APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.8.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE KASHI NATH PANDEY, J.

Special Appeal No. 116 of 2007

Pramod Kumar Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shamimul Hasnain
Sri Amit Saxena
Sri P.N. Saxena

Counsel for the Respondents:
Sri P.K. Mishra
Sri P.N. Rai
C.S.C.

Constitution of India Art. 226- Regularisation-daily wagers working under state election Commission-seeking benefit judgment of D.B. Which was allowed-upheld by the Apex Court treating Representation for Regularisation-as application-direction by single judge to given benefit of the direction of Apex Court reported in AIR 1995 S.C. 1115-contrary to the mandet of Apex court in Uma Devi Case-Can not sustain-if they are eligible and have participated in Regular selection process every thing equal-their candidature may be considered with other candidates without giving preferential consideration.

Held: Para 17

We are thus of the opinion therefore find that the directions dated 14.12.2000 in Special Appeal No. 784 of 2000 for considering the candidature of the petitioner for permanent appointment by giving him the benefit of service rendered by him are no longer enforceable. The petitioner is required to be considered along with other candidates for selection under the statutory rules, provided he is eligible to apply and any permanent vacancy is available and is advertised.

Case law discussed:
[AIR 1995 SC 1115], [(2006 (4) SCC 1], [AIR 2009 SC 3121].

(Delivered by Hon'ble Sunil Ambwani, J.)

1. We have heard Sri P.N. Saxena, assisted by Sri Amit Saxena for the appellant. Sri P.K. Mishra, appears for respondent Nos. 2 to 4 - State Election Commission. The standing counsel appears for respondent No.1.

2. In this intra-court appeal, the petitioner-appellant is aggrieved by the judgement of learned Single Judge dated 27.8.2004 in writ petition No. 18730 of 2003, in which a direction was issued that the benefit of giving preference allowed in the judgement of Supreme Court in **U.P. State Road Transport Corporation Vs. U.P.P.N.S.B. Sangh** [AIR 1995 SC 1115] (in that all other things being equal the petitioner will be given preference in direct recruitment), be allowed, if the petitioner applies for any post of clerk to fall vacant for future under the State Election Commission. The Court has further directed to allow other benefits, which are available to him under para 12 of the judgement of the Supreme Court.

3. The facts given in the judgement under challenge and other judgements of this Court, deciding petitioner's writ petitions, are that the petitioner had worked on daily wages of contract, at the rate of Rs.45/- per day as clerk in the State Election Commission in District Sonebhadra from 26.3.1995 to 9.2.1996. He filed a writ petition No. 6570 of 1996

in which an interim order was passed on 20.2.1996 directing that the question of appointment of the petitioner for the purpose of election work in the next Parliament Election may be considered. He was allowed to continue from 1.4.1996. His wages were however paid only till 28.2.1997. The writ petition was disposed of on 20.1.1998 with following directions:-

"This writ petition is finally disposed of with the direction that in case the petitioner is actually working from 1.3.1997 and is still working, he shall be paid his salary of the post of clerk and that his case for regularization in service or for regular appointment against available vacancy shall be considered according to law by the respondent No.2, who shall pass a speaking order within a month from the date of production of a certified copy of this order. The termination orders dated 9.2.1996 and 28.2.1997 shall stand quashed."

4. The petitioner-appellant's representation for regularization was rejected. He filed a writ petition No. 7170 of 2000, which was dismissed on 29.11.2000. The Special Appeal No. 784 of 2000 was allowed in part on 14.12.2000 with following directions:-

"Having considered the submissions of the learned counsel for the parties, we are of the view that in the event there are permanent vacancies available and the State Election Commission feels to fill up the same, the case of the petitioner along with other candidates should also be considered for permanent appointment and the services rendered by the writ petitioner should also be taken into account while giving permanent appointment."

5. The petitioner-appellant thereafter filed a contempt application No. 2409 of 2001 for compliance of the order of the Division Bench in Special Appeal No. 784 of 2000. An objection was taken that the petitioner did not apply for appointment in response to the advertisement issued on 15.12.2000, for filling up of 49 posts of Clerks and Typists under direct recruitment. Learned Judge hearing the contempt application on 12.9.2002 found that there was no such direction given by the court to the petitioner to apply, and that the consideration of his appointment was not subject to making an application. Learned Judge hearing the contempt matter summoned the opposite parties to appear before the Court on 29.10.2002 for framing of charges. The authorities appeared before the Court. On the explanation given by them, the contempt application was dismissed on 6.1.2003 holding that there was no wilful disobedience of the order of the Division Bench dated 14.12.2000.

6. The petitioner filed a Special Leave Petition against the order dated 6.1.2003 dismissing the contempt application. The Supreme Court on 7.4.2003 dismissed the SLP with the following order:-

"In our view impugned order passed in contempt proceedings does not call for our interference, however, if the petitioner's rights are affected and orders passed by the courts are not complied with, it would be open to him to resort to any other alternative remedy for

execution including the filing of a fresh writ petition.

The Special Leave Petition is dismissed accordingly."

7. The petitioner therafter filed writ petition No.18730 of 2003 which was disposed of vide order dated 27.8.2004 giving rise to this Special Appeal.

8. Learned Single Judge has found that the main dispute between the parties is not regarding the requirement of filing application. If it was the only dispute then the same could be resolved within no time either by treating petitioner's representation dated 23.12.2000 as an application to that effect or by directing the petitioner to file a formal application for appointment. The main controversy revolves around the interpretation of the judgement of Special Appeal. He found correct interpretation of the said judgement is that the petitioner has to be given preference in the appointment taking into account the period of service rendered by him. The judgement of the Division Bench cannot be read to hold that the appointment has to be given without considering him for along with other candidates. The writ petition was accordingly disposed of with directions that if the petitioner applies for any future post of Clerk under the State Election Commission, he will be given benefits as provided under para 12 of the U.P.S.R.T.C's case (Supra).

9. The petitioner is now 40 years of age. The maximum age limit prescribed for the general category candidates to be given appointment in the State services is 35 years.

10. Sri P.N. Saxena submits that learned Judge has not correctly appreciated the directions given on 14.12.2000 in Special Appeal No. 784 of 2000. The petitioner was required to be considered for appointment on permanent vacancies taking into account the service rendered by him. He was not required to apply, and that on 15.12.2000 when the vacancies were advertised, the judgement dated 14.12.2000 had to be complied with, by considering the petitioner for appointment irrespective of the fact that he did not apply. He submits that the order dated 14.12.2000 in Special Appeal No. 784 of 2000 has become final and has not been complied with so far. The State Election Commission is bound to give appointment to the petitioner on any permanent vacancy, after taking into account the services rendered by him.

11. The petitioner had worked as Clerk on contract with the State Election Commission for a period of less than 11 months (between 26.3.1995 and 9.2.1996), and thereafter from 1.4.1996 in pursuance to the interim order of this Court in writ petition No. 6570 of 1996. The later period was litigious in nature, which came to an end after rejection of his representation for regularization and dismissal of writ petition No. 7170 of 2000, on 29.11.2000. The Special Appeal No. 784 of 2000 was allowed in part on 14.12.2000, with directions that in the event permanent vacancies are available and the State Election Commission decides to fill up the same, the case of the petitioner along with other candidates should also be considered for permanent appointment taking into account and giving preference to past services.

12. In Secretary, **State of Karnataka Vs. Umadevi (3)** [(2006 (4) SCC 1], the Supreme Court held that any appointment through side door would be violative of constitutional scheme of equality contained in Articles 14 and 16 of the Constitution. Para 43 of the judgement of the Supreme Court in Umadevi case (supra) is quoted hereunder:-

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

13. In the present case, the order of the Division Bench dated 14.12.2000 in Special Appeal No. 784 of 2000 does not amount to giving any directions, to give appointment

to the petitioner dehorse the service rules. The petitioner-appellant was required to apply when the advertisement was made by the State Election Commission to be considered for appointment along with other candidates. The only benefit which could be given to the petitioner-appellant was to give benefit of service rendered by him, if he is otherwise eligible, and all other things are equal in comparison with other candidates.

14. In **General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and others** [AIR 2009 SC 3121], the Supreme Court held:-

"24. As to the first submission above, it is worth mentioning that judicial decisions unless otherwise specified are retrospective. They would only be prospective in nature if it has been provided therein. Such is clearly not the case in Umadevi (supra). Accordingly, even though the cause of action would have arisen in 2002 but the decision of Umadevi (supra) would squarely be applicable to the facts and circumstances of the case. Secondly, before a person can claim a status of a government servant not only his appointment must be made in terms of the recruitment rules, he must otherwise fulfill the criterion therefore Appointment made in violation of the constitutional scheme is a nullity. Rendition of service for a long time, it is well known, does not confer permanency. It is furthermore not a mode of appointment."

15. Sri P.N. Saxena, submits that judgment dated 14.12.2000 in Special Appeal No. 784 of 2000 has become final between the parties and that any view taken or judgement delivered by the Supreme Court subsequent to that decision cannot take away the binding effect of the judgement. The State Election Commission has to comply with the directions and provide employment to the petitioner. He would submit that effect of Umadevi (3) (Supra) case is not to rewind the clock, and to take away the effect of the final orders passed by this Court deciding rights of the citizens of the country.

16. The Supreme Court has warned the High Court, in no uncertain terms, not to issue directions contrary to the law laid down in Umadevi (3) (Supra). Even if there are any directions given by the court for giving appointment, dehorse the rules, after the constitution bench judgement in Umadevi (3) (supra), the High Court cannot issue a writ of mandamus to implement such direction. The Supreme Court has not only laid down the law but has also issued strict and stern directions, to adhere to the constitutionalism and to follow the direction of the Supreme Court which protect the rights of the citizens under Articles 14 and 16 of the Constitution. The Supreme Court has held that courts in the country, under the having constitutional scheme, do not have powers to issue direction to disobey the law. If there is any such directions, the appellate court or even the coordinate bench hearing the matter, can refuse to implement it, provided it gives sufficient reason.

17. We are thus of the opinion therefore find that the directions dated 14.12.2000 in Special Appeal No. 784 of 2000 for considering the candidature of the petitioner for permanent appointment by giving him the benefit of service rendered by him are no longer

enforceable. The petitioner is required to be considered along with other candidates for selection under the statutory rules, provided he is eligible to apply and any permanent vacancy is available and is advertised.

18. The Special Appeal is **dismissed** with the aforesaid observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2010

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 347 of 2004

Banaras Hindu University, Varanasi ...Petitioner

Versus

State of UP and another ...Respondents

Counsel for the Petitioner:
Sri V.K.Upadhya
Sri V.K.Singh
Sri Hem Pratap Singh
Sri Yashwant Verma
Sri D.K.Singh
Ms.Pooja Goel

Counsel for the Respondents:
Sri C.K.Parekh
Sri Vivek Verma
Sri Chandan Sharma
C.S.C.

Constitution of India Art 285-Demand of Service tax-the building owned by B.H.U.,IITK ICAR-although exempted from tax-demand of service tax by respective Municipal Corporation-held-the petitioners being statutory corporation and society even being established by union are not within of definition of union of India-No service charge can be charged.

Held: Para 18

The OM only applies to the buildings of the Union. It does not apply to the staturory corporation or the societies that have independent identity. No service charge can be realised from the petitioners in pursuance of the OM. In view of this the impugned recoveries against the petitioners are illegal and are liable to be quashed.

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

1. The main question involved in these writ petitions relates to the power of the Municipal Corporation to levy service charge in pursuance of the office memo of the Central Government dated 26.4.1994 (the OM).

THE FACTS

2. Article 285 of the constitution exempts the property of the Union from the State taxation. The OM was issued that stating that, though the buildings of the Union are exempted from the municipal taxes but they are liable to pay service taxes as contemplated therein.

First Writ Petition

3. The Banaras Hindu University, Varanasi (the BHU) is a Central University established by Central Government under the Banaras Hindu University Act (Act No. 16 of 1915). It is a statutory corporation established under the Central Act.

4. The Municipal Corporation, Banaras issued 10 notices dated 3-9.2.2004 (Annexures-11, 12 and 13 to the writ petition) under the Municipal Corporation Act (the Act) informing the

BHU regarding the assessment of their why service charges as contemplated in the OM be not taken from them. Hence the present writ petition by the BHU.

Second Writ Petition

5. The Indian Institute of Technology, Kanpur (IIT-K) is an engineering institute. Initially it was a society. Subsequently, it was incorporated by the Central Government under the Indian Institute of Technology Act (Act No. 59 of 1961). IIT-K is also a statutory body incorporated under the Central Act.

6. The Municipal Corporation, Kanpur issued notice in the year 2003 requiring the IIT-K to make available the details of its building so that the proceedings for assessment under the Act may be undertaken.

7. Subsequently, an order was passed on 21.7.2006 assessing the house assessment and thereafter charging service charge according to the OM. Hence the second writ petition by the IIT-K.

Third Writ Petition

8. In 1926, a royal commission for agricultural recommended setting up an establishment for agricultural research. In pursuance of the same Imperial Council for Agricultural Research was established as a society registered under the Societies Registration Act. After independent, it was renamed as Indian Council of Agricultural Research (ICAR). Indian Institute of Pulses Research, Kanpur (IIPR) is a branch of buildings and asking them to show cause the ICAR. The buildings etc. belong to the ICAR.

9. The IIPR received a notice from the Municipal Corporation, Kanpur dated 3.11.2009 regarding payment of general house tax. The petitioner filed its reply on 16.11.2006. Thereafter, the accounts of the IIPR were attached on 29.3.2007 for payment of the general house tax dues. Hence, the third writ petition.

10. The third writ petition was filed by IIPR and not ICAR as the notices etc. were in the name of IIPR otherwise, it is for the benefit of ICAR.

11. In the counter affidavit in the third writ petition, it is stated that the accounts were attached not because of recovery any general house tax but for the recovery of service charge in pursuance of the OM.

Service Charge Under the OM--Being Demanded

12. In all the writ petitions, the amount that is being demanded is the service charge in pursuance of the OM and not any other tax or fee. The question is, does the OM apply to them.

POINTS FOR DETERMINATION

13. We have heard Sri VK Singh, Sri Hem Pratap Singh, Sri Yashwant Varma, Sri DK Singh, Ms. Pooja Goel, counsel for the petitioners; and Sri Vivek Verma, Sri Chandan Sharma and standing counsel for the respondents.

14. The following points arise for determination.

(i) Whether the OM is applicable to buildings of the petitioners;

(ii) Whether a tax or a fees can be charged by an office memo;

(iii) Whether the petitioners who are imparting education (in the first and the second writ petitions) and is a research institute (the petitioner in the third writ petition) are charitable institutions and cannot be assessed in view of section 177 (b) of the Act.

1st Point: Not Applicable

15. The BHU as well as IIT-K are statutory bodies incorporated under the Central Government Act. They have right to sue and can be sued in their own name.

16. The IIPR is the branch of ICAR that is a registered society under the Societies Registration Act. It can also sue and be sued in its own name.

17. A statutory corporation, or a society or a company, even if it is State within the meaning of Article 12 of the Constitution or an instrumentality of the Union, are not synonymous with it. They have different identity and cannot be treated to be Union (see below)1.

18. The OM only applies to the buildings of the Union. It does not apply to the staturory corporation or the societies that have independent identity. No service charge can be realised from the petitioners in pursuance of the OM. In view of this the impugned recoveries against the petitioners are illegal and are liable to be quashed.

2nd & 3rd POINT: NOT NECESSARY TO DECIDE

19. The counsel for the petitioner cited the following rulings in support of second and third point:

(i)Second point,

- Municipal Corporation, Amristar Vs. Senior Superintendent of Post Office; AIR 2004 SC 2912;

(ii)Third point,

- PC Raja Ratnam Institution Vs Municipal Corporation of Delhi; AIR 1990 SC 816;
- Municipal Corporation of Delhi Vs. Children book trust; AIR 1992 SC 1456;
- Christian Children fund INC Vs Municipal Corporation Delhi;
- Jindal Stainless Ltd. Vs State of Haryana; 2006 (7) SCC 241 Para 39-45;
- TMA Pai Vs. State of Karnakata

And submitted that these points should be decided in their favour.

20. We are allowing the writ petition on the first point. It is not necessary to express any opinion on the second and the third point.

CONCLUSIONS

21. Our conclusions are as follows:

(i) The statutory corporation as well as the societies are not Union even if they are established by the Union Government. They are not covered by the office memo dated 26.4.1994 issued by the Central Government;

(ii) The recovery of service charges in pursuance of office memo dated 26.4.1994 is illegal and are quashed. However, it will be open for the respondents to assess and charge such tax or fee as permissible under the law after giving reasonable opportunity to the petitioners.

With these observations, the writ petitions are allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE KASHI NATH PANDEY, J.

Special Appeal No. 828 of 2008

Manoj Kumar Nagar and others
...Petitioner
Versus
The State of U.P. and others
...Respondent

Counsel forthe Petitioner
Sri Pradeep Pandey
Sri Kamlesh Shukla

Counsel for the Respondent
Sri S.D.Sahai
C.S.C.

Constitution of India Art. 226-Grant in-aid by G.O. Dated 7.9.2006 about 1000 institutions running Junior High School-required to be taken in grant in aid-the application of the petitioner institution-rejection on ground of arrival after one day and the institution in question up-graded to High School-held-not proper-as per law developed by Apex Court-up gradation of institution shall not come in consideration of grant in aid-to the Junior High School Section-Single Judge failed to consider this aspect-judgment set-a-side-direction issued to the authorities to consider as fresh within specified period.

Held: Para 7

Both the grounds cannot be sustained inasmuch as the application was sent by registered post, before the date fixed for receiving the applications. The State Government was as such not justified in refusing to accept the application. Further we find that inspite of the objections of late arrival, the application was actually considered and the institution was not found qualified to receive the ground on the ground that it was upgraded to Junior High School. In the Supreme Court judgment cited as above, it has now been held that upgradation of the institution as High School cannot be a ground to refuse the grant-in-aid to Junior High School section.

Case law discussed:
2008 (2) ESC 1497 (All) (DB), Special Leave Petition (C) No. 4630 of 2008

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Heard Shri Kamlesh Shukla and Shri Pradeep Pandey for the petitioners appellants.

2. Shri Manoj Kumar Nagar, Principal and 16 Assistant Teachers of 'Nain Singh Junior High School, Shivali, District Bulandshahr are aggrieved by the judgment of learned Single Judge dated 23.1.2008 in Civil Misc. Writ Petition No. 1317 of 2007 Manoj Kumar Nagar and others vs. State of UP and others, by which their writ petition for grant-in-aid

to the Junior High School fulfilling the terms and conditions under the Government Order dated 7.9.2006, was dismissed on the ground that the petitioners were working in the institution, which was established to be maintained from its own financial resources, and thus, it cannot expect the State Government to pay salary to the teachers and its employees. Learned Judge found that the judicious discretion of the State Government to choose some of the institutions, which comply with the conditions for grant-in-aid, is not subject to discretion under Article 226 of the Constitution.

3. Shri Kamlesh Shukla and Shri Pradeep Pandey learned counsel for appellant would submit that the institution was given permanent recognition as Junior High School on 1.7.1985 under the Government Order dated 7.9.2006, by which the State Government had decided to give grant-in-aid to 1000 Junior High Schools running classes from 6 to 8. The application for grant-in-aid, sent by registered post was received on 4.10.2006, whereas the forms were required to be deposited between 14.9.2006 to 3.10.2006. The name of the Junior High School, in which petitioners are teaching, was not included in the list on the ground that the Junior High School was upgraded to High School, and thus did not qualify for being included in the grant-in-aid list, which was applicable to those Junior High School, running only from Class 6 to 8.

4. In the counter affidavit of Smt. Kamlesh Gupta, Deputy Basic Education Officer, First, Bulandshahr, only these two reasons are given for not including the Junior High School, in which the petitioners are teaching in the grant-in-aid list.

5. Learned counsel for the appellants has relied upon a judgment in **Vidya Devi Laghu madhyamik Vidyalaya, Basti vs. State of UP and others 2008 (2) ESC 1497 (All) (DB)** and the judgment of Supreme Court in **Special Leave Petition (C) No. 4630 of 2008 State of UP and others vs. Committee of Management, Tapeshwari Saraswati Vidya Mandir** and others, decided on December 2, 2009 to allege that the upgradation of the school, cannot be taken as a ground to disqualify the school.

6. We find that learned Single Judge has not considered the grievance of the petitioner in the light of the objections taken by the respondents. The petitioners' application was rejected only on the ground, that it was received a day later than the date fixed and that the institution was upgraded as High School.

7. Both the grounds cannot be sustained inasmuch as the application was sent by registered post, before the date fixed for receiving the applications. The State Government was as such not justified in refusing to accept the application. Further we find that inspite of the objections of late arrival, the application was actually considered and the institution was not found qualified to receive the ground on the ground that it was upgraded to Junior High School. In the Supreme Court judgment cited as above, it has now been held that upgradation of the institution as High School cannot be a ground to refuse the grant-in-aid to Junior High School section.

8. The Special Appeal is **allowed.** The judgment of learned Single Judge dated 23.1.2008 in Writ Petition No. 1317 of 2007 is set aside. The respondents are directed to reconsider petitioners' application in the light of judgments as above very expeditiously, and in any case within a period of two months from the date the petitioners furnish a certified copy of the judgment alongwith the relevant records in the office of the Director of Basic Education, UP.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.10.2010

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE RITU RAJ AWASTHI, J.

Writ Petition No. 1495 of 2010

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

Constitution of India, Art 226-Medical reimbursement-petitioner working as A.D.J. Retired from Distt. 'A'-put claim at Distt 'B' where presently residing-deniel by Distt. Judge at place 'B'-held-not proper general direction issued to all the Head of Depott. to process such claim as per choice made by the retired person or his family member-if not worked in that particular Distt.-summon entire service record from the place of last working-promptly clear the same.

Held: Para 9

To give full meaning and effect to the benefit of medical reimbursement to a retired government servant and other persons eligible under the rules/government orders, we make it clear and provide that such a medical claim can be placed/put forward before the Head of the concerned office where the person concerned is residing and intents to submit his claim, or also at a place from where the government servant has retired. This would be the choice of the person concerned. In case a government servant is retired from a different place and he lodges his claim at the place where he is residing, it will be the duty and responsibility of the said office/Head of Department to ask for necessary records and information, if any required from the place from where the government servant has retired and the office aforesaid would be under an obligation to provide all necessary details and documents to the office, where the government servant has applied for reimbursement. Care has to be taken that in such a case unusual delay may not occur, so that the purpose of the government order does not stand defeated.

(Delivered by Hon'ble Pradeep Kant, J.)

1. Notice on behalf of respondent nos.1, 2, 3 and 5 has been accepted by the learned Chief Standing Counsel and on behalf of respondent no.4, by Sri Manish Kumar.

2. With the consent of the parties' counsel, the petition is being disposed of finally at the admission stage.

3. Learned counsel for the petitioner submitted that the petitioner had retired from the post of Additional District Judge, District Balia in November, 1996. The petitioner has claimed reimbursement with respect to his medical claim of the year 2005. The petitioner went to place his papers in the office of the District Judge, Bahraich, where he is residing after retirement, but the District Judge has refused the same, saying that such a claim can be reimbursed only from the place,

from where the petitioner has retired, i.e. District Balia.

Relevant Para-3 of the Government Order is quoted below:

"3. Sewanivrit sarkari sewak evam unke pariwar ke aashrit sadasya tatha mrit sarkari sewak ke pariwar pension hetu ahar sadasya ki chikitsa vyaya pratipurti se dave sambadhit karyalayadhayksha ko athva us karyalaya mein prastut kiye jayange, jahan se wah sewanivrit hue ho."

4. Para-3 of the Government Order aforesaid says that the retired government servant and his dependents, family members and also family pension holders of deceased government servant can place their claim for medical reimbursement before the Head of Department of the concerned office or in the office from where the government servant has retired.

5. The aforesaid directives have been reiterated in the subsequent Government Order dated 9.8.2004 also.

6. The meaningful interpretation apart from the literal meaning of the aforesaid para would mean that a retired government servant can lay his claim for medical reimbursement at the place where he is residing, if there is any office of the Head of Department over there. He can also make such claim in the office from where he has retired. But this cannot be taken to understand that the claim of government servants or their dependents etc. for medical reimbursement can only be lodged at the place from where the government servant has retired.

7. A government servant after retirement settles himself at a place of his choice, which may not be the same place from where he has retired from service. The facility/privilege of reimbursement of the medical expenses that he incurred even after retirement would stand denied in many cases, if the government servants are required to lay all their medical claim from the place from where they retire.

8. Medical reimbursement has to be done immediately and promptly, so that the purpose of the same may not stand frustrated.

9. To give full meaning and effect to the benefit of medical reimbursement to a retired government servant and other persons eligible under the rules/government orders, we make it clear and provide that such a medical claim can be placed/put forward before the Head of the concerned office where the person concerned is residing and intents to submit his claim, or also at a place from where the government servant has retired. This would be the choice of the person concerned. In case a government servant is retired from a different place and he lodges his claim at the place where he is residing, it will be the duty and responsibility of the said office/Head of Department to ask for necessary records and information, if any required from the place from where the government servant has retired and the office aforesaid would be under an obligation to provide all necessary details and documents to the office, where the government servant has applied for reimbursement. Care has to be taken that in such a case unusual delay may not occur, so that the purpose

of the government order does not stand defeated.

10. For the reasons stated above, we give liberty to the petitioner to lay his claim alongwith a certified copy of this order before the District Judge, Bahraich, who would consider the same and act accordingly.

11. With the aforesaid clarification, the writ petition is disposed of finally, accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE K.N. PANDEY, J.

Special Appeal No. 1606 of 2008

Jagdamba Prasad Singh ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri H.K. Mishra
Sri S.K. Mishra
Sri Sanjeev Singh
Sri Vinay Singh

Counsel for the Respondents:
Sri J.K. Tiwari
C.S.C.

Constitution of India Art. 226-Dismissal from service-without holding inquiry-on allegation of wrong calculation of interest on award of compensation-petitioner of appellant being lowest employee if committed any error-could not be tressed by Ahalmad and SLO-subsequent withdrawal of large amount due to fraud of another employees of land acquisition Depott-appellant can not be punished with dismissal-neither disciplinary authority, nor appellant authority nor Hon'ble Single Judge tried to find out the correct fact dismissal set-a-side with all consequential benefits.

Held: Para 27

The anxiety of the Court to decide the cases quickly sometimes leads to gross injustice to the persons, who approach the Court giving all the required facts. In the present case, the District Magistrate, the Commissioner and thereafter learned Single Judge did not care to look into the facts of the case, in which no charge of embezzlement was alleged or established. The petitioner serving as Amin at the lowest level was found to have made incorrect calculation, which could have been made by any body by way of a bonafide mistake and could be corrected by the officer making payment. He was punished in the matter of a greater fraud played on the record subsequently by Shri Ram Dawar, the employees in the office of Special Land Acquisition Officer, and in which he was not involved.

(Delivered by Hon'ble Sunil Ambwani, J.)

1. We have heard Shri S.K. Mishra appearing for the petitioner-appellant. Shri J.K. Tiwari, Standing Counsel appears for the State respondents.

2. The petitioner-appellant-a confirmed Amin holding a regular post was dismissed from service three years before he was to retire on the charges, that he had wrongly calculated interest of Rs.37,823.71 payable towards compensation for acquisition of land under the Land Acquisition Act to its owner. His appeal was dismissed after this Court issued a writ of mandamus to decide the matter. By this Special Appeal he has challenged the order of learned Single Judge dated 30.9.2008, and the orders of his dismissal dated

28.6.2001, by the District Magistrate, Jaunpur and the appellate order dated 19.8.2002 by the Commissioner, Varanasi under the U.P. Government Servants (Punishment and Appeal) Rules, 1999.

3. Learned Single Judge dismissed the writ petition by a short order as follows:

"Hon. Rajiv Sharma, J.

Heard learned counsel for the petitioner and learned Standing Counsel.

Petitioner has preferred the instant writ petition against the order of punishment of termination of service interalia on the ground that the punishment which has been awarded to the petitioner terminating his services is too harsh, but he could not point out any irregularity in the conduct of the enquiry or any illegality in the orders passed by the Disciplinary Authority. The Apex Court in the case of Anil Mishra vs. Union of India and others, (2008) 7 SCC 732 has held that scope of judicial review in the matter of Departmental proceedings is limited and the Courts could not sit as an appellate authority.

In view of the above, I do not find any illegality or infirmity in the order impugned. Writ Petition is accordingly dismissed.

Dated: 30.9.08

Sd/- Rajiv Sharma, J."

4. Brief facts giving rise to this writ petition are that Shri Jagdamba Prasad Singh petitioner-appellant was serving as a confirmed Amin on regular basis in the office of Special Land Acquisition Officer, Jaunpur. The land in plot No. 138 area .83 acres of one Tilakdhari Prajapati was acquired by the State Government for 220 KVA, Electricity Sub Station at Village Muradganj, Jaunpur, for which he was paid compensation of Rs. 20,025.61 by the Land Acquisition Officer, Jaunpur on 16.8.1984, vide his award dated 29.5.1985 of Rs. 2,97,507.58. The land owner filed a reference under Section 18 of the Land Acquisition Act, 1894 (LA Case No. 68/1985) decided by the Additional District Judge, Jaunpur on 31.5.1988. An appeal filed by State against the order of Additional District Judge, Eighth dated 16.8.84 was dismissed on 18.7.1992. The amount of compensation was substantially enhanced. The land owner filed an Execution Case No. 6/1996 and was paid an amount of Rs.2,99,727.37 as compensation on 22.3.1997.

5. One Shri Ram Dawar Yadav filed an application on 5.2.1998 on the basis of a power of attorney dated 29.5.1997, seeking further payment of Rs. 2, 46, 177.57 for acquisition of the same land. The amount was paid over to him in Execution Case No. 6 of 1996, on behalf of Shri Tilakdhari Prajapati on the basis of power of attorney. When the fraud was detected, a first information report was lodged by Shri Mohan Lal son of Tilakdhari Prajapati against Shri Ram Dawar Yadav; Shri Devi Prasad Upadhyay,SLAO office, Jaunpur; Shri Om Shanker Srivastava, Clerk in the office of SLAO on 8.11.1999 registering Case Crime No. 751 of 1999 under Sections 419, 420, 467, 468, 471, 218, 120B IPC Police Station Line Bazar, District Jaunpur. On the basis of the complaint, a preliminary enquiry was initiated by the District Magistrate and was conducted by the Sub Divisional Magistrate. The Sub Divisional Magistrate in his report dated 8.4.2000 found the allegations made against Shri

Ram Dawar Yadav; Shri Om Shanker and Shri Devi Prasad Upadhyay,SLAO of interpolation of Execution Case No. 5 to 6 of 1996 in which the payment was given all over again to Shri Ram Dawar Yadav. The petitioner was not found involved in the fraud. In this report the Sub Divisional Magistrate also observed, to the effect that Shri Tilakdhari Prajapati the land owner in the main execution case was paid by a calculation mistake an excess amount towards interest. The petitioner-appellant had prepared a note of payment of enhanced compensation in which he had, instead of deducting Rs.20,025.61 already paid to the land owner in the calculation of the amount on the rate fixed by the Additional District Judge, deducted the amount at the end of the calculation, by which some amount was paid to the original land owner in excess towards the interest.

6. The Sub Divisional Magistrate observed in his report dated 8.4.2000 that the payment made to Shri Ram Dawar Yadav on the power of attorney of Shri Tilakdhari Prajapati of Rs. 2, 46, 177.57 was wrong and illegal and that the amount should be recovered from Shri Ram Dawar Yadav and that the departmental enquiry should be initiated against the employees, who were guilty, namely Shri Om Shanker Srivastava (Ahalmad), and Hari Shanker Yadav (Ahalmad/Accounts Clerk).

7. The District Magistrate considered the report and while directing recovery from Shri Ram Dawar Yadav, instructed the Additional District Magistrate (Finance and Revenue) to seek explanation from the then Special Land Acquisition Officer Shri B.M. Singh. The Additional District Magistrate asked the Sub Divisional Magistrate to submit an enquiry report. The Sub Divisional Magistrate, Badlapur, in his report dated 5.6.2000 after narrating the facts of enhancement of compensation and payment of the enhanced compensation to the land owner, found that Shri Tilakdhari Prajapati has executed a registered power of attorney in favour of Shri Ram Dawar Yadav for receiving the amount. Shri Ram Dawar Yadav forged the document by changing the number of the execution case from 5/1996 to 6/1996 and made an application for payment of enhanced compensation on which the amount was paid over to him all over again without verifying that the earlier execution case was disposed of after paying the enhanced compensation.

8. In the criminal case the Chief Judicial Magistrate, Jaunpur had clearly observed that the Special Land Acquisition Officer was not involved in the case and that the fraud was played by Shri Ram Dawar Yadav, Shri Tilakdhari Prajapati and Shri Devi Prasad. He found that Shri Ganga and Shri Basant Lal Amins had prepared a separate report on 17.12.1998 and got permission from the then Special Land Acquisition Officer for payment to Shri Ram Dawar Yadav holding power of attorney of Shri Tilakdhari Prajapati. There was no budget for the amount. The amount was paid from the PLA account and thus Shri Basant Lal Amin was responsible for payment.

9. The Sub Divisional Magistrate mentioned in one of the paragraph that in the earlier calculation also the amount paid to the land owner of Rs.20,025.61 on 16.8.1984 should have been adjusted from the total amount worked after the enhanced rate fixed by the Additional District Judge and thereafter the interest at 15% should have been worked. In this calculation Shri Jagdamba Prasad Singh, Amin (the

petitioner-appellant) was guilty of making wrong calculations by which an amount of Rs.37,823.71 was earlier paid in excess to the land owner.

10. The District Magistrate, on the basis of the report, apart from taking action against other employees, prepared a charge sheet against the petitioner on June 13, 2000. In this charge sheet the petitioner was charged only with making a wrong calculation in respect of the first payment of enhanced compensation to the land owner of an amount of Rs.2,46,177.97 to Shri Tilakdhari Prajapati (land owner). In the report of Shri Ram Kewal Tiwari (SDO, Badlapur dated 5.6.2000) the calculation of 15% interest at Rs.37,823.71 was added for the period from 16.8.1984 to 22.3.1997 of a total of Rs.4596/- and the enquiry report of Shri S.P. Singh, Deputy Collector, Jaunpur dated 10.3.2000, and the power of attorney of Shri Tilakdhari Prajapati were proposed to be relied upon as documents in the departmental enquiry in proof of charges.

11. The petitioner took up a defence that the calculation made by him as Amin of the enhanced compensation after the judgment of the Additional District Judge was not final. It was only a proposed calculation for the purpose of drawing the amount, which was required to be verified by the Ahalmad and thereafter by the Special Land Acquisition Officer before the payment was made. In any case he had calculated the amount in accordance with the prescribed standard and had not calculated the amount of interest of 538 days from 29.5.1982 to October, 1996, giving benefit to the State. The petitioner denied that the charge was made out of over-payment against him.

12. In the enquiry report the petitioner was found to be guilty of wrong calculation of the amount. The District Magistrate in his show cause notice dated 8.2.2001 given to the petitioner, alleged that since the petitioner is guilty of making wrong calculation of the amount of Rs. 37,823.71 and since the charge is of embezzlement and is of serious nature, a major penalty is proposed to be imposed upon him.

13. The petitioner submitted a reply to the show cause notice and reiterated that he was not the person responsible, nor had the authority to pay the amount. He had simply made a calculation of enhanced compensation, after it was increased by the reference court, for which no standards are prescribed by any orders laying down any procedure. The proposals were made on the earlier instructions of the concerned Land Acquisition Officer, or his Ahalmad and that the final calculation is made by the Ahalmad, and the Special Land Acquisition Officer. If the calculation was wrong, the Ahalmad, Accounts Officer and thereafter the Special Land Acquisition Officer were required to correct, it before preparing the cheque for payment. The petitioner, however, stated that in fact in the estimated interest the land owner was not paid 160 days interest from 14.10.1996 to 22.3.1997.

14. The District Magistrate by his order dated 28.6.2001 agreed with the report of the enquiry officer and concluded that the charged officer has in connivance with the parties made a wrong calculation for payment of higher amount illegally to land owner Tilakdhari Prajapati and has caused loss to the revenue, which is a misconduct under C.C.S. Rules, 1955 and calls for a major penalty. He passed orders of major penalty on 28.6.2001, of removing the petitioner from service.

15. In the appeal before the Commissioner of the Division, the petitioner once again reiterated that he was not responsible for making the higher payment. He had only calculated the interest on the note sheets, which were required to be checked up by the Ahalmad, Accounts Officer and thereafter by the Special Land Acquisition Officer. He also pleaded that Shri Basant Lal the amin responsible for the fraud in making the entire amount paid all over again to the person holding power of attorney by manipulating the execution case and was reinstated by the Finance and Revenue Officer, Jaunpur on 1.9.2001 in pursuance to the order of the Chairman, Board of Revenue dated 3.7.2001.

