APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.08.2012

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE VISHNU CHANDRA GUPTA, J.

First Appeal No. - 46 of 2008

Smt. Srabani Adhikari ...Petitioner
Versus
Vikas Adhikari ...Respondents

Counsel for the Petitioner:
Sri Shailesh Kumar

Counsel for the Respondents:
Sri B.D. Misra
Sri B.D.Misra

Hindu Marriage Act, 1956-Section 19-Appeal-against order passed under section 13-B-without following the procedure contained therein without any bona fide attempt for mediation under section 89 C.P.C.-held-order unsustainable-set-a-side.

Held: Para 7 and 8

In a suit filed for maintenance under the Hindu Marriage Act or any other law time being enforced it shall always be incumbent upon the trial court or family court to adopt the recourse provided under Section 89 of the CPC before granting a decree of the suit filed for divorce or dissolution of marriage. In the present case, the family court without following the procedure provided under Section 13 B of the Act as well as without applying mind in terms of Section 89 of the CPC had decreed the suit.

Apart from Section 89 of the CPC, "The Family Courts Act, 1984 as well as rules framed thereunder namely U.P. Family Courts Rules, 1995 contains the procedure with regard to conciliation. While adjudicating the controversy with regard to divorce even with regard to maintenance it shall be obligatory on the part of family court to make all efforts with regard to conciliation or mediation and convince the parties for settlement of their dispute amicably. Breakage of family neither fulfill the social requirement nor it is just and fair in social interest.

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

1. Heard learned counsel for the appellant and learned counsel for the respondents.

2. The present appeal has been preferred under Section 19 of the Hindu Marriage Act against the impugned judgement and decree dated 13.2.2008 passed in Regular Suit No. 1236 of 2007. An application under Section 13 B of the Hindu Marriage Act was moved by the appellant before the Family Court Lucknow. Affidavits were filed by the appellant and the respondents with regard to mutual consent for divorce. It appears that after receipt of application, Additional Judge Family Court after hearing counsel for the parties had passed the impugned judgement and order dated 13.2.2003 without following the procedure contained in Section 13 B of the Hindu Marriage Act. For convenience, Section 13 B of the Hindu Marriage Act is reproduced as under:-

"13B. ***Divorce by mutual consent.***

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws

Amendment Act, 1976 , (68 of 1976) on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub- section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.]"

3. A plain reading of aforesaid provision reveals that after receipt of application under Section 13 B of the Act, the Family Court shall fix a date not earlier than six months but not later than eighteen months, if the petition is not withdrawn in the meantime. Thereafter, being satisfied, after hearing the parties and after making such inquiry as it thinks fit that marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

4. In the present case, admittedly, the procedure prescribed under Section 13 B of the Hindu Marriage Act has not been followed. Petitioner's counsel further submits that being illiterate lady she was not aware about the application, moved before the court. However, he submits that there is no joint application was moved by the parties whereby signature of appellant and the respondents duly verified by the lawyers. Certain other procedural illegality or irregularity has been pointed out with the allegation of commission of fraud. Even if, no fraud was committed but fact remains that the procedure prescribed under Section 13 B of the Hindu Marriage Act was not followed.

5. A plain reading of the impugned judgement reveals that the application was moved under Section 13 B of the Hindu Marriage Act. The family court should have applied its mind to the contents of application as well as provisions contained in Section 13 B of the Hindu Marriage Act. It is well settled proposition of law that procedure prescribed by the Act or any statutory provision must be followed by the Courts while adjudicating a controversy. Non-compliance of procedure provided by legislature shall vitiate the judgement and decree passed by the courts.

6. Safeguard provided by Section 13 B of the Hindu Marriage Act has got its own object and reasons. The purpose behind Clause 2 of Section 13 B of the Act is to give reasonable time to the husband and wife both to think over their drastic steps with regard to separation from the matrimonial life. The period of six months provided under Section 13 B of the Hindu Marriage Act also gives an opportunity to the parties to give second look to their decision taken with regard to separation and divorce. Divorce in matrimonial is the last recourse and before granting a decree of divorce it shall always be incumbent upon the Family Court not only to provide reasonable opportunity to give a second look with regard to decision taken by the parties for mutual consent but also as far as possible take necessary steps to save

matrimonial bond by dialogue or through mediation. Divorce become more serious event in a persons life when the married couple has got children and whose future and career rests on the shoulder of their parents, who are fighting with each other and proceeding for divorce without any effort for amicable settlement. Legislature to their wisdom has amended CPC and introduced Section 89 which is reproduce as under:-

" [89. Settlement of disputes outside the Court.

