APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

First Appeal Defective No. – 260 of 1995

State of U.P. and others ...Petitioner
Versus
Smt. Mahadevi ...Respondents

Counsel for the Petitioner:
Sri S.M.A. Kazmi
S.C.

Counsel for the Respondents:
.....

Limitation Act-Section-5-Delay of 20 years-in filing Land Acquisition Appeal-No reasonable and acceptable explanation-except routine explanation given-being state there can not be separate provision of Limitation-held-in land acquisition Law of Delay not available to either Party-Appeal dismissed on ground of un-explained delay of 20 years.

Held: Para 6

In State of Punjab Vs. Harchal Singh AIR 2006 SC 2122 the Court has taken into consideration the "Laws Delay" which may not be attributable to anyone in the land acquisition matters. In the instant case also the matter has become almost 20 years old since the date on which amount was enhanced by the reference court.

Case law discussed:
J.T. 2012 (2) S.C. 483; A.I.R. 2010 SC 1323; AIR 2006 SC 2122

(Delivered by Hon'ble S.U. Khan, J.)

1. These 9 appeals are directed against common judgment, award and decree dated 27.9.1993 passed by 5th A.D.J. Bulandshar in 9 L.A. References being L.A. Reference no.66 to 84 all of 1993. All these appeals have been filed with exactly 500/- days delay. In each appeal time to file supplementary affidavit in respect of delay condonation application was granted and supplementary affidavits were filed on 15.11.1995. Through the impugned judgment compensation has been enhanced from about Rs.20,000/- per bigha to about Rs.70,000/- per bigha.

2. In the original affidavit filed along with delay condonation application it was stated that appellants i.e. State of U.P. through Collector Bulandshar, S.L.A.O. Bulandshar and Executive Engineer Madhya Ganga Nahar Khand – 19 Aligarh got the copy of the judgment on 6.11.1993 thereafter D.G.C. was required to give his opinion. The D.G.C. gave the opinion for filing appeal on 9.11.1993. The matter was referred to the acquiring body which sent its recommendation on 21.12.1993. Thereafter on 24.12.1993 matter was referred to the State for obtaining sanction to file appeal. The Government raised some queries through letter dated 9.2.1994 which was replied on 18.3.1994 (para 12 of the affidavit). Thereafter sanction was granted on 6.6.1994 and 27.6.1994. Thereafter it is mentioned in para 15 that huge Court fees amounting to Rs.30,000/- was required which was to be paid by the appellant no.3. Appellant nos. 1 and 2 wrote eleven letters from 9.2.1994 to 17.5.1995 in that regard (para 15 of the affidavit). Thereafter, in para 16 it is mentioned that inspite of so many letters money was not made available hence it was withdrawn from P.L.A. account on 26.5.1995.

3. In the supplementary affidavit filed on 15.11.1995 exactly same thing has been stated. In para 7 of the supplementary affidavit the 11 dates on which reminders were sent by appellant no.1 and 2 to appellant no.3 as mentioned in para 15 of the original affidavit have been again mentioned. Appellant no.3 even after 11 reminders from February 1994 till May 1995 (15 months) did not remit the necessary expenses. Ultimately expenses were withdrawn from P.L.A. Account. It shows utter negligence of the appellants.

4. In office of the Chief Post Master General Vs. Living Media J.T. 2012(2) S.C.483 Supreme Court refused to condone the inordinate delay (of 427 days) in filing S.L.P. paras 12 and 13 of the said judgment are quoted below:-

"12) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay."

5. Moreover, the enhanced amount as awarded by the impugned judgment must have been realised by the claimants respondents long before. No one has appeared on their behalf even though notices on delay condonation applications

were issued . Supreme Court in **Stanes Higher Secondary School Vs. Special Tehsildar (L.A). A.I.R. 2010 SC 1323** has held that if the amount as awarded by the reference court has been withdrawn by the landowner then even if High Court reduces the said amount, it would be quite unjust to direct return of the said amount (para 12).

6. In **State of Punjab Vs. Harchal Singh AIR 2006 SC 2122** the Court has taken into consideration the "Laws Delay" which may not be attributable to anyone in the land acquisition matters. In the instant case also the matter has become almost 20 years old since the date on which amount was enhanced by the reference court.

7. Accordingly, delay condonation application in each appeal is rejected.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.04.2012

BEFORE
THE HON'BLE AJAI LAMBA, J.

Bail No. - 307 of 2012

Vimlesh Kumar ...Petitioner
Versus
State of U.P ...Respondents

Counsel for the Petitioner:
Sri D.P.Singh

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure-Section 439-Bail-offence under Section 363/366/376 I.P.C.-as per radiological examination age of prosecutrix found 18-19-years-statement U/S 164 categorically accepted relationship with accused-who herself taken away accused alongwith her-considering these factors-applicant-entitled for bail.

(Delivered by Hon'ble Ajai Lamba,J.)

1. Vimlesh Kumar, S/o Sri Bhagwan Deen Gararia has filed this application under Section 439 Cr.P.C. for bail in Case Crime No. 49 of 2011 under Sections 363/366/376 I.P.C., Police Station Pachdevra, District Hardoi.

2. Learned counsel appearing for the applicant contends that the prosecutrix is found to be aged 18-19 years as per radiological examination. In the statement given by the prosecutrix under Section 164 Cr.P.C., she has categorically stated that she had relation with the applicant and it is she, who took Vimlesh Kumar along with her. It has further been stated in the statement that she was going to contract court marriage with the applicant when the police apprehended her.

3. Facts, as stated, on behalf of the applicant have not been disputed by the learned counsel for the respondent-State.

4. I have also taken note of the fact that the applicant has been in custody since 8.2.2011 and the investigation has been concluded.

5. Considering the various factors, including radiological age of the applicant and her stand reflected from her statement recorded under Section 164 Cr.P.C., application for bail is allowed.

6. Bail to the satisfaction of the court concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2012

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE PANKAJ NAQVI, J.

Civil Misc. Writ (Tax) Petition No. 369 of 2010

Principal, Boys' High School & College/Holy Trinity School Church Lane, Allahabad ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders

Counsel for the Respondents:
Sri Afzal Beg
C.S.C.

U.P. Municipal Corporation Act 1959-Section 177(c)-Demand of water tax @ 12-1/2 % of House tax-petitioner running Boys High School-never claimed exemption from water tax-if no assessment by Jal Nigam-water Tax can be charged on assessment made by Corporation -in absence of pleadings-cannot be decided-apart from alternative remedy of appeal under Section 54-can make representation to Jal Sansthan-petition dismissed.

Held: Para 9 & 10

The exemption from payment of house tax does not mean that the municipal authorities are prohibited from determining annual value of the building. Even if the petitioner is not liable to pay house tax in view of the exemption given under Section 177 (c), they could have filed objections to the assessment of the annual value of the building under the Municipal Corporation Act, 2004, as the same assessment can be made the basis of assessment of water tax under Section 53 (4) of the Act.

There is nothing to show that the petitoner had filed any objection to the assessment of annual value of the school building under the U.P. Municipal Corporation Act, 1959.

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

1. We have heard Shri A.D. Saunders, learned counsel for the petitioner. Learned Standing Counsel appears for the State respondents. Shri Afzal Beg appears for the Allahabad Jal Sansthan, Allahabad, which is now known as Nagar Nigam, Allahabad.

2. This writ petition is directed against the demand of water tax for the year 2009-10 of Rs.3,61,025/-, at 12 1/2% of the annual value of the building, assessed by the Nagar Nigam, Allahabad for the house tax at Rs.21,87,800/-.

3. Brief facts giving rise to this writ petition are as follows:-

"There is an institution known as Boys' High School & College, Allahabad. The institution imparts education up to Class XII and is affiliated to the ICSE.

There is a church known as 'Holy Trinity Church, Allahabad' for Christians' worship. Alongwith the church building there was open land of the church. On the campus of the church there is a hall known as 'Knox Hall'. This hall stands independently and is used for church's religious activities. Till date this hall is used for church activities as and when required.

Boys' High School & College which had been established in the year 1860 required an additional annexe as the

admission of student was falling beyond its capacity. The management decided to open an annexe in the campus of Holy Trinity Church with the permission of the Church. This annexe was known as 'Holy Trinity School (Annexe of Boys' High School & College) Allahabad.

Holy Trinity Church gave permission for opening of the annexe as it was for the charitable and good cause. Accordingly Holy Trinity School, an annexe of Boys' High School & College was opened in the year 1987.

It is submitted that Holy Trinity School is only an annexe of Boys' High School & College, being part and parcel of the said school and is not a separate institution.

Nagar Nigam, Allahabad (earlier known as Nagar Mahapalika, Allahabad) imposed house tax in respect of 'Knox Hall' for a certain amount under the heading 'Knox Memorial Hall' and for the year 1999 made an assessment of Rs.386.40, which was duly paid on 12.7.1999, even though 'Knox Hall' stood exempted being church property used for religious activities. However, to avoid any controversy the amount of Rs.386.40 was paid in respect of 'Knox Hall'.

The Nagar Nigam, as it is now known, made an assessment dated 29.10.2002 in respect of Knox Memorial Hall, 16/2 Church Lane, Allahabad for Rs.24,26,403/- alleged to be for the period 1.10.1997 to 31.3.2003 taking the annual rental value to be Rs.21,37,800/- and imposed House Tax @ 22% of the annual value of Knox Hall."

4. Rt. Rev. A.R. Stephan, Bishop of Lucknow, Church of North India has filed a separate Writ Petition No.2996 of 2002, against the assessment of the house tax on the same property, claiming exemption under Section 177 (c) of the U.P. Municipal Corporation Act, 1959 for payment of house tax. An interim order was passed staying the levy and realisation of the house tax. By a separate judgment we have allowed the writ petition today with the findings that Section 177 (c) of the U.P. Municipal Corporation Act, 1959, as amended from time to time, provides for an exemption from general tax on the school buildings, whether they are aided by the government or not.

5. In this writ petition we are concerned with the payment of water tax, which is closely linked and is based on percentage of the payment of house tax, but is levied for different object and purpose namely establishment and maintenance of the water supply and sewerage services in the urban areas.

6. There is no exemption provided under the U.P. Water Supply and Sewerage Act, 1975 to the school buildings, whether they are aided by the State Government or not from payment of water tax. The water tax is to be paid on the basis of assessment of the annual value at the rates prescribed under Section 52 (2), which shall not be less than 6% and not more than 14%, and sewerage tax, which shall not be less than 2% and more than 4% of the assessed annual value of the premises as government may from time to time after considering the recommendation of the Nigam by notification in the gazette declare. The water tax is to be paid irrespective of the fact whether owner or occupier of the building has applied for water connection, if it is within the radius prescribed from the nearest stand post or other water works at which water is made available to the public by Jal Sansthan vide Section 55 (b) of the Act. The

Rules have been framed prescribing the radius to be 100 mtrs. from the nearest ferrule.

7. In the present case it is submitted by Shri Arun Saunders that the school has not applied for any water connection nor does it have any water tap to which water is supplied by the Nagar Nigam. He has, however, not denied that the main water line are passing within 100 mtrs. of the school and thus restrictions on levy of tax under section 55 on the proximity with availability of water supply made by Nagar Nigam, are not applicable to the school.

8. We do not find any substance in the contention that since the school building is exempt from the house tax, the Nagar Nigam cannot rely on the assessment of house tax for the assessment of the water tax. Section 53 (1) (a) of the Act, provides for making assessment for educational institution at the rate of 5% of the market value of the premises. The method of assessment is different from the assessment provided to be made under the U.P. Municipal Corporation Act, 1959. Sub-section (4) of Section 53, however, provides that until assessment of annual value of the premises in any local area is made by Jal Sansthan, the annual value of the premises in local areas will be assessed by local body concerned for the purposes of house tax, which were deemed to be annual value of the premises for the purposes of the levy of water tax. Sub-section (4) of Section 53 is quoted as below:-

"53 (4). Until an assessment of the annual value of premises in any local area is made by the Jal Sansthan or any other agency specified under sub-section (2) the annual value of all premises in that local area, as assessed by the local body concerned for the purposes of house tax shall be deemed to be the annual value of the premises for the purposes of this Act as well."

9. The exemption from payment of house tax does not mean that the municipal authorities are prohibited from determining annual value of the building. Even if the petitioner is not liable to pay house tax in view of the exemption given under Section 177 (c), they could have filed objections to the assessment of the annual value of the building under the Municipal Corporation Act, 2004, as the same assessment can be made the basis of assessment of water tax under Section 53 (4) of the Act.

10. There is nothing to show that the petitoner had filed any objection to the assessment of annual value of the school building under the U.P. Municipal Corporation Act, 1959.

11. The rate of water tax is to be fixed between 6% to 14% and the sewerage tax between 2% to 4%, on the assessed annual value of property, as State Government may from time to time after considering the recommendation of the Nigam declared in the notification in the gazette.

12. We do not find that there is any pleading or any objections were filed that rate of water tax should be reduced on the school run by the petitioner, as an educational institution run by a charitable society.

13. It is always open to the petitoner to make a representation to the Nagar Nigam to be forwarded to the State Government, to reduce the rates of water tax and sewerage tax on the schools.

14. We also find that under Section 54 of the Act there is appeal provided against the assessment to the Prescribed Authority.

15. On the aforesaid discussion, we dismiss the writ petition with liberty to the petitoner to make objections to the Jal Sansthan, Allahabad, which is now a part of the Nagar Nigam, and if the petitoner is still aggrieved file an appeal to the Prescribed Authority. This order, however, will not be treated as any restrained order on payment of water tax, which should be paid regularly until the petitioner's representation or appeal, as the case may be, is decided.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2012

BEFORE
THE HON'BLE SYED RAFAT ALAM, C.J.
THE HON'BLE VIKRAM NATH, J.

Special Appeal No. - 680 of 2012

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

Counsel for the Petitioner:
Sri R.K. Pandey
Sri S.P. Sharma

Counsel for the Respondents:
C.S.C.

U.P. Police Officers of the Subordinate Rank (Punishment and Appeal) Rules 1991-Rule 8 (2) (b)-Dismissal from service without recording reasons-for satisfaction regarding impossibility of holding inquiry-set-a-side but direction to hold inquiry as fresh-held not proper where the delequent employee already retired-as is clear from opening words of Rule 8- " No Police Officer mean Officer the member of force-but a retired Police Officer-is not member of Force-direction to held inquiry not proper-petition allowed with all consequential benefits.

Held: Para 14

Therefore, the first direction in the order of the learned Single Judge to hold an enquiry after giving proper opportunity cannot be given effect to unless the appellant is allowed to continue on the strength of the force or in other words to continue in service, otherwise no enquiry could be conducted against him under Rule 8 of the Rules.

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

1. This intra-court appeal arises from the order of the learned Single Judge dated 26th March, 2012, passed in Civil Misc. Writ Petition No.54347 of 1999. The operative portion of the order of the learned Single Judge is reproduced hereunder :-

"Since no reason has been given in the impugned order as to why it was not possible to hold an enquiry order under rule 8(2)(b) is not fully justified.

In the facts and circumstances of the case, I direct the respondents to hold an enquiry in the matter and give to the petitioner a proper opportunity of hearing. The respondent authority shall conclude the enquiry in accordance with law within three months from the date of production of a certified copy of this order being placed by the petitioner before the respondent authority within ten days from today. It is made clear that this order will not amount to an order of reinstatement or setting aside the order of termination but this is being passed for this purpose of giving to the petitioner a proper opportunity of hearing.

The writ petition is disposed of as above. No costs."

2. We have heard learned counsel for the appellant and Sri M.S. Pipersenia, learned Standing Counsel for the State - respondents.

3. The appellant - Rajendra Singh filed the writ petition praying for quashing of the dismissal order dated 06.12.1999, passed by the Superintendent of Police Fatehpur, purported to have been passed invoking the provisions of Rule 8(2)(b) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the 'Rule').

4. At the outset, we may refer to Rule 8(2)(b) of the 1991 Rules which reads as under :

" Dismissal and removal - (1) No Police officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.

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

Provided that this rule shall not apply -

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

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reasons to be recorded by that authority in writing it is not reasonably practicable to hold such enquiry; or

(c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry."

5. According to the above quoted Rule, the authority is empowered to inflict punishment in exceptional cases without holding any enquiry and disciplinary proceedings, for the reasons to be recorded by the said authority that it was not reasonably practicable to hold such enquiry.

6. The learned Single Judge found that no reasons had been recorded as to why it was not reasonably practicable to hold the enquiry and was therefore of the view that the impugned order could not be justified. Further, the learned Single Judge directed the respondent authority to hold an enquiry in the matter and to give the petitioner - appellant a proper opportunity of hearing and the enquiry be concluded within three months from the date of production of certified copy of the order. Lastly, the order of the learned Single Judge provided that the said order would not amount to an order of reinstatement or setting aside the order of termination but was being passed for the purpose of giving the petitioner - appellant a proper opportunity of hearing.

7. Learned counsel for the appellant has submitted that once the learned Single Judge was of the view that no reasons had been recorded as to why it was not reasonably practicable to hold the enquiry, the only option left was to quash the order of punishment, thus, the learned

Single Judge fell in error in not quashing the order of punishment instead providing that it would remain in force. The next submission is that so long as the employee is not in service whether under suspension or otherwise, there could be no occasion to continue an enquiry against a dismissed employee who has no lien in the department. According to learned counsel for the appellant, for this reason also, the order of the learned Single Judge directing to hold fresh enquiry after proper opportunity to the petitioner - appellant, cannot be sustained.

8. On the other hand, Sri M.S. Pipersenia, learned Standing Counsel submitted that pursuant to the order of the learned Single Judge, the Superintendent of Police, Fatehpur has already appointed Deputy Superintendent of Police, Sri Surya Kant Tripathi to conduct the enquiry vide order dated 16th April, 2012, therefore, this Court may not interfere in this appeal.

9. Having considered the submissions, we find substance in the argument advanced by the learned counsel for the appellant. Rule 8(2)(b) of the 1991 Rules is an exception to the general procedure followed in awarding punishment to the Government Servants. It is also an exception to Article-311 (1) and (2) of the Constitution of India, therefore, due caution and care is to be exercised while invoking the said provision. The Rule itself mentions that no Police Officer shall be dismissed or removed or reduced in rank except after proper enquiry and disciplinary proceeding as contemplated in the said Rules, provided that the said Rule would not apply under the following three given circumstances :-

(i) Where the punishment is on the ground of conduct which has led to the conviction of the employee on the criminal charge.

(ii) Where for reasons to be recorded, it was found to be not reasonably practicable to hold the enquiry and lastly,

(iii) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry.

10. He who holds the procedural sword must perish with the sword. Thus where the procedure prescribed has not been followed by the authority then the decision taken in violation of such prescribed statutory procedure cannot be sustained.

11. Undisputedly, the punishment order dated 06.12.1999 did not spell out the reasons as to why it was not reasonably practicable to hold the enquiry. The learned Single Judge has also recorded a similar finding. However, it was specifically clarified by the learned Single Judge in the last part of the order that the order would not amount to reinstatement or setting aside of the termination order. It is this part of the order which is offending the appellant.

12. A Division Bench of this Court, of which one of us (S.R. Alam, C.J.) was a member, in the case of **State of U.P. & Others Vs. Chandrika Prasad, 2006 (1) ESC 374 (All.) (DB),** while considering Rule 8 of the Rules, in paragraph 15 of the judgment, observed as under :-

"15. *The words some "reasons to be recorded in writing that it is not*

reasonably practicable to hold enquiry" means that there must be some material for satisfaction of the disciplinary authority that it is not reasonably practicable. The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. The Apex Court in the case of Jaswant Singh v. State of Punjab and others, AIR 1991 SC 385 in para 5 at page 390 has observed as under :-

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

"...When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

13. Thus, the order of the Superintendent of Police, Fatehpur dated 06.12.1999, dismissing the appellant from service, impugned in the writ petition, cannot sustain and is liable to be quashed. Besides that, a departmental proceeding can be pressed into motion only against an employee who is on the strength and the roll of the department; one who is in employment and in service or one who has lien in the service. A dismissed or a terminated employee has no lien in service. He cannot be treated to be an employee of the department. As such no enquiry could be conducted against a person not on the strength and roll of the force. Rule 8 of the Rules opens with the words "no police officer shall be dismissed or removed from service...". Police officer would mean an officer in the police department on the strength and roll of the force.

14. Therefore, the first direction in the order of the learned Single Judge to hold an enquiry after giving proper opportunity cannot be given effect to unless the appellant is allowed to continue on the strength of the force or in other words to continue in service, otherwise no enquiry could be conducted against him under Rule 8 of the Rules.

15. Thus, we are of the view that the order of punishment was liable to be quashed in view of the finding recorded by the learned Single Judge that no reasons have been recorded. Further the last sentence of the last but one para of the order of the learned Single Judge is liable to be set aside. However, the direction given by the learned Single Judge to the effect that the enquiry be conducted and after giving due opportunity in accordance with law, appropriate orders may be passed by the disciplinary authority, does not warrant any interference.

16. In view of the above discussion, we modify the order of the learned Single Judge to the extent that the last sentence of the last but one para of the order is set aside and further the order of dismissal dated 06.12.1999 is quashed. Necessary consequences may follow. It would

however be open to the disciplinary authority to pass order of suspension during the enquiry, which may now be conducted pursuant to the order of the learned Single Judge.

17. The appeal stands disposed of with the above modification.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.04.2012

BEFORE
THE HON'BLE D.K. UPADHYAYA, J.

Service Single No. - 730 of 2004

Dhirendra Singh and others ...Petitioner
Versus
State of U.P.Through Secy. Govt. of U.P. Civil Lko. and 3 others ...Respondents

Counsel for the Petitioner:
Abdul Moin
Sri Abhinav N Trivedi

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- Termination of Service-putting stigma-based upon preliminary enquiry-order impugned can not be termed as simplicitor-but founded on allegation of misconduct-termination Quashed with salary apart from Training allowance.

Held: Para 22

The Court on the basis of the finding of guilt recorded in the preliminary enquiry dated 30.11.2003 and the indications given by the letter dated 13.01.2004 comes to the definite conclusion that the services of the petitioners were terminated on account of the finding of guilt. Thus, impugned orders are not orders of termination simplicitor, rather they are "founded" on the allegations of misconduct and the finding of misconduct and gross indiscipline against the petitioners. The impugned orders, thus, are clearly casting stigma on the conduct of the petitioners and hence, in this situation, the impugned orders are not sustainable at all.

Case law discussed:
(1999) 3 SCC 60; (2010) 8 SCC 220; Special Appeal No. 126 (S/B) of 2005, Kailash Bharti vs. State of U.P and others; (2002) 1 SCC 520; (1999) 2 SCC 21

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

1. Fate of the instant writ petition hinges on the issue as to whether the impugned orders terminating the services of the petitioners, though couched in innocuously worded language to make them appear to be order of termination simplicitor, are, in fact, the result of the employer accepting the allegations of some misconduct against the petitioners.

2. Heard Sri Abdul Moin and Sri Abhinava N. Trivedi, learned counsels for the petitioners and learned Standing Counsel appearing for the State and perused the pleadings and material available on record.

3. To arrive at a conclusion as to whether the allegations of misconduct against the petitioners form "Foundation" or "Motive" for termination of their services, the facts of the case as culled from the pleadings on record need to be examined.

4. Having participated in a selection for the post of Constable, the petitioners were selected and accordingly petitioner no.1, by means of order dated 19.04.2003, was required to report at 15th Battalion of Provincial Armed Constabulary (in short PAC), Agra.

Similarly, petitioner no.2 vide order dated 20.04.2003 was also directed to report at the Headquarters of 26th Battalion, PAC, Gorakhpur.

5. According to the petitioners, their appointments were on probation for a period of two years which included nine months training. The petitioners were undergoing training at 27th Battalion, PAC, Sitapur which started from 25/26.04.2003.

6. It appears that on 23.10.2003, some incident of mapeet amongst trainees took place in the night of 23.10.2003 wherein both the petitioners are alleged to be involved. Accordingly, the Commandant, 27th Battalion, Sitapur, where the petitioners were undergoing training, directed the Assistant Commandant to conduct a preliminary enquiry into the incident by means of order dated 30.10.2003. Pursuant to the said order, the Assistant Commandant conducted an eqnuiry into the allegations of marpeet etc. which is alleged to have taken place in the said incident and recorded statements of various persons including the petitioners. The Assistant Commandant, PAC submitted his report of the preliminary enquiry on 30.11.2003 and concluded therein that the petitioners were found guilty of misconducting themselves and further that they had indulged in the acts of the indiscipline. The extracts of the said preliminary enquiry report dated 30.11.2003 is available on record (Annexure No.8 to the writ petition). In the said report the recommendation made by the Assistant Commandant in respect of the petitioners is as under:-

*"रि0 आ0 धीरेन्द्र सिंह रि0 आ0 जितेन्द्र प्रताप टोली नं0 4 द्वारा नि0 अ0 वेद प्रकाश दुबे को पहचान कर सोते समय उसे ई दल के बैरक में मारना, किसी अन्य के कहने या उकसाने पर इस **तरह की घोर अनुशासनहीनता व उदण्डता जैसी कार्यवाही करना और अपने स्वविवेक से कार्य न करने का दोषी पाये जाने के कारण दोनों रिकूटों के विरूद्ध नियमानुसार कार्यवाही करते हुए सेवा से अलग किये जाने की संस्तुति की जाती है।'***

7. The petitioners were also placed under suspension by means of orders dated 30.10.2003 passed by the Commandants, 27th Battalion, PAC Sitapur which are on record (Annexure 7 & 7A to the writ petition). Thus, admittedly, before passing the order of termination of services of the petitioners, a preliminary inquiry was got conducted and detailed inquiry report running into at least 57 pages was submitted by the Inquiry Officer holding the petitioners guilty of misconduct and gross indiscipline. The recommendation by the Inquiry Officer was also made in respect of the petitioners that they may be removed from service.

8. For the purposes of deciding the issue involved in the instant writ petition, it is not necessary to go into the veracity or, truthfulness or otherwise of the incident or the charges or for that matter, into the allegations against the petitioners. However, the Court notices that in the incident of marpeet a preliminary inquiry was conducted wherein the petitioners were found guilty. It is also noticed that the petitioners were placed under suspension and this incident ultimately resulted in passing of the impugned orders terminating the services of the petitioners which, though, is being portrayed as order of termination simplicitor. The question which needs to be considered is

as to whether the allegations of misconduct or the findings of guilt recorded by the Inquiry Officer in the preliminary inquiry report dated 30.11.2003 form "Foundation" or "Motive" of passing of the impugned orders".

9. Learned counsels for the petitioners heavily relied on two judgments of the Hon'ble Supreme Court i.e ***Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Others, reported in (1999) 3 SCC 60*** and ***Union of India and Others Vs. Mahaveer C. Singhvi, reported in (2010) 8 SCC 220*** and submitted that analysis of the facts of the present case and material available on record unambiguously establish that the allegations against the petitioners and the findings of misconduct form the foundation of impugned orders of termination of services of the petitioners and not the motive. Hence, the impugned orders cannot be said to be orders of termination simplicitor, rather the orders passed are stigmatic and punitive in nature. Hence, the same cannot be allowed to be sustained for the reason that no inquiry was held prior to passing of the impugned orders.

10. Learned counsels for the petitioners further submitted that though the orders under challenge are innocuously worded and do not contain anything which points out or indicates that they are founded on the allegations of misconduct and finding of guilt against the petitioners but the Court can pierce the veil and arrive at the correct conclusion that, in fact, the impugned orders are punitive in nature and not simplicitor.

11. Learned counsels for the petitioners argued that the stigma or the fact as to whether the impugned orders are punitive can be inferred from the documents and material available on record. The termination order may not contain a word pointing out that it is stigmatic but if on the basis of material available on record it can safely be concluded that the order of termination of services of the petitioners are founded on the findings of misconduct, the Court can quash the orders as being punitive in nature.

12. Learned counsels for the petitioners in this regard refer to para 21 of the judgment rendered by Hon'ble Supreme Court in case of ***Dipti Prakash Banerjee (supra)*** which runs as follows:-

"If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

13. It has also been argued on behalf of the petitioners that in the instant case the stigma against the petitioners can be gathered from two documents i.e. the preliminary inquiry report dated 30.11.2003 submitted by the Assistant Commandant, PAC, Sitapur wherein it has been recorded that the petitioners were found guilty of misconduct and gross indiscipline and also the letters dated 13.01.2004 (Annexures 9 & 9A to the writ petition) whereby petitioners were required to make their deposition in a regular departmental inquiry conducted against certain individuals. Referring to the aforesaid inquiry report dated 30.11.2003, learned counsels for the petitioners submitted that the said inquiry report clearly records a finding about the petitioners being guilty of misconduct and indiscipline. The reference has been emphatically made to the letters dated 13.01.2004 wherein it has clearly been indicated that the services of the petitioners were terminated on account of the fact that they were found guilty in the preliminary inquiry conducted into the incident of marpeet which occurred on 23.10.2003.

14. Learned counsels for the petitioners vehemently argued further that the impugned orders terminating the services of the petitioners are punitive in nature and are stigmatic which is unambiguously evident from a bare reading of the letters dated 13.01.2004 which contain clear indication that services of the petitioners were terminated for the reason that they were found guilty in the preliminary inquiry report. Letter dated 13.01.2004 (Annexure 9 to the writ petition) is reproduced hereinbelow:-

ठ द्वारा पंजीकृत डाक

भू0पू0रि0आ0 धीरेन्द्र सिंह पुत्र श्री रामचन्द्र सिंह
ग्राम–सरायचक गोबिन्दपुर, पोस्ट–परौखा
थाना–बेवर, जनपद–मैनपुरी।

दिनॉक : 23–10–2003 को रिकूट आरक्षियों सहित आप द्वारा आरक्षी वेद प्रकाश दुबे ई दल के साथ किये गये ***मार पीट के प्रकरण में प्रारम्भिक जॉच के उपरान्त आपको दोषी पाये जाने के कारण आपकी सेवा समाप्त की जा चुकी है***
नि0मु0आ0आई0टी0आई0 मनवास पाण्डेय, नि0मु0आ0पी0टी0आई0 जयशंकर पाठक, नि0 आरक्षी वेद प्रकाश दुबे, मु0आ0 राजाराम के विरुद्ध उ0प्र0 अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड एवं अपील) नियमावली–1991 के नियम–14(1) के अन्तर्गत विभागीय कार्यवाही मुझ पीठासीन अधिकारी एवं सहायक सेवानायक द्वारा की जा रही है जिसमें आपका बयान अंकित किया जाना है।

अतः आपको सूचित किया जाता है कि दिनॉक : 20–1–2004 को बयान हेतु 27वीं वाहिनी पीएसी सीतापुर मेरे कार्यालय में उपस्थित होना सुनिश्चित करें।

पत्रॉक–पी0एफ0–10–2003
दिनॉकः जनवरी 13,2004

(गोपेश नाथ खन्ना)
पीठासीन अधिकारी एवं
सहायक सेनानायक,
27वीं वाहिनी पीएसी
सीतापुर।

प्रतिलिपि :–

1:– वरिष्ठ पुलिस अधीक्षक जनपद–मैनपुरी को इस आशय के साथ कि आवश्यक कार्यवाही हेतु सम्बन्धित थाना इन्चार्ज को निर्देशित करने की कृपा करें।

2:– थाना इन्चार्ज, थाना– बेवर जनपद–मैनपुरी को सूचनार्थ एवं आवश्यक कार्यवाही हेतु।ठ

15. The other letter dated 13.01.2004 written in respect of the

petitioner no.2 (Annexure 9A to the writ petition) is identically worded and is a verbatim copy of Annexure 9 to the writ petition.

16. Reliance has also been placed by the learned counsel for the petitioners in the case of ***Union of India and Others Vs. Mahaveer C. Singhvi (supra)*** wherein it has been held that if findings of misconduct against a probationer is arrived at behind his back on the basis of an inquiry conducted into certain allegations and if the same forms foundation of the order of discharge simplicitor, the same would be bad and liable to be set aside.

17. Learned counsels for the petitioners have also drawn the attention of the Court to para 46 of the judgment in the case of ***Union of India and Others Vs. Mahaveer C. Singhvi (supra),*** which is quoted here under:-

"As has also been held in some of the cases cited before us, if a finding against a probationer is arrived at behind his back on the basis of the enquiry conducted into the allegations made against him/her and if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside. On the other hand, if no enquiry was held or contemplated and the allegations were merely a motive for the passing of an order of discharge of a probationer without giving him a hearing, the same would be valid. However, the latter view is not attracted to the facts of this case."

18. Yet another decision of a Division Bench of this Court dated 28.02.2005 rendered in ***Special Appeal No. 126 (S/B) of 2005, Kailash Bharti vs. State of U.P and others,*** has been relied on behalf of the petitioners. In the said case, referring to various judgments of the Hon'ble Supreme Court, the Division Bench evolved the following principles:-

"(i) That an order of termination simpliciter which does not contain any stigma in its language, does not by itself debar the Writ Court from looking behind the order for ascertainment of the true motive and foundation of it.

(ii) On the basis of the materials on record including affidavits and documents brought before the Court, the Writ Court can, if the circumstances are appropriate, come to a finding of fact as to what was the reason and genesis of the order of termination. In doing that, it can and should judge, in all the facts and circumstances, whether in pith and substance the order of termination is a product of the employer accepting some allegation of misconduct or serious ineptitude against the writ petitioner. In case of such finding the order of termination would have to comply with the requirements of an ordinary inquiry and hearing.

(iii) If the Court finds that the inquiry for termination resulted only in some innocuous departmental finding against the writ-petitioner, even if it be reached behind his back, like redundancy or mere suitability for the job, the writ petitioner would have no case. The reason for this is that the redundant employer still has a chance of being employed elsewhere, since he has a good name left; and that an unsuitable employee in one Organization and one

Department might still be suitable elsewhere. Ineptitude, negligence, drunkenness and misconduct are not of this nature, since those would render the employee unsuitable everywhere and for all purposes to a great degree."

19. On the other hand, learned Standing Counsel appearing for the State has relied upon the judgment of the Hon'ble Supreme Court in the case of ***P.N. Verma Vs. SGPGI and another, reported in (2002) 1 SCC 520*** and has submitted that merely because a preliminary inquiry was held prior to passing of the impugned order of termination simplicitor, it cannot be said that the impugned orders are punitive in nature.

20. The competing arguments advanced by learned counsels for the respective parties have been considered. The Division Bench of this Court in the case of ***Kailash Bharti vs State of U.P and others (supra)*** after analyzing various pronouncements of the Apex Court including the case of ***P.N. Verma Vs. SGPGI and another (supra), Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Others (supra)*** and in ***Chandra Prakash Shahi Vs. State of U.P. and others, reported in (1999) 2 SCC 21*** and various other judgments evolved the principles to be applied as test to determine as to under what circumstances the order of termination simplicitor can be said to be punitive and further as to the scope of judicial review in such matters. The Division Bench in the said case has clearly noted down that the writ court can look behind the order to ascertain the true foundation or motive of the order of termination of service. In other words, even if the order of termination is worded innocuously not indicating or pointing out any allegation of misconduct, the Writ Court can clear the web and ascertain the true colour of the order and infer as to whether the allegation of misconduct is the motive or the foundation of order of termination.

21. As to the difference between the situation where the order can be said to be "founded" on the allegations of misconduct and the situation where the allegations can be said to be a case of "motive" for passing the order of termination, it must suffice to say that the simple order of termination will be treated as "founded" on the allegations if the findings were arrived at in an enquiry without a full fledged regular departmental enquiry whereas if the employer is not inclined to conduct an enquiry but simply wants to discontinue the services of the employee against whom certain allegations are there, it will be a case of "motive". In case the order of termination is founded on the allegations of misconduct then the same would be vitiated and not sustainable. However, if the allegations are not intended to be enquired into by the employer and the employer intends to discontinue the services of the employee against whom there are complaints, the same would be a case based on "motive" and the same would be an order of termination simplictor.

22. Looking to the facts of the instant case, it is abundantly clear that though no full fledged regular departmental enquiry was conducted but nonetheless, the preliminary enquiry was held wherein the petitioners have been held guilty of misconduct and gross

indiscipline. The basis of passing of the impugned orders terminating the services of the petitioners is the finding of misconduct and of gross indiscipline recorded by the Assistant Commandant in his enquiry report dated 30.11.2003. This fact is evident from the letters dated 13.01.2004 wherein it is clearly indicated that the services of the petitioners were terminated on account of the findings of guilt as recorded in the preliminary enquiry report. The Court on the basis of the finding of guilt recorded in the preliminary enquiry dated 30.11.2003 and the indications given by the letter dated 13.01.2004 comes to the definite conclusion that the services of the petitioners were terminated on account of the finding of guilt. Thus, impugned orders are not orders of termination simplicitor, rather they are "founded" on the allegations of misconduct and the finding of misconduct and gross indiscipline against the petitioners. The impugned orders, thus, are clearly casting stigma on the conduct of the petitioners and hence, in this situation, the impugned orders are not sustainable at all.

23. In para 10 of the judgment in the case of ***Union of India and Others Vs. Mahaveer C. Singhvi (supra)***, Hon'ble Supreme Court has clearly observed that if findings as to misconduct were arrived at even without a regular departmental enquiry, a simple order of termination is to be treated as founded on the allegations and would be bad.

24. In view of discussions made and reasons indicated above, the Court finds that the impugned orders dated 04.12.2003, terminating the services of the petitioners which are annexed as Annexure No. 1 and 2 to the writ petition respectively, are not sustainable being bad in law. Hence the same are hereby quashed.

25. Apart from challenging the impugned orders dated 04.12.2003 whereby the services of the petitioners were terminated (Annexures 1 & 2 to the writ petition), the petitioners have also challenged the order dated 07.01.2005 wherein the Commandant, 27th Battalion, PAC, Sitapur has stated that in compliance of the interim order dated 09.02.2004 passed in the instant petition, the petitioners were allowed to complete the remainder period of their training but the decision regarding their reinstatement in service shall be taken after final judgment in the writ petition. The petitioners have also challenged an order again passed by the Commandant 27th Battalion, PAC Sitapur whereby the petitioners were ordered to be reinstated in compliance of the interim order dated 13.07.2006 passed in this writ petition with a simultaneous prayer to direct the opposite parties to pay salary and other allowances to the petitioners treating them in continuous services w.e.f. 07.01.2005.