16. Learned counsel for petitioner has also brought on record the order of this Court dated 18.2.2005 allowing the writ petition filed by Shri Hari Shanker Yadav, Accounts Officer, who had prepared and paid over the amount to Shri Ram Dawar Yadav on the basis of the power of attorney, which started the enquiry in which the petitioner was charge sheeted. The Writ Petition No. 2898/2001 Hari Shanker Yadav vs. District Magistrate, Jaunpur and others was allowed on 18.2.2005, on the ground that adequate and sufficient opportunity of hearing was not given to the petitioner. He was not allowed to lead evidence, cross examination to witnesses and to examine documentary evidence of the department.

17. The appeal filed by the petitioner was dismissed by the Commissioner, Varanasi Region, Varanasi on 19.8.2002 without considering the grounds raised by the petitioner. The appellate authority has referred to the grounds but has mechanically without considering the defence of the petitioner concluded that the petitioner has caused loss to the revenue and has not satisfactorily denied the charges levelled against him.

18. It is submitted by learned counsel for petitioner that all the arguments were raised before learned Single Judge, but that without considering the submissions, the writ petition was dismissed by picking up only one ground from his argument that on the charges, even if it was found proved, the punishment was too harsh. Learned Single Judge has not considered the facts of the case and the grounds raised in the writ petition in deciding the matter.

19 We have considered the submissions and perused the entire record including the preliminary reports, the reply given by the petitioner, the enquiry report, the order of District Magistrate, the grounds of appeal, the appellate order and find that learned Single Judge has not considered the grounds and has decided the writ petition casually by a short order, without giving good and sufficient reasons. In fact he did not consider the merits of the case at all.

20. The enquiry was initiated, into the charge on a complaint made by the son of the land owner, alleging that his father was 72 year's old; he was hard of hearing and since his mother was also not keeping well, and his brother was not educated, Shri Devi Prasad, Advocate was engaged. His father executed a power of attorney in favour of Shri Ram Dawar Yadav for receiving the amount. He was informed, after the death of his mother and brother, as well as Shri Devi Prasad Upadhyay,Advocate died that some fraud has been played. He enquired about the payment of compensation. He was

informed by Shri Ratnakar Shukla, Advocate, that Shri Ram Dawar Yadav has been paid the amount. He was advised to get the power of attorney annulled on which firstly he got the power of attorney cancelled by making application in the office of Sub Registrar (Sadar) Jaunpur on 7.10.1999. Thereafter when he came to Jaunpur from Surat (Gujarat), where he is working on a loom in Shiv Silk Company Ltd., on the enquiries made by him from the record, he found that Ram Dawar had manipulated the power of attorney by changing the case number and with the connivance of clerk Shri Hari Shanker Yadav and Shri Om Shankar Srivastava and had received Rs. 2, 46, 177.97 from the Special Land Acquisition Officer on 19.2.1998. On the enquiries made from the office of Additional District Magistrate, he found that after changing the number of the execution case he made an application to the District Judge for transfer of the case. Since the payment was not made, he got a recovery certificate issued from the Court of Additional District Judge, VIIIth, Jaunpur and got the amount transferred with the influence of Shri Hari Shanker Yadav and Shri Om Shanker Yadav to his account. The Special Land Acquisition Officer did not issue any notice to the petitioner's father or his advocate Shri Devi Prasad Upadhyay and sent a report regarding payment six months later. The FIR does not disclose, but proceeds on the basis that his father did not receive the amount of enhanced compensation. He requested for taking action against the guilty persons.

21. In the fact finding enquiry it was found that the fraud was played on the record by Shri Ram Dawar Yadav along with Shri Basant Lal Amin and Shri Hari Shankar Yadav. During the course of enquiry, it was found that at the time of calculation of the revised amount to be paid a wrong calculation was made by the petitioner. In the report dated 8.4.2000 of the Deputy Collector, Jaunpur, the amount calculated by the petitioner is given as follows:-

"Rate per acre	96,296.30
0.83 acre	77,037.20
Soletiam charge 30%	23,111.16
Total	1, 00, 148.66
12% Addl. (440 days)	11,144.01
15% interest (5308 days)	1, 08, 460.61
Deduction of the amount previously made	20,025.61
Amount payable	1, 99, 727.37"

22. In the report and thereafter in the preliminary enquiry report dated 5.6.2000 on the directions of the District Magistrate, it was reported that at the time of making first calculation as above the amount of Rs.20,025.61, already paid in the year 1984, to the land owner, was required to be deducted from the total amount excluding solatiam before calculating the interest. The wrong method of calculation resulted into over calculation of interest of 4596 days on Rs.20,025.61 at 15% by the petitioner at Rs.37,823.71.

23. Admittedly the petitioner was not the authority to make final calculations, to draw the amount and make the payment. As a lowest officer in the rung, the petitioner was required to make

preliminary calculations. The calculations were thereafter required to be checked by the Ahalmad, Accounts Officer and finally by the Special Land Acquisition Officer before the compensation was actually paid. The fraud was played subsequently by Shri Ram Dawar Yadav alongwith Shri Om Shankar and Shri Hari Shanker in the office of Special Land Acquisition Officer by which an amount of Rs.2, 46, 177.97 was paid to the person holding power of attorney and by changing the number of the execution case.

24. The record clearly demonstrates that the petitioner was neither responsible for making final calculations nor payment of the amount and that he had no concern with the fraud played upon by Shri Ram Dawar Yadav the power of attorney holder with other employees.

25. The petitioner had pleaded all these facts before the District Magistrate as well as the appellate authority. It appears that they had no time to go through the record, and without looking into the facts they found a scapegoat and punished the petitioner by removing him from service. They did not even care to find out whether the amount calculated by the petitioner was actually paid to the land owner, and whether there was any allegation against the petitioner for having misappropriated the amount for concluding that the State had suffered loss. The District Magistrate did not even wait for the conclusion of the criminal case and failed to notice that the other employees, who were involved in the fraud played subsequently on record, were either reinstated or the orders of their dismissal were set aside by this Court.

26. We find that the petitioner was not the person responsible for making final calculations for drawing the amount, and for making payment. He had simply made calculations, which were required to be checked by the Ahalmad and the Accounts Officer and thereafter re-checked by the Special Land Acquisition Officer before the payment was made to the land owner. The Special Land Acquisition Officer was let off in the preliminary enquiry for having made false payment to Shri Ram Dawar Yadav. Only his clerk was found responsible. The calculation made by the petitioner, at the first instance in favour of the land owner was referred to in the preliminary enquiry, as a passing reference for incorrect calculation, by the Sub Divisional Magistrate and thereafter by the District Magistrate as a ground for levelling charges against the petitioner.

27. The anxiety of the Court to decide the cases quickly sometimes leads to gross injustice to the persons, who approach the Court giving all the required facts. In the present case, the District Magistrate, the Commissioner and thereafter learned Single Judge did not care to look into the facts of the case, in which no charge of embezzlement was alleged or established. The petitioner serving as Amin at the lowest level was found to have made incorrect calculation, which could have been made by any body by way of a bonafide mistake and could be corrected by the officer making payment. He was punished in the matter of a greater fraud played on the record subsequently by Shri Ram Dawar, the employees in the office of Special Land Acquisition Officer, and in which he was not involved.

28. We, therefore, find it just and proper to allow the Special Appeal and quash the orders of the District Magistrate dated 28.6.2001 removing the petitioner

from service; the order of the Commissioner, Varanasi Division, Varanasi dated 19.8.2002 allowing the appeal and the order of the learned Single Judge dated 30.9.2008 dismissing the writ petition. The petitioner was to retire in the year 2003. He shall be treated to be in service till the date of his retirement and shall be paid the entire arrears of salary upto date of his retirement and the entire retiral benefits to be calculated, and paid to him within four months from the date a certified copy of the order is produced in the office of District Magistrate, Jaunpur.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.10.2010

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Single No. 2264 of 2007

Awadhesh Kumar Pandey ...Petitioner
Versus
Commissioner, Lucknow and another ...Respondent

Counsel for the Petitioner:
Vivek Manishi Shukla

Counsel for the Respondent:
C.S.C.

Arms Act 195, Section 17-Cancellation of license of non Prohibited fire Arms-on pertext of Public interest-nowhere such ground provided in statutory provision,-even appeal rejected by no speaking order-held illegal arbitrary-right to possess fire Arm with right to life protection under Art 21 of constitution-can not denied on filing ground.

Held: Para 18

A notice may be taken of the fact that for any reason whatsoever, the crime rate is rising day by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is a fundamental right guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess fire arms for their personal safety and to save their family from miscreants. It is often said that ordinarily in a civilized society, only civilized persons require arms licence for their safety and security and not the criminals. Of course, in case the Government feels that arms licences are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act.

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

1. Heard Sri Vivek Manishi Shukla, learned counsel for the petitioner and learned Standing Counsel.

2. By means of present writ petition, the impugned orders dated 21.12.2005 and 14.09.2006 passed by the respondent no.1 i.e. Commissioner, Lucknow Division, Lucknow and order dated 28.05.2003 passed by respondent no. 2, District Magistrate, Sitapur are under challenge.

3. Facts in brief as submitted by the learned counsel for the petitioner are that the petitioner was holder of licence No. 798 Double Barrel Gun, granted by the licensing authority/District Magistrate, Sitapur.

4. On 23.01.2003, petitioner received a show-cause-notice issued by

the licensing authority/District Magistrate, Sitapur that why the licence should not be cancelled and his licence was also suspended. On 05.02.2003, petitioner submitted reply in response to the show-cause-notice dated 23.01.2003. Thereafter, vide order dated 28.05.2003 petitioner's licence was cancelled.

5. Aggrieved by the same, petitioner preferred an appeal before the appellate authority under Section 18 of the Arms Act, 1959 dismissed vide order dated 21.12.2005. Thereafter, the petitioner filed an application for recall/restoration of the said order, dismissed vide order dated 14.09.2006 by the appellate authority/Commissioner, Lucknow Division, Lucknow, hence the present writ petition has been filed.

6. Learned counsel for the petitioner while assailing the impugned orders in question submits that the order passed by the appellate authority dated 21.12.2005 by which the petitioner's appeal has been dismissed is a non-speaking order and passed without application of mind, as such the same is arbitrary in nature, in violation of principles of natural justice.

7. He further submits that the Licensing Authority/District Magistrate, Sitapur had cancelled the petitioner's licence vide order dated 28.05.2003 on the basis of a report dated 14.01.2003 submitted by Superintendent of Police, Sitapur, copy of the said report was not given to the petitioner, accordingly the non-supply of the material/report dated 14.01.2003 renders the impugned order without jurisdiction.

8. Learned counsel for the petitioner further submits that as a matter of fact and record, two cases namely Case Crime No. 174/89 and 135/95 which are the basis of passing of the impugned order of cancellation of his arm licence in both the cases he has been acquitted.

9. Further, there is no finding in the impugned orders about the imminent danger to public peace and safety due to the involvement of the petitioner in alleged criminal cases, but the impugned order of cancellation passed by the respondent no. 2 in 'Janhit'; the said action is per se illegal and in contravention to the provisions as provided under Section 17 of the Arms Act.

10. In support of his contention, learned counsel for the petitioner relies on the following judgments.

1. Fuzail Ahmad Vs. Commissioner Allahabad Mandal, Allahabad and others [2001(19) LCD 1]

2. Ram Murti Madhukar Vs. District Magistrate, Sitapur [1998 (16) LCD 905]

3. Ram Sanehi Vs. Commissioner, Devi Patan Division Gonda and another [2004(22) LCD 1643]

4. Mohd. Haroon Vs. The District Magistrate, Siddharth Nagar [2003(21) LCD 548]

5. Hari Kant @ Raja Vs. State of U.P. and others [2002(1) JIC 714(All)]

6. Raghubir Singh Vs. Commissioner Jhansi Division, Jhansi & others [2002(2)JIC 987(All)]

7. Ram Karpal Singh Vs. Commissioner Devi Patan Mandal Gonda and others [2006(24) LCD 114]

8. Satish Singh Vs. District Magistrate, Sultanpur [2010(68) ACC 94].

11. On the strength of the said judgments, learned counsel for the petitioner submits that the Arm licence no. 798 cancelled only on the ground of 'Janhit' cannot be cancelled under the provisions as provided under Section 17 of the Arms Act, so the instant writ petition liable to be allowed.

12. Sri Suresh Panjwani, learned Standing Counsel on the other hand submits that after considering the facts and circumstances of the case, the licence of the petitioner has been cancelled by the respondent no. 2 taking into consideration the report submitted against him by police authority of the District Sitapur, said order was confirmed by the appellate authority. However, Sri Suresh Panjwani, learned Standing Counsel fairly admits that the two criminal cases which were the basis of the passing of the impugned cancellation order in the same, petitioner has been acquitted.

13. I have heard learned counsel for the petitioner and gone through the record.

14. The power to suspend or cancell the arm licence has been given under Section 17 Arms Act, 1951, from the perusal of the said section, it can be seen that the arm licence can be cancelled or suspended on the ground that it will necessary for security and public safety.

15. A plain reading of Section 17 indicates that the arms licence can be cancelled or suspended on the ground when the licensing authority deems it necessary for the security of the public peace or the public safety. In the present case, while passing the impugned order, neither the District Magistrate nor the appellate authority has recorded the finding as to how and under what circumstances, the possession of arms licence by the petitioner, is detrimental to the public peace or the public security and safety. Merely because criminal cases are pending does not seems to attract the provisions of Section 17 of the Arms Act.

16. To attract the provisions of Section 17 of the Arms Act with regard to public peace, security and safety, it shall always be incumbent on the authorities to record a finding that how and under what circumstances and in what manner, the possession of arms licence shall be detrimental to public peace, safety and security. In absence of any such finding merely on the ground that a criminal cases are pending without considering any circumstances with regard to danger of public peace, safety and security, the provisions contained under Section 17 of the Arms Act, shall not satisfy.

17. Needless to say that right to life and liberty are guaranteed under Article 226 of the Constitution of India and the arms licences are granted for personal safety and security after due inquiry by the authorities in accordance with the provisions contained in Arms Act, 1959. The provisions of Section 17 of the Arms Act with regard to suspension or cancellation of arms licence cannot be invoked lightly in an arbitrary manner. The provisions contained under Section

17 of the Arms Act should be construed strictly and not liberally. The conditions provided therein, should be satisfied by the authorities before proceeding ahead to cancel or suspend an arms licence.

18. A notice may be taken of the fact that for any reason whatsoever, the crime rate is rising day by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is a fundamental right guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess fire arms for their personal safety and to save their family from miscreants. It is often said that ordinarily in a civilized society, only civilized persons require arms licence for their safety and security and not the criminals. Of course, in case the Government feels that arms licences are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act.

19. Learned counsel for the petitioner relied upon the judgment reported in ***Ram Sanehi Vs. Commissioner, Devi Patan Division Gonda and another [2004(22) LCD 1643]*** where this Court relied upon its earlier judgment ***Habib Vs. State of U.P.2002 ACC 783*** and in one another judgment ***Fakir Chand Vs. Commissioner, Meerut Mandal, Meerut 2002 (11) ACC 518*** and it has been held that merely because criminal case is pending, it shall not create a ground for suspension or cancellation of arms licence in pursuance of powers conferred by Section 17 of the Arms Act. The authorities have to record finding based on material evidence with regard to breach of public peace and security while cancelling the arms licence.

20. In the present case, neither the District Magistrate, Sitapur nor appellate authority while passing the impugned order has recorded the reasons as on what grounds and under what circumstances if the petitioner possesses the Arm licence, the same would be against the society of public peace or public safety but the same had cancelled on the ground of 'Janhit' taking into consideration the two criminal cases in respect of which a report was submitted against the petitioner, however the said two criminal cases he was acquitted, so the impugned action on the part of respondents thereby cancelling his arm licence is arbitrary action, in violation to the provisions of the Arms Act.

21. Further, in the impugned order dated 14.09.2006 passed by the appellate authority/Commissioner, Lucknow Division, Lucknow, no reasons on the basis of which the appellate authority had came to the conclusion for dismissing the appeal of the petitioner had been stated/given moreover, when it was brought to the notice to the appellate authority that the two criminal cases which are the basis of the cancellation of Arm licence by the respondent no. 2 vide order dated 28.05.2003, in the same petitioner has been acquitted, so it is incumbent upon the appellate authority to discuss the said fact and thereafter the impugned order should be passed.

22. For the foregoing reasons, the orders dated 21.12.2005 and 14.09.2006 passed by the respondent no. 1 and the order dated 28.05.2003 passed by the respondent no. 2 are quashed and respondent no. 2 is directed to restore/renew the licence of the petitioner forthwith.

Accordingly, writ petition is allowed.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2010

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Second Appeal No. 2751 of 1978

The State of U.P. ...Appellant
Versus
Union of India and another ...Respondent

Counsel for the Appellant:
Sri Shrish Chandra(S.C.)

Counsel for the Respondent:
Sri Govind Saran
S.C.

Code of civil procedure-Section-102-readwith constitution of India Art-131-suit by State Govt. for loss of 3236 bags of wheat worth of Rs. 3283.53 against Railways including Union of India-Preliminary issue regarding maintainability decided against Plaintiff/Appellant-whether appeal maintainable-held 'yes'-civil court has jurisdiction to try such suit-Art.131 come in existence where dispute between State picture and Union of India in context of constitutional relationship arose-suit for loss against Railways not barred. Appeal allowed.

Held: Para 14 and 16

In view of the aforesaid, I am of the considered opinion that the present second appeal is not hit by Section 102 CPC.

In the aforesaid decision, the Apex Court considering the various earlier decisions concerning Article 131 held that a suit filed against the Union of India for recovery of compensation for the loss on account of damage caused to the goods belonging to the State dispatched through Indian Railways is maintainable in a civil court and is not covered by Article 131 of the Constitution of India which confers exclusive original jurisdiction upon the Supreme Court in respect of the disputes within the ambit of the above Article. It was further laid down that Article 131 of the Constitution of India is attracted only when a dispute arises between or amongst the State and the Union of India in the context of Constitutional relationship that exists between them and the powers, rights, duties, immunities, liabilities, disabilities etc., flowing therefrom but would not cover ordinary disputes of the nature in relation to carrying on any trade or business covered by Article 298 of the Constitution of India. Thus, where the State Government has made a claim like any other consignee of goods dispatched through Railways for compensation whose success or failure depend on proof of facts which have to be established in the same way in which a private person would have to establish such a claim would essentially be a claim against the Railway administration and not actually against the Union of India who is impleaded as a party to the suit being the owner of the India Railways by virtue of Article 300 of the Constitution of India. The dispute of such a kind is actually a dispute between the Railway administration and the person instituting the suit.

Case law discussed:
AIR 1967 SC 344, AIR 1960 SC 980, AIR 1984 SC 1675

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

1. The State of U.P. had booked 3236 bags of wheat for transportation by Railways. At the destination, at the time of delivery the wheat was found short, moist and spoiled on account of which State of U.P., allegedly suffered a loss of Rs. 3,283.53 paise. The negligence was attributed solely to the Railways.

2. The State of U.P. as plaintiff instituted a suit against the Union of India through General Manager, Northern Eastern Railway, Gorakhpur and the General Manager Northern Railway, Baroda House, New Delhi for recovery of Rs. 3,283.53 paise.

3. In the suit, a preliminary objection was raised on behalf of the defendants that the suit is not maintainable in view of Article 131 of the Constitution of India. Accordingly, issue no. 6 was framed with regard to above preliminary objection. It was decided by the first court and it was held that the jurisdiction of the civil court stood excluded and the plaint was ordered to be returned for presentation to proper court vide judgment and order dated 4.10.1974.

4. The aforesaid judgment and order has been upheld in Miscellaneous Appeal also vide judgment and order dated 25.2.1977.

5. Aggrieved by the aforesaid judgments and orders, the State of U.P. has preferred this Second Appeal.

6. The appeal was admitted on the following substantial question of law:-

Whether the civil court has jurisdiction to try the suit or it should be tried by the Supreme Court of India under Article 131 of the Constitution of India?

7. Heard Sri Shrish Chandra, learned Standing counsel for the State of U.P. and Sri Govind Saran, learned counsel for the Indian Railways/ Union of India.

8. Before proceeding to answer the above question, as the valuation of the suit as well as the appeal is only Rs. 3,283.53 paise and Section 102 CPC provides that no second appeal shall lie when the subject matter of the original suit for recovery of money does not exceed Rs. 25,000/-, on the insistence of the counsel for the respondent, I consider it appropriate to first deal with the issue as to whether the second appeal is barred and is not maintainable in view of Section 102 CPC.

9. Section 102 CPC as it stands today was introduced by amending Act No. 22 of 2003 w.e.f. 1.7.2002 and bars second appeal in suits for recovery of money where the valuation of the original suit does not exceed Rs. 25,000/-. However, on the date of filing of the Second Appeal and its admission, Section 102 CPC was differently worded. It was as follows:-

Section 102 CPC- "No second appeal in certain suits- No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount of value of the subject-matter of the original suit does not exceed [three thousand rupees]"

10. A plain reading of the aforesaid provision makes it clear that in respect of

the suits which are cognizable by Courts Small Causes no second appeal would lie if the subject matter of the suit does not exceed 3,000/- rupees.

11. The suit in question is not of the nature which is cognizable by the court of Small Causes and moreover its valuation is also over 3,000/- rupees. Therefore, the second appeal against the judgment and orders of the lower courts was not barred by Section 102 CPC at the relevant time.

12. The right of appeal is a statutory right and when the statute at the relevant time of cause of action provided for a remedy of an appeal, the said right can not be taken away later on. In other words, the subsequent amendment to the aforesaid provision would not be detrimental to the appeal.

13. The Supreme Court in the case of ***Vitthalbhai Naranbhai Patel Vs. Commissioner of Sales Tax AIR 1967 SC 344*** has held where a right of appeal is taken away after the commencement of the proceedings it will not affect the right of appeal which had vested in the litigant at the time of action. The Supreme Court in the case of ***State of Bombay Vs. M/S S.G. Firms Exchange AIR 1960 SC 980*** also held that not even the right to appeal can be impaired by putting onerous conditions subsequently.

14. In view of the aforesaid, I am of the considered opinion that the present second appeal is not hit by Section 102 CPC.

15. Now coming to the substantial question of law involved in this appeal the same is no longer ***res-integra*** in view of ***AIR 1984 SC 1675 Union of India Vs. State of Rajasthan.***

16. In the aforesaid decision, the Apex Court considering the various earlier decisions concerning Article 131 held that a suit filed against the Union of India for recovery of compensation for the loss on account of damage caused to the goods belonging to the State dispatched through Indian Railways is maintainable in a civil court and is not covered by Article 131 of the Constitution of India which confers exclusive original jurisdiction upon the Supreme Court in respect of the disputes within the ambit of the above Article. It was further laid down that Article 131 of the Constitution of India is attracted only when a dispute arises between or amongst the State and the Union of India in the context of Constitutional relationship that exists between them and the powers, rights, duties, immunities, liabilities, disabilities etc., flowing therefrom but would not cover ordinary disputes of the nature in relation to carrying on any trade or business covered by Article 298 of the Constitution of India. Thus, where the State Government has made a claim like any other consignee of goods dispatched through Railways for compensation whose success or failure depend on proof of facts which have to be established in the same way in which a private person would have to establish such a claim would essentially be a claim against the Railway administration and not actually against the Union of India who is impleaded as a party to the suit being the owner of the India Railways by virtue of Article 300 of the Constitution of India. The dispute of such a kind is actually a dispute between the Railway

administration and the person instituting the suit.

17. In view of the above decision of the Supreme Court and its ratio decendai the substantial question of law raised in this appeal has to be answered in favour of the plaintiff appellant and against the respondents and it is held that the suit for claim and damages based upon Section 80 of the Railways Act was maintainable before the civil court and would not lie before the Supreme Court.

18. Accordingly, appeal succeeds and is allowed. The impugned judgment order and decree of the lower appellate court dated 25.2.1997 passed in Civil Appeal No. 240 of 1974 and that of the court of first instance dated 4.10.1974 passed in Original Suit No. 272 of 1972 State of U.P. Vs. Government of India and others are both set aside with no orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.08.2010

BEFORE
THE HON'BLE D.P. SINGH, J.
THE HON'BLE VEDPAL, J.

Writ Petition No. 4180 (S/B) of 1990

S.N. Taneja ...Petitioner
Versus
State of U.P. and others ...Respondent

Constitution of India-Art. 14 and 16-Parity of Pay Scale-petitioner after retirement from Army-joined as Secretary Zila Sainik Board-denied the same Pay given to the juniors who joined much after petitioner-on ground petitioner not accepted working on contractual basis-Tribunal rejected claim with reasoning that for enforcement of right of equality-only the High Court or the Apex Court can entertain-held-different mode of recruitment can not be ground for different Pay Scale in same cadre post-petitioner entitled for same Salary perk and status.

Held: Para 18

Accordingly, we are of the view that respondents have no right to discriminate with regard to payment of salary and status between the petitioner and subsequent appointees on the post of Secretary because of the different source of recruitment. The petitioner seems to be entitled for payment of same salary, perks and status.

Case law discussed:
1972 S.L.R. 832, (1999) 4 SCC 756, 2007 AIR SC 2509, 1989 (1) SCC 121.

(Delivered by Hon'ble D.P. Singh, J)

1. We have heard learned counsel for the petitioner as well as learned Standing and perused the record.

Dispute giving rise to the present controversy relates to payment of salary to the petitioner on the post of Secretary of Zila Sainik Board appointed through different sources. Petitioner claimed parity in pay scale on the ground that the persons appointed at later stage by contractual assignment or otherwise have been given higher pay scales.

2. The petitioner who is an officer of Indian Army had joined as Emergency Commissioned Officer on 30.6.1963, later on released from Army on 15.8.1967. Thereafter, he was appointed as Secretary of Zila Sainik Board in 1971 in the pay scale of Rs.400-750, on a non Gazetted post. He was posted at District Shahjahanpur as Secretary Grade-I. Later on some Emergency Commissioned Officers released from the Army were

appointed by the Government on the post of Secretary, Zila Sainik Board with higher pay scale and status.

3. Admittedly, even persons junior to the petitioners who were released from the Army services, were appointed on the post of Secretary in the year 1974 with higher pay scale of Rs.550-1200 and gazetted status.

4. Petitioner submitted representation. His submission that there cannot be two pay scales of the cadre of Secretary and he is entitled for same pay scale and status which are being enjoyed by subsequent appointees of the post of Secretary. Representation submitted by the petitioner was decided by an order dated 23.8.1981 and the Government had refused to give higher pay scales of Rs.650-1300. Hence, the petitioner approached the Tribunal for declaration with regard to higher pay scale from 1974 and the scale of 650-1300 from 1975 when other Secretaries were appointed in the Department availing the same pay scales. The petitioner also prayed for the pay scale of Rs.1100-1900 from July, 1979. So far as the Gazetted status is concerned, the petitioner had prayed for extending benefit w.e.f. 1975. It is also stated by the petitioner before the Tribunal that one additional increment for every officer of Army services was provided vide Government of India's Circular dated 1.7.1972 and its benefit is to be extended to the released Emergency Commissioned Officers also.

5. The respondents contested the case before the Tribunal with the submission that the petitioner was appointed in the pay scale of Rs.225-500, revised to Rs.400-750 on the basis of the Pay Commission's report of 1971-73. It was admitted by the respondent-State before the Tribunal that in the year 1974, in the cadre of Secretary, 18 gazetted posts were created in the scale of 550-1100 on which the pension holders from the Army were appointed. The benefit was denied to the petitioner on the ground that the petitioner is not a pension holder. However, it is not disputed that the post of Secretary constitutes one cadre, same duties, liabilities and functioning. It is further stated by the respondent-State that the benefit of Government of India's Circular (supra) did not *epso facto* apply to the State Government.

6. It is also stated by the respondent before the Tribunal that by a letter dated 23.3.1978, an offer was made to the petitioner that if he is agreed to appear for interview before the selection committee for appointment on contract basis, then he will be provided new higher pay scale to which the petitioner has refused.

7. The Tribunal after considering the rival submissions made before it, held that the petitioner shall be abide by the appointment letter and shall not be entitled for pay scales given to the subsequent appointees of the cadre. The Tribunal further held that the principles with regard to equality of pay can be enforced by the High Court and Supreme Court and not by the Tribunal. The Tribunal further held that the respondent-State had offered the petitioner to appear before the selection committee for appointment on contract basis for the higher pay scale of 650-1300 but the petitioner had not accepted the same, hence it may not be made available by the Tribunal. The Tribunal noted that in response to the offer of the State

Government with regard to the contractual appointment, the petitioner took plea that if his lien is maintained in the regular cadre of the post of Secretary, only then he can accept the appointment on contract basis. Government declined to accept the petitioner's condition, hence refused to call him for the appointment on contractual basis.

8. Attention has been invited to Section 4 of the U.P. Pubic Services (Tribunal) Act, 1976, which is reproduced as under :-

"4.Reference of claims to Tribunal.-- If any person who is or has been a public servant claims that in any matter relating to employment as such public servant his employer or any officer or authority subordinate to the employer has dealt with him in a manner which is not in conformity with any contract, or--

(a).in the case of a Government servant, with the provisions of Article 16 or Article 311 of the Constitution or with any rules or law having force under Article 309 or Article 313 of the Constitution ;

(b). In the case of a servant of a local authority or a statutory corporation, with Article 16 of the Constitution or with any rules or regulations having force under any Act of Legislature constituting such authority or corporation ;

he shall refer such claim to the Tribunal and the decision of the Tribunal thereon shall, subject to the provisions of Article 226 and 227 of the Constitution, be final :

(Provided that no reference shall, subject to the terms of any contract, be made in respect of a claim arising out of the transfer of a public servant.

Provided that no reference shall ordinarily be entertained by the Tribunal until the claimant has exhausted his departmental remedies under the rules applicable to him.

Provided also that where no final order is made by the competent authority, that is to say the State Government or other authority or officer or other person competent to pass such order with regard to the appeal preferred or representation made by the Claimant within one year from the date on which such appeal was preferred or representation was made, the Claimant may by a written notice require such competent authority to pass the order and if the order is not passed within one month of the service of notice the Claimant shall be deemed to have exhausted his departmental remedy.

9. A plain reading of the provision contained in Section 4 of the Act shows that a public servant may approach the Tribunal in case in any matter relating to his/her employment as a public servant his employer or any officer or authority subordinate to the employer has dealt with him in a manner which is not in conformity with any contract or in the case of government servant, with the provisions of Article 16 or Article 311 of the Constitution or with any rules or law having force under Article 309 or Article 313 of the Constitution of India. The provisions contained in Section 4 of the Act seems to make a case for interference by the Tribunal. Article 16 of the Constitution of India proclaims that there

shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. It further provides that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

10. It is implicit in Clause (2) of the Article 16 of the Constitution of India that there cannot be any discrimination in the matter of employment. Employment includes all related matters which includes the payment of salary without any discrimination. Article 16 protects the employment in public office without any discrimination. In case while filling the post of Secretary of Zila Sainik Board with same duties and functional liabilities, the State treated differently because of the different source of recruitment, it shall amount to discrimination and Tribunal could have adjudicated the matter while deciding the claim petition. Findings recorded by the Tribunal seems to be not correct appreciation of law.

11. Now coming to the next limb of controversy as to whether there can be different salary or pay scale for the same post or same cadre because of different source of recruitment. Undisputedly, the duty and functional liability of the post of Secretary of petitioner vis-a-vis others who appointed subsequently are the same. There is nothing on record which may reveal that the persons appointed on the post of Secretary on contract basis or retired army personnel getting regular pension after joining on the post will have different liabilities, duties and assignment than the petitioner possess. Merely because the source of recruitment is different, the respondents could not treat differently the petitioner vis-a-vis other persons who had joined at later stage in the cadre of Secretary of Sainik Board.

12. In a case reported in 1972 S.L.R. 832 : State of Mysore Vs. M.H.Krishna Murthy (S.C.), Hon'ble Supreme Court has held that because of integration of two wings of service into one single cadre, it shall not be open to the State to discriminate the persons who become members of the same cadre with regard to further promotion from the integrated cadre on the basis of the inquiry source of recruitment to a particular wing. The rule making power conferred on the State under Article 309 of the Constitution relating to recruitment and conditions of service could not be used to validate unconstitutional discrimination in promotional chances of the government servant belonging to same category.

13. Aforesaid proposition of law has been reiterated by the Hon'ble Supreme Court in the case reported in (1999) 4 SCC 756 : Kamlakar and others Vs. Union of India and others. In the case of Kamlakar(supra), their Lordships held that once the person join a cadre from more than one source like direct recruitee and promotee, the distinction between the direct recruitees and promotees disappears at any rate so far as the equal treatment in the same cadre for payment of pay scale given is concerned. The birthmarks have no relevance in this connection.

14. The Division Bench of this Court in an under reported judgment delivered in writ petition No.2007 (S/B) of 1999 : Hamid Ali Qazi Vs. U.P. Corporation Ltd. and others in which one

of us (Hon'ble Devi Prasad Singh,J) was a member has observed as under :-

"In view of above it is not the source of recruitment plays role in fixation of salary, perks and other service benefits but it is the service condition of the cadre concern plays role in fixation of salary perks and revised scale. Once an incumbent joins a cadre whether as promotee or as direct recruit, the persons from both the categories shall be entitled for same salary, perks and other benefits.

13. There is one other aspect of the matter. It has not been disputed by the parties' counsel that a person holding the post of Assistant Engineer whether joins the cadre by promotion or direct recruit discharges same duties without any difference. Whether it is promotees or direct recruit after joining the cadre of Assistant Engineering functions with equal rights, duties and liabilities without any difference. Accordingly any classification made for the payment of time pay scale to the Assistant Engineers as has been done by the impugned circular so far as it deprives the promotees from time pay scale after 19 years of service is unreasonable, unjust and improper and is violative of Article 14 of the Constitution of India."

15. In a case reported in ***2007 AIR SC 2509 : Nehru Yuva Kendra Sansthan Vs. Rajendra Kumar Shukla,*** their Lordships of Hon'ble Supreme Court has held that because of different source of recruitment, there cannot be a different pay scale. In case the persons are discharging the same duties and are paid salary and other allowances, then there is no reason to deny the same benefits to others who are discharging the same duties and functions. Otherwise also, there cannot be two different pay scales for the persons working in the same cadre without same duty.

16. In the aforesaid case of Hamid Ali Qazi (supra), the Division Bench has further observed as under :-

"14.The object of Article 14 is wider is to ensure fairness and equality of treatment. Extending a benefit to one class of an establishment and denying to the other class enumerated in the same provision shall be an incident of arbitrary and bad law vide : 1974(4) SCC 3 E.P.Royappa Vs. State of Tamilnadu & another : 1978(1) SCC 248 : Mrs. Menaka Gandhi Vs. Union of India ; and Indian Express Newspapers (P) Ltd. Vs. Union of India (1995) Supp (4) SCC 758(para 13 to 15 and 20). Wherever there is denial of equality, such action shall be arbitrary and Article 14 of the Constitution of India strikes at arbitrariness of State action in any form. The classification made by the state authorities whether by legislative enactment or executive action may be tested at touchstone of Article 14 of the Constitution of India being arbitrary or discriminatory vide, (1981) 1 SCC 722, Ajay Hasia Vs. Khalid Mujib Sehravardi (para 16 and 19) ; AIR 1979 SC 1628 : Ramana Dayaram Shetty Vs. I.A.A.I.(para 10 and 21) ; AIR 1991 SC 101 Delhi TRansport Corporation Vs. D.T.C. Mazdoor Congress (para 199, 244, 251, 262, 264, 267)."

17. Reliance placed by the learned Standing Counsel in a case reported in ***1989 (1) SCC 121 State of U.P. and others Vs. J.P.Chaurasia*** seems to be misconceived where the Hon'ble Supreme Court had accepted the payment of different pay scales for the persons

working on the post of Bench Secretary, Grade-I and Grade-II alongwith Section Officers. The case of J.P.Chaurasia (supra) seems not applicable in the facts and circumstances of the present case as in the present controversy, there appears single post of Secretary of Zila Sainik Board and persons appointed at later stage, were appointed on the same post which the petitioner was holding. It is a case where discriminatory treatment was imparted by the State Government with regard to the payment of salary, perks and status. Once the cadre is same, post is same, duties are same, functions, and liabilities are the same, then there cannot be two or more pay scales merely because of source of recruitment are different.

18. Accordingly, we are of the view that respondents have no right to discriminate with regard to payment of salary and status between the petitioner and subsequent appointees on the post of Secretary because of the different source of recruitment. The petitioner seems to be entitled for payment of same salary, perks and status.

19. In view of the above, we are of the view that the Tribunal has failed to exercise the jurisdiction vested in it.

20. Accordingly, writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 29.11.1988 passed by the Tribunal, as contained in Annexure No.2 is hereby quashed. We also allow the claim petition and grant relief as prayed by the petitioner before the Tribunal with regard to the parity in the pay scale, perks and status. A writ of mandamus is also issued directing the respondents to take decision expeditiously for extension of benefit keeping the observations made hereinabove, within a period of three months from the date of receipt of present judgment.

Recovery if any, made shall be refunded to the petitioner forthwith.

