namely Rahul Sondhi.

4. The Company filed Original Suit No. 585 of 1972 with the prayer that the possession of the gun be restored in favour of the plaintiff after obtaining possession of the same from defendant no. 5 i.e. the Appellant, in the alternative it was prayed that a sum of Rs.3000/- be paid towards cost of the gun and a further sum of Rs. 1500/- be awarded as damages. The suit was contested by the auction purchaser as well as by the present appellant. It was stated that the order for auction of the property in question has not been subjected to any challenge and, therefore, the relief for return of the gun could not be granted.

5. The Trial Court by means of the judgment and order dated 24.01.1976 decreed the suit with cost. The defendants were directed to hand over the gun to the plaintiff within the time specified and in case of default the plaintiff was held entitled to a sum of Rs. 3000/- as cost of the gun. However the claim for damages was rejected.

6. Not being satisfied with the judgment and order of the Trial Court the Appellant filed Civil Appeal No. 48 of

1976. The appeal has been partly allowed vide judgment and order of the Additional Civil Judge, Muzaffarnagar dated 22.07.1976. It is against the part of the judgment whereby the order directing the appellant to return the gun has been maintained the present second appeal has been filed.

7. On behalf of the appellant it has been contended that the judgment and order of the First Appellate Court is self contradictory. Counsel for the appellant has vehemently contended that since the auction of the seized property has been effected in accordance with Section 458 Cr.P.C. under orders of the District Magistrate and such order has not been set aside by any competent Court of law, the same has become final between the parties and no Civil Court can set aside the auction in terms of Section 458 Cr.P.C. The aforesaid aspect of the matter has completely been ignored by the Courts below. Any auction proceedings under the provisions of Cr.P.C., cannot be interfered in a Civil Suit. Counsel for the appellant contended that merely because the Hon'ble High Court on 25.08.1971 had set aside the order of forfeiture of the gun on miscellaneous application filed by the plaintiff company, it will not mean that the auction proceedings taken under Section 458 Cr.P.C. Automatically stand nullified.

8. I have heard learned counsel for the parties and have gone through the records of the present second appeal.

9. From the facts as they exist on record it is apparently clear that after the gun was seized and orders for sale of the same were issued. Such orders for sale of the property seized during criminal proceedings are referable to Section 458 Cr.P.C. Section 458 (2) provides for an Appeal against an order of the Magistrate directing sale of the property. It is apparent from the records of this appeal that the order declaring the seizure to be illegal was made by this Court on 25.08. 1971 when proceedings under Section 458 Cr.P.C. for sale of the gun had already taken place on 22.06.1970. It is therefore, obligatory upon the plaintiff company to have got the order of sale passed under Section 458 Cr.P.C. set aside and then only any direction for the return of the gun could be given effect to. The plaintiff for reasons best known to it has not brought to the knowledge of the Court in his Criminal Misc. Application resulting in the order dated 25.08.1971, the factum of the order for sale passed under Section 458 Cr.P.C. and the actual sale which had taken place on 22.06.1970 i.e. much prior to the date of the order of the High Court dated 25.08.1971 setting aside the forfeiture.

10. The auction so effected cannot be re-opened or set aside on a suit filed for return of the gun filed by the plaintiff. In the opinion of the Court unless the auction proceedings under Section 458 are set aside, no Civil Court has jurisdiction to direct return of the property sold under Section 458 Cr.P.C. Consequently the decree to the extend it directs return of the auctioned property cannot be upheld. Accordingly the decree is hereby set aside. However remaining part of the decree for payment of cost of the gun by defendant no. 4 is maintained.

11. The appeal stands allowed accordingly.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.10.2009

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Revision No. 3550 of 2009

Juned Pahalwan ...Applicant
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicant:
Sri V.P. Srivastava
Sri Lav Srivastava
Sri Vijay Singh Senger

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

Criminal Revision-Summoning of applicant-under Section 319 Cr. P.C.-offence under Section 302/394/506 IPC-on ground unless all the witnesses crass-examined-mere on possibility of involvement-summoning order can not be passed-alternatively till the decision of larger Bench of Apex Court in Hardeep Singh case order be kept in abeyance-held-misconceived-consideration of possibility of conviction not required under law.

Held: Para 9 & 11

In my view, the later view is to be preferred to the view taken in some decisions which have insisted on necessity for cross examining the witnesses is for reaching a finding about the probability of conviction before summoning an accused.

In view of my preference to the view taken in Hardeep Singh's case and because even in the said decision the proceedings against Vijay Preet Singh had not been stayed until the larger Bench of the Apex Court considered the matter, I see no reason for issuing notice or keeping the matter pending till the larger Bench decides the issue in the Apex Court.

Case law discussed:
1983 (1) SCC 1, 2000 (2) JIC 5 (SC), 2000(3) SCC 262, 2005 (1) JIC 107 (SC), , 2007 (58) ACC 254, 2009 (1) JIC 362 (SC), SCC 248, 1991 (9) LCD 149.

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

1. Heard Shri V.P. Srivastava, learned senior counsel for the revisionist and learned Additional Government Advocate.

2. This criminal revision has been filed challenging an order dated 13.8.2009 passed by the learned Additional Sessions Judge/Special Judge (DAA), Kanpur Dehat in SST No. 200 of 2008 summoning the revisionist in a case under sections 302/394/504/506 IPC, police station Bhognipur, Kanpur Dehat in exercise of powers under section 319 of the Code of Criminal Procedure.

3. It was mentioned in the application for summoning the revisionist that on 1.5.2008 at about 9.20 P.M., the revisionist Juned Pahalwan, Zubair Khan alias Majhlay and Hasnain alias Motey and Ghulam Jilani committed the murder of the deceased Aejaz Khan, the brother of the informant Chand Babu, who lodged a report of the incident at 11.10 PM. The revisionist was shown armed with a double barrel gun with which he fired on the deceased and the post-mortem report confirmed the said injury as there were six gun shot injuries on the deceased and 67 pellets were retrieved from the body of the deceased. These pellets were said to be forced by the DBBL gun used by the revisionist.

4. Learned trial judge observed that it was probable that the injuries to the deceased could have been caused by the DBBL gun as only one other accused Hasnain was carrying a "Pauniya" and the other accused were armed with rifles. He was, therefore, prima facie satisfied that it appeared from the evidence that the revisionist was involved in the incident. He was not impressed with the alibi evidence accepted by the investigating officer, who had recorded the 161 Cr.P.C. statement of the revisionist wherein the revisionist was said to be admitted at PHC, Naukha Rath between 30.4.2008 and 2.5.2008 for diarrhoea and vomiting.

5. Shri V.P. Srivastava, learned senior counsel for the revisionist did not raise any submission on merits. He only argued that as the Apex Court has taken the view in some cases, viz ***Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and others, 1983 (1) SCC 1, Michael Machado and another Vs. CBI and another, 2000 (2) JIC 5 (SC), 2000(3) SCC 262 and Krishnappa Vs. State of Karnataka, 2005 (1) JIC 107 (SC***) that the powers to summon an accused under section 319 Cr.P.C. was an extraordinary power to be exercised sparingly and it was only for compelling reasons that the Court could taken cognizance. Some of the recent decisions in ***Mohd. Shafi Vs. Mohd Rafiq, 2007 (58) ACC 254*** had insisted that it was only after cross-examination of a witness that an accused should be summoned and that in other recent decisions it was held that unless there was a probability of conviction a summoning order ought not to have been passed.

6. He however submitted that in ***Hardeep Singh Vs. State of Punjab and others 2009 (1) JIC 362 (SC)***, which is also a two Judge decision, the Apex Court has questioned the propriety of the view that an accused could only be summoned after the witnesses had been cross-examined and that the powers of summoning should only be exercised when there is likelihood of an accused being convicted. This matter has then been referred by the two judges Bench to a larger Bench and it was contended that until the larger Bench of the Apex Court takes a decision on the matter, the proceedings should be stayed.

7. As pointed out above, in the present case on merits, learned counsel for the revisionist could not contend that there was no probability of conviction on the evidence that was being produced. Even in *Hardeep Singh (supra*) the Apex Court was examining some connected petitions, one such special leave petition was *Manjeet Pal Singh Vs. State of Punjab and another*. It was held that there was nothing against the respondent No. 2 and the final report had been accepted by the trial court and the High Court and likewise in the case of Hardeep Singh (supra) where respondent Jagdar was not charge sheeted, the order issuing process was not held to be unlawful. Only in the case of Vijay Preet Singh where the name of the accused found place in the FIR where he was not only present with the weapon of assault (gadasa) but also arrested from scene of occurrence, his exclusion from the charge sheet was held not justified and submission of final report by the police was held not in consonance with law. The Apex Court had set aside the order by which the application under section 319 Cr.P.C. had been rejected by the trial Court. Thereafter, it had referred the matter to

the larger Bench for taking a decision on two points alluded to herein-above. Significantly in Hardeep Singh's case the proceedings against Hardeep Singh were not kept in abeyance till the consideration of the matter by the larger Bench.

8. As I find a conflict of opinions between two Judges' decisions, in my view, the view preferred in ***Hardeep Singh (supra)*** and in ***Rakesh and another Vs. State of Haryana, SCC 248***, wherein it was observed that cross examination was not material for summoning an accused and all that was required to be seen from the evidence was whether there was sufficient material or evidence for the Court to reach a conclusion that other accused who was sought to be summoned, was also involved in the commission of the crime. Probability of conviction was not required to be considered at this stage.

9. In my view, the later view is to be preferred to the view taken in some decisions which have insisted on necessity for cross examining the witnesses is for reaching a finding about the probability of conviction before summoning an accused.

10. In a Full Bench decision of this Court in ***Ganga Saran Vs. Civil Judge 1991 (9) LCD 149***, the Court held that when there is a conflict of two co-equal decisions of the Apex Court, which cannot possibly be reconciled, then it is not necessary to follow the later view, but this Court is entitled to decide which of the two views take the law more accurately and elaborately.

11. In view of my preference to the view taken in Hardeep Singh's case and because even in the said decision the proceedings against Vijay Preet Singh had not been stayed until the larger Bench of the Apex Court considered the matter, I see no reason for issuing notice or keeping the matter pending till the larger Bench decides the issue in the Apex Court.