26. As regards the prayer of the petitioners for payment of salary etc certain developments took place after filing of the writ petitions which have been noticed by the Court. While entertaining the writ petition this Court passed an interim order on 09.02.2004 directing therein that the petitioners shall be allowed to undergo and complete their training. Accordingly, in compliance of the said interim order dated 09.02.2004, the petitioners were allowed to undergo

training and on 07.01.2005 an order was passed by the Commandant stating therein that final decision regarding the reinstatement of the petitioners shall be taken after final judgement of this Court in the present writ petition. The said order dated 07.01.2005 has been challenged by the petitioners by way of seeking amendment in the writ petition and this Court by means of order dated 13.01.2005 provided that till the next date of listing the operation of the order dated 07.01.2005 shall be remain stayed. However, it is noteworthy that the operation of the order of termination of services of the petitioners was never stayed. Though there was no stay, by this Court of the orders of termination of services of the petitioners, another order was passed by the Court on 13.07.2006 directing the opposite parties to ensure compliance of the Court's order dated 13.01.2005 and further that the petitioners may be given posting and assigned their duties. The Court notices that by the order dated 13.01.2005, only operation of the order dated 07.01.2005 was stayed which provided that decision regarding reinstatement of the petitioners shall be taken after final decision of the writ petition, however, the orders of termination of services were never stayed.

27. Notwithstanding the fact that the orders terminating the services of the petitioners were never stayed by the Court, it appears that in compliance of the order dated 13.07.2006, the order dated 25.01.2007 (Annexure No. 14 to the writ petition) was passed reinstating the petitioners in service. The reinstatement of the petitioners in service was made in compliance of the order dated 13.07.2006 of the Court whereby for the first time the opposite parties were directed by this Court that the petitioners may be given posting and assigned their duties. Prior to 13.07.2006, no order by the Court was passed either staying the operation of the orders of termination of services of the petitioners or issuing interim Mandamus for reinstatement of the petitioners.

28. In the light of above facts, the Court, while quashing the impugned orders of termination of services of the petitioners, allows the writ petition and further directs that the petitioners shall be entitled for salary and other admissible allowances w.e.f. the order dated 13.07.2006 passed by this Court, apart from payment of emoluments/allowances admissible to them during the training period. Accordingly, the opposite parties shall pay this amount within a period of eight weeks from the date of production of certified copy of this judgment.

29. On account of quashing of impugned orders terminating the services of the petitioners by this judgment, they shall be given the benefit of continuity of service throughout but would not be entitled to payment of salary and allowances for the period prior to 13.07.2006.

30. In terms of the above observations/directions, the writ petition is allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2012

BEFORE
THE HON'BLE S.P. MEHROTRA, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.

Special Appeal No. 1349 of 2008

Chauharya Dubey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Vinod Kumar Singh
Sri Arun Kumar Mishra
Sri Radha Kant Ojha
Sri Dinesh Kumar Tripathi
Sri R.S. Gupta

Counsel for the Respondents:
Sri G.k.Gupta
Sri M.D. Singh 'Shekhar'
Sri R.D. Tiwari
Sri Sanjeet Kumar Yadav
Sri A.K. Yadav
Sri Pankaj Rai
C.S.C.

Constitution of India, Article 226- appointment of Principle by Transfer-No objection by authorized controller for purposes of mutual consent of management of both institution-be treated the consent if manager held- "Yes" as per law laid down by Full Bench Yashoda Rajkumari Kunjali's case.

Held: Para 18

It will thus be noticed that the main contention made by the petitioner-appellant in the Writ Petition as also in the present Special Appeal stands answered against the petitioner-appellant, and it is evident that the Prabandh Sanchalak of the institution in question was authorized to give consent and No-Objection Certificate in respect of the transfer of the respondent no.6 on the post of Principal to the institution in question.

Case law discussed:
(2002) 1 UPLBEC 683; Civil Misc. Writ Petition No. 46320 of 2004, Yashoda Raj Kumari Kunjil Vs. State of U.P. and others; (2011) 1 UPLBEC 370

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The present Special Appeal has been filed against the judgment and order dated 22.9.2008 passed by the learned Single Judge dismissing *Civil Misc. Writ Petition No. 49796 of 2008* filed by the petitioner-appellant.

2. It appears that the petitioner-appellant was working on the post of Lecturer in Gangapur Inter College, Gangapur, Varanasi (hereinafter also referred to as "the institution in question"). By the order dated 7.3.2008, Prabandh Sanchalak was appointed in the institution in question. One Dashrath Singh, who was working as the Principal of the institution in question, after attaining the age of superannuation retired from the post of Principal on 30.6.2008.

3. By the order dated 1.7.2008 passed by the Prabandh Sanchalak of the institution in question, the petitioner was appointed as Officiating Principal of the institution in question. It was further observed in the said order dated 1.7.2008 that the pay, allowances, etc., admissible for the said post, would be payable after the consent/ approval of the District Inspector of Schools, Varanasi.

4. By the order dated 26.7.2008, the District Inspector of Schools, Varanasi attested the signature of the petitioner-

appellant consequent to his appointment as Officiating Principal of the institution in question.

5. It further appears that by the order dated 5.9.2008 passed by the Additional Director of Education (Intermediate), Uttar Pradesh, Allahabad, the respondent no.6, who was working as the Principal of Gahmar Inter College, Gahmar, Ghazipur, was transferred as Principal of the institution in question.

6. It further appears that the said transfer order was made after the Committee of Management, Gahmar Inter College, Gahmar passed a Resolution dated 17.8.2008 and gave its No-Objection Certificate dated 17.8.2008, and also the Prabandh Sanchalak of the institution in question passed a Resolution dated 19.8.2008 and gave his No-Objection Certificate dated 19.8.2008. Pursuant to the said Transfer Order dated 5.9.2008, the respondent no.6 submitted his joining on the post of Principal of the institution in question. The District Inspector of Schools by the order dated 15.9.2008 attested the signature of the respondent no.6 as the Principal of the institution in question.

7. The petitioner-appellant filed the aforesaid *Civil Misc. Writ Petition No. 49796 of 2008,* interalia, making the following prayer:

"i) a writ, order or direction in the nature of certiorari to call for the record as well as order dated 5.9.2008 passed by the Additional Director of Education (Secondary), U.P., Allahabad and to quash the same;

ii) a writ, order or direction in the nature of mandamus commanding the respondents not to interfere in the functioning of the petitioner as Principal of the Gangapur Inter College, Gangapur, Varanasi and to pay his salary regularly month to month applicable to the said post;

iii) a writ, order or direction in the nature of mandamus restraining the respondent no.6 from the joining the post of Principal in Gangapur Inter College, Gangapur, Varanasi;

iv) any other writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case;

v) award costs of the writ petition to the petitioner."

8. By the order dated 22.9.2008, the learned Single Judge dismissed the said Writ Petition filed by the petitioner-appellant.

9. Thereupon, the petitioner-appellant has filed the present Special Appeal.

10. By the order dated 14.10.2008, a Division Bench of this Court granted interim order in the present Special Appeal, which is reproduced below:

"We have heard Sri Ashok Khare, learned senior counsel assisted by Sri V.K. Singh for the appellant, learned standing counsel appearing for respondents no.1, 2, 3 and 4 and Sri G.K. Gupta, learned counsel appearing for respondent no.6. They pray for and are allowed one month's time to file counter affidavit. The appellant shall have two weeks thereafter to file rejoinder affidavit. The appellant shall take steps, to serve respondent no.5 by registered post, within a week. The office shall send notice returnable at an early date.

List on the date fixed by the office in the notice.

Learned counsel for the appellant has urged that in the institution Prabandh Sanchalak has been appointed. As per Regulations 55 to 61 of Chapter III of the Regulations framed under the U.P. Intermediate Education Act, 1921 the transfer from one institution to another can be made subject to the consent and approval of both the committees of management. In the instant case permission has been granted by Prabandh Sanchalak. Prima facie, we are of the opinion that Prabandh Sanchalak could not grant such an approval/consent. The question has also been referred to a larger bench as has been noticed by the learned single judge in his judgment. In this view of the matter, the appellant is entitled to interim order.

Until further orders of this court, effect and operation of the judgment and order dated 22.9.2008 passed by learned single judge and the order dated 5.9.2008 transferring respondent no.6 to the appellant's institution shall remain stayed."

11. It further appears that against the said order dated 14.10.2008, the respondent no.6 filed Special Leave Petition before the Supreme Court. By the order dated 24.10.2008, Their Lordships of the Supreme Court dismissed the said Special Leave Petition.

12. We have heard Shri R.K. Ojha, learned counsel for the petitioner-appellant, the learned Standing Counsel appearing for the respondent nos. 1 to 4 and Shri M.D. Singh 'Shekhar', learned Senior Counsel assisted by Shri R.D. Tiwari, learned counsel for the respondent no.6, and perused the record.

13. The main contention of the petitioner-appellant in the Writ Petition as well as in the present Special Appeal has been that the Prabandh Sanchalak appointed in the institution in question was not authorized to give consent for transfer of the respondent no.6 as Principal of the institution in question, as the said power could be exercised only by the Committee of Management.

14. In ***Narendra Kumar Vs. State of U.P. and others, (2002) 1 UPLBEC 683,***a learned Single Judge held that the Prabandh Sanchalak appointed in an Institution was authorised to give consent, like Committee of Management, for transfer of a Principal to the Institution.

15. In ***Civil Misc. Writ Petition No. 34450 of 2001, Committee of Management, Uchchtar Madhyamik Vidhyala Samiti, Sukhpura, Ballia and another Vs. Director of Education (Secondary) U.P., Lucknow and others*** connected with ***Civil Misc. Writ Petition No.36980 of 2001, Surendra Nath Gupta Vs. State of U.P. through Secretary Secondary Education, Government of U.P., Lucknow and others,*** another learned Single Judge disagreed with the view taken by the learned Single Judge in ***Narendra Kumar case*** (supra), and referred the following questions for consideration by a Larger Bench :

"1. Whether the consent of Prabandh Sanchalak appointed by Joint Director of Education under Clause 7 of the Scheme of Administration for holding election given by him under Regulation 58 of Chapter III of Regulation made under the Intermediate Education Act, 1921 for transfer of a Principal to the institution amounts to

consent of the 'Committee of Management' as provided in proviso (1) to Regulation 61(1) of the Regulations as above? and

2. Whether the interpretation given by learned Single Judge in favour of such consent given by Prabandh Sanchalak to be valid by interpreting proviso (1) to Regulation 61(1), in Narendra Kumar Vs. State of U.P. and others, is correct."

16. In view of the above reference, a learned Single Judge also referred ***Civil Misc. Writ Petition No. 46320 of 2004, Yashoda Raj Kumari Kunjil Vs. State of U.P. and others,*** for consideration by the Larger Bench.

17. The said questions were answered by the Larger Bench by its decision dated 8.9.2010 holding that "once an Authorized Controller/ Prabandh Sanchalak/ Administrator is appointed, such a person will exercise all powers conferred by the Scheme of Administration and in addition the powers conferred by the various Acts, Regulations and the Rules."The said decision is reported in ***Yashoda Rajkumari Kunjil Vs. State of U.P. and others, (2011) 1 UPLBEC 370.***

18. It will thus be noticed that the main contention made by the petitioner-appellant in the Writ Petition as also in the present Special Appeal stands answered against the petitioner-appellant, and it is evident that the Prabandh Sanchalak of the institution in question was authorized to give consent and No-Objection Certificate in respect of the transfer of the respondent no.6 on the post of Principal to the institution in question.

19. In the circumstances, no interference is called for with the judgment and order dated 22.9.2008 passed by the learned Single Judge dismissing the Writ Petition filed by the petitioner-appellant challenging the transfer order dated 5.9.2008.

20. Shri R.K. Ojha, learned counsel for the petitioner-appellant has fairly stated that the petitioner-appellant has already retired on 30.6.2009.

21. In view of the above, the Special Appeal filed by the petitioner-appellant is liable to be dismissed, and the same is accordingly dismissed.

22. However, on the facts and in the circumstances of the case, there will be no orders as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.04.2012

BEFORE
THE HON'BLE S. V.SINGH RATHORE, J.

U/S 482/378/407 No. - 1369 of 2012

Shiv Pratap Singh ...Petitioner
Versus
The State of U.P Thru Principal Secy., Home., and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Tripathi

Counsel for the Respondents:
Govt. Advocate

Cr.P.C.-Section 482-quashing of FIR-allegations of procuring forged will-cancellation under consideration in Civil suit-FIR lodged after 10 years-in view of Shushil Suri Case-held-not available-from perusal of allegations-can not be termed mala-fide-can not be interfered-direction to consider Bail Application

keeping in view of Lal Kamlendra Pratap as well as Full Bench decision of Amrawati case-given.

Held: Para 5 and 6

Perusal of the material available on record, makes out commission of cognizable offence by the applicant.

In view of the aforesaid facts, at this stage, on the basis of document filed it cannot be said that the F.I.R. was lodged due to malafide against the applicant. During the course of arguments, learned counsel for the applicant submitted that he is willing to face the trial and surrender before the Court and necessary direction be given for protection of his liberty.

Case law discussed:
2009 (3) ADJ 332 (SC); 2004 (57) ALR 290

(Delivered by Hon'ble S.V. Singh Rathore, J.)

1. By means of this application u/s 482 Cr.P.C., the applicant has prayed that the F.I.R. dated 23.12.11 bearing case Crime No. 270/11 P.S. Fatanpur, Pratapgarh, District ? Pratapgarh and chargesheet dated 19.1.2012 be quashed and also order dated 27.1.2012 passed by Chief Judicial Magistrate, Pratapgarh, by which the applicant was summoned, on the chargesheet be quashed.

2. The submission of the learned counsel for the applicant is that his case is covered by the guideline No. 7 laid down by the Hon'ble Apex Court in the case of State of Haryana and others v. Ch. Bhajan Lal and others AIR 1992 SC 604. It is further submitted that the matter regarding the genuineness of the 'will' is still pending before the court of competent Civil and Revenue jurisdiction, the F.I.R. of this case has been lodged after considerable delay of 10 years.

3. Law is settled on the point that the power u/s 482 Cr.P. C. has to be exercised sparingly. Hon'ble Apex Court in a recent judgment in the case of ***Sushil Suri v. Central Bureau of Investigation (2011)2 Supreme Court Cases (Cri) 764*** , in paragraph 16 has held as under :-

"16.Section 482 Cr.P.C. itself envisages three circumstances under which the inherent jurisdiction may be exercised by the High Court, namely, (I) to give effect to an order under Cr.P.C;(ii) to prevent an abuse of the process of court; and (iii) to otherwise secure the ends of justice. It is trite that although the power possessed by the High Court under the said provision is very wide but it is not unbridled. It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the Court exists. Nevertheless, it is neither feasible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Yet, in numerous cases, this Court has laid down certain broad principles which may be borne in mind while exercising jurisdiction under Section 482 Cr.P.C. Though it is emphasized that exercise of inherent powers would depend on the facts and circumstances of each case, but the common thread which runs through all the decisions on the subject is that the Court would be justified in invoking its inherent jurisdiction where the allegations made in the complaint or charge-sheet, as the case may be, taken at their face value and accepted in their

entirety do not constitute the offence alleged."

4. In the facts of this case there is specific allegation against the applicant that he fabricated a 'will' and after investigation police has filed charge sheet against him. The petitioner submits that he has falsely been implicated in this case because of the malafide of the opposite parties no. 2 to 4.

5. Perusal of the material available on record, makes out commission of cognizable offence by the applicant.

6. In view of the aforesaid facts, at this stage, on the basis of document filed it cannot be said that the F.I.R. was lodged due to malafide against the applicant. During the course of arguments, learned counsel for the applicant submitted that he is willing to face the trial and surrender before the Court and necessary direction be given for protection of his liberty.

7. Keeping in view the aforementioned legal position, the petition lacks merit and it deserves to be dismissed and is accordingly dismissed.

8. Since in this case, F.I.R. was lodged after 10 years and a civil dispute regarding the correctness of the 'will' is also pending before the Court of competent Civil and Revenue jurisdiction. Therefore, it is provided that in case petitioner surrenders before the trial court within a period of 15 days from today then his bail application shall be considered by the Courts below expeditiously, in the light of guidelines provided by the Hon'ble Apex Court in the case of ***Lal Kamlendra Pratap Singh V. State of U.P. 2009(3) ADJ322(SC) and Amrawati & another V. State of U.P. 2004(57)ALR 290,*** if possible on the same day.

9. During this period of 15 days the petitioner shall not be arrested.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2012

BEFORE
THE HON'BLE YATINDRA SINGH,J.
THE HON'BLE B. AMIT STHALEKAR,J.

Special Appeal No. - 2124 of 2011

State of U.P. and others ...Petitioners
Versus
Smt. Namrata Singh ...Respondents

Counsel for the Petitioner:
Dr. Y.K. Srivastava
S.C.

Counsel for the Respondent:
Sri R.A. Akhtar
Sri B.K. Mishra

<u>Constitution of India, Article 226</u>- Petitioner obtained Degree of Shiksha Shashtri-equivalents to B.Ed. On 13.07.1999-institution in question was granted permission to run B.Ed. Classes in the year 1998-99-by NCERT-can not be denied from Training of Special B.T.C course.

Held: Para 6

The contention of the appellant has been rebutted by the petitioner-respondent. A counter affidavit along with letter of the NCTE dated 5.8.2004 has been filed wherein it has been mentioned that Sri Lal Bahadur Shastri Rashtriya Sanskrit Vidyapeetha, New Delhi had been granted recognition by the Northern

Regional Committee of NCTE for conducting Shiksha Shastri (B.Ed.) course of one duration from the academic session 1998-1999. In the said letter it was also mentioned that the Shiksha Shastri degree awarded by Sri Lal Bahadur Shastri Rashtriya Sanskrit Vidyapeetha, New Delhi is accepted by the Government for the purpose of employment.

(Delivered by Hon'ble B.Amit Sthalekar,J.)

1. This special appeal has been filed against the judgement and order of the learned Single Judge dated 16.9.2008 allowing the writ petition of the petitioner-respondent and the order dated 13.5.2010 dismissing the review application of the appellants-respondents.

2. The petitioner- respondent filed writ petition seeking direction to the respondents to consider the name of the petitioner for Special B.T.C. Training Course.

3. The contention of the petitioner-respondent is that she had obtained Shiksha Shastri degree which is equivalent to B.Ed. certificate from Sri Lal Bahadur Shastri Rashtriya Sanskrit Vidyapeetha, New Delhi. She was not allowed to go for training. In para-11 of the writ petition it is mentioned that she was not sent for training and no reason was given for the same. The petitioner-respondent filed writ petition no.48433 of 2008 which was disposed of by this Court and a direction was issued to the respondent to allow the petitioner to pursue her Special B.T.C. Course.

4. We have heard counsel for the parties. With the consent of the parties writ petition is being decided at this stage.

5. The contention of the appellants is that the marksheet of the Shiksha Shastri was issued to the petitioner-respondent on 13.7.1999 on which date Sri Lal Bahadur Shastri Rashtriya Sanskrit Vidyapeetha, New Delhi was not recognised by the NCTE.

6. The contention of the appellant has been rebutted by the petitioner-respondent. A counter affidavit along with letter of the NCTE dated 5.8.2004 has been filed wherein it has been mentioned that Sri Lal Bahadur Shastri Rashtriya Sanskrit Vidyapeetha, New Delhi had been granted recognition by the Northern Regional Committee of NCTE for conducting Shiksha Shastri (B.Ed.) course of one duration from the academic session 1998-1999. In the said letter it was also mentioned that the Shiksha Shastri degree awarded by Sri Lal Bahadur Shastri Rashtriya Sanskrit Vidyapeetha, New Delhi is accepted by the Government for the purpose of employment.

7. In view of above, the degree of the petitioner-respondent was valid. There was no reason as to why the petitioner-respondent was not sent for training for Special B.T.C. course in question.

8. We find no merit in the present appeal. It is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.04.2012

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Revision No. - 2532 of 2008

Subhash Chand ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Pankaj Kumar Tyagi
Smt. Archana Tyagi

Counsel for the Respondent:
Govt. Advocate
Sri R.K.Pandey

Code of Criminal Procedure-Section 357 (3)-compensation of Rs.60,000/-with conviction 3 years rigorous imprisonment and fine of Rs. 5000/- under Section 138 of negotiable Instruments Act-Revision against conviction in case amount of compensation alongwith fine deposited within 2 month-conviction of 3 month rigorous imprisonment converted into already undergone-Revision partly allowed.

Held: Para 3

In my opinion, there is no illegality, impropriety and irregularity in the judgment and orders passed by the courts below. Hence, no interference is called for by this Court in this revision. However, as regard the question of sentence, it is directed that payment of compensation awarded by the court below under Section 357 (3) Cr.P.C. of Rs. 60,000/- which shall be paid by the revisionist within two months from today to opposite party No. 2 and Rs. 5,000/- should also be deposited by the revisionist to the court concerned and the sentence of simple imprisonment of three months is converted to period already undergone. Revision is partly allowed. In case of default of payment, as directed above, the revisionist shall be taken into custody to serve out sentence as directed by the courts below.

(Delivered by Hon'ble Ramesh Sinha,J.)

1. Heard Sri Pankaj Kumar Tyagi, learned counsel for the revisionist, Sri R.K. Pandey, learned counsel for opposite party No. 2 and the learned A.G.A. appearing for the State. Perused the record.

2. This revision has been preferred against the judgment and order dated 27-8-2008 passed by Additional Sessions Judge, Court No. 2, Meerut and order dated 18-3-2008 passed by Judicial Magistrate, Mawana, District Meerut by which the courts below have convicted and sentenced the revisionist under Section 138 Negotiable Instrument Act with a simple imprisonment of three months, imposed fine of Rs. 5,000/- and under Section 357 (3) Cr.P.C. a compensation of Rs. 60,000/- has been awarded against the revisionist which is to be paid to opposite party No. 2. The counsel for the revisionist stated that the revisionist is ready to pay the amount of compensation awarded by the court below to the tune of Rs. 60,000/- within two months from today and the period of imprisonment of three months may be converted to already undergone. The revisionist shall also pay a fine of Rs. 5,000/-.

3. After having heard learned counsel for the parties and there are concurrent findings of the courts below regarding conviction of the revisionist. In my opinion, there is no illegality,

impropriety and irregularity in the judgment and orders passed by the courts below. Hence, no interference is called for by this Court in this revision. However, as regard the question of sentence, it is directed that payment of compensation awarded by the court below under Section 357 (3) Cr.P.C. of Rs. 60,000/- which shall be paid by the revisionist within two months from today to opposite party No. 2 and Rs. 5,000/- should also be deposited by the revisionist to the court concerned and the sentence of simple imprisonment of three months is converted to period already undergone. Revision is partly allowed. In case of default of payment, as directed above, the revisionist shall be taken into custody to serve out sentence as directed by the courts below.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2012

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE PANKAJ NAQVI, J.

Writ Tax No. - 2996 of 2002

Rt. Rev. A.R.Stephen,Bishop of Lucknow ...Petitioner

Versus

The Nagar Nigam,Alld. and another ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders

Counsel for the Respondents:
Sri Q.H.Siddiqui

U.P. Municipal Corporation Act 1959-as amended Act 2006-Section 177 (c)- Exemption from House Tax-Knox Memorial Hall situated in Holy Trinity Church-running Boys High School-levy of House Tax-on ground being un-aided School-misconceived-exemption is unconditional-wholly immaterial whether aided or un-aided-demand notice quashed.

Held: Para 14

For the aforesaid reasons, we find that the building of 'Holy Trinity School', used solely for the purposes of school, even if it is not getting any aid from the State Government is exempt from payment of house tax. The exemption under Section 177 (c) of the U.P. Municipal Corporation Act, 1959, is not qualified, or conditional and thus the school is not liable to pay any house tax.

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

1. We have heard Shri A.D. Saunders, learned counsel for the petitioner. Learned Standing Counsel appears for the State respondents. Shri Q.H. Siddiqui has filed appearance on behalf of Nagar Nigam and has also filed counter affidavit. This matter is on the list for several months. He has not appeared on any of the dates and thus we are proceeding to hear the matter on the basis of the counter affidavit filed by Nagar Nigam, Allahabad.

2. Rt. Rev. A.R. Stephan, Bishop of Lucknow, Church of North India, Bishop House, Allahabad has filed this writ petition against the Nagar Nigam, Allahabad and the Tax Superintendent, Nagar Nigam, Allahabad against the levy and assessment of tax on the 'Holy Trinity School', Knox Memorial Hall, 16/2, Church Lane, Allahabad.

3. Brief facts giving rise of this writ petition are that there is Holy Trinity Church at 16/2, Church Lane, Allahabad. There is also a hall known as 'Knox

Memorial Hall', which is used for charitable purposes. A school building has been constructed in the same campus in which a school in the name of 'Holy Trinity School' is being run. The school is an annexe of Boys High School and College, Allahabad. The school is not aided by the Government. It is alleged that the school is being run by the charitable society for charitable purposes dealing in the field of education. The school also has church functions particularly in the month of December every year, in which the students of the school participate. The Nagar Nigam, Allahabad is assessing the house tax on 'Knox Memorial Hall' 16/2 Church Lane, regularly. It appears that the petitioner was paying the house tax at the rate of Rs.386.40. The annual value of the building of the school was assessed for the first time and on which the house tax was assessed w.e.f. 1.10.1997 to 31.3.2003 giving rise to this writ petition.

4. The Nagar Nigam has assessed the house tax on 'Knox Memorial Hall' 16/2 Church Lane, Allahabad on the annual value of the building at Rs.21,37,800/- on which house tax was worked out at Rs.4,70,316/-. A bill for payment of current house tax and the arrears of Rs.19,56,087/- was sent to the petitoner to be paid by 30.9.2002.

5. By an interim order dated 11.12.2002, the recovery of the bill was stayed by the Court. The order is quoted as below:-

"Sri QS Siddqui may counter affidavit within three weeks. List thereafter.

Section 177 of UP Municipal Corporation Act, 1959 exempted Schools and colleges from house tax. By the amended UP Municipal (Amendment) Act (1999), UP Act No.17 of 1999, Schools and colleges are still exempted except for professional, vocational, technical and medical institutions, which are not run and managed by the Government. Hence prima face the levy of the impugned house tax appears to be illegal in view of section 177 of the Act as amended. We, therefore, stay the operations of the bill dated NIL, Annexure-3 to the writ petition till further order."

6. The counter affidavit of Shri S.L. Yadav, Legal Advisor, Nagar Nigam, Allahabad has been filed stating in para 4, 6, 8 and 10 as follows:-

"4. That the contents of para 2 of the writ petition are denied as stated and it is further submitted that in the records of Nagar Nigam the building no.16/2 Church Lane is recorded in the name of Knox Memorial and in which a School namely Holy Trinity is also running along with the Church and School is running in the entire building except the portion of Church. It is further submitted that in accordance to the Section 174 (a) of U.P. Municipal Corporation Act, 1959 the value of building is Rs.3,44,02,352/- and after assessing at the rate of 7% the value comes to Rs.21,37,800/- with effect from 1.10.97, and in accordance to the provision of the Act the Church has been exempted while assessing the tax.

6. That the contents of para 4 of the writ petition are denied as stated and in reply it is further submitted that the Holy Trinity School which is a Branch/Annexee of Boys High School is imparting

education, with fee and also the aforesaid institution is not being managed by the State Government.

8. That the contents of para 6 of the writ petition are denied as stated and it is further submitted that the Secretary/ Govt. issued a G.O. No.1674/Naw-9-98 dt. 22.7.98 by which exemption has been granted to certain institution namely Govt. Colleges, Govt. Degree Colleges and College and degree colleges of Handicapped/ Deaf & Dumb/ unsound mind and also the colleges and degree colleges who are not charging fee of Rs.50/- per month. But the petitioner has failed to produce any document which may show that the condition stated in the G.O. dated 22.7.98 is applicable upon him. For kind perusal of this Hon'ble Court copy of the G.O. dt. 22.7.98 is being attached herewith and marked as Annexure CA-1.

10. That the contents of para 8 of the writ petition are denied as stated and it is further submitted that Holy Trinity School is managed by the institution namely Church of North India and from the student from all the caste and religion are studying after paying heavy amount to the institution and also there is no provision for the poor or down trodden section of the society."

7. Shri Saunders, learned counsel for the petitioner submits that the U.P. Municipal Corporation Act, 1959 provide for exemption from general tax on the schools building. He submits that unamended Section 177 had originally exempted buildings solely used as jails, court houses, treasuries, schools and colleges. The unamended Section 177 (c) provided as follows:-

"177. (c) building solely used as schools and intermediate colleges whether aided by the State Government or not, fields, farms and gardens of Government aided institutes of research and development, playgrounds of government aided or unaided recognized educational institutions and sports stadium."

8. The Act was amended by U.P. Ordinance No.20 of 2002 and U.P. Ordinance No.8 of 2003 on 21.11.2002 and 8.4.2003 respectively. These ordinances could not be replaced by an Act of the Legislature and were allowed to lapse. The U.P. Municipal Corporation Act, 1959 was thereafter amended by U.P. Municipal Corporation (Amendment) Act, 2004 by U.P. Act No.16 of 2004 w.e.f. 11th August, 2004. The Prefatory Note giving statement of object and reasons appended to the U.P. Municipal Corporation (Amendment) Act, 2004 reads as follows:-

"Prefatory Note-Statement of Objects and Reasons-With a view to bringing uniformity with other Corporations of the Country in the names of certain offices of the Municipal Corporation and making the provisions more effective and practicable in the present situation, the Uttar Pradesh Municipal Corporation (Amendment) Ordinance, 2002 (U.P. Ordinance No.20 of 2002) and the Uttar Pradesh Municipal Corporation (Amendment) Ordinance, 2003 (U.P. Ordinance No.8 of 2003) were promulgated on November 21,2002 and April 8, 2003 respectively to amend the Uttar Pradesh Municipal Corporation Act, 1959 (U.P. Act No.2 of 1959). The provisions of the said Ordinances were replaced by the Uttar Pradesh Municipal Corporations (Amendment) (Second)

Ordinance, 2003 (U.P. Ordinance No.29 of 2003) but it could not be replaced by an Act of the Legislature and was allowed to be lapsed. Now it has been decided to amend the said Act with retrospective effect i.e. with effect from November 21,2002 to provide for,-

1. changing the names of certain offices of the Municipal Corporations;

2. making provision for more than one Additional Municipal Commissioner in a Municipal Corporation;

3. removal of Mayor by the State Government after considering the motion of no-confidence passed by the three-fourth majority of the total number of the members of the Corporation;

4. insertion of certain acts which also disqualify a person from being or from being chosen as the Corporator, a Deputy Mayor or Mayor of a Corporation;

5. increasing financial jurisdiction of the Mayor, the Corporation and the Municipal Commissioner in relation to the execution of contracts and sanction of estimates;

6. changing the procedure of imposition and realization of property tax.

The Uttar Pradesh Municipal Corporations (Amendment) Bill, 2004 is introduced accordingly."

9. Section 177 (c) was amended by the U.P. Municipal Corporation (Amendment) Act, 2004 providing that building solely used as school and intermediate college, whether aided by the State Government or not shall be exempted from general tax. The amendment of Section 177 is quoted as below:-

"9. Amendment of Section 177- In Section 177 of the principal Act,-

(a) for clause (c) the following clause shall be substituted, namely:-

"(c) building solely used as schools and Intermediate colleges whether aided by the State Government or not;";

(b) for clause (h) the following clause shall be substituted, namely:-

"(h) residential buildings occupied by the owner of building, which is located in such area which has been included in the limit of Corporation within five years or the facilities of roads, drinking water and street light provided in the area, whichever is earlier."

10. The Act was further amended by U.P. Act No.38 of 2006, amending clause (c) of Section 177 as follows:-

"177. (c) building solely used as schools and intermediate colleges whether aided by the State Government or not, fields, farms and gardens of Government aided institutes of research and development, playgrounds of government aided or unaided recognized educational institutions and sports stadium."

11. The exemptions under Section 177 (b), and its subsequent amendments chronologically detailed as above including last amendment by U.P. Act No.38 of 2006, exempted the buildings solely used as schools and colleges. Initially there was no qualifying words

such as 'whether aided by the State Government or not'. These words were subsequently added in the Amendment Act, 2004, and thereafter the Amendment Act, 2006.

12. In the present case it is not denied that in the campus of the church and the 'Knox Hall', the school by the name of 'Holy Trinity School', is being run in a separate building, which is an annexee of the Boys High School and College. There is no denial in the counter affidavit that this building is being solely used as school. The petitioner states that the school is not getting any aid by the State Government. In view of the exemption given under Section 177 (c), as amended from time to time, it is immaterial whether the building, which is solely used as school is aided by the State Governmetn or not.

13. There is no other provision in the U.P. Municipal Corporation Act, 1959, nor any reliance has been placed upon any other provisions of law or Government Order, which takes away the exemption provided by Section 177 (c) of the Act to the buildings solely used as school.

14. For the aforesaid reasons, we find that the building of 'Holy Trinity School', used solely for the purposes of school, even if it is not getting any aid from the State Government is exempt from payment of house tax. The exemption under Section 177 (c) of the U.P. Municipal Corporation Act, 1959, is not qualified, or conditional and thus the school is not liable to pay any house tax.

15. The writ petition is **allowed.** The impugned assessment and the bill of house tax and the order dated 28.10.2002 passed by the Tax Superintendent, Nagar Nigam, Allahabad is set aside. This judgment will be operative only on the assessment and demand of house tax, and will not be applicable for any other tax or charges levied by Nagar Nigam or any other statutory body for taxes, fees or service charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.04.2012

BEFORE
THE HON'BLE P. K. SINGH BAGHEL, J.

Civil Misc. Writ Petition no. 3625 of 2010

Om Prakash Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare
Sri Ashok Khare

Counsel for the Respondents:
C.S.C.

U.P. Police Officer Subordinate Rank (Punishment and Appeal Rules 1991) Section-Rule-2 (2) (b)-petitioner was engaged as Police Constable-dismissed by evoking power dispensed with formal enquiry-without recording any reason for not practicable to hold formal enquiry-without recording any reason for satisfaction-about not practicable to hold formal enquiry-pertaining to appointment based upon forged certificate-case does not fall under exception of Jaswant Singh Case-dismissal order quashed.

Held: Para 14

What emerges from the above mentioned cases is that the recording of the reason is a condition precedent for invoking Rule 8(2)(b) of the 1991 Rules and the reasons must be genuine to the

facts of the case. In the present case, the controversy against the petitioner was that he had used the forged certificate. To prove the said allegations, disciplinary proceedings was necessary. This case does not fall under the exception carved out by the Supreme Court in the cases of Jaswant Singh (supra) and Satyavir Singh (supra).

Case law discussed:

(1985) 4 SCC 252; (1991) 1 SCC 362; 2006 (1) ESC 374; 2009(9) ADJ 86; 2011 (3) UPLBEC 2421; 2011 (4) ADJ 851; 2011 (5) ADJ 835; 2010 (4) AWC 3495; 2009 (5) ADJ 405; 2008 (3) UPLBEC 2357

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

1. By means of the present writ petition, the petitioner has challenged his dismissal order dated 25.7.2007 whereby he has been dismissed from service in terms of Rule 8 (2)(b) of the Uttar Pradesh Police Officers of Subordinate Rank (Punishment & Appeal) Rules, 1991.

2. The brief facts of the case are that the petitioner was initially appointed in the year 2004 as a constable in Provincial Armed Constabulary. He completed his one year training during the period 2005-06 and after completion of his training, he was posted at Fatehpur. While he was posted in Mirzapur, on 25.7.2007 the Commandant, 12th Battalion, Provincial Armed Constabulary, Fatehpur dismissed him in terms of the proviso (b) of Rule 8(2) of the Uttar Pradesh Police Officers of Subordinate Rank (Punishment & Appeal) Rules, 1991.

3. The respondent nos. 2 and 3 have filed counter affidavit. In paragraph no. 7 of the counter affidavit, it has been mentioned that the petitioner was selected on the post of Constable and he has submitted a forged certificate in regard to his three years working in U.P. Home Guard Department. Thus, on the basis of the forged certificate, he has got benefit of relaxation of age. It is the further stand of the respondents that in the inquiry, it was found that the petitioner has worked only one year and he was not entitled for the maximum age relaxation on the basis of his working certificate of U.P. Home Guard Department and as such the Rule 8(2)(b) has been invoked. No other ground has been mentioned in the counter affidavit for holding the inquiry.

4. I have heard Sri Siddharth Khare for the petitioner and learned Standing Counsel for the respondent.

5. Sri Khare has submitted that no notice or opportunity has been given to him before passing the said order and from the counter affidavit, it is clear that some inquiry was conducted behind his back and as such he ought to have been given opportunity if any inquiry was conducted against the petitioner. Sri Khare has further urged that Rule 8(2)(b) enjoins the Disciplinary Authority to record the reason in writing that why it was not reasonably practicable to hold such inquiry.

6. From the perusal of the impugned order, it is evident that no reason at all has been recorded in the impugned order. He further stated that since criminal case was pending and he expected that the said criminal case shall be concluded within a reasonable time and as such there was some delay in filing the writ petition. Mr. Khare has further submitted that the order of the disciplinary authority is without jurisdiction as he was posted at Mirzapur and the Commandant, Mirzapur was competent authority to pass the order. However, the order has been passed by the

Commandant Fatehpur and as such the impugned order is without jurisdiction. He has placed reliance on the Division Bench Judgements of this Court in State of U.P. and others Vs. Chandrika Prasad, 2006(1) ESC 374; Yadunath Singh Vs. State of U.P. and others, 2009(9)ADJ 1986; and Single Bench Judgments of this Court in Writ Petition No. 76110 of 2011, Girijesh Kumar Singh Vs. State of U.P. and others and Writ Petition No. 5471 of 2011, Girijesh Kumar Singh Vs. State of U.P. through Principal Secretary Transport Department.

7. Learned Standing Counsel has submitted that since the petitioner has used the forged certificate as such the disciplinary authority has rightly invoked Rule 8(2)(b) in this case. He has invited attention of the Court towards paragraph 7 of the counter affidavit. He has further submitted that in this case, there was no need to comply the principles of natural justice as he has secured his employment by furnishing a forged document and if that document had not been filed by him he would not have got the age relaxation and in such a case the disciplinary authority has rightly dispensed with his services in terms of Rule 8(2)(b) of the aforesaid Rules, 1991.