With the aforesaid directions, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.08.2010

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE RITU RAJ AWASTHI, J.

Writ Petition No. 4310 (MB) of 2010.

Smt. Vandana Dixit ...Petitioner
Versus
Visitor S.G.P.G.I. and others ...Respondents

Constitution of India-Art. 226 readwith transplantation of Human Organs Rules 1995-Rule-6F(C) (xi)-Petitioner suffering from renal failure since 2004-after getting approved from state level committee approached the Fortis Hospital-who refused to operate as the approval not obtained from Hospital level committee-held-illegal-no such statuary requirement after having approval from state level committee to obtain approval from hospital level committee-No hospital either Govt. or Private can refused to go beyond Rules-direction for prompt enforcement of approval given subject to choice of petitioner to either approach before Fortis or P.G.I.

Held: Para 66

We, therefore, conclude with a note that it is the responsibility of all the doctors and hospitals to facilitate the treatment in a deserving case to the patient who is

in emergent need of transplantation of human organs by following the provisions of the Act and the Rules at the earliest and the Authorization Committees so formed have the responsibility to give permission only when they are satisfied about the statutory requirements having been fulfilled. with promptitude. The delay in giving such treatment sometimes may prove fatal, for the ailing who has a right to live a longer life which life should be as comfortable as it could be. Transplant of human organ can not be refused for the reasons which do not flow from the Act aforesaid.

(Delivered by Hon'ble Pradeep Kant, J.)

1. Heard Sri Akhilesh Kalra, learned counsel for the petitioner and Sri Alok Mathur for the Fortis Hospital, Sri Jai Deep Narain Mathur for the Sanjay Gandi Post Graduate Institute of Medical Sciences, and Sri D.K. Upadhaya, learned Chief Standing Standing Counsel for the State,

2. The petitioner, Smt. Vandana Dixit, a patient of renal failure since the year 2004, has approached this Court seeking a direction to the respondent State authorities to ensure that Sanjay Gandhi Post Graduate Institute of Medical Sciences (hereinafter referred to as 'the SGPGI') or Fortis Hospital, Noida, U.P. be directed to undertake the renal transplantation in view of authorization given by the Authorization Committee, whereas the SGPGI and the Fortis Hospital are shifting their responsibility and are avoiding transplantation.

3. The grievance in nut-shell is that despite authorization given by the State Level Committee as required under the Transplantation of Human Organs Act, 1994 (hereinafter referred to as 'the Act, 1994) none of the aforesaid two hospitals are proceeding with the treatment/operation, which they cannot do. Further, delay in undertaking the transplant, is adversely affecting her condition, which is deteriorating every passing moment.

4. The petitioner, Smt. Vandana Dixit aged about 47 years, is a house-wife. Besides her husband, she has one daughter aged about 12 years and one son aged about 21 years. She suffered renal failure in the year 2004. She was admitted to SGPGI, Lucknow, as a patient in the Nephrology Department and was advised dialysis and renal transplant.

5. Renal transplant is only permitted when the donor is a near relative of the recipient or when the donor is not the near relative of the recipient, then on authorization being given by the Authorization Committee. The near relative namely; the brother and family members, though offered their kidney for such a transplant but they were rejected on medical ground. Since no other relative came forward to donate kidney to the petitioner, the renal transplant could not be done and, therefore, since 2004, she is undergoing regular dialysis twice a week which at the time of filing of the writ petition was being done in the Vivekanand Hospital, Lucknow under the regular consultation and guidance of the SGPGI.

6. When a query was made to the learned counsel appearing for the SGPGI by this Court as to why SGPGI is not treating the petitioner and why renal transplant is not being done, a statement was given by Sri J.N. Mathur, appearing

for the SGPGI that the patient alongwith family members may present themselves in Nephrology Department, where she would be attended without any inconvenience being caused to her alongwith donor on the very next day. Since thereafter, she is in the SGPGI where dialysis is being regularly done.

7. The petitioner, since was not able to arrange the donor for herself amongst her own relatives therefore, she tried for a non-relative donor. She fortunately contacted Sri Inderjeet, who stayed with the family of the petitioner since long, and has been settled by the family of the petitioner, whereas he offered to donate his kidney voluntarily.

8. The petitioner was given to understand that the donor, not being a near relative, transplantation can only be done if the Authorization Committee which has been constituted under the Act, 1994 permits such donation. The petitioner, therefore, jointly with Sri Inderjeet, applied after completing necessary formalities alonwith necessary affidavits to the Authorization Committee for granting necessary permission to Sri Inderjeet to donate his kidney and to the petitioner for receiving the said kidney.

9. The Authorization Committee in its meeting held on 21st November 2009 after completing all the formalities and after examining the medical reports, etc. granted the necessary authorization for the donation of the kidney by Sri Inderjeet to the petitioner after appending a note that the petitioner should be made aware of the fact that as the blood group of the petitioner, and that of the donor do not match therefore, the petitioner may have difficulty after the renal transplantation. The said authorization was communicated to the petitioner from the office of the Commissioner of Lucknow Division on 27th November 2009.

10. The petitioner after getting the said authorization, approached the Fortis Hospital, Noida for transplantation. Fortis Hospital, Noida rejected the request of the petitioner on the ground that even though, renal transplant of emotionally related donor is permissible under the Act, 1994 but a policy decision has been taken by the Hospital that such operation will not be performed by the Fortis Hospital, Noida.

11. It may be stated that Fortis Hospital is situate at Noida, which is within the State of Uttar Pradesh. Similarly SGPGI is not performing the renal transplant despite necessary authorization being granted by the Authorization Committee.

The requests and approaches to the Hospitals aforesaid since resulted in vain, the petitioner finding the Court as the last hope has approached this Court by filing the instant writ petition.

The trauma that, the petitioner and his family is facing, cannot be less realized and experienced by those who know the family and also by those who understand the plight and helpless-ness of such a person. It is a different matter that in a serious ailment like this, for very many reasons, an organ transplant may not be advisable medically and that the risk in undertaking the transplant may be much higher and beyond the limit of permitted risk or that may be for any other valid ground, if the experts namely; medical experts are of the considered

opinion that no useful purpose would be served, and that transplant is not feasible and medically advisable, transplantation may be avoided but in case authorization certificate has duly been given by a Committee constituted for the purpose by the State Government, transplantation cannot be rejected on the ground that the Hospital will not accept such authorization certificate, which has been issued by a particular Committee, unless such authorization is also given by another Authorization Committee viz; Hospital Based Committee.

Transplantation of any human organ can also be not refused by any Hospital, which undertakes such transplant, in violation of the Act, 1994 and Rules, 1995 as amended, because it has taken a policy decision, that it will not accept the human organ of a non-relative donor, though such donor is authorized under the aforesaid Act to donate any of his organ to the recipient.

12. On notice being issued, Sri Alok Mathur, appearing for Fortis Hospital made it clear that Fortis Hospital is not unwilling to undertake the treatment, as may be medically advised, viz; transplantation of kidney, but since the petitioner has gone to Indraprastha Apollo Hospital, New Delhi, first, and the Authorization Committee of the said Hospital, in the meeting held on 10.2.2010, has rejected to transplant the kidney, a fact not disclosed by the petitioner, the hospital therefore, has refused to undertake the transplant.

13. The main plea of Fortis Hospital as urged by the learned counsel and also as stated on oath in their counter affidavit is that though the petitioner had obtained approval from the State Level Authorization Committee but she has not obtained final approval from the Committee of answering respondent though the authorization of Hospital Based Authorization Committee is mandatory.

14. It has also been submitted that the Fortis Hospital in terms of the Rules called upon the petitioner and the donor to submit a joint application alongwith the details as required under the Transplantation of Human Organs Rules-1995 (hereinafter referred to as the Rules, 1995) but they failed to turn up, hence the answering respondent could not process the case of the petitioner for being placed before the Hospital based Authorization Committee for considerations. Submission is that the petitioner cannot place reliance upon the approval given by the Authorization Committee Lucknow as the final approval for transplantation is to be granted by the Hospital Based Committee where transplant has to take place.

15. Though it has been suggested by the learned counsel for the Fortis that the Authorization Committee of District Meerut would be competent to do so but it is not clear if it is the Hospital Based Authorization Committee , but even if it be so, the question arises, whether after getting the authorization by a Committee duly constituted by the State Government, any further authorization is needed from any other Committee may be Hospital based Authorization Committee.

16. A preliminary objection has also been raised that Fortis Hospital is not the State within the meaning of Article 12 of the Constitution of India and therefore, no

writ would lie nor any such direction can be issued by the High Court.

17. Sri J.N Mathur appearing for SGPGI also says that SGPGI may undertake transplantation, as may be reqired and is advisable and feasible but it will still take atleast six months more, in undertaking the operation which period may stand further extended.

18. The plea of the petitioner is that despite she having been given approval by the statutory Authorization Committee for transplantation of kidney by taking it from Shri Inderjeet, who is a non-relative donor, yet the hospitals aforesaid are delaying the treatment and in fact refusing to undertake transplantation merely on the pretext that the petitioner must seek authorization from a Hospital Based Authorization Committee, which refusal is not only against the provisions of the Act of 1994 or the Rules framed thereunder, but also against all medical ethics, and violation of human right of the petitioner to enjoy a better health, and comfortable life, so long she is alive, rather her condition is getting deteriorated day by day

19. We do not find any reason either for SGPGI or for the Fortis not to proceed further with the matter and to refuse the recipient the transplantation of kidney of the non-relative donor on such misconceived ground. In a case of human organ transplant, it is the medical advice of the experts, which counts for deciding whether the transplant be undertaken, it being medically advisable and feasible. The Court would rarely give its opinion in this regard but the Courts would in all such cases can ensure that transplantation of any organ in the body of any person(patient) is not being refused unethically, unprofessionally, arbitrarily against the protection given under the Act of 1994 and the Rules of 1995 and/or for some extraneous reasons which do not have any relevance with the medical treatment.

20. Each hospital is legally obliged and every Doctor has a moral duty who is not only under Hippocratic oath taken at the time of joining the medical profession but also under the constitutional mandate and professional ethics, to give and provide such medical advice and treatment which cures the patient and lessens the agony of the patient. If the disease is not fully curable, the treatment is to be given, for improving the quality of life, of the ailing, so that he/she can live with less discomfort and pain even during the last lap of his/her life. If such treatment requires transplant of any human organ, it can not be refused merely because of some technical objection raised by the Hospitals, though no such objections can be substantiated under the Act, 1994 and the Rules, 1995 enforced for the purpose.

21. Refusing to undertake the necessary transplant despite there being due authorization given by one Authorization Committee and there being no other reason for not undertaking such treatment/operation but only for his insistence that the approval be taken by the Hospital Based Authorization committee also would not only prick the conscious of the court as no person can be deprived of his life and health care by adopting such a course and indifferent attitude, but would also be against all norms of professional ethics, and morality

besides it will defeat the very provisions of the Act, 1994 and the Rules, 1995.

22. Right to life includes protection of health and health care. In the case of *Chameli Singh vs State of U.P. (1996)2 page 549,* right to food, water, decent environment, education, medical care and shelter, has been found to be in the components of right to live. In the case of *Pt. Parmanand Katara vs Union of India and others reported in (1989)4 SCC 286*, instant medical aid for the injury suffered by injured persons, has been held to be the requirement of Articles 21 and 32. The apex court in the aforesaid case did not make any distinction between the private practitioner (Doctor) or a Government Doctor. Their Lordships observed that all doctors, including private doctors are obliged to render immediate medical aid in injury cases.

23. In the case of *Unni Krishnan vs State of Andhra Pradesh, (1993) 1 SCC 645 and Mohini Jain(Miss) vs State of Karnataka and others reported in (1992) 3 SCC 666* the right to eduction was found to be implicit in Article 21 and it was directed that private unaided recognized/affiliated professional colleges can not charge fee higher than that charged in government institutions. Commercialization of education is impermissible. The scheme was framed by the Supreme Court itself for admission in private colleges.

24. The plea that Fortis is not a Government Hospital, therefore, no writ petition will lie, is thus, a completely misplaced argument. No hospital, may be, private or Government hospital, can refuse appropriate, adequate and prompt treatment to any person who requires medical aid.

25. The Hospital is not doing only commercial activity or business for earning huge profits but also social service and is supposed to provide right, effective and prompt medical treatment and health care like any other Government Hospital, therefore, it cannot violate the spirit and soul of Article 21 of the Constitution. If private Hospitals are allowed to run a mock or permitted to refuse treatment of any patient at their own whims and caprice, unethically, it would defeat the very purpose and the meaning and extent of right to health care which is embodied in Article 21 of the Constitution.

26. Apart from the aforesaid reasons the writ petition is also maintainable because each and every hospital has to be registered under the Transplantation of Human Organs Act, 1994, if it transplants human organs, and is governed and controlled by the provisions contained therein. Any violation on its part in giving effect to the statutory provisions of the Act or that of the Rules framed thereunder, would be statutory violation. Thus, even if the hospital is a private hospital with no Government aid, the courts would have jurisdiction to issue a writ in the nature of mandamus and to compel such a hospital to perform its duties otherwise legally enforceable. In this regard let us have a glimpse of the Act, 1994 and The Transplantation of Human Organs Rules, 1995 (as amended on 31.7.2008), (hereinafter referred to as 'the Rules, 1995') framed thereunder.

27. Prior to enforcement of the Act, 1994 there was no effective law in India

for regulating transplantation of organs in human beings, as a result of which many scams were detected, where human organs were purchased and sold for a price and at times even without making it known to the patient/persons for whom such organ was extracted with the assistance of doctors without their consent therefore with a view to check, control and protect the innocent persons, for becoming the victims of unscrupulous people, including the Doctors and their staff, the Act, 1994, was enacted to regulate the removal, storage and transplantation of human organs for therapeutic purposes.

28. The Act mainly ensures the prevention of commercial dealings in human organs and for matters connected therewith or incidental thereto.

The Act, 1994 was made applicable in the first instance, to the States of Goa, Himachal Pradesh and Maharashtra and to all the Union territories and it was also to apply to such other State which adopted this Act by resolution passed in that behalf under clause (1) of Article 252 of the Constitution. The Act, 1994 is in force in the State of U.P.

29. The Act, 1994 defines the 'hospital' in section 2(g) which includes a nursing home, clinic, medical centre, medical or teaching institution for therapeutic purposes and other like institution. It does, thus, apply to every hospital without any distinction, of it being run by the Government or privately.

30. The 'donor' has been defined in sub section 2(f) of the Act, 1994 which means any person, not less than eighteen years of age, who voluntarily authorizes the removal of any of his human organs for therapeutic purposes under sub section (1) or sub-section (2) of section 3;

And 'recipient' means a person into whom any human organ is, or is proposed to be, transplanted.

'Registered medical practitioner' has been defined in section 2(n) of the Act, 1994 which means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and who in enrolled on a State Medical Register as defined in clause (k) of that section.

'Near relative' has been defined in section 2(i) of the Act, 1994, which means spouse, son, daughter, father, mother, brother or sister.

31. Chapter II of the aforesaid Act, 1994 deals with the authority for the removal of human organs from the body of the deceased or from the body of a person in the event of his brain-stem death, etc.

Section 9, places restrictions on removal and transplantation of human organs from the body of any person, during his life time, unless he is a near relative of the recipient. The aforesaid section 9 reads as under:-

"9. Restrictions on removal and transplantation of human organs.--(1) Save as otherwise provided in sub-section (3), no human organ removed from the body of a donor before his death shall be transplanted into a recipient unless the donor is a near relative of the recipient."

32. Sub section 3 of section 9 of the Act, 1994, reproduced below would stand attracted in the present case as the donor is not the near relative of the recipient. The aforesaid provision provides that if any donor authorises the removal of any of his organs for transplantation into the body of such recipient, for reasons given therein, such human organ shall not be removed and transplanted without the prior approval of the Authorization Committee.

"Section 9(3) If any donor authorizes the removal of any of his human organs before his death under sub-section (1) of section 3 for transplantation into the body of such recipient, not being a near relative, as is specified by the donor by reason of affection or attachment towards the recipient or for any other special reasons, such human organ shall not be removed and transplanted without the prior approval of the Authorization committee.

33. Sub section 4 of section 9 aforesaid in sub clause (a) obligates the Central Government to constitute one or more Authorization Committees consisting of such members as may be nominated by Central Government on such terms and conditions as may be specified in the notification for each of the Union territories whereas the State Government is to constitute one or more Authorization committees consisting of such members as may be nominated by the State Government on such terms and conditions as may be specified in the notification for the purposes of this section.

34. When such Committee is made then an application jointly has to be made in such form and in such manner as may be prescribed, by the donor and the recipient and thereafter the Authorization Committee shall hold an enquiry and after satisfying itself that the applicants have complied with all the requirements of this Act and the Rules made thereunder, grant the applicants, approval for the removal and transplantation of the human organ.

In view of sub Section-6 of Section 9 of the Act, 1994, if after the inquiry and after giving an opportunity to the applicants of being heard, the Authorization Committee is satisfied that the applicants have not complied with the requirements of this Act and the rules made thereunder, it shall, for reasons to be recorded in writing, reject the application for approval.

35. The Act, 1994 therefore, makes the Central Government as well as the State Government responsible for constituting the Authorization Committee and it is the mandate of the Act that such Committee has to be necessarily formed. The benefit of the provisions of the Act otherwise would not be made available to the persons who have the donors ready for donating their organs to them because of their emotional attachment but they are not the near relatives. Non-constitution of Authorization Committee thus would defeat the very purpose of the Act as it would endanger the life of many persons who urgently need transplantation of one organ or the other.

36. Chapter III deals with the provisions for regulating the Hospitals and section 10 of the Act, 1994 specifically says in sub section 1(a) that on and from the commencement of this Act, no hospital, unless registered under

this Act, shall conduct, or associate with, or help in, the removal, storage or transplantation of any human organ; sub clause (b) says that no medical practitioner or any other person shall conduct, or cause to be conducted, or aid in conducting by himself or through any other person, any activity relating to the removal, storage or transplantation of any human organ at a place other than a place registered under this Act; and sub clause (c) says that no place including a hospital registered under sub-section (1) of section 15 shall be used or cause to be used by any person for the removal, storage or transplantation of any human organ except for therapeutic purposes. The removal of the eyes or the ears may be done at any place from the dead body of any donor, for therapeutic purposes, by a medical practitioner.

37. The aforesaid section specifically prohibits every hospital from undertaking removal, storage or transplantation of human organs unless it gets itself registered under this Act. This leaves no doubt that Fortis Hospital which is undertaking the transplantation of human organs with facilities of removal and storage has necessarily to be registered under the provisions of the Act, 1994 and it having been registered under the said Act, it would be governed by the provisions of the aforesaid Act.

38. Again section 12 says that no registered medical practitioner shall undertake the removal or transplantation of any human organ unless he has explained, in such manner as may be prescribed, all possible effects, complications and hazards connected with the removal and transplantation to the donor and the recipient respectively.

39. Appropriate Authority has been defined in Chapter IV of the Act, 1994 which provides that the Central Government shall appoint by notification, one or more officers as 'Appropriate Authorities' for each of the Union territories and the State Government shall appoint by notification, one or more officers as 'Appropriate Authorities' for the purpose of this Act. The Appropriate Authority shall perform the following functions namely:-

(i)to grant registration under sub-section (1) of section 15 or renew registration under sub-section (3) of that section;

(ii)to suspend or cancel registration under sub-section (2) of section 16;

(iii)to enforce such standards, as may be prescribed, for hospitals engaged in the removal, storage or transplantation of any human organ;

(iv)to investigate any complaint of breach of any of the provisions of this Act or any of the rules made thereunder and take appropriate action;

(v)to inspect hospitals periodically for examination of the quality of transplantation and the follow-up medical care to persons who have undergone transplantation and persons from whom organs are removed; and

(vi)to undertake such other measures as may be prescribed.

40. The requirement under the aforesaid provisions is that every hospital whether Government or private engaged either partly or exclusively, with any

activity relating to the removal, storage or transplantation of human organ, immediately before commencement of this Act, shall apply for registration within sixty days from the date of commencement of the Act. But such a hospital so engaged in such activity shall cease to engage in any such activity on the expiry of three months from the date of commencement of the Act unless such hospital has applied for registration and is so registered or till such application is disposed of, whichever is earlier.

Under Section 15, a certificate of registration is issued to the hospital by Appropriate Authority after completing the requirement as provided therein.

41. Chapter VI deals with the offences and penalties in case there is any violation of the provisions of the Act.

Section 23 of the Act protects all action taken in good faith.

Section 24 gives power to make rules to the Central Government in pursuance of which the transplantation rules have been enacted by the Central Government.

The rules, again defines the 'registered practitioner' in continuation of the definition given in clause (n) of section 2 of the Act, 1994 which also includes an allopathic doctor with MBBS or equivalent degree under the Medical Council of India Act.

All other words and expressions used and not defined in these Rules, but defined in the Act, shall have the same meaning respectively assigned to them in the Act.

Rule 4A speaks for Authorization Committee and Rule 6A provides for composition of Authorization Committees.

Sub clause (1) of Rule 4A says that 'the medical practitioner who will be part of the organ transplantation team for carrying out transplantation operation shall not be a member of the Authorization Committee constituted under the provision of clauses (a) and (b) of sub-section (4) of section 9 of the Act'.

Sub clause (2) of Rule 4A relates to transplantation between a married couple whereas sub clause (3) of Rule 4A relates to proposed donor or recipient or when both are not Indian Nationals/citizens whether 'near relatives' or otherwise. Sub clause (4) of Rule 4A deals with situation where the proposed donor and the recipient are not 'near relatives', as defined under clause (i) of section 2 of the Act.

Sub clause (4) of Rule 4A reads as under:-

4A(4). When the proposed donor and the recipient are not "near relatives', as defined under clause (i) of section 2 of the Act, the Authorization Committee shall evaluate that,-

i. there is no commercial transaction between the recipient and the donor and that no payment or money or moneys worth as referred to the Act, has been made to the donor or promised to be made to the donor or any other person;

ii the following shall specifically be assessed by the Authorization Committee:-

a .an explanation of the link between them and the circumstances which led to the offer being made;

b. reasons why the donor wished to donate;

c .documentary evidence of the link, e.g. proof that the have lived together, etc;

d. old photographs showing the donor and recipient together;

iii. that there is no middleman or tout involved;

iv. that financial status of the donor and the recipient is probed by asking them to give appropriate evidence of their vocation and income for the previous three financial years. Any gross disparity between the status of the two must be evaluated in the backdrop of the objective of preventing commercial dealing;

v. that the donor is not a drug addict or known person with criminal record;

vi. that the next of the kin of the proposed unrelated donor is interviewed regarding awareness about his or her intention to donate an organ, the authenticity of the link between the donor and the recipient and the reasons for donation. Any strong views or disagreement or objection such kin shall also be recorded and taken note of.

42. The requirements thus, for consideration of Authorization Committee, in case of non relative donor and recipient has been specifically and categorically mentioned in the aforesaid provision. Any authorization given in terms of aforesaid Rules, would be a valid and binding authorization given by the duly authorized committee.

The argument of the learned counsel for the Fortis is that though there is an authorization given by the State Level Committee, Lucknow but final authorization has to be given by the Meerut District Authorization Committee which allegedly is a Hospital Based Committee and therefore, in absence of such authorization, transplantation cannot be done, for which he relies upon Rule 6A of the Rules, 1995 but on scrutiny of this rule, it does not substantiate the aforesaid plea.

Rule 6A only prescribes the Composition of Authorization Committees.

Sub rule (1) of Rule 6A says that there shall be one State Level Authorization Committee and sub rule (2) of Rule 6A says that Additional Authorization Committees may be set up at various levels as per norms namely;

(i) no member from transplant team of the institution should be a member of the respective Authorization Committee. All foreign Nationals (related and unrelated) should go to 'Authorization Committee' as abundant precaution needs to be taken in such cases; and

(ii) Authorization Committee should be Hospital based in Metro and big cities if the number of transplants exceeds 25 in a year at the respective transplantation centers. In small towns, there are State or District Level Committees if transplants are less than 25 in a year in the respective districts.

Sub clause 2(ii)A deals with the composition of Hospital Based Authorization Committees which are to be constituted by the State and in case of Union territories by the Central Government.. Such committee has to be constituted as under:-

Senior most person officiating as Medical Director or Medical Superintendent of the Hospital, two senior medical practitioners from the same hospital who are not part of the transplant team; and two members being persons of high integrity, social standing and credibility, who have served in high ranking Government positions, such as in higher judiciary, senior cadre of police service or who have served as a reader or professor in University Grants Commission approved University or are self employed professionals of repute such as lawyers, chartered accountants and doctors (of Indian Medical Association) etc; and Secretary (Health).

Whereas sub rule 2(ii) B prescribes composition of State or District Level Authorization committees, to be constituted by the State Government and in case of Union territory by the Central Government). It shall consists of the following:-

a. *Medical Practitioner officiating as chief Medical Officer or any other equivalent post in the main./major Government Hospital of the District;*

b*. two senior medical practitioners to be chosen from the pool of such medical practitioners who are residing in the concerned District and who are not part of any transplant team;*

c*. two senior citizens, non-medical background (one lady) of high reputation and integrity to be chosen from the pool of such citizens residing in the same district, who have served in high ranking Government positions, such as in higher judiciary, senior cadre of police service or who have served as a reader or professor in University grants Commission approved University or are self- employed professionals of repute such as lawyers, chartered accountants and doctors (of Indian Medical Association) etc; and*

d*. Secretary (Health) or nominee and Director Health Services or nominee.*

(Effort should be made to have most of the members 'ex-officio so that the need to change the composition of committee is less frequent.)

Rule 6B says that the State Level Committee shall be formed for the purpose of providing approval or no objection certificate to the respective donor and recipient to establish the legal and residential status as a domicile State. It is mandatory that if donor, recipient and place of transplantation are from different states, then the approval or "no objection certificate" from the respective domicile State Government should be necessary. The institution where the transplant is to be undertaken in such case the approval of Authorization Committee is mandatory.

Rule 6C speaks about the quorum of the Authorization Committee and 6D speaks about the format of the of the Authorization Committee. Rule 6E deals with Secretariat of the Committee.

Rule 6F lays down the area on which focus has to be made by the Authorization Committee. Rule 6F is reproduced as under:-

6F. The Authorization committee shall focus its attention on the following, when the proposed transplant is between individuals

C. ....
i. ....
ii..... ....
iii..... ....
iv. ....
v. ....
vi. ....

vii. Where the proposed transplant is between individuals who are not "near relatives". The authorization committee shall evaluate;-

i that there is no commercial transaction between the recipient and the donor. That no payment of money or moneys worth as referred to in the sections of the Act, has been made to the donor or promised to be made to the donor or any other person. In this connection, the Authorization Committee shall take into consideration:-

a. an explanation of the link between them and the circumstances which led to the offer being made.

b. documentary evidence of the link e.g. proof that they have lived together etc.

c. reasons why the donor wishes to donate; and

d. old photographs showing the donor and the recipient together.

ii. that there is no middleman/tout involved;

iii. that financial status of the donor and the recipient is probed by asking them to give appropriate evidence of their vocation and income for the previous three financial years. Any gross disparity between the status of the two, must be evaluated in the backdrop of the objective of preventing commercial dealing;

iv. that the donor is not a drug addict or a known person with criminal record; that the next of kin of the proposed unrelated donor is interviewed regarding awareness about his\her intention to donate an organ, the authenticity of the link between the donor and the recipient and the reasons for donation. Any strong view of disagreement or objection of such kind may also be recorded and taken note of; and

viii. ....

ix In the course, of determining eligibility of the applicant to donate, the applicant should be personally interview by the Authorization Committee and minutes of the interview should be recorded. Such interviews with the donors should be video graphed.

x. ....

xi The Authorization Committee should state in writing its reason for rejecting / approving the application of the proposed donor and all approvals should be subject to the following conditions:-

i. that the approved proposed donor would be subjected to all such medical test as required at the relevant stages to determine his biological capacity and compatibility to donate the organ in question.

ii. further that the psychiatrist clearance would also be mandatory to certify his mental condition, awareness, absence of any overt or latent psychiatric disease and ability to give free consent.

iii. all prescribed forms have been and would be filled up by all relevant persons involved in the process of transplantation.

iv. all interviews to be video recorded.

xii .The authorization committee shall expedite its decision making process and use its discretion judiciously and pragmatically in all such cases where, the patient requires immediate transplantation.

xiii. Every authorized transplantation center must have its own website. The Authorization Committee is required to take final decision with in 24hours of holding the meeting for grant of permission of rejection for transplant. The decision of the Authorization committee should be displayed on the notice board of the hospital or institution immediately and should reflect on the website of the hospital or institution within 24 hours of taking the decision. Apart from this, the website of the hospital or institution must update its website regularly in respect of the total number of the transplantations done in that hospital or institution along with the details of each transplantation. The same data should be accessible for compilation, analysis and further use by respective State Governments and Central Government.

43. Relying upon the composition of Authorization Committee as given in rule 6A, Fortis cannot say that in the absence of authorization being given by the Hospital Based Authorization Committee, the authorization given by the State Level Committee is not complete.

44. The authorization, whether is required by only one Committee namely; the State Level Committee, or the District Level Committee or Hospital Based Committee or in all cases, but for the authorization given by the Hospital Based Authorization Committee, necessarily an authorization by Hospital Based Authorization Committee will be needed, as urged by Fortis has to be ascertained from the provisions of the Act, 1994 and the Rules, framed thereunder namely; Rules, 1995.

45. Merely because there is a provision for composition of Additional Authorization Committees under Rule 6A of the Rules 1995, it would not mean that for permitting transplant of the human organ, of a non-relative donor in the recipient approval must be taken from such Additional Authorization Committee which includes the Hospital Based Authorization Committee also.

46. Section 9(3) of the Act, 1994 requires that in case of non-relative donor and recipient, such human organs shall not be removed without prior approval of the Authorization Committee and then in sub clause 4(b) of Section 9 of the

aforesaid Act, it has been prescribed that the State Government shall constitute, by notification, one or more Authorization Committees consisting of such members as may be nominated by the State Government on such terms and conditions as may be specified in the notification for the purposes of this section.

Sub section 5 of section 9 of the aforesaid Act again says that on an application jointly made, in such form and in such manner as may be prescribed by the donor and the recipient, the Authorization Committee shall hold an enquiry and give necessary approval.

Section 9 of the aforesaid Act, which in fact is the substantive provision, thus only requires the non relative donor and recipient to have an authorization i.e. only one authorization.

47. The provision of the Act, speaks only for one authorization and does not say any where that authorization, from State Level Committee, District Level Committee and Hospital Based Authorization Committee, has to be taken from all such Committees or any of the two committees or it has necessarily to be taken from Hospital Based Authorization Committee. Had it been the intention of the Act that Hospital Based Committee must give authorization despite authorization being given by the State Level Committee or District Level Committee, the provision aforesaid ought to have been differently worded saying that prior approval from Hospital Based Authorization Committee would be in addition to any approval given by any of the Committees and is a requirement, must, for transplantation of the human organ but there is no such mention in the aforesaid provision.

When the Act itself speaks for only one authorization from a duly constituted authorized committee on the grounds and reasons given therein, there would hardly be any occasion for any hospital to say that the patient must possess another authorization certificate from a different committee.

48. This plea also finds support from Rules 1995, wherein again Rule 6A which lays down the composition of Authorization Committee, very specifically says that there shall be one State Level Authorization Committee. If there is one State Level Authorization Committee and no other committee is formed in the State, whether it can be said that the authorization given by such a committee would not be relevant and binding upon all the hospitals (whether government or private) and all doctors duly registered for the purpose of this Act, the answer will be in negative.

49. The additional Authorization Committees have been permitted to be constituted by the State Government or Central Government as the case may be, as per the circumstances given in the aforesaid Rules, but that does not mean, that authorization will have to be taken from more than one Committee, may be, the Hospital Based Authorization committee.

50. There can also not be a requirement under the Act or the Rules for having authorization from more than one committee duly constituted by the State Government for the reason that the aforesaid committee is mainly an ethics

committee which has to satisfy primarily and essentially that there is no commercial transaction between the donor and the recipient and that conditions specified under the Rules for such transplantation stands fulfilled, though it also has to see the medical angle, to some extent regarding transplantation which authorization again will be subject to the condition as given in Rule 6F(C)(xi).

51. It also requires notice that Authorization Committee deals with the request for donation of human organ by donor for being transplanted in the body of the recipient only after medical advice, by the competent Doctor/Hospital is given for such a transplant. The factum, therefore, that the recipient requires a human organ transplant cannot be disputed by the Authorization Committee which is not to answer whether such transplant should be done or not. The Authorization Committee would only record his finding on the conditions mentioned under the Rules and shall see after examining the persons concerned and being satisfied with the documents produced, that it is a case of voluntary donation of human organ by a non-relative with no commercial transaction, but only because of love, affection and emotional attachment.

52. The duties of the Medical Practitioner has also been given in Rule 4, who has to see before removing a human organ from the body of a donor before his death, that the donor has given his authorization in Form 1(A) or 1(B) of 1(C), as the case may be and that other conditions also stand fulfilled. On fulfillment of requirements as given in the Rules with respect to transplantation, as may be applicable, in the case of donor who is relative or non relative donor, the medical practitioner, can proceed to undertake the transplant/operation.

53. Once a District Level Committee or State Level Committee duly constituted by the State Government gives authorization, in accordance with the rules, there appears to be no need for having another authorization from a Hospital Based Authorization Committee. A Hospital Based Authorization Committee or Additional Authorization Committee also have been empowered to grant authorization as per the conditions mentioned under the Rules therefore, authorization can be taken by any such committee.

54. In case any other interpretation is given to the provisions of the Act and the Rules, an anomalous situation can arise namely; State Level Committee or District Level Committee, as the case may be, after being satisfied on the parameters given under the Act and the Rules issue an authorization certificate but the Hospital Based Committee takes another view, the question would be which view is to prevail i.e. whether the transplant may be proceeded with subject to medical clearance for the operation by the experts, who are to perform the transplant in view of the approval given by one Committee or it should be refused because of the refusal on the part of the Hospital Based Committee. This is not provided under the Act nor Rules nor would be in the interest of the patient who requires transplantation of any organ.

55. In the case of *Kuldeep Singh and another vs State of Tamil Nadu and others, reported in (2005)11 SCC 122, decided on 31.03.2005,* the dispute arose

as to whether Authorization Committee of Tamil Nadu or that of Punjab was competent to issue authorization certificate. In the aforesaid case both donor and recipient belonged to the State of Punjab but the treatment of the patient was being given at Devaki Hospital Ltd. At Chennai for renal disorder.

The Supreme Court, looking to the object of the Act which prohibits said transaction for donation of organ, observed as under:-

"As the object is to find out the true intent behind the donor's willingness to donate the organ, it would not be in line with the legislative intent to require the Authorization committee of the State where the recipient is undergoing medical treatment to decide the issue whether approval is to be accorded. Form I in terms requires the applicants to indicate the residential details. This indication is required to prima facie determine as to which is the appropriate Authorization Committee. In the instant case, therefore, it was the Authorization Committee of the State of Punjab which is required to examine the claim of the petitioners".

56. The aforesaid judgment fortifies the view taken by us that only one Authorization Committee is required to give authorization/approval, and there is no requirement of seeking authorization/approval by any second Committee, may be the Hospital Based Committee.

Their Lordships in the case of Kuldeep Singh (supra) also observed that :-

"The shocking exploitation of abject poverty of many donors for even small sums of money, appears to have provided the foundation for enacting the Act. The Authorization Committee has to be satisfied that the Authorization for removal is not for commercial consideration. Since some amount of urgency has to be exhibited because of the need for transplantation, expeditious disposal of the application would be appropriate. But the matter should not be dealt with in a casual manner as otherwise the intent and purpose of the Act shall be frustrated".

57. The Act, 1994 and the Rules 1995 have been framed only to protect innocent and gullible persons from being victimized either by money power or by deceitful means, which were being applied and may be applied for taking out the organs for transplantation from one human body to be placed in another human body. The restrictions imposed clearly specified the manner in which the transplant can be effected of an organ from one person to another person with respect to near relatives, as defined under the Act, foreign Nationals (related and unrelated), married couple and also non-related donor etc.

It also takes care of the situation where donor and recipient belong to two different States.

58. The Authorization Committee may be the State Level Authorization Committee or the District Level Authorization Committee or Hospital Based Authorization Committee has to judge the application moved by the donor and recipient on the basis of guidelines, parameters and conditions which have

been mentioned in the Act and the Rules. Once the Authorization Committee duly constituted by the State Government or Central Government as the case may be, gives such approval/authorization after being satisfied that all the conditions stand fulfilled, there would be no occasion for such person namely; the donor and the recipient to have another authorization from any other Authorization Committee for the transplant.

59. No Hospital and registered Doctor, can refuse to undertake the transplant of any human organ on the ground that despite approval being given by one duly constituted Authorization Committee, additional authorization from any other Authorization Committee will be needed, unless it is found that the authorization has not been given in accordance with the rules but even in such a case, the matter has to be referred to the Authorization Committee for reconsideration within the shortest possible time.