12. I find no illegality in the impugned order, the revision is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2009

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.14145 of 2008

Rajesh Kumar Yadav & others ...Petitioners
Versus
State of U.P. Dept of Irrigation and others ...Respondents

Counsel for the Petitioners:
Sri D.S.P. Singh

Counsel for the Respondents:
Sri M.C. Chaturvedi
Sri K.R. Singh
Sri Rajiv Sharma
Sri Govind Saxena
Sri M.C. Tripathi

Constitution of India-Article-226- Cancellation of selection- selection for the Post of Nalkoop Mistri finalized- formal appointment letters was to be issued- superintending engineer by impugned order cancelled entire selection without assigning any reason - except recording the ward "inevitable reason" in counter affidavit only reason disclosed the complainant made by local M.L.A. As well as unsuccessful candidates- neither any enquiry held nor any material produced before the court

justifying the cancellation held- wholly erroneous, arbitrary without justification-order quashed- direction for appointment of selected candidate issued -within month.

Held: Para 20 & 40

Thus in view of aforesaid discussion, there can be no scope for doubt to hold that the impugned order dated 8.2.2008 passed by the Respondent No 4, cancelling the selection and select list of the petitioners dated 25.1.2008, is wholly erroneous, arbitrary and without any justification. Except the complaint of Member of Parliament and an unsuccessful candidate upon which the explanation from the Chairman/ Member of Selection committee was asked for, the Respondent No 4, or any other authority had not held any imquiry in respect of said complaint. No material was collected to find out that the allegations of complaint is correct and true, so as to record its satisfaction that selection in question was found to be so tainted that entire selection is liable to be cancelled. Therefore, in view of law laid down by the Hon'ble Apex Court referred herein before, in my considered opinion the impugned order dated 8.2.2008 passed by the Respondent No 4 cannot be sustained, accordingly same is hereby quashed.

In view of aforesaid discussion I am of the considered opinion that the selection in question is fair and proper and cannot be held to be tainted by any malpractice in the process of said selection so as to enable the respondents to record his satisfaction to cancel the said selection. Accordingly, the respondents have no justification to cancel the selection in question and without the appointment of selected candidate included in the select list dated 25.01.2008. Since it is not in dispute that the names of the petitioners are found in the select list dated25.01.2008 as approved by Superintending Engineer, Tube Well, Circle Basti contained in Annexure-3 to the writ petion, and I have already quashed the impugned order dated 08.02.2008 passed by respondent no.4 (Annexure-3 of the writ petition), therefore, the concerned respondent is directed to offer appointments to the petitioners on the post of Tube Well Mistri within a period of one month from the date of production of certified copy of the order passed by this Court before Superintending Engineer, Tube Well, Circle Basti.

Case law discussed:-

2009(2) ESC 1241, AIR 2001 SC.2196, (2001) 6 SCC 380, AIR 1984 SC 1271, AIR. 1989.SC. 1642, (1990) 2 UPLBEC 1174, AIR 2006 SC.2571, AIR 2001 SC 2196, (2001) 6 SCC 380.

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

By this petition, the petitioners have challenged the order dated 8.2.2008 (Annexure-4 of the writ petition) passed by Superintending Engineer, Nalkoop Mandal Basti (respondent no.4), whereby selection dated 25.1.2008 on the post of Nalkoop Mistri against backlog vacancies of Group C posts was cancelled.

2. The brief facts leading to the case are that initially backlog vacancies of Group C posts of Nalkoop Mistry of Basti Tube well Circle were advertised on 13.8.2007. In pursuance of which the Selection Committee had held interview on 17.11.2007 and 18.11.2007 but the aforesaid selection was cancelled on 20.11.2007 by the Superintending Engineer Tube well Circle, Basti. On the same day the aforesaid backlog vacancies were again advertised and the petitioners were selected by the Selection Committee. The select list was approved by competent authority respondent no.4 himself. Thereafter he had sent the said select list vide office order dated 25.1.2008 for joining the petitioners on

the posts shown in the select list against their names to the office of Executive Engineer, Nalkoop Division, Basti. The advertisement dated 20.11.2007 and office order dated 25.1.2008 containing the names of the selected candidates sent to the office of Executive Engineer, Nalkoop Division, Basti are on record as Annexures-2 and 3 of the writ petition. However, before appointment letters were issued by the respondent no.5 to the petitioners in pursuance of direction of Superintending Engineer dated 25th January, 2008, he himself has cancelled the said selection and select list dated 25.1.2008 without disclosing any reason therefor merely stating therein that the selection has been cancelled for inevitable reasons. The order of respondent no.4 dated 8th February, 2008 is on record as Annexure-4 of the writ petition. Feeling aggrieved against which the petitioners have filed the instant writ petition.

3. Heard Sri D.S.P. Singh, learned counsel for the petitioners and Sri K.R. Singh, learned standing counsel for the respondents.

4. Learned counsel for the petitioners has submitted that since the impugned order passed by the respondent no.4 does not disclose any reason therefore, hence in given facts and circumstances of the case the impugned order is wholly arbitrary, illegal and is not sustainable in the eye of law. Further submission of the learned counsel for petitioners is that once the selection of Nalkoop Mistry was approved by the Respondent No.4 himself vide office order dated 25.1.2008 and he himself had directed the Executive Engineer respondent no.5 to issue appointment letters to the selected candidates/ the petitioners, in that eventutility the Respondent no.4 himself could not cancel the said selection without any material on record and with out any justification therefor but from the perusal of counter affidavits filed by the respondents it is clear that there was no material before the respondent no.4 on the basis of which he could arrive at a such conclusion which could justify the cancellation of said selection. The mere complaint of Member of Parliament and any unsuccessful candidate that the selection was vitiated on account of mal-practice in said selection without any material in support thereof and without any inquiry thereon to substantiate the said complaints the selection in question and pursuant select list could not be cancelled.

5. Besides this, learned counsel for the petitioners has further submitted that the irregularity pointed out by the respondents that the selection was held in violation of certain rules of recruitment cannot be held to be sufficient ground for vitiating the entire selection unless on account of violation of alleged rules of recruitment the selection in question is otherwise found to be tainted by any malpractice. In support of his aforesaid submissions he has placed reliance upon a decision of this Court rendered in ***Ram Prakash Singh and others Vs. State of U.P. and others reported in 2009 (2) ESC 1241*** and other decisions of Hon'ble Apex Court which would be referred hereinafter.

6. In justification of impugned action taken by the respondents against the petitioners learned standing counsel has placed reliance upon the assertions made in three counter affidavits filed in the writ petition. The details of which

shall given hereinafter at relevant places. Besides this, learned standing counsel has also placed reliance upon two decisions of Hon'ble Apex Court rendered in ***Union of India and others Vs. Tarun K. Singh and others AIR 2001 SC 2196*** and in ***All India SC & ST Employees' Association and another Vs. A Arthur Jeen and others (2001) 6 SCC 380***.

7. On the basis of rival submissions of learned counsel for the parties, the first question which requires consideration of this Court is that as to whether the impugned order dated 8.2.2008 passed by Superintending Engineer respondent no.4 cancelling the selection in question is arbitrary for want of reasons? From the perusal of order dated 8.2.2008 (contained in Annexure-4 of the writ petition) passed by Superintending Engineer, Nalkoop Mandal Basti, it is clear that the impugned order does not disclose any reason therefor. It has merely stated that the approved select list dated 25.1.2008 is cancelled with immediate effect for inevitable reason. What was actual reason, is not communicated or disclosed in the impugned order.

8. In this connection, a reference can be made to a decision of Hon'ble Apex Court rendered in ***Liberty Oil Mills and others Vs. Union of India and others, AIR 1984 S.C. 1271***, wherein while dealing with the provision of Imports and Exports (Control) Act and (Control) Order, it has been held that where the decision may be taken without assigning any reason, it does not mean that reason for decision is not necessary, it merely implies that the decision has to be communicated but the reasons for such decision have not to be stated. The expression 'without assigning any reason' only means that there is no obligation to formulate the reasons and nothing more. Reason of course must exist for decision, otherwise the decision would be arbitrary. For ready reference it would be appropriate to extract the relevant portion of the observation made by Hon'ble Apex Court in para 22 of the decision as under:-

22. "The expression "without assigning any reason" implies that the decision has to be communicated, but reasons, for the decision have not to be stated. Reasons of course, must exist for the decision since the decision may only be taken if the authority is satisfied that the grant of licence or allotment of imported goods will not be in the public interest. We must make it clear that 'without assigning reasons' only means that there is no obligation to formulate reasons and nothing more. Formal reasons may lead to complications when the matter is still under investigation. So the authority may not give formal reasons, but the skeletal allegations must be mentioned in order to provide an opportunity to the person affected make his representation. Chapter and verse need not be quoted. Details may not mentioned and an outline of the allegation should be sufficient."

9. In ***M/s. Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, AIR 1989 S.C. 1642***, the Hon'ble Apex Court observed that every action of the executive authority must be subject to rule of law and must be informed by reason so whatever be the activity of public authority, it should meet the test of Article 14. Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. The pertinent observation

made in para 25 of the decision is extracted as under:-

25. "Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the Executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14."

10. The aforesaid decisions have been reiterated and followed by Hon'ble Apex Court in ***Kumari Shrilekha, Vidyarthi etc. etc. Vs. State of U.P. And others, (1990) 2 UPLBEC 1174***. The pertinent observation made in para 13 and para 30 of the said decision are extracted as under:-

*"13.. . ...However, 'without assigning any cause' is not to be equated with ' without existence of any cause'. It merely means that the reason for which termination is made need not to be assigned or communicated to the appointee. It was held in **Liberty Oil Mills and others Vs. Union of India and others, (1984) 3 SCC 464 that the expression' without assigning any reason' implies that the decision has to be communicated, but reasons for the decision have not to be stated, but the reasons must exist, otherwise, the decision would be arbitrary**."*

30. In M/s Dwarkadas and Marfatia Sons Vs. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293, the matter was re-examined in relation to an instrumentality of the State for applicability of Article 14 to all its actions. Referring to the earlier decisions of this Court and examining the argument for applicability of Article 14, even in contractual matters, Sabyasachi Mukherji,J.(as the learned Chief Justice then was), speaking for himself and Kania,J., reiterated that 'every action of the State or an instrumentality of the State must be informed by reason. . . . . actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution.' The basic requirement of Article 14 is fairness in action by the State and we find it difficult to accept that the State can be permitted to act otherwise in any field of its activity, irrespective of the nature of its function, when it has the uppermost duty to be governed by the rule of law. Non-arbitrariness, in substance, is only fair play in action. We have no doubt that this obvious requirement must be satisfied by every action of the State or its instrumentality in order to satisfy the test of validity."