8. I have considered the rival submissions. Rule 8(2)(b) gives power to the disciplinary authority to dismiss/review a police officer only on the ground that it is not reasonably practicable to hold inquiry against him. It further enjoins the disciplinary authority to record the reasons for reaching to such conclusion. The Rule 8(2)(b) of the Police Rules reads as under:-

"8. (2)(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

9. The Rule 8(2)(b) is para materia to second proviso to Article 311 of the Constitution of India. The clause (b) of the second proviso to Article 311 of the Constitution of India came to be considered in several Judgments of the Supreme Court. The Supreme Court in the case of Satyavir Singh Vs. Union of India, (1985) 4 SCC 252, has considered in detail the amendment of second clause of Article 311 of the Constitution by the Constitution (Forty-second Amendment) Act, 1976. The relevant portion of the Judgment in the case of Satyavir Singh (supra) at page 280 is as follows:-

"(104) Where a clause of the second proviso to Article 311(2) or an analogous service rule is applied on an extraneous ground or a ground having no relation to the situation envisaged in such clause or rule, the action of the disciplinary authority in applying that clause or rule would be mala fide and, therefore, bad in law and the court in exercise of its power of judicial review would strike down both the order dispensing with the inquiry and the order of penalty following thereupon."

10. In the Case of Jaswant Singh Vs. State of Punjab, (1991) 1SCC 362, the Supreme Court held that the decision to dispense the departmental inquiry is an exceptional case and the concerned authority must record its reason for its satisfaction to dispense the disciplinary proceedings. The relevant part of the Judgement in the case of Jaswant Singh (supra) at page 369 is as under:-

"The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer. In the counter filed by respondent 3 it is contended that the appellant, instead of replying to the show cause notices, instigated his fellow police officials to disobey the superiors. It is also said that he threw threats to beat up the witnesses and the Inquiry Officer if any departmental inquiry was held against him."

11. The three Division Benches of this Court in the Cases of State of U.P. and others Vs. Chandrika Prasad, 2006(1) ESC 374, Pushpendra Singh and other Vs. State of U.P. and Yadunath Singh Vs. State of U.P. and others, 2009(9) ADJ86 have followed the principles laid down by the Supreme Court in the aforementioned cases. In the case of Pushpendra Singh (supra), this Court held as follows:-

"Thus, in order to dispense with the regular departmental proceeding for inflicting punishment of dismissal, removal or reduction in rank, recording reasons is condition precedent. The idea or object of recording reasons is obviously to prevent arbitrary, capricious and mala fide exercise of power. Therefore, recording of reason is mandatory and in its absence the order becomes laconic and cannot sustain. Onus is on the State or its authorities to show that the order of dismissal has been passed strictly as per prescription of the statutes. The Hon'ble Apex Court in the case of Union of India v. Tutsi Ram Patel, AIR 1985 SC 1416 while considering Articles 310 and 311 of the Constitution of India held that two conditions must be satisfied to uphold action taken under Article 311 (2) of the Constitution of India, viz., (i) there must exist a situation which renders holding of any enquiry not reasonably practicable, (ii) the disciplinary authority must record in writing its reasons in support of its satisfaction. The Hon'ble Apex Court further observed that though Clause (3) of Article 311 makes the decision of the disciplinary authority in this behalf final, yet such finality can certainly be tested in the Court of law and interfered with if the action is found to be arbitrary or mala fide or motivated by extraneous considerations or merely a rule to dispense with the enquiry.

The satisfaction that it is not reasonably practicable to hold such enquiry has to be spelled out either in the order itself or at least it has to be available on record. Learned Standing Counsel also during his submission could not show us any such reason recorded by the competent authority in the. record to show any ground or reason for invoking the provisions contained in Rule 8 (2)(b) of the Rules. It is well settled legal position that when a statutory functionary makes an order based on some reasons or grounds, its validity is to be tested on the ground or reasons mentioned therein and cannot be supplemented by giving reasons through affidavit filed in the case (See Mohinder Singh Gill and another v. Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851, para 8)."

12. The similar view has been taken by the another Division Bench in Yadunath Singh Vs. State of U.P. and others. In the

said case also the disciplinary proceeding was dispensed with without any plausible reason. The only reason mentioned in the order was that the departmental inquiry shall consume sufficient time and on the said ground the Rule 8(2)(b) was invoked. This Court set aside the order of the disciplinary authority and held as under:-

"Here in the present case, the disciplinary authority had recorded its satisfaction but it is well settled that that satisfaction has to be based on germane grounds and not ipse dixit of the disciplinary authority. Here the only ground to dispense with the inquiry is that if the writ petitioner-appellant is allowed to continue in service, a departmental inquiry shall consume sufficient time and, therefore, such continuance will have bearing on the moral of the other police personnel. We are of the opinion that the ground recorded by the disciplinary authority while dispensing with the inquiry is not germane nor is it on any material that may be relevant, as such, the ground set forth cannot justify dispensing the inquiry at all.

5. The provisions contained under Rule 8 (2)(b) have been incorporated keeping in view the provisions of Article 311 (2)(b) of the Constitution of India. The power conferred on the authority to dispense with an inquiry in a given situation where it is reasonably not practicable to hold an inquiry, has been envisaged therein. The Apex Court in the case of Union of India and another v. Tulsi Ram Patel, (1985) 3 SCC 398, had the occasion to consider the scope of the aforesaid provision and the Apex Court laid down the test of reasonableness in the said case to be reflected by the authority while proposing to dispense with an inquiry. Paragraph 130 of the said decision is reproduced below:

Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances byway of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through other threatens, intimidates and terrorizes the officer who is the disciplinary authority or member of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary

authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the Court so far as its power of judicial review is concerned and in such a case the Court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India is an instance in point."

13. The aforesaid decision of the Division Bench have been followed in other cases namely Kuldeep Kumar Vs. State of U.P. and others, 2011(3) UPLBEC 2421; Dharam Pal Singh Chauhan Vs. State of U.P. and others, 2011(4) ADJ 851; Gulabdhar Vs. State of U.P. and others, 2011(5) ADJ 835; Ram Yagya Saroj Vs. State of U.P. and others, 2010(4) AWC 3495; Umesh Kumar Vs. State of U.P. and others, 2009(5) ADJ 405; and Bishambher Singh Bhadoria Vs. State of U.P. and others, 2008 (3) UPLBEC 2357.

14. What emerges from the above mentioned cases is that the recording of the reason is a condition precedent for invoking Rule 8(2)(b) of the 1991 Rules and the reasons must be genuine to the facts of the case. In the present case, the controversy against the petitioner was that he had used the forged certificate. To prove the said allegations, disciplinary proceedings was necessary. This case does not fall under the exception carved out by the Supreme Court in the cases of Jaswant Singh (supra) and Satyavir Singh (supra).

15. In view of the above, the writ petition is allowed. The impugned order dated 25.7.2007 is quashed. However, it shall be open to the respondent authority to proceed to hold the inquiry under 1991 Rules. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2012

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 3825 of 1976

The State of U.P. Through the Divisional Forest Officer, Mirzapur ...Petitioner
Versus
IVth Additional District Judge and others ...Respondents

Counsel for the Petitioner:
Sri Lalji Sinha
S.C.

Counsel for the Respondents:
Sri V.K. Singh
Sri Bhagwati Prasad Singh
Sri H.P. Mishra
Sri R.N. Singh
Sri V.K. Singh
Sri B.P. Singh
Sri Vivek Kumar Singh

Indian Forest Act 1927-Section 3-Deceleration of land -about 746 Bigha 17 Biswa-as surplus land-situated in revenue village Babua Raghunath Singh-objection by Raja Vishwanath Singh-being hereditary tenant after abolition of Zamindari become Sirdar under Section 19 and subsequently Bhumidhar-as such after deposit of 20 times rent became Bhumidhar-who gifted to Charitable Trust DAIYA-hence can not be declared

as forest land including cultivatory land also-held-Bhumidhari Rights Subordinate to propitiatory Rights of State Government-hence can exercise its Power under Section 4-Land actually under cultivation be excluded-consequential direction given.

Held: Para 45

At this stage, learned counsel for the respondents submits that from the finding recorded by the authorities under Act, 1927, it was admitted that a small portion of the land was actually under cultivation and therefore, such land could not be treated to be forest or waste land. It would fall in category 'c' as aforesaid. No demarcation of the area in that regard has been done. Therefore, the State Government must at least be directed to exclude the land, which was under cultivation, as it was part of the holding excluded under Section 3 of Act, 1927.

Case law discussed:
1960 (RD) 337; 1990 AWC 210

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

1. Heard Sri V.K. Singh, learned Additional Advocate General, assisted by Sri V.K. Chandel, learned Standing Counsel for the State-petitioner and Sri R.N.Singh, and Sri B.P. Singh, learned Senior Advocates assisted by Sri Vivek Kumar Singh, Advocate on behalf the contesting respondent, in both the writ petitions.

2. These two writ petitions raise common question of law and facts and have, therefore, been clubbed together and are being decided together by means of this common order. Civil Misc. Writ Petition No. 3825 of 1976 has been treated to be the leading writ petition.

3. The State of Uttar Pradesh has filed this writ petition for quashing of the orders dated 22nd March, 1961 passed by the Forest Settlement Officer, Mirzapur, dated 28th October, 1961 passed by the Commissioner Varanasi as also the order dated 28th May, 1976 passed by the IVth Additional District Judge, Mirzapur.

4. Facts in short leading to the present writ petition as are follows:

5. Notification under Section 4 of the Indian Forest Act, Act, 1927 (hereinafter referred to as the "Act, 1927"), was issued by the State of Uttar Pradesh on 19th December, 1955, which included amongst other the areas of village Babura Raghnath Singh and Katra Tappa Upraudh, District Mirzapur. To the said notification, objections were filed by Raj Vishwa Nath Pratap Singh under Section 6 of Act, 1927. On the objection so filed, it appears that an order was passed excluding the plots in question from the limits of the proposed reserved forest on 22nd April, 1957. Subsequently, however, order dated 22nd April, 1957 was recalled under order of the Forest Settlement Officer dated 20th December, 1957. As a result whereof, objections under Section 6 of Act, 1927 stood restored.

6. During the pendency of the aforesaid proceedings, Vishwa Nath Pratap Singh is stated to have deposited 10 times of the land revenue and to have obtained Bhumidhari Sanad of the land covered by the notification under Section 4 of the Act, 1927, with reference to the provisions of U.P. Agriculture Tenants (Acquisition of Privileges) Act, 1949 (hereinafter referred to as the 'Act, 1949') read with the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereafter referred to as the 'Act, 1950'). Immediately, after obtaining Bhumidhari Sanad, Sri Vishwa Nath Pratap

Singh executed a gift deed of the area covered by notification under Section 4 of the Act, 1927 in favour of Daiya Charitable Society on 21st June, 1959.

7. The objections filed by Vishwa Nath Pratap Singh were not pressed. Thereafter Daiya Charitable Society made an application for impleadment in place of Vishwa Nath Pratap Singh, which was allowed on 22nd July, 1959 by the Forest Settlement Officer. The Daiya Charitable Society instead of pursuing the objections filed by Vishwa Nath Pratap Singh filed its own objections. The objections filed by the Daiya Charitable Society were admitted.

8. Under the order dated 22nd March, 1961, the Forest Settlement Officer framed four issues for determination, namely, (a) whether the transfer made by Vishwa Nath Pratap Singh in favour of the objector i.e. Daiya Charitable Society is valid and in accordance with law or not, (b) whether the land in dispute was a jungle or waste land on the date of vesting or not, (c) whether the objector has acquired any right over the land in dispute and (d) what relief, if any, objector is entitled?

9. The Forest Settlement Officer vide order dated 22nd March, 1961 held that since the entire land in dispute was recorded as the holding of Vishwa Nath Pratap Singh in the records of 1359 Fasli Khasara, question of its vesting after abolition of Zamindari does not arise. He went out to hold that it might be a farzi holding in the village records but this question cannot be decided in the proceedings under Section 4 of Act, 1927. The plots in dispute were not entered in the list of plots transferred to Forest Department as they constituted a holding in the pre-vesting days. The order refers to the local inspection made twice, the report whereof is on File No. 237/349/36. It discloses that only a small area of the notified plots is under actual cultivation and that the remaining major part of it was forest and waste land on the date of vesting. The land has not vested in the Government being recorded in the holding coming down since pre-vesting period. He then proceeded to hold that since Vishwa Natha Pratap Singh was recorded as tenant-in-chief of the land in question and after depositing 10 times of the land revenue he has acquired Bhumidhari rights the gift deed executed by him in favour of Daiya Charitable Society was valid.

10. So far as the issue nos. 3 and 4 are concerned it was held that the objectors have become bhumidhar of the land as per the decision of issue nos. 1 and 2. The objector was entitled to utilize the entire holding in the way he was legally entitled. Claim of the objector was allowed and the Divisional Forest Officer was advised to take necessary action to acquire the land in dispute under Section 11 of Act, 1927, if so required.

11. Not being satisfied with the order passed by the Forest Settlement Officer dated 22nd March, 1961, the State of Uttar Pradesh filed an appeal under the Act, 1927 before the Commissioner, Varanasi Division, Varanasi. The appeal was dismissed by the Additional Commissioner vide order dated 28th October, 1961 only on the ground that on record there is Khasara entry of 1359 Fasli, which records that the land in dispute was recorded as kastkari of Vishwa Nath Pratap Singh and such a land will not become the propriety of the State government even after abolition of Zamindari. The transfer of the land in dispute in favour of Daiya Charitable Society was also upheld.

12. Against the order of the Additional Commissioner, the State of Uttar Pradesh preferred a revision before the District Judge, Mirzapur being Civil Revision No. 85 of 1966. The revision has also been dismissed by the IVth Additional District & Sessions Judge, Mirzapur vide order dated 28th May, 1976 after recording that from Khatauni Extract of 1359 Fasli, it is evident that Raja Vishwa Nath Pratap Singh was recorded under ziman as a hereditary tenant of the plots in question. After enforcement of Act, 1951, the land shall be deemed to have been settled by the State Government with Raja Vishwa Nath Pratap Singh, who became entitled to retain possession as Sirdar under Section 19 of the Act. He has become Bhumidhar by depositing 10 times the rent under the Act, 1949.

13. The learned Additional District & Sessions Judge has recorded that the land in question was part of the holding within the meaning of U.P. Tenancy Act, 1939 (hereinafter referred to as the 'Act, 1939'), it was not possible for the State Government to constitute a reserved forest qua such land, and therefore, the notification under Section 4 of Act, 1927 was not competent and without jurisdiction. The learned Additional District & Sessions Judge went out to consider Sections 4 and 6 of Act, 1950 as well as definition of land as provided under Section 3 (8) of Act of 1939. The contention of the State of Uttar Pradesh that since the land was not occupied for any purpose mentioned in the aforesaid definition, it cannot be said to be part of 'holding' within the meaning of its definition under Section 3 (10) read with Section 3 (8) of Act, 1939 was repelled on the ground that even if Raja Vishwa Natha Pratap Singh i.e. hereditary tenant could not cultivate the land even for years together, he would not be deprived of his right as hereditary tenancy. It has been explained that merely because the land is not being cultivated and was lying as waste will not effect the rights of the tenure-holder. Accordingly the revision filed by the State of Uttar Pradesh was dismissed.

14. In order to keep the record straight, it may be noticed that while the aforesaid proceedings were pending, the State authorities issued notice under Section 10 (2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as the 'Act, 1960') including the land in question along with other land in the year 1975-1976. Objections filed were considered and the ceiling limits were determined by the Prescribed Authority under order dated 17th November, 1976. Against the same revenue appeals were filed before the District Judge, Allahabad, wherein transfers made were accepted. The IVth Addition District Judge vide order dated 10th February, 1977 held that 1990 bighas and 2 biswa of Mauja Babua Raghu Nath Singh and 746 bighas and 17 biswas of Mauja Katra of District Mirzapur was surplus in the hand of the tenure-holder. According to the respondents, the ceiling proceedings have become final between the parties. In the matter of compensation for the trees and other developments, which were standing over the surplus land, revenue appeal no. 188 of 1981 were filed by the Daiya Charitable Society. The appeal was allowed by the District Judge, Allahabad vide order dated 29th August, 1981. Writ petition filed by the State against the said order being Civil Misc. Writ Petition No. 2362 of 1982 was dismissed by the High Court on 21th May/June, 1984. Thereafter, Special Leave to Appeal (Civil) No. 9119 of 1985 was filed by the State of Uttar Pradesh before the Hon'ble Supreme Court of India, it was also dismissed vide order dated 31st October, 1985.

15. Daiya Charitable Society is stated to have filed Original Suit No. 36 of 1973 in the matter of determination of number of trees and its valuation. The suit was decreed by the Civil Judge, Mirzapur vide order dated 8th November, 1976 determining the value of trees at Rs. 15,34,300/-. First appeal filed by the State Government against the said valuation is pending before the High Court being First Appeal No. 42 of 1977. In respect of trees existing over the land within the District of Allahabad first appeal no. 178 of 1975 which has been decided and the valuation of trees has been modified.

Contentions of State-petitioner:

16. In the aforesaid factual background, the learned Additional Advocate General on behalf of the State-petitioner submitted that there has been complete miscarriage of justice at the hand of the authorities under the Act, 1927. He explains that under Section 3 of Act, 1927 as amended in the State of Uttar Pradesh, the State Government has been conferred a power to construe any forest land or waste land or any other land (not being land for the time being comprised in any holding or in any village Abadi), which is the property of the Government or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled, **as reserved forest** in the manner provided in the Act. Under Explanation to the said Section, holding has been assigned the same meaning as is assigned to the word "holding" under the U.P. Tenancy Act, 1939. According to the learned Additional Advocate General, Section 3 contemplates three categories of land, which are the State property or over which the State has proprietary rights i.e. (a) forest land, (b) waste land and (c) any other land. According to him, so far as the forest and waste lands are concerned, the power to constitute a reserved forest is absolute. The conditional exclusion clause applies to other land i.e. the third category (c). The The State Government gets a right to constitute the forest/waste land as is a reserved forest, if it is the property of the State or the State has proprietary rights over the same.

17. He submits that the authorities have misread the provisions of Section 3 of Act, 1927 and have proceeded on misconception of law in applying the conditional exclusion Clause, in the case of land, which is forest and waste land also. It is the case of the State Government that the authorities under Act, 1927 have also failed to take note of the law as declared by the Supreme Court of India in the case of **Mahendra Lal Jaini vs. State of Uttar Pradesh & others,** reported in AIR 1963 SC 1019. According to him, the Supreme Court of India has laid down that any land to which the provisions of Act, 1950 apply after the enforcement of the said act would become property of the State Government and the State shall have proprietary right over the entire land covered by the Act, 1950. The Apex Court has explained that a bhumidhar has a better right than a Sirdar and the Sirdar has a better right than a Asami, yet all are mere tenure-holder under the State and the State has the proprietary right over the land. Even in respect of the land of which a person claims to be Bhumidhar, Chapter II of Act, 1927 would apply. Learned Additional Advocate General, therefore, submits that in the facts of the case, what was required to be seen by the authorities, under the Forest Act was as to whether the land was forest or waste land and whether State had the proprietary rights over the same.

18. The fact that the land in question is covered by Act, 1950 is admitted to the respondents, inasmuch as it is their own case that they had obtained bhumidhari sanad with reference to the provisions of Act, 1950 and that it is only because of the bhumidhari sanad granted in his favour, that Vishwa Nath Pratap Singh had executed a gift deed in favour of Daiya Charitable Society, which has stepped into its shoes and is contesting the proceedings. It was neither the case of Vishwa Nath Pratap Singh nor it is the case of the society that the land is outside the scope of Act, 1950. Learned Additional Advocate General explains that all the authorities/courts below have recorded a concurrent finding of fact based on spot inspection that the major portion of the land was forest and waste land, only small portion was under cultivation. Thus according to the learned Additional Advocate General, land being covered by Act, 1950 and most of it being forest and waste land, could be declared to be reserved forest, (on simple reading of Section 3 of Act, 1927) by adopting the procedure of Section 4 of the Forest Act. Orders impugned therefore, cannot be legally sustained and the objection of the Daiya Charitable Society is liable to be rejected.

Contentions of contesting respondent:

19. Sri R.N. Singh, learned Senior Advocate on behalf of Daiya Charitable Society submits that if any land is part of the holding of an hereditary tenant and if such person has subsequently obtained bhumidhari sanad after abolition of zamindari, by deposit of 10 times the land revenue, then such land, even though, it may be forest or waste land, on the date of vesting, cannot be declared as reserved forest. For the purpose a heavy reliance has been placed upon the use of the words "not being land for the time being comprised in any holding" subsequent to the words "any other land" in Section 3 of Act, 1927. According to Sri Singh, word "holding" as per Explanation to Section 3 of Act, 1927 has been assigned the same meaning as has been assigned to the same word under Section 3 (7) of Act, 1939.

20. Section 3 (7) of the Act, 1939 defines "holding" to means a parcel or parcels of land held under one lease, engagement or grant or in the absence of such lease, engagement or grant under one tenure.

21. From the record, it was established that Vishwa Nath Pratap Singh was recorded as the tenant-in-chief over the land in 1369 Fasali khasara entry. The land was, therefore, comprised in the holding of Viswanath Pratap Singh. In respect of such land, the State Government had no power to constitute any reserved forest. He has placed reliance upon the judgment of the Supreme Court in the case of State of Uttar Pradesh vs. Smt. Sarjoo Devi & others reported in AIR 1977 SC 2196 for explaining the meaning of the word "holding". According to him, it is not necessary that every piece of land, part of the holding must actually be used for cultivation all the time. He then placed reliance upon the Division Bench judgment of this Court in the case of Subedar Dalip Singh Karki vs. State of U.P. reported in 1974 RD 227 for the proposition that even Banjar land can form part of the holding of an hereditary tenant, over which Sirdari rights will accrue under Section 19 of Act, 1950 and later bhumidhari rights can be granted on satisfaction of the conditions required. Reference is also made to the

judgment this Court in the case of Ram Pati & others vs. District Judge, Mirzapur reported in 1985 (RD) 448 for the proposition that it is the intention, as borne out from the lease is to be seen as to for what purpose, the land is being held, actual growing of crops is not a sine qua non or a condition precedent for examining the said issue.

22. Sri B.P. Singh, learned Senior Advocate on behalf of Daiya Charitable Society in furtherance of what has been stated by Sri R.N. Singh, contended that Section 7 of Act, 1950 saves the rights of the tenant and for that purpose Section 19 (iv) of Act, 1950 and Section 5 (29) of the Act, 1939 are also referred to. According to him, rights of the intermediaries have been taken over by the State Government under Act, 1950 but the rights of the tenant have not been so taken over, and therefore, the rights of Vishwa Nath Pratap Singh and the Daiya Charitable Society, who are the tenants are not adversely effected, in any manner because of the enforcement/applicability of Act, 1950 in the area concerned.

23. It is further contended by both the learned counsels for the respondents that the present writ petition has practically become infructuous because of the recognition of the rights of Vishwanath Pratap Singh as the Bhumidhar by the State Government by granting bhumidhari sanad in his favour and in view of the orders passed by the authorities under Act, 1960 as well as the order passed by the Civil Court in the matter of determination of compensation for the trees standing on the land in question. They submit that once the State authorities themselves have admitted the Daiya Charitable Society as the holder of the land for the purposes of ceiling and owner of the trees being the bhumidhar of the land in question, it is no more open to the State Government to contend that the same was not a part of the holding within Section 3 of Act, 1927, so as to issue a notification under Section 4 of Act, 1927.

24. I have considered the submissions made by the learned counsel for the parties and have examined the records of the writ petitions.

25. For appreciating the controversy raised on behalf of the parties, it would be worthwhile to reproduce Section 3 of Act, 1927 as applicable in the State of Uttar Pradesh, it reads as follows:

"STATE AMENDMENT

Uttar Pradesh.*---For section 3, substitute the following section, namely:----------*

"3. Power to reserve forests. ----The State Government ***may constitute any forest land or waste land or any other land (not being alnd for the time being comprised in any holding [****] or in any village abadi) which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled, a reserved forest in the manner hereinafter*** *provided.*

Explanation.---The expression "holding" shall have the meaning assigned to it in U.P. Tenancy Act, 1939, and the expression 'village abadi' shall have the meaning assigned to it in the U.P. Village Abadi Act, 1947."

26. From a simple reading of Section 3 of Act, 1927, it would be clear that the

State Government has been granted power to constitute a reserved forest in respect of three categories of land, if it is the property of the State Government or the Government has proprietary rights over it, (a) forest land (b) waste land and (c) any other land (not being land for the time being comprised in any holding or in any village abadi). Other parts of section are not relevant for our purposes. Right of the State Government to constitute reserved forest in respect of forest and waste land is not circumscribed by the exclusion clause as applicable to other lands i.e. not being land for the time being comprised in any holding or in any village Abadi.

27. In respect of forest land and waste land, which is the property of the State Government or over which it has proprietary rights, the power of the State to constitute a reserved forest is absolute. In respect of forest and waste land only two facts are to be satisfied for constituting a reserved forest i.e. (the land is forest or waste land and (b) it is the property of the State or the State has proprietary right over the same.

28. Conclusion so drawn by this Court is well supported by a Division Bench judgment of this Court in the case of Raghu Nath Singh & Another vs. The State of Uttar Pradesh & Another reported in 1960 (RD) 337, wherein after reproducing the provisions of Act, 1927, it has been explained as follows:

"A careful examination of the provisions of the Indian Forest Act would show that the power of the State Government to constitute any land as a reserved forest is circumscribed by three conditions as laid down in Section 3. Firstly, it can constitute such forest land or waste land to be reserved forest as is the property of Government. Secondary it can do so if the proprietary rights in the land vest in Government, or thirdly where it (the Government) is entitled to the whole or any part of the forest produce of any land. The Sections of the Act after Section 3 prescribe the manner in which any land can be constituted a reserved forest."

29. The Division Bench has further held that the action of the State Government in constituting the leased lands as reserved forest can be upheld, if any, of the three conditions are proved to exist.

30. In respect of the land in question with the enforcement of the Act, 1950, proprietary rights have vested in the State Government. It is admitted on record that most of the land qua which notification under Section 4 of Act, 1927 had been issued was forest and waste land. Therefore, condition no.1, as pointed by the Division Bench stands satisfied.

31. So far as the contention raised on behalf of the respondents qua the land being under the tenancy of Vishwanath Pratap Singh, and it being part of his holding qua which bhumidhari sanad had been issued, therefore, the State Government could not exercise power of declaring such forest and waste land as reserved forest under Section 3 of Act, 1927 is concerned, suffice is to reproduce paragraphs-26, 27 and 29 of the judgment of the Apex Court in the case of **Mahendra Lal Jaini (Supra),** relevant portion of paragraphs 26, 27, and 29 read as follows:

"(26.) ***It is necessary therefore to I look at the scheme of Chap. II of Forest Act, which contains sections 3 to 27 and deals with reserved forests. Section 3***

provides that the State Government may constitute any forest land or waste land which is the property of Government or over which the Government has proprietary rights, *or to the whole or any part of the forest produce of which the Government is entitled, a reserved forest. Section 4 provides for the issue of a notification declaring the intention of the Government to constitute a reserved forest. Section 5 bars accrual of forest rights in the area covered by notification under s. 4 after the issue of the notification. ....."*

(27) It is clear from this review of the provisions of Chap. II that it applies inter alia to forest land or waste land, which is the property of the Government or over which the Government has proprietary rights. By the notification under S. 4, the Forest Settlement Officer is appointed to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest produce, and to deal with the same as provided in this Chapter. ..... It will be clear therefore that Chap. II contemplates that where forest land or waste land is the property of Government or over which the Government has proprietary rights, the Forest Settlement Officer shall proceed to determine subordinate rights in the land before a notification under S. 20 is issued making the area a reserved forest. *In the determination of these rights, the Forest Settlement Officer has the same powers as a civil court has in the trial of suits, and his order is subject to appeal and finally to revision by the State Government.* ***Section 5 also shows that after a notification under S. 4, no further forest rights can accrue. It appears, however, that after the Abolition Act came into force, it was felt that more powers should be taken to control forests than was possible under S. 5 as under the Abolition Act all lands to which the-Abolition Act applied had vested in the State and become its property. .....***

29.....It is next urged that even if Ss. 38-A to 38-G are ancillary to Chap. II, they would not apply to the petitioner's land, as Chap. II deals inter-alia with waste land or forest land, which is the property of the Government and not with that land which is not the property of the Government, which is dealt with under Chap. V. That is so. But unless the petitioner can show that the land in dispute in this case is his property and not the property of the State, Chap. II will apply to it. ***Now there is- no dispute that the land in dispute belonged to the Maharaja Bahadur of Nahan before the Abolition Act and the said Maharaja Bahadur was an intermediary. Therefore, the land in dispute vested in the State under S. 6 of the Abolition Act and became the property of the State.*** *It is however, contended on behalf of the petitioner that if he is held to be a bhumidhar in proper proceedings, the land would be his property and therefore Chap. V-A, as originally enacted, if it is ancillary to Chap. II would not apply to the land in dispute. We are of opinion that there is no force in this contention.* ***We have already pointed out that under S. 6 of the Abolition Act all property of intermediaries including the land in dispute vested in the State Government and became its property.*** *It is true that under S. 18, certain lands were deemed to be settled as bhumidhari lands, but it is clear that after land vests in the State Government under S. 6 of the Abolition Act, there is no provision therein for divesting of what has vested in the State*

Government. ***It is however urged on behalf of the petitioner that he claims to be the proprietor of this land as a bhumidhar because of certain provisions in the Act. There was no such proprietary right as bhumidhari right before the Abolition Act. The Abolition Act did away with all proprietary rights in the area to which it applied and created three classes of tenure by S. 129; bhumidhar, sirdar and asami, which were unknown before. Thus bhumidhar, sirdar and asami are all tenure-holders under the Abolition Act and they hold their tenure under the State in which the proprietary right vested under S. 6. It is true that bumidhars have certain wider rights in their tenures as compared to a sirdars similarly sirdars have wider rights as compared to asamis, but nonetheless all the three are mere tenure holders - with varying rights - under the State which is the proprietor of the entire land in the State to which the Abolition Act applied. It. is not disputed that the Abolition Act applies to the land in dispute and therefore the State is the proprietor of the land in dispute and the petitioner even if he were a bhumidhar would still be a tenure-holder. Further, the land in dispute is either waste land or forest land (for it is so far not converted to agriculture) over which the State has proprietary rights and therefore Chap. II will clearly apply to this land and so would Chap. V-A.*** *It is true that a bhumidhar has got a heritable and transferable right and he can use his holding for any purpose including industrial and residential purposes and if he does so that part of the holding will lie demarcated under S. 143. It is also true that generally speaking, there is no ejectment of a bhumidhar and no forfeiture of his land. He also pays land revenue (S. 241) but in that respect he is on the same footing as a sirdar who can hardly be called a proprietor because his interest is not transferable except as expressly permitted by the Act. Therefore, the fact that the payment made by the bhumidhar to the State is called land revenue and not rent would not necessarily make him of a proprietor, because sirdar also pays land Revenue though his rights are very much lower than that bhumidar.* ***It is true that the rights which the bhumidar has to a certain extent approximate to the rights which a proprietor used to have before the Abolition Act was passed; but it is clear that rights of a bhumidhar are in many respects less and in many other respects restricted as compared to the old proprietor before the Abolition Act.*** *For example, the bhumidhar has no right as such in the minerals under the sub-soil. Section 154 makes a restriction on the power of a bhumidhar to make certain transfers. Section 155 forbids the bhumidhar, from making usufructury mortgages. Section 156 forbids a bhumidhar, sirdar or asami from letting the land to others, unless the case comes under S. 157. Section 189 (aa) provides that where a bhumidhar lets out his holding or any part thereof in contravention of the provisions of this Act, his right will be extinguished.* ***It is clear therefore that though bhumidhars have higher rights than sirdars and asamis, they are still mere tenure-holders under the State which is the proprietor of all lands in the area to which the Abolition Act applies. The petitioner therefore even if he is presumed to be a bhumidhar can of claim to be a proprietor to whom Chap. II of the Forest Act does not apply, and therefore Chap. V-A, as originally enacted, would not apply : (see in this connection, Mst. Govindi v. The State, of Uttar Pradesh), AIR 1952 All. 88). As we have already***

pointed out Ss. 4 and 11 give power for determination of all rights subordinate to those of a proprietor, and as the right of the bhumidhar is that of a tenure-holder, subordinate to the State, which is the proprietor, of the land in dispute, it will be open to the Forest Settlement officer to consider the claim made to the land in dispute by the petitioner, if he claims to be a bhumidhar. *This is in addition to the provision of S. 229-B of the Abolition Act. The petitioner therefore even if he is a bhumidhar cannot claim that the land in dispute is out of the provisions of Chap. II and therefore Chap. V-A, even if it is ancillary to Chap. II, would not apply. We must therefore uphold the constitutionality of Chap. V-A, as originally enacted, in the view we have taken of its being supplementary to Chap. II,* ***and we further hold that Chap. II and Chap. V-A will apply to the land in dispute even if the petitioner is assumed to be the bhumidhar, of that land."***

32. Thus, it will be seen that the Supreme Court has laid down that bhumidhars have certain wider rights in their tenure-holding as compared to Sirdars. Similarly, Sirdars have wider rights as compared to Asamis, but nonetheless all three are mere tenure-holders with holding rights over the land, the proprietary right whereof is with the State. The Apex Court has gone on to hold that although Bhumidhars have higher rights than Sirdars and Asamis, they are still mere tenure-holders under the State, which is proprietor of all lands in the area to which Abolition Act applies i.e. Act, 1950. Petitioner even if presumed to be bhumidhar cannot claim to be proprietor of the land to whom Chapter II of the Forest Act does not apply.

33. It has, therefore, to be held that Vishwanath Pratap Singh was merely a sirdar and subsequently with the grant of sanad, a bhumidhar in respect of land, which has been found to be forest and waste land of which the State Government, was the proprietor in view of application of Act, 1950 to the area. He or for that purpose the society cannot contend that the State Government has no power to declare the forest land and waste land as reserved forest under Section 4 of Act, 1927. Bhumidhari rights are subordinate to the proprietary rights of the State Government. In view of provisions of Section 3 of Act, 1927, the power of the State Government to declare the forest and waste lands of which it has the proprietary as reserved forest is not diluted in any manner, merely because Vishwanath Pratap Singh is held to be the Sirdar and thereafter bhumidhar.

34. This Court is not called upon to enter into the issue as to whether the forest land and waste land subject matter of Section 4 notification formed part of the holding of Vishwanath Pratap Singh or not, inasmuch as, as already noticed above, exclusion, which has been provided under Section 3 of Act, 1927, applies to other lands only and not to the forest and waste lands, which, in the opinion of the Court, form a separate class under Section 3 of Act, 1927.

35. Most of the land is forest or waste land and that Act, 1950 applies in the area is admitted on record, both in view of pleadings and evidence before the authorities under the Forest Act as well as before this Court. The State could exercise its power under Section 4 of the Act, 1927 in the facts of the case. The contention raised by the learned Additional Advocate

General finds favour with this Court and is upheld.

36. This Court may now deal with the other objection, which has been raised on behalf of the respondents, namely, that these proceedings under Act, 1927 have become redundant in view of subsequent proceedings i.e. grant of bhumidhari sanad, ceiling proceedings taken under Act, 1960 and because of orders passed by the competent Civil Court in the matter of determination of valuation of trees standing on the land in question.

37. This Court may record that ceiling limits are determined with regard to the land held by a recorded tenure-holder. Such determination of the ceiling limits does not divest the State Government of proprietary rights over the land, which is forest land and waste land nor its power to constitute the forest land and waste land as reserved forest is lost because of such ceiling proceedings. Both acts operate in different field. Whatever may have been the decision in the proceedings under Act, 1960, the exercise of powers under Section 4 of Act, 1927 by the State will not be diluted or adversely affected.

38. There is another reason for this Court to not to accept the said contention, namely, that grant of bhumidhari sanad and the initiation of proceedings under Act, 1960, has all taken place after the issuance of notification under Section 4 of Act, 1927. Issuance of bhumidhari sanad only results in respondent getting certain better rights as tenant only. The ceiling proceedings being subsequent to the notification under Section 4 of Act, 1927 would always abide by the outcome of the proceedings under Section 4 of Act, 1927 and even otherwise are entirely for a different purpose.

39. Reference may also be had to Section 5 of Act, 1927 which reads as follows:

"STATE AMENDMENT

Uttar Pradesh.-*----For Section 5, substitute the following section, namely:----*

5. Bar of accrual of forest rights.--- After the issue of a notification under Section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land, nor any tree therein felled, girdled, lopped, tapped, or burnt, or its bark or leaves stripped off, or the same otherwise damaged, nor any forest-produce removed therefrom, except in accordance with such rules as may be made by the [State Government] in this behalf. (Vide Uttar Pradesh Act 23 of 1965)"

40. A Division Bench of this Court has held that status quo has to be maintained once a notification under Section 4 of Act, 1927 has been issued and no fresh rights in the land covered by Section 4 notification can be created (Reference **Liyakat Ali Khan vs. State of U.P. & others**; 1990 AWC 210).

41. So far as the orders passed in Civil Suit are concerned, suffice is to record that right to the property in the trees is based on the fact that the plaintiffs were the bhumidhars of the land in question and not because of any other title vested in them over the land.

42. As already noticed above, merely because the petitioner became the bhumidhar because of issuance of bhumidhari sanad in his favour, proprietary rights of State and its power under Sections 3/4 of Act, 1927 is not diluted. Grant of bhumidhari sanad or orders passed in the ceiling proceedings or orders passed by the Competent Civil Court in the matter of determination of valuation of trees would not adversely reflect upon the competence of the State to issue the notification under Section 4 of Act, 1927.

43. It was then contended that since the land in question was not transferred to the forest department by the revenue department, it is to be treated as part of the holding and therefore, could not be part of the notification under Section 4 of Act, 1927.

44. Contention so raised on behalf of respondents does not appeal to the Court, mere non-transfer of the land by the revenue department to the forest department will not vitiate the notification under Section 4 of Act, 1927.

45. At this stage, learned counsel for the respondents submits that from the finding recorded by the authorities under Act, 1927, it was admitted that a small portion of the land was actually under cultivation and therefore, such land could not be treated to be forest or waste land. It would fall in category 'c' as aforesaid. No demarcation of the area in that regard has been done. Therefore, the State Government must at least be directed to exclude the land, which was under cultivation, as it was part of the holding excluded under Section 3 of Act, 1927.

46. Contention so raised on behalf of respondents has force. There is a finding, on the basis of spot inspection that in small area of the land covered by the notification under Section 4 of Act, 1927, cultivation was being done and therefore, that part of the land, which was under cultivation, no notification under Section 4 of Act, 1927 could have been issued treating it to be forest or waste. Such land under cultivation would be covered by the definition of other land i.e. category (c) as aforesaid. Being part of the holding of a Sirdar/Bhumidhar, it could not be included in the notification under Section 4 of Act, 1927, specifically in view of definition of "holding" under the Explanation to Section 3 of Act, 1927.