60. Sri D.K. Upadhyay, learned Chief Standing Counsel has produced before us the photocopy of the minutes of the meeting held on 22.11.2009. The minutes says that the committee so constituted in pursuance of Government order dated 11.09.1998 and approved by Government order dated 21.1.2006 by the State Government consists of following persons :-

1. Sri Prashant Trivedi, Commissioner/President, Lucknow Division, Lucknow.

2. Sri A.K. Shukla, Chief Medical Officer,Lucknow.

3. Dr. Bhupendra Pal Singh, Assistant Professor, Urology, Chatrapati Shahuji Maharaj, Chikitsa Vishwavidyalay, Lucknow.

4. Dr. Rahul Janak Singh, Associate Professor, Urology Department, Chatrapati Shahuji Maharaj, Chikitsa Vishwavidyalay, Lucknow.

5. Dr. David Kumar, Associate Professor, Eye Department, Chatrapati Shahuji Maharaj, Chikitsa Vishwavidyalay, Lucknow;

The Committee, after considering the request of the petitioner Smt. Vandana Dixit and Sri Inderjeet, for transplantation of kidney, has approved and has granted permission for getting the transplant done permitting Sri Inderjeet to donate his one kidney to the recipient.

The application given by the petitioner, was produced before us from the record. In the application the petitioner has stated as under:-

"Sir Inderjeet who is living with us since long, and grown up with us, is much more than our family member. Undoubtedly, he has no blood relation with me but for sentiments prevailing, on account of our family relationships, has made him closer than real relations. Ever since beginning, when we were trying our blood relations for the purpose he insisted to donate his one kidney in order to save my life and take me out from the ordeal. My husband as well as myself asked him and his wife to wait till any of our blood relative could be accepted as suitable donor, but he insisted saying "although he is aware that donating one kidney is no problem, he can lay his life for Bhabhi"

(i.e. me). He respects my husband as his elder brother, and is engaged in service in a Company at Lucknow. He is leading his life independently. But for emotional attachment Inder is living with us ever since he left his parents."

61. The donor Sri Inderjeet also presented himself in person before the Committee and filed his own affidavit and the affidavit of his wife Smt. Upasana. Statement was also given by Sri Inderjeet before the Committee reiterating that he is donating one kidney to save the life of his Bhabhi like namely Vandana Dixit without any coercion or pressure either from him or family members or any other persons and so was the affidavit sworn by his wife Smt. Upasana. Smt. Vandana Dixist has also filed her affidavit. The Committee, thus, considered the aforesaid affidavits and the statement of Sri Inderjeet and after examining the medical reports found that the blood group of Sri Inderjeet is A (+) and that of the recipient Smt. Vandana Dixit is AB (-) and therefore, there may be some problem in transplantation. The Committee had informed this fact to the recipient. The letter which has been sent to the petitioner under the signatures of the Additional Commissioner (Administration) dated 27.11.2009 mentions about the approval granted with the aforesaid caution.

62. The authorization having been given by the Committee constituted by the State Government permitting the donor Sri Indrajeet to donate one kidney to the recipient Smt. Vandana Dixit with the conditions as required under section 12 of the Act, 1994 there cannot be any necessity for having any other authorization, from any other Authorization Committee including the Hospital Based Authorization Committee.

63. Neither Fortis nor SGPGI could thus, have refused transplantation of kidney on the ground that approval of the Hospital Based Authorization Committee has not been obtained, unless such transplant otherwise is not medically suggestable and advisable, for which Rule 6F(c)(xi) makes a specific provision, necessitates all such medical tests of the proposed donor, as required at the relevant stages to determine his biological capacity and compatibility to donate the organ in question.

64. It is neither the case of the Fortis nor SGPGI that authorization given by the Committee at Lucknow is not the appropriate authorization or it does not conform to the requirement as given in the Act and the Rules but only plea is that unless authorization given by the Hospital Based Authorization Committee, the transplantation cannot be done.

65. Sri Alok Mathur during the course of argument also stated that Fortis is not against giving treatment to the petitioner, and in case the petitioner approaches the hospital, it would not refuse transplantation on the aforesaid ground nor shall ask for any other authorization from any other committee.

Considering the scheme of the Act, 1994 and the Rules framed thereunder as well as the object and purpose which is sought to be achieved and the legislature's intention to control the mischief of illegal removal, storage and transplantation of human organs, not only by fraudulent means but also to protect such human being, who under economic compulsions

and for poverty bargain such a transplant for some money, we would like to reiterate that the provisions of the Act, 1994 and the Rules 1995 have to be strictly complied with by all doctors and hospitals irrespective of the fact whether they are Government hospitals, private hospital, private practitioner or nursing homes etc. and any violation of the provisions of the Act in transplantation would entail the consequence as given under the Act.

66. We, therefore, conclude with a note that it is the responsibility of all the doctors and hospitals to facilitate the treatment in a deserving case to the patient who is in emergent need of transplantation of human organs by following the provisions of the Act and the Rules at the earliest and the Authorization Committees so formed have the responsibility to give permission only when they are satisfied about the statutory requirements having been fulfilled. with promptitude. The delay in giving such treatment sometimes may prove fatal, for the ailing who has a right to live a longer life which life should be as comfortable as it could be. Transplant of human organ can not be refused for the reasons which do not flow from the Act aforesaid.

67. We, therefore, dispose of this petition finally with the direction that the petitioner may approach the Fortis Hospital or SGPGI as per her liking and discretion, where she would be provided the necessary treatment/operation, as may be medically advisable, with immediate promptness as she is waiting for the transplant for the last six years or so, by following the instructions given in Rule 6F(c)(xi).

Subject to aforesaid directions, the petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.10.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE SHABIHUL HASNAIN, J.

Writ Petition No.6610 (M/B) of 2002

Om Prakash ...Petitioner
Versus
State of U.P. and another ...Respondents

Constitution of India Art. 229 (2), 283, 360 readwith Allahabad High Court officers and Staff (Condition of Service and Conduct Rules 1976-Rule 38, 40-stay of encashment leare of class 3rd and 4th employees-on ground of financial scarcity whether the G.O. Denying encashment ultra vires to Article 283? held-'No' Power exercised by the Chief Justice with regards to salary fund etc. subject to approval of Govt.-facility of leave encashment can not be treated as property of employee-No applicability of Art-360 or 283 -fundamental Rule 103 provides-encashment of leave-Power to issue instructions about payment of encashment-includes power of withdrawal or stay granting- power of Govt. providing service conditions based on financial capacity-Rule discharged.

Held: Para 15

Salary and allowances form part of the conditions of service as contemplated under Article 309 of the Constitution of India. As discussed earlier, by virtue of the Subsidiary Rules, which flow from Rule 103 of the Fundamental Rules, the Government provided for leave encashment by surrender of earned leave, but that was subject to the orders issued by the Government in this regard from time to time. The Government issued an Office Memorandum. If it was

open to the State Government, by administrative instructions, to provide for leave encashment, that would also include the power to withdraw and/or to stay the Office Memorandum. This is not a case of reduction of pay but staying operation of a provision providing for leave encashment. It, therefore, cannot be said that there is no power in the Government to withdraw or stay the leave encashment and if it is so, it cannot be said that the part of the impugned Government Order is ultra vires or violative of Article 229 (3) of the Constitution of India.

Case law discussed:

(1998) 3 SCC 72, (2003) 4 SCC 239, [AIR 1976 SC 123], [AIR 1975 SC 889], [AIR 1971 SC 1850], AIR 1960 All.193.

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. Rule. By consent of parties, heard forthwith.

2. The writ petitioner is in the employment of respondent no.2. By means of the present writ petition, the writ petitioner seeks to challenge the Government Order dated 27.12.1999 by which, the State Government stayed the rule providing for encashment of leave in respect of Groups C and D employees. The writ petitioner is a Group-C employee. This writ petition is purported to raise not only his personal grievance, but also off all similarly situated employees of respondent no.2.

It is the case of the writ petitioner that the impugned Government Order is arbitrary, unconstitutional and illegal on the ground that at the time of filing of the petition there was no financial hardship, but in pursuance of the impugned Government Order, till date, the State Government is not providing for leave encashment. Though in the writ petition issue was also raised regarding L.T.C. facility, as that is being subsequently paid, has not been argued.

3. The writ petitioner is in the service of respondent no.2. Conditions of service are regulated by Article 229 of the Constitution of India and the rules framed thereunder. For that purpose, we may gainfully referred to Rule 40 of the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 (hereinafter referred to as 'the Rules, 1976'), which reads as under:-

"40. Regulation of other matters.-- (1) All officers and servants of the Court shall be subject to the superintendence and control of the Chief Justice.

(2) In respect of all matters (not provided for in these rules) regarding the conditions of service of officers and servants of the Courts including matters relating to their conduct, control and discipline, the rules and orders for the time being in force and applicable to Government servants holding corresponding posts in the Government of Uttar Pradesh shall apply to the officers and servants of the Court subject to such modifications, variations and exceptions, if any, as the Chief Justice may, from time to time, specify.

Provided that no order containing modifications, variations or exceptions in rules or orders relating to salaries, allowances, leave or pensions shall be made by the Chief Justice except with the approval of the Governor:

Provided further that the said powers exercisable under rules and orders of Government of Uttar Pradesh by the

Governor shall be exercised by the Chief Justice or by such officer as he may, by general or special order, direct.

(3) If any doubt arises in regard to a particular post in the establishment being corresponding to a post in the State Government, the matter will be decided by the Chief Justice."

4. Similarly, Article 229 of the Constitution of India, reads as under:-

"229. Officers and servants and the expenses of High Courts.-- (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:

Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2)Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorized by the Chief Justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund."

5. The grievance of the writ petitioner is that in the impugned Government Order, it was provided that after March, 31, 2000, further instructions will be issued. However, to the writ petitioner's knowledge, no further instructions have been issued. It is pointed out that when there is any financial instability in any part of India or any part of Territory, it is open to the President under Article 360 of the Constitution of India, to issue by proclamation a declaration of financial emergency. In the absence of any such proclamation or declaration as prescribed under Article 360 of the Constitution of India, the impugned Government Order could not have been issued and consequently, it is illegal and unconstitutional. There are others averments, which are not necessary to be referred to, as they are not relevant for considering the main prayer clause, which is impugning the Government Order dated 27.12.1999 and consequential relief by way of a writ of mandamus to provide for leave encashment to the writ petitioner as well as other employees.

6. The principal grounds raised by the writ petitioner in the writ petition are: (a) that paragraph 2 of the impugned Government Order is against the provisions of Article 229 of the Constitution of India; (b) that the impugned Government Order is against the provisions of Article 360 of the

Constitution of India; (c) that the impugned Government Order is violative of Article 283 of the Constitution of India and (d) that the implementation of the impugned Government Order is against the fundamental right of the writ petitioner as well as other employees.

7. A counter affidavit has been filed on behalf of respondent no.1. It is set out that the government servant earns leave in respect of the period spent on duty which is called Earned Leave. Earned Leave of 31 days is to be credited in advance in the leave account of every government servant in half yearly installments in each calender year. 16 days Earned Leave shall be credited on first day of January and 15 days Earned Leave on the first day of July of every calender year. In case, an employee renders lesser duties in the next 6 months, the same is adjusted @ two and half days per month.

8. For the first time, the facility of encashment of Earned Leave, credited to the leave account of the government employee, was made available w.e.f. 1.4.1973, vide G.O. dated 24.3.1973 with certain conditions. The same was suspended, vide G.O. dated 23.8.1974. The same was again provided by G.O. dated 10.10.1974 and again was affected in a modified form w.e.f. 30.10.1981. The benefit of leave encashment was provided to the employees of the State Government by means of the Government Order and initially the same was not referred in the Financial Rules. Subsequently, vide G.O. dated December 21, 1992, the provisions to the said effect were made, by making amendment to Rule 81-B and Subsidiary Rule 157-A of the Fundamental Rules, according to which, a government servant may be permitted to surrender a portion of earned leave at his credit and allowed cash payment in lieu thereof in accordance with orders issued by the Government in this regard from time to time.

9. Considering the financial position of the Government, vide Government Order dated 29.1.1999, a provision was made to deposit the money of leave encashment of Group C and D State Government Employees in their General Provident Fund till 31.3.1999 and with regard to the Officers of Group A and B, benefit of leave encashment was stopped w.e.f. the calender year of 1999. On account of the critical financial condition of the State, facility of leave encashment to Group C and D employees was stayed, vide Government Order dated 27.12.1999 and the same was extended till further orders, vide G.O. dated 13.4.2000 and at present such facility is stayed.

By amendment made in the Financial Hand Book, it has been provided that a Government servant may be permitted to surrender a portion of earned leave at his credit and allowed cash payment in lieu thereof in accordance with the orders issued by the Government in this regard from time to time. The benefit of leave encashment has not been stopped to the Group C and D employees but only stayed and there is no requirement of making amendment in the Financial Hand Book.

10. The facility of leave encashment according to the State is not the fundamental right of an employee. As a matter of fact, earlier the employees of the State Government were allowed to surrender a part of their earned leave during his service period. The same has, however, been abolished with regard to Group A and B Officers. In respect of Group C and D

employees, the same has been stayed. The State Government, it is contended, is not bound to provide the facility of leave encashment in service and the reasons for suspending the facility of leave encashment have been mentioned in the Government Order dated 27.12.1999

11. Under the proviso to Sub-Article (2) of Article 229 of the Constitution of India, it has been provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State. Therefore, without approval of the Governor of the State, it would not be proper to make such payments on account of salaries, allowances, leave or pension. The facility of leave encashment during the service period cannot be treated as property of an employee. The question, therefore, of applicability of Articles 360 and 283 of the Constitution of India will not arise. The salaries of the employees are paid from the consolidated fund of State and insofar as the leave encashment is concerned, it has only been stayed.

It is, therefore, stated that there is no merit in the contentions advanced on behalf of the writ petitioner and consequently, the writ petition may be dismissed.

12. Considering the contentions advanced, we have been called upon to answer the following questions:-

(1) Whether there is any rule framed by the Chief Justice in exercise of the powers conferred under Article 229 of the Constitution of India, whereby an employee of respondent no.2 is entitled to leave encashment and if so, whether it is open to the Government, by an Office Memorandum, to withdraw the facility of leave encashment?

(2) Whether considering Articles 229 (3) of the Constitution of India, refusal to allow leave encashment is violative of Article 266 read with Article 360 of the Constitution of India?

(3) Can it be said that the Circular, most specifically paragraph 2, is violative of Article 283 of the Constitution of India?

13. We may first deal with question no.1. Conditions of service of the employees of respondent no.2 are governed by Article 229 of the Constitution of India. The conditions of service of the officers and servants of a High Court, shall be such, as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorized by the Chief Justice to make rules for the purpose, provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State. The Chief Justice, therefore, has absolute control insofar as the employees of the High Court are concerned vis a vis the control by the High Court over the sub-ordinate Courts. See **High Court of Judicature of Rajasthan Vs. Ramesh Chandra Paliwal** (1998) 3 SCC 72 and **High Court of Judicature of Rajasthan Vs. P.P. Singh** (2003) 4 SCC 239. Article 229 (3) of the Constitution of India further sets out that the administrative expenses of a High Court, including all salaries, allowances and pension payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other money taken by the Court shall form part of that Fund. We have earlier

reproduced Rule 40 of the Rules, 1976. In terms of the said Rules, in matters pertaining to conditions of service, the rules and orders for the time being in force and applicable to Government servants holding corresponding posts in the Government of Uttar Pradesh, shall apply to the officers and servants of the Court subject to such modifications, variations and exceptions, if any, as the Chief Justice may, from time to time, specify. Thus, it would be clear that in the absence of any other rules, the rules framed by the Government would be applicable in terms of Rule 40. As set out in the affidavit of respondent no.1, the provision for leave encashment was made for the first time w.e.f. 1.4.1973, vide Government Order dated 24.3.1973. It is not necessary to refer to the subsequent orders, as we have already set them out earlier. We may only refer to the Uttar Pradesh Subsidiary (First Amendment) Rules, 1992. Rule 80 (1) (xiii) as substituted by the Uttar Pradesh Subsidiary (First Amendment) Rules, 1992 and notified on December 21, 1992, reads as follows:-

"80 (1) Earned Leave-- The following procedure shall deemed to have come into force with effect from January 1, 1978 in regard to calculation of an earned leave in respect of Government servants serving in the State for the period spent on duty from the date of commencement of continuous service:-

(xiii)a government servant may be permitted to surrender a portion of earned leave at his credit and allowed cash payment for leave so surrendered by him in accordance with the orders issued by Government in this regard from time to time."

14. The Government in exercise of its executive powers had issued Office Memorandum dated October 30, 1981 and subsequent Office Memorandums by which, provision was made for leave encashment as set out therein. Therefore, considering Article 229 (3) read with Rule 40 of the Rules, 1976, the provisions for payment of leave encashment to the Group C and D employees of the High Court would be governed by the Subsidiary Rules and Office Memorandums. This would be so considering Rule 40 of the Rules, 1976, which made applicable to the allowances available to the Government employees holding the corresponding posts in the service of the State Government. The law as to the scope of Article 229 of the Constitution of India and the powers of the Chief Justice, to make rules, has been settled by a series of judgments of the Supreme Court. We may gainfully refer to the **State of A.P. Vs. Gopal Krishna Murthi** [AIR 1976 SC 123]. We may also gainfully refer to the judgments in **State of Assam Vs. Bhuban** [AIR 1975 SC 889] and **Gurumoorthy Vs. A.G.** [AIR 1971 SC 1850]. It would, thus, be clear that an employee holding Group C and D post in the service of the High Court would only be entitled to the leave encashment, if rule to that effect, has been made by the Chief Justice in consultation with the Governor of the State. The Government cannot, therefore, direct withholding or payment of allowances of High Court employees once rules have been made and notified. See: **Akhil Kumar Bhattacharya Vs. State of U.P.**, AIR 1960 All. 193. The question, therefore, will be considering the rule made by the Chief Justice. In the Rules of 1976, Rule 40 refers to government rules and orders for encashment of leave and salary etc. Once an office memorandum has been stayed and has not been given effect to, in

our opinion, the language of Rule 40 of the Rules, 1976 would result in holding that the Group C and D employees of the High Court would not be entitled to leave encashment, as it is stayed. Leave encashment was being paid pursuant to the Office Memorandum. It has been stayed pursuant to another Office Memorandum. Insofar as Group A and B Officers are concerned, that has been totally withdrawn. Considering Rule 80 (xiii) of the Rules of 1992 read with rule 40 (2) of the High Court Rules, the Office Memorandum providing for encashment of earned leave in respect of employees of the High Court holding Group C & D posts is also stayed.

15. Another incidental question for our consideration, is as to whether it is open to the State Government to have stayed the payment of leave encashment. The conditions of service of government employees are governed by Article 309 of the Constitution of India and the rules made thereunder and in the absence of any rule, by administrative instructions and Office Memorandums, as made from time to time. Salary and allowances form part of the conditions of service as contemplated under Article 309 of the Constitution of India. As discussed earlier, by virtue of the Subsidiary Rules, which flow from Rule 103 of the Fundamental Rules, the Government provided for leave encashment by surrender of earned leave, but that was subject to the orders issued by the Government in this regard from time to time. The Government issued an Office Memorandum. If it was open to the State Government, by administrative instructions, to provide for leave encashment, that would also include the power to withdraw and/or to stay the Office Memorandum. This is not a case of reduction of pay but staying operation of a provision providing for leave encashment. It, therefore, cannot be said that there is no power in the Government to withdraw or stay the leave encashment and if it is so, it cannot be said that the part of the impugned Government Order is ultra vires or violative of Article 229 (3) of the Constitution of India, as the Chief Justice in making the rules has made applicable the Government rules and orders. The issue of staying payment of an allowance no doubt will be subject to Article 14 of the Constitution of India. If the State forms an opinion that the conditions are such, that the financial burden on account of payment of leave encashment, may be a small amount, for the time being, is resulting in financial hardship or the expression used as 'critical financial condition', it cannot be contended on behalf of the writ petitioner that the payment of leave encashment ought not to have been stayed or stopped in the absence of any specific Act or Rule or any other Legislation and that the State Government is bound to pay the leave encashment, or to disclose how its financial position is critical. The writ petitioner has nowhere placed any material to hold that the impugned circular is a colourable exercise of power and/or to that extent, it is arbitrary. In the absence of any material, it is not possible for this Court to hold that it would not be open to the State Government to have issued the impugned order. The order staying the payment of leave encashment is a matter of policy decision of the State Government. The State apart from paying salary to its employees is also bound to implement economic programmes for the benefit of its economically backward sections of the Society. If, therefore, the State has taken a decision considering its financial position to stay the Office Memorandum, we cannot find fault with that action. The first contention is, therefore, accordingly answered.

16. We then come to the second question as to what is the effect of the provisions of Articles 360 and 266 of the Constitution of India read with Article 229 (3) of the Constitution of India. Article 229 (3) of the Constitution, charges the administrative expenses of a High Court, including all salaries, allowances and pension on the Consolidated Fund of the State. Article 266 of the Constitution of India provides for a Consolidated Fund of India and further provides as to which moneys or revenues would be included in the Fund called as 'the Consolidated Fund of India'. Thus, it is only in the event that allowances are payable, then it shall be chargeable on the Consolidated Fund of India maintained under Article 266 of the Constitution of India. Once we have held that presently the leave encashment is not available, the question of payment under Article 266 of the Constitution of India would not arise. Hence this contention is also liable to be rejected and is hereby rejected.

17. One more contention is based on Article 283 of the Constitution of India. In our opinion, placing reliance on Article 283, is totally misplaced. All the Article 283 of the Constitution of India provides for, is that the custody of the Consolidated Fund of India and other funds will be regulated by law made by the Parliament and, until provision in that behalf is so made, shall be regulated by rules made by the President. As we have set out while dealing with Article 266 of the Constitution of India, on the facts and circumstances of the case, Article 229 (3) of the Constitution of India is not attracted. Hence question of considering Article 283 is not, in any way, relevant for deciding the present controversy. Accordingly, that argument is also rejected.

18. The last argument as advanced is based on Article 360 of the Constitution of India. Article 360 is the power in the President. If the President is satisfied that a situation has arisen whereby financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect. Therefore, it is the executive power of the President. Merely because the State Government, in its Office Memorandum, has set out that the payment of leave encashment has been stayed on account of critical financial condition of the State, it does not *ipso facto* mean that the financial emergency as contemplated in Article 360 of the Constitution has arisen. As noted earlier, financial emergency would arise when the President so holds under Article 360 of the Constitution of India. We are not dealing with the issue as to whether it is open to the President, in respect of the States and the Unions, to impose financial emergency merely because the State has decided not to waive the stay on encashment of leave because of its financial condition. The expression used is 'financial stability or credit of India or of any part of the territory thereof. It is true that under Article 1 (3) of the Constitution of India, the territory of India shall comprise, amongst others, the territories of the States, and that would also include the State of Uttar Pradesh. The President, having not issued any declaration under Article 360 of the Constitution of India, the argument advanced is devoid of substance and merit. We must also deprecate the practice of raising such frivolous grounds in a matter of Seirous jurisprudential issue. Merely because the State is not in a position to pay an allowance, a petitioner cannot plead Article 360. It is always within the right of a State to fix conditions of service based on its financial capacity. The only challenge in

such matters may be under Articles 14 and 16 of the Constitution of India. Hence, this contention is also rejected.

19. In the light of the above, rule discharged. However, there shall be no order as costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.10.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE SHABIHUL HASNAIN, J.

Writ Petition No. 8250 of 2010

Sri Gyanendra Kumar Singh and others ...Petitioner
Versus
The Election Commissioner of India and others ...Respondent

Counsel for the Petitioners:
Shri Akhilesh Kalra

Counsel for the Respondents:
Shi O.P. Srivastava

Constitution of India Art.171 readwith Representation of People Act 1950 Section 27 and Registration of Electors' Rule, 1960-Rule 31-Validity of Guidelines issued of Election Commission requiring physical presence of those graduates of constituency-whether ultra vires-being contrary to Art. 171-held- 'No'-various reasons dismissed.

Held: Para 13

In our opinion, considering the above discussions, it is not possible to hold that the Guidelines issued are ultra vires. They are in furtherance of the powers conferred on the Election Commission under Sections 21, 22, 23 and 27 of the Act and the Rules framed thereunder and Article 324. Section 27 of the Act itself sets out that every person, who is ordinarily a resident in a graduates' constituency and has, for at least three years before the qualifying date, been either a graduate of a University in the territory of India or in possession of any of the qualifications specified under clause (a) of sub-section (3) by the State Government concerned, shall be entitled to be registered in the electoral roll for that constituency. Thus, the procedure adopted by the Election Commission to restrict those who are ineligible, and the criteria adopted, cannot be said to be contrary and ultra vires the Act. In our opinion, they are in furtherance of the mandate cast on the Election Commission to purify the electoral process and to keep away the undesirable and unwanted persons who seek to destroy the democratic process.

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. By means of the present petition, the petitioners seek a declaration that the Guidelines dated 03.12.2009 issued by the Election Commission of India (hereinafter referred to as the 'Election Commission') are illegal and void and also all consequential orders and directions. The submission is that the Guidelines are ultra vires Article 171 of the Constitution of India read with Section 27 of the Representation of the People Act, 1950 and Rule 31 of the Registration of Electors' Rules, 1960.

2. The case of the petitioners is that the Election Commission published a public notice vide Press Note dated 18.12.2009, whereby the residents of the graduates' constituency of Kanpur were called upon to get their names included in the electoral roll in accordance with the terms and conditions contained in the Guidelines dated 03.12.2009. The public notice required the residents, otherwise

eligible for being registered as voters of the graduates' constituency of Kanpur, to appear in person with original mark-sheet/degree or equivalent certificate along with Form 18 before the Designated Officer, who was to verify the genuineness of the graduate certificate. In the notice, it was set out that persons, not submitting the certificates of graduation or its equivalent, would not be entitled to be registered as voters. Considering the conditions contained in the notice, published in pursuance of the Guidelines dated 03.12.2009, a large number of graduates who, under the Constitution and the Statute, are entitled to be registered as voters, are being deprived of their statutory and constitutional rights to vote during the election of the U.P. State Legislative Council of Kanpur graduates' constituency. Article 324 of the Constitution of India, provides that the superintendence, direction and control of preparation of the electoral rolls and the conduct of the elections to Parliament and Legislature in every State, vests in the Election Commission. The procedure for preparation of electoral rolls and the manner of filing the forms are prescribed under the provisions of the Representation of the People Act, 1950 (hereinafter referred to as the 'Act').

3. The further case as set out is that the preparation of electoral rolls for the graduates' constituency for election to the Council, is to be carried out as per the procedure prescribed by Section 27 of the Act. The Chief Electoral Officer (CEO), as provided under Section 13A of the Act, is responsible for supervising the preparation, revision and correction of electoral rolls in the State. As per Section 13AA of the Act, the District Election Officers are to prepare and revise the electoral rolls under the superintendence, direction and control of the Chief Electoral Officer. Similarly, Section 13B of the Act provides that the electoral rolls for a Constituency, including the Council Constituency, are to be prepared and revised by an Electoral Registration Officer.

Section 27 (3) of the Act, provides for the qualification for a person to be registered as a voter. Sub-section 5 (a) of Section 27 of the Act, categorically provides that any person, who is ordinarily resident in a graduates' constituency and has, for at least three years before the qualifying date, which in the present case is 01.11.2009, been either a graduate of a University in the territory of India or is in possession of any of the qualifications specified under clause (a) of sub-section (3) by the State Government concerned, shall be entitled to be registered in the electoral roll for that constituency. The procedure for preparation of electoral rolls is provided for in the Act itself. A duty has been cast on the Election Commission for preparation of electoral rolls of every constituency. While preparing the electoral roll for a graduates' constituency, the procedure prescribed under the Act must be followed. This has to be in conformity with the Constitution of India. Reference is, then, made to various provisions of the Act and the Rules known as the Registration of Electors' Rules, 1960 (hereinafter referred to as the 'Rules').

4. It is submitted on behalf of the petitioners that a perusal of the Act and the Rules, would clearly establish that a person eligible to be registered as an elector for a graduates' constituency is

required to send or deliver to the Registering Officer, the application in Form 18 for inclusion of his name in the roll of electors. The statutory provision of the Act or the Rules do not envisage his personal appearance before the Registering Officer for personal verification of documents. Form 18, being part of a statutory provision, cannot be altered, modified or amended by the Guidelines issued by the Election Commission. Apart from that, it is submitted that the procedure prescribed under the Guidelines is cumbersome, and discourages voters from enlisting their names, which is neither envisaged under the Act or the Rules nor is required and hence the Guidelines are unreasonable.

5. Though, no reply has been filed on behalf of the Election Commission, it has been pointed out by the learned counsel that the procedure, as prescribed under the Guidelines, is to ensure that the doubtful and bogus applications are not entertained and names of such persons are not included in the voter list. The Guidelines provide for a safeguard against bogus and ineligible voters. Learned counsel has also placed before us a communication dated 17.09.2010 sent by the Election Commission to the Chief Electoral Officer of Uttar Pradesh. Reference is also made to an order dated 25.06.2004 passed by the Patna High Court in **C.W.J.C. No. 11685 of 2003 (Shri Prakash Srivastava & Ors. Vs. The Chief Election Commissioner, Govt. of India & Ors.) with C.W.J.C. No. 14440 of 2003 and C.W.J. C. No. No. 4800 of 2002**, which we will refer in the judgment in the course of discussion.

In the communication by the Election Commission to the Chief Electoral Officer, U.P., Lucknow dated 17.09.2010, a copy of which is placed on record, reference is made to the aforesaid petition filed in the Patna High Court challenging the irregularities in the electoral rolls of Saran Graduates Constituency. The allegation was that, many non-graduates got their names enrolled in the electoral rolls on the basis of forged certificates and sought an enquiry to be instituted by the Election Commission in the matter. An enquiry was conducted and it transpired in the enquiry report that a large number of applicants filed fake certificates in support of their educational qualification. On verification, the District Magistrate, Siwan found that out of 176 persons, only 14 were eligible. These persons got their names included, taking advantage of the instructions of the Election Commission, then in vogue as contained in the then existing Para 45 Chapter IX of the Handbook of Electoral Registration Officer, which provided that the applicant should submit each document in support of their educational and other qualifications so that his claim could be considered for inclusion of his name in a graduates' constituency in Form 18 under Rule 31 (3) of the Rules. Based on the enquiry, the Guidelines for revision of the electoral rolls of graduates' and teachers' Constituencies in Bihar were amended. The amended Guidelines issued for the revision of the electoral rolls of graduates' and teachers' Constituencies in the State of Bihar were found successful, as there was no major complaint in regard to revision of rolls. The same instruction was adopted at the time of revision of electoral rolls of graduates' and Teachers' Constituencies in the States of Maharashtra and Karnataka in 2005 and

the same was found to be effective in preparing clean rolls there also.

The procedure for enrolment of voters in graduates' and teachers' Constituencies has been slightly amended subsequently after considering some representations received. The earlier instructions were to produce the original certificates/mark sheets before the Designated Officers. The Commission had earlier appointed Sub-Divisional Officers including ERO and AEROs as the Designated Officers for accepting the application forms for enrolment. Keeping in view the various representations received expressing difficulty in going to the District Magistrates and Sub Divisional Magistrates for showing the certificates, the Commission has now appointed the Block Development Officers as the Designated Officers to conduct verification of certificates of the applicants in addition to Sub-Divisional Officers vide its letter dated 29th December, 2009. Subsequently, reducing the inconvenience of the applicants further, the Commission also appointed Additional Designated Officers for authentication of the copies of the Degree/Mark sheets of the eligible voters after verification of their original certificates. There are several Additional Designated Officers. It is pointed out that these steps are successful in getting defect-free and accurate roll and also there was no major complaint with regard to revision of rolls received in the Election Commission, since the chances of enrolment of bogus voters were almost eliminated because of the proper verification of certificates. Any dilution of the instructions to do away with proper verification of the claim with reference to proper certificates/records would lead to ineligible persons getting enrolled.

6. The Press Note setting out process of elections was published on 5th October, 2010. The date of issue of notification was 15th October, 2010. The last date for filing nominations was 22nd October, 2010. The other dates were also specified in the said Note. The petitioners had filed the petition on 19th August, 2010. The matter was taken up by the Court on 23.08.2010. However, this Court, by order dated 12.10.2010 issued a direction that it will be open for the willing persons to send their application forms for inclusion of their names in the voter list, without personally presenting themselves before the Authorised Officer, and to produce a copy of the Guidelines.

7. The question for our consideration is, whether the Guidelines issued by the Election Commission can be said to be unconstitutional or ultra vires or unreasonable? The relevant provisions of the Act may be set out. Sections 15, 18, 21, 22 and 23 of the Act reads as under:-

"15. Electoral roll for every constituency.-- For every constituency there shall be an electoral roll which shall be prepared in accordance with the provisions of this Act under the superintendence, direction and control of the Election Commission.

18. No person to be registered more than once in any constituency.-- No person shall be entitled to be registered in the electoral roll for any constituency more than once.

21. Preparation and revision of electoral rolls.-- (1) The electoral roll for

each constituency shall be prepared in the prescribed manner by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made under this Act.

(2) The said electoral roll--

(a) shall, unless otherwise directed by the Election Commission for reasons to be recorded in writing, be revised in the prescribed manner by reference to the qualifying date--

(i) before each general election to the House of the People or to the Legislative Assembly of a State; and

(ii) before each bye-election to fill a casual vacancy in a seat allotted to the constituency; and

(b) shall be revised in any year in the prescribed manner by reference to the qualifying date if such revision has been directed by the Election Commission:

Provided that if the electoral roll is not revised as aforesaid, the validity or continued operation of the said electoral roll shall not thereby be affected.

(3) Notwithstanding anything contained in sub-section (2), the Election Commission may at any time, for reasons to be recorded, direct a special revision of the electoral roll for any constituency or part of a constituency in such manner as it may think fit:

Provided that subject to the other provisions of this Act, the electoral roll for the constituency, as in force at the time of the issue of any such direction, shall continue to be in force until the completion of the special revision so directed.

22. Correction of entries in electoral rolls.-- If the electoral registration officer for a constituency, on application made to him or on his own motion, is satisfied after such inquiry as he thinks fit, that any entry in the electoral roll of the constituency--

(a) is erroneous or defective in any particular,

(b) should be transposed to another place in the roll on the ground that the person concerned has changed his place of ordinary residence within the constituency, or

(c) should be detected on the ground that the person concerned is dead or has ceased to be ordinarily resident in the constituency or is otherwise not entitled to be registered in that roll,

the electoral registration officer shall, subject to such general or special direction, if any, as may be given by the Election Commission in this behalf, amend, transpose or delete the entry:

Provided that before taking any action on any ground under clause (a) or clause (b) or any action under clause (c) on the ground that the person concerned has ceased to be ordinarily resident in the constituency or that he is otherwise not entitled to be registered in the electoral roll of that constituency, the electoral registration officer shall give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him.

23. Inclusion of names in electoral rolls.--(1) Any person whose name is not included in the electoral roll of a constituency may apply to the electoral registration officer for the inclusion of his name in that roll.

(2) The electoral registration officer shall, if satisfied that the applicant is entitled to be registered in the electoral roll, direct his name to be included therein:

Provided that if the applicant is registered in the electoral roll of any other constituency, the electoral registration officer shall inform the electoral registration officer of that other constituency and that officer shall, on receipt of the information, strike off the applicant's name from that roll.

(3) No amendment, transposition or deletion of any entry shall be made under section 22 and no direction for the inclusion of a name in the electoral roll of a constituency shall be given under this section, after the last date for making nominations for an election in that constituency or in the parliamentary constituency within which that constituency is comprised and before the completion of that election."

Power has been conferred to the Central Government to make rules under Section 28 of the Act. Relevant provision of Section 28 of the Act reads as under:-

"28. Power to make rules.- (1) The Central Government may, after consulting the Election Commission, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) … … …
… … ...

(h) the revision and correction of electoral rolls and inclusion of names therein."

8. Rule 31 of the Rules provides for preparation for graduates' and teachers' constituencies, which reads as under:-

"31. Rolls for Graduates' and Teachers' Constituencies - (1) The roll for every graduates' or teachers' constituency shall be prepared in such form, manner and language or languages as the Election Commission may direct.

(2) The roll shall be divided into convenient parts which shall be numbered consecutively.

(3) For the purpose of preparing the roll the Registration Officer shall, on or before the 1st October issue a public notice calling upon every person entitled to be registered in that roll to send to, or deliver at his office before the 7th day of November next following an application in Form 18 or Form 19, as the case may be, for inclusion of his name.

(4) The said notice shall be published in two newspapers having circulation in the constituency and republished in them once on or about the 15th October and again on or about the 25th October.

4-A. The provisions of sub-rules (3) and (4) shall apply in relation to revision of the roll for every graduates' or teachers' constituency under sub-section (2) (a) (ii) of Section 21 of the Act, as they apply in relation to the preparation of such roll subject to the modification that references to the Ist October and the 7th day of November in sub-rule (3) and references to the 15th October and 25th October in sub-rule (4) shall be construed respectively as references to such date, as may be specified by the Election Commission in relation to each such revision.