11. From a close analysis of the aforesaid decisions, it is clear that even if the authority is not obliged to communicate the reasons for its decision or the decision can be taken without assigning any reason, it merely means that there is no obligation to formulate the reasons and nothing more, but the reasons for decision must exist, otherwise, the decision would be arbitrary. The basic requirement of Article 14 is fairness in action by State and State cannot be permitted to act otherwise in any field of its activity irrespective of the nature of its function when it has the upper most duty to be governed by the rule of law. The non-arbitrariness in substance is only fair play in action.

12. Now next question arises for consideration is that as to whether there exist sufficient material on the basis of

which the cancellation of aforesaid selection can be justified. But before probing such materials it necessary to refer a decision of Hon'ble Apex Court, rendered in **Inderapreet Singh Kahlon and others Vs State of Punjab and others A.I.R. 2006 SC 2571**, wherein en mass cancellation of selection of Civil Service Officers of Executive and Judicial Branches on the ground of large scale fraud in selection procedure at behest of Chairman of State Public Service Commission was under consideration. In para 41 and 42 of the said decision Hon'ble Apex Court held that before termination of services of employees whose selection was tainted the compliance of three principles at the hands of state was imperative. The pertain observation made in para- 41 and 42 of the decision are extracted as under:-

41."If the services of the appointees who had put in few years of service were terminated; compliance of three principles at the hands of the State was imperative, vis., to establish (1) Satisfaction in regard to the sufficiency of the materials collected so as to enable the State to arrive at its satisfaction that the selection process was tainted; (2) determine the question that the illegalities committed go to the root of the matter which vitiate the entire selection process. Such satisfaction as also the sufficiency of materials were required to be gathered by reason of a thorough investigation in a fair and transparent manner; (3) Whether the sufficient material present enabled the State to arrive at satisfaction that officers in mejority have been found to be part of the fraudulent purpose or the system itself was corrupt."

42."Once such findings were arrived at,all appointments traceable to the officers concerned could be cancelled."

13. In para 61 of the said decision, the Hon'ble Apex Court, held that, when the services of the employees are terminated interalia on the ground that they might have aided and abetted corruption, and thus either for sake of probity in governance or in public interest there services should be terminated, the court must satisfy itself that conditions therefor exist. The court while setting aside a selection may require the state to establish that the process was so tainted that entire selection process is liable to be cancelled. The pertinent observations made in this regard in para 61 of the decision are as under:-

***61.**............But, when the services of the employees are terminated interalia on the ground that they might have aided and abetted corruption and, thus, either for the sake of probity in governance or in public interest their services should be terminated; the court must satisfy itself that conditions therefor exist. The court while setting aside a selection may require the State to establish that the process was so tainted that the entire selection process is liable to be cancelled.*

14. Now coming to the materials placed by the respondents in justification of the impugned action taken by the respondent no. 4. Three counter affidavits have been filed by the respondents in pursuance of various directions given by this Court. In the first counter affidavit sworn on 24th April, 2008 filed by Rama Shanker Gupta posted as Assistant Engineer, Mechanical Tube well Division, Basti the reasons for cancellation of the

aforesaid selection are given in paras 6, 7 and 10 of the counter affidavit as under:-

*"**6**. That in reply to the contents of paragraph nos. 4 & 5 of the writ petition it is submitted that namely Sri Lal Mani Prasad, Member of Parliament, District Basti had made a complaint to the Superintendent Engineer, Tube-well Circle, Basti regarding serious mala-practice in the selection process and alleged that complete process was vitiated on several accounts, thereafter Senior Official has directed not to issue any appointment letter in favour of the selected candidates. Thereafter, due to serious allegations the respondent no. 4 had cancelled the Selection Committee and its selection process. Thereafter the Chief Engineer vide letter dated 29.01.2008 had given clear cut direction to the Superintendent Engineer not to issue any appointment letter in favour of the selected candidates. A photo copy of the complaint dated 28.01.2008 made by the Mr. Lal Mani Prasad, Member of Parliament and letter dated 29.01.2008 issued by Chief Engineer are being filed herewith and marked as **Annexure No. CA-1 & 2** to this affidavit.*

7. That the contents of paragrah no. 6 of the writ petition are not admitted as stated, hence vehemently denied. It is further submitted that the serious allegations had been leveled against the said selection and its process. Thereafter it had been found that namely Sri Angad Prasad, Executive Engineer, Nalkoop Division Siddharth Nagar was a Chairman of the Selection Process and other members namely Sri Sohan Ram-Executive Engineer, Sri Virendra Singh-Executive Engineer and Sri Shiv Shankar Gupta Sub Divisional Magistrate, Sadar District Basti and Sri Vishwanath Gupta Executive Engineer were other members of the Selection Committee. The interview were taken place on 17.11.2007 and 18.11.2007, after completing the interview it had been found that the Chairman of the Selection Committee had breached the secrecy and without any approval from the Competent Authority had declared the result on the notice board. The result of the said selection was declared without any approval from the Superintending Engineer Nalkoop Circle Basti, the conduct of the Chairman was against the rules and regulations. It is pertinent to mention here that the Appointing Authority is Superintending Engineer, in this regard the departmental enquiry has already been commenced, therefore, under these circumstances the alleged selection was cancelled by the Competent Authority.

10. That the contents of paragraph no. 9 of the writ petition are not admitted hence vehemently denied. It is submitted that the whole process of selection was vitiated and tented on various grounds and also serious allegations had been levelled against the Chairman and its members, thereafter departmental enquiry has also been initiated under these circumstances the whole selection was cancelled. Under these circumstances individual notice to the petitioners were not required and there is no violation of natural justice."

15. From a close analysis of averments made in the said counter-affidavit and enclosures appended thereto, it appears that averments contained in para-7 of the counter-affidavit pertain to the earlier selection in respect of which interview was held on 17.11.2007 and 18.11.2007 which was cancelled on

20.11.2007. The aforesaid selection is not in dispute, but respondents have tried to mixed up the facts of earlier selection, with the present selection which is subject matter of the dispute. In respect of instant selection, only this much is stated that Sri Lal Mani prasad Member of Parliament had made a serious complaint about the selection to the Superintending Engineer Tube-well circle Basti on 28.1.2008, the copies of which were also endorsed to the Chief Engineer Tube-well and Engineer in Chief of irrigation department. On receipt of said complaint, the Chief Engineer, Tube-well wrote a letter to the Superintending Engineer Tube-well circle Basti on 29.1.2008, directing him, that Executive Engineers of concerned divisions may be, directed not to appoint selected candidates nor they be given charge of the work until further, orders. The aforesaid complaint and letter of Chief Engineer are on record as Annexure - CA-1 and CA-2 to the counter-affidavit. Except the aforesaid complaint and the letter of the Chief Engineer, no other materials are placed on record. Therefore after going through the aforesaid counter-affidavit on 1.8. 2008 this Court has directed the respondents to bring on record those materials on the basis of which the approved select list dated 25.1.2008 was cancelled. Thereafter another counter-affidavit sworn by Sri Rakesh Sharma posted as Superintending Engineer in the office of Chief Engineer at Lucknow has been filed.

16. In the para 3,4,5,6 and 7 of the said counter-affidavit, it is stated that three posts of Tube-well machines (Nalkoop mistri) were advertised in various Newspapers on 20.11.2007, in pursuance of which interview of all eligible candidates was held by selection committee on 23.1.2008 and 24.1.2008. The selection was based on the marks obtained in qualifying examination as well as interview. The petitioners were selected by the selection committee and their selection was approved by Respondent No 4. vide his order dated 25.1.2008. However before the appointment letter could be issued to the selected candidates/ petitioners, the Respondent No 4 received very strong complaint from Sri Lal Mani Prasad Member of Parliament stating therein that the earlier selection (which was cancelled) has been restored by the Chairman/ Member of Selection Committee by taking heavy amount of gratification consequently the Chief Engineer vide his letter dated 29.1.2008 directed the Respondent No 4 not to issue appointment letters to the petitioners and not to permit them to join.

17. In Para 8 to11 of the said counter affidavit it is further stated that apart from complaint made by Member of Parliament, there have been complaints from many other candidates levelling the same allegation against the selection in question. A true copy of one such complaint is enclosed as Annexure -1 of the said affidavit. It is stated that the Respondent No 4 immediately made an inquiry to fortify the allegations levelled in the letter of Member of Parliament by writing a letter to him on 31.1.2008, requesting him to submit the evidence in support of allegations levelled against Chairman and Member of Selection Committee. A true copy of the said letter dated 31.1.2008 has been filed as Annexure-2 of the said affidavit. Not only this but the Respondent No 4, has also sought explanation from the Chairman of the Selection committee namely Sri

Sohan Ram Executive Engineer vide his letter dated 31.1.2008 in respect of allegation levelled by the Member of Parliament. A true copy of said letter dated 31.1.2008 has been enclosed as Annexure- 3 of the said counter- affidavit. It is stated that when no explanation was submitted by the Chairman of the Selection committee, the Respondent No 4, wrote another letter on 5.2.2008 asking him to submit his explanation by 7.2.2008 so that superior officers may be apprised in this regard. A copy of said letter has been enclosed as Annexure -CA 4 of the said counter-affidavit.

