ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.04.2011

BEFORE
THE HON'BLE ANIL KUMAR,J.

Rent Control No. - 4 of 2011

Siya Ram ...Petitioner
Versus
District Judge (Incharge) Barabanki and others. ...Respondent

Counsel for the Petitioner:
Sri Ravindra Pratap Singh

Counsel for the Respondent:
Sri Manish Kumar
Sri P.S.Bajpai

U.P. Urban Building (Regulation of letting Rent and Eviction) Act 1972- Rule-15(2)-release application by co-owner without impleading other co-owners-whether maintainable? held- 'yes' as per law laid down by Full Bench decision of Ram Gopal Sharma case.

Held: Para 16

In view of the above-said facts, I do not find any illegality or infirmity in the impugned orders dated 26.11.2010 passed by opposite party no.1 and order dated 20.7.2010 passed by opposite party no.2 thereby holding that the release application moved by a co-owner/ landlord without impleading other co-owner/landlord of the shop under the tenancy of the petitioner/ tenant is maintainable.

Case law discussed:
1993 (11) LCD 372; 2010(1) JCLR 307(All); 1987 (1) Allahabad Rent Cases 281; 1977 Allahabad Rent Cases 83; 1988 (1) Allahabad Rent Cases 463; 1993 (11) LCD 372; 2004 (3) ARC 519

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

1. Heard Sri R.P. Singh , learned counsel for the petitioner and Sri P.S. Bajpai, learned counsel appearing on behalf of opposite parties.

2. By means of present writ petition, the petitioner has challenged the order dated 26.11.2010 passed by District Judge (Incharge) Barabanki/opposite party no.1 and the order dated 20.7.2010 passed by Civil Judge (Junior Division) Court no.13 Barabanki/opposite party no.2 as contained in anneuxre nos . 1 and 2 respectively.

3. Controversy in the present case relates to a shop situated Mohalla - Naka Pergana & Tehsil Nawabganj district Barabanki . Further Siya Ram petitioner is a tenant of the aforesaid shop since 1995 .

4. In respect to the said shop owned by landlord/ respondent no.3 a release application under Section 21(1) of the Act no. 13 of 1972 moved on 7.2.2007 . Accordingly , P.A. Case no. 2 of 2007 registered before the prescribed authority/ Civil Judge (Junior Division) Barabanki .

5. On 15.12.2007 a written statement filed and on 11.5.2010, an application under Order 11 Rule 1 CPC read with Section 34 of U.P. Act no. 13 and Rule 22 of the Rules 1972 moved inter alia stating therein that other co-owners/landlords of the shop in question not impleaded as a party in the matter in question so release application moved by respondent/ one of the landlord is not maintainable and by the said application permission was sought to give certain query / interrogatrise. Landlord filed an objection to the aforesaid application on

3.7.2010. The said application moved by the tenant on 11.5.2010 registered as Paper no. GA-58. After considering the matter on merit , rejected vide order dated 20.7.2010. Aggrieved by the same , petitioner/tenant filed a revision , dismissed vide order dated 26.11.2010 hence, the present writ petition filed.

6. Sri R. P. Singh learned counsel for the petitioner while assailing the impugned order submits that the order in question passed by respondents no. 1 and 2 are illegal and arbitrary in nature , the courts below fell error in not appreciating that as per admitted fact rather not disputed can one landlord without impleading other. Landlord even release application not signed by other landlord is not maintainable in view of the provisions as provided under Rule 15(2) of the U.P. Urban Building (Regulation of Letting , Rent and Eviction) Act ,1972 and in this regard query / interrogatrise has been asked by the petitioner necessarily for disposal of the controversy involved in the present case . Accordingly, orders passed by courts below are per si illegal and liable to be set aside.

7. Sri P.S. Bajpai, learned counsel for the respondents while defending orders which under challenged in the present writ petition submits that as per settled proposition of law when an application moved by co-landlord for release under Section 21 (1) (a) of the Act no.13 of 1972 without impleading others he is competent enough to initiate release proceedings alone without even impleading co-owners. Accordingly , there is neither any illegality or infirmity in the orders passed by the courts below and the present writ petition filed by the petitioner liable to be dismissed. In support of his arguments he placed reliance on the following judgments :-

(1) ***Ram Gopal Sharma Vs. Ist Additional District Judge, Meerut and others 1993 (11) LCD 372.***

(2) ***Sarika Kedia Vs. Additional District Judge , Deoria & others , 2010(1) JCLR 307 (All)***

8. I have heard the learned counsel for the parties and gone through the record.

9. Undisputed facts of the present case , petitioner is a tenant of the shop situated in Mohalla-Naka Pergana & Tehsil Nawabganj district Barabanki and in respect to which respondent no.3/ landlord moved an application for release registered as P.A. Case no .2 of 2007 before opposite party no.2 . On 11.5.2010 an application under Order 11 Rule 1 CPC read with Section 34 of U.P. Act no. 13 and Rule 22 of the Rules 1972 was moved inter alia stating therein that other co-owner of the shop in question is not impleaded as party and further certain query/ interrogatrise asked , registered as paper no. Ga-58, rejected by order dated 20.7.2010 passed by prescribed authority . Revision filed , dismissed by the revisional authority vide order dated 26.11.2010.

10. In view of the factual background, the only question which has to be considered in the instant case whether an application moved by one of the co-owner of the property in question even their release application is maintainable without impleading the other co-owner of the said property or not in view of the provisions as provided under

Rule 15(2) of the Rules, 1972 quoted hereunder:-

" 15 . Application for release of building under occupation of tenant:- [Section 21(1)]

(1).....

(2) The application or its reply shall be signed and verified in the manner prescribed under Rules 14 and 15 of Order VI of the First Schedule to the Code of Civil Procedure , 1908. If there are more than one landlords, the application shall be signed by all the co-landlords.

(3) ……....."

11. A full Bench of this Court in the case of ***Gopal Dass and another Vs. Ist Additional District Judge, Varanasi and others , 1987 (1) Allahabad Rent Cases,281*** after considering the Rule 15(2) of the U.P. Urban Buildings (Regulation of Letting , Rent and Eviction) Rules, 1972 has held as under:-

"So far as the applicability of this Rule to the present case is concerned, there is not problem. Murlidhar Sah who has brought the action for eviction of the premises in question is undoubtedly the landlord. He was signed the application . He alone is competent to sign the application. However, we may point out that the requirement of Rule 15(2) that an application for release of premises owned by co-owners should be signed by all co-owners would be invalid. One co-owner is competent to maintain an action for eviction of the tenant of the entire premises, since he can be considered as a landlord within the meaning of Section 3 (j) of the Act. One co-owner alone would be competent to sign such an application."

12. Moreover prior to said full Bench, Hon'ble the Apex Court in the case of ***Sriram Pasricha Vs. Jagannath and others, 1977 Allahabad Rent Cases 83*** has held as under :-

" It is therefore, clear that the rule that a co-owner may maintain an action to eject a trespasser without joining other co-owners in such action can have no application where a co-owners in such actin can have no application where a co-owners seek to evict a tenant who is in possession of the property after determination of the lease. "

13. Thereafter in the case of ***Laxmi Devi Vs. Iind Additional District Judge, Varanasi and others , 1988(1) Allahabad Rent Cases, 463*** this Court has held as under:-

" In a Full Bench case of *Gopal Dass and others Vs. Ist Addl. District Judge, Varanasi , reported in 1987(1) ARC 281,* it was held :

" In view of these decisions, there can, therefore, be little doubt as to the maintainability of the action of eviction brought by one co- owners without impleaidng the other co-owner."

it was also observed that -

" However , we may point out that the requirement of Rule 15(2) that an application for release of premises owned by co-owners should be signed by all co-owners would be invalid. One co-owner is competent to maintain an action for eviction of the tenant of the entire

premises , since he can be considered as a landlord within the meaning of Section 3(j) of the Act . One co-owner alone would be competent to sign such an application."

In Ram Paricha Vs. Jagannath and others , reported in AIR 1976 SC 2335 it was observed at 2339 as follows:

"Jurisprudentially it is not correct to say that a co-owner of property is not its owner, he owns every part of the composite property alone with others and it cannot be said that he is only a partowner or a fractional owner of the property . The position will change only when partition takes place. It is , therefore, not possible to accept the submission that the plaintiff who is admittedly the landlord co-owner of that premises is not the owner of the premises within the meaning of Section 13(1) as long as he is a co-owner of the property being at same time the acknowledged landlord of the defendants."

In Rang Nath V. State of U.P. and others , reported in 1984 ALJ 455: 1984(1) ARC 642 it was held that a suit for eviction filed under Section 21 of the Act by one of the co-owner -landlord along is maintainable . The same view has also been taken in the case of Smt. Vatsala Nayar Vs.Vandana Tandon and others reported in 1988 (1) ARC 57. Thus, in view of the decision above, it is amply clear that the application filed by the petitioner Smt. Laxmi Devi for the release of the accommodation under Section 21 (1) (a) is clearly maintainability."

14. Same view again reiterated by this Court in the cases of ***Ram Gopal Sharma Vs. Ist Additional District Judge, Meerut and others , 1993 (11) LCD 372*** and ***Vijay Bhatt Vs. Shri Julian Abraham and another , 2004 (3) ARC 519.***

15. Recently by this Court in the case of **Sarika Kedia (Supra)** after placing reliance of the Full Bench Judgment of **Gopal Dass (Supra)** held as under:-

" The primary question regrading release application by one of the co-landlords is concerned in a proceeding under Section 21 of the Act , is competent enough to institute the release application all alone impleading other-co-landlords as proforma opposite parties as it is the instant case . One perusal of the Full Bench decision, it is clear that a release application filed by one of the co-owners is maintainable even if the other co-owners are not impleaded . Secondly requirement of Rule 15(2) of U.P. Urban (Regulation of Letting, Rent and Eviction) Act ,1972 was held to be invalid."

16. In view of the above-said facts, I do not find any illegality or infirmity in the impugned orders dated 26.11.2010 passed by opposite party no.1 and order dated 20.7.2010 passed by opposite party no.2 thereby holding that the release application moved by a co-owner/ landlord without impleading other co-owner/landlord of the shop under the tenancy of the petitioner/ tenant is maintainable.

17. For the foregoing reasons, the writ petition lacks merits and is dismissed as such.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.04.2011

BEFORE
THE HON'BLE S.U. KHAN, J.
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE V.K. DIXIT, J.

Civil Application No. 16(O) of 2010

Gopal Singh Visharad ...Petitioner
Versus.
Jahoor Ahmad and others ...Respondent

With:
Civil Application No. 17(O) of 2010; Civil Application No. 18(O) of 2010; Civil Application NO. 19(O) of 2010; Objection No. 20 of 1989; C.M. Application No. 21(O) of 2010; C.M. Application No. 22(O) of 2010; C.M. Application No. 23(O); C.M. Application No. 24 (O) of 2010

(A)-Code of Civil Procedure-Section 2(2)-Distinction between "judgment" and 'Decree' explained judgment contains reasons and conclusions-but decree contains formal expression of an adjudication determining rights of the parties.

Held: Para 37

The distinction between the "judgment" and "decree", therefore, is that the judgment contains reasons as well as the conclusions thereof but the decree contains formal expression of an adjudication conclusively determining right of parties with regard to all or any of the matter in controversy in the suit. The phrase "all matters in controversy in the suit" would cover the ultimate conclusion and adjudication made by the Court which should form part of decree as it is this part which has to be normally put on for execution as provided in Part II of CPC. It talks of execution of "decree" and not of the judgment. It is for this reason Section 33 provides that after the case has been heard, the Court shall pronounce judgment and on such judgment a decree shall follow. It is the conclusive determination, therefore, which must be expressed formally in the decree and not the conclusions on various grounds/ issues considered by the Judge in judgment. In the context we are of the view that adjudication determining conclusively rights of parties by the Court, which obviously being the majority decision would/should contain the part of decree and not just and mere "expression" given by all the Judges.

(B)-C.P.C. Order XX Rule-7-Date of Decree-should be the date when judgment signed-Signature of judges on decree may be on different date but the date of Decree must bear the same date of judgment.

Held: Para 45

This is also evident from Order XX Rule 8 which provides that decree can be signed by another Judge where the Judge pronouncing the judgment vacated the office without signing decree or if the Court cease to exist, as the case may be. In this case also D.V. Sharma, J. pronounced the judgment and retired on 01.10.2010. Hence there was/is no occasion for him to sign the decree. V.K. Dixit, J. has been nominated to the Bench who can sign the decree but obviously he would not mention the date 30.09.2010 under his signatures. The Judge's signature, therefore, may contain the date when sign the decree but the date of decree would be the date of pronouncement of judgment. The objection, therefore, suggesting that the date of decree must be changed as the date when signed, is hereby rejected.

Case law discussed:
AIR 1946 Madras 348; AIR 1950 Orissa 125(FB); AIR 1954 Hyderabad 104; AIR 1961 MP 223; AIR 1962 Patna 398; AIR 1969 Gujarat 152; (2000) 1 LRI 606

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

1. These objections have been filed against the draft decree prepared by Registrar of this Court pursuant to judgment dated 30.09.2010 whereby four original suits were decided. The suits were initially filed in the Court of Civil Judge, Faizabad wherefrom transferred to this Court pursuant to order dated 10.07.1989 passed on applications made by State of U.P. The matter was heard by a Special Bench consisting of three Judges constituted by Hon'ble the Chief Justice as requested by Division Bench in the order dated 10.07.1989 whereby transfer was allowed.

2. The suits were decided on 30.09.2010. All the three Judges have given their separate decisions. The decree, therefore, has to be prepared in the light of majority decision or unanimous decision, if any, though contained in separate decisions of all the three Judges.

3. For the purpose of preparation of decree the procedure prescribed in the High Court Rules read with Code of Civil Procedure *(hereinafter referred to as "CPC")* has to be observed.

4. The procedure for preparation of decree is contained in Order XX Rules 6, 6-A, 7, 8, 9 and 18 of CPC. In the High Court Rules Chapter VIII Rules 8, 9, 10 and 11 provide procedure for preparation of decree.

5. The Registrar has drawn the decree and put up the same to notice of all the parties as contemplated under Chapter VIII Rule 9 of the High Court Rules. Some of parties have filed their objections which the Registrar has placed for consideration by Court under Chapter VIII Rule 10 of the High Court Rules.

6. We proceed to consider these objections suitwise.

OOS No. 1 of 1989

7. In OOS No. 1 of 1989 *(hereinafter referred to as "Suit-1")* two objections have been filed. First is Civil Application No. 16(O) of 2010 filed on behalf of Nirmohi Akhara. It says that in view of totality of judgement and in view of composite delivery of judgment in all connected suits, entire operative part of judgement of one of us (Sudhir Agarwal, J.) should be made part of decree in view of Order XX Rule 6 CPC. The decree should agree with the judgement. It is important fact which should be inserted in decree. The judgement of Justice Agarwal does contain a map, Appendix-7, which should be made part of decree alongwith details contained in roman digit I to VII in the judgment.

8. Another objection is C. M. Application No. 21(O) of 2010, on behalf of defendant no. 1/1, Farooq Ahmad son of Jahoor Ahmad and defendant no. 10, Sunni Central Board of Waqf. It refers to certain corrections in the draft decree. In the description of defendants, name of defendant no. 1/1 is said to have been written as फारूख अहमद (Farookh Ahmad) in place of फारूक अहमद (Farooq Ahmad). Similarly in respect to defendant no. 9 it says that it should be mentioned completely as Babu Priya Dutt Ram in place of B. Priya Dutt and further since he is no more a remark (now dead) should be given. The next objection is that map Plan 1 prepared by Sri Shiv Shankar, Pleader/Commissioner appointed by Court in Suit-1 as mentioned by S.U. Khan, J. in the operative part of his judgment should be annexed/enclosed with the decree. The date of decree should be changed, as it

ought to be the date when the decree is prepared and signed and not the date of judgment. Lastly it says that operative part of the judgment of Sudhir Agarwal, J. as find mentioned in Para 4566 at pages 5079-5081 should be mentioned in its entirety and Appendix-7 referred to in the said judgement i.e. the operative part should be made part of the decree.

9. Sri Hari Shankar Jain, learned counsel appearing on behalf of Hindu Mahasabha though is not a party in Suit-1 but during the course of oral arguments submits that the decree in respect to Suit-1 is not clear and it is not evident whether the suit has been decreed or not. Therefore, the manner in which it has been prepared is not in accordance with Order XX Rule 6 CPC read with Chapter VIII Rule 8 of High Court Rules.

10. We shall first find out, what relief has been granted to plaintiff in Suit-1 and how the suit has been decided by three judges in their separate decisions. Here we may mention one more aspect. Since the judgment of three Judges are running in several volumes consisting of 8666 pages, we would refer from the relevant volume, page number and para number of the judgment of concerned Judge. Further, fortunately this judgment has also been reported in **2010 ADJ page 1 (Special F.B.)** and it is in three volumes. For convenience we will also refer page number and para number of the said report.

11. The judgment of S.U. Khan, J. has dealt with certain issues of Suit-1 separately but on page 261 (page 109 Volume 1 of the report) it reads as under:

"In respect of findings on other issues (except issues relating to relief) I fully agree with the findings of my brother Sudhir Agarwal, J. subject to any thing contrary stated/found in this judgement of mine."

12. Issue No. 17, Suit-1 related to relief and has been dealt with by S.U. Khan, J. in his judgement at pages 262 to 276 (pages 109 to 114, Vol. I of the report).

13. However a reading of the aforesaid shows that S.U. Khan, J. has not granted any relief to plaintiff of Suit-1. It is true that specifically nothing has been said on the issue of relief of Suit-1 but we are of the view that a relief if not granted, means it has been rejected.

14. Sudhir Agarwal, J. has dealt with issue No. 17, Suit-1 relating to reliefs in paras 4554 and 4555, pages 5072-5073, Vol. 21 (paras 4554-4555, pages 2867-2868, Vol. III of the report); para 4570, page 5088, Vol. 21 (para 4570, page 2876, Vol. III of the report); and, para 4571, page 5091, Vol. 21 (para 4571, page 2878, Vol. III of the report). It decrees Suit-1 partly. The Judge has made a declaration that plaintiff has right of worship at the site of dispute including the part of land which is held by this Court to be the place of birth of Lord Rama according to the faith and belief of Hindus but this right is subject to such restrictions as may be necessary by authorities concerned in regard to law and order, i.e., safety, security and also for the maintenance of place of worship etc. Rest of the relief has been specifically denied.

15. Dharam Veer Sharma, J. in his separate judgment in OOS No. 1 of 1989 at page 33 (page 3489, Vol. III of the report) has held that plaintiff is not entitled for the relief claimed and defendants are also not entitled for special costs as initially the plaintiff who filed the suit is no more. It

thus ordered that suit is dismissed with easy costs.

16. Now we come to the question as to what ought to be the contents of decree.

17. Order XX Rule 6 CPC provides that the decree shall normally specify the relief granted or other determination of suit. In respect to Suit-1 we find that S.U. Khan, J. has not granted any relief to the plaintiff and D.V. Sharma, J. has held that plaintiff is not entitled for any relief and the suit is dismissed. In our view there is no occasion in Suit-1 while preparing the decree to mention other determination when majority has not granted any relief to plaintiff. It is only in the decision of Sudhir Agarwal, J. where suit has been decreed partly and some relief has been granted but that is in minority so far as this aspect is concerned.

18. Now the question would be whether minority decision should also form part of the decree or not.

19. Lots of arguments have been advanced on this aspect. Reference was made to Order XLI Rule 35 CPC which provides where there are more Judges than one and there is difference of opinion among them it shall not be necessary for any Judge dissenting from the judgment of Court to sign the decree. It means that the judgment of minority need not be signed by such Judge.

20. To our mind this provision does not help anyone in preparation of decree hereat inasmuch as this provision is applicable for preparation of decree by Appellate Court. Here we have heard and decided original suits transferred from subordinate court. The High Court has decided suits in original jurisdiction and not as an Appellate Court. No other provision in CPC throws any light on this aspect of the matter.

21. Chapter XV of High Court Rules makes certain provision in respect to original and extraordinary original civil jurisdiction. Rule 22 says trial of suits removed by the Court from any Court subject to superintendence of High Court to be tried and determined by it in exercise of extraordinary original civil jurisdiction and provides that rules contain in Chapter XV shall apply to such suits also.

22. Here also nothing is said about the manner in which decree is to be prepared by this Court particularly when case has been heard by a larger Bench consisting of three Judges and decisions have been given separately by all the Judges constituting the Bench. It is an extraordinary situation. Normally a civil suit when instituted in original course is decided by Presiding Judge of the Court which is obviously a Single Judge. When a suit is transferred from subordinate Court to High Court, then also it is normally decided by a Single Judge. We have not come across of any other illustration where civil suits preferred before the civil judge in subordinate court have been transferred to this Court and tried, heard and decided by a Special Bench consisting of three Judges, more so when all the three Judges have delivered their separate decision. This is totally a novel situation. Learned counsels for the parties also could not assist this Court by placing any other illustration or precedent of a similar kind.

23. Whether minority order of a Bench should make part of decree or not, therefore, has to be considered in the light

of what a "decree" is? It is defined in Section 2(2) CPC and reads as under:

*"2(2) "decree" means the **formal expression of an adjudication** which, so far as regards the Court expressing it, **conclusively determines the rights of the parties** with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include,--*

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default.

Explanation--A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

24. It talks of formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determines rights of parties with regard to all or any of the matters in controversy in the suit.

25. The term "decree" has been defined so as to contain "formal expression" of an adjudication. These words have not been used in Section 2(11) which defines judgement. Though in Section 2(16) the word "order" contains the phrase "formal expression" but it is the formal expression of any decision of civil court and not the formal expression of adjudication. The judgment contains statement given by Judge on the ground of a decree. The decree, therefore, need not contain a statement of reasons given by Judge. Then the question would arise as to what is the meaning of words, "adjudication", "formal" and "expression".

26. In **"Legal Thesaurus-Deluxe Edition 1980"** by William C. Burton at page 11 the term "adjudication" has been defined as under:

***"Adjudication**-act of judgment, adjudgment, arbitrage, arbitrament, arbitration, authoritative decision, award, conclusion, decision, declaration, decree, deliberate determination, determination, determination of issues, disposition, edict, **final determination,** final judgment, finding, irrevocable decision, judgment, judgment on facts, judicial decision, opinion, order, order of the court, proclamation, pronouncement, reasoned judgment, res judicata, resolution, result, ruling, sentence, settled decision, verdict."*

27. In P. Ramanatha Aiyer's **"The Law Lexicon-The Encyclopaedic Law Dictionary with Legal Maxims, Latin Terms, Words and Phrases"** 2nd Edition Reprint 2007 at page 11 the term "adjudication" has been defined as under:

"Adjudication.** The act of adjudicating; the process of trying and determining a case judicially. **The application of the law to the facts and an authoritative declaration of the result."

28. In **"Black's Law Dictionary"** with pronunciations Fifth Edition at page 39 the term "adjudication" has been defined as under:

***"Adjudication.** The formal giving or pronouncing a judgment or decree in a case; also the judgment given. The entry of*

a decree by a court in respect to the parties in a case."

29. In **"Webster's Encyclopedic Unabridged Dictionary of the English Language" 1989** the meaning of word "formal" at page 557 is:

"Formal- *. . . . . being in accordance with usual requirements . . . . . being a matter of form only; perfunctory . . . . . pertaining to the form, shape or mode of a thing, specially as distinguished from the substance."*

30. In **"Legal Thesaurus-Deluxe Edition 1980"** by William C. Burton at page 233 the term "formal" has been defined as under:

"Formal-*accepted, according to established form, affected, approved, businesslike, ceremonial, ceremonious, confirmed, conventional, customary, decorous, fixed, following established custom, following established form, following established rules, formalis, formalistic, in accordance with conventional requirements, inflexible, mannered, observant of form, official, polite, pompous, prescriptive, prim, proper, reserved, rigid, ritual, ritualistic, set, starched, stiff, stilted, systematic, traditional, unbending, uncompromising."*

31. In **"Concise Oxford English Dictionary" 11th Edition** at page 558 the term "formal" has been defined as under:

"Formal-*done in accordance with rules of convention or etiquette . . . having a conventionally recognised form, structure, or set of rules. . . . ."*

32. In P. Ramanatha Aiyer's **"The Law Lexicon-The Encyclopaedic Law Dictionary with Legal Maxims, Latin Terms, Words and Phrases"** 2nd Edition Reprint 2007 at page 750 term "formal" has been defined as under:

"Formal. *Done in due form, or with selemnity; according to regular method. Of the outward form, shape or appearance, not the matter or substance of a thing; ceremonial; required by convention; observance of form and not of the spirit."*

33. The term "expression" is defined in **"Webster's Encyclopedic Unabridged Dictionary of the English Language" 1989** at page 503:

"Expression-. *. . . . . the manner or form in which the thing is expressed in words; wording; phrases . . . . . indication of feeling, spirit, character etc. as on the face, in the voice or in artistic execution . . . ."*

34. In **"Legal Thesaurus-Deluxe Edition 1980"** by William C. Burton at page 216 the term "expression" has been defined as under:

"Expression-*appearance, demonstration, disclosure, display, emergence, evidence, evincement, exhibit, exhibition, exposition, exposure, illustration, indication, instance, mark, presentation, presentment, revealment, revelation, show, showing, sign, token, uncovering."*

35. The term "expression" is defined in **"Concise Oxford English Dictionary" 11th Edition** at page 503:

*"**Expression**-the action of expressing something. A look on someone's face that conveys a particular emotion. A word or phrase expressing an idea. . . ."*

36. The term "expression" in defined in P. Ramanatha Aiyer's **"The Law Lexicon-The Encyclopaedic Law Dictionary with Legal Maxims, Latin Terms, Words and Phrases"** 2nd Edition Reprint 2007 at page 687:

*"**Expression.** A word, phrase or form of speech; the act of manifesting by action or language."*

37. The distinction between the "judgment" and "decree", therefore, is that the judgment contains reasons as well as the conclusions thereof but the decree contains formal expression of an adjudication conclusively determining right of parties with regard to all or any of the matter in controversy in the suit. The phrase "all matters in controversy in the suit" would cover the ultimate conclusion and adjudication made by the Court which should form part of decree as it is this part which has to be normally put on for execution as provided in Part II of CPC. It talks of execution of "decree" and not of the judgment. It is for this reason Section 33 provides that after the case has been heard, the Court shall pronounce judgment and on such judgment a decree shall follow. It is the conclusive determination, therefore, which must be expressed formally in the decree and not the conclusions on various grounds/ issues considered by the Judge in judgment. In the context we are of the view that adjudication determining conclusively rights of parties by the Court, which obviously being the majority decision would/should contain the part of decree and not just and mere "expression" given by all the Judges.

38. The suggestion that decision of Judge constituting minority, if not made a part of the decree, such Judge may not sign the decree, would not apply where the decree is being prepared by the Court in its original jurisdiction as a trial court. The decree may be signed by all the Judges constituting the Bench. It is necessary to make the things clear unequivocally to parties concerned. In this case categorical and specific majority opinion on various aspects between Judges has to be gathered since the observations and expressions have been made with reservations, references etc. To our mind, it means when an adjudication is made and it conclusively determines rights of parties, only that part should form the contents of decree. The majority judgment finds that plaintiff is not entitled to any relief or Suit-1 is to be dismissed.

39. The extraordinary situation demands extra ordinary procedure and methods. We initially, therefore, were inclined to hold that decision of Sudhir Agarwal, J. constituting minority opinion may be made part of the decree but we ultimately after due diligence over the matter decided to follow a method so that things may be apparent and clear to all parties. The way in which we intend to proceed is not inconsistent with any specific provision with respect to preparation of decree contained in CPC or High Court Rules.

40. We, therefore, direct that the decree of Suit-1 should express Court's formal expression of adjudication conclusively determining the rights of parties with regard to all the matters in

controversy in suit. In our view, the decree, therefore, in Suit-1 be prepared as under:

Order of the Court (Majority Order):

S.U. Khan, J.-No relief granted.

D.V. Sharma, J.-Suit is dismissed with easy costs.

41. So far as other objections are concerned, the corrections mentioned in paras 1 of C.M. Application No. 21(O) of 2010 shall be incorporated since no objection has been raised in this regard. With reference to objections contained in paras 2 and 6 of the application, since the conclusion of Sudhir Agarwal, J. is not to be made part of decree, therefore objection in this regard is rejected. The corrections sought in para 3 of the application is misconceived inasmuch as in the array of parties of Suit-1 defendant no. 9 is Superintendent of Police, Faizabad and not B. Priya Dutt or Babu Priya Dutt Ram, hence this correction sought by applicant is rejected.

42. Now we come to objection taken in para 5 of Application No. 21(O) of 2010. So far as the date of decree is concerned, Order XX Rule 7 CPC reads as under:

"7. Date of decree--*The decree shall bear the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree."*

43. It is thus evident from Rule 7 that so far as the date of decree is concerned, it would be the same on which judgment was pronounced but signature of the Judge on decree shall be made or can be made subsequently when he is satisfied that decree has been drawn up in accordance with judgement. Therefore, date under the signature of Judges on decree may be different but date of decree cannot be different from that of the judgment. It has to be the same, i.e., the date when the judgement was pronounced.

44. Almost all the High Courts are unanimous with the view that decree comes into existence on the date of judgment even though it is signed later. As soon as the judgment is pronounced, decree is there. In law it comes into existence though it is not formally prepared and signed on the same date. The expression "date of decree" does not mean the date on which it is signed but the date on which the judgment is actually declared. The provision is very clear and admits no doubt. We are fortified in taking the above view from the decisions in **Ventataraya Vs. Mallappa, AIR 1946 Madras 348; Sri Ram Chandra Mardaray Deo Vs. Bhalu Patnaik, AIR 1950 Orissa 125 (FB); Dagduba Vs. Abdul Gafoor, AIR 1954 Hyderabad 104; Lalchand Vs. Kanhaiyalal, AIR 1961 MP 223; Rajeshwar Rai Vs. Shankar Rai, AIR 1962 Patna 398; Bai Vasanti Vs. Suryaprasad, AIR 1969 Gujarat 152; and, West Bengal Essential Commodities Supply Corpn. Vs. Swadesh Agro Farming and Storage Pvt. Ltd., (2000) 1 LRI 606.**

45. This is also evident from Order XX Rule 8 which provides that decree can be signed by another Judge where the Judge pronouncing the judgment vacated the office without signing decree or if the Court cease to exist, as the case may be. In

this case also D.V. Sharma, J. pronounced the judgment and retired on 01.10.2010. Hence there was/is no occasion for him to sign the decree. V.K. Dixit, J. has been nominated to the Bench who can sign the decree but obviously he would not mention the date 30.09.2010 under his signatures. The Judge's signature, therefore, may contain the date when sign the decree but the date of decree would be the date of pronouncement of judgment. The objection, therefore, suggesting that the date of decree must be changed as the date when signed, is hereby rejected.

46. With respect to objection raised in para 4 of C.M. Application No. 21(O) 2010, since S.U. Khan, J. has not granted any relief, the occasion to annex map Plan 1 as part of decree does not arise.

47. So far as Civil Application No. 16(O) of 2010 filed by Nirmohi Akhara is concerned, we find that basically objections raised therein are similar as are contained in C.M. Application No. 21(O) of 2010 filed on behalf of defendants no. 1/1 and 10 in Suit-1, which we have already discussed and, therefore, both these objections are disposed of as discussed above.

48. The office is directed to prepare decree of Suit-1 as directed above.

OOS No. 3 of 1989

49. Now coming to OOS No. 3 of 1989 (*hereinafter referred to as "Suit-3"*) we find that objections vide Civil Application No. 17(O) of 2010 on behalf of Nirmohi Akhara are in identical terms as Application No. 16(O) of 2010.

50. So far as Suit-3 is concerned, S.U. Khan, J. in his judgment at pages 262 to 276 (pages 109 to 114, Vol. 1 of the report) has not said anything separately but in a composite manner has declared that Nirmohi Akhara is entitled to 1/3 share in the property in dispute.

51. Sudhir Agarwal, J. however in para 4557, page 5073, Vol. 21 (para 4557, page 2868 Vol. III of the report) has held:

"4557. In view of our findings in respect of issues no. 2, 3, 4, 9 and 14 the plaintiff, Suit-3, is not entitled to any relief."

52. Summarizing his findings on various issues, in para 4570, at page 5089, Vol. 21 (para 4570 at page 2877, Vol. III of the report); Sudhir Agarwal, J has said:

"4570. . . . . .

9. Issue 13 (Suit-3)-The plaintiff is not entitled to any relief in view of the findings in respect of issues 2, 3, 4, 14 and 19."

53. In the ultimate conclusions recorded in para 4571, page 5091, Vol. 21 (para 4571, page 2878, Vol. III of the report) he says that Suit-3 is dismissed and parties shall bear their own costs. It reads as under:

"4571. In the result, Suit-1 is partly decreed. Suits 3 and 4 are dismissed. Suit-5 is decreed partly. In the peculiar facts and circumstances of the case the parties shall bear their own costs."

54. D.V. Sharma, J. has said in his separate judgement in OOS No. 3 of 1989 at page 18 (page 3496 Vol. III of the report) as under:

"The suit is dismissed with easy costs."

55. In our view the Court's decision, therefore, in majority is the decision of Sudhir Agarwal and D.V. Sharma, JJ. and, therefore, the decree shall contain the order as under:

The Court's order (by majority of Sudhir Agarwal and D.V. Sharma, JJ.):

"Suit is dismissed. Cost made easy."

56. So far as objections raised in para 1 in Application No. 22(O) of 2010 is concerned, we find that address given for both the defendants no. 6/1 and 6/2 is the same as mentioned in the substitution application, therefore, no change is required. However, we find that word "Bazar" has been printed twice and, therefore, the word "Bazar" at one place shall be deleted. In the description of defendant no. 11 after the word "Singarghat" word "Ayodhya" is already there, hence no correction is required.