(5) The provisions of rules 10 to 27 except clause (c) of sub-rule (1) and clause (c) of sub-rule (2) of rule 13 shall apply in relation to graduates' and teachers' constituencies as they apply in relation to assembly constituencies:

Provided that a claim or an application for the inclusion of a name shall be made in Form 18 or Form 19, as may be appropriate."

Paragraph 6 (iv) and (v) of the Guidelines, which is also relevant, reads as under:-

"6. Procedure for enumeration for Graduates Constituencies:-

(i) ....

(iv) The eligible person should apply for enrolment of their names in the prescribed form 18 along with documents listed in sub para (iii) above.

(v) Every person making an application in form 18 shall be required to produce his degree or certificate or marksheet, in original, in support of his eligibility for verification as per the following procedure:-

a. In case where the applicant directly .....his application in person before the Designated Officer duly appointed for the purpose, he will produce the original degree, certificate, mark sheet before the Designated Officer. The Designated Officer will scrutinize the degree, certificate, mark sheet and after satisfying himself record either Verified with original and found correct or Verified with original and found not correct, Repeated.

The Designated Officer will then affix his signature full name and PIN number on the application as mark of a summary enquiry and return a photocopy (only attested by him) of the original document furnished by the applicant toward the application to the ERO.

b. In case where the application is sent by post to the ERO/AERO along with attested copies of degree, certificate, the ERO will forward the same to the Sub-Divisional Officer (SDO), incharge of the area where the applicant resides. The SDO will in turn, issue a notice to the applicant to appear either before him or a designated officer appointed for the purpose in the sub division, in person along with his original certificate. Such notice will be issued by registered post or hand-delivered with proper acknowledgment due. On the appointed day of the hearing the applicant will produce his original certificate and the Designated Officer will then proceed with his enquiry as per sub-para (a) above and affix his decision as laid completion of

the enquiry by the SDO to the ERO/AERO concerned."

9. As we have noted earlier, there is a procedure for preparation of the electoral rolls. Section 27 of the Act itself sets out that the seats are reserved for graduates' constituency and there is a power to the State Government to set out the qualifications equivalent to that of a graduate of a University.

Insofar as Article 171 of the Constitution of India is concerned, all that it provides for is the reservation in the Legislative Council of a State for those who possess qualifications prescribed for or under any law made by the Parliament as equivalent to that of a graduate of any such University. Article 324 of the Constitution of India confers power on the Election Commission of superintendence, direction and control of the preparation of electoral rolls and conduct the elections to Parliament and Legislature of every State. That roll has to be prepared in terms of Section 27 of the Act. It is now well settled that where no Rules have been made, then it is open to the Election Commission to issue regulations or instructions for the purpose of free and fair conduct of elections, which would include preparation of voters roll excluding those who are not eligible to be included. The exercise undertaken by the Election Commission is based on the directions issued to it by the Patna High Court in **Shri Prakash Srivastava (supra),** to weed out those who were not eligible to be included in the voters list and thus maintain purity of the list. Pursuant to the said directions, the Election Commission has taken steps to check the inclusion of those who are otherwise not eligible. This exercise, therefore, cannot be said to be contrary to the rule making power conferred on the Government under Section 28 of the Act and the Rules.

10. The power of the Election Commission to make regulations or issue directions is no longer res-integra. Reference may be made to the following observations of the Supreme Court in **Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851:-**

"91. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsize the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings:

1 (a) Article 329 (b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

2 (a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may

cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection, with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Art. 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be a required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

3. The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post election stage and procedure as predicated in Article 329 (b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other things necessary for fulfillment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.

115. Apart from the several functions envisaged by the two Acts and the rules made thereunder, where the Election Commission is required to make necessary orders or directions, are there any other functions of the Commission? Even if the answer to the question may be found elsewhere, reference may be made to S. 19A of the Act which, in terms, refers to functions not only under the Representation of the People Act, 1950 and the Representation of the People Act, 1951, or under the rules made thereunder, but also under the Constitution. The Commission is, therefore, entitled to exercise certain powers under Art. 324 itself on its own right, in an area not covered by the Acts and the rules. Whether the power is exercised in an arbitrary or capricious manner is a completely different question."

11. We may note that increasingly, the electoral process is sought to be negated by those seeking the highest office in a democratic set up, many a times with a record which an ordinary voter would shrink at. We also find that in the enquiry held pursuant to the direction by the Patna High Court, it was revealed that a large number of persons who were not graduates had got their names included in the electoral roll. These voters otherwise would have been ineligible to vote. Their very presence on the electoral roll and the exercise of right to vote itself

destabilizes the solemnity of the electoral process. To that extent, any steps taken by the Election Commission to purify the process really cannot be said to be arbitrary, inasmuch as they are in furtherance of its powers to see that only those contest and participate in the process of election who are, otherwise, eligible. Merely, because the procedure laid down may require verification of the documents, itself cannot result in holding that the process is vitiated or cumbersome and, therefore, unreasonable. The number of voters in the graduates' constituency vis-a-vis the general voters is limited. A large number of officers designated to verify the qualification is, to an extent, to avoid the difficulty being faced by the persons to be enrolled.

12. The contention raised is that the Guidelines would result in denying people from getting themselves registered as voters from graduates' constituencies and, to that extent, the Guidelines are unreasonable. The process of elections or preparing the voters list is not confined to the State of Uttar Pradesh alone. The Election Commission has prepared these Guidelines for every State where there is a Legislative Council. The process, by which only genuine voters are enrolled, cannot be said to prevent maximum participations of citizens in a democratic set up. On the contrary, it is only the genuine persons who are entitled and desirous of participating in the election process, will be enrolled. The argument that the procedure is cumbersome and, therefore, an elector may not want to get his name included, cannot be a ground to hold that the procedure is unreasonable, unless they are prevented from being enrolled. It is the duty of a voter to see that he enrolls himself. Even if there be some difficulty, nonetheless the procedure adopted is to purify the electoral process. Difficulty, if any, cannot result in holding that the Guidelines are unreasonable.

13. In our opinion, considering the above discussions, it is not possible to hold that the Guidelines issued are ultra vires. They are in furtherance of the powers conferred on the Election Commission under Sections 21, 22, 23 and 27 of the Act and the Rules framed thereunder and Article 324. Section 27 of the Act itself sets out that every person, who is ordinarily a resident in a graduates' constituency and has, for at least three years before the qualifying date, been either a graduate of a University in the territory of India or in possession of any of the qualifications specified under clause (a) of sub-section (3) by the State Government concerned, shall be entitled to be registered in the electoral roll for that constituency. Thus, the procedure adopted by the Election Commission to restrict those who are ineligible, and the criteria adopted, cannot be said to be contrary and ultra vires the Act. In our opinion, they are in furtherance of the mandate cast on the Election Commission to purify the electoral process and to keep away the undesirable and unwanted persons who seek to destroy the democratic process.

14. No other contentions were advanced before us. Apart from that, by the time the matter came up for hearing, steps had already commenced for holding the elections. Article 329 (b), would also be a fetter on us and it is not possible for this Court to interfere in the electoral process.

15. For all the aforesaid reasons, we find no merit in this petition which is accordingly dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE PRADEEP KANT, J.

Misc. Bench No. 9419 of 2010

Dr. (Smt) Shobha Gupta ...Petitioner
Versus
Union of India ...Respondent

Counsel for the Petitioner:
Ashok Pande

Counsel for the Respondent:
A.S.G.
Manish Jauhari

Constitution of India, Art 226- Application for agency-for distribution of LPG Gas vitarak-rejected on ground non possessing land with her own name-father-in-law given affidavit-in case agency given-land shall be Transferred with her name-admittedly the petitioner is the wife of married son-not coverred within the definition of family rejection-held-proper.

Held: Para 8

We may deal with the contention as now raised on behalf of the petitioner herein insofar as the definition of Family Unit is concerned. No doubt, the respondent no. 2 would be State within the meaning of Article 12 of the Constitution of India and it will be bound by the principles laid down under Article 14 of the Constitution, but at the same time, as has been held by the Supreme Court in its various pronouncement, respondent no. 2 can also act as an private individual in the field of contract. In the instant case, the agency is to be given to a person who owns the land, either in his/her own name or in the name of a member as defined in the Family Unit. The Family Unit is restricted to applicant, applicant's spouse and unmarried son(s) / daughter(s). Admittedly, the petitioner is the daughter-in-law. In other words the wife of 'married son' who does not fall within the definition of family unit.

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. Heard learned counsel for the parties.

2. Respondent no. 2-Indian Oil Corporation Ltd. had issued an advertisement for allotment of an agency, which is known as Rajeev Gandhi Gramin L.P.G. Vitarak (RGGLV) in October, 2009 on the terms and conditions mentioned in the advertisement. One of the conditions is that the person seeking agency should own a suitable land at advertised location for LPG godown & showroom.

3. The word 'own' has been defined to mean as clear ownership title of the property in the name of applicant / family member of the 'Family Unit'. 'Family Unit' has been defined to include a married applicant which shall consist of the applicant, applicant's spouse and unmarried son(s) / daughter(s). 'Family Unit' of an unmarried applicant shall consist of applicant, applicant's parents and applicant's unmarried brother(s) / sister(s).

4. The petitioner herein applied for the said agency. Insofar as the requirement of land as per the advertisement is concerned, she has relied on an affidavit of her father-in-law that in the event, the petitioner succeeds in getting the agency, he would

transfer the land in the name of the petitioner, apart from giving her an amount of Rs.2.50 lacs for construction of the Godown and Showroom.

5. The respondent no. 2 intimated to the petitioner by communications dated 17th May, 2010 and 16th August, 2010 that she had not been found to be eligible for RGGLV, as she did not have the land at the advertised location and as the land for Godown as shown at Item No. 9 of the application is in the name of Shri Ram Avtar Gupta, her father-in-law, who did not fall under the definition of family unit as defined in the advertisement.

6. On behalf of the petitioner, learned counsel submits that the definition of 'Family Unit' in the application is arbitrary and violative of Article 14 of the Constitution of India.

7. In the first instance, the petitioner, at the time of making application for agency, knew the requirements, even then she chose to take a chance. Having failed, she has now sought to challenge the same. We are of the opinion that the writ petition as filed would not be maintainable and the Court should not exercise its extra ordinary jurisdiction in favour of a party like the petitioner herein.

8. We may deal with the contention as now raised on behalf of the petitioner herein insofar as the definition of Family Unit is concerned. No doubt, the respondent no. 2 would be State within the meaning of Article 12 of the Constitution of India and it will be bound by the principles laid down under Article 14 of the Constitution, but at the same time, as has been held by the Supreme Court in its various pronouncement, respondent no. 2 can also act as an private individual in the field of contract. In the instant case, the agency is to be given to a person who owns the land, either in his/her own name or in the name of a member as defined in the Family Unit. The Family Unit is restricted to applicant, applicant's spouse and unmarried son(s) / daughter(s). Admittedly, the petitioner is the daughter-in-law. In other words the wife of 'married son' who does not fall within the definition of family unit.

9. Question is whether it was open to respondent no. 2 to lay down any such condition. Also whether in such a situation, the land owned by the father-in-law of the applicant can be said to be in the ownership of the petitioner herein. The answer is clearly in negative. The second test would be whether an affidavit on behalf of the father-in-law that he would transfer the land if the petitioner succeeds, can enlarge the meaning of the expression 'Family Unit'. In our opinion, once Family Unit has been defined and from the definition of the 'Family Unit', the intention becomes clear that the land must be owned by the applicant or the member of the family unit. It is in that context that persons, other than unmarried son(s) / daughter(s), have not been included in the definition of Family Unit. Normally a married son and married daughter would be having an independent livelihood.

10. In our opinion, the classification made in the advertisement between the married and unmarried cannot be said to be arbitrary or unreasonable considering the object of the scheme.

For the aforesaid reasons, we find no merit in the second contention also.

11. The petition stands dismissed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 13172 of 1988

Bhagwan Singh and others ...Petitioner
Versus
Additional Commissioner, Meerut and others ...Respondent

Counsel for the Petitioners:
Sri S.N. Singh
Sri A.K. Rai
Sri R.N. Singh
Sri V.K. Singh

Counsel for the Respondents:
Sri K.S. Chauhan
S.C.

U.P. Imposition of Ceiling on land Holding Act, 1960 Section 27(6)-Suo moto Power exercise by commissioner within 7 years from the date of grant of Patta of surplus land-Patta approved on 10.03.77 by SDM-section 27 enforced w.e.f. 10.11 80 vide U.P. Act No. 20/1982-further enhanced from two to 7 years vide U.P. Act No. 24/86-logical interpretation period of 7 years be counted from the date 10.11.80 when section 6 introduced-not from the date of actual grant.

Held: Para 11

This Court therefore holds that the period of limitation for exercise of powers by the Commissioner under Section 27(6)-A of U.P. Imposition of Ceiling on Land Holdings Act would start from 10.11.1980 so far as the lease and settlements prior to the said date are concerned and the actual date on which the lease/settlement was granted is wholly irrelevant.

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

1. Petitioner before this Court seeks quashing of the order of the Additional Commissioner, Meerut Division, Meerut dated 28.6.1988 wherein in exercise of powers under Section 27 of sub-clause 4 and 6 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 on 10.11.1980 with the petitioner has been cancelled after exercise of suo moto powers.

2. The order impugned Annexure No. 2 to the writ petition is challenged before this Court only on one ground namely the proceedings under Section 27(6) Act No. 1 of 1961 were initiated beyond the prescribed period of "seven years" provided for under the said clause. Therefore, the entire proceedings are wholly without jurisdiction. According to the petitioner, the period of "seven years" has to be counted from the date of issuance of the patta in the facts of the case on 10.3.1977. The notice under Section 6 itself has been issued on 4.9.1986 i.e. after 7 years therefore is bad.

3. Standing Counsel in reply contends that an amendment was made by U.P. Act No. 26 of 1980 were in the words "two years" as existing in Section 27(6) were substituted by the words "seven years". This amendment came into force on 10.11.1980 and the period of seven years has to be counted after said dated i.e. 10.11.1980. The impugned proceedings are therefore within time.

4. I have heard counsel for the parties and have examined the records.

5. From the rival contentions raised on behalf of the petitioner, it is apparently clear that the only issue involved in the present writ petition is as to what shall be the starting point for computation of the period of "seven years" in terms of Section 27 in sub-clause 6 and as to whether in the facts of the case this period is to be counted from the date patta was granted/approved by the Sub-Divisional Magistrate i.e. 10.3.1977 or from the date the section 27(6) was introduced in the U.P. Imposition of Ceiling on Land Holdings Act, 1960.

6. For appreciating the aforesaid controversy, it would be relevant to reproduce the amendments introduced words vide U.P. Act No. 20/1982 with effect from 10.11.1980 in the Act of 1960 and which reads as follows:

7. **Amendment of Section 27 of U.P. Act No. 1 of 1961**. - In Section 27 of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 -

(i) in sub-section (6), for clauses (a) and (b), the following clauses shall be substituted, namely :-

"(a) in the case of any settlement made or lease granted before November 10, 1980, before the expiry of a period of two years from the said date, and

(b) in the case of any settlement made or lease granted on or after the said date, before expiry of a period of five years from the date of such settlement or lease."

Vide U.P. Act No. 24 of 1986 the words "two years' in clause (a) were substituted to read as "seven years". The amended provision 27(6) reads as follows:

(i) in clause (a), for the words "two years", the words "seven years" shall be substituted and be deemed always to have been substituted;

(ii) in clause (b), for the words "five years from the date of such settlement or lease", the words "five years from the date of such settlement or lease or up to November 10, 1987, whichever be later" shall be substituted and be deemed always to have been substituted.

8. From the reading of the aforesaid provisions of clause (a) and (b) of Section 27 it shall be amply clear that so far as the settlements made prior to November 10, 1980 are concerned, the Legislature at the first instance in its wisdom decided to prescribe the period of "two years" for the Commissioner to exercise suo moto powers in the matter of cancellation of settlements of surplus land. Logical this period of two years has to be counted from date of the introduction of sub-section 6 i.e. 10.1.1980.

9. In the opinion of the Court, in the matter of settlements and leases which were granted before 10.11.1980 (irrespective of the date on such settlement was made) the period of two years was provided for exercise suo moto powers of the Commissioner and other interpretation would frustrate the purpose of the averments so introduced and would create a situation were lease settlements granted more than two years prior to 10.1.1980 would not be reopened under section 27(6).

10. This period of "two years" has been amended to read as "seven years" and to have always been so substituted under U.P. Act No. 24/1986. As a logical conclusion this period of "seven years" must also be counted from the date section 6-A was introduced i.e. 10.11.1980.

11. This Court therefore holds that the period of limitation for exercise of powers by the Commissioner under Section 27(6)-A of U.P. Imposition of Ceiling on Land Holdings Act would start from 10.11.1980 so far as the lease and settlements prior to the said date are concerned and the actual date on which the lease/settlement was granted is wholly irrelevant.

12. There is another reason for arriving at the same conclusion. From a reading of sub-section 27(6)-B it will be seen that in respect of settlement and lease granted after 10.10.1980 the period for exercise of suo moto powers by the Commissioner has been provided as 5 years from the date of such settlement of the lease or up to 10.11.1987 whichever is later. It will therefore be seen that under clause (b) also the Commissioner can exercise suo moto powers up to 10.11.1987 in respect of lease granted after 10.11.1980 and qua which the period of 5 years have expired after such grant.

13. For the reasons recorded above, this Court finds that the contention raised on behalf of the petitioner has no force. The Commissioner could exercise his suo moto powers within seven years from 8.11.1980 in the matter and he has rightly done so in the facts of the present case.

14. Writ petition lacks merit and is accordingly dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2010

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE K.N. PANDEY, J.

Civil Misc. Writ Petition No.15505 of 2005

Pawan Kumar Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
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U.P. Recruitment of Dependents of Govt. Servent (Dyeing in Harness) Rules, 1974-Rule 5-Compassionate appointment-petitioner are dependent of work charge permanent muster Roll - employee-died in harness after completing 10 to 27 years service-whether the benefit of compassionate appointment available ?-held-'No' as they are not Govt. employees-the case

law relied by petitioners not correctly decided.

Held: Para 26

On the aforesaid discussion, and in view of the law laid down in General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi (Supra), we answer the questions posed as follows:-

"1. A daily wager and workcharge employee employed in connection with the affairs of the Uttar Pradesh, who is not holding any post, whether substantive or temporary, and is not appointed in any regular vacancy, even if he was working for more than 3 years, is not a 'Government servant' within the meaning of Rule 2 (a) of U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974, and thus his dependants on his death in harness are not entitled to compassionate appointment under these Rules.

2. The judgements in Smt. Pushpa Lata Dixit Vs. Madhyamik Shiksha Parishad and others, 1991 (18) ALR 591; Smt. Maya Devi Vs. State of U.P. (Writ Petition No.24231 of 1998 decided on 2.3.1998); State of U.P. Vs. Maya Devi (Special Appeal No.409 of 1998); Santosh Kumar Misra Vs. State of U.P. & Ors., 2001 (4) ESC (Alld) 1615; and Anju Misra Vs. General Manager, Kanpur Jal Sansthan (2004) 1 UPLBEC 201 giving benefit of compassionate appointment to the dependants of daily wage and workcharge employee have not been correctly decided."

Case law discussed:

AIR 2003 SC 2658, (2006) 4 SCC 1, (2007) 1 SCC 408, (2007) 2 SCC 481, (2007) 6 SCC 162, (2009) 2 SCC L&S 304, AIR 1996 SC 2445, (1994) 4 SCC 138, (1996) 1 SCC 301, (1997) 11 SCC 390, (1998) 9 SCC 485, (1998) 5 SCC 192, (2000) 7 SCC 192, (2004) 7 SCC 265, (1998) 2 SCC 412, (2004) 12 SCC 487, (2006) 5 SCC 766

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

1. In Pawan Kumar Yadav V. State of U.P. & Ors. the Court noticed judgements of this Court taking divergent views in the matter of recruitment of dependants of government servants, dying in harness, where the deceased employees were either daily wagers or workcharge employees, who were not regularly appointed, and referred the following questions for decision of larger bench:-

"1. Whether a daily wager and work charge employee, employed in connection with the affairs of Uttar Pradesh, who is not holding any post whether substantive or temporary is a 'Government Servant' within the meaning of Rule 2 (a) of U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974?

2. Whether the judgement in Smt. Pushpa Lata Dixit Vs. Madhyamik Shiksha Parishad and others, 1991 (18) ALR 591; Smt. Maya Devi Vs. State of U.P. (Writ Petition No.24231 of 1998 decided on 2.3.1998); State of U.P. Vs. Maya Devi (Special Appeal No.409 of 1998); Santosh Kumar Misra Vs. State of U.P. & Ors., 2001 (4) ESC (Alld) 1615; and Anju Misra Vs. General Manager, Kanpur Jal Sansthan (2004) 1 UPLBEC 201, giving benefit of compassionate appointment to the dependants of daily wager and work charge employees, have been correctly decided?"

2. The questions were referred by Hon'ble Mr. Justice A.N. Ray, the then Chief Justice on 13.5.2005 to a Bench of three judges. A large number of writ petitions and special appeals filed subsequently, on the same questions were connected, with the reference.

3. The petitioners are represented by Shri S.P. Shukla, Shri S.K. Misra, Shri L.C. Srivastava, Shri Ashok Tripathi, Shri Bikash Kumar Mishra, Shri Ashok Tripathi, Shri Sunil Kumar Srivastava, Shri Shashi Kant Shukla, Dr. Dharmesh Chaturvedi, Shri Bhoopendra Nath Singh, Shri Rakesh Kumar Singh, Shri K.M. Misra and Shri N.K. Mishra. No other counsel has appeared in the listed matters. Shri M.C. Chaturvedi, Chief Standing Counsel assisted by Dr. Y.K. Srivastava, Standing Counsel appeared for various departments of the State and for State of U.P. in the special appeals.

4. Prior to 7.10.1974, recruitment of dependants of government servant dying in harness was regulated by several Government Orders and departmental instructions. The Government of U.P. Notified the U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974 (In short the Rules of 1974) under the proviso to Art.309 of the Constitution of India on 7th October, 1974. The framing of these statutory Rules of 1974, had the effect of the Rules prevailing over all the Government Orders/ Circulars/ Letters, which have after the framing of Rules, no force of law.

5. Rule 2 provides definition of 'Government Servant', which has been defined in Clause (a) thereof to mean:-

"(a) `Government servant' means a Government servant employed in connection with the affairs of Uttar Pradesh who -

(i) was permanent in such employment ; or

(ii) though temporary had been regularly appointed in such employment ; or

(iii) though not regularly appointed, has put in three years' continuous service in regular vacancy, in such employment.

Explanation- "Regularly appointed" means appointed in accordance with the procedure laid down for recruitment to the post or service, as the case may be;"

Rule 3 provides, that the Rules would be applied to recruitment of dependents of the deceased government servants to public services and posts in connection with the affairs of State of Uttar Pradesh. Rule 4 provides for a non-obstante clause stating that the same shall have effect notwithstanding anything to the contrary contained in any rules, regulations or orders in force at the commencement thereof.

Rule 5 provides for recruitment to a member of the family of the deceased as under:-

"5. Recruitment of a member of the family of the deceased. - (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a

suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person-

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time-limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death."

6. The object of appointment on compassionate ground to the dependent of the deceased government servant dying in harness has been subject matter of consideration by the Supreme Court in various cases.

(a) In Umesh Kumar Nagpal vs. State of Haryana, (1994) 4 SCC 138 the Supreme Court held:-

"The compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the Rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over." (Para 6)

(b) In the case of Jagdish Prasad vs. State of Bihar, (1996) 1 SCC 301, the Supreme Court observed:-

"The very object of appointment of a dependent of the deceased employees who die-in-harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family." (Para 3)

(c) In MMTC Ltd. vs. Pramoda Dei. (1997) 11 SCC 390, it is observed by the Supreme Court:-

"As pointed out by this Court, the object of compassionate appointment is to enable the penurious family of the deceased employee to tide over the sudden financial crisis and not to provide employment, and that mere death of an employee does not entitle his family to compassionate appointment." (Para 4)

(d) In the case of S. Mohan vs. Government of T.N., (1998) 9 SCC 485, the court stated that :-

"The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole

breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over." (Para 4)

(e) This court has observed in Director of Education (Secondary) v. Pushpendra Kumar, (1998) 5 SCC 192:-

"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependant of a deceased employee. In Umesh Kumar Nagpal v. State of Haryana this Court has taken note of the object underlying the Rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family." (Para 8)

(f) In the case of Sanjay Kumar v. State of Bihar, (2000) 7 SCC 192, the court stated:-

"This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the breadearner who had left the family in penury and without any means of livelihood." (Para 3)

(g) In the case of Punjab National Bank v. Ashwini Kumar Taneja, (2004) 7 SCC 265, it was observed by the court that:-

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crisis." (Para 4)

(h) In the case of State of U.P. vs. Paras Nath, (1998) 2 SCC 412, the court has held that :-

"The purpose of providing employment to a dependant of a Government servant dying-in-harness in preference to anybody else, is to mitigate the hardship caused to the family of the employee on account of his unexpected death while still in service. To alleviate the distress of the family, such appointments are permissible on compassionate grounds provided there are Rules providing for such appointment. The purpose is to provide immediate financial assistance to the family of a deceased Government servant. None of these considerations can operate when the application is made after a long period of time such as seventeen years in the present case." (Para 5)

(i) In the case of National Hydroelectric Power Corpn. vs. Nanak Chand, (2004) 12 SCC 487, the court has stated that :-

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crises." (Para 5)

(j) In the case of State of J. and K. vs. Sajad Ahmed Mir, (2006) 5 SCC 766, the court has held that :-

"Normally, an employment in the Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed from except where compelling circumstances demand, such as, death of the sole breadwinner and likelihood of the family suffering because of the setback. Once it is proved that in spite of the death of the breadwinner, the family survived and substantial period is over, there is no necessity to say "goodbye" to the normal rule of appointment and to show favour to one at the cost of the interests of several others ignoring the mandate of Article 14 of the Constitution." (Para 11)

7. The recruitment under the Rules of 1974 to the dependants of an employee dying in harness is confined to the dependants of the deceased 'Government servant'. A Government servant defined under Rule 2 (a) means a Government servant employed in connection with the affairs of Uttar Pradesh. The nature of employment is clarified under the Rules (i) either permanent; (ii) though temporary, had been regularly appointed in such employment or; (iii) though not regularly appointed, has put in 3 years continuous service in regular vacancy in such employment. The explanation appended to Clause (a) explains that the words 'regularly appointed' means, appointed in accordance with the procedure laid down for recruitment to the post or service as the case may be. There is no difficulty in ascertaining the nature of employment for which the Rules are applicable, if the Government servant was permanent. The difficulty also does not arise, where the nature of employment is temporary and the

person has been regularly appointed in such employment. The words 'regularly appointed' have been explained to mean the appointment in accordance with the procedure of recruitment for the post or service. The difficulty arises, where a person has not been regularly appointed, but has put in 3 years' continuous service in regular vacancy. The word 'regular vacancy' in such employment is not defined under the Rules.

8. In order to find out the nature of employment of the persons through whom the petitioners are claiming compassionate appointment, it is necessary to set out the facts in respect of cases in which the counsels appeared and pressed their claims.

9 (a). In Pawan Kumar Yadav Vs. State of U.P., Writ Petition No.15505 of 2005, Shri Raja Ram Yadav was appointed as daily waged Class-IV employee in the Forest Department at Mirzapur in the year 1983. He died on 31.10.1997, after serving for 14 years as daily waged employee leaving behind his widow and four sons including Pawan Kumar Yadav (the petitioner) and one daughter. They were alleged to be solely dependent upon him. The petitioner applied for compassionate appointment under the Rules of 1974 on 14.6.1998. In the counter affidavit of Shri R.K. Tripathi, Forest Ranger, Forest Division it is stated that the petitioner's father late Shri Raja Ram Yadav was working as **daily wager on the post of Gateman.** He was not permanent employee and that since the petitioner's father did not come within the definition of government servant under the Rules of 1974, he was not entitled to appointment. In para 16 it is denied that the petitioner's father had continuously worked from 1983 upto 1997.

(b) In Writ Petition No.59778 of 2006 , Surendra Singh Vs. State of U.P. & Ors., the petitioner's father Satya Narain Singh was initially appointed on the post of **Part Time Tube Well Operator** in the Irrigation Department in the year 1990 till 18.5.1999. He was getting the same pay scale and other emoluments as of regular Tube Well Operators with deductions of general provident fund. He was liable to be regularised but unfortunately the order of regularisation was not made. With the 73rd Amendment to the Constitution of India all Tube Well Operators under the Government Order dated 1.7.1999 working in the eight Department of the Government including regular or part time Tube Well Operators were designated as Multi Purpose Panchayat Workers. The petitioner's father was issued letter on 18.5.1999 relieving him from the duties of Tube Well Operator and was placed under the Gram Panchayat. He was working as Gram Panchayat Vikas Adhikari and Secretary of Various Village Panchayats in District Deoria till he died in harness on 21.6.2006. The petitioner's mother made an application for appointment on compassionate grounds on 24.7.2006, which was rejected on 29.7.2006 on the ground that the petitioner's father was serving as Part Time Tube Well Operator and was not a government servant as defined for claiming appointment on compassionate grounds under the Rules of 1974.

(c) In Smt. Chanda Devi Vs. State of U.P. & Ors., Writ Petition No.9500 of 2006, late Shri Tej Bahadur Singh was appointed as Meth on **permanent muster roll in Public Works Department** under

the Executive Engineer, PWD, Allahabad on 28.5.1990. He died in harness after completing 9 years and 9 months of service on 1.3.2000. The petitioner applied for compassionate appointment on 8.5.2000, as his widow. The Writ Petition No.2743 of 2004 was finally disposed of on 22.2.2005 to consider the representation within one month. The representation was decided on 21.4.2005 stating that total length of service of Shri Tej Bahadur Singh was 9 years and 9 months, and hence she could not be appointed. The petitioner filed second Writ Petition No.50984 of 2005, which was allowed by this Court in the same terms as in the case of Km. Suman Kumari (Writ Petition No.21622 of 2004). In Suman Kumari, the petitioner was claiming compassionate appointment on the death of her mother Smt. Kewal, who was also given compassionate appointment on the death of her husband. The facts of the case of Km. Suman Kumari were entirely different than the case of Smt. Chanda Devi. The Superintending Engineer, Allahabad Circle, PWD, Allahabad again rejected the application of Chanda Devi on 19.1.2006 on the ground that her husband was working on permanent muster roll with only 9 years and 9 months service to his credit and thus she was not entitled to compassionate appointment.

(d) In Smt. Manvasi Devi @ Shanti Devi Vs. State of U.P. & Ors., Writ Petition No.44470 of 2006 Shri Raj Jeet Yadav was engaged as **daily waged Beldar (Cook) in the Irrigation Department** on 1.8.1983. His name was included at Sl.No.24 in the seniority list issued in the year 1998. He was given workcharge employment in the office of Executive Engineer, Sharda Sahayak Khand-39, Irrigation Department, Allahabad on 19.6.1998. A Writ Petition No.13746 of 2001 was filed by him to regularise his services and was disposed of to consider his representation. His claim was rejected on 21.6.2002 on the ground that he was working as workcharge employee since 19.6.1998. He died on 12.12.2005. The representation made by the petitioner on 2.12.2005 was not considered on 21.6.2002 on the ground that the deceased was daily wager in workcharge establishment.

(e) In Ravi Srivastava Vs. State of U.P. & Ors., Writ Petition No.68880 of 2006, the petitioner's father Shri Sudhir Kumar Srivastava was appointed as **Chowkidar on daily wages** on 25.3.1985 **in the office of Executive Engineer, Construction Division-II**, PWD, Kanpur Nagar and continued to work in the same capacity upto 25.3.1987. Thereafter he worked from 26.9.1987 to 25.9.1988 as Meth at Police Station Gajner. His father, thereafter, worked as **Meth at Primary Health Centre, Makrandpur,** Kanpur Nagar as muster roll daily waged employee w.e.f. 26.9.1988. He became **permanent muster roll employee** at Sl.No.9 w.e.f. 1.6.1989 upto his death on 15.10.2006. The petitioner Shri Ravi Srivastava applied for compassionate appointment on 1.11.2006, which was rejected on 14.11.2006 on the ground that by Government Order dated 29.1.2003 the provisions for compassionate appointment of the dependants of daily wagers/ workcharge establishment employees has been stopped.

(f) In Guddu Musleem Vs. State of U.P. & Ors., Writ Petition No.28559 of 2006, the petitioner's father was working as **work charge employee 'Beldar' in the office of Nirman Khand-1, Public**

Works Department since 26.3.1987. He was not regularised upto his death on 8.6.2003 leaving behind four members in the family. The petitioner applied for compassionate appointment dated 12.9.2003 was not considered on the ground of letter of Government of Uttar Pradesh dated 29.1.2003 by which the compassionate appointment of daily wager/ work charge employee was stopped. The Executive Engineer, Nirman Khand-1, PWD, Varanasi by letter dated 13.3.2006 rejected the application in pursuance to the directions of this Court dated 25.2.2006 in Writ Petition No.7308 of 2006 on the ground that by Government Order dated 29.1.2003 the compassionate appointment was not to be considered for the dependants of daily wagers/ workcharge employee.

(g) In Rama Shanker Singh Vs. State of U.P. & Ors., Writ Petition No.57072 of 2006 the petitioner's father died in harness working as **Seasonal Collection Peon.** He was employed on seasonal basis from February 1976 to 29.8.2005. It is stated that since 7.2.1981 upto the date of his death on 29.8.2005 he was working without any break. The petitioner's application dated 15.9.2005 and 12.12.2005 for compassionate appointment was rejected on 11.3.1997 in pursuance to the order of this Court dated 19.5.2006 in Writ Petition NO.27893 of 2006 on the ground that his father was appointed on seasonal basis. He was not working on any regular post on temporary basis and thus his continuance if for more than 3 years did not entitle the petitioner's appointment on compassionate grounds.

(h) In Smt. Kusama Devi Vs. State of U.P. & Ors., Writ Petition No.45697 of 2006, the petitioner's husband was engaged as **Meth on daily wage in Public Works Department** on 26.5.1985. He was appointed on the same post in work charge on 1.7.1999 and died on 3.5.2006. Her application for compassionate appointment was rejected on 26.5.2006 on the ground that in **temporary work charge establishment** there is no provision for appointment of the dependants of the employees dying in harness on compassionate grounds.

(i) In Smt. Shyama Devi Vs. State of U.P. & Ors., Writ Petition No.7687 of 2010, the petitioner's husband Shri Har Dayal was employed as **muster roll employee as Peon in the office of the Executive Engineer, Awas Vikas Parishad,** Bareilly on 16.3.1985. He died while serving as muster roll employee on 1.7.2007.

(j) In Smt. Sunita Devi Vs. State of U.P., Writ Petition No.2789 of 2010, the petitioner's husband Shri Shyama Charan was employed as **part time Tube Well Operato**r on 9.4.1991. He was posted at Village Musapur, Distt. Bareilly. The Government proposed to regularise the services of all Part Time Tube Well Operators appointed prior to 30.6.1998 under the Part Time Tube Well Operators Regularisation (First Amendment) Rules, 2008. The petitioner's husband was entitled to regularisation. He, however, died on 20.12.2007 in a road accident leaving behind the petitioner and two daughters. Her application for compassionate appointment was considered in pursuance to the direction issued by this Court dated 27.7.2009 in Writ Petition No.37012 of 2009 on the ground that her husband was not government servant within the meaning of Rules of 1974. The deceased Government Servant was appointed as Part

Time Tube Well Operator on 9.8.1991 on honorarium of Rs.299/- for 3 years for working on 2 ½ hours. He was not holding any post nor were regularly appointed in any vacancy to be considered as government servant.

It is relevant to state here that in pursuance to the judgement of this Court in Suresh Chandra Tiwari & Ors. Vs. State of U.P. & Ors., Writ Petition No.3558 (SS) of 1992 dated 16.8.1994 followed in Uma Shankar Yadav Vs. State of U.P., Writ Petition No.30228 of 1993, decided on 26.9.1995 and against which special leave petition filed by the State of U.P. in State of U.P. Vs. Mangra Prasad Verma was dismissed on 22.3.1995 and the review petition was also dismissed on 19.10.1995, the State Government framed Rules under the Proviso to Art.309 of the Constitution of India: U.P. Regulation of Part Time Tube Well Operators Rules, 1996. The Rules were amended by First Amendment in 2008 on 5.5.2008 providing that persons working on 30th June, 1998 or prior to that date on part time Tube Well Operator and were serving regularly on the enforcement of the First Amendment Rules will be considered for regularisation, if he is eligible after considering his suitability in accordance with his service record. It is alleged in the writ petition that the petitioner had a right to be considered for regularisation under the Rules in accordance with the service book. He, however, died before the enforcement of the Rules on 5th May, 2008 on 30.12.2007.