47. Let the Forest Settlement Office identify the area over which cultivation was being done as per the reports available in the original records of File No. 237/349/36 and exclude the same from the notification issued under Section 4 of Act, 1927.

48. For the remaining land covered by Section 4 notification, the objections of the respondents are rejected.

49. For the aforesaid reasons, order dated 22nd March, 1961 passed by the Forest Settlement Officer, Mirzapur, order dated 28th October, 1961 passed by the Commissioner Varanasi as also order dated 28th May, 1976 passed by the IVth Additional District Judge, Mirzapur are hereby quashed.

50. Let the authorities proceed in accordance with law under the Act, 1927 in terms of the notification issued under Section 4 of Act, 1927 with due diligence subject to the direction issued above.

51. Both the writ petitions are allowed subject to the observations made above.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.04.2012

BEFORE
THE HON'BLE SURENDRA KUMAR, J.

CRIMINAL APPEAL No. 5054 of 2006

Rajju Pathak @ Raj Kumar ...Appellant
Versus
State of U.P ...Respondent

Counsel for the Petitioner:
Sri G.S. Chaturvedi
Sri Sri Ajat Shatru Pandey
Sri Sushil Kumar Dubey
Sri B.N. Singh

Counsel for the Respondents:
Sri Ajay Sengar
A.G.A.

Criminal Appeal-conviction of 10 years rigorous imprisonment-offence under Section 307, 452 I.P.C.-one shot country made Pistol injury-on forehead-according to Forensic Report manufactured by injured himself-appellant in jail since 29.03.2005-sentence modified already undergone Appeal allowed to this extent.

Held: Para 31

Learned counsel for the appellant has submitted that the appellant is in jail since 29.3.2005 and he is aged about 35 years and considering the facts and circumstances of the case and the fact that one shot was fired by the appellant which hit on the forehead of the injured, some leniency in sentence should be adopted.

Case law discussed:
(2001) 7 SCC page 318 (SC); AIR 2004 SC page 69; AIR 2004 SC page 77; 1983 Cr.L.J. (SC) page 331

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

1. The appellant Rajju Pathak @ Raj Kumar has filed the instant criminal appeal against the judgment and order of the conviction and sentence dated 31.7.2006 passed by the Additional Sessions Judge, FTC No.2, Jalaun at Orai, in S.T. No.127 of 2005 State Vs. Rajju Pathak @ Raj Kumar and others, relating to Case Crime No.15 of 2005 under Section 307, 452 IPC, Police Station Rampura, District Jalaun, and also in S.T. No.128 of 2005 relating to Case Crime No.30 of 2005 under Section 25 Arms Act, Police Station Rampura District Jalaun. The appellant has been convicted and sentenced to undergo ten years rigorous imprisonment with fine of Rs.5,000/- under Section 307 IPC, two years rigorous imprisonment with fine of Rs.1000/- under Section 452 IPC and also one year rigorous imprisonment with fine of Rs.1,000/- under Section 25 Arms Act. In default of payment of the aforesaid fine, the appellant has been sentenced to further undergo six months additional simple imprisonment. All the sentences have been directed to run concurrently. The co-accused Gyan Singh has been acquitted of the said charge vide impugned judgment and order giving benefit of doubt.

2. According to the first information report lodged by Kishun Dutt Tiwari, on 13.3.2005 at 5:30 p.m., the facts of the prosecution case are that the first informant Kishun Dutt Tiwari aged about 55 years was sitting inside his house and was talking with Jamuna Saran Srivastava and Chhuna @ Shiv Naresh. Around 4:00 p.m., one accused Gyan Singh also came there, just then the appellant Rajju Pathak @ Raj Kumar

aged about 35 years armed with Tamancha (Katta) came in the courtyard of the house of the first informant and discharged fire from his Katta at the first informant Kishun Dutt Tiwari with an intent to kill him. The fire shot hit in the forehead of the injured and co-accused Gyan Singh and one unknown accused also made fire. The trio ran away extending life threat and hurling abuses. The incident took place as a result of old enmity. The first information report of the incident was lodged against the appellant and one Gyan Singh under Sections 307, 452, 504, 506 IPC. The weapon of offence namely Tamancha of 315 bore and two live cartridges were recovered from possession of the appellant by the police. The investigation was made by the Investigating Officer who after completion of the investigation submitted charge sheet under the aforesaid sections.

3. The trial Court framed charge under Section 307/34, 452, 504, 506 IPC against the appellant and one Gyan Singh. The appellant was further charged under Section 25 Arms Act.

4. The appellant pleaded not guilty and claimed to be tried on the said charges.

5. The prosecution examined the injured as well as informant Kishun Dutt as PW-1, Smt. Rajendri Devi PW-2 in the eyewitnesses account. The prosecution also examined Dr. L.K. Niranjan as PW-3, Dr. M.C. Verma PW-4, S.I. Ram Dularey PW-5, H.C. Virendra Singh PW-6, S.I. R.B. Shukla (Retd.) PW-7.

6. According to the evidence of the injured Kishun Dutt PW-1 on the day of the incident, the witness was sitting in the courtyard of his house and his wife Rajendri Devi, Jamuna Saran Srivastava and Chhunna were also sitting and talking there. On the day of the incident around 4:00 p.m., co-accused Gyan Singh and one Amit Dubey came there and sat on the cot expressing their desire to purchase Sesame tree of the witness. After about 15 minutes, the appellant Rajju Pathak @ Raj Kumar armed with Tamancha came there and fired one shot from Tamancha at the head of the witness. The fire shot hit in the forehead of the witness. The wife of witness and others who were sitting there tried to catch the appellant, Gyan Singh and Amit Dubey but trio ran away making fire from their Tamanchas. This injured was taken to the police station by motorcycle where the witness gave the written report of the incident which has been proved as Exhibit Ka-1 by the witness. This injured witness was taken to the District Hospital, Orai where his medical examination was conducted and injury report Exhibit Ka-2 was prepared.

7. The Investigating Officer took blood stained Baniyan of the injured and prepared memo as Exhibit Ka-3. The injured was referred to Regency Hospital, Kanpur where he underwent operation and pellet from injury was taken out. According to the testimony of this PW-1, the appellant Rajju Pathak @ Raj Kumar fired at the witness with an intent to kill him due to old enmity and pending litigation.

8. It is evident from cross examination of this injured PW-1 that he was prosecuted in the murder case of

Smt. Kaushal Kishore (Bhabhi of the witness) and 10-15 cases were pending against this witness at the time of the incident. The witness has clearly admitted at page no.16 of his evidence recorded before the trial Court that there were two groups in the village, one group was of the witness and another group was of the appellant. The witness has identified Tamancha used in the said offence as Exhibit-1 saying that one fire shot made by the appellant from it hit in the head of the witness and while leaving the place, the appellant fired two or three shots.

9. Smt Rajendri Devi PW-2 is wife of PW-1. She has narrated and repeated the same facts as stated in the evidence of PW-1 and also first information report of the incident. According to her, it was the appellant who fired shot from Tamancha at her husband, which hit in the head portion of her husband. She has also admitted old enmity of the appellant with her husband saying that she could not tell the distance from which the fire was made at her husband.

10. Dr. L.K. Niranjan, PW-3 has proved injury report of the injured saying that he examined the injured Kishun Dutt on 13.3.2005 and following injury was found on his person:-

1. Firearm wound of entry size of 2cm x 0.5 cm x bone deep on left side of forehead, 2cm above from left eyebrow, marginal abrasion present and scorching all around the wound was found, blood was oozing and palpable pellet was on right side of forehead. X-ray was advised and injury was kept under observation.

11. According to the evidence of the doctor, the said injury was likely to be caused on 13.3.2005 around 4:00-4:15 p.m. by firearm. Injury was on vital part.

12. Dr. M.C. Verma PW-4 who was radiologist took x-ray of the head of the injured. One cylinderical and one small rounded radio opaque shadow of metallic density was seen in the x-ray and there was fracture of frontal bone. This witness has proved x-ray report as Exhibit Ka-5.

13. S.I. Ram Dularey PW-5 was Investigating Officer of the case who started the investigation and recorded statement of the witnesses and prepared site plan Exhibit Ka-6 and also took one empty cartridge 315 bore from the spot through memo Exhibit Ka-7. According to this witness, he took the appellant on police remand by the order of the Court dated 1.4.2005 and then Tamancha of 315 bore and two live cartridges were got recovered at the pointing out of the appellant from inside the heap of bricks placed in the agriculture plot of Mahendra Dhobi on 2.4.2005 at 11:00 a.m. and recovery memo Exhibit Ka-3 was prepared. This witness also prepared site plan of the place of the recovery of Tamancha as Exhibit Ka-10 and sent the same to the forensic laboratory and after completion of the investigation, submitted charge sheet as Exhibit Ka-9.

14. H.C. Virendra Singh PW-6 has been examined by the prosecution to prove chik FIR as Exhibit-11 and G.D. Entry thereof Exhibit Ka-12 and chik FIR under Section 25 Arms Act as Exhibit Ka-13 and G.D. entry thereof Ka-14.

15. Sri R.B. Shukla, PW-7, S.I. (Retd.) investigated the case under Section 25 Arms Act and after completing the investigation, submitted charge sheet Exhibit-Ka 16 and sanction of the District Magistrate, Exhibit Ka-17 was obtained.

16. The appellant while examining under Section 313 Cr.P.C. denied the whole prosecution story and stated that the first informant/injured Kishun Dutt was engaged in the manufacturing of the illegal Tamanchas and during inspection of the manufactured Tamanchas, the fire shot was accidentally discharged which hit the injured Kishun Dutt causing the said injury. He has been falsely implicated on account of enmity in this case.

17. Awadh Bihari DW-1 was examined in the trial Court. This DW-1 tried to prove that he did not hear any sound of fire shot nor any kind of noise on the day of the incident from house of the injured. This DW-1 is immediate neighbour of the injured Kishun Dutt having adjoining house. This DW-1 has further deposed that hearing some cries, people were going to the house of the injured and this witness also went there at 4:00 p.m. and saw that Kishun Dutt had sustained injury in his head but at that time, the appellant was not present there at the house of the injured. DW-1 has further tried to establish that he had not seen the appellant Rajju Pathak @ Raj Kumar going to or coming out of the house of the injured. When this defence witness supported the candidate of his own caste in the election, since then he was not on visiting terms to the house of the injured as their relations had become sour. Since this defence witness had some enmity with the injured prior to the alleged incident, his evidence does not inspire confidence.

18. Heard Sri Ajat Shatru Pandey, learned counsel for the appellant and learned AGA for the State. I have carefully gone through the evidence available on record.

19. It appears from the report of the Forensic Science Laboratory dated 16.5.2005 which is Exhibit Ka-18 that the weapon of offence namely .315 bore Tamancha with two live cartridges in one sealed bundle and one empty cartridge of .315 bore in another sealed bundle were sent to the Forensic Science Laboratory, which were examined. The used empty cartridge was found to have been fired from the said recovered firearm.

20. In this case, the injured Kishun Dutt PW-1 has supported the prosecution case in his evidence. His evidence has further been supported by the testimony of his wife Smt. Rajendri Devi PW-2. Learned counsel for the appellant has not been able to point out any kind of material discrepancy or contradiction in their evidence. There is no reason to disbelieve their testimony. The testimony of the injured witness and presence of the firearm injury on his forehead coupled with fracture of the head bone are sufficient to establish the presence of the appellant on the spot on the date and time of the occurrence. His evidence as well as evidence of his wife PW-2 is truthful, natural, probable and is fully reliable and trustworthy as credibility of the same has not been shaken in any way.

21. The testimony of the injured has been fully corroborated by medical evidence. No contradiction has been pointed out between medical evidence and ocular evidence by the learned counsel for the appellant. Thus, apart from it, recovery of the aforesaid Tamancha with two live cartridges and one empty cartridge at the pointing out of the appellant without having any valid licence is also proved beyond doubt from the evidence on record.

22. In the case of *Anil Rai Vs. State of Bihar (2001) 7 SCC page 318 (SC),* it has been observed that testimony of any inimical witness cannot be discarded merely on the ground of enmity if it is otherwise convincing and consistent and enmity is proved to be the motive of the crime. However, possibility of falsely involving some person in the crime or exaggerating the role of some of the accused by such witness should be kept in mind and ascertained on the facts of each case.

23. In the case of *Kamaljit Vs. State of Punjab AIR 2004 SC page 69,* it has been observed that minor variations between medical evidence and ocular evidence do not take away primacy of the later.

24. In the case of *Rama Kant Rai Vs. Madan Rai and others AIR 2004 SC page 77,* it has been observed that evidence of eyewitnesses is to be tested for its inherent consistency and inherent probability of the prosecution story. If eyewitness account is even credible and trustworthy, medical evidence pointing to alternative possibility is not to be accepted as conclusive.

25. The main contention of the learned counsel for the appellant is that single shot was fired by the appellant which hit in the forehead of the injured and some pellets of the fire shot were under skin of the forehead and only one head bone was fractured. Hence, there was no intention of the appellant to cause death and the said injury was not sufficient in the ordinary course of nature to cause death of the injured.

26. In the case of *State of Maharastra Vs. Balram Bama Patil and others 1983 Cr.L.J. (SC) page 331,* it has been observed that it is not necessary that the injury actually caused to the victim of assault should be sufficient under ordinary circumstances to cause death of the person assaulted. Section 307 IPC makes a distinction between an act of accused and its result, if any. What the Court has to see is whether the act irrespective of its result was done with the intention or knowledge and under circumstances mentioned in Section 307 IPC. It is sufficient in law if there is present an intent coupled with some over act in execution thereof.

27. Some contentions of the learned counsel for the appellant are that no supplementary report in the light of x-ray report was prepared and was made available on record. That in this case, there was admittedly old enmity, two independent eyewitnesses Shiv Nath and Jamuna Saran Srivastava were not examined. That the incident took place in the open space. That the place of standing of the injured and also of the appellant were not shown in the site plan.

28. I have considered these submissions and compared them with the evidence on record.

29. As per x-ray report, there was fracture of frontal bone of the head of the injured and injury was griveous in nature. Hence, absence of the supplementary report is not sufficient to give any benefit to the appellant. The prosecution case has been completely and fully established from the evidence of PW-1 and his wife PW-2 and then supported by medical evidence. Hence non-examination of the so-called independent witnesses is of no help to the appellant in the facts and circumstances of the case. There is no material omission in the site plan and all relevant points have been shown therein by the Investigating Officer. If there is any such minor discrepancy or omission, the benefit of the same can not be given to the appellant.

30. As per statement of the appellant recorded under Section 313 Cr.P.C., the injured sustained firearm injury on his person due to accidental discharge of fire shot from any one of Tamanchas allegedly manufactured by the injured himself. Thus, there remains no doubt that firearm injury found on the forehead of the injured was caused by Katta/Tamancha which was recovered at the pointing out of the appellant by the police and the said fire was found to have been made from Tamancha of the appellant by the Forensic Science Laboratory leaving no room of doubt on the veracity or genuineness of the prosecution case. Thus, the impugned judgment and order recording conviction and sentence of the appellant under Section 307, 452 IPC and 25 Arms Act, is upheld.

31. Learned counsel for the appellant has submitted that the appellant is in jail since 29.3.2005 and he is aged about 35 years and considering the facts and circumstances of the case and the fact that one shot was fired by the appellant which hit on the forehead of the injured, some leniency in sentence should be adopted.

32. Learned AGA opposing this submission, has taken me through the last two pages of the impugned judgment. It appears from page no.28 of the impugned judgment that the appellant Rajju Pathak @ Raj Kumar has criminal history and he has been convicted in some murder case in S.T. No.90 of 2003 State Vs. Pawan Upadhyay and others by the Special Judge (E.C. Act) and sentenced to imprisonment for life. This fact has not been disputed by the learned counsel for the appellant.

33. The incident took place in the year 2005. The appellant fired one shot from his Tamancha at the injured without repeating the same and only one firearm injury in the forehead was caused. The appellant is in jail since 29.3.2005 namely for more than seven years in this case. The sentence awarded to the appellant should in the interest of justice as per the learned counsel for the appellant be modified and the same should be reduced to the period undergone by the appellant.

34. In the result, while upholding the conviction recorded by the trial Court vide judgment and order dated 31.7.2006, this Court reduces the

sentence awarded to the appellant to the period of imprisonment already undergone by him. The appeal is to that extent allowed and order modified. The bail bonds of the appellant are discharged. The appellant shall be set at liberty if he is not wanted in any other case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.04.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Single No. - 5282 of 1988

Central Drug Institution {At : 02:00 P.M.} ...Petitioner
Versus
Gyaneshwar Tripathi and others ...Respondents

Counsel for the Petitioner:
Sri Asit Kumar Chaturvedi

Counsel fr the Respondents:
C.S.C.

U.P. Industrial Dispute Act 1947-Section-6 (1)-Duty of labor court-when any dispute referred for adjudication under Section 4 K-Tribunal or Lower Court duty bound for adjudication-unless award passed-no power to consign the record merely on statement of representative of workmen-held-recall order justified-can not be termed in contravention of statutory provision.

Held: Para 22 and 23

Thus , in view of the above said fact , it must , therefore, be held as a matter of construction , when the reference under Section 4K of the U.P. Industrial Act 1947 has been made to Labour Court/ Tribunal , the said authority is duty bond to adjudicate the reference which is made to it. Accordingly the action on the part of the opposite party no.2/ Labour Court in the present case , thereby passing the order dated 12.8.1987 (Annexsure no.5) consigning the reference to record on the statement given by the representative/ workman Sri Gyaneshwar Tripathi that he is not in a position to contact workman and the case may be consigned , is contrary to law thus unsustainable.

In view of the above said fact , the subsequent action on the part of the Labour Court thereby recalling the order dated 12.8.1987 (Annexure no.5) on an application moved on behalf of the workman and passing the impugned order dated 4.5.1988 (Annexure no.8) under challenge in the present case cannot be said to be an action in contravention to the mandatory provisions as provided under the Act for adjudication of the industrial dispute referred to it by the State Government under Section 4K of the Act.

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

1. Heard Sri Asit Kumar Chaturvedi, learned counsel for the petitioner , Sri S.C. Sitapuri learned counsel for respondent no.1, learned State Counsel for respondent no.2 and perused the record.

2. In the city of Lucknow there is an institute known as Central Drug Research Institute , Lucknow (Hereinafter referred to as ' Institute') established and administered by the Council of Scientific and Industrial Research , New Delhi , a Society, registered under the Societies Registerationi Act, 1860.

3. As per the version of the petitioner , the institute has been established for conducting research work in various drugs , and no productive activity is being carried

out in the institute resulting in goods or services.

4. For the purpose of security arrangement, opposite party no.1/ Sri Gyaneshwar Tripathi had been engaged with effect from 9.12.1980. Later on, a decision, as per instructions received from Council of Scientific and Industrial Research , New Delhi, was taken that the security arrangement of the institute be entrusted to M/s Ex-Servicemen Security Group, Lucknow with effect from 1.4.1984 as such an oral agreement has taken place between the institute and the said security group for the purpose of security arrangement.

5. In view of the said development , as per the pleading of the petitioner, opposite party no.1 voluntarily abandoned from service in the institute with effect from 1.4.1984 as he did not want to work under the security contractor / M/s Ex-Servicemen Security Group, Lucknow.

6. In view of the above said background initially a conciliation was made between the parties which was unsuccessful, as such the State Government under Section 4 K of the Uttar Pradesh Industrial Disputes Act, 1947 (hereinafter referred to as "Act') made a reference reproduced as under:-

" Kya seva Yojakon dwara apne Shramik Gyaneshwar Tripathi Chowkidar son of Shri Raj Bahadur Tripathi ko dinank 1.4.1984 se karya se prathak/ vanchit kiya jana uchit tatha/ athva vaidhanik hai? Yadi nahin, to sambandhit shramik kya labh/ anutosh/relief pane ka adhikari hai, tatha anya kis vivaran sahit."

7. Accordingly, a reference has been registered before opposite party no.2/ Labour Court as Adjudication Case no. 89 of 1985 (Director, Central Drug Research Institute, Chatter Manzil , Lucknow Vs. Gyaneshwar Tripathi) . On 17.7.1986, opposite party no.1 filed written statement thereafter on 21.8.1985 petitioner filed written statement. On 19.2.1986, Sri P.L. Chabbra , Administrative Officer (SG) CDRI, Lucknow files a rejoinder statement ,thereafter on 15.4.1987, opposite party no .1 filed rejoinder statement duly signed by his authorized representative Sri D.R. Saxena.

8. On 12.8.1987 authorized representative of opposite party no.1 made a statement that he is not in a position to contact opposite party no.1 and states that the case may be consigned . In view of the above said fact, opposite party no.2/ Labour Court on 12.8.1987 passed an order as contained in annexure no.5 to the writ writ petition reproduced as under:-

" Case called out. Workmen's representative is present. He say that he is not in a position to contact the workman and the case may be consigned.

In view of their request, let the case be consigned to record."

9. In the month of December, 1987 (Annexure no.6) , on behalf of opposite party no.1 an application has been moved for recall of the order dated 12.8.1987 to which petitioner filed objection (Annexure no.7) on 8.3.1988 after hearing the learned counsel for the parties, opposite party no.2 by order dated 4.5.1988 (Annexuer no.8) recalled the order dated 12.8.1987on payment of Rs.300/- as costs to the

petitioner and fixed 14.7.1988 for further hearing.

10. Aggrieved by the order dated 4.5.1988 (Annexure no.8) present writ petition has been filed by the petitioner/ institute and on 26.8.1988 this Court has passed an interim order, the relevant portion is quoted as under:-

"Till further orders proceedings before the Labour Court may continue but no final orders may be passed."

11. In view of the facts and circumstances of the case, the question which is to be decided in the present case is that *"whether the labour court has got power to consign the matter to record when a reference has been made to it under Section 4 -K of the Act for deciding the dispute ?"*

12. In order to decide the said question , it will be appropriate to go through the Section 4-K of the Act, which provides that where the State Government is of opinion that any industrial dispute exists or is apprehended , it may at any time by order of writing:

(a) refer the dispute of any matter appearing to be connected with or relevant to the dispute to a Labour Court .

(b) refer the matter of industrial dispute is one of those contained in the First shedule, or to a Tribunal .

(c) refer the matter of dispute is one contained in the First Schedule or the Second Schedule for adjudication.

13. Provided that were the dispute relates to any matter specified in the Second Schedule and is not likely to affect more than one hundred workmen, the State Government may, if it so thinks fit, make the reference to a Labour Court.

14. Thus, as the mandate of the Section 4 K of the Act in express term empowers the State Government has power to reefer the industrial dispute to a Labour Court/ Tribunal for adjudication if the State Government is of opinion that any industrial dispute exists or is apprehended .

15. Further, Section 6 (1) of the Act imposes a duty upon the Labour Court or Tribunal for adjudication of dispute which has been referred to it and for said purpose they shall hold its proceedings expeditiously and shall as soon as it is practicable on the conclusion thereof , submit its award to the State Government.

16. Moreover, Section 5(C) of the Act provides that the procedure and powers of Boards , Labour Courts and Tribunals while concluding the proceedings and states that subject to any rules that may be made in this behalf , Labour court and tribunal shall follow such procedure as the arbitrator , the Labour Court or the Tribunal may think fit.

17. Section 5 (2) of the Act provides that a presiding officr of a Labour Court or a Tribunal may for the purpose of enquiry into any existing or apprehended industrial disputes , after giving reasonable notice , enter the premises occupied by any establishement to which the disputes relates.

18. Section 5 (3) provides that Labour Court or Tribunal shall have the same powers as are vested in a Civil Court

under the Code of Civil Procedure, 1908, when trying a matter in sub section (3) (a) and (3) (b) .

19. After conclusion of adjudication of the dispute which referred to Labour Court in view of the provisions as provided under Section 6 (1) and Section 6 (2) of the Act provides that an award of Labour Court or Tribunal shall be in writing and shall be signed by its Presiding Officer. Further thereafter sub section (3) of Section 6 provides as under:-

"(1-A) An award in an industrial dispute relating to the discharge or dismissal of a workman may direct the setting aside of the discharge or dismissal and reinstatement of the workman on such terms and conditions, if any, as the authority making the award may think fit, or granting such other relief to the workman, including the substitution of any lesser punishment for discharge or dismissal , as the circumstances of the case may require.

(3) Subject to the provisions of sub-section (4) every arbitration award and the award of the Labour Court or Tribunal , shall, within a period or thirty days from the date of its receipt by the State Government be published in such manner as the State Government thinks fit."

20. Moreover, Section 6-A of the Act lays down the certain conditions in which the State Government can modify the award which is referred to it . However, sub section (1) of Section 6-A) of the Act provides that an award shall become enforceable on the expiry of thirty days from the date of its publication under Section 6 of the Act.

21. Upon an examination of all the statutory provisions, it is clear that a statutory duty is imposed upon the tribunal to hold its proceedings expeditiously and submit its award to the State Government as soon as a reference is made to it for adjudication under Section 4K of the Act. The other Sections , namely, Sections 6, 6A and 5(C) of the Act are all peremptory in character. The scheme and purpose of the statute is that once a reference is made by the State Government, the industrial tribunal must hold its proceedings and submit its award in an expeditious manner and upon such an award being made it should be published by the State Government under Section 6(3) and should normally become enforceable within thirty days of its publication.

22. Thus , in view of the above said fact , it must , therefore, be held as a matter of construction , when the reference under Section 4K of the U.P. Industrial Act 1947 has been made to Labour Court/ Tribunal , the said authority is duty bond to adjudicate the reference which is made to it. Accordingly the action on the part of the opposite party no.2/ Labour Court in the present case , thereby passing the order dated 12.8.1987 (Annexsure no.5) consigning the reference to record on the statement given by the representative/ workman Sri Gyaneshwar Tripathi that he is not in a position to contact workman and the case may be consigned , is contrary to law thus unsustainable.

23. In view of the above said fact , the subsequent action on the part of the Labour Court thereby recalling the order dated 12.8.1987 (Annexure no.5) on an application moved on behalf of the workman and passing the impugned order dated 4.5.1988 (Annexure no.8) under

challenge in the present case cannot be said to be an action in contravention to the mandatory provisions as provided under the Act for adjudication of the industrial dispute referred to it by the State Government under Section 4K of the Act.

24. For the foregoing reasons, writ petition lacks merit and is dismissed.

25. Keeping in view the facts and circumstances of the case that the adjudication case on the reference made by the State Government under Section 4K of the Act has been registered before the Labour Court in the year 1985 and since then the same is pending before opposite party no.2, a direction is issued to opposite party no.2 to decide the matter expeditiously, preferably, within a period of six months from the date a certified copy of this order is produced.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.04.0212

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Service Single No. - 5415 of 2002

Raghvendra Kumar Srivastava
...Petitioner
Versus
State of U.P.Thru Secy.,Revenue Deptt., Lucknow and 3 others ...Respondents

Counsel for the Petitioner:
Sri Ashok Pandey
Sri Vinod Kumar Pandey

Counsel for the Respondents:
C.S.C.

U.P. Govt. Servant (Discipline and Appeal) Rules 1999-Rule-7-Dismissal from Services-without serving chargesheet-without fixing date, time and place of inquiry-without opportunity of evidence-without following procedure contained under Rule 7-held-illegal-unsustainable-dismissal quashed.

Held: Para 22

The U.P. Government Servant (Discipline and Appeal) Rules, 1999, particularly Rule 7 provides the procedure for imposing major penalties and Rule 8 relates to submission of enquiry report, whereas Rule 9 deals with action on enquiry report. The opposite parties have not followed the procedure prescribed for imposing major penalty of dismissal on the petitioner.

Case law discussed:
2011 (29) LCD 832

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

1. Heard learned counsel for the petitioner as well as the learned Standing Counsel and perused the records.

2. The writ petition has been filed challenging the order dated 31.12.2001 by which the petitioner while working on the post of Collection Amin has been dismissed from the service after holding disciplinary proceedings.

3. Learned counsel for the petitioner submitted that the petitioner was neither provided relevant documents demanded by him for submission of reply to the charge sheet nor any date, time or place was fixed by the Enquiry Officer to hold the enquiry. It is also submitted that even the charge sheet was not served upon the petitioner and the entire enquiry proceedings were held ex parte in the absence of the petitioner. It is also submitted that the petitioner was not provided with the enquiry report and the

opportunity to rebut the findings recorded in the enquiry report.

4. Learned counsel for the petitioner in order to emphasize his submissions submitted that from the perusal of the impugned order itself, it is very much clear that the enquiry report was sent along with certain documents demanded by the petitioner as well as the report of Naib Tehsildar, Shahganj dated 30.10.2000 and the report of the Deputy Collector, Bikapur dated 13.11.2000 for service on the petitioner, but the same was not served on the petitioner.

5. It is also submitted that from the perusal of the order impugned, it is very much clear that the relevant records demanded by the petitioner were supplied along with the enquiry report, meaning thereby that the enquiry proceedings were completed and thereafter the opposite parties had sent the said relevant records to the petitioner, which itself indicates that the petitioner was not provided opportunity to properly defend himself in the so called enquiry proceedings.

6. It is also emphasized that the entire enquiry proceedings were held in gross violation of principles of natural justice as well as the procedure prescribed under the U.P. Government Servant (Discipline and Appeal) Rules, 1999 especially Rule 7 of the said Rules, 1999.

7. In support of his submissions learned counsel for the petitioner has relied upon the judgment of the Division Bench in the case of *Abdul Salam Vs. State of U.P. & others* 2011 (29) LCD 832 (Paras 16,17,18 & 27), wherein it has been observed that in the departmental proceedings for awarding major punishment, no short-cut is permissible. The charge sheet has to be furnished to the delinquent to apprise him of the charges, which should be specific along with the evidence, both oral and documentary, which the department intends to rely for upholding the charges. In case after service of charge sheet, the delinquent needs any document or copy thereof, such prayer has to be considered by the enquiry officer and the documents which are found relevant for enquiry are to be 0.00"supplied to the delinquent. In case copies of any such document cannot be supplied for any valid reason, free access has to be afforded to the delinquent for making inspection of such records. After this stage, the reply is to be submitted by the delinquent within the given time schedule and the enquiry is to proceed, fixing date, time and place calling the delinquent.

8. It has also been observed by the Division Bench that normally the evidence by the department is required to be led first to prove the charges wherein the delinquent is also allowed to participate, who can cross-examine the witnesses, with opportunity of adducing the evidence either in rebuttal or for disapproving the charges.

9. Learned Standing Counsel, on the other hand, on the basis of the counter affidavit submitted that the petitioner was fully aware about the disciplinary proceedings initiated against him but he never filed reply to the charge sheet and intentionally kept on demanding documents by sending letters through Speed Post. The petitioner was guilty of embezzlement and misappropriation of funds which itself indicates the seriousness of the charges and as such the

petitioner was rightly dismissed from the service.

10. The learned Standing Counsel also tried to submit that the petitioner had deposited a sum of Rs. 67,925/- in the Bank which in itself is the admission on the part of the petitioner and as such as per Rule 7 (vi) of U.P. Government Servant (Discipline and Appeal) Rules, 1999, no disciplinary enquiry was required to be conducted.

11. I have considered the submissions made by the parties' counsel.

12. From the perusal of the impugned order, it appears that the opposite party no. 2 while passing the said order has recorded that the charge sheet was served on the petitioner on 20.12.2000, however, in the same order in the subsequent paragraph, the date of charge sheet is mentioned as 23.4.2001, as such the said charge sheet could not have been served on the petitioner on 20.12.2000. The impugned order also indicates that the enquiry report dated 8.11.2001 along with the relevant records relating to the charges, i.e. report dated 30.10.2000 of the Naib Tehsildar, Shahganj, the report dated 9.11.2000 of Tehsildar Bikapur as well as the report dated 13.11.2000 of Deputy Collector, Bikapur were sent for service at the residence of the petitioner on 15.12.2001, however, the petitioner was not found residing at the recorded address hence the same could not be served on him.

13. From the said fact, it is evidently clear that the records which were considered during the enquiry were sent for service on petitioner along with the enquiry report, meaning thereby that the petitioner was not given the said records earlier and no opportunity to rebut the same and submit his defence in this regard was provided.

14. It is to be noted that the enquiry report dated 8.11.2001, after conclusion of the enquiry proceedings was sent for service on the petitioner requiring him to give his reply/objection.

15. I am of the considered opinion that it was not a stage to provide relevant records to the petitioner as at that time the enquiry proceedings were already completed and the enquiry report was already prepared. In case the relevant records were required to be served on the petitioner, the same should have been served prior to holding oral enquiry.

16. It is also required as to whether the Enquiry Officer had taken any decision with regard to providing the documents demanded by the petitioner for the purpose of submitting his reply to the charge sheet. There is nothing on record on the basis of which it can be said that the enquiry officer had applied his mind with regard to the relevancy of the documents demanded by the petitioner. On the other hand, the impugned order indicates that the punishing authority while passing the impugned order has observed that the documents demanded by the petitioner had no relevancy.

17. It is to be observed that it is not the requirement of law. In fact, in case a delinquent demands any document for the purpose of submitting reply to the charge sheet, the Enquiry Officer is required to apply his mind regarding relevancy of such documents and decide as to whether the said documents are required to be

given or not. The punishing authority at the time of awarding punishment is not to decide the relevancy 0.00"of the said documents as that would defeat the very purpose of giving adequate opportunity to the delinquent.

18. In the present case, it appears that the relevant records were neither supplied to the petitioner nor any date, time or place was fixed by the Enquiry Officer to hold the enquiry.

19. It is also to be observed that even if a delinquent has not participated or did not cooperate in the enquiry, it is the duty of the Enquiry Officer to hold the enquiry proceedings in order to prove the charges on the basis of the evidences relied in support of the charges.

20. In the present case, the petitioner was also not provided with the enquiry report and an opportunity to file his objection as required under the rules. In case the service could not be effected by the messenger, it was the duty of the opposite parties to have effected the service on the petitioner through the publication or other mode of service.

21. In the case of *Abdul Salam* (Supra), the Court has observed that time and again the Apex Court as well as this Court has pronounced in the matters of enquiry for awarding major punishment no short-cut is permissible. The relevant paragraphs Nos. 16,17,18 and 27 are reproduced hereunder:

16. Before coming to any conclusion, it would be relevant to mention the legal position with regard to the conduction of the departmental enquiry and award of punishment to a delinquent employee. Time and again, the Hon'ble Apex Court as well as this Court has pronounced that in the matter of enquiry for awarding major punishment, no short-cut is permissible. The charge-sheet has to be furnished to the delinquent to apprise him of the charges, which should be specific along with the evidence, both oral and documentary, which the department intends to rely for upholding the charges. In case after service of charge-sheet, the delinquent needs any documents or copy thereof, such prayer has to be considered by the enquiry officer and the documents which are found relevant for enquiry are to be supplied to the delinquent. In case copies of any such document can not be supplied for any valid reason, free access has to be afforded to the delinquent for making inspection of such records. After this stage, the reply is to be submitted by the delinquent within the given time schedule and the enquiry is to proceed, fixing the date, time and place calling the delinquent.

17. Normally, the evidence by the department is required to be led first to prove the charges wherein the delinquent is also allowed to participate, who can cross-examine the witnesses, with opportunity of adducing the evidence either in rebuttal or for disproving the charges. It is thereafter that the enquiry officer has to submit its report either saying that any of the charges stand proved or not. There has to be corroborating evidence to prove the charge and without any material being placed by the department to substantiate the documentary evidence, the charge can not be found to be proved. There has to be a corroboration of facts from the documents on record and if any report is also being relied upon, the said report is

also required to be authenticated by the person who has submitted the report, therefore, for this purpose the oral enquiry is required to be held for proving the charges.

18. In the case of State of Uttar Pradesh and others Versus Saroj Kumar Sinha, the Hon'ble Apex Court has observed as under:

"26. The first inquiry report is vitiated also on the ground that the inquiry officers failed to fix any date for the appearance of the respondent to answer the charges.

Rule 7(x) clearly provides as under:

"(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge- sheet in absence of the charged Government servant."

27.*A bare perusal of the aforesaid sub-Rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge.*

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

27. *In this view of the matter, we are of the considered opinion that the departmental enquiry conducted against the appellant-petitioner on the basis of which the punishment of dismissal from service was awarded, was not held in accordance with law as propounded by the Apex Court as well as this Court, as discussed above.*

22. The U.P. Government Servant (Discipline and Appeal) Rules, 1999, particularly Rule 7 provides the procedure for imposing major penalties and Rule 8 relates to submission of enquiry report, whereas Rule 9 deals with action on enquiry report. The opposite parties have

not followed the procedure prescribed for imposing major penalty of dismissal on the petitioner.

23. I am of the considered opinion that the order impugned for the reasons given above, is not sustainable. As such the order dated 31.12.2001, a copy of which is annexed as Annexure No. 10 to the writ petition, is hereby quashed with liberty to the opposite parties to hold afresh enquiry from the stage of issuance of the charge sheet. In case the enquiry proceedings are held, the same shall be concluded and final order shall be passed within a period of five months. The petitioner shall be reinstated in service forthwith. However, the consequential benefits would depend on the outcome of the enquiry.

24. The writ petition is allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.04.2012

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE P.K.S. BAGHEL, J.

Criminal Appeal No. 6952 of 2010

Babloo @ Virendra and others
...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri P.S. Pundir
Sri R.B. Yadav

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 374 (2)-Criminal Appeal-conviction U/S 302/34 I.P.C.-burden of proof wrongly shifted on appellant in terms of Section 106 of evidence Act-in the fact and circumstances of the case prosecution can not creave from burden of proof-Trail Court placed much reliance upon recovery of country made pistol from accuse Babloo-while recovery memo-disclose place of recovery from the field of Baran Singh-apart from so many diversity in prosecution evidence-held-prosecution failed to prove its case beyond reasonable doubt-not sustainable.

Held: Para 20 and 27

What emerges from the above mentioned cases are that the prosecution is not absolved from its duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt and the Section 106 of the Evidence Act is attracted in exceptional cases.

Having regard to the circumstances of the case, we are satisfied that that the prosecution has failed to prove its case against the accused beyond reasonable doubt and the findings of the trial court are not sustainable for the reasons given hereinabove.

Case law discussed:
AIR 1956 SC 404; AIR 1992 SC 2100; AIR 2000 SC 2988; AIR 2005 SC 2345; 1956 SCR 199; (1960) 1 SCR 452; (1974) 4 SCC 193; AIR 2005 SC (2345); (2012) 1 SCC 10; 1991 CRI.L.J. 1235; 1988 CRI.L.J. 1583

(Delivered by Hon'ble P.K.S. Baghel,J.)

