ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI,J.

Election Petition No. - 9 of 2009

V.M.Singh S/O Mander Singh ...Petitioner
Versus
Feroze Varun Gandhi ...Respondents

Counsel for the Petitioner:
Sri V.M. Singh(Petitioner in Person)
Dr. Archana Pandey
Sri M.N. Krishnamani
Sri R.K. Pandey
Sri Sri Rajeev Kumar Singh
Sri Ravi Shankar Prasad
Sri U.N. Sharma

Counsel for the Respondents:
Sri K.N. Tripathi
Sri K.R. Singh

Representation of People Act-Section 83 (I)-allegation of corrupt practices against returning candidate without supplying any material-Pre-election speech-can not be said corrupt practices-without giving the particulars of date time and channel by which such speech was telecast-in absence of compliance mandatory provisions-election Petition Liable to be rejected.

Held: Paras 16,28,35,63,80

When pre-nomination speeches do not constitute a cause of action or corrupt practice and are not relevant to challenge election of the returned candidate, I am unable to understand as to how such speeches would be relevant to corroborate the post nomination speeches. In my opinion the submission of the petitioner's counsel is devoid of merit.

Therefore, I am of the view that the pre-nomination speeches of a candidate have no relevance to constitute a corrupt practice within the meaning of section 100 and 123 of the Act. More so, they do not even disclose a cause of action to maintain an election petition against the returned candidate. Point no.1 is accordingly disposed of.

Therefore, I am of the view that the election petition is silent with regard to the material fact that the telecasts/ publications of pre and post nomination speeches of the respondent by the TV channels and other media during the post nomination period were made with the implied or express consent of the respondent.

The last submission on behalf of the respondent was that the petitioner has not supplied true copies of certain documents, therefore, he has not made compliance of section 81(3) of the Act and as such the election petition is liable to be dismissed under section 86 of the Act. Learned counsel for the respondent submitted that the petitioner has pleaded in the election petition regarding broadcast of post nomination speeches of the respondent and the tapes made by various channels. The contents of alleged speeches, tapes and broadcast have not been quoted in the petition nor they have been made integral part of the election petition. It was further submitted that the CDs filed by the petitioner relate to the pre nomination speeches. It was also submitted that in para 40 of the election petition, the petitioner has relied on a report of Forensic Science Laboratry (inshort 'FSL') to the effect that voice in the CDs was of the respondent. This report is very material to link the respondent with the CDs. The petitioner has not furnished any copy of the report of FSL to the respondent. The learned counsel for the respondent further submitted that in para 45 of the election petition the petitioner has relied on certain video clippings to show that the

respondent was not in Pilibhit when his two affidavits were sworn in before the Notary Public at Pilibhit. The said video clippings are the basis of allegations made in paragraphs 42 and 45 of the election petition but no video clippings have been provided to the respondent. In paragraph 19 of the petition, the petitioner has referred to two complaints and other references made by the respondent. In paragraph 21 of the petition, the petitioner has relied on the report of L.I.U. And the CD sent by the District Election Officer to the Election Commission. In paragraph 23 of the petition, the petitioner has referred to a more comprehensive CD having more damaging inputs but copies of none of the documents referred to in paras 19, 21 and 23 have been furnished to the respondent. These documents, according to the petitioner, contain material facts, therefore, due to non-furnishing of copies of these documents, the petition is liable to be dismissed. In support of his submissions, Mr. K.N. Tripathi relied on following cases:

In view of the finding on the point no. 5, the petitioner has not furnished copies of the documents referred to in paras 19, 21, 23, 40 and 45 of the election petition to the respondent as required by section 81 (3) of the Act, therefore, the petitioner has not made compliance of the mandatory provisions of section 81(3) of the Act. As such the election petition is liable to be dismissed only on this ground under section 86(1) of the Act.

Case law discussed:

(1994) Supp. (2) SCC 446; (1994) 2 SCC 392; (1996)1 SCC 378; (1996) 1 SCC 399; 1975 Supp SCC 1; AIR 1975 SC 2299; (2006) 13 SCC 795; (2008) 9 SCC 284; (1996) 1 SCC 378; AIR 1984 SC 309; 1974 (3) SCC 425; AIR 1986 SC 1253; AIR 1987 All 319; AIR 1972 SC 515; AIR 1984 SC 621; (1999) 2 SCC 217; (2007) 3 SCC 617; AIR 1995 SC 2284; (1994) Supp. (2) SCC 446; AIR 1976 SC 744; 1985 AWC 515; (1983) 3 Supreme Court Cases 487; (1996) 1 SCC 399; AIR 2000 Patna 262; AIR 1960 SC 368; (1996) 1 SCC 169; AIR 1990 SC 924; AIR 1986 SC 1253; AIR 1987 All 319; AIR 1982 SC 983; AIR 1954 SC 210 Para 7; AIR 1995 SC 2284.

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

1. Heard Mr. M.N. Krishnamani, learned senior counsel assisted by Mr. Raghvendra Kumar Pandey for the petitioner and Mr. Keshari Nath Tripathi, learned Senior Counsel assisted by Mr. K.R. Singh for the Objector respondent.

2. The election petitioner Mr. V.M. Singh has filed the instant election petition to challenge the election of the respondent Mr. Feroze Varun Gandhi (the returned candidate) as a Member of the House of the People from 26- Pilibhit Constituency.

3. It is not in dispute that the respondent Mr. Feroze Varun Gandhi is the returned candidate belonging to Bhartiya Janata Party and the petitioner Mr. V.M. Singh is the nearest defeated candidate belonging to the Indian National Congress. The notification for the election was issued on 2.3.2009. The respondent filed his nomination on 22.4.2009. The date of poll was 13.5.2009. The respondent's election has been challenged with the allegations that he made speeches during the election campaign in different meetings and appealed for vote in the name of religion by creating animosity and hatred between Hindu and Muslim community. Speeches so made by the respondent can be divided into two categories. The first category of speeches dated 22.2.2009, 6.3.2009, 7.3.2009 and 8.3.2009 relate to the pre-nomination period. Post-nomination speeches made by the respondent have been referred to in para 30 of the election petition. In para 29, 30

and 38 of the election petition, it has been pleaded that hatred speeches made prior to the nomination were integral part of the general election and were telecast repeatedly by T.V. Channels from 17.3.2009 till the finalisation of the election on 16.5.2009.

4. The second ground for challenging the respondent's election petition is that his nomination was improperly accepted by the returning officer. It is alleged that the respondent's affidavit in form 26 and his affidavit regarding his assets were not signed nor sworn in by him before the Notary Public on 22.4.2009 at 12.10 PM and 12.20 PM at Pilibhit, because at that time, he had been addressing a public meeting in district Bareilly. The relevant facts relating to the affidavits have been referred to in paras 6K and 41 to 51 of the election petition and copies thereof have been filed as Schedule 20 to the election petition.

5. The respondent has moved three interlocutory applications, challenging the maintainability of the election petition. The first interlocutory application has been moved under section 86 (1) of the Representation of People Act, 1951 (hereinafter referred to as 'the Act') mainly on the ground that he has not been furnished the copies of the documents referred to in paragraphs 19, 21, 23, 40 and 45 of the election petition. The said documents contain material facts with regard to the allegations of corrupt practice, therefore, it was obligatory in view of section 81(3) of the Act, on the part of the petitioner to supply true copies of the documents to the respondent. Since the petitioner has not supplied the documents, therefore, the election petition is liable to be dismissed under section 86 (1) of the Act.

6. The second interlocutory application has been moved under Order VI Rule 16 of the Civil Procedure Code (hereinafter referred to as 'the Code') read with section 86 (1) of the Act, mainly on the ground that the allegations made in paragraphs 6 to 40, 54 and 57 of the election petition do not contain material facts. The averments made in the election petition are frivolous and irrelevant in view of the reasons that the facts stated in the petition relate to the incidents/events prior to the filing of the nomination by the respondent, therefore, the allegations made in the election petition are neither relevant nor can be considered as material facts to constitute the corrupt practice within the meaning of section 100 and 123 of the Act. Paragraphs 6K and 41 and 51 of the election petition do not contain material facts relating to improper acceptance of respondent's nomination. As such paragraphs 6 to 51, 54 and 57 of the election petition are liable to be struck off under Order VI Rule 16 of the Code.

7. The third interlocutory application has been moved by the respondent under Order VII Rule 11 of the Code, mainly on the ground that the election petition does not disclose any cause of action, more so, the aforesaid paragraphs as also grounds A to J relate to the pre-nomination period when the deponent had not become a candidate within the meaning of section 100 and 123 of the Act. The allegations made in ground 'K' do not amount to any cause of action under section 100 (d) (1) of the Act. More so, the pleadings contained in

the election petition are frivolous, unnecessary and irrelevant. Therefore the petition is liable to be rejected under Order VII Rule 11 of the Code.

8. The petitioner has filed counter affidavits against the aforesaid interlocutory applications. With regard to the interlocutory application moved under section 86 (1) of the Act, the petitioner has set up the case that the documents referred to in paragraphs 19, 21, 23, 40 and 45 of the election petition are not in his possession and therefore, he was not in a position to file the same with the election petition. He has annexed a list of such documents alongwith the election petition and has applied for summoning them by moving an application, therefore, the objection under section 86(1) of the Act has no merit and is liable to be dismissed.

9. With regard to the interlocutory application under Order VI Rule 16 of the Code, the petitioner has filed a detail counter affidavit stating that no doubt some of the facts pertain to the incidents/ events prior to the filing of the nomination by the respondent but the speeches and corrupt practices continued even after the nomination, therefore, they are relevant and can not be struck down at this initial stage. The petitioner further set up the case that the election of the respondent has been challenged also on the ground that the affidavits filed by him in support of the nomination were not sworn in before the Notary Public at the time mentioned in the affidavits in view of the fact that the respondent was busy in addressing an election meeting at that time and there was a telecast of that news on television, therefore, the allegations made in the election petition can not be said to be altogether irrelevant and frivolous. As such the application under Order VI Rule 16 of the Code is liable to be dismissed.

10. Keeping in view the facts and circumstances of the case and the submissions of the learned counsel for the parties, the following points arise for determination:

(1) Whether the pre-nomination speeches of the respondent neither constitute a corrupt practice nor disclose a cause of action and are liable to be struck off being unnecessary and irrelevant ?

(2) Whether the election petition is silent with regard to the material facts that the telecast of pre-nomination speeches by the Media was made with the consent, express or implied, of the respondent ?

(3) Whether the election petition relating to the post-nomination speeches of the respondent does not disclose material facts and is vague and ambiguous and does not constitute a cause of action or a corrupt practice ?

(4) Whether the election petition does not contain, material facts with regard to affidavits filed by the respondent in support of his nomination papers except two affidavits (Schedule 20) filed with one nomination paper only ?

(5) Whether non supply of copies of the documents or things referred to in paragraphs 19, 21, 23, 40 and 45 of the election petition amounts to non compliance of section 81(3) of the Act ?

(6) Whether the Election Petition is liable to be dismissed on the grounds stated in the interlocutory applications moved by the respondent ?

POINT NO. (1)

11. Mr. Keshari Nath Tripathi, learned senior counsel submitted that the speeches made by the respondent prior to his filing the nomination can not be taken as a relevant material to constitute a corrupt practice nor can be taken as relevant facts to constitute a valid cause of action to maintain the election petition. Mr. Tripathi further submitted that only post-nomination speeches are relevant for constituting the corrupt practice. In support of his submissions, Mr. Tripathi placed reliance on the following cases:

(i) Subhash Desai vs. Sharad J. Rao (1994) Supp. (2) SCC 446;

(ii) Mohan Rawale vs. Damodar, (1994) 2 SCC 392;

(iii) Chandrakanta Goyal vs. Sohan Singh, (1996) 1 SCC 378; and

(iv).Ramakant Mayekar vs. Celine D'Silva, (1996) 1SCC 399.

12. In the case of ***Subhash Desai (supra),*** the Apex Court, while considering the question of relevancy of pre-nomination speeches, held that the pre-nomination speeches are not relevant for the purposes of constituting a corrupt practice. The Apex Court further opined that a person becomes candidate at the election only on filing a nomination paper because section 79 (b) of the Act defines the term 'candidate' to mean a person who has been or claims to have been duly nominated as a candidate at any election. The Apex Court while propounding this principle, relied on its earlier decision in the case of ***Indira Nehru Gandhi vs. Raj Narain, 1975 Supp SCC 1***, and held in para 18 as follows:

"18. On behalf of the appellant, it was then pointed out that in election petition, while alleging corrupt practices, reference has been made in respect of the speeches and publications, of period prior to 31-1-1990, which was the date when nomination papers were filed. The publications and speeches alleged to have been made prior to 31-1-1990 have to be ignored because the framers of the Act, required the High Court to judge the conduct of the candidate, his agent or persons with the consent of the candidate or his election agent, only after a person becomes a candidate for the particular election. A person becomes a candidate for the election in question only after filing the nomination paper. In this connection, reference may be made to Section 79(b) of the Act which defines 'candidate' to mean a person, who has been or claims to have been duly nominated as a candidate at any election. Section 34 of the Act says that a candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited the amounts prescribed in the said section. When a person becomes a candidate, was examined by this Court in the well-known case of Indira Nehru Gandhi v. Raj Narain ***(1975 Supp SCC 1)*** *and it was held:*

"The 1951 Act uses the expression "candidate" in relation to several offences for the purpose of affixing liability with reference to a person being a candidate. If no time be fixed with regard to a person being a candidate it can be said that from the moment a person is elected he can be said to hold himself out as a candidate for the next election."

Recently, this Court in the case of Mohan Rawale v. Damodar Tatyabal has said:

"We hold that all the averments in paragraphs 1 to 20 of the memorandum of election petition insofar as they refer to a period prior to 23-4-1991 cannot amount to allegations of corrupt practice."

This cut-off date 23-4-1991 was fixed with reference to the date when nomination papers were filed by the appellant concerned, because since that date the appellant will be deemed to have legally acquired the status of a candidate. According to us, any allegation of corrupt practice against the appellant, made by the respondent in respect of the period prior to the filing of nomination by the appellant on 31-1-1990, cannot be taken into consideration for judging the legality or validity of his election."

13. The aforesaid principles have been reiterated in the case of ***Mohan Rawale (supra).*** The Supreme Court has made the following observations in para 6 and 8 of the judgment:

" 6. *This, we are afraid, is not the correct perception of the matter. The view fails to take note of and give effect to the substitution of the definition of the expression "candidate" in Section 79(b). All sub-sections of Section 123 of the Act refer to the acts of a 'candidate' or his election agent or any other person with the consent of the candidate or his election agent. The substituted definition completely excludes the acts by a candidate up to the date he is nominated as a candidate. Shri Sanghi, therefore, asks us to take this position to its logical conclusions and strike out these allegations in the election petition.*

8. We hold that all the averments in paragraphs I to 20 of the memorandum of election petition insofar as they refer to a period prior to April 23, 1991 cannot amount to allegations of corrupt practice. But on the question whether they are relevant and admissible for other purposes for the reasons submitted by Shri Nariman we abstain from expressing any opinion. This aspect did not engage the attention of the High Court and was not considered by it. It is for the High Court to consider them at the appropriate time. We, therefore, declare that the allegations in paras I to 20 relating to the period anterior to the commencement of the candidature cannot be relied upon to establish corrupt practice proprio vigore".

14. In the case of **Chandrakanta Goyal (supra),** the Apex Court while considering the relevancy of pre-nomination speeches followed its earlier verdict rendered in the case of Subhash Desai (supra) and opined that pre-nomination speeches made by any candidate can not form basis of any corrupt practice. A person becomes a candidate at the election on filing his

nomination and not before that. The observations of the Apex Court made in para 3 of the judgment are being reproduced as follows:

"3. So far as the speeches of 29.1.1990 are concerned,there can be no doubt that the same have no relevance in the present context inasmuch as they were acts prior to the date on which the appellant became a candidate at the election. This being so, any speech made prior to the date on which she became a candidate at the election cannot form the basis of a corrupt practice by any candidate at that election since any act prior to the date of candidature cannot be attributed to her as a candidate at the election. For this reason, the learned counsel for the respondent rightly made no attempt to dispute this position. {See - Subhash Desai vs. Sharad J. Rao and Others : 1994 Supp.(2) SCC 446.}

15. In the case of **Ramakant Mayekar (supra),** the Apex Court again held that the pre-nomination speeches are irrelevant to form the basis of any corrupt practice and opined that relevant date is the date of nomination wherefrom the speeches of a candidate are considered relevant. While upholding this principle the Apex Court held in para 9 as follows:

"9. As for the speeches alleged to have been made on 29.1.1990, it may be stated at the outset that they have to be excluded from consideration since they cannot form the basis of any corrupt practice at the election, inasmuch as they relate to a period prior to the date on which Ramakant Mayekar became a candidate at the election as defined in Section 79(b) of the R.P. Act. This is the settled position in law. [See Subhash Desai vs. Sharad J. Rao and Others, 1994 Supp. (2) SCC 446; Indira Nehru Gandhi vs. Raj Narain, 1975 Supp. SCC 1; Mohan Rawale vs. Damodar Tatyaba, 1994 (2)SCC 392]."

16. Mr. M.N. Krishnamani, learned senior counsel for the petitioner on the other hand submitted that if it is held that pre nomination speeches of the respondent do not constitute corrupt practice, even then, such speeches, being hate speeches, could at least be relevant to corroborate the post nomination speeches. Mr. Krishnamani placed reliance on paras 8 and 9 (Paras 7 and 8 of S.C.C.) of the judgment of the Apex Court rendered in the case of **Mohan Rawale (supra).** In para 8 (Para 7 of S.C.C.) of the judgment, submissions of Mr. R.F. Nariman have been described. Mr. Nariman had contended that even if the allegations made in para 1 to 20 did not, by themselves, establish corrupt practice in law by virtue of their commission prior to the appellant becoming a candidate, these averments, and allegations must be read as pans of similar transactions pleaded in the later and subsequent paragraphs of the election petition. Mr. Nariman had further argued before the Apex Court that paragraphs 1 to 20 of the election petition could not be relevant if they could be sustained for the purpose of probalising or furnishing "similar-fact" evidence of the allegations of corrupt practice made in the later paragraphs of the election petition. The Apex Court did not agree with the submissions of Mr. Nariman and held in para 9 (Para 8 of SCC) that all the averments made in paragraphs 1 to 20 of the election petition in so far as they refer to a period

prior to 23.4.1991 could not amount to allegations of corrupt practice. The Apex Court however, abstained from expressing any opinion regarding relevancy of pre nomination speeches for other purposes and left the same for consideration by the High Court at the appropriate time. In the case of Mohan Rawale (supra) the Apex Court has not expressed any opinion with regard to submissions of Mr. R.F. Nariman and very clearly held that pre-nomination allegations could not be relied upon to establish corrupt practice proprio vigore. No doubt the Apex Court while holding so left the question of relevancy of pre-nomination speeches for other purposes to be considered by the High Court. But the Apex Court did not express any opinion as to under what circumstances the pre-nomination speeches would be relevant for other purposes. When pre-nomination speeches do not constitute a cause of action or corrupt practice and are not relevant to challenge election of the returned candidate, I am unable to understand as to how such speeches would be relevant to corroborate the post nomination speeches. In my opinion the submission of the petitioner's counsel is devoid of merit.

17. The second submission on behalf of the petitioner was that the term "candidate" has been defined in section 79 (b) of the Act, according to which "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election and this definition is applicable for the purposes of Part VI and Part VII of the Act as this is evident from the words 'in this part and part VII' occurring in the beginning of definitions contained in section 79. The definition of "candidate" as given in section 79 (b) of the Act has to be given wider import for the purposes of section 123 of the Act so as to include also the period commencing from the date of notification issued by the election commission till the filing of the nomination and can not be restricted to the period commencing on and from the date of nomination only. The said definition has to be given effect keeping in view the context in which the term 'candidate' has been used in section 123 of the Act because the expression "unless the context otherwise requires" used in section 79 of the Act clearly supports the view that the definition of term 'candidate' in section 79 (b) of the Act is not static and can be modified suitably according to the context in which the term 'candidate' has been used. In support of this submission, Mr. Krishnamani, referred to the judgment of the Apex Court in the case of ***Indira Nehru Gandhi vs. Raj Narain & another, AIR 1975 SC 2299*** and contended that in that case the Supreme Court, while scrutinising the effect of the amendment of section 123 (7) of the Act, expressed the view that the legislature was well within its right to determine a point of time prior to which any action of the candidate can not be deemed to be corrupt practice. The Apex Court further held that in absence of such a restriction any successful candidate would automatically become a candidate for the subsequent election after five years. According to Mr. Krishnamani, the Apex Court while making this observation, clarified that the definition of the word 'candidate' may be departed from, if there is something in the context to show that the definition should not be applied. In this connection, the learned counsel referred to paras 218 and 219 of the

judgment rendered in Indira Nehru Gandhi (supra) which are as follows:

"218. .....Reading the word "candidate" in Section 123(7) of the RP Act in the sense in which it has been defined as a result of the amendment made by Act 40 of 1975. I find that the only reasonable inference is that the person referred to as a candidate in that clause should be a person who has been or claims to have been duly nominated as a candidate at an election and not one who is yet to be nominated.

219. Mr. Shanti Bhushan has invited our attention to Clause (b) of Section 100(1) of the RP Act wherein it is stated that subject to the provisions of Sub-section (2) of the section if the High Court is of the opinion that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent, the High Court shall declare the election of the returned candidate to be void. "Returned candidate" has been defined in Clause (f) of Section 79 to mean, unless the context otherwise requires, a candidate whose name has been published under Section 67 as duly elected. It is urged that as the corrupt practice referred to in Clause (b) of Section 100(1) of the RP Act would in the very nature of things have to be committed by the returned candidate before his name was published under Section 67 as duly elected, the words "returned candidate" in Clause (b) of Section 100(1) must be taken to have been used with a view to identify the person who subsequently became a returned candidate. It is urged that if while dealing with corrupt practice committed by a candidate before he became a returned candidate in the context of Section 100(1)(b), it is permissible to hold that the words "returned candidate" are intended to identify the person who subsequently became a returned candidate, the same criterion should apply when construing the word "candidate" in Section 123 of the RP Act. This contention, in my opinion, is devoid of force. The definition of the words "returned candidate" and "candidate" given in Section 79 of the RP Act are preceded by the words "unless the context otherwise requires". The connotation of the above words is that normally it is the definition given in the section which should be applied and given effect to. This normal rule may, however, be departed from if there be something in the context to show that the definition should not be applied. So far as Clause (b) of Section 100(1) is concerned, the context plainly requires that the corrupt practice referred to in that clause should have been committed by the candidate before he became a returned candidate, or by his agent or by any other person with his consent or that of his election agent. The compulsion arising from the context which is there in Clause (b) of Section 100(1) of the RP Act is singularly absent in Section 123(7) of the RP Act. There is nothing in the context of the latter provision which requires that we should not give full effect to the new definition of the word "candidate".

18. Mr. Krishnamani continued to argue that the Apex Court in the case of Indira Nehru Gandhi (supra) had inter alia, examined the constitutional validity of the Election Laws (Amendment) Act, 1975 and introduced the new definition

of the word "candidate". In fact, the Apex Court examined the validity of the aforesaid Act in the light of the provisions of section 123(7) of the Act alone, which is apparently clear from para 234 of the judgment, which reads as follows:

"234. Reference was also made by Mr. Shanti Bhushan to the effect of retrospective amendment in cases which may arise under Section 123(1) of the RP Act. We are in the present case not concerned with Section 123(1) of the RP Act..... ."

19. Keeping in view section 123 (7) of the Act, the Apex Court was of the view that the aforesaid amendment was constitutional as the Parliament had powers to enact such laws. According to Mr. Krishnamani, the ratio behind this conclusion has been given in para 385 of the judgment, which reads as follows:

"385. The legislature must fix some point of time before which a person cannot be a 'candidate' in an election, and, a wide latitude must be given to the legislature in fixing that point. In Union of India v. Parameswaran Match Works, Civil Appeals Nos. 262-273. 587-591 and 1351-1402 of 1971 and 1883-1921 of 1972, D/- 4-11-1974 - () this Court observed:

The choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or point there must be, and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless we can say that it is very wide of the reasonable mark. See Louisville Gas Co. v. Alabama Power Co. 240 US 30 at p. 32 per Justice Holmes."

20. On the basis of the aforesaid observations of the Apex Court, Mr. Krishnamani submitted that in section 123 (7) of the Act it is difficult to ascertain whether the listed acts would be for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate irrespective of the fact that they were carried out prior to a particular point in time, therefore, the Act as well as the verdict of the Apex Court explicitly reveal that the date of nomination can serve as an effective benchmark to determine whether the act constitutes a corrupt practice or not. The same is also true for section 123 (6) of the Act among others.

21. It was next submitted by the learned senior counsel appearing for the petitioner that a strict interpretation of section 79 (b) of the Act would in fact render some of the provisions of the Act as unenforceable and due to this reason the Apex Court observed in para 219 of the judgment rendered in Indira Nehru Gandhi's case (supra) that the definition may, however, be departed from if there be something in the context to show that the definition should not be applied. Mr. Krishnamani referred to the provisions of section 123 (3), section 123 (3A) and section 123 (1)(A)(a) of the Act and contended that if it is held that a person becomes candidate mere on filing a nomination only, the provisions of these sections would become unenforceable.

According to the learned counsel, section 123 (1)(A)(a) of the Act clearly prohibits candidates from giving bribe to a person either to stand or not to stand as a candidate in the election, therefore, if the definition of the "candidate" as provided in section 79(b) of the Act is applied, in that eventuality, section 123 (1)(A)(a) of the Act would become ineffective. Mr. Krishnamani further submitted that there is another reason which makes the position clear that the term "candidate" in section 79 (b) cannot apply to the allegations arising out of section 123 (3) and section 123 (3A) of the Act. The whole object of these provisions is that a candidate should not indulge in hate speeches or communal attacks in order to injure the sentiments of any sect or to induce and infuse feeling of hatred in another community in order to polarise people in his favour by creating communal hatred. Therefore, a candidate can not be held to be justified to make hatred and communal speeches even about one minute before filing his nomination. The hate pre nomination speeches by which a person has already been done the mischief and damage prevented by section 123 (3) and section 123 (3A) of the Act would go scot free if the literal definition of "candidate" given in section 79(b) of the Act is given effect to and in that eventuality, he would be able to gain benefits by such hate speeches in his election prospects. It was also submitted on behalf of the petitioner that the object of section 123 (3) and section 123 (3A) of the Act is also to prevent other candidates fighting the election from being put to grave loss and prejudice on account of such hate speeches. The respondent's object all along before and after the filing of the nomination was to consolidate Hindu votes by targeting Muslims and Sikhs by hurling venouoness, vituperative and vulgar attacks on them. In such a context the narrow definition of "candidate" would work havoc and defeat the very object of the aforesaid sections. In the backdrop of these contexts, Mr. Krishna Mani submitted that the definition of the term "candidate" as contained in section 79(b) of the Act includes not only a person who becomes a candidate on filing nomination but also a person who is an "would be candidate".

22. The learned counsel for the petitioner further submitted that the principles laid down in the cases of **Subhas Desai (supra), Mohan Rawale (supra), Chandrakanta Goyal (supra) and Ramakant Mayker (supra)** have not laid down any law and are not binding precedents. In these cases, the principles being relied upon by the counsel for the respondent were propounded only on the concession granted by the counsels. Mr. Krishna Mani referred to para 8 of the judgment in **Mohan Rawale's** case (supra), para 3 of the **Chandrakanta Goyal's** case (supra) and para 9 of the judgment in **Ramakant Mayker's** case in support of his submissions. In other words, submissions of the counsel for the petitioner was that in all the aforesaid three cases the Apex Court has not laid down any law. Whatever observations have been made, they have been made by way of concession, therefore, the decisions are not binding judicial precedents. Mr. Krishnamani proceeded further to argue that a counsel has no right to concede on a question of law so as to bind his client. In any event, the Apex Court in multiple cases, held that any decision passed on a point that has

been either conceded by one party or mutually agreed to by both the parties, can not be deemed to be a binding precedent. In the case of ***Uptron India Ltd. vs. Shammi Bhan (1998) 6 SCC 538*** the Apex Court has observed in para 23 of the judgment that ".... Even otherwise, a wrong concession on a question of law, made by a counsel, is not binding on his client. Such concession cannot constitute a just ground for a binding precedent." This view has been reiterated by the Apex Court in the case of ***Commissioner of Central Excise, Chennai-I vs. ITC Ltd. (2006) 13 SCC 795 and Rajbir Singh Dalal vs. CDL University Sirsa and another, (2008) 9 SCC 284.*** It was next submitted that the case laws cited by the learned counsel for the respondent being contrary to the analogy of section 123 of the Act as well as the decision rendered in the Indira Nehru Gandhi's case (supra), are per incuriam.

23. Before entering into merits of the aforesaid submissions of the learned counsel for the parties, it seems to be just and expedient to see as to how the present definition of the term "candidate" was brought on the statute book. After the judgment of this Court in the case of **Raj Narain vs. Indira Nehru Gandhi** (rendered by Hon'ble Jagmohan Lal Sinha,J.), the Parliament made exhaustive amendment in the Representation of People Act by The Election Laws (Amendment) Act, 1975 (Act No. 40 of 1975), (hereinafter referred to as 'the Amending Act') and amended the definition of the term "candidate" with retrospective effect. Before the amendment, the term "candidate" had wider import, and according to that, a person used to be considered as a "candidate" even prior to his filing the nomination. The pre amended definition of the term "candidate" as defined in section 79 (b) of the Act, was as follows:

"79. In this Part and in Part VII, unless the context otherwise requires,-

(a).....

(b) a candidate means a person who has been or claims to have been duly nominated as a candidate at any election and any such person shall be deemed to have been a candidate as from the time, with the election in prospect, he began to hold himself out as a prospective candidate."

24. Therefore, according to pre-amendment definition, "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election and any such person was being deemed to have been a candidate not only from the date of his nomination but also as from the time, with the election in prospect, he began to hold himself out as a prospective candidate.

25. By the amending Act, the words and expressions "and any such person shall be deemed to have been a candidate as from the time, with the election in prospect,he began to hold himself out as a prospective candidate" were deleted from section 79 (b) of the Act. Consequently the following definition, which is operative since then, was incorporated in section 79:

"79. In this Part and in Part VII unless the context otherwise requires,-

(a).....

(b) "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election;"

26. The validity of the Amending Act was challenged before the Constitution Bench of the Apex Court in the case of Indira Nehru Gandhi vs. Raj Narain (supra), which was an appeal against the aforesaid judgment of this Court and the Apex Court upheld the amendment and held that after the commencement of the Amending Act, the question as to when a person holds himself out as a candidate, therefore,lost its importance in the context of new definition. No doubt in paras 384 and 385 of the judgment rendered in Indira Nehru Gandhi's case (supra) the Apex Court observed, as submitted by Mr. Krishnamani, that the legislature must fix some point of time before which a person can not be a candidate in an election, and a wide latitude must be given to the legislature in fixing that point, but from this observation it can not be inferred that the Apex Court allotted some date other than the date of nomination under the amended law as the date on which a person becomes a candidate in an election. In fact the Apex Court made the aforesaid observations while considering the power of the legislature to make the amendment fixing the date of nomination as the date for commencement of candidature of a person in an election instead of the date of such commencement under the unamended law. Therefore, the aforesaid observations do not support the petitioner's case. It may also be mentioned that the Apex Court, after considering the pros and cons of the Amending Act and pre-amendment position of section 79(b) of the Act, very specifically held that a returned candidate becomes candidate only on the date of filing his nomination paper. The Apex Court further observed that uncertainty had been removed by the amendment, therefore, the amended definition of the term "candidate" was made applicable in Indira Nehru Gandhi's case.

27. It is no doubt true that the definition of the term "candidate" given in section 79 of the Act is preceded by the words "unless the context otherwise requires" but the term "unless the context otherwise requires" has a relevance only when the context requires otherwise. Normally it is the definition given in the section should be applied and given effect to but this normal rule may be departed from if there be something in the context to show that the definition should not be applied. In the case of Indira Nehru Gandhi (supra) the Apex Court, while considering the words "unless the context otherwise requires" for finding out the correct meaning of the term "candidate" for the purposes of section 100(1) and section 123 of the Act, has very clearly held that there is nothing in the context which requires that full effect of the definition "candidate" should not be given. While following the ratio of Indira Nehru Gandhi's case, the Apex Court, in the cases of **Subhash Desai. Chandrakanta Goyal, Ramakant Mayker and Mohan Rawale,** very clearly held that the speeches relating to the period anterior to the commencement of the candidature could not be relied upon to establish corrupt practice proprio vigore. In all the

aforesaid cases, the Apex Court has explicitly held that the relevant date is the date of the nomination where-from a candidate has been made responsible for a corrupt practice committed by him or his election agent or by any other person with his consent or with the consent of his election agent. The acts, omissions and speeches made by a candidate prior to his nomination has been held by the Apex Court in the aforesaid cases as irrelevant for constituting a cause of action or a corrupt practice and this is the law declared by the Apex Court and it is incorrect to say that the Apex Court laid down this law due to any concession of any of the counsel. In my considered opinion, the law declared by the Apex Court in the cases **Indira Nehru Gandhi, Subhas Desai, Mohan Rawale, Chandrakanta Goyal and Ramakant Mayker** are judicial precedents within the meaning of Article 141 of the Constitution of India and is binding on this Court. The grounds on which basis Mr. Krishnamani tried to contend that the aforesaid decisions do not come within the category of judicial precedents, do not appear to be tenable nor can be taken into account to surpass the decisions of the Apex Court. So far as the submission of Mr. Krishnamani that the term "candidate" as defined in section 79(b) of the Act has a different meaning for the purposes of section 123 (3) and 123 (3A) of the Act is concerned, it has also no substance. According to section 123 (1)(A)(a) of the Act giving of bribe to any person with the object, directly or indirectly, of inducing a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate in an election, is a corrupt practice. Mr. Krishnamani tried to submit that the expression "a person to stand or not to stand as .....a candidate at an election", occurring in section 123(1)(A)(a) of the Act clearly indicates that a person becomes a candidate even prior to his filing nomination paper. In my opinion, this submission does not appear to have any merit. Section 123 (1)(A)(a) of the Act contemplates existence of at least two persons, one who gives or offers to give the bribe, and the other, to whom the bribe is given or offered to be given. According to section 123 (1)(A), the bribe giver must be a candidate and to whom the bribe is given or offered may or may not be a candidate. The liability of corrupt practice, according to section 123 (1)(A) of the Act is on the candidate, his agent or any other person who acts with the consent of the candidate or his election agent and not on the person who is induced to stand or not to stand as a candidate, therefore, the line of reasoning submitted by Mr. Krishnamani for giving a different meaning to the term 'candidate' for the purposes of section 123 and 100 of the Act being contrary to the settled principles, has no legal support (judicial precedent). In fact what Mr. Krishnamani is trying to argue, is to restore the pre-amendment definition of the term "candidate", which after the commencement of the Amending Act, is not permissible in law specially when the Apex Court in the aforesaid decisions and in so many other decisions, propounded the date of nomination as the relevant date for the commencement of candidature of a person in an election and excluded his pre-nomination speeches etc.

28. Therefore, I am of the view that the pre-nomination speeches of a candidate have no relevance to constitute a corrupt practice within the meaning of

section 100 and 123 of the Act. More so, they do not even disclose a cause of action to maintain an election petition against the returned candidate. Point no.1 is accordingly disposed of.

POINT NO. (2)

29. With regard to this point, Mr. K.N. Tripathi submitted that the petitioner, on the basis of the pleadings contained in paras 29, 30 and 38 of the election petition, has tried to contend that the pre-nomination speeches were repeatedly telecast from 13.3.2009 till the finalisation of the result of the election on 16.5.2009, therefore,the pre-nomination speeches are relevant to constitute the corrupt practice. But neither in para 29 nor in para 38 of the election petition nor elsewhere in the entire election petition, the petitioner has pleaded that the pre nomination speeches made by the respondent were telecast by various channels with the consent of the respondent, therefore, the telecast so made can not be treated as a ground to constitute a corrupt practice or a cause of action against the respondent. More so, the averments made in paras 29, 30 and 38 of the election petition with regard to the telecast of pre nomination speeches are also vague and indefinite. The names of TV channels, date and time of telecast and exact speeches that were telecast, have not been disclosed in the election petition. Paras 24, 25 and 26 of the election petition disclose pre nomination telecast of respondent's speeches, as such they are not at all relevant. It was next submitted that in absence of respondent's consent for the telecast, it can not be held that the respondent was responsible for the telecast. It was next submitted that knowledge or connivance is not consent in the Election Law and even question of implied consent does not arise in such matters. Mr. K.N. Tripathi, in support of his submissions, placed reliance on the following cases :

(i) Chandrakanta Goyal vs. Sohan Singh, (1996) 1 SCC 378; and

(ii)Charan Lal Sahu vs. Giani Zail Singh, AIR 1984 SC 309).