(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

(a) arbitration;
(b) conciliation
(c) judicial settlement including settlement through Lok Adalat; or
(d) mediation.

(2) Where a dispute had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.]

7. In compliance of Section 89 of the CPC it shall be necessary for the court to apply mind with regard to settlement of dispute outside the court. Out of the different procedure provided by Section 89 of the CPC, the conciliation, mediation or lok adalat are the common procedure which are being adopted by court to settle the dispute outside the court. In a suit filed for maintenance under the Hindu Marriage Act or any other law time being enforced it shall always be incumbent upon the trial court or family court to adopt the recourse provided under Section 89 of the CPC before granting a decree of the suit filed for divorce or dissolution of marriage. In the present case, the family court without following the procedure provided under Section 13 B of the Act as well as without applying mind in terms of Section 89 of the CPC had decreed the suit.

8. Apart from Section 89 of the CPC, "The Family Courts Act, 1984 as well as rules framed thereunder namely U.P. Family Courts Rules, 1995 contains the procedure with regard to conciliation. While adjudicating the controversy with regard to

divorce even with regard to maintenance it shall be obligatory on the part of family court to make all efforts with regard to conciliation or mediation and convince the parties for settlement of their dispute amicably. Breakage of family neither fulfill the social requirement nor it is just and fair in social interest.

9. In view of above, appeal deserves to be allowed. Accordingly, impugned judgement and decree dated 13.2.2008 is set aside. The matter is remitted back to the family court concerned. The family court shall decide the case afresh in accordance with law keeping in view the observation made hereinabove expeditiously, say within a period of six months.

10. Appeal is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 25704 of 2007

Mithru & Others ...Petitioner
Versus
Commissioner Azamgarh Division, Azamgarh & Others ...Respondents

Counsel for the Petitioner:
Sri Govind Krishna

Counsel for the Respondents:
C.S.C.
Sri A.P. Singh
Sri Anuj Kumar
S.C.

U.P.Z.A & L.R. Act Rules-Rules-115-A-Cancellation of Patta-application filed after 15 years-on ground the construction not made within 3 years whereas the constructions were demolished-being found in contravention of U.P. Roadside Land Control Act 1945-held-such order will not deprive the petitioner from his ownership-however petitioner restrained from raising any construction on the part of land where demolition made.

Held: Para 5

Application for cancellation having been filed after about 15 years of allotment was liable to be dismissed on this ground alone. If under U.P. Road Side Land Control Act order of demolition was passed in respect of construction made on part of the allotted land then it only meant that petitioners were not entitled to make construction thereupon, however, such order does not amount to depriving the person concerned of his ownership. Question of ownership in proceedings under U.P. Road Side Land Control Act is wholly irrelevant.

(Delivered by Hon'ble Sibghat Ullah Khan, J.)

1. Heard Sri Govind Krishna, learned counsel for the petitioners and Sri A.P. Singh, learned counsel for the respondent No.3 and learned standing counsel for respondents No.1, 2 and 4.

2. This Writ Petition is directed against order dated 07.11.2002 passed by Collector/ D.M. Azamgarh in Case No.22 under Section 122-B/ Rule 115-P of U.P.Z.A. & L.R., Act and Rules. The said case was initiated on the complaint of Asfaq Ahmad, the respondent No.3. Through the impugned order allotment of land by Gaon Sabha/ Land Management Committee in favour of the petitioner No.1 and father of petitioners made in the year 1966-67 was cancelled. A small piece of land had been allotted for constructing

house. It was asserted in the cancellation application that land in dispute was rasta and construction had not been made within three years as required by Rule 115-Q. It was also pleaded that under U.P. Road Side Land Control Act, 1945 no construction could be made on the land as it was within prohibited distance from a regulated road. It is also mentioned in the impugned order that during pendnecy of suit in the year 1983 petitioner started making constructions hence proceedings under U.P. Road Side Land Control Act were initiated against the petitioners which were decided on 30.08.2006 against the petitioners. Through order dated 30.08.2006 constructions were directed to be removed and were subsequently removed. It is also mentioned that the land in dispute was entered as usar in the land revenue record. It is also mentioned in the said order that according to the report of Niab Tehsildar dated 14.07.1983, the land was being used as *rasta.* Plot number of the land in dispute is 198, area 33 *kari* (about 160 square yard).