(k) In Smt. Om Kanti Vs. State of U.P. & Ors., Writ Petition No.71855 of 2009, the petitioner's husband was working as **Part Time Tube Well Operator** on 26.5.1987 and was working as such, when he died in harness on 29.6.2000 in a road accident. Her applications dated 22.9.2000 and 7.2.2001 were considered in pursuance to the directions issued by this Court. Her Writ Petition No.31703 of 2001 was dismissed on 30.4.2004. In special appeal an order was passed on 10.7.2009 to decide his representation, which was rejected on 5.11.2009 on the ground that he was not covered by Regularisation Rules of 1996 as he was appointed on 26.5.1987, whereas the Rules of 1996 provided for cut off date as 1.10.1986.

(l) In Chandan Kumar Dubey Vs. State of U.P., Writ Petition No.5764 of 2010, the petitioner's father was appointed as **Part Time Tube Well Operator** on 21.2.1987 and died in harness on 16.3.2001. His mother made an application for compassionate appointment on 23.6.2004 and after attaining the majority the petitioner filed an application for compassionate appointment. He has prayed for direction to decide his representation.

(m) In Subhash Chandra V. State of U.P., Writ Petition No.12099 of 2010, the petitioner's father late Shri Mehi Lal was appointed as **Beldar in Class-IV category on daily wage basis in the Irrigation Department.** On 1.4.1975 he was **absorbed in permanent workcharge establishment** on 1.10.1990 and died in harness on 7.11.2006. The petitioner applied for compassionate appointment on 4.12.2006. He got information under the Right to Information Act that his father was working in regular workcharge establishment. In Writ Petition NO.20891 of 2008, his representation was directed to be decided by order dated 29.4.2008.

(n) In Mahipal Vs. State of U.P. & Ors., Writ Petition No.7750 of 2010, the petitioner's father was employed as **Meth**

on daily wage in Public Works Department on 25.2.1986. He was shifted in the workcharge establishment on 18.12.1999 in the office of National Highway Branch. He died on 15.10.2009. It is stated that juniors to the petitioner were regularised on 7.1.2010. The petitioner's application for compassionate appointment filed on 23.11.2009 and reminder on 2.12.2009 were considered and rejected on 20.12.2009 on the ground that his father was **working in the workcharge establishment** since 18.12.1999. There is no Government Order giving the compassionate appointment to the irregular workcharge employee.

(o) In State of U.P. & Ors. Vs. Zaved Akhtar, Special Appeal No.(1170) of 2007, the delay has been condoned on 9.1.2008. The special appeal has to be given regular number. In this appeal the State of U.P. is aggrieved by the judgement of learned Single Judge dated 28.9.2007 in Writ Petition No.43673 of 2001 directing the respondents to consider the claim of the petitioner for compassionate appointment within six weeks on the ground that the petitioner's father was appointed for more than 3 years continuously and it was immaterial whether he was working in workcharge establishment or regular establishment. The Statutes (Rules of 1974) is beneficial in nature and has to be construed liberally. While setting aside the orders dated 28.8.2001 and 30.8.2001 by which the application for compassionate appointment was rejected as petitioner's father was working as **Pump Operator in the workcharge establishment** on his death. There is stay of the judgement by the Division Bench, connecting the matter with this reference on 9.1.2008.

(p) In State of U.P. & Ors. Vs. Ramadhar Vishwakarma, Special Appeal No.567 of 2008, the State of U.P. and the Irrigation Department is aggrieved against the judgement of learned Single Judge dated 24.1.2008 in Writ Petition NO.4325 of 2008 directing the Executive Engineer, Irrigation Division, Kushi Nagar to reconsider the compassionate appointment rejected by impugned order dated 29.10.2007 and to give appointment as petitioner's father Shri Mansa Sharma had continuously worked for 38 years in the **workcharge establishment** prior to his death. The directions have been given to consider him for compassionate appointment within two months, if he is otherwise eligible and qualified for the post and shall be offered compassionate appointment under the Rules of 1974 irrespective of the fact that his father had worked as employee in the workcharge establishment.

10. In the exigencies of work, the State employs on various projects and schemes a large number of employees on daily wage basis. These employees do not work against any temporary or permanent post, or even a tenure post. They are neither permanent nor employed on temporary basis against the regular vacancy. These employees do not hold any post. The daily waged appointment is made in the exigency of service in accordance with the requirement of work. In **State of Haryana & Anr. Vs. Tilak Raj & Ors., AIR 2003 SC 2658,** the Supreme Court held:-

"12. A scale of pay is attached to a definite post and in case of a daily wager, he holds no posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and

permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-a-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one."

11. In the **Secretary, State of Karnataka & Ors. Vs. Umadevi (3) & Ors., (2006) 4 SCC 1** a Constitution Bench of the Supreme Court has reaffirmed the law, with which the Supreme Court had sometimes in the past in a few cases, had taken a different view such as State of Haryana Vs. Piare Lal, (1992) 4 SCC 118, as follows:-

"26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent -- the distinction between regularization and making permanent, was not emphasized here -- can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in paragraph 50 of Piara Singh (supra) are to some extent inconsistent with the conclusion in paragraph 45 therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

31. In Ashwani Kumar and others Vs. State of Bihar and others (1996 Supp. (10) SCR 120), this Court was considering the validity of confirmation of the irregularly employed. It was stated:

"So far as the question of confirmation of these employees whose entry was illegal and void, is concerned, it is to be noted that question of confirmation or regularization of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on ad hoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorized and is not against any sanctioned vacancy, question of regularizing the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularization or confirmation is given it would be an exercise in futility."

37. It is not necessary to multiply authorities on this aspect. It is only necessary to refer to one or two of the recent decisions in this context. In State of U.P. vs. Niraj Awasthi and others (2006 (1) SCC 667) this Court after referring to a number of prior decisions held that there was no power in the State under Art. 162 of the Constitution of India to make appointments and even if there was any such power, no appointment could be

made in contravention of statutory rules. This Court also held that past alleged regularisation or appointment does not connote entitlement to further regularization or appointment. It was further held that the High Court has no jurisdiction to frame a scheme by itself or direct the framing of a scheme for regularization. This view was reiterated in State of Karnataka vs. KGSD Canteen Employees Welfare Association (JT 2006 (1) SC 84).

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

49. It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have

indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

51. The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognize that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution."

12. In Indian Drugs & Pharmaceuticals Ltd. V. Workmen, (2007) 1 SCC 408 the Supreme Court observed:-

"Admittedly, the employees in question in Court had not been appointed by following the regular procedure, and instead they had been appointed only due to the pressure and agitation of the union and on compassionate ground. There were not even vacancies on which they could be appointed. As held in A. Umarani vs. Registrar, Co-operative Societies and Ors., 2004 (7) SCC 112, such employees cannot be regularized as regularization is not a mode of recruitment. In Umarani's case the Supreme Court observed that the compassionate appointment of a woman

whose husband deserted her would be illegal in view of the absence of any scheme providing for such appointment of deserted women."

13. In National Institute of Technology V. Niraj Kumar Singh, (2007) 2 SCC 481 the Supreme Court held that all public appointments must be in consonance with Art.16 of the Constitution of India and observed:-

"14. Appointment on compassionate ground would be illegal in absence of any scheme providing therefore. Such scheme must be commensurate with the constitutional scheme of equality.

16. All public appointments must be in consonance with Article 16 of the Constitution of India. Exceptions carved out therefore are the cases where appointments are to be given to the widow or the dependent children of the employee who died in harness. Such an exception is carved out with a view to see that the family of the deceased employee who has died in harness does not become a destitute. No appointment, therefore, on compassionate ground can be granted to a person other than those for whose benefit the exception has been carved out. Other family members of the deceased employee would not derive any benefit thereunder."

14. Again in I.G. (Karmik) v. Prahalad Mani Tripathi, (2007) 6 SCC 162 the Supreme Court observed:-

"7. Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion."

15. The judicial decisions unless otherwise specified are retrospective. They would only be prospective in nature, if it has been provided therein. Even though cause of action in any case may have arisen prior to Uma Devi, the judgement would squarely be applicable to the facts and circumstances of the case. (Uttaranchal Jal Sansthan V. Laxmi Devi & Ors., (2009) 2 SCC L&S 304.

16. In State of Manipur v. Thingujam Brojen Meetei, AIR 1996 SC 2114, the Supreme Court observed that dependants of confirmed workcharge employee will not be entitled to appointment on the ground of compassion as provided in the scheme. The word 'employee' does not conceive casual or purely adhoc employee or those, who are working as apprentices. (State of Haryana v. Rani Devi, AIR 1996 SC 2445).

17. It is submitted by learned counsel appearing for the petitioners that the petitioners are dependants of the employees, who were regularly appointed in regular vacancies, and in any case most of them were entitled to be regularised after having served for more than three years in regular vacancies. It is submitted that but for their untimely death these employees were liable to be considered and regularised in the regular vacancies in the department. In respect of the employees working in the workcharge establishment, it is submitted that it was a matter of time before these

employees could be posted in the permanent workcharge establishment, for claiming regular wages. They were in no manner different than in the nature of appointment of employees, who were regularly appointed in regular vacancies. The State Government has caused invidious discrimination in rejecting the applications of compassionate appointment of the petitioners on the ground that they were not Government servant, as defined in Clause (a) of Rule 2 of the Rules of 1974. The definition is inclusive in nature and will also include the employees, who were working for long periods and were entitled to be regularised.

18. Learned counsel for the petitioners further submit that in Smt. Pushplata Dixit (Supra) this Court had considered the nature of employment of the daily wager and workcharge employees, who had served for long period, sometimes as much as 24 years and held that depriving dependants of such employees compassionate appointment on the same object and criteria on which such employment is given to permanent Government servant, temporary Government servant, regularly appointed and those, who were not regularly appointed but had put in 3 years continuous service in regular vacancy was highly discriminatory and thus violative of Art.14 and 16 of the Constitution of India. Same view was expressed in Smt. Maya Devi (Supra), Santosh Kumar Misra (Supra) and Anju Misra (Supra).

19. It is submitted that the object of compassionate appointment in respect of daily wager and workcharge employee is no less important than the object, which is to be served in giving employment to the employees of permanent and temporary employees, who were regularly appointed or had put in three years continuous service in regular vacancy. The words "though not regularly appointed had put in three years' continuous service in regular vacancy" means that these employees were entitled to be included in the same category.

20. In respect of the employees the State Government in Irrigation Department, Public Works Department, Minor Irrigation, Rural Engineering Services, Grounds Water Department has provided for employment the regular establishment and workcharge establishment. The person appointed in regular establishment are appointed against a post, after following due procedure prescribed under the rules. In workcharge establishment the employees are not appointed by following any procedure or looking into their qualification. They do not work against any post or regular vacancy. They only get consolidated salary under the limits of sanction provided by Government Order dated 6th April, 1929. The conditions of their employment is provided in paragraphs 667, 668 and 669 of Chapter XXI under the Head of Establishment in Financial Hand Book Volume IV. Their payments are provided to be made in same Financial Hand Book Volume IV in Paragraph Nos.458, 459, 460, 461, 462 and 463.

21. Shri M.C. Chaturvedi, learned Chief Standing Counsel submits that by Government Order dated 1.1.2000 Paragraphs 667, 668 and 669 of Financial Hand Book Volume 4 have been deleted and that thereafter the payments are not being made to them from the budget allotted from the regular establishment, and they are not entitled to any allowance or pensionary benefits. They are paid from contingencies and are required to work until the work is available. The services of

workcharge employees are regularised only when regular vacancy is available. Until then they cannot be treated as government servants.

22. In Uttaranchal Jal Sansthan Vs. Laxmi Devi (Supra) the Supreme Court has held "it is one thing to say that by reason of such contingencies services of the workcharge employee should be directed to be regularised, but it is another thing to say that although they were not absorbed in the permanent cadre, still on their deaths their dependants would be entitled to invoke the Rules".

23. The regular need of work, of which presumption has been set to arise after working for long number of years and the principles of legitimate expectations, would not mean that there was a regular vacancy. The word 'regular' vacancy has not been defined but that a distinction must be made between a need of regular employees, and the existence of regular vacancies. In Uttaranchal Jal Sansthan Vs. Laxmi Devi (Supra) the Supreme Court said; 'indisputably the services of the deceased had not been regularised. in both the cases the writ petitions were filed but no effective relief thereto had been granted. In the case of late Leeladhar Pandy, allegedly he was drawing salary on regular scale of pay. that may be so but the same would not mean that there existed a regular vacancy".

24. The Supreme Court further went on to explain in para 18 to 20 as follows:-

"18. Indisputably having regard to the equality clause contained in Articles 14 and 16 of the Constitution of India whether the appointment is in a regular vacancy or not is essentially a question of fact. Existence of a regular vacancy would mean a vacancy which occurred in a post sanctioned by the competent authority. For the said purpose the cadre strength of the category to which the post belongs is required to be taken into consideration. A regular vacancy is which arises within the cadre strength.

19. It is a trite law that a regular vacancy cannot be filled up except in terms of the recruitment rules as also upon compliance of the constitutional scheme of equality. In view of the explanation appended to Rule 2(a), for the purpose of this case we would, however, assume that such regular appointment was not necessarily to be taken recourse to. In such an event sub-clause (iii) of clause (a) as also the explanation appended thereto would be rendered unconstitutional.

20. The provision of law which ex facie violates the equality clause and permits appointment through the side door being unconstitutional must be held to be impermissible and in any event requires strict interpretation. It was, therefore, for the respondents to establish that at the point of time the deceased employees were appointed, there existed regular vacancies. Offers of appointment made in favour of the deceased have not been produced."

25. In General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi (Supra) the Supreme Court considered and interpreted the expression 'regular vacancy' in respect of same Rules namely U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974. The judgement of the Apex Court interpreting the same Rules and deciding the questions posed before us squarely covers question No.1, in favour of the State and is binding on the High Court.

26. On the aforesaid discussion, and in view of the law laid down in General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi (Supra), we answer the questions posed as follows:-

"1. A daily wager and workcharge employee employed in connection with the affairs of the Uttar Pradesh, who is not holding any post, whether substantive or temporary, and is not appointed in any regular vacancy, even if he was working for more than 3 years, is not a 'Government servant' within the meaning of Rule 2 (a) of U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974, and thus his dependants on his death in harness are not entitled to compassionate appointment under these Rules.

2. The judgements in Smt. Pushpa Lata Dixit Vs. Madhyamik Shiksha Parishad and others, 1991 (18) ALR 591; Smt. Maya Devi Vs. State of U.P. (Writ Petition No.24231 of 1998 decided on 2.3.1998); State of U.P. Vs. Maya Devi (Special Appeal No.409 of 1998); Santosh Kumar Misra Vs. State of U.P. & Ors., 2001 (4) ESC (Alld) 1615; and Anju Misra Vs. General Manager, Kanpur Jal Sansthan (2004) 1 UPLBEC 201 giving benefit of compassionate appointment to the dependants of daily wage and workcharge employee have not been correctly decided."

27. All the writ petitions are consequently dismissed. The delay in filing the Special Appeal Nos.845 (D) of 2009; 595 (D) of 2002; 610 (D) of 2003 and 1170 (D) of 2007 has been sufficiently explained and is accordingly condoned. The Special Appeal Nos.845 (D) of 2009; 595 (D) of 2002; 610 (D) of 2003; 1284 of 2010; 1849 of 2009; 1170 (D) of 2007; 85 of 2004 and 567 of 2008 are allowed. The judgements of learned Single Judge challenging these appeals are set aside and the writ petitions are dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2010

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 19526 of 1996

Azim Ullah ...Petitioner
Versus
Rent Control and Eviction Officer and others ...Respondents

Counsel for the Petitioner:
Sri Dharam P. Singh
Sri P.K. Dubey
Sri S. Niranjan

Counsel for the Respondents:
Sri.S.M. Dayal
Sri Ashok Srivastava
Sri M.D. Singh 'Shekhar'
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Sri S.M.A. Kazmi

U.P. Act No. 13 of 1972-Section 16- Release application by land lord in 1994- while Suit before SCC pending since 1988 for inconsistent user and Sub-tenancy-tenant petitioner alleged himself as unauthorised occupant-on application under section 12 of the Act for deemed vacancy by third person-land lord filed release application -whether time limit will come in way of land lord/Respondent held-'No'-unfettered right of release of land lord there in view of Ajai Pal's case.

Held: Para 10

So far as the question of delay is concerned, it can be examined from two

angles. As already noted above, the landlord had filed suit for eviction in 1988 treating the petitioner to be a statutory tenant but it was the petitioner himself who claimed and obtained the benefit of being an unauthorized occupant and therefore the landlord had no other option but to file the release application on the ground of deemed vacancy and thus application was filed within a reasonable time in 1994, which was much before the expiry of twelve years. Secondly, the proceedings for declaration of vacancy were not started by the landlord but by one Vasudeo and only when notices were issued by the Rent Controller to the petitioner that the release application was filed and therefore applying the ratio laid down by the Division Bench in Ajay Pal's case (Supra) the right of the landlord to get it released, was unfettered.

Case law discussed:

[1984 A.R.C. 17], [1996 (2) A.R.C.474], [2006 (1) A.R.C. 377], [1993 (20 A.R.C. 204 FB], [2002 (8) SCC 31], [2008 (2) A.R.C. 264].

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard learned counsel for the parties.

2. This petition is directed against a vacancy order dated 27.5.1996. The connected petition no. 19162 of 1997 is directed against the release order granted in favour of the respondent-landlord but its fate would depend upon the decision of the present case.

3. The dispute relates to a shop on the ground floor of a building No.128/91, Block B, Kidwai Nagar in Kanpur of which the respondents are the owners in possession. The respondents instituted a SCC suit no. 39 of 1988 against the petitioner under section 20 of U.P. Act No. XIII of 1972 (here-in-after referred to as the Act) treating him to be a statutory tenant of the disputed shop from 1979 @ Rs.90/- per month for eviction on the ground of arrears of rent from 1.4.1983 to 18.1.1988 and material alternation. The petitioner filed written statement denying default and further alleging that he was inducted by the father of the respondents as an unauthorized occupant in 1979 without an order of allotment passed under the Act and therefore he could not be evicted under the Act. The suit was subsequently dismissed also on the ground that the petitioner was an unauthorized occupant.

4. However, after the pleadings were exchanged by the parties, one Vasudev filed an application for allotment of the disputed shop on 10.6.1994 alleging vacancy as it was occupied by the petitioner without an order of allotment. After obtaining a report of the Inspector, the Rent Controller issued notice to both the parties, who appeared and filed their respective pleadings and evidence. The Rent Controller rejected the case of the petitioner that he was a tenant since 1975 and went on to hold that he was inducted as a tenant in 1979 without an allotment order in violation of sections, 11, 13, 14, 16, 31, 33 etc. of the Act and declared it to be vacant by the impugned order.

5. It is urged on behalf of the petitioner that since the landlord himself had inducted him as tenant, thus could not reap the benefit of his own fault. It is also urged on behalf of the petitioner that since no proceedings for declaration of vacancy or release having been initiated within a period of 12 years, the proceedings initiated on the basis of allotment application dated 10.6.1994 were not maintainable as it was beyond a reasonable time. In support of his contention, he has relied upon the decision of the Apex Court rendered in the case of

Mansa Ram Vs. S.P. Rathore and others [1984 A.R.C. 17] and the subsequent decisions of this court following it in the case of **Smt. Brij Bala Jain Vs. Smt. Amarjeet Kaur and others** [1996 (2) A.R.C. 474]; **Anil Kumar Dixit Vs. Maya Tripathi and another** [[2006 (1) A.R.C. 377] and the decision in **Rajeev Maurya Vs. Rent Control and Eviction Officer and others** [2008 (3) A.R.C. 359].

6. In Mansaram's case it was held that twelve year was a reasonable time to initiate vacancy proceedings against an unauthorized occupant and the other decision merely followed it. Let us consider, what was the precise issue before the Apex Court in the case of Mansa Ram (Supra). That was a case under Central Provinces and Berar Letting of Houses and Rent Control Order, 1949. Under the said Order, the landlord was obliged to intimate vacancy to the Collector within seven days under Clause 21 (1) and was restrained from letting out the premises except in accordance with an order of the Collector under Clause 23. However, under Clause 23 (1) the Collector was obliged to pass an order for allotment within 15 days failing which the landlord was entitled to let it out under sub clause (2) and the tenancy was recognized under Sub clause (2) of Clause 22. Thus, under the aforesaid order, though the right of landlord was curtailed but yet he had the right to let out the premises to a person of his choice on the non-allotment within 15 days of the intimation and there was no complete bar under the said Order. In this background, it was examining whether an application for eviction was maintainable after 22 years. The Court in these circumstances, and rightly so, held that the power should be exercised within a reasonable time and the applicability of Clause 23 (2) should have been examined. However, there is a complete bar upon any person to occupy any premises covered by the Act as a tenant in section 11 which reads as under:-

"11. Prohibition of letting without allotment order *- Save as herein-after provided, no person shall let any buildings except in pursuance of an allotment order issued under section 16."*

7. A Full Bench of our Court in **Nootan Kumar Vs. Additional District Judge** [1993 (20 A.R.C. 204 FB] held that occupation by a tenant through an agreement dehors the provisions of the Act and would be void and no eviction at the behest of the landlord could be passed against such tenant. But this Full Bench was overruled by the Apex Court in **Nutan Kumar Vs. II Additional District Judge** [2002 (8) SCC 31] holding that in view of sections 11, 12, 13, 17 and 31 of the Act, the tenant would be treated to be an unauthorized occupant and in view of section 12 the premises would be deemed vacant and available for allotment or release. A Division Bench of our Court in **Ajay Pal Singh Vs. District Judge, Meerut** [2008 (2) A.R.C. 264] was called upon to answer the following questions referred to it by a learned Single Judge in view of contrary decisions by two learned Judges of this Court:-

"1. Whether in case a landlord lets a building/accommodation covered under the U.P. urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. XIII of 1971) to a person without allotment order, and the building/accommodation is declared vacant on account of such letting, the landlord is deprived of seeking release of such

building/accommodation under Section 16 (1) (b) of the said Act?

2. Whether the release application filed by such a landlord under Section 16 (1) (b) of the said Act is liable to be ignored, and the release order passed on such application is void and cannot be given effect to?

3. Whether the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India can deprive such a landlord of his right to seek release of the aforesaid building/accommodation under Section 16(1) (b) by issuing declaration declaring the release order in favour of such a landlord as void, and directing the District Magistrate/Delegated Authority not to give effect to such release order?"

8. After considering large number of decisions of the Apex Court and this Court, it answered the questions in para 26 of the report in the following manner:-

In view of the aforesaid we are of the considered opinion that the application made by the landlord under Section 16 (1) (b) for release of an accommodation, which is deemed to be fallen vacant under section 12 (4) because of his having put in occupation an unauthorized occupant, is not hampered or impaired in any manner under the 1971 Act. The application has to be considered on merit in accordance with law by the District Magistrate. Unauthorized occupant/prospective allottee has no right to interfere in the aforesaid proceedings of release, as has been held by successive judgements of the Hon'ble Supreme court as well as by this Court repeatedly. It is only after the release application is rejected, that a prospective allottee comes into picture and therefore revision against an order of release under section 18 at the behest of prospective allottee would not be maintainable. The questions referred to this Bench by the Hon'ble Single Judge are, therefore, answered as follows:

(a) Landlord is not deprived of his legal right to make an release application in respect of a building which had been earlier given in possession, by him, to an unauthorized occupant in violation of the provisions of Act No. XIII of 1971.

(b) The release application made by the landlord cannot be ignored nor the order passed thereon can be termed to be void or of no effect.

(C) The High Court in exercise of powers under Section 226 of the Constitution of India need not declare the order made in favour of such landlord as void, In view of the answer given to question No.1, referred to above."

9. Thus, the argument of the learned counsel for the petitioner that the landlord was estopped from claiming release of the building cannot be accepted.

10. So far as the question of delay is concerned, it can be examined from two angles. As already noted above, the landlord had filed suit for eviction in 1988 treating the petitioner to be a statutory tenant but it was the petitioner himself who claimed and obtained the benefit of being an unauthorized occupant and therefore the landlord had no other option but to file the release application on the ground of deemed vacancy and thus application was filed within a reasonable time in 1994, which was much before the expiry of twelve years. Secondly, the proceedings for declaration of

vacancy were not started by the landlord but by one Vasudeo and only when notices were issued by the Rent Controller to the petitioner that the release application was filed and therefore applying the ratio laid down by the Division Bench in Ajay Pal's case (Supra) the right of the landlord to get it released, was unfettered.

11. Thus examined from any angle, none of the arguments advanced merits acceptance.

12. No other point has been urged.

13. For the reasons above, this is not a fit case for interference under Article 226 of the Constitution of India. Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2010

BEFORE
THE HON'BLE FERDINO I. REBELLO, C.J.
THE HON'BLE DILIP GUPTA, J.
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 20841 of 2009

Neena Chaturvedi ...Petitioner
Versus
Public Service Commission, Uttar Pradesh ...Respondent

Counsel for the petitioner:
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Sri Yatindra Dubey

Counsel for the respondent:
Sri. M.A. Qadeer,
Sri. Iqbal Ahmad Siddiqui,
Sri Pushpendra Singh
C.S.C.

Indian Post Office Act 1898-letter-send through registered post-in the post office being public service having wide impact-touching Fundamental Rights of Candidates-considering this aspect-reference made before Full Bench-if application send through Registered post on 17.02.20009 record in office of commission one day later-whether is the commission bound to process the same if the Post Office is agent of candidate who send this article or the agent of commission?-held-reference itself misconceived-considering various legal aspects there is no role of commission-if ofter not accepted by candidate-Post Office being the agent of sender-the candidate is self responsible-reference itself not maintainable.

Held Para 45

Even in respect of an agency the same is based on the principle, that the Principal is bound by the acts of the agent. Rule of agency in a case of merely inviting offers normally would not apply if a date for receipt of the acceptance is set out. Therefore, in such cases, if at all the law of agency applies it would be between the sender and the post office by virtue of the fact that the sender delivers the letters or articles to the post office. The post office is bound as an agent of the sender to deliver it to the addressee.

Case Law Discussed:
[2009 (3) ESC 2082 (All)], 1974 A.L.J.470 (FB), AIR 1954 SC 429, 1987 U.P.L.B.E.C.,316, A.C.J. 1995 page 200, (2001) 4 S.C.C. 448, (2002) 1 S.C.C. 1, AIR 2005 Supreme Court 752, (2008) 10 SCC 1, 1974 A.L.J. 470 (FB), AIR 1954 SC 429, AIR 1959 SC 1070, (1979) 3 S.C.C. 745, (2003) 2 S.C.C. 111, AIR 1990 SC 1782, (1990) 3 S.C.C. 682, AIR 1988 SC 1531, (2008) 10 SCC 1, 1987 U.P.L.B.E.C. 316, [(2006) 1 UPLBEC 152], AIR 1966 S.C. 1466, (1879) 4 Ex D 216, [1974] 1 All ER 161.

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. The Petitioner pursuant to an advertisement, which had invited applications for the post of Lecturer in Government Intermediate College, which

were to be received in the office of the Commission till 20th February, 2009 either by speed post or by hand, sent his application by speed post on 17th February, 2009, which was received in the office of the Commission on 21th February, 2009. The petitioner had prayed for a mandamus to direct the Commission to accept the application form and allow the petitioner to participate in the process of selection. In that petition, by order dated 28.05.2009, the present reference.

2. learned Single Judge of this Court, in this case, reported as Neena Chaturvedi vs. **U.P. Public Service Commission, Allahabad** [2009 (3) ESC 2082 (All)] has been pleased to refer the matter for consideration by a larger Bench. Some of the relevant paragraphs read as under:-

"49. Although I am conscious about the legal proposition that a little difference in the facts or additional facts may make a lot of difference in presidential (precedental) value of a decision but having regard to the facts and circumstances of the case, I am of the considered opinion, that in such cases the **moving factor or decessive factor is not prescription of one mode or several modes by the addressee to send the articles to him rather it is express or implied authorisation by the addressee to send the articles to him by post, ultimately decides the issue and makes the post office an agent of the addressee.** It is immaterial that the addressee has provided any other or more alternative modes to the sender including through post-office to send the articles to the addressee. In my opinion, prescription of such other alternative mode for sending the articles to addressee would not change the legal position stated herein before. However, in cases **where addressee does not prescribe any modes for sending the articles to him and merely time for receipt of the articles is fixed/prescribed and sender chooses by his own to send the articles to the addressee through registered post, in that eventuality alone the post office would continue to act as agent of the sender and not of addressee and for any delay in transit the addressee would not be responsible for simple reason that in such situation it can not be held that addressee has expressly or impliedly authorised or requested the senders to send the articles through registered post.**

50. In view of aforesaid discussion, in my opinion, the decisions rendered by Division Benches of this Court *in Ram Autar Singh v. Public Service Commission, U.P., Allahabad and others,* 1987 UPLBEC 316 (by Hon'ble Mr. Justice B.N. Misra and Hon'ble Mr. Justice A.P. Misra), in *Anupam v. Public Service Commission, U.P. Allahabad and another*, W.P. No. 57508 of 2005 decided on 4.10.2005 (by Hon'ble Mr. Justice Amitava Lala and Hon'ble Mr. Justice Prakash Krishna), in *Adil Khan v. State of U.P. and others*, W.P. No. 23152 of 2006 decided on 5.5.2006 (by Hon'ble Mr. Justice S.R. Alam and Hon'ble Mr. Justice Sudhir Agarwal) require re-consideration by Larger Bench/Full Bench comprising of at least three or more than three judges of this Court in the light of decisions rendered by Hon'ble Apex Court in *M/s. Ogale Glass Works Ltd. case (supra), Jagdish Mill's* case (supra), *Indore Malwa United Mill's case* (supra), *Unit Trust of India v. Ravinder Kumar Shukla's* case (supra) and in *Bhikha Lal's* case (supra) decided by Full Bench of this Court in context of questions formulated by me in preceding part of this Judgment.

51. Since the postal service constituted under the provisions of Indian Post Office Act 1898 is entrusted public service and stood test of time, therefore, having regard to the facts that the questions involved in the case have wide impact upon the large public interest touching the fundamental rights of the candidates under Articles 16 and 21 of the Constitution of India, an authoritative decision is required to be rendered by Full Bench of this Court comprising of at least three or more than three judges so that the matter may be set at rest for all the times to come in future**. The Hon'ble the Chief Justice is requested to constitute a Full Bench** of this Court comprising of at least three or more than three judges for deciding the questions formulated by me in preceding part of this judgment as early as possible."

3. Though the precise question has not been formulated, considering paragraphs 49, 50 and 51 and the reliance placed on the Full Bench judgment **of Bhikha Lal and others v. Munna Lal,** 1974 A.L.J.470 (FB) and **Commissioner of Income Tax, Bombay v. M/s Ogale Glass Works Ltd.** AIR 1954 SC 429, and the question referred for consideration by the learned Judge in answering the issue before him and which reads as under:-

"Whether in given facts and circumstances of the case, the post office is agent of the addressee (Commission) or sender and as to whether the petitioner can be made to suffer on account of default of the post office in delivering the application form of the petitioner to the Commission after last date of receipt of application form which was sent by the petitioner within prescribed time?"

4. The learned Judge whilst answering the issue apart from other reasons was pleased to observe as under:-

(i) I am of the considered opinion, that in such cases **the moving factor or decessive factor is not prescription of one mode or several modes by the addressee to send the articles to him rather it is express or implied authorisation by the addressee to send the articles to him by post, ultimately decides the issue and makes the post office an agent of the addressee.** It is immaterial that the addressee has provided any other or more alternative modes to the sender including through post-office to send the articles to the addressee. In my opinion, prescription of such other alternative mode for sending the articles to addressee would not change the legal position stated herein before.

(ii). In cases where **addressee does not prescribe any modes for sending the articles to him and merely time for receipt of the articles is fixed/prescribed and sender chooses by his own to send the articles to the addressee through registered post, in that eventuality alone the post office would continue to act as agent of the sender and not of addressee and for any delay in transit the addressee would not be responsible for simple reason that in such situation it can not be held that addressee has expressly or impliedly authorised or requested the senders to send the articles through registered post."**

5. The question that can be formulated for consideration would be *"when applications are invited, one through post office and the other by any other means or only through post, does the post office become the agent of the addressee, because*

there is express or implied authorisation by the addressee to send the articles by post."

6. Sri M.A. Qadeer, learned Senior Counsel, appearing for the U.P. Public Service Commission has raised a preliminary objection that considering the judgment in **Ram Autar Singh v. Public Service Commission, U.P., Allahabad and others, 1987 U.P.L.B.E.C., 316, unreported judgments in Anupam v. Public Service Commission, U.P. passed in Writ Petition No. 57508 of 2005 decided on 4.10.2005, in Smt. Pooja Singh v. Public Service Commission & others passed in Writ Petition No. 67808 of 2006 decided on 13.12.2006, in Adil Khan v. State of U.P. & others passed in Writ Petition No. 23152 of 2006 decided on 5.5.2006**, the issue which has been referred by the learned Single Judge for consideration to a Larger Bench stands concluded and, therefore, he submits that considering the law declared by the judgement of a Bench of five Judges of this Court in **Rama Pratap Singh and others v. State of U.P. and others,** A.C.J. 1995 page 200 and the Supreme Court in **Bharat Petroleum Corpn. Ltd. v. Mumbai Shramik Sangha and others** (2001) 4 S.C.C. 448, **Pradip Chandra Parija and others v. Pramod Chandra Patnaik and others** (2002) 1 S.C.C. 1 **and Central Board of Dawoodi Bohra Community and another** v. State of Maharashtra and another AIR 2005 Supreme Court 752, **and Official Liquidator v. Dayanand and others** (2008) 10 SCC 1, the learned Single Judge could not have directly referred the matter to the Full Bench even if he held a different view. Only if the learned Single Judge had come to a conclusion that there were two conflicting views of learned Single Judges, then only a reference could have been made for referring the matter to a Bench of two Judges or at the highest, if there had been two conflicting judgments of two Division Benches, the matter could have been referred to the learned Chief Justice for constitution of a larger Bench. Judicial discipline requires that a learned Single Judge is bound by the judgment of a Larger Bench.

7. On the other hand, Mr. N.L. Pandey, learned counsel appearing on behalf of the petitioner submits that the learned Single Judge was right in referring the matter to a Larger Bench considering the Full Bench judgment in the case of **Bhikha Lal and others v. Munna Lal** 1974 A.L.J. 470 (FB) and the judgment of the Supreme Court in **Commissioner of Income Tax, Bombay v. M/s Ogale Glass Works Ltd.** AIR 1954 SC 429 and other judgments referred to.

It is further submitted that what is binding on a learned Judge is the *ratio decidendi* of the judgment. Considering the Full Bench judgment in **Bhikha Lal** (supra), **M/s. Ogala Glass Works Ltd. (supra), and Commissioner of Income Tax, Bihar & Orissa v. M/s Patney and Company**, AIR 1959 SC 1070, the learned Single Judge was well within his jurisdiction to have referred the matter to the learned Chief Justice for constituting a Larger Bench.

8. Learned Counsel has placed reliance on the judgments in the case **of Dalbir Singh and others v. State of Punjab,** (1979) 3 S.C.C. 745. Our attention has been drawn to Paragraph 22 of the said judgement, which reads as under:-

"22. With greatest respect, the majority decision in **Rajendra Prasad** case (supra) does not lay down any legal

principle of general applicability. A decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less 'law declared' within the meaning of Article 141 of the Constitution so as to bind all courts within the territory of India. According to the well-settled theory of precedents every decision contains three basic ingredients:

(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi. It is not every thing said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of **Qualcast (Wolverhampton) Ltd. v. Havnes LR 1959 AC 743** it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts on an earlier case appear to be identical to those of the case before the Court, the Judge is not bound to draw the same inference as drawn in the earlier case."

Learned counsel further draws our attention to paragarph 59 of the judgment in **Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and others,** (2003) 2 S.C.C. 111, which is as under:-

"59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See *Ram Rakhi v. Union of India,* AIR 2002 Del 458 (FB), *Delhi Admn. (NCT of Delhi) v. Manohar Lal,* (2002) 7 SCC 222, *Haryana Financial Corpn. v. Jagdamba Oil Mills,* (2002) 3 SCC 496 and *Nalini Mahajan (Dr) v. Director of Income Tax (Investigation),* (2002) 257 ITR 123 (Del)].

9. We have heard learned counsel. Let us first address to the issue of *ratio decidendi* and per *incuriam.*

10. How can the ratio decidendi be ascertained from a decision has been very clearly dealt with in **Krishna Kumar Vs. Union of India, AIR 1990 SC 1782.** The observations made by Hon'ble Apex Court in para 18 and 19 of the decision are as under:-

"18. The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required." This was what Lord Selborne said in Caledonian Railway Co. v. Walker's Trustees (1882 (7) AC 259) and Lord Halsbury in Quinn v. Leathem (1901) AC495 (502). Sir Frederick Pollock has also said: "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.