30. In the case of ***Chandrakanta Goyal vs. Sohan Singh, (supra)*** the apex Court while considering the question of relevancy of a corrupt practice committed by any other person for the returned candidate, propounded the principle that the act amounts to a corrupt practice must be done by a candidate or his agent or by any other person with the consent of a candidate or his election agent and the consent of the candidate or his election agent must be pleaded and proved and held in paras 8 and 9 as follows:

"8. *..... The only surviving allegations relate to speeches made by some leaders of the political parties for which even the High Court has not recorded a clear finding of appellant's consent thereto and the High Court has merely said that the consent may be implied from the fact that the makers of the speeches were leaders of the political party.*

9. As an abstract proposition of law it cannot be held that every speech by a leader of a political party, who is not an agent of the candidate set up by the party, is necessarily with the consent of the candidate set up by that party to make it superfluous to plead and prove

the candidate's consent, if that speech otherwise satisfies the remaining constituent parts of a corrupt practice. The act amounting to a corrupt practice must be done by "a candidate or his agent or by any other person with the consent of a candidate or his election agent'. A leader of a political party is not necessarily an agent of every candidate of that party. An agent is ordinarily a person authorised by a candidate to act on his behalf on a general authority conferred on him by the candidate. Ordinarily, the agent is the understudy of the candidate and has to act under the instructions given to him, being under his control. The position of a leader is different and he does not act under instructions of a candidate or under his control. The candidate is held to be bound by acts of his agent because of the authority given by the candidate to perform the act on his behalf. There is no such relationship between the candidate and the leader, in the abstract merely because he is a leader of that party. For this reason, consent of the candidate or his election agent is necessary when the act is done by any other person. Thus, even in the case of a leader of the party, ordinarily, consent of the candidate or his election agent is to be pleaded and proved, if the election of the candidate is to be declared void under Section 100(1)(b) for the corrupt practice committed by the leader."

31. In the case of ***Charan Lal Sahu v. Giani Zail Singh (supra),*** a Constitution Bench of the Apex Court reiterated the aforesaid principles and held that in absence of a pleading that the act of undue influence was committed with the consent of the returned candidate, one of the main ingredients would remain unsatisfied, therefore, the facts constituting the consent of the returned candidate must be specifically pleaded. Paras 29 to 31 of the judgment being relevant on the question, are being reproduced as follows:

"29. Section 18(1) (a) of the Act which we have already set out, provides that the Supreme Court shall declare the election of the returned candidate to be void if it is of opinion-

"that the offence of bribery and undue influence at the election has been committed by the returned candidate or by any person with the consent of the returned candidate."(emphasis supplied).

We may keep aside the question of bribery since there is no allegation in that behalf. Nor is it alleged that the offence of undue influence was committed by the returned candidate himself. The allegation of the petitioners is that the offence of undue influence was committed by certain supporters and close associates of Respondent 1 with his connivance. It is patent that this allegation, even if it is true, is not enough to fulfil the requirements of section 18(1) (a). What that section, to the extent relevant, requires is that the offence of undue influence must be committed by some other person with the "consent" of the returned candidate. There is no plea whatsoever in the petition that undue influence was exercised by those other persons with the consent of Respondent 1.

30. It is contended by Shri Shujatullah Khan who appears on behalf of the petitioners, that connivance and consent are one and the same thing and

that, there is no legal distinction between the two concepts. In support of this contention, learned counsel relies upon the meaning of the word 'connivance' as given in Webster's Dictionary (Third Edition, Volume 1, p. 481); Random House Dictionary (p. 311); Black's Law Dictionary (p. 274); Words and Phrases (Permanent Edition, Volume 8A, p. 173); and Corpus Juris Secundum (Volume 15A, p. 567). The reliance on these dictionaries and texts cannot carry the point at issue any further. The relevant question for consideration for the decision of the issue is whether there is any pleading in the petition to the effect that the offence of undue influence was committed with the consent of the returned candidate. Admittedly, there is no pleading of consent. It is then no answer to say that the petitioners have pleaded connivance and, according to dictionaries, connivance means consent. The plea of consent is one thing: the fact that connivance means consent (assuming that it does) is quite another. It is not open to a petitioner in an Election Petition to plead in terms of synonyms. In these petitions, pleadings have to be precise, specific and unambiguous so as to put the respondent on notice. The rule of pleadings that facts constituting the cause of action must be specifically pleaded is as fundamental as it is elementary. 'Connivance' may in certain situations amount to consent, which explains why the dictionaries give 'consent' as one of the meanings of the word 'connivance'. But it is not true to say that 'connivance' invariably and necessarily means or amounts to consent, that is to say, irrespective of the context of the given situation. The two cannot, therefore, be equated. Consent implies that parties are ad idem. Connivance does not necessarily imply that parties are of one mind. They may or may not be, depending upon the facts of the situation. That is why, in the absence of a pleading that the offence of undue influence was committed with the consent of the returned candidate, one of the main ingredients of section 18(1) (a) remains unsatisfied.

31.The importance of a specific pleading in these matters can be appreciated only if it is realised that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says, 'connivance' here, or whether the petitioner has used expression as meaning 'consent'. It is remarkable that, in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to keep their options open until the trial and adduce such evidence of consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly, it is impermissible to substitute the word 'consent' for the word 'connivance' which occurs in the pleadings of the petitioners."

32. The learned counsel for the petitioner, in reply, submitted that adequate pleadings with regard to the telecast of the respondent's pre nomination speeches by TV channels and electronic media have been made in paragraphs 29 and 38 of the election petition. Paras 29 and 38 of the election

petition, if taken into account, disclose the respondent's implied consent. Paragraphs 29 and 38 of the election petition are being reproduced as follows:

"29. The hate speeches of Mr. Feroze Varun Gandhi were the integral part of the General Elections and were telecast repeatedly from 13.03.2009 till the final results of the elections were declared on 16.05.2009, whether when Mr. Feroze Varun Gandhi went to the Delhi High Court on 19.03.2009 to seek bail or when the Allahabad High Court that dismissed his petition for quashing the FIR or when the Delhi High Court permitted him to withdraw his petition that had become infructuous in the light of the Allahabad High Court order or when he went to Pilibhit to surrender or when he was lodged in Pilibhit jail or when the NSA was slapped on him on 29.03.2009 or when he was shifted to Etah jail as well as approached the Supreme Court on 01.04.2009 or when the Supreme Court granted him parole or when he was released on parole and went back to Delhi on 16,.04.2009 or when he came to Pilibhit to file his nomination on 32.04.2009 or while he was campaigning in Pilibhit or elsewhere, these hate speeches were also shown as the background to the latest events that were being telecast."

"38. On account of the poisonous election speeches given by Mr. Feroze Varun Gandhi, the electronic media also played up the same and in fact, the Varun Gandhi hate speeches were given prominence and were repeatedly telecast on all the national news channels and dominated all the other issues in the entire elections.

Not only this, even the print media of Pilibhit, both Amar Ujala and Dainik Jagran, Pilibhit Editions, were obsessed by the hate speeches and he was prominently written about by the print media only for the hate speeches and issues connected to it, like his going to jail etc. While he was permitted to have home food and was having the same, the media made their stories sensational by writing that how he had to eat stale and dry chappatis and how he was made to sleep on the floor on torn 'darri's'. In order to ensure that he gains public sympathy, he was continuously shown as some one who had been wronged. There was absolutely no mention of the development of the area that was done by his mother in the last 20 years or what he intended to do in the next five years. The electronic media followed him in their OB Vans everywhere, which gave him an edge over his opponents in terms of publicity. The newspapers saw that the story of minority bashing by Mr. Feroze Varun Gandhi increased their sales, so they continued with this agenda right through the elections and had a major hand in further provoking the sentiments of the Hindus and went on to polarize the Hindu vote bank."

33. Learned counsel for the petitioner further submitted that according to the aforesaid paragraphs of the election petition the hate speeches were continuously shown/telecast by the Electronic Media till the voting date and thus, such speeches continued to remain fresh in the mind of the voters, therefore, the respondent took wilfully advantage of the same by not issuing any notice to the Media to stop the telecast. Rather he quietly allowed such repeated telecasts since it suited him, therefore, the telecast

was made with his implied consent. The Apex Court, in the case of ***Laxmi Narain vs. Returning Officer, 1974 (3) SCC 425*** while dealing with the corrupt practice under section 123 of the Act, has made abundantly clear that "consent" can be inferred from the circumstances. According to the learned counsel, the continued broadcast/telecast of the pre nomination speeches of the respondent after the date of nomination till the finalisation of the election, does constitute a corrupt practice, therefore, the pre nomination speeches of the respondent have relevance not only for constituting a "cause of action" but also for constituting a "corrupt practice" within the meaning of section 123 of the Act.

34. The learned counsel for the petitioner tried to contend further that the pre-nomination speeches of the respondent remained alive after the respondent's nomination on account of publication and telecast of such speeches respectively by print media and various TV channels, and the respondent, on account of such publication and telecast, was ultimately benefited in his election. In my opinion according to section 100 (1)(b) of the Act, election of the returned candidate can be declared void only when any corrupt practice has been committed by the returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent. Therefore, it is obligatory on the part of the election petitioner to plead material facts relating to such consent of the returned candidate or his election agent. It may also be mentioned that there is not even a single word in para 6K, 29 and 38 of the election petition or elsewhere in the election petition that such telecast and publication had been made with the consent express or implied, of the respondent or his election agent. In absence of such material facts in the election petition, the petition will be contrary to section 83 (1)(a) of the Act, therefore, liable to be dismissed. In the cases of **Chandrakanta Goyal and Charan Lal Sahu,** the Apex Court has held that the act or omission of any person does not bind a candidate unless it was done with the consent express or implied of the candidate or his election agent, therefore, it was necessary for the petitioner to plead the consent of the respondent or his election agent in the election petition specifically in clear terms. In absence of any specific plea on this point, it can not be inferred from the contents of the election petition that the petitioner has at least set up a case of implied consent. Mr. Krishnamani tried to submit that the respondent did not come forward to prohibit the media for publishing or telecasting his pre nomination speeches during the post nomination period, therefore, the publication and the telecast were made with the respondent's implied consent and this inference can be drawn from the election petition without there being any specific plea on this point. In my opinion the factual position is otherwise. On a careful perusal of the election petition, it is abundantly clear that the petitioner has nowhere pleaded that the respondent, despite coming to know the publication and telecast of his pre nomination speeches in the aforesaid manner, did not lodge any protest nor gave any notice to the media for stopping the publication and telecast. In absence of this plea, it can not be contended that the petitioner has set up the case of consent of the

respondent regarding the publication/telecast of his pre nomination speeches in the aforesaid manner by the media.

35. Therefore, I am of the view that the election petition is silent with regard to the material fact that the telecasts/ publications of pre and post nomination speeches of the respondent by the TV channels and other media during the post nomination period were made with the implied or express consent of the respondent.

POINT NO. (3)

36. Mr. K.N. Tripathi senior counsel submitted that with regard to post nomination speeches of the respondent, the petitioner's entire pleadings are contained in para 30 of the election petition only, which reads:

"30. It would not be out of place to say that these hate speeches were given more news time on every channel's telecast during the General Elections as compared to any other issue or agenda. Because of this reason, the hate speech of 7th and 8th March, 2009 remained fresh in the minds of the electorate of Pilibhit and finally it is on account of these speeches that the Hindu votes polarized in favour of Mr. Feroze Varun Gandhi and against the petitioner and other candidates. That even after his release from jail on parole, Mr. Feroze Varun Gandhi in his meetings continued with his hate speeches, but with a difference. He said in village Chandiya Hazara, Puranpur as well as in other villages of Barkhera in the first week of May that he was bound by the affidavit that he had given in the Supreme Court to mark his words but, he continued with his dialogues instead of the earlier statements 'jo haath hindu ke upar uthega us haath ko Varun Gandhi kaat dalega', he would say 'jo haath hindu ke upar uthega us haath ko' and his supports would repeat the balance in chorus 'Varun Gandhi kaat dalega'. This was broadcast by various channels including NDTV and STAR News which were covering Mr. Feroze Varun Gandhi's campaign live. In fact NDTV showed the same in their introductory montage of the coverage of the election results on 16.05.2009. The petitioner seeks liberty of this Hon'ble Court to summon the said tapes from the channels. "

37. Mr. K.N. Tripathi submitted that the averments made in para 30 of the election petition are vague, indefinite and tend to embarrass a fair trial of the petition. More so, the petitioner has himself disclosed in para 30 of the petition that alleged post nomination speeches were different from the pre nomination speeches but the petitioner has not disclosed the contents, words and expressions of the alleged speeches, therefore, the court is not in a position to ascertain as to whether or not the post nomination speeches amount to a corrupt practice. Mr. Tripathi next submitted that it is nowhere pleaded in the election petition that the respondent made any appeal to vote for him on the ground of religion, race, caste and community etc. or to refrain from voting for any person on the said ground. It is also nowhere pleaded that said speeches were for the furtherance of the prospects of the election of the respondent or the same prejudicially effected the election of any other candidate, therefore, requirements

of section 123 (3) and section 123 (3-A) of the Act have not been fulfilled. Mr. Tripathi further submitted that mere the averment that the respondent continued with his hate speeches but with a difference does not amount to disclosure of material facts constituting a corrupt practice. The petitioner's own admission is that post nomination speeches were different from earlier so called hate speeches but the petitioner nowhere specified as to which part of the earlier speeches continued during the post nomination period. Mere using the expression "hate speech" does not amount to corrupt practice as the said expression has not been made one of the essential ingredients to constitute a corrupt practice. The petitioner has not disclosed the date, time and place where the meeting was allegedly held at villages Chandia Hazara and Pooranpur. He has also not disclosed the names of other villages of Barkheda where meetings were allegedly held. The date, time and place of meetings have also not been mentioned. The expression "first week of May" made in para 30 of the election petition is too vague and general, therefore, it is of no help to the petitioner. In support of his submissions Mr. K.N. Tripathi placed reliance on the following cases:

(I) Azhar Hussain vs. Rajeev Gandhi, AIR 1986 SC 1253;

(ii) Har Narain vs. Vinod Kumar, AIR 1987 All 319;

(iii) Hardwari Lal vs. Kanwal Singh, AIR 1972 SC 515;and

(iv) Daulat Ram vs. Anand Sharma, AIR 1984 SC 621;

38. In the case of Azhar Hussain (supra), the Apex Court while considering the question of essential ingredients of the corrupt practice gave stress on the date, time and place of the speeches and held as follows:

"25. In this case also, no time, date and place of the speeches delivered by the respondent have been mentioned. No exact extracts from the speeches are quoted. Nor have the material facts showing that such statements imputed to the respondent were indeed made been stated. No allegation is made to the effect that it was in order to prejudice the election of any candidate. Or in order to further the prospects of the election of the respondent. The essential ingredients of the alleged corrupt practice have thus not been spelled out. So far as the meeting is concerned, the principle (1) laid down in Nihal Singh's case (supra) discussed in the context of the charge contained in ground (Il)(i) is attracted. The view taken by the High Court is therefore unexceptionable."

39. In the case of ***Har Narain (supra)*** this Court while considering the question of existence of cause of action with regard to charge of corrupt practice propounded the principle that petitioner must state to the precision of the details including the details of time, place and names of voters, nature and manner of the threat extended to them and the actual words and expressions used for giving threat to the voters and observed as under:

"10. .....The material facts are those facts which can be considered as material supporting the allegations made. In other words, they must be such

facts as to afford basis for the allegations, made in the petition. (Jitendra Bahadur Singh v. Krishna Behari, AIR 1970 SC 276). S. 83 of the Act, 1951 is mandatory and requires the election petition to contain first a concise statement of material facts and then require the fullest possible particulars. The word, "material" shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material act leads to an incomplete cause of action and the statement of claim becomes bad. (Samant N. Balakrishna v. George Fernandez, AIR 1969 SC 1201).

11. ..... In the case of Hardwari Lal (supra) which also involved a charge of corrupt practice, it was held that an election petition which merely alleges corrupt practice against successful candidate of obtaining or procuring or attempting to obtain or procure the assistance of certain named Government Servants in the furtherance of the prospect of his election by writing letters under his own signature without giving material facts and the necessary particulars as to the nature of the assistance the time and place where it was sought from each of the persons mentioned does not furnish any cause of action and it is no election petition in the eye of law. It, therefore, follows that time and place constitute material facts and they have to be disclosed to present a full picture of cause of action like other material facts. In Daulat Ram Chauhan v. Anand Sharma, AIR 1984 SC 621, their Lordships adverting to material facts of corrupt practice observed : --

'We must remember that in order to constitute corrupt practice, which entails not only the dismissal of the election petition but also other- serious consequences like disbarring the candidate concerned from contesting a future election for a period of six years, the allegation must be very strongly and narrowly construed to the very spirit and letter of the: law. In other words, in order to constitute corrupt practices the following necessary particulars, statement of facts and essential ingredients must be contained in the pleadings : --

(1) Direct and detailed nature of corrupt practice as defined in the Act.

(2) Details of every important particular must be stated giving the time place, names of persons, use of words and expressions, etc.

(3) It must clearly appear from the allegations that the corrupt practices alleged were indulged in by (a) the candidate himself (b) his authorised election agent or any other person with his express or implied consent'.

12. From the above rule, it is abundantly clear that for giving a cause of action with regard to a charge of corrupt practice, the petitioner must state to the precision of the details including the details of time, place, names of voters, who were terrorised, use of words and expressions for extending threat and the nature and manner of the threat extended Similar rule has been reiterated in the latest decision Azhar Hussain v. Rajiv Gandhi, AIR 1986 SC 1253 by the Supreme Court I, therefore, do not agree with Sri Dwivedi that the details of polling stations, names of voters, nature and

manner of threat, actual words used for extending threat constitute merely particulars that can be furnished later, and not the material facts which must be stated in the petition to give a full picture of the cause of action. From the above decisions of the Supreme Court, it is abundantly clear that the petitioner will have to furnish all these details to give a complete picture of cause of action for the charge of corrupt practice and that he cannot be permitted to make up this deficiency good either by way of amendment on the ground that they merely constitute 'particulars' that can be furnished during the trial either by adducing evidence or in the petition by amendment suo motu or at the direction of the court. The disclosure of all these details in the petition at the very inception is mandatory and the petitioner cannot be permitted to furnish these details, later either suo motu or under the direction of the court. It is precisely here that the order dt. 13-12-1985 went wrong. The proviso to Clause (c) of Sub-section (l) of Section 83 of the Act, 1951 Is also a pointer that the petitioner while raising a charge of corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. The disclosure of all the material facts including the details relating to time, place, names of voters, nature and manner of threat extended to them, the actual words and expression used for giving threat, the fact of explicit or implied consent and the details of talks held between the respondent, his father and the polling agents in the petition right from inception was essential and the Court directing the petitioner vide order dt. 13-12-1985 to furnish all these details did some thing, which is not permitted by the case law, stated hereinbefore. If all these facts are not stated in the petition then it would be liable to be rejected straightway under Order 7, Rule ll(a) CP.C The law does not permit to inject a life in a dead petition by inserting the material facts and furnishing cause of action thereby. Continuance of the trial sans cause of action would amount to an abuse of process of the court within the meaning of Section 151 CP.C and, therefore, the court is fully empowered to exercise inherent powers to set right the wrong by recalling the order dt. 13-12-1985."

40. In the case of ***Hardwari Lal (supra)*** the Apex Court reiterated the aforesaid principles and observed in para 18 as under :

".....It is, therefore, apparent that the appellant who was charged by the election petitioner with corrupt practice should be told in the election petition as to what assistance he sought. The type of assistance, the manner of assistance, the time of assistance, the person from whom assistance is sought are all to be set out in the petition about the actual and the specific assistance with which the appellant can be charged in violation of the provisions of the Act. Nor is there any statement in the election petition describing the manner in which the prospects of the election were furthered and the way in which the assistance was rendered.....".

41. In the case of **Daulat Ram Chauhan** (supra) the Apex Court held that the election petition must be so clear and specific that the inference of corrupt practice irresistibly admits of no doubt or

qualm and further held that where the allegations of fraudulent practice is open to two equal possible inferences, the pleadings of corrupt practice must fail. The relevant portion of the observations made in para 18, 19 and 20 of the judgment are reproduced as follows:

"18. ..... In other words, in order to constitute corrupt practices, the following necessary particulars, statement of facts and essential ingredients must be contained in the pleadings:-

(1) Direct and detailed nature of corrupt practice as defined in the Act,

(2) details of every important particular must be stated giving the time, place, names of persons, use of words and expressions, etc. (3) it must clearly appear. from the allegations that the corrupt practices alleged were indulged in by (a) the candidate himself (b) his authorised election agent or any other person with his express or implied consent.

19..... It cannot be left to time, chance or conjecture for an inference by adopting an involved process of reasoning. In fine, the allegation must be so clear and specific that the inference of corrupt practice will irresistibly admit of no doubt or qualm.

20. As a logical consequence of the principles enunciated by us, it follows that where the allegation of fraudulent practice is open to two equal possible inferences, the pleadings of corrupt practice must fail. ....."

42. The learned senior counsel for the petitioner on the other hand submitted that the election petition has been filed on variety of grounds including the grounds of corrupt practice based on post nomination speeches of the respondent, therefore, the election petition can not be dismissed at this preliminary stage only on account of the fact that pre nomination speeches do not constitute a cause of action or a corrupt practice. In this connection, Mr. Krishnamani submitted that para 30 of the election petition discloses material facts relating to post nomination speeches and contended that according to para 30 the pre nomination hate speeches continued even after filing of the nomination by the respondent. Mr. Krishnamani further submitted that in paragraph 30 of the election petition it is pleaded that the respondent made speeches in Chandia Hazara, Pooranpur and in other villages of Barkhera in the first week of May 2009 that he was bound by the affidavit, he had given in the Supreme Court to mark his words, but he continued with his dialogue instead of his previous *statement 'jo haath hindu ke upar uthega us haath ko Varun Gandhi kaat dalega',* he used to say *'jo haath hindu ke upar uthega us haath ko*' and on his raising this slogan the mob used to say *'Varun Gandhi kaat dalega'*. Therefore, the said speech of the respondent was a corrupt practice within the meaning of the Act specially when it was telecast in various channels. As such according to Mr. Krishnamani, the election petition discloses material facts.

43. In order to consider the aforesaid submissions of the learned counsel for the petitioner and the respondent, it w ould be

expedient to consider as to what is the requirements to constitute a complete pleading which includes also an election petition. Section 83 of the Act deals with the contents of the election petition. According to section 83 (1)(a) an election petition shall contain a concise statement of the material facts on which the petitioner relies. Section 83 (1)(b) of the Act further provides that an election petition shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. Therefore, a pleading (election petition) which is ambiguous, unintelligible, vague or which contains unnecessary or irrelevant allegations, can not be said to be a pleading containing material facts. As held by the Apex Court in the case of **H.D. Revanna vs. G. Puttaswamy Gowda and others, (1999) 2 SCC 217,** the material facts should be fully set out in the Election Petition and if any fact is not set out, the petitioner can not be permitted to adduce the evidence relating thereto later nor will he be permitted to amend the petition after expiry of the period of limitation prescribed for an Election Petition. In the case of ***Virender Nath Gautam v. Satpal Singh & others, (2007) 3 SCC 617,*** the Apex Court reiterated this principle and held that an election petition must contain a concise statement of 'material facts' on which the petitioner relies. It should also contain 'full particulars' of any corrupt practice that the petitioner alleges including a full statement of names of the parties alleged to have committed such corrupt practice and the date and place of commission of such practice. When the election petitioner refers to certain speeches of the returned candidate and pleads that such speeches do constitute a corrupt practice within the meaning of section 100 and 123 of the Act, it is a must for the election petitioner to plead or annex the contents of the speeches in the election petition. It is also necessary for him to specify the date and time when, and the place where, the returned candidate had made the speeches. If all these things are missing in an election petition, it cannot be held that the election petition contains material facts. In the case of **Azhar Hussain (supra),** it was alleged by the returned candidate that no time, date and place of the speeches delivered by the respondent had been mentioned in the election petition and even no exact extracts from the speeches were quoted, the Apex Court found the election petition incompetent.

44. In the judgment rendered in the case of ***Gajanan Krishnaji Bapat and another vs. Datta Ji Ragho Baji Meghi and other, AIR 1995 SC 2284,*** the Apex Court reiterated the necessity of pleading material facts relating to a corrupt practice and held that the election law insists that to unseat a returned candidate, the corrupt practice must be specifically alleged and strictly proved to have been committed by the returned candidate himself or by his election agent or by any other person with the consent of the returned candidate or by his election agent. Suspicion, howsoever, strong cannot take the place of proof, whether the allegations are sought to be established by direct evidence or by circumstantial evidence. Since, pleadings play an important role in an election petition, the legislature has provided that the allegations of corrupt practice must

be properly alleged and both the material facts and particulars provided in the petition itself so as to disclose a complete cause of action. The Apex Court further observed in para 17 of the judgment that section 83 of the Act provides that the election petition must contain a concise statement of the material facts on which the petitioner relies and further that he must set forth full particulars of the corrupt practice that he alleges including as full a statement as possible of the name of the parties alleged to have committed such corrupt practices and the date and place of the commission of each of such corrupt practice. This Section has been held to be mandatory and requires first a concise statement of material facts and then the full particulars of the alleged corrupt practice. So as to present a full picture of the cause of action.

45. In the case of ***Subhash Desai vs. Sharad J. Rao (1994) Supp. (2) SCC 446,*** the Apex Court observed that section 86 does not contemplate dismissal of the election petition for non-compliance of the requirement of Section 83 of the Act. But section 83 enjoins that an election petition shall contain concise statement of material facts, and shall set forth full particulars of any corrupt practice that the petitioner alleges, which should be verified and supported by affidavit, so far the allegations of corrupt practices are concerned. This provision is not only procedural, but has an object behind it; so that a person declared to have been elected, is not dragged to court to defend and support the validity of his election, on allegations of corrupt practice which are not precise and details whereof have not been supported by a proper affidavit. Apart from that, unless the material facts and full particulars of the corrupt practices are set forth properly in the election petition, the person whose election is challenged, is bound to be prejudiced in defending himself of the charges, which have been levelled against him.

46. In the case of ***Udhav Singh vs. Madhav Rao Scindia, AIR 1976 SC 744,*** the Apex Court had considered the question of necessity of pleading material facts and held that all the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are "material facts". In the context of a charge of corrupt practice, "material facts" would mean all the basic facts constituting the ingredients of the particular corrupt practice alleged, which the petitioner is bound to substantiate before he can succeed on that charge. Whether in an election-petition, a particular fact is material or not, and as such required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon and the special circumstances of the case. In short, all those facts which are essential to clothe the petitioner with a complete cause of action, are "material facts" which must be pleaded and failure to plead even a single material fact amounts to disobedience of the mandate of sec. 83(1) (a) of the Act.

47. In the case of ***Alisinghani Bhagwan Singh vs. Rajeev Gandhi, 1985 AWC 515,*** this Court reiterated the aforesaid principles and held that the expression "material facts" has been interpreted to mean facts which are necessary for formulating a complete cause of action and it has been held that

if any one material statement is omitted from the pleading, the statement of the claim is bad. This view was expressed on the basis of the decisions of the Apex Court in ***Roop Lal Sathi v. Nachchattar Singh, (1983) 3 Supreme Court Cases 487*** and ***Samant M. Bal Krishna v. George Fernandes, 1969 Supreme Court 1201***.

48. The cases of ***Har Narain (supra), Hardwari Lal (supra) and Daulat Ram (supra)*** relied upon by the learned counsel for the respondent, which have already been referred to respectively in paragraphs 39, 40 and 41 of this judgment also laid down similar principles.

49. The object behind mandatorily requiring the election petitioner to disclose material facts in the election petition is to provide an opportunity to the returned candidate to meet the allegations and to set up appropriate defence. In absence of material facts, he can not be put to a surprise to answer relevant facts at the stage of evidence or trial. More so, no amount of evidence can be led if there is no pleading on the point. If the election petitioner does not quote or annex the speeches made by the returned candidate in the election petition nor he discloses the date, time and place of speeches, he can not be permitted to adduce evidence on this point. Therefore, requirement of disclosure of material facts in the election petition is not a mere formality rather it is a mandatory requirement. Even failure of pleading a single material fact amounts to disobedience of the mandate of section 83 (1) (a) of the Act.

50. The contents of the election petition with regard to post nomination speeches of the respondent are liable to be examined in the backdrop of the aforesaid settled principles.

51. In most of the paragraphs of the election petition whatever speeches of the respondent have been quoted, they relate to pre nomination period. As I have already held, while answering point no.1, pre nomination speeches neither constitute a cause of action nor a corrupt practice, therefore, they are liable to be excluded. Only paragraph 30 of the election petition, already reproduced in the beginning of para 36 of this judgment, contain facts relating to post nomination speeches. The averments made in paragraph 30 of the election petition can be classified in the following portions:

(a) The first portion pertains to hate speeches which were given more news item on every channels and telecast during the general election as compared to any other issue or agenda and because of this the hate speeches of 7th and 8th March 2009 remained fresh in the minds of the electorates of Pilibhit and finally on account of these speeches that the Hindu votes polarised in favour of the respondent Mr. Feroze Varun Gandhi and against the petitioner and other candidates. This portion of the averments made in paragraph 30 of the election petition is with regard to pre nomination speeches and their telecast which have already been considered and answered in point no.1 and point no. 2, therefore, it is not necessary to repeat these aspects again while considering the matter relating to post nomination speeches.

(b) The second portion pertains to respondent's speeches after his release on

parole. The petitioner has stated that the respondent continued with hate speeches but he has not reproduced the hate speeches, which were made after release on parole. When the petitioner took pain to quote various speeches of the respondent relating to the pre nomination period, in various paragraphs of the election petition which were not relevant at all to establish a cause of action or a corrupt practice, there does not appear to be any justification in not reproducing or quoting the post nomination speeches in the election petition. The petitioner has also not specified as to what were the changed speeches after nomination. More so, the petitioner has not specified the date and time when, and the place where, such speeches were made, therefore, these material facts are missing in the election petition.

(c) The third portion is with regard to speeches made in village Chandiya Hazara, Pooranpur as well as in other village of Barkhera in the first week of May 2009 but the petitioner has not disclosed the specific date, time and the speeches made in these villages. The word "first week of May" is quite vague and general, therefore, this portion of the pleading contained in para 30 of the election petition also does not disclose material facts.

(d) The fourth portion of para 30 of the election petition is that the respondent used to say that he was bound by the affidavit he had given in the Supreme Court but continued with his dialogue instead of earlier statement 'jo haath hindu ke upar uthega us haath ko Varun Gandhi kaat dalega' , he used to say 'jo haath hindu ke upar uthega us haath ko' and his supporters used to raise the slogan 'Varun Gandhi kaat dalega'. The learned counsel for the petitioner submitted that a mere raising of such slogan did not amount to a corrupt practice and placed reliance upon ***Ramakant Mayekar vs. Celine D'Silva, (1996) 1SCC 399*** in support of his submissions. In that case, the Apex Court propounded the principle that mere mention of religion does not amount to a corrupt practice and held that what is forbidden by law is an appeal by a candidate for votes on the ground of `his' religion or promotion etc. of hatred or enmity between groups of people, and not the mere mention of religion. There can be no doubt that mention made of any religion in the context of secularism or for criticising the anti-secular stance of any political party or candidate cannot amount to a corrupt practice under sub-section (3) or (3A) of Section 123. Neither in para 30 of the election petition nor elsewhere in the election petition, the petitioner has disclosed as to which place and on which date and time such dialogues were made by the respondent, therefore, this material fact is missing in the election petition. Mere a mention of the aforesaid slogan in para 30 of the election petition without any averment that such speeches were for the furtherance of the prospects of the election of the respondent or the same prejudicially effected election of any other candidate and also without any allegation of appeal by the respondent to vote for him on the ground of religion etc. or to refrain from voting for any person on that ground was not sufficient compliance of section 83(1)(a) of the Act, therefore, there is no pleading containing material facts to fulfil the requirements of section 123 (3) and section 123 (3-A) of the Act. Therefore,

this portion of para 30 of the election petition also does not disclose material facts and is vague.

(e) Last portion of para 30 of the election petition is that the election campaign of Mr. Feroze Varun Gandhi was telecast by various channels including NDTV and Star News. More so, NDTV showed the same in its introductory montage of the coverage of the election results on 16.05.2009. This portion is also very vague and ambiguous. What was the telecast made by the aforesaid News channels and what were the speeches during the campaign by the respondent has not been specified in the election petition. A mere use of the expression that respondent's campaign was telecast by various channels can not be said to be material fact to constitute a corrupt practice, specifically tapes prepared by various channels have neither been filed with the election petition nor their copies have been furnished to the respondent. In the case of ***Ramakant Mayekar (supra)*** the Apex Court found a serious defect in the pleading on account of non production of the video cassettes or non production of its transcript with the election petition and held that this state of pleading relating even to the video cassettes, when the video cassettes or its transcript were not produced along with the election petition or its copy furnished with the copy of the election petition to the appellant, is a serious defect in the pleading which once again has been totally overlooked at the trial of this election petition. This again has resulted in raising an issue for which the requisite pleadings were not there and then admitting considerable evidence which is irrelevant and inadmissible.

52. On a careful scrutiny of the para 30 of the election petition, it can not be concluded that the petitioner has disclosed material facts constituting a cause of action or a corrupt practice. In this view of the matter, the submission of the counsel for the petitioner has no substance.

53. For the reasons discussed above, I am of the view that the election petition does not disclose material facts relating to the post nomination speeches of the respondent and is vague, general and uncertain, therefore, the election petition does not constitute a cause of action and is liable to be rejected. Point No.3 is disposed of accordingly.

POINT NO. (4)

54. With regard to the grounds relating to improper acceptance of nomination filed by the respondent, Mr. K.N. Tripathi submitted that the petitioner has made relevant allegations with regard to this ground in paras 41 to 51 of the election petition and also in ground "K" specified in paragraph 6 of the election petition. According to paragraphs 42 and 43 of the election petition, the petitioner has stated that two affidavits were sworn in on 22.4.2009 at about 12.10 PM and 12.20 PM at Pilibhit, which were filed by the respondent alongwith his nomination but at that time the respondent had been addressing a public meeting at Nawabganj district Bareilly, which is 25 Kms. away from Pilibhit, therefore, the presence of the respondent before the Notary Public in Pilibhit to swear the affidavits was not possible and as such his affidavits were no affidavit in the eye of law. The petitioner has, therefore,

confined his contention with regard to only two affidavits, whose copies have been annexed as Schedule 20 to the petition. Even in the list of documents filed along with the petition only the aforesaid two affidavits have been specified. Mr. Tripathi further submitted that the respondent had filed four sets of nomination papers whereas the petitioner has challenged only one set of nomination paper and validity of the affidavits filed therewith and has not challenged remaining three nomination papers nor the affidavits annexed along with those three nomination papers. It is well settled that if a candidate files more than one nomination paper, his nomination paper can be rejected only on the ground that his all the nominations are invalid. In case any nomination is valid, the candidate shall deemed to be a duly nominated candidate, notwithstanding some of the nominations are found invalid. Mr. Tripathi placed reliance on ***Rama Nand Prasad Singh vs. Vidya Sagar Nishad, AIR 2000 Patna 262*** in support of his submissions. The Patna High Court has observed in paragraph 8 as follows:

"8. .....It appears that there is no rule that if four sets of nomination papers are filed and if some of the nomination papers are rejected, the other sets of nomination papers shall also be deemed as rejected and if any of the four sets of nomination papers is found fit and proper to be accepted and is accepted, the nomination would not be deemed to be valid."

55. Mr. Tripathi further relied upon ***S. M. Banerji vs. Sri Krishna Agrawal, AIR 1960 SC 368,*** in which the Apex Court observed in paras 7 and 8 as under:

"7. The foregoing provisions, so far relevant to the present enquiry, may be summarised thus: If a candidate has been dismissed from Government service and a period of five years has not elapsed since dismissal-, he will have to file along with the nomination paper a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State. If it has not been done, the Returning Officer, either suo motu or on objections raised by the opposite party, has to reject the nomination. If the nomination paper does not disclose any such defect and if the Returning Officer has no knowledge of that fact, he has no option but to accept the nomination. The Returning Officer may improperly accept a nomination paper though it discloses the said defect and though an objection is raised to its reception on that ground. Section 100(1)(d)(i) of the Act deals with improper acceptance of any nomination and s. 100(1)(d)(iv) permits an attack on the ground, among others, of non-compliance with the provisions of the Act.