57. With respect to objection in para 2 of Application No. 22(O) of 2010 we find that defendant no. 1 in Suit-3 is not Babu Priya Dutt Ram but it is Sri Jamuna Prasad Singh hence no correction is required.

58. So far as objections contained in paras 3 and 4 of the application are concerned, the same stand rejected for the reasons we have already given while discussing similar objections in respect to Suit-1.

59. The other objections on other aspects of the matter stand rejected in view of our discussion already made above being similar.

OOS No. 4 of 1989

60. Now coming to OOS No. 4 of 1989 (*hereinafter referred to as "Suit-4"*) we find that objection vide Civil Application No. 18(O) of 2010 on behalf of Nirmohi Akhara is in identical terms as Application No. 16(O) of 2010.

61. So far as Suit-4 is concerned, S.U. Khan, J. in his judgment at pages 262 to 276 (pages 109 to 114, Vol. 1 of the report) has not said anything separately but in a composite manner has declared that Sunni Central Waqf Board is entitled to 1/3 share in the property in dispute.

62. Sudhir Agarwal, J. in para 4553, page 5072, Vol. 21 (para 4553, page 2867 Vol. III of the report) has held:

"4553. In view of our finding on Issue No. 3 since the suit is barred by limitation, the question of entitlement of any relief to the plaintiff does not arise as the suit itself is liable to be dismissed."

63. Summarizing his findings on various issues, in para 4570, at page 5084, Vol. 21 (para 4570 at page 2874, Vol. III of the report) he (Agarwal, J) said:

"4570. . . . . .

21. Issue 16 (Suit-4)-No relief since the suit is liable to be dismissed being barred by limitation."

64. In the ultimate conclusions recorded in para 4571, page 5091, Vol. 21 (para 4571, page 2878, Vol. III of the report) he (Agarwal, J) says that Suit-4 is

dismissed and parties shall bear their own costs. It reads as under:

"4571. In the result, ... Suits 3 and 4 are dismissed . . . . . In the peculiar facts and circumstances of the case the parties shall bear their own costs."

65. D.V. Sharma, J. has said in his separate judgement in OOS No. 4 of 1989 at page 219, Vol. IV (page 3474 Vol. III of the report) as under:

"The suit is dismissed but the parties shall bear their own costs."

66. In our view the Court's decision is the majority decision consisting of Sudhir Agarwal and D.V. Sharma, JJ. and, therefore, the decree shall contain the order as under:

The Court's order (by majority of Sudhir Agarwal and D.V. Sharma, JJ.):

"Suit is dismissed. Cost made easy."

67. The objections otherwise on this aspect stand rejected in view of our discussion made above.

68. The objections vide para 1 of C.M. Application No. 23(O) of 2010 intends to take note of certain fact which is not borne out from the record. Till the matter was decided or even when the judgment was reserved no such information was placed on record that plaintiff no. 9 (Suit-4) Mahmud Ahmad has expired. No application was also placed on record for bringing his heirs on record. We, therefore, at the stage of preparation of decree cannot direct any such change which requires verification of certain facts. The objection as contained in para 1 of application is hereby rejected.

69. The request made vide para 2 of Application No. 23(O) of 2010 also, we are afraid, cannot be granted. As per order, in the array of parties after the name of Sri Gopal Singh Visharad the word "deleted" is already there. The name of Mahant Suresh Das was impleaded as defendant no. 2/1 and, therefore, it has been mentioned in the same manner. Since there is no order changing the chronology of various defendants and, therefore, at this stage we do not find any justification for changing the chronology of defendants and hence, no correction is required as requested in para 2 of the application. It is accordingly rejected.

70. So far as para 3 of Application No. 23(O) of 2010 is concerned, we find that description of party is the same as contained in original plaint. Hence, no correction can be permitted at this stage. Regarding the death of Priya Dutt Ram, Receiver, it is true that there is no order on record to mention it in the array of parties against defendant no. 9 in Suit-4 but this fact has already been taken note in the judgement of Sudhir Agarwal, J. and, therefore, this fact can be mentioned in array of parties. We direct that in the description of defendant no. 9 in Suit-4 after description of defendant no. 9 following shall be added: "(now dead)".

71. Coming to the request made in para 4 of Application No. 23(O) of 2010 we find that in the description of defendant no. 21 it is already mentioned that he died on 23.07.1994, therefore, nothing further is required.

72. Rest of the request/objections as made in paras 5 and 6 of Application No. 23(O) of 2010 are concerned, the same are rejected for the reasons we have already given while discussing similar objections in regard to Suit-1.

OOS No. 5 of 1989

73. Now we come to OOS No. 5 of 1989 *(hereinafter referred to as "Suit-5").* Three objections have been filed. Civil Application No. 19(O) of 2010 is on behalf of Nirmohi Akhara and it is in identical terms as Application No. 16(O) of 2010.

74. Objection No. 20 of 2010 is on behalf of defendant no. 11, All India Hindu Mahasabha. Sri H.S. Jain, Advocate has submitted that it is not evident from the decree whether it is final decree or preliminary decree. According to him the decree is vague and is not inconformity with Section 2(2) CPC. It should mention the determination of issues on the basis of majority judgment of Court which has not been done. The operative part of the judgment of all the three Judges has been mentioned without indicating as to what adjudication have been made by majority opinion and what rights of parties to suit have been determined. He relied on a decision of Apex Court in **S. Satnam Singh and others Vs. Surendra Kaur and another, 2009(2) SCC 562.**

75. The third application is C.M. Application No. 24(O) of 2010 filed on behalf of defendant no. 4, Sunni Central Board of Waqfs, defendant no. 5, Sri Mohammad Hashim and defendant no. 26, Hafiz Mohd. Siddiqui.

76. We first come to factual objections raised in Application No. 24 (O) of 2010 and then shall discuss other aspects.

77. So far as objection raised in para 1 of Application No. 24 (O) of 2010 is concerned, we find that initially the suit was filed by Sri Deoki Nandan Agrawal impleading himself as plaintiff no. 3 but after his death it was substituted by others and lastly by Sri Triloki Nath Pandey. In the circumstances, we do not find any reason or occasion to make any description of Sri Deoki Nandan Agrawal in the decree particularly considering the fact that description of parties in decree is consistent with what it is in the plaint as it was on the date of judgment. Request, therefore, as made vide para 1 of application is hereby rejected.

78. Similarly with respect to defendant no. 6 the information about his death is not on record and none has sought any substitution. The description of parties in decree is consistent with description as contained in the plaint on the date of judgment, hence we do not find any reason to order any alteration particularly when facts sought to be taken note would require verification. Therefore, the request made in para 2 of the application is also rejected.

79. The request made in para 4 refers to a typing mistake in the name of counsel, Sri Zafaryab Jilani. The same is allowed. In the judgment there is no mistake and it appears that this mistake inadvertently has occurred while drawing the decree by office. Therefore, the correction shall be made and the name of counsel shall be corrected as "Zafaryab Jilani".

80. The objection regarding date of decree taken in para 6 of Application No. 24 (O) of 2010 is rejected for the reasons

we have already given above while discussing similar objections in respect to Suit-1.

81. Now we shall deal with collectively the objections contained in paras 5, 7 and 8 of Application No. 24 (O) of 2010 and the objections raised by Sri H.S. Jain pressing Application No. 20 of 2010.

82. What ought to be the contents of decree we have already discussed. The judgement cited by learned counsel Sri Jain does not lay down any law contrary to what we have already said. In **S. Satnam Singh (supra)**, in para 15 of the judgment, the Apex Court has said:

"15. For determining the question as to whether an order passed by a court is a decree or not, it must satisfy the following tests:

"(i) There must be an adjudication;

(ii) Such adjudication must have been given in a suit;

(iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;

(iv) Such determination must be of a conclusive nature; and

`(v) There must be a formal expression of such adjudication."

83. In the subsequent paragraphs of judgment it has discussed the nature of preliminary decree and final decree, the exposition of law whereof admits no exception.

84. We shall now consider what constitute formal expression of adjudication conclusively determining rights of parties with regard to all or any of the matters in controversy in suit, so far as Suit-5 is concerned.

85. Hon'ble S.U. Khan, J. has discussed Issue No. 30, Suit-5 on pages 262 to 276 (pages 109 to 114, Vol. 1 of the report). On pages 275-276 (pages 113/114, Vol. 1 of the report) S.U. Khan, J. has said:

"Accordingly, in view of the VIIth finding (Supra) all the three parties (Muslims, Hindus and Nirmohi Akhara) are entitled to a declaration of joint title and possession to the extent of one third each and a preliminary decree to that effect is to be passed.

In the matter of actual partition it is only desirable but not necessary to allot that part of property to a party which was in his exclusive use and occupation. Accordingly, in view of peculiar facts and circumstances it is held that in actual partition, the portion where the idol is presently kept in the makeshift temple will be allotted to the Hindus and Nirmohi Akhara will be allotted land including Ram Chabutra and Sita Rasoi as shown in the map, plan I. However, to adjust all the three parties at the time of actual partition slight variation in share of any party may be made to be compensated by allotting the adjoining land acquired by the Central Government."

86. Then the gist of findings have been given on pages 280-283 (115/116, Vol. 1 of the report) which is the summary of findings based whereon the order has been made by S.U. Khan, J. on pages 284-

285 (page 116 of the report) which reads as under:

"Accordingly, all the three sets of parties, i.e. Muslims, Hindus and Nirmohi Akhara are declared joint title holders of the property/ premises in dispute as described by letters A B C D E F in the map Plan-I prepared by Sri Shiv Shanker Lal, Pleader/Commissioner appointed by Court in Suit No.1 to the extent of one third share each for using and managing the same for worshipping. A preliminary decree to this effect is passed.

However, it is further declared that the portion below the central dome where at present the idol is kept in makeshift temple will be allotted to Hindus in final decree.

It is further directed that Nirmohi Akhara will be allotted share including that part which is shown by the words Ram Chabutra and Sita Rasoi in the said map.

It is further clarified that even though all the three parties are declared to have one third share each, however if while allotting exact portions some minor adjustment in the share is to be made then the same will be made and the adversely affected party may be compensated by allotting some portion of the adjoining land which has been acquired by the Central Government.

The parties are at liberty to file their suggestions for actual partition by metes and bounds within three months.

List immediately after filing of any suggestion/ application for preparation of final decree after obtaining necessary instructions from Hon'ble the Chief Justice.

Status quo as prevailing till date pursuant to Supreme Court judgment of Ismail Farooqui (1994(6) Sec 360) in all its minutest details shall be maintained for a period of three months unless this order is modified or vacated earlier."

87. Sudhir Agarwal, J. in his decision has considered Issue No. 30, Suit-5 in paras 4558-4566, pages 5073-5081, Vol. 21 (paras 4558-4566, pages 2868-2872, Vol. III of the report). Having discussed the matter in para 4566 the directions/declarations have been given as under:

***"4566.** In the light of the above and considering overall findings of this Court on various issues, following directions and/or declaration, are given which in our view would meet the ends of justice:*

*(i) It is declared that the area covered by the central dome of the three domed structure, i.e., the disputed structure being the deity of Bhagwan Ram Janamsthan and place of birth of Lord Rama as per faith and belief of the Hindus, belong to plaintiffs (Suit-5) and shall not be obstructed or interfered in any manner by the defendants. This area is shown by letters AA BB CC DD in **Appendix 7** to this judgment.*

(ii) The area within the inner courtyard denoted by letters B C D L K J H G in Appendix 7 (excluding (i) above) belong to members of both the communities, i.e., Hindus (here plaintiffs, Suit-5) and Muslims since it was being used by both since decades and centuries. It is, however, made clear that for the

purpose of share of plaintiffs, Suit-5 under this direction the area which is covered by (i) above shall also be included.

(iii) The area covered by the structures, namely, Ram Chabutra, (EE FF GG HH in Appendix 7) Sita Rasoi (MM NN OO PP in Appendix 7) and Bhandar (II JJ KK LL in Appendix 7) in the outer courtyard is declared in the share of Nirmohi Akhara (defendant no. 3) and they shall be entitled to possession thereof in the absence of any person with better title.

(iv) The open area within the outer courtyard (A G H J K L E F in Appendix 7) (except that covered by (iii) above) shall be shared by Nirmohi Akhara (defendant no. 3) and plaintiffs (Suit-5) since it has been generally used by the Hindu people for worship at both places.

(iv-a) It is however made clear that the share of muslim parties shall not be less than one third (1/3) of the total area of the premises and if necessary it may be given some area of outer courtyard. It is also made clear that while making partition by metes and bounds, if some minor adjustments are to be made with respect to the share of different parties, the affected party may be compensated by allotting the requisite land from the area which is under acquisition of the Government of India.

(v)The land which is available with the Government of India acquired under Ayodhya Act 1993 for providing it to the parties who are successful in the suit for better enjoyment of the property shall be made available to the above concerned parties in such manner so that all the three parties may utilise the area to which they are entitled to, by having separate entry for egress and ingress of the people without disturbing each others rights. For this purpose the concerned parties may approach the Government of India who shall act in accordance with the above directions and also as contained in the judgement of Apex Court in ***Dr. Ismail Farooqi (Supra).***

(vi)A decree, partly preliminary and partly final, to the effect as said above (i to v) is passed. Suit-5 is decreed in part to the above extent. The parties are at liberty to file their suggestions for actual partition of the property in dispute in the manner as directed above by metes and bounds by submitting an application to this effect to the Officer on Special Duty, Ayodhya Bench at Lucknow or the Registrar, Lucknow Bench, Lucknow, as the case may be.

(vii) For a period of three months or unless directed otherwise, whichever is earlier, the parties shall maintain status quo as on today in respect of property in dispute."

88. The summary of findings on different issues is contained in para 4570, page 5091, Vol. 21 (para 4570, at page 2878, Vol. III of the report) and it says:

"20. Issue 30 (Suit-5)-The suit is partly decreed in the manner the directions are issued in para 4566."

89. In para 4571 it concludes by saying that Suit-5 is decreed partly.

90. A wholesome reading of above makes it clear that suit has been partly decreed in the decision of Agarwal, J. in the manner the directions/declarations contained in para 4566 and cost has been made easy on parties vide para 4571. Therefore, in our view, the decree must

contain from the decision of Agarwal, J., the directions/declarations contained in para 4566 and part of para 4571 which provides that the parties shall bear their own costs.

91. D.V. Sharma, J. has decreed Suit-5 in its entirety and in his separate judgment in OOS No. 5 of 1989 on page 174 (Page 3586, Vol. III of the report) after dealing Issue No. 30 he has passed following order:

"Plaintiffs' suit is decreed but with easy costs. It is hereby declared that the entire premises of Sri Ram Janm Bhumi at Ayodhya as described and delineated in annexure nos. 1 and 2 of the plaint belong to the plaintiff nos. 1 and 2, the deities. The defendants are permanently restrained from interfering with, or raising any objection to, or placing any obstruction in the construction of the temple at Ram Janm Bhumi Ayodhya at the site, referred to in the plaint."

92. The order of the Court, therefore, is the majority order consisting of S.U. Khan and Sudhir Agarwal, JJ. In our view, the decree must contain the order as under:

The Court's order (by majority of S.U. Khan and Sudhir Agarwal, JJ.)

S.U. Khan, J.

"Accordingly, all the three sets of parties, i.e. Muslims, Hindus and Nirmohi Akhara are declared joint title holders of the property/ premises in dispute as described by letters A B C D E F in the map Plan-I prepared by Sri Shiv Shanker Lal, Pleader/Commissioner appointed by Court in Suit No.1 to the extent of one third share each for using and managing the same for worshipping. A preliminary decree to this effect is passed.

However, it is further declared that the portion below the central dome where at present the idol is kept in makeshift temple will be allotted to Hindus in final decree.

It is further directed that Nirmohi Akhara will be allotted share including that part which is shown by the words Ram Chabutra and Sita Rasoi in the said map.

It is further clarified that even though all the three parties are declared to have one third share each, however if while allotting exact portions some minor adjustment in the share is to be made then the same will be made and the adversely affected party may be compensated by allotting some portion of the adjoining land which has been acquired by the Central Government.

The parties are at liberty to file their suggestions for actual partition by metes and bounds within three months.

List immediately after filing of any suggestion/ application for preparation of final decree after obtaining necessary instructions from Hon'ble the Chief Justice.

Status quo as prevailing till date pursuant to Supreme Court judgment of Ismail Farooqui (1994(6) Sec 360) in all its minutest details shall be maintained for a period of three months unless this order is modified or vacated earlier."

Sudhir Agarwal, J.

(i) It is declared that the area covered by the central dome of the three domed structure, i.e., the disputed structure being the deity of Bhagwan Ram Janamsthan and place of birth of Lord Rama as per faith and belief of the Hindus, belong to plaintiffs

(Suit-5) and shall not be obstructed or interfered in any manner by the defendants. This area is shown by letters AA BB CC DD in ***Appendix 7*** *to this judgment.*

(ii) The area within the inner courtyard denoted by letters B C D L K J H G in Appendix 7 (excluding (i) above) belong to members of both the communities, i.e., Hindus (here plaintiffs, Suit-5) and Muslims since it was being used by both since decades and centuries. It is, however, made clear that for the purpose of share of plaintiffs, Suit-5 under this direction the area which is covered by (i) above shall also be included.

(iii) The area covered by the structures, namely, Ram Chabutra, (EE FF GG HH in Appendix 7) Sita Rasoi (MM NN OO PP in Appendix 7) and Bhandar (II JJ KK LL in Appendix 7) in the outer courtyard is declared in the share of Nirmohi Akhara (defendant no. 3) and they shall be entitled to possession thereof in the absence of any person with better title.

(iv) The open area within the outer courtyard (A G H J K L E F in Appendix 7) (except that covered by (iii) above) shall be shared by Nirmohi Akhara (defendant no. 3) and plaintiffs (Suit-5) since it has been generally used by the Hindu people for worship at both places.

(iv-a) It is however made clear that the share of muslim parties shall not be less than one third (1/3) of the total area of the premises and if necessary it may be given some area of outer courtyard. It is also made clear that while making partition by metes and bounds, if some minor adjustments are to be made with respect to the share of different parties, the affected party may be compensated by allotting the requisite land from the area which is under acquisition of the Government of India.

(v) The land which is available with the Government of India acquired under Ayodhya Act 1993 for providing it to the parties who are successful in the suit for better enjoyment of the property shall be made available to the above concerned parties in such manner so that all the three parties may utilise the area to which they are entitled to, by having separate entry for egress and ingress of the people without disturbing each others rights. For this purpose the concerned parties may approach the Government of India who shall act in accordance with the above directions and also as contained in the judgement of Apex Court ***in Dr. Ismail Farooqi (Supra).***

(vi) A decree, partly preliminary and partly final, to the effect as said above (i to v) is passed. Suit-5 is decreed in part to the above extent. The parties are at liberty to file their suggestions for actual partition of the property in dispute in the manner as directed above by metes and bounds by submitting an application to this effect to the Officer on Special Duty, Ayodhya Bench at Lucknow or the Registrar, Lucknow Bench, Lucknow, as the case may be.

(vii) For a period of three months or unless directed otherwise, whichever is earlier, the parties shall maintain status quo as on today in respect of property in dispute.

(viii)The parties shall bear there own costs."

93. The map Plan 1 prepared by Shiv Shankar Lal, Pleader/ Commissioner referred to in the order of S.U. Khan, J. and

Appendix-7 referred to in the order of Sudhir Agarwal, J. shall form part of the decree of Suit-5.

94. The Objection No. 20 of 2010, paras 5, 7 and 8 of Application No. 24(O) of 2010 and Application No. 19(O) of 2010 are disposed of accordingly.

ORIGINAL JURISDICTION
SIDE SIDE
DATED:LUCKNOW 16.04.2011

BEFORE
THE HON'BLE ANIL KUMAR,J.

Rent Control No. - 33 OF 2011

Amanattullah S/O Niyamattullah and others. ...Petitioner
Versus
Additional District Judge, Court No.2 Bahraich and others ...Respondent

Counsel for the Petitioner:
Sri Rajeiu Kumar Tripathi
Sri B.R. Tripathi

Counsel for the Respondent:
Sri Manish Kumar

U.P. Urban Building (Regulation of letting Rent and Eviction)-Rule 197-Rule 22-(e)-consolidation and decision of five different cases-pending in same court-objection that term of Eviction used under Section 20, while release can be under Section 21, hence different nature of cases can't be clubbed together-held-misconceived-once release application allowed-eviction of tenant automatically there-prescribed authority rightly exercises its power by consolidated all cases-petition dismissed.

Held: Para 32

In the light of above said facts, submission made by learned counsel for petitioners that Rule 22(e) is applicable to eviction proceeding and not to release started on the basis of an application for release moved by landlord under Section 21(1)(a) of the U.P. Act No. XIII of 1972, so the provisions of Section 22(e) will not be available because the term eviction has been used under Section 20 of the Act, is wholly misconceived argument and rejected in view of the facts stated above, coupled with the fact that once an application for release moved under Section 21(1)(a) of the U.P. Act No. XIII of 1972, then the natural outcome of the same will be eviction of tenant from the premises in respect to which release application has been moved, as such if two or more release applications have been moved by landlord for eviction of tenant then the Prescribed Authority/Appellate authority has got power to consolidate the same as per provisions as provided under Section 34(1)(g) read with Section 22(e) of the Rules framed under the U.P. Act No. XIII of 1972.

Case law discussed:
1999(1) Allahabad Rent Cases, 557

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

1. Heard Sri Rajeiu Kumar Tripathi, learned counsel for the petitioners.

2. By means of present writ petition, petitioners challenged order dated 27.11.2010 passed by Additional District Judge, Court no. 2, Bahraich in Rent Appeal No. 3 of 2007 under Section 22 of the U.P. Act No. XIII of 1972.

3. Facts in brief are that the controversy in the present case relates to six shops which are situated in Mohalla Brahmanipura, Chowk Bazar, Bahraich, purchased by respondent no. 2 to 5 on 28.02.1990 from erstwhile owner Sardar Raj Jodhveer Singh, in which the petitioners are tenants.

4. On 04/06.11.2000, landlord/respondents moved an application for release of six shops under the provisions of Section 21(1)(a) & 21(1)(b) of the U.P. Act No. XIII of 1972. Accordingly, the following cases registered before the Prescribed Authority/5th Upper Civil Judge, Bahraich.

1.Rent Control Case no. 5/2000 (Jyoti Kumar Vs. Abdul Basit).

2.Rent Control Case no. 6/2000 (Jyoti Kumar Vs. Shurur Ahmad).

3.Rent Control Case no. 7/2000 (Jyoti Kumar Rastogi Vs. Abdul Quadir).

4.Rent Control Case no. 8/2000 (Jyoti Kumar Rastogi Vs. Amanatullah).

5.Rent Control Case no. 9/2000 (Jyoti Kumar Rastogi Vs. Aziz Ahmad).

6.Rent Control Case no. 10/2000 (Jyoti Kumar Rastogi Vs. Kudubuddin).

5. On 04.10.2002 a compromise entered between the parties in Rent Control Case no. 10/2000 in respect to shop no. 6, accordingly released in favour of the landlords, so, the controversy before the Prescribed Authority remains in respect to 5 shops under the tenancy of the petitioners.

6. Before the Prescribed Authority, landlord moved an application under Section 34(1)(g) of Act read with Rule 22 of the Rules framed under U.P. Act No. XIII of 1972, to consolidate the five cases i.e. Rent Control Case no. 5/2000 (Jyoti Kumar Rastogi Vs. Abdul Basti), Rent Control Case no. 6/2000 (Jyoti Kumar Vs. Shurur Ahmad), Rent Control Case no. 7/2000 (Jyoti Kumar Rastogi Vs. Abdul Quadir), Rent Control Case no. 8/2000 (Jyoti Kumar Rastogi Vs. Amanatullah), Rent Control Case no. 9/2000 (Jyoti Kumar Rastogi Vs. Aziz Ahmad).

7. Accordingly, the said application registered as Paper No. Ka-17. On behalf of tenants, objection filed inter alia stating therein, that application moved by landlord to consolidate five cases is misconceived, rather the same is in contravention to the provisions as provided under Section 4(A) C.P.C.

8. By order dated 20.02.2002, the Prescribed Authority allowed application(paper no. Ka-17) moved by the landlord to consolidate five cases.

9. Needless to mention herein that order passed by Prescribed Authority for consolidate the cases not challenged by the petitioners and by means of judgment and order dated 29.10.2010, Prescribed Authority/5th Upper Civil Judge, Bahraich allowed all the five release applications of landlord moved under Section 21(1)(a) and 21(1)(b) of the U.P. Act No. XIII of 1972.

10. Aggrieved by the same, petitioners filed Rent Appeal(registered as Rent Appeals nos. 3 of 2007 to 7 of 2007) under Section 22 of the U.P. Act No. XIII of 1972.

11. During the pendency of the Rent Appeals before Appellate Authority, on behalf of petitioners an application moved on 11.03.2010(Annexure no. 7) praying therein that all appeals shall be delinked and heard separately to which objection filed on behalf of landlord-respondents on 16.09.2010 (Annexure no. 8).

12. Appellate Authority after hearing on the point of issue by order dated 27.11.2010 rejected application moved on behalf of the petitioners to hear the appeals separately and further ordered that all the five appeals will be consolidated and heard together and appeal no. 04 of 2007 will be leading appeal.

13. Aggrieved by order dated 27.11.2010 passed by Appellate Authority/Additional District Judge, Court no. 2, Bahraich, present writ petition has been filed by the petitioners.

14. Sri Rajeiu Kumar Tripathi, learned counsel for the petitioners while assailing impugned order submits that six separate proceedings have been initiated by the respondent no. 2-landlord for release of the six different shops against the petitioners in which the defence of each tenants are different, so if the matter in questions are consolidated and heard together, the petitioners will deprive the right to put their defence in respect to comparative hardship and personal need.

15. Sri Tripathi, learned counsel for petitioners further submits that the term 'eviction' has been used under Section 20 of the U.P. Urban Buildings(Regulation of Letting, Rent and Eviction) Act, 1072, while the term 'release' has been used under Section 21 of the U.P. Urban buildings (Regulation of Letting, Rent and Eviction) Act, 1972, and as such both the terms are of different meanings, the same cannot be clubbed together for the purpose of assuming of powers under Rule-22(e) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972. So, respondent no. 1 while passing impugned order, committed manifest error of law and jurisdiction in wrongly assuming of powers of Rule-22(e) of the U.P. Urban Buildings(Regulation of Letting, Rent and Eviction) Rules, 1972 which is not meant for proceedings of 'release'.

16. On behalf of the petitioners it is also argued that impugned order passed by respondent no. 1 thereby consolidating all appeals to be heard together is an action without jurisdiction and the same has been passed wrongly assuming the power under Sub Section (8) of Section 34 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, read with Rule-22(e) of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Rules, 1972, hence impugned order dated 27.10.2010, is void-ab-initio, liable to be set aside.

17. He further submits that Code of Civil Procedure are not applicable to the proceedings of 'release' under U.P. Act No. XIII of 1972 in general, but the same is specifically applicable for the purposes prescribed under Section 34 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, but this aspect of the matter has completely been overlooked by respondent no. 1 while passing the impugned order, so the same is liable to be set aside.

18. I have heard learned counsel for petitioners and gone through the record.

19. So far as factual matrix of the present case are concerned, it is not in dispute that respondent no. 2 is landlord-owner of the shops in question, under the tenancy of the petitioners situated in Mohalla Brahmanipura, Chowk Bazar, Bahraich in respect to which release

applications moved by the landlords-respondent nos. 2 to 5 under Section 21(1)(a) read with 21(1)(b) of the Act separately and in addition to the said release applications one application moved in respect to the shop under the tenancy of one Sri Kutubuddin in respect to which a compromise entered between the parties on 04.10.2002 and released in favour of the landlord.

20. Before Prescribed Authority landlord moved an application to consolidate the Rent case Nos. 5 of 2000 to 9 of 2000, under Section 34(1)(g) of the Rent Act read with Rule 22 of the Rules framed under U.P. Act No. XIII of 1972, to which objections filed by the tenants-petitioners, allowed vide order dated 02.02.2002 (Annexure no. 4) by the Prescribed Authority, not challenged before any higher Forum.

21. Subsequently, thereafter all the rent cases consolidated, heard together and decided by common judgment dated 29.10.2010 by which all the release applications moved by the respondents-landlords are allowed. Aggrieved by the same, five Rent Appeals filed namely Rent Control Appeal No. 3 of 2007 to 7 of 2007 by the petitioners before the respondent no. 1.

22. On 11.03.2010 (Annexure no. 7) an application moved in Rent Control Appeal No. 3 of 2007 to delink all appeals and heard separately to which objection filed by the landlord. After hearing the parties, rejected by means of order dated 27.10.2010 passed by Appellate Authority/Additional Civil Judge, Court no. 2, Baharich holding that all the five appeals will be heard together and Rent Control Appeal No. 3 of 2007 will be leading one.

23. Now, in order to decide the controversy involved in the present case, I feel it is appropriate to have a glance to the relevant provisions as provided under the Rent Control Act and Rules framed therein which governs the field in question, quoted herein under :-

"21: Proceedings for release of building under occupation of tenant-

(1) The Prescribed Authority may on an application of the landlord in that behalf order the eviction of a tenant form the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists , namely-

(a) that the building is bona- fide required either in in its existing from or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, or calling or where the landlord is the trustee of a public charitable trust , for the objects of the trust:

Section 34 (1) (g) of the Act provides as under:-

"Powers of various authorities and procedure to be followed by them.-(1) The District Magistrate , the prescribed authority or any [appellate or revising authority] shall for the purpose of holding any inquiry or hearing [any appeal or revision] under this Act have the same powers as are vested in the Civil Court

under the code of Civil Procedure, 1908 (Act no. V of 1908), when trying a suit , in respect of the following matters, namely-

(g) any other matter which may prescribed."

24. Rule 22(e) of U.P. Urban Buildings (Regulation of Letting , Rent and Eviction) Rules 1972 (hereinafter referred as an 'Rules') , the relevant portion quoted herein under:-

"22. Power under the Code of Civil Procedure, 1908 [Section 34(1) (g).- The District Magistrate , the Prescribed Authority or the Appellate Authority shall, for the purposes of holding any inquiry or hearing any appeal or revision under the Act, shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 when trying a suit , in respect of the following matters, namely-

* * * * * * *

(e) the power of consolidate two or more case of eviction by the same landlord against different tenants;"

Section 38 of the Act provides as under:-

"38. Act to override T.P. Act and Civil Procedure Code.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Transfer of Property Act, 1882 (Act no. IV of 1882) or in the Code of Civil Procedure 1908."

25. In view of the above provisions under U.P. Act no. XIII of 1972, the provisions which have to be considered is Order IVA of the Code of Civil Procedure , 1908 (inserted by U.P. Act no. 57 of 1976 with effect from 1.1.1977) while deciding the present case quoted as under:-

"Order IVA- Consolidation of suits and proceedings- When two or more suits or proceedings are pending in the same court, and the court is of opinion that if it expedient in the interest of justice, it may be order direct their joint trial, where upon all such suits and proceedings may be decided upon the evidence in all or any of such suits or proceedings."

26. Now, reverting to the facts of the present case submission made by the learned counsel for the petitioners that the term 'eviction' has been used under Section 20 of the U.P. Urban Buildings(Regulation of Letting, Rent and Eviction) Act, 1072, while the term 'release' has been used under Section 21 of the U.P. Urban buildings (Regulation of Letting, Rent and Eviction) Act, 1972, and as such both the terms are of different meanings, the same cannot be clubbed together for the purpose of assuming of powers under Rule-22(e) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 so, respondent no. 1 while passing impugned order, committed manifest error of law and jurisdiction in wrongly assuming of powers of Rule-22(e) of the U.P. Urban Buildings(Regulation of Letting, Rent and Eviction) Rules, 1972 which is not meant for proceedings of 'release', is wholly misconceived and incorrect argument because intention and object of the legislature while framing Section 34 of the U.P. Act No. XIII is to lay down the powers of various authorities in respect of

certain specified matters and to prescribe procedure for conducing the proceedings contemplated by this Act, which lays down a special procedure to be followed in the proceedings before the District Magistrate, the prescribed authority, or the appellate authority while holding an enquiry, or hearing the appeal under this Act as the case may be. This Section is a complete code so far as the powers of, and procedure to be followed by, the authorities under this Act are concerned. Section 34 of the Act and Rule 22 of the Rules framed under the Act are both procedural and they do not enlarge the powers conferred on the Prescribed Authority under Section 21(1)(a) or (b) of the Act.

27. Further, the provisions of Sub Section (1) of 34 of the Act to be interpreted in such a manner so that the object of U.P. Act No. XIII of 1972 may not be defeated and correct interpretation of the same is to the effect that Section 34 confers on the District Magistrate, the prescribed authority and an appellate authority, for hearing matter under the Act, same powers as are vested in the civil Court under the Code of Civil Procedure, when trying the suit, in respect of specified matters.

28. From reading of the Act and Rules, it is clear that legislature wanted to give specific power to authorities under the Act and Rules, one of the power is given under Rule 22(e) of Rules confers a power of consolidating two or more cases of eviction by the same landlord against different tenants. Whenever cases are consolidated, the evidence on record is to be read in all the consolidated cases. The provisions of Rule 22(e) of the Rules have been made in order to avoid duplication and multiplicity of the proceedings. The provisions in question specifically permit the consolidation of cases. Hence, there would be no illegality if two cases are consolidated keeping in view the said facts and provisions as provided under Section 4(A) of the Code of Civil Procedure which gives sole discretion to the court before whom two trails are pending to consolidate the same. In the interest of justice, however, it is settle proposition of law that if a discretion is vested in a court/authority, the same could not be exercised in a arbitrary manner but should be exercised judicially after proper application of mind, taking into consideration the fact and circumstances of the case so that no parties can suffer from the discretion so exercised by the court.