19. In other words, ***the enunciation of the reason or principle upon which a question before a Court has been decided is alone as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge - made, and a minor premise consisting of the material facts of the case under immediate consideration.*** *If it is not clear, it is not the duty of the Court to spell it out with difficulty in order to be bound by it. In the words of Halsbury, 4th Edn., Vol. 26, para 573:*

"The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to be bound by it, and it is always dangerous to take one or two observations out of a long judgement and treat them as if they gave the ratio decidendi of the case. If more reason than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi."

11. On the issue of per incuriam, we may refer to the judgment of the Supreme Court in **Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court** (1990) 3 S.C.C. 682. More specially paragraph 40, to point out as to when a judgment can be said to be *per incuriam,* which is as under:-

"40. We now deal with the question of *per incuriam* by reason of allegedly not following the Constitution Bench decisions. The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given *per incuriam* when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court. It cannot be doubted that Article 141 embodies, as a rule of law, the doctrine of precedents on which our judicial system is based. In *Bengal Immunity Company Ltd. v. State of Bihar,* AIR 1955 SC 66, it was held that the words of Article 141, "binding on all courts within the territory of India", though wide enough to include the Supreme Court, do not include the Supreme Court itself, and it is not bound by its own judgments but is free to reconsider them in appropriate cases. This is necessary for proper development of law and justice. May be for the same reasons

before judgments were given in the House of Lords and *Re Dawson's Settlement Lloyds Bank Ltd. v. Dawson,* (1966) 1 WLR 1456, on July 26, 1966 Lord Gardiner, L.C. Made the following statement on behalf of himself and the Lords of Appeal in Ordinary:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."

12. A judgment, therefore, can be said to be per incuriam if through inadvertence a Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court or through inadvertence did not consider a relevant statutory provision or rule or was oblivious of the relevant provisions of law, so that in such cases some part of the decision or some step in the reasoning on what it is based is found on that account to be demonstratively wrong. [see **A.R. Antuley v. R.S. Nayak and another, AIR 1988 SC 1531, Punjab Land Development and Reclamation Corporation Ltd. (supra)].**

13. Once the *ratio decidendi* is ascertained, the learned Judge is bound to follow the judgments of larger Benches. The issue of per incuriam would only arise if from the ratio of judgments of larger Benches it is found that those Benches did not consider the principles as set out in paragraphs 11and 12 of this judgment.

14. We may also refer to the following paragraph in the judgment in the case of **Official Liquidator v. Dayanand and others,** (2008) 10 SCC 1, which is as under:-

"78. There have been several instances of different Benches of the High Courts not following the judgments/orders of coordinate and even larger Benches. In some cases, the High Courts have gone to the extent of ignoring the law laid down by this Court without any tangible reason. Likewise, there have been instances in which smaller Benches of this Court have either ignored or bypassed the ratio of the judgments of the larger Benches including the Constitution Benches. These cases are illustrative of non-adherence to the rule of judicial discipline which is sine qua non for sustaining the system. In *Mahadeolal Kanodia v. Administrator General of W.B.* AIR 1960 SC 936, this Court observed: (AIR p. 941, para 19)

"19... If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling

one another's decisions. *If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another Single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court."*

15. Let us first find the ratio of the judgment in **Bhikha Lal (supra)** applying the test laid down in **Dalbir Singh (supra)** and **Krishna Kumar (supra).**

16. The judgement in **Bhikha Lal (supra)** had been considered by the learned Division Bench of this Court in the case of **Ram Autar Singh v. Public Service Commission. U.P., Allahabad and others,** 1987 U.P.L.B.E.C. 316. We may gainfully refer to paragraphs 6 & 7 of the said judgment, which reads as follows:-

"6. Learned counsel appearing for the petitioner has urged that as there was no negligence or default on the part of the petitioner, there can be no justification for rejection of his application merely because it reached the Commission after expiry of the last date. As despatch of application forms by post was recognised by the Commission as one mode of delivery of application forms from the candidates to the Commission, the postal authorities became the agents of the Commission and delivery to the postal authorities would amount to receipt by the Commission. In support of this contention reliance is placed on a Full Bench decision of this Court reported in 1974, Allahabad Law Journal, 470. The facts of the case before the Full Bench are clearly distinguishable from the facts of the present case. That was a case of remission of rent by the tenant to his landlords. The amount of rent due to be paid by the tenant to the landlords was a petty sum of Rs. 35/- and after discussing several cases of the Supreme Court and of the courts in England and keeping in view the peculiar facts and circumstances of the case, the Full Bench finally came to the conclusion, on the facts and in the circumstances of the case, the tenant respondent could not be said to have committed a default under Section 3 (1) (a) of the Act in respect of the payment of Rs. 35/- which he sent to the plaintiffs-landlords by a money order well within time but which had reached the landlords after the expiry of thirty days.

7. On careful consideration we are of the opinion that the principles enunciated in respect of landlord and tenant in the aforesaid Full Bench decision do not have any application to the facts of the present case. In our view the facts and circumstances of the present case do not warrant application of the law of contract. We have already stated that in the present case the Commission had clearly notified that the closing date for receipt of applications completed in all respects was 14-7-1986 and that applications received beyond that date were not to be accepted. Therefore, even if we were to hold that the advertisement was to be construed as an offer, as the term is understood in the law of contract, the said offer was clearly notified to lapse owing to the passing of time. Acceptance cannot be said to have been

completed on mere despatch. It would have been complete only if it had reached the offer or before the offer had lapsed on expiry of the time prescribed." (emphasis supplied)

In **Bhikha Lal (supra),** the question for consideration was whether the tenant, who after having sent a money order for the rent due to the landlord well within time but which reached the landlord after expiry of 30 days, could be said to be a defaulter. The learned Full Bench was in that context considering the issue as to whether the postal authorities can be said to be the agent of the landlord.

After analysing various judgments referred to therein, the principle deducible which can be noted is that where a creditor had authorized explicitly or impliedly payment by money order, through the post office and the debtor does dispatch the money order, the post office becomes the agent of the addressee (landlord). The Court observed "As far as the question under consideration before us is concerned, it strikes me that there is no material difference or distinction between a payment by cheque and a transaction where payment is made by a money order."

Thereafter, after considering the law, the Court held "if there is an express or implied request by the landlord for payment of the amount claimed as arrears of rent, through a money order, the payment to the post office is payment to the payee unless by subsequent action under Section 44 of the Post Office Act the remitter cancels the money order. Various judgements were considered. As to what would be express or implied request, the Court held that two principles emerge, which we may further reproduce as under:-

"22. From an analysis of these decisions two principles emerge : The first is that if the creditor and the debtor reside at two different places served by postal system, from the very fact that the creditor makes a demand through the post, an authority to the debtor to meet his obligation through the post is implied. This principle, to my mind is the foundation of the decision in *Norman v. Rickets* which as already stated above, has met the approval of the Supreme Court. From the facts of the case, as reported it does not appear that there was any evidence showing that in any earlier transaction the debtor had met her obligations to her creditor by post. The only two circumstances present before the Court were : firstly that the creditor and the debtor resided at two different places in England and, secondly, that the creditor had made the demand for payment by means of a letter sent through the post. Thus, it appears to me that the Court in this case inferred an implied authority to the debtor to send the cheque by post merely because a demand had been made by post. This principle to my mind is based on sound logic. If a trader sends me a reminder of an outstanding bill through a messenger, in the absence of any intention expressed to the contrary, I believe I would be justified in assuming that the trader, by implication has authorised me to send the amount outstanding through that messenger. Extending this principle, if a creditor who resides in a different town, makes a demand from his debtor by means of a letter despatched through the post he impliedly invites the debtor to meet his obligations through the post. In this connection it may be borne in mind that "the government exercises a governmental power for the public benefit in the establishment and operation of the postal money order system and is not engaged in commercial translations, notwithstanding it

may have some aspects of commercial banking". (Corpus Juris Secundum, Vol. 72, page 298) and further that the State has a monopoly in post offices as a consequence of which the debtor has no choice as between competing postal organizations.

23.Another principle that emerges from the two Supreme Court decisions cited above is that if the debtor and the creditor reside in two different places, served by post offices and payments have to be by cheques, then in the absence of anything to the contrary, an implied agreement can be culled out authorising the debtor to despatch the cheques through the post office which will be treated as the creditor's agent. This has come to be recognized as payment "according to the course of business usage in general". This principle can be extended to the case of payments made through money orders. If the creditor and the debtor reside at two different places so that the debtor cannot reasonably be expected to make cash payments personally or through a messenger, then in the absence of a stipulation to the contrary it may be assumed that the debtor is impliedly authorized to pay his debt through money orders. In such cases deposit of the cash at a postal money order office will be treated as payment to an agent of the creditor made in accordance with "the ordinary usages of man-kind" to borrow the words used by Lord Herschell in *Henthorn v. fraser,* (1892) 2 Ch. D. 27.

The Court also held that what was material was that the Commission had specified a date for receipt of applications and as such acceptance could not be said to have been completed on mere dispatch but would be completed if it had reached by the time specified. This is the ratio of that judgment.

It is therefore clear that the Full Bench was not considering an issue of an invitation to apply but a case where a money order was sent through post and in those circumstances held that there was an implied or express agreement to send the money through post and in such cases, the postal authorities can be said to be the agent of the landlord (addressee). It is in that context the Court held that in such circumstances, the tenant cannot be said to be a defaulter.

17. In **Ram Autar Singh (supra),** the question for consideration before the Court was rejection of the petitioner's application to appear at the competitive examination for recruitment to the post of Munsif on the ground that the application was received beyond the last date fixed by the Commission. The judgment in **Bhikha Lal (supra)** was considered and distinguished on the ground that the principle enunciated in respect of the landlord and tenant in the Full Bench decision, does not have any application to the facts of the case. The learned Bench proceeded to hold considering that closing date for the receipt of application completed in all respects was 14.7.1986 and that the applications received beyond that date were not to be accepted. "Therefore, even if we were to hold that the advertisement was to be construed as an offer, as the term is understood in the law of contract, the said offer was clearly notified to lapse owing to the passing of time. Acceptance cannot be said to have been completed on mere despatch. It would have been complete only if it had reached the offer or before the offer had lapsed on expiry of the time prescribed."

18. In the case of **Pramod Kumar Singh v. State of U.P. and another,** [(2006) 1 UPLBEC 152], the judgement

considered **Ogale Glass Works Ltd., (supra), Indore Malwa United Mills Ltd. v. The Commissioner of Income-tax (Central) Bombay,** AIR 1966 S.C., 1466, **Unit Trust of India v. Ravinder Kumar Shukla and others,** (2005) 7 S.C.C. 428.

In **Pramod Kumar Singh (supra),** the issue again was non receipt of the application by the Commission sent through post where post was one of the methods for applying. After considering various judgments of this Court and the Supreme Court, the Court observed as under:-

"9. Therefore, what we get from the above analysis? We get the answer that either in the law or in the contract or in the advertisement or in the necessary document if mode is prescribed, such mode will be *the guiding principle in determining the issue as regards service.* If the mode is one, one has no other alternative but to follow the same. If the mode is more than one then the alternative mode can be exercised. If one chooses to apply adopting one mode and failed to exercise other mode, the responsibility lies with the sender not with the addressee because the post office is the agent only in respect of one mode. In the instant case fault might have been committed by the post office be it agent of either of the parties or be it a public service mechanism. But so far as the Commission is concerned, it is not at fault whenever more than one mode is prescribed in the advertisement. Frankly speaking we are very much sympathetic to the candidate, who lost the opportunity of making application, but we are sorry to say that we can not render any equitable justice in favour of the petitioner against the Commission in such circumstances."

19. **Anupam (supra)** was again a case of non acceptance of the application by the Public Service Commission as it had reached beyond the prescribed period. There were two modes for making applications. The Court observed as under:-

"...When two modes are prescribed by the Commission and one mode is availed, the same is the risk and responsibility of the sender himself. Writ C cannot evaluate amount of risk and responsibility to compensate the petitioner. If the petitioner is entitled any compensation in accordance with law from the post office, he can seek advise for the same but Commission can not be held responsible by extending time for availing the postal mode only.

....Therefore, what we get from the above analysis? We get the answer that either in the law or in the contract in the advertisement or in the necessary document if mode is prescribed, such mode will be the guiding principle in determining the issue as regards service. If the mode is one, one has no other alternative but to follow the same. If the mode is more than one then the alternative mode can be exercised. If one chooses to apply adopting one mode and failed to exercise other mode, the responsibility lies with the sender not with the addressee because the post office is the agent only in respect of one mode. In the instant case, fault might have been committed by the post office be it agent of either of the parties or be it a public service mechanism. But so far as the Commission is concerned, it is not at fault whenever more than one mode is prescribed in the advertisement."

20. The law thereafter was revisited in the case of **Adil Khan (supra).**

In **Adil Khan (supra),** the issue again was similar, i.e. non receipt of application sent through post. There was more than one mode for submission of forms. The learned Division Bench applied the ratio in **Ram Autar Singh (supra)** and agreed with the view taken in **Anupam (supra).** Reference was made to the judgment in **Akhilesh Chandra Maurya vs. State of U.P.**- Writ Petition No. 7892 of 2005 decided on 10.4.2006, where it was held that postal department is an agent of the Commission and in case the form is received beyond time due to postal delay, the same cannot be rejected. The Bench also considered **Shashi Bhushan Kumar vs. Higher Education Service**- Writ Petition No. 40351 of 2000, decided on 12.9.2000, where the view had been taken that when the advertisement prescribed no other mode except agency of post office for entertaining application forms of the prospective candidates, the post office becomes the agent of the addressee. This judgment was distinguished on the basis of only one mode and not more than one mode as in the present case.

Paragraphs 6 to 9 of the aforesaid judgment are as under:-

"6. As per the ratio of AIR 1980 SC 431, *Union of India v. Mohd. Nazim,* a post office accepts responsibility of the sender when it accepts postal articles to send to the addressee. It is a public service. It can neither be treated as agent like common carrier nor it enter upon any contract by the acceptance of postal article either with the sender or addressee. However, in a recent judgment dated 19th September, 2005 in Appeal (Civil) No. 1691 of 2005, *Unit Trust of India v. Ravinder Kumar Shukla, etc. etc.,* the Supreme Court held that in the absence of any contract or request from the payee, mere posting would not amount to payment. In cases where there is not contract or request, either expressly or impliedly, the post office would continue to act as an agent of the drawer. In that case the loss is of the drawer. If two situations are seen side by side, the question or responsibility will be understandable. In the instant case, request is there on the part of the addressee. Therefore, the addressee is responsible provide post office alone has been made agent for the purpose of receiving application as per the request. There the shoe pinches. When two modes are prescribed by the Commission and one mode is availed, the same is the risk and responsibility of the sender himself. Writ Court can not evaluate amount of risk and responsibility to compensate the petitioner. If the petitioner is entitled for any compensation in accordance with law from the post office, he can seek advise for the same but the Commission can not be held responsible by extending time for availing the postal mode only. It has argued that if someone is stationed in a far away place and is not able to come to file such application personally, second mode cannot help such candidate. We can understand the agony but in such case we can not compel the Commission for accepting application because post office is agent only in respect of service through it. Moreover, according to us, question is not the distance, but non-availability of other mode. Commission is to discharge public duty to all. It can not find out individual difficulty to meet the same. Otherwise it will become never ending process. Two very important Supreme Court judgments have been referred herein. First one is reported in AIR 1996 SC 1466 (V 56 C 288), *The Indore Malwa United Mills Ltd. v. The Commissioner of Income-tax (Central) Bombay.* This is in respect of Income Tax

Act but even therein the Supreme Court categorically held as follows:-

"If by an agreement, express or implied, by the creditor, the debtor is authorised to pay the debt by a cheque and *to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque* and the creditor receives payment as soon as the cheque *is posted to him."* (Emphasis supplied)

Therefore, the mode of sending the cheque was only by post."

7. In AIR 1954 SC 429 (Vol. 41, C.N. 104), *Commr. of Income tax, Bombay South, Bombay v. Messrs Ogale Glass Works., Ogale Wadi,* the Supreme Court held again in a case of Income Tax Act and Contract Act about sending cheques by post, as under:-

"There can be no doubt *that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post* that makes the post office the agent of the addressee. After such request the addressee cannot be heard to say that the post office was not his agent and, therefore, the loss of the cheque in transit must fall on the sender on the specious plea that the sender having the very limited right to reclaim the cheque under the Post Office Act, 1898, the Post Office was his agent, when in fact there was no such reclamation." (Emphasis Supplied)"

"8. Again in this case we find that a request was made by the addressee to the sender to send the cheque by post and for the same he could not avoid the responsibility. Sometimes in the cases between landlord and tenant we find notice is required to be served by post in accordance with law and if not served following such prescription, such notice can not be construed as a valid notice."

"9. Therefore, what we get from the above analysis? We get the answer that either in the law or in the contract or in the advertisement or in the necessary document if mode is prescribed, such mode will be *the guiding principle in determining the issue as regards service.* If the mode is one, one has no other alternative but to follow the same. If the mode is more than one then the alternative mode can be exercised. If one chooses to apply adopting one mode and failed to exercise other mode, the responsibility lies with the sender not with the addressee because the post office is the agent only in respect of one mode. In the instant case fault might have been committed by the post office be it agent of either of the parties or be it a public service mechanism. But so far as the Commission is concerned, it is not at fault whenever more than one mode is prescribed in the advertisement. Frankly speaking we are very much sympathetic to the candidate, who lost the opportunity of making application, but we are sorry to say that we can not render any equitable justice in favour of the petitioner against the Commission in such circumstances."

21. **In Adil Khan (supra), Ram Autar Singh (supra), M/s Ogale Glass Works Ltd. (supra), Sri Jagdish Mills Ltd. v. The Commissioner of Income Tax, Bombay North, Kutch and Saurashtra** AIR 1959 SC 1160, Indore Malwa United Mills (supra) were considered and the view taken in **Ram Autar Singh (supra)** and **Anupam (supra)** was approved.

22. The learned Judge in his judgment has proceeded to distinguish **Ram Avtar Singh** (supra), **Smt. Pooja Singh** (supra), **Anupam** (supra) and **Adil Khan** (supra). Once the learned Judge found that the judgments which he had considered and distinguished or found as *per incuriam,* had been considered and distinguished by larger Benches even in the opinion of the learned Judge wrongly, then the judgments cannot be said to be per incuriam. The judgments were not rendered in ignorance of the judgments of the Supreme Court or of this Court. It is nobody's case that the judgments of the Division Bench of this Court had been passed in ignorance of any provision of law, which had to be considered for the purpose of considering the issue. The doctrine of *per incuriam,* therefore, was not applicable. In these circumstances, the learned Judge considering the binding precedents, ought not to have proceeded to direct a reference.

23. Apart from that, the learned Benches, which had taken the view that in the case where there was more than one mode of receiving application, then in that case, the post office would not be an agent of the addressee and had also relied upon the judgments of the Orissa High Court in **Dr. Annada Prasad Pattnaik Vs. State of Orissa and others,** reported in AIR 1989 ORISSA 130, a Full Bench of Madras High Court in **R. Vinothkumar v. The Secretary, Selection Committee, Sabarmathi Hostel, Kilpauk Medical College Hostel Campus, Kilpauk, Madras & Others,** reported in 1995-1-L.W. 351 and the judgment of Andhra Pradesh High Court in **V. Ramesh V. Convenor, EAMCET-1995, Jawaharlal Nehru Technological University, Hyderabad,** reported in AIR 1997 ANDHRA PRADESH 79.

24. Let us now consider the ratio of the Supreme Court Judgments which were considered by the learned Single Judge in **Ogale Glass Works Ltd. (supra).** A finding was recorded that considering the usage in general the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles. Apart from that it was observed that implication of an agreement arising from such business usage the assessee expressly requested the Government to "remit" the amount of the bills by cheques. This clearly amounted in effect to an express request by the assessee to send the cheques by post.

Then after considering English Law, the Supreme Court was pleased to observe as under:-

"There can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee.

After such request the addressee cannot be heard to say that the post office was not his agent and, therefore, the loss of the cheque in transit must fall on the sender..."

Secondly, the Court observed as under:-

"...Apart from this principle of agency there is another principle which makes the delivery of the cheque to the post office at the request of the addressee a delivery to him and that is that by posting the cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract

by such performance. (See Section 50 of the Indian Contract Act and illustration (d) thereto)"

The matter was again considered in **M/s Patney and Con. (supra)** wherein it was observed by the Supreme Court that if it is shown that the creditor authorized the debtor either expressly or impliedly to send a cheque by post the property in the cheque passes to the creditor as soon as it is posted. Therefore the post office is an agent of the person to whom the cheque is posted if there be an express or impliedly authority to send it by post. But in the absence of such request the post office cannot be constituted as the agent of the creditor.

In **Shri Jagadish Mills Ltd. (supra)** the Supreme Court once again observed that where, however, on the facts and circumstances of the case an implied request by the creditor to send the cheque by post can be spelt out, the Post Office would be constituted the agent of the addressee for the purposes of receiving such payment.

In **The Indore Malwa United Mills Ltd. (supra)** the Supreme Court reiterated that if by an agreement, express or implied, by the creditor, the debtor is authorized to pay the debt by a cheque and to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque and the creditor receives payment as soon as the cheque is posted to him.

The Supreme Court examined all the earlier judgments referred to in **Unit Trust of India vs. Ravinder Kumar Shukla and others,** (2005) 7 S.C.C. 428. A finding was recorded that there was no proof of any contract or request by payees for sending the amount by post nor any proof of a practice from which such request could be implied. In such circumstances, the Court observed that, thus the law is that in the absence of any contract or request from the payee, mere posting would not amount to payment. In cases where there is no contract or request, either express or implied, the post office would continue to act as the agent of the drawer. In that case the loss is of the drawer.

In all the judgments except in the case of **Ravinder Kumar Shukla (supra),** a finding was recorded that either there was an express or implied agreement between the parties to send the cheque by post.

25. The principle, therefore, from these judgments is clear that as between the sendor (debtor) and the creditor (addressee), if the creditor agrees, expressly or impliedly that the cheques should be sent by post, then in that event on the debtor sending the cheques by post, the post office becomes the agent of the creditor. Similarly when offers are invited generally through advertisement or otherwise to reach the offeror, then on acceptance of the offer communicated through post, the post office becomes the agent of the offeror on the day the acceptance is posted.

26. It is true that the judgments of co-ordinate Benches of other High Courts, at the highest, are persuasive and not binding precedents. However, the learned Judge ought to have noted that once the larger Benches of this Court had considered those judgments and placed reliance on the ratio decidendi, the learned Judge ought to have, as a matter of judicial propriety, followed the view taken by the larger Benches of this Court, even if he had reservation on the law laid down.

27. We may note that the High Court of Orissa in **Dr. Annada Prasad Pattnaik** (supra) had taken the view that where delivery can be made in a mode at the option of the sender, the agency through which delivery is made acts as the agent of the sender whereas if delivery is made by way of despatch in the mode stipulated or prescribed by the addressee, the agency through which the article is despatched acts as the agent of the addressee.

28. The judgment of the Full Bench of the Madras High Court in **R. Vinothkumar** (supra) noted that the decision of the Supreme Court had not answered the issue of construction of a clause stipulating a condition, the non-fulfilment of which has the effect of denying an applicant the benefit of consideration of his application. The Court noted that the receipt of the application within the stipulated time being a condition for the very exercise of power by the competent Selection Authority, there is neither any scope for such Authority, even if it so desires, to exercise the power in respect of such an application belatedly received nor could this Court compel the exercise of power by such Authority notwithstanding the non-fulfilment of the condition precedent for its exercise. The Court further noted that the normal expectation of the applicant that his application may reach the Authority in time or the actual lapse in the postal services resulting in the belated delivery of the envelope containing the application cannot be used as lever against the Selection Authorities. The Full Bench after considering the law and the judgments of the Supreme Court proceeded to hold that as per the principle evolved in the *Common Denominator decisions* of the Supreme Court, as reflected in the decision of the Division Bench of Orissa High Court, such post office must have to be construed to have been constituted as the agent of the sender/applicant and not the agent of the addressee/Directorate. Only if the post office is being constituted as the agent of the addressee, the receipt of application by such agent, long prior to the last date of receipt of applications would tantamount to the receipt of application by the Principal/addressee/Directorate.

29. The Andhra Pradesh High Court in **V. Ramesh** (supra) relied on the judgment of the Madras High Court in **R. Vinothkumar** (supra) and agreed with the view taken by the majority and the judgment of Janarthanam, J. We may only note that in the case before the Andhra Pradesh High Court, it was the department, which had used the agency of the post office to send a communication to the addressee to appear for the examination, which he did not receive in time.

30. The law on the acceptance of application through post, when it is one of the modes for applying as set out in the case of **Ram Avtar Singh** (supra) and its ratio that for acceptance to be completed, it must reach within the time stipulated, is being followed in the State for the last over 23 years and is being reiterated from time to time. In these circumstances, in our opinion, the learned Judge totally misdirected himself in law, firstly, in distinguishing the judgments and secondly, in not following them and referring the matter to a larger Bench.

31. That being the position, considering the law declared by the Supreme Court in **Bharat Petroleum Corpn. Ltd. (supra), Pradip Chandra Parija (supra)** and **Central Board of Dawoodi Bohra Community (supra),** the

learned Single Judge could not have made the reference, which we hold, is not maintainable.

32. Having said so, to re-state the law, we may revisit the issue. In the instant case, the applicant applied to a body which has invited applications by a cut-of-date. Even if the post office was an agent, all that the agent agrees to do is to deliver the letter or parcel within the reasonable period of time as noted by the Division Bench in the case of **Pramod Kumar Singh (supra).**

33. Apart from that insofar as the entire process of recruitment is concerned, may be in the office of respondent or any other body, which invites applications, if view is accepted that the post office becomes the agent of the addressee, the very process of recruitment itself would be frustrated. A contract between the sender and the post office cannot bind the addressee. Even otherwise accepting a proposition that the post office becomes the agent of the body which invited the applications would lead to manifest inconvenience and absurdity. For how long would such body have to wait for receipt of applications sent by post to conduct the interview, or hold the examination and what happens in cases where the application is lost through transit. Therefore when applications are to be received by a particular cut off date assuming that there is an offer and acceptance, receipt of the application by that cut off date only would make the acceptance complete.

34. Let us consider some statutory provisions. Section 4 of the Indian Post Office Act, 1898 sets out that whenever within India, posts or postal communications are established by the Central Government, the Central Government shall have the exclusive privilege of conveying by post, from one place to another, all letters except for which is set out thereunder.

By virtue of Section 6, the Government shall not incur any liability by reason of the loss, misdelivery or delay of, or damage to, any postal article in course of transmission by post except in so far as such liability may in express terms be undertaken by the Central Government as provided in the Act.

Under The General Clauses Act, 1897, in Section 27 it is provided where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post (emphasis supplied).

Similar in so far as The Uttar Pradesh General Clauses Act, 1904 is concerned, Section 27 is identical except for the words "Central Government Act", the expression used is the "Uttar Pradesh Act" which authorizes or requires any document to be served by post the expression used is "in the ordinary course of post'.

Section 114 of The India Evidence Act, 1872 *illustration (f)* reads as under:-

"(f) That the common course of business has been followed in particular cases."

We may also reproduce Section 4 of the Indian Contract Act, which reads as under:-

"4. Communication when complete. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,--

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,--

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to him knowledge."

Thus considering that the post office has an exclusive privilege, letters sent through post office in cases covered by the General Clauses Act and the U.P. Act, the delivery is effected when the letter would be delivered in the ordinary course of post and considering Section 4 of the Indian Contract Act as against the acceptor, when it comes to the knowledge of the proposer.

35. We may now consider the Postal Rule in English Law as stated in HALSBURY'S Laws of England, Fourth Edition Reissue, which states as under:-

"In modern times, contracts negotiated at a distance tended to be made by correspondence exchanged through the post administered by the Post Office. Except as stated below, all communications with respect to the formation of a contract which are sent through the medium of the Post Office have the legal effects previously outlined. However, where such a communication is sent through the medium of the Post Office, there is said to be a general rule that a properly-addressed postal acceptance is complete when the letter of acceptance is posted....

The following consequences are said to follow from this "postal rule' : (1) a postal revocation of an offer only takes effect on receipt, provided that the revocation is communicated, so that an acceptance posted at any time before that receipt prevails ; (2) a postal acceptance takes effect on posting even though accidentally lost or delayed in the post ; and (3) a postal acceptance of an offer relating to title of goods takes effect in priority to another contract affecting the same subject-matter but made after posting of the first acceptance."

In para 677, it is set out as under:-

"It is presumed that, unless the offeror exclusively prescribes some different mode of acceptance, an offer made through the post may be accepted by post. Furthermore, even where an offer is not made by post, if the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means

of communicating the acceptance, the offer may be accepted by a letter sent through the post. Such posted acceptances prima facie take effect on posting..."

This rule has been described as under:-

"Various unconvincing reasons for the postal rule have been judicially suggested. First, it has been argued that, if the rule did not exist, no contract could ever be completed by post because neither party should be bound until he knew the other had received his communication. Secondly, it has been explained on the basis that the Post Office is the common agent of both parties ; but, of course, the Post Office is only the agent to carry not to receive, the communications. Thirdly, it has been said that English law favours the offeree because it is the offeror who "trusts the post'. Fourthly, by way of explanation it has been argued that the offeror must be considered as making the offer all the time his offer is in the post, and therefore the agreement is complete as soon as the acceptance is posted. In truth, the rule is an arbitrary one, being little better than the possible alternatives ; and it is, perhaps, linked with the Post Office practice that a posted letter cannot be retrieved."

36. In CHITTY ON CONTRACTS Thirtieth Edition, Volume I, the posting rule which is discussed under the heading under Sub-Chapter of "THE ACCEPTANCE", CHITTY describes Acceptance as under:-

"An acceptance is a final and unqualified expression of assent to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer. On this test, a mere acknowledgement of an offer would not be an acceptance; nor would a person to whom an offer to sell goods had been made accept it merely by replying that it was his "intention to place an order" or by asking for an invoice...

The posting rule has been described as under:-

"An acceptance sent by post could take effect when it is actually communicated to the offeror, when it arrives at his address, when it would in the ordinary course of post have reached him, or when it is posted. Each of these solutions could cause inconvenience or injustice to one of the parties, especially when the acceptance is lost or delayed in the post. In English law, what is usually regarded as the general rule is that a postal acceptance takes effect when the letter of acceptance is posted...

It is then observed as under:-

"The posting rule applies only if it is reasonable to use the post. This will normally be the case if the offer itself is made by post. It may be reasonably to use the post even though the offer was made orally if immediate acceptance was not contemplated and the parties lived at a distance...

The posting rule can be excluded by the terms of the offer. The posting rule is essentially one of convenience. The English authorities support its application in three situations namely, Posted acceptance preceded by uncommunicated withdrawal; Acceptance lost or delayed in the post; Priorities; Misdirected letter of acceptance."

The law thus emanates from an offer made. Generally speaking, an agreement is reached when an offer made by one of the parties (the offeror) is accepted by the other (the offeree or acceptor). Such an agreement

may, however, lack contractual force because it is incomplete, because its terms are not sufficiently certain, because its operation is subject to a condition which fails to occur because it was made without any intention to create legal relations. An agreement may also lack contractual force on the ground of want of consideration.

The learned author then notes, that there is, however, a distinction between an offer and invitation to treat when the parties negotiate with a view to making a contract, many preliminary communications may pass between them before a definite offer is made. One party may simply ask, or respond to, a request for information, or he may invite the other to make an offer. A communication by which a party is invited to make an offer is commonly called an invitation to treat. It is distinguishable from an offer primarily on the ground that it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms. A statement is clearly not an offer if it expressly provides that the person who makes it is not to be bound merely by the other party's notification of assent but only when he himself has signed the document in which the statement is contained.

Advertisements intended to lead to the making of bilateral contracts are not often held to be offers. Thus a newspaper advertisement that goods are for sale is not generally an offer; an advertisement that a scholarship examination will be held is not an offer to a candidate.

37. In this respect, we may consider the judgment in **Rooke v. Dawson [1895] 1 Ch. 480.**

In that case, the CHITTY, J. held as under:

"In that case the defendants sent out a circular as follows: "We are instructed to offer to the wholesale trade for sale by tender the stock in trade of" A., amounting to so and so, "and which will be sold at a discount in one lot. Payment to be made in cash." It was held that this did not amount to a contract or promise to sell to the person who made the highest tender. The judgment of the Court was that this was, to use Mr. Justice *Willes'* words (1): "A mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them." Applying the principles of that case to the present, is there a contract ? In my opinion there is nothing more than a proclamation that an examination for a scholarship will be held, and there is no announcement that the scholarship will be awarded to the scholar who obtains the highest number of marks. Consequently by coming in and submitting to the examination the Plaintiff did not do that which resulted in a contract."

This therefore would be an authority for the proposition that a newspaper advertisement inviting applications for scholarship, is not an offer.

38. The various judgments which have been considered would indicate that the postal rule normally applies when there is a case of offer and acceptance. The judgments of our Supreme Court are in a set of cases of an agreement between the debtor and the creditor that the cheque should be sent by post. It is in these circumstances that courts in India applied the postal rule, whereby the Post Office

becomes an agent for the addressee (creditor) in those circumstances.

39. If applications are invited by addressee for an interview or recruitment from eligible members from the general public, by advertisement either expressly by one mode or more, one of which is post office, when an applicant chooses to send his application through post, though the letter is posted in time but delivered late after last date of receipt, the question that arises for consideration is:-

"On an offer being made by advertisement and an acceptance is sent by post, when does the acceptance become complete, on the date of receipt of the acceptance in the post office or its receipt by the addressee"

On an advertisement being issued by the offeror inviting applications through post and the sender (applicant) sends application through post (acceptance) but the same does not reach by the date mentioned in the advertisement, will the postal rule apply? The offeror in such cases, apart from inviting applications also lays down as one of its terms, that applications have to be received by a particular date. The offer therefore made if any, is receipt of the application through the post by a particular date.

The postal rule however applies, the moment an acceptance is posted through post, then the post office becomes the agent of the addressee (offeror). An advertisement inviting applications for examination or recruitment is merely an invitation to offer and not an offer itself. The person who sends his application by post or by any other mode assuming it is based on an offer, must send the acceptance by the particular date, in terms of offer. If it does not reach by that date, there can be no acceptance and the postal rule would not apply.

40. In **Household Fire Insurance v. Grant (1879) 4 Ex D 216,** the Court considering the rule held that as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put to an end, in the event of the letter never being delivered. After considering the rule, the court noted "that the implication of a complete, final and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both." The Court then held "at the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance".

41. In **Holwell Securities Ltd. v. Hughes,** [1974] 1 All ER 161, the Court of appeal held, that the rule that an acceptance of an offer could be effected, so as to constitute a binding contract, merely by posting a letter of acceptance, did not apply when the express terms of

the offer stipulated that the acceptance had to reach the offeror. Thus the postal rule does not apply in cases when the express terms of the offer specify that the acceptance must reach the offeror. In the same judgement LAWTON LJ. held that it also does not operate if its application would produce manifest inconvenience and absurdity, quoting opinion set out in Cheshire and Fifoot's Law of Contract.

In **Holwell Securities Ltd. (supra),** the issue was 'acceptance by post'. The question was whether mere acceptance of an offer constituted binding contract by posting a letter of acceptance. The Court of appeal speaking through Lawton, J. observed as under "Does the rule apply in all cases where one party makes an offer which both he and the person with whom he was dealing must have expected the post to be used as a means of accepting it? In my judgment, it does not. First, it does not apply when the express terms of the offer specify that the acceptance must reach the offeror. The public nowadays are familiar with this exception to the general rule through their handling of football pool coupons. Secondly, it probably does not operate if its application would produce manifest inconvenience and absurdity". This was based on the opinion set out in Cheshire and Fifoot's Law of Contract.

The court then observed that such an interpretation would be subject to inconvenience and absurdity and then observed "In my judgment, the factors of inconvenience and absurdity are but illustrations of a wider principle, namely, that the rule does not apply if, having regard to all the circumstances, including the nature of the subject-matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other

42. That the English Postal rule will apply in India, has been accepted by the Supreme Court in **M/s Ogale Glass Works Ltd. (supra)** where the Court rejecting the argument that English principles would not apply observed "It is, however, not necessary to pursue this line of reasoning any further for the principles underlying the English decision are clearly consonant with the provisions of the Indian Law".

43. If the postal rule is made applicable in matters of inviting applications to appear for an examination or for an interview, and applications are to be sent by post, even if one application does not reach in time on account of postal delay to scrap the examination or hold special examination in such cases would produce manifest inconvenience and absurdity.

44. In ANSON'S LAW OF CONTRACT edited by A.G. Guest, 26th Edition, the postal rules has been explained as where the terms of the offer expressly or impliedly indicate that it is to be accepted, not by the performance of some act or forbearance, but by a return promise given by the offeree, the general rule is clear: acceptance must be communicated before it can take effect. But in certain exceptional cases the law, for reasons, of convenience, is prepared to hold that the offeror is bound though the acceptance has not reached him. This is so where it is reasonable for the offeree to notify his acceptance by post or telegram.