8. Before we consider the contentions of the parties, it would be convenient to appreciate the true scope of the two decisions of this court in the light of the arguments advanced by the learned Counsel. The first decision is in 1955-1 SCR 267: (AIR 1954 SC 520) Durga Shankar Mehta v. Thakur Raghuraj Singh. This decision turns upon the provisions of sub-s. (1)(c) and sub-s. (2)(c) of s. 100 of the Representation of the People Act, 1951 before it was amended by Act XXVII of 1956. Sub-s. (1)(c) and sub-s. (2)(c), in so far as they are material to the present

discussion correspond to s. 100(1)(d)(i) and s. 100(1)(d)(iv) respectively of the amended Act. This case arose out of an election held in December, 1951, for the double member Lakhnadon Legislative Assembly Constituency in Madhya Pradesh, one of the seats being reserved for Scheduled Tribes. The appellant and respondents 1, 3,5 and 7 therein were duly nominated candidates for the general seat in the said constituency, while respondents Nos. 2, 4 and 6 were nominated for the reserved seat. No objection was taken before the Returning Officer in respect of the nomination of either the appellant or respondent No. 2. The appellant and respondent No. 2 were declared elected to the general and reserved seat respectively. The respondent No. 1 filed an election petition against the appellant and the other respondents for setting aside the election as wholly void. One of the allegations was that the respondent No. 2, was, at all material times, under 25 years of age and was consequently not qualified to be chosen to fill a seat in the Legislative Assembly of a State under Art. 173 of the Constitution. The Election Tribunal held that the acceptance by the Returning Officer of the nomination of respondent No. 2 amounted to an improper acceptance of nomination within the meaning of s. 100(1)(c) of the Act, and on that ground declared that the entire election was void. The candidate, who was elected to the general seat preferred an appeal to this Court and contended that his nomination had been properly accepted by the Returning Officer and, therefore, if respondent No. 2 was not duly qualified to be elected, his election alone should be declared void on the ground that such disqualification shall fall under sub-s., (2)(c) of s. 100 and not under sub-s. (1)(c) thereof This Court accepted the contention and in that context defined the import of " improper acceptance " within the meaning of s. 100(1)(c) of the Act. Mukherjea, J., as he then was, delivering the judgment of the Court observed at p. 277 (of SCR): at (p. 524 of AIR)::

" If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is any objection to the nomination. The Returning-Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination. But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination. 'This would be apparent from section 36, sub-section (7) of the Act . . .".

The learned Judge proceeded to state at p. 278 (of SCR): (at p. 524 of AIR)::

" It would have been an improper acceptance, if the want of qualification was apparent on the electoral roll itself or on the face of the nomination paper and the Returning Officer overlooked that defect or if any objection was raised and enquiry made as to the absence of qualification in the candidate and the Returning Officer came to a wrong conclusion on the materials placed

before him. When neither of these things happened, the acceptance of the nomination by the Returning Officer must be deemed to be a proper acceptance."

This judgment, therefore, is a clear authority for the proposition that if the want of qualification does not appear on the face of the nomination paper and if no objection is raised on that ground before the Returning Officer, the acceptance of the nomination must be deemed to be a proper acceptance."

56. Mr. M.N. Krishnamani, on the other hand, submitted that it was incorrect to say that the petitioner has challenged only one nomination paper filed by the respondent. In fact the petitioner has challenged all the four sets of nomination papers filed by the respondent and has made necessary averments in para 6K and 43 of the election petition which are being reproduced as under:

"6K. Because the result of the election has been materially affected on account of improper acceptance of nomination of returned candidate. The affidavit of returned candidate in form 26 and affidavit of assets were neither signed before the Notary Public nor was it sworn in the presence of the returned candidate thus the affidavit filed with the nomination paper was no affidavit. The affidavit was purported to have been signed and attested at 12.10 PM and 12.20 PM on 22.04.2009 respectively before the Notary Public at Pilibhit, whereas Mr. Feroze Varun Gandhi was in Bareilly in the corresponding period and in the absence of the deponent before the Notary Public at Pilibhit no affidavit could be sworn. Therefore the alleged affidavit filed along with the nomination is not a valid affidavit as required under section 33 and 33A of the Representation of the People Act, 1951. The nomination filed by the returned candidate ought to have been rejected but the returning officer wrongly accepted the nomination of the returned candidate which has materially affected the result of the election and thus the election of the returned candidate is liable to be declared void on the ground of section 100(1) (d) (I) of Representation of People Act, 1951. The concise statement of the material facts and full particulars of the ground have been comprehensively taken up in the succeeding paragraphs that are paragraphs 41 to 51 infra. "

"43. That Mr. Feroze Varun Gandhi filed his nomination papers on 22.04.2009 and the affidavits along with the Nomination, which are mandatory under section 33 (a) of the Act. The said affidavits are no affidavits in the eys of law since the affidavits have been signed and sworn before the Notary Public at about 12.10 PM and 12.20 PM at Pilibhit, whereas the tracking team as well as the live telecast on the channels would have captured the footage showing that Mr. Feroze Varun Gandhi was addressing a public meeting in Nawabganj, Bareilly at the same time."

57. Mr. Krishnamani submitted that in view of the aforesaid averments made in the election petition two things are very clear, firstly the petitioner filed the affidavits which were already in his possession, secondly, he further relies on other affidavits of the respondent which were not in his possession. In view of the

averments made in paras 20, 23 and 43 of the election petition, the respondent can not be permitted to contend that the petitioner's case is confined to the extent of questioning only one nomination paper and not all the nomination papers filed by the respondent by taking the advantage of the fact that only the affidavits relating to one nomination paper have been annexed with the election petition. Mr. Mani lastly submitted that if the election petition and its annexures are read together, it gives the only conclusion that the petitioner has challenged acceptance of all the four nomination papers and the affidavits annexed therewith filed by the respondent. This contention further finds support from the list of documents filed under Chap. XV-A Rule 3 of the Allahabad High Court Rules.

58. In order to appreciate the aforesaid submissions, it seems to be expedient to look into the relevant provisions of the Act. Section 33 of the Act provides for presentation of nomination papers and requirements for a valid nomination. Sub-section (6) of section 33 provides that nothing in this section shall prevent any candidate from being nominated by more than one nomination paper: provided that not more than four nomination papers is permissible by or on behalf of any candidate nor can be accepted by the returning officer for election in the same constituency. In this view of the matter, a person may file up to four nomination papers in an election relating to the same constituency. If a person files more than one nomination paper, his nomination cannot be treated to have been rejected unless his all nomination papers are found as invalid by the returning officer after the summary inquiry contemplated in section 36(2) of the Act. In other words, if a person files only one nomination paper and his nomination paper is invalid within the meaning of section 36(2) of the Act, his nomination paper in toto shall be rejected and on such rejection he will be out of fray as a candidate at the election but the position is different where more than one set of nomination papers are filed. In that situation, if any of the sets of the nomination papers is found, on summary inquiry, in conformity with the requirements of section 33 (2) of the Act, such nomination paper can not be treated to be rejected only on the ground that his other nomination papers are not valid and are liable to be rejected. In other words, if more than one set of nomination papers are filed and any of them is valid in all respects, the invalidity, illegality or incompetency of other nomination papers, in such situation, will carry no significance or relevance to the question relating to the validity of nomination papers. This legal proposition is well settled and was not disputed at the Bar. Therefore, the person challenging the nomination paper of a candidate, has to challenge his all the nomination papers instead of any one of them and plead the material facts on which basis the nomination papers are alleged to be invalid.

59. The respondent has pleaded in paragraph 47 of the written statement that he had filed four sets of nomination paper, which has not been denied by the petitioner in the Replication and was not disputed even during the hearing. The submission of the learned counsel for the respondent was that the petitioner has questioned the validity of only one

nomination paper in the election petition and has not set up any pleading with regard to remaining three nomination papers, therefore, if the present pleading of the petitioner regarding the nomination papers of the respondent is taken at its face value, the election of the respondent can not be quashed on this ground, because his other three nomination papers still survive as valid as they have not been questioned in the election petition. To fortify this submission, the learned counsel for the respondent submitted that the petitioner has made reference of only two affidavits dated 22.4.2009 of the respondent in the election petition. One affidavit was sworn in at 12.10 PM and the other was sworn in at 12.20 PM at Pilibhit and have been annexed as schedule 20 to the election petition. The petitioner has alleged in the election petition that the respondent had been addressing a public meeting in district Bareilly during the aforesaid period. The learned counsel for the respondent further submitted that it has also not been disputed that each nomination paper was to be supported by two affidavits of the candidate, one regarding his assets and the other regarding the informations required by section 33A of the Act, therefore, there were in all eight affidavits on behalf of the respondent, which were filed with his four nomination papers but the petitioner has made a reference of only two affidavits in the election petition and has not made any assertion regarding other affidavits. As such the election petitioner has questioned only one set of nomination paper filed by the respondent with which both the affidavits (schedule 20) have been annexed and not any other nomination paper. Mr. Krishnamani tried to rebut this submission on the ground that the expression 'nomination papers', in plural has been described in the election petition, which means the petitioner has challenged all the nomination papers and not only one nomination paper filed by the respondent.

60. In my opinion, the election petition is silent as to what was the date and time of the swearing in of the remaining six affidavits of the respondent filed with other three nomination papers. The election petition is further silent as to whether the respondent had been addressing a public meeting in Bareilly district also during the period the other six affidavits were allegedly sworn in before the Notary Public at Pilibhit. In the election petition, date 22.4.2009, time 12.10 PM - 12.20 PM has been disclosed for swearing in of the affidavits (schedule 20) at Pilibhit. Each affidavit takes its own time for its swearing in before the Oath Commissioner or Notary Public, therefore, all the eight affidavits could not be sworn in during the aforesaid period of ten minutes. The petitioner, when noticed this infirmity in the election petition, tried to clarify the infirmity and stated in para 42 and 43 of the Replication that swearing in of all the affidavits had been done between 12.10 to 12.50 PM, which means each affidavit consumed 5 minutes for its swearing in, therefore, all eight affidavits consumed forty minutes i.e. from 12.10 PM to 12.50 PM. The aforesaid clarification made in the Replication has no relevance nor it can be treated as a part of pleading required to be made in the election petition specially when the respondent had no occasion or opportunity to reply the facts brought by way of replication

and not pleaded in the election petition. According to settled legal position,the material facts must be disclosed in the election petition and not elsewhere. The election petition does not disclose the material fact that the respondent was not in Pilibhit during the period 12.21 PM to 12.50 PM. The election petition further does not disclose the material fact that during the period 12.21 PM to 12.50 PM the respondent had been addressing a public meeting in Bareilly district. It is also not pleaded in the election petition specifically that the respondent's other six affidavits were no affidavit in the eye of law. In absence of these material facts in the election petition, it can be concluded with the observation that the petitioner has not disclosed material facts relating to validity or competency of other three nomination papers of the respondent including remaining six affidavits filed with those three nomination papers, therefore, mere use of term nominations (in plural) in the election petition is of no significance. More so, the petitioner has not annexed copies of other six affidavits with the election petition nor supplied their copies to the respondent. The respondent's nomination paper has been questioned in the election petition only on the ground of deficiency in the affidavits (schedule 20) and not on any other ground.

61. For the reasons disclosed above, I am of the view that the election petition does not contain material facts with regard to affidavits filed by the respondent in support of his remaining three sets of nomination papers except the two affidavits (schedule 20) filed with one set of nomination paper nor supplied copies thereof to the respondent.

62. Point no.4 is answered accordingly.

POINT NO. (5)

63. The last submission on behalf of the respondent was that the petitioner has not supplied true copies of certain documents, therefore, he has not made compliance of section 81(3) of the Act and as such the election petition is liable to be dismissed under section 86 of the Act. Learned counsel for the respondent submitted that the petitioner has pleaded in the election petition regarding broadcast of post nomination speeches of the respondent and the tapes made by various channels. The contents of alleged speeches, tapes and broadcast have not been quoted in the petition nor they have been made integral part of the election petition. It was further submitted that the CDs filed by the petitioner relate to the pre nomination speeches. It was also submitted that in para 40 of the election petition, the petitioner has relied on a report of Forensic Science Laboratry (inshort 'FSL') to the effect that voice in the CDs was of the respondent. This report is very material to link the respondent with the CDs. The petitioner has not furnished any copy of the report of FSL to the respondent. The learned counsel for the respondent further submitted that in para 45 of the election petition the petitioner has relied on certain video clippings to show that the respondent was not in Pilibhit when his two affidavits were sworn in before the Notary Public at Pilibhit. The said video clippings are the basis of allegations made in paragraphs 42 and 45 of the election petition but no video clippings have been provided to the respondent. In paragraph 19 of the petition, the

petitioner has referred to two complaints and other references made by the respondent. In paragraph 21 of the petition, the petitioner has relied on the report of L.I.U. And the CD sent by the District Election Officer to the Election Commission. In paragraph 23 of the petition, the petitioner has referred to a more comprehensive CD having more damaging inputs but copies of none of the documents referred to in paras 19, 21 and 23 have been furnished to the respondent. These documents, according to the petitioner, contain material facts, therefore, due to non-furnishing of copies of these documents, the petition is liable to be dismissed. In support of his submissions, Mr. K.N. Tripathi relied on following cases:

(i) Manohar Joshi v. Nitin, (1996) 1 SCC 169;

(ii) U.S. Sasidharan v. Karunakaran, AIR 1990 SC 924;

(iii)Azhar Hussain v. Rajeev Gandhi, AIR 1986 SC 1253.

64. In the case of ***Manohar Joshi (supra),*** the Apex Court held that where the document is incorporated by reference in the election petition, without reproducing its contents in the petition, it is mandatory to furnish a copy of that document to the respondent, failing which the petition is liable to be dismissed under section 86(1) of the Act but where the contents of the document are fully incorporated in the election petition and its copies also filed therewith, it is not necessary to furnish a copy of that document to the respondent. Para 24 of the judgment being relevant is reproduced as follows:

"24. The distinction brought out in the above decisions is, that in a case where the document is incorporated by reference in the election petition without reproducing its contents in the body of the election petition, it forms an integral part of the petition and if a copy of that document is not furnished to the respondent with a copy of the election petition, the defect is fatal attracting dismissal of the election petition under Section 86(1) of the R.P. Act. On the other hand, when the contents of the document are fully incorporated in the body of the election petition and the document also is filed with the election petition, not furnishing a copy of the document with a copy of the election petition in which the contents of the document are already incorporated, does not amount to non-compliance of Section 81(3) to attract Section 86(1) of the R.P. Act. In other words, in the former case the document filed with the election petition is an integral part of the election petition being incorporated by reference in the election petition and without a copy of the document, the copy is an incomplete copy of the election petition and, therefore, there is non-compliance of Section 81(3). In the other situation, the document annexed to the petition is mere evidence of the averment in the election petition which incorporates fully the contents of the document in the body of the election petition and, therefore, non-supply of a copy of the document is mere non-supply of a document which is evidence of the averments in the election petition and, therefore, there is no non-compliance of Section 81(3)."

65. In the case of ***U.S. Sasidharan v. Karunakaran, (supra),*** the Apex Court while reiterating the aforesaid two

principles laid down in Manohar Joshi's case, propounded one additional principle that when a document has been filed in the proceeding but is not referred to in the petition, either directly or indirectly, a copy of such document need not be served on the respondent. The observations made in paras 14, 15, 16 and 17 of the judgment are as under:

"14. It has been already noticed that the High Court dismissed the election petition as the appellant has not furnished to the first respondent copies of the notice, photograph and the video cassette referred to above along with a copy of the election petition. So far as the copies of the notice and the photograph are concerned, we do not think that the High Court was justified in holding that these should have also been furnished to the first respondent along with the copy of the election petition. Dr. Chitale, learned Counsel appearing on behalf of the first respondent, also has not urged that the copies of these two documents should have been served upon the first respondent. What has, however, been vehemently urged on behalf of the first respondent is that he should, have been served along with the election a copy of the video cassette. This contention will be considered presently.

15. We have already referred to section 83 relating to the contents of an election petition. The election petition shall contain a concise statement of material facts and also set forth full particulars of any corrupt practice. The material facts or particulars relating to any corrupt practice may be contained in a document and the election petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the document must be supplied inasmuch as by making a reference to the document and without pleading its contents in the election petition, the document becomes incorporated in the election petition by reference. In other words, it forms an integral part of the election petition. Section 81(3) provides for giving a true copy of the election petition. When a document forms an integral part of the election petition and a copy of such document is not furnished to the respondent along with a copy of the election petition, the copy of the election petition will not be a true copy within the meaning of section 81(3) and, as such, the court has to dismiss the election petition under section 86(1) for noncompliance with section 81(3).

16.On the other hand, if the contents of the document in question are pleaded in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondent and that will not be non-compliance with the provision of section 81(3). The document may be relied upon as an evidence in the proceedings. In other words, when the document does not form an integral part of the election petition, but has been either referred to in the petition or filed in the proceedings as evidence of any fact, a copy of such a document need not be served on the respondent along with a copy of the election petition.

17.There may be another situation when a copy of the document need not be served on the respondent along with the election petition. When a document has

been filed in the proceedings, but is not referred to in the petition either directly or indirectly, a copy of such document need not be served on the respondent. What section 81(3) enjoins is that a true copy of the election petition has to be served on the respondents including the elected candidate. When a document forms an integral part of an election petition containing material facts or particulars of corrupt practice, then a copy of the election petition without such a document is not complete and cannot be said to be a true copy of the election petition. Copy of such document must be served on the respondents."

66. In the case of ***Azhar Hussain v. Rajeev Gandhi*** (supra) the Apex Court reiterated the aforesaid principles and held in para 28 of the judgment as follows:

"28. It will be noticed that in the election petition it has been mentioned that a copy of the poster would be subsequently filed, and the cuttings of some newspaper reports would also be filed later on. The election petitioner sought an amendment to delete the averments on both these aspects. The High Court rejected the prayer in regard to poster (Ex. B), but granted the prayer in respect of the cuttings. The High Court has taken the view that the poster was claimed to be an integral part of the election petition and since it was not filed (much less its copy furnished to the respondent) the pleading suffered from infirmity and non-compliance with Section 83(1) read with Section 86(1) of the Act. Non-filing of the poster is fatal to the election petition as in the absence thereof the petition suffers from lack of material facts and therefore the statement of cause of action would be incomplete. Nothing turns on the facts whether or not the words "a copy of the said poster would be filed as Exhibit B" are allowed to be retained in the election petition or are deleted as prayed for by the appellant. The fact remains that no copy of the poster was produced. It must also be realized that the election petitioner did not seek to produce the copy of the poster, but only wanted a reference to it deleted so that it cannot be said that the accompaniments were not produced along with the election petition. The fact remains that without the production of the poster, the cause of action would not be complete and it would be fatal to the election petition inasmuch as the material facts and particulars would be missing. So also it could not enable the respondent to meet the case. Apart from that the most important aspect of the matter is that in the absence of the names of the respondent's workers, or material facts spelling out the knowledge and consent of the respondent or his election agent, the cause of action would be incomplete. So much so that the principle enunciated by this Court in Nihal Singh's case (supra) would be attracted. And the Court would not even have permitted the election petitioner to lead evidence on this point. The High Court was therefore fully justified in taking the view that it has taken. "

67. Mr. M.N. Krishnamani, on the other hand, submitted that the documents referred to in paras 19, 21, 23, 40 and 45 of the election petition were neither in the possession of the petitioner nor he had any control thereon, therefore, it was beyond his reach to furnish copies of such documents to the respondent. The

petitioner has already moved an application for summoning the documents referred to in the aforesaid paras of the election petition, therefore, the election petition can not be dismissed for non compliance of section 81(3) of the Act. In furtherance of his submissions, Mr. Krishnamani, referred to Rule 3 of Chapter XV A of the Allahabad High Court Rules, which reads as under:

"3. Presentation of election petition.- Every election petition shall be presented to the Registrar.

The petition shall bear an office report on Court-fee and on compliance, in addition to other matters, with Sections 81, 82, 83 and 117 of the Act.

The petitioner shall file with the petition a list of all documents whether in his possession or power or not, on which he relies as evidence in support of his claim."

68. On the basis of the aforesaid Rule, the petitioner's counsel submitted that the petitioner had supplied the respondent the copies of all the documents which were in his possession, therefore, the documents which were not in his possession, could neither be filed nor copies thereof could be given to the respondent. The non-supplied documents have not only been referred to in the election petition but their contents have also been sufficiently pleaded in the election petition, therefore, there is no non compliance of section 81(3) of the Act. It was next submitted that the case of **Azhar Hussain vs. Rajeev Gandhi (supra)** is not applicable to the facts of this case. In that case there was no allegation against the returned candidate directly and it was contended that multiple third parties were working with the consent of the respondent. It was, therefore, held in that case that without complete details of the events, the respondent can not be expected to defend himself effectively for the acts done by others whereas in the present case all the allegations have been made against the respondent for indulging himself in committing corrupt practice, therefore, the case of **Azhar Hussain (supra)** has no application in the present case.

69. It was lastly submitted on behalf of the petitioner that the respondent has nowhere specified as to which of the copies furnished by the petitioner was not tallying with the original. The election petition alongwith adequate number of copies of the petition had been filed in the office of the Registrar General, who in turn, served the same on the respondent, therefore, the respondent can not be permitted to raise the plea of non compliance of section 81 (3) of the Act.

70. Section 81(3) of the Act provides that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. Section 86 (1) provides that the High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117. In other words, if there is non-compliance of section 81(3) of the Act, the election petition can not proceed and has to be dismissed by the High Court.

71. The decisions of the Apex Court in the cases of **Manohar Joshi, U.S. Shashidharan and Azhar Hussain,** have settled the following principles:

(I) Compliance of section 81(3) of the Act is mandatory and its non compliance entails dismissal of the election petition under section 86(1) of the Act without any exception;

(II) Where a document is incorporated by reference in the election petition without reproduction of its contents in the petition it becomes an integral part of the election petition, therefore, it is mandatory to furnish a copy of such document along with the election petition to the respondent. Non submission of this document is fatal;

(III) But where the contents of a document are fully incorporated in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondent and its non supply does not amount to non compliance of section 81(3) of the Act;

(iv) When a document has been filed in the proceeding but is not referred to in the petition, directly or indirectly, a copy of such document need not be served on the respondent.

(v) In absence of the document required to be furnished along with the petition to the respondent, he would not be able to meet the case set up by the petitioner, therefore, such non compliance causes serious prejudice to the defence of the respondent. Due to this reason, section 86(1) of the Act makes it mandatory for the High Court to dismiss the election petition on the ground of non compliance of section 81 (3) of the Act.

72. Mr. Krishnamani instead of disputing the aforesaid legal position and placing any other law on the subject contended that non supplied documents referred to in paras 19, 21, 23, 40 and 45 of the election petition were not in the possession of the petitioner, therefore, it was beyond his reach to furnish copies of such documents to the respondent. Keeping in view this difficulty, the petitioner has filed not only a list of such documents but has also moved an application for summoning the documents, therefore, in such situation, the election petition cannot be dismissed for non compliance of section 81(3) of the Act.

73. In my opinion, the aforesaid submission of Mr. Krishnamani has no merit. Where election petitioner referred to a document in the election petition without reproducing its content in the petition, it becomes an integral part of the election petition, therefore, the election petitioner can not be exonerated from making compliance of mandatory provision of section 81(3) of the Act. If an election petitioner is not in possession of a document, the proper course for him not to make the document as an integral part of the election petition by referring the same in the election petition but if he does so he has no option except to make compliance of the requirements of section 81 (3) of the Act. The other course, that was open to the petitioner was to reproduce the contents of the document in the election petition and in that eventuality he could not be compelled to furnish a copy of the document to the

petitioner. But the election petitioner, in the garb of not having possession of the document, can not be permitted to get rid away the requirement of the aforesaid mandatory provision. The respondent in absence of such documents and their contents, would not be able to meet the allegations made in the election petition and to submit relevant reply in the written statement. More so, he can not be put to a surprise after filing of the written statement to meet the document neither filed by the petitioner along with the election petition nor reproduced in the petition. In that eventuality, non-furnishing of the document to the respondent would cause serious prejudice to his defence. It appears that due to this reason section 86 (1) of the Act makes it mandatory for the High Court to dismiss the election petition on the ground of non-compliance of section 81(3) of the Act. No doubt, the petitioner has moved an application for summoning the documents referred to in paras 19, 21, 23, 40 and 45 of the election petition but the prayer for summoning such documents can not be treated to be the compliance of section 81 (3) of the Act. In that eventuality too, the respondent would not be able to meet the documents, or to set up his defence as he has already filed the written statement and had no occasion to answer the documents and their contents in the written statement already filed. Therefore, the petitioner can not be exonerated from supplying the aforesaid documents to respondent as mandatorily required by section 81(3) of the Act.

74. For the reasons discussed above, I am of the view that the petitioner has not supplied the documents referred to in paras 19, 21, 23, 40 and 45 of the petition to the respondent and they being the integral part of the election petition were required to be furnished to the respondent, therefore, the petitioner has not made compliance of section 81 (3) of the Act.

75. Point no.5 is answered accordingly.

POINT NO. (6)

76. On a perusal of the entire election petition, it is abundantly clear that the petitioner has challenged the respondent's election mainly on the ground that the respondent's election speeches during the pre as well as post nomination period amount to a corrupt practice and even his pre nomination speeches due to telecast/publication by various TV channels and other media during the post nomination period remained alive and effected the electorates to cast their votes for the respondent on the ground of religion. In view of the finding on point no.1, the pre nomination speeches of the respondent, which have been averred in most of the paragraphs of the election petition, do not constitute a corrupt practice nor disclose a cause of action and are irrelevant and unnecessary, therefore, such speeches are liable to be excluded. In view of the finding on point no. 3, the post nomination speeches of the respondent, referred to only in paragraph 30 of the election petition, do not disclose material facts and are vague, general and uncertain. In the case of Anil Vasudeo Salgaonkar vs. Naresh, (2009) 9 SCC 310, the Apex Court has dealt with the consequence of not pleading material facts in the election petition and held in para 50 that the position is well settled that an election petition can be summarily

dismissed if it does not furnish the cause of action in exercise of the power under the Code of Civil Procedure. Appropriate orders in exercise of powers under the Code can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with. The Apex Court further held in para 51 that all the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of Section 83(l)(a). An election petition therefore can be and must be dismissed if it suffers from any such vice. As observed by this Court in the case of ***Har Narain vs. Vinod Kumar, AIR 1987 All 319,*** if material facts are not stated in the petition then it would be liable to be rejected straightway under Order 7, Rule ll(a) C.P.C. The law does not permit to inject a life in a dead petition by inserting the material facts and furnishing cause of action thereby. Continuance of the trial sans cause of action would amount to an abuse of process of the court within the meaning of section 151 C.P.C.

77. Therefore, the pleading relating to post nomination speeches being against the mandate of section 83 (1) of the Act does not constitute a cause of action and is liable to be rejected.

78. The point no.2 has dealt with the telecast/publication of pre nomination speeches by various TV channels and media and it has been found that the election petition is silent with regard to material facts that the telecast/publication of such speeches were made with the consent, express or implied, of the respondent or his election agent. In absence of material facts in the election petition relating to such consent of the respondent or his election agent, the publication/telecast of the respondent's speeches by the media does not constitute a corrupt practice committed by the respondent or his election agent or by any other person with the consent of the respondent or his election agent. It is well settled that the act of any third party is not binding on the candidate or his election agent unless it is alleged that it was consented to by the candidate or his election agent. In this view of the matter, telecast/publication of respondent's pre nomination speeches by TV channels and media has no relevance to constitute a corrupt practice against the respondent.

79. In addition to aforesaid it may also be mentioned that according to the finding on the point no.4 the election petition merely questions the validity of only two affidavits (schedule 20) filed with one set of nomination paper of the respondent and it does not contain material facts with regard to other six affidavits filed in support of remaining three sets of nomination papers of the respondent, and the petitioner has not challenged all the four sets of nomination papers filed by the respondent. Even if the petitioner's case that the affidavits (schedule 20) were not validly sworn in by the respondent on the date and time disclosed in the affidavits is ultimately proved, the other three sets of nomination papers of the respondent would still survive, therefore, the election petition can not

succeed on the ground that one set of the nomination paper of the respondent had been accepted improperly.

80. In view of the finding on the point no. 5, the petitioner has not furnished copies of the documents referred to in paras 19, 21, 23, 40 and 45 of the election petition to the respondent as required by section 81 (3) of the Act, therefore, the petitioner has not made compliance of the mandatory provisions of section 81(3) of the Act. As such the election petition is liable to be dismissed only on this ground under section 86(1) of the Act.

81. Mr. M.N. Krishnamani tried to contend that the election petition has raised so many questions relating to the fact and law, which disclose various triable issues, therefore, it is not proper to dismiss the petition at this preliminary stage.

82. In the case of ***Jyoti Basu vs. Debi Ghosal, AIR 1982 SC 983,*** the Apex Court observed that a right to elect, fundamental though it is to democracy, is anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of Statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. In the trial of election dispute the court is put in a straight jacket. The view expressed in Jyoti Basu's case had already been taken by the Apex Court as back as in the year 1954 in the case of ***Jagannath vs. Jaswant Singh, AIR 1954 SC 210 Para 7*** and has been reiterated again in the case of ***Gajanan Krishnaji Bapat and another vs. Datta Ji Ragho Baji Meghi and other, AIR 1995 SC 2284***.

83. Therefore, an election petition, which does not conform to the statutory requirements, is a dead petition and must be dismissed out rightly. In the present matter, in view of the findings on the aforesaid points the election petition suffers from material infirmities as it does not inter alia fulfil the statutory requirements of section 81 (3) and 83 (1) of the Act. Therefore, the contention that the election petition discloses triable issues, does not appear to have any merit.

84. For the aforesaid reasons, the election petition is liable to be dismissed. Point No. 6 is decided accordingly.

85. Therefore, all the three interlocutory applications are allowed. Consequently, the election petition is dismissed with costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.20113

BEFORE
THE HON'BLE PANKAJ MITHAL,J.

First Appeal From Order No. - 379 of 1996

United India Insurance Co.Ltd.
...Petitioner
Versus
Hareshwar Singh and others
...Respondents

Counsel for the Petitioner:
Sri S.K.Jaiswal
Sri S.K. Mehrotra

Counsel for the Respondents:
Ranjeet Kumar Mishra

Motor Vehicle Act 1988-Section 140-no fault liability-incorporated by amendment-effective from 14.08.1994-admittedly accident took place on 01.08.1994-amended provision can not be made with retrospective effect-tribunal committed gross error-not sustainable.

Held: Para 11

In view of the aforesaid facts and circumstances, I am of the opinion that the Tribunal grossly erred in law in awarding interim compensation of Rs.25,000/- in case of permanent injury for an accident which took place on 14.8.94. On the relevant date on account of no fault liability interim compensation to the extent of Rs.12,500/- alone was admissible.

Case law discussed:
2010(3) T.A.C. 879 (Orissa); AIR 2008 SC 2276

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

1. Heard Sri S.K. Mehrotra and Sri Archit Mehrotra on behalf of defendant-appellant and Sri Rajesh Kumar Mishra, holding brief of Sri Ranjeet Kumar Mishra for the claimant-respondents.

2. The appeal is directed against the interim award dated 14.2.96 passed by the Motor Accident Claims Tribunal in MAC No. 53 of 1995.

3. The accident had taken place on 14.8.94 and the claim petition was presented in 1995. By the impugned order dated 14.2.96 a sum of Rs.25,000/- has been awarded under Section 140 of the Motor Vehicles Act, 1988 (hereinafter referred as the Act) on account of no fault liability subject to final adjudication of the claim under Section 166 of the Act.

4. It may be noted that the claim under Section 166 of the Act has not finally been adjudicated probably on account of the interim order operating in the present appeal.

5. The submission of Sri Mehrotra, learned counsel for the appellant is that the provision for award of Rs.25,000/- under Section 140(2) of the Act was made by an amendment with effect from 14.11.1994 vide Act No.54 of 1994 whereby the limit of no fault of liability in the case of permanent injury was enhanced from Rs.12,500/- to Rs.25,000.

6. The accident had taken place on 14.8.94 and therefore, the amended provision would not apply and as such the tribunal committed an error in awarding interim award of Rs.25,000/-.

7. It is admitted position that initially in the case of permanent injury no fault liability was only to the extent of Rs.12,500/-. It was increased to Rs.25,000/- with effect from 14.11.1994.

8. The amendment is not retrospective in nature. The amended provision of Section 140(2) as such would not be applicable to an accident which had taken place earlier to the amendment i.e. 14.8.94.

9. In **Divisional Manager, United India Insurance Co. Ltd. Vs. Nagendra Sethi and others 2010(3) T.A.C. 879 (Orissa)** his Lordship of the Orissa High Court while considering a similar controversy held that where an accident had taken place on 14.8.94 i.e. prior to the amendment, the amended provisions enforced with effect from 14.11.94 would not be applicable as they are not retrospective in nature.

10. Even the Apex Court in **State of Punjab & others Vs. Bhajan Kaur and others AIR 2008 SC 2276** laid down that amendment to Section 140 of the Act vide Act No.54 of 1994 w.e.f. 14.11.94 is not retrospective and would not be applicable to accidents prior to said date.

11. In view of the aforesaid facts and circumstances, I am of the opinion that the Tribunal grossly erred in law in awarding interim compensation of Rs.25,000/- in case of permanent injury for an accident which took place on 14.8.94. On the relevant date on account of no fault liability interim compensation to the extent of Rs.12,500/- alone was admissible.

12.. In view of above, the appeal is allowed. Interim award dated 14.2.96 is modified and is confined to Rs.12,500/- with further direction that the balance amount of Rs.12,500/- which has been deposited pursuant to the interim order of this court dated 21.5.96 shall continue to remain deposited and would abide by the final decision of the claim petition.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2011

BEFORE
THE HON'BLE ASHOK SRIVASTAVA,J.

Criminal Misc. Application No 1241 of 2010

Sumit Rajendra Bhalotia ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Anjani Kumar Mishra

Counsel for the Respondents:
Sri Umesh Kumar Dwivedi
A.G.A.

Code of Criminal Procedure-Section 482-summoning order-offence U/S 420/406 IPC-from bare perusal of complaint-clear case of breach of contract-pure civil nature dispute-all transaction made at Mumbai-no part of transaction at Allahabad-Magistrate passed Summoning order on mechanical manner-Court expressed its great displeasure-regarding conduct of Judicial Officer-Summoning order quashed.

Held: Para 12

I have gone through all the three case laws mentioned above. In the instant case prima facie there is nothing which may indicate that the applicant has any dishonest intention when he entered into the contract with opposite party no. 2. Therefore, summoning of the applicant under Section 420 I.P.C. cannot be allowed to sustain. From the perusal of the complaint itself it is evident that it is a simple case of breach of contract. This contract had taken place at Mumbai. No part of it has been executed in the city of Allahabad. From the entire records it is

evident that opposite party no. 2 has misused the process of law. The learned Magistrate has, in a mechanical and routine manner, summoned the applicant which shows that he did not care even to read the complaint in a proper manner. Such type of conduct from a judicial officer is not desirable.

Case law discussed:

2009 (1) SCC (Cri.) 996; 2009 (2) SCC (Cri) 941

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

1. Through this petition which has been filed by the applicant under Section 482 Cr.P.C., he has prayed that the order dated 22.8.2009 passed by learned Additional Chief Judicial Magistrate (1), Court No. 2, Allahabad in Criminal Case No. 3305/09 (Prem Chandra Vs. Sumit Bhalotia) be quashed and set aside.

2. Brief facts of this case are that opposite party no. 2, Premchandra Dubey, a resident of Allahabad City filed a complaint case under Sections 420/406 I.P.C. in the court of learned Magistrate concerned on 8.7.2009. According to this complaint, opposite party no. 2 is a building painter and is doing the work of painting in Mumbai. He has got an office there in the name of Shivam Construction. Keeping in view his business prospects and derivable income he decided to leave Bombay and start his business of building painting in the city of Allahabad. Therefore, he came back to Allahabad and left his business at Mumbai to be managed by his brother Manik Chandra. The applicant is a resident of Mumbai. As per allegations of the complaint, the applicant had renovated his residential building at Mumbai and made certain additional constructions in it. He wanted his renovated building to be painted and for the purpose he went to the office of O.P. no. 2 at Mumbai where he met the brother of the complainant and informed him regarding his requirements. The brother of opposite party no. 2 told the applicant that he (the applicant) should contact his brother who at that time was at Allahabad. It has been alleged in the complaint that the applicant made a telephonic call to respondent no. 2. Since it was a big contract, the opposite party no. 2 told the applicant that he will come to Mumbai and after inspecting the building he will quote the rates and the probable expenditure. The opposite party no. 2 had informed the applicant regarding the rate etc. and the labour charges. Thereafter the opposite party no. 2 went to Mumbai and contacted the applicant on 8.9.2007 and handed him over the quotations which were accepted by the applicant. The entire painting work was completed by opposite party no. 2 in the month of April, 2008. Thereafter he submitted a bill to the applicant which was about Rs. 15,56,320/-. The advances already made were to be adjusted in this amount. Thereafter the opposite party no. 2 came back to Allahabad with the belief that the applicant will pay the dues within a reasonable time. When the payment was delayed, the opposite party no. 2 went to Mumbai and requested the applicant for payment but no payment was made. Thereafter, the opposite party no. 2 came back to Allahabad and sent a legal notice to the applicant through his counsel for payment of dues. In para 18 of his complaint under Section 200 Cr.P.C., the opposite party no. 2 has said that the applicant has cheated him, committed a breach of contract and and also committed the offence of breach of trust. The learned Magistrate examined the complainant/opposite party no. 2 under Section 200 Cr.P.C. and also examined

the witnesses produced by the complainant/opposite party no. 2 before him under Section 202 Cr.P.C. Thereafter through the impugned order, the learned Magistrate summoned the applicant under Section 420/406 I.P.C. Feeling aggrieved by this order and the proceedings pending before his Court, the applicant has moved this petition with a prayer that the order impugned and the entire proceedings of the criminal case be quashed.