29. The provisions as provided under Section 22(e) of the rules has been considered in the case of Kallu Vs. IX Addl. District Judge, Kanpur and others (supra) where the landlord moved applications for release against two tenants for consolidating and this Court has held as under:-

"Whenever cases are consolidated, the evidence on record is to be read in all the cases which are consolidated. The provisions of Rule 22(e) have been made in order to avoid duplication of evidence and multiplicity of the proceeding. These provisions specifically permit the consolidation of the case as it has been done in the court below, consolidating the two cases into one. It may be mentioned that the petitioner did not even the objections the application for consolidation of the cases. In the circumstances, the second objection of the learned counsel is also over-ruled."

30. In the case of ***Abdul Rahman Vs. Ist Addi tonal Civil Judge(Senior Division) Moradabad and another,1999(1) Allahabad Rent Cases, 557*** in para -3 it is held as under :-

"It is true that under Rule 22(e):-

"22. Power under the Code of Civil Procedure, 1908, Section34(1)(g):- The District Magistrate, the Prescribed Authority or the Appellate of Revising Authority shall, for the purpose of holding any inquiry or hearing any appeal or revision under the Act, shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters , namely-

(e) the power of consolidate two or more cases of eviction by the same landlord against different tenants.

(f) The power referred to in Section 151 and 152 of the Code of Civil Procedure, 1908 to made any order for the ends of justice or to prevent the abuse of process of the authority concerned, gives power to consolidate cases filed by one landlord against different tenants. This may held in assessing the bona fide need and comparative hardship. The actual accommodation with the landlord may be known. The Rules 22(e) does not empower the Prescribed Authority to consolidate the cases filed by different landlords against the same tenant. But this does not mean that Prescribed Authority in no other case can consolidate the case. All Courts and Tribunals have inherent power to prevent the abuse of process of law [Busching Schmitz Vs. Menghani, AIR 1977 SC 1569 para 22-23; devise its own procedure subject to statutory prohibition [Prabhakara Vs. D. Panoara, AIR 1976 SC 1803 (para 13)] So has the authorities and the Courts under the Act.The Authorities and the Court have inherent power not because of any legislature but because of their nature and constitution [Indian Bank Vs. Stayam Finre(P) Ltd., 1996(5) SCC 5 (22)]. They have power to pass order in the interest of justice [Gridlays Bank Vs. Central Govt. Industries Tribunal, AIR 1981 SC 606(para6)] or follow procedure unless prohibited [Devendra Nath v. ADJ, Agra, 1977 ARC 475] by law. Rule 22(f) [Kindly see foot no.2] specifically confers inherent power to make any order for ends of justice or to prevent the abuse of the authority concern. The Act does not prohibit consolidation of two cases against same tenant in respect of same premises by different landlords. The only limitation is it should be in interest of justice or to prevent the abuse of the process of law."

Further in para-4 in the case of ***Abdul Rahman (Supra)*** it is also held as under:-

"It is for Prescribed Authority to consider whether it is in interest of justice to consolidate the case or not under inherent powers."

31. In the light of the fact , the position which emerges out, in nut shell, that if two cases are pending before the same court for trial then the court concerned in the interest of justice have a discretion to consolidate the same , the said discretion is to be exercised judicially after proper application of mind not in a mechanical manner and no party can claim order thereof as matter of right to

get both the case consolidated on his request.

32. In the light of above said facts, submission made by learned counsel for petitioners that Rule 22(e) is applicable to eviction proceeding and not to release started on the basis of an application for release moved by landlord under Section 21(1)(a) of the U.P. Act No. XIII of 1972, so the provisions of Section 22(e) will not be available because the term eviction has been used under Section 20 of the Act, is wholly misconceived argument and rejected in view of the facts stated above, coupled with the fact that once an application for release moved under Section 21(1)(a) of the U.P. Act No. XIII of 1972, then the natural outcome of the same will be eviction of tenant from the premises in respect to which release application has been moved, as such if two or more release applications have been moved by landlord for eviction of tenant then the Prescribed Authority/Appellate authority has got power to consolidate the same as per provisions as provided under Section 34(1)(g) read with Section 22(e) of the Rules framed under the U.P. Act No. XIII of 1972.

33. For the foregoing reasons, writ petition filed by the petitioners lacks merit and is dismissed.

34. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.04.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA,J.

Review Petition Defective No. - 95 of 2011

Anis Ahmad @ Chand Babu S/O Habib Ahmad (M/S 221/2011) ...Petitioner
Versus
State Of U.P. Thru Secretary Food & Civil Supplies and others ...Respondents

Counsel for the Petitioner:
Sachin Srivastava

Constitution of India-Article 226-Review Application-on ground of concealment f fact-petitioner got interim order-allegations found established-interim order discharged-Petition itself dismissed for concealment of material fact.

(Delivered by Hon'ble S.N.Shukla, J.)

The applicant has filed the present application to review the order dated 13.1.2011 on the ground that the petitioner succeeded to get the order on the basis of concealment as pursuant to the order impugned dated 16.6.2010 passed by the learned Commissioner, Devi Patan Mandal, Gonda, the enquiry had been concluded by the Sub Divisional Magistrate Nanpara on 22nd September, 2010, whereas the petitioner instituted the petition on 11.1.2011 and succeeded to get an interim order by this Court without disclosing the facts of the enquiry.

In view of the aforesaid facts, I am of the view that once the order impugned passed by the learned Commissioner, Devi Patan Mandal,

Gonda has already been executed and pursuant to that the petitioner was enjoying the same there is no occasion to go back for this Court, therefore, I hereby review the order dated 13.1.2011 passed in Writ Petition No. 221(M/S) of 2011 and dismiss the petition based on concealment of the facts as well as also being infructuous.

Review petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.04.2011

BEFORE
THE HON'BLE RAJIV SHARMA,J.

Misc. Single No. - 108 of 2007

Ram Ujagar and another ...Petitioner
Versus
Smt.Kailasha and others ...Respondent

Counsel for the Petitioner:
Sri Mohd. Saeed Ii,
Sri Mohammad Saeed-Ii

Counsel for the Respondent:
C.S.C.
Sri Y.M.Singh

Code of Civil Procedure-Order XXVI Rule-12-application to appoint commissioner-rejected by Trail Court-upheld by revisional court-ignoring this fact commissioner report a simple piece of evidence-aggrieved party has right to lead evidence in rebuttal or controvert the report.

Held: Para 14

The report of the Commissioner may be relied on after examining the Commissioner not as report forming the basis of an investigation contemplated by Order 26, Rule 9, but as corroborating the evidence of inspection conducted by the Commissioner The view by the lower court therefore that the report can be treated as evidence in the suit under Order 26, Rule 10, Sub-rule (2), C.P.C. is palpably incorrect.

Case law discussed:
[2006 (100) RD 484]; [AIR 1997 Calcutta 59]; AIR 1934 Mad 548; 1954 Ker I.T. 324; AIR 1933 Cal 475

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

1. Heard learned counsel for the parties.

2. By means of instant writ petition, the petitioners have assailed the order dated 20.9.2006 passed by the District Judge, Unnao in Civil Revision No. 139 of 2006 and the order dated 30.8.2006 passed by the Civil Judge (Junior Division), North, Unnao in Regular Suit No. 225 of 1992, as contained in Annexure Nos. 1 and 2, respectively, to the writ petition.

3. Undisputed facts are that husband of opposite party No.1, namely, Raja Ram and father of the opposite parties Nos. 2, 3 and 4 had filed a suit for permanent injunction , which was registered as Regular Suit No. 225 of 1992. Petitioner/Defendants contested the suit by filing written statement. During the pendency of the suit, an application for issuance of Commission was moved by the private/opposite parties, in which, a Survey Commissioner was appointed by the Trial Court for making inspection. After inspection, the Survey Commissioner submitted a report, to which objections were filed by the petitioners. The Trial Court, after rejecting the objections, confirmed the

Survey Commissioner's report vide order dated 29.9.1999.

4. In order to rebut the averments of the report, the petitioners/defendants filed an application under Order XXVI,Rule 12 C.P.C. to appoint a Commissioner, which was rejected by the Trial Court vide order dated 30.08.2006, against which, a revision was preferred and that too was dismissed by the order dated 20.9.2006.

Feeling aggrieved, petitioners have filed the instant writ petition *inter alia* on the grounds that while passing the impugned orders, the Courts below lost sight of the fact that a Commissioner Report was simply a piece of evidence and the aggrieved party, against whom, the report was going, had a legal right to adduce evidence in rebuttal to contradict the Commissioner's report.

5. Learned counsel for the petitioner submits that Order XXVI Rule 9 of the Civil Procedure Code provides for the appointment of Commissioner for local investigation; Rule 11 for examination of accounts; Rule 13 for making partition; and Sub-Rule 3 of Rule 14 provides for confirmation of report or for setting aside the report of a Commissioner but there is no such provision when the Court appoints Commissioner for making local investigation. Sub-rule 2 of Rule 10 of the Civil Procedure Code treats the report of a Commissioner only as a piece of evidence. The parties have a right to cross-examine the Commissioner in open Court touching any of the matters referred to or mentioned in the report. The parties may also adduce evidence either supporting the report of Commissioner or show that the report of the Commissioner is erroneous. In fact, the Court cannot take final view regarding the report of a Commissioner till the evidence is finally concluded and Court applies its mind on the report of the Commissioner. But in the instant case, the petitioners have not been provided ample opportunities by both the Courts below to adduce their evidence against the Commissioner's report.

6. To substantiate their arguments, learned Counsel for the petitioners has relied upon the judgment of this Court rendered in the case of ***Bulaki Lal and others Versus Mewa Lal and another*** [2006 (100) RD 484] and the Supreme Court's report in ***Amena Bibi and others versus Sk. Abdul Haque*** [AIR 1997 Calcutta 59].The contention raised by the learned counsel for the petitioners was that the report of the Commissioner is inadmissible in evidence and cannot be acted upon in view of Order 26.

7. Order 26, Rules 9, 10 and 18 of the Code of Civil Procedure which are relevant in the present controversy are being reproduced hereinafter:

"Order 26, Rule 9: **Commissions to make local investigations:--**

"In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the

persons to whom such commission shall be issued, the Court shall be bound by such rules."

Order 26, Rule 10: **Procedure of Commissioner:--**

"(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) **Report and depositions to be evidence in suit:--**

The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) **Commissioner may be examined in person:** Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made its it shall think fit."

Order 26, Rule 18 deals with the appearance of the Counsel before the Commissioner and it reads as under:-

" Order 26 Rule 18 **Parties to appear before Commissioner :--**

"(1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence."

8. In the case of ***Latchan v. Rama Krishna,*** AIR 1934 Mad 548, the Apex Court had to consider the validity of a commission report prepared in violation of Order 26, Rule 18, C.P.C. The facts were that an order for the issue of a commission was passed without notice to the defendant and no notice was also given to the defendant to be present at the time of inspection by the Commissioner of the property. Hon'ble Cornish, J. observed thus:

"It must be remembered that Rule 10(2), Order 26, Civil P.C., makes the report of the Commissioner evidence in the suit. Therefore it is of importance that the report should not be founded on representations made to the Commissioner, or on matters brought to his notice by one party to the suit alone. Indeed, it is so manifestly improper that one party to a suit should be given a commission and the advantage of a report by the Commissioner without the knowledge of the opposite party that think this alone would be sufficient to justify the interference of a Revision court. But there is Rule 18, Order 26 which says that when a commission is issued under this order the court shall direct that the parties shall appear before the Commissioner in person or by their agents or pleaders. Sub-rule (2) of Rule 18 says that where all or any of the parties do not so appear, the

Commissioner may proceed in their absence. Rule 18 is mandatory, and is intended to ensure that the parties have notice of the appointment of the Commissioner and that they must attend his investigation.

9. The legal validity of a Commissioner's report when there was no notice issued to the defendant before passing the order appointing the Commissioner or before the Commissioner visited the property for investigation was considered in ***V. P. Veerabhadran Pillai v. A. P. Bhagavathi Pillai,*** 1954 Ker I.T. 324 and it was observed:-

"It is improper to get commissioner reports behind the back of one of the parties to a litigation. A decision based on such a report is unsustainable "

10. The object of local investigation under Order 26, Rule 9, C.P.C. as stated in ***Amulya Kumar v. Annada Charan,*** AIR 1933 Cal 475 is not so much to collect evidence which can be taken in court but to obtain evidence with regards to its very peculiar nature can only be had at the spot. Order 26, Rule 9 C.P.C. invests the court with a discretion in passing an order for the issue of a commission and does not provide for the presence of both parties when an order for the issue of commission is passed. There may be cases where the object of the issue of commission itself will be lost by ordering notice to the defendant before passing the order for the issue of commission. In emergent cases it is necessary for the court to pass an order issuing commission without ordering notice. An order for the issue of a commission for local investigation without issue of notice under Order 26, Rule 9, cannot be characterised as without jurisdiction.

11. The only possible view which can be interfered is also clear from the wording of Order 20, Rule 18, C.P.C. which insists on notice to the parties to appear in person or by their agents or pleader in the property at the time of inspection. Notice to the parties is made compulsory only before the investigation is done by the Commissioner. It is open to the Court to pass an ex parte order for the issue of a commission for investigation even before the defendant has entered appearance.

12. Order 26, Rule 10 Sub-rule (2) states that the report and the evidence taken by the Commissioner shall be evidence in the suit. The principle behind Order 26, Rule 18 is obvious Order 26, Rule 10(1) authorises the Commissioner to take evidence regarding those matters which he is competent to investigate and reduce the same in writing and file the same along with his report. It is a principle of natural justice that it is only evidence taken in the presence of a party that could be used against him. It is for this reason that Order 26. Rule 18 contemplates an opportunity to be given to the parties to be present before, the Commissioner in the property at the time of investigation. Thus, the inevitable conclusion is that the court cannot take an absolute and final view till the evidence is finally concluded and the court applies its mind on the report of the Commissioner. To put it differently, the report of the Commissioner is only one of the pieces of evidence amongst other evidence to led by the parties for evidence.

13. It may be added that from the provisions and citations referred to above, it is manifest that the party objecting to Commissioner's report can lead best possible evidence at the time of hearing to countermand the report even if the same was accepted earlier.

14. The report of the Commissioner may be relied on after examining the Commissioner not as report forming the basis of an investigation contemplated by Order 26, Rule 9, but as corroborating the evidence of inspection conducted by the Commissioner The view by the lower court therefore that the report can be treated as evidence in the suit under Order 26, Rule 10, Sub-rule (2), C.P.C. is palpably incorrect.

15. For the reasons aforesaid, I set-aside the impugned orders and allow the petition. However, it is provided that it will be open for both the parties to substantiate the respective contentions regarding the tenability or untenability of the Commissioner's report and its conclusions.

16. As the Regular Suit No.225 of 1992 is pending since 1992, as such, the trial Court shall make earnest endeavour in deciding the suit, after affording opportunity of hearing to the parties and in accordance with law, expeditiously, say, within a period of two years from the date of receipt of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE S.C. CHAURASIA,J.

Service Bench No. - 862 of 1994

Dina Nath Chaube ...Petitioner
Versus
Central Bank of India and others ...Respondent

Counsel for the Petitioner:
Sri A.Mannan
Sri S.C.Mishra
Sri S.K. Singh
Sri Sharad Kumar Chaudhary
Sri Sharad Kumar Srivastava

Counsel for the Respondent:
Sri Vinay Shankar
C.S.C.

Constitution of India, Article 311(2)- Dismissal order-without supplying copy of preliminary inquiry without giving opportunity to produce all the witnesses-non supply of material document-held-vitiate entire disciplinary proceedings-even appellant authority not considered this aspect-held-order not sustainable.

Held: Para 14 & 15

In view of above, so far as the submission of learned counsel for the petitioner that the Disciplinary Authority has not exercised its jurisdiction as an independent adjudicator and not considered the objections filed by the petitioner and also not discussed the evidence available on record except reproducing the observation made by the Enquiry Officer, mechanically, seems to be correct. The Disciplinary Authority should have passed a speaking and reasoned order after considering the evidence led by the parties. It was

obligatory on the part of Disciplinary Authority to record finding with regard to petitioner's objection for non-supply of copy of preliminary enquiry report as well as in not permitting the petitioner to produce all seven witnesses as demanded during the course of enquiry.

The appellate authority has also not applied its mind with regard to aforesaid facts and circumstances while dismissing the appeal mechanically without recording the finding with regard to objection filed by the petitioner. On the sole ground, the writ petition deserves to be allowed leaving it open for the Disciplinary Authority to consider the same while passing a fresh order.

Case law discussed:

(2003) 3 Supreme Court Cases 450; (2000) 3 Supreme Court Cases 454; AIR 1997 Supreme Court 3387; (1999) 7 Supreme Court Cases 739; (2004) 2 UPLBEC 1457; (2004) 2 UPLBEC 1461; (1995) 6 SCC 750; (2005) 1 UPLBEC 354; (2005) 1 UPLBEC 368; (1999) 8 Supreme Court Cases 582; (1999) 8 Supreme Court Cases 584; (2010) 3 Supreme Court Cases 732; (2010) 2 Supreme Court Cases 772; (2010) 2 Supreme Court Cases 786; AIR 1982 Supreme Court 937; (1975) 1 Supreme Court Cases 155; (1975) 1 Supreme Court Cases 156; A.I.R. 1974 SC 1589.

(Delivered by Hon'ble Devi Prasad Singh,J.)

1. The petitioner, who happens to be the Branch Manager of the respondent-bank namely Central Bank of India, has approached this court under Article 226 of the Constitution of India against the impugned order of punishment whereby the petitioner has been removed from service.

2. Heard learned counsel for the petitioner & respondents.

3. According to learned counsel for the petitioner, on the basis of preliminary enquiry report, the chargesheet dated 20 January, 1990, was served on the petitioner containing as many as 29 charges. The preliminary enquiry was conducted by one Sri G.B.Pandey. After receipt of the chargesheet, the petitioner had moved an application for supply of copy of the report of the preliminary enquiry report and other documents. At the face of record, it appears that the same was not provided to the petitioner. The respondent-bank claimed privilege with regard to the enquiry report and declined to supply the same. Under these circumstances, the petitioner could not file reply to the chargesheet. However, the Enquiry Officer had proceeded with the enquiry and recorded the statements of certain witnesses who were duly cross-examined by the petitioner. At the defence stage, the petitioner had moved an application for producing seven witnesses. However, out of seven witnesses, only four witnesses were permitted to be produced, whose names are Shyam Sunder Pandey, Chandra Prakash Mishra, Nakchhed Pandey and Gorakh Nath. On behalf of the prosecution/respondent-bank, only one witness namely Sri G.B.Pandey, who conducted the preliminary enquiry, was produced. Thereafter, the Enquiry Officer has submitted the enquiry report and in pursuance thereof, the impugned order of punishment has been passed by the Disciplinary Authority.

4. While assailing the impugned order, it has been submitted by learned counsel for the petitioner that the privilege claimed by the respondent-bank with regard to non supply of copy of the preliminary enquiry report which is the foundation of the allegation, is not sustainable and the Disciplinary Authority has got no right to claim any privilege.

5. Submission of learned counsel for the petitioner is that since the preliminary enquiry report has been relied upon and the sole witness on behalf of the prosecution is the officer concerned who has conducted the preliminary enquiry, hence, preliminary enquiry report is a material document and non furnishing of the copy of the preliminary enquiry report had caused serious prejudice to the petitioner.

6. It has also been submitted by learned counsel for the petitioner that because of non supply of documents alongwith the copy of the preliminary enquiry report, the petitioner could not submit reply to the chargesheet. After receipt of the show cause notice alongwith the enquiry report, the petitioner has submitted reply and stated that non supply of copy of preliminary enquiry report has caused serious prejudice. The Enquiry Officer has not called the material witnesses inspite of the application moved by the petitioner. It has also been submitted that impugned order passed by the Disciplinary Authority is a non speaking one. Neither the reply submitted by the petitioner has been considered nor the evidence led by the petitioner in the form of defence witnesses has been taken into account while passing the impugned order of punishment.

7. Further submission of learned counsel for the petitioner is that there is no allegation against the petitioner with regard to embezzlement or causing loss to the bank.

8. So far as first submission of learned counsel for the petitioner that the impugned order is a non speaking one and non-consideration of objection submitted by the petitioner, seems to be correct. A perusal of the impugned order reveals that the Disciplinary Authority had reproduced the charges in the impugned order and thereafter, referred the observation made by the Enquiry Officer with regard to those charges and thereafter recorded finding, but, while doing so, the Disciplinary Authority had not discussed nor referred or taken into account the statements given by the defence witnesses, and how and under what circumstances, the Disciplinary Authority has arrived to the conclusion with regard to finding of guilt of the petitioner.

9. Now, it is settled proposition of law that it is obligatory on the part of the Disciplinary Authority to record a specific finding after taking into account the evidence led by the parties and then record a finding.

10. It is also settled proposition of law that non furnishing of material documents and that too like the preliminary enquiry report vitiates the enquiry proceedings.

11. Learned counsel for the petitioner has relied upon the following Judgments reported in :-

1. (2000) 3 Supreme Court Cases 450, U.P .State Road Transport Corpn. and Others Versus Mahesh Kumar Mishra and Others

2.(2000) 3 Supreme Court Cases 454, Rang Bahadur Singh and Others Versus State of U.P.

3. AIR 1997 Supreme Court 3387, Union of India and another Versus G.Ganayutham (Dead) by L.Rs.

4. (1999) 7 Supreme Court Cases 739, Yoginath D. Bagde Versus State of Maharashtra and Another

5. (2004) 2 UPLBEC 1457, Kailash Nath Gupta, Ex-Recovery Officer, Allahabad Bank Versus Enquiry Officer, Allahabad Bank, Regional Officer, Allahabad and others

6. (2004)2 UPLBEC 1461, Raj Kishore Yadav Versus U.P. State Public Service Tribunal, Indra Bhawan, Lucknow and others

7. (1995)6 SCC, 750 Union of India and another Versus B.C.Chaturvedi.

8. (2005) 1 UPLBEC 354, Ganesh Santa Ram Sirur Versus State Bank of India and another

9. (2005) 1 UPLBEC 368, Sanjeev Gupta and others Versus Union of India and another

10. (1999) 8 Supreme Court Cases 582, Hardwari Lal Versus State of U.P. and others.

11. (1999) 8 Supreme Court Cases 584, S.Jamaludeen and others Verus High Court of Madras and others

12. (2010) 3 Supreme Court Cases 732, Secretary and Curator, Victoria Memorial Hall Versus Howrah Ganatantrik Nagrik Samity and others.

13. (2010) 2 Supreme Court Cases 772, State of Uttar Pradesh and Others Versus Saroj Kumar Sinha

14. (2010) 2 Supreme Court Cases 786, Tamil Nadu Housing Board Versus L. Chandrasekaran (dead) by Lrs. And others

15. AIR 1982 Supreme Court 937, State of Uttar Pradesh Versus Mohd. Sharif (dead) through L.Rs.

16. (1975) 1 Supreme Court Cases 155, the State of Punjab Versus Bhagat Ram

17. (1975) 1 Supreme Court Cases 156, Smt. Hardeep Kaur and Another Versus the State of Punjab and another

12. In the case of ***Secretary and Curator, Victoria Memorial Hall(Supra),*** their Lordships of Hon'ble Supreme Court, held as under:-

"40. It is a settled legal proposition that not only an administrative but also a judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of justice-delivery system, to make known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice."The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind."(Vide State of Orissa V. Dhaniram Luhar and State of Rajasthan V. Sohan Lal)

41. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum.(Vide Raj Kishore Jha V. State of Bihar, SCC p. 527,para 19; Vishnu Dev Sharma V. State of U.P., Sail Vs. STO, State of Uttranchal V. Sunil Kumar Singh Negi, U.P.SRTC V. Jagdish Prasad Gupta, Ram Phal V. State of Haryana, Mohd Yusuf V. Faij Mohammad and State of H.P. V. Sada Ram."

13. In the case of State of U.P. and others (Supra), Hon'ble Supreme Court while discussing the right and duty of the Disciplinary Authority, held as under :-

"28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority /Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case, the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

29. Apart from the above, by virtue of Article 311(2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee.

30. When a departmental enquiry is conducted against the government servant it cannot treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service.

14. In view of above, so far as the submission of learned counsel for the petitioner that the Disciplinary Authority has not exercised its jurisdiction as an independent adjudicator and not considered the objections filed by the petitioner and also not discussed the evidence available on record except reproducing the observation made by the Enquiry Officer, mechanically, seems to be correct. The Disciplinary Authority should have passed a speaking and reasoned order after considering the evidence led by the parties. It was obligatory on the part of Disciplinary Authority to record finding with regard to petitioner's objection for non-supply of copy of preliminary enquiry report as well as in not permitting the petitioner to produce all seven witnesses as demanded during the course of enquiry.

15. The appellate authority has also not applied its mind with regard to aforesaid facts and circumstances while dismissing the appeal mechanically without recording the finding with regard to objection filed by the petitioner. On the sole ground, the writ petition deserves to be allowed leaving it open for the Disciplinary Authority to consider the same while passing a fresh order.

16. Supreme Court in a case reported in ***A.I.R. 1974 SC 1589, Krishna Chandra Tandon Vs The Union of India,*** held that preliminary enquiry report is material piece of of evidence, and its non supply should be violative of principles of natural justice. Hence, writ petition deserves to be allowed.

17. A writ in the nature of certiorari is issued quashing the impugned orders dated 16-10-1992, 29-04-1993 and 13-03-1994, as contained in Annexure Nos. 3,5 & 6 to the writ petition, with all consequential benefits with liberty to pass fresh order keeping in view the observations made in the body of the judgment.

18. Since, the petitioner has already retired from service, let Disciplinary Authority take a decision, in accordance to law, after taking into account the objection filed by the petitioner to the enquiry report as well as evidence led by the parties, expeditiously say preferably within a period of three months from the date of receipt of certified copy of this order. No cost.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.04.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA,J.

Criminal Misc. Case No.1003 of 2011

Kulwant Singh ...Petitioner
Versus
State of U.P. and another ...Opp.parties

Code of Criminal Procedure-Section 319-summoning order-although Magistrate failed to record the reason of its satisfaction for summoning the applicant-bare perusal of statement of witness-summoning order-held-proper-so far direction of separate Trail not supported by any reasonable ground-to this extent-application partly allowed.

Held: Para 14 and 16

In the present case the learned Magistrate has shown his satisfaction to summon the petitioner for trial on the basis of the statement of witnesses, being satisfied that the petitioner is liable to be tried. Though the learned Magistrate had to record his satisfaction in specific words as to what higher standard he has adopted to satisfy himself for summoning the petitioner, but he has failed to do so, however, keeping in view the statement of witnesses, I am of the view that the petitioner has rightly been summoned for trial, therefore, I do not feel it appropriate to interfere in the order impugned only on the ground that the learned Magistrate has failed to disclose the material of his satisfaction for consideration of the application and for summoning the petitioner for trial.

However, in light of the aforesaid facts, I am of the view that the case is not such a stage as it permits the separation of petitioner's trial from other co-accused, therefore, the direction of the learned

Magistrate for separation of petitioner's trial from other accused being not supported with any reasonable ground, is hereby quashed and it is observed that the petitioner shall be tried together with the co-accused. To this extent the petition is allowed and for other reliefs the petition is dismissed.

Case law discussed:

Crl. Misc. Case No. 2532 of 2010 (U/S 482); (2009) 16 SCC 785; (2009) 13 SCC 608; (2009) 16 SCC 46; (2007) 4 SCC 773; (1979) 1 SCC 345; (1983) 1 SCC 1; (2010) 1 SCC 250; Criminal Misc Case No. 3907 of 2008

(Delivered by Hon'ble Shri Narayan Shukla,J.)

1. Heard Dr.Salil Kumar Srivastava, learned counsel for the petitioner, Mr.R.K.Singh, learned counsel for opposite party No.2 and Mr.Rajendra Kumar Dwivedi, learned Additional Government Advocate for the State.

2. The petitioner has challenged the order dated 11th of February, 2011, passed by the learned Additional Sessions Judge, Lakhimpur Kheri in Sessions Trial No.297 of 2008, on the application moved under Section 319 of the Code of Criminal Procedure. By means of order impugned, on the basis of statement of P.W.1 Harjinder Singh (complainant) and P.W.2 Jeet Singh (injured witness), the petitioner, in exercise of power provided under Section 319 of the Code of Criminal Procedure, has been summoned for trial and the case of trial has been separated from other co-accused.

3. The petitioner has challenged the order mainly on the ground that the learned Trial court has not recorded any finding to the effect that on the basis of evidence on record there is possibility of conviction of petitioner. It is stated that in absence of any such finding, the order passed by the learned Trial Court is unsustainable in the eye of law. In support of his submission he cited the following cases decided by this court as well as by the Hon'ble Supreme court:-

Rajol and others versus State of U.P. And another, passed in Crl.Misc. Case No.2532 of 2010 (U/s 482).

4. In the said case this court after considering the several decisions on the point held that the court considering the evidence for the purpose of Section 319 Cr.P.C. is not legally required to evaluate the evidence as it is ordinarily done while rendering the final judgment, but the court has to see whether or not, the evidence on record appeals to the reason for the purposes of Section 319 Cr.P.C. and the story narrated by the witness, against the person sought to be summoned, is not improbable and absurd and a conviction is possible on such statement, if un-controverted.

5. In the case of **Hardeep Singh versus State of Punjab, reported in (2009) 16 SCC 785,** the Division Bench of two Hon'ble Judges of the Supreme Court has referred two questions for consideration of a Bench of three Hon'ble Judges. The second question is relevant in the present case, which is reproduced hereunder:-

(ii) What is the test and what are the guidelines of exercising power under Section 319(1) Cr.P.C.? Whether such power can be exercised only if the court is satisfied that the accused summoned in all likelihood would be convicted?

The aforesaid referred question has been noticed by the Hon'ble Supreme

Court in the case of **Harbhajan Singh and another versus State of Punjab and another, reported in (2009) 13 SCC 608,** but it has been observed that "if a judicious discretion exercised by the Court had led it to pass an order under Section 319 of the Code, the High Court exercising a revisional jurisdiction would interfere therewith, inter alia, in a case where legal principles laid down by this court had not been satisfied.

6. In the case of **Sarabjit Singh and another versus State of Punjab and another, reported in (2009) 16 SCC 46,** the Division Bench of two Hon'ble Judges of the Supreme court has also taken note of the aforesaid reference and observed as under:-

"21.An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned."

7. The Supreme Court further held that the higher standard be set up for the purpose of invoking the jurisdiction under section 319 of the Code.

8. In the case of **Y.Saraba Reddy versus Puthur Rami Reddy and another, reported in (2007) 4 SCC 773,** the Division Bench of three Judges of the Hon'ble Supreme Court considered the scope of Section 319 of the code of Criminal Procedure and took note of earlier decisions i.e. **Joginder Singh versus State of Punjab, reported in (1979) 1 SCC 345** as well as the **Municipal Corporation of Delhi versus Ram Kishan Rohtagi, reported in (1983) 1 SCC 1**. The relevant paragraph 10 and 11 of the case of **Municipal Corporation of Delhi** (Supra) are reproduced hereunder:-

"10. On a careful reading of Section 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with the other accused persons, if the court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. Of course, as evident from the decision in **Sohan Lal v. State of Rajasthan, reported in (1990) 4 SCC 580** the position of an accused who has been discharged stands on a different footing.

11. Power under Section 319 of the Code can be exercised by the court suo

motu or on an application by someone including the accused already before it. If it is satisfied that any person other than the accused has committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word 'evidence' in Section 319 contemplates the evidence of witnesses given in court. Under sub-section (4)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of sub-section (4)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned."

9. After considering the aforesaid observations the Hon'ble Supreme Court held that the trial court shall take steps for proceeding against the respondents in terms of Section 319 of the Code of Criminal Procedure.

10. In the case of **Suman versus State of Rajasthan and another, reported in (2010) 1 SCC 250,** the Hon'ble Supreme Court held as under:-

"27. In view of the settled legal position as above, we hold that a person who is named in the first information report or complaint with the allegation that he/she has committed any particular crime or offence, but against whom the police does not launch prosecution or files charge-sheet or drops the case, can be proceeded against under Section 319 CrPC if from the evidence collected/produced in the course of any inquiry into or trial of an offence, the court is prima facie satisfied that such person has committed any offence for which he can be tried with other accused. As a corollary, we hold that the process issued against the appellant under Section 319 CrPC cannot be quashed only on the ground that even though she was named in the complaint, the police did not file charge-sheet against her."

11. In view of the settled view of the Hon'ble Supreme court as has been discussed, here-in-above, it is not in dispute that in dealing with the case under Section 319 of the Code, the trial court has been permitted to proceed in terms of Section 319 of the Code. Section 319 of the Code is extracted below:-

"319.Power to proceed against other persons appearing to be guilty of offence.-(1) Whether, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such persons had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced:"

12. As is evident from the aforesaid provisions, it does not require anywhere for the court to record any such finding as against the person who has been summoned, the evidence is such as to lead his conviction unless it is rebutted, therefore, keeping in view the extra ordinary power provided under this Section, it can be said that the learned Magistrate in exercising the power provided under this very Section has to take extra ordinary care, for which he can adopt some higher standard to arrive at satisfaction for calling upon the witness under Section 319.

13. This court has already examined the same question in the **Criminal Misc. Case No.3907 of 2008:Shankar and another versus State of U.P. And another and in Criminal Misc. Case No.654 of 2011 (U/s.482 Cr.P.C.):Mohd.Arif and another versus State of U.P.and another** and has observed that there is no restriction on the learned Magistrate to summon any person for trial, if at any stage of proceeding the trial court is satisfied that on the basis of evidence collected/produced in the course of inquiry into or trial of the offence, that such person has committed any offence, for which he can be tried with other accused.