18. In Para 12,13 and 14 of the said counter-affidavit it is further sated that in the inquiry the Respondent No.4, found the allegations levelled against the Chairman and Member of Selection Committee to be prima facie correct, and as such he had no option but to cancel the said selection. It is stated that departmental proceeding have been initiated against the erring members of the Selection committee to take appropriate action against them. For ready reference the averments made in para 12,13 and 14 of the said counter-affidavit are extracted as under:-

12. *That in the inquiry, the Respondent No. 4 found the allegations leveled against the Chairman/Members of the Selection Committee to be prima-facie correct and as such he had no option but to cancel the appointment with immediately affect the Respondent No. 4.*
13. *That the Respondent No. 4 has cancelled the Selection in order to ensure fair selection in future and to prevent repetition of such activities.*
14. *That the Departmental Proceedings have been initiated against the erring Members/Chairman of the Selection Committee in order to take appropriate action against them."*

19. From the perusal of averments contained in and materials placed through, the aforesaid counter-affidavit, only this much is clear that on receipt of the complaint about the selection in question, the Respondent No 4 had written letter to the complainant Sri Lal Mani Prasad, M.P. to adduce his evidence in support, of the allegation levelled in the complaint and also sought explanation from Chairman of the Selection Committee namely Sohan Ram Executive Engineer. There is nothing to indicate that complainant Sri Lal Mani Prasad and/ or any other such complainant has adduced any evidence before Respondent No 4 or before any other Inquiry Officer in support of of the allegations contained in the said complaint. Apart from it no material has been brought on record to show that Respondent No 4 and/ or any other officer had held any inquiry in respect of allegation levelled against said selection. There is nothing on record to show that allegations levelled against Chariman and Member of Selection committee, are found prima facie, correct. No finding of any sort of inquiry is brought on record through the aforesaid counter-affidavit, so as to enable the court, to know on the basis of which such conclusion was drawn by the Respondent No 4, therefore, in my considered opinion mere allegation in the said affidavit cannot take the place of proof. Further no material has been brought on record to show initiation of any departmental proceeding against Chairman /Member of Selection Committee as such mere allegation in this regard cannot take the

place of proof as it is well settled principle of law.

20. Thus in view of aforesaid discussion, there can be no scope for doubt to hold that the impugned order dated 8.2.2008 passed by the Respondent No 4, cancelling the selection and select list of the petitioners dated 25.1.2008, is wholly erroneous, arbitrary and without any justification. Except the complaint of Member of Parliament and an unsuccessful candidate upon which the explanation from the Chairman/ Member of Selection Committee was asked for, the Respondent No 4, or any other authority had not held any inquiry in respect of said complaint. No material was collected to find out that the allegations of complaint is correct and true, so as to record its satisfaction that selection in question was found to be so tainted that entire selection is liable to be cancelled. Therefore, in view of law laid down by the Hon'ble Apex Court referred herein before, in my considered opinion the impugned order dated 8.2.2008 passed by the Respondent No 4 cannot be sustained, accordingly same is hereby quashed.

21. At this juncture, before further proceeding with the case, it is necessary point out that in aforestated situation after quashing the impugned order ordinarily this court does not issue writ of mandamus or direction to the authorities to offer appointment to the selected candidates unless the selection is found to be fair and proper, but instead of leaving matter with the authorities to hold fresh inquiry in a fair and transparent manner that as to whether the selection is fair or is tainted by any malpractice and take appropriate decision thereon, in order to avoid further litigation, and leaving the selected candidates for running pillar to post, this court has directed the authorities to bring the materials on record, even if such inquiry is held subsequently, after cancelling the said selection, and file the same on affidavit, by keeping the petition pending consequently another supplementary counter-affidavit sworn on 3.7.2009 has been filed, by Sri Rama Shanker Gupta Assistant Engineer.

22. The averments made in para 2 to 6 of the said supplementary counter affidavit are extracted as under:-

"2. यह कि प्रारम्भिक जांच में नलकूप मिस्त्री चयन प्रक्रिया में नियमावली का उल्लंघन होना पाया गया है अतएव चयन समिति एवं चयनसूची का निरस्तीकरण उचित है।

3. यह कि चयन प्रक्रिया के दोषपूर्ण एवं नियमों के उल्लंघन के लिए दोषी अधिकारी प्रशासनिक स्तर (ग्रुप-ए) के हैं अतएव अंतिम जांच शासन को अनुमोदनार्थ श्री अरूण कुमार, मुख्य अभियन्ता (स्तर-1) सि० (यांत्रिक) विभाग द्वारा प्रस्तुत की जानी है।

4. यह कि बैकलाग के अन्तर्गत नलकूप खण्ड-बस्ती में नलकूप मिस्त्री पद पर की गयी भर्ती प्रक्रिया में अनियमितता के सम्बन्ध में वरिश्ठ स्टाफ अधिकारी (नलकूप) सिंचाई विभाग, उ०प्र० के अ० शा० पत्रांक 4753/ नलकूप/ निांक 25.06.2009 द्वारा अधीक्षण अभियन्ता नलकूप मण्डल, बस्ती को वस्तुस्थिति स्पष्ट करते हुए प्रतिशपथपत्र दाखिल करने हेतु निर्देशित किया गया है। पत्र दिनांक 25.06.2009 की छायाप्रति माननीय न्यायालय के अवलोकनार्थ इस अनुपूरक प्रतिशपथपत्र के साथ **संलग्न एस०सी०ए०-1** के रूप में संलग्न की जा रही है।

5. यह कि सन्दर्भित प्रकरण में मुख्य अभियन्ता (यांत्रिक) स्तर पर-1, सिंचाई विभाग, उ०प्र० लखनऊ के पत्रांक 3403/ नलकूप/बैकलाग/दिनांक 01.05.2008 द्वारा शिकायतकर्ता श्री विजय कुमार शर्मा (अभ्यर्थी) एवं श्री लालमणि प्रसाद सांसद के शिकायती पत्र पर आख्या मांगी गयी है। पत्र दिनांक 01.05.2008 की छायाप्रति माननीय न्यायालय के अवलोकनार्थ इस अनुपूरक प्रतिशपथपत्र के साथ **संलग्नक एस०सी०ए०-2** के रूप में संलग्न की जा रही है।

6. यह कि अधीक्षण अभियन्ता, नलकूप मण्डल, बस्ती के अ०शा०पत्रांक 4738/न०म०ब०/ जांच दिनांक 20.05.2009 द्वारा विन्दुवार सूचना मुख्य अभियन्ता नलकूप पूर्व फैजाबाद के माध्यम से भेजी गयी है एवं प्रतिलिपि वरिश्ठ स्टाफ अधिकारी (नलकूप) कार्यालय प्रमुख अभियन्ता सिंचाई विभाग उ०प्र० लखनऊ को दी गयी है। प्रकरण में निर्णय अद्यतन स्थिति में अपेक्षित है। पत्र दिनांक 20.05.2009 की छायाप्रति माननीय न्यायालय के अवलोकनार्थ इस अनुपूरक प्रतिशपथपत्र के साथ **संलग्नक एस०सी०ए०-3** के रूप मे संलग्न की जा रही है।"

23. From the perusal of abovenoted supplementary counter-affidavit and enclosures attached therewith, it appears that after cancellation of selection dated 25.1.2008 vide impugned order dated 8.2.2008, a preliminary inquiry was held by the authorities wherein as transpires from the records (Annexure-CA-2 to the supplementary counter-affidavit) that Sri D.C. Agrawal Chief Engineer (Mechanical) level -I poseted in the office of Engineer in Chief, Irrigation department vide his letter dated 1.5.2008 had directed the Chief Engineer (Tube-well) (East) Irrigation Department U.P. Faizabad, to send his point-wise comments, in respect of complaints of Sri Vijai Kumar Sharma (candidate) and Sri Lal mani Prasad Member of Parliament regarding irregularities committed in selection of Nalkoop Mistri, held by the office of tube-well circle Basti. By the aforesaid letter, point-wise comments/ reply of total six questions were sought for. In compliance of the said direction, the Superintending Engineer Tube-well circle Basti, vide his report dated 20.5.2009 (as revealed from Annexure-CA-3 of the said supplementary counter-affidavit) has submitted his comments on the aforesaid points to the Chief Engineer tube-well (East) Irrigation Department Faizabad which are dealt with herein after.

24. While replying the question No 1, in respect of nomination of Chairman and Members of the earlier selection committee in new selection committee the superintending Engineer Tube-well circle Basti has stated that, in the earlier selection committee. Sri Angad Prasad, Executive Engineer, Tube-well Division, Siddharth Nagar, was Chairman, and Sri Sohan Ram, Executive Engineer (attached with the Tube-well circle Basti), Sri Virendra Singh, Executive Engineer, Tube-well Division Basti, Sri Vishwanath Gupta Executive Engineer Tube-well Division Sant Kabir Nagar, and nominee of the District Magistrate were Members. Besides other things it is also stated that Sri Rakesh Sharma, the then Superintending Engineer, had written a letter to the Chief Engineer on 22.11.2007 for fresh nomination of Chairman and Member of new Selection Committee by changing earlier Chairman and Members, but finding no response, from, the Chief Engineer, he himself, within his discretion has nominated Chariman and Members of Selection Committee by excluding Sri Angad Prasad, Executive Engineer, Tube-well Division, Siddharth Nagar and Sri Vishwanath Gupta, Executive Engineer. Tube-well Division Sant Kabit Nagar. who were nominated as Chairman and Member in earlier Selection Committee. In the new selection committee, Sri Sohan Ram, Executive Engineer, who was Member of earlier Selection Committee, was nominated as Chairman and Sri Virendra Singh who was member of Earlier committee was again nominated as Member of new Selection Committee besides other new Members, It is also stated that since no inquiry was pending against Sri Sohan Ram, Executive Engineer, and Sri Virendra Singh, Executive Engineer, in respect of earlier

selection which was cancelled on 20.11.2007, therefore, aforesaid Chairman and Member of the new Selection Committee cannot be said to be tainted.

25. While making reply of question No-2, that what was reason for cancellation of earlier selection held prior to 23.1.2008 and 24.12008, it is stated that earlier select list was published by Sri Angad Prasad the then Chairman of the Selection Committee without prior approval of the Superintending Engineer Tube Well, Circle Basti and it was cancelled on the ground that, it was found tainted. Whereas in respect of reply of question No-3 that as to whether the money was demanded by the Selection committee from the Selected candidates, it is stated that there is no material on record on the basis of which it can be held that Selection Committee had demanded any money from selected candidates.