3. I have heard learned counsel for the applicant, learned counsel for the opposite party no. 2 as well as learned A.G.A. and also perused records and the the rulings filed from both the sides.

4. It has been contended from the side of the applicant that the criminal case filed by the opposite party no. 2 is based on false and fabricated facts; that keeping in view the allegations levelled in the complaint, at the most it may be a case of breach of contract of civil nature and the learned Magistrate has erred in summoning the applicant under Section 406/420 I.P.C. It has further been contended that all the acts such as execution of work and advances paid to opposite party no. 2 etc. had taken place at Mumbai and, therefore, the court at Allahabad has no territorial jurisdiction.

5. On the other hand it has been submitted from the side of opposite party no. 2 that the order was placed by the applicant through telephone and the order was received in the city of Allahabad and from the very beginning the intention of the applicant was dishonest and he wanted to deceive the opposite party no. 2 and he had already made up his mind that he will not pay the dues and other charges to opposite party no. 2.

6. In the instant case the learned Magistrate had summoned the applicant under Section 406/420 I.P.C.

7. The definition of criminal breach of trust has been given under Section 405 I.P.C. If we analyse this definition it will be clear that the first ingredient of the section is "entrusting with property, or with any dominion over property". This ingredient is an important ingredient of the offence of criminal breach of trust and from the records it is evident that in the instant case this ingredient is missing all together. Therefore, summoning of the applicant under Section 406 I.P.C. cannot be sustained.

8. Now let us examine the ingredient of Section 415 I.P.C. in which the offence of cheating has been defined. Section 415 I.P.C. is as follows :

"415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

9. In this connection, my attention has been drawn towards the case law **2009 (1) SCC (Cri.) 996 (V.Y. Jose and another Vs. State of Gujarat and another).** In para 12 the Supreme Court has said as follows :

"12. For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or doshonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out."

10. Similar opinion has been expressed by the Supreme Court in **2009 (2) SCC (Cri.) 941 (S.V.L. Murthy and others Vs. State Rep. By CBI, Hyderabad and others).**

11. From the side of opposite party no. 2 the judgment and order dated27.10.2010 passed by this Court in Criminal Misc. Application No. 33856 of 2010 (Anand Kumar Porwal Vs. State of U.P. and another) has been relied upon.

12. I have gone through all the three case laws mentioned above. In the instant case prima facie there is nothing which may indicate that the applicant has any dishonest intention when he entered into the contract with opposite party no. 2. Therefore, summoning of the applicant under Section 420 I.P.C. cannot be allowed to sustain. From the perusal of the complaint itself it is evident that it is a simple case of breach of contract. This contract had taken place at Mumbai. No part of it has been executed in the city of Allahabad. From the entire records it is evident that opposite party no. 2 has misused the process of law. The learned Magistrate has, in a mechanical and routine manner, summoned the applicant which shows that he did not care even to read the complaint in a proper manner. Such type of conduct from a judicial officer is not desirable.

13. On the basis of the above discussion, I am of the view that there is force in the petition and it must succeed.

14. The petition under Section 482 Cr.P.C. is allowed. The entire proceedings of Criminal Case No. 3305/09 (Prem Chandra Vs. Sumit Bhalotia) including the summoning order dated 22.8.2009 are quashed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.20113

BEFORE
THE HON'BLE PANKAJ MITHAL,J.

First Appeal From Order No. - 1635 D of 2011

New India Assuarance Company
...Appellants
Versus
Mahendra Pratap Singh and others
...Respondents

Counsel for the Petitioner:
Sri Manish Kumar Nigam

<u>Motor Vehicle Act 1988-Section 170</u>-liability to pay compensation-a beneficiary legislation-even if breath of policy-insurer to pay entire amount with liberty to recover the same from vehicle owner-still hold good field-as no decision on reference taken as yet by Apex Court-direction of tribunal warrants no interference.

Held:Para 12

The submission of the learned counsel for the appellant that the validity of such a direction upon the Insurance Company to pay and recover has been referred to a larger Bench by the Supreme Court vide

reference order dated 31st August 2009 reported in (2009) 8 SCC 785 National Insurance Company Limited Vs. Parvathneni and another is not of much relevance as the said reference has not yet been answered and the law as referred to above holds the field as on date.

Case law discussed:

(2007) 7 SCC 56; (2008) 7 SCC 416; (2008) 7 SCC 526; 2008 (9) SCC 100; 2009(7) ADJ (DB); (2009) 8 SCC 785

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

1. The appeal is reported to be defective on account of non filing of an application under Section 170 of the Motor Vehicles Act.

2. The submission of Sri M.K. Nigam, learned counsel for the appellant is that in the present case no such application was filed before the tribunal and as such its copy can not be enclosed with the memo of appeal.

3. In view of the above, the defect reported in presentation of the appeal does not exist.

4. Appeal be given a regular number.

5. Heard Sri M.K. Nigam, learned counsel for the appellant on merits of the appeal.

6. The submission is that the offending vehicle was being driven without a valid permit and therefore the condition to pay and recover could not have imposed upon the insurance company.

7. It has to be remembered that the Motor Vehicles Act, 1988 is a beneficial piece of legislation which is meant to protect the interest of the sufferers/claimants. Therefore, the law courts have evolved a principle that where the vehicle is insured and there is breach of policy, the liability to pay compensation may rest upon the owner but the insurer will pay the compensation in the first instance and recover it from the owner. This principle safeguards the interest of the sufferers/claimants and at the same time saves the insurer from the liability by giving right to recover the compensation from the owner of the vehicle.

8. The above principle placing initial burden to pay compensation upon the insurance company and permitting it to recover it from the owner of the vehicle, later on is enunciated in a number of decisions of the Supreme Court in ***Oriental Insurance Co. Ltd. Vs. Brij Mohal (2007) 7 SCC 56, New India Insurance Co. Vs. Darshana Devi (2008) 7 SCC 416, National Insurance Co. Ltd. Vs. Yellamma and (2008) 7 SCC 5262008 (9) SCC 100 Samundra Devi Vs. Narendra Kaur.***

9. A Division Bench of this Court in ***National Insurance Company Limited Vs. Chotey Lal and others 2009 (7) ADJ (DB)*** while considering the condition imposed in the award of the Motor Accident Claims Tribunal directing the insurer to pay and recover the amount from the owner held it is an equitable principle and that such a direction is only a stop gap arrangement which does not ultimately makes the insurer liable for compensation. Thus, principle of pay and recover as a condition in the award

was held to be valid in view of the beneficial scheme of the Act.

10. Following the aforesaid principle and the Division Bench decision of this Court, I myself dismissed First Appeal From Order No. 3337 of 2011 including similar question vide my order dated 12.10.2011.

11. In view of the aforesaid decision, I find that there is no substance in the present appeal and it is liable to the dismissed.

12. The submission of the learned counsel for the appellant that the validity of such a direction upon the Insurance Company to pay and recover has been referred to a larger Bench by the Supreme Court vide reference order dated 31st August 2009 reported in ***(2009) 8 SCC 785 National Insurance Company Limited Vs. Parvathneni and another*** is not of much relevance as the said reference has not yet been answered and the law as referred to above holds the field as on date.

13. Accordingly, the appeal lacks merit and is dismissed.

14. The statutory deposit made before this Court shall be remitted to the tribunal immediately for adjustment towards payment of compensation to the claimants.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.10.2011

BEFORE
THE HON'BLE RAVINDRA SINGH,J.

U/S 482/378/407 No. - 2445 of 2010

Ashok Kumar Rai ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Vashu Deo Misra
Sri Vinod Kumar Misra

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Section-419-application to quash charge sheet-as no offence made out-applicants to move discharge application-if moved within 30 days-shall be decided under the provision of law-till disposal of such applicant arrest stayed.

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

1. Heard learned counsel for the applicant and learned A.G.A.

2. This application has been filed with a prayer to quash the charge sheet of case crime No. 25 of 2009 under sections 419, 420, 467, 468, 471 IPC and section 12 of Passport Act, P.S. Chhapiya, District Gonda pending in the court of learned C.J.M. Gonda in criminal case No. 1539 of 2010.

3. It is contended by learned counsel for the applicant that on the basis of the allegations made against the applicant no offence is made out, but without doing the fair investigation the chargesheet has been

submitted against the applicant, the same may be quashed.

4. In reply of the above contention, it is submitted by learned A.G.A. that this plea may be taken by the applicant by way of moving the discharge application.

5. Considering the submissions, made by learned counsel for the applicant and learned A.G.A., it is directed that in case applicant moves discharge application within 30 days from today before the court concerned through his counsel, the same shall be heard and disposed of under the provisions of law. Till the disposal of that application, the applicant shall not be arrested.

6. With this direction, this application is finally disposed of.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2011

BEFORE
THE HON'BLE S.C. AGARWAL,J.

Criminal Revision No. - 2614 of 2011

Nainapati ...Revisionist

Versus

State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri B.N Singh

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

Code of Criminal Procedure Code-Section 233-revisionist facing Trail for offence under Section 27/273-applicant moved application for getting the sample analyzed by Director, Central Food Laboratory-rejected-in absence of specific provision-held-even in absence of provision accused entitled to adduce defence evidence-like prosecution who relied the analysis report-treating liquor unfit for human consumption-impugned order not sustainable-consequential directions issued.

Held: Para 6

The case is at the stage of defence evidence. The defence evidence does not mean that only oral evidence is to be adduced. To get the sample analyzed by a Laboratory and producing the report of such analysis and examination of expert in evidence is also part of defence evidence. In these circumstances, even though, there is no provision in Cr.P.C. for sending the sample of liquor to Director, Central Food Laboratory, there is no bar either. The rights which are available to the prosecution are also available to the defence. Both the parties have to be treated equally. In these circumstances, the impugned order cannot be sustained and is liable to be set-aside.

(Delivered by Hon'ble S.C. Agarwal,J.)

1. This revision under section 397/401 of the Code of Criminal Procedure is directed against order dated 30.6.2011 passed by Additional Sessions Judge (Ex-Cadre), Court No.1, Jalaun at Orai in Sessions Trial No.212 of 2010, State Vs. Nainapati under section 60 Excise Act and sections 272 / 273 IPC, P.S. Konch, whereby application of the accused-revisionist for taking another sample from the case property and sending it to another expert was rejected.

2. The revisionist is facing trial under sections 272 / 273 IPC for possessing illicit liquor, which was found by the Public Analyst to be injurious to health and unfit for human

consumption, as the sample was found containing urea.

3. Learned counsel for the revisionist submitted that the report given by Public Analyst, Lucknow is not correct and the revisionist has a right of rebuttal of getting the sample of liquor analyzed by a higher authority i.e. Director, Central Food Laboratory, Kolkata or Chandigarh and learned Additional Sessions Judge committed illegality in rejecting the application on the ground that there is no such provision in the code of criminal procedure to enable the defence to get the sample analyzed.

4. Learned counsel for the revisionist has placed reliance on section 233 Cr.P.C. to show that the accused is entitled to adduce evidence in defence and right to adduce defence evidence includes right to get the sample reanalyzed from a competent Laboratory. In the alternative, the submission is that if the prosecution has a right to get the sample analyzed by Public Analyst, on the same analogy, the defence has also a right to get the sample analyzed by Director, Central Food Laboratory, as provided in the Prevention of Food Adulteration Act.

5. Learned A.G.A. supported the impugned order and submitted that there is no reason to doubt the report of Public Analyst and without any substantial cause, the sample cannot be sent to Central Food Laboratory and the provisions of the Prevention of Food Adulteration Act are not applicable in the instant case.

6. To prove the allegation that sample of liquor was unfit for human consumption and injurious to health, the police and the prosecution relied upon the report of Public Analyst, to whom the sample of liquor was sent for analysis. If a right has been conferred on one party, there is no reason why the said right cannot be exercised by the adverse party. When on one hand, the report of Public Analyst is being used against the revisionist to prove that the sample was injurious to health and contained urea, the defence also has a right to get the another sample of the seized material sent to the Director, Central Food Laboratory for analysis. The case is at the stage of defence evidence. The defence evidence does not mean that only oral evidence is to be adduced. To get the sample analyzed by a Laboratory and producing the report of such analysis and examination of expert in evidence is also part of defence evidence. In these circumstances, even though, there is no provision in Cr.P.C. for sending the sample of liquor to Director, Central Food Laboratory, there is no bar either. The rights which are available to the prosecution are also available to the defence. Both the parties have to be treated equally. In these circumstances, the impugned order cannot be sustained and is liable to be set-aside.

7. Revision is allowed.

8. Impugned order dated 30.6.2011 is set-aside.

9. The application of the revisionist for re-examination of the sample stands allowed.

10. Learned Addl. Sessions Judge is directed to summon the case property in Court and in presence of both the parties, Court shall direct taking up of a proper representative sample, which shall be sealed with the seal of the Court and shall be sent to Director, Central Food Laboratory for analysis. For this purpose, all steps shall be taken and all fees shall be paid by the revisionist in accordance with law and the rules.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.10.2011

BEFORE
THE HON'BLE S.C. AGARWAL,J.

Criminal Revision No. - 4207 of 2011

Hargyan ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri L.S. Yadav

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Section 397/401-criminal Revision-against the Summoning order by Magistrate-by criticizing the Investigation Officer for not recording the statements of victim-and fail to possess the clothes-adopted novel method by passing summoning order on affidavit of complainant and the witness-complete go-by to the directions of Division Bench in case of Pakhando-held-can not sustained-set-a-side.

Held: Para 8

In the instant case, neither cognizance was taken on the basis of the material available in the case diary nor the protest petition was treated as a complaint. The cognizance cannot be taken on the basis of affidavits of the complainant or the witnesses, therefore, the order passed by the Magistrate cannot be sustained and is liable to be set-aside.

Case law discussed:
2001 (43) ACC 1096

(Delivered by Hon'ble S.C. Agarwal, J.)

1. Heard learned counsel for the revisionist and learned A.G.A. for the State and perused the material available on record.

2. No notice is issued to private opposite party in view of the order proposed to be passed today, however, liberty is reserved for private opposite party to apply for variation or modification of this order if he/she feels so aggrieved.

3. This revision under section 397/401 Cr.P.C. is directed against order dated 6.7.2011 passed by Judicial Magistrate, Moradabad in criminal case no.1394 of 2010 (Smt. Sudha Rani Vs. Hargyan and others) arising out of case crime no.524 of 2008, P.S. Behjoi, District Moradabad, whereby the final report submitted by the police was rejected, cognizance was taken and the revisionist Hargyan was summoned to face trial under sections 376, 506 IPC.

4. Learned counsel for the revisionist submitted that the Magistrate has neither taken cognizance on the basis of material available in the case diary nor the procedure prescribed for complaint cases was adopted, but a novel method was adopted by the Magistrate and cognizance has been taken on the basis of affidavits of the

complainant and the witnesses Chandra Pal and Guljari.

5. A perusal of the impugned order reveals that the Magistrate has criticized the investigating officer for not recording the statement of witness Guljari, not getting the statement of the victim recorded under section 164 Cr.P.C. and for not taken into possession the clothes of the victim and not sending them for analysis to public analyst.

6. A Division Bench of this Court in the case of ***Pakhando and others Vs. State of U.P. and another, 2001 (43) ACC 1096,*** held that on receipt of a final report submitted by the police and a protest petition being filed by the complainant, the Magistrate has following four courses opened to him :-

(1) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant ; or

(2) He may take cognizance under Section 190 (1) (b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed ; or

(3) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner ; or

4) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190 (1) (a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

7. In the instant case, learned Magistrate has not adopted any of the four courses available to him. If there was sufficient material available in the case diary, the Magistrate could have taken cognizance under section 190 (1) (b) Cr.P.C. on the basis of material available in the case diary. If the investigation was not conducted properly, the Magistrate could have directed further investigation giving specific directions on the points on which further investigation was required. If the Magistrate was of the opinion that no case for trial is made out, he could have accepted the final report and rejected the protest petition and lastly the Magistrate could have treated the protest petition as a complaint and adopted the procedure prescribed for complaint cases.

8. In the instant case, neither cognizance was taken on the basis of the material available in the case diary nor the protest petition was treated as a complaint. The cognizance cannot be taken on the basis of affidavits of the complainant or the witnesses, therefore, the order passed by the Magistrate cannot be sustained and is liable to be set-aside.

9. Revision is allowed.

10. The impugned order dated 6.7.2011 is set-aside.

11. Learned Magistrate is directed to take a fresh decision on the final report in the light of a Division Bench decision of this Court in case of Pakhando (supra).

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.10.2011

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE A.P. SAHI, J.
THE HON'BLE SURENDRA SINGH, J.

Criminal Revision No. 4414 of 2004

Munna Singh @ Shivaji Singh & others ...Revisionist

Versus

State of U.P. and another ...Opp. Parties

Counsel for the Revisionist:
Sri R.C.Yadav

Counsel for the Opposite Parties:
Sri B.N. Rai
Sri S.B. Singh
Sri N.K. Rai
Govt. Advocate

(A) Code of Criminal Proedure-Section 397 (1)-Criminal revision-against the order passed under section 145(1) and 146(1)-whether maintainable ?-held-"Yes".

Held: Para: 41

Our answer to the question referred would be therefore in the negative, and we hold that orders passed under Sections 145(1) and 146(1) of the Code are not in every circumstance, orders simplicitor, and therefore a revision would be maintainable in the light of the observations made in this judgment depending on the facts involved in each case.

(B) Criminal Revision-final and interlocutory order-nature defined-and explained distinctions between the two-final order-means-nothing more to be decide by Trail Court-interlocutory means-which does not decide the rights and liabilities of parties-a pure interim measure.

Held: Para 33

The distinction between the two, interlocutory and intermediary would be that the former does not bring about any consequence of moment and is an aid in the performance of the final Act. It does not affect any existing rights finally or to the disadvantage of either extremes. An intermediate order can touch upon the rights of the parties or be an order of moment so as to affect any of the rival parties by its operation. Such an order affecting the rights of a person or tending to militate against either of the parties even at the subordinate stage can be termed as an intermediate or an intermediary order.

Case law discussed:
2004(48) ACC 579; 1981 (18) ACC 316; 1977 ACC 10; 2002 (2) Allahabad Criminal Ruling 1457; 1978(15)ACC 183 SC; AIR 1980 SC 962; 1985 ACC 45 SC; 2001 (1) JIC 381 SC; 2002(2) ACr.R 1457; 2001 (1) ACr.R 514; 2004 (48) ACC 579; 1999 (39) ACC 649; 1969 Crl.LJ Page 13 (Vol. 75C.N. 4) (SC); 1980 SCC (Cri) Page 9; 1980 SCC Page 116; A.I.R. 2000 SC 1504; 2001 (1) JIC 381 (S.C.); 1985 A.W.C. 128 S.C.; 2001 All JIC 95 S.C.; 1999 (39) ACC 678; 2004 (48) ACC 579; 1978 (15) ACC 183 (S.C.); 2002 Alld. JIC 378; 2000 (40) ACC 738; AIR 1980 SC 962; AIR 1978 Supreme Court 47; AIR 1977 Supreme Court 403; AIR 1968 Supreme Court 733; AIR 1977 Supreme Court 2185; 1991 Cri.LJ. 1765; 1985 (1) SCC 427; (1988) 4 SCC 452; (2000) 4 SCC 440; 1990 Cr.L.J. 1541; AIR 1980 Supreme Court 962; 2004 (48) ACC 579; 1999 (39) ACC 649; 1979 (4) SCC 665; 1990 Cr.L.J. 961

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

1. Chronic disputes relating to immovable property involving claims to lawful possession, founded on complicated facts seeking legal review, often give rise to an apprehension of breach of peace that leads to initiation of steps for maintaining law and order, and preventing unwarranted situations, calling upon the authorities empowered under the Criminal Procedure Code to take action for attachment and pass orders under the provisions of Sections 145(1) and 146(1) of the Code. Such orders that may affect the rights of the parties, whether can be subject matter of a revision under Sub Section (2) of Section 397 of the Code, is the main issue of reference before this Full Bench.

2. To be precise, it would be appropriate to gainfully reproduce the issue framed by the learned Single Judge after having noted the decisions relied upon by either of the parties which is as follows:-

"Whether the orders passed by the Magistrate under Section 145(1) and 146(1) of the Code are interlocutory orders simplicitor and no revision petition under Section 397 or 403 of the Code or petition under Section 482 of the Code is maintainable against the same."

3. The learned Single Judge was of the opinion that cases in which such proceedings are drawn have different facts and different implications. It has been further indicated that denial of the revisional jurisdiction to a litigant would be unjustified and for that the learned Single Judge has relied on his own judgment in the case of ***Gulab Chand Vs. State of U.P. & another, reported in 2004 (48) ACC 579.*** While proceeding to make the reference the learned Single Judge however expressed his opinion that the bar of Sub Section (2) of Section 397 of the Code would not apply uniformly and for that the opinions expressed in two Division Benches of this Court in the case of **Indra Deo Pandey Vs. Smt. Bhagwati Devi, 1981 (18) ACC 316** and in the case of **Sohan Lal Burman Vs. State of U.P., 1977 ACC 10** were considered, and then referring to the Supreme Court decisions given subsequently, particularly in the case of **Ranbir Singh Vs. Dalbir Singh and others, 2002 (2) Allahabad Criminal Ruling 1457**, referred this matter for a definite opinion on the law to be laid down by a larger bench. The learned Single Judge held that even orders of temporary nature may have far reaching consequences upon the rights or interest of the aggrieved party, and such a litigant cannot be rendered remediless as this was not the intention of the framers of the statute while creating the bar under Sub Section (2) of Section 397.

4. Sri R.C. Yadav while advancing his submissions in the leading case of Munna Singh (supra) has urged that a Civil Suit No. 111 of 1980, in which the respondent no. 2 Guru Ram Vishwakarma Madhukar is the plaintiff is still pending, and a status quo interim order is operating as such there was no occasion for the Magistrate to have passed the orders impugned herein. The submission is that the revision against preliminary orders passed under Section 145(1) Cr.P.C. and 146(1) Cr.P.C. are amenable to the revisional jurisdiction under the Code as they touch upon the rights of the parties and are therefore not mere interlocutory orders. Reliance has been placed on the judgments that have been referred to by the

learned Single Judge in the referring order as follows:-

1. 1978(15) ACC 183 SC Madhu Limaye Vs. State of Maharashtra.

2 .AIR 1980 SC 962 V.C. Shukla Vs. State.

3. 1985 ACC 45 SC, Ram Sumer Mahant Puri Vs. State of U.P.

4. 2001(1) JIC 381 SC Mahant Ram Saran Das Vs. Harish Mohan & another.

5. 2002 (2) ACr.R 1457 SC Ranbir Singh Vs. Dalbir Singh and others.

6. 2000(1) ACr.R 514 Ram Lachchan and others Vs. State of U.P. and another.

7. 2004(48) ACC 579 Gulab Chand Vs. State of U.P. & another.

8. 1999 (39) ACC 649 Laxmi Kant Dubey Vs. Smt. Jamuni & others.

5. Sri B.N. Rai on behalf of the respondent no. 2 submits that the revisionist herein Munna Singh, was not a party to the civil suit, and therefore there was no option but to proceed under Sections 145 and 146 Cr.P.C. against him. The action does not give any rise to a cause so as to make the orders revisable in the present case. Sri Rai contends that in the event of emergency, such powers can be invoked and along with his written submissions he has relied on the following decisions to substantiate his arguments:-

1 1969 Crl.LJ Page 13 (Vol. 75 C.N. 4) (SC) R.H. Bhutani Vs. Miss Mani J. Desai and others.

2. 1980 SCC (Cri) Page 9 Mathura Lal Vs. Bhanwar Lal & another.

3. 1980 SCC Page 116 Rajpati Vs. Bachan and another."

6. Sri V. Singh has advanced his submissions in Criminal Revision No. 1045 of 2002 (Smt. Murti Devi and others Vs. State of U.P. & others), contending that where an order under Sub Section (1) of Section 145 which involves the jurisdiction of the Magistrate to proceed or terminate the proceedings, may be revisable. An order under 146(1) Cr.P.C. cannot be according to him, subjected to a revision under Sub Section (2) of Section 397 Cr.P.C. In this case the learned Additional District Judge has set aside the order passed under Section 145 read with Section 146(1) on the ground that a civil suit in relation to the disputed property was pending for the past 10 years in which a status quo order had been passed on 23rd March, 1990 and therefore the Magistrate erroneously assumed jurisdiction to proceed in the matter. Sri Singh contends that where there is an apprehension of immediate breach of peace then an order passed under Sub Section (1) of Section 146 would be an interlocutory order and not an order of the nature as urged on behalf of the respondents. He therefore contends referring to almost the same decisions as relied on by the other counsel and referred to hereinabove, that an order passed under Section 145(1) Cr.P.C. would be revisable but not an order under Section 146(1) of the Code as it is only for a temporary purpose.

7. Sri S.B. Singh who has appeared for the opposite parties No. 2 and 3 Ram Lakhan and Mukut Dhari has also furnished his written submissions contending that parallel proceedings under

the Criminal Procedure Code have to be avoided and multiplicity of litigation is against public interest. Therefore keeping in view the decisions cited at the bar, the impugned orders under Sections 145(1) and 146(1) of the Code have to be treated as intermediary orders and not mere interlocutory orders, hence revisable under Section 397(1) of the Criminal Procedure Code. Sri S.B. Singh has relied on the following decisions in support of his submissions:-

1 .A.I.R. 2000 SC 1504 (Amresh Tiwari Vs. Lalta Pd. Dubey & Ors.)

2. 2001 (1) JIC 381 (S.C.) (Mahant Ram Saran Das Vs. Harish Mohan and others)

3. 1985 A.W.C. 128 S.C. (Ram Sumer Puri Mahant Vs. State and others)

4 .2001 All JIC 95 S.C. (Laphinoris Shang Pling and others Vs. Hambay Shullai and another)

5. 1999 (39) ACC 649 (Lakshmi Kant Dubey Vs. Smt. Jamuni and others)

6. 1999 (39) ACC 678 (Vishwanath and another Vs. Addl. Session Judge, Basti and others)

7. 2004 (48) ACC 579 (Gulab Chand Vs. State of U.P. and others)

8. 1978 (15) ACC 183 (S.C.) (Madhu Limaye Vs. State of Maharashtra)

9. 2002 Alld. JIC 378 (Ranbir Singh Vs. Dalbir Singh and others)

10. 2000(40) ACC 738 (Ram Lachchan and others Vs. State of U.P. and others)

11. AIR 1980 SC 962 (V.C. Shukla Vs. State of U.P. and others).

8. Learned A.G.A. on behalf of the State submits that a revision having been specifically barred against a interlocutory order by the legislature under Section 397 (1) Cr.P.C., this court while answering the reference will have to clarify the law in order to enable the Magistrates and the Revising Authorities to decipher the cases where such a bar would not operate. The learned A.G.A. has also invited the attention of the Court to the decisions and the relevant paragraphs that have already been cited on behalf of the learned counsel for the either side.

9. Having heard learned counsel for the parties, it would be appropriate to reproduce Sections 145, 146 and Section 397 of the Code of Criminal Procedure to understand the controversy:-

"145.Procedure where dispute concerning land or water is likely to cause breach of peace.-

(1) Whenever an Executive Magistrate is satisfied from a report of a police or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader on a specified date and time, and to put in written statements of their respective

claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute:

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) (a) If the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid down in sub-section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the

completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.

146.Power to attach subject of dispute and to appoint receiver.-

(1) If the Magistrate at any time after making the order under sub-section (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof:

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908:

Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate-

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;

(b) may make such other incidental or consequential orders as may be just."

397. Calling for records to exercise powers of revision:-(1)*The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself; to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling, for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record.*

Explanation:- All Magistrates, whether Executive or Judicial and whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

10. The legal wrangle began when different courts gave their interpretations in the absence of any precise definition of the words "interlocutory order" occurring in the Code. The same not having been either illustratively or exhaustively defined came to be given different shades on the facts of a case in which the said words were sought to be interpreted. We may gainfully refer to the *locus classicus* and *magnum* opus on this subject rendered by the apex court in the celebrated decision of **Madhu Limaye Vs. State of Maharashtra, reported in AIR 1978 Supreme Court 47.** This case has been referred to and followed as an illustration which in turn had relied on two earlier decisions in the case of ***Smt. Parmeshwari Devi Vs. The State & another, AIR 1977 Supreme Court 403*** and the decision in the case of ***Mohan Lal Magan Lal Thacker Vs. State of Gujarat, AIR 1968 Supreme Court 733.*** The said decision is an authority for having coined the terminology of an intermediate order or intermediary order which can be subject to a revision under Sub Section (1) of Section 397 of the Code. While dealing with the issue of distinction between an interlocutory order and a final order their Lordships noticed the definition contained in the third Edition of Halsbury's Laws in England as follows in Paragraph 12 of the said judgment:-

"Para 12. Ordinarily and generally the expression 'interlocutory order' has been understood and taken to mean as a converse of the term 'final order.' In volume 22 of the third edition of Halsbury's Laws of England at Page 742, however, it has been stated in para 1606:-

".....a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required."

In para 1607 it is said:

"In general a judgment or order which determines the principal matter in question is termed 'final'."

In para 1608 at pages 744 and 745 we find the words:

"An order which does not deal with the final rights of the parties, but either (1) is made before judgment and gives no final decision on the matter in dispute but is merely on a matter of procedure or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out is termed "interlocutory." An interlocutory order, through not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals."

11. An illustration that would be worth referring is in the case of ***Amar Nath and others Vs. State of Haryana and***

others, reported in AIR 1977 Supreme Court 2185 where the choice of the legislature to introduce the bar was traced out and explained in paragraph 6 of the said judgment as follows:-

6. ..... The main question which falls for determination in this appeal is as to what is the connotation of the term "interlocutory order" as appearing in sub-section (2) of Section 397 which bars any revision of such an order by the High Court. The term "interlocutory Order" is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure. Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision. Decided cases have laid down that interlocutory orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect. ***It seems to us that the term "interlocutory order" in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the rights of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code.*** *Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397 (2) of the 1973 Code.* ***But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court."***

12. In the case of Smt. Parmeshwari Devi (supra) the law laid down in Mohan Lal's case (supra) was explained as follows:-

"7. *The Code does not define an interlocutory order, but it obviously is an intermediate order, made during the preliminary stages of an enquiry or trial. The purpose of sub-section (2) of Section 397 is to keep such an order outside the purview of the power of revision so that the enquiry or trial may proceed without delay. This is not likely to prejudice the aggrieved party for it can always challenge it in due course if the final order goes against it. But it does not follow that if the order is directed against a person who is not a party to the enquiry or trial, and he will have no opportunity to challenge it after a final order is made affecting the parties concerned, he cannot apply for its revision even if it is directed against him and adversely affects his rights.*

8. *A somewhat similar argument came up for consideration before this Court in Mohan Lal Magan Lal Thacker v. State of Gujarat (1968) 2 SCR 685 = (AIR 1968 SC 733). The controversy there centred round the meaning of Article 134(1) (c) of the Constitution and the*

Court examined the meaning of the words "final" and "interlocutory." It was held that the meaning "had to be considered separately in relation to the particular purpose for which it is required" to be interpreted. No single test can be applied to determine whether an order is final or interlocutory. Then it has been held by this Court in that case as follows-

"An interlocutory order, though not conclusive of the main dispute may be conclusive as to the subordinate matter with which it deals." It may thus be conclusive with reference to the stage at which it is made, and it may also be conclusive as to a person, who is not a party to the enquiry or trial, against whom it is directed....."

13. Thus, in view of the aforesaid decisions, it is clear that no exclusive or exhaustive singular test can be framed in a *straight jacket formula* to determine as to whether an order would be final or interlocutory. The meaning of the words have to be understood in the light of the facts of each particular case in relation to the particular purpose for which the word is required to be interpreted. This in our opinion is reflected in the decision in the case of Ranbir Singh (supra) where while upholding the order of the High Court it was clearly indicated that where the parties have already entered into a litigation before the Civil Court then such proceedings should be avoided.

14. Before proceeding to express our opinion on the connotation of the words interlocutory orders, final orders and intermediary orders, it would be appropriate to refer to the decisions of this Court which have impelled the learned single Judge to refer the matter for a definite pronouncement. The Division Bench in the case of Sohan Lal Burman (supra) was held to be no longer good law by the Division Bench in the case of Indra Deo Pandey (supra). The case of Indra Deo Pandey went on to hold that an order passed under Sub Section (1) of Section 146 for attachment during the pendency of the proceedings of Section 145 even if improper, is an error of purely temporary and intermediate in nature which does not purport to decide any legal rights of the parties. It was further held that such an order is passed for the purpose of effective final adjudication of the proceedings and it does not amount to any disposal of any part of the controversy between the parties.

15. This aspect of the matter came to be considered in a case by a full bench of the Jammu and Kashmir High Court pertaining to an order passed under Section 145(1) of the Code read with the amendments brought about in the criminal procedure code as applicable in the State of Jammu & Kashmir under the Amending Act No. 37 of 1978 in the case of Brij Lal Chakoo Vs. Abdul Ahmad, 1980 Cr.L.J. Pg. 89. The Full Bench was called upon to resolve the issue about the maintainability of a revision in relation to an interlocutory order of a similar nature as involved herein.

16. The decision went on to hold that the assumption of jurisdiction by the Magistrate under Section 145 Cr.P.C. and the making of a preliminary order cannot be termed as a mere interlocutory order, inasmuch as, the very foundation upon which the Magistrate proceeds is based on a satisfaction that there is a dispute relating to possession of immovable property and there is an apprehension of breach of peace. Whether the Magistrate had the

jurisdiction to proceed or not was held to be not a mere interlocutory order and therefore revisable if the ingredients of jurisdiction are missing. The decision further went on to hold that the attachment of the property under Sub Section (4) of Section 145 in such a situation would also be without jurisdiction as it affects the possessory right of a party. It was further held that even though the order of attachment is made at an interim stage of the proceedings nevertheless **"it is an order of moment which has the effect on the right of the party in possession and cannot therefore be said to be a mere interlocutory order so as to bar the revisional jurisdiction of the high court".**

17. The Court further went on to hold that there are cases where Magistrates invoke such provisions arbitrarily in a routine manner which has the effect of dispossessing a person already in possession. In such a situation the aggrieved party can always demonstrate before the revisional court that no such emergent circumstance existed justifying the invoking of such powers or that the Magistrate had no jurisdiction to make such an order regardless of the procedure laid down under Section 145 Cr.P.C. Relying on the decision in the case of Smt. Parmeshwari Devi (supra) in Paragraph 17 held as follows:-

Para 17. *It is worthy to mention here that the orders of the category as mentioned above though not conclusive of the main dispute are, undoubtedly, conclusive as to the subordinate matter. That such an order is amenable to the revisional jurisdiction of the High Court cannot be gainsaid."*

18. This full bench decision has been followed by a learned Single Judge of the Gauhati High Court in the case of ***Indrapuri Primary Co-operative Housing Society Ltd. and another Vs. Sri Bhabani Gogoi, reported in 1991 Cri.LJ. 1765.***

19. To the contrary however a pure order under Section 146(1) was held to be an interlocutory order by the Full Bench of the Punjab & Haryana High Court in the case of ***Kartar Singh and others Vs. Smt. Pritam Kaur and another, 1984 Cr.L.J. 248.*** The said decision however went on to deal with the matter on the footing that the issue revolved around the composite provisions of Sections 145 and 146 Cr.P.C. and unequivocally held that these proceedings do not substantially call for being subjected to a revision. In Paragraph 12 of the decision the Division Bench judgment of this Court in the case of Indra Deo Pandey (supra) was approved as follows:-

"Para 12. *Apart from the judgments of this Court, the recent Division Bench decision in Indra Deo Pandey Vs. Smt. Bhagwati Devi, 1981 All LJ 687, renders a complete answer to most of the contentions raised on behalf of the petitioner. After an exhaustive examination of the matter (with which I entirely concur), it was held that the earlier Division Bench view of the same High Court in Sohan Lal Burman Vs. State of U.P., 1977 Cri LJ 1322, was in fact no longer good law after the authoritative pronouncement in Mathuralal's case (1980 Cri LJ 1) (SC) (supra)."*

20. Nonetheless, it is necessary to refer to Paragraph 4 of the same Full Bench judgment of Kartar Singh's case (supra) where the Court has expressed its

difficulty in attempting a precise and conclusive definition so as to draw a distinction between an interlocutory order and a final order or any other order falling in between. Paragraph 4 of the said judgment is gainfully reproduced herein under:-

"Para 4. *It is plain that the specific question herein is but a limb of the larger yet perennial controversy as to what constitutes a final as against a merely interlocutory order and the penumbral area lying betwixt the two extremes. In view of the mass of conflicting case law on the point, it would appear that these two terms are not capable of a precisely exclusive definition for each and it would be a vain attempt to define what seems to be inherently undefinable. One cannot help commenting that the erudite attempts to confine each of the terms to a procrustean bed of the precise legal definition is reminiscent of the somewhat tautologist definition of a circle as one, that is, circular. Therefore, without launching into a dissertation as to what are the precise legal attributes of a final order as against an interlocutory one and attempting to draw a razor-sharp line betwixt the two, I propose to confine myself to the limited focal question - whether in the peculiar context of Section 146 (1) of the Code, the attachment of immovable property is broadly interlocutory in nature and that too for the specific purposes of S. 397 (2) thereof."*

21. However while proceeding to answer the reference as noted above, the Court went on to take into consideration the provisions of Section 145 as well. But while answering the reference the recital contained in Paragraph 16 of the judgment is as follows:-

"Para 16. *To conclude, the answer to the question posed at the very outset, is rendered in the affirmative and it is held that an order of attachment of an immovable property under Section 146 (1) of the Code is interlocutory in nature within the meaning of Section 397 (2) of the Code and consequently no revision against the same is maintainable."*

22. Then came the decision in the case of ***Ram Sumer Puri Mahant Vs. State of U.P & others, reported in 1985 (1) SCC 427*** as explained in the later decision of the apex court in the case of ***Jhummamal Vs. State of Madhya Pradesh (1988) 4 SCC 452*** and later on dealt with in the case of ***Amresh Tiwari Vs. Lalta Prasad Dubey and another*** reported in ***(2000) 4 SCC 440.*** The outcome of these three decisions was to the effect that where an injunction order passed by a competent court of civil jurisdiction existed, then proceedings initiated under Section 145 Cr.P.C. deserved to be dropped. The Apex Court however in the case of Ranbir Singh (supra) held that even though the orders of the High Court setting aside the orders under Section 145(1) and 146(1) were unsustainable, yet in the circumstances of the case, the order of the High Court quashing the preliminary order under Section 145 (1) and 146(1) Cr.P.C. were maintained leaving it open to the parties to approach the civil court for an appropriate interim order where the dispute was pending without being influenced by the findings recorded by the High Court. The emphasis therefore again was laid on the principle that where a civil proceeding has been initiated and the matter is pending between the parties, then the Magistrate should be slow in invoking the jurisdiction

of attaching or taking into possession of a property involved in such a dispute.