1. The appellants Babloo @ Virendra, Sandeep and Dharmvir have preferred this Criminal Appeal under Section 374 (2) Cr.P.C. against the judgment and order dated 15.10.2010 passed by the First, learned Additional Sessions Judge, F.T.C. No.1, Bijnor in S.T. No. 242 of 2010, Crime no. 1101 of 2009 and S.T. No. 243 of 2010, Crime

No. 1103 of 2009. The appellants were put to trial and the trial court convicted them for the offences under Sections 302/34 IPC sentencing them to undergo life imprisonment with fine of Rs. 20,000/- each. The appellant no. 1-Babloo @ Virendra has also been convicted under Section 25 of the Arms Act for two years R.I. in S.T. No. 243 of 2010, Crime no. 1103 of 2009.

2. Facts of the appeal are these: The appellant no.1 Babloo, resident of village Bhogpur, police station Chandpur, District Bijnor was married with Meenu, the daughter of deceased Satpal Singh. Satpal Singh's house is 6 km. away from his daughter's house. On 29.11.2009 at about 4.00 p.m. the deceased's daughter Meenu had made a phone call to her father and complained that her husband, the appellant no. 1-Babloo, appellant no. 2 Sandeep and the appellant no. 3-Dharmvir, all residents of village Bhogpur were beating her in connection with their demand for a new Maruti car. They also threatened to kill her and when she was talking to her father she was crying on the phone. Her father after receiving the said phone call immediately proceeded to her in-law's house along with Rambir and Vipin. They reached there at 5.00 p.m. and found that her husband Babloo- the appellant no. 1, Sandeep-the appellant no. 2 and Dharmvir- the appellant no. 3 were still beating his daughter Meenu. The deceased Satpal Singh tried to save his daughter but Dharmbir and Sandeep caught hold of him and Babloo, the appellant no. 1 fired at Satpal Singh with a country made pistol. He was fataly wounded. Rambir and Vipin who had accompanied Satpal Singh were present all through and later on during trial they became eye witnesses of the said incident. The critically injured Satpal Singh was taken to the hospital at Chandpur, where the doctor referred him to Bijnor hospital. In Bijnor also the doctor having regard to his precarious condition referred him to Meerut. While he was on the way to Meerut, he succumbed to his injuries. On 30.11.2009 Shyam Bir son of deceased Satpal Singh lodged an FIR (Ex Ka-1) at 9.15. a.m., which was recorded at police station Chandpur district Bijnor implicating appellants Babloo, Sandeep and their father Dharamvir. On the basis of allegation made therein a case crime no. 1101 of 2009 under section 498-A, 323, 302/34 IPC and 3 /4 D.P. Act was registered against the appellant. On the same day viz. 30.11.2009 an empty cartridge was recovered from the spot (Ex-ka -4).

3. Sri Anil Kumar Singh, S.I. Police was nominated as I.O. of the case, who commenced investigation in the matter and prepared site plan. The I.O. arrested Babloo @ Virendra and recovered a country made pistol of 315 bore along with one live cartridge from the field of one Baran Singh. Another First Information Report (Ex Ka-16) was lodged on 2.12.2009 at 7.25 a.m. the case crime no. 1103 of 2009 under Section 25 Arms Act was registered against Babloo.

4. The inquest on the dead body was conducted and inquest memo, Chick No. 485 of 2009 was written by Head Moharir Daulatram. He had also made entries in G.D. (Ka-10). The Site plan was prepared by Gyanendra Singh (Ka-17). The dead body of the deceased was sent for postmortem. The autopsy on the dead body of the deceased was conducted by the doctor concerned. The postmortem report reveals that cause of death was due

to shock and hemorrhage as a result of anti mortem injuries. The following observations were made by the doctor in the postmortem report, (i) gun shot wound of entry 3.0 x 2.0, entry deep oval in shape, wound of exit 1.5 x 1.00 entry.

5. On 2.12.2009 the I.O. sent the cartridge for forensic examination, which was found at the spot. After completion of investigation, the I.O. Submitted chargesheet (Ka-18) against appellants-accused under section 498-A, 323, 302 IPC and Section 3 / 4 D.P. Act. All the three accused appellants were put up for trial.

6. The prosecution examined five eye witnesses namely, PW-1 Shyamveer son of deceased Satpal, PW-2 Meenu d/o Satpal Singh, PW-3 Vipin son of deceased Satpal Singh, PW-4 Rajvir Singh, the eye witness of the incident and PW-5 Jaishankar who was the pairokar of the prosecution.

7. PW-1, PW-2, PW-3 and PW-4 were declared hostile as they did not support the case of the prosecution. PW-1 Shyamveer Singh in his examination-in-chief had proved the contents of the FIR. However, in the cross examination he changed his version and did not support the case of the prosecution. In his deposition, he has stated that he did not see the incident and whatsoever the facts were mentioned in the FIR were on the basis of information of Rambir and Vipin. He had also denied the fact that in-law's of his sister had ever tortured her for demand of dowry. The PW-2 Meenu, the daughter of Satpal Singh, in her statement, stated that she was married two years before the incident. Her husband or her in-laws never made any demand of dowry. They were completely satisfied with the dowry whatsoever was given by her parents. She also denied the allegations made in the FIR that she had made a phone call to her father on 29.11.2009. She further denied that she asked him to come to her in -law's house on that date. When she was confronted with her statement under section 161 Cr.P.C., she flatly denied that she had made any such statement to the I.O. She further stated that she is living in her in-law's house. The PW-3 Vipin, the son of the deceased Satpal Singh in his examination in chief, stated that the allegations against the appellant Babloo @ Virendra and his family members with regard to demand of dowry were incorrect and false. He has also stated that on 29.11.2009, there was no phone call from his sister. He also denied his alleged statement under section 161 Cr.P.C. He proved his signature on the inquest report. This witness was also declared hostile by the prosecution. PW-4 Rambir denied the allegation made in the FIR that he had accompanied late Satpal Singh on 29.11.2009 to the Meenu's house. He was also declared hostile by the prosecution. In his cross-examination he denied all the allegations made in the FIR. The PW- 5 Jaishankar as a pairokar in the police station Chandpur, has proved various exhibits such as FIR exhibit- 16 and site plan etc. It is pertinent to mention here that in S.T. No.. 243 of 2010 under section 25 Arms Act, the sole accused Babloo @ Virendra-the appellant no. 1 had admitted his guilt. The said document is exhibit ka -26 and it is noteworthy that the said document is undated. The perusal of exhibit -ka-26 indicates that hand written application is undated and the accused had not signed it at the place where his name as an applicant is

mentioned. From perusal of the document it is evident that some other person has written it and Babloo @ Virendra had signed it. It is also mentioned that since his mother is ill and he is in jail for the last 9 months, therefore, he may be given lesser punishment.

8. Trial court vide impugned judgment dated 15.10.2010 has found that all the appellants Babloo, Dharmbir and Sandeep were guilty under section 302/34 IPC and sentenced them to undergo imprisonment for life with fine of Rs. 20,000/- each. The appellant no. 1, Babloo @ Virendra was also found guilty under section 25 Arms Act and he was sentenced two years R.I. However, the accused were not found guilty for the offences under section 323/34, 498-A and 3/ 4 D.P. Act

9. We have heard Sri P.S.Pundir, learned counsel for the appellants and learned AGA for the State.

10. Learned counsel for the appellants Sri P.S. Pundir has taken us through the impugned judgment of the trial court, the statement of the witnesses and the various other materials placed before us. Learned counsel for the appellants submitted that there was no evidence on record to prove beyond reasonable doubt about the incident itself as there was not a single eye witness of the alleged incident which took place at 5.00 p.m. on 29.11.2009 at the house of the appellant no. 1. The two eye witnesses namely Rambir and Vipin have also been declared hostile and they have denied there presence at the time of the alleged incident. He has further urged that daughter of Satpal Singh in her examination-in-chief as well as in cross examination had denied the fact that she has ever been tortured in connection with demand of dowry and she has also denied the alleged occurrence which took place at her home on 29.11.2009 wherein her husband Babloo @ Virendra has been made accused under section 302/34 IPC.

11. Learned counsel for the appellants strenuously urged that finding of the trial court with regard to the admission of the appellant Babloo @ Virendrain in support of S.T. No. 243 of 2010 has been illegally read by the trial court in S.T. No.. 242 of 2010. He has submitted that trial court has erred in placing the burden of proof on the accused in terms of Section 106 of the Evidence Act. **He place reliance on the judgment report in AIR 1956 SC 404 Shambhu Nath Mehra Vs. State of Ajmer, AIR 1992 SC 2100 State of Maharashtra Vs. Sukhdeo Singh and another, AIR 2000 SC 2988 State of West Bengal Vs. Mir Mohammad Omar and others etc, AIR 2005 SC 2345 Murlidhar Vs. State of Rajsthan.**

12. Before adverting to the legal submissions made by the learned counsel for the appellants, it would be advantageous to refer the findings of the trial court for holding appellants guilty. The trial court has based its finding on four material facts; (i) There is no direct evidence and as such on the basis of circumstantial evidence, the accused have been held to be guilty (ii) The burden of proof is on the accused in terms of Section 106 of the Evidence Act (iii) The accused Babloo @ Virendra has admitted his guilt in another S.T. No. 343 of 2010 and as such he is guilty in S.T. No. 242 of 2010 also. (iv) The Forensic report exhibit Ka-30 dated 6.10.2010 indicates that the

cartridge which was found at the house of the appellant no. 1 (Babloo) was fired from the country made pistol which was recovered from the possession of Babloo. The assailant had used the said pistol to kill Satpal Singh.

13. Indisputably, there is no substantive evidence to support the prosecution case. The trial court itself has recorded the finding that in absence of any substantive or direct evidence, only on the basis of circumstantial evidence, the accused have been found guilty.

14. The eye witnesses mentioned in the FIR have denied there presence at the time of occurrence. The I.O. of the case has not collected the blood from where the deceased was alleged to have been shot. There is no eye witness of the incident when the appellant no. 1 alleged to have fired at late Satpal Singh. The two important witnesses have turned hostile and they denied their presence. The trial court has also erred in shifting the burden of proof on the accused in terms of Section 106 of the Evidence Act.

15. Section 106 as used the word " especially within the knowledge of the accused". In the present case, the ingredient of the section 106 of the Evidence Act is not attracted at all, inasmuch as the body of Satpal Singh was not recovered from the house of Babloo. No blood was found at his house. There was no eye witness of occurrence. The two alleged eye witness turned hostile and denied their presence at the spot. The object of Section 106 of the Evidence Act is not to relieve the prosecution of its burden of proof. The aid of Section 106 of the Act can be available only in those exceptional cases where it would be well neigh impossible for the prosecution to prove certain facts which are especially in knowledge of the accused. For illustration, if a crime is committed in the bed room of a person during night, then there can not be any possibility for the presence of an eye witness. In such situation the fact of the crime may be especially in knowledge of the person who was present in the house with the deceased. The Supreme Court has considered the ingredients and the applicability of the Section 106 of the Evidence Act in series of decisions. In the case of ***Shambhu Nath Mehra v. State of Ajmer, 1956 SCR 199, the Supreme Court held:-***

"9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show

that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor and Seneviratne v. R."

16. In the case of **Krishan Kumar Vs. Union of India, (1960) 1 SCR 452,** the Supreme Court had occasion to deal with the same issue. The relevant part of the judgment is extracted herein below:-

"It is not the law of this country that the prosecution has to eliminate all possible defences or circumstances which may exonerate him. If these facts are within the knowledge of the accused then he has to prove them. Of course the prosecution has to establish a prima facie case in the first instance. It is not enough to establish facts which give rise to a suspicion and then by reason of Section 106 of the Evidence Act to throw the onus on him to prove his innocence."

17. In the case of **Sawal Das Vs. State of Bihar, (1974) 4 SCC 193, at page 197**, the Supreme Court has laid down the law in the following terms:-

"10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is: Has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?"

18. In the case of **Murlidhar Vs. State of Rajasthan reported in 2005 (11) SCC 133 and AIR 2005 SC (2345)** in paragraph no. 20 of the Judgment the Supreme Court has followed its earlier judgment of Mir Mohammad Omar and others which is extracted here in below:-

"20. In Mir Mohd. Omar1 it was established that the accused had abducted the victim, who was later found murdered. The abductors had not given any explanation as to what happened to the victim after he was abducted by them. The Sessions Court held that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt as there was "a missing link in the chain of events after the deceased was last seen together with the accused persons and the discovery of the dead body of the deceased at Islamia Hospital". Rejecting the said contention this Court observed (vide SCC p. 392, para 31):

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty."

19. In a recent case of **Prithipal Singh Vs. State of Punjab, (2012) 1 SCC 10**, Supreme Court has highlighted the said proposition as follows;

"53. In *State of W.B. v. Mir Mohammad Omar* this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. *Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (See also Shambhu Nath Mehra v. State of Ajmer, Sucha Singh v. State of Punjab and Sahadevan v. State)."*

20. What emerges from the above mentioned cases are that the prosecution is not absolved from its duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt and the Section 106 of the Evidence Act is attracted in exceptional cases.

21. As regard to the finding of the trial court on the admission of Babloo @ Virendra in another S.T. No. 243 of 2010, the said admission cannot be relevant in the present case and on the basis of the said admission accused Babloo @ Virendra cannot be held guilty under Section 302/34 IPC. In the said confession, he had admitted his guilt in respect of the offence under Section 25 of the Arms Act. It is significant to mention that the trial court has recorded the finding that the weapon was recovered from the house of Babloo @ Virendra, the said finding is incorrect. The weapon was found from the field of one Baran Singh, which is evident from siteplan of S.T. No. 243 of 2010 (Exhibit Ka- 1). From a perusal of the confession, it is evident that Babloo @ Virendra was already in jail for the last 9 months and his mother was keeping indifferent health and as such he has made a request for lesser punishment. The trial court has made the admission of Babloo @ Virendra in S.T. No. 243 of 2010, Crime No. 1103 of 2009, under Section 25 of the Arms Act main ground for conviction in S.T. No. 242 of 2010, Crime no. 1101 of 2009. We are unable to agree with the view of the trial court, as the said admission cannot be treated as a missing link of the circumstantial evidence.

22. Learned counsel appearing for the appellants has placed reliance on the judgment of Supreme Court in the case of **State of Maharashtra Vs. Sukhdeo Singh reported in AIR 1992 SC 2100**. He submitted that the trial court has grievously erred in misconstruing the admission made by the accused in another S.T. No. 242 of 2010, Crime no. 1101 of 2009. He submitted that the court cannot act on the admission or confession made by the accused in another case and his statement recorded under Section 312 Cr.P.C. without complying with the provision and

ingredients of Section 229 of the Cr.P.C. The relevant portion of the judgment is extracted herein below:-

"Section **229** next provides that if the accused pleads guilty, the judge shall record the plea and may, in his discretion, convict him thereon. The plain language of this provision shows that if the accused pleads guilty the judge has to record the plea and thereafter decide whether or not to convict the accused. The plea of guilt tantamounts to an admission of all the facts constituting the offence. It is, therefore, essential that before accepting and acting on the plea the judge must feel satisfied that the accused admits facts or ingredients constituting the offence. The plea of the accused must, therefore, be clear, unambiguous and unqualified and the Court must be satisfied that he has understood the nature of the allegations made against him and admits them. The Court must act with caution and circumspection before accepting and acting on the plea of guilt."

23. With regard to the findings of the trial court that the Ballistic report shows that the cartridge which was found at the spot was fired from the same country made pistol which was recovered from the accused Babloo. We find from the record that there are obvious discrepancies for the following reasons, (i) In the charge sheet of S.T. No. 243 of 2010, it is mentioned that the country made pistol was recovered from the possession of the accused Babloo, when he was arrested from his house on 2.12.2009 at 9.05 a.m., whereas in the siteplan (exhibit Ka-1) the country made pistol and one live cartridge were shown to be recovered from a field of one Baran Singh, behind the house of the accused Babloo. We have perused the recovery memo of the country made pistol dated 2.12.2009 (exhibit Ka-16). It has not been signed by any independent witness and in the said recovery memo, it is mentioned that country made pistol and one live cartridge were found from the field of Baran Singh. This material discrepancy has escaped the notice of the trial court. Thus, its finding on this issue is perverse. The trial court has also relied on the Ballistic report (exhibit Ka -30). The recovery of the country made pistol and the live cartridge was made on 2.12.2009, however, the same was sent for forensic report on 4.2.2010 after two months. In the report, it is mentioned that along with country made pistol one missed fired cartridge was also sent for its examination. In Ballistic report, it is mentioned that the missed fire cartridge was compared with two cartridges which were test fired by the Ballistic expert. There was no case of prosecution that any missed fire cartridge was found, only one live cartridge was found on 2.12.2009. In the report of Ballistic expert, only his conclusion has been mentioned, no reason has been given. In the case of **Gopal Singh Gorkha, Vs. State of U.P. reported in 1991 CRI.L.J. 1235,** this Court has observed as follows:

"Para 22. An expert opinion in fire arms identification case should produce facts and not opinion which can not be checked. Being the Head of the Forensic Science Laboratory, the expert should know his responsibility towards the administration of criminal justice. He should give up the habit of producing his bald opinion. The expert should, if he expects his opinion to be accepted, put before the court, all the material which induced him to come to his conclusion so that the court, although not an expert may from its own judgment on these materials.

Bald opinions are of no use to the court and often lead to the breaking of very import important links of prosecution evidence which are led for the purpose of corroboration."

24. A Division Bench of Madhya Pradesh High Court, reported in **1988 CRI.L.J. 1583, Santokh Singh and others Vs. State of Madhya Pradesh,** has taken the following view;

"Para-14- No doubt, the Ballistic expert J.K. Agarwal (PW-17) has stated that the empty cartridge, Art. C, has been fired from the gun, Art. A (vide his report Exp. P-32), but he stated no reasons for his opinion. The opinion was dogmatic rather than explanatory. In view of Adam's case, 1971 Cri. App Rep 349 (SC), such dogmatic opinion of the Ballistic experted has to be discarded. That apart, the fact that the recovery of the empty cartridge Art. C, is highly suspicious and that the gun Art. A before being sent to the Ballistic expert was kept in police custody for a long period for two months and ten day, make this evidence very unreliable. Hence, fit to be ignored."

25. The facts of the said case say that the gun was sent for examination to Ballistic expert after two months and ten days. In the said case also the opinion of Ballistic expert was only a conclusion without support of detail reasons. In the said case although the Ballistic expert was examined, however, the court discarded the evidence of the Ballistic expert following the judgment of Supreme Court, in Adam's case 1971 Cri App Rep 349 SC.

26. In view of the above discussions, the finding of the trial court on this issue is not sustainable.

27. Having regard to the circumstances of the case, we are satisfied that that the prosecution has failed to prove its case against the accused beyond reasonable doubt and the findings of the trial court are not sustainable for the reasons given hereinabove.

28. In the result, the appeal against the S.T. No. 242 of 2010 (State Vs. Babloo @ Virendra and others) under Sections 302/34 IPC, Police Station Chandpur, District Bijnor succeeds and the same is **allowed.**

29. The judgment of conviction and order of sentence passed by the First learned Additional Sessions Judge, F.T.C. No. 1, Bijnor is hereby set aside.

30. Now coming to S.T. No. 243 of 2010, (Crime No. 1103 of 2009), in this matter the accused Babloo had admitted his guilt. In his statement under section 213 Cr.P.C. also he has admitted the fact regarding recovery of a county made pistol of 315 bore and one live cartridge of 315 bore at his home on 2.12.2009 at 9.05 a.m. He has also admitted that he had made an application admitting his guilt and prayed for lesser punishment on the ground that his mother is keeping indifferent health.

31. Learned counsel appearing for the appellants has not made any other argument in this matter.

32. In view of the aforesaid facts, we do not find any infirmity in the order of the trial court. The judgment and order of the trial court does not warrant any interference, therefore, we affirm the same. The appeal of Babloo @ Virendra against the judgment and order arising out of S.T.

No. 243 of 2010 (Crime Case No. 1103 of 2009) is dismissed.

33. All the appellants are acquitted from the charges of which they have been found guilty in S.T. No. 242 of 2010. The appellant no. 2 and 3 Sandeep and Dharmvir are on bail, they need not to surrender. The appellant no. 1 Babloo, who is in jail shall be released after completing his sentence in S.T. No. 243 of 2009, (Case Crime No. 1103 of 2009), unless wanted in some other case. All the appellants shall stand discharged from the liabilities of their respective bail bonds.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.04.2012

BEFORE
THE HON'BLE RITU RAJ AWASTHI,J.

Writ Petition No. - 9272 (S/S) of 2011

Ram Kumar Verma ...Petitioner
Versus
State of U.P. through Secy. Intermediate Edu. Lko. and others ...Respondents

Counsel for the Petitioner:
Sri Som Kartik

Counsel for the Respondent:
C.S.C.
Sri H.S. Jain
Sri S.P. Shukla

U.P. Secondary Education Service Selection Board 1982-Section-16-appointment of Head Master by Transfer-challenged-petitioner being Senior most L.T. Grade Teacher working on Ad-Hoc basis-requisition send to Board-and once Selection Process started-appointment by Transfer illegal-held-misconceived-when transfer of R-6 approved after completing all requirement-selection process automatically canceled-cancellation order name of petitioner institution placed at serial no. 19-petition dismissed.

Held: Para 28

This Court has come to the conclusion that since the advertisement dated 29.6.2011 was cancelled by subsequent notification dated 26.8.2011 issued by the Board as such it cannot be said that the process of selection was started or was in progress when the opposite party no. 6 was transferred on the post in question, therefore, the judgments aforesaid in the case of Asha Singh (supra) and Smt. Amita Sinha (supra) will be of no assistance to the petitioner as in the said case, the vacancies were advertised and applications were invited but the same had neither been withdrawn nor cancelled by the Board but in the present case, the vacancy for the post of Headmaster which was earlier invited was withdrawn and the advertisement made by the Board was cancelled as such there was no legal bottle neck in finalizing the transfer proposal of the opposite party no. 6. Moreover, the transfer of opposite party no. 6 was accorded final approval by the Additional Director of Education, who is said to be the competent authority. The opposite party no. 6 thereafter has submitted his joining on the post in question on 27.12.2011.

Case law discussed:
2007 (3) UPLBEC 2497; 2009 (1) ALJ 611

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

1. Heard Mr. Som Kartik, learned counsel for petitioner, learned Standing Counsel for opposite party nos. 1 to 3, Mr. H.S Jain, learned counsel for opposite party no. 5 as well as Mr. S.P. Shukla, learned counsel for opposite party nos. 4 & 6 and perused the record.

2. The writ petition has been filed with the following prayers:

"(i) To issue a writ, order or direction in the nature of certiorari quashing the advertisement dated 29-06-2011 issued by the Board so far as it relates to filling up the post of Head Master of the School, by way of transfer, after summoning the record.

(ii) To issue a writ, order or direction in the nature of mandamus commanding the opposite party No. 1 to 5 to not to fill the post of Head Master of the school by way of transfer.

(iii) To issue such order or direction deemed just and proper in the facts and circumstances of the case.

(iv) To award the cost of writ petition."

3. However, in para 1 of the writ petition it is mentioned that the writ petition is directed against the notification dated 26.8.2011 whereby the opposite party no. 5 has cancelled the earlier advertisement to fill up the post of Principal of the College by direct recruitment through U.P. Secondary Education Services and Selection Board (hereinafter referred to as the 'Board') and the reason given is that the said post shall be filled up by transfer. It is further mentioned that the writ petition is also directed against the attempt of opposite party nos. 1 to 5 to appoint opposite party no. 6 on the post of Head Master in the institution by transfer.

4. The controversy involved in the writ petition basically relates as to whether the post of Head Master in the Railway Higher Secondary School, Charbagh, Lucknow (hereinafter referred to as the 'School') is to be filled up through the Board by direct recruitment or it can be filled up by way of transfer of opposite party no. 6.

5. Shorn of unnecessary details, the brief facts are that the school is a recognized school under Intermediate Education Act, 1921 (hereinafter referred to as the 'Act of 1921'). It is included in grant in aid scheme of the Uttar Pradesh Government and the salary of the teachers and other employees of the school is governed under the provisions of High School and Intermediate Colleges (Payment of Salary to Teachers and other Employees) Act, 1971 (hereinafter referred to as the 'Act of 1971'). The post of Head Master of the School fell vacant on substantive basis on 27.9.1990 owing to death of Sri Vijay Narain Pathak who was permanent Head Master. After his death, Sri Desh Raj Singh Rathore, LT Grade Teacher was promoted as Head Master on ad hoc basis, he too died in June, 1998. Thereafter, Sri Mata Prasad, the next senior most LT Grade Teacher was promoted to the post of Head Master on ad hoc basis from July, 1998. He retired on 30th June, 2002. Thereafter, the next senior most LT Grade Teacher, Smt. Pushp Lata Misra was promoted as Head Master on ad hoc basis. She too retired on 30.6.2006.

6. It was thereafter that the petitioner was promoted as Head Master on ad hoc basis w.e.f. 01.09.2006. The appointment of petitioner was approved by the District Inspector of Schools, Lucknow vide letter dated 30.12.2006.

7. A requisition to fill up the post in question was sent to the Board in the year 2000. One Sri Yogesh Chandra Tripathi was selected for the said post and was nominated for appointment, however, due to interim order granted by the High Court at Allahabad, the recommendation of the Board was kept on hold, until the matter was finally decided by the Supreme Court in the year 2009 in the case of Balbir Kaur, wherein the aforesaid selection was upheld. Thereupon the Board vide its letter dated 01.07.2009 had sent the name of Sri Yogesh Chandra Tripathi for appointment on substantive basis on the post in question. The District Inspector of Schools, Lucknow also issued the letter dated 10.7.2009 in this regard. However, Sri Yogesh Chandra Tripathi did not turn up to join in the school, even after a long time. Hence, the committee of Management-opposite party no. 4 vide letter dated 16.12.2009 informed the District Inspector of Schools-opposite party no. 3 that the person recommended by the Board did not turn up to join on the post of Head Master.

8. In the meantime, Sri Jai Jai Ram Upadhyay-opposite party no. 6 made an application seeking his transfer to the School. The opposite party no. 4 vide letter dated 29.5.2011 gave its consent for his transfer to the school. However, the Board on the basis of the fact that the selected candidate has not joined in the school, issued advertisement dated 29.6.2011 to fill up the post in question by selection.

9. In the meantime, application for transfer of opposite party no. 6 was processed and the institution where he was working gave its no objection on 27.6.2011 and recommended for his transfer to the school. The District Inspector of Schools, Hardoi also recommended for his transfer by letter dated 13.7.2011. The District Inspector of Schools, Lucknow as well recommended for transfer of opposite party no. 6 by his recommendation dated 05.08.2011. The Joint Director of Education, Lucknow also send the recommendation vide his letter dated 09.09.2011 and ultimately the matter was considered by the Additional Director of Education who vide letter dated 16.12.2011 recorded final approval of transfer of opposite party no. 6 to the school. Thereafter the opposite party no. 6 was relieved from Santosh Kumar Inter College, Hardoi on 26.12.2011 and said to have joined in the school on 27.12.2011 in the forenoon.

10. The advertisement dated 29.6.2011 inviting applications for the post in question in the school by direct recruitment through selection was cancelled by notification published by the Board on 26.8.2011, copy of advertisement dated 29.6.2011 and notification dated 26.8.2011 are annexed as Annexure Nos. 4 & 5, respectively.

11. Learned counsel for petitioner submitted that the petitioner being the senior most Assistant Teacher LT Grade was appointed as Head Master on ad hoc basis in the school under Section 18 of the U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as the 'Act of 1982'). His appointment has been approved by the District Inspector of Schools, Lucknow and he is continuously working and discharging all the duties of Head Master to the best of satisfaction of the concerning authorities.

12. Contention of learned counsel for petitioner is that the name of petitioner being senior most Assistant Teacher LT Grade of the school was forwarded to the Board in pursuance of advertisement dated 29.6.2011 and he has a right to be considered in the selection, which was to be held by the opposite party no. 5. His further contention is that once the advertisement dated 29.6.2011 was issued by the Board, the process of selection was started and as such in view of the law laid down by this Court in the case of ***Asha Singh Vs. State of U.P. and others; 2007 (3) UPLBEC 2497,*** which has been affirmed by Division Bench in the case of ***Smt. Amita Sinha Vs. State of U.P. and others; 2009 (1) ALJ 611,*** the post in question could not be filled by transfer.

13. Mr. H.S. Jain, learned counsel for opposite party no. 5 on the other hand submitted that the advertisement issued to fill up the post in question through selection by the Board was subsequently cancelled by notice dated 26.8.2011 and as such it cannot be said that once the process for selection was in progress, when the post in question has been filled up by way of transfer of opposite party no. 6.

14. It is further submitted that in fact by notice dated 28.6.2011, a list of approximately 100 institutions was published which includes the institutions including Railway Higher Secondary School, Charbagh, Lucknow where earlier advertisements to fill up posts through selection by the Board was issued but they were cancelled for various reasons, which is evident from perusal of Annexure No. 5 to the writ petition.

15. Mr. S.P. Shukla, learned counsel for opposite party nos. 4 & 6 submitted that the opposite party no. 6 is having qualification of P.hd. and he was selected as Principal for a Hardoi College by the Board and thus the opposite party no. 6 being a selectee of the Board itself, there was no impediment, much less wrong in allowing him to be transferred to the institution of the opposite party no. 4, particularly, when the Committees of Management of both the institutions agreed for such transfer and the District Inspector of Schools, Hardoi as well as District Inspector of Schools, Lucknow also gave their consent in writing and the Joint Director of Education, Lucknow Region also agreed. Not only this the Additional Director of Education within whose powers lies the approval of transfer has also ruled in favour of the opposite party no. 6 and has allowed the transfer.

16. I have considered the submissions made by the parties' counsel.

17. Section 16 of the Act of 1982 refers to appointment of teachers including Principals/Headmasters.

18. For ready reference, the amended Section 16 is reproduced below:

"16. Appointment to be made only on the recommendations of the Board- *(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made thereunder, but subject to the provisions of Sections 12, 18, 21-B, 21-C, 21-D, 21-E, 21-F, 33, 33-A, 33-B, 33-C, 33-D, 33-E and 33-F, every appointment of a teacher shall, on or after the date of commencement of the U.P. Secondary Education Services Selection Board*

(Amendment) Act, 2001 be made by the Management only on the recommendation of the Board:

Provided that in respect of retrenched employees, the provisions of Section 16-EE of the Intermediate Education Act, 1921 shall mutatis mutandis apply.

Provide further that the appointment of a teacher by transfer from one Institution to another, may be made in accordance with the regulations made under Clause (c) of Sub-section (2) of Section 16-G of the Intermediate Education Act, 1921.

Provided also that the dependent of a teacher or other employee of an Institution dying in harness who possess the qualifications prescribed under the Intermediate Education Act, 1921, may be appointed as teacher in Trained Graduate's Grade in accordance with the regulations made under Sub-section (4) of Section 9 of the said Act.

(2) Any appointment made in contravention of the provisions of Sub-section (1) shall be void."

19. Thus, under the amended Section 16, following six modes of appointment are contemplated:

(a) by way of direct recruitment through process of selection held by U.P. Secondary Education Services Selection Board, Allahabad,

(b) by way of promotion within 50% quota, in accordance with the Statutory Rules applicable,

(c) by way of transfer in accordance with the provisions of Regulations 55 to 62 of Chapter-III of Regulations framed under the U.P. Intermediate Education Act, 1921,

(d) by appointment of reserved pool Teacher under Sections 21-B to 21-D of the Act of 1982,

(e) by way of regularization of teachers appointed on ad-hoc basis under Sections 33-A to 33-D of the U.P. Secondary Education Services Selection Board Act, 1982,

(f) by way of compassionate appointment.

20. In the case in hand, the petitioner was promoted as Headmaster on ad hoc basis w.e.f. 01.09.2006 after the post in question got vacant due to retirement of one Smt. Pushp Lata Mishra. The requisition to fill up the post in question was sent to the Board in the year 2000 and one Sri Yogesh Chandra Tripathi was selected for the said post, however, Sri Yogesh Chandra Tripathi did not turn up to join the post in question.

21. It appears that, in the meantime, the opposite party no. 6 being a substantively appointed Principal in Santosh Kumar Inter College, Hardoi made an application seeking his transfer to the School where the petitioner was working. The opposite party no. 4 gave his consent by letter dated 29.5.2011 for transfer of opposite party no. 6 to the School. The institution where the opposite party no. 6 was working also gave its no objection on 27.6.2011 and recommended for his transfer. The District Inspector of Schools, Hardoi by letter dated 13.7.2011

also recommended for his transfer and the opposite party no. 3-District Inspector of Schools, Lucknow by letter dated 05.08.2011 agreed for his transfer. The Joint Director of Education, Lucknow in this regard sent its recommendation by letter dated 09.09.2011 and ultimately the matter was considered by the Additional Director of Education, who by letter dated 16.12.2011 recorded final approval for transfer of opposite party no. 6 to the School. It was thereafter that the opposite party no. 6 was relieved from Santosh Kumar Inter College, Hardoi and submitted his joining in the School where the petitioner is working on 27.12.2011.

22. It is to be noted that in the meantime the Board treating the post in question to be vacant issued advertisement dated 29.6.2011 inviting applications for selection on the post in question, however, the said advertisement was cancelled by notice published by the Board on 26.8.2011, perusal of which clearly indicates that out of total posts advertised earlier, 23 posts have been cancelled, 7 posts have been amended and a decision has been taken to include 94 new posts. The last date of applying was thereafter extended from 25.8.2011 to 26.9.2011. In the list of institutions where the selection has been cancelled, name of the School (Railway Higher Secondary School, Charbagh, Lucknow) is at SL. No. 19 and the reason for cancellation is given as 'Transfer'.

23. It is evident that the advertisement dated 29.6.2011 was modified by notification dated 26.8.2011 according to which the advertisement issued regarding filling of the post in question through selection stood cancelled, hence it cannot be said that the process for selection to fill up the post in question was started and it was in progress when the transfer of opposite party no. 6 was effected. It is very much clear that the advertisement dated 29.6.2011 so far as the post in question is concerned was cancelled by notification dated 26.8.2011.

24. It is not the case of the petitioner that the Board has no power to cancel the earlier advertisement dated 29.6.2011 or that the post in question cannot be filled up by way of transfer, even after cancellation of the advertisement. The pleadings are only to the effect that the action of opposite parties to fill up the post in question by way of transfer is arbitrary and illegal as the requisition for filling of the same was forwarded by the Committee of Management to the Board and in pursuance of the same, the post was advertised by the Board.

25. Now, in the light of aforesaid facts, it would be appropriate to examine the laws laid down by this Court in the case of *Asha Singh (supra)* and *Smt. Amita Sinha (supra).*

26. The question which cropped up for consideration in the case of *Asha Singh (supra)* was as to whether once the vacancy has been requisitioned for direct recruitment by Committee of Management for Intermediate College and in fact the vacancy has been advertised, is it still open to the Management of the same institution to fill up the vacancy by way of transfer, so as to negate the selection held by the Board against the same requisitioned vacancy. The Court came to the conclusion that once the vacancy has been advertised on a requisition made by the Committee of

Management by the U.P. Secondary Education Services Selection Board, Alllahabad, the Committee of Management looses its discretion to fill up the vacancy by way of transfer inasmuch as the process of direct recruitment has been started. Once the advertisement is made by the U.P. Secondary Education Services Selection Board, Allahabad, the Committee of Management cannot resort to the mechanics of transfer for the purpose of filling up of the same vacancy, which had already been advertised.

Relevant paras 19, 20 and 21 are reproduced as under:

"19. This Court may record that once the vacancy is advertised, the Committee of Management must loose its discretion to fill the same vacancy by transfer inasmuch as the process of direct recruitment has been started. Once the advertisement is made by the U.P. Secondary Education Services Selection Board, Allahabad the Committee of management cannot resort to the mechanics of transfer for the purposes of filling up of the same vacancy, which had already been advertised.

20. It is necessary to restrict the discretion of the Management upto that stage, so as to safeguard the entire proceedings of selection, which had been initiated by the U.P. Secondary Education Services Selection Board, Allahabad. It is with reference to the number of vacancies which have been advertised that the number of candidates to be invited for interview and finally empanelled in their respective categories, has to be determined. Further the selected candidates have to exercise their options qua their empanelment under Rule 12 (4) of the U.P. Secondary Education Services Selection Board Rules, 1998 qua the vacancies which were subject matter of advertisement. Any attempt of the Management to fill the advertised vacancy by way of transfer, would result in creating a situation wherein the selected candidates may be deprived of their appointment despite having not been selected in order to merit, inasmuch as after they are empanelled for a particular institution, they will not be permitted to join because of vacancy had been filled by transfer in between. The entire proceedings initiated by the U.P. Secondary Education Services Selection Board, Allahabad will be brought to nought because such change of heart of the Management of the institution. The entire process of selection will have to be re-done by the U.P. Secondary Education Services Selection Board, Allahabad so that the selected candidate may exercise his option only in respect of available vacancy. This would neither be practical nor reasonable.

21. This Court, therefore, holds that once the vacancy has been advertised on a requisition made by the Committee of Management by the U.P. Secondary Education Services Selection Board, Allahabad, the Committee of Management looses its discretion to resort to mode of appointment by way of transfer and then it is only by direct recruitment on the recommendation of the U.P. Secondary Education Services Selection Board, Allahabad that any appointment against the vacancy advertised can be made."