26. However, while replying fourth question that as to whether, selection process was transparent, it is stated that while interviewing the candidates the provisions of Sub-Rule-4 (c) of Rule-5 of Uttar Pradesh Procedure for Direct Recruitment for Group-C Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) (First Amendment) Rules, 2003 notified and published on 21.6.2003 in extraordinary Gazette of U.P. have been violated, therefore, Sri Rakesh Sharma, the then Superintending Engineer, has been found prima facie guilty for violation of said rules. It is stated that under aforesaid Rules, it is provided that the marks secured by the candidates under Sub-Rule-3 (a), (b) and (c) of Rule-5 of rules in question shall not be disclosed to the Chairman and Members of the Selection Committee at the time of interview, but from the perusal of broad-sheet, prepared at the time of interview, it appears that the marks obtained by the candidates under the aforesaid provisions of rules were disclosed to the Chairman and Members of the Selection Committee at the time of interview, thus thereby the provisions of the aforesaid rules were violated.

27. While replying the question No 5, that as to whether Virendra Singh, Executive Engineer and Sri Sohan Ram, Executive Engineer are prima facie quilty of committing any irregularity in selection process, it is stated that Sri Sohan Ram, Executive Engineer, chairman, and Sri Virendra Singh Ex Engineer, Member of the Selection committee are not found prima facie guilty of committing any irregularity in selection process. However, it is further stated that marks obtained by the candidates were communicated to the selection committee by the Superintending Engineer, Tube-well circle Basti, resulting which transparency of selection process has been violated.

28. While making reply of question No 6, that as to whether selection was held under supervision of the Superintending Engineer Tube-well circle Basti, it is pointed out as earlier in reply of question No 4 that the provisions of Sub-rule 4 (c) of Rule-5 of Rules in question were violated by the then Superintending Engineer Tube-well Circle Basti, consequently the transparency of selection process was offended. It is also stated that nothing transpires from record, that the selection was held under supervision of the superintending Engineer Tube-well circle Basti. Except the aforesaid comments no other opinion is expressed by the

Superintending Engineer in respect of the selection in question in his preliminary report dated 20.5.2009 sent to the Chief Engineer. Therefore in order to arrive at a correct conclusion about the fairness of selection in question, it is necessary to analyse the aforesaid findings of preliminary inquiry report dated 20.5.2009.

29. From a close analysis of the aforesaid report of preliminary inquiry, it is clear that Sri Angad Prasad, Executive Engineer, Tube well Division Siddharth Nagar and Sri Vishwanath Gupta, Executive Engineer, Tube well Division, Sant Kabir Nagar who were respectively Chairman and member of the earlier selection committee were not nominated as Chairman and member of new selection committee in question again, rather they have been excluded therefrom. In new selection committee Sri Sohan Ram, Executive Engineer attached with Tubewell Circle Basti was nominated as Chairman and Sri Virendra Singh, Executive Engineer, Tubewell Division was also nominated as member, therefore the allegation levelled in the complaint, that earlier Chairman and members of selection committee have been again nominated as Chairman and members of new selection committee, is factually incorrect. It is no doubt true that Sri Sohan Ram, Executive Engineer and Sri Virendra Singh, Executive Engineer were members of earlier selection committee, but no inquiry was found pending against them in respect of earlier selection which was cancelled on 20.11.2007. Beside this, they were also not found prima facie guilty of committing any irregularity nor the new selection committee was found to have demanded money from selected candidates. The finding of preliminary inquiry report to the effect that there is nothing to indicate that the selection in question was held under the supervision of the Superintending Engineer, Tubewell Circle Basti, in my considered opinion, appears to be misconceived and without any legal consequence, which could adversely affect the process of selection particularly in wake of fact that the new selection committee which has held the selection in question was constituted by him.

30. However, so far as violation of provisions of sub-rule 4 (c) of Rule-5 of Procedure for Direct Recruitment for Group-C Posts (First Amendment) Rules, 2003 is concerned, it is to be noted that the recruit on the posts of Tube-Mechanics (Nalkoop Mistri) is governed by a set of Rules framed under the proviso to Art. 309 of the Constitution of India namely Tube-well Mistri Service Rules - 1951, but since aforesaid service is a Sub-ordinate service and posts falling thereunder come within the purview of Group -C posts, therefore, having overriding effect upon the relevant service rules, the recruitment for such posts is governed by the U.P. Procedure for Direct Recruitment for Group-C Posts(Outside the Purview of U.P. Public Service Commission) Rules, 2002 as amended from time to time including amended Rule-2003.

31. It is to be noted that, while making comments or reply to the question No.4 vide his preliminary report dated 20.5.2009 sent to the Chief Engineer, the Superintending Engineer has stated the violation of aforesaid provisions of the rules in the selection in question. Therefore, at this juncture the question which arises for consideration is that as to

whether violation of sub-rule 4 (c) of Rule 5 of (First Amendment) Rule 2003 would ipso facto vitiate the entire selection in question or it requires some thing more? In order to find out accurate answer to this question, it is necessary to have a survey of Rule-4 of the U.P. Procedure for Direct Recruitment for Group C posts (outside the Purview of U.P. Public Service Commission) Rules 2002 and amended rule 5 of 2003 Rules which reflects entire process of selection for Group C posts under the said rules.

32. Rule 4 of 2002 Rules deals with the determination of vacancies by the Appointing authority for the purpose of selection to be made in the recruitment year. In case Chairman of Selection Committee is an officer other than the Appointing authority, the Appointing authority is required to intimate the vacancies to the Chairman of the Selection Committee who shall thereupon proceed to hold selection according to the procedure prescribed for recruitment under Rule-5 of the said rules. For ready reference the provisions of Rule-4 of 2002 Rules are extracted as under:-

"4. The appointing authority shall determine the number of vacancies to be filled during the course of the year as also the number of vacancies to be reserved for candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with the relevant service rules. In case the Chairman of the Selection Committee is an officer other than the appointing authority, the appointing authority shall intimate the vacancies to the Chairman of the Selection Committee."

33. By rule 2 of the Uttar Pradesh Procedure for Direct Recruitment for Group C posts (Outside the Purview of the U.P. Public Service Commission) (First Amendment) Rules 2003 the entire provisions of existing Rule-5 of 2002 rules have been substituted by amending rules 2003 as under:-

"5.(1) For making direct recruitment the vacancies shall be notified in the following manner:-

(i). . . . . ;
(ii). . . . . ;
(iii)....
(2) . . . . .
(3)The selection shall carry one hundred marks. The merit list of the candidates shall be prepared in the following manner:-
(a) (1) Such posts for which only academic qualifications are prescribed, the marks shall be awarded to each candidate in the following manner:-
. . . . .
. . . . .
(b) Marks to a retrenched employee shall be awarded in the following manner subject to the maximum of fifteen marks:-
. . . .
. . . .
(c) Marks to a sportsman shall be awarded in the following manner subject to the maximum of five marks:-
(d) ....
(4)(a) After the results of the evaluations under cluases (a),(b),(c) and (d) of sub-rule (3) have been received and tabulated, the Selection Committee shall, having regard to the provisions of reservation referred to in rule-4, hold an interview. The number of candidates to be called for interview against the number of vacancies shall be such as is considered appropriate

by the Selection Committee, but in any case it shall not exceed ten candidates for one vacancy.

(b) ***The interview shall carry fifty marks.*** *Marks at the interview shall be awarded in the following manner:-*

(i) Subject/General Knowledge-Up to ten marks.

(ii) Personality Assessment- Up to twenty marks.

(iii) Power of Expression- Up to twenty marks.

(c) ***The Chairman and Members of the Selection Committee shall, in no case, be provided any information with regard to marks obtained by candidates under clauses (a), (b) and (c) of Sub-rule (3) at the time of interview.***

(5) The marks obtained by each candidate at the interview under sub-rule (4) shall be added to the marks obtained under sub-rule (3). The final select list shall be prepared on the basis of aggregate of marks so arrived. If two or more candidates obtained equal marks in the aggregate, the candidate senior in age shall be placed higher in the select list."

(6) The select list referred to in sub-rule (5) shall be forwarded to the appointing authority.

34. From a joint reading of Rules 4 and 5 of the said rules it is clear that appointing authority is obliged to determine the number of vacancies to be filled up during the course of year as also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with the relevant service rules and where the Chairman of Selection Committee is an officer other than the appointing authority, the appointing authority shall intimate the vacancies to the Chairman of the Selection Committee who shall thereupon advertise the vacancies and shall proceed to hold selection as provided under Rule-5 as amended by amended Rules 2003.

35. From a careful reading of entire provisions of Rule 5 of Procedure for Direct Recruitment for Group C Posts Rules 2002, which is substituted by Rule-5 of First Amendment Rules 2003, it appears that entire process of selection of candidates has to be carried out by Selection Committee constituted for said purpose. As revealed from sub-rule 3, of rule 5 of said rules, it appears that the marks of candidates has to be computed in the manner given under clauses (a),(b),(c) and (d) of said rules and under sub-rule 4(a) of Rule 5 of Amended Rules 2003 it appears that after the result of evaluation under clauses (a), (b), (c) and (d) of sub-rule 3 have been received and tabulated, the Selection Committee shall having regard to the provisions of reservation referred to in Rule 4 hold an interview. The number of candidates to be called for interview against the number of vacancies shall be such as is considered appropriate by the Selection Committee but in any case it shall not exceed ten candidates for one vacancy. Sub-rule 4(b) of Rule- 5 provides that the interview shall carry 50 marks and manner of allocation of marks in interview under different heads have also been provided thereunder. Sub-rule 4(c) of Rule 5 of said rule stipulates that the Chairman and members of Selection Committee shall, in no case, be provided any information with regard to the marks obtained by candidates under clauses (a), (b) and (c) of sub-rule 3 at the time of interview. Sub-rule 5 of Rule 5 of 2003 rules provides that the marks obtained by each

candidate at the interview under sub-rule 4 shall be added to the marks obtained under sub-rule 3. The final select list shall be prepared on the basis of aggregate of marks so arrived. Sub-rule 6 further provides that select list referred to in sub-rule 5 shall be forwarded to the appointing authority.