23. In a matter of reference before the Madhya Pradesh High Court a Division Bench went on to hold that an order passed under Section 146 (1) Cr.P.C. is not an interlocutory order and would therefore be revisable. The said decision is reported as ***Keshav Prasad Bhatt Vs. Ramesh Chandra 1990 Cr.L.J. 1541.***

24. While carving out a distinction between the orders of a final nature and interlocutory nature the apex court in the case of **V.C. Shukla Vs. State, AIR 1980 Supreme Court 962** gave the nomenclature of an "intermediate order" to be between a final order and the initiation of a proceeding which may be affecting the interest of either of the parties, and could not be termed as a pure and simple interlocutory order. This view came to be followed by a learned Single Judge of this Court earlier who has made the present reference in the case of **Gulab Chand Vs. State of U.P. 2004 (48) ACC 579** and again by a learned single Judge of this Court in the case of ***Lakshmi Kant Dubey Vs. Smt. Jamuni & others, reported in 1999 (39) ACC 649.***

25. In the aforesaid background this Court has therefore to proceed to first give an indication as to meaning of the words final order, interlocutory order and an intermediate or intermediary order and the distinction between them.

26. The term **"final order"** means a decision finally affecting the rights of the contending parties. It is an issue which goes to the foundation of a trial and can be never questioned if it has been allowed to stand. It would therefore be final. The test of such finality would depend upon the facts of a case indicating termination of proceedings and ultimately affecting the fate of the parties. A final order is one which leaves nothing more to be decided by its own force.

27. The word 'Final' connotes that which comes at the end. It marks the last stage of a process leaving nothing to be looked for or expected. It is something ultimate in nature. It puts to an end to something or in other words, it brings to a close any strife or uncertainty. It is the conclusion of an event, that which comes last. It connotes the finishing of some act and completion of some beginning. It does not allow the inclusion of anything or something that might be possible thereafter. A decisive stroke that cannot be reversed or altered is final.

28. The word **"interlocutory order"** as defined in the Law Lexicon by P. Ramanatha Aiyar 1997 Edition, is an order made pending the cause and before a final hearing is concluded on merits. Such an order is made to secure some end and purpose necessary and essential to the progress of the litigation, and generally collateral to the issues formed by the pleadings and not connected with the final judgment. It has been termed as a purely interim or temporary nature of an order which does not decide the important rights or liabilities of the parties.

29. An interlocutory stage is an intermediate moment before the happening of the main event. It is something during the course of an action in the shape of a pronouncement which is not finally decisive of a dispute. It is provisional but not final touching some incident or emergent question.

30. Then comes the third category of the orders which fall in between. In our opinion it is this aspect which was left out in the decision of the Punjab & Haryana High Court in the case of Kartar Singh (supra) which deserves to be adverted to. The word intermediate order as defined in the law Lexicon (supra) is an order granted before entry of judgment, made between the commencement of an action and the final pronouncement.

31. The word 'Intermedium' means between or in the middle. It is something intermediate in position or an intervening action or performance before the final conclusion. That which is situated or occurring between two things is intermediate. It holds the middle place or degree between two extremes interposed in between.

32. There is no doubt about what are final orders and the controversy stands narrowed down to the difference between an interlocutory order and an intermediate/intermediary order.

33. The distinction between the two, interlocutory and intermediary would be that the former does not bring about any consequence of moment and is an aid in the performance of the final Act. It does not affect any existing rights finally or to the disadvantage of either extremes. An intermediate order can touch upon the rights of the parties or be an order of moment so as to affect any of the rival parties by its operation. Such an order affecting the rights of a person or tending to militate against either of the parties even at the subordinate stage can be termed as an intermediate or an intermediary order.

34. The invoking of the emergent powers under Section 146(1) Cr.P.C. is dependant on the satisfaction of the Magistrate that it is a case of emergency and none of the parties are in possession or the Magistrate at that stage unable to decide as to which of the parties was in possession. It is only then that attachment can be resorted to. An emergency is an unforeseen occurrence or a crisis with a pressing necessity which demands immediate action. An emergent situation is one that suddenly comes to notice and is almost unexpected or unapprehended. It is a situation that requires prompt attention impelling immediate action.

35. The action to be taken would however be dependant on the satisfaction of a Magistrate recorded under Section 145(1) Cr.P.C. that there exists an apprehension of breach of peace either on the basis of a police report or upon other information received. The order of attachment on such a dispute being brought to the notice of the Magistrate therefore is clearly linked with the right of a party to retain lawful possession. The aforesaid ingredients have to exist to allow the Magistrate to exercise his authority within his jurisdiction. Accordingly the assumption of jurisdiction is dependant on the contingency that may arise in a dispute referable to the said provisions and hence what necessarily follows that if there is an exercise for want of jurisdiction or erroneous exercise of jurisdiction, then the order on the given facts of a case may not be a mere interlocutory order. If the exercise of a power and passing of an order is questionable to the extent of touching the rights of the parties or are orders of moment, depending on the peculiar facts of individual cases, then the order in our opinion would be an intermediate nature of

an order that can be subjected to a revision under Section 397 Cr.P.C.

36. The legislature in its wisdom will be presumed to have curtailed the revisional jurisdiction to the extent as spelt out under Sub Section (2) of Section 397 Cr.P.C. in order to prevent any delays or unnecessary impediments in proceedings relating to trials under the Criminal Procedure Code. As noticed above, the orders which do not fall within the exact nature of an interlocutory order may therefore not be prohibited from being subjected to a revision in larger public interest. A litigant who is aggrieved by an action which does not involve immediate urgency can always knock the doors of the revisional court, dependant on the facts of each individual case as explained hereinabove.

37. We would also like to add that there were divergent views with regard to the jurisdiction of the Magistrate proceeding after attachment under 146(1) Cr.P.C. but the said issue came to be resolved by the apex court in the case of **Mathuralal Vs. Bhanwarlal, 1979 (4) SCC 665.**

38. In view of what has been expressed hereinabove, we find ourselves in respectful agreement with the views expressed by the various courts and this Court to the effect that there is a third category of order which falls in between an interlocutory and a final order that does touch upon the rights of the parties and is an order of moment. An order under Section 145(1) followed by an order under Section 146(1), or even passed simultaneously, brings to the forefront the primary question of the assumption of jurisdiction by the Magistrate to proceed in a matter. If the facts of a particular case do not warrant the invoking of such a jurisdiction, for example, in cases where civil disputes are pending and orders are operating, then in view of the law laid down by the apex court in the decisions referred to hereinabove following Ram Sumer Puri Mahant's case (supra), an order ignoring such proceedings will have to be curtailed for which a revision would be maintainable under Sub Section (1) of Section 397 as, such an order, would not be a mere interlocutory order and would touch upon the rights of the parties.

39. We have also come across an unreported judgment of the apex court in the case of Gyatri & others Vs. Ranjit Singh & others, Special Leave to Appeal (Crl) No. 3584 of 2006 decided on 13.2.2008 where the same view has been reiterated.

40. The difficulty again is that can such a list of illustrations be catalogued so as to confine the revisional jurisdiction in relation to such intermediate orders. Our obvious answer is in the light of what has been said in the case of Mohan Lal's case (supra) by the apex court that the determination of such an issue as to whether a revision would be maintainable or not would in turn depend upon the nature of the order and the circumstances in which it came to be passed. Thus it would depend on the facts and circumstances of each separate individual case where the revising authority will have to examine as to whether the Magistrate has proceeded to exercise his judicious discretion well within his jurisdiction or has travelled beyond the same, keeping in view the various shades of litigation in such matters where the apex court and this Court has held that an intermediate order,

which is not necessarily an interlocutory order, could be subjected to revision. An order not conclusive of the main dispute between the parties, but conclusive of the subordinate matters with which it deals is not a purely interlocutory order even though it may not finally adjudicate the main dispute between the parties. In our opinion therefore a revision would not be barred under Sub Section (1) of Section 397 of the Code if the orders impugned before the revising authority fall within the tests indicated hereinabove.

41. Our answer to the question referred would be therefore in the negative, and we hold that orders passed under Sections 145(1) and 146(1) of the Code are not in every circumstance, orders simplicitor, and therefore a revision would be maintainable in the light of the observations made in this judgment depending on the facts involved in each case.

42. Coming to the issue as to whether a petition under Section 482 would be maintainable or not, the same has been dealt with by a Full Bench of our court in the case of ***H.K. Rawal and another Vs. Nidhi Prakash and another reported in 1990 Cr.L.J. 961.*** We having gone through the said decision, do not find it necessary to answer the same as the question under reference before this Court is primarily relating to the maintainability of a revision that has been dealt with hereinabove.

43. Let the papers be now placed before the learned Single Judge for proceeding to decide the revisions in accordance with the principles indicated hereinabove.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2011

BEFORE
THE HON'BLE SANJAY MISRA,J.

Contempt Application (Civil) No. - 5025 of 2011

Dinesh Tripathi ...Petitioner
Versus
Saif Ahmad, Judicial Magistrate and another ...Respondents

Counsel for the Petitioner:
Sri A.B. Singh
Sri Manish Singh

Counsel for the Respondents:
.....

Contempt of Court Act 1971-Section-12-willful disobedience-non consideration of interim bail on same day-violated-in Amrawati case Full Bench no where said when instructions are complete-on same day can not be considered on merit-neither the Magistrate nor the Session Judge committed any Contempt by rejecting Bail on merit-no contempt made out.

Held: Para 7

The direction to grant interim bail is to be clearly read as not applicable when the Magistrate decides to pass final orders on the bail application on the day of his surrender without postponing the date for consideration of bail. In cases where the Public Prosecutor has complete instructions from the Investigating Officer no adjourned date is required to be fixed.

(Delivered by Hon'ble Sanjay Misra,J.)

1. Heard Sri A.B.Singh, learned counsel for the applicant.

2. Contempt is alleged of the order dated 20.9.2011 passed in Writ Petition No. 17528 of 2011 (Sri Dinesh Tripathi Vs. State of U.P. and others). Learned counsel for the applicant has submitted that by the order dated 20.9.2011 passed by the Writ Court, it was clearly provided that if the petitioner moves an application for surrender before the Court concerned within three weeks, the Magistrate shall fix a date within two weeks thereafter for appearance of the petitioner and in the meantime release the petitioner on interim bail on such terms and conditions as the court concerned considers fit and proper, till the date fixed for disposal of the regular bail. The Court further provided that when the matter reaches before the Sessions Judge, it will be in the discretion of the Sessions Judge to consider granting interim bail pending consideration of the regular bail on similar terms as mentioned above, if the petitioner applies for bail before him. Further direction was given that for a period of three weeks from that date or till the petitioner appears/surrenders before the court below and applies for bail, whichever is earlier, the petitioner shall not be arrested.

3. Insofar as the condition of not being arrested for three weeks prior to surrender is concerned, there is no dispute nor learned counsel has argued that the petitioner was arrested in violation of that condition.

4. The first condition relates to the stage when the petitioner moves an application for surrender before the Magistrate. The Magistrate is required to fix a date for appearance of the petitioner and in the meantime release him on interim bail. It was further provided that the Magistrate shall direct the public prosecutor to seek instructions from the Investigating Officer by the date fixed and then decide the regular bail application. The said direction appears to be based on the observation made by the Full Bench in the case of Amrawati Vs. State of U.P. which judgement has been referred to in the order of the Writ Court.

5. In Amrawati Vs. State of U.P., the Full Bench had clearly provided with respect to bail application under Section 437 Cr.P.C. that if the Magistrate in a very rare and exceptional case decides to postpone the hearing of the bail application and does not decide it on the same day, he must record reasons in writing. Therefore, it was provided that in such circumstances, which have been referred by the Full Bench as rare and exceptional where the Magistrate decides to postpone the hearing of the bail application, he shall grant interim bail.

6. The directions of the Writ Court in the present case based on the decision of the Full Bench leaves no room for doubt that in case the petitioner moves an application for surrender and the Magistrate does not decide the bail application on the same day, he has to grant interim bail and fix a date for appearance of the applicant for consideration of his application for regular bail.

7. The direction to grant interim bail is to be clearly read as not applicable when the Magistrate decides to pass final orders on the bail application on the day of his surrender without postponing the date for consideration of bail. In cases where the Public Prosecutor has complete instructions from the Investigating Officer no adjourned date is required to be fixed.

8. In the present case, the applicant made an application for surrender and bail on 17.10.2011. On this date the public prosecutor had all the relevant documents and instructions available and placed them before the Court. The Magistrate therefore, did not adjourn the matter because there was no rare and exceptional circumstance to adjourn the matter. All the records of the prosecution and instructions were available on that very date hence there was no reason for the Magistrate to adjourn the hearing of the bail application. Admittedly the prosecution did not seek any adjournment.

9. The order of the Magistrate clearly records that he has perused all the documents produced by the police. He has refused to grant bail by rejecting the bail application on merits on the very same day without adjourning the matter for another date. Consequently, if the Magistrate decides the bail application on the very same day, it cannot be held that he has disobeyed the directions issued by the Writ Court, which is based on the observation made by the Full Bench in the case of Amrawati (supra).

10. Insofar as the bail application under Section 439 Cr.P.C. is concerned that is considered by the Sessions Judge after the matter has been dealt with by the Magistrate under Section 437 Cr.P.C.. Here the Full Bench clearly held that it is the discretion of the Sessions Judge whether to decide the bail application on the same day or not and it is also his discretion to grant interim bail the same day subject to final decision of the bail application later.

11. On the one hand if the consideration of the bail application under Section 437 Cr.P.C. was to be adjourned the Magistrate was to grant interim bail and on the other hand if consideration of the bail application under Section 439 Cr.P.C. was to be adjourned the Sessions Judge had discretion to consider granting interim bail pending consideration of the regular bail.

12. The Full Bench as also the Writ Court in the order contempt whereof is alleged has used the word discretion of the Sessions Judge for the purpose of grant of interim bail. That discretion cannot be interpreted to mean that he has to grant interim bail. The discretion given is clearly a freedom to form an opinion on the facts and circumstances of each case. Discretion cannot be misinterpreted to mean that the the Sessions Judge has to grant interim bail. Such interpretation made by learned counsel cannot be accepted in view of the decision of the Full Bench in the case of Amrawati (supra) as also in view of the direction to exercise discretion by the Writ Court.

13. Learned counsel for the applicant has emphasized on the use of the words 'similar terms as mentioned herein above' if the petitioner prays for bail before the Sessions Judge. According to him the terms mentioned in the order of the Writ Court are clear that when the applicant makes an application for surrender, the Magistrate will fix a date for his appearance and in the meantime release him on interim bail. If the aforesaid interpretation of learned counsel for the applicant is accepted then it is clear that the Sessions Judge has no discretion in the matter of consideration of interim bail. That will not be a correct interpretation of the word 'discretion' used by the Full Bench in the case of Amrawati

(supra) as well as by the Writ Court in the order contempt whereof is alleged.

14. There is a difference of jurisdiction between consideration of a bail application under Section 437 Cr.P.C. and Section 439 Cr.P.C. When there is no postponement or when in his discretion the Sessions Judge refuses to grant interim bail pending consideration of regular bail then it is not a contempt. Otherwise it will mean that the Sessions Judge has no discretion in the matter of interim bail.

15. The Writ Court had clearly directed that it will be in the discretion of the Sessions Judge to consider granting interim bail. When he has considered it and refused to grant interim bail then it is not a contempt. He could in his discretion grant interim bail on similar terms as were made applicable to bail applications under Section 437 Cr.P.C. That was a discretion given to him by the Writ Court. He has exercised such discretion. If according to the applicant the exercise of discretion was not judicially exercised then he can avail the remedy available to him in law. It cannot be brought within the ambit of a contempt.

16. For the aforesaid reasons, it cannot be held that the opposite parties no.1 and 2 have disobeyed the directions issued by the Writ Court when the opposite party no.1 has decided the bail application on the same day and opposite party no.2 has in his discretion rejected the prayer for interim bail.

17. The contempt petition is accordingly dismissed.

18. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.10.2011

BEFORE
THE HON'BLE SHABIHUL HASNAIN,J.

Service Single No. - 7671 of 2011

Smt. Anita Singh W/O Ajay Kumar Singh ...Petitioner

Versus

State Of U.P. Through Prin. Secy. Basic Edu. Lko. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajiv Shukla

Counsel for the Respondent:
Sri A.M. Ttripathi
C.S.C.

Constitution of India, Article 21-Right to live with dignity-petitioner working as Shiksha Mitra-proceeded on maternity leave-after leave not allowed to join-inspite of positive direction-held-her fundamental right to leave with dignity can not be denied-direction issued to allow her to join immediately.

Held: Para 5

The lady has a right to live with dignity and to perform all the duties. As a mother, she has the fundamental right to live with dignity is a basic norms to the petitioner. Such norms cannot be flouted by the opposite parties in the manner that they are not allowing the petitioner to join her service.

(Delivered by Hon'ble Shabihul Hasnain,J.)

1. Heard Sri Rajiv Shukla, learned counsel for the petitioner and Sri A. M. Tripathi for the opposite party no. 5 as

well as learned Standing counsel for opposite parties no. 1 and 3 only.

2. Issue notice to opposite parties no. 2, 4, 6 and 7.

3. The petitioner was selected for the post of 'Shiksha Mitra' in the session 2005-06. She has completed her training during 2005. The petitioner is discharging her duties to the satisfaction of the opposite parties. On 02.10.2010, the petitioner has submitted an application for maternity leave. She gave birth to baby child on 16.10.2010 at Nazreth Hospital, Allahabad and thereafter she was on leave until 02.12.2010. It has been further submitted that she came back to school for joining and submitted application before opposite party no. 6, in turn he has directed opposite party no. 7 for allowing the petitioner to join her services. Despite, application the opposite parties have not allowed the petitioner to join her services.

4. Learned counsel for the petitioner has drawn the attention of this Court in paragraph 4 of the Government Order dated 15.06.2007, as contained annexure-6 to the writ petition. The maternity leave has been sanctioned to 'Shiksha Mitra' even otherwise the maternity leave is a right under Article 21 of the Constitution of India.

5. The lady has a right to live with dignity and to perform all the duties. As a mother, she has the fundamental right to live with dignity is a basic norms to the petitioner. Such norms cannot be flouted by the opposite parties in the manner that they are not allowing the petitioner to join her service.

6. Learned counsel for the petitioner prays for and is granted three weeks' time to file rejoinder-affidavit.

7. Meanwhile, the opposite parties are directed to allow the petitioner to join the duties immediately and pay the honorarium as she was getting prior to proceeding on leave.

8. List this case after four weeks.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI,J.

Criminal Misc. Application No. 18183 of 2011

Ram Ayodhya and others ...Applicants
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri S.K. Dubey
Sri V.N. Pandey

Counsel for the Respondents:
Govt. Advocate
Sri B.K. Mishra

Code of Criminal Procedure-Section 190 (a) (b)-Power of Magistrate-if Magistrate not satisfied with investigation officers report-can direct for re-investigation on treat the Protest application as complainant case-but can not proceed to summon on extraneous material with protest application-not the part and partial of investigation report-held-summoning order not sustainable.

Held: Para 9

I have perused the impugned order. The learned Magistrate was of the view that the statements of the complainant and

witnesses were not recorded correctly. He has referred to various documents in the impugned order on which basis the summoning order has been passed and those documents were filed along with the protest petition, therefore, the summoning order was passed on the basis of extraneous materials not forming part of the case diary. As such it can not be upheld. The proper course for the Magistrate was to see as to whether the materials collected during the investigation had made out any case against the petitioners or not. If the materials so collected had not made out any case against the accused and were sufficient to proceed with the matter, the proper course for the Magistrate was to treat the protest petition as complaint and proceed therewith under Chapter XV of the Code. The summoning order, which is based on extraneous materials filed along with the protest petition and having no support from the materials collected during the investigation, can not be sustained.

Case law discussed:

AIR 1968 SC 117; AIR 1995 SC 231; AIR 2008 SC 207; AIR 1989 S.C. 885; AIR 1980 S.C. 1883; [(2006) 4 SCC 359]; [(2006) 7 SCC 296]; [(2004) 7 SCC 768]

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

1. Heard Mr. S.K. Dubey for the petitioners, Mr. B.K. Mishra for the respondent no.2 and learned AGA for the respondent no.1 and perused the record.

2. This is a petition under section 482 of the Code of Criminal Procedure (in short 'the Code') for quashing the summoning order dated 30.4.2011 passed by the Additional Chief Judicial Magistrate, Kasaya, district Kushi Nagar in the case crime no. 599 of 2010 under section 395 IPC, police station Sevarahi, district Kushi Nagar.

3. It appears that in the aforesaid matter the investigating officer submitted a final report. The respondent no.2 filed a protest petition against the final report and submitted that neither his statement nor statements of his witnesses were recorded during the investigation, therefore, submission of the final report was unjustified. The learned Additional Chief Judicial Magistrate perused the final report as well as the protest petition and other materials filed along with the protest petition and passed the summoning order dated 30.4.2011 holding that prima facie a case under sections 323, 504, 506 and 395 IPC was made against the petitioners, who are eighteen in number.

4. Mr. S.K. Dubey submitted that the summoning order has been passed on the basis of the materials supplied by the respondent no.2 along with the protest petition and there was no evidence at all in the case diary to make out a case against the petitioners, therefore, the summoning order, being based on the materials filed along with the protest petition, was not proper. The proper course for the Magistrate was to treat the protest petition as complaint and to proceed therewith under Chapter XV of the Code. He could take the cognizance only on the basis of the materials, if any, collected during the investigation and not otherwise.

5. Mr. B.K. Mishra, on the other hand, submitted that the investigating officer had not done the investigation in a fair manner. Despite there being adequate evidence, the investigating officer submitted a final report, therefore, the materials produced along with the protest petition could be taken into consideration

by the Magistrate while passing the summoning order.

6. The law with regard to the power of the Magistrate to agree or not to agree with the police report is well settled. In my opinion, the Magistrate is not bound by the conclusion of the Investigating Officer. He is competent under law to form his own independent opinion on the basis of the materials collected during the investigation. The Magistrate may or may not agree with the conclusion of the Investigating Officer. If the Investigating Officer submits charge sheet, in that eventuality the Magistrate may differ from the charge sheet and refuse to take cognizance by holding that no case is made out. In a case where the final report is submitted the Magistrate may on perusal of the materials placed in support of the final report opine that the conclusion of the Investigating Officer is not correct and the offence is made out. In that eventuality, the Magistrate may reject the final report and take cognizance of the offence. In appropriate cases, the Magistrate, after rejecting the final report may direct for further investigation/re-investigation. This preposition has been settled by the Hon'ble Apex Court in catena of cases and some of the them are as follows:

1. Abhinandan Jha vs Dinesh Mishra AIR 1968 SC 117,

2. State of Maharashtra vs Sharad Chandra Vinayak Dongra & others AIR 1995 SC 231,

3. Sanjay Bansal vs Jawahar Lal Vats AIR 2008 SC 207,

4. M/s India Carat Private Ltd v State of Karnataka & another AIR 1989 S.C. 885,

5. H.S. Bains vs State AIR 1980 S.C. 1883,

6. Minu Kumari vs. State of Bihar [(2006) 4 SCC 359],

7. Popular Muthiah vs. State [(2006) 7 SCC 296],

8.Gangadhar Janardan Mhatre vs. State of Maharashtra [(2004) 7 SCC 768].

7. The law in regard to the protest petition is also well settled. If any protest petition is filed against the final report, the Magistrate may proceed to examine the matter on the basis of materials collected during the investigation and to see whether or not any case for taking cognizance of the offence is made out from the materials collected during the investigation. If a prima facie case is made out, the Magistrate may take cognizance of the offence under section 190 (1) (b) of Code and reject the final report. But if such materials do not make out any case for taking cognizance of the offence, the Magistrate may, in that situation, treat the protest petition as complaint. If any protest petition is treated as complaint, it should be dealt with in accordance with Chapter XV of Code.

8. It is also equally well settled that at the stage of taking cognizance of an offence, the Magistrate is not required to examine thoroughly the merits and demerits of the case and to record a final verdict. At that stage he is not required to

record even reasons, as expression of reasons in support of the cognizance may result in causing prejudice to the rights of the parties (complainant or accused) and may also in due course result in prejudicing the trial. However, the order of the Magistrate must reflect that he has applied his mind to the facts of the case. In other words at the stage of taking cognizance what is required from the Magistrate is to apply his mind to the facts of the case including the evidence collected during the investigation and to see whether or not there is sufficient ground (prima facie case) to proceed with the case. The law does not require the Magistrate to record reasons for taking cognizance of an offence.

9. I have perused the impugned order. The learned Magistrate was of the view that the statements of the complainant and witnesses were not recorded correctly. He has referred to various documents in the impugned order on which basis the summoning order has been passed and those documents were filed along with the protest petition, therefore, the summoning order was passed on the basis of extraneous materials not forming part of the case diary. As such it can not be upheld. The proper course for the Magistrate was to see as to whether the materials collected during the investigation had made out any case against the petitioners or not. If the materials so collected had not made out any case against the accused and were sufficient to proceed with the matter, the proper course for the Magistrate was to treat the protest petition as complaint and proceed therewith under Chapter XV of the Code. The summoning order, which is based on extraneous materials filed along with the protest petition and having no support from the materials collected during the investigation, can not be sustained.

10. The petition is allowed. The impugned order is quashed. The Magistrate is directed to reconsider the matter in accordance with law.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2011

BEFORE
THE HON'BLE RAKESH TIWARI,J.
THE HON'BLE VIJAY PRAKASH PATHAK,J.

Criminal Misc. Writ Petition No. - 18290 of 2011

Smt. Sonam Pandey and others
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Gaurav Kumar Shukla

Counsel for the Respondents:
C.S.C.

Constitution of India-Article 226-Quashing of FIR-offence under Section 363, 366 IPC-Petitioners are major living as husband-wife-petition disposed of with direction-no arrest till submission of charge sheet U/S 173.

Held: Para 10

The law has to extend protection in the manner and no harm befalls due to wrath of the parents who have either married in their own caste or out side the caste. Now the society has changed with the need and time. It is accepting not only inter-caste marriage but also live-in-relationship. FIRs. are being used as weapon by the parents to satisfy their ego and provide show case in the society that they do not accept such

relationship. This does not appear to be fair as on becoming major a boy or girl is entitled to marry.

Case law discussed:

(2010) 10 SC-469; 2006, ALD (CRI)-2-230

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

1. Heard counsel for the petitioners and the learned AGA.

2. The petitioner nos. 1 and 2 claim to be major and have married out of their love and affection. Petitioner nos. 3 to 9 are relative and friends of petitioner no.2. An FIR has been lodged under Sections 363 and 366 IPC which has been registered as case crime no.689 of 2011, under Sections 363 and 366 IPC, P.S. Govind Nagar District Kanpur Nagar.

3. The petitioners have filed this writ petition for quashing the FIR dated 10.9.2011, lodged by respondent no.4 in case crime no.689 of 2011, under Sections 363 and 366 IPC P.S. Govind Nagar District Kanpur Nagar and for issuance of a mandamus directing respondent no.2 and his subordinate officers neither to arrest the petitioners nor harass them in pursuance of the aforesaid FIR.

4. Petitioner no.1 Smt. Sonam Pandey and petitioner no.2 Raghvendra Mishra are present in Court and have been identified by their counsel.

5. It is submitted by the learned counsel for the petitioners that petitioner no.1 has married with petitioner no.2 out of her own free will and both are majors, hence, the respondents may be directed not to harass or take any coercive action in any manner against the petitioners and also not to interfere in the peaceful living of the petitioners as husband and wife.

6. The Apex Court in the case of **D. Velusamy versus D. Patchaiammal (2010) 10 SCC-469** has even recognized live-in-relationship between a man and woman in the nature of marriage.

7. In the case of **Lata Singh versus State of U.P. , 2006,ALD (CRI)-2-230** the Apex Court has held that-

" if any boy or girl who is a major undergoes inter-caste or inter religious marriages with a woman or man, who is major, the couple will not be harassed by anyone nor subjected to threats or acts of violence and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law. The Apex Court further held that the police at all the concerned places should ensure that neither the petitioner nor her husband nor any relatives of the petitioners husband are harassed or threatened nor any acts of violence are committed against them. If anybody is found doing so, he should be proceeded against sternly in accordance with law by the authorities concerned."

8. In Writ Petition No. 28455 of 2008, Smt. Priya and another Vs. State of U.P. and others, the Court held that-

"A large number of such cases are coming to High Court claiming protection of life and liberty and praying for a direction to the police authorities to protect them from harassment under Article 226 of the Constitution. The number of such cases ranges from 3 to 20 cases per day. Most of such cases are based on no basis. The question is how many of the police force

can be spared for protection of such persons ? The law provides that if the girl and the boy are major and after marriage they are being harassed, they can take recourse to procedure provided in law, i.e., they can move the S.S.P. of the district and lodge complaint and let the police after investigation submit its report, but it is seen that in order to stall investigation they directly approach the High Court seeking protection from alleged harassment by their parents and the police.

If such be the case the police is to be brought in the dock but the High Court cannot be treated as a Marriage Bureau certifying the marriage and directing the authorities not to investigate the F.I.Rs. or the complaints filed by the parties by directing "to keep their hand off" in the garb of "claimed harassment" by respondents.

---------- If the petitioners are major, they can lead their happy married life.

In such cases where parties are major and have married with their own sweet will but are being harassed, they should approach the police authorities with proof of their age and their statements. In case there is no proof of age, then they may approach the appropriate authority for determination of their age on the basis of medical examination. In any case, it is expected of every citizen that he will cooperate in investigation and not stall it by directly coming to High Court. Apprehension of harassment is not a cause of action to provide protection to world at large. Article 226 should be sparingly used in appropriate rarest cases depending upon the facts and circumstances of each case.

This Court is not inclined to interfere in such matters in its extra ordinary jurisdiction under Art. 226 of the Constitution at this stage."

9. Question of proof of age of the petitioners who are married cannot be examined by this Court as this is a question of investigation and medical examination, they have to approach the appropriate authority for determination of their age.

10. There are two facets of the society in the marriage of such boys and girls who marry against wishes of their parents. One facet is where the parents cut off their relations from the young couple and wash away their hands from such happening of marriage as spectator, instead of supporting the couple who do require their moral support initially while entering into the married life. The other facet is where the parents are unable to accept the idea that their child has grown and is major and that he is entitled in law to marry a spouse of his own choice. The parents in such a case are so perturbed that as to how the society will react that they not only lodged an FIR against their own flesh and blood who have married but sometimes also take steps further to eliminate them in the name of honour killing. The law has to extend protection in the manner and no harm befalls due to wrath of the parents who have either married in their own caste or out side the caste. Now the society has changed with the need and time. It is accepting not only inter-caste marriage but also live-in-relationship. FIRs. are being used as weapon by the parents to satisfy their ego and provide show case in the society that they do not accept such relationship. This does not appear to be fair as on becoming major a boy or girl is entitled to marry.

11. We are living in free India and are governed by the Constitution of India. We are not living in those primitive days where the head of the family used to rule the roost and the marriages were performed according to his will. The Apex Court in the case of **B. Velusamy (supra)** has also taken note of the changed society and has observed in paragraphs 34 and 35 of the judgment thus:-

" 34. In feudal society sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror, as depicted in Leo Tolstoy's novel Anna Karenina, Gustave Flaubert's novel Madame Bovary and the novels of the great Bengali writer Sharat Chandra Chattopadhyaya.

35. However, Indian society is changing, and this change has been reflected and recognized by Parliament by enacting the Protection of Women from Domestic Violence Act, 2005.

Reference in this regard may also be had to the love happened between Anar Kali and Salim in Mugal era. We observe with happiness that society has changed a lot since those days.

12. In the facts and circumstances of this case and for all the reasons stated above, this petition is disposed of with directions to the respondent authorities not to take any coercive action against the petitioners Smt. Sonam Pandey, Raghvendra Mishra, Vishnu Kant Mishra, Smt. Urmila Devi, Puneet Awasthi, Swati Awasthi, Atul Mishra, Manisha Mishra and Akash Verma or arrest them till submission of report under Section 173 Cr.P.C. in case crime no. 689 of 2011, under Sections 363 and 366 IPC, P.S. Govind Nagar District Kanpur Nagar.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2011

BEFORE
THE HON'BLE S.C. AGARWAL,J.

Criminal Misc. Application No. 19614 of 2011
(U/S 482 CR.P.C)

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

Counsel for the Applicant:
Sri Anoop Trivedi

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

Code of Criminal Procedure- Section 48- application seeking direction for disposal-application moved under section 204 (4) for dismissal of complaint on basis of compromise-apart from failure of complainant to deposit process fee-offence under Section 363, 366, 376 IPC-triable by Session Court-Magistrate has no option except to comply the provision of Section 208 committing the case under Section 209 to the session Court-offence where the Police can arrest without warrant no steps required by the complainant under rule 17 of general rule (Criminal)-no order to pass appropriate order on such application-can be issued.

Held: Para 12

Offences under sections 363, 366, 376 IPC are serious and heinous offences. Trial of such a case is not dependent on the mercy or fancy of the complainant. The complainant, in such a case, cannot be permitted to say that she does not wish to proceed with the trial and the complaint be dismissed. A heinous

offence is an offence against society. Once cognizance has been taken in a case exclusively triable by the Court of Sessions on the basis of a complaint and the summoning order has been passed, the Magistrate has no option, but to comply with the provisions of section 208 Cr.P.C. and to commit the case to the Court of Sessions under section 209 Cr.P.C.

(Delivered by Hon'ble S.C. Agarwal, J.)

1. Heard Sri Anoop Trivedi, learned counsel for the applicant and Sri D.R. Chaudhary, learned Government Advocate on behalf of the State of U.P.

2. This Application u/s 482 Cr.P.C. has been filed with a prayer to quash the order dated 11.3.2011 passed by A.C.J.M., Court No.5, Meerut and to further direct him to pass appropriate orders on the application dated 5.3.2011 presented by the applicant.

3. The facts of the case are that the applicant Smt. Geeta is the complainant in complaint case no. 2847/9 of 2010, Smt. Geeta Vs. Teja and another under sections 363, 366, 376 IPC, P.S. Hastinapur pending in the Court of A.C.J.M., Court No.5, Meerut. The complaint was filed in the year 2006 in the Court of Ist Addl. Civil Judge (J.D.) / Judicial Magistrate, Meerut with allegations of kidnapping and rape against the accused Teja and Balraj. Learned Magistrate examined the complainant under section 200 Cr.P.C. and the witnesses Ramesh Chandra and Vijay Pal under sections 202 Cr.P.C. The Magistrate, vide order dated 28.7.2006, took cognizance of the offence and summoned the accused persons to face trial under sections 363, 366, 376 IPC and the complainant was directed to take steps within a week.