14. In the present case the learned Magistrate has shown his satisfaction to summon the petitioner for trial on the basis of the statement of witnesses, being satisfied that the petitioner is liable to be tried. Though the learned Magistrate had to record his satisfaction in specific words as to what higher standard he has adopted to satisfy himself for summoning the petitioner, but he has failed to do so, however, keeping in view the statement of witnesses, I am of the view that the petitioner has rightly been summoned for trial, therefore, I do not feel it appropriate to interfere in the order impugned only on the ground that the learned Magistrate has failed to disclose the material of his satisfaction for consideration of the application and for summoning the petitioner for trial.

15. So far as the separation of trial is concerned, the learned counsel for the respondent No.2 Mr.R.K.Singh, informs that till date the petitioner has not surrendered before the court below, whereas the case of the other accused is at the stage of prosecution evidence, therefore, the petitioner's trial has rightly been separated from the other co-accused.

16. However, in light of the aforesaid facts, I am of the view that the case is not such a stage as it permits the separation of petitioner's trial from other

co-accused, therefore, the direction of the learned Magistrate for separation of petitioner's trial from other accused being not supported with any reasonable ground, is hereby quashed and it is observed that the petitioner shall be tried together with the co-accused. To this extent the petition is allowed and for other reliefs the petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.04.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE S.C. CHAURASIA,J.

Service Bench No. - 1186 of 2007

Ram Mohan Dayal ...Petitioner
Versus
State of U.P. Thru Prin. Secy. Irrigation and another ...Respondent

Counsel for the Petitioner :
Umesh Kumar Srivastava

Counsel for the Respondent:
C.S.C.

Constitution of India, Article 226-Higher Pay Scale-denied on ground the petitioner not completed 18 years continuous service as Asst. Engineer and after retirement it can not be given-held-misconceived-when promotion of Petitioner approved by Commission against vacancy 88-89-entitled for counting the period of national promotion as such entitled for next higher pay scale particularly when all the juniors to petitioner have been given-petitioner can not be discriminated on his retirement .

Held: Para 15 and 16

The finding recorded by the Government while dismissing the representation by impugned order dated Ist May, 2007 seems to be incorrect appreciation of law. Even if petitioner has been retired from service and the U.P. Public Service Commission has sent its approval after the petitioner's age of superannuation, the right available to petitioner in accordance with the government order dated 26th Sept., 1992 shall not extinguish. Petitioner shall be entitled for higher pay scale in accordance with the government order. More so, it has been submitted by the petitioner's counsel that all other Assistant Engineers, whose services have been regularized with due approval by the order dated Ist Sept., 1992 have been given higher pay scale. Accordingly, the petitioner cannot be treated differently from the persons who have been given higher pay scale after regularization of service with due approval of the Commission.

Keeping in view the order dated Ist Sept., 1997, it appears that services of several persons was regularised collectively hence the petitioner cannot be treated differently. Petitioner also falls in the same category of the employees who have been regularized in terms of approval granted by the Commission vide order dated Ist Sept., 1997. Giving a different treatment denying the promotional avenues or higher pay scale to the petitioner amounts to hostile discrimination on the part of the State authority.

Case law discussed:
2005 (23) LCD 173

(Delivered by Hon'ble Devi Prasad Singh,J.)

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

2. This writ petition under Article 226 of the Constitution of India has been preferred against the impugned order dated 1.5.2007 by which the petitioner's representation has been rejected declining

to grant the higher pay-scale in terms of Government Order dated 26th Sept., 1990 (Annexure-11 to the writ petition) on the ground that the petitioner has already retired from service. While he was in service, he was not a regular employee and attained the age of superannuation before receiving the recommendation of U.P. Public Service Commission (hereinafter referred to as "the Commission").

3. The Petitioner was initially appointed on the post of Junior Engineer (Civil) in the Irrigation Department and joined on the said post on 4th August, 1957. His services were approved by the Commission on the said post and confirmed from 1.1.1966. A seniority list was prepared in which the petitioner was placed at serial No. 595 and two other persons namely Jagdish Pradesh Saxena and Jagdish Prasad Gupta were placed at serial No. 618 and 615 respectively against the 25% vacancies falling within a quota of promotees in the cadre of Assistant Engineer (Civil). The petitioner was promoted on ad-hoc basis on 14.8.1989 (Annexure-3 to the writ petition).

4. Keeping in view a length of satisfactory service of the petitioner, the petitioner was entitled for regularisation under the provision of The U.P. Regularisation of Ad-hoc Promotion (on posts within the purview of Public Service Commission) Rules 1988 (hereinafter referred to as "the Rule"). However, he could not be regularized under the Rule during the period of his employment. Petitioner attained the age of superannuation on 31.12.1994.

5. It appears that before the retirement of the petitioner the State Government had sent the case of the petitioner and other persons with due recommendation to the Commission for regularisation. The Commission vide his order dated 1st Sept., 1997 approved the proposal of the State Government for regularization of petitioner and other similarly situated persons under the Rule (supra). The copy of the approval of the Commission has been filed as Annexure-6 to the writ petition. From perusal of the approval of the Commission, it appears that the petitioner's services were regularized against the vacancies of 1988-89 along with other similarly situated persons.

6. According to the learned counsel for the petitioner, under the government order dated 26th Sept., 1992 all the Assistant Engineers who have rendered five years of satisfactory service were entitled for pay of higher pay scale i.e. Rs. 3000-4500 and after 18 years of satisfactory service they were entitled for enhancement of pay i.e. Rs. 3700-5000. Further submission of the petitioner's counsel is that since Sri Jagdish Pradesh Saxena and Sri Jagdish Prasad Gupta, juniors to the petitioner, were promoted then the petitioner is also entitled to be promoted.

7. Earlier, the petitioner filed a Writ Petition No. 1453 (S/B) of 2006 with the prayer that he may be granted the higher pay-scale of Rs. 3000-4500 in terms of government order dated 26th Sept., 1992 and 23rd August, 1997. A division Bench of this Court vide judgment and order dated 18th Oct., 2006 had directed the State Government to take a decision on

petitioner's representation after taking into account the government order.

8. By the impugned order dated 1.5.2007 the petitioner's representation has been rejected mainly on the ground that since the petitioner was not a regular employee during the course of employment, therefore, he is not entitled for higher pay-scale and it has been further observed in the impugned order that before the receipt of the recommendation of the Commission, the petitioner has attained the age of superannuation.

9. While assailing the impugned order, it has been submitted by the learned counsel for the petitioner that the petitioner's services have been regularized against the vacancy of 1988-89. Some persons junior to the petitioner were extended the benefit of the higher pay scale.

10. The submission of learned counsel for the petitioner is that since the U.P. Public Service Commission has sent a recommendation and regularized the services with retrospective effect i.e. from 88-89 , the petitioner has become entitled for higher pay scale.

11. On the other hand learned Standing Counsel submitted that since the petitioner has already attained the age of superannuation before the receipt of recommendation from the U.P. Public Service Commission, he is not entitled for higher pay scale. The learned Standing counsel defended the impugned order and reiterated the observation of Special Secretary of the Government of U.P.

12. While assailing the impugned order, attention of this Court has been invited to the case reported in **2005 (23) LCD 173 Dhan Pal Singh Vs. State of U.P. and another**.

13. In the case of Dhan Pal Singh (s) the Government order dated 25th June, 1984 has been relied upon for grant of notional promotion. The Government order provides that even if an employee retired or died, he shall not be debarred of service benefits. On the basis of seniority in terms of government order notional promotion should be given to the employees who died during the course of employment or even after retirement. After considering the definition and meaning of notional promotion it has been held in case of Dhan Pal Singh (s) decided by one of us (Devi Prasad Singh,J.) that employee's right will not be extinguished because of retirement from service. Relevant portions of the judgment are reproduced as under:

"Petitioner's counsel further submits that the provision contained in Government Order dated 25.6.2004 though speaks as a special reference for the retired employees or the employees who expired, for the purpose of grant of notional promotion but it does not exclude the serving employees. Para 2 of the G.O. dated 25.6.1984 for convenience is reproduced as under:

इस विषय पर शासन के समक्ष यह प्रश्न उठाया गया है कि क्या उन कर्मियों के नाम भी पात्रता सूची में सम्मलित किये जायें जो यदि समय से चयन की कार्यवाही किये जाने का पात्रता सूची में रखे जाते तथापि चयन की कार्यवाही में विलम्ब होने के कारण पात्रता सूची तैयार करते समय सेवा निवृत्त हो चुके है अथवा उनकी मृत्यु हो चुकी है। इस प्रश्न का गहराई से विचारोपरान्त शासन इस निष्कर्ष पर पंहुचता है कि सूची में इन सभी कर्मियों के नाम सम्मिलित करने

चाहिए जिनके नाम पात्रता सूची में होते यदि चयन समय से कराया गया होता, भले ही चयन के समय उनमें अब कुछ एक कार्मिक सेवा निवृत्त हो चुके हों अथवा उनकी मृत्यु हो चुकी हो। यदि ऐसा नहीं किया जाता तो ऐसे मृत्यु सेवा निवृत्त कार्मियों को ऐसे लाभ से वंचित रहना पड़ सकता है जो समय से चयन के उपरांत उन्हे अनुमन्य हो सकती है। अतः पात्रता सूची में उपर्युक्त कार्मिकों के नाम शामिल करके प्रोन्नति हेतु नियमानुसार उनकी उपयुक्तता पर विचार किया जाना चाहिए तथा उपयुक्त पाए जाने पर उन्हे सम्बन्धित वर्ष दिनांक से नोशनली प्रोन्नति की जानी चाहिए ताकि उन्हे वह समस्त लाभ अनुमन्य किये जा सके जो वे प्राप्त करते यदि प्रोन्नति की कार्यवाही समय से हो जाती। नोशनल प्रोन्नति देने पर संबंधी कार्मिक की मृत्यु अथवा सेवा निवृत्ति जैसी भी स्थिति हो की तिथि को सम्बन्धित पदों की रिक्त मानते हुए उन्हे नियमानुसार भरा जाना चाहिए। उर्पक्त नियमावली 1970 के नियम 21 के अनुसार प्रत्येक वर्ष के सम्बन्ध में प्रथक–प्रथक पात्रता सूची तैयारी करने का आशय भी यहीं है कि सम्बन्धित वर्ष में जो कार्मिक पात्रता सूची मे सम्मिलित किये जाने हेतु अर्ह थे उनके नाम उस वर्ष की पात्रता सूची में रखे जायेंगे भले ही चयन की कार्यवाही के समय कार्मिक की मृत्यु हो चुकी हो अथवा वह सेवा निवृत्त हो चुका हो।

3. At the face of record the Government Order does not exclude the serving employee. It only specify that even if employee dies or retired shall be considered for placement in the serniority list. According to THE NEW LAXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE the words "notion" and "notional" has been defined as under:

"notion-a concept, idea, his notion of a good novel is not hers, a general concept, the notion of law, a theory or idea lacking precision or certainty, the notion is not fully worked out in his mind, an understanding, she had no notion what he meant, a whim or fancy, his head was full of strange notions, inexpensive small useful articles (hairpins, needles, thread, combs etc.) sold in a store"

"notional-belonging to the realm of ideas, not of experience, (or things) existing only in the mind."

The word notional in other dictionaries (as comes out from internet) has been defined as under:

NOTIONAL

1. Conceptional, ideational, fanciful, speculative, fanciful, imaginary, imagined.

2. Being or of the nature of a notion or concept

3. Indulging in or influenced by fancy

4. Not based on fact or investigation

5. Not based on fact; dubious

6. Having descriptive value as distinguished from syntactic category.

4. In view of above, for granting of notional promotion it is not necessary that the person concerned has actually worked on the said post firstly, he may be directed to discharge duty on the said post and only at later stage or he may be given notional promotion in accordance to rule. Only thing is necessary for grant of notional promotion is that at the relevant date and time the person concerned should have right to get the benefit which he had claimed at later stage.

In the present case petitioner had claimed for promotion on the post of Research Supervisor from the date when juniors were promoted. Accordingly, petitioner can be given promotion

notionally from the date when juniors were promoted in case, he was qualified at the relevant time in accordance to rules."

14. Now coming to the present controversy. It is evident from the letter of the U.P. Public Service Commission dated Ist Sept., 1997 that the petitioner's services have been regularized in the cadre of Assistant Engineer against the vacancy/selection for the year 1988-89. Meaning thereby the petitioners shall deemed to be regular employee from 1988-89 in terms of approval of U.P. Public Service Commission noted in its letter dated Ist Sept., 1997. It is in agreement with the recommendation of State Government with regard to regularization of service under the Regularization Rule against the year 1988-89. Accordingly, by fiction of law, the petitioner shall be deemed to be a regular employee from 1988-89 and shall be entitled of all service benefit in terms thereon.

15. The finding recorded by the Government while dismissing the representation by impugned order dated Ist May, 2007 seems to be incorrect appreciation of law. Even if petitioner has been retired from service and the U.P. Public Service Commission has sent its approval after the petitioner's age of superannuation, the right available to petitioner in accordance with the government order dated 26th Sept., 1992 shall not extinguish. Petitioner shall be entitled for higher pay scale in accordance with the government order. More so, it has been submitted by the petitioner's counsel that all other Assistant Engineers, whose services have been regularized with due approval by the order dated Ist Sept., 1992 have been given higher pay scale. Accordingly, the petitioner cannot be treated differently from the persons who have been given higher pay scale after regularization of service with due approval of the Commission.

16. Keeping in view the order dated Ist Sept., 1997, it appears that services of several persons was regularised collectively hence the petitioner cannot be treated differently. Petitioner also falls in the same category of the employees who have been regularized in terms of approval granted by the Commission vide order dated Ist Sept., 1997. Giving a different treatment denying the promotional avenues or higher pay scale to the petitioner amounts to hostile discrimination on the part of the State authority.

17. In view of above, writ petition is allowed and a writ in the nature of certiorari is issued quashing the impugned order dated 1.5.2007 (Annexure-1 to the writ petition) with all consequential benefits. We also issue a writ of mandamus commanding the opposite parties to reconsider the petitioner's case for payment of higher pay-scale in terms of Government Order dated 26.9.1992 (Annexure-11), keeping in view the observation made in the body of the present judgment expeditiously, say within a period of 2 months.

18. No order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.03.2011

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 1241 of 2011

Jile Singh ...Revisionist
Versus
State of U.P. and another ...Opposite Parties

Counsel for the Revisionist:
Sri C.B. Singh

Counsel for the opposite Party:
Sri Lalit Kumar Shukla
A.G.A.

Code of Criminal Proceding:-Section 210-offence under Section 302-on the basis of material available Magistrate Committed the case for Trail-after committal on complaint revisionist also found involved-Summoning Order Challenged on background after committal of case-Magistrate became functus officio-held-misconceived-case was never committed-against revisionist-in absence of any material during investigation-order passed by Magistrate perfectly justified.

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

1. Heard Sri C.B. Singh, learned counsel for the revisionist, Sri Lalit Kumar Shukla for the complainant, learned A.G.A. and perused the record.

2. By this revision summoning order dated 3.1.2011 passed by the C.J.M., Mathura in complaint case no. 3100 of 2009, Tek Chanda Sharma Vs. Jile Singh and other, for offences under section 302,201 I.P.C. has been challenged.

3. The incident, in the present case relates with murder of Bharat Lal, in respect of which an F.I.R. was got registered against unknown persons. Investigation which ensued ultimately culminating in charge sheet Hari Singh as an accused for the crime. Findings his case triable by Court of Sessions, the same was committed for his trial to the Sessions Court where it is still continuining.

4. Informant, on being aggrieved by non-filing of charge sheet against the revisionist, thought it appropriate to file a complaint case against the revisionist for committing murder of Bharat Lal. C.J.M. took cognizance of the offence and after observing due procedure prescribed for complaint case summoned the revisionist vide order dated 3.1.2011 which order now has been assailed in the instant revision.

5. Supporting the revision, learned counsel for the revisionist submits that under Section 309 of the Code, the entire case in respect of murder of Bharat Lal was committed to the Sessions Court on the earlier occasion of another accused Hari Singh and, therefore, cognizance qua revisionist on a subsequent occasion by C.J.M. in respct of that very case is unsanctified. Learned counsel for the revisionist further submits that after committal of case qua Hari Singh, C.J.M. had become functus officio. He further contends that once the charge sheet has been submitted in respect of a crime, no further complaint can be entertained in respect of same incident nor anybody else can be added as an accused. In support of his submissions, learned counsel based his opinion on the decision of the Apex Court in the case of ***Jai Chandra Singh and another Vs. State of Punjab and another (1997) 1 SCC 345.***

6. Learned A.G.A. conversely submitted illucidely and elaborating procedure prescribed for complaint case and committal proceedings that if an accused is not tried along with the charge sheeted accused then complaint in his respect is maintainable and such an accused can be proceeded with for the same crime and offence. In this respect, learned A.G.A. drew support from Section 210 Cr.P.C.

7. Considering rival contentions, no force is found in the submissions of learned counsel for the revisionist. Facts as mentioned above indicate that in respect of murder of Bharat Lal, police investigated the offence but charge sheeted only Hari Singh. Present revisionist Jile Singh was not an accused in the aforesaid police charge sheet. Complainant-informant had no reason to array Jile Singh as an accused under Section 319 Cr.P.C. for the reason that police papers did not contain any allegation against him. For him to prosecute Jile Singh on the basis of such police investigation would have been a futile effort although, informant-complainant had credible material with him to rope Jile Singh also for the charge of murder. Having such an opinion, complainant though it fit to lodge a complaint against Jile Singh. C.J.M. committed no illegality in entertaining the said complaint. After due observance of the procedure prescribed for complaint case for offence triable by Court of Sessions that the C.J.M. has summoned the revisionist to stand trial for the murder of Bharat Singh. The procedure so adopted by C.J.M. does not amount to filing of two cases in respect of same accused. In respect of single incident, different persons can be prosecuted on the basis of different evidences but inconsonance with judicial discipline, the trial of all those persons should be conducted jointly by the same court to avoid contrary findings. It can not be said that in a complaint case different accused can not be prosecuted for committing murder of the same person when other accused has been charge sheeted by the police.

8. Contention of learned counsel for the revisionist that case which is committed under Section 309 Cr.P.C. makes court of magistrate functus officio in respect of other accused in the same crime, therefore, cannot be expected and is hereby repelled. Another reason for not accepting the said prayer is that committal of case preceds compliance of section 207 Cr.P.C. Under that section, copies of the documents are handed over to the accused and only thereafter, his case is committed to the Sessions Court. Thus, although, the case is committed to the Sessions Court under Section 309 Cr.P.C. but it is in respect of a particular accused. There cannot be any commitment proceeding in absence of accused or in respect of a person who was not arrayed as an accused at that stage. Contention so raised by counsel for the revisionist, therefore, is wholly un-impressive, meritless and is hereby rejected.

9. Another important aspect to be noted at this juncture is that Section 210 Cr.P.C. provides that in respect of identicle incident, if an accused is not being prosecuted on the basis of a police charge sheet, then he can be tried in a complaint case instituted by the same complainant. For a ready reference, the provision of Section 210 Cr.P.C. is reproduced below;

"(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry

or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such export cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

10. In view of the above, I do not find any reason to set aside the summoning order of the revisionist as has been prayed for and, therefore, I do not find any merit in this revision.

11. However, it is desirable for this Court to direct that since the complaint case instituted against the revisionist relates to the murder of same person Bharat Lal, under the provisions of Section 323 Cr.P.C. it is desirable to commit his case to the Court of Sessions for trial and be allotted to the same Judge who is prosecuting Hari Singh on the basis of police charge sheet in respect of the same murder to avoid conflicting findings and it is ordered accordingly.

12. After the aforesaid decision was dictated in open Court, it was submitted that since Hari Singh has already been allowed bail some direction for expeditious consideration of bail of revisionist be issued.

13. Considering above submission, I hereby directed both the courts below to dispose of the bail prayer of the revisionist in accordance with law after hearing Public Prosecutor without unreasonable delay as expeditiously as possible.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.04.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA,J.

Criminal Misc. Case No. 1342 of 2011

Union of India and others ...Applicants
Versus
State of U.P. and another
...Opposite Parties

<u>Code of Criminal Procedure Section-475</u>- Application for transfer of criminal case of Court Marshal before nearest commanding officer-rejected by the Magistrate as no change framed-held-misconceived-Magistrate failed to appreciate law correctly-order quashed only statement of offence required

Held: para 7

Thus for sending a person for trial under the Court-martial, the framing of charge by the Magistrate is not necessary. The only statement of the offence committed by him is to be recorded by the learned Magistrate. Therefore, I am of the view that the learned Magistrate has failed to

appreciate the law on the subject correctly. Under the circumstances, I hereby quash the order impugned dated 23.2.2011, passed by the Additional Chief Judicial Magistrate-Vth, Court No. 29, Lucknow and the direction is issued to the learned Magistrate to transfer the case to the concerned officer who is competent for trial of the case forthwith.

Case law discussed:
AIR 1971 Supreme Court 1120

(Delivered by Hon'ble Shri Narayan Shukla,J.)

1. Heard Mr. Raj Kumar Singh, learned counsel for the petitioner as well as Sri Rajendra Kumar Dwivedi, learned Additional Government Advocate for the State.

2. The petitioners have challenged the order impugned dated 23.2.2011, passed by the Additional Chief Judicial Magistrate-Vth, Court No. 29, Lucknow, whereby the petitioners' application for transfer of case for trial to the Armed Forces Tribunal has been rejected on the ground that in the matter the charge sheet has already been filed and the court has taken cognizance of the offences, therefore, now it cannot be transferred to the Tribunal.

3. Learned counsel for the petitioners invites the attention of the Court towards the provisions of Section 475 of the Code of Criminal Procedure, which speaks for delivery of the case to commanding officers of persons liable to be tried by Court-martial. Section 475 of the Code of Criminal Procedure is extracted herebelow:-

"475. Delivery to commanding officers of persons liable to be tried by Court- martial. *(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court- martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court- martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court- martial.*

Explanation.- In this section-

(a) " unit" includes a regiment, corps, ship, detachment, group, battalion or company,

(b) " Court- martial" includes any tribunal with the powers similar to those of a Court- martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court- martial for trial or to be examined touching any matter pending before the Court- martial."

4. Learned counsel for the petitioners further submits that there is Army Act, 1950 as well as Rules framed thereunder which empowers the Tribunal for trial of such cases, therefore, the transfer of the case cannot be denied. In the case of **Lt. Col. S.K. Kashyap and another Vs. State of Rajasthan, reported in AIR 1971 Supreme Court 1120,** the Hon'ble Supreme Court has discussed the controversy involved in the matter and held that for transferring the case for trial under the Army Act, it is not necessary for the learned Magistrate to frame charges and then transfer the matter. Section 5 of the Code of Criminal Procedure (old) has been dealt with and has expressed the opinion that the words "charged with and tried for an offence" mean that there are accusations and allegations against the person. It does not mean that the charges have been framed. The relevant paragraph of 26 of the judgment is reproduced herebelow:-

"26.The next question is as to what meaning should be given to the words " charged with and tried for an offence under the principal Act", occurring in Section 5(1)(A). Counsel for the appellants contended that the words "charged with and tried for an offence" would mean that charges had been actually framed and trial commenced. There is a distinction between Clauses (a) and (b) of sub-section (1) of Section 5 of Act 22 of 1966. Clause (a) deals with persons who are subject to the military, naval or ari force law being charged with and tried for an offence together with a person or persons not so subject whereas Clause (b) deals only with persons who are subject to military, naval or air-force law. In the present case, the appellants are persons who were subject to military law and they were charged along with civilians. Therefore, Clause (a) is attracted. It is in connection with a case which concerns only persons subject to military, naval or air-force law that under Section 5(1)(b) it is enacted that a case is not only to be pending before 30 June, 1966 before a Special Judge but that changes should also have been framed against such persons. The absence of framing of charges in Clauses (a) and requirement of framing charges in Clause (b) repels the construction suggested by counsel for the appellants that charges should have been framed in the present case in order to make it a case pending within the meaning of Section 5(1)(a) of the 1966 Act. The words "charged with and tried for an offence" mean that there are accusations and allegations against the person. The words "charged with" are used in Section 5 (1)(a) in contradistinction to the words "charges have already been framed" in Section 5(1)(b) of the Act. Therefore, the use of separate words in the two separate Clauses (a) and (b) is significant to indicate that the statute speaks of the words "charged with" in Clause (a) not in the sense of "charges have been framed" in Clause (b). The legislative intent is abundantly clear from the use of separate words."

5. The learned Magistrate does not dispute the authority of the court under the Army Act to try with the case.

6. The provisions of Section 475 of the Code of Criminal Procedure are itself clear that when the person who is subject to military, naval or air force law and is liable to be tried by the Court-martial, is brought before the Magistrate and charged with an offence, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together for the offence in which he is accused to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial.

7. Thus for sending a person for trial under the Court-martial, the framing of charge by the Magistrate is not necessary. The only statement of the offence committed by him is to be recorded by the learned Magistrate. Therefore, I am of the view that the learned Magistrate has failed to appreciate the law on the subject correctly. Under the circumstances, I hereby quash the order impugned dated 23.2.2011, passed by the Additional Chief Judicial Magistrate-Vth, Court No. 29, Lucknow and the direction is issued to the learned Magistrate to transfer the case to the concerned officer who is competent for trial of the case forthwith.

8. In the aforesaid terms, the petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.04.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE S.C. CHAURASIA,J.

Service Bench No. - 1785 of 1997

Prahlad Lal Srivastava ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner
Sri P N Bajpai

Counsel for the Respondent
C S C

Constitution of India, Article 226-consequential benefits-Tribunal set-a-side termination order-back wages not given as " no work no pay" but other consequential benefits can not be denied-direction issued accordingly.

Held: Para 6 & 7

Since the order of punishment has been set aside by the tribunal, the order of tribunal has attained finality to the extent the respondents are concerned.

In view of above, we dispose of the writ petition with the direction to the respondents to provide all consequential benefits treating the petitioner's continuity in service except the back wages.

(Delivered by Hon'ble Devi Prasad Singh,J.)

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

2. The order of termination dated 17.2.1993 was set aside by the

impugned order dated 26.3.1996. However, back wages was not provided.

3. While assailing the impugned order, it has been submitted by the petitioner's counsel that the petitioner is entitled for back wages as well as all service benefit.

4. Learned Standing Counsel submitted that the petitioner is not entitled for back wages on the principle of no work and no pay. Learned Standing Counsel has no objection with regard to petitioner's continuity in service and other service benefits. It has also been submitted that the petitioner has been reinstated in terms of tribunal's order.

5. So far as the back wages are concerned, we are of the view that the petitioner is not entitled for payment of back wages. However, so far as other benefits are concerned, the petitioner has got right to claim the same.

6. Since the order of punishment has been set aside by the tribunal, the order of tribunal has attained finality to the extent the respondents are concerned.

7. In view of above, we dispose of the writ petition with the direction to the respondents to provide all consequential benefits treating the petitioner's continuity in service except the back wages.

8. Subject to above, the writ petition is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.04.2011

BEFORE
THE HON'BLE DEVENDRA KUMAR ARORA,J.

Service Single No. 1887 of 2011

Rama Shanker Shukla ...Petitioner
Versus
Zila Basic Shiksha Adhikari Sitapur and others ...Respondent

Counsel for the Petitioner:
Sri R.K.Sharma

Counsel for the Respondent:
Sri Rakesh Kumar Tiwari
Sri Rakesh Kumar Tiwari

U. P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of services of Teacher) Rules, 1978.-Rule-14-Date of retirement teachers working in recognized institution-date of retirement shall be the date on which 62th Date of Birth celebrated-meaning thereby the petitioner shall retire on 30.06.2011 as the date of birth is 01.07.49-friction of a day will be omitted-as the period of counting will start from midnight of the date of birth-62 years shall be the midnight of 30.06.2011-by impugned notice rightly made to retire -No illegality in impugned order.

Held: Para 6

The section embodies that in computing the age of any person, the day on which he was born is to be included as a whole day and he must be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

On applying the principle laid down by Hon'ble Supreme Court on the facts and circumstances of the present case, the petitioner whose date of birth is

01.07.1949 will complete the age of 62 years on 30.06.2011, a day preceding to the petitioner's birth day anniversary i. e. 01.07.2011 and, as such, petitioner has been rightly given notice of his superannuation on attaining the age of 62 years on 30.6.2011. Since 30.6.2011 is the last date of the month as well as end of the academic session, therefore, as per Rule 14 of the U. P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of services of Teacher) Rules, 1978 petitioner will retire from service on 30.6.2011. There is no illegality in the impugned notice/order of retirement dated 01.1.2011.

Case law discussed:

1986 (4) SCC 59

(Delivered by Hon'ble D.K.Arora,J.)

1. By means of present writ petition, the petitioner prays for a writ, order or direction in the nature of certiorari for quashing of the order of retirement dated 01.01.2011, issued by opposite party no. 3. Petitioner further prays for a writ in the nature of mandamus commanding the opposite parties to retire on 31.7.2011 and give extended period of employment till 30.6.2012 as envisaged under Rule 14 of the Service Rules.

2. Submission of learned counsel for the petitioner is that the petitioner was appointed as Assistant Teacher in Shri Gomteshwar Madhyamik Vidyalaya, Hindaur, Sitapur (hereinafter referred to as 'institution') vide appointment letter dated 25.6.1977 (Annexure No. 2). He joined his duties in the institution on 01.7.1977. The institution came under grant in aid w.e.f. 01.4.1980 and petitioner's services were approved on 18.7.1980. Further submission of learned counsel for the petitioner is that the service and service conditions of the petitioner are governed by *U. P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of services of Teacher) Rules, 1978.(hereinafter referred to as 'Service Rules')* framed under section 19 (2) of the U.P. Basic Education Act. Rule 14 of the Service Rules provides that an Assistant Teacher will retire in the afternoon of the last day of the month in which he attains the age of 62 years. The Rule further provides that an Assistant Teacher who retires during an academic session, shall continue to work till June 30, following next after the date of his retirement and such period of service shall be deemed as extended period of employment. The petitioner will attain the age of 62 years on 01.7.2011 as per his date of birth mentioned in High School Certificate and in Service Book. Thus, according to Rule 14, the petitioner will retire in the afternoon of 31st July, 2011 and he will also be entitled to the extended period of employment till 30th June, 2012. The Manager of the institution gave a notice of retirement dated 01.01.2011 to the petitioner indicating therein that since date of birth of the petitioner is 01.7.1949, as such, he will retire on 30.6.2011. The petitioner on receipt of notice dated 01.1.2011 made a representation/objection to the Manager of the institution on 20.1.2011 mentioning therein that he cannot be retired prior to the age of his superannuation as envisaged under Rule 14 of the Service Rules. The petitioner demonstrated in his representation that he is being retired one day before the age of 62 years. The petitioner also sought his extension of employment till 30th June, 2012. When the petitioner did not receive any reply from the opposite parties of his

representation dated 20.1.2011, he sent a reminder on 23.3.2011.

3. It is also submitted by learned counsel for the petitioner that since the opposite parties are intending to retire the petitioner one day before the age of 62 years, therefore, he is compelled to approach this Court by means of the present writ petition.

Heard learned counsel for parties and perused the record.

The main controversy involved in the present writ petition is *"Whether the petitioner will compete the age of 62 years on 30.6.2011 or on 1st July, 2011, keeping in view the fact that his date of birth is 01.7.1949."*

4. The services of the petitioner are governed by *U. P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of services of Teacher) Rules, 1978.(hereinafter referred to as 'Service Rules').* As per Rule 14 of the Service Rules an Asst. Teacher will retire on the last day of the month in which he attained the age of superannuation (62) years. It further provides that an Asst. Teacher who retires during the academic session, shall continue to work till 30th June following next after the date of his retirement and such period shall be deemed as extended period of employment.

5. The Hon'ble Supreme Court while analyzing the similar controversy in the case of **Prabhu Dayal Sesma vs. State of Rajasthan and another reported in 1986 (4) SCC 59** was pleased to observe that while counting the age of a person, whole of the day should be reckoned and it starts from 12 O'clock in the mid-night and he attains the specified age on the preceding, the anniversary of his birth day. The observation of Hon'ble Supreme Court in paras- 9 to 14 read as under:-

"9..... At first impression, it may seem that a person born on January 2, 1956 would attain 28 years of age only on January 2, 1984 and not on January 1, 1984. But this is not quite accurate. In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birthday. We have to apply well accepted rules for computation of time. One such rule is that fractions of a day will be omitted in computing a period of time is years or months in the sense that a fraction of a day will be treated as a full, day. A legal day commences at 12 O'clock midnight and continues until the same hour the following night. There is a popular misconception that a person does (sic not) attain a particular age unless and until he has completed a given number of years. In the absence of any express provision, it is well settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birthday.

10. In **Halsbury's Laws of England, 3rd edn. Vol. 37, para 178 at p. 100,** the law was stated thus:

"In computing a period of time, at any rate when counted in years or months, no regard is, as a general rule, paid to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day.... Similarly, in calculating a person's age the day of his

birth counts as a whole day; and he attains a specified age on the day next before the anniversary of his birthday."

11. We have come across two English decisions on the point. In Rex. v. Scoffin, the question was whether the accused had or had not completed 21 years of age. Section 10 (1) of the Criminal Justice Administration Act, 1914 provides that a person might be sent to Borstal if it appears to the court that he is not more than 21 years of age. The accused was born on February 17, 1909. Lord Hewart, C.J. Held that the accused completed 21 years of age on February 17, 1930 which was the Commission day of Manchester Assizes.

12. In **Re Shurey, Savory v. Shurey,** the question that arose for decision was this: Does a person attain a specified age in law on the anniversary of his or her birthday, or on the day preceding that anniversary? After reviewing the earlier decisions, Sargent, J. said that law does not take cognizance of part of a day and the consequence is that person attains the age of twenty-one years or of twenty-five years, or any specified age, on the day preceding the anniversary of his twenty-first or twenty-fifth birthday or other birthday, as the case may be.

13. From **Halsbury's Laws of England, 4th Edn., vol. 45, para 1143 at p. 550** it appears that Section 9 of the Family Law Reforms Act, 1969 has abrogated the old common law rule stated in Re Shurey Savory v. Shurey.