27. In the case of S*mt. Amita Sinha (supra)*, the judgment of *Asha Singh (supra)* was challenged in special appeal

before the Division Bench, wherein the Division Bench while upholding the judgment of *Asha Singh (supra)* held as under:

"15. It was submitted by the appellant's counsel that under the 1998 Rules a right has been conferred upon two senior-most teachers of the college for being considered for appointment on the post of Principal and filling up the vacancy of the head of the institution by transfer necessarily defeats such right to consideration. In support of his contention the learned counsel for the appellant relied upon Prem Singh Manav Vs. District Inspector of Schools, Meerut and others, 1991(18) A.L.R. 279, Dinesh Bahadur Singh Vs. State of U.P. and others, 2004(4) AWC 2945 and Darshan Singh Vs. State of U.P. and others 1996(28) ALR 495. In Manav's case the question of filling up a vacancy from two competing modes of appointment, namely by transfer or by selection was not involved. The transferred candidate had joined the college several years before the dispute relating to appointment as Acting Principal arose and the question involved was about the seniority of the petitioner and the teacher transferred to the institution several years back. In Dinesh Bahadur Singh's case the petitioner who was the senior-most lecturer in the College was aggrieved by the notification of the vacancy on the post of Principal and contended that the claim of the senior-most Lecturer to be appointed as Principal was akin to the right of promotion. The Court negatived the contention that the right of the senior-most teacher to be considered for selection could be treated as a right to promotion. It was held that the post of Principal could be filled up by promotion. In para 3 of the Reports it has been observed that the post had not been advertised by the Board. In Darshan Singh's case the facts have not been set out in the judgment. The Court held that if the post has been advertised but could not be filled up for a long time, appointment by transfer could not be excluded on the ground of the senior-most teacher losing his right of consideration for selection. The question of harmonisation of the provisions to avoid conflict in the operation of Rules relating to appointment by transfer or by selection through Board was not considered in that case. The decisions cited do not hold anything, which may detract us from the view taken by us. We have already held that upto the stage of the computation of vacancies appointment by transfer can be made. In none of the cases cited was the transferred teacher posted to the institution after the advertisement of the vacancy by the Commission and his right of being appointed in preference to a selected candidate may have been upheld.

16. In the result, we find no merit in this appeal. It is accordingly, dismissed. "

28. This Court has come to the conclusion that since the advertisement dated 29.6.2011 was cancelled by subsequent notification dated 26.8.2011 issued by the Board as such it cannot be said that the process of selection was started or was in progress when the opposite party no. 6 was transferred on the post in question, therefore, the judgments aforesaid in the case of Asha Singh (supra) and Smt. Amita Sinha (supra) will be of no assistance to the petitioner as in the said case, the vacancies were advertised and applications were invited but the same

had neither been withdrawn nor cancelled by the Board but in the present case, the vacancy for the post of Headmaster which was earlier invited was withdrawn and the advertisement made by the Board was cancelled as such there was no legal bottle neck in finalizing the transfer proposal of the opposite party no. 6. Moreover, the transfer of opposite party no. 6 was accorded final approval by the Additional Director of Education, who is said to be the competent authority. The opposite party no. 6 thereafter has submitted his joining on the post in question on 27.12.2011.

29. Under the aforesaid facts and circumstances, I am of the considered opinion that the writ petition being devoid of merit is liable to be dismissed, it is accordingly dismissed.

30. Interim order, if any, stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 9349 of 1998

Smt. Dhanauti & others ...Petitioner
Versus
Addl. Commsssioner ...Respondent

Counsel for the Petitioner:
Sri Triveni Shankar

Counsel for the Respondents:
Sri Ajeet Srivastava
Sri V.K. Singh
Sri Sudhakar Pandey
S.C.

U.P.Z.A. & L.R. Act 1950-Section-198 (5)- Cancellation of lease-on basis of report submitted by Tehsildar-without issuing notice or opportunity of hearing-held order nullity.

Held: Para 12 and 13

In these circumstances, the only conclusion that can be drawn is that the cancellation has been carried out in violation of the provisions of sub-section (5) of Section 198 of the Act.

Thus, in my opinion, the order of the Collector dated 29.08.1996 being in violation of principles of natural justice and in violation of the aforesaid statutory provisions is a nullity. Accordingly, the order dated 29.08.1996 and the affirmance thereof by the Commissioner dated 26.02.1998 in so far as it relates to the petitioners' allotment and its cancellation is hereby set aside with a direction to the Collector-respondent no.2 to afford an opportunity of hearing to the petitioners and then pass an appropriate order in accordance with law.

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

1. Heard Sri Triveni Shanker, learned counsel for the petitioners, Sri Ajeet Srivastava, learned counsel for the respondent nos.3 & 4 and learned Standing Counsel for the respondent nos.1, 2 & 5.

2. Notices were issued to other respondents. Some of them have already filed writ petition no.17310 of 1998 (Loknath and others Vs. Board of Revenue and others). The petitioners herein claim that they were allotted land by the Gaon Sabha in the meeting held on 10.07.1994. The same came to be approved by the Sub-Divisional Officer, Saidpur on 09.12.1994. The dispute arose

on account of an application having been moved by Chandra Deo the then Gram Pradhan in the year 1996 and a copy of the said application on which proceedings were initiated, is filed as Annexure No.2 to the writ petition.

3. Sri Triveni Shanker, learned counsel for the petitioner submits that the first question that arises for consideration is that such a proceeding could not have been initiated or concluded without putting the petitioners to notice in terms of sub-section (5) of Section 198 of the U.P. Z.A. & L.R. Act, 1950. He further contends that the findings which have been recorded on the basis of an alleged report of the Tehsildar dated 15.07.1996, was never made known to the petitioners, and the said report has been made the basis for the cancellation of the lease. A categorical plea has been raised to this effect in paragraph nos.14 to 16 of the writ petition. It is further urged that there was neither any irregularity nor were the petitioners ineligible for grant of lease and in the absence of any notice and without any explanation in this regard, the conclusions drawn are ex-parte without allowing the participation of the petitioners under the statutory requirement aforesaid.

4. A counter affidavit has been filed on behalf of respondent nos.3 and 4 Gaon Sabha but no counter affidavit has been filed on behalf of the State. The other respondents, as noted above, have already filed a separate writ petition. They are also aggrieved by the action of the Collector in proceeding to take suo motu action for allotment of leases in accordance with the directions given in the impugned order dated 29.08.1996.

5. Aggrieved by the order of the Collector dated 29.08.1996 and the dismissal of the revision of the petitioners on 26.02.1998 the present writ petition has been filed contending that the impugned orders are in violation of principles of natural justice as enshrined under the statutory provisions of sub-section (5) of Section 198 of the Act and even otherwise against the weight of evidence on record.

6. Sri Triveni Shanker, learned counsel for the petitioner, therefore, submits that the impugned orders deserve to be quashed and the writ petition deserves to be allowed.

7. Learned counsel for Gaon Sabha on the other hand contends that a finding has been recorded that ineligible persons have been allotted land and that the petitioners were not party to the said allotment proceedings, as such, the entire procedure is vitiated. He contends that the petitioners had opportunity to demonstrate their bona fides before the Commissioner in appeal and as such, the plea of opportunity does not hold water. He contends that the impugned order clearly records findings of fact which does not deserve any interference in the exercise of discretionary jurisdiction of powers under Article 226 of the Constitution of India.

8. Learned Standing Counsel also adopts the same arguments.

9. Having perused the documents on record and having considered the aforesaid submissions, the dispute in so far as it relates to the allotment of petitioners is concerned it is undisputed that the petitioners were allotted land and the same was approved by the Sub-

Division Officer, Saidpur. If the authorities were proceeding to cancel the said allotment, in the opinion of the Court the mandatory requirement of sub-section (5) of Section 198 of the 1950 Act had to be fulfilled inasmuch as sub-section (5) clearly recites that no orders for cancellation shall be made unless a notice of show cause is given to the allottee. The principles of natural justice are, therefore, engrained as a statutory requirement and there is nothing on record to indicate that the petitioners were ever put to notice about the said proceedings initiated by the Collector.

10. Apart from this the counter affidavit of the Gaon Sabha does not demonstrate that any such notice was served on the petitioners.

11. The contention raised on behalf of the petitioners that the order has been passed on the basis of a report of the Tehsildar dated 15.07.1996 also deserves to be noticed inasmuch as if the said report is the basis of the cancellation order then in that event it was obligatory on the Collector to put the petitioners to notice about the evidence which was sought to be utilized for cancelling the lease of the petitioners.

12. In these circumstances, the only conclusion that can be drawn is that the cancellation has been carried out in violation of the provisions of sub-section (5) of Section 198 of the Act.

13. Thus, in my opinion, the order of the Collector dated 29.08.1996 being in violation of principles of natural justice and in violation of the aforesaid statutory provisions is a nullity. Accordingly, the order dated 29.08.1996 and the affirmance thereof by the Commissioner dated 26.02.1998 in so far as it relates to the petitioners' allotment and its cancellation is hereby set aside with a direction to the Collector-respondent no.2 to afford an opportunity of hearing to the petitioners and then pass an appropriate order in accordance with law.

14. The writ petition is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2012

BEFORE
THE HON'BLE DHARNIDHAR JHA, J.
THE HON'BLE RAMESH SINHA, J.

Civil Misc. Habeas Corpus Writ Petition No. 10715 of 2012

Smt. Kavita ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Srivastava

Counsel for the Respondents:
Sri A.K.Pandey
Govt. Advocate

Constitution of India, Article 226-Habeas Corpus Petition-determination of age-C.J.M. By placing reliance upon medical report-confined petitioner in Nari Niketan-confirmed by Session Judge-admittedly when the offence committed she was about 18 years-as per law developed by Apex Court in Jai Mala Case 3 years have to be added-petitioner not committed any offense-if taken away from Lawful custody of her guardian-her liberty can not be confined-petition disposed of by giving liberty to go at any place or person of her choice

Held: Par a 5 and 6

We have just recorded that the lady is aged 18 years or more than that and is thus, major and her liberty could never be confined by an order which might be having the tinge of judicial sanctity. Usually judicial sanctity is attached to resisting such order so as to resisting the release of such confined persons. But the balance of reasonableness, which is the hallmark of judging such orders, convince us that any judicial order, which failed the scrutiny on reasonableness could not be upheld. The lady, Smt. Kavita, was more than 18 years of age and as such, the order of the Chief Judicial Magistrate and that passed by the learned Sessions Judge in the form of Annexure 5 and 6 respectively, could not be upheld.

We are clearly of the view that the lady was wrongfully confined in exercise of an illegal judicial jurisdiction. We, as such, direct that the lady, Smt. Kavita, be set at liberty immediately so that she could go to the place or to a person, she likes or chooses to.

Case law discussed:

AIR 1982 SC 1297; AIR 1965 SC 942

(Delivered by Hon'ble Dharnidhar Jha,J.)

1. We have directed the petition to be listed in our chambers. Accordingly, we have heard again Sri Manoj Kumar Srivastava, Sri A. K. Pandey and Sri S. M. Pandey, learned counsel for the parties We have with us, in our Chambers, Smt. Kavita, the solitary petitioner, along with her counsel Sri Manoj Kumar Srivastava.

2. The present petition seeks an order for quashing the orders dated 12-12-2011 passed by the learned Chief Judicial Magistrate, Aligarh, and that of dated 19-12-2011 passed by the learned Sessions Judges, Aligarh (Annexures 5 and 6 to the petition, respectively). By order dated 12-12-2011, the learned Chief Judicial Magistrate observed that the petitioner was below 18 years of age and as such was a minor who should not be handed over in the custody of her lawful guardian who had not come up before the court for the purpose. The Chief Judicial Magistrate, therefore, ordered confinement of the petitioner, Smt. Kavita in Nari Niketan, Mathura, in connection with case crime no. 256 of 2011 under Sections 363 and 366 I. P.C. That order appears challenged before the learned Sessions Judge in Criminal Revision petition no. 815 of 2011 and by order dated 19-12-2011 the learned Sessions Judge confirmed the order passed by the learned Chief Judicial Magistrate.

3. During the course of hearing, it was brought to our notice that the petitioner was aged about 18 years on account of having been born on 15-4-1992 as appears from Annexure 1 to the counter affidavit filed by the State of U. P. Thus, on the day the petition was filed, she was about 18 years of age. Our attention was also drawn to the medical examination report which appears at pages 21 to 23 of the present petition to submit that the doctor appears not having expressed his opinion as regards determination of age of the petitioner in spite of carrying out the ossification test. We find that the doctor in spite of having recorded the complete or partial fusion of different joints or epiphyses, was not finally opining as to what could be the age of Smt. Kavita. We are of the opinion that the doctor was probably working under some influence and was not discharging his official duties in spite of having been asked by the Chief Medical Officer, Aligarh, in that behalf as appears from the

part of report which appears at page 23 of the present petition. We record our disapproval on the manner Dr. R.K. Goel discharged his duties and we direct the Chief Medical Officer, Aligarh, to be vigilant about the official performance of duties by Dr. R. K.Goel.

4. However, we are conscious of the fact that there might be some dispute regarding the petitioner being aged below 18 years or more than that age, on the date of occurrence, but we have considered the age recorded in her school records which was 15-4-1994. We do not have any hesitation in recording that the lady, Smt. Kavita is aged about 18 years of age. The medical assessment of age may also not be conclusive. The determination of age is always in the realm of being the estimated age on account of scientific exercise. This is the reason that the Supreme Court in the case of **Jaya Mala v. Home Secretary, Government of Jammu and Kashmir**, reported in **AIR 1982 SC 1297** had observed that if the age has been determined by the doctor medically then three years have to be added to such assessed age. That judgement has consistently been followed in the cases of the present nature to give weightage to assess the age of the victim so as to appreciating the evidence of minority / majority of the victim in favour of the accused. In addition to that, it is trite that if the girl who is at the verge of majority, walks out of her parent's house to go with any man, then it could not be a case of kidnapping as the same could not be said to be an act of taking away or enticing away a woman below 18 years of age. It could be a mere case of elopement. This proposition was laid down by the Supreme Court in the case of **S. Varadarajan vs State of Madras** reported in **AIR 1965 SC 942.** We are not concerned with that aspect of the matter. We are mainly concerned as to whether a lady who is 18 or more years of age, could be directed to be confined. Even assuming that the lady was below 18 years of age, we have to keep in our mind that Smt. Kavita was not an accused, she has not committed any offence. Legally, her custody could not be authorised by any court in connection with any offence which is alleged having been committed on account of taking or enticing her away from her lawful guardianship. It would have been in the fitness of things that the learned Chief Judicial Magistrate should have appreciated that position of law and should not have directed the confinement of the lady in Nari Niketan, as he did. He could have directed her to be set at liberty, at any rate.

5. We have just recorded that the lady is aged 18 years or more than that and is thus, major and her liberty could never be confined by an order which might be having the tinge of judicial sanctity. Usually judicial sanctity is attached to resisting such order so as to resisting the release of such confined persons. But the balance of reasonableness, which is the hallmark of judging such orders, convince us that any judicial order, which failed the scrutiny on reason-ableness could not be upheld. The lady, Smt. Kavita, was more than 18 years of age and as such, the order of the Chief Judicial Magistrate and that passed by the learned Sessions Judge in the form of Annexure 5 and 6 respectively, could not be upheld.

6. We are clearly of the view that the lady was wrongfully confined in exercise of an illegal judicial jurisdiction. We, as

such, direct that the lady, Smt. Kavita, be set at liberty immediately so that she could go to the place or to a person, she likes or chooses to.

7. With the above directions, we dispose of the present petition.

8. Let a copy of this order be made over to Sri R. A. Mishra, for onward communication to the concerned authorities. Sri Mishra shall, in the meantime, communicate by any means of communication, the gist of this order and that may be treated as the result of the petition, so that the lady may not be confined further.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLHABAD 27.04.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 11997 of 1992

Hindalco Industries Limited ...Petitioner
Versus
Industrial Tribunal-I, U.P. at Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri N.B. Singh
Sri Ritvik Upadhaya
Sri Vinod Upadhyay

Counsel for the Respondent:
Sri P.C. Jhingam
S.C.

Constitution of India, Article 226-House Rent allowance-Labor Court allowed reference in favor of workers-Hindalco Company situated in forest area-considering shortage of accommodation management given residential houses those who worked without having residential Quarter for 10 years-it can work and wait the availability-for such considerable period-management can not be burdened by House Rent allowance-ignoring this aspect-award not sustainable.

Held: Para 22

If some workmen have already worked for decades together without being dissatisfied with non-availability of housing accommodation or HRA in lieu thereof, and they are given housing accommodation seniority-wise as soon as it becomes available, the Court finds no justification to allow payment of HRA to such workmen with such a long retrospectivity causing an extraordinary financial burden on the employer. In fact, on this aspect also the tribunal has not at all considered anything and in a most casual and abrupt manner, also without application of mind, it has passed the award granting relief of house allowance from the date of appointment. This direction, therefore, also in my view is illegal and unsustainable.

Case law discussed:
AIR 1960 SC 886; AIR 1959 SC 1035

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

1. Sri Vinod Upadhyay, Senior Advocate, assisted by Sri Ritvik Updhyay for the petitioner and learned Standing Counsel for respondent no.1 and 3. Initially, Sri P.C. Jhingam had put in appearance and filed counter affidavit and after his death notice was issued to respondent no.2 to engage another counsel vide order dated 21.10.2011. None has appeared on behalf of respondent no.2 though the case has been called in revised list.

2. The writ petition is directed against the award dated 29th April 1991

of Industrial Tribunal-I, U.P. at Allahabad (hereinafter referred to as "the Tribunal") in Adjudication Case No. 40 of 1989 whereby the Tribunal has directed the petitioner i.e., M/S Hindalco Industries Ltd. (hereinafter referred to as "the employer") to pay 10% of the basic pay towards house allowance to workers who are not provided housing accommodation by the employer, from the date of their appointment till such time housing accommodation is not offered to them.

3. Respondent no.2 is a union of workers of Hindustan Aluminium Corporation Limited, Renukoot, in district Sonbhadra. An industrial dispute was raised by the Union that some of the workers who are not provided with housing accommodation should be provided house rent allowance. A reference was made for adjudication of the above dispute vide State Government notification dated 1.5.1989 under Section 4-K of U.P. Industrial Disputes Act to the following effect:

"Kya Sewayojkon dwara apne kuchh shrmikon ko avas suvidha athva avas bharra na diya jana uchit tatha/athva baidhanik hai? Yadi nahin, to sambandhit shramika kya laabh/kshatpurti paane ke adhikari hai, kis tithi se tatha anya kis vivaran sahit?"

"Whether non-providing of housing facility or housing allowance by the employer to some of its workmen is justified and/or legal. If not, whether the concerned workmen are entitled to any benefit or compensation and from which date and with what details." (English translation by Court)

4. It is this reference which has been answered by the Tribunal in favour of workmen as said above.

5. The area in which the petitioner's industrial establishment is established was basically a forest area in which about more than 50 years ago, on the initiative taken by State Government and the management of the petitioner's industrial establishment, a heavy industry was set up with multiple objectives of contributing to the national resources and also providing development and employment to local inhabitants. The adjacent area was mostly inhabited by Adivasis and other very poor rural inhabitants. It is the establishment of the large industrial undertaking HINDALCO which increased employment potential in the area attracting a huge labour force from the adjacent area as also the distant ones. The basic requirement i.e. establishment of industry obviously is to be catered first and therefore, land became available to the petitioner was mostly used for establishing industrial undertakings. Besides thereto, some residential accommodation had also been constructed including schools, playgrounds etc. Some residential accommodation has been constructed for the benefit of State's administrative departments which is again for the larger benefit of the industrial working force in petitioner's industry, which at the time of dispute in question was about 15000/-.

6. Outside industrial establishment, private residential accommodation was scanty and virtually people find it very difficult to get a suitable accommodation in and around 70 KM area in which the industry is situated. Since the accommodation available with the industry is limited, the management followed principle of seniority for allocating

residential accommodation to labourers. Such accommodation is provided free of cost subject to charge of nominal amount towards maintenance.

7. The case of the workmen is that since the housing accommodation having been provided free of cost to some of the workers while others did not get it, they are entitled for suitable house rent allowance otherwise treatment of the industry would be arbitrary and discriminatory. The workers initially claimed housing rent allowance (for short 'HRA') at the rate of 20%.

8. Sri Upadhyay contended that there is no express or implied condition of service obliging the employer to provide residential accommodation or HRA to the entire industrial force. Facility of housing accommodation provided by the employer was voluntary. The industry though inclined to allot housing accommodation to all its employees so that the workers may serve the industry with much efficiency but it has its own limitations inasmuch as the land is not available. The industry is corresponding and approaching the State Government for acquisition of more land but has not been successful therein so far. In any case, the voluntary act on the part of employer cannot be treated to be an express or implied conditions of service to provide free accommodation to labourers or payment of HRA. The Tribunal having failed to consider relevant aspects had erred in law and therefore, the impugned award is liable to be set-aside. Reliance is placed on Apex Court's decisions in **B.N. Elias and Co. Ltd. Employees' Union and others Vs. B.N. Elias and Co. Ltd. and others AIR 1960 SC 886, Patna Electric Supply Company Limited, Patna Vs. Patna Electric Supply Workers' Union AIR 1959 SC 1035.**

9. Sri Vinod Upadhyay, learned Senior Advocate further contended that the basic obligation of providing housing facility to the public at large is that of the Government and not of the petitioner Industry. There is no agreement between the petitioner and respondent no.2 i.e., the employer and employees that either housing accommodation or allowance in lieu thereof shall be provided. There is no service condition to this effect. No assurance ever held by the petitioner industry to the workmen that after their engagement/employment in service with the petitioner industry, they would be provided housing accommodation or allowance in lieu thereof. He contended that in view of absence of any service condition, the award of the Tribunal is wholly illegal, unjust, unreasonable and, therefore, liable to be set aside.

10. Learned Standing Counsel on the contrary attempted to support the award for the reasons stated therein

11. I have heard learned counsel present for respective parties and perused the record.

12. The award of Labour Court itself shows that the place it is now known as Renukoot was previously a village named Jhokhai. There was only Adivasi population in this village used to live in hutments. The petitioner industry was established in 1960 and production commenced in 1962. The land was acquired by the State Government for establishment of the above industry and the petitioner industry undertaking, besides set up of their factory/plant also set up a

power generation unit and also built residential colonies, schools, playgrounds etc. for their employees.

13. Admittedly, there is no written service condition agreement, contract or anything alike which may entitle the workmen either to get free housing accommodation or HRA from the petitioner industry. Considering the peculiar facts and nature of industrial unit in its own interest, the industry has constructed a number of residential houses and allotted to its workmen/employees who are permanent. Allotment is founded on the criteria of seniority since number of accommodation is lesser than the number of workers claiming it. At the relevant time, the industry was charging Rs.6/- per month towards maintenance charges. The employer's stand that there is no condition of service obliging it to provide free residential accommodation or HRA in lieu thereof, was not found incorrect by the Tribunal. There is no such representation also by the employer. This is evident from the following findings:

"It is also true that the basic duty to provide industrial housing is that of the Government and not of the employers. It is also true that there is no agreement between the workers and the employers according to which house accommodation is to be provided to workers. There is no service condition to that effect. No assurance is given to the workmen when they enter into service that they will be provided with house or else house rent."

14. However, having said so the Tribunal then proceeded to observe that since some of the workmen have been provided housing accommodation voluntarily, non-providing of housing accommodation or HRA in lieu thereof to others would be arbitrary. If the employer on its own has provided housing accommodation, free of cost to some of the workers i.e., about 50% , it amounts to an implied service condition though there is no any express condition in any agreement to this effect. The Tribunal has further applauded the welfare measures taken by the employer of *suo motu* extending facility of free housing accommodation to its employees despite there being no lsuch conditions of service and has also noticed *bona fide* of the employer to provide further accommodation subject to availability of land and construction of houses thereon. However, this attempt on the part of the employer has been construed as an implied condition making obligatory upon it to pay HRA to the workers who are not provided with free housing accommodation. In absence of any other criteria, the Tribunal has upheld HRA rate prescribed by the State Government for its employees and has followed the same by issuing direction to this effect to the petitioner employer.

15. To my mind, this approach of the Tribunal is not justified and reasonable in the context of the entire matter. To constitute a condition of service, there must be something more than mere conduct on the part of employer showing that it has given some benefit to to some of its employees. There must be something to show that the employer intends to provide the benefit as a part and parcel of the condition of service to workmen. If something is found in the agreement, there would be no difficulty but otherwise, the mere fact of granting certain benefit to some of the employees, *ipso facto,* would not and may not constitute an implied condition of service unless intention of the

employer and kind of representation to the workmen to this effect is borne out from some material.

16. In the present case, the employer industry on their own have allotted residential accommodation available with them to the seniormost workers, free of cost, and even to those workers there does not appear to be any express or implied condition of service that such benefit or amenity shall be extended by the employer. The fact that nominal and negligible amount is charged from the workmen who are allotted housing accommodation also shows that the employer never intended to create any interest in the housing accommodation on the part of the concerned workmen and that is how only token amount is payable by the workmen which is termed as "maintenance charges".

17. In providing voluntary facility of housing accommodation, the industry follows a genuine principle of seniority so that those having longer service in industry may get facility of free accommodation first comparing to those who have lesser service. The issue in question in my view is squarely covered by Apex Court's decision in **Patna Electric Supply Co. Ltd. (Supra).** The Court, on the one hand, upheld the power of industrial adjudicatory forum to extend an existing agreement or making of new one or creation of new obligation or modification of old ones. It also held that it cannot be doubted that in appropriate cases, industrial adjudication may impose new obligations on the employer in the interest of social justice and with the object of securing peace and harmony between the employer and his workmen and full co-operation between them. In settling the dispute between the employer and workmen the adjudicatory forum under industrial law is not confined to administration of justice in accordance with agreement strictly. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. Its power is not confined to mere interpretation or executing contractual rights and obligations of the parties but it can create new rights and obligations between them which it considers essential for keeping industrial peace. However, that itself does not mean that whatever is considered by the Tribunal in interest of workers can be allowed without having a realistic approach in the context of the entire scenario, namely, the industry as well as workers and public at large. Once an industry is established, its sole object is not confined to generation of employment but the production which results in adding to public resources contribute for national development. Employment is one of the ancillary and subsidiary developmental activity which results due to establishment of the industry going for production. Health of the industry, its potential of survival and continuance, contribution towards national resources, etc., therefore, cannot be undermined. The general interest of entire public at large has also to be seen in such matters.

18. The Tribunal found, in the present case, that the area was extremely backward where the industry in question was set up in 1960. The State Government invited establishment of the petitioner industry offering certain exemptions and concessions at the relevant time so that in one of the most backward area in the State of U.P. an industry of substantial potential and of national importance may be

established. The petitioner industry is contributing to national development which also includes defence requirement since it produces aluminium. The industry, instead of taking any undue advantage of lack of bargaining power of workmen, on its own and voluntarily constructed houses, colonies, etc. and to the extent accommodation is available, the same is being provided to workmen, following a valid criteria of seniority.

19. The Apex Court in **Patna Electric Supply Co. Ltd. (Supra)** has observed that housing accommodation of industrial labour is the primary responsibility of the State. In the context of present economic conditions of industries, it would not be expedient to impose an obligation of providing housing accommodation upon the industry. It also said that scheme of wages normally fixes the wages taking into account factors relating to availability of accommodation in the area concerned and other relevant factors. It has also taken note of the fact that Tribunals usually do not entertain employees' claim for housing accommodation and do not even allow a separate demand of house allowance as such. The Court has also deprecated casual approach of imposing obligation relating to housing facilities upon the industry. In para 22 of the judgment it said:

".....The discussion of the problem in these two chapters shows that housing shortage can be conquered only by sustained and well-planned efforts made by the States and the industry together. It is a very big problem and involves the expenditure of a huge amount. Efforts are being made by the Central Government to invite the cooperation of industrial employers to tackle this problem with the progressively increasing financial and other assistance offered by the State Governments. But it is obvious that this problem cannot at present be tackled in isolation by Industrial Tribunals in dealing with housing demands made by employees in individual cases. In the present economic condition of our industries it would be inexpedient to impose this additional burden on the employers. Such an imposition may retard the progress of our industrial development and production and thereby prejudicially affect the national economy. Besides such an imposition on the employers would ultimately be passed by them to the consumers and that may result in an increase in prices which is not desirable from a national point of view. It is true that the concept of social justice is not static and may expand with the growth and prosperity of our industries and a rise in our production and national income, but so far as the present state of our national economy, and the general financial condition of our industry are concerned, it would be undesirable to think of introducing such an obligation on the employers today. That is why we think the Industrial Tribunals have very wisely refused to entertain pleas for housing accommodation made by workmen from time to time against their employers."

20. It is also said that before taking any view with respect to housing facility or HRA, in favour of the workmen, financial ability of industry to meet the additional burden must have to be considered.

21. Admittedly, from a perusal of the impugned award any such consideration is apparently lacking.

Further, assumption on the part of the Tribunal that giving free accommodation to about 50% of workmen while depriving others even from house allowance is discriminatory, also has no basis for the reason that the facility of housing accommodation has not been extended by employer on a pick and choose method but subject to availability and is provided following the valid criterion of seniority. It is voluntary also.

22. Parity with State Government employees is also something which has misguided the Tribunal, inasmuch as, once it is held that housing accommodation is the prime responsibility of State, what is applicable to employees of the State Government would not apply suo motu to employees of a private industrial establishment. Besides, the Tribunal has also not considered anything as to how and why it was justified in awarding HRA at the rate of 10% of the basic salary from the date of appointment of workmen, inasmuch as, there is nothing on record to show that the workmen raised any such dispute immediately after their appointment or within a reasonable time thereafter. If some workmen have already worked for decades together without being dissatisfied with non-availability of housing accommodation or HRA in lieu thereof, and they are given housing accommodation seniority-wise as soon as it becomes available, the Court finds no justification to allow payment of HRA to such workmen with such a long retrospectivity causing an extraordinary financial burden on the employer. In fact, on this aspect also the tribunal has not at all considered anything and in a most casual and abrupt manner, also without application of mind, it has passed the award granting relief of house allowance from the date of appointment. This direction, therefore, also in my view is illegal and unsustainable.

23. In view of the above discussion, the Tribunal was not justified in answering the reference in favour of workmen and the amount of housing allowance awarded with retrospective effect, cannot sustain.

24. Resultantly, the writ petition succeeds and is allowed. The impugned award dated 29th April 1991 in Adjudication Case no. 40 of 1989 (Annexure 4 to the writ petition) is hereby quashed.

25. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2012

BEFORE
THE HON'BLE MANOJ MISRA,J.

Civil Misc. Writ Petition No. 15378 of 2009

Kuldeep Kr. Misra ...Petitioner
Versus
The Zila Prabhandhak and others ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar (Sharma)
Sri Sant Ran Sharma

Counsel for the Respondents:
Sri N.P. Singh
Sri N.P. Singh
Sri M.P. Singh

Constitution of India, Article 226- compassionate appointment-claimed after 18 years delay-only reason disclosed pendency of dispute of

succession-held-rejection proper-compassionate appointment can not be claimed as a matter of right.

Held: Para 9

The contention of the petitioner that on account of succession dispute the application remained pending, therefore, the delay could not defeat his right, is not sustainable. The purpose of succession certificate is to enable the debtor of the deceased person to seek a valid discharge by making payment to its holder. Thus, even if there had been a dispute with regard to succession for entitlement to the terminal dues payable to the deceased employee, there was no impediment for the petitioner to approach the Court, on pressing need, if there was any, for appointment on compassionate ground. After such a long lapse, particularly, when the claim for compassionate appointment was not pending before any court, there is no justification to consider appointment on compassionate ground, as the very purpose for which it is provided stands exhausted.

Case law discussed:

(1994) 1 SCC 192; (2009) 7 SCC 295; (2007) 9 SCC 571; (2009) 13 SCC 112; (2009) 6 SCC 481

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

1. I have heard Sri Manoj Kumar Sharma, counsel for the petitioner and Sri N.P. Singh, counsel for the respondents and have perused the record. As pleadings are complete, with the consent of the counsel for the parties, the petition is being finally disposed of at the admission stage.

2. The facts, in brief, are that one Mahendra Nath Misra, who was an employee of Food Corporation of India, working on the post of AG-III(Store), Jhansi, died in harness on 04.12.1991. The petitioner claims himself to be younger brother of deceased Mahendra Nath Misra. It is claimed by the petitioner that his brother Mahendra Nath Misra was suffering from Leprosy as well as Cancer. Since he was unmarried, the petitioner was looking after him, and in return, petitioner's elder brother provided for education of the petitioner. Consequent to the death of his elder brother, the petitioner, on 10.02.1992, applied for appointment on compassionate ground. This application of the petitioner remained pending on account of a succession dispute between one Uma Devi, who claimed herself to be the legally wedded wife of Mahendra Nath Misra, and the parental family of Mahendra Nath Misra. It is claimed that the Civil Court ultimately, in the year 2004, decided the dispute whereby the claim of Uma Devi was rejected and the succession certificate granted in favour of the mother of the petitioner was upheld. After conclusion of the succession case, the petitioner again set in motion his claim for compassionate appointment, which was rejected by the order dated 17.11.2008. The ground for rejection of the claim was that under the Govt. of India's instructions only widow/ son/ daughter /adopted son or adopted daughter could be considered for compassionate appointment, therefore, the petitioner, who was brother of the deceased employee, was not eligible for consideration. It is this order, which has been impugned in this petition.

3. Along with his writ petition, the petitioner has enclosed a copy of circular No. 29 of 1990 dated August 20, 1990, which contains the scheme for compassionate appointment of a son/daughter/near relative of the deceased employee of Food Corporation of India.

4. The counsel for the petitioner submitted that under the scheme, which was operative on the date of death of his elder brother, the benefit of compassionate appointment was available to a **"near relative"** also. He claimed, that since the term **"near relative"** has not been defined, it would, therefore, include a brother. He contended that the application of the petitioner for appointment on compassionate ground was thus wrongly rejected. On the question of delay of nearly 18 years in approaching this court for seeking compassionate appointment, the counsel for the petitioner submitted that the delay was not on the part of the petitioner, but for the reason that no orders were passed on his application on account of the succession dispute. More over, he submitted, that the scheme for compassionate appointment did not bar an application submitted with a delay. Referring to Clause VI of the Scheme, which provides that the appointing authority can also consider the request for compassionate appointment even when the death took place long ago, say five years or so, he submitted that the application can be entertained. He has further submitted that the delay cannot defeat his right to seek compassionate appointment, which had accrued to him on the date of the death of his brother.

5. Per contra, Sri N.P. Singh, who appeared for the Food Corporation of India, submitted that although the scheme for compassionate appointment had provided for appointment of a son/daughter/near relative of the deceased employee of a corporation, but subsequently, under the directions of the Apex Court in the case of **Auditor General of India and others versus G. Ananta Rajeswara Rao reported in (1994) 1 SCC 192** decided on 8.4.1993, vide circular No. 7 of 1997 dated 31.3.1997 the term **"near relative"** was deleted from the scheme and since then only a widow, son or daughter including adopted son or adopted daughter are entitled to be considered for appointment on compassionate ground. Sri N.P. Singh further submitted that the object of compassionate appointment is to provide succour to the bereaved family so as to enable it to tide over sudden crisis caused on account of the death of its bread winner. He submitted that the right to seek compassionate appointment is not a right which can be said to be vested in the applicant. It is only a right to be considered for compassionate appointment. He submits that in the instant case, the brother of the petitioner had died in the year, 1991 whereas the petitioner waited for nearly 18 long years to petition this court for compassionate appointment. He submits that even if there was a dispute relating to succession, the appointment on compassionate ground could have been claimed with the intervention of the Court. It was submitted that since the petitioner has not approached the Court within a reasonable period, an adverse inference should be drawn with regards to the pressing need of the petitioner, and that since in any case the period of crisis is over, the question of providing compassionate appointment does not arise.

6. The counsel for the petitioner in his rejoinder submissions contended that the deletion of the term "near relative" would not affect his right as the petitioner had already applied under the unamended scheme, therefore, the application should have been considered on the basis of the old scheme.

7. After having considered the rival submissions of the parties, I am of the view that since the appointment on compassionate ground is an exception to the fundamental principle enshrined under Article 16(1) of the Constitution of India, which provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, the benefit of compassionate appointment can be allowed only with a view to provide for the bereaved family to tide over sudden crisis caused on account of the death of its bread winner. This benefit of compassionate appointment cannot be used as an alternate source of recruitment. The Apex Court in the case of **Auditor General of India (supra)** deprecated the term **near relative** as vague and undefined. The relevant portion of the judgment of the apex court, as contained in paragraph no.5, is reproduced below:

"A reading of these various clauses in the Memorandum discloses that the appointment on compassionate grounds would not only be to a son, daughter or widow but also to a near relative which was vague and undefined. A person who dies in harness and whose members of the family need immediate relief of providing appointment to relieve economic distress from the loss of the bread-winner of the family need compassionate treatment. But all possible eventualities have been enumerated to become a rule to avoid regular recruitment. It would appear that these enumerated eventualities would be breeding ground for misuse of appointments on compassionate grounds. Articles 16(3) to 16(5) provided exceptions. Further exception must be on constitutionally valid and permissible grounds. Therefore, the High Court is right in holding that the appointment on grounds of descent clearly violates Article 16(2) of the Constitution. But, however it is made clear that if the appointments are confined to the son/daughter or widow of the deceased government employee who died in harness and who needs immediate appointment on grounds of immediate need of assistance in the event of there being no other earning member in the family to supplement the loss of income from the bread-winner to relieve the economic distress of the members of the family, it is unexceptionable. But in other cases it cannot be a rule to take advantage of the Memorandum to appoint the persons to these posts on the ground of compassion. Accordingly, we allow the appeal in part and hold that the appointment in para 1 of the Memorandum is upheld and that appointment on compassionate ground to a son, daughter or widow to assist the family to relieve economic distress by sudden demise in harness of government employee is valid. It is not on the ground of descent simpliciter, but exceptional circumstance for the ground mentioned. It should be circumscribed with suitable modification by an appropriate amendment to the Memorandum limiting to relieve the members of the deceased employee who died in harness from economic distress. In other respects Article 16(2) is clearly attracted."

Keeping in view the aforesaid observations made by the Apex Court, a circular was issued by the respondent-corporation thereby deleting the term near relative from the category of eligible persons entitled to avail the benefit of compassionate appointment. However, in the instant case the deletion of the term **"near relative"** may not be fatal to the claim of the petitioner, as his application

was filed before the amendment of the scheme. In that regard reference may be made to the Apex Court's decisions in the cases of **Maharani Devi & Another versus Union of India & others** reported in **(2009) 7 SCC 295 and SBI versus Jaspal Rana (2007) 9 SCC 571.** But there is another reason to deny relief to the petitioner, and that is, the delay of 18 years on the part of the petitioner in approaching the court for appointment on compassionate ground.

8. The object of compassionate appointment is not to provide an alternative route for appointment, but to ameliorate the condition of the bereaved family caused on account of sudden death of its bread-winner. It is not a vested right which can be exercised at leisure. In the case of **Eastern Coalfields Limited v. Anil Badyakar & Others** reported in **(2009) 13 SCC 112,** the Apex Court said:

" The principles indicated above would give a clear indication that the compassionate appointment is not a vested right which can be exercised at any time in future. The compassionate employment cannot be claimed and offered after a lapse of time and after the crisis is over."