4. Earlier this case was registered as criminal case no.281 of 2006 and presently it is registered as complaint case no. 2847 of 2010.

5. On 5.3.2011, an application was moved on behalf of the complainant before the Magistrate stating therein that she does not wish to proceed with the complaint and is not willing to pay the process fee and, therefore, the complaint be dismissed. This application was supported by an affidavit. This application was actually presented in Court on 11.3.2011 and the Magistrate passed an order that the application be put up on the date fixed.

6. The grievance of the applicant is that the complainant is the master of her case and she does not wish to proceed with the case and, therefore, the Magistrate was bound to dismiss the complaint under section 204 (4) Cr.P.C. as the complainant was not wiling to pay the process fee and, therefore, the Magistrate is bound to dismiss the criminal complaint.

7. Sri Trivedi admitted that the complainant has entered into a compromise with the accused persons and, therefore, the complainant has promised to get her complaint dismissed and, therefore, she has filed this application u/s 482 Cr.P.C. for the aforesaid purpose.

8. Sri D.R. Chaudhary, learned Government Advocate, replying to the contentions raised by Sri Trivedi, submits that the case is triable by Court of Sessions and after passing a summoning order in terms of section 204 (1) Cr.P.C., the Magistrate has no jurisdiction to

dismiss the complaint under section 204 (4) Cr.P.C. on the ground of failure of the complainant to pay the process fee. He contends that in a case exclusively triable by the Court of Sessions, the complainant is not required to pay any process fee and the process fee in accordance with Rule 17 of the General Rules (Criminal) is required to be paid only in cases where cognizance has been taken in the offences, which are non-cognizable.

9. Section 204 Cr.P.C. provides as follows :

Section 204 Cr.P.C. Issue of process. - *(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be ?*

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

Rule 17 of the General Rules (Criminal) is as follows :

"17. Process Fee. - *The Fees hereinafter mentioned shall be chargeable for serving and executing processes issued by criminal courts in the case of offences other than the offences for which police officers may arrest without a warrant....."*

10. Rule 17 makes it clear that process fee is to be paid by a complainant for serving and executing the processes issued by the Magistrate only in cases where police officers may not arrest a person without a warrant. Rule 17 does not apply to the cases where the police officers may arrest without a warrant. The instant case is under sections 363, 366, 376 IPC and in such a case, a police officer has power to arrest the accused without warrant and, therefore, in the instant case, Rule 17 of the General Rules (Criminal) is not applicable and the applicant (complainant) is not required to pay any process fee.

11. A criminal complaint can be dismissed under section 204 (4) Cr.P.C. only if a process fee is payable by the complainant and is not paid within a reasonable time. Since in a case

exclusively triable by the Court of Sessions, no process fee is payable by the complainant, section 204 (4) Cr.P.C. has no application in the instant case and the complaint cannot be dismissed at the instance of the complainant under section 204 (4) Cr.P.C. simply on the ground that the complainant does not wish to pay the process fee.

12. Offences under sections 363, 366, 376 IPC are serious and heinous offences. Trial of such a case is not dependent on the mercy or fancy of the complainant. The complainant, in such a case, cannot be permitted to say that she does not wish to proceed with the trial and the complaint be dismissed. A heinous offence is an offence against society. Once cognizance has been taken in a case exclusively triable by the Court of Sessions on the basis of a complaint and the summoning order has been passed, the Magistrate has no option, but to comply with the provisions of section 208 Cr.P.C. and to commit the case to the Court of Sessions under section 209 Cr.P.C.

13. In view of the aforesaid, the prayer made by applicant for dismissal of her complaint under section 204 (4) Cr.P.C. cannot be accepted.

14. The Application u/s 482 Cr.P.C. is misconceived and is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.10.2011

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 23766 of 2010

Mukesh ...Applicant
versus
State of U.P. ...Opposite Party

Counsel for the Petitioner:
Sri Rajiv Gupta
Sri Dileep Kumar

Counsel for the Respondents:
Sri B.A. Khan
A.G.A.

Code of Criminal Procedure-Section 439-Bail application Offence under section 302-named-from FIR stage-deceased 18 years young boy-sustained 10 ante-morem injuries-at 9 P.M. The applicant and other co-accused taken deceased for threshening of wheat crops-but on spot neither the crop nor its straw found-nor blood found even on injury of crushing-considering gravity of case-not entitled for bail.

Held: Para 7

Considering the facts, circumstances of the case, submission made by learned counsel for the applicant, learned A.G.A.and from the perusal of the record it appears that the name of the applicant has been disclosed by the first informant at the inquiry stage, the allegation against the applicant and co-accused Subhash is that the deceased was called by them from his house in the night of 16.4.2010 at about 7-8 P.M.for the tractor threshing and in the morning the dead body of the deceased was found embedded in the thresher, neither in the thresher nor near the thresher the wheat crop and its straw was found, the

deceased had sustained 10 ante morem injuries including a crushed injury, during investigation, the statement of some of the witnesses have been recorded in support of the prosecution version, the deceased was a young man, aged about 18 years, the gravity of the offence is too much and without expressing any opinion on the merits of the case the applicant is not entitled for bail, the prayer for bail is refused.

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

1. Heard Sri Dilip Kumar and Rajeev Gupta, learned counsel for the applicant, learned A.G.A. and Sri B.A. Khan, learned counsel for the complainant.

2. This bail application has been filed by the applicant Mukesh with a prayer that he may be released on bail in case crime No. 442 of 2010 under section 302 IPC, P.S. Karhal, District Mainpuri.

3. The facts in brief of this case are that an information to the police station Karhal was given by Sri Kamlesh Kumar on 17.4.2010 at 6.10 A.M. mentioning that his son, the deceased Charan Singh aged about 18 years was taken from his house in the evening on 16.4.2010 by the co-accused Subhash and the applicant Mukesh. The first informant was not permitting to go in the company of the applicant and other co-accused person even then they had taken the deceased. In the morning of 17.4.2010 at about 4.00 A.M. first informant received information that to know the whereabouts of the deceased who had gone thresher. On that information the first informant came to the field with Suresh son of Megh Singh and saw that thresher and tractor were present but nobody was present there. He saw the thresher in which body of the deceased was embedded but he could not know as to what manner the alleged occurrence had taken place. On that information the inquest report was prepared on 17.4.2010 and the post mortem examination was done on 17.4.2010 at 3.30 P.M. According to the post mortem examination report the deceased had sustained ten ante mortem injuries. Thereafter the detailed FIR was lodged by first informant Kamlesh Kumar at the police station, Karhal on 6.5.2010 at about 7.00 or 8.00 P.M. The deceased was called by the applicant and co-accused Subhash from his house at the pretext of threshing the wheat crop. The first informant was not permitting because prior to five or six days, there had been a quarrel between the applicant and co-accused Subhash. The witness Sadho Singh and Nigaate Lal saw the applicant when they were taking the deceased at about 9.00 P.M. on the way. By that time they were extending the threats. On a quarry made by them it was told by the deceased that applicant and other co-accused persons were taking him on field for threshing work. On 17.4.2010 at about 4.00 A.M. it was told by one Jaipal Singh that the deceased was embedded in thresher. On that information the first informant came to the field and saw the dead body of the deceased embedded in the tractor, the tractor was also parked there, but the applicant and co-accused Subhash were not present there. The deceased was died but there was no blood in the thresher or near the thresher there was no crop of the wheat or straw of the wheat. This information was given to the police station concerned. On the same day witness Umesh Kumar and Mahesh Chandra saw the applicant and co-accused Subhash and two unknown persons. They embedded the dead body of the deceased at about 2.00 or 2.30 A.M. On 20.4.2011 it was apprised by the Subhash that on 19.4.2010 at about 8.00 P.M. the applicant and co-accused Subhash came there who stated that they had

committed the mistake by committing the murder of the deceased because he was not paying their money and they asked for compromise. The applicant applied for bail before learned Sessions Judge, Mainpuri who rejected the same on 19.4.2010.

4. It is contended by learned counsel for the applicant that the first informant is not an eye witness, in FIR there is no reference that the alleged incident has been witnessed by any person. The information was given by the first informant about the accidental death whose dead body was embedded/inserted in the thresher but it was mentioned that in the evening of 16.4.2011, the deceased was called from his house by the applicant and other co-accused persons, though the first informant was not permitting the deceased to go in the company of the applicant and other co-accused and in the morning the dead body was found. The report was scribed by Rajveer Singh that on 6.5.2010 i.e. after about 20 days of the alleged incident, an application was moved before the S.S.P.Mainpuri making the allegation against the applicant, the same has been registered as FIR. The first informant has been interrogated by the I.O. he narrated the same story as mentioned in the FIR but on important queries made by I.O. the first informant kept silence, he was asked as to why he did not reveal the event of quarrel between the deceased and co-accused Subhash which occurred about 5 or 6 days prior to the alleged incident and as to why he allowed the decease to go in the company of accused persons, he was again quarried as to whether he had given written application on 17.4.2010 on in correct facts about the death. He accepted that he had handed over the written information on the same day. Thereafter the I.O.had taken six affidavits from the family members of the victim. The said persons were, namely, Sadho Singh, the real brother of grand father of the victim, Nibhati Lal real brother of grand father of the victim , Umesh Kumar and Mahesh Chandra, the real uncles of the victim and one Subhash Chandra resident of Nagla Hare, the real maternal uncle of the victim, they had corroborated the concocted and improved version which had seen in the light of the day on 6.5.2010 for the first time. The statement of Subhash was also recorded showing that the applicant had made extra judicial confession. The I.O.had recorded the statement of other persons in the case diary. Except above mentioned statement there is no evidence against the applicant. The entire story of prosecution is totally false and concocted and cooked up. In the present case no blood was found either on the thresher or near the thresher. According to the prosecution version there was no wheat crop and straw. The witnesses, whose statements have been recorded by the I.O.are wholly unreliable and no reliance can be placed on such belated and after thought version, the applicant is having no criminal antecedent.

5. But the post mortem examination report shows that after sustaining the 10 ante mortem injuries including the crush injury, the bleeding would have taken place. It infers that the deceased was killed some where else thereafter his dead body was embedded in the thresher but during investigation, no such evidence has been collected by the I.O. to show the place where the deceased was killed. Even the prosecution is not clear as to how and in what manner the deceased was killed. The applicant is not involved in any criminal case, he is in jail since 4.6.2011, he may be released on bail.

6. In reply of the above contention, it is submitted by learned A.G.A.and the counsel for the complainant that the names of the applicant and other co-accused have been disclosed at the first instance by the first informant , the applicant and other co-accused Subhash had taken the deceased from his house for working at thresher because the deceased was a poor person, aged about 18 years. The first informant had asked not to go in the company of the applicant and other co-accused persons even then, he was taken by the applicant and other co-accused Subhash, the applicant and co-accused Subhash are very powerful person, the deceased has been killed by the applicant and other co-accused persons only to teach the lesson to others also, in any way at the time of threshing there was no wheat crop because neither the wheat crop nor its straw was found in or near the thresher, it shows that by force the deceased was embedded in the thresher, the deceased had sustained 10 ante mortem injuries in which,injury no.8 was crush injury involving from the lower abdomen below umbilicus and waist (left lower part of back) to whole of left lower part, the deceased had sustained abrasion and lacerated wound also. It shows that by force the deceased was embedded in the thresher and he has been killed. It is also surprising that in the filed at the alleged place of occurrence, the tractor was there but applicant and other co-accused were not present there. It is a pre planned murder. The I.O.had recorded the statement of the witnesses, they have supported the prosecution story, the witness Umesh Kumar and Mahesh Chandra had seen the incident in between 2.00 and 2.30 A.M. when they were inserting the deceased inside the thresher. The applicant and other co-accused are very powerful person, in case the applicant is released on bail, he may tamper with the evidence, the applicant is having the association of criminals who are extending the threats to the first informant and other witnesses, the applicant has been challaned under section 2/3 U.P.Gangser Act, therefore, the applicant may not be released on bail.

7. Considering the facts, circumstances of the case, submission made by learned counsel for the applicant, learned A.G.A.and from the perusal of the record it appears that the name of the applicant has been disclosed by the first informant at the inquiry stage, the allegation against the applicant and co-accused Subhash is that the deceased was called by them from his house in the night of 16.4.2010 at about 7-8 P.M.for the tractor threshing and in the morning the dead body of the deceased was found embedded in the thresher, neither in the thresher nor near the thresher the wheat crop and its straw was found, the deceased had sustained 10 ante morem injuries including a crushed injury, during investigation, the statement of some of the witnesses have been recorded in support of the prosecution version, the deceased was a young man, aged about 18 years, the gravity of the offence is too much and without expressing any opinion on the merits of the case the applicant is not entitled for bail, the prayer for bail is refused.

8. However, considering the submission made by learned counsel for the applicant that the applicant is in jail since 4.6.2010, it is directed that the proceedings of the session trial pending against the applicant may be expedited without granting unnecessary adjournment to either of the side.

9. With the above direction, this bail application is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2011

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 36732 of 2008

Gaurav Pachaury ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri Rohit Singh
Sri Ishwar Chandra

Counsel for the Respondent:
C.S.C.

U.P. Recruitment of Dependent of Govt. Servant (Dying in Harness Rules) 1974-Rule 2 (a) (iii)-compassionate appointment-denial on ground deceased employee was not regular employee but a seasonal worker-held-misconceived-petitioner's case fall under clause 3 of rule 2-petitioner's father was initially appointed as Seasonal Collection Amin in 1979-regular appointment made on 25.03.1997-died in harness on 13.02.2005-rejection of claim-illegal-quashed.

Held: Para 14

Facts of the present case are quite similar to the facts of the cases of Malti Devi (supra) and Panmati Devi (supra) before the Division Bench and in view of the principles laid down by the aforesaid two judgments, the impugned order dated 29.04.2008 passed by respondent no. 2 rejecting the claim of the petitioner for compassionate appointment, cannot be sustained and is hereby quashed.

Case law discussed:
2006 (1) ESC 316 (All) (DB); [2008 (4) ESC 2373 (All) (DB)]

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

1. Heard Shri Rohit Singh, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. Petitioner has approached this Court for issuing a writ of certiorari to quash the impugned order dated 29.04.2008 passed by District Magistrate, Hathras rejecting the claim of the petitioner for compassionate appointment. A further writ of mandamus has been claimed commanding the respondents to appoint the petitioner on compassionate ground.

3. Brief facts giving rise to the dispute are that father of the petitioner was initially appointed as seasonal Collection Amin on 25.07.1979 and posted at Tehsil Sadabad, District Mathura. He moved a representation before the District Magistrate in the year 1996 claiming appointment on the post of regular Collection Amin. When no decision was taken, he approached this Court by filing Writ Petition No. 37385 of 1996 along with other identically situated Seasonal Collection Amin. The said writ petition was disposed of by this Court vide order dated 25.11.1996 directing the District Magistrate to decide the representation filed by the petitioners in accordance with law and relevant rules and it was further directed that if the services of the petitioners therein have not been terminated, they shall be permitted to continue in service and will also be entitled to salary.

4. It has been urged that in pursuance to the aforesaid order of this

Court, the father of the petitioner was allowed to function as Amin vide order dated 25.03.1997 passed by District Magistrate. Thereafter, on creation of new that time. On attaining majority, he made an application for grant of compassionate appointment in July 2007. When no decision was taken, he approached this Court by filing Writ Petition No. 3760 of 2008, which was disposed of vide order dated 23.01.2008 directing the District Magistrate, Hathras to take a final decision within a period of two months from the date of production of a certified copy of the order.

5. In compliance of the aforesaid order, the claim of the petitioner has been rejected on 29.04.2008 mainly on the ground that since the father of the petitioner was not absorbed as regular Collection Amin, though he has functioned as Collection Amin, hence, the petitioner is not entitled to be given compassionate appointment.

6. Learned counsel for the petitioner has vehemently contended that rejection of claim of the petitioner on the ground that his father was not regularly appointed on the post of Collection Amin, though he had functioned on the said post, is not sustainable in view of Rule 2 (a) (iii) of the U.P. Dying-in-Harness Rules, 1974, which provides that a Government servant also includes a servant, who though not regularly appointed, but had put in 3 years' continuous service in regular vacancy in such employment and in view of the said definition, compassionate appointment cannot be denied on the ground that petitioner's father was not substantively appointed and not regularised.

district Mahamaya Nagar, he was adjusted there. He died in harness on 13th February, 2005 in a road accident. Petitioner was a minor at

7. Learned Standing Counsel referring to the averments made in the counter affidavit, contended that father of the petitioner was a seasonal employee and not a regular employee and was only allowed to function as a Collection Amin in pursuance to the order passed by this Court in Writ Petition No. 37385 of 1996, as such, the petitioner is not entitled for being offered compassionate appointment.

8. I have considered the argument advanced by the learned counsel for the parties and perused the record.

9. The definition of Government servant as contained in 1974 Rules includes, "not only the Government servant in permanent service, but even temporary Government servant and also those not regularly appointed, but have put in 3 years' continuous service."

Rule 2 (a) of 1974 Rules reads as under.

"2. Definition.- In these rules, unless the context otherwise requires:

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

(i) was permanent in such employment; or

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

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

10. Factual position which emerges out from the own showing of the respondents is that petitioner's father had functioned as seasonal Collection Amin from 1979 and thereafter vide order dated 25.03.1997, he was allowed to function as Collection Amin regularly. Once petitioner's father had functioned for such a long years right from 1979 till his death on 13.02.2005, mere description that he was a seasonal Collection Amin, will not denude the status of Collection Amin and in particular after he was allowed to function continuously, as such, vide order dated 25.03.1997 passed by Additional District Magistrate in pursuance to the order of this Court in Writ Petition No. 37385 of 1996.

11. In the present case, the long continuous service, which had put in by the father of the petitioner, his case clearly falls within the ambit of "thought not regularly appointed, but had put in 3 years' continuous service in regular vacancy in such employment."

12. The similar question in identical facts and circumstances have been the subject matter of consideration by a Division Bench of this Court in the case of **State of U.P. & Ors. Vs. Smt. Malti Devi, 2006 (1) ESC 316 (All) (DB),** wherein after considering the definition of Government servant as contained in Rule 2 (a) of 1974 Rules, it was held as under.

"It appears that the appellants are under the impression that unless and until Government servant is permanent employee, 1974 Rules is not applicable. The said view is not correct and rather contrary to the Rules."

13. The same view has again been reiterated by another Division Bench in the case of **State of U.P. & Ors. Vs. Panmati Devi & Anr., [2008 (4) ESC 2373 (All)(DB)],** wherein also the petitioner was claiming compassionate appointment on the ground that his father was initially engaged as seasonal Collection Peon on 17th February, 1976, thereafter had worked as seasonal Collection Peon for different periods. Subsequently, his services were terminated which was stayed by this Court, as a result, he continued in service till 19th May, 2005 when he died while working as Collection Peon. In such circumstances, the Division Bench held as under.

"Thus, the facts of the case reveal that the working of the father of the petitioner has been continuous for 19 years and during this period, he was paid salary in the regular pay scale. We are satisfy that such working cannot be treated to be seasonal. In such circumstances, the direction issued by the learned Single Judge under the impugned judgment for considering the case of petitioner for compassionate appointment cannot be faulted with. The discretion exercised by the learned Single Judge, in the facts of the present case, is not interfered with."

14. Facts of the present case are quite similar to the facts of the cases of **Malti Devi** (supra) and **Panmati Devi** (supra) before the Division Bench and in view of the principles laid down by the aforesaid two judgments, the impugned order dated 29.04.2008 passed by

respondent no. 2 rejecting the claim of the petitioner for compassionate appointment, cannot be sustained and is hereby quashed.

15. Writ petition stands allowed with the direction to the respondents to consider the claim of the petitioner for grant of compassionate appointment expeditiously, preferably within two months from the date of production of a certified copy of this order before him.

16. However, in the facts and circumstances, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 40344 of 2011

Raj Prakash ...Petitioner
Versus
State Of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.V. Singh
Sri S.L. Singh

Counsel for the respondents:
C.S.C.

Constitution of India, Article 226- "U.P. Police an organized Gang of Dacoits"- observation of Apex Court fully proved in case in hand-in mid night-searching the Fire Arm of petitioner without any authority of law-to justify their misdeed got registered so many false criminal cases-Police Officer of District in question being uncontrolled can do any legal nor illegal activities-District Police Officer failed to check them-taking possession of weapon of petitioner wholly arbitrary illegal-chief Secretary to take disciplinary action against S.O.- Petition allowed with cost of Rs.50,000

Held: Para 37

In view of the above, I have no manner of doubt in declaring action of taking away of petitioner's firearm licence and weapon by respondent No.4 to be wholly illegal and arbitrary. However, considering the above discussion, the writ petition is disposed of with the following directions:

A. Chief Secretary, U.P. Lucknow shall look into the matter and find out involvement, dereliction and collusion of various officials of District Police, Ghaziabad and thereafter shall take such departmental and other action as provided in law within a period of three months and submit a progress report to this Court.

B. The petitioner shall be entitled to cost, exemplary in nature, for harassment and illegal action of the respondents to which he has made to suffer, which I quantify to Rs.50,000/-. The aforesaid cost at the first instance shall be paid by respondent No.1 but it shall be at liberty to recover the same from the officials concerned who are responsible after making such enquiry as directed above and provided in law.

C. This case shall be listed in the first week of February, 2012 only for the purpose of considering progress report as directed above but otherwise it stands disposed of.

Case law discussed:
(1991) 4 SCC 406; (1980) 3 SCC 526; (1995) 3 SCC 757; (2004) 5 SCC 26

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

1. Police is Police. None can police the Police. It can make wonders and miracles. Hardened criminals can be

shown totally innocent. Similarly, totally innocent, honest and simple person may be depicted a hard core criminal. It can terminate hardened criminals in the name of encounter in the same manner as it can do by terminating a poor innocent person in the garb of encounter. It is for this reason at one point of time, i.e. about three decades ago, Apex Court (Hon'ble V.R. Krishna Iyer, J.) had observed:

"Who can police the Police."

2. We all have no manner of doubt that Police constitute real backbone of State's police power to maintain law and order but it is possible only when the agency work with real devotion and honesty to its constitutional and legal obligation instead of satisfying its petty materialistic demands. The case in hand is a real illustration to remind the off quoted statement of a very learned Judge of this Court long back that *"U.P. Police is an organized gang of dacoits, ..."* though, the said observation was later on expunged. It appears that fact remains despite paper expunction.

3. I do not intend to condemn entire police force of the State but unfortunately the manner in which hierarchy from lower to highest has shown its apathy to correct erring officials and on the contrary their darity to go to the extent of supporting erring officials by even manufacturing documents has really surprised this Court.

4. The real complaint of the petitioner was so simple that it ought to have been redressed by the District Chief of Police, but not only it has travelled to this Court but in the zeal of justifying an admitted illegal action, the respondents have gone to the extent of preparing documents sometimes with back-dates making things more serious and complicated leaving no option to the Court but to place on record its anguish.

5. The petitioner Raj Prakash came to this Court raising his grievance that his firearm licence and weapon have been taken away by respondent No.4 in the night of 12/13 July, 2011 illegally and despite his complaint to Senior Superintendent of Police, Ghaziabad, respondent No.3 vide application dated 15.07.2011, none has shown any interest to redress his grievance. The petitioner also sent copies of letter dated 15th July, 2011 to Director General of Police, U.P., Chief Minister, U.P. besides others. The petitioner apprehended and may be rightly that his weapon, took away illegally by respondent No.4, may be used for committing some crime and thereby to implicate the petitioner falsely therein. In such circumstances, he had no alternative but to approach this Court.

6. The brief facts the petitioner disclosed in the writ petition are that he is residing in outskirts of Village Niwari in the vicinity of his agricultural property District Ghaziabad. He possessed a firearm licence No.194/August, 2010 which was granted on 23rd August, 2010 by District Magistrate, Ghaziabad. The petitioner also possessed a firearm namely Revolver 0.32 bore purchased by him from Fieldgun Factory on 02.02.2011 which was endorsed on the aforesaid licence.

7. At about 11.30 P.M. in the night of 12/13 June, 2011 when the petitioner was sleeping with his family, Sri Om Prakash Singh, Station House Officer, P.S. Niwari, District Ghaziabad came to

his house along with police party and knocked the door. The petitioner owing to late night refused to open the door. The respondent No.4 threatened to break open the door forcibly as a result whereof petitioner opened the door of his house. The police people thereupon abused and beat the petitioner and directed to show his weapon and firearm licence. When shown, the same were taken by the Police headed by respondent no.4 and petitioner was directed to come to the Police Station next day.

8. On 13th July, 2011, when petitioner went to the police station, respondent No.4 gave him receipt of deposit of his weapon and firearm licence along with 12 cartridges. No reason was assigned by respondent No.4 as to how and under what authority he had taken away firearm licence and weapon and has been deposited with the police.

9. When the two things were not returned, petitioner made a complaint to respondent No.3 and a copy of complaint was endorsed to Home Minister, Chief Minister of the State as also Director General of Police but in vague. The writ petition was filed in the Registry on 19th July, 2011 and it was taken up on 21st July, 2011. This Court required learned Standing Counsel to explain under what authority firearm licence and weapon were taken away by respondent No.4 and kept in police custody.

10. Learned Standing Counsel sought a short time to seek instructions and the matter was fixed for 26th July, 2011. On that day, learned Standing Counsel made a statement that firearm licence and weapon was taken away by respondent No.4 entering the petitioner's house and he also could not dispute that this action of respondent No.4 was illegal and unauthorized. He seeks a short time to file affidavit explaining relevant facts. This Court in the circumstances passed following order:

"Pursuant to this court's order dated 21.7.2011, learned Standing Counsel after receiving instructions admitted that respondent no.4 S.H.O. Om Prakash Singh admittedly entered the petitioner's residence and took away his fire arm and license, etc. He also could not dispute that the aforesaid action of the S.H.O. was illegal and unauthorized. He further prays for and is allowed three days time to file an affidavit explaining these facts. He also stated that the fire arm and the license which were taken away from the petitioner have been returned to him, which fact has not been disputed by petitioner.

As prayed, put up this matter on Monday.

A copy of this order shall be made available to learned Standing Counsel today itself for communication to the respondent."

11. A counter affidavit sworn by one Nirankar Singh, Circle Officer, Modinagar, District Ghaziabad was filed. It tried to stress upon the fact that petitioner has a long criminal history and several criminal cases are pending against him. Paras 7, 12 and 13 of the counter affidavit read as under:

"7. That it is relevant to mention here that petitioner is criminal in nature and many F.I.R. have been lodged against the

petitioner and Criminal cases are pending against the petitioner.

12. That the contents of paragraph No.5 of the writ petition are not admitted as stated, hence denied. It is submitted that there are Eight cases are registered against the petitioner which are as under:-

i. Case Crime No. 114/89 under Section 307 I.P.C. at Police Station Niwari.

ii. Case Crime No. 93/90 under Section 147/148/149/307 I.P.C. at Police Station Niwari.

iii. Case Crime No. 33/92 under Section 356 I.P.C. at Police Station Sihane Gate.

iv. Case Crime No. 13/92 under Section 2/3 of Gangster Act at Police Station Niwari.

v. Case Crime No. 22/92 under Section 110 Cr.P.C. at Police Station Niwari.

vi. Case Crime No. 46/96 under Section 3/1 of U.P. Gunda Act at Police Station Niwari.

vii. Case Crime No. 38/96 under Section 323/504 I.P.C. at Police Station Niwari.

viii. Case Crime No. 64/2000 under Section 3/1 of Gunda Act at Police Station Niwari.

13. That the contents of paragraph Nos.6 & 7 of the writ petition are not admitted as stated, hence denied. It is submitted that petitioner is a criminal and many criminal cases are pending against him. It is further submitted that petitioner has obtained the Fire Arm Licence by concealing the material fact and mislead the authority concerned."

12. It also said that two complaints were received against petitioner lodged one by Sukkhan Khan, S/o Kale Khan, R/o Ward No.5, Kasba & P.S. Niwari, District Ghaziabad and another by one Guruved S/o Om Pal Singh R/o Village & Post -Paugi, P.S. Niwari, District Ghaziabad alleging that petitioner had threatened them to kill. These complaints were registered at P.S. Niwari, and, respondent No.4 went for investigation at 11 a.m. on 13th July, 2011 to the house of petitioner for inquiry and took away firearm and licence which were deposited in Malkhana at 4.00 P.M. on 13th July, 2011.

13. The above counter affidavit was controverted by petitioner in his rejoinder affidavit. He pointed out that neither on the date when respondent No.4 visited petitioner's house nor on the date when counter affidavit was filed, nor even on the date when firearm licence was granted to the petitioner, any criminal case was pending for investigation or trial against him. In respect to 8 cases referred to in para 19 of counter affidavit, petitioner stated that six have already resulted in acquittal long back vide court's judgments dated 16.7.1993, 16.6.1995, 23.7.1997, 19.4.1999 and 13.6.2003. With respect to alleged complaints of Sri Guruved and Sukkhan Khan, petitioner said that Guruved S/o Om Pal Singh has given an affidavit that he did not make any complaint on 13th July, 2011 to the police as alleged in counter affidavit and in

respect to Sukkhan Khan, petitioner filed a copy of voter list showing that no such person is residing in ward No.5 at all. He, therefore, contended that both these documents i.e. Annexure C.A.3 and 4 are forged and fictitious. He reiterated that firearm licence and weapon both were taken away by respondent no.4 in the night of 12/13th July, 2011 when he visited petitioner's house at around 11.30 p.m. and receipt was handed over on the next date i.e. 13th July, 2011 when the petitioner along with some other villagers went to police station.

14. This Court initially was not inclined to go into the question of culpability or whether the petitioner is a history-sheeter or not but simply wanted to know whether respondent No.4, in law, was authorized to take away firearm along with licence from lawful possession of a person concerned without there being any order of the District Magistrate suspending the licence or directing for surrender of firearm or any other such order by the competent authority or when it was not seized as a case property under Code of Criminal Procedure. The court also wanted to know that firearm, if as stated in the counter affidavit, was taken in custody by respondent No.4 pursuant to an investigation made in the two alleged complaints of Sri Sukkhan Khan and Guruved, when he visited petitioner's house at 11 a.m. on 13th July, 2011, why it remained with him for almost five hours and could be deposited in Malkhana only in the evening around 4 p.m.

15. The learned Standing Counsel, when not able to reply above queries, sought time. This Court thus passed following order on 1st August, 2011:

"Learned Standing Counsel admitted that firearm of the petitioner was taken away by respondent No.4 and was kept in Malkhana but he could not tell under which provision and what authority it was seized or taken away by respondent No.4. He also could not tell whether for this illegal and unauthorized act of respondent No.4, any action was taken by respondent No.1 and 3.

As requested, put up day after tomorrow i.e. 03.08.2011 to enable him to seek instructions in the matter."

16. A supplementary counter affidavit sworn by Nirankar Singh, Circle Officer, Modinagar, District Ghaziabad on 2nd August, 2011 at 6.10 p.m. was filed. He appended two letters/orders of S.S.P. Ghaziabad. One is dated 14th July, 2011 said to have been issued by respondent No.3 directing Sri Ajay Kumar, S.P., Rural, Ghaziabad to hold a preliminary enquiry against illegal action of respondent No.4 of seizure of firearm and licence without any authority and submit report within five days. The second is the letter dated 1st August, 2011 whereby Sri Om Prakash Singh, Sub Inspector, Civil Police, S.H.O. Niwari, was placed under suspension under Rule 17(1)(a) of U.P. Police Officer of Subordinate Rank (Punishment & Appeal) Rules 1991 on the allegation of taken custody of firearm licence of petitioner without any reason. The endorsement No. 4 to the said suspension order is to S.P., Rural with reference to respondent No.3's letter dated 14th July, 2011 directing him to submit preliminary enquiry report within three days.

17. This matter was heard by Court for some time on 5th August, 2011 and

this Court prima facie found that counter affidavit filed by Sri Nirankar Singh, Circle Officer on behalf of respondents No.3 and 4 apparently contains false averments. The documents appended in the counter affidavit on one hand show that alleged complaint of Sukkhan Khan refers to the threat allegedly extended by the petitioner at 11 a.m. on 13th July, 2011 near Holi Chowk and at the same time respondent No.4 had claimed that after receiving this complaint, he proceeded for enquiry at 11 a.m. on 13th July, 2011. When the incident itself alleged to have taken place at 11 a.m. at some distance, it was wholly impossible that simultaneously after recording complaint, respondent No.4 could have or would have proceeded for investigation/enquiry in the matter at the same time i.e. 11 a.m. on 13th July, 2011 and to this extent the police record i.e. Rawangi and complaint both could not have been correct.

18. Besides, in respect to old criminal cases, counter affidavit said that they are pending while six out of eight resulted in acquittal several years back and two cases were not connected to the petitioner yet it was stated in the counter affidavit as if all these matters are still pending and petitioner is facing those criminal cases. The court required respondents as also the deponent of counter affidavit to explain these apparent inconsistencies in the counter affidavit which demonstrates that counter affidavit contained false statements.

19. Three affidavits thereafter have been filed; one is an affidavit dated 10th August, 2011 of Om Prakash Singh, the then Station House Officer, P.S. Niwari, District Ghaziabad respondent No.4 in which he had reiterated the facts regarding alleged complaints of Sukkhan Khan and Gurved as also his visit of petitioner's house at 11 a.m. on 13th July, 2011. Nothing has been explained by him about the long time weapon remained with him without any authority. He has tried to cast expursion on the officers/officials on whose recommendation firearm licence was granted to the petitioner and has referred to two letters dated 13th July, 2011 and 19th July, 2011 sent to respondent No.3 informing about seizure of firearm licence and weapon from petitioner and also recommending cancellation of licence. No dispatch number had been given in these two letters. There is no acknowledge, therefore it is difficult to ascertain receipt of the letters in the office of respondent No.3. What is important is that he has filed a photocopy of the affidavit filed by petitioner where in para 5 he has said, on 20th July, 2010 neither any case is registered in any Court nor he has been found guilty.

20. The respondent No.4 claims that this part of affidavit is false but on a query of the Court, learned Standing Counsel could not tell as to which case was found registered on 20th July, 2010 against the petitioner. The six cases, which were registered between 1.9.1989 to 2000 already resulted in acquittal/discharge of petitioner and therefore they cannot be said to register against the petitioner and admittedly, it is not the case of respondents that petitioner was found guilty in any of those matters. The interesting aspect of this affidavit is that in para 8, respondent no.4 admits that his action of taking away revolver from the petitioner is not backed by any order

by the competent authority. Paras 8 and 9 read as under:

"8. That it may be clarified that the conduct of the deponent while taking the revolver and bringing it to the police station though was not backed by any order of the competent authority but the action was taken in good faith so that a person of such bad repute must not have fire arm license, which he has obtained by manipulating the things. In fact, when a person applies for grant of license as per Rule, he is supposed to given an Affidavit clarifying regarding criminal cases. The petitioner has deliberately moved a false affidavit before the Licensing Authority wherein he went to the extent of denying the registration of the criminal cases against him. For the sake of convenience the affidavit furnished by the petitioner for grant of fire arm license is being annexed herewith and marked as Annexure No. 3 to this Personal Affidavit.

9. That neither there was bad intention on the part of the deponent in taking away the revolver nor any arbitrariness has been done. The intention of the deponent was to verify the weapon and license and the circumstances in which it was granted as the deponent was apprehended that in case the weapon and license is not taken from the custody of the petitioner then he may try to flee with weapon etc. and will try to terrorize the complainants."

21. Sri Nirankar Singh, deponent of the counter affidavit and supplementary counter affidavit appeared before the Court in person and stated that he had no personal knowledge of the matter but had come to Allahabad in respect to some other matter when he was directed by respondent No.3 i.e. S.S.P., Ghaziabad to swear a counter affidavit and supplementary counter affidavit in this case also and he complied the said order. He admits that he could not verify facts stated in the counter affidavit. He also tenders unconditional apology for filing counter affidavit with lapses and assured the Court that he shall check up proper facts before filing an affidavit in the Court in future. Paras 3 and 5 of his affidavit dated 12th August, 2011 read as under:

"3. That in continuation of the oral undertaking given on behalf of the deponent, the deponent do hereby offers unconditional apology for the lapses done by him while filing counter affidavit to the above writ petition.

5. That the deponent do hereby undertakes that in future he will take necessary precaution and will ensure that proper facts must be placed on record before the Hon'ble Court whenever any affidavit is sworn by him. The deponent further undertakes that he will not repeat the mistake in future."

22. Another affidavit has been filed by Sri Om Prakash Singh tendering his apology for the lapses.

23. Sri C.S.Singh, learned Additional Chief Standing Counsel also informed the Court that on 11th August, 2011 pursuant to petitioner's letter dated 15th July, 2011 a first information report being Case Crime No.113 of 2011 has been registered at 1.30 p.m. against Sri Om Prakash Singh, Incharge Inspector, P.S. Niwari.