14. It is in recognition of the difference between how a person's age is legally construed and how it is understood in common parlance. The legislature has expressly provided in **Section 4 of the Indian Majority Act, 1875** that how the age of majority is to be computed. It reads:

"4. Age of majority how computed.- In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of Section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of Section 3, at the beginning of the eighteenth anniversary of that day."

6. The section embodies that in computing the age of any person, the day on which he was born is to be included as a whole day and he must be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

On applying the principle laid down by Hon'ble Supreme Court on the facts and circumstances of the present case, the petitioner whose date of birth is 01.07.1949 will complete the age of 62 years on 30.06.2011, a day preceding to the petitioner's birth day anniversary i. e. 01.07.2011 and, as such, petitioner has been rightly given notice of his superannuation on attaining the age of 62 years on 30.6.2011. Since 30.6.2011 is the last date of the month as well as end of the academic session, therefore, as per Rule 14 of the U. P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of services of Teacher) Rules, 1978 petitioner will retire from service on 30.6.2011. There is no illegality in the impugned notice/order of retirement dated 01.1.2011.

7. In view of the aforesaid facts and reasons, the writ petition lacks merits and deserves to be dismissed.

8. Writ Petition is dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.04.2011

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA,J.

Misc. Single No. - 1979 of 2011

Ram Pheran Yadav ...Petitioner
Versus
Commissioner, Devi Patan Division, Gonda and another ...Respondent

Counsel for the Petitioner:
Sri Avadhesh Kumar Singh

Counsel for the Respondent:
C.S.C.

Constitution of India, Article 226- attachment of petitioner-fair price shop-on ground after dismissal of Appeal in default stay order not extended-held before attachment the authority concern ought to have give opportunity to get the order extended-order impugned not sustainable.

Held: Para 9

Once, the Appellate Authority had passed an interim order in the appeal preferred by the petitioner against the order of respondent no.2 by which he had cancelled the petitioner's fair price shop license, staying the implementation and operation of the order passed by the opposite party no.2 and the stay order could not be extended not on account of any fault on behalf of the petitioner but due to non-availability of the respondent no.1 on the date fixed, it was incumbent upon the respondent no.2 to have given a reasonable opportunity to the petitioner to get the interim order extended before proceeding to attach the card-holders of his fair price shop with some other shop.

(Delivered by Hon'ble B.K.Narayana,J.)

1. Notice on behalf of opposite party nos. 1 and 2 has been accepted by learned Chief Standing Counsel.

2. Heard learned counsel for the petitioner and learned standing counsel and perused the records.

3. Counsel for the petitioner is permitted to make amendments in the prayer of the writ petition.

4. Learned counsel for the petitioner submitted that license of fair price shop of the petitioner was cancelled by the respondent no.2 vide order dated 06.01.201. Against the said order the petitioner preferred an appeal before the respondent no.1 which was registered as Appeal No. 80-03 and in which on 12.01.2011 an interim order was passed by the respondent no.1 in favour of the petitioner by which the effect and implementation of the order passed by the opposite party no.2 was directed to be kept in abeyance till 23.02.2011.

5. It appears that the respondent no.1 was not available on 23.02.2011, as a result, the interim order dated 12.01.2011 granted in favour of the petitioner could not be extended, although the petitioner had moved an application in this regard on that very date, as a result, the card-holders of the petitioner's shop were attached with some other shop by the respondent no.2 vide his order dated 18.03.2011, copy whereof has been filed as Annexure No.4 to the writ petition.

6. This writ petition has been filed by the petitioner with a prayer to quash the

order dated 18.03.2011 passed by the opposite party no.2.

It is contended on behalf of the petitioner that once the appeal preferred by the petitioner against the cancellation of his fair price shop license had been admitted by the respondent no.1 and an interim order was passed in favour of the petitioner staying the operation and implementation of the impugned order dated 06.01.2011, the opposite party no.2 travelled beyond his jurisdiction in attaching the card-holders of the petitioner's shop with some other shop merely on the ground that the interim order passed by the respondent no.1 was not extended on 23.02.2011 due to non-availability of respondent no.1.

7. Learned standing counsel appearing for the opposite parties made his submissions in support of the impugned order.

8. After having examined the submissions made by the counsel for the parties and perused the impugned order as well as other relevant records, I find that the submissions made by the learned counsel for the petitioner have force and the same are liable to be accepted.

9. Once, the Appellate Authority had passed an interim order in the appeal preferred by the petitioner against the order of respondent no.2 by which he had cancelled the petitioner's fair price shop license, staying the implementation and operation of the order passed by the opposite party no.2 and the stay order could not be extended not on account of any fault on behalf of the petitioner but due to non-availability of the respondent no.1 on the date fixed, it was incumbent upon the respondent no.2 to have given a reasonable opportunity to the petitioner to get the interim order extended before proceeding to attach the card-holders of his fair price shop with some other shop.

10. In my opinion the impugned order cannot be sustained and is liable to be set aside.

11. The writ petition is allowed. The order dated 18.03.2011 passed by the opposite party no.2 is set aside.

12. However, respondent no.1 is directed to decide the appeal No. 80-03 in accordance with law within a period of one month from the date a certified copy of this order is produced before him. Till the petitioner's appeal is decided, the interim order dated 12.01.2011 passed by the respondent no.1 shall remain in force.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.04.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI,J.

Misc. Single No. - 2191 of 2011

Ghaziabad Development Authority Through Its V.C. Ghaziabad ...Petitioner
Versus
R.C.Saxena and others ...Respondent

Counsel for the Petitioner :
Arvind Kumar

Constitution of India-Article 226-Alternative Remedy-order passed by State consumer Forum under Section 17 (1) (b) of consumer protection Act-by exercising revisional power-second revision before National Forum maintainable on joint reading of Section 19 and 21 of the Act-High Court already over burdened with large pendency of

cases in view of Division Bench Case Dr. Manvendra Mishra-High Court refused to exercise its direction.

Held: Para 14

As already discussed, the Act is a complete code in regard to redressal of grievances (complaints) of the consumer and also in regard to appeal and revision against the order passed by the State Commission and other authorities, and as such the extra ordinary writ jurisdiction under Article 226 of the Constitution of India, which is a discretionary jurisdiction, should not be invoked in such matters.

Case law discussed:

(2005) 6 Supreme Court Cases 499; (2003) 2 SCC 107; (2004) 4 Supreme Court Cases 268; (2006) 5 S.C.C. 469; (2000) 1 UPLBEC 702; 2009 (2) ACR 2349

(Delivered by Hon'ble Shri Kant Tripathi,J.)

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

The learned counsel for petitioner submitted that the instant writ petition has been filed under Article 226 of the Constitution of India for quashing the order dated 9.8.2010 passed by the Uttar Pradesh Consumer Disputes Redressal Commission (hereinafter referred to as the 'State Commission') in revision no.109 of 2006, whereby the State Commission dismissed the petitioner's revision and confirmed the order dated 28.4.2006 of the District Forum, Ghaziabad. The learned counsel for the petitioner further submitted that the State Commission has passed the aforesaid order in exercise of its revisional jurisdiction under section 17(1)(b) of The Consumer Protection Act, 1986 (hereinafter referred to as 'the Act'), therefore, the order so passed is not appealable before the National Consumer Disputes Redressal Commission (hereinafter referred to as the 'National Commission'). According to section 19 of the Act only an order passed under sub clause (i) of clause (a) of section 17 of the Act is appealable before the National Commission, therefore, the instant writ petition under Article 226 of the Constitution of India is maintainable.

2. The Consumer Protection Act, 1986 has been enacted to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith. The Act has provisions for constitution of District Forum, State Commission and National Commission, respectively, at the District level, State level and the National level for redressal of the grievances (complaints) of the consumer.

3. The National Commission has power of revision and that power has been very specifically conferred on the National Commission under section 21 (b) of the Act. Moreso, section 21 (a) (ii) of the Act has conferred jurisdiction on the National Commission to entertain appeals against the orders of any State Commission but there is no specification as to which of the orders of the State Commission is appealable under section 21 (1)(a) of the Act. Therefore, the provisions of section 21 (a) (ii) of the Act have to be read alongwith the provisions of section 19 of the Act. As such the orders passed by the State Commission in exercise of original jurisdiction under section 17 (1) (a) (i) of the Act is appealable before the National Commission. If the provisions of section 21 (a)(ii) of the Act is read in isolation, each and every order passed by the State Commission is appealable before

the National Commission. In fact section 21 of the Act deals with the jurisdiction of the National Commission which confers on it not only the original jurisdiction of value of certain amount but also deals with the jurisdiction to entertain appeal against the order of the State Commission and also to exercise revisional jurisdiction. Whereas section 19 of the Act provides as to which order of the State Commission is appealable, therefore, sections 19 and 21 of the Act have to be read together to decide the question as to whether a particular order is appealable or not.

4. The impugned order dated 9.8.2010 has been passed by the State Commission in exercise of revisional jurisdiction and there is no bar of second revision. As such the order passed by the State Commission in exercise of revisional jurisdiction can very well be subjected to revisional jurisdiction of the National Commission under section 21 (b) of the Act.

5. In view of the aforesaid, the petitioner has an appropriate alternative efficacious remedy by way of filing a revision under section 21 (b) of the Act against the impugned order dated 9.8.2010 (Annexure 1), therefore, it does not appear to be just and expedient to exercise extra ordinary writ jurisdiction under Article 226 of the Constitution of India.

6. The Supreme Court has almost settled the legal position regarding maintainability of writ petition under Article 226 of the Constitution of India in a case where alternative remedy is available to the petitioner. Some of the important cases are being referred to hereinbelow.

7. In Whirlpool Corporation vs. Registrar of Trade Marks and others, AIR 1999 SC 22, the Supreme Court has held that under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

8. A similar view has been expressed in the case of State of H.P. and others vs. Gujrat Ambuja Cement Ltd. and another (2005) 6 Supreme Court Cases 499, in which the Supreme Court observed after relying on few important earlier decisions that except for a period when Article 226 was amended by the Constitution (Forty second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy, it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy

provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

9. In Harbanslal Sahnia vs. Indian Oil Corpn. Ltd. (2003) 2 SCC 107, the Supreme Court reiterated the same principles and held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights where there is a failure of the principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

10. It is also well settled in the case of U.P. State Bridge Corporation Ltd. and others vs. U.P. Rajya Setu Nigam S. Karamchari Sangh (2004) 4 Supreme Court Cases 268 and other cases that it would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the Statute, the person who insists upon such remedy can avail of the process as provided in that Statute and in no other manner.

11. In the case of A.P.Foods vs. S. Samuel and others (2006) 5 S.C.C. 469, the Supreme Court reiterated the same principles and held that a writ petition under Article 226 of the Constitution of India should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

12. Expressing a serious concern over the heavy arrears in this court, a Division Bench of this Court held in Manvendra Misra (Dr.) Vs. Gorakhpur University (2000) 1 UPLBEC 702 that since writ jurisdiction is a discretionary jurisdiction hence if there is an alternative remedy the petitioner should ordinarily be relegated to his alternative remedy. This is specially necessary now because of the heavy arrears in the High Court, and this Court can no longer afford the luxury of entertaining writ petitions even when there is an alternative remedy in existence. No doubt alternative remedy is not an absolute bar, but ordinarily a writ petition should not be entertained if there is an alternative remedy.

13. Considering the aforesaid decisions, a division bench of this Court has again held in the case of Nanhe @ Indra Kumar vs. State of U.P. and others, 2009 (2) ACR 2349, that no writ petition under Article 226 of the Constitution should be entertained when statutory remedy is available under the concerned statute unless exceptional circumstances propounded in Whirlpool's case (supra) are made out.

14. As already discussed, the Act is a complete code in regard to redressal of grievances (complaints) of the consumer and also in regard to appeal and revision against the order passed by the State Commission and other authorities, and as such the extra ordinary writ jurisdiction under Article 226 of the Constitution of India, which is a discretionary jurisdiction, should not be invoked in such matters.

15. In view of the aforesaid, the writ petition is not maintainable and is accordingly dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.04.2011

BEFORE
THE HON'BLE RITU RAJ AWASTHI,J.

Service Single No. - 2289 of 2011

Pankaj Kumar and others ...Petitioner
Versus
State Of U.P. Through The Principal Secy. In The Dept.Home ...Respondent

Counsel for the Petitioner:
A.P.Singh

Counsel for the Respondent:
C.S.C.

U.P. (Civil Police and Head Constable Service rules 2008)-Rule 26 readwith Regulation 520 Police Regulation-transfer order challenged on ground in view of judgment 29.05.10 in W.P. No. 3838 of 2010 in which Constitution of Regulation Police Establishment Board itself-illegal hence as approval given by Regional Police Board without jurisdiction-held-in view of Full Bench decision of Vinod Kumar case-Constitution of Regional Police Board found proper-as such transfer order can not be bad-second ground of attack after existence of Rule 2008 , G.O. 11.07.86 lost its significance also misconceived as the Rule does not cover the field of transfer as such the G.O. still applicable.

Held: Para 11 & 15

So far as the contention of learned counsel for the petitioners that the Government Order dated 11.7.1986 stands superseded after coming into force Rules 2008, is concerned, it is to be noted that the preamble of Rules 2008 recites that the said rules have been framed to regulate the selections, promotions, appointments, determination of seniority and confirmation etc. of the Constables and Head Constables of civil police in the police force. A reading of these rules indicates that they do not deal with the transfer of police personnel. It is also to be seen that as per Rule 26 of the said Rules 2008, the matters which are not covered under these rules shall be governed by the rules, regulations and the orders applicable generally to Government servants. The Government Order dated 11.7.1986 specifically deals with the transfer of police personnel as such suffice is to mention that the said Government Order dated 11.7.1986 is duly applicable and enforceable in the present case.

In this view of the matter, I am of the considered view that constitution of Regional Police Establishment Boards can not be said to be wrong.

In the present case, the transfer order of the petitioners has been passed after approval of the Regional Police Establishment Board as such it can not be said to be bad in the eyes of law.

Case law discussed:
(2010) 3 UPLBEC 2060; 2011 (2) ADJ 177 (DB); Writ Petition No. 1781 (S/S) of 2011

(Delivered by Hon'ble Ritu Raj Awasthi,J.)

1. Notice on behalf of the opposite parties has been accepted by the learned Chief Standing Counsel.

Heard learned counsel for the petitioners as well as Sri Badrul Hasan, learned Standing Counsel.

2. This writ petition has been filed challenging the transfer order dated 17.4.2011 including the decision/order/approval of the Regional Police Establishment Board dated 13.4.2011 by which the petitioners no. 1 to 5 have been transferred from Lucknow to

Raibareli and the petitioner no. 6 has been transferred from Lucknow to Lakhimpur Kheri, on the ground that they are posted in the adjoining district to the home district which is not permissible as per the Government Order dated 11.7.1986. Challenge has also been made to the Government Order dated 11.7.1986.

Learned counsel for the petitioners submits that after coming into force the U.P. (Civil Police) Constables and Head Constables Service Rules 2008 (hereinafter referred to as 'Rules 2008') notified by the notification dated 2.12.2008, the Government Order dated 11.7.1986 has been superseded. Moreover, in view of Rule 26 of the Rules 2008, the matters not specifically covered by these rules shall be governed by the rules, regulations and the Orders applicable generally to Government servants serving in connection with affairs of the State.

3. Contention is that Rule 2008 does not prohibit the posting of police personnel in the home district or the adjoining district to the home district and, therefore, there can not be any embargo on the posting of the police personnel in the home district or districts adjoining to the home districts.

4. Learned counsel for the petitioners further submits that, in fact, Regulation 520 of the Police Regulation provides that the transfers which result in officers being stationed far from their homes should be avoided as much as possible, meaning thereby that the police personnel shall be posted near to the home districts.

Since Regulation 520 of the Police Regulations provided that transfers which result in officers being stationed far from their homes as far as possible should be avoided, therefore, the Government Order dated 11.7.1986 which is contrary to the Police Regulations is wrong and can not be allowed to deal with the transfers of the police personnel.

Moreover, the opposite parties on the one hand vide circular dated 21.3.2011 has exempted all those police personnel posted in the V.I.P. duties from the general transfers and on the other hand have made large scale transfers on the basis of the Government Order dated 11.7.1986 which amounts to discrimination.

5. It is further contended by learned counsel for the petitioners that the Full Bench of this Court in the case of Vinod Kumar & another Vs. State of U.P. & others (2010) 3 UPLBEC 2060, while considering the constitution of the Police Establishment Board vide notification dated 12.3.2008 has observed that Rule 26 of Rules 2008, makes applicable the rules pertaining to the Government servants i.e. the persons appointed to public services and posts in connection with the affairs of the State and as Regulation 520 deals with the transfers of police personnel, who are also a part of the public services of the State, therefore, insofar as the police personnel are concerned, the regulation pertaining to the transfers would continue to apply to them. In this regard he has relied on para 20 of the judgment in the case of Vinod Kumar (Supra).

"20. In our opinion, therefore, considering the fact that the Rule 26 of the Rules, 2008 makes applicable the rules pertaining to the Government servants, i.e. persons appointed to public services and posts in connection with the affairs of the State, and as Regulation 520 deals with the transfers of the police personnel, who are

also a part of the public services of the State, therefore, insofar as the police are concerned, the Regulation pertaining to transfer would continue to apply to them. Therefore, though one of the Boards constituted is not strictly in terms of the directions issued by the Supreme Court in Prakash Singh (Supra), nonetheless considering the exercise that has to be done and the provisions for transfer, as contained in the Police Regulations, there has been sufficient compliance."

Further contention of learned counsel for the petitioners is that the constitution of the Regional Police Establishment Board is not as per the directions issued by the Apex Court in the case of Prakash Singh Vs. Union of India (2006) 8 SCC 1. The Full Bench in the case of Vinod Kumar (Supra) has only upheld the validity of constitution of four Police Establishment Boards by notification dated 12.3.2008, as such the impugned order passed on the basis of approval of the Regional Police Establishment Board are wrong and not sustainable in the eyes of law.

6. Learned counsel for the petitioners also submitted that earlier the transfer orders of the petitioners dated 29.5.2010 and 28.5.2010 were challenged in the Writ Petition No. 3838 (S/S) of 2010, which were quashed by the order dated 28.8.2010 with liberty to the opposite parties to pass afresh orders in accordance with law after approval from the Board constituted vide notification dated 12.3.2008 (wrongly mentioned as 12.8.2009). His contention is that when the Court had allowed the opposite parties to pass afresh orders with the approval from the Board as per the notification dated 12.3.2008, then it was not open for the opposite parties to have taken approval from the Regional Police Establishment Board, which has not been constituted as per the notification dated 12.3.2008 as the Regional Police Establishment Boards have been constituted vide notification dated 9.4.2010.

The learned Standing Counsel in opposition has submitted that the Government Order dated 11.7.1986, specifically deals with the transfers of the Police personnel including the Constables and Head Constables. It also provides that no police personnel shall be posted in the home district or the district adjoining to the home district. It is also submitted by the learned Standing Counsel that the Government Order dated 11.7.1986 is fully applicable even today after the Rules 2008 have been framed which only regulate the selection, promotion, training, appointment, determination of seniority and confirmation etc. of constables and Head Constables of civil police in the State of U.P. police force. The said Rules 2008 do not deal with the transfers of the police personnel.

7. It is further submitted that Rule 26 of Rules 2008, specifically provides that all those matters which are not covered under the rules shall be governed by the rules, regulations and the Orders applicable generally to the government servants meaning thereby that the Government Order dated 11.7.1986, which deals with the transfers of the police personnel shall be applicable even after coming into force of Rules 2008.

8. The learned Standing Counsel contends that validity of the constitution of the Regional Police Establishment Boards was not before the Full Bench in the case of Vinod Kumar (Supra), however, the Full

Bench has upheld the theory of plurality of constitution of Police Establishment Boards as it has been observed by the Full Bench that looking into the vast area of the State and the total strength of the police force it is not possible to appoint one Board and accordingly the State by notification dated 12.3.2008 in exercise of its power under Section 2 of the Police Act,1861 had constituted four different Boards. Thus, the Full Bench has found the constitution of different Boards as proper. The Regional Police Establishment Boards constituted by the Government Order dated 9.4.2010 are headed by the Inspector General of Police (Establishment) and there is no illegality in the constitution of the said Boards.

9. A Division Bench of this Court in the case of State of U.P. & others Vs. C.P. Ravindra Singh and others, 2011 (2) ADJ 177 (DB), while setting aside the judgment passed by the learned Single Judge has come to the conclusion that in case the transfer orders have been passed on the basis of approval of the Regional Police Establishment Boards there is no illegality.

The learned Standing Counsel further submits that the Court while deciding the Writ Petition No.3838 (S/S) of 2010 by order dated 28.8.2010 had quashed the transfer orders dated 29.5.2010 and 28.5.2010 by which the petitioners were transferred, with liberty to the opposite parties to pass afresh orders in accordance with law after approval from the Board. His contention is that in the present case the Regional Police Establishment Board has granted approval which is sufficient as per the requirement of law and according to the directions issued by the Apex Court in the case of Prakash Singh (Supra) and observations made by the Full Bench in the case of Prakash Singh (Supra). Mere observation of the Court in its order dated 28.8.2010 to pass afresh orders after approval of the Board constituted as per the notification dated 12.3.2008 does not mean that only that Board which has been constituted by notification dated 12.3.2008 was required to grant approval and in case the approval has been granted by the Regional Police Establishment Board the order of transfer is bad.

10. I have considered various submissions made by the learned counsel for the parties.

11. So far as the contention of learned counsel for the petitioners that the Government Order dated 11.7.1986 stands superseded after coming into force Rules 2008, is concerned, it is to be noted that the preamble of Rules 2008 recites that the said rules have been framed to regulate the selections, promotions, appointments, determination of seniority and confirmation etc. of the Constables and Head Constables of civil police in the police force. A reading of these rules indicates that they do not deal with the transfer of police personnel. It is also to be seen that as per Rule 26 of the said Rules 2008, the matters which are not covered under these rules shall be governed by the rules, regulations and the orders applicable generally to Government servants. The Government Order dated 11.7.1986 specifically deals with the transfer of police personnel as such suffice is to mention that the said Government Order dated 11.7.1986 is duly applicable and enforceable in the present case.

So far as the contention of learned counsel for the petitioners that in view of Rule 26 of Rules 2008 only those

Government Orders would be applicable which generally apply to the Government servants serving in connection with the affairs of the State, i.e. the transfer policies dealing with the Government servants are concerned, this Court is of the considered opinion that since the Government Order dated 11.7.1986 specifically deals with the transfer of police personnel, therefore, the Government Order dated 11.7.1986 would be fully applicable and the general transfer policy with respect to the Government servants would not be applicable in this case.

12. This Court had the occasion to consider the Government Order dated 11.7.1986 in Writ Petition No. 1781 (S/S) of 2011, Satya Narain Singh & others Vs. State of U.P. , wherein this Court while dismissing the writ petition held as under:

"So far as the contention of the learned counsel for the petitioners with regard to the discrimination in view of circular letter dated 21.3.2011 (wrongly mentioned as 24.3.2011) is concerned, suffice is to mention that the said circular letter relates to the transfer of the police personnel posted in V.I.P. duties. It is for the department to decide as to whether such police personnel posted in V.I.P. duties shall be subjected to transfers as per the Government Order dated 11.7.1986 or not."

13. The Government Order dated 11.7.1986 provides the guidelines for transfer of that police personnel, which also provide that they shall not be posted in their home districts or the adjoining districts to the home districts.

So far as the constitution of Regional Police Establishment Board is concerned, a Division Bench of this Court in the case of State of U.P. & others Vs. C.P. Ravindra Singh (Supra) has considered the Full Bench decision of this Court in the case of Vinod Kumar (Supra) which has upheld the theory of plurality of Police Establishment Boards and has found that in case the transfer order has been issued with the approval of the Regional Police Establishment Board that would not render it totally illegal. The relevant paragraph 14 in the case of State of U.P. & others Vs. C.P. Ravindra Singh (Supra) is quoted below:

"According to us, pluralistic view in the place and instead of singular view is one of the devices to maintain transparency. It avoids possibilities of motivated action, biasness or influence in the cases of transfer. To that extent, there is no conflict between Prakash Singh (Supra) and the steps taken by the State. The only issue is whether the State has strictly complied with or sufficiently complied with the direction of the Supreme Court in Prakash Singh (Supra). According to the Full Bench of this High Court in Vinod Kumar (Supra), direction has been sufficiently complied with. Learned Chief Standing Counsel has given an explanation by saying that the position of the State of Uttar Pradesh as regards its vastness and population may not be similar with various other States. Therefore, if the Board is constituted strictly in compliance with the direction of the Supreme Court then the State will not get full time engagement of such officers to maintain the law and order situation of the State. To that, it is desirable that the State should explain such position before the Supreme Court. It is expected that by now it has been done by the State. But so far as the existing position is concerned, this

Division Bench will be governed by both, Prakash Singh (Supra) and Vinod Kumar (Supra) and a conjoint reading of both the judgments speaks that a mode or mechanism of plurality has been adopted by the State, in spite of the existing law. Therefore, this Court does not find any reason to negate the orders of transfer, as were impugned in the writ petition."

14. It is to be borne in mind that the Full Bench of this Court in the case of Vinod Kumar (Supra) while considering the constitution of Police Establishment Board constituted vide notification dated 12.3.2008 has upheld the constitution of various Police Establishment Boards headed by the Director General of Police as well as Inspector General of Police. The Full Bench in paras 18,19,20 & 21, observed as under:

"18.The judgment in Prakash Singh (Supra) was to ensure that in the matter of transfers and promotions etc., the officers and men would be considered based on their merit and uninfluenced by any political decision, patronage or consideration. Merely, because one of the functionaries named by post in the directions of the Supreme Court, is not in the Board, per se would not make the entire action of transfers void or non est. The administrative instructions are in exercise of the executive power of the State under Article 162 of the Constitution of India, which power extends to matters with respect to which the Legislature of the State has power to make laws. The transfers will have to be done in terms of the Police Regulations in force. To that extent, Rule 26 of the Rules 2008 will have to be so read with the expression 'orders applicable generally to Government servants serving in connection with the affairs of the State' which includes the Regulations. It is only in an area where conditions of service are not covered by the Act, Rules or Regulations, with the rules in the matter of conditions of service applicable to other Government servants, would be applicable. As long as the Regulations are in force, they will continue to be applicable in the matters of transfer. The Regulations also provide for regular transfers, which are transfers not on account of administrative exigency or in public interest. Rule 26 can not be read to mean that all existing rules and regulations in the matter of conditions of service including transfer are no longer in force. Rule 26 only contemplates a situation where there is a vacuum or no provision.

19. It is true that there may be no strict compliance in terms of the directions issued by the Supreme Court in Prakash Singh (Supra) insofar as one of the Boards is concerned. The Government has attempted to contend that the notification has to be read with the exercise of power under Section 2 of the Police Act. There is a power in the State Government under Section 2 to have issued notification constituting the Boards. The Section does not provide for the publication or laying of the Rules or Regulations made thereunder before the Legislature. In other words, the power conferred on the Government, as a delegate, to make rules is not subject to any control by the Legislature. Rules as held by the judgment of the Supreme Court can be made under Section 2 of the Police Act. The Government, in the absence of legislation, in exercise of its power under Article 309 of the Constitution should have made rules governing the conditions of service. In the instant case, there is legislation governing transfers, but there is

no provision for Constitution of Boards. The Boards have been constituted by the State in exercise of its executive powers. It is now well settled that in an area, where rule or existing law is silent in the matter of conditions of service, administrative instructions can be issued to fill in the void or gap, which the State has done. However, we have held that the notification for reasons given cannot be held to be an exercise of power under Section 2 of the Police Act.

20.In our opinion, therefore, considering the fact that the Rule 26 of the Rules, 2008 makes applicable the rules pertaining to the Government servants,i.e.,persons appointed to public services and posts in connection with the affairs of the State, and as Regulation 520 deals with the transfers of the police personnel, who are also a party of the public services of the State, therefore, insofar as the police are concerned, the Regulation pertaining to transfer would continue to apply to them. Therefore, though one of the Boards constituted is not strictly in terms of the directions issued by the Supreme Court in Prakash Singh (Supra), nonetheless considering the exercise that has to be done and the provisions for transfer, as contained in the Police Regulations, there has been sufficient compliance.

21.In these circumstances, we are clearly of the opinion that, though we have found that the notification constituting the Board is not traceable to Section 2 of the Police Act, the same at the highest, amounts to an irregularity and not illegality and would not vitiate the transfers, if they have been done in terms of the Regulations and after the approval of the Board."

15. In this view of the matter, I am of the considered view that constitution of Regional Police Establishment Boards can not be said to be wrong.

In the present case, the transfer order of the petitioners has been passed after approval of the Regional Police Establishment Board as such it can not be said to be bad in the eyes of law.

So far as Regulation 520 of the Police Regulations is concerned, it provides as under:

520. *Transfer of Gazetted Officers are made by the Governor in Council.*

The Inspector General may transfer Police Officers not above the rank of Inspector throughout the province.

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

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

Sub-inspectors and head constables should not be allowed to stay in a particular district for more than six years

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

16. The said regulation only provides that the transfers which result in officers being stationed far from their homes should be avoided as much as possible. It does not mean that the police officers/personnel should be posted in their home districts or the districts adjoining to the home districts. As per the said regulation the transfers which result in officers being stationed far from their homes should be avoided as much as possible. It does not even prohibit the transfer to far off places, as such, the contention raised in this regard by the learned counsel for the petitioners has no force.

17. The petitioners were earlier transferred by orders dated 29.5.2010 and 28.5.2010 and they had challenged the said orders by filing Writ Petition No. 3838 (SS) of 2010, mainly on the ground that the transfer orders have been issued with the approval of the Regional Police Establishment Board, which has not been validly constituted and, therefore the orders are bad. The writ petition was allowed and the orders dated 29.5.2010 and 28.5.2010 were quashed with liberty to the opposite parties to pass fresh orders in accordance with law after approval from the Board constituted by notification dated 12.3.2008.

18. Since the Full Bench in the case of Vinod Kumar(Supra) has upheld the validity of the constitution of various Police Establishment Boards by notification dated 12.3.2008 and relying on the aforesaid Full Bench decision, a Division Bench of this Court in the case of State of U.P. & others Vs. C.P. Ravindra Singh (Supra) has found that in case the transfer order has been issued with the approval of the Regional Police Establishment Board, it would not render the transfer order bad, I am of the considered opinion that in case the transfer order has been passed with the approval of the Regional Police Establishment Board, it would not render the order bad. The observation of the Court in the order dated 28.8.2010 passed in the Writ Petition No. 3838 (S/S) of 2010 is to be read in the manner that the approval of the Police Establishment Board duly constituted was required. Since the validity of the Regional Police Establishment Board has been upheld and the present transfer order has been issued with the approval of the Regional Police Establishment Board, the order impugned can not be said to be bad in law merely because it was observed by the Court in its order dated 28.8.2010 that the approval of the Board constituted by the notification dated 12.3.2008 was required.

19. In this view of the matter, I am of the considered opinion that there is no illegality or infirmity in the impugned orders. The petitioners are holding a transferable post. Transfer is an incident of service. They are supposed to work anywhere in the State of U.P. The petitioners have no right to claim their posting at a particular place.

20. For the aforesaid reasons the writ petition being devoid of merit is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.04.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI,J.

U/S 482/378/407 No. - 3849 of 2008

Dev Sharan Yadav ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Balram Yadav

Counsel for the Respondent:
Govt.Advocate

Code of Criminal Procedure-Section 321-Application for withdrawal of prosecution-as offence under Section 309 I.P.C.-applicant already deposited entire amount of embezzlement-rejection by magistrate confining its consideration on gravity of case-ignoring other factors like growing age, pendency of criminal case for last 28 years-held-not proper direction for re-consideration issued.

Held: Para 8

The learned Magistrate seems to have passed the impugned order in a slipshod manner without considering the relevant facts of the case and guided himself on the basis of gravity of the crime and held that it was not in public interest to allow the prayer for withdrawal from prosecution. The gravity of the crime cannot be said to be the sole guiding factor for deciding the petition under section 321 of the Code of Criminal Procedure. The learned Magistrate should have taken into account other relevant factors such as the old age of the applicant, his criminal history, if any, as well as the fact that he had deposited the entire amount involved the present case. It was also a relevant factor that the F.I.R. is of the year 1982 and since then more than 28 years have elapsed but the trial is still pending with no logical progress. Was it in public interest to keep the trial pending after about 28 years specially in a case where embezzled amount had been deposited and the Public Prosecutor wanted withdrawal from the prosecution. All these facts need to be given due consideration by the learned Magistrate while considering the application filed under section 321 of the Code of Criminal Procedure. In view of the fact that the learned Magistrate has not considered all the relevant aspects of the matter and passed the impugned order in a summary manner, it would be just and expedient to direct the learned Magistrate to reconsider the matter.

Case law discussed:
(1980) 3 SCC 435; (1976) 4 SCC 250; 2005 (51) ACC 724 (SC)

(Delivered by Hon'ble Shri Kant Tripathi,J.)

1. Heard learned counsel applicant and learned AGA for the respondents and perused the record.

2. Counter and rejoinder affidavits have been exchanged.

3. With the consent of the learned counsel for the parties, this application is being disposed of finally.

4. It appears that the applicant is an accused in the case crime no. 197 of 1982, under section 409 I.P.C., Police Station-Inayatnagar, District-Faizabad, pending in the court of First Judicial Magistrate, Faizabad. The Assistant Prosecuting Officer in-charge of the case moved an application under section 321 of the Code of Criminal Procedure for withdrawal from the prosecution of

the applicant under the instruction dated 21.02.2007 given by the State Government. Learned Magistrate considered the application and arrived at the conclusion that the charge against the applicant was of serious in nature, therefore, it was not proper in public interest to permit withdrawal from prosecution. Accordingly, the learned Magistrate rejected the application vide his order dated 14.12.2007.