3. In para-3 of the writ petition, it is mentioned that 50 kari was allotted to the petitioner No.1 on 17.07.1966 and 52 kari was allotted in favour of father of petitioners on 11.03.1967, total 102 *karis* (about 500 square yards) under Section 115-M of U.P. Z.A. & L.R. Rules. Accordingly, it is clear that the impugned orders relate only to part of the allotted land. In para-6 of the writ petition it is mentioned that first application for cancellation was filed on 03.02.1981 which was dismissed on 22.08.1983. Thereafter, another application was filed, which was allowed by the impugned order dated 07.11.2002. It is not mentioned that when the second application was filed which was decided by order dated 07.11.2002.

4. Against order dated 07.11.2002 petitioner No.1 filed revision (No.97/A of 2006-07), which was dismissed on 11.04.2007 by Commissioner, Azamgarh Division, Azamgarh. Said order has also been challenged through this writ petition.

5. Application for cancellation having been filed after about 15 years of allotment was liable to be dismissed on this ground alone. If under U.P. Road Side Land Control Act order of demolition was passed in respect of construction made on part of the allotted land then it only meant that petitioners were not entitled to make construction thereupon, however, such order does not amount to depriving the person concerned of his ownership. Question of ownership in proceedings under U.P. Road Side Land Control Act is wholly irrelevant.

` 6. Accordingly, Writ Petition is allowed. Impugned orders are set aside. However it is clarified that the portion over which constructions were demolished after passing of the order dated 30.08.2006 under U.P. Road Side Land Control Act, petitioners shall not make any construction however the said land will continue to belong to them.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2012

BEFORE
THE HON'BLE MANOJ MISRA, J.

Criminal Revision No. - 2560 of 2012

Sanjay Somani ...Petitioner
Versus
State of U.P. & another ...Respondents

Counsel for the Petitioner:
Sri Vishal Jaiswal

Counsel for the Respondents:
A.G.A.

Criminal Revision-summoning order challenged under section 200 recorded-summoning order after 15 years itself barred by limitations-held-Branch manager of Bank itself be treated complaint-and the delay caused by Court-complainant can not be blamed-held-summoning order justified-observation regarding prompt action on complaint made-to sub serve the very purpose of code.

Held: Para 5 and 8

As regards the contention that the proceedings were barred by limitation, I am of the view that if the complaint was made within the period of limitation, the complainant has done what he could do. It is for the Court thereafter to proceed and issue process. Accordingly, if the Court delays issuance of process the complainant cannot be penalized for the delay on part of the Court. The Apex Court in the case of Japani Sahoo Vs. Chandra Shekhar Mohanty, reported in (2007) 7 SCC, 394 held that the relevant date, for computing the period of limitation under Section 468 CrPC, is the date on which the complaint is filed for initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a Court.

With regards to the submission that the statement of Jitendra Nath Trivedi could not have been relied, as he was neither examined in Court nor he presented the complaint, I am of the view that this would not make a material difference at the stage of summoning. It is noteworthy that the complaint was presented on behalf of Allahabad Bank, which is a public sector bank constituted under the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970, which is a Central Act. Moreover it is a Government Company under section 617 of the Companies Act. Therefore, by virtue of Section 21 clause Twelfth of Indian Penal Code read with Section 2(y) of the Code of Criminal Procedure, its branch Manager, who presented the complaint, would be a "public servant" and, as such, by virtue of the decision of the Apex Court in the case of National Small Industries Corporation Ltd. V. State (NCT of Delhi) (2009) 1 SCC 407 (vide paragraphs 16, 19 and 20 of the judgment) the benefit of the proviso to Section 200 CrPC i.e. exemption from examination of the complainant and the witnesses, would be available, even though Allahabad Bank (the Company) was the complainant. Accordingly, the summoning order cannot be faulted on this ground as well.