36. Thus, from a careful reading of the aforesaid rules it indicates that the rules are silent as to whether there exist any other separate authority or agency which would undertake the task of evaluation and tabulation of marks secured by the candidates under clauses (a), (b), (c) and (d) of sub-rule 3 of Rule 5 of the said rules. In absence of any separate authority for said purpose it can be readily assumed that the aforesaid task of evaluation and tabulation of marks of candidates under sub-rule 3 of Rule 5 of 2003 rules has to be undertaken by the Selection Committee itself. In such situation it is very difficult to assume that while undertaking the aforesaid task, the Selection Committee would not be informed or aware of the marks obtained by the candidates under clauses (a), (b), (c) and (d) of sub-rule 3 of rule 5 of 2003 Rules. Therefore, in my opinion, legal embargo contained under sub-rule 4 (c) of Rule-5 of 2003 Rules to the effect that in no case the Chairman and members of Selection Committee shall be provided any information with regard to the marks obtained by the candidates under clauses (a), (b) and (c) of sub-rule 3 of Rule 5 of the rules in question at the time of interview appears to be impracticable and unworkable unless Rules in question provides for separate authority to carry out the task of evaluation and tabulation of marks of candidates under sub-rule 3 of Rule 5 of rule in question and after completing the aforesaid task, the said authority would further undertake to withhold the aforesaid information with it and after determination of number of the candidates to be called for interview, they would be forwarded to the Selection Committee.

37. But contrary to it from careful reading of sub-rule 4 (a) of Rule 5 of the Rules in question it appears that after the result of evaluation under clauses (a), (b), (c) and (d) of sub-rule 3 have been received and tabulated, the Selection Committee shall having regard to the provisions of reservation hold an interview. The number of candidates to be called for interview against the number of available vacancies has to be determined by the Selection Committee, which does not appear to be practicable unless the Selection Committee peruse or is informed about the tabulated marks obtained by the candidates under sub-rule 3, and take into account while calling the appropriate number of candidates for interview. In other words unless the selection committee would go through the merit list prepared on the basis of marks obtained by the candidates under sub-sub rule 3 of rule 5 of the said Rules, it would not be practicable for the Selection Committee to call the requisite number of candidates for interview which has to be found appropriate by it. It leaves no room for doubt to hold that the Selection Committee being in the helm of affairs of entire process of selection under the existing set of rules of recruitment cannot be prevented from perusing the marks obtained by the candidates under sub-rule 3 of rule-5 of the rules even if the marks obtained by the candidates are not provided to the Chairman and members of the Selection Committee at the time of

interview. Thus, in my opinion, under the existing set of rules, the marks obtained by the candidates under clauses (a), (b) and (c) of sub-rule 3 of Rule-5 of rules in question cannot be kept secret from the Chairman and members of Selection Committee as it does not appear to be practicable and workable.

38. It is no doubt true that sub-rule 4(c) of Rule 5 seems to be enacted to maintain secrecy in respect of marks obtained by the candidates under sub-rule 3 of Rule-5 at the time of interview from Chairman and members of Selection Committee so that the Selection Committee may not be capable to favour the candidates intended to be selected by it by awarding excessive marks to such candidates in interview. But unless there exist any other separate authority/agency for evaluation and tabulation of marks obtained by the candidates under sub-rule-3 and further such authority/agency would undertake to determine the number of candidates to be called for interview having regard to the number of vacancies available for such selection, it is very difficult to assume that secrecy of marks obtained by the candidates under sub-rule 3 of Rule-5 of rules in question can be maintained from the Chairman and members of Selection Committee particularly where the same Chairman and members of Selection Committee has to carry out the task of evaluation and tabulation of marks obtained by the candidates under sub-rule-3 of Rule-5 and further task of determination of number of candidates to be called for interview on the basis of marks obtained by the candidates under sub-rule 3 of Rule-5 of the said Rules. Therefore, in my opinion, unless it is found that the Selection Committee has unduly favoured the selected candidates by awarding excessive marks to them in the interview, the mere fact that the Chairman and members of Selection Committee have been informed about the marks obtained by the candidates under clauses (a), (b) and (c) of sub-rule 3 of Rule-5 of rules at the time of interview, as revealed from the broad sheet of selection, would not ipso facto vitiate the selection in question.

39. Now, coming the to the facts of the case as revealed from preliminary report of Superintending Engineer dated 20th May, 2009 contained in Annexure CA-3 to the supplementary counter affidavit filed on behalf of respondents there is nothing to indicate that the selected candidates have been unduly favoured in interview by awarding excessive marks to them by the Chairman and members of Selection Committee instead thereof it has been shown that the Chairman and members of Selection Committee are not found prima facie guilty of committing any irregularity in process of selection and it was further reported that the Selection Committee has not demanded any gratification/money from the candidates, as such in given facts and circumstances of the case in my considered opinion the selection in question cannot be held to be tainted on account of any malpractice in said selection. Any alleged irregularity in respect of violation of sub-rule 4 (c) of Rule 5 of 2003 Rules would not automatically vitiate the entire selection unless any malpractice is found to be proved in the said selection. In given facts and circumstances of the case the decisions of Hon'ble Apex Court cited by learned standing counsel rendered in ***Union of India and others Vs. Tarun K. Singh and others*** reported in ***AIR 2001***

SC 2196 and ***All India SC & ST Employees' Association and another Vs. A Arthur Jeen and others (2001) 6 SCC 380*** have no application, as such can be of no assistance to the case of respondents.

40. In view of aforesaid discussion I am of the considered opinion that the selection in question is fair and proper and cannot be held to be tainted by any malpractice in the process of said selection so as to enable the respondents to record his satisfaction to cancel the said selection. Accordingly, the respondents have no justification to cancel the selection in question and withhold the appointment of selected candidates included in the select list dated 25.01.2008. Since it is not in dispute that the names of the petitioners are found in the select list dated 25.01.2008 as approved by Superintending Engineer, Tube Well, Circle Basti contained in Annexure-3 to the writ petition, and I have already quashed the impugned order dated 8.2.2008 passed by respondent no.4 (Annexure-3 of the writ petition), therefore, the concerned respondent is directed to offer appointments to the petitioners on the post of Tube Well Mistry within a period of one month from the date of production of certified copy of the order passed by this Court before Superintending Engineer, Tube Well, Circle Basti.

41. With the aforesaid observation and direction, writ petition succeeds and stands allowed.

ORIGINAL JURIDICTION
CIVIL SIDE
DATED ALLAHABAD: 24.10.2009

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

Civil Misc. Writ Petition No.10725 of 2009

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

Counsel for the Petitioner:
Sri R.K.Ojha
Sri Ripu Daman Singh
Sri Ashok Khare

Counsel for the Respondents.
Sri V.K.Upadhyaya
Sri Ritvik Upadhyaya
Sri Samir Sharma
Sri S.R.Singh,C.S.C.

U.P. Intermediate Education Act-1921-Section 7-A (a)-selection of Head of Institution up gradation from high school to Intermediate-recognisation by Govt confined in respect of preparing student for admission to examination-and not regarding creation of post-selection of petitioner as head of Institution by the U.P. Secondary Education Commission-entitled to join and to look after the affairs of Inter classes also-direction issued accordingly.

Held-Para 22-

So far as the present petitioner is concerned, there is nothing to indicate that the petitioner is not qualified to hold the post of the Principal of the Institution. In my opinion, the advertisement issued in the category of High School and not as an Intermediate College does vitiate the selection of the petitioner which has been made on the post of the Headmaster of the High School level. The selections having been

made for the post that was requisitioned is therefore in order. The said requisition or the advertisement is not invalidated on account of the recognition order dated 30th March, 1998 inasmuch as, as explained above, the alleged transformation in the status of the post is not such so as to invalidate the selection of the petitioner on the post in question.

Case law discussed:
2008 (3) ESC 409, 1981 UPLBEC 336, 2006(2) AWC 1561, 2007(4) ADJ 357 (DB), 2007 (10) ADJ 248, 1999 (1) Education and Service Cases 168.

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

1. Heard Sri R.K. Ojha, learned counsel for the petitioner assisted by Sri Ripu Daman Singh and Sri V.K. Upadhyaya, learned Senior Counsel assisted by Sri Ritvik Upadhyaya for the respondent No.4-Committee of Management. Sri Ashok Khare, learned Senior Counsel has filed an impleadment application on behalf of the person, who is stated to be functioning as an Officiating Principal of the Institution. The said application has been entertained under Chapter 22 Rule 5-A of the Allahabad High Court Rules. Sri A.K. Yadav, learned counsel has been heard for respondent No.5 and learned Standing Counsel for the respondents No.1 to 3.

2. This petition questions the selections on the post of Principal in Aditya Birla Inter College, Renukoot, Sonebhadra, which is an institution recognized and governed by the provisions of the U.P. Intermediate Education Act, 1921 and the Regulations framed thereunder. The institution is under the grant-in-aid list of the State Government for running twenty-four Sections upto the level of High School for which recognition already stood granted by the State Government. The selection of teachers and the Head of the Institution is governed by the provisions of the U.P. Secondary Education Services Selection Board Act, 1982.

3. The facts shorn of details are that the Institution was initially recognized as a Junior High School under the relevant provisions then existing on 19th June, 1964. The institution was accorded permission and recognition whereupon it stood upgraded as High School w.e.f. 25th January, 1965. A copy of the said recognition order has been filed as Annexure- 2 to the counter affidavit filed on behalf of the Management. The High School level of the institution was from time to time given the benefit of running additional sections which according to Sri Upadhayaya has swelled to 24, and grant-in-aid to the High School level of the Institution was extended on 31st March 1984. Subsequently, upon expansion of the Institution, the Management applied for recognition upto the Intermediate level upon which the competent authority vide order dated 30th March, 1998 extended the benefit of running Intermediate classes under the provisions of Section 7-A(a) of the 1921 Act. The said recognition was modified later on with additional sanction of subjects vide order dated 23.8.2000, Annexure-8 to the counter affidavit, 21.8.2004, Annexure 9 to the counter affidavit and 03.5.2005, Annexure 10 to the counter affidavit. There is a significant indication with regard to condition No.5 in the recognition order dated 30.3.1998 wherein Clause 5 of the said recognition indicates that the institution shall appoint a qualified Head of the Institution. However, this condition has been scored

out in the subsequent orders of the year 2000, 2004 and 2005.