5. The learned counsel for the applicant submitted that the applicant is an old person aged about 63 years who has deposited the entire amount involved in the present case in the Government treasury. More so he has no criminal antecedent, therefore, no useful purpose would be served to try the applicant, therefore, it was desirable on the part of the learned Magistrate to allow the application for withdrawal from the prosecution. It was next submitted that the application for withdrawal from the prosecution could be moved on the instruction of the State Government because the Uttar Pradesh Act No. 18 of 1991 has amended section 321 of the Code of Criminal Procedure with effect from 16.02.1991 which provides that the application for withdrawal from the prosecution can be moved by the Public Prosecutor or the Assistant Public Prosecutor in-charge of the case on the written permission of the State Government which shall be filed in the court.

6. Learned counsel for the applicant further submitted that in view of the Apex Court verdict in the case of ***Rajender Kumar Jain Vs. State (1980) 3 SCC 435,*** the ultimate discretion to withdraw from prosecution was of the Assistant Prosecuting Officer in-charge of the case and the court's jurisdiction was merely supervisory in nature, therefore, what was open to the court was to see whether the Public Prosecutor acted with independent mind in the broader interest of public justice, therefore, according to that verdict the court is required to see the broader interest of public justice, public order and peace while considering an application under section 321 of the Code of Criminal Procedure. It was further held in that case that *the court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution. In the case of* ***State of Orissa Vs. Chandrika Mohapatra and others (1976) 4 SCC 250*** *, the Apex Court propounded the principles that the ultimate guiding consideration must always be the interest of administration of justice and that is touch stone on which the question must be determined. However, the Apex Court further opined that no hard and fast rule can be laid down nor can any categories of cases be defined in which consent should be granted or refused. It must ultimately depend on the facts and circumstances of each case in the light of what is necessary in order to promote the ends of justice, because the objective of every judicial process must be the attainment of justice.*

7. In the case of ***Rahul Agarwal Vs. Rakesh Jain and another, 2005 (51) ACC 724 (SC)*** the Apex Court reiterated the aforesaid principles and held:

"From these decisions, as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the Court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the Court may permit withdrawal of the prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the Court may allow the withdrawal of prosecution. The discretion under section 321, Code of Criminal Procedure is to be carefully exercised by the Court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance".

8. The learned Magistrate seems to have passed the impugned order in a slipshod manner without considering the relevant facts of the case and guided himself on the basis of gravity of the crime and held that it was not in public interest to allow the prayer for withdrawal from prosecution. The gravity of the crime cannot be said to be the sole guiding factor for deciding the petition under section 321 of the Code of Criminal Procedure. The learned Magistrate should have taken into account other relevant factors such as the old age of the applicant, his criminal history, if any, as well as the fact that he had deposited the entire amount involved the present case. It was also a relevant factor that the F.I.R. is of the year 1982 and since then more than 28 years have elapsed but the trial is still pending with no logical progress. Was it in public interest to keep the trial pending after about 28 years specially in a case where embezzled amount had been deposited and the Public Prosecutor wanted withdrawal from the prosecution. All these facts need to be given due consideration by the learned Magistrate while considering the application filed under section 321 of the Code of Criminal Procedure. In view of the fact that the learned Magistrate has not considered all the relevant aspects of the matter and passed the impugned order in a summary manner, it would be just and expedient to direct the learned Magistrate to reconsider the matter.

9. Therefore, the application is allowed and the impugned order dated 14.12.2007 (Annexure No. 1) is quashed. The learned Magistrate is directed to reconsider the matter in the light of the observations made hereinbefore and pass appropriate order afresh in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2011

BEFORE
THE HON'BLE F.I.REBELLO, C.J.
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 7849 of 2011

Abdul Aziz Ansari ...Petitioner
Versus
State of U.P. and another ...Respondents

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

Counsel for the respondents
Sri Irshad Hussain
C.S.C.

U.P. Municipalities Act 1916-Section 48 (2) (a) and (b) (vi)(xi)(xiv)-necessity of recording reasons-ceasure of financial and administrative Power of President Nagar Palika Parishad-without considering reply as well as written submission-mere saying no material available-highly shocking-even administrative authority are bound to give reasons-order can not sustain.

Held: Para 9

In the present case, what we see is that the entire exercise has been undertaken by the respondent authorities with a predetermined mind, throwing to the winds the entire procedure prescribed in law. This is evident from a plain reading of impugned order as well as the conduct of the respondents while dealing with a serious matter of removal of the petitioner who is a democratically elected President of Nagar Palika Parishad. Neither his reply has been properly considered nor written submissions taken into account, except for a mere mention in the order that nothing material has been stated therein. If this is permitted, then in every case all replies, arguments and submissions can always be brushed aside in a sentence by stating that nothing material has been argued or submitted and thus the reply or submission is rejected. Authorities performing quasi judicial functions are obliged to give reasons for not accepting the replies or submissions of a party. This is to ensure that there is nothing arbitrary in the actions of the authorities and that the authority has looked into the matter after applying his mind. In the present case, the same is totally lacking. This Court strongly deprecates the same. What we also notice is that the conduct of the respondents in the case of the petitioner earlier also has not been very fair as once after the order ceasing the financial and administrative powers of the petitioner as President had been stayed by this Court on 4.2.2010, the same was not restored for more than four months till 23.6.2010, without there even being any stay order from the Apex Court in the Special Leave Petition filed by the respondents, which was ultimately dismissed.

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

1. The petitioner was elected as President of Nagar Palika Parishad, Kairana, Muzaffar Nagar and took charge of the said office on 16.11.2006. The term of office of the petitioner is five years. In the preceding five years term also, the petitioner was elected and functioned as President of Nagar Palika Parishad. On 20.1.2009, a complaint was lodged by the two members of the Nagar Palika Parishad, which related to the business of the Parishad conducted during the term prior to 2006 as well as for the current term. On 27.8.2009, the petitioner was issued a show cause notice by the State Government as to why the petitioner may not be removed from the office of the

President under Section 48(2)(a) and (b)(vi)(xi)(xiv) of the Municipalities Act, 1916 (hereinafter referred to as the 'Act'). By the said order itself, the financial and administrative powers of the petitioner were ceased under the proviso to Section 48 of the Act. The petitioner thereafter submitted his detailed pointwise reply to the respondent no. 1 on 11.9.2009. Since no order was passed, the petitioner filed a writ petition no. 48338 of 2009 challenging the ceasure of his financial and administrative powers. By order dated 4.2.2010 passed in the aforesaid writ petition, the order ceasing the financial and administrative powers of the petitioner vide order dated 27.8.2009 had been stayed by this Court but it was provided that the enquiry may proceed. Challenging the said interim order, the State Government filed a Special Leave Petition no. 17031 of 2010 in which no interim order was granted and subsequently the special leave petition was dismissed by the Apex Court. It was only on 23.6.2010 that the financial and administrative powers of the petitioner were restored. Since further proceedings in pursuance of the notice were not stayed, on 28.12.2010 the petitioner was given an opportunity of hearing by the respondent no. 1, on which date the petitioner also filed his written submissions. Then by order dated 27.1.2011 passed by the respondent no. 1 (State of UP through Principal Secretary, Nagar Vikas, Lucknow), the petitioner has been removed from the office of the President of Nagar Palika Parishad, Kairana, Muzaffar Nagar. Challenging the said order, this writ petition has been filed.

2. We have heard Sri P.N. Saxena, learned Senior Counsel assisted by Sri Amit Saxena, learned counsel appearing for the petitioner as well as learned Standing Counsel appearing for the respondents and have perused the averments made in the writ petition as well the counter affidavit filed by the respondents.

3. The submission of learned counsel for the petitioner is that the impugned order has been passed under Section 48(2)(a) of the Act, which gives the power to the State Government to remove the President only if there has been a failure on the part of the President in performing his duties. It is contended that the charges levelled against the petitioner cannot be termed as failure on the part of the President in performing his duties, which is the ground for removing of the petitioner. The charges can be divided in two sets, one which relates to fixation of annual rent of five houses and land, which was fixed at less than rental value, and the other regarding transfer of tenancy rights of nine shops, out of which eight shops were transferred in the preceding term which ended in 2006, and only one with regard to the current term, for which explanation had been given by the petitioner in his detailed pointwise reply running in over 15 pages. Learned counsel for the petitioner has vehemently argued that though show cause notice as well as opportunity of hearing was given to the petitioner, in response to which the petitioner had submitted his detailed pointwise reply and had also given his written submissions at the time of hearing but none of them have been considered by the respondent no. 1 while passing the impugned order, and all that has been stated is that no material evidence or ground has been given in the reply so as to discharge the petitioner of the charges.

It is, thus, submitted that the impugned order has been passed by the respondents in a mechanical manner without application of mind and without considering the pointwise reply and written submissions of the petitioner and as such, the impugned order is liable to be set aside.

4. Learned Standing Counsel has however submitted that the order finds support from the reports of District Magistrate and Sub-Divisional Magistrate and as such the said order should be considered in the light of the said reports, and he thus submits that the order is fully justified. On being asked, learned Standing Counsel could not make a statement as to whether the reports of the District Magistrate and Sub-Divisional Magistrate had been provided to the petitioner before passing of the impugned order. It has been further submitted that the order having been passed under Section 48(2-A) and not under Section 48(2)(a) is fully justified as, according to the learned Standing Counsel, by UP Act No. 6 of 2004 sub-section (2-A) had been inserted to provide that where after enquiry the President is found to be guilty of any of the grounds referred to in sub-section (2), he shall cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President, which shall, until he is exonerated of the charges mentioned in the show cause notice issued to him under sub-section (2), be exercised and performed by the District Magistrate or by an officer nominated by him not below the rank of the Deputy Collector.

5. According to the learned counsel for the petitioner, the said sub-section (2-A) has been omitted by UP Act No. 2 of 2005 and as such would have no relevance to the facts of the present case.

6. Perusal of the impugned order dated 27.1.2011 would go to show that the relevant charges have been mentioned in the said order and just below each charge, a brief synopsis of the reply has been given. In the end all that has been stated is that the petitioner had been given personal hearing on 28.8.2010 on which date written submission was also filed, in which it was mentioned that the complainant had stated that he had not lodged any such complaint nor signed the same and as such the complaint was false, which could not be the basis of initiating proceeding against the petitioner. After recording this, in six lines the entire evidence and submissions of the petitioner have been discarded by merely stating that no material evidence or ground has been placed to dispute the charges and hence exercising power under Section 48(2)(a) of the Act the petitioner is removed from the office of Nagar Palika Parishad, Kairana, Muzaffar Nagar.

7. This is a shocking way of dealing with the complaint and the reply submitted, leading to the removal of an elected President of Nagar Palika Parishad. Merely completing the procedure and formality of issuing notice and receiving the reply to the notice and giving opportunity of hearing is not sufficient. What is to be seen is that the reply to the show cause notice, which in the present case is detailed point wise reply, has been considered by the authority or not. In the reply, the petitioner has given clear reasons for fixing of annual rental value at below the actual rent received and also for transfer

of tenancy rights of the shop in question, which all was done after the necessary resolution was passed by the Members of the Nagar Palika and not by the President alone. What we find from the impugned order is that the explanation given by the petitioner has not been dealt with or considered by the respondent no. 1 while passing the final order.

8. Foundation of democracy in our country is laid down at the grass root level. In the villages, Gram Pradhans are democratically elected by the people. In towns and cities, the Members and President of Nagar Palika Parishad are elected by the people under the provisions of the Municipalities Act. It is this democratic process, which begins from the grass root level and goes upto the election of the Members of Legislative Assemblies and the Parliament, which runs the State Governments and the country. At the lower level, the village panchayats and local bodies are elected by the people so that people, through their representatives, have their say in the running of the local bodies. No doubt the power to either cease the financial and administrative powers or the removal of a duly elected President of Nagar Palika Parishad is provided in the Act itself, but the same has to be exercised with caution and not in a routine manner at the whims and fancies of the authorities so as to disturb the very fabric of democracy and shake the foundation of a body duly elected by the people. Parliament has recognized the role of local bodies, specially the Panchayats and Municipalities by amending the Constitution and making Constitutional provisions in the matter of term of office and other conditions.

9. In the present case, what we see is that the entire exercise has been undertaken by the respondent authorities with a predetermined mind, throwing to the winds the entire procedure prescribed in law. This is evident from a plain reading of impugned order as well as the conduct of the respondents while dealing with a serious matter of removal of the petitioner who is a democratically elected President of Nagar Palika Parishad. Neither his reply has been properly considered nor written submissions taken into account, except for a mere mention in the order that nothing material has been stated therein. If this is permitted, then in every case all replies, arguments and submissions can always be brushed aside in a sentence by stating that nothing material has been argued or submitted and thus the reply or submission is rejected. Authorities performing quasi judicial functions are obliged to give reasons for not accepting the replies or submissions of a party. This is to ensure that there is nothing arbitrary in the actions of the authorities and that the authority has looked into the matter after applying his mind. In the present case, the same is totally lacking. This Court strongly deprecates the same. What we also notice is that the conduct of the respondents in the case of the petitioner earlier also has not been very fair as once after the order ceasing the financial and administrative powers of the petitioner as President had been stayed by this Court on 4.2.2010, the same was not restored for more than four months till 23.6.2010, without there even being any stay order from the Apex Court in the Special Leave Petition filed by the respondents, which was ultimately dismissed.

10. For the aforesaid reasons, we find merit in this petition and are of the opinion that the order dated 27.1.2011 cannot be sustained in the eye of law. Accordingly, this writ petition stands allowed. The order dated 27.1.2011 passed by the respondent no. 1 is set aside. It shall be open for the respondents, if they are so advised, to pass fresh orders in accordance with law and after giving adequate opportunity to the petitioner. If the order be adverse, it is not to be given effect to for a period of two weeks from the date of communication of the order to the petitioner. We make it clear that since the impugned order has been set aside, the petitioner shall be forthwith allowed to function as President with all powers.

11. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2011

BEFORE
THE HON'BLE ARUN TANDON,J.

Civil Misc. Writ Petition No. 8528 of 2001

Shiv Om and others ...Petitioners
Versus
District Judge, Farrukhabad ...Respondent

Counsel for the Petitioner:
Sri Anand Behari Lal Verma
Sri Tahir Hussain Farooqui

Counsel for the Respondent:
Sri Sunil Ambwani
Sri Amit Sthaleker
S.C.

Constitution of India, Article 226-right to appointment-out of 7 post of class 4th employees -appointment made strict in accordance with merit-thereafter the list lost its existence-petitioner admittedly below in merit than those candidates-subsequent appointment from retrenched employer-petitioner being stranger can not be allowed to question the same-held-no right to claim appointment.

Held: Para 8 and 9

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

The advertisement, copy whereof has been enclosed as Annexure-1 to the writ petition, specifically mentions that there are 7 vacancies of Class-IV employee on the regular side and there are 9 vacancies of Class-IV employees which are reserved for appointment of retrenched employees. Admittedly, as against 7 regular vacancies, candidates strictly in accordance with merit list have been appointed. Petitioners are lower in merit viz-a-viz all the seven candidates appointed. With the appointment of 7 candidates against regular vacancies, the select list preprepared for the purpose lost its life. The same was rightly cancelled under the order dated 04th December, 2000. The controversy in that regard stands settled by the Hon'ble Supreme Court in the case of Rakhi Ray and others vs. High Court of Delhi and others; (2010) 2 SCC 637.

So far as the vacancies reserved for retrenched employees are concerned, the petitioners can have no claim as they do not belong to said category. With regard to the appointments offered by way of promotion from the post of Chowkidar and Mali to that of Process Server to the persons named in paragraph 12 of the writ petition, this Court is of the opinion that the petitioners not being employee of judgeship cannot object to such promotion.

Case law discussed:
(2010) 2 SCC 637; (2002) 10 SCC 269; (2002) 10 SCC 549.

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

1. An advertisement was published by the District Judge, Farrukhabad for making appointments on various posts including the posts of Class-IV employee. A select list was prepared. The petitioners before this Court, who are six in number, were empanelled at serial nos. 9, 10, 12, 13, 18 and 20 respectively.

2. According to the petitioners, candidates at serial no. 1 to 4 were appointed on 28.07.1998, candidate at serial no. 5 was appointed on 12.08.1998, candidate at serial no. 7 was appointed on 16.12.2000 and the candidate at serial no. 8 was appointed on 18.12.2000.

3. According to the petitioners the select list itself was cancelled on 04.12.2000. Even thereafter appointment of candidates at serial nos. 7 and 8 was made. In paragraph 12 of the writ petition it is stated that in the month of January, 2001 three other persons were appointed as Class-IV employee.

On these allegations the petitioners have prayed for quashing of the order dated 04.12.2000 canceling the select list as well as a mandamus directing respondents to offer appointment to the petitioners.

4. Counsel for the petitioner submits that as many as 16 vacancies were advertised and therefore the petitioners, who were within the first 16 in the merit list, were entitled to appointment. He further submits that the appointments were offered illegally to three candidates in the month of January, 2001, as their names were not included in the select list prepared for the posts in question.

5. A counter affidavit has been filed on behalf of the District Judge and it has been stated that 7 permanent vacancies of Class-IV posts were advertised and in respect of other 9 Class-IV vacancies it was specifically mentioned that the same are reserved for retrenched employees only. It is then stated that the candidates from serial nos. 1 to 8 have been appointed against substantive vacancies strictly in order of merit. Candidate at serial no. 6 has not been appointed. Petitioners are lower in merit than the appointed candidates. The select list exhausted itself with the appointment against the advertised vacancies. The petitioners have no claim for any appointment.

6. So far as candidates appointed on 16th and 18th December, 2000 are concerned, it has been explained that there was some discrepancy in the roster prepared and after necessary corrections the orders for appointment of candidates at serial nos. 7 and 8 were issued. It has been stated that the petitioners did not belong to reserved category.

7. So far as the candidates appointed in the month of January, 2001 are concerned, it is stated that they have not been appointed by way of direct recruitment. They were promoted from the post of Chowkidar, Mali to the post of Process Server. The petitioners can have no claim in respect of such promotion.

8. I have heard learned counsel for the parties and have examined the records.

The advertisement, copy whereof has been enclosed as Annexure-1 to the writ petition, specifically mentions that there

are 7 vacancies of Class-IV employee on the regular side and there are 9 vacancies of Class-IV employees which are reserved for appointment of retrenched employees. Admittedly, as against 7 regular vacancies, candidates strictly in accordance with merit list have been appointed. Petitioners are lower in merit viz-a-viz all the seven candidates appointed. With the appointment of 7 candidates against regular vacancies, the select list preprepared for the purpose lost its life. The same was rightly canceled under the order dated 04th December, 2000. The controversy in that regard stands settled by the Hon'ble Supreme Court in the case of ***Rakhi Ray and others vs. High Court of Delhi and others; (2010) 2 SCC 637.***

9. So far as the vacancies reserved for retrenched employees are concerned, the petitioners can have no claim as they do not belong to said category. With regard to the appointments offered by way of promotion from the post of Chowkidar and Mali to that of Process Server to the persons named in paragraph 12 of the writ petition, this Court is of the opinion that the petitioners not being employee of judgeship cannot object to such promotion.

10. In the facts and circumstances of the case, no mandamus as prayed for by the petitioners can be issued.

Counsel for the petitioners has placed reliance upon the judgment of the Hon'ble Supreme Court in the cases of ***Suvidya Yadav and others vs. State of Haryana and others;.(2002) 10 SCC 269 and Sandeep Singh vs. State of Haryana and another; (2002) 10 SCC 549.***

11. The judgments relied upon by the counsel for the petitioners are clearly distinguishable in the facts of the case, as it has already been recorded that all the advertised vacancy within the category against which the petitioners had applied, had been filled by the candidates more meritorious to the petitioners.

Writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2011

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

Civil Misc. Writ Petition No. 12754 of 2011

Vittavihin Vidyalaya Prabhandhak Welfare Association ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Brij Raj

Counsel for the Respondents:
C.S.C.

Constitution of India Art. 226-Petitioner running Private School-un-aided institution challenge the validity of Govt. Order relating to self-center-examination center can not be claimed as matter of right-apart from that no right of manager going to be affected-can not be allowed to challenge the Policy-which is sole discretion of Board.

Held: Para 9

The impugned provisions are all regulatory in nature, inasmuch as, they advance the cause of holding examinations and merely because the said provisions have either been misused or not put to use or not having been strictly complied with, the same cannot

be declared to be ultra vires the provisions of Article 14 of the Constitution of India. The independent cases relating to such allotments can be challenged by aggrieved persons and not by the association. The Government Orders, which have been issued, are in consonance with the provisions of 1921 Act and they do not travel beyond the scope of the powers conferred on the Board under the aforesaid Act. The Government Orders do not offend any public policy. The institutions have no right to claim that they should function as centres. The issue relating to discrimination of not making some of the institutions as centres cannot lead to the conclusion that the action of the Board is arbitrary.

Case law discussed:

2003 (1) ESC 347; 2002 (3) AWC 2271.

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

1. The petitioner-association claiming itself to have been formed for the interest of the management of secondary schools recognized under the provisions of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as the '1921 Act') has filed this writ petition challenging the Government Order dated 10th September, 2010 and the amended order dated 12.11.2010 relating to the formation of centres for holding examinations of the Board of U.P. High School and Intermediate Examinations. The claim in essence is that the State Government has taken arbitrary decisions on the basis of the impugned provisions of the Government Orders which violates the right and equal treatment to the institutions for operating as centres.

2. Learned counsel for the petitioner has relied on certain decisions to advanced his submissions and he contends that a judicial review is permissible.

3. The dispute in essence is that the petitioner-association has stood up for the cause of self finance institutions and also such institutions, who want their institutions to function as self centres, for the students of Class-X and Class-XII, and conduct the examinations on behalf of the Board. This submission is based on the Government Orders to contend that the respondents themselves have formulated a policy to provide self centres particularly to such institutions which are catering to the need of female students. The respondents have violated and discriminated the provisions as against the members of the petitioner-association by either not allotting centres or refusing to allot centres on arbitrary grounds.

4. Other submissions have been raised that centres have been sent far away at a considerable distance, which is also causing inconvenience to the students and hence the Government Orders deserve to be struck down to the extent as prayed for.

5. Having heard learned counsel for the petitioner and the learned Standing Counsel, the Board of High School and Intermediate Examinations is an autonomous body created under the provisions of the U.P. Intermediate Education Act, 1921. Section 7 of the 1921 Act empowers the Board to conduct examinations for which it is empowered to do all such other acts and things as may be requisite in order to further the objects of the Board for regulating and supervising the examinations as the act empowers the Board to do everything essential for the purpose by necessary implication. It also empowers the Board to fix examination centres. A centre has been defined under Section 2(aa) of 1921 Act as follows:

2 (aa). " "Centre" means an institution or a place fixed by the Board for the purposes of holding its examinations and includes the entire premises attached thereto;

6. This definition was introduced be way of an amendment in the year 1959 itself as it was necessary to empower the Board to hold examinations at a particular centre by fixing the same and appointing a superintendent for conducting the said examinations. The power to regulate is, therefore, implicit with regard to the location of centres.

7. This Court in the case of ***Jamiluddin, Manager, Managing Committee, Saghir Fatima Mohammadia Girls Inter College Agra Vs. Secretary Board of High School and Intermediate Allahabad and others*** reported in ***2003 (1) ESC 347*** has held as follows:

"While parting with the case, I would like to note that no Manager has any right to challenge the selection of centres. The Court takes judicial notice of the fact that self centres are places of well manipulation and designed centres for permitting candidates to use unfair means by charging money and that is sole interest of the Managers of such Institutions. ***U.P. Board and District Level Committees should be given free hand for selecting centres and this Court should not, particularly in exercise of its jurisdiction under Article 226, Constitution of India, interfere with the same as it is an administrative decision.*** *It goes without saying that this Court has always jurisdiction to interfere with the Administrative orders in the rarest of rare cases, provided petitioner furnishes sufficient material to show that such decision has been taken arbitrarily or with some ulterior motives."*

8. The petitioner-association, therefore, cannot contend on behalf of the Managers of the institutions that they have an absolute right to maintain this writ petition for the said cause.

9. The impugned provisions are all regulatory in nature, inasmuch as, they advance the cause of holding examinations and merely because the said provisions have either been misused or not put to use or not having been strictly complied with, the same cannot be declared to be ultra vires the provisions of Article 14 of the Constitution of India. The independent cases relating to such allotments can be challenged by aggrieved persons and not by the association. The Government Orders, which have been issued, are in consonance with the provisions of 1921 Act and they do not travel beyond the scope of the powers conferred on the Board under the aforesaid Act. The Government Orders do not offend any public policy. The institutions have no right to claim that they should function as centres. The issue relating to discrimination of not making some of the institutions as centres cannot lead to the conclusion that the action of the Board is arbitrary.

10. Apart from this, the petition has been filed at the verge of the moment when the examinations are about to commence. Any alteration as prayed for by the petitioners would even otherwise jeopardise the entire examinations. The operation of self centres and the menace of centres claiming such rights were also noticed by the Division Bench in the case of ***Krishna Kumar Upadhyay Vs. State of***

U.P. and others reported in ***2002 (3) AWC 2271.***

11. Even otherwise, a Division Bench of this Court in Special Appeal No. 118 of 2011 decided on 27.1.2011 has held as follows:

"According to us, there is a difference between right and expectation. Definitely an institution has a right to impart education but right to be an examination centre can not be an available right to the institution."

12. The challenge raised therefore is unfounded and there is no merit in the petition.

13. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2011

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

Civil Misc. Writ Petition No.14735 of 2011

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

Counsel for the Petitioner:
Sri R.C.Singh

Counsel for the Respondents:
C.S.C.

U.P. Imposition of Ceiling and land Holding Act-Section-11-A-Petitioner's land declared surplus-while they became Seerdars-thereafter Bhumindhar under Z.A. & L.R. Act-during consolidation they have been allotted Chak-and in are possession-held-pending disposal of objections-interim protection from dispossession given.

Held: Para 7

Relying on the said decisions, it is urged that even otherwise this Court has acknowledged that recorded and even unrecorded tenure holders are entitled to be heard in the ceiling proceedings and objections under Section 11 (2) have to be disposed of before any other remedy is availed of by a person claiming rights. Sri R.C. Singh has invited the attention of the Court to paragraphs 32, 33 and 34 of the decision in the case of Virendra Deep Singh and others Vs. District Magistrate, Rampur, and others, 2010 (10) ADJ 646 (DB), to urge that the objections under Section 11 (2) are obviously subsequent to the determination of surplus land which entitles a tenure holder aggrieved to file an objection.

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

1. This writ petition has been filed by 9 tenure holders claiming themselves to be the recorded tenure holders of the disputed plots which is alleged to have been declared as surplus under the provisions of the U.P. Imposition of Ceiling and Land Holdings Act.

2. The contention raised is that the land in question had been settled in favour of the petitioners by the erstwhile Zamindars of the land and by virtue of such settlement, they have become Seerdars and again Bhumindhars i.e. tenure holders in their own right under the U.P. Z.A. & L.R. Act, 1950, by operation of law.

3. The petitioners also contend that their names were recorded in the revenue records and for that they have relied upon the extract of Khatauni between 1366-

1368 Fasli and 1372-1374 Fasli. They also contend that the land has been allegedly declared surplus in the hands of such persons, who are alleged to be the tenure holders whereas the correct facts are that the said land has already been settled in favour of the petitioners and cannot be treated to be surplus.

4. A copy of the objection moved under Section 11 (2) of the U.P. Imposition of Ceiling and Holdings Act has been filed as Annexure-3. It is urged that the petitioners came to know very recently about the said land having been made part of the surplus land under the Ceiling Act whereas during the consolidation operations, the petitioners had been allotted Chaks in respect of the same land as they were in possession and ownership of the same.

5. The only prayer made is that a mandamus be issued to decide the objections and till the objections are disposed of, the petitioners be not dispossessed by the respondents - authorities.

6. Learned counsel for the petitioner has invited the attention of the Court to the orders passed in Writ Petition Nos. 67690/2006, 29689/2007, 41729/2007, 60643/2007, 59444/2008, 54437/2009 and 2400/2010, which have been quoted in the body of the petition.

7. Relying on the said decisions, it is urged that even otherwise this Court has acknowledged that recorded and even unrecorded tenure holders are entitled to be heard in the ceiling proceedings and objections under Section 11 (2) have to be disposed of before any other remedy is availed of by a person claiming rights. Sri R.C. Singh has invited the attention of the Court to paragraphs 32, 33 and 34 of the decision in the case of Virendra Deep Singh and others Vs. District Magistrate, Rampur, and others, 2010 (10) ADJ 646 (DB), to urge that the objections under Section 11 (2) are obviously subsequent to the determination of surplus land which entitles a tenure holder aggrieved to file an objection. This is in order to protect the right of such tenure holders, who have not been given notice under Section 10 (2) of the Act. Some of the petitioners in the said decision had straight away approached this Court by filing a Writ Petition under Article 226 of the Constitution of India without moving any such objection before the ceiling authorities. Following the ratio as indicated in paragraphs 32, 33 and 34 of the aforesaid decision, the Court held that a tenure holder is not entitled to straight away maintain a petition and he has to approach the authority by filing an objection before the ceiling authorities.

8. Accordingly, the writ petition is disposed of with a direction to the respondent No.3 to decide the objections of the petitioners under Section 11 (2) of the Ceiling Act. The petitioners allege that they are still continuing in possession over the land as they were recorded during consolidation operations and the said land could not have been subjected to any lease under Section 27 of the Ceiling Act. In such a situation and in view of the authorities that have been referred to in the writ petition, till there is a final decision on the objection in accordance with law, and in the event the petitioners are in actual physical possession of their land, they shall not be dispossessed till such objections are decided.

9. With the aforesaid directions, the writ petition stands disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2011

BEFORE
THE HON'BLE ARUN TANDON,J.

Civil Misc. Writ Petition No. 22260 of 1987

Suredra Narain Singh @ Babu ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri D. Singh
Sri D.P. Singh
Sri Kunal Ravi Singh
Sri V.K.S.Chaudhary
Sri V.P.Pathak

Counsel for the Respondent:
S.C.

(A). U.P. Imposition of Ceiling on Land Holdings Act, 1960-Section 10-Notice declaring surplus land issued on 17.11.83-questioned on ground after expiry of two years from the date of enforcement of Act-even on amended Act-Notice impugned after 8 years not proper-held-section 9(1) contemplates general notice-Section 9 (2-A) requires statement of those who had not subjected to any notice earlier-petitioner never submitted any declaration-continued his possession-can not be allowed to take plea of limitation .

Held; Para 22

This Court, therefore, records that the plea that the notice under Section 10(2) being not issued within reasonable time i. e. 2 would render the proceedings bad years does not appeal to the Court in the facts of the case. The petitioner himself failed to carry out the requirements of Section 9(1) or 9(2) by not filing his statement within the time provided under the said section.

(B). U.P. Imposition of ceiling on land holding Act 1960-Section-4-A-irrigated-non irrigated plots-authorities specifically held the plot in question under command area of Betwa Canal-goes to show the irrigated plots non availability of Khasra entries of 1378, 1379 and 1380 fasli-not mean that authority can not determined such issue-in said back ground non availability of entries of Khasra-not of much relevance.

Held: Para 24

It may be recorded that the relevant Khasras of 1378, 1379 and 1380 Fasli were not brought on record by the petitioner or by the state. It was not the case of the petitioner that such Khasra entries were available and/or be examined. Section 4-A of Act, 1960 require consideration of the aforesaid Khasras entries and such other records, as may be considered necessary, as well as for spot inspection being made for determination as to whether a particular plot of land is irrigated or not. Merely because the Khasras entries of 1378, 1379 and 1380 Fasli were not on record/not available, it will not mean that the Prescribed Authority could not have determined the issue qua the plots being irrigated or not with reference to the other material on record. It has been found as a matter of fact that the Plot Nos. 169 and 172 were situate within the command area of Betwa Canal, which was Schedule-I canal. Reference to Khasra entries of 1388, 1389 and 1390 Fasli is not of much relevance in the said factual background.

Case law discussed:
(2003) 7SCC 667; (1976) 2 SCC 181; 1997 (88) RD 385

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

1. Heard Sri V.K.S. Chaudhary, Senior Advocate assisted by Sri Kunal Ravi Singh, Advocate and Standing Counsel on behalf of the State. Nobody is present for the respondent no. 4.

2. Petitioner before this Court seeks quashing of the order dated 31.01.1985 passed by the Prescribed Authority under the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as Act, 1960) as well as the order of the Appellate Authority dated 13.11.1987 dismissing the appeal.

3. Before adverting to the facts of the petition it is appropriate to record that the present writ petition was dismissed under a judgment dated 08th May, 2007. The petitioner made a review application, which was granted by the Hon'ble Judge on 06th February, 2009 and the writ petition was restored to its original number. Hence this petition has again been placed for hearing before this Court.

4. Fact in short giving rise to the present writ petition are as follows:

A notice under Section 10(2) of the Act, 1960 was issued by the Prescribed Authority on 17.11.1983, which was duly served upon the petitioner indicating that the tenure holder had 8.1 acres of irrigated land as surplus. Petitioner filed objections to the aforesaid notice, which contained three basic objections i. e. (a) that the notice has been issued to the petitioner only on 17.11.1983 when such proceedings under Section 10(2) should have been initiated within reasonable time, as no period of limitation has been prescribed under the Act, 1960 for the purpose, this reasonable period cannot extend to nearly 8 years to be counted from the date amendments were introduced in the Act, 1960 by U.P. Act No. 20 of 1976.

(b) that a sale deed dated 27.11.1971 was executed by the petitioner with the permission of the Settlement Officer Consolidation. The same was a bona fide transaction and therefore the land so transferred was liable to be excluded.

(c) Plot Nos. 169 and 172 had wrongly been shown as irrigated.