Likewise, in the case of **Santosh Kumar Dubey v. State of Uttar Pradesh and Others** reported in **(2009) 6 SCC 481,** the Apex Court, observed as under:

"The very concept of giving a compassionate appointment is to tide over the financial difficulties that is faced by the family of the deceased due to the death of the earning member of the family. There is immediate loss of earning for which the family suffers financial hardship. The benefit is given so that the family can tide over such financial constraints.

The request for appointment on compassionate grounds should be reasonable and proximate to the time of the death of the bread earner of the family, inasmuch as the very purpose of giving such benefit is to make financial help available to the family to overcome sudden economic crisis occurring in the family of the deceased who has died in harness. But this, however, cannot be another source of recruitment. This also cannot be treated as a bonanza and also as a right to get an appointment in Government service."

9. The contention of the petitioner that on account of succession dispute the application remained pending, therefore, the delay could not defeat his right, is not sustainable. The purpose of succession certificate is to enable the debtor of the deceased person to seek a valid discharge by making payment to its holder. Thus, even if there had been a dispute with regard to succession for entitlement to the terminal dues payable to the deceased employee, there was no impediment for the petitioner to approach the Court, on pressing need, if there was any, for appointment on compassionate ground. After such a long lapse, particularly, when the claim for compassionate appointment was not pending before any court, there is no justification to consider appointment on compassionate ground, as the very purpose for which it is provided stands exhausted.

10. For the reasons aforesaid, compassionate appointment cannot be provided to the petitioner. The petition is,

therefore, liable to be dismissed and is, accordingly, **dismissed.** No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2012

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 15950 of 2012

Tapeshwar Prasad Gautam ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Lalji Chaudhary

Counsel for the Respondent:
C.S.C.

U.P. Secondry Education Service Selection Board, Act 1982-Section 16 (2)-payment of salary-petitioner appointed as Assistant Teacher simply on application without following procedures of appointment-without creation of Post-claiming salary on basis of Apex Court direction in Chandigarh Administration Case-held-misconceived in view of Gopal Dubey (FB) Case-salary can not be paid from state fund-appointment being contractual-can pursue Civil suit against Manager.

Held: Para 9

In view of the aforesaid, no relief as prayed for by the petitioner can be granted. The petitioner has not been able to demonstrate that he has been appointed in the institution under the provisions of the Intermediate Education Act or under the provisions of the U.P. Act No. 05 of 1982. The appointment of the petitioner appears to be purely contractual. The petitioner may seek his remedy, qua payment of salary, against the manager by way of Civil Suit.

Case law discussed:
2000 (2) SCC 42; 1999 (1) UPLBEC 01

(Delivered byHon'ble Arun Tandon, J.)

1. Petitioner before this Court seeks a writ of mandamus directing the respondents to pay salary to the petitioner in the grade of Rs.5500-9000 w.e.f. 15.07.1996 along with interest through an account payee cheque, in the alternative to consider and decide his representation dated 19.01.2012.

2. It is the case of the petitioner that Jai Sat Gurudev Janta Inter College, Dullahpur, Ghazipur is an institution recognized under the provisions of the Intermediate Education Act, 1921 (herein after referred to as the Act, 1921). It is further stated that the institution has been taken on grant-in-aid list in the year 1983 and the provisions of U.P. Act No. 24 of 1971 were made applicable to the said institution. In paragraph 5 of the writ petition, it is stated that the petitioner was appointed as Assistant Teacher (Social Science) vide letter dated 10.07.1996. He joined the institution on 15.07.1996. The respondent, Committee of Management, is not making payment of salary admissible to the post of Assistant Teacher of an Intermediate College. On the contrary petitioner is being paid a meager amount. It is submitted that the petitioner is discharging the same duties as are being discharged by any other Assistant Teachers working in the institution.

3. Reliance has been placed upon the judgment of the Hon'ble Supreme Court in the case of **Chandigarh Administration and others vs. Mrs.**

Rajni Vali and Others reported in **2000 (2) SCC, 42** wherein it has been held that the salary to be paid by the unaided institution must be at par with that paid by institutions receiving grant-in-aid. It is stated that a hostile discrimination is being practiced by the Committee of Management in the matter of payment of salary to the teachers who have been appointed against non sanctioned post like the petitioner and those who have been appointed by the management against sanctioned post.

4. This Court may record that the case set up by the petitioner is wholly misconceived. From the appointment letter enclosed as Annexure-1 to the writ petition, it is apparently clear that the Manager of the institution has recorded that on an application being made by the petitioner, the Committee of Management has decided to appoint the petitioner as Assistant Teacher and order was being issued for his joining on 01.07.1996. Petitioner joined in pursuance thereof.

5. Counsel for the petitioner could not demonstrate that such appointment offered to the petitioner was against any sanctioned post available in the institution duly created under Section 9 of the U.P. Act No. 24 of 1971. For this reason only, the petitioner cannot claim salary from the State exchequer in view of the Full Bench judgment of this Court in the case of **Gopal Dubey Vs. District Inspector of Schools, Maharajganj; 1999 (1) UPLBEC, 01)** wherein it has been held that the liability of the State to make payment of salary is only against the posts duly created under Section 9 of the U.P. Act No. 24 of 1971.

6. Even otherwise, this Court may record that under Section 16 of the U.P. Secondary Education Services Selection Board Act, 1982 (herein after referred to as the Act, 1982) it has been provided that all appointments in recognized Intermediate institutions shall be made on the recommendation of the Selection Board, except where the appointments are ad hoc or as contemplated under other sub sections of Section 16 of the **Act, 1982** and the Rules framed thereunder from time to time. Section 16(2) declares appointment made contrary to the provisions of the Act as void ab initio. It is admitted on record that the petitioner has not been appointed on the recommendation of the Selection Board nor his appointment is covered by any other clause of Section 16 of the Act, 1982. Therefore, the appointment of the petitioner has to be treated as void.

7. If the case of the petitioner is that he has been appointed against the post of Assistant Teacher in respect of Subject wherein recognition has been granted under Section 7-AA of the Act, 1921 i.e. Self Finance, then the payment of salary has to be made in accordance with the Government Order issued for the purpose but there is no such pleading in the present petition.

8. The claim of parity has also to be rejected by this Court inasmuch as the Hon'ble Supreme Court has repeatedly held that the nature and the manner of appointment, the qualifications prescribed etc. can be a reasonable basis for denying the parity of salary.

9. In view of the aforesaid, no relief as prayed for by the petitioner can be granted. The petitioner has not been able

to demonstrate that he has been appointed in the institution under the provisions of the Intermediate Education Act or under the provisions of the U.P. Act No. 05 of 1982. The appointment of the petitioner appears to be purely contractual. The petitioner may seek his remedy, qua payment of salary, against the manager by way of Civil Suit.

10. The judgment relied upon by the counsel for the petitioner is clearly distinguishable in the facts of the present case.

11. For the reasons recorded above, the present writ petition is dismissed.

ORIGINAL JURISDICTIONAL
CIVIL SIDE
DATED: ALLAHABAD 13.04.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 18125 of 2012

Smt. Rekha ...Petitioner
Versus
Smt. Veermati and another ...Respondents

Counsel for the Petitioner:
Sri Ratnakar Upadhyaya

Counsel for the Respondents:
C.S.C.

Code of Civil Procedure-Section-80-Maintainability of Election Petition-defect of Non Compliance of 80 C.P.C.-raised by individual and not by State Govt.-held-in view of Full Bench decision of Sunni Central Board-objection of non compliance of 80 C.P.C.-can not be raised by individuals-rejection order-proper.

Held: Para 4

In view of above exposition of law laid down by Special Bench, it is quite clear that objection with respect to want of notice under Section 80 CPC cannot be taken by a private individual since it is for the benefit of Government and its officials and, therefore, it can be taken only by them and would be considered if it is pressed by those for whose benefit the provision has been made. A private individual cannot challenge the proceeding by taking the plea of want of notice under Section 80CPC.

Case law discussed:
2010 ADJ Page 1 (SFB) (LB); 1984 (2) SCC 627; (1900) ILR 24 (Mad.) 271; AIR 1969 SC 674; AIR 1978 SC 1608; AIR 1927 PC 176; AIR 1947 PC 197; AIR 1949 PC 143; AIR 1966 SC 1068; AIR 1958 SC 274; AIR 1955 SC 425; AIR 1964 SC 1300; AIR 2002 SC 1745; AIR 1981 Bombay 394; 1963 (1) SCR 657; 2001 (1) SCC 555; ILR (1903) 25 All 187; AIR (29) 1942 Bombay 339; AIR 1969 (Kerela) 280; AIR 1969 Alld. 161

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

1. This writ petition is directed against the order dated 13.01.2012 passed by District Judge, Baghpat whereby objection with regard to defect in election petition on account of non-compliance of Section 80 C.P.C. has been rejected.

2. Besides that election petition is not defective for non-compliance of Section 80 C.P.C., this Court is also of the view that such objection cannot be raised at the instance of a private party if State has not taken such an objection.

3. This issue has been considered by a Special Bench of this Court in **Sunni Central Board of Waqfs Vs. Sri Gopal Singh Visharad and others, 2010 ADJ Page 1 (SFB)(LB)** and in the judgment delivered by myself (concurred by

Hon'ble S.U. Khan, J. on this issue), it has been said:

"622. Now we come to the second part of this issue i.e. 10 (b). The legislative intent of Section 80 is to give the Government sufficient notice of the suit which is proposed to be filed against it so that it may reconsider the decision and decide for itself whether the claim made could be accepted or not. The object of the section is advancement of justice and securing public good by avoidance of unnecessary litigation **(Bihari Chowdhary and another Vs. State of Bihar and others 1984 (2) SCC 627; State of Andhra Pradesh and others Vs. Pioneer Builders AIR 2007 SC 113).**

623. We, however, proceed to consider certain authorities cited on behalf of the defendant no. 10 to press upon their submission that in case of non compliance of Section 80 C.P.C., it is the duty of the Court to reject the plaint outright even if no objection is raised by anyone since it is a jurisdictional issue.

624. Prior to Section 80 C.P.C., 1908, similar provision existed in Section 424 of C.P.C., 1882. Considering the purpose and objective of such a provision, in **Secretary of State for India In Council Vs. Perumal Pillai and others (1900) ILR 24 (Mad.) 271** it was held:

"... object of the notice required by section 424, Civil Procedure Code, is to give the defendant an opportunity of settling the claim, if so advised, without litigation."

625. With reference to Section 80 C.P.C. of 1908, the objective and purpose came to be considered in **Secretary of State for India In Council Vs. Gulam Rasul Gyasudin Kuwari (1916) ILR XL (Bom.) 392** wherein it was held as under :

"... the object of section 80 is to enable the Secretary of State, who necessarily acts usually through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that some official order has been illegally made to their prejudice."

626. I**n Raghunath Das Vs. Union of India and another AIR 1969 SC 674**, in para 8, the Court said :

"8. The object of the notice contemplated by that section is to give to the concerned Governments and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if s0.00"o advised without litigation. The legislative intention behind that section in our opinion is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations. The purpose of law is advancement of justice. The provisions in Section 80, Civil Procedure Code are not intended to be used as boobytraps against ignorant and illiterate persons."

627. The object and purpose of enactment of Section 80 C.P.C. was also noticed in **State of Punjab Vs. M/s. Geeta Iron and Brass Works Ltd. AIR 1978 SC 1608** as under :

"A statutory notice of the proposed action under S. 80 C.P.C. is intended to

alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted."

628. The requirement of notice under Section 80 C.P.C. has also been held mandatory. In **Bhagchand Dagaduss Vs. Secretary of State for India in Council AIR 1927 PC 176,** it was held that the provision is express, explicit and mandatory. It admits no implications or exceptions. It imposes a statutory and unqualified obligation upon the Court. Therein a noticed was issued under Section 80 C.P.C. on 26.6.1922, but the suit was instituted before expiry of the period of two months from the said date. The Judicial Committee Observed:

"To argue as appellants did, that the plaintiffs had a right urgently calling for a remedy, while Section 80 is mere procedure, is fallacious, for Section 80 imposes a statutory and unqualified obligation upon the Court."

629. This decision was followed by Judicial Committee in **Vellayan Chettiar Vs. Government of Province of Madras AIR 1947 PC 197.**

630. In **Government of the Province of Bombay Vs. Pestonji Ardeshir Wadia and Ors. AIR 1949 PC 143** it has been held that provisions of Section 80 of the Code are imperative and should be strictly complied with.

631. A Constitution Bench of the Apex Court in **Sawai Singhai Nirmal Chand Vs. Union of India AIR 1966 SC 1068** also took the same view. Following the above authorities in **Bihari Chowdhary (supra),** the Apex Court, in para 6, observed:

"6. It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice under Section 80 C.P.C. is attracted, can not be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the Section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."

632. In none of the above noted cases, the Courts had the occasion to consider whether a Suit for non compliance of Section 80 C.P.C. ought to be dismissed even if the authority for whose benefit the provision has been made is not inclined to press this objection or is interested to get the decision on merits from a competent Court of law. On the contrary, slight divergent view was also going on simultaneously as is evident from some of the authorities of the Apex Court.

633. In **Dhian Singh Sobha Singh Vs. Union of India AIR 1958 SC 274** (page 281), the Court observed that Section 80 C.P.C. must be strictly complied with but that does not mean that the terms of Section should be construed in a pedantic manner or in a manner completely divorced from common sense. It observed :

"The Privy Council no doubt laid down in Bhagchand Dagadusa v. Secretary of State AIR 1927 PC 176 that the terms of section should be strictly

complied with. That does not however mean that the terms of the notice should be scrutinised in a pedantic manner or in a manner completely divorced from common-sense. As was stated by Pollock, C. B., in Jones v. Nicholls, (1844) 13 M&W 361=153 ER 149 "we must import a little commonsense into notices of this kind." Beaumont, C. J., also observed in Chandu Lal Vadilal v. Government of Bombay, AIR 1943 Bom 138 "One must construe Section 80 with some regard to common-sense and to the object with which it appears to have been passed."

634. In para 17 of the judgment while referring to and relying on its earlier decision of **Sangram Singh Vs. Election Tribunal, Kotah, AIR 1955 SC 425**, the Apex Court said:

"Section 80 of the Code is but a part of the Procedure Code passed to provide the regulation and machinery, by means of which the Courts may do justice between the parties. It is therefore merely a part of the adjective law and deals with procedure alone and must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it."

635. The protection provided under Section 80 is given to the person concerned. If in a particular case that person does not require protection, he can lawfully waive his right. This is what was held in **Dhirendra Nath Gorai and Sabal Chandra Shaw and others Vs. Sudhir Chandra Ghosh and others AIR 1964 SC 1300** where considering a pari materia provision, i.e. Section 35 of Bengal Money Lenders Act, 1940 the Apex Court held that such requirement can be waived. Similarly, while considering Section 94 of the Representation of People Act, 1951, the above view was reiterated in **S. Raghbir Singh Gill Vs. S. Gurucharan Singh Tohra and others 1980 (Suppl.) SCC 53**. All the aforesaid decisions have been followed in **Commissioner of Customs, Mumbai Vs. M/s. Virgo Steels, Bombay and another AIR 2002 SC 1745** and it has been held that notice in such a case can be waived.

636. A Full Bench of the Bombay High Court in **Vasant Ambadas Pandit Vs. Bombay Municipal Corporation and others AIR 1981 Bombay 394** while considering a similar provision contained in Section 527 of Bombay Municipal Corporation Act, 1888 held "*The giving of the notice is a condition precedent to the exercise of jurisdiction. But, this being a mere procedural requirement, the same does not go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and on such waiver, the Court gets jurisdiction to entertain and try the suit."*

637. In **Amar Nath Dogra Vs. Union of India 1963 (1) SCR 657; State of Punjab Vs. Geeta Iron and Brass Works Ltd. 1978 (1) SCC 68** and **Ghanshyam Dass Vs. Dominion of India 1984 (3) SCC 46** the Apex Court also held that notice under Section 80 C.P.C. or similar provisions of other Acts are for the benefit of a particular authority. The same can be waived as they do not go to the root of jurisdiction in the true sense of the term. Referring to the aforesaid judgments as well as the Full Bench judgment of Hon'ble Bombay High Court in **Vasant Ambadas Pandit (supra),** the Apex Court in **Bishandayal and sons Vs. State of Orissa and others**

2001 (1) SCC 555 (para 16) said that there can be no dispute to the proposition that a notice under Section 80 can be waived.

638. In fact we find in **Ghanshyam Dass and Ors. Vs. Dominion of India and Ors. (supra)** wherein a three judges Bench considered the correctness of the decision of this Court in **Bachchu Singh Vs. Secretary of State for India in Council, ILR (1903) 25 All 187, Mahadev Dattatraya Rajarshi Vs. Secretary of State for India AIR 1930 Bom 367 and earlier decision in S.N. Dutt Vs. Union of India, AIR 1961 SC 1449.** Though the facts of that case are slightly different but what has been observed by the Apex Court is of some importance. The Apex Court while reiterating the Privy Council's observations in **Bhagchand Dagadusa (supra)** that requirement of Section 80 C.P.C. of giving notice is express, explicit an mandatory and admits of no implications or exceptions, however observed that one must construe Section 80 with some regard to common sense and to the object with which it appears to have been passed. It also observed that our laws of procedure are based on the principle that "as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities". The Apex Court overruled its decision in **S.N. Dutt (supra)** as also the Bombay High Court's decision in **Mahadev Dattatraya Rajarshi (supra)** and this Court's decision in **Bachchu Singh (supra).** In the case before the Apex Court though notice was issued but on a closer scrutiny, the High Court found that it was not a valid notice under Section 80 C.P.C. and therefore non suited the plaintiff. This judgment was reversed by the Apex Court making the abovesaid observations. The Court reiterated that the object of notice contemplated by Section 80 is to give to the Government and public officers an opportunity to consider the legal position and to make amends or settle the claim, if so advised, without litigation so that public money and time may not be wasted on unnecessary litigation.

639. Considering the objective of such enactment and the fact that party concerned can waive it, we are of the view that the plea of want of notice under Section 80 cannot be taken by a private individual since it is for the benefit of the Government and its officers.

640. A Division Bench of Hon'ble Bombay High Court in **Hirachand Himatlal Marwari Vs. Kashinath Thakurji Jadhav AIR (29) 1942 Bombay 339** said *"In the first place defendant 3 is not the proper party to raise it, and in the second place the receivers in our opinion must be deemed to have waived their right to notice. It is open to the party protected by S. 80 to waive his rights, and his waiver binds the rest of the parties. But only he can waive notice, and if that is so, it is difficult to see any logical basis for the position that a party who has himself no right to notice can challenge a suit on the ground of want of notice to the only party entitled to receive it. We think therefore that this ground of attack is not open to defendant 3; and for our view on this point direct support may be obtained from 32 Cal. 1130."*

641. The same view has been taken by Kerala High Court in **Kanakku Vs. Neelacanta, AIR 1969 (Kerala) 280**

holding that the plea of want of notice cannot taken by private individuals.

642. A Single Judge of this Court in **Ishtiyaq Husain Abbas Husain Vs. Zafrul Islam Afzal Husain and others AIR 1969 Alld. 161** has also expressed the same view:

"It appears to me that the plea of want of notice is open only to the Government and the officers mentioned in section 80 and it is not open to a private individual. In this particular case the State Government did not even put in appearance. The notice, therefore, must be deemed to have been waived by it."

643. We respectfully endorse the aforesaid view of the Hon'ble Single Judge.

644. The entire issue 10 (a) and 10 (b) (Suit-3) is, accordingly, decided in favour of plaintiffs (Suit-3). We hold that a private defendant cannot raise objection regarding maintainability of suit for want of notice under Section 80 C.P.C."

4. In view of above exposition of law laid down by Special Bench, it is quite clear that objection with respect to want of notice under Section 80 CPC cannot be taken by a private individual since it is for the benefit of Government and its officials and, therefore, it can be taken only by them and would be considered if it is pressed by those for whose benefit the provision has been made. A private individual cannot challenge the proceeding by taking the plea of want of notice under Section 80CPC.

5. In view thereof the order impugned in this writ petition warrants no interference.

6. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.04.2012

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 19624 of 2012

Atul Kumar Goel ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Singh

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

U.P. Basic Education (Teachers) Service Rules 1981-Rule 8-Promotion on post of Head Master-petitioner being appointed on compassionate ground-remained untrained-held-in absence of minimum requisite qualification-can not be appointed/promoted as Head Master-general Mandamus issued-claim of parity with other similarly situated persons appointed and working Head Master-No mandamus to perpetuate illegality can be issued.

Held: Para 5

So far as the second ground raised by the petitioner is concerned, suffice is to record that the minimum qualifications prescribed for appointment on the post of Headmaster have been laid down in Rule 8 of the Rules, 1981. Training is a must for appointment on the post of Headmaster/Headmistress in senior basic schools as well as in junior basic

schools. Admittedly, the petitioner is not possessed of any training qualification as on date. In absence of his being possessed of the prescribed minimum qualification for such appointment on the post of Headmaster, as per the statutory provisions applicable, the Basic Shiksha Adhikari appears to be justified in holding that the petitioner cannot be promoted on the post of Headmaster/Headmistress.

Case law discussed:

JT 2009 (13) SC 422

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

1. Petitioner before this Court was offered compassionate appointment as Assistant Teacher in Parishadiya Vidyalaya. Admittedly, the petitioner is untrained. He seeks quashing of the order of the Basic Shiksha Adhikari dated 23.12.2011, whereby the representation of the petitioner for promotion as Headmaster has been rejected on two grounds; (a) the notional seniority of five years provided to such teachers appointed on compassionate basis under Government Order dated 15.11.2009 has since been revoked by the State Government vide order dated 21st November, 2011 and (b) the petitioner being untrained is not qualified for the post of Headmaster appointment whereof is regulated by U.P. Basic Education (Teachers) Service U.P. Basic Education Teachers Service Rules, 1981 (hereinafter referred to as 'Rules, 1981').

2. The order is being challenged on two grounds (a) the State Government has the power to issue a Government Order having regard to the powers vested in it under Section 13 of the U.P. Basic Education Act, 1972 and (b) there are large number of similarly situate compassionate appointee, who were untrained but have been granted promotion on the post of Headmaster and are still working, while it is petitioner alone who has been discriminated in the matter of grant of such promotion.

3. The Court will deal with both the aforesaid contentions serially.

(a) It may be recorded that the power of the State Government conferred under Section 13 of the Act, 1972 is to issue such directions to the Board i. e. Basic Education Board, as may be required in the efficient administration of the Act, and the Board in turn is obliged to comply with the said directions.

4. In the facts of the case the State Government has not issued any direction to the Board for regulating its conduct in a particular manner. The State Government on its own issued a Government Order providing notional seniority of five years to the teachers appointed on compassionate ground, under which statutory authority such a direction could be issued by the State Government and that too without affording any opportunity to the teachers, who would be affected by grant of such notional seniority, could not be explained by the counsel for the petitioner. Therefore, the State Government, realizing its mistake, has rightly recalled the said Government Order vide its subsequent order dated 22nd November, 2011. The order of the State Government dated 22nd November, 2011 is strictly in accordance with law. There is no justification for grant of notional seniority to the persons appointed on compassionate ground, thereby superseding the regularly appointed teachers without affording them any opportunity in the matter.

5. So far as the second ground raised by the petitioner is concerned, suffice is to record that the minimum qualifications prescribed for appointment on the post of Headmaster have been laid down in Rule 8 of the Rules, 1981. Training is a must for appointment on the post of Headmaster/Headmistress in senior basic schools as well as in junior basic schools. Admittedly, the petitioner is not possessed of any training qualification as on date. In absence of his being possessed of the prescribed minimum qualification for such appointment on the post of Headmaster, as per the statutory provisions applicable, the Basic Shiksha Adhikari appears to be justified in holding that the petitioner cannot be promoted on the post of Headmaster/Headmistress.

6. So far as the claim of parity is concerned, it may be recorded that the Hon'ble Supreme Court of India in the case of ***Ghulam Rasool Lone vs. State of Jammu & Kashmir, reported in JT 2009 (13) SC, 422*** *has held that there cannot be any negative equality and no mandamus can be issued by a writ court asking the State authorities to perpetuate the illegality*. Therefore said contention is also repelled.

7. This Court, however, directs that respondent no. 1 shall take all necessary steps requiring the Basic Shiksha Adhikari of the district concerned to ensure that no person, who is not possessed of the prescribed minimum qualification as per Rule 8 of the Rules 1981, is appointed and permitted to work on the post of Headmaster/Headmistress, if any such appointment has been made, the same is recalled immediately in accordance with law.

8. Petitioner is at liberty to file a certified copy of this order before the Secretary, who shall take appropriate action within four weeks from the date a certified copy of this order is filed before him.

9. With the aforesaid observation/direction the present writ petition is **disposed of.**

ORIGINAL JURISDICTION'
CIVIL SIDE
DATED: ALLAHABAD 12.04.2012

BEFORE
THE HON'BLE SUNIL HALI, J.

Civil Misc. writ Petition No. 30790 of 1998

U.P.State Road Transport Corporation & others ...Petitioner
Versus
Jamla Ahmad & another ...Respondents

Counsel for the Petitioner:
Sri Vivek Saran
Sri R.A. Gaur

Counsel for the Respondents:
S.C.
Sri A.M. Zaidi
Sri M.H. Khan

Constitution of India, Article 226- Termination during Probation period- Labor Court allowed claim-petition on ground workman a probationer no right of hearing-not available where termination order passed putting stigma- inquiry and opportunity of hearing is must.

Held: Para 5

In the present case, foundation of the order is that he has managed to get an employment on the basis of a certificate which was found to be forged. This is a

matter which requires to be enquired into and an opportunity has to be given to the workman to rebut this plea. Petitioner cannot invoke the principle that since the workman is on probation as such he has power to dispense with his services, even if there is a case of misconduct on the basis of which his services have been terminated. It is already stated herein supra, that the foundation of the order determines the scope of interference by the Court where the order clearly mentions that the order of discharge is based upon the fact that the work of employee was not found to be satisfactory than no judicial review in such matter is permissible. But where the order of discharge is founded on the ground that there are allegations of misconduct against the employer in that eventuality the Courts have always power to review the order on the ground as to whether enquiry in the matter has been conducted or not before issuance of order of termination. In the present case, no such enquiry has been conducted.

Case law discussed:

2011-Lawas (SC)-3-55

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

1. Petitioner was appointed as Cleaner on 26.9.1998 for a period of one year and was put on probation for the said period. At the time of appointment he had produced a certificate of training of I.T.I., Hameerpur. It transpires from the record that the certificate was verified from the Principal of the I.T.I. Hameerpur and on verification of the same it is found to have not been issued by the said Principal and a communication dated 28.7.1999 to this effect has been issued by the Principal of I.T.I. Hameerpur. The claimant services were terminated on 23.3.1999. An Industrial Dispute was raised by the employee before the Labour Court and the Labour Court vide its order dated 7.11.1997 allowed the claim and set aside the order of termination. It is this order which is subject matter of challenge before this Court.

2. Case of the petitioner is that the workman was under probation and it is during this period it was found that a certificate which he had produced was found forged. This was based upon a communication of the Principal of I.T.I., Hameerpur dated 28.7.1999 and being a probationer the workman had no right to be heard in the matter. Learned counsel for the petitioner has placed reliance on the case of the Hon'ble Apex Court in **Rajesh Kumar Srivastava Vs State of Jharkhan reported in 2011-Lawas (SC)-3-55.**

3. Heard learned counsel for the parties and perused the material on record.

4. There is no dispute with this proposition of law that where a person who is placed on probation can be discharged during period of probation. No enquiry in the matter is required in this behalf. The object of placing a person on probation is to enable the employer to adjudge the suitability of an employee for continuation in service and also for confirmation in service. During period of probation his activities are generally under scrutiny and on the basis of his over all performance a decision is generally taken by the employers as to whether his service should be confirmed or he should be released from service. Once the decision to this effect is recorded by the employer the option is either to confirm his services or to release him from service. But where the order of termination is based upon a complaint that the certificate procured by

the workman is forged which is foundation of the termination order then the principle of discharge simplicitor cannot be applied. Satisfaction of the employer which empowers him to order the discharge of an employee is only to assess the suitability of a person to be retained in service or not. Any act of the employer unconnected with the purpose which results the termination of an employee then the veil has to be lifted in order to find out the purpose for such termination. Once it is disclosed that services of the employee are terminated for some misconduct even if he is on probation then the enquiry in the matter is required to be conducted.

5. In the present case, foundation of the order is that he has managed to get an employment on the basis of a certificate which was found to be forged. This is a matter which requires to be enquired into and an opportunity has to be given to the workman to rebut this plea. Petitioner cannot invoke the principle that since the workman is on probation as such he has power to dispense with his services, even if there is a case of misconduct on the basis of which his services have been terminated. It is already stated herein supra, that the foundation of the order determines the scope of interference by the Court where the order clearly mentions that the order of discharge is based upon the fact that the work of employee was not found to be satisfactory than no judicial review in such matter is permissible. But where the order of discharge is founded on the ground that there are allegations of misconduct against the employer in that eventuality the Courts have always power to review the order on the ground as to whether enquiry in the matter has been conducted or not before issuance of order of termination. In the present case, no such enquiry has been conducted.

6. In this view of the matter, I do not find any reason to interfere in the impugned order. The impugned order do not suffers from any illegality or infirmity. The writ petition lacks merits and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2012

BEFORE
THE HON'BLE BHARATI SAPRU,J.

Civil Misc. Writ Petition No. 41702 of 1998

Abhilash Kumar ...Petitioner
Versus
State of U.P. & another ...Respondents

Counsel for the Petitioner:
Sri V.C.Srivastava
Sri C.B.Yadav
Sri V N Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Right of appointment-petitioner selected as Police Constable-not allowed to join Training-on allegation of false deceleration in application form-inspite of interim order-not enforced within an year-subsequent acquittal-immaterial-held-person propensity to perpetuate falsehood not entitled to be a member of disciplinary force-case law relied by petitioner-distinguishable considering facts and the circumstances-petitioner dismissed.

Held: Para 17, 18 and 19

Thus in my opinion, the petitioner deserves no relief. It may also be stated here that despite interim order given by

this Court, the petitioner was never allowed to join and he did not file any contempt petition within a period of one year.

The judgments relied on by the petitioner do not apply to the case in hand. The judgment of the Hon'ble Apex Court relied on by the learned counsel for the petitioner is distinguisable on the point that this is not the case of termination but rather the petitioner was not allowed to join duty from very beginning.

The enforcement of law and order in the nation cannot be left to the hands of the persons who have the propensity to perpetuate falsehood or are inclined to give misleading information for such propensity's would then no doubt also extend in the carriage of their duties.

Case law discussed:

2011 AIR SCW 3601; Aditya Kumar versus State of U.P. and others (special appeal (D) no.997 of 2009) decided on 13.10.2009; Ram Kumar versus State of U.P. and others (special appeal (d) no.924 of 2009) decided on 31.8.2009; 1997 (1) ESC 179 (SC); (2003) 3 SCC 437; (2005) 7 SCC 177

(Delivered by Hon'ble Bharati Sapru, J.)

1. This petition has been filed by the petitioner seeking a writ of mandamus directing the respondents to allow the petitioner to join duties and complete his training.

2. The case in the writ petition is that the petitioner appeared in examination and test for the recruitment of constables and cleared it in the year 1998 but after being selected, he was not sent for training on the ground that there was a criminal case pending against the petitioner being criminal case no.61 of 1997 under sections 325, 323, 504, 506 I.P.C.

3. It has been stated clearly in para 5 of the writ petition that no chargesheet has been submitted by the State against the petitioner and no conviction has been made. This court passed an interim order on 16.12.1998 allowing the petitioner to complete his training and join his duties.

4. A counter affidavit was filed by the State in which revelations were made in the affidavit with regard to the case of the petitioner.

5. It was brought to the notice of the court that the petitioner at the time of making an application for selection and in the verification affidavit, had stated that he was not involved in any case and had not been chargesheeted. The petitioner had in fact made false statement in the verificatioin affidavit and upon an examination of the verification, the matter came to light that he had been chargesheeted in criminal case no.61 of 1997 under sections 325, 323, 504, 506 I.P.C.

6. The contentions of para 4 of the counter affidavit have been replied in para 4 of the rejoinder affidavit and are not denied. The petitioner has simply stated that he had no knowledge of the said matter. In a latter affidavit, the petitioner has brought on record the fact that he was subsequently acquitted on 10.5.2002.

7. The tenor of the petition is that the petitioner was falsely implicated in a case and because he was ultimately acquitted, he should have been allowed to join duties.

8. On the other hand, counter affidavit reveals that the ground for not allowing the petitioner to join duties and

to go for training was on account of fact that he had given false information in his verification.

9. Learned counsel for the petitioner has argued that because he was ultimately acquitted, he should have been allowed to join duties and has relied on judgment of Hon'ble Apex Court rendered in the case of **Commissioner of Police and others versus Sandeep Kumar, reported in 2011 AIR SCW 360**1 in which the accused respondent was terminated from service for having given false statement in his verification. Hon'ble Apex Court has taken a lenient view of the matter and has stated that the courts must display wisdom in condoning the minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives.

10. In the case **Commissioner of Police and others versus Sandeep Kumar (supra),** the Hon'ble Apex Court was referring to a case of Welsh students, who had participated in making demonstration before the Court, which was considered contemptuous.

11. Learned standing counsel who has appeared for the respondents has on the contrary relied on two Division Bench decisions of this Court in the case of **Aditya Kumar versus State of U.P. and others (special appeal (D) no.997 of 2009)** decided on 13.10.2009 in which the Special Appeal Court, relying on the Hon'ble Apex Court has come the conclusion that where the petitioner made a declaration which on verification was found to be false and he did not contest the same but only submitted that he had been acquitted of the charges and therefore he should have been taken into consideration for appointment, would not be judicious.

12. The Division Bench has also held that in the facts and circumstances of that case when the petitioner did not contest the effect of loding of the F.I.R. before the date of declaration, cancellation of the appointment could not be held to be bad on any count.

13. The second Division Bench decision in the case of **Ram Kumar versus State of U.P. and others (special appeal (d) no.924 of 2009) decided on 31.8.2009** in which also this Court has taken a view that where a false declaration has been made and it is discovered from the examination of the verification, no relief should be given to such a petitioner.

14. The Supreme Court decisions have been relied by the Division Bench are **Delhi Administrative and others versus Sushil Kumar reported in 1997 (1)(ESC 179 (SC) and Kendriya Vidyalaya Sangathan versus Ram Ratan Yadav reported in (2003) 3 SCC 437 and A.P. Public Service Commision versus Koneti Venkateswarulu reported in (2005)7 SCC 177.**

15. Having heard Sri Neeraj Singh for the petitioner and Sri A.C. Mishra learned standing counsel for the respondents State and having perused the consistent view of the Hon'ble Apex Court in the above-noted case, I am of the opinion, the petitioner in the present case does not deserve any relief.

16. The petitioner was seeking appointment as police constable. The personnel of the police force are sentinels

of the nation. Their character and integrity at all times should be above board including at the threshold of their appointments. It would certainly not be wise to induct a person in a disciplined force who has at the threshold of his appointment sought induction on the basis of falsehood or misleading information. This would not be conducive for maintaining peace and order in the nation. On the other hand, it would be completely contradictory and opposed to it.

17. Thus in my opinion, the petitioner deserves no relief. It may also be stated here that despite interim order given by this Court, the petitioner was never allowed to join and he did not file any contempt petition within a period of one year.

18. The judgments relied on by the petitioner do not apply to the case in hand. The judgment of the Hon'ble Apex Court relied on by the learned counsel for the petitioner is distinguisable on the point that this is not the case of termination but rather the petitioner was not allowed to join duty from very beginning.

19. The enforcement of law and order in the nation cannot be left to the hands of the persons who have the propensity to perpetuate falsehood or are inclined to give misleading information for such propensity's would then no doubt also extend in the carriage of their duties.

20. The writ petition is dismissed as above. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2012

BEFORE
THE HON'BLE RAJIV SHARMA,J.

Civil Misc. Writ Petition No. 50352 of 2008

Smt. Pushpa Agrawal ...Petitioner
Versus
Insurance Ombudsman U.P. And Uttaranchal and others ...Respondents

Counsel for the Petitioner:
Sri S.D. Singh
Sri Diptiman Singh

Counsel for the Respondents:
Sri Prakash Padia

Constitution of India, Article 226-claim of Insurance Policy-insurer kidnapped and murdered-denial on ground of death not accidental but murder-even the death of criminal background assured-termed as accidental death due to-held-denial on ground but murdered-even the death of criminal background assured-termed as accidental death-held-denial of claim arbitrary and illegal-necessary direction to pay the benefits with cost given.

Held: Para 34

Considering the matter in all pros and cons, I am of the view that reasoning given by the Ombudsman cannot be justified by any standard. LIC policy excludes death due to limited causes mentioned in Exclusion Clause under para 10(b) and, therefore, it is totally irrelevant to find out the background of the deceased. Further, even in case where there is a criminal background of the assured, it would be difficult to hold that his murder was not accidental unless he has taken up the quarrel and that the immediate cause of injury was

deliberate and willful act of the insured himself.

Case law discussed:

2000 ACC 291 SC; [1910] 2 KBD 689]; 1975 I LLJ 394; 2000 (3) Supreme 698; AIR 1965 SC 1288; JT 2004 (8) SC 8; [AIR 1999 Gujarat 280]; (2000) 5 SCC 113

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

1. Heard Sri S.D.Singh, learned Counsel for the petitioner and Sri Prakash Padia, learned Counsel for the opposite parties.

2. Through the instant writ petition under Article 226 of the Constitution of India, the petitioner challenges the award dated 30.6.2008 passed by the Insurance ***Ombudsman,*** Uttar Pradesh & Uttarakhand, Lucknow (opposite party No.1) [hereinafter referrred to as the "Ombudsman" for the sake of brevity], in complaint No. LP-117/21/001/07-08 contained in Annexure 5 to the writ petition, whereby the Ombudsman disposed of the complaint by confirming the orders of the authority of Life Insurance Corporation of India whereby the claim for Double Accident benefit was denied as well as the accrued bonus. However, the liberty was granted by the Ombudsman to the complainant/petitioner to approach the forum directly after the trial was concluded with a certified copy of the judgment of the session's court within two months from the date of judgment and the forum was at liberty to reopen the case, if so warrants.