4. The present dispute relates to the selection and appointment on the post of Principal of the Institution by the U.P. Secondary Education Service Selection Board which has proceeded to select the petitioner Kaushal Kumar Singh treating the Institution of having a post of a Head Master of the High School level for which selections have been held and against which the placement of the petitioner has been made. The requisition for such selection on an earlier occasion had been sent in the year 1991. However, selections were not held on the said post and as noticed above, in between, the institution came to be recognized as an Intermediate college for the subjects, as referred to in the recognition orders and filed along with counter affidavit from 30.3.1998 onwards. It appears that there was an internal communication about the holding of selection on the said post and it is alleged that the requisition was again sent on 27th of September, 2000 by the District Inspector of Schools, Sonebhadra requesting the Commission to hold a selection on the post in question. It has also been stated that a further verification was made in this regard whereafter the Board has proceeded to hold selections and has selected the petitioner against the said post.

5. The petitioner after having been selected could not join the Institution. According to the allegations made, the petitioner in spite of having been selected against advertisement No.1 of 2002 was unable to join on account of the litigation which was pending in the matter which went upto the Supreme Court in relation to the said advertisement that consumed a considerable time and was ultimately answered in the case of ***Balbir Kaur Vs. Service Selection Board and Others*** reported in ***2008 (3) ESC 409.***

6. It is on account of having failed to join in the institution that the petitioner has filed the present writ petition seeking a writ of mandamus commanding the respondents to ensure that the petitioner is made to join as Principal in the Institution and function as such. This writ petition was initially entertained and an order was passed on 3rd March, 2009 whereby the District Inspector of Schools was called upon to explain as to why action has not been taken by the Management for ensuring the joining of the petitioner. A counter affidavit was filed by the Committee of Management refuting the stand taken on behalf of the petitioner. The District Inspector of Schools filed a counter affidavit asserting therein that in spite of repeated reminders, the Committee of Management has failed to respond to the request of the District Inspector of Schools. The Officiating Head of the Institution has also filed an impleadment application and has contended that so far as the petitioner is concerned, he does not hold the qualification to be appointed as Head of the Institution of an Intermediate College and even otherwise the selections are contrary to the provisions of the Act and the Rules applicable.

7. The attention of the Court has been invited to the advertisement against which the selection has been made and according to the said advertisement, the institution has been indicated under Category-03 which undisputedly is relates to a boys institution upto the High School level.

8. Sri R.K. Ojha, learned counsel for the petitioner contends that the resistance put forth by the Committee of Management is absolutely unfounded, inasmuch as, the post was requisitioned under the relevant rules framed under the U.P. Secondary Education Services Selection Board Act, 1982 and the said requisition is valid, inasmuch as, the post in question is that of a Head Master as the Institution in question is aided upto the High School level and once the requisition had been made for the same, there is no error committed by the Board in proceeding to make the selections. He further submits that the petitioner is fully qualified to hold the post and further the placement made by the Board is in accordance with the category of the institution that was advertised. He further submits that in the absence of any infirmity much less a legal infirmity, there is no occasion for the Committee of Management to resist the selection and placement of the petitioner.

9. Sri V.K. Upadhyaya, learned Senior Counsel for the Management advanced his submissions with the aid of the decisions which have been placed before the Court. The decisions cited at the bar are that of ***State of U.P. & Ors. Vs. District Judge, Varanasi & Ors.*** reported in ***1981 UPLBEC 336, [Dr. (Smt.) Sushila Gupta Vs. Joint Director of Education, Kanpur Region, Kanpur & Ors.]*** reported in ***2006(2) AWC 1561, Ajay Pratap Rai Vs. District Basic Education Officer, Jaunpur & Ors.***, reported in ***2007(4) ADJ 357 (DB)*** and the decision in the case of ***Smt. Shail Kumari Singh Vs. State of U.P. & Ors.*** reported in ***2007 (10) ADJ 248.*** Sri Upadhyaya contends that a perusal of the ratio of the decisions referred to herein above leave no room for doubt that once the institution in question was given recognition as an Intermediate College then the identity of the Institution as a High School stood finally merged in the Intermediate College and that the post of Head Master automatically vanishes and substituted by the post of Principal of the Institution. His contention is that it is for this reason no payment of salary has been made to the Head Master since 1990 and the upgradation brings about a complete change in the status of the Institution as also the automatic evaporation of the post of the Head Master in the institution. On such facts he contends that the Board had no authority to proceed to make selections once the Institution had been upgraded and its status stood altered. He contends that the requestion, which has been sent in 1990 and stated to have been reasserted in the year 2000 are both erroneous, inasmuch as, once the institution was upgraded, there was no occasion for the Board to have proceeded to make any selection for a Headmaster and consequently the entire exercise of sending the requisition or verifying the same behind the back of the Committee of Management was a futile exercise. He further submits that there was no requirement of any further creation of the post, inasmuch as, once the recognition was granted on 30th March, 1998 at the Intermediate level, the said recognition itself postulates the existence of the post of the Principal of the institution. He further submits that there is no requirement with regard to the creation of a fresh post of Principal, inasmuch as, the Institution is not under the grant-in-aid list upto the

Intermediate level and therefore, there is no occasion for seeking any sanction under Section 9 of the U.P. Act No.24 of 1971. He further submits that this automatic disappearance of the post of Headmaster disentitles the Board to proceed to make any selections and the requisition if sent by the District Inspector of Schools was a stillborn requisition. He submits that the lower section of High School looses its identity as held by this Court in ***State of U.P. (supra)*** and as noticed and interpreted by the subsequent decisions cited at the bar. He submits that merely because there is a recognition upto the High School level and grant-in-aid, the same would not eclipse the recognition granted upto the Intermediate level. The submission in essence is that the Committee of Management cannot be saddled with the selectee of the Board who could not have been selected against a post which according to the management does not exist and secondly, even otherwise which post could not have been filled up without being advertised in the appropriate category of a Boys Intermediate College. Sri Khare has invited the attention of the Court to the provisions of Chapter II, regulation 2 which according to him would be available in the event the Institution would have promoted the Headmaster as a Principal of the Institution and which has actually been done in the instant case by the resolution of the Committee of Management of the year 1998.

10. Sri A.K. Yadav, learned counsel for the Board, contends that the petitioner cannot be prevented from joining in the institution, inasmuch as, the proposed respondent Daya Shankar Pandey, who is continuing as an ad hoc Principal, is entitled to continue only till regular selections are made. Any order, which is obviously interim in nature, cannot prevent the joining of the petitioner, as contended by the Management on the strength of the order passed in Writ Petition No.10237 of 2008. He further submits that an interim order was passed in this very petition on 3rd of March, 2009 calling upon the authorities to show cause as to why action be not taken for preventing or obstructing the joining of the petitioner. He submits that the Management did not challenge the requisition, which had been sent to the Board nor did the Management intimate the Board at the time of the selections in the year 2002 that there was any legal impediment in holding of the selections. Even otherwise, there is no impediment in law to withhold the selections, inasmuch as, the post of the Headmaster, which is duly sanctioned and aided up to the High School level has not been abolished and on the other hand there is no sanction of the post of Principal of the Intermediate College. He contends that the recognition order dated 30th March, 1998 simply requires that as a result of the recognition, so granted, there has to be a qualified person to hold the office of Principal/Head of the Institution. Learned Standing Counsel has also adopted the same arguments as Sri Yadav and has supported the cause of the petitioner.

11. Having heard learned counsel for the parties, what emerges from the record is that the vacancy on the post of Headmaster of the Institution, which was a High School, came into existence

on 16th October, 1989 upon the death of the permanent incumbent of the post. The Institution was only recognized and aided upto the High School level then. The U.P. Secondary Education Service Selection Board Act, 1982 had already been enforced and was very much applicable for the purpose of holding selections on the post of the Head of the Institution in question. Accordingly, a requisition was sent as per the then existing Rules through the District Inspector of Schools for selection on the post of the Head of the Institution. For reasons best known to the Board, the selections could not be held within time and the advertisement was also delayed. In between the order dated 30th March, 1998 granting recognition to the Institution to impart education in certain subjects at the Intermediate level was granted. This recognition is under Section 7-A(a) of the U.P. Intermediate Education Act, 1921 which reads as follows:

Recognition of an Institution in any new subject or for a higher class:- Notwithstanding anything contained in clause (4) of Section 7 -

(a) The Board may, with the prior approval of the State Government, recognize an institution in any new subject or group of subjects or for a higher class;

12. The consequence of such a recognition is that the Institution does not get any automatic aid nor there are any automatic creation of posts. The said recognition is on a voluntary request of the Institution, and is for the purpose of permitting the institution to prepare students to appear in examinations at the Intermediate level in certain subjects. The recognition does not bring about any automatic creation of posts. However, realizing the difficulties that were likely to arise for imparting such education in a higher class, the provisions of Section 7-AA were introduced to permit employment of part time teachers and instructors as an interim measure for the benefit of students on the condition that the honorarium payable to such teachers would be borne by the Management from its own resources. The status of such teachers is, therefore, of part time teachers who do not form part of the regular cadre. The aforesaid Section does not contemplate the creation of the post of the Head of Institution. Even otherwise, there cannot be a part time Head of the Institution as neither the Act contemplates so nor the Regulations indicate the engagement of a part time Head of the Institution. It is under such conditions that the Institution was granted recognition.

13. The Management did not challenge the requisition relating to the post of Headmaster and according to the Management, after the Institution was granted recognition at the Intermediate level, a resolution was passed to continue Sri Daya Shankar Pandey as the Head of the Institution upon its upgradation. The Selection Board during these intervening events had sought verification from the District Inspector of Schools about the requisition sent earlier in the year 1991 and the District Inspector of Schools reaffirmed the existence of the vacancy on the post of Headmaster.