24. A photocopy of petitioner's letter dated 15th July, 2011 and photocopy of

first information report show that District Magistrate marked it to S.S.P. i.e. respondent No.3 with the endorsement on 18.7.2011 ''कृप्या नियमानुसार आवश्यक कार्यवाही सुनिश्चित करें'' Thereafter the said letter was marked to C.O. Modinagar by respondent No.3 on 27th July, 2011. It remained pending without any action for almost 15 days. On 11th August, 2011, when respondents found some trouble in the Court, it appears that this FIR was registered.

25. Learned Addl. C.S.C. despite repeated query could not defend action of respondent No.4 in taking away petitioner's firearm licence and weapon. He also could not defend stand of respondent No.4 that he proceeded for enquiry at 11 A.M. on 13th July, 2011 after receiving a complaint of Sukkhan Khan and Gurved of alleged threat rendered by the petitioner he could not explain that Sukkhan Khan, if complained to have alleged threat at 11 A.M. on 13th July, 2011 at some other place, how it is possible that simultaneously complaint could have been submitted in the police station and immediately thereupon respondent No.4 could have proceeded for enquiry. This Court has no manner of doubt that general diary kept by respondent No.4 in the police station has been manufactured by showing his Rawangi at 11 A.M. on 13th July, 2011 referring to the two complaints of Sukkhan Khan and Gurved. Whether these two persons actually made any complaint, whether they are real persons or not are not the matter need be enquired by this Court for the reason that reading Annexure C.A.4 i.e. alleged complaint of Sukkhan as also the general diary of police station showing respondent No.4 Rawanagi (departure) at 11 A.M. on 13th July, 2011 it is evident that either Rawanagi timing is incorrect or time of incident mentioned in the complaint is incorrect. Since both the documents have been relied by respondent No.4 in his defence to justify that firearm and licence were not taken away in the night but in day time and the two documents are self contradictory, I have no option but to infer that respondent No.4's claim that he visited petitioner's premises in the day time on 13th July, 2011 is incorrect. The custody of two items namely licence and weapon is admittedly without any authority of law. This fact came to the notice of respondent No.3 S.S.P. Ghaziabad admittedly when the petitioner's letter dated 15th July, 2011 was communicated to him. The documents produced by the respondents before this Court namely endorsement made on petitioner's letter to Circle Officer, Modinagar on 27.7.2011 shows that before that S.S.P. Ghaziabad had not reacted to the matter at all. He did not find anything wrong in the action of respondent No.4. Meaning thereby police officials in District Ghaziabad are free and uncontrolled to do whatever they like, legal or illegal without any intervention from the District Superintendent who had the ultimate responsibility of controlling all these officials.

26. Inaction, in the circumstances, can be inferred to be deliberate. I am constrained to observe for the reason that letter dated 14th July, 2011 filed as Annexure 1 to the supplementary counter affidavit said to have been issued by S.S.P., Ghaziabad directing S.P., Rural to hold a preliminary enquiry against respondent No.4, in my view, is an anti-dated letter, to cover up lapses on the part of respondent No.3. There are several

reasons for this inference. In the counter affidavit sworn on 13th July, 2011 by Sri Nirankar Singh on behalf of respondents No.3 and 4, he has not referred to any such letter and on the contrary there is one dimensional effort that is to justify action of respondent No.4. Therefore up to 30th July, 2011 there was no attempt on the part of respondent No.3 either to treat anything wrong on the part of respondent No.4 or to get any enquiry conducted in the matter. It is only when the respondents were confronted with a self contradictory incorrect or incomplete information contained in the counter affidavit, demonstrated by the petitioner by filing a rejoinder affidavit on 1st August, 2011, that a letter of suspension was passed simultaneously and back dated letter was prepared and mentioned therein so as to create a defence that respondent No.3 had already reacted to the situation and prompt action has been taken. Moreover the order dated 14th July, 2011 require the S.P., Rural to submit preliminary enquiry report within five days but no such enquiry report appears to have been submitted and that is why in the suspension order respondent No.3 require S.P., Rural to submit preliminary report thereafter within three days.

27. In fact, this is inaction of respondent No.3 which has compelled this Court to draw inference that illegal and anti public activities of Police are shielded and protected by superior officers either by total inaction or by creating documents, may be backdated or otherwise. It is this nexus of superior officers shielding subordinate's illegal and unauthorized action which has compelled this Court to make observation against police officers/ officials in general.

28. From 21st July, 2011 and onwards the matter was heard by this Court on various dates. State of U.P. through Secretary (Home) was also a party. In law, there is presumption that learned Standing Counsel must have conveyed notice of the case to respondent No.1 also, particularly when this Court prima facie found at some stage that a false affidavit has been filed and therefore an action under Section 340 Cr.P.C. may also be required against deponent of the counter affidavit. But at no stage respondent no.1 has shown to take any step enquiring as to how and in what circumstances such things are happening in the district concerned.

29. Police force is meant for protection of the people. Its sole aim and purpose is to maintain law and order by preventing crime and if committed, to find out and book the guilty person so as to get punished in accordance with law. There is no other agency in the State except the Police who has this statutory as well as constitutional obligation for protection of people. But unfortunately it is still living in the colonial State of affairs when Police used to be deployed against public to crush their genuine demands. The Police, at that time, reflected the glorified image of the ruling Colonial State. It treated inhabitants of the country as slaves and that is why always tried not to allow them to raise their voice against ruling empire. More than half a century India has attained its independence. Now is governed by Constitution given by the people to itself so as to function, "for the people', "by the people', "of the people' principle but the police has not mend its ways. Today the people are frightened more with police than the criminals. There is virtually a

lack of confidence with this Uniformed Force. Judicial cognizance can be taken of several heinous crimes being committed almost daily and many a times with the nexus of politicians/criminals whereby common and innocent people are being made target. The criminality on the part of Police is highly dangerous being a double edged weapon. When they commit crime, they are themselves being investigating agency, naively cover up the matter. The result is that the Courts of law ultimately ordinarily fail to punish guilty for want of proper evidence for which the agency is responsible. In criminal prosecution, eye and ear of the courts of law, basically is the prosecuting agency, and when the agency itself is indulged in a cover up mission, it is almost impossible to bring guilty person to book and punish. Police officials have become so daredevil that they do not hesitate in committing day light and daring offences and thereby to stick to it, may be for the reason that they are well equipped with the system of covering it up. The situation is really alarming and needs immediate remedial measures. The public dissatisfaction and distress cannot wait indefinitely if it is not attended now. It may be too late in the day and may burst in a people's revolution we are witnessing in some other parts of the world.

30. In **Delhi Judicial Service Association Vs. State of Gujarat & Ors., (1991) 4 SCC 406** where brutal behaviour of police in arresting and assaulting a Chief Judicial Magistrate of Nadiad was considered by the Court in contempt petition as well as writ petitions entertained directly. The Apex Court observed:

"Aberrations of police officers and police excesses in dealing with the law and order situation have been the subject of adverse comments from this Court as well as from other courts but it has failed to have any corrective effect on it.." (Para 39)

31. Hon'ble Krishna Ayer, J in **Prem Shankar Shukla Vs. Delhi Administration, (1980) 3 SCC 526** observed:

"If today freedom of the forlorn person falls to the police somewhere, tomorrow the freedom of many may fall elsewhere with none to whimper unless the court process invigilates in time and polices the police before it is too late."

32. In a concurring judgment in **Dhananjay Sharma Vs. State of Haryana & Ors. (1995) 3 SCC 757** Hon'ble Faizan Uddin, J in para 58 observed:

"58. It is in common knowledge that in recent times our administrative system is passing through a most practical phase, particularly, the policing system which is not as effective as it ought to be and unless some practical correctional steps and measures are taken without further delay, the danger looms large when the whole orderly society may be in jeopardy. It would, indeed, be a sad day if the general public starts entertaining an impression that the police force does not exist for the protection of society's benefits but it operates mainly for its own benefit and. once such an impression comes to prevail, it would lead to disastrous consequences."

33. The Court took judicial notice in para 57 of the judgment that every morning one opens the newspapers and goes through its various columns, one feels very much anguished and depressed in reading reports of custodial rapes and deaths, kidnapping, abduction and faked police encounters and all sorts of other offences and lawlessness by the police personnel, of which countless glaring and concrete examples are not lacking.

34. In **Daroga Singh & Ors. Vs. B.K. Pandey (2004) 5 SCC 26** the Court remarked object with which the Police Force was created and said that police is the executive force of the State to which is entrusted the duty of maintaining law and order and of enforcing regulations for prevention and detection of crime. It is considered by society as an organised force of civil officers under the command of the State engaged in the preservation of law and order in the society and maintaining peace by enforcement of laws and prevention and detection of crime. One who is entrusted with the task if maintaining discipline in the society must first itself be disciplined. Police is an agency to which social control belongs and therefore the police has to come up to the expectations of the society.

35. Then it had reminded itself the policing role the country witnessed during British Raj and in para 44 the court said:

"44. We have not been able to forget the policing role of the police of British Raj wherein an attitude of hostility between the police and the policed under the colonial rule was understandable. It is unfortunate that in one of the largest constitutional democracies of the world the police has not been able to change its that trait of hostility."

36. Unfortunately, observation and expectations of Courts have gone in vain as the police force have not mend its ways. Most of the matters do not come to the Court and when somebody dares to take up the matter to the Court only then the extent to which the Police act ruthlessly and arbitrarily is experienced by the Courts also. The situation is really very grim and disappointing. It is high time when State should look into large spectrum of reforms to correct Police and policing in the State else the things may not rendered uncontrollable.

37. In view of the above, I have no manner of doubt in declaring action of taking away of petitioner's firearm licence and weapon by respondent No.4 to be wholly illegal and arbitrary. However, considering the above discussion, the writ petition is disposed of with the following directions:

A. Chief Secretary, U.P. Lucknow shall look into the matter and find out involvement, dereliction and collusion of various officials of District Police, Ghaziabad and thereafter shall take such departmental and other action as provided in law within a period of three months and submit a progress report to this Court.

B. The petitioner shall be entitled to cost, exemplary in nature, for harassment and illegal action of the respondents to which he has made to suffer, which I quantify to Rs.50,000/-. The aforesaid cost at the first instance shall be paid by respondent No.1 but it shall be at liberty to recover the same from the officials concerned who are responsible after

making such enquiry as directed above and provided in law.

C. This case shall be listed in the first week of February, 2012 only for the purpose of considering progress report as directed above but otherwise it stands disposed of.

38. Copy of this order shall be sent to Chief Secretary, U.P. at Lucknow by Registrar General forthwith for information and compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Mic. Writ Petition No. 40817 of 2011

Vinay Kumar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Yadav
Sri Ashok Khare

Counsel for the Respondent:
C.S.C.
Sri Rajesh Kumar Pandey

Constitution of India, Article 226-locus standi-petitioner being stranger-challenged the action of R-3-in grant of fire arm licence to a hurdened criminal-even convicted in by life imprisonment in number cases-rejection of complaint on ground mere lodge FIR-can not be ground fro cancellation-but nothing whisper regarding major punishment-such dubious manner if allowed to perpetuate cause serious consequences to determent of public-can be questioned by strangers.

Held: Para: 11

Though I am inclined to uphold preliminary objection of learned counsel for respondent no.7 that the petitioner is a mere complainant hence cannot be allowed to challenge the order passed by the licensing authority withdrawing show cause notice and dropping the proceedings under Section 17(3) of the Arms Act 1959 but exercising the powers in constitutional extraordinary jurisdiction under Article 226 this Court cannot remain a silent spectator if it comes to the knowledge of the Court that the executive authorities in sensitive matter like regulation of firearm are acting in a dubious manner which if allowed to perpetuate may result in more serious consequences to the detriment of public at large. In the circumstances, I decline to interfere in the order impugned in the writ petition at the instance of the petitioner

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

1. This writ petition has been filed by one Vinay Kumar assailing the order dated 27.5.2011, passed by Additional District Magistrate, City, Allahabad revoking show cause notice dated 30.1.2010 under Section 17(3) of the Indian Arms Act, 1959 and consigning proceedings initiated against Sri Ram Kishore Yadav, respondent no.7 .

2. In brief submission of counsel for the petitioner is that respondent no.7 is a convict in two criminal cases for an offence under Section 302 read with Section 34 IPC yet proceedings for cancellation of his arms licence has been revoked by respondent no.3 in a wholly illegal and perverted manner. It is alleged that the impugned order has been passed by respondent no.3 with antedating when an application for transfer of the case was moved before the District Magistrate on 9.6.2011.

3. Respondents no. 2 and 3 have filed counter affidavit sworn by Sri Hansraj Sub-Divisional Magistrate, Sadar, Allahabad and respondent no.7 himself has filed counter affidavit through his counsel Sri Anil Tiwari. Pursuant to this Court's order dated 25.7.2011 original record of cases no. 56 of 2010 and 57 of 2010 wherein impugned order has been passed was also produced before the Court.

4. Sri Anil Tiwari has raised a preliminary objection regarding maintainability of writ petition at the instance of petitioner, a stranger contending whether an arms licence should be granted or should be allowed to continue is a matter within the statutory discretion of the licensing authority i.e., the District Magistrate concerned and once such discretion has been exercised, no third person including a complainant if any, can be said to have a grievance entitling him to challenge the action of licensing authority and, therefore, the writ petition at the instance of the petitioner being not maintainable deserves to be dismissed in limine.

5. Learned counsel for the petitioner sought to repel the argument of Sri Tiwari contending that respondent no.7 is a proven criminal having been convicted in two cases of heinous crime under section 302 read with Section 34 IPC. He is misusing his firearm by threatening local people including the petitioner at whose instance proceeding under Section 17 was initiated by the authority concerned but respondent no.3 to whom the District Magistrate transferred the matter passed the impugned order for wholly extraneous and collateral reasons and, therefore, the petitioner is an aggrieved person and can maintain the writ petition for assailing an order passed under a statute but in utter disregard thereof and law on the subject. It is contended while in other cases on account of mere registration of criminal cases, firearm licences already granted have been cancelled but respondent no.7 has been singled out for the reason of his high access and approaches.

6. Though the petitioner has pleaded that a large number of criminal cases from time to time were registered against respondent no.7 but from record, what this Court finds to be admitted fact is that respondent no.7 is a convict in two criminal cases, namely S.T. No. 23 of 1984 under Section 302/34 IPC decided on 15.12.1987 and S.T. No. 514 of 1985 under Section 302/34 IPC decided on 18.4.1990 wherein he has been sentenced to undergo life imprisonment. Appeals in both the matters are said to be pending before this Court. Respondent no.7 had two licence no. 551 of 1983 for rifle no. NB 811784 NPB-315 bore and another licence no. 5469 for Pistol No. 236061. Inspector in Charge Dhoomanganj, Allahabad submitted a report dated 20.10.2009 recommending cancellation of licence no. 551 of 1983 (new number 8113, P.S. Colonelganj) which was endorsed by D.I.G., Allahabad vide his report dated 4.11.2009. A similar report in respect of licence no. 8112 was also submitted by the police authorities. The District Magistrate, Allahabad on 6.11.2009 registered both the matters and authorised respondent no.3 for further proceedings. Show cause notices under Section 17(3) were issued in respect of both the licences on 30.1.2010. After service of notice upon respondent no.7 hearing concluded on 30.3.2010 and 6.4.2010 was fixed for delivery of order. In the order sheet of both the cases there is pasting of separate piece of paper on some already transcribed order. When I tried to see through light it appears

that an order was transcribed regarding passing of order by respondent no.3 on 6.4.2010 but thereafter the same has been changed and a different order was mentioned on a small piece of paper posted on back of paper no. 2/1 in the record of Case No. 56 of 2010 and 57 of 2010. The order sheet further shows that thereafter on several occasions arguments were heard and date was fixed for delivery of order but the order was not delivered. For example on 20.8.2010 hearing in both the matters concluded and 3.9.2010 was fixed for orders. The order was not delivered on 3.9.2010 having been declared public holiday due to last Friday of Ramzan. Then a long adjournment was given fixing 28.9.2010. On the next day also the order was not delivered on the pretext that there is a decision of no adverse order and the case was fixed for re-hearing on 15.10.2010. Again hearing concluded on 7.12.2010 and 14.12.2010 was fixed for orders. On 14.12.2010 order was not delivered on the ground of Presiding Officer being busy in administrative work and the same reason was assigned for the next date i.e., 21.12.2010. The further next date 28.12.2010 also did not see the order and the reason assigned is the decision of "no adverse order" and the matter was fixed again for hearing on 18.1.2011. Lastly after dozen of dates hearing took place on 20.5.2011 and order was delivered on 27.5.2011.

7. In the counter affidavit respondents no. 2 and 3 have relied upon the said record to plead that there is nothing irregular on the part of respondent no.3 in passing the impugned orders. Dispatch number has been entered by the Reader of the office of respondent no.3 on 6.6.2011 and parties applied for certified copy of the order only on 10.6.2011 and onwards.

8. The petitioner stated in para 22 of the writ petition that though the matter was heard on 20.5.2011 but the order was not delivered and hence he filed application before the District Magistrate, Allahabad on 9.6.2011 seeking transfer of both the cases to some other Court levelling certain allegations against respondent no.3. This fact of filing of application is not in dispute.

9. Licence file of respondent no.7 which has also been produced before the Court shows that respondent no.7 had a direct connection with Senior Administrative Officer inasmuch as on his application for change of address from P.S. Dhoomanganj to P.S. Colonelganj verification of address has been made by the then A.D.M. (Finance & Revenue) stating that he personally knows respondent no.7 and accordingly verified his change of address at New Katra, P.S. Colonelganj.

10. The manner in which record of two cases has been kept and the matter has been dealt with by respondent no.3 leaves much scope to say something which presently I am refraining myself so that the order which I propose to pass may not prejudge the issue and cause prejudice to anyone. Ex facie, I have no manner of doubt that respondent no.3 in the impugned order has relied on the proposition that mere registration of criminal case does not justify proceedings for cancellation of firearm licence, completely misdirecting himself and ignoring the fact that here is not a case of mere registration but the person concerned had been convicted twice by the Trial Courts in cases involving heinous crime under Section 302 read with section 34 IPC and, therefore, the proposition relied by respondent no.3 had no application whatsoever. What prompted him to misread such proposition to this extent deserves an

inquiry particularly in the light of the fact that the order sheet has some manipulation in the form of pasting of a piece of paper for hiding an earlier written order by changing the same.

11. Though I am inclined to uphold preliminary objection of learned counsel for respondent no.7 that the petitioner is a mere complainant hence cannot be allowed to challenge the order passed by the licensing authority withdrawing show cause notice and dropping the proceedings under Section 17(3) of the Arms Act 1959 but exercising the powers in constitutional extraordinary jurisdiction under Article 226 this Court cannot remain a silent spectator if it comes to the knowledge of the Court that the executive authorities in sensitive matter like regulation of firearm are acting in a dubious manner which if allowed to perpetuate may result in more serious consequences to the detriment of public at large. In the circumstances, I decline to interfere in the order impugned in the writ petition at the instance of the petitioner but dispose of the writ petition with the following directions:

(I) This judgment shall not preclude the State Government from making appropriate inquiry in the manner and the circumstances, the impugned order has been passed by respondent no.3.

(II) The Chief Secretary, U.P. Government shall get appropriate inquiry into the matter and if necessary, through vigilance establishment or CB CID, as the case may be, and submit progress report on 16.1.2012.

(III) In case the State Government finds it necessary to pass order relating to continuation of firearm licences no 551/1983 and 5469 possessed by respondent no.7, it can take such action as permissible in law and this judgment shall not come in its way.

(IV) Registrar General is directed to send a copy of this order forthwith to Chief Secretary U.P. Government for information and compliance.

(V) This writ petition stands disposed of for all purposes except for perusal of the progress report for which it shall be listed on 16.1.2012.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2011

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No.44591 Of 2011

Smt. Kalpana Agrahari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Mishra

Counsel for the Respondents:
Sri Amit Sthalekar
Sri Yashwant Verma
C.S.C.

Constitution of India-Article 226-Right to appointment once selection process started-appointment letter issued-can not be file up such vacancy-by transfer from another judgeship-held-joining within one month-transfer employee accommodated any other place or to adjust in future vacancy.

Held: Para 10

Respectfully following the aforesaid two decisions, I am of the view that the filling up vacancy by transfer of Arun

Kumar Singh from Etawah Judgeship to Banda Judgeship after the advertisement for filling up the 14 vacancies and on completion of the selection process and the issue of appointment letter to the petitioner being selected was not justified and has no consequence and, therefore, the petitioner is entitled to be appointed in pursuance of the vacancy advertised.

Case law discussed:

2010 (1) ESC 250 (All); 2008 (4) ESC 2799 (All) (DB); 2006 (5) AWC 4682

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

1. Heard Sri S.K.Mishra, learned counsel for the petitioner, learned Standing Counsel appearing on behalf of respondent no.1 and Sri Yashwant Verma, learned counsel appearing on behalf of respondent nos.2 and 3.

2. For the purpose of filling up of 14 vacancies in Class III category in Banda Judgeship, a selection process was initiated in pursuant to which the Selection Committee drew up its minutes and the same was accepted by the District Judge in pursuance of which advertisement was issued and examination was h0.79"eld on 27.02.2011. The Selection Committee has been constituted to complete the selection process, get the copies of the examinees examined and get the result declared. The petitioner was selected in Class III cadre in general category of the candidates. An appointment letter was issued on 30.03.2011 by the District Judge, Banda appointing the petitioner on temporary basis. The petitioner was asked to report for joining within fifteen days and further asked to bring medical certificate, issued by Chief Medical Officer, Banda and the original educational certificates. When the petitioner appeared for joining, she has not been allowed to join.

3. A letter dated 07.04.2011 was issued by Senior Administrative Officer, Banda to the petitioner stating therein that he has been asked by the District Judge, Banda to inform you that you have been selected in Class III post but since by the order of Hon'ble High Court, one Sri Arun Kumar Singh has been transferred from Etawah Judgeship to Banda Judgeship, one post has been filled by the transfer and the total vacancy has been reduced by one post, therefore, it is not possible to appoint you and in case in future if any vacancy will be available you will be given appointment. According to the petitioner, subsequently five posts of Class III posts fallen vacant due to the reasons mentioned in paragraph no.12 of the writ petition, which is not disputed but in paragraph no.13 of the counter affidavit, it is stated that it relates to the future vacancies which came into existence after the culmination of the selection process. When the vacancy was occurred, the petitioner wrote several letters annexed along with the writ petition claiming her appointment. When the petitioner could not be given appointment, the petitioner filed the present writ petition seeking a direction to the District Judge, Banda permitting the petitioner to join in pursuance of the order dated 30.03.2011 further to count his seniority since 05.04.2011. In paragraph no.4 of the counter affidavit, it is stated that by letter dated 29.03.2011 issued by High Court, a Class III employee of Etawah Judgeship was relieved from Etawah on 31.03.2011 and joined at Banda Judgeship on 01.04.2011.

4. Learned counsel for the petitioner submitted that once for filling up of 14 existing vacancies in respect of which there is no dispute, the process of selection has been started and the petitioner has been selected and the appointment letter has been issued, the petitioner's appointment can not be denied on the ground that one vacancy has been reduced on account of the transfer of a Class III employee from Etawah Judgeship to Banda Judgeship. He submitted that once the selection process has been initiated and culminated by the completion of selection process and by issuance of appointment letter, the post can not be reduced by transferring one of the employee to Banda Judgeship and such transfer is illegal and unjustified and could not be given effect to. He further submitted that the petitioner has been issued appointment letter on 30.03.2011 while Arun Kumar Singh has been relieved on 31.03.2011 from Etawah Judgeship. After the issue of appointment letter to the petitioner, such transfer could not be given effect to and the total vacancies could not be reduced by one post on account of transfer. Therefore, the petitioner is entitled to be permitted to join in pursuance of the appointment letter dated 30.03.2011.

5. In support of the contention he relied upon the decision of the learned Single Judge of this Court in the case of **Raja Ram etc. Vs. State of U.P. and others, reported in 2010 (1) ESC, 250 (All),** wherein it has been held that once process of selection by direct recruitment has begun by issuance of an advertisement inviting applications, same can not be filled by transfer and also on the Division Bench decision in the case of **Smt. Amita Sinha Vs. State of U.P. and others, reported in 2008 (4) ESC, 2799 (All) (DB).**

6. Sri Yashwant Verma, learned counsel appearing on behalf of respondent nos.2 and 3 submitted that mere by issuance of appointment letter, the right to join did not occur in case there was no vacancy. He submitted that it is true that the petitioner was selected and the appointment letter was issued but meanwhile Arun Kumar Singh has been transferred from Etawah Judgeship to Banda Judgeship and, therefore, one vacancy was reduced and the petitioner's claim of appointment has rightly been denied. He further submitted that after the completion of selection process, the petitioner can not claim her appointment against future vacancy.

7. In support of his argument, he relied upon the Division Bench decision of this Court in the case of **District Judge, Baghpat and another Vs. Anurag Kumar and others, reported in 2006 (5) AWC, 4682.**

8. I have considered the rival submissions. The pleading in the writ petition are not very sound but in sum and substance the relief claimed by the petitioner is that in pursuance of selection and appointment letter, she should be allowed to join. The Division Bench of this Court in the case of Smt. Amita Sinha (Supra) passed in Special Appeal upheld the view of the learned Single Judge, who has held that once the process of selection by Commission has begun by issuance of advertisement inviting applications, the vacancy can not be filled by transfer. Subsequent appointment by transfer after the issue of advertisement was held invalid by learned Single Judge. The

Division Bench of this Court has held that upto the stage of computation of vacancies, appointment by transfer can be made and after the advertisement of the vacancy by Commission, such vacancy can not be filled up by transfer.

9. The learned Single Judge in the case of **Raja Ram etc. Vs. State of U.P. and others (Supra)** has held as follows:

"So far as the second issue qua appointment by way of transfer of a teacher against advertised vacancy is concerned, a Division Bench of this Court in the case of Smt. Amita Sinha Vs. State of U.P. And others (Supra) has held that once the process of selection by direct recruitment has begun by issuance of an advertisement inviting applications, the same can not be filled by transfer. Hence in view of the said Division Bench judgment, appointments made by transfer against an advertised vacancy of Advertisement No.1 of 2005 is rendered illegal and of no consequence."

10. Respectfully following the aforesaid two decisions, I am of the view that the filling up vacancy by transfer of Arun Kumar Singh from Etawah Judgeship to Banda Judgeship after the advertisement for filling up the 14 vacancies and on completion of the selection process and the issue of appointment letter to the petitioner being selected was not justified and has no consequence and, therefore, the petitioner is entitled to be appointed in pursuance of the vacancy advertised.

11. The decision cited by learned counsel appearing on behalf of respondent nos.2 and 3 in the case of **District Judge, Baghpat and another Vs. Anurag Kumar and others (Supra)** is of no help. It does not decide the issue involved in the present case. It only provides, 1) the advertisement of number of post not existing on the day of advertisement, was de hors the Rules, and 2) the selection of the persons against future vacancy which occurred after advertisement is illegal.

12. In the circumstances, the writ petition is allowed and the District Judge, Banda is directed to permit the petitioner to join within a period of one month from the date of presentation of the certified copy of this order. It is further directed that the District Judge, Banda may request the Hon'ble High Court to transfer Arun Kumar Singh to any other place or to adjust him against future vacancy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2011

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition N0. 52048 of 2011

Vikas Jauhari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Vikas Tripathi

Counsel for the Respondents:
Ms. Suman Sirohi (S.C.)
C.S.C.

U.P Recruitment of Dependents of Government Servants (Dying in Harness) Rule 1974-Rule-2(c), 4(42) readwith Section 12 of Hindu Adoption and maintenance Act 1955-compassionate Appointment-claimed by adopted son-

rejection on ground- absence of specific provision for appointment of adopted son-held-illegal adopted child shall be deemed the child of his/her adopted father/mother-entitle for appointment on compassionate ground.

Held: Para 10

From the perusal of above section, it is clear that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family."

Case law discussed:

1994 (68) FLR 283; (1996) 1 UPLBEC 4; 2005 (4) ESC 2706 (All); 2009 (3) ESC 1869 (All); 2011 (2) ADJ 511

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

1. Heard Sri Ashok Khare, learned Senior Advocate, appearing on behalf of the petitioner and Ms. Suman Sirohi, learned Standing Counsel.

2. With the consent of the parties the writ petition is disposed of finally.

3. The petitioner, being adopted son of the deceased employee, claimed compassionate appointment. His claim for compassionate appointment has been rejected by the order dated 13.6.2011 on the ground that there is no provision for compassionate appointment for adopted son, which is being challenged in the present writ petition.

4. Learned counsel for the petitioner submitted that under the Uttar Pradesh Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974 in the category of dependant's son is mentioned. "Son" is defined under the General Clauses Act, 1897 (hereinafter referred to as the ("Act").

5. I find substance in the argument of learned counsel for the petitioner.

6. Section 2 (c) of U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 defines the family as follows:

"(i) Wife or husband;

(ii) Sons;

(iii) Unmarried and widowed daughters.

(iv) If the deceased was unmarried Government servant, brother unmarried sister and widowed mother dependent on the deceased Government servant."

7. Son is not defined under the Rules, 1974.

8. Section 4 (42) of the Act defines son, which says that "son" in the case of anyone the law applicable to whom permits adoption, shall include an adopted son. Therefore, adopted son is also entitled for compassionate appointment.

9. Sections 12 and 16 of the Hindu Adoptions and maintenance Act, 1956 which provides the effect of adoption are extract as under:

"12. Effects of adoption---An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such

date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that ---

(a) The child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) Any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of h is or her birth;

(c) The adopted child shall not divest any person of any estate which vested in him or her before the adoption."

16.Presumption as to registered documents relating to adoption--- Whenever any document registered under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of the Act unless and until it is disproved."

10. From the perusal of above section, it is clear that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family."

11. In this view of the matter, the adopted son is as good the real son.

12. Reliance is placed on the decisions of this Court in the case of ***Sunil Saxena Vs. State of U.P. And others, reported in 1994 (68) FLR, 283, Singhasan Gupta Vs. State of U.P. and another, reported in (1996) 1 UPLBEC, 4, Ravindra Kumar Dubey Vs. State of U.P. and others, reported in 2005 (4) ESC, 2706 (All), in the case of Shiv Prasad Vs. State of U.P. and others, reported in 2009(3) ESC, 1869 (All)*** and in the case of ***Jagat Pal Vs. State of U.P. and others, reported in 2011 (2) ADJ, 511***, learned Single Judge has held that adopted son will be treated as son for the purpose of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974.

13. In view of the above, I am of the considered view that the adopted son also falls within the definition of family defined under section 2 (c) of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 and entitled for the claim of compassionate appointment.

14. In the result, the writ petition is allowed. The impugned order dated 6/13.6.2011 is set aside and the respondent is directed to consider the claim of the petitioner for compassionate appointment. However, before giving the appointment of the adopted son, the authority concerned should examine the validity of the adopted son with reference to the provisions of Hindu Adoptions and Maintenance Act, 1956.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2011

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

Civil Misc. Writ Petition No. 52932 OF 2011

Aporv Jindal Director M/s Jindal Frozen Food Pvt. Ltd. ...Petitioner
Versus
Mr. Amit Kumar Kubba & another ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Vijay Prakash

Counsel for the Respondents:
Sri Manish Tiwari
Sri R.K. Shukla

Code of Criminal Procedure-order XXI Rule 89, rule 92 (2)-Petitioner purchased the property in question from judgment debtor-after knowledge about auction sale in execution proceeding-moved application-for impleadment as party with prayer to set-a-side-the auction-allowed by execution court-after that the execution court has to pass formal order setting-a-side the auction sale-strict in accordance with provision of Rule 89 and 92 not beyond that-argument when application allowed there is automatic non existence of auction sale-held-misconceived-with-consequential directions-petition disposed of.

Held: Para 14

This Court is of the opinion that in view of the provisions of sub-rule (2) of Rule 92, the order has to be passed by the court for setting aside the sale on the requirements as indicated therein, read with requirements of Rule 89 on their being complied with. This therefore requires the passing of an order after applying mind to the ingredients that are required to be examined in terms of Rule 89 and Rule 92 as indicated hereinabove. In view of this, the contention raised on behalf of the petitioner that the sale will be presumed to have been set aside under the Order dated 7th August, 2007 does not appear to be correct, inasmuch as, an order under the aforesaid provisions has to be passed by the court concerned. The issue relating to the enquiry to be made is being apprehended by the petitioner to be a full scale enquiry on the merits of the claim of the petitioner. This apprehension in my opinion is misplaced, inasmuch as, the enquiry which has to be made is only confined to the provisions of Rule 89 and Rule 92 and not beyond that.

Case law discussed:
2004 ACJ 683 (Paras 9 and 10); AIR 1935 Madras Pg. 842; 1962 ALJ 735; 2004 ACJ 683

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

1. Heard Sri Shashi Nandan learned Senior Counsel along with Sri Vijay Prakash for the petitioner, Sri Manish Tiwari for the respondent no. 1 - decree holder and Sri S.K. Shukla for the auction purchaser - respondent no. 2. The dispute falls within a very short campus in this petition which assails the order passed by the court below rejecting the application moved by the petitioner for consigning the execution proceedings in Execution Case No. 44 of 2004. Learned counsel for the parties agree that the petition be disposed of finally as no further affidavits are necessary, the issue involved being purely legal.

2. The background in which the said application came to be moved is that the property in dispute became subject matter of attachment during execution proceedings on 10th March, 2005. The petitioner is stated to have purchased the

property from the judgment-debtor on 12th January, 2006. In between the attached property was put to auction which took place on 19th October, 2006 in which the respondent no. 2 alleges to have purchased the property. Immediately thereafter, upon making the deposits on 15th November 2006, the petitioner moved an application on 21st November 2006 under Order XXI Rule 89 C.P.C., praying for setting aside the sale which was numbered as Application No. 3-C. Objections were filed to the said application by the decree holder and the auction purchaser both, confined only to locus of the petitioner to move the said application. The said objections were heard and ultimately the application filed by the petitioner came to be allowed on 7th August, 2007. The decree holder and the auction purchaser both filed revisions against the said order dated 7th August, 2007 before this Court. The revision filed by Sanjai Batra the auction purchaser was numbered as Civil Revision No. (12) of 2008 which was dismissed as withdrawn by the following order:-

"BY THE COURT

After the matter was heard for some time, learned counsel appearing for the applicant made a prayer to dismiss the instant revision as withdrawn in as much as the same is not maintainable.

Prayer made is allowed.

Revision stands dismissed as withdrawn.

Dt/-122.2008 Sd/-Krishna Murari,J."

3. The revision filed by the respondent no. 1 decree holder was dismissed on 14th July, 2009 by the following order:-

"Hon'ble Devi Prasad,J.

The revisionist has purchased a property which is subject matter of execution proceeding. The respondent has filed an objection which was opposed by the revisionist. Learned trial Court has recorded a finding that in view of the provision contained in Order XXI Rule 89 CPC, any person having interest in the property in dispute shall have right to file objection. The objection filed by the respondent as Paper No.3-Ga has been accepted by the learned Civil Judge (Senior Division), Ghaziabad.

The order does not seem to suffer from any impropriety or illegality.

The revision is devoid of merit. It is accordingly dismissed."

4. The respondent no. 1 who is the decree holder assailed the order of this Court before the apex court in Special Leave Petition No. 7732 of 2010. The said S.L.P. was dismissed observing that the petitioner may raise objections that may be available to him in law. The order passed by the apex court is reproduced herein under:-

"Delay condoned.

The Special Leave Petition is dismissed.

However, we request the Trial Court to dispose of the pending proceedings as

expeditiously as possible, preferably within six months from today.

It is needless to observe that the petitioner is entitled to raise all the objections as may be available to him in law."

5. The petitioner moved an application for consigning the proceedings to records in view of the fact that the application filed by him under Order XXI Rule 89 C.P.C. had already been allowed, which application came to be contested, whereafter the order came to be passed on 11th March, 2011 holding that the application under Order XXI Rule 89 CP.C. had not been decided on merits and was only an acceptance of the locus of the petitioner to move the application under Order XXI Rule 89 C.P.C.

6. The petitioner came up before this Court in Civil Misc. Writ Petition No. 18951 of 2011 which was disposed of by the following order dated 1st April, 2011:-

"Hon'ble Rajes Kumar,J.

Heard Sri Neeraj Tripathi, learned counsel for the petitioner and learned Standing Counsel.

Learned counsel for the petitioner submitted that the petitioner had purchased the property in dispute from judgment debtor. In pursuance of the decree, the property was put to auction on 19.10.2006. The petitioner moved an application under Order XXI Rule 89 C.P.C. for setting aside the auction after complying with the necessary requirement. The said application has been allowed on 07.08.2007, which is annexure-7 to the writ petition. The petitioner moved an application before the court below that when the application under Order XXI Rule 89 C.P.C. has been allowed, no further order is required and, therefore, the file pertaining to the case no.256 of 2006 be consigned to record. On the said application, the trial court has passed the impugned order dated 11.03.2011 wherein it has been held that the said application has not been decided on merit for which 25.03.2011 has been fixed. He further submitted that once the application under Order XXI Rule 89 C.P.C. has been allowed, there is no justification to hear the application on merit again.