Learned author notes that logic of this rule may be questioned and various attempts have been made to justify this rule analytically. After considering various lines of reasons, the author observes that the better explanation would seem to be that the rule is based, not on logic, but on commercial convenience. If hardship is caused, as it obviously may be, by the delay or loss of a letter of acceptance, some rule is necessary, and the rule at which the Courts have arrived is probably as satisfactory as any other would be. It is always open to the offeror to protect himself by requiring actual notification of the acceptance, and the nature of the offer or the circumstances in which it was made may indicate that notification is required.

45. Even in respect of an agency the same is based on the principle, that the Principal is bound by the acts of the agent. Rule of agency in a case of merely inviting offers normally would not apply if a date for receipt of the acceptance is set out. Therefore, in such cases, if at all the law of agency applies it would be between the sender and the post office by virtue of the fact that the sender delivers the letters or articles to the post office. The post office is bound as an agent of the sender to deliver it to the addressee.

46. In our opinion, therefore, though as earlier pointed out the reference itself is not maintainable,t we have clarified the law so as to avoid multiplicity of proceedings.

47. The reference is answered in the negative.

48. Reference is answered accordingly.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Misc. Application No. 25801 of 2010

Surya Nath Singh and another ..Petitioner
Versus
State Of U.P. and another ...Respondent

Counsel for the Petitioner:
Kamal Kumar Singh

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 482-summoning order/process issued by Magistrate on complaint filed by commissioner-on allegation of forged entry made much prior institutions of proceedings-not fall within preview of Section 195 (1)(b)(ii)-as no wrong done during pendency of revision before the commissioner-no procedure adopted by Magistrate by treating complaint under section 340 order passed by Magistrate cannot upheld

Held: Para 14

In the present case, the alleged forgery in the revenue record was committed outside the Court much prior to the initiation of the proceeding in the Additional Commissioner's Court and it is nowhere stated that any forgery was committed in or in relation to the judicial proceeding pending in the Court of learned Additional Commissioner or in respect of a document filed in that proceeding. Therefore, the provisions of section 340 of the Code. are not attracted in this case and as such no inquiry was required under section 340 of the Code before filing the complaint.

Case law discussed:
(1998) 2 SCC 493, (1996) 3 SCC 533, (2005) 4 SCC 370, AIR 2010 SC 812.

(Delivered by Hon'ble Shri Kant Tripathi, J.)

1. Heard learned counsel for the applicants and learned A.G.A. for the respondent and perused the record.

2. With the consent of the learned counsel for the parties, the petition is finally disposed of.

3. This petition under section 482 of the Code of Criminal Procedure (in short 'Code') has been filed against the order dated 04.06.2010 passed by Judicial Magistrate, Mau in Case No. 504 of 2005, (Ramakant Pandey V. Surya Nath Singh and others) whereby the applicants have been summoned as accused.

4. It appears that the Additional Commissioner, Azamgarh Division Azamgarh while disposing of Revision No. 870/120M (Ram Badan V. Surya Nath Singh) under section 219 of the Uttar Pradesh Land Revenue Act, found that the revenue record entry in favour of the applicant No.1 in respect of Plot No. 1297 and 1333 of village Tajopur, Pargana and Tehsil Sadar, District Mau was a forged entry and accordingly allowed the revision and directed that the aforesaid plots be recorded as Banzar in the revenue record. Against the order of the Additional Commissioner, the petitioner No.1 filed Civil Misc. Writ Petition No. 51950 of 2003 in this Court, which was finally disposed of with the direction that the matter may be taken before the regular Court for declaration of title. It further appears that the Additional Commissioner filed a complaint in the Court of Chief Judicial Magistrate, Mau against the applicants with the allegations that the applicants were responsible for the forged entry in the revenue record and prayed that they may be punished in accordance with law. The learned Additional Commissioner appears to have filed the complaint under section 340 of the Code. Ultimately, the complaint was put up before the Judicial Magistrate, Mau and the applicants filed a written objection against the maintainability of the complaint mainly on the ground that the Additional Commissioner had not held any inquiry under section 340 of the Code., therefore, the complaint was not maintainable but the Judicial Magistrate rejected the objection and directed for issue of processes against the applicants.

5. The learned counsel for the applicants submitted that the Additional Commissioner filed the complaint without holding an inquiry as contemplated by section 340 of the Code, therefore, the complaint was not maintainable and the learned Magistrate was not competent to take cognizance on such complaint.

6. The learned A.G.A., on the other hand submitted that the alleged forgery was committed in the revenue record outside the proceeding of the matter decided by the learned Additional Commissioner, therefore, section 340 of the Code was not attracted.

7. The sole question which arises for consideration in this case is whether the complaint was not maintainable without the inquiry under section 340 of the Code.

Section 340 of the Code reads as follows:-

"340. Procedure in cases mentioned in section 195:- *(1) When upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an*

inquiry should be made into any offence referred to in clause (b) of sub-section(1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e)bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may opinion;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.

(4) In this section, "Court" has the same meaning as in section 195."

8. A perusal of the aforesaid excerpts of section 340 of the Code reveals that an inquiry under section 340 of the Code is required to be made only when any offence referred to in clause (b) of sub-section(1) of section 195 is alleged to have committed in or in relation to a proceeding of the concerned court or in respect of a document produced or given in a evidence in a proceeding in that Court. In other words, section 340 of the Code prescribes the procedure as to how a complaint may be filed in regard to the offences referred to in section 195(1)(b) of the Code.

9. Section 195 of the Code deals with the prosecution for contempt of lawful authority of Public Servants, for offences against public justice and for offences relating to documents given in evidence. Section 195(1)(b) of the Code may be reproduced as follows:-

"(1) No Court shall take cognizance, -

(a) (i).....

(ii).....

(iii).....

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code, namely, sections 193 to 196 (both inclusive) 199,200, 205 to 211 (both inclusive) and 228, when such offence is

alleged to have been committed in, or in relation to, any proceeding in any Court; or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in a Court; or

(iii) of any criminal conspiracy to commit or attempt to commit or the abetment of, any offence specified in sub-clause(i) or sub-clause(ii);

except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.

(2).....

(3).....

(4)....."

10. Therefore, section 195 (1)(b) refers to two different category of the offences. The first category of the offences are punishable under sections 193 to 196, 199, 200, 205 to 211 and 228 I.P.C. The second category of the offences are the offences described in section 463 I.P.C. or punishable under sections 471, 475, 476 I.P.C. In the first category of offences section 195 of the Code is attracted only when if any of such offences is alleged to have been committed in or in relation to any proceeding in any court whereas in regard to the second category of the offences section 195 is applicable when any of such offences is committed in respect of a document produced or given in evidence in a proceeding in a court. In the cases of conspiracy to commit, or an attempt to commit, or the abatement of, any of the aforesaid both the category of offences also, the provisions of section 195 are applicable. In all such type of cases, the cognizance of the offences can be taken only on the complaint in writing of the court concerned or of any authorised officer of the court or of the court to which the court concerned is subordinate and not otherwise. Before lodging of a complaint as required by section 195 of the Code, it is also necessary to hold an inquiry under section 340 of the Code.

11. In the case of **Sachida Nand Singh Vs. State of Bihar (1998) 2 SCC 493,** the Apex Court held that the bar contained in section 195(1)(b)(ii) of the Code would not apply where forgery of a document was committed before the document was produced in the court. However, a contrary view was expressed in the case of **Surjit Singh Vs. Balbir Singh (1996) 3 SCC 533.** In order to reconcile the verdicts given in the said two decisions and to propound a correct law on the subject, a Constitution Bench of the Apex Court reconsidered the matter in the case of **Iqbal Marwah and another Vs. Meenakshi Marwah and another (2005) 4 SCC 370** and propounded the following principles:-

"The scheme of the statutory provision may now be examined. Broadly, Section 195, Cr.P.C. deals with three distinct categories of offences which have been described in clauses (a), (b)(i) and (b)(ii) and they relate to (1) contempt of lawful authority of public servants, (2) offences against public justice, and (3) offences relating to documents given in evidence. Clause (a) deals with offences punishable under Sections 172 to 188 IPC which occur

in Chapter X, IPC and the heading of the Chapter is - "Of Contempts of the Lawful Authority of Public Servants. These are offences which directly affect the functioning of or discharge of lawful duties of a public servant. Clause (b)(i) refers to offences in Chapter XI, IPC which is headed as - "Of False Evidence and Offences Against Public Justice". The offences mentioned in this clause clearly relate to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a court of justice or before a public servant who is bound or authorised by law to receive such declaration, and also to some other offences which have a direct correlation with the proceedings in a court of justice (Sections 205 and 211, IPC). This being the scheme of two provisions or clauses of Section 195 viz. that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a public servant or has a direct correlation with the proceedings in a court of justice, the expression "when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court" occurring in clause (b)(ii) should normally mean commission of such an offence after the document has actually been produced or given in evidence in the court. The situation or contingency where an offence as enumerated in this clause has already been committed earlier and later on the document is produced or is given in evidence in court, does not appear to be in tune with clauses (a)(i) and (b)(i) and consequently with the scheme of Section 195, Cr.P.C. This indicates that clause (b)(ii) contemplates a situation where the offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any court."

12. The aforesaid principles have been reiterated in the case of **Mahesh Chandra Sharma V. State of U.P. AIR 2010 SC 812.** In that case, the Apex Court has held in para 28, 29 and 30 as follows:-

28. *" Learned Single Judge completely lost sight of the fact that the offence committed by accused in collusion with Area Lkhpal was not in relation to court proceedings. It was in any case behind the back of the appellant and as soon as he came to know with regard to the illegal designs of the accused he lodged a complaint under section 156(3) of the Cr.P.C.*

29. The law on the point is too well settled in the light of the abovesaid two judgments of this Court that section 195(1)(b)(ii) of the Cr.P.C. contemplates a situation where offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any Court.

30. The learned Single Judge further committed a gross error in resorting to section 340 of the Cr.P.C. as provisions of the said section can be invoked only when it is established that offence of forgery had already been committed. In any case, accused had miserably failed for grant of any relief under section 482 of the Cr.P.C. The limit of exercising jurisdiction conferred on the Court under section 482 of the Cr.P.C. is well defined and by no stretch of imagination, it could be said that petition filed by accused under section 482 of the Cr.P.C. had fulfilled the requirement as contemplated in this Section."

13. It is, thus, well settled that if any of the offences referred to in section 195 (1)(b) (ii) of the Code is committed in respect of a document before the document is produced or given in evidence in a proceeding in any court, the provisions of section 195 would not be attracted. In that eventuality, it will not be necessary to hold an inquiry under section 340 of the Code for filing the court complaint. But the position is different if such offence is committed after production of the document in evidence in the court. In that situation the court complaint as required by section 195 of the Code would be necessary for taking cognizance and it would also be necessary to hold the inquiry under section 340 of the Code before filing the complaint.

14. In the present case, the alleged forgery in the revenue record was committed outside the Court much prior to the initiation of the proceeding in the Additional Commissioner's Court and it is nowhere stated that any forgery was committed in or in relation to the judicial proceeding pending in the Court of learned Additional Commissioner or in respect of a document filed in that proceeding. Therefore, the provisions of section 340 of the Code. are not attracted in this case and as such no inquiry was required under section 340 of the Code before filing the complaint.

15. The complaint filed by learned Additional Commissioner, in view of the aforesaid reasons, is nothing except an ordinary complaint under section 190(1)(a) of the Code. Therefore, the learned Magistrate was legally required to observe the procedures laid down in Chapter XV of the Code. But in this case no such procedure has been adopted and summoning order has been passed treating the complaint under section 343 of the Code. Therefore, the summoning order cannot be upheld.

16. The petition is allowed. The impugned order dated 04.06.2010 and all consequential proceedings done in pursuance of the impugned order are quashed.

17. The learned Magistrate is directed to proceed with the complaint in accordance with Chapter XV of the Code and pass an appropriate order in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2010

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 26617 of 2010

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

Counsel for the Petitioner:
Sri C.B. Dubey

Counsel for the Respondent:
C.S.C.

U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules 1974- Rule-2(c)-Compassionate appointment-claim by adopted son-rejected on ground of not within definition of family under the Rule-held-illegal-adopted son has same status as of natural son-necessary direction issued.

Held Para 27

After observing so, this Court has held that adopted son is as good as real son. In this view of the matter, I am of the definite opinion that the adopted son has got the same status under law as the

natural son has and there can be no difference in between the two (adopted or natural) either for mythological purpose or for secular purpose to perpetuate the line of family. The view taken by me also finds support from several decisions of this Court rendered in Sunil Saxena Vs. State of U.P. and others, 1994 (68) FLR 283; Singhasan Gupta Vs. State of U.P. and another, (1996) 1 UPLBEC 4 and Ravindra Kumar Dubey Vs. State of U.P. and others, 2005 (4) ESC 2706 (All). Thus, the impugned notice/order dated 17.4.2010 sent/passed by respondent no. 3 is unsustainable in the eye of law and deserves to be quashed.

Case law discussed:

2009 (3) ESC 1869 (All), 1994 (68) FLR 283, (1996) 1 UPLBEC 4; 2005 (4) ESC 2706. (All)

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

1. By means of this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the impugned reply/order dated 17.4.2010 sent/passed by respondent no. 3 with the further prayer to direct the respondents to provide appointment to the petitioner under the ***U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules 1974*** (herein after referred to as Rules of 1974), within specific period.

2. The facts giving rise to this case are that the father of the petitioner late Radhey Shyam was confirmed Class IV Employee with the respondents and he expired in harness on 21.11.2007. Initially the father of the petitioner was issue less therefore through registered adoption deed he adopted the petitioner on 25.2.2004, copy of adoption deed has been brought on record as Annexure No. 2 to the writ petition. After the death of father, the petitioner has applied for appointment on compassionate ground on 3.12.2007 under the ***Rules of 1974*** but nothing was done. The petitioner has sent thereafter number of reminders on 15.2.2008, 28.2.2008 and 16.7.2008, copy of the application as well as reminders have been brought on record as Annexure No.4 to the writ petition.

3. It is stated in paragraph no. 7 of the writ petition that the petitioner has obtained succession certificate on 14.2.2008, copy of which has been brought on record as Annexure no. 3 to the writ petition.

4. It is stated in paragraph 9 of the writ petition, that after the death of his father, the petitioner has received all the service benefits as a legal heir of his father late Radhey Shyam.

5. It appears that the respondent no. 3 through letter dated 3.3.2008 has inquired from the higher authorities whether an adopted son of a deceased employee is entitled to get an appointment under the Rules of 1974? copy of this letter has been brought on record as Annexure 5 to the writ petition. When nothing was done, the petitioner has sent a legal notice on 10.4.2010. In pursuance thereof, impugned information dated 17.4.2010 has been given to the petitioner which has been brought on record as Annexure no. 1 to the writ petition.

6. From the perusal of the impugned reply/order dated 17.4.2010 sent by Regional Director Social Forestry Region Bareilly it transpires that Regional Director Social Forestry Region has taken the view that adopted son do not fall in the ambit of son and dependent as defined under Rule 2 (c) of the ***Rules of 1974.***

7. While assailing the impugned notice Sri C.B. Dubey, learned counsel for the petitioner has submitted that it has not been denied by the respondents that the son of a deceased employee falls in the ambit of definition of family as defined under the Rules of 1974 and what has been denied is that the adopted son do not fall in the ambit of son. In his submissions, the respondents could not differentiate in between son and adopted son as the adopted son is as good as natural son under the provisions of ***Hindu Adoptions and Maintenance Act, 1956*** (hereinafter referred to as Act of 1956). In his submissions, the impugned reply/order dated 17.4.2010 is illegal and deserves to be quashed.

8. Refuting the submissions of learned counsel for the petitioner learned standing counsel has tried to defend the notice/order dated 17.4.2010 passed by Regional Director Social Forestry Region Bareilly by saying that the order dated 17.4.2010 is perfectly legal as there is no word like 'adopted son' mentioned in the definition of family of the dependents of deceased under the Rules of 1974. In his submissions no infirmity can be attached with the impugned order.

9. I have heard learned counsel for the petitioner and learned standing counsel and considered their submissions. With the consent of learned counsel for the parties the writ petition is taken up for final disposal on the admitted facts of the case.

The dispute involved in this case revolves towards the word 'adopted son'.

10. To appreciate the controversy the mythological and the legal aspect of 'son' is required to be looked into. In Vadic age and even thereafter prior to India got its independence, the insistence was given for a Hindu to have a male child and the desire for male offspring (in particular) was very natural in all early societies. Male issue was prized both for the continuance of the family as well as for the performance of funeral rites and offerings. ***The Veda declares*****:** *"Endiess are the worlds of those who have sons; there is no place for the man who is destitute of male offspring'. "May our enemies be destitute of offspring". " O Agni, may I obtain immortality by offspring. Rig Veda, I, 21, 5 cited in Vas., XVII, 2-4; Vishnu, XV, 45; Manu, VI,36, 37; IX, 45.*

11. Not only in Vadic age but later on ***Manu*** also emphasized the ***Vadic*** injunction regarding the necessity for a son thus : *"Through a son, he conquers the world; through a son's son, he obtains immortality but through his son's grand-son, he gains the world of the Sun. Because a son delivers his father from the hell called PUT, he was therefore called PUT-TRA. Manu, IX, 137, 138; Vishnu, XV, 44, 46.Medhatithi explains that the hell called 'put' isonly ' the name given to the four kinds of elemental life on the earth' and that all that is meant is that by the birth of a son, the father is "born next in a divine life". Jha., Manu Bhashya, Vol. V, 123.*

So also ***Yajnavalkya*** : *"Because continuity of the family in this world and the attainment of heaven in the next are through sons, son's sons and sons' grandsons, therefore women should be loved and protected."*

For the above reasons, in the old age twelve or thirteen kinds of sons were recognized and mentioned by the earlier writers : *(1) The legitimate son (Aurasa) is*

one begotten by a man upon his lawfully wedded wife. (2) The son of an appointed daughter (Putrikaputra). (3) The son of the wife (Kshetraja) is one begotten upon a man's appointed wife or widow by his brother or near kinsman. (4) The son secretly born (Gudhaja or Gudhotpanna) is the son born in a man's house to his wife when it is not certain who the father is. (5) The maiden's son (Kanina) is the son born to an unmarried girl in her father's house before her marriage. (6) The son of the pregnant bride (Sahadha or Sahodhaja) is the son born to a woman whom one, while she is pregnant, knowingly or unknowingly marries. (7) The son of a twice married woman (Paunarbhava). (8) The son given (Dattaka) is the son whom his father or mother gives in adoption. (9) The son made (Kritrima) is the son whom a man himself makes his son with the adoptee's consent only. (10) the son bought (Krita) is one sold by his father and mother or either. (11) The deserted son (Apaviddha) is one who, having been discarded by his father and mother, is taken in adoption. (12) The son self-given (Svayamdatta) is one, who bereft of father and mother or abandoned by them presents himself saying ' Let me become thy son', and (13) The Nishada or Parasava is the son of a Brahmin by a Sudra wife. A person by appointing another as heir to his property cannot confer on him the status of a son; the latter cannot claim as heir of another on the footing that he is the son of the farmer. Gaut. XXVIII, 32,33; Baudh II, 2, 3, 14-30; Apas, II, 6, 13, 1-11; Vas., XVII, 9-22; Vishnu, XV, 1-27; Manu, 1, 127-140, 158-184;Yajn II, 127-132; Nar.,XII, 17-20; 45-47; Mitakshara, I, xi.

Gurudit Singh v. Surjit Singh 1950 Pepsu 56: 2 Pepsu LR 431.

12. Under the old Hindu law the insistence was not only given for having a son and perpetuate the family line but simultaneously a pious duty was also imposed to maintain the dependents like wife, aged parents and a minor son as a matter of personal obligation arising from the very existence of the relationship and quite independent of the possession of any property, ancestral or self acquired. A text of **Manu** cited in the **Mitakshara** and the **Parasaramadhaviya** says "*It is declared by Manu that the aged mother and father, the chaste wife and an infant child must be maintained even by doing a hundred misdeeds". The text is not found in Dr. Buhler's edition (SBE Vol XXV) but is cited in Mit. on Yajn II, 175 (Setlur, 819). The last clause is only an arthavada to show the importance of the duty. Ghose HL, I, 322; see Manu, VIII, 389 with Medhatithi's comment on it; Savitribai vs. Luximibai (1878) 2 Bom 573; Commr of Income-tax v. Lakshmipathi Saheba (1935) 14 Pat 313, 316; Bhoopathi Nath Vs. Basanta Kumari (1936) 63 Cal 1098, 1110. So the Mitakshara lays down that " where there may be no property but what has been self-acquired, the only person whose maintenance out of such property is imperative are aged parents, wife and minor children."*

13. The importance and extent of the right of maintenance necessarily arisen from the theory of an undivided family. The head of such a family is bound to maintain its members, their wives and their children, to perform their ceremonies and to defray the expenses of their marriages, in other words, those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income. The right of maintenance includes persons who by

reason of personal disqualification are not allowed to inherit, such as the idiot, the madman and the rest. The right of maintenance was also extended with respect to illegitimate son, Concubine etc. (some portion of the citation has been borrowed from ***Mayn's Hindu Law.***

14. After India's independence the Parliament realising the present need of the society, has enacted ***The Act of 1956***. The object and reason of the Act as has been mentioned in introductory part of the Act is reproduced below :-

With the passing of the Hindu Succession Act, 1956, which treats sons and daughters equally in the matter of succession, it has now become possible to simplify the law of adoption among Hindus. The Bill provides for the adoption of boys as well as girls. There is no longer any justification for allowing a husband to prevent his wife from taking a child in adoption after his death. The adoption made by a widow will hereafter be in her own right. No person need be divested of any property, which has vested in him, by reason only of the fact that subsequent to such vesting an adoption has been made. This rule of divesting has been the cause of many a ruinous litigation.

15. It would appear from the perusal of the Act that after enactment of the Act of 1956 now a male or female both can adopt a child either it is male or female.

16. In the Ancient Hindu Law five kinds of adopted sons were recognized as there was no concept to adopt a female child. However the Modern Hindu Law recognizes only two namely, the *dattaka* (adopted) and the *Kritrima*. The *dattaka* form is in use all over India. The *Kritrima* form is prevalent in *Mithila* and the adjoining districts.

17. The object and purpose of the adoption are two fold. The first is religious, to secure benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of waters to the soul of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name.

18. However after the enactment of the Act of 1956 the mythological purpose has disappeared but so far as the modern purpose is concerned, the Act provides for adoption of a child and once a child has been adopted either by adoptive father or mother it has a definite effect which has been provided under Rule 12 of the Act of 1956.

For better appreciation Section 12 of the aforesaid Act is quoted below.

12. Effects of adoption :- *An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family :*

Provided that-

(a) The child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) Any property which vested in the adopted child before the adoption shall continue to vest in such person subject to

the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) The adopted child shall not divest any person of any estate which vested in him or her before the adoption.

19. From the perusal of above section, it is clear that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

20. It appears recognizing the duty to maintain the dependents in the service law also, proper care has been taken of by the framer of the Rules of 1974 by making a provision for saving out the dependents of a deceased employee who have fallen under financial crunch after the death of an employee while working with the department. There also almost on the same line the family has been defined and dependents have been identified.

21. In so far as the lis involved in this case with regard to equivalence of adopted son with natural son (*aurasa*) under the Rules of 1974 is concerned, it has tobe looked into in the context of the word 'family' as defined under Rule 2 (c) of the Rules of 1974 which runs as under.

(i) Wife or husband

(ii) Sons

iii) Unmarried and widowed daughters.

(iv) If the deceased was unmarried government servant, brother unmarried sister and widowed mother dependent on the deceased government servant.

22. From the perusal of Rule 2 (c) (ii) and 2 (c) (iii) of the Rules of 1974 it transpires that the word 'sons' and 'unmarried and widowed daughters' have been mentioned whereas in Clause (iv) the word 'brother' and 'unmarried sister' has been mentioned. Here, in Sub-Rule 2 (c) (ii) and 2 (c) (iii) plurality is attached with the word 'son' and 'daughter' whereas with respect to Sub-Rule 2 (c) (iv) it is in singular form by mentioning (brother and sister) and not 'brothers' and 'sisters'.

23. The problem which is wriggling in my mind is that why the framer of the Rules of 1974, in Rule 2 (c) (ii) and (iii) has attached plurality with the word 'son' and 'daughter' as 'sons' and 'daughters' and why singularity is attached with the word 'brother' and 'sister' in Rule 2 (c) (iv), whereas either it is son, daughter, brother or sister they constitute one class and in each category their number may be more than one, therefore, in view of Rule 5 which provides that only one member of the family is entitled to be considered for appointment, attaching plurality with the word 'son' and 'daughter', the framer of the rule has intended to mean something more behind the attachment of plurality with the word 'son' and 'daughter' and that looking into the object of the rule in recent perspective is to attach plurality means not to infer number of the 'son' and 'daughter' but the kind of the 'son' and 'daughter' who are legally recognized under law, as after the enactment of the Act of 1956 the kind

of 'son' and 'daughter' has become more than one i.e. natural/real/son/daughter and adopted son/ daughter. It may be noticed that according to the Act of 1956 right of adoption has been given to a male and female both to adopt either a male or female child. The effect of such adoption is that by virtue of adoption a male or female child becomes a 'son' or 'daughter' as the case may be of the adopter and this constitute a separate category i.e. adopted son/daughter and that is why plurality is not attached with the words 'brother' and 'sister' under Rule 2 (c) (iv) as the kind of 'brother' and 'sister' for the purposes of this rule or other rules is not more than one.

24. Otherwise also the Act of 1956 has been enacted by the Parliament and the provisions contained in this Act, unless something otherwise is provided under this Act, will prevail over any Act of the State legislation or Rules framed under Article 309 of the Constitution of India. In the present case, the Rule which is under consideration has been framed under Article 309 of the Constitution of India, therefore, also the effect of adoption providing same status to adopted child as of a natural child will prevail over the rule in question and both the adopted child as well as the natural child will be treated at par, without there being any difference amongst two.

25. For the above reason, I am of the view that the Rules of 1974 itself provide that the adopted son/daughter is also included in the definition of family as defined under Rule 2 (c) (ii) and (iii) of the Rules.

26. Otherwise also the definition of family as defined under the Rules of 1974 begins as, 'family shall include' and this aspect of the matter has been considered by this Court in the case of ***Shiv Prasad Vs. State of U.P. and others 2009 (3) ESC 1869 (All)*** where this Court has observed as under :-

It appears that in Rule-2 of Dying in Harness Rules which defines various words or expressions mentioned in the definition clause, these words and expressions are preceded by the words 'unless the context otherwise requires'. It means that the definitions given in the definition clause should be normally applied and given effect to but this normal rule may however be departed from if there be something in context to show that definition should not be applied. In view of legal position stated by Hon'ble Apex Court referred hereinbefore, the definition of expression 'family' given in the definition clause appears to be an inclusive definition as the definition clause used the word 'include' in the definition of family. Such definition is known as expansive definition and is used to enlarge the meaning of the words or phrases occurring in the body of statute and when it is so used, the words or phrases should be construed as comprehending not only such thing which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. Contrary to it, where in a definition clause of a statute a word is defined to mean certain thing whenever that word is used in that statute, it shall mean what is stated in the definition 'unless the context otherwise requires'. Such definition is known as restrictive

definition and used to restrict the meaning of expression defined in the definition clause and whenever such word or expression is used in the body of the statute, it shall be restricted to meaning assigned in the definition clause and popular or natural meaning of such word or expression shall not be applied.

27. After observing so, this Court has held that adopted son is as good as real son. In this view of the matter, I am of the definite opinion that the adopted son has got the same status under law as the natural son has and there can be no difference in between the two (adopted or natural) either for mythological purpose or for secular purpose to perpetuate the line of family. The view taken by me also finds support from several decisions of this Court rendered in ***Sunil Saxena Vs. State of U.P. and others, 1994 (68) FLR 283; Singhasan Gupta Vs. State of U.P. and another, (1996) 1 UPLBEC 4 and Ravindra Kumar Dubey Vs. State of U.P. and others, 2005 (4) ESC 2706 (All).*** Thus, the impugned notice/order dated 17.4.2010 sent/passed by respondent no. 3 is unsustainable in the eye of law and deserves to be quashed.

28. In the result, the writ petition succeeds and is allowed. The impugned reply/order dated 17.4.2010 passed by respondent no. 3 (Regional Director Social Forestry, Region Bareilly) is hereby quashed.

29. Keeping the purpose and object of the Rules of 1974 i.e. to save out the family from financial crunch after the death of an employee, the concerned respondent is directed to reconsider the petitioner's matter in view of the observation made hereinabove within a period of six weeks from the date a certified copy of this order is produced before him, by passing a reasoned speaking order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2010

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

Civil Misc. Writ Petition No. 26836 of 2004

Dinesh Kumar ...Petitioner
Versus
The Dy. Inspector General of Police and another ...Respondent

Counsel for the Petitioner:
Sri Mithilesh Kumar Tiwari

Counsel for the Respondents:
C.S.C.
Sri K.C.Sinha

Constitution of India Article 342-Caste of Kol-whether included in schedules tribes?-held-'No' unless-promulgated by President of India-even in constitution scheduled tribes U.P. order 1967-not included the caste of Kol as scheduled tribes can not be treated as S.T.

Held: Para 5

Without entering into the other merits of the procedure for dispensing with the services of the petitioner it would be appropriate to mention that the Constitution Scheduled Tribes Order 1950 promulgated by the President of India under Article 342 does not contain the caste of the petitioner namely 'Kol' as a scheduled tribe. The Constitution Scheduled Tribe Uttar Pradesh Order 1967 published on 24th June, 1967 includes only five castes as scheduled tribes namely (1) Bhotia (2) Buksa (3) Jannsari (4) Raji and (5) Tharu. The

caste of Kol is not included in the said order. The power to include a caste as a scheduled tribe or a scheduled caste is vested under Article 342 of the Constitution in the President of India and any notification by the State Government to the contrary is of no relevance.

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

1. The petitioner applied for being appointed as a constable in the Central Reserve Police Force on the basis of a caste certificate dated 30th June 1995 issued by the Tehsildar Karchhana District Allahabad indicating that the petitioner is a scheduled tribe. The caste of the petitioner is mentioned as "Kol".

2. In the year 2003 the department instituted a departmental enquiry against the petitioner on the ground that the petitioner had obtained appointment on the basis of a wrong caste certificate and ultimately he was removed vide order dated 12th April, 2004. The petitioner has come up assailing the said order and during the pendency of the writ petition the petitioner had preferred an appeal which has also been dismissed as such the consequential relief has also been claimed.

3. A counter affidavit has been filed on behalf of the respondents wherein it has been stated that the petitioner had deliberately and intentionally got employment on the strength of a certificate even though the caste of the petitioner is not included within the scheduled tribe order.

4. I have perused the impugned order as well as the facts stated in the counter affidavit and the reply submitted by the petitioner.

5. Without entering into the other merits of the procedure for dispensing with the services of the petitioner it would be appropriate to mention that the Constitution Scheduled Tribes Order 1950 promulgated by the President of India under Article 342 does not contain the caste of the petitioner namely 'Kol' as a scheduled tribe. The Constitution Scheduled Tribe Uttar Pradesh Order 1967 published on 24th June, 1967 includes only five castes as scheduled tribes namely (1) Bhotia (2) Buksa (3) Jannsari (4) Raji and (5) Tharu. The caste of Kol is not included in the said order. The power to include a caste as a scheduled tribe or a scheduled caste is vested under Article 342 of the Constitution in the President of India and any notification by the State Government to the contrary is of no relevance.

6. Learned counsel for the petitioner contends that the State Government had issued a Government Order in this regard. The aforesaid reliance placed is without any basis inasmuch as the said declaration has to be made under a presidential order.

7. Learned counsel for the petitioner has been unable to furnish any such document which may indicate that there is a presidential order including the caste of Kol as a scheduled tribe. In view of this the issuance of the certificate or even otherwise does not come to the aid of the petitioner once it is established that the caste of the petitioner does not fall within the scheduled tribe category as

per Article 342 of the Constitution of India. Accordingly, the writ petition lacks merit and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATE: ALLAHABAD 22.09.2010

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

Civil Misc. Writ Petition No. 30643 of 2007

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

Counsel for the Petitioner:
Sri Diptiman Singh

Counsel for the Respondents:
C.S.C.

U.P. Regularisation of Daily Wagers Appointment on Group-D post Rules 2001-Rule 4 (1) (a)-Regularisation of Daily wagers working on Group-D post-since 1990-forest Department-not disputed their functioning-Regularisation can not be denied-direction for fresh consideration issued.

Held: Para 9 and 10

In the opinion of the Court the aforesaid stand taken in the counter affidavit is untenable in law inasmuch as if the petitioner was factually working in the year 1991 particularly on the cut off date i.e. 29th June 1991 then he falls for consideration for the benefit of regularization and payment of minimum wages as a Group-D employee keeping in view the 2001 Rules as well as the decisions rendered by this Court and by the Apex Court.

Coming to the relevancy part as stated in Paragraph 8 of the counter affidavit suffice it to say that such a daily wager has to be continued in service on the date of the commencement of the rules. The rules have commenced on 21st December, 2001. There is no denial that the petitioner was working on 21st December 2001 and has been paid his wages. In view of this the impugned order dated 15th March 2005 and 8th March 2005 Annexure 6 to the writ petition is unsustainable and it is hereby quashed. The matter is remitted back to the respondent no. 3 for reconsideration of the claim of the petitioner in the light of the observations made herein above within a period of three months of the date of presentation of a certified copy of this order before him.

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

1. The petitioner has been discontinued as a daily wager in the Forest Department and simultaneously an order has been passed on 15th March 2005 refusing the benefit of regularization to the petitioner on the ground that the petitioner's claim does not fall within the provisions of The Uttar Pradesh Reguarisation of Daily Wages Appointments on Group D Posts Rules 2001.

2. Learned counsel for the petitioner contends that the impugned order proceeds on erroneous assumption of facts and law inasmuch as the petitioner was working as a daily wager since 1990 prior to the cut off date of 29th June 1991 and was also working on the date of the 2001 Rules which were enforced on 21st December 2001. He submits that in view of the provisions of the aforesaid rules particularly Rule 4(1)(a), the petitioner is entitled for regularization and the facts in support of such a claim have been completely ignored as such the impugned order is vitiated.

3. Learned Standing Counsel on the other hand contends that factually the petitioner has been unable to establish his case with regard to functioning so as to entitle him the benefit of regularization and therefore the impugned order does not suffer from any infirmity. He submits that in the absence of any proof of his functioning in the manner as provided for under the rules the petitioner cannot be allowed the benefit of regularization.

4. I have perused the records and the affidavits have been exchanged between the parties.

5. The petitioner has come out with a clear case that he was working since 1990 and the petitioner relies on a certification by the Forest Range Officer dated 1st June 1994 Annexure-1 to the writ petition. The said certificate recites that the petitioner continuously worked on daily wages from September 1990 to May 1994.

6. The aforesaid annexure has been narrated in Paragraph 5 of the writ petition. The respondents have given their reply in paragraph 8 to the same which is quoted hereinbelow:

"Para 8. That, the contends of para no. 5 of the writ petition are not correct as they are stated. The petitioner had never been paid salary by the department but ***he has been given wages as admissible to the dailywager. The service of the dailywager start from morning and came to an end in evening automatically. Certificate which has been annexed by the petitioner as annexure-1 to the writ petition is no relevancy with the regularisation of the petitioner*** *on group 'D' post."*

7. A perusal of the said reply given in the counter affidavit clearly indicates that the petitioner was given wages as admissible to a daily wager. The said paragraph does not deny the working of the petitioner as certified by the Forest Range Officer from 1990 to 1994, nor is it stated that the said certificate is fake or forged. The petitioner therefore has led evidence to indicate that he has worked as a daily wager on the cut off date.

8. The stand taken is that the certificate is of no relevancy keeping in view the 2001 regularization rules.

9. In the opinion of the Court the aforesaid stand taken in the counter affidavit is untenable in law inasmuch as if the petitioner was factually working in the year 1991 particularly on the cut off date i.e. 29th June 1991 then he falls for consideration for the benefit of regularization and payment of minimum wages as a Group-D employee keeping in view the 2001 Rules as well as the decisions rendered by this Court and by the Apex Court.

10. Coming to the relevancy part as stated in Paragraph 8 of the counter affidavit suffice it to say that such a daily wager has to be continued in service on the date of the commencement of the rules. The rules have commenced on 21st December, 2001. There is no denial that the petitioner was working on 21st December 2001 and has been paid his wages. In view of this the impugned order dated 15th March 2005 and 8th

March 2005 Annexure 6 to the writ petition is unsustainable and it is hereby quashed. The matter is remitted back to the respondent no. 3 for reconsideration of the claim of the petitioner in the light of the observations made hereinabove within a period of three months of the date of presentation of a certified copy of this order before him.

11. So far as the claim of payment of minimum wages is concerned reference may be had to the Division Bench judgment of this Court given in Special Appeal No.1205 of 2010 (Chanchal Kumar Tiwari and others Vs. Shri Hari Shankar).

The writ petition is allowed.