It was also stated that 12.19 acres of land was exclusively recorded in the name of Brij Kishore, who had not been issued notice under Rule 8. In order to keep the record straight it may be recorded that Sri Brij Kishore filed an independent objection claiming a right over Gata No. 65. Brij Kishore has been impleaded as respondent no. 4 in the present writ petition.

5. The Prescribed Authority, after recording the evidence and after considering the case pleaded by the parties, vide order dated 31.01.1985 held that the objections raised by the petitioner and Brij Kishore were unfounded. He held that the petitioner had 8.18 acres of land as surplus.

6. Not being satisfied with the order so passed, the petitioner filed an appeal under Section 13 of the Act, 1960. Brij Kishore (Respondent no. 4) also filed an independent appeal. Both the appeals were clubbed together and dismissed under one common judgment dated 13th November, 1987. Hence this petition.

It may be recorded that nobody is present on behalf of Brij Kishore (respondent no. 4) nor the Court has been

informed about any other writ petition having been filed by Brij Kishore.

7. Before this Court Sri V.K.S. Chaudhary, Senior Advocate has raised two grounds for challenging the orders impugned. Firstly, that although no time limit is fixed under Section 10(2) of Act, 1960 for issuance of a notice but such a power can be exercised only within reasonable time. He submits that U.P. Act No. 20 of 1976 was published in the official gazette on 03rd May, 1976. It was made effective from 10th October, 1975 and therefore any proceedings in pursuance to the said Amending Act could have been taken within reasonable period, which if read with reference to other provisions of Act, 1960 would be a period of two years. Since in the facts of the case notice has been issued after 8 years, the entire proceedings are bad, as the reasonable period cannot extend to 8 years.

8. Reliance has been placed upon the judgments of the Hon'ble Supreme Court of India in the cases of ***Ibrahimpatnam Taluk Vyavasaya Coolie Sangham vs. K. Supresh Reddy and others; (2003) 7 SCC 667 (Paragraph 12 and 13), State of H.P. And others vs. Rajkumar Brijender Singh and others; (2004) 10 SCC 585,*** as well as ***M/s S.B. Gurbaksh Singh vs. Union of India and others; (1976) 2 SCC 181.***

9. He clarifies that there had been three stages for imposition of ceiling on land holding in the State of Uttar Pradesh. The first stage commenced with the introduction of U.P. Act No. 1 of 1961 i. e. the principal Act. The second stage stood initiated with the issuance of U.P. Act No. 13 of 1973, whereby amendments were made in Section 9 and other corresponding provisions. The Amending Act also contains transitory provision, whereunder two years time limit had been fixed for re-determination of the ceiling limits, and the third stage stood commenced with the introduction of U.P. Act No. 20 of 1976 i.e. with effect from 10.10.1975.

10. Counsel for the petitioner submits that under Section 13-A of Act, 1960 a period of two years from the date of notification under Section 14 has been provided for rectification of a mistake. Under Section 9 of the U.P. Act No. 2 of 1975 (Transitory Provision) a period of 2 years has been provided for redetermination of ceiling limits under the amended provisions. Lastly under Section 13(3) of the U.P. Act No. 20 of 1975 (Transitory Provision) in respect of cases already decided before 10.10.1975, a period of two years have been notified for redetermination of the ceiling limits. The State Legislature has found this period of two years to be the fair and reasonable period for reopening of the orders already made and this period, according to the petitioner, should be the maximum period for exercise of powers under Section 10(2).

11. Since in the facts of the case notice has been issued after nearly 8 years under Section 10(2), he submits that the same cannot be considered to be a reasonable period for exercise of power by the authorities. The proceedings should, therefore, fall on this ground alone in view of the law referred to above.

12. The second ground raised before this Court is that both the authorities have taken into consideration the Khasra entries of the 1388, 1389 and 1390 Fasli for arriving at a conclusion that Plot No. 169 and 172 were irrigated. He submits that the Khasra entries of 1378, 1379 and 1380 Fasli

alone could have been taken into consideration. Reliance has been placed upon the judgment of this Court in the case of ***Badi Bahu vs. State of U.P. and others; 1997(88) RD 385.***

13. Standing Counsel in reply contends that Section 9(1) and 9(2) of Act 1960 provides for issuance of a general notice in response whereof every tenure holder is required under law to submit his statement qua the surplus land possessed by him. It is only because of the default committed by such recorded tenure holder by not responding to the general notice under Section 9(1) and 9(2) of Act, 1960 that the Prescribed Authority has to exercise his power under Section 10. It is therefore contended that in the facts of the case the plea that the Court may determine two years as the reasonable period for exercise of power under Section 10(2), after issuance of general notice under Section 9(1) or 9(2), is wholly misplaced. He further clarifies that during all this intervening period i. e. from the date of issuance of general notice under Section 9(1) or 9(2) till the the date of issuance of notice under Section 10(2) to the petitioner, he continued to enjoy the land which was surplus with him, and therefore it cannot be said that any rights of the petitioner are adversely affected because of some delay in issuance of notice under Section 10(2).

With regard to second contention of the petitioner it is contended that under Section 5(2) explanation, of Consolidation of Holdings Act, 1953 (hereinafter referred to as 'Act, 1953') it has been clarified that proceedings under Act of 1960 shall not be deemed to be proceedings in respect of declaration of right or interest in any land. Meaning thereby that the proceedings under the Ceiling Act will not stand abated because of issuance of notification under Section 4 of the U.P. Consolidation of Land Holdings Act. Section 30(b) of the Act No. 8 of 1953 clarifies that the rights of the tenure holder entering into possession over the Chak would be the same as he had in his original holding together with such other benefits of irrigation from a private source, till such source exists, as the former tenure holder of the plots comprising the Chak had in regard to them. He, therefore, submits that irrespective of the consolidation proceedings the ceiling limits of the petitioner have rightly been determined. In the facts of the case authorities have recorded a categorical finding that Plot No. 169 and 172 were irrigated with reference to the fact that the plots lay within the command area of Betwa River Canal covered by clause thirdly of Section 4-A of the Act, 1960.

14. I have heard learned counsel for the parties and have gone through the records of the writ petition.

15. So far as the first contention raised on behalf of the petitioner is concerned, it may be recorded that it is not the case of the petitioner that a general notice under Section 9(1) or 9(2) of the Act, 1960 was not issued or that the petitioner filed his statement as required thereunder. Therefore, in the facts of the case provisions of Section 10 were fully attracted and a notice was issued to the petitioner under Section 10(2) in accordance with law.

Section 9, as amended from time to time, takes care of both the situations i. e. (a) after publication of general notice under Section 9(1) under the principal Act, and (b) after issuance of general notice under Section 9(2) as added by Act No. 18 of 1973.

16. Section 9(2) proviso contemplates issuance of individual notice to the tenure holder by the Prescribed Authority irrespective of the fact as to whether any general notice had been issued under Section 9(2) for the area or not.

Section 9(2-A) of the Act, 1960 contemplates a contingency where the recorded tenure holder, having surplus land on 24.01.1971 or thereafter, has not submitted his statement as required under general notice under Section 9(2) and against him no proceedings under Act, 1960 were pending as on 10th October, 1975. Such a tenure holder has to submit his statement referred to in Section 9(2) within 30 days from the said date.

17. From a joint reading of the aforesaid provisions it shall be clear that Section 9(1) contemplates a general notice at the first instance. Thereafter, with the amendment in parent Act vide Act No. 18 of 1973 publication of a fresh general notice under Section 9(2) was provided. Proviso to Section 9(2) permitted the Prescribed Authority to issue individual notice to tenure holders for filing their statement irrespective of the general notice published.

Section 9(2-A) requires filing of statement by the persons like the petitioner who had not submitted their statement and in respect of whom no proceedings under the Act, 1960 were pending on 10th October, 1975 i. e. the date on which U.P. Act No. 20 of 1976 came into force. The section makes filing of the return necessary within 30 days from 10th October, 1975 qua the surplus land held by the tenure holder and his family members on 24.01.1971 or thereafter including the acquired or disposed of land between 24.01.1971 to October 10, 1975 and for its inclusion.

18. Section 10 confers a power upon the Prescribed Authority to prepare the statement qua the persons who do not furnish their statement under Section 9, indicating the individual plots to be taken as surplus and thereafter to serve a notice in that regard under Section 10(2). For exercise of power under Section 10(2) no period of limitation has been provided.

19. It is no doubt true that under Section 13-A two years period from the date of issuance of notification under Section 14(4) has been provided for rectification of any mistake apparent on the face of record. Similarly, under Section 9 of U.P. Act No. 2 of 1975 (Transitory provision) a period of two years had been provided for redetermination of the ceiling limits under the Amended Act, and lastly under Section 31(3) of the U.P. Act No. 20 of 1976 (Transitory Provision) a period of two years is provided for redetermination of the surplus land in accordance with the provisions of the Act qua cases already decided before 10.10.1975.

20. It will be seen that all these three provisions pertain to redetermination/recalculation of the ceiling limits or for correction of the mistakes in orders determining the ceiling limits of a tenure holder. It is in respect of these contingencies only a period of two years has been provided as limitation. The legislature was aware of the aforesaid provisions, yet in its own wisdom it decided not to provide any limitation for exercise of power under Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960. The High Court cannot legislate and lay down that power under Section 10(2) has to be exercised within two years of the date from which the tenure holder was required to file his statement under Section 9(1) or 9(2) of

the Act, 1960. The plea, that such limitation of 2 years should be read in the section for exercise of power under Section 10(2) as reasonable period, also does not appeal to the Court.

21. The judgments relied upon by the counsel for the petitioner deal with either exercise of *suo moto* or revisional power for correcting the orders passed earlier. The judgments are, therefore, clearly distinguishable. Orders, which are passed earlier settled the rights of the parties and it is in this background that the Hon'ble Supreme Court of India has held that the suo moto exercise of power/exercise of revisional power for re-opening of earlier order, settling the rights of the parties, cannot be exercised after an unreasonable period.

However, in same judgments the Apex Court has explained that what would be the reasonable period has to be determined in the facts of each case. In the facts of the case in hand there has been no determination of the surplus land at the first instance and the petitioner throughout continued to enjoy the land, which he should himself have surrendered by filing a statement under Section 9 as surplus land. Therefore, the delay in issuance of notice under Section 10(2) to the petitioner has been to his benefit and there has been no adjudication of his rights at any point of time earlier.

22. This Court, therefore, records that the plea that the notice under Section 10(2) being not issued within reasonable time i. e. 2 would render the proceedings bad years does not appeal to the Court in the facts of the case. The petitioner himself failed to carry out the requirements of Section 9(1) or 9(2) by not filing his statement within the time provided under the said section.

23. So far as the issue of Plot No. 169 and 172 being un-irrigated is concerned, suffice is to record that the Prescribed Authority under the impugned order had categorically recorded that the plots were situate within the command area of Betwa Canal, which as per the notification dated 08.09.1971, published in the official gazette dated 20th September, 1991, is Schedule-I category canal. Therefore, in view of Section 4-A thirdly it has rightly been held that the land, being within the command area of lift irrigation canal, had to be treated as irrigated.

24. It may be recorded that the relevant Khasras of 1378, 1379 and 1380 Fasli were not brought on record by the petitioner or by the state. It was not the case of the petitioner that such Khasra entries were available and/or be examined. Section 4-A of Act, 1960 require consideration of the aforesaid Khasras entries and such other records, as may be considered necessary, as well as for spot inspection being made for determination as to whether a particular plot of land is irrigated or not. Merely because the Khasras entries of 1378, 1379 and 1380 Fasli were not on record/not available, it will not mean that the Prescribed Authority could not have determined the issue qua the plots being irrigated or not with reference to the other material on record. It has been found as a matter of fact that the Plot Nos. 169 and 172 were situate within the command area of Betwa Canal, which was Schedule-I canal. Reference to Khasra entries of 1388, 1389 and 1390 Fasli is not of much relevance in the said factual background.

25. In the totality of the circumstances brought on record, it is held that the Prescribed Authority was right in recording that Plot Nos. 169 and 172 were irrigated in view of the fact they were situate in effective command area of Betwa Canal, a Schedule-I Canal.

26. This Court may further clarify that any change in the plots because of the consolidation operation shall not in any way adversely affect the findings recorded qua the original land holding of the petitioner being irrigated, inasmuch as Section 30 of the Consolidation of Holdings Act, 1953 clarifies that from the date a tenure holder enters into possession of Chak allotted to him shall be deemed to have entered into possession with same rights, title, interest and liability, as he had in the original holdings together with such other benefits of irrigation from a private source, till such source exists. In view of the aforesaid Section 30(b) of the Consolidation of Holdings Act, 1953 the petitioner cannot take benefit of mere change in the plot numbers due to consolidation operation. It is not the case of the petitioner that area of his land holdings has been reduced because of such consolidation operation and he should be given benefit of such reduction in area.

27. In the totality of the circumstances on record, this Court finds no good ground to interfere. The writ petition is dismissed. Interim order, if any, stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.04.2011

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 24777 of 2011

Lakhan Lal ...Petitioner
Versus
State Of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri M.N. Singh

Counsel for the Respondent:
C.S.C.

U.P. Imposition of ceiling on Land Holding Act-1960-Section 14(1)(e)-ceiling appeal admitted-stay application rejected-considering language without deciding appeal-possession of surplus land can not be taken by Collector-rejection of prayer of stay from dispossession-not proper-writ court itself granted interim protection.

Held: Para 7

Even otherwise in such matters where an appeal is filed and the same has been admitted, the same presumes a prima facie case of the petitioner. The appellate authority should therefore not refuse to exercise discretion for granting interim relief as indicated in the case of Mahmood Rais V. State of U.P. reported in 2009(5) ADJ 529. Learned Commissioner himself has admitted the appeal and therefore the rejection of the stay application is unjustified.

Case law discussed:
2009(5) ADJ 529

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

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

2. Learned standing counsel states that since a pure question of law is involed it is not necessary to file a counter affidavit at this stage.

3. The petitioner is a tenure holder against whom proceedings were initiated under the U.P.Imposition of Ceiling on Land Holdings Act, 1960 and the Prescribed Authority vide orderdated 28.2.2011 declared certain land as surplus in the hands of the petitioner. Aggrieved the petitioner has preferred an appeal being Ceiling Appeal No.3 of 2010-11 which has been admitted on 15.4.2011. However, while admitting the appeal the application for an interim relief has been rejected on the ground that there is no justification for grant of any interim order.

4. Learned counsel for the petitioner submits that in view of the provisions of clause (c) of Section 14(1) of the 1960 Act, the Collector can take possession of the surplus land only after decision in appeal and upon a notification being issued under Section 14. He submits that the aforesaid situation has not arrived and therefore the appellate authority ought to have granted an interim order so as not to disturb the possession of the petitioner during the pendency of the appeal.

5. Learned standing counsel submits that as a matter of fact that in view of the legal position as indicated by the petitioner, the appeal itself has to be disposed of before possession can be taken.

6. Having heard learned counsel for the parties as a matter of fact the Collector cannot take possession of the land so long as the appeal is not decided in terms of the provisions referred to hereinabove.

7. Even otherwise in such matters where an appeal is filed and the same has been admitted, the same presumes a prima facie case of the petitioner. The appellate authority should therefore not refuse to exercise discretion for granting interim relief as indicated in the case of **Mahmood Rais V. State of U.P.** reported in **2009(5) ADJ 529.** Learned Commissioner himself has admitted the appeal and therefore the rejection of the stay application is unjustified.

8. Accordingly the writ petition is disposed of with a direction that the petitioner should not be dispossessed from the land in dispute till the disposal of the appeal at this stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.04.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 61552 of 2008

Naushad Alam ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri J.A. Azmi
Sri J.J. Munir

Counsel for the Respondent:
C.S.C.
Sri J.P.Singh
Sri S.K.Anwar
Sri T.M. Abbasi
Sri Zafar Abbas

Intermediate Education Act 1921-Chapter III Regulation 103-compassionate appointment-minority institution-provision of Regulation 103 already quashed by Single Judge-

meaning thereby-it is like stillborn provision-order of D.I.O.S. directing compassionate appointment-quashed necessary direction to proceed with selection in accordance with law issued.

Held: Para 24 and 31

Now, the second aspect, whether declaration of an amending provision would have the effect of revival of old provision or it stood wiped out from the statute book. This has to be seen in the light of the decision whereby the provision has been struck down. Whenever a statute, whether principal or subordinate legislation, is struck down, being violative of provisions of the Constitution, and in particular fundamental rights under Part III of the Constitution, in view of Article 30(2) of the Constitution, such a statute is void ab initio. It is like a stillborn provision incapable of repeal or substitution of an existing provision.

That being so, since there is a clear provision by way of proviso to Regulation 103 that the provision pertaining to compassionate appointment would not apply to minority institutions, in my view, DIOS had no authority or jurisdiction to direct the Management of the College to make appointment from a claimant of compassionate appointment. The college Management therefore had rightly made its selection. In the absence of any other reason, the same could not have been disapproved only on the ground that a candidate claiming compassionate appointment had to be appointed on the post in question.

Case law discussed:

2002(2) UPLBEC 1742; Civil Misc. Writ Petition Nos.12157 of 2003 with 33298 of 2002 (Governing Body of the Registered Society Designated as St. Andrew's College Association, Gorakhpur Vs. State of U.P.); AIR 1958 SC 468; AIR 1954 SC 728; AIR 1958 SC 648; AIR 1963 SC 1019; JT 2005 (12) SC 1

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

1. Both these matters relate each other and hence are being decided by this common judgment.

2. Writ Petition No.61552 of 2008 is directed against three orders. One is dated 18th August, 2008 (Annexure 5 to the writ petition) whereby District Inspector of Schools, Azamgarh (hereinafter referred to as "DIOS") respondent No.3 has informed Manager, Shibli National Inter College, Azamgarh (hereinafter referred to as "College" that proposal for appointment of Naushad Alam (petitioner) on the post of Assistant Clerk is being disapproved since matter of compassionate appointment in the aforesaid College is pending.

3. Second impugned order in this writ petition is dated 23rd August, 2008 whereby DIOS has invited applications for appointment on compassionate basis against existing vacancies which included the vacancy in question i.e. of Assistant Clerk occasioned due to retirement of Sri Abdul Qadeer. The third order is dated 18th August, 2008 whereby DIOS has recommended respondent No.6 (Atharu Ebad) for appointment on the post of Assistant Clerk in the vacancy in question in the College directing the competent authority to issue letter of appointment forthwith.

4. Learned counsel for the petitioner contended that in view of proviso to Regulation 103 of Chapter III, right to claim compassionate appointment in not available to the heirs of the employees of minority institution and hence impugned orders are wholly illegal and void *ab initio*.

5. No counter affidavit has been filed on behalf of respondents No.1 to 3. The respondents No.4 and 5, however, have filed counter affidavit through Sri S.K.Anwar Advocate. It is said that a Selection Committee was constituted by Committee of Management consisting of the following:

1.Sri Abu Saad Ahmad (President)

2.Sri Shamim Ahmad (Secretary).

3.Wasi Uddin (Joint Secretary)

4.Sri Niyaz Ahmad Jamili (Manager)

5.Sri Abu Mohd. Khan (Principal)

6. The committee interviewed 11 candidates including the petitioner as well as respondent No.6 for the post in question and prepared merit list. It found that only two candidates i.e. petitioner and one Mohd. Shahid were conversant with typing which was the essential qualification and accordingly made recommendation in favour of the petitioner pursuant whereto the resolution was passed by Managing Committee for appointment of petitioner as 'Assistant Clerk'.

7. It is said that DIOS has no authority under law to interfere in appointment of the teaching and non teaching staff in a minority institution. Regulations 101 to 107 do not apply to minority institutions. It is said that any other view would make the Regulations violative of Article 30 read with Section 16-F and 16-FF of U.P. Intermediate Education Act, 1921 (hereinafter referred to as the "Act 1921").

8. Respondent No.6 initially filed a short counter affidavit through Sri J.P. Singh, Advocate stating that his father late Sri Ali Ebad was Lecturer (Urdu) in the College and died on 30th December, 2006. His application for compassionate appointment was forwarded by Manager of the College to DIOS on 23rd June, 2007. The Principal also forwarded name of respondent No.6 for compassionate appointment to DIOS on 26th June, 2007. When the matter was pending, new manager, who was interested in fresh appointment, proceeded to hold selection and fixed 5th June, 2008 for interview. DIOS, in the circumstances, issued a letter on 4th June, 2008 directing Manager not to hold any selection on 5th June, 2008, but ignoring thereto, selection proceedings were completed and resolution was passed in favour of petitioner. He however admits that he knows little typing but claims that relaxation in the matter of requisite qualification is provided in the rules.

9. A detailed counter affidavit has also been filed by respondent no.6 where also similar averments have been made.

10. Learned counsel for the petitioner contended that Regulation 103, which provides a right to the dependent of a deceased employee to claim appointment on compassionate basis specifically says that such provisions shall not be applicable to minority institution.

11. However, there was an amendment by notification dated 9th August, 2001 whereby the proviso to Regulation 103 was repealed and a new regulation without proviso was substituted. Regulation 103 before notification dated 9th August, 2001 and as

it stand subsequent to notification dated 9.8.2001 is reproduced as under:

Prior to 09.8.2001

103. *Notwithstanding anything contained in these regulations, where any teacher or employee of ministerial grade of any recognised, aided institution, who is appointed accordingly with prescribed procedure,dies during service period, then one member of his family, who is not less than eighteen years in age, can be appointed on the post of teacher in trained graduate grade or on any ministerial post, if he possesses prescribed requisite academic qualifications, training eligibilities, if any, and he is otherwise fit for appointment :*

Provided that anything contained in this regulation would not apply to any recognised aided institution established and administered by any minority class.

Explanation.- For the purpose of this regulation "member of the family" means widow or widower, son, unmarried or widowed daughter of the deceased employee.

Note.- This regulation and Regulations 104 to 107 would apply in relation to those employees who have died on or after 1 January, 1981."

On & After 09.8.2001

"103. *Notwithstanding anything contained in these regulations, where any teacher or employee of ministerial grade of any recognised, aided institution, who is appointed accordingly with prescribed procedure,dies during service period, then one member of his family, who is not less than eighteen years in age, can be appointed on the post of teacher in trained graduate grade or on any ministerial post, if he possesses prescribed requisite academic qualifications, training eligibilities, if any, and he is otherwise fit for appointment :*

Explanation.- For the purpose of this regulation "member of the family" means widow or widower, son, unmarried or widowed daughter of the deceased employee.

Note.- This regulation and Regulations 104 to 107 would apply in relation to those employees who have died on or after 1 January, 1981."

Thus the real distinction between two above is the 'proviso'.

12. The validity of notification dated 9th August,2001 deleting proviso to Regulation 103 came to be challenged in writ petition **Committee of Management, MAH Inter College & Another Vs. District Inspector of Schools, Ghazipur and others 2002 (2) UPLBEC 1742.** This Court held the said notification violative of Article 30 of the Constitution and hence quashed the same.

13. It is thus contended that earlier Regulation continued to operate, and, hence no right was available to an employee, teaching or non teaching, of minority institution, to claim a vested right of compassionate appointment therefore, the impugned orders are wholly illegal and without jurisdiction.

14. Per contra, learned counsel appearing for respondents No.6 stated that decision of learned Single Judge in

Committee of Management, MAH Inter College & Anr. (supra) came to be considered by a Division Bench in **Civil Misc. Writ Petition Nos.12157 of 2003 with 33298 of 2002** ***(Governing Body of the Registered Society Designated as St. Andrew's College Association, Gorakhpur Vs. State of U.P.)*** decided on 27th August, 2003 and the Division Bench expressed its disagreement with the view of the Hon'ble Single Judge. Hence, it is contended that decision of Hon'ble Single Judge in ***Committee of Management MAH Inter College (supra)*** stood overruled by the Division Bench judgement. In the existing provisions, right to compassionate appointment is available to all irrespective of the nature of institution. It is thus contended that no interference is called in the orders impugned in this writ petition.

15. Having heard Sri J.A.Azmi for the petitioner, learned Standing Counsel for respondent No.3, Sri S.K.Khurshid Anwar for respondent No.4 and 5; and, Sri J.P.Singh for respondent No.6, in my view, the short question up for consideration would be, "whether the decision of Hon'ble Single Judge in ***Committee of Management M.A.H. Inter College (supra)*** in so far as it quashed the notification dated 9th August, 2001 survive with respect to the consequences of its decision on notification dated 9th August, 2001; and; what is the effect of disagreement expressed by the Division Bench in ***St. Andrew College Association (supra).***

16. If the answer comes in favour of the petitioner, no further enquiry may be necessary in the case in hand.

17. The Hon'ble Single Judge in **Committee of Management M.H.Inter College (supra)** having considered the issue observed in paras 23, 27 and 28 of the judgment as under:

"23. The question now arises as to what relief is to be granted. Two options are open. One that the provisions of Regulations 103 to 107be read down as in applicable to minority institutions and to quash the recommendations made by the District Inspector of Schools and the other : to also strike down the notification dated 9.8.2001 impugned in this writ petition. It has already been held that if the Regulations are applied to a minority institution they would infringe Article 30(1) read with Article 29 and, therefore, the recommendations made by the District Inspector of Schools are liable to be quashed.

27. As the notification substituting the new Regulation 103 only repeals the proviso and otherwise re-enacts the old Regulation entirely has the effect of creating confusion about the true legal position on the issue of minority rights, it is necessary to strike down it and not merely to read down the provisions of Regulations 103 to 107 as inapplicable to minority institutions. It does not require emphasis that subordinate legislation by the notification on an issue so sensitive as minority rights without application of mind and which does not, according to the admission of the State itself bring out the true intention casts doubt upon the bona fides of the Government itself upon the minority question and cannot be tolerated to exist.

28. In the result, both the writ petitions are allowed. The Notification

No. 5834/15-7-2 (1)/90, dated 9th August, 2001 (Annexure-1) and also the order of the District Inspector of Schools, Ghazipur dated 27.12.2001 in Writ Petition No. 4308 of 2002 are quashed and the order dated 8.11.2001 (Annexure-4) passed by the District Inspector of Schools. Muzaffarnagar and the notification dated 9.8.2001 (Annexure-5) in Civil Misc. Writ Petition No. 43328 of 2001 are quashed.

18. It is not disputed by learned counsels for the parties that the very notification dated 9th August, 2001, which was issued to bring about an amendment by substitution in Regulation 103 was challenged in the above matter and has been quashed by Hon'ble Single Judge.

19. Learned counsel for the parties also stated that the judgement attained finality since it was not taken in appeal either by filing an intra Court appeal or before the Apex Court. The result of the judgment therefore is that notification dated 9th August, 2001, whereby amendment was made in Regulation 103 Chapter III of Regulations framed under U.P. Intermediate Education Act, 1921 stood quashed and no longer survive.

20. The matter before Division Bench in ***St. Andrew's College Association (supra)*** pertain to higher education and statute 39 Chapter 23 of statutes of Gorakhpur University was up for consideration before Division Bench which itself did not make any distinction in the matter of dying in harness appointments in the colleges governed by the said statute but it was contended that said statute has to be read in a manner so as to apply only to general institutions and not to minority institutions otherwise it would be violative of Articles 29 and 30. The Division Bench considered the matter and observed that the said restriction would be applicable so far as Teaching posts are concerned but cannot be applied to Class III and Class IV posts. In this regard decision of Hon'ble Single Judge, which relates to Secondary Educational institutions, governed by Act 1921 Act, was considered and in para 15 of the judgment, the Division Bench said as under:

"15. Learned Counsel for the petitioner has invited our attention to the decision of a learned single Judge of this Court in Committee of Management, MAH Inter College v. DIOS, Ghazipur, 2002 (3) AWC 2221, in which a contrary view has been taken by the learned single Judge. The learned single Judge was of the view that since an appointment on compassionate grounds is not made on merit since there is no competition with the candidates from the open market hence it cannot be said that a direction for making such appointments in minority institutions will be conducive to efficiency and standards of education in the said institution. We respectfully disagree with the reasoning given by the learned single Judge. As held by the Supreme Court in TMA Pai's case (supra) a regulation for the welfare of teacher does not infringe the right of a minority institution under Article 30 of the Constitution. We do not see how appointment on a Class III or Class IV post will affect. The standard of education in a minority institution. After all, a Class III post is not a teacher's post."

21. Having said so, the Division Bench in paras 19, 20 and 21 said as under:

"19. As regards the decision of the Supreme Court in N. Ammad v. Manager, Emjay High School, 1998 (6) SCC 764, all that has been held in that decision is that the management has full freedom to appoint any person as Head Master. This again has nothing to do with compassionate appointment on a Class III post. Hence this decision is also distinguishable.

20. We see no reason why humanitarian regulations, such as the kind which has been impugned in this petition, cannot be made for minority institutions. We cannot see how such humanitarian measures of the kind with which we are dealing in this petition can be said to infringe the right under Article 30 of a minority institution.

21. It may have been a different matter if the compassionate appointment was sought to be made on the post of Head Master or teacher, and there it possibly could have been said that this infringes the right of the minority institution under Article 30 of the Constitution. Since teaching work is certainly related to the standard of education imported. That is not the case here. Here we are concerned with an appointment on a Class III post in a minority institution on compassionate ground. We see no violation of Article 30 of the Constitution in such a case, or in case of a Class IV post."

22. It is thus evident that reasoning followed by Hon'ble Single Judge in **Committee of Management, MAH Inter College (supra)** to quash the notification dated 9th August, 2001 were not approved by the Division Bench in **St. Andrew's College Association (supra)** and the Division Bench expressed its disagreement with the said reasoning. The said disagreement has been noticed specifically in the following words:

"We respectfully disagree with the reasoning given by the learned Single Judge."

23. It is no doubt true that decision to this extent of Hon'ble Single Judge cannot be said to be a good law any longer after the aforesaid Division Bench judgment but the question up for consideration in this case is entirely different. The Division Bench judgment would not operate as to had the effect of setting aside the Hon'ble Single Judge's decision in ***Committee of Management, MAH Inter College (supra)*** since the Division Bench judgment was not passed in appeal arising out of the aforesaid Hon'ble Single Judge's judgment but it was in a different matter governing different statute and different context. Therefore, so far as decision of Hon'ble Single Judge is concerned, the orders or provisions, which have been quashed or declared illegal therein, would not revive. The judgment of Hon'ble Single Judge having attained finality would take within its sweep whatever has been done therein. This effect could have been nullified only in appeal and not otherwise. The notification dated 9th August, 2001 having been quashed by the Hon'ble Single Judge in **Committee of Management, MAH Inter College (supra)** it would not stand revived by the Division Bench decision in **St. Andrew's College Association (supra)** which has nothing to do either with the Secondary Educational Institutions or U.P. Intermediate Education Act, 1921 or Regulation 103 mentioned in notification

dated 9th August, 2001 which purported to have been issued under Section 9(4) of Intermediate Education Act, 1921 since the Division Bench was only concerned with a case pertaining to higher educational institutions governed by the U.P. State Universities Act, 1973 and the statutes framed thereunder i.e. Gorakhpur University Statute.

24. Now, the second aspect, whether declaration of an amending provision would have the effect of revival of old provision or it stood wiped out from the statute book. This has to be seen in the light of the decision whereby the provision has been struck down. Whenever a statute, whether principal or subordinate legislation, is struck down, being violative of provisions of the Constitution, and in particular fundamental rights under Part III of the Constitution, in view of Article 30(2) of the Constitution, such a statute is void ab initio. It is like a stillborn provision incapable of repeal or substitution of an existing provision.

25. In **N.P.V. Sundara Vs. State of Andhra Pradesh AIR 1958 SC 468** considering the doctrine of still-born piece of legislation a Constitution Bench said,

"If a law is on a field not within the domain of the legislature, it is absolutely null and void, and a subsequent cession of that field to the legislature will not have the effect to breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment."

26. In **Sagir Ahmad Vs. The State of U.P. & Ors AIR 1954 SC 728** the Court examined challenge to the Constitutional validity of U.P State Transport Act, 1951 under which the State was enabled to run Stage Carriage Service to the exclusion of others. In exercise of its power under the Act, the State Government made a declaration extending the act to a particular area and frame a scheme for operation of the stage carriage service on certain routes. At the relevant time the State did not have the power to deny citizen of his right to carry on transport service. However, after the Constitution (First) Amendment Act of 1951, the State became entitled to carry on any trade or business either by itself or through Corporation owned or controlled by it to the exclusion of private citizens wholly or in part. One of the question raised was whether the Constitution (First) Amendment Act could be invoked to validate an earlier legislation. The Court held that the Act was unconstitutional at the time of enactment and therefore it was **stillborn** and could not be vitalized by a subsequent amendment of the Constitution removing the constitutional objection and must be re-enacted. Hon'ble Mukherjea, J. speaking for the Court referred to Prof. Cooley in his work on "Constitutional Limitations" (Vol. I page 384) and said:

"a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted".

The Hon'ble Court further observed that it is of the view that this is a sound law.

27. This view was reiterated in **Deep Chand Vs. The State of U.P. & Ors. AIR 1958 SC 648** where the Court said that a plain reading of Article 13(2) indicates, without any reasonable doubt, that prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still-born law.

28. Again another Constitution bench in **Mahendra Lal Jaini Vs. State of U.P. AIR 1963 SC 1019** reiterated the above view in para 22 of the report. It says,

"..it must be held that unlike a law covered by Art. 13(1) which was valid when made, the law made in contravention of the prohibition contained in Art. 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse."

29. This has been followed recently in **Rakesh Vs. Dr. JT 2005 (12) SC 1.**

30. In the case in hand, Hon'ble Single Judge in his judgment dated 30th April, 2002 held the amendment sought to be brought in Regulation 103 by notification dated 9th August, 2001 violative of Article 30 of the Constitution, and in fact, had quashed the same. That being so, unless the judgment is set aside, its effect i.e. quashing of notification, would continue, meaning thereby, Regulation 103, as it was existing and operating before the issuance of notification dated 9th August, 2001 would continue to hold the field.