14. The main question, which is the foundation of the argument on behalf of the Committee of Management is, as to the impact of the recognition order dated 30th March, 1998. Sri Upadhyay, on the strength of the decisions referred to herein above contends that once the status of the Institution was raised to the level of an Intermediate College under the recognition order dated 30th March, 1998, there is an automatic transition in the status of the Institution and as submitted by him earlier, the High School level Institution stood merged loosing its identity as such and resulting in a transformed Intermediate level institution. In order to appreciate this argument a reference to the order of recognition and the relevant provision namely Section 7-A(a) of the 1921 Act would be appropriate. A reading between the lines of the aforesaid Section would leave no room for doubt that the same is in the nature of a permission to run classes of higher level for imparting education to students to enable them to prepare and appear as students in the Intermediate level examination to be conducted by the Board. The purpose of such recognition is not creation of posts or abolition of any post. The purpose is to provide education to the students who offer themselves as candidates to appear in the examination of the Intermediate level conducted by the U.P. Board. For this, the word 'recognition' has to be understood in the context as defined under Section 2(d) of the U.P. Intermediate Education Act quoted below:

"Recognition means recognition for the purpose of preparing candidates for admission to the Board's examinations."

15. A perusal of the said Section would indicate that it is a privilege or a facility which is extended by the Board for preparing students to appear in the examination conducted by the Board. It is a competence created in the Institution to impart education as recognized by the State through the Board. While doing so, the State Government has the power to extend the benefit of grant-in-aid by providing for posts in such institution and extended amenities which may be required for running of the such institution. However, the State itself has evolved a statutory provision to grant recognition without the benefit of grant in aid or any financial benefit and it is therefore, open to an institution to either accept such condition or not. The Institution cannot compel the State Government to automatically extend the benefit of creation of posts or financial aid. The recognition of an institution and benefits of financial aid are entirely two different concepts. To explain this position it would be apt to refer to the case of ***Gopal Dubey Vs. District Inspector of Schools reported in 1999 (1) Education and Service Cases 168.*** It would, however, be relevant to clarify that the said Full Bench came to the conclusion that upon a recognition being granted under Section 7-A, there cannot be any deemed creation of the posts without there being any sanction under Section 9 of the U.P. Act No.24 of 1971.

16. In the instant case, the contention goes ahead to the extent that

by virtue of the recognition under Section 7-A(a), the institution may not be entitled to claim grant in aid as that would require a formal creation and sanction order under Section 9 of U.P. Act No.24 of 1971 but at the same time mere non-availability of a creation or sanction order for grant in aid would not dilute the status of the Institution which has been recognized up to the Intermediate level and for which the post of Principal of that level comes into existence by virtue of such recognition. The aforesaid argument does appeal at first flush and it raises a vital issue in relation to the status of an institution as also the consequence thereof relating to the post of the Head of the Institution. The reason is that there cannot be two Heads of Institutions for the same school. In such a situation the question arises, can there be a selection by the Board on the post of Headmaster when the requirement is of a Principal of an Intermediate level. The answer to this question would rest on as to whether there is an automatic disappearance of the post of Headmaster on transformation of a High School level institution into an Intermediate College.

17. In the instant case the recognition order, which has been granted to the Institution under Section 7-A (a) does not rescind or withdraw the recognition granted to the Institution at the High School level. It also does not abolish the post of Headmaster nor is there anything on record to indicate that the grant in aid to the institution up to the High School level has been withdrawn. To my mind, it appears that realizing this position, the Management has come up with a case that it has already requested the State Government to withdraw the institution from the grant in aid list. The management went to the extent of filing a writ petition before this Court for a direction to the State Government to decide said representations about which facts have been indicated in paragraph 30 to 32 of the counter affidavit of the Management. The fact that the Institution still continues to be recognized as a High School and receives grant in aid, therefore, till today continues to exist and there is nothing on record to the contrary. Accordingly, the status of the Institution upto the High School level remains undisputed and the same has not been dislodged so far.

18. So much on the facts of this case that emerge from the pleadings. The legal submission on behalf of the Committee of Management is that in view of the law laid down by this Court in the Full Bench case of ***State of U.P. (supra)*** which has been followed in the case of ***Dr. (Smt.) Sushila Gupta (supra)*** and upheld by a Division Bench in the case of ***Ajay Pratap Rai (supra),*** the institution which was a High School till 1998 became an Intermediate College and has therefore, lost its identity as such. It is on the strength of these decisions Sri Upadhyay contends that the post of Headmaster evaporates, inasmuch as, there can be only one Head of the Institution at the Intermediate level and as such the Board could not have proceeded to advertise and hold the selection in the year 2002. In order to analyse the aforesaid submission it would be appropriate to point out that the said decisions are in relation to consequences of upgradation in order to apply the relevant rules it

was concluded that in view of the provisions of Regulation 4 of Chapter II, no appointment could be made except upon the recommendation of the Selection Board. The dispute in the Full Bench decision of ***State of U.P (supra)*** was nowhere concerned with the interpretation of the provisions relating to Section 7-A(a) and Section 7-AA. In that case, the observation was that once a Junior High School was recognized as a High School then for the purpose of applicability of the Rules it would be governed as a High School and the Junior High School would loose its identity. The said case was in relation to extension of the benefit of grant in aid and the Full Bench ruled that the grant in aid which has been made available at the Junior High School level would continue to be made available even after upgradation. Accordingly, the said decision does not directly or even indirectly answer the issue involved herein.

19. So far as the decision in the case of ***Sushila Gupta (supra)*** is concerned, the same was a dispute where the Management was proceeding to appoint the Head of the Institution treating the same as a Junior High School in spite of the fact that recognition had been granted under Section 7-A of the Act. The Court came to the conclusion that the Institution looses its identity of that as a Junior High School and therefore the provisions of the U.P. Intermediate Education Act would apply. The nature of the conflict resolved therein was of a situation where the employee of an upgraded institution was claiming benefits arising out of upgradation. The said case was nowhere concerned with the appointment of a Head of an Institution as is presently involved where the Institution already stands recognized and aided as a High School with permission to run Intermediate Classes. The dispute in this case as noticed above is with regard to the competence of the Board to proceed to hold a selection where the recognition order under Section 7-A(a) has been granted to the Institution during the intervening period. Accordingly, the decision in the case of Sushila Gupta (supra) does not in any way bring about any improvement in the submissions advanced on behalf of the Committee of Management.

20. The reason for the same is not far to see. The Institution can always appoint part time teachers upon the recognition granted to it under Section 7-A(a). The Institution can have a person who is duly qualified to be appointed against the sanctioned post of Head Master and such appointee can also handle the Intermediate Section provided he is otherwise qualified for the same. Thus, there is no necessity of raising an argument of there being a conflict in the mind of the Management for appointment on the post of the Head of the Institution. The petitioner if selected as Headmaster and appointed can also look after the Intermediate section if he is qualified but the selection cannot be resisted, inasmuch as, the post of headmaster or Head of the Institution as sanctioned earlier does not evaporate under any automatic transition, as suggested by the Management. Neither the order of recognition dated 30th March, 1998 contemplates so nor do the provisions of the relevant statute as noticed above in

any way contradict each other so as to warrant such an argument. The teachers, who are to be appointed under Section 7(AA) are part time teachers. There is no vacuum on the post of Head of the Institution, inasmuch as, there is only a transition in the level of education imparted and not of any posts that were already existing in the Institution. The requisition for the post of Headmaster, which was sent to the Board appears to have remained unchallenged on the presumption of the Management that it was an exercise in futility. The management appears to have not challenged the advertisement and was making efforts to wriggle out of the control of the State Government and the statutory provisions by seeking withdrawal. The management therefore can be presumed to be aware of the proceedings of selections as it was making preparations for its defences. The Management in effect wants the Board not to select the Principal for the Institution and in order to avoid the same has also gone to the extent of requesting the State Government to withdraw the grant-in-aid.

21. There is a third dimension to the matter also. The State Government in its wisdom brought about Section 7-AA making provisions for part time teachers when recognition is granted under Section 7-A (a). While doing so, the State Government could have clarified the position also in respect of the position as to who would be entitled to head the Institution. This situation has to be taken care of for the simple reason that the qualification for the post of a Headmaster of a High School is slightly different from the post of a Principal of an Intermediate College. In view of this variation of qualification such difficulties can arise and therefore, it is the obligation of the State Government to issue an appropriate clarification. Taking an instance where there is already a permanent selected Headmaster of the institution, what would happen if such an institution is granted recognition to the Intermediate level under Section 7-A(a) if the existing Headmaster of the Institution does not hold the qualification of a Principal of an Intermediate level college. To that extent, an argument can be entertained and in such an event if a fresh post of Principal is presumed to be sanctioned then in a converse situation upon the selection of a Principal of an Intermediate College what would be status of the Headmaster who has been already selected by the Board to function as the Head of the Institution. Thus, the situation does require an appropriate legislation to clarify the situation lest any further confusion is perpetuated. In such a situation the Court may not be called upon to legislate, as through a judicial intervention, the Court can "iron out the creases and not weave a new texture". On facts also this case does not warrant such an attempt and the issue is left open to be adjudicated in an appropriate case.

22. So far as the present petitioner is concerned, there is nothing to indicate that the petitioner is not qualified to hold the post of the Principal of the Institution. In my opinion, the advertisement issued in the category of High School and not as an Intermediate College does vitiate the selection of the petitioner which has been made on the post of the Headmaster of the High

School level. The selections having been made for the post that was requisitioned is therefore in order. The said requisition or the advertisement is not invalidated on account of the recognition order dated 30th March, 1998 inasmuch as, as explained above, the alleged transformation in the status of the post is not such so as to invalidate the selection of the petitioner on the post in question.

23. Accordingly, the writ petition is allowed. A mandamus is issued to the respondents, the respondent No.4 in particular to allow the petitioner to join and function in the Institution within three weeks from the date of production of a certified copy of the order before the said respondent. The interim order passed herein stand discharged.