3. Factual matrix of the case are that the petitioner's son Sri Neeraj Kumar Agarwal, aged about 26 years, who was engaged in business, took two policies i.e. Policy No. 3116783632 and 312042657, on his own life under plan/term 14/49 from Life Insurance Corporation of India with Double Accident benefit. Unfortunately, her son was murdered on 19.11.2006, as a consequence of which, petitioner being nominee and mother of the deceased claimed the insured amount, to which Life Insurance Corporation of India [hereinafter referred to as ***"the Insurance Company"***] asked the petitioner to furnish the requisite information in the prescribed claim forms. In pursuance thereof, the petitioner submitted her claim in the prescribed claim forms. The In-house Investigating Officer of the Insurance Company investigated the claim and submitted report. On the basis of the said report, the Senior Divisional Manager, Allahabad of the Insurance Company accepted the petitioner's claim for Basic Sum Assured but repudiated/rejected the claim for Double Accident Benefit vide letter dated 28.12.2007 on the grounds that death of the deceased is due to murder after kidnapping and not by an accident and as such, Double Accident Benefit is not payable to her. However, petitioner received the Basic Sum Assured amount, under protest.

4. Against the letter dated 28.12.2007, petitioner approached the Zonal Manager at Kanpur by preferring a representation. The Zonal Manager also rejected the petitioner's representation and upheld the decision of Senior Divisional Manager, Allahabad. Feeling aggrieved, the petitioner preferred a complaint, bearing No. LP/117/21/001/07-08, before the Ombudsman, who, vide order dated 30.6.2008, after perusing the material on record and submissions made orally before it and relying upon the judgment of Hon'ble Supreme Court in the case of Smt. Rita Devi Versus New India Assurance Co. Ltd.;(2000) ACC 291 SC disposed of the complaint with the following observations and directions :

"In the instant case, the culprits are under trial, hence, it is difficult to say anything conclusively regarding the motive and intent of the persons accused. A lot will depend upon the judgment of the session court in this matter to determine the admissibility of the claim. Under these circumstances, I am disposing off the complaint by confirming the order of respondent company in denying the A.B. However, the complainant by this order is at liberty to approach this forum directly with a certified copy of the judgment of the session's court within two months from the date of judgment. The forum shall be at liberty to reopen the case if so warrants depending on the judgment of the sessions court and pass appropriate orders."

5. Feeling aggrieved, the petitioner has preferred the instant writ petition *inter alia* on the grounds that since the murder of the insured was unlooked for or mishap or untoward event which was not expected or designed, as such, the Ombudsman erred in not considering the claim of the petitioner in right perspective.

6. Sri S.D. Singh, learned Counsel for the petitioner has submitted that from bare perusal of the word 'Accident' under the Accident Benefit Clause of the policies of the insured meant and included all or any reason for death or injury, which is unforeseen and not on account of any natural, probable or foreseen cause, from the point of view of the insured. Thus, the term "Accident" under the Accident Benefit clause of the policies has to be given the widest and must not restricted meaning. He submits that the business rivalry and/or kidnapping of the insured on account of such rivalry or his murder were not and cannot be held to be foreseen or probable causes of death of the insured when his life was insured by the Insurance Company.

7. Elaborating his submission, Sri Singh submits that intention of the abductors of the insured was irrelevant and extraneous for invoking the Accident Benefit clause under the policies. Thus, the murder of the insured was an accidental happening so far as the insured was concerned and as such, the opposite parties erred in rejecting the claim of the petitioner for Double Accident Benefit.

8. Refuting the submissions of learned Counsel for the petitioner, Sri Prakash Padia, learned Counsel for the opposite parties did not dispute the facts of the case but submits that on submission of claim in the prescribed proforma, the said claim was investigated and an order was passed to accept the claim for the basic sum assured and repudiated the claim for Double Accidental benefit, vide order dated 28.12.2007 passed in respect of both the policies, the Senior Divisional Manager inter alia on the facts that there is sufficient proof to show that the policy-holder was kidnapped and death was caused due to murder, which is not an accident. The said order dated 28.12.2007 was confirmed by the Zonal Manager of the Corporation in the representation dated 16.2.2008 vide orders dated 18.3.2008. Being dis-satisfied with the aforesaid orders, the petitioner approached the Insurance Ombudsman U.P. and Uttaranchal at Lucknow, which was registered as complaint No.LP-117/21/001/07-08 and vide award 30.6.2008, the Ombudsman disposed of the complaint, which is under challenge in the present writ petition.

9. Sri Padia, while defending the impugned orders, submits that the findings

were recorded after perusing the material on record as well as taking into account the facts which came to knowledge of Ombudsman during the course of personal hearing on 27.6.08 that an FIR was lodged on 11.11.2006 at Police Station Ghoorpur, District Allahabad to the effect that the life assured was abducted by some unknown persons with an intent to kill the life assured. The FIR was lodged by the uncle of life assured, namely, Vijay Kumar Agarawal. It was further stated by the members of family of life assured that there is a business rivalry in the family and as such, certain members of the family had hired the assailants and due to this rivalry, the assailants killed the life assured. It was also brought to the knowledge of the Ombudsman during the course of hearing that against the accused persons, trial is in progress in the Sessions Court and the said fact was also taken into consideration by the Ombudsman in the order impugned.

10. Sri Padia further submits that the Ombudsman had rightly relied upon the judgment of ***Smt. Reeta Devi Versus New India Assurance Co. Ltd.*** Reported in 2000 ACC 291 SC, whereby the Apex Court, while distinguishing between a murder which is not an accident and murder which is an accident, held that if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder and accordingly Ombudsman was of the opinion that as the trial is under progress, it is very difficult to say anything conclusively regarding the motive and intention of the persons accused and lot will depend upon the judgment of the Sessions Court in the matter in question. Thus, after taking all these facts and circumstances, the Ombudsman confirmed the orders passed by the authorities of the Insurance Corporation and a liberty was given to the petitioner to approach the forum directly again, as stated hereinabove.

11. Having heard learned Counsel for the parties and perusing the records, I am of the view that under the facts and circumstances of the instant case, the only question which requires consideration in this petition is ***"whether the death caused due to murder of the insured can be held to be "accidental death' ? "***

12. The material on record reveals that an FIR was lodged on 11.11.2006 at Thana Ghhorpur, Allahabad by the uncle of life insured (Vijay Kumar Agarwal), stating therein that on 11.11.2006, at 6.45 P.M., while the life insured was returning home from Hot Mix Plant situated at National Highway No. 76 with Maruti Van No. UP 70 K-0505 driven by his driver Shekhar and when they reached near Jasra Railway Crossing, 7-8 persons aged about 25 to 32 years, who sat on a Marshal Jeep armed with deadly weapons, abducted the life insured but left his driver. Immediately thereafter, his driver conveyed about the said incident over telephone to the members of family and on that basis, uncle of the life insured lodged the F.I.R. Before the Ombudsman, the insurance company contended that the death of the insured occurred due to murder and, hence, the insurance company was not bound to pay the sum assured.

13. In order to answer the aforesaid question in an equitable manner, terms of the policy bond, which is under plan/term 14/49, is reproduced as under :

"10-2. Accident Benefit : If at any time when this Policy is in force for the full sum assured, the Life Assured, before the expiry of the period for which the premium is payable or before the policy anniversary on which the age nearer birthday of the Life Assured is 70 whichever is earlier, involved in an accident resulting in either permanent disability as hereinafter defined or death and the same is proved to the satisfaction of the Corporation, the Corporation agrees in the case of:-

(a) Disability to the Life Assured : (I) to pay in monthly instalments spread over 10 years an additional sum equal to the Sum Assured under the Policy, if the policy becomes a claim before the expiry of the said period of 10 years, the disability benefit instalments which have not fallen due will be paid along with the claim, (ii) to waive the payment of future premiums.

The maximum aggregate limit of assurance under all policies on the same life to which benefits (i) and (ii) above apply shall not in any event exceed Rs.10,00,000 if there be more policies than one and if the total assurance exceeds Rs.10,00,000 the benefit shall apply to the first Rs.10,00,000 sum assured in order of date of the Policies issued.

The waiver of premium shall extinguish all options under the policy and also the benefits covered by para (b) of the Clause except as to such assurance, if any as exceeds the maximum aggregate limit of Rs.10,00,000 and which have been kept in force by continued payment of premiums.

10(b) Death of the life assured: To pay an additional sum equal to the Death Benefit under this policy, if the Life Assured shall sustain any bodily injury resulting solely and directly from the accident caused by outward, violent and visible means and such injury shall within 120 days of its occurrence solely, directly and independently of all other causes result in the death of the life assured. However, such additional sum payable in respect of this policy, together with any such additional sums payable under other policies on the life of the Life Assured shall not exceed Rs.10,00,000.

The Corporation shall not be liable to pay the additional sum referred in (a) or (b) above, if the disability of the death of the life assured shall -

i) be caused by intentional self injury, attempted suicide, insanity or immoraly or whilst the life assured in under the influence of intoxicating liquor, drug or narcotic, or

(ii) take place as a result of accident while the Life Assured engaged in aviation or aeronautics in any capacity other than of a fare-paying, part paying or non-paying passenger in any air craft which is authorized by the relevant regulation to carry such passengers and flying between established aerodromes, the Life Assured having at that time no duties on board the aircraft or requiring descent therefrom, or

(iii) be caused by injuries resulting from riots, civil commotion, rebellion, war (whether war be declared or not) invasion, hunting, mountaineering, steeple chasing or racing of any kind; or

iv) result from the life assured committing breach of law, or

v) result from employment of the Life Assured in the armed forces or military service of any country at war (whether war

be declared or not) or from being engaged in police duty in any military, naval or police organization."

14. The policy bond specifically provides that if the life assured sustains any bodily injury resulting solely and directly from the accident caused by outward violent and visible means, which results in the death of the life assured within the period of 120 days of its occurrence, heirs would be entitled to get accidental benefit.

15. On further perusal of the terms of policy bond, which includes Exclusion Clauses it will be revealed that the Corporation is not liable to pay additional sum in case the death is caused under any of the circumstances mentioned in Clauses (i) to (v) but it does not exclude death due to murder for any reason. Inspite of it, the insurance company has repudiated the Double Accident claim on the ground that the death of the assured was due to murder.

16. Admittedly, the policy bond did not define the word 'Accident' but qualified that the accident must be accompanied by qualities such outward, violent and visible means. There is no dispute that in a Murder, these three ingredients are existing. As the word 'accident' is not defined in the Terms and Conditions of the policy bond and as such, in the alternative, the Court proceeded with the dictionary meaning.

17. In England, law on the subject is settled. In Halsbury's Laws of England Vol. 25 Pg.307 Para 569, 4th Edition (2003 reissue), as to the meaning of the word "accident', it is stated as under :

"569. Meaning of "accident'. The event insured against may be indicated in the policy solely by reference to the phrase "injury by accident' or the equivalent phrase "accidental injury', or it may be indicated as "injury caused by or resulting from an accident'. The word "accident', or its adjective "accidental', is no doubt used with the intention of excluding the operation of natural causes such as old age, congenital or insidious disease or the natural progression of some constitutional physical or mental defect; but the ambit of what is included by the word is not entirely clear. It has been said that what is postulated is the intervention of some cause which is brought into operation by chance so as to be fairly describable as fortuitous. The idea of something haphazard is not necessarily inherent in the word; it covers any unlooked for mishap or an untoward event which is not expected or designed, or any unexpected personal injury resulting from any unlooked for mishap or occurrence. The test of what is unexpected is whether the ordinary reasonable man would not have expected the occurrence, it being relevant that a person with expert knowledge, for example of medicine, would have regarded it as inevitable. The stand point is that of the victim, so that even willful murder may be accidental as far as the victim is concerned."

18. As per Macmillan English Dictionary for advanced learners, International Edition, the word "Accident" and its related words along with illustrations is as follows:

"ACCIDENT: 1. a crash involving a car, train, plane, or other vehicle; a fatal accident on the autoroute between Paris and Lyons. He was tragically killed in a motorcycle accident. The accident was caused by ice on the road. 1a. a sudden event, usually caused by someone making a mistake that results in damage, injury, or death; Seven men were killed in a serious

mining accident yesterday. A riding/climbing/hunting accident. 1b. a mistake that causes minor damage or harm: Don't make such a fuss - it was an accident.

2. Something that happens unexpectedly, without being planned: To be honest, my second pregnancy was an accident. 2a. it is no accident used for saying that something was planned, perhaps for dishonest reasons: It is no accident that every letter we send is delayed.

An accident of birth a situation caused by who your family is rather than by anything you do.

An accident waiting to happen 1. a situation likely to cause an accident: An ageing nuclear reactor is an accident waiting to happen. 2. someone who behaves in a way what is likely to cause trouble

By accident by chance, without being planned or intended. Quite by accident, she came up with a brilliantly simple solution. Occasionally we would meet by accident in the corridor."

19. It will be seen in the word "Accident", the presence of intention, pre-planning or expectations removes a particular happening out of the definition of word Accident. This definition has universal application and the dictionary does not make any distinction based on any particular situation. In legal terms, absence of mens rea is the criteria for calling any incident an Accident.

20. The word "Murder" has also not been defined in the policy bond and as such, the definition of word "Murder" has also been borrowed as "Murder" is defined in the form of noun as *THE CRIME OF KILLING SOMEONE DELIBERATELY* and in the form of verb as *TO COMMIT THE CRIME OF KILLING SOMEONE DELIBERATELY*.

21. It is this word 'deliberate' that rules out the possibility of an incident being called an Accident. This exactly is the reason that Accident has been made an exception and a defence to a charge of Murder and the Indian Penal Code describes the various kinds of Culpable Homicide amounting to Murder and not amounting to the same as the reading of Sections 299, 300, 301 and 304-A along with Accident as a defense or an exception. Sections 299, 300, 301 and 304-A reads as under :

"299. Culpable homicide:- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder:- Firstly, Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly:- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly:- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly:- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1:- When culpable homicide is not murder:- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

301. Culpable homicide by causing death of person other than person whose death was intended:- If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to case, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

304-A. Causing death by negligence:- Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

22. The question that under which circumstances the "willful act" of the third party can be held to be 'accidental' ?, is discussed in Halsbury's Laws of England Vol. 25 Pg.311 Para 575, 4th Edition (2003 reissue), as under:

575. Injury caused by a willful act. An injury caused by the willful or even criminal act of a third person, provided the insured is not a party or privy to it, is to be regarded as accidental for the purpose of the policy, since from the insured's point of view it is not expected or designed. Injuries sustained by gamekeeper in a criminal attack upon him by poachers, by a chashier who was murdered by a robber, and by a master at an industrial school who was murdered by the boys, have been held to be accidental. However, if the immediate cause of the injury is the deliberate and willful act of the insured himself, there would seem to be no accident, and no claim will lie under the policy, at any rate if the insured is not mentally disordered at the time of his act.

23. Mere knowledge of hazard of an occurrence will not take it away from the category of accident in its general sense. Albeit, the law may in a given context define accident to restrict its wider meaning and dilute it to what is called a 'pure accident', but there is no warrant for such restricted meaning in the context of the above clause of the Insurance Policy.

24. It would not be out of place to mention that ***Nisbet v. Rayne and Burn,*** [1910] 2 KBD 689 is a leading case on this subject. A cashier was traveling in a train with a large sum of money intended for payment to his employer's workmen. He was robbed and murdered and the Court of Appeal held the murder was an accident from the point of view of the cashier and, therefore, it was an accident within the meaning of that term in the Workmen's Compensation Act, 1906.

25. In ***Smt. Satiya vs. Sub Divisional Officer***, 1975 I LLJ 394 (Madhya Pradesh) a chowkidar in the Public Works

Department was murdered while on duty. One of the questions that arose was whether his murder could be said to be an accident. Relying upon Nisbet, it was held that the murder was an unlooked for mishap or untoward event which was not expected or designed. The learned Judge held that word "accident" excludes the idea of willful and intentional act but as explained in Nisbet, *"the phrase ought to be held to include murder as it was an accidental happening so far as the workman was concerned."*

26. The combined effect of reading the aforesaid sections cannot be better illustrated than mere reproduction of the words of the Supreme Court in the case of **Smt. Rita Devi and others Vs New India Assurance Company Limited and Another** reported in 2000 (3) Supreme 698, as "the question, therefore, is can a murder be an accident in any given case ? There is no doubt that "murder', as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder' which is not an accident and a "murder' which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

27. Insofar as legal principle is concerned, it is not the insured's point of view that is the criteria but it is The Rule of Contra Proferentem that is actually the legal principle applicable to insurance contracts.

28. Rule of Contra Proferentem is generally made applicable to standard form of contracts. Later, this rule was extended to Terms and Conditions of insurance policies. It is strictly a rule of interpretation where, in case of an ambiguity, the construction that is favourable to the insured is adopted. This is purely a rule invoked for interpretation of the terms of contracts. This rule has no application to anything when no particular term of contract is under interpretation. Even this interpretation is confined to cases where there is existence of any ambiguity in any particular term. In the absence of any word being in ambiguity, it cannot be invoked.

29. As seen from the dictionary meaning and as on exception on defense to a charge of murder and further going by the interpretation of the said term by the Supreme Court in Rita Devi (Supra), hardly any ambiguity exits. The Supreme Court of India in **Central Bank of India Vs Hartford Fire Insurance Company** reported in AIR 1965 SC 1288 clearly held "it is well known however that the rule (of contra proferentum) has no application where there is no ambiguity in the words in the standard form of contract.

30. In the case of **United India Insurance Company Limited Vs Harchandrai Chandanlal** reported in JT 2004 (8) SC 8, the Supreme Court reiterated at para 14 that the terms of contract has to be strictly read and NATURAL meaning be given to it. No outside aid should be sought unless the meaning is ambiguous.

31. From the aforesaid reasonings, it can safely be inferred that "even the willful murder' of the assured is accidental as far as insured is concerned and such murder is to be described as "by chance' or "fortuitous'.

32. At this juncture, it would be useful to refer following observations made by the Division Bench of Gujarat High Court in the case of **Ambalal Lallubhai Panchal (Ranerwala) v. LIC of India** [AIR 1999 Gujarat 280], wherein the question involved was whether a death caused by dog bite can be said to be death caused by an accident so as to make the Life Insurance Corporation of India liable to pay an additional sum equal to sum assured under the extended benefit clause of the Policy, may be referred:

"7. The word "accident" has a very wide significance in its ordinary sense. In the present case, we are not concerned with the philosophical meaning of the expression "accident". The word, though easy to understand when used in any particular context, is found to be difficult to define in a manner that would encompass all its shades of meanings. The expression 'accident' generally means some unexpected event happening without design, even though there may be negligence and it is used, in a popular and ordinary sense of the word, as denoting an unlocked for mishap or an untoward event which is not brought about by intention or design. It is however, unnecessary to attempt any uniform definition of a term which has the utility of answering varied situations.

This term has to be applied in law to any occurrence or result that could not have been foreseen by the agent (because not necessarily involved in his action) or to a result not designed (and therefore, presumably not foreseen) or lastly to anything unexpected. The question as to what will and will not constitute an accident under a given circumstance would depend upon the facts of each particular case and would be a mixed question of law and facts. Accidents can broadly be divided into two categories, viz. where there is some external act, agency or mishap and those where there is no such external act, agency or mishap. In legal contemplation, accident happens without any designed, intentional or voluntary causation such as an occurrence which happens by reason of some violence, casualty or vis. major without any design or consent or voluntary co-operation. An unexpected personal injury resulting from an unlooked-for mishap or occurrence would be an accident. The word "accident" would get its colour from the context in which it is used. The word has fallen for our interpretation in context of the following accident benefit clause in a Life Insurance Policy and in context of the question whether death due to dog bite is an accident within the meaning of this clause, so as to merit payment of additional sum equal to the sum assured under this clause.

10. Accident Benefit : If at any time when this policy is in force for the full sum assured, the Life Assured before the expiry of the period for which the premium is payable or before the policy anniversary on which the age nearer birthday of the Life Assured is 70, whichever is earlier, is involved in an accident resulting in either permanent disability as hereinafter defined or death and the same is proved to the

satisfaction of the Corporation, the Corporation agrees in the case of

a) xxx xxx xxx

b) Death of the Life Assured : To pay an additional sum equal to the Sum Assured under this policy, if the Life Assured shall sustain any bodily injury resulting solely and directly from the accident caused by outward violent and visible means and such injury shall within 90 days of its occurrence solely, directly and independently of all other causes result in the death of the Life Assured. However, such additional sum payable in respect of this policy together with any such additional sums payable under other policies on the life of the Life Assured shall not exceed Rs. 5,00,000/-.

xxx xxx xxx

It will be seen that the word "accident" used in this clause is not circumscribed to any narrow meaning. What has been excepted from the liability of the insurer has been specifically mentioned in the said Clauses (i) to (v) of Clause 10(b). All that is required for this clause to operate is that the bodily injury sustained by the Life Assured results solely and directly from the accident caused by "outward violent and visible means", which injury has resulted in the death of the Life Assured within the period as contemplated by the clause."

33. So far as the reliance placed by the Ombudsman in the case of ***Rita Devi Vs. New India Assurance Co. Ltd;*** (2000) 5 SCC 113, is concerned, I am of view that Rita Devi (supra) is not applicable in the facts and circumstances of the case insofar as in the case of Rita Devi (supra), the Apex Court considered and interpreted a phrase providing "death due to accident arising out of the use of motor vehicle". Thereafter, the Court referred to various decisions and arrived at a conclusion that they have no hesitation in coming to a conclusion that the deceased, Dashrath Singh, was employed to drive an auto rickshaw for ferrying passengers on hire. On the fateful day the auto-rickshaw was parked at auto-rickshaw stand and unknown passengers engaged the said auto-rickshaw for their journey and during that journey, it was alleged that the passengers caused murder of Dashrath Singh. The Apex Court held that death in such case was due to accident. The Court further observed that the difference between "murder which is not an accident' and "murder which is an accident' depends on the proximity of the cause of such murder. If the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any felonious act then such murder is an accidental murder arising out of the use of motor vehicle and held that the insurance company was liable to reimburse the claimant, whereas in the instant case, in a clause of Insurance policy, which assures accident benefits in respect of the loss caused from any accident by "outward, violent and visible means". There is no warrant to qualify this clause by carving out any exception on the grounds such as carelessness, negligence, avoidability etc. The only exceptions that apply are those which have been specifically enumerated and for all other eventualities, which can be described as accident by its general and non-technical sense, the liability to pay the accident benefit arises when the accident is caused by "outward, violent and visible means". This qualification is meant to provide for ascertainability of the event.

34. Considering the matter in all pros and cons, I am of the view that reasoning given by the Ombudsman cannot be justified by any standard. LIC policy excludes death due to limited causes mentioned in Exclusion Clause under para 10(b) and, therefore, it is totally irrelevant to find out the background of the deceased. Further, even in case where there is a criminal background of the assured, it would be difficult to hold that his murder was not accidental unless he has taken up the quarrel and that the immediate cause of injury was deliberate and willful act of the insured himself.

35. For the reasons aforesaid, the decision for repudiating the claim vide letter dated 28.12.2007 by the Senior Divisional Manager, Life Insurance Corporation, with regard to Double Accident Claim benefit and the decision of the Zonal Manager upholding the order passed by the Senior Divisional Manager as well as the award dated 30.6.2008, which confirms the above orders in denying the accrued bonus and the findings recorded therein, are hereby quashed. The Insurance Company shall disburse the amount accrued towards the Double Accident Claim benefit including bonus and also pay an interest at the rate of 8% per annum on the said amount from the date the same has fallen due under Policy Nos. 3116783632 and 312042657, within a period of three months from the date of receipt a certified copy of this order.

36. I pain to note that petitioner's son died due to untoward incident and she is running from pillar to post since 2008 for her legitimate claim/right but the Insurance Company, on one pretext or other, is dragging the petitioner from one litigation to other litigation, therefore, it is appropriate and just to impose cost upon the Life Insurance Corporation of India.

37. The writ petition is allowed with costs, which is quantified to Rs.25,000/-. The Life Insurance Corporation of India shall pay the cost of Rs.25,000/- within a month from today before the Registry of this Court. On receipt of the said cost, Registry is directed to pay Rs.15,000/- to the petitioner and balance of the amount i.e. Rs.10,000/- shall be remitted to the account of Mediation and Conciliation Centre of this Court forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2012

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE ASHOK PAL SINGH, J.

Civil Misc.Writ Petition No.52687 of 2008

Krishna Nand Barnwal ...Petitioner
Versus
Union of India & others ...Respondents

Counsel for the Petitioner:
Sri Ashish Srivastava
Sri S.D. Tiwari

Counsel for the Respondents:
Sri J.P. Mishra
Sri Manoj Kumar
Sri Praveen Kumar Jaiswal (S.C.)
A.S.G.I.

Constitution of India, Article 226- Benefits of Assured Carrier Advance Scheme-denial on ground petitioner being appointed as valveman was granted up-gradation on post of "Pipe Fitter"-while the Feeder as well as Promotional Post remained same-held

entitled for promotional pay 5000-8000 w.e.f. 01.01.1996

Held: Para 9

From the clarification issued by the Government of India also, it is evident that if the feeder and the promotional posts are in the same pay scale the benefits under the ACP Scheme has to be allowed ignoring the promotion.

Case law discussed:

(1994) 5 SCC 392; 1973 (2) F.L.R. 398; AIR 2005 (SC) 3353

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

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

2. The petitioner has challenged the order dated 17.12.2004 passed by the Garrison Engineer (N), Binnaguri, District Jalpaiguri, respondent No.3, whereby the claim of the petitioner for second financial upgradation under the Assure Carrier Promotion Scheme (hereinafter referred to as the "ACP Scheme") has been denied on the promise that the promotion of the petitioner from the post of "Valveman' to the "Pipe Fitter' has been considered as first financial upgradation for the purpose of "ACP Scheme" and subsequently upgradation granted w.e.f. 9.8.1999 in the pay scale of Rs.4000-6000 as second financial upgradation; that since the petitioner has already availed two promotions or financial upgradation, he is not entitled to any further financial upgradation.

3. The petitioner has challenged the said order passed by respondent No.3 by filing O.A. No.1948 of 2005 (Krishna Nand Barnwal vs. Union of India and others) praying that in accordance with the clarification issued in this regard, the promotion of the petitioner in a common grade does not constitute promotion/upgradation and as such ignoring the same, the petitioner shall be entitled for the second upgradation in the pay scale of Rs.5000-8000 under the ACP Scheme w.e.f. 1.1.1996. After hearing the parties the said O.A. was dismissed by the Central Administrative Tribunal, Allahabad (in short CAT) vide its order dated 31.7.2008.

4. The facts of the case are that petitioner was initially appointed a "Valveman" on 30.6.1967 in the pay scale of Rs.75-1-85-2-95 which was revised to Rs.210-4-226-EB-4-250-5-290 on the basis of Third Pay Commission in the year 1993. The petitioner was promoted in the year 1976 to the post of Pipe Fitter but he claims to not have been given any financial upgradation on the basis of the Third Pay Commission report as the pay scale of Valveman was equivalent to the pay scale of Pipe fitter. It was subsequently noticed that revision of the pay scale done in 1973 was incorrect and therefore an expert classification committee was constituted and in view of the report thereof the pay scale was revised to Rs.260-400 in 1991. On 24.2.2003 the petitioner was given first financial upgradation in the pay scale of Rs.4000-6000, however, the respondent has treated the same as second financial upgradation with a view that the promotion of the petitioner from the post of Valveman to Pipe Fitter was the first promotion, hence the upgradation in pay scale Rs.4000-6000/- shall be constituted as second upgradation under ACP Scheme. Being aggrieved the petitioner met the respondents personally and pointed out

that it should be First Financial Upgradation and not Second Financial Upgradation. Since there was no response, the petitioner made a representation on 19.10.2004 to the CWE and respondent No.3 requesting that the order dated 24.2.2003 be modified to First Financial Upgradation. The representation of the petitioner has been rejected by the respondents observing that on implementation of three grade structure pay of Pipe Fitter of grade 210-290 to 260-400 has been considered as first financial upgradation. Since there was no response, the petitioner filed the O.A.

5. Lastly the contention of the petitioner is that the implementation report of classification committee was a revision of pay in pay scale from Rs.210-290 to 260-400 and was for the both post Pipe Fitter and Valveman, hence does not constitute any financial upgradation. In this regard the Government of India Department of Personnel and Training has issued a clarification dated 10.2.200 that if the feeder and promotional posts are on the same pay scale, the benefits under ACP scale to be allowed ignoring the said promotion.

6. Per contra learned for the respondents has submitted that since the pay scale of "Valveman' and "Pipe Fitter' was separated by circular dated 15.10.1984 (Annexure SA 1 to the supplementary affidavit dated 6/7.11.2008) the job of Pipe Fitter has been upgraded and placed in the skilled grade in the pay scale of Rs.260-400 while the job of Valveman is referred in the semi skilled grade in the pay scale of Rs.210-290. Therefore,the petitioner was provided financial upgradation also along with the post of Pipe Fitter prior to introduction of A.C.P. schemes hence the petitioner was entitled for second upgradation only in the pay scale of Rs.4000-6000 and not Rs.5000-8000. He placed reliance of judgment of the Supreme Court in the case of **Tarsem Singh and another vs. State of Punjab and others, (1994)5SCC 392,** contending that it is well settled principle of law that the promotion is understood under the service law jurisprudence as advancement in rank, grade or both . Therefore in view of this aspect also petitioner was admittedly benefitted with the advancement in the rank being promoted to the post of Pipe Fitter from the Volveman in the upgrade post being different and higher pay scale of skilled grade in comparison to the pay scale of semi skilled grade. Hence his claim of Rs.5000-8000 is highly misconceived and is liable to be rejected by this Court. He further placed reliance of the judgment in the case of **Hindustan Lever Limited and the Workan, reported in 1973(2)F.L.R.398,** contending that in the present case the respondent department has rightly fixed to the petitioner in the pay scale of Rs.4000-6000 and this was found correct in view of the admitted position on the record of the case by the learned court below, therefore, the writ petition deserved to be dismissed.

7. After hearing counsel for the parties and on perusal of record, the moot point for consideration before this Court is that in the facts and circumstances of this case, whether the promotion of the petitioner to the upgraded post of Pipe Fitter (Skilled grade) in pay scale 260-400, which prior to its separation and upgradation vide

circular dated 15.10.1984 was in the same pay scale as that of Valveman (semi-skilled) in pay scale of Rs.210-290 could be termed as "financial upgradation under the 'ACP Scheme'.

8. Admittedly both the posts were in same pay scale prior to 15.10.1984, under which two "financial upgradation" were to be granted to the eligible employees. The petitioner having been provided the post of Pipe Fitter prior to to the introduction of ACP Scheme cannot be said to have been provided 'financial upgradation' under the said scheme;From the records it is clear that he has been granted only one 'financial upgradation' after the ACP Scheme was introduced i.e. to say that his pay/salary under the scheme has increased once though he was eligible for two such financial upgradation.

9. From the clarification issued by the Government of India also, it is evident that if the feeder and the promotional posts are in the same pay scale the benefits under the ACP Scheme has to be allowed ignoring the promotion.

10. The case laws cited by the respondents are therefore clearly distinguishable.

11. For all the reasons stated above the writ petition succeeds and is allowed with costs of Rs.20,000/- in view of **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India and others, AIR 2005 (SC) 3353**

12. The orders dated 17.12.2004 passed by respondent Nos.1 and dated 31.7.2008 passed by respondent No.2 are quashed.

13. The respondents are directed to grant second "financial upgradation to the petitioner under the ACP Scheme with all consequential benefits to him after fixing his pay in the pay scales of Rs.5000-8000 from 1.1.1996 with interest @ 6% p.a. till the date of actual payments.

14. The order to be complied with by the respondents within three months from today.

15. No orders as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 61774 of 2007

Darul Uloom Deoband Saharanpur ...Petitioner

Versus

Labour Court & others ...Respondents

Counsel for the Petitioner:
Sri Rahul Sahai

Counsel for the Respondents:
Smt. Sumati Rani Gupta
C.S.C.

Constitution of India, Article 226- Charitable Education Institution-whether exumpted from provision of Industrial Dispute Act ?-held-'No'-termination of 37 years services of respondents/workmen working as electrician certainly falls within definition of workman-considering unfair treatment labor court

rightly awarded back wages-No interference by Writ Court call for.

Held: Para 9

It is by now well settled that educational institutions are industries but its teachers and teaching staff are not workman. The respondent-workman was an electrician in the institution and, therefore, he was a workmen. Reference be had to the judgment in the cases of SCC 1988 (4) Page 43 Miss A. Sundarambal Vs. Government of Goa, Daman and Diu and others and SCC 1996 (4) Page 225 Haryana Unrecognised Schools' Association Vs. State of Haryana. The respondent-workman was an electrician in the institution and, therefore, he was like skilled workers. In such circumstances, the contention raised on behalf of the petitioner cannot be accepted in view of the decision rendered in Bangalore Water Supply (Supra) itself as followed in the subsequent judgment reported to hereinabove.

Case law discussed:

SCC 1978 Volume 2 Page 213; SCC 1988 (4) Page 43; SCC 1996 (4) Page 225

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

1. Heard learned counsel for the petitioner and Sumati Rani Gupta for the respondent No.2.

2. The petitioner is a society running an institution imparting religious education. The services of the respondent No.2 were dispensed with. An industrial dispute was raised and the award has been passed in favour of the workman. The petitioner has challenged the said award on the ground that the Industrial Disputes Act, 1947 does not apply in relation to such a charitable institution which was imparting religious education without charging any fee from its students. A written statement was filed by the petitioner-employer and a copy of the same has been filed on record which has also been reproduced in the award itself.

3. The respondent-workman also contested the claim and evidence was led and the reference was as to whether the termination of the services of the petitioner w.e.f. 19.4.2005 was illegal and if so to what relief is the respondent-workman entitled.

4. The dispute between the employer and the respondent-workman was in relation to holding of a fair enquiry as well. It is evident from the record that as a matter of fact neither any inquiry was held nor the workman-respondent was confronted with any evidence that was sought to be relied on by the employer for the purpose of terminating his services.

5. Learned counsel for the petitioner submits that if the Industrial Disputes Act was itself not applicable, then the question of holding an inquiry or raising an industrial dispute does not arise for examination before this Court.

6. Learned counsel for the respondent-workman submits that the Industrial Disputes Act does not grant any exemption to such an institution. There was no inquiry at all and the entire proceedings culminated in the termination of the answering-respondent in utter violation of principles of natural justice. It is further submitted that the answering respondent had served the institution for more than 37 years and in the absence of any valid reason termination of his services was invalid and as such the answering respondent was entitled for reinstatement and payment of back wages.

7. The answering respondent has admittedly retired and attained the age of superannuation. In such circumstances the petitioners have come up questioning the award in relation to the payment to which the respondent claims entitlement.

8. Having heard learned counsel for the parties. Learned counsel for the petitioner relying on the judgment in the case of **Bangalore Water Supply & Sewerage Vs. A. Rajappa and others SCC 1978 Volume 2 Page 213** contends that such institutions are entirely exempted from the purview of the Industrial Disputes Act and hence the Labour Court committed a manifest error by proceeding to construe otherwise. Learned counsel for the respondent-workman has relied on the same judgment to contend that the judgment does not carve out any such exemption in favour of the petitioner as such in these circumstances the said plea of the petitioner cannot be entertained.

9. It is by now well settled that educational institutions are industries but its teachers and teaching staff are not workman. The respondent-workman was an electrician in the institution and, therefore, he was a workmen. Reference be had to the judgment in the cases of **SCC 1988 (4) Page 43 Miss A. Sundarambal Vs. Government of Goa, Daman and Diu and others and SCC 1996 (4) Page 225 Haryana Unrecognised Schools' Association Vs. State of Haryana.** The respondent-workman was an electrician in the institution and, therefore, he was like skilled workers. In such circumstances, the contention raised on behalf of the petitioner cannot be accepted in view of the decision rendered in Bangalore Water Supply (Supra) itself as followed in the subsequent judgment reported to hereinabove.

10. The respondent- workman has been given an unfair treatment by not holding any inquiry at all and in the circumstances the labour court was fully justified in awarding back wages to the respondent. I am not inclined to interfere with the impugned award at all. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2012

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.

Civil Misc. Writ Petition No. 64921 of 2010

Smt. Malika Jahan Ara Begum
...Petitioner
Versus
Abdul Rahim Khan (Now Dead) and others ...Respondents

Counsel for the Petitioner:
Sri Ramendra Asthana

Counsel for the Respondents:
Sri V.K. Dixit

Constitution of India, Article 226- impleadment application after 1-1/2 years-while similar application with same grounds already rejected by Lower Appellate Court-remained unchallenged-can not be entertained directly before Writ Court.

Held: Para 5

It is also notable that even though the present writ petition is pending since 24.10.2010, the impleadment application has been filed by the applicant today i.e. after more than 1-1/2 years without any plausible explanation with regard to delay. Thus, the impleadment application filed at the last stage of the writ petition without challenging the earlier order of the court below rejecting the

impleadment applicant can not be accepted as bonafide.

(Delivered by Hon'ble Shashi Kant Gupta, J.)

Re: Civil Misc. Impleadment Application Dated 25.04.2012

1. This is an Impleadment Application filed by the applicant namely Malik Shah Nawaz Wali Khan stating that the property in dispute was purchased by him on 20.09.1996, as such, he is the necessary and proper party to the present writ petition.

2. Earlier also, the applicant Malik Shah Nawaz Wali Khan had moved a similar application for impleading him as party before the lower Appellate Court in Appeal No. 110 of 1985. The said application was rejected by order dated 31.07.2010 holding that the property, which has been purchased by the applicant, is not the disputed portion of the property and the said application was filed with malafide intention to delay the proceeding of the case. It was also held by the lower Appellate Court that the applicant is neither a necessary party nor his rights are affected.

3. It is also notable that the release application was filed in the year 1984 and matter is pending since last 28 years but unfortunately till date the matter has not attained finality. The Appellate court below has already held that the property in dispute was not the property, which has been purchased by the applicant, as such, the applicant is neither a necessary party nor his rights are affected.

4. The impleadment application was rejected on 31.07.2010 by the Court below but the said order was never challenged by the applicant. Today, when the matter was taken up for final disposal after several adjournments as unlisted, the applicant filed the present impleadment application. It appears that the present application has been filed by the applicant mainly to delay the disposal of the present writ petition.

5. It is also notable that even though the present writ petition is pending since 24.10.2010, the impleadment application has been filed by the applicant today i.e. after more than 1-1/2 years without any plausible explanation with regard to delay. Thus, the impleadment application filed at the last stage of the writ petition without challenging the earlier order of the court below rejecting the impleadment applicant can not be accepted as bonafide.

6. In view of the above, the impleadment application is dismissed.