In view of the aforesaid facts and circumstances, the court is of the view that let the petitioner may file a fresh application before the court below taking all the pleas which have been taken in the writ petition disputing the further decision on merit on the application under 21 Rule 89 C.P.C. In case, if the petitioner files any application within a period of two weeks, the trial court is directed to dispose of the said application after giving opportunity of hearing to all concerned parties within another period of two months before proceeding with the case further by a reasoned order.

For a period of ten weeks, the impugned order dated 11.03.2011 passed in Misc. Case No.256 of 2006 (Apurva Jindal Vs. Amit Kumar Kubba and others) shall be kept in abeyance and shall be subject to the fresh order which will be passed.

The writ petition stand disposed of.
Order Date :- 1.4.2011"

7. Consequently a detail application was again moved by the petitioner and the same has again been rejected on the ground that the matter is yet to be decided on merits relating to the setting aside of the sale and therefore the same will be heard further on 30th September, 2011. Aggrieved, the petitioner is before this Court praying for quashing of the said order and for a direction that the court may proceed keeping itself confined to the request of consigning the records made on behalf of the petitioner.

8. Sri Shashi Nandan submits that the approach of the court below is absolutely erroneous, inasmuch as, no objections to the application moved under Order XXI Rule 89 C.P.C. had been made by the opposite parties except for raising an objection to the locus of the petitioner and in this view of the matter the application which has been allowed on 7th August, 2007 will be presumed to have accepted the prayer of setting aside the sale. A mere formality of passing a formal order remains. There is no occasion for the court to now proceed to hear the entire matter on merits as observed in the impugned order. It is further submitted that so far as the respondent no. 2 -auction purchaser is concerned, his revision filed before this Court against the order dated 7th August, 2007 had been dismissed as withdrawn, and therefore he will be presumed to have abandoned any future claim in the matter.

9. It is further contended that the court below has misconstrued the observations made by this Court in the judgment dated 1st April, 2011 and has committed the same error and in effect the sale has to be set aside which the court is obliged to do in view of the law laid down by the apex court in the case of **Challamane Huchha Gowda Vs. M.R. Tirumala & another, 2004 ACJ 683 (Paras 9 and 10).** He has further invited the attention of the court to the Full Bench decision of the Madras High Court in the case of **L.A. Krishna Ayyar Vs. Arunachalam Chettiar,** reported in **AIR 1935 Madras Pg. 842** and the Division bench judgment of this Court in the case of **Moolchand Vs. Bishwanath Prasad Tilbha Deshwar & others**, reported in **1962 ALJ 735.**

10. Sri Shashi Nandan has further laid stress on the words used in Rule 89 of Order XXI read with Rule 92(2) of Order XXI to contend that in the absence of any objections which could have been possibly made, there is no option for the court except to pass an order for setting aside the sale which in effect has already been done in the order dated 7th August, 2007.

11. Replying to the said submissions on behalf of the petitioner, learned counsel for the respondents contends that the order dated 7th August, 2007 makes it clear that the matter has to be heard on the issue relating to the setting aside of the sale and it is for the said purpose that the court while proceeding to pass the order on 7.8.2007 had observed that the file shall be placed alongwith the records of the main execution proceedings in Execution Case No. 44 of 2004 for further hearing. He therefore submits that the petitioner cannot be permitted to pre-empt this part of the action of the court. The answering respondents are also entitled to raise their objections in relation to the aspect of setting aside the sale. He therefore contends that the impugned order does not suffer from any infirmity

and hence does not require any interference by this Court.

12. Having heard learned counsel for the parties it would be appropriate to gainfully reproduce Rules 89 and 92 of Order XXI for the purpose of this case:-

"89. Application to set aside sale on deposit

(1) Where immovable property has been sold in execution of a degree, 1[any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person,] may apply to have the sale set aside on his deposition in Court,-

(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and

(b) for payment, to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

92. Sale when to become absolute or be set aside.

(1) When no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:

1[Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.]

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within 2[sixty days] from the date of sale, 3[or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court ***shall make an order setting aside the sale****]:*

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

2[Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.]

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

3[(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

3(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court directs, be revived at the stage at which the sale was ordered.]"

13. A perusal of the said provisions makes it clear that a person who claims an interest in the property is entitled to move an application for setting aside the sale. This part of the issue already stands concluded in favour of the petitioner by the orders which have been passed by this Court and culminating under the order passed by the apex court. The petitioner therefore has an interest in the property and therefore entitled to make a prayer for the passing of an order in relation to the setting aside of the sale.

14. The contention seems to be narrowed down between the parties on the issue as to what should be the extent of the enquiry which can be made by the court while proceeding to pass such an order. This Court is of the opinion that in view of the provisions of sub-rule (2) of Rule 92, the order has to be passed by the court for setting aside the sale on the requirements as indicated therein, read with requirements of Rule 89 on their being complied with. This therefore requires the passing of an order after applying mind to the ingredients that are required to be examined in terms of Rule 89 and Rule 92 as indicated hereinabove. In view of this, the contention raised on behalf of the petitioner that the sale will be presumed to have been set aside under the Order dated 7th August, 2007 does not appear to be correct, inasmuch as, an order under the aforesaid provisions has to be passed by the court concerned. The issue relating to the enquiry to be made is being apprehended by the petitioner to be a full scale enquiry on the merits of the claim of the petitioner. This apprehension in my opinion is misplaced, inasmuch as, the enquiry which has to be made is only confined to the provisions of Rule 89 and Rule 92 and not beyond that. The order has to be passed and to that extent the court is obliged to pass an order in view of the decision relied upon by the learned counsel for the petitioner in the case of **Challamane Huchha Gowda Vs. M.R. Tirumala & another**, reported in **2004 ACJ 683** where the apex court has observed as under:-

"Because the purpose of Rule 21 is to ensure the carrying out of the orders and decrees of the Court, once the judgment-debtor carries out the order or decree of the Court, the execution proceedings will correspondingly come to an end. It is to be noted that the Rule does not provide that the application in a particular form shall be filed to set aside the sale. Even a memo with prayer for setting aside sale is sufficient compliance with the said Rule. Therefore, upon the satisfaction of the compliance with conditions as provided under Rule 89, it is mandatory upon the Court to set aside the sale under Rule 92. And the Court shall set aside the sale

after giving notice under Rule 99(2) to all affected persons."

15. It is therefore an obligation of the court to pass such an order as it is mandatory as observed by the Apex Court. The recital contained in the order dated 7th August, 2007 does not indicate that the court had formally passed an order for setting aside the sale which requirement has to be fulfilled for the passing of an order and therefore the writ petition stands disposed of with a direction to the court concerned to proceed to pass an order in accordance with law in the light of the observations made hereinabove within a period of two months from the date of presentation of a certified copy of this order before the court concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2011

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition N0. 55804 of 2011

Ajay Kumar ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Pankaj Srivastava

Counsel for the Respondents:
Ms. Suman Sirhio
C.S.C.

Constitution of India Article 226-U.P. Recruitment of Dependents of Governments Servants Dying in Harness Rule 1974-compassionate appointment-petitioner's father working as Forest Guard on daily wages basis-died in harness-even worked for more than 3 years and given salary in Pay Scale-in view of Full Bench decision of Pawan Kumar case not entitled for compassionate appointment.

Held: Para 8

The Full Bench of this Court in the case of Pawan Kumar Yadav vs. State of U.P. and others (supra) on consideration of Rules 5 (1) and 2 (a) of the Dying in Harness Rules, 1974 has held that the dependants of the daily wager or work charge employee not holding any post either substantive or temporary and not appointed in any regular vacancey; even if he worked for more than three years before the death is not entitled for appointment on compassionate ground.

Case law discussed:
(2006) 9 SCC-337; (2009) 2 SCC (L&S) 304; [2010 (8) ADJ 664 (FB)]; Pawan Kumar Yadav vs. State of U.P. and others (supra)

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

1. The petitioner is claiming compassionate appointment on account of death of his father, who died on 29.9.2007 under the U.P. Recruitment of Dependents of Government Servants Dying in Harness, Rules, 1974 (hereinafter referred to as ("Dying in Harness, Rules, 1974").

2. The contention of the petitioner is that his father was employed as a daily wager on the post of Forest Guard in the year 1984 in Badaun. In pursuance of the order of the apex Court in the case of ***State of U.P. and others Vs. Putti Lal, reported in (2006) 9 SCC-337,*** he was getting minimum pay-scale of the pay-scale of the regular employee. On 24.5.2008, the petitioner's mother had requested respondent to extend the benefit of Dying in Harness Rules, 1974 to the petitioner, the son of the deceased, and

also claimed pension. The Divisional Director Social Forestry Division, Badaun, District Badaun wrote a letter to the District Magistrate, Badaun dated 3.6.2008 stating therein that Late Sri Ram Pal was working as a daily wager in the minimum of pay-scale, died on 29.9.2007 and since he was working as a daily wager, the dependants of the deceased are not entitled for the benefit of pension and compassionate appointment. The compassionate appointment has accordingly been denied. Being aggieved, the petitioner filed the present writ petition.

3. Heard Sri Pankaj Srivastava, learned cousnel for the petitioner and Ms. Suman Sirohi, learned Standing Cousnel for the respondents.

4. Learned counsel for the petitioner submitted that father of the petitioner was regularly appointed employee and put three years continuous service therefore, under sub-clause (iii) of clause (a) of Rule 2 of the Dying in Harness Rules, 1974, the father of the petitioner was covered under the Government servant and, therefore, the petitioner is entitled for the compasionate appointment.

5. Ms. Suman Sirohi, learned Standing Counsel submitted that the father of the petitioner was engaged as a daily wager. He was neither regularly appointed nor his appointment was against the regular vacancy and, therefore, the father of the petitioner was not Government servant as defined under clause (a) of Rule 2 of the Dying in Harness Rules, 1974. She further submitted that Rule 2 (a) (iii) of the Dying in Harness Rules, 1974 came up for consideration before the apex Court in the case of ***General Manager, Uttaranchal Jal Sansthan vs. Laxmi Devi and others, reported in (2009) 2 SCC (L&s) 304*** wherein it has been held that the daily wager not employed in regular vacancy is not a Government servant and not entitled for compassinate appointment. She further submitted that the issue involved is squarely covered by the Full Bench decision of this Court in the case of ***Pawan Kumar Yadav vs. State of U.P. and others, reported in [2010 (8) ADJ 664 (FB)]*** wherein it has been held that dependants of the daily wager or work charge employee, not holding any post either substantive or temporary and not appointed in any regular vacancy; even if he worked for three years before the death not entitled for appointment on compassinate ground.

6. I have considered the rival submissions.

7. The issue involved is no more res integra. It is not the case of the petitioner that the father of the petitioner was engaged against the regular vacancy following the proper procedure laid down for the recruitment to the post. It is also not the case of the petitioner that the service of his father had ever been regularized. Merely because the father of the petitioner was getting the minimum of pay-scale in view of the decision of the apex court in the case of ***State of U.P. and others Vs. Putti Lal, reported in (2006) 9 SCC-337*** (supra), the status of the employment will not change. His engagement was a daily wager and on the date of the death he worked as a daily wager. He was not regularly appointed employee against the regular vacancy. The apex Court in the case of ***General Manager, Uttaranchal Jal Sansthan vs.***

Laxmi Devi and others (supra) has considered Rule 2 (a) (iii) of the Dying in Harness Rules, 1974 and has held that the daily wager not employed in regular vacancy is not a Government servant under Rule 2 (a) (iii) of the Dying in Harness Rules, 1974 and the dependants of such daily wagers are not entitled to be considered for compassionate appointment. The word "regular vancancy" has been interpretated as means the vacancy which occurs against a sanctioned post of a cadre strength. It has been further held that regular vancancy cannot be filled up except in terms of the recruitment rules as also upon compliance with the constitutional scheme of equality. In view of the Explanation appended to Rule 2 (a), for the purpose of this case would, however, assume that such regular appointment was not necessarily to be taken recourse to. In such an event sub-clause (iii) of clause (a) as also the Explanation appended thereto would be rendered unconstitutional. The provision of law which ex facie violates the equality clause and permits appointment through the side-door being unconstitutional must be held to be impermissible and in any event requires strict interpretation. It was, therefore, for the respondents to establish that at the point of time the deceased employees were appointed, there existed regular vacancies. The apex Court further held that merely because the deceased was drawing salary on a regular scale of pay, the same would not mean that there existed a regular vacancy.

8. The Full Bench of this Court in the case of ***Pawan Kumar Yadav vs. State of U.P. and others*** (supra) on consideration of Rules 5 (1) and 2 (a) of the Dying in Harness Rules, 1974 has held that the dependants of the daily wager or work charge employee not holding any post either substantive or temporary and not appointed in any regular vacancey; even if he worked for more than three years before the death is not entitled for appointment on compassionate ground.

9. In view of the above, I do not find any merit in the claim of the petitioner and is liable to be rejected. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 58289 of 2011

Deputy General Manager, Bhartiya Door Sanchar Nigam Ltd. ...Petitioner
Versus
Ram Kumar Sharma and others ...Respondents

Counsel for the Petitioner:
Sri K.N. Mishra
Sri Abhishek Mishra

Counsel for the Respondents:
.....

<u>Indian Telegraph Act 1885-Section7-B</u>-jurisdiction of permanent Lok Adaalat-a creation of statute-order passes by P.L.A.-not simply arbitration award-but adjudicationary roll to play-warrants nor interference

Held: Para 6

It is contended that Indian Telegraph Act, 1885 (hereinafter referred to as "Act 1885") is a special Act and if there is any deficiency on account of system failure, no compensation is payable unless it is

shown that there is negligence of departmental officials. He also contended further that in view of Section 7B of Act 1885, dispute could have been referred to Arbitration, and, Permanent Lok Adalat had no jurisdiction in the matter. Reliance is placed on Apex Court's decision in Civil Appeal No.7687/04 decided on 1st September, 2009 (General Manager, Telecom Vs. M.Krishnan & Anr.) wherein Apex Court held that in view of remedy provided under Section 7-B of Indian Telegraph Act, the remedy under Consumer Protection Act by implication is barred. Indian Telegraph Act is special Act and Legal Services Authorities Act, 1987 is general Act as such special law overrides general law. Relying thereon it is contended that Permanent Lok Adalat had no jurisdiction to adjudicate regarding compensation. In this regard reliance is also placed on Apex Court's decision in Chairman, Thiruvalluvar Transport Corporation Vs. Consumer Protection Council, 1995(2) SCC 479. It is thus contended that the impugned order is wholly without jurisdiction.

Case law discussed:

Civil Appeal No.7687/04 decided on 1st September, 2009 (General Manager, Telecom Vs. M.Krishnan & Anr.); 1995(2) SCC 479; JT2008(6) SC 517

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

1. Heard Sri K.N.Mishra, learned counsel for the petitioner and perused the record.

2. The writ petition is directed against order dated 30th August, 2011 passed by Permanent Lok Adalat, Aligarh holding petitioner liable for payment of damages to the tune of Rs.5,000/- besides expenses to respondent No.1.

3. The facts in brief given rise to the present dispute are as under:

4. The respondent No.1 booked a telegram on 17th June, 2011 at Lucknow to transmit a massage to Senior Treasury Officer, Aligarh for extension of his earned leave from 18th June, 2011 to 28th June, 2011. The said telegram was not delivered till 14th July, 2011 as a result whereof respondent No.1 suffered deduction of salary for the period of absence and therefore he claimed damages/ compensation.

5. The defence taken by petitioner is that telegram which was received at Aligarh, was illegible and therefore was returned to Lucknow. The Central Telegraph office was also informed of the situation. Thereafter on 9th July, 2011 the matter was examined and technical fault in the system was rectified whereafter telegram was obtained in legible condition and handed over to one Sri Jabar Singh (T.M.) for distribution. However, he could not distribute the same being second Saturday and Sunday and thereafter from 11th to 13th July, 2011 he was absent due to illness. He could distribute the telegram on and after 14th July, 2011 after rejoining service.

6. It is contended that Indian Telegraph Act, 1885 (hereinafter referred to as "Act 1885") is a special Act and if there is any deficiency on account of system failure, no compensation is payable unless it is shown that there is negligence of departmental officials. He also contended further that in view of Section 7B of Act 1885, dispute could have been referred to Arbitration, and, Permanent Lok Adalat had no jurisdiction in the matter. Reliance is placed on Apex Court's decision in **Civil Appeal No.7687/04 decided on 1st September, 2009 (General Manager, Telecom Vs.**

M.Krishnan & Anr.) wherein Apex Court held that in view of remedy provided under Section 7-B of Indian Telegraph Act, the remedy under Consumer Protection Act by implication is barred. Indian Telegraph Act is special Act and Legal Services Authorities Act, 1987 is general Act as such special law overrides general law. Relying thereon it is contended that Permanent Lok Adalat had no jurisdiction to adjudicate regarding compensation. In this regard reliance is also placed on Apex Court's decision in **Chairman, Thiruvalluvar Transport Corporation Vs. Consumer Protection Council, 1995(2) SCC 479.** It is thus contended that the impugned order is wholly without jurisdiction.

7. However, I find no force in the submission.

8. So far as applicability of Section 7B of Act 1885 is concerned, I do not find that the same has any application in a case like the present one.

9. Section 7B of Act 1885 reads as under:

"Arbitration of disputes: *(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this section.*

(2) The award of the arbitrator appointed under sub-section (1) shall be conclusive between the parties to the dispute and shall not be questioned in any court."

10. Here is not a case raising a dispute relating to telephone bills. Whenever an adjudicatory forum is provided in a statute, which is a Special Act, scope of adjudicatory power under such special Act will confine to the provision concerned and shall not be stretched to the cases which are not apparently covered thereby.

11. In the case in hand petitioner's services were availed by an individual but the petitioner committed default in rendering such service. It could not render service in the manner it was expected. The sufferer therefore has come up for claiming damages on account of failure on the part of petitioner to serve the individual concerned against payment it had received for rendering a particular service. Such matter apparently would not fall within the scope of Section 7B of Act 1885 and therefore it cannot be said that decision of Apex Court in **General Manager, Telecom (supra)** would be applicable to the case in hand.

12. Coming to the question whether the matter in question would be within the ambit of Permanent Lok Adalat, it would be appropriate to have a bird eye view of the provisions of the relevant statute. The Legal Services Authorities Act, 1987 (hereinafter referred to as "Act 1987") was enacted with an object to secure operation of legal system and promoting justice on the basis of equal opportunity. Section 22B talks of establishment of Permanent Lok Adalats for exercising

such jurisdiction in respect of one or more "public utility services" and for such areas as may be specified in the notification. The term "Public Utility Service" has been explained in Section 22A(b) of Act 1987 and reads as under:

"public utility service" means any-

(i) transport service for the carriage of passengers or goods by air, road or water; or

(ii)postal, telegraph or telephone service; or

(iii)supply of power, light or water to the public by any establishment; or

(iv)system of public conservancy or sanitation; or

(v)service in hospital or dispensary; or

(vi)insurance service.

and includes any service which the Central Government or the State Government, as the case may be, may, in the public interest, by notification, declare to be a public utility service for the purpose of this chapter."

13. It clearly includes postal, telegraph and telephone service. Therefore, the petitioner is a service covered by the term "Public Utility Service" under Section 22A(b) of Act 1987 and therefore Permanent Lok Adalat created under Section 22B of Act 1987 would have jurisdiction thereupon.

14. It is not the case of the petitioner that in the notification issued by the competent authority creating Permanent Lok Adalat there is no mention of postal, telegraph or telephone service or that the petitioner's public utility service is excluded therein. On this aspect in fact there is no challenge or no averment in the entire writ petition. The only challenge is vis a vis Section 7B of Act 1885 and legal Services Authorities Act, 1987. In view of specific inclusion of petitioner as "public utility service" under Section 22A(b) of Act 1987 in respect whereto a Permanent Lok Adalat can be established under Section 22B of Act 1987, it cannot be said that jurisdiction can be excluded. A dispute can be raised before Permanent Lok Adalat provided the parties had not already taken up their matter before any Court. Making observation in the context of the provisions of Permanent Lok Adalat in Act 1987, the Apex Court in para 16 of the judgment in **Inter Globe Aviation Ltd. (supra)** said:

"But in this case, the Respondent did not approach a "court". The claim was filed by the Respondent before a Permanent Lok Adalat constituted under Chapter VI-A of the Legal Services Authorities Act, 1987 ('LSA Act' for short). Section 22C provides that any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for settlement of the dispute. When the statement, additional statements, replies etc., are filed in an application filed before it, the Permanent Lok Adalat is required to conduct conciliation proceedings between the parties, taking into account, the circumstances of the dispute and assist the parties in their attempt to reach an amicable settlement of the dispute. If the parties fail to reach

an agreement, the Permanent Lok Adalat is required to decide the dispute. The Permanent Lok Adalats are authorized to deal with and decide only disputes relating to service rendered by notified public utility services provided the value does not exceed Rupees Ten Lakhs and the dispute does not relate to a non-compoundable offence. Section 22D provides that the Permanent Lok Adalat shall, while conducting the conciliation proceedings or deciding a dispute on merit under the LSA Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice and shall not be bound by the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872. Section 22E provides that every award of the Permanent Lok Adalat shall be final and binding on the parties and could be transmitted to a civil court having local jurisdiction for execution. Each and every provision of Chapter VIA of LSA Act emphasizes that is the Permanent Lok Adalatis a Special Tribunal which is not a 'court'. As noted above, Section 22C of the LSA Act provides for an application to the Permanent Lok Adalat in regard to a dispute before the dispute is brought before any court and that after an application is made to the Permanent Lok Adalat, no party to the application shall invoke the jurisdiction of any court in the same dispute, thereby making it clear that Permanent Lok Adalat is distinct and different from a court. The nature of proceedings before the Permanent Lok Adalat is initially a conciliation which is non-adjudicatory in nature. Only if the parties fail to reach an agreement by conciliation, the Permanent Lok Adalat mutates into an adjudicatory body, by deciding the dispute. In short the procedure adopted by Permanent Lok Adalats is what is popularly known as 'CON-ARB' (that is "conciliation cum arbitration") in United States, where the parties can approach a neutral third party or authority for conciliation and if the conciliation fails, authorize such neutral third party or authority to decide the dispute itself, such decision being final and binding. The concept of 'CON-ARB' before a Permanent Lok Adalat is completely different from the concept of judicial adjudication by courts governed by the Code of Civil Procedure."

15. In **United India Insurance Co. Ltd. Vs. Ajay Sinha and Anr. JT 2008 (6) SC 517** the role of Permanent Lok Adalat has been described by the Court as borne out from a reading of the various provision in Chapter VIA of Act 1987 as under:

"26. Here, however, the Permanent Lok Adalat does not simply adopt the role of an Arbitrator whose award could be the subject matter of challenge but the role of an adjudicator. The Parliament has given the authority to the Permanent Lok Adalat to decide the matter. It has an adjudicating role to play."

16. Since in the present case learned counsel for the petitioner has not advanced any other submission except the issue that in view of Section 7B of Act 1885, Permanent Lok Adalat had no jurisdiction in the matter which has already discussed above, I am of the view that the order impugned warrants no interference. The writ petition, in the circumstances, deserve to be dismissed in limine.

17. Dismissed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2011

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 65844 of 2008

Vaibhav Tewari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

U.P. Recruitment of Dependents of Govt. Servants (Dying in Harness Rules) 1974-Rule-5-compassionate appointment petitioner's father working as Police Constable missing from 31.01.1998-FIR lodged on 17.09.1998-treating civil death after 7 years all benefits given-claim for appointment rejected on ground of absnece of specific provision-held-not proper-under rule no description of nature of death or difference between death and civil death-entitled for appointment.

Held: Para 6

From a perusal of the above Rules, it is clear that where a Government servant dies in harness, a member of the family could be given appointment under the Rules. The Rules do not contemplate death of any particular kind in order to benefit the heirs. It only provides that in case a Government servant dies in harness, one member of the family would be entitled to be considered for grant of compassionate appointment. The Rules do not specify the manner of death that would qualify any employment to the heirs. The language of the Rules clearly suggests that all kind of death caused by every possible manner, would be included under the Rules and the benefit of employment has to be given to the dependants of the person, who dies in harness and the cases where civil death is presumed in law, are not liable to be excluded.

Case law discussed:
[(2005) 1 UPLBEC 858]; [2009 (6) ADJ 591]

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

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

2. Petitioner's father was working as a Constable in Civil Police. He went missing from 31.01.1998. When there was no trace of his whereabouts, the mother of the petitioner lodged a First Information Report on 17.09.1998 at Police Station Kotwali, District Ballia. After expiry of period of 7 years, his civil death was presumed and the respondents treating him to be dead, proceeded to sanction and release family pension to the mother of the petitioner and also released Gratuity, General Provident Fund and Group Insurance etc. Mother of the petitioner moved an application dated 28.07.2005 before the Superintendent of Police for giving compassionate appointment to the petitioner. When no action was taken, another application dated 27.12.2006 was moved before the U.P. Police Headquarter. Vide letter dated 23.06.2007, Deputy Inspector General (Establishment), Police Headquarter called for a report from the Superintendent of Police, Ballia. The petitioner's request for compassionate appointment was rejected vide order dated 20.11.2008 on the ground that there is no provision under the Dying-in-Harness Rules, 1974 (for short the Rules) to give

compassionate appointment to the heirs of missing person, and therefore, the petitioner cannot be given compassionate appointment.

3. It is contended by the learned counsel for the petitioner that the Rule does not create any distinction between a person, who is dead or whose civil death is presumed. It only provides that where a Government servant dies in harness, one member of his family is entitled to be considered for grant of compassionate appointment.

4. In reply, it has been submitted by the learned Standing Counsel that the State Government vide Government order dated 9th December, 1998 has clarified that the provisions of the Rules are not applicable in case of employees, whose death is presumed in law.

5. I have considered the argument advanced by the learned counsel for the parties and perused the record.

Rule 5 of the Dying-in-Harness Rules, 1974 reads as under.

"Recruitment of a member of the family of the deceased-

5 (1) In case a Government servant dies-in-harness after the commencement of these Rules and the spouse of the deceased Government servant is not already employed under the Central Government or State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government Service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment Rules if such person-

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

(ii) is otherwise qualified for Government service, and,

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

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

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

6. From a perusal of the above Rules, it is clear that where a Government servant dies in harness, a member of the family could be given appointment under the Rules. The Rules do not contemplate death of any particular kind in order to benefit the

heirs. It only provides that in case a Government servant dies in harness, one member of the family would be entitled to be considered for grant of compassionate appointment. The Rules do not specify the manner of death that would qualify any employment to the heirs. The language of the Rules clearly suggests that all kind of death caused by every possible manner, would be included under the Rules and the benefit of employment has to be given to the dependants of the person, who dies in harness and the cases where civil death is presumed in law, are not liable to be excluded.

7. The view taken by me finds support from the judgment of the learned Single Judge in the case of **Ajay Kumar Shukla Vs. State of U.P. & Ors., [(2005) 1 UPLBEC 858]** and **Amit Sharma Vs. State of U.P. & Ors., [2009 (6) ADJ 591].**

8. In the present case, admittedly, the father of the petitioner was missing for 7 years and was presumed to be dead. Acknowledging the factum of death, the respondents not only starting paying family pension to the mother of the petitioner, but also released all the post retiral benefits. In such circumstances, there is no reason why the benefit of the Rules will not be applicable in the case of the petitioner.

9. Further a Government Order cannot have overriding effect on the statutory Rules. Once the Rules do not exclude the cases of civil death, the same cannot be done by means of a Government Order. In view of above, the Government Order dated 09.12.1998 being relied upon by the learned Standing Counsel is of no avail and the consideration of petitioner for compassionate appointment cannot be rejected on the basis of said Government Order.

10. In view of the above facts and discussions, the impugned order dated 20.11.2008 passed by respondent no. 2, Deputy Inspect General (Establishment) U.P. Police Headquarters, Allahabad is not liable to be sustained and is hereby quashed. Writ petition stands allowed. Respondent no. 2 is directed to reconsider the petitioner's application for employment under the Rules in accordance with law within two months from the date of production of a certified copy of this order before him.

11. In the facts and circumstances, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2011

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No.66640 of 2010

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

Counsel for the Petitioner:
Sri S.M.A. Abdy

Counsel for the Respondents:
C.S.C.

U.P. Inferior Revenue Clerk (Registrar kanungo)and Asst. Registrar Kanungo) Service Rule 1958-Rule 7-readwith U.P. Subordinate revenue Executive (Bhulekh) Servicce Rules, 1977-Rule 17-

Petitioner being fully qualified and eligible as per recommendation made by D.M.fro appointment as R.I.-Board of Revenue by order 04.06.2010-selected for promotion on post of Revenue Inspector-onsame day being unaware petition participated for promotion on post of Registrar kanungo-stood first in merit but junior appointed ignoring petitioner-petition claimed that due to bad health unable to join post of Revenue Inspector being filed post-and Registrar kanungo being Ist in merit can do official work easily-but never challenge the selection order dated 04.06.2010-not entitled to claim Post of R.K. Being already selected as Revenue Inspector-Petition dismissed.

Held: Para 8

It is is not in dispute that by the order dated 4.6.2010, the petitioner has been selected/promoted on the post of Revenue Inspector by the Board. The said order has not been challenged and has become final. Even though, neither in the writ petition nor in the counter affidavit, it is stated that for the post of Revenue Inspector, the Collector has sought the name from the petitioner, but Rule 17, which provides for promotion on the post of Revenue Inspector, contemplates that the name of the candidates would be selected by the Collector, therefore, it appears that the Collector must have recommended the name of the petitioner and the petitioner has been promoted/appointed as the Revenue Inspector by the Board by the order dated 4.6.2010 and when the Lekhpals have been asked to give their names for promotion on the post of Assistant Registrar, Kanunago, the petitioner applied for the promotion on the post of Assistant Registrar, Kanunago, but has not been considered as he has already been selected and promoted on the post of Revenue Inspector and ceased to be a Lekhpal on the date of the consideration for promotion on the post of Assistant Registrar, Kanunago. Since the order of the Board of Revenue dated 4.6.2010 is not being challenged in none of the writ petitions, I do not find any illegality in the impugned orders.

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

1. The petitioner was appointed on the post of Lekhpal on 27.4.1974. He became permanent on 24.7.1976. He is posted as a Lekhpal in Tehsil Syana, District Bulandshahr.

2. It appears that vide letter dated 7th July, 2010, the Additional District Magistrate (Administration), Bulandshahr invited applications from the Lekhpals, who have completed their six years of service, for the promotion on the post of Assistant Registrar, Kanunago. It has been directed to give information by 12.7.2010. The petitioner was at serial no.1 in the seniority list of the Lekhpals. In pursuance of the aforesaid letter of the Additional District Magistrate (Administration), the petitioner also applied for the promotion, vide application dated 14.7.2010. The name of the petitioner was sent alongwith the relevant information by the Tehsildar, Syana, on 23.7.2010 by which it has also been informed that the promotion is to be made by the District Magistrate after interview to be held on 24.7.2010. The petitioner has been directed to appear on 14.7.2010 at 10:00 A.M. in the office of the Assistant Land Revenue Officer along with the certificate of the educational qualification and other records. When the petitioner came to know that by the order dated 24.7.2010, juniors to the petitioner have been promoted on the post of Assistant Registrar, Kanunago, he

filed Writ Petition No. 66640 of 2010, claiming his promotion on the post of Assistant Registrar, Kanunago and for quashing the order dated 24.7.2010 by which juniors to the petitioner have been promoted and the petitioner has been ignored. This Court has entertained the writ petition and directed the respondents to file the counter affidavit. The counter and the rejoinder affidavits have been filed in the said writ petition.

3. Meanwhile, on 11th February, 2011, a Government Order has been passed in pursuance to that, the District Magistrate, Bulandshahr has passed an order on 19th February, 2011 whereby the Sub Divisional Magistrate, Syana, Bulandshahr has been directed to relieve the petitioner for the training of Revenue Inspector. Thereafter on 20th February, 2011, the petitioner made a representation before the Sub Divisional Magistrate, requesting therein that since only two years' service remained and deteriorating health of the petitioner as well has his wife, he is not able to go outside the District, therefore, he may be exempted from the training of the Revenue Inspector. On consideration of the representation, the petitioner was not relieved, but again on 24.5.2011, an order has been passed by the Tehsildar, Syana whereby the petitioner was relieved for training. The petitioner has sought leave and further made a representation before the District Magistrate that he has sought promotion on the post of Assistant Registrar, Kanunago for which the writ petition is pending and in case if he will be asked to go for training of Revenue Inspector, the writ petition will become infructuous. Challenging the order dated 24.5.2010 by which the petitioner has been relieved, the petitioner filed Writ Petition No. 34042 of 2011, which has been disposed of vide order dated 9.6.2011 whereby this Court directed the petitioner to make a representation before the Collector and the Collector has been asked to dispose of the same within six weeks. The petitioner filed a detailed representation dated 22.6.2011 on which the District Magistrate has sought a report from the Tehsildar, Syana and thereafter by the order dated 3.8.2011 rejected the representation of the petitioner mainly on the ground that the Board of Revenue vide order dated 4.6.2010 promoted the petitioner on the post of Revenue Inspector, therefore, the claim of the petitioner for the promotion on the post of Assistant Registrar, Kanunago cannot be considered once the petitioner has already been promoted. It is, however, admitted that the petitioner was at serial no.1 of the list of selected candidates and the petitioner appeared in the interview for the post of Assistant Registrar, Kanunago. The order of the District Magistrate, Bulandshahr is being challenged in Writ Petition No. 46605 of 2011.

4. Heard Sri S.M. Abdy, learned counsel for the petitioner and the learned Standing Counsel.

5. Learned counsel for the petitioner submitted that both the posts of Assistant Registrar, Kanunago and the Revenue Inspector are equivalent posts and are the promotional posts. However, the post

of Revenue Inspector is related with the field work whereas the post of Assistant Registrar, Kanunago is the post for the office work and since the petitioner was not keeping well and his health is not suitable to work in the filed, the petitioner is more suitable and is entitled for the promotion on the post of Assistant Registrar, Kanunago. He submitted that the petitioner claimed his promotion on the post of Assistant Registrar, Kanunago and he is not aware about the order of the Board of Revenue dated 4.6.2010 and has never been informed about the said order inasmuch as the petitioner has been asked to apply for the post of Assistant Registrar, Kanunago for which he applied and also called upon for the interview in which he appeared and in the select list, he has been placed at serial no.1, therefore, the petitioner is entitled to be promoted on the post of Assistant Registrar, Kanunago.

6. Learned Standing Counsel submitted that the Board of Revenue vide order dated 4.6.2010 has already promoted the petitioner on the post of Revenue Inspector and, therefore, till the said order exists, the petitioner cannot be promoted on the post of Assistant Registrar, Kanunago. Under the Subordinate Revenue Executive (Bhulekh Nirikshak) Service Rules, 1977, the Board of Revenue is the authority, which selects/promotes the Lekhpals on the post of Revenue Inspector. The procedure for the promotion is contemplated under Rule 17, which provides that (a) the Board, every year, shall provide the number of candidates to be selected by 1st of March to the Commissioner, (b) the Collector, first of all, collect the names of the candidates and the provide the same to the Commissioner, in a proforma prescribed, by 1st of June and (c) the Commissioner has to send the report to the Board by 1st of July. In the U.P. Inferior Revenue Clerk (Registrar Kanunago and Assistant Registrar, Kanunago) Service Rules, 1958, the Collector is the appointing authority of the Assistant Registrar, Kanunago. Under Rule 7 of the said Rules, those Lekhpals who have served for more than six years, by promotion, may be appointed as the Assistant Registrar, Kanunago. Learned Standing Counsel submitted that since the petitioner has been appointed as the Revenue Inspector, under the aforesaid Rules, by the Board of Revenue on 4.6.2010, he ceased to be the Lekhpal and, therefore, he could not be considered for the promotion on the post of Assistant Registrar, Kanunago.

7. I have considered the rival submissions of the learned counsel for the petitioner and the learned Standing Counsel and perused the impugned orders.

8. It is is not in dispute that by the order dated 4.6.2010, the petitioner has been selected/promoted on the post of Revenue Inspector by the Board. The said order has not been challenged and has become final. Even though, neither in the writ petition nor in the counter affidavit, it is stated that for the post of Revenue Inspector, the Collector has sought the name from the petitioner, but Rule 17, which provides for promotion on the post of

Revenue Inspector, contemplates that the name of the candidates would be selected by the Collector, therefore, it appears that the Collector must have recommended the name of the petitioner and the petitioner has been promoted/appointed as the Revenue Inspector by the Board by the order dated 4.6.2010 and when the Lekhpals have been asked to give their names for promotion on the post of Assistant Registrar, Kanunago, the petitioner applied for the promotion on the post of Assistant Registrar, Kanunago, but has not been considered as he has already been selected and promoted on the post of Revenue Inspector and ceased to be a Lekhpal on the date of the consideration for promotion on the post of Assistant Registrar, Kanunago. Since the order of the Board of Revenue dated 4.6.2010 is not being challenged in none of the writ petitions, I do not find any illegality in the impugned orders.

9. In the result, the writ petition fails and is dismissed.