31. That being so, since there is a clear provision by way of proviso to Regulation 103 that the provision pertaining to compassionate appointment would not apply to minority institutions, in my view, DIOS had no authority or jurisdiction to direct the Management of the College to make appointment from a claimant of compassionate appointment. The college Management therefore had rightly made its selection. In the absence of any other reason, the same could not have been disapproved only on the ground that a candidate claiming compassionate appointment had to be appointed on the post in question.

32. In the result, the writ petition No.61552 of 2008 is allowed. The impugned order dated 18th August, 2008 (Annexure 5 to the writ petition) is hereby quashed. The DIOS is directed to consider the proposal and resolution of management of the college afresh with respect to the selection for appointment of petitioner on a Class III post in accordance with law and in the light of the observations made above and to pass a fresh order with regard to his financial approval within one month from the date of production of a certified copy of this order, after giving due opportunity of hearing to all concerned parties.

33. Writ petition no.66596 of 2008 has been filed by Atharul Ebad, respondent No.6 in writ petition no.61552 of 2008, seeking a mandamus directing respondent No.3 to take steps for implementation of his orders dated 18th August, 2008 and 31st August, 2008, the two orders, which have been challenged

by Naushad Alam in Writ Petition no.61552 of 2008.

34. Since the orders dated 18th August, 2008 and 31st August, 2008 are quashed, writ petition no.66596 of 2008 must have to fail. It is accordingly dismissed.

35. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2011

BEFORE
THE HON'BLE ASHOK BHUSHAN,J.
THE HON'BLE SHYAM SHANKAR TIWARI,J.

Civil Misc. Writ Petition No. 71837 of 2010

Harish Chandra ...Petitioner
Versus
U.P. Sahkari Gram Vikas Bank Ltd. and others ...Respondents

Counsel for the Petitioner:
Sri A.P. Singh

Counsel for the Respondent:
C.S.C.,
Sri K.M.Misra
Sri Shailendra Kumar Singh

U.P. Cooperative Societies Act, 1965-Section 34 readwith Section 95-A-Recovery certificate-loan advance to purchase of Tempo-default in payment of instalments-petitioner possesses less than 3.125 acre land in view of G.O. Dated 27.09.07 such plots can not be auctioned-other mode of recovery by issuing recovery certificate-provision of Section 95-A of the Act are fully attracted by virtue of section 34 of the Act-held-recovery certificate-justified-petition dismissed.

Held: Para 11

Under Section 34, the State Government has a right to nominate on the Committee of Management of such society not more than two persons in cases as mentioned in the said section. It is not denied that the State Government gives loan and makes advances to respondent no. 1 and the U.P. Sahakari Gramin Vikas Bank is run on the financial aid and grants provided by the State as has been submitted by learned counsel for the respondents. The respondent no. 1 thus, is clearly covered within the meaning of section 34 and with regard to recovery of dues of such society section 95-A is fully attracted. As mentioned above, the respondent no. 1 is registered cooperative society within the meaning of U.P. Cooperative Societies Act, 1965 by virtue of section 131 of 1965 Act. Hence, Section 95-A is fully attracted in the facts of the present case. As submitted by learned counsel for the respondents, the agricultural land of less than 3.125 acres cannot be sold hence, the respondent no. 1 can adopt the other process of recovery as provided. Thus, the respondents are free to adopt other process of recovery except for auction of the land result of which may render the agriculturist having less than land 3.125 acres.

Case law discussed:
1965 R.D. 327; 1968 R.D. 187; 1968 R.D. 57; 1969 R.D. 79; 2001 Allahabad Civil Journal 1167;1984 AIR (S.C.) 718

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

1. By this writ petition, the petitioner has prayed for quashing the citation dated 8.11.2010 for recovery of amount of Rs. 1,31,875/- as well as recovery certificate dated 15.10.2007 in so far as it relates to the petitioner (Annexure-6 to the writ petition). Short counter affidavit and short supplementary counter affidavit have

been filed by the respondent no. 1 to which rejoinder affidavit has also been filed by the petitioner.

2. Brief facts, which emerged from pleadings of the parties are; the petitioner was sanctioned a loan of Rs. 73,000/- on 20.1.2001 by respondent no. 1 for purchase of tempo. The petitioner deposited an amount of Rs. 11,925/- on 29.10.2001 and Rs. 6,166/- on 7.6.2002 towards repayment of loan. No further amount was paid by the petitioner hence, the respondent no. 1 made application to the District Assistant Registrar, Cooperative Societies, Allahabad for issuance of certificate under section 95-A (1) of U.P. Cooperative Societies Act, 1965 for recovery of an amount of Rs. 1,31,875/- from the petitioner. District Assistant Registrar issued recovery certificate dated 15.10.2007, which certificate contained the name of the petitioner also. On the basis of the recovery certificate issued by the District Assistant Registrar, a citation dated 8.11.2010 has been issued by the Tahsildar for recovery of amount of Rs. 1,31,875/-. The petitioner by this writ petition has challenged the aforesaid recovery certificate and citation.

3. Learned Counsel for the petitioner in support of the writ petition, raised following submissions.

i. Sections 15 and 16 of the U.P. Sahakari Gramin Vikas Bank Act, 1964 and Rule 45 of U.P. Sahakari Gramin Vikas Bank Rules, 1971 provides a procedure for recovery of loan, which procedure having not been followed for recovery, the action of the respondents in issuing recovery certificate under section 95-A is illegal. When procedure has been prescribed under the Act and Rules, any other mode or manner of recovery is prohibited. Learned Counsel for the petitioner in support of his above submission, placed reliance on judgments of this Court reported in 1965 R.D. 327, **Wakf Alu-Allah Kayam Karida- Ahmad Ullah Khan Sahab, Waqf Baratu through Riaz Uddin Tailar Vs. Balak Singh,** 1968 R.D. 187, **Brij Bahadur Lal Vs. Dy. Director of Consolidation, U.P. & others,** 1968 R.D. 57, **Abdul Wahid Khan and others Vs. Dy. Director of Consolidation, Jaunpur, and others,** 1969 R.D. 79 **Durga Prasad Vs. Board of Revenue U.P. and others**, Full Bench judgment of this Court in **Smt. Sharda Devi Vs. State of U.P.**, 2001 Allahabad Civil Journal 1167. The judgment of the apex Court reported in 1984 AIR (S.C.) 718 **A.R. Antulay Vs. Ramdas Sriniwas Nayak.**

ii. Section 95-A of the U.P. Cooperative Societies Act, 1965 is not applicable with regard to loan sanctioned by U.P. Sahakari Gramin Vikas Bank since the bank is neither an agricultural credit society nor a society referred to in section 34 of the U.P. Cooperative Societies Act, 1965.

4. Sri K.N. Misra, learned counsel for the respondents refuting the submissions of learned counsel for the petitioner, submits that recovery by issuance of certificate under section 95-A of the U.P. Cooperative Societies Act, 1965 is fully permissible for respondent no. 1. He submits that the said issue has already been decided by Division Bench of this Court in writ petition No. 66154 of 2010 **Sukh Lal Vs. State of U.P. and others** decided on 5.1.2011, where

similar arguments have been repelled. He further submits that the respondent no. 1 is a society which is governed by section 34 of the U.P. Cooperative Societies Act, 1965 and recovery by issuing a certificate under section 95-A is fully permissible. He submits that execution of certificate under section 92 is permissible for which limitation is 12 years. He submits that petitioner has not made any repayment of loan after payment of two amounts of Rs. 11,925 and 6,166/- in the year 2001 and 2002. He further submits that the land of the petitioner being less than 3.125 acre, it cannot be sold due to the Government Order dated 27.9.2007 which prohibits auction of land of less than 3.125 acre. He submits that the land of the petitioner cannot be sold hence, the Bank has no option except to proceed under section 95-A the 1965 Act.

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

6. The principal submission which has been pressed by Sri Awadhesh Pratap Singh, learned counsel for the petitioner is that 1964 Act and the Rules framed thereunder provides a specific procedure for recovery hence, the recovery by issuance of certificate under section 95-A of the U.P. Cooperative Societies Act, 1965, is not permissible. He submits that when a statute provides a manner of doing a particular thing, the said thing can be done in the above manner only and doing of thing by another manner is prohibited. 1964 Act provides procedure for realization of its loan. In the present case, stand taken by the respondents is that recovery had been initiated in accordance with Section 95-A of the U.P. Cooperative Societies Act,1965 which procedure is permissible, as the respondent no. 1 is a registered cooperative society within the meaning of U.P. Cooperative Societies Act, 1965. The above issue which has been raised in the writ petition, was considered by a Division Bench of this Court in the case of Sukh Lal (supra). It is relevant to extract relevant discussions in this regard. The Division Bench in **Sukh Lal's** case repelled the above submission after considering the provisions of 1964 Act and U.P. Cooperative Societies Act, 1965. Following was laid down by the Division Bench in the aforesaid case:

"The U.P. Sahkari Gram Vikas Banks Act, 1964 has been enacted to facilitate the working of Sahkari Gram Vikas Banks in the State of Uttar Pradesh. Section 2(j) provides that Uttar Pradeshs Sahkari Gram Vikas Bank means a cooperative society registered under the Cooperative Societies Act. Section 2(j) is quoted below:-

"2(j). Uttar Pradesh Sahkari Gram Vikas Banks means a cooperative society registered under the Co-operative Societies Act for the time being in force in Uttar Pradesh with its area of operation covering the whole of Uttar Pradesh and carrying on the business as a Gram Vikas Bank and facilitating the operation of its members;"

7. From the materials brought on the record including the mortgage deed (Annexure-1 to the writ petition), it is clear that the Uttar Pradesh Sahkari Gram Vikas Bank Limited is a registered society under the Cooperative Societies Act, 1912. According to Section 131 of the 1965 Act any cooperative society

existing on the date of coming into force of the 1965 Act and registered under the Cooperative Societies Act, 1912 shall be deemed to be registered under the 1965 Act. Thus the U.P. Sahkari Gram Vikas Bank is a registered cooperative society within the meaning of the 1965 Act. Section 15 of the 1964 Act provides procedure for distraint and sale by the Gram Vikas Bank. Sections 15(1) and 16(1) of the 1964 Act, which are relevant for the purpose, are quoted below:-

"15(1). Distraint when to be made.- (1) If any instalment payable under a mortgage executed in favour of a Gram Vikas Bank or any part of such instalment remains unpaid for more than one month from the date on which it falls due, the managing committee may, in addition to any other remedy available to the said bank, apply to the Registrar for the recovery of such instalment or part thereof by distraint and sale of the produce of the mortgaged land including the standing crops thereon."

(2) .....

(3) .....

16. Power of sale when to be exercised -(1) Notwithstanding anything contained in the Transfer of Property Act, 1882, where a power of sale without the intervention of court is expressly conferred on a Gram Vikas Bank by a declaration of charge made or mortgage deed executed before or after the commencement of this Act, the managing committee of such bank or any person authorised by such committee in this behalf shall, in case of default in payment of the money due under the mortgage or charged or any part thereof, have power, in addition to any other remedy available to the said bank, to bring the property subject to any mortgage or charge to sale without the intervention of the court.

(2) .....

(3) .....

(4) .....

(5) ....."

The aforesaid of Sections 15 and 16 of the 1964 Act clearly indicate that the power given in the aforesaid sub-sections are in addition to any other remedy available to the said Bank. Thus the procedure laid down in the 1964 Act does not prohibit adopting of any other process which is available to the Gram Vikas Bank under any law. As noticed above, the Gram Vikas Bank being a registered cooperative society within the meaning of the 1965 Act, the provisions of Section 95-A of the 1965 Act are fully applicable.

Rule 45 of the 1971 Rules on which much reliance has been placed by counsel for the petitioners, provides as under:-

"45. Recovery of arrears of loans secured on furnishing sureties - (1) The Registrar may on an application made in this behalf for the recovery of arrears of any loan or any instalment thereof on furnishing a statement a accounts in respect of such loans and after making such enquiries, if any, as he thinks fit, issue a certificate for recovery of the amount due.

(2) A certificate issued by the Registrar under sub-rule (1) shall be final and conclusive proof of the dues which shall be recoverable as arrear of land revenue from the sureties and the borrower jointly and severally."

Rule 45 of the 1971 Rules has been subsequently added in the 1964 Act. By notification dated 22nd January, 1990 Chapter 5-A was added in the 1965 Act. Rule 45 is akin to Section 95-A of the 1965 Act. Section 95-A of the 1965 Act is quoted below:-

"95-A. Special provision for recovery of certain dues of agricultural society. (1) The Registrar may, on an application made by society referred to in Section 34 or an agricultural credit society for the recovery of arrears of any loan advanced by it or any instalment thereof to any member and on its furnishing a statement of accounts in respect of such loan and after making such inquiries, if any, as he thinks fit, issue a certificate for recovery of the amounts due.

(2) A certificate issued by the Registrar under sub-section (1) shall be final and conclusive proof of the dues which shall be executable under Section 92."

Rule 45 of the 1971 Rules provides that Registrar on an application made for recovery of arrears of any loan may issue a certificate for recovery of the amount. The word "Registrar" is defined in Section 2(h) of the 1964 Act, which is to the following effect:-

"2(h). "Registrar" means the person appointed by the State Government to be Registrar of Cooperative Societies for the State of Uttar Pradesh under the provisions of the Cooperative Societies Act for the time being in force in Uttar Pradesh;"

Section 95-A of the 1965 Act also refers to "Registrar" and for "Registrar", the definition given in Section 2(r) of the 1965 Act is to be referred, which is to the following effect:-

"2(r). "Registrar" means the person for the time being appointed as Registrar of Cooperative Societies under sub-section (1) of Section 3 and includes any person appointed under sub-section (2) of that section when exercising all or any of the powers of the Registrar;"

From the above provisions, it is clear that the procedure for issuing certificate under Rule 45 of the 1971 Rules and the authority to issue the said certificate are the same as provided under Section 95-A of the 1965 Act. Thus the submission of learned counsel for the petitioners that recovery, which is under challenge, is against the 1964 Act and the 1971 rules cannot be accepted.

The respondent-Bank has come up with the specific plea that recovery has been initiated on the basis of certificate issued under Section 95-A of the 1965 Act and the said certificate has been filed as Annexure CA-2 to the counter affidavit filed by respondent No.4. Annexure CA-2 to the counter affidavit specifically refers to Section 95-A of the 1965 Act and the certificate has been issued by the District Assistant Registrar, Cooperative Societies, U.P. The respondent No.4 has brought on the record the notification dated 15th

November, 1979 issued by the State Government in exercise of power of U.P. General Clauses Act, 1904 read with power of the State Government as referred to under Section 3(2) of the 1965 Act by which the District Assistant Registrar has been authorised to exercise the power under Section 95-A of the 1965 Act with regard to such branches of the Uttar Pradesh Sahkari Bhumi Vikas Bank Limited which are within its jurisdiction. Section 3 of the 1965 Act is quoted below:-

"3. Registrar. -(1) The State Government may appoint a person to be the Registrar of Cooperative Societies for the State.

(2) The State Government may, for the purpose of this Act, also appoint other persons to assist the Registrar and by general or special order confer on any such person all or any of the powers of the Registrar.

(3) Where any order has been made under sub-section (2) conferring on any person all or any of the powers of the Registrar under any provision of this Act, such order shall be deemed to confer on him all the powers under that provision as may be amended from time to time."

Thus the District Assistant Registrar is fully empowered to exercise the power of Registrar under Section 95-A of the 1965 Act and the recovery certificate dated 5th October, 2007 issued by the District Assistant Registrar is fully in consonance with the provisions of Section 95-A of the 1965 Act and the District Assistant Registrar for the purpose of Section 95-A of the 1965 Act is empowered to act as Registrar. Thus the submission of the petitioners' counsel that recovery proceedings initiated against the petitioners are in breach of the 1964 Act and the 1971 Rules is misconceived."

8. Learned Counsel for the petitioner in support of his submission that when a thing is required to be done in a statute in a particular maner, the same has to be done in the said manner, has placed reliance on large number of judgements as noted above. The Full Bench judgment of this Court in the case of **Abdul Wahid Khan** (supra), while considering the principle of statutory interpretation, held that the words used by Legislature to be construed in their natural meaning when text is explicit. There cannot be any dispute to the principles of interpretation as laid down by the apex Court in the said judgment. The same principle of statutory interpretation were reiterated by this Court in the case of **Durga Prasad** (supra). In A.R. Antulay's case (supra), following was laid down in paragraph 22:

"Once the contention on behalf of the appellant that investigation under Sec. 5A is a condition precedent to the initiation of proceedings before a special Judge and therefore cognizance of an offence cannot be taken except upon a police report, does not commend to us and has no foundation in law, it is unnecessary to refer to the long line of decisions commencing from Taylor v Taylor, (1) Nazir Ahamad v. King Emperor (2) and ending with Chettiam Veettil Ahmad and Anr. v. Taluk Land Board and Ors., (3) laying down hitherto uncontroverted legal principle that

where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all Other methods of performance are necessarily forbidden."

9. There cannot be any dispute to the proposition as laid down by the apex Court in the above mentioned case, following the earlier judgment of the Privi Council and the judgments of the apex Court as noticed therein. However, in the present case, although procedure for recovery has been laid down in 1964 Act and Rules 1971, but according to the express provisions of Sections 15 and 16 other modes of recovery are not prohibited. When Sections 15 and 16 itself contemplated that remedy as provided under sections 15 and 16 are *"....in addition to any other remedy available to the said Bank..."* Thus, according to Sections 15 and 16 any other remedy available to the Bank is also contemplated by statutory provision. Thus, the provisions of Sections 15 and 16 itself contemplated that recovery can also be effected by any other manner available to the Bank and any other mode of recovery available to the Bank is not prohibited rather is permitted by statutory provision. As noticed above, the respondent no. 1 being a registered cooperative society within the meaning of Section 131 of the U.P. Cooperative Societies Act, 1965, the mode of recovery under section 95A was clearly available to the respondent no. 1. Thus, the principles laid down by the apex Court in A.R. Antulay's case (supra) is not attracted and the recovery by mode as prescribed under section 95-A, is not prohibited rather is permitted by provisions of 1964 Act.

10. The second submission which has been pressed by learned counsel for the petitioner is that Section 95-A is not attracted to the respondent no. 1 since it is neither an agricultural credit society nor a society referred to under section 34 of 1965 Act. It is true that the respondent No. 1 is not an agricultural credit society thus, it has to be looked into as to whether the respondent no. 1 is covered by society as contemplated under section 34. Section 34 of the U.P. Cooperative Societies Act, 1965 is as follows:

" Section 34 - Nominee of the Government on the committee of management.-*(1) Where the State Government has-*

(a) subscribed directly to the share capital of a co-operative society under Chapter VI: or

(b) assisted indirectly in the formation or augmentation of the share capital of a co-operative society as provided in Chapter VI; or

(c) given loans or made advances to a co-operative society or guaranteed the repayment of principal and payment of interest on debentures issued by a co-operative society or guaranteed the repayment of principal and payment of interest on loans or advances to a co-operative society.

the State Government shall have the right to nominate on the Committee of Management of such society not more than two persons one of whom shall be a Government servant, so, however, that the Government servant shall not vote at an election of an office-bearer of the society.

Provided that where the society is engaged in production of sugar and--

(i) the share capital subscribed to by the State Government is not less than one crore rupees, or

(ii) the share of the State Government in the share capital of the society exceed fifty per cent of the total share capital of the society, or

(iii) the State Government has given loans or made advances to the society, or guaranteed the repayment of principal or payment of interest on debenture, issued by the society or guaranteed the repayment of principal and interest on loans and advances to the society and the amount exceeds fifty per cent in the aggregate of the total amount so borrowed by the society.

the State Government shall also have the right to nominate the Chairman of the Committee of Management, who shall be a Government servant, of such societies and their apex society, namely, the Uttar Pradesh Co-operative Sugar Factories Federation Ltd.

(2) A person nominated under sub-section (1) shall hold office during the pleasure of the State Government.

(3) The right of nomination vested in the 11[Joint Registrar-in-charge or Deputy Registrar-in-charge] under this section may be delegated by it to any authority specified by it in that behalf.

Explanation.--For the purpose of this section any guarantee given by the Central Government on the recommendation of the State Government shall be deemed to be a guarantee given by the State Government."

11. Under Section 34, the State Government has a right to nominate on the Committee of Management of such society not more than two persons in cases as mentioned in the said section. It is not denied that the State Government gives loan and makes advances to respondent no. 1 and the U.P. Sahakari Gramin Vikas Bank is run on the financial aid and grants provided by the State as has been submitted by learned counsel for the respondents. The respondent no. 1 thus, is clearly covered within the meaning of section 34 and with regard to recovery of dues of such society section 95-A is fully attracted. As mentioned above, the respondent no. 1 is registered cooperative society within the meaning of U.P. Cooperative Societies Act, 1965 by virtue of section 131 of 1965 Act. Hence, Section 95-A is fully attracted in the facts of the present case. As submitted by learned counsel for the respondents, the agricultural land of less than 3.125 acres cannot be sold hence, the respondent no. 1 can adopt the other process of recovery as provided. Thus, the respondents are free to adopt other process of recovery except for auction of the land result of which may render the agriculturist having less than land 3.125 acres.

12. Full Bench judgment of this Court in **Smt. Sharda Devi** (supra), which has been relied by learned counsel for the petitioner has laid down that recovery of dues by banking company under U.P. Public Moneys (Recovery of Dues) Act, 1972 can be taken only when the loan of advance grant or credit has been given by bank under a State

sponsored scheme and not otherwise. In the present case, the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972 has not been resorted to by respondent no. 1 nor recovery has been initiated under the 1972 Act hence, the said Full Bench judgment has no application in the facts of the present case.

13. In the writ petition, it has also been alleged that recovery is time barred under the provisions of the Indian Limitation Act. Under section 92 of the U.P. Cooperative Societies Act, 1965, the time for execution is provided as 12 years. No foundation has been laid down in the writ petition as to how the issuance of certificate under section 95-A of U.P. Cooperative Societies Act is barred by any law of limitation. Due to above reason, the above submission has not been pressed.

14. No ground has been made out to quash the recovery certificate as well as citation issued by the Tahsildar for recovery. The petitioner is not entitled for any relief. However, as contended by learned counsel for the respondents, recovery can be effected by any means other than auction of the mortgaged land of the petitioner, which is less than 3.125 acre.

15. Subject to above, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.04.2011

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SANJAY MISHRA, J.

Civil Misc. Writ Petition No. 21663 of 2011

Vikas Singh and others ...Petitioners
Versus
State of U.P. and another ...Respondents

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

Counsel for the Respondents:
Sri M.C. Chaturvedi (C.S.C.)
Sri Ramanand Pandey (S.C.)
Sri Ravindra Kumar
Sri Ramendra Pratap Singh

Constitution of India, Article 226- maintainability of writ petition-affidavit filed by Parokar-and not by Petitioner without disclosing identity or connection with Petitioners-when writ of certionary or mandamus can not be issued on affidavit of Power of Attorney holder-writ filed by Pairokar not maintainable.

Held: Para 2

Supporting affidavit of the pairokar speaks that the averments of all the paragraphs of the writ petition are true to his personal knowledge. But in paragraph-7 of the writ petition, where the allegations are made against the Chief Minister of the State and the Chairman of the Noida authority, it appears to be based on the informations of property dealer/s even without disclosing the identity of such person/s. No such persons are even made party respondents. Against this background,

prima facie writ petition appears to be unsustainable in nature.

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

1. **Amitava Lala, J.--** Out of four petitioners, three are individuals and the other one is a company through one Dr. Harsh Mahajan claiming to be its Managing Director without any supporting affidavit of competency. The whole writ petition is not filed by any of the petitioners but with supporting affidavit of one Naunidh Singh Arora, aged about 25 years, son of Sri M.S. Arora, B-47, Sarvodaya Enclave, New Delhi-17 claiming himself to be *pairokar* of the petitioners, however, without disclosing any connection between himself and the petitioners. Cloud can not be dispelled from the mind of the Court about the questionable identity of the deponent. Moreover, this Court has already held that even a power of attorney holder has no right to get an order in the nature of writ of certiorari or mandamus, in **2010 (3) ADJ 319 (DB) (Vice Admiral, Rustam Khusro Shapoor Ji Gandhi and others Vs. State of U.P. and others).** The relevant part of such judgement is quoted hereunder:

".....In any event, a further question can arise before this Court whether a writ of Certiorari or Mandamus can be issued in favour of the Power of Attorney holder, on which there is a direct judgement of this Court being in Dr. Prabhu Nath Prasad Gupta v. State of U.P. and others, 2003 (4) AWC 3010, which has held that the writ petition by Power of Attorney holder of the petitioner seeking relief in the nature of writ of Certiorari for aggrieved person is not maintainable. The only exception is in respect of writ of Habeas Corpus and writ of Quo Warranto. We have also verified such ratio in the Division Bench judgment of this Court to which one of us (Amitava Lala, J.) was a Member in Bharat Petroleum Corporation limited, Mumbai v. M/s Amar Auto and others, 2008 (5) ADJ 584 (DB), wherein a distinguishing feature arose about maintainability of suit and writ petition by the Power of Attorney holder. It was held therein that as because a plaint or written statement in any suit or memorandum of appeal in any civil appeal are supported by verification, there is a chance to examine authenticity of the person claiming to be the Power of Attorney holder. But neither such mechanism is available to the writ petitioners nor it is based on any verification for further scrutiny. It is based on personal affidavit. It has also been confirmed by further Division Bench presided by one of us (Amitava Lala, J.) in C.M.W.P. No. 44007 of 1998 along with other two matters (Smt. Gurmeet Kaur Kwatra v. Vice-Chairman, Varanasi Development Authority Varanasi and others) by extending the bar up to scope of writ of Mandamus and Prohibition along with writ of Certiorari."

2. Supporting affidavit of the pairokar speaks that the averments of all the paragraphs of the writ petition are true to his personal knowledge. But in paragraph-7 of the writ petition, where the allegations are made against the Chief Minister of the State and the Chairman of the Noida authority, it appears to be based on the informations of property dealer/s even without disclosing the identity of such person/s. No such persons are even made party respondents. Against this background, prima facie writ petition appears to be unsustainable in nature.

3. For the purpose of better understanding, paragraph-7 of the writ petition is quoted below:

"7. That on 1.10.2010 the Petitioner No.1 wrote letter to the Chairman, NOIDA Authority informing him the fact that ***the property dealers in NOIDA had informed the Petitioner No.1*** *that allotment is being done only in such cases where bribe money to the tune of Rs.5.50 crores per farm house of 10,000 sq. mtrs was paid to Ms. Mayawati. The Petitioner No.1* ***when queried the property dealer*** *as to how a bona fide eligible applicant could be debarred from allotment, was informed that the form has been made so elaborate and with so many Annexures and with so many counter signing of Chartered Accounts and Chartered Engineers and with project report etc. and further the allotment process envisaged screening of the application forms and an interview by a selection committee only for the purpose of granting discretion to the NOIDA authority to reject the application so that only such of those applications would be cleared who pay the bribe money. The Petitioner No.1 also brought out in his letter the fact that the application form* ***as advised by the property dealers*** *has been made in such a manner that firstly, very few people could be able to fill up the form because of the technicalities involved in the same and secondly, along with the form there were so many documents to be annexed signed by the chartered accounts or by chartered engineers which also very few people would be able to arrange and thirdly a project report for the farm house construction of the farm house, income tax returns and the balance sheets had also been asked thereby increasing the subjectivity of the plot allotment committee in selecting or rejecting an application. It was also pointed out in that letter that the farm house was being sold below the market price and hence there were ample scope for bribe to be asked in the allotment. The Petitioners accordingly vide his letter requested for criteria to be followed by the plot allotment committee in the matter of allotment of plot and as to what weightage was to be given for the interview in such allotments. These details were asked at the earliest to enable the Petitioners to properly fill up the forms. True copy of letter dated 1st October, 2010 is annexed herewith and marked as* ***Annexure No.1*** *to this writ petition."*

4. Apart from that, from the facts of the case it appears to us that the petitioners are socially well established and/or financially affluent, who inclined to get allotment of plots of land for farm house in the open green space of Noida under the scheme known as "Open-Ended Scheme For Development of Farm House on Agricultural Land-2010". The petitioners, being signatories therein, have agreed to fulfil the terms and conditions prescribed in the application for allotment of such plots. Bottom of such application comprises clause of declaration, which is as follows:

"DECLARATION BY THE APPLICANT

I/We hereby declare that the information, submitted with application form, are true to the best of our knowledge. Nothing has been concealed and no part of it is false. I/We further declare that we have carefully read and understood the terms and conditions for allotment of farmhouse plot and do

hereby abide by the same. Each page of the terms & conditions has been signed. I/We are aware, if allotment is obtained on the basis of false information, the NOIDA may cancel our allotment at any stage and forfeit all the deposits made by me/us."

5. However, the petitioners want to get lands as per their choice upon payment of 10% extra premium.

6. So far as question of allotment as per the choice upon payment of 10% extra premium is concerned, learned Counsel appearing for the Noida authority has contended that there is no such scope under the scheme and/or the terms and conditions for allotment, therefore, the petitioners can not be permitted to do so. The reliefs as claimed in the writ petition are as follows:

"i. Call for the record relating to the allotments being made by the Noida authority and further to direct the allotment of plots in favour of Petitioner No.2 and Petitioner Nos. 3 and 4 as clearly their applications were complete and were eligible in all respects and the Noida authority had no justification to either keep their applications pending or to reject them while at the same time making allotments to other persons whose standing would be far inferior to the standing of the petitioner No.2 and Petitioners No.3 and 4 in the matter of allotment of plots for development of the farm house.

ii. Call for the records of the Respondents and direct the respondents to allot plots to Petitioner Nos. 1,2 and Petitioner No.3 and 4 as per their choice as the Petitioners have already undertaken to pay 10% extra premium for exercising the said choice.

iii. Or in the alternative direct that the allotments of farm house made in the last two years by the NOIDA authority be cancelled and all the plots be put on auction so that the petitioners could participate in the same and bid for the plot of their own choice.

iv. To stay any further allotment of farm house or in the alternative reserve three farm houses contiguous to each other for the petitioners.

v. Direct the Noida authority to place on record the deliberations of the Plot Allotment Committee, the criteria followed by them in the matter of allotment and as to how the persons allotted were better than the petitioner No.2 and Petitioners No.3 and 4 so as to deny the petitioners an allotment while at the same time make allotment to others.

vi. Any other writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case to meet the ends of justice.

vii. Award the cost of the petition to the petitioners."

7. Learned Counsel appearing for the Noida authority has further contended before us that after participation in the proceedings for selection with regard to allotment of land, the petitioners can not turn around and say that they will not go by the terms and conditions mentioned in the application but they will go on the basis of their choice of land on payment of 10% extra premium when no such condition is available in the scheme.

Function and power of the authority in respect of the transfer of land has been provided under Section 6 of the U.P. Industrial Area Development Act, 1976, which is quoted hereunder:-

"6. Functions of the Authority*- (1) The object of the Authority shall be to secure the planned development of the industrial development areas.*

(2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions-

(a) to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purpose of this Act;

(b) to prepare a plan for the development of the industrial development area;

(c) to demarcate and develop sites for industrial, commercial and residential purpose according to the plan;

(d) to provide infra-structure for industrial, commercial and residential purposes;

(e) to provide amenities;

(f) to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;

(g) to regulate the erection of buildings and setting up of industries; and

(h) to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or any other specified purpose in such area."

8. There is no challenge as to the vires of such Act nor one can challenge the same after participating in the selection process on the basis of the terms and conditions mentioned in the development scheme, taking any fictitious plea.

9. It further appears that the writ petition is bad for misjoinder of necessary parties. The petitioner no. 1 has already got allotment of land for farm house when the claims of the petitioner nos. 2, 3 and 4 are under consideration, as **specifically** contended by the learned counsel appearing for the Noida authority. Therefore, the claims of the petitioner no. 1 and the petitioner nos. 2, 3 and 4 are diagonally opposite. Petitioner no. 1 wants to get the alternative plot since, according to him, the allotment has been made to him at a far away place and high-tension line has been fixed over and above such land, when the other petitioners are yet to get the allotment of land.

10. Against this background, learned Counsel appearing for the Noida authority has produced before this Court the map of the locale, from which we find that no high-tension line has been shown as proceeding over the land allotted to petitioner no. 1. Copy of such map is directed to be kept with the record.

11. Therefore, when the writ petition is made at a stage when allotment has been **made** to one and allotment is **under consideration** with regard to others, such writ petition will be declared as infructuous for the petitioner no. 1 and

premature for the rest. There is limited scope of judicial scrutiny in the writ jurisdiction of this Court in respect of such type of disputes. Learned Counsel appearing for the Noida has relied upon paragraphs 9 and 12 of the judgement reported in **(2004) 4 SCC 19 (Directorate of Education and Others Vs. Educomp Datamatics Ltd. And Others)**, wherein the Supreme Court held as under:

" 9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in **Tata Cellular v. Union of India [(1994) 6 SCC 651].** After examining the entire case-law the following principles have been deduced: (SCC pp.687-88, para 94)

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quashi administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

"12. ..... The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

(emphasis supplied)

12. We also find that ratio of such judgement has been followed by a Division Bench of this Court in the judgement reported in **2009 (9) ADJ 603 (DB) (Air Force Naval Housing Board,**

New Delhi and Others Vs. State of U.P. & Others).

13. Learned Chief Standing Counsel has contended that the allegations as made against the Chief Minister of the State and the Chairman of the Noida authority are very wild without any foundation whatsoever, therefore, such type of comments not only be deprecated but exorbitant cost will be imposed.

14. In totality, we are of the view that the writ petition is misconceived in nature and can not be admitted for any of the grounds discussed above. Therefore, on contest, we are of the firm view that the writ petition can not be admitted. Hence, it is dismissed at the stage of admission, however, without imposing any cost.

15. With a caution, we are of the view that if the petitioners are really serious about the charges, as levelled against some of the important authorities of the State without making them party respondents herein, it is open for them to make specific complaint with materials before the appropriate agency for the purpose of enquiry or investigation.