Case law discussed:
(2007) 7 SCC, 394; (2009) 1 SCC 407

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

1. Heard learned counsel for the revisionist and learned A.G.A for the State.

2. By this revision application, the revisionist has challenged the summoning order dated 18.7.2012 passed by the First Special Metropolitan Magistrate (1st Class), Kanpur Nagar in Complaint Case

No.2900 of 2012 (Old No.350 of 1995), whereby the revisionist has been summoned under section 138 of the Negotiable Instruments Act, 1881.

3. The facts, as elicited from the record, are that Allahabad Bank, a body corporate constituted under the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970, on 6.2.1995, instituted complaint, under section 138 of the Negotiable Instruments Act, 1881, against M/s Somani Investments and its authorized representative / signatory Sanjay Somani (the revisionist). In the complaint it was alleged that the revisionist issued cheque no.309886, dated 20.12.1994, drawn on ANZ Grindlays Bank, for Rupees four crores in favour of the complainant as part payment towards the adjustment of his liability. The said cheque was presented for collection of the cheque amount, on 31.12.1994. On 31.12.1994 itself, the Bankers (ANZ Grindlays Bank) returned the cheque unpaid with the remark "Refer to Drawer (insufficient funds)". Consequently, demand notice was sent under registered post on 13.1.1995, which was served on 14.1.1995. On failure to make payment within the statutory period of 15 days, complaint was filed on 6.2.1995, with documents i.e. photocopy of the concerned cheque, bank memo, notice, postal receipt, etc. From the certified copy of the order sheet, which has been brought on record through a supplementary affidavit dated 6.8.2012, it appears that the Court registered the complaint on 6.2.1995 itself and fixed 10.2.1995 for recording of statement under section 200 CrPC. The order sheet also discloses that on 21.2.1995 statement under section 200 CrPC was recorded. From Annexure 2 to the main affidavit, it appears that statement of C.L. Maurya, the branch Manager of the Complainant, was recorded, who supported the complaint case. After recording the statement, under section 200 CrPC, on 21.2.1995, the court fixed a date for arguments. Thereafter, it appears that the case got adjourned for various reasons and dates after dates were fixed in the matter. According to the counsel for the revisionist, the matter was delayed as the original of the cheque concerned was not produced. However, on 30.6.2012, an affidavit of Jitendra Nath Trivedi, the branch Manager, Allahabad Bank, was filed, which disclosed that the original of the cheque was handed over to the then Complainant's counsel Sri Vinod Lal Chandani, and since he is no more alive, the original cannot be produced. The court below finding that a prima facie case punishable under Section 138 of the Negotiable Instruments Act, 1881 was made out against the revisionist passed the impugned summoning order.

4. Challenging the summoning order, the learned counsel for the revisionist contended that the summoning order cannot be passed after 17 years of the presentation of the complaint. It has been contended that the complaint was filed on 6.2.1995 whereas the summoning order was passed on 18.7.2012, therefore, the proceedings should be deemed to be barred by limitation. It has further been submitted that in absence of the original of the dishonored cheque, the court below could not have acted upon the complaint allegations and proceeded to summon the revisionist. A feeble attempt was also made to challenge the validity of the summoning order on the ground that the affidavit submitted by Jitendra Nath Trivedi, who was not the complainant,

without his examination in Court, could not have been relied upon.

5. As regards the contention that the proceedings were barred by limitation, I am of the view that if the complaint was made within the period of limitation, the complainant has done what he could do. It is for the Court thereafter to proceed and issue process. Accordingly, if the Court delays issuance of process the complainant cannot be penalized for the delay on part of the Court. The Apex Court in the case of **Japani Sahoo Vs. Chandra Shekhar Mohanty, reported in (2007) 7 SCC, 394** held that the relevant date, for computing the period of limitation under Section 468 CrPC, is the date on which the complaint is filed for initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a Court. While holding as above, the apex court, in paragraph 49 of the judgment in **Japani Sahoo (supra),** observed as follows:

"49. Because of several reasons (some of them have been referred to in the aforesaid decisions, which are merely illustrative cases and not exhaustive in nature), it may not be possible for the court or the Magistrate to issue process or take cognizance. But a complainant cannot be penalised for such a delay on the part of the court nor can he be non-suited because of failure or omission by the Magistrate in taking appropriate action under the Code. No criminal proceeding can be abruptly terminated when a complainant approaches the court well within the time prescribed by law. In such cases, the doctrine "actus curiae neminen gravabit (an act of court shall prejudice none) would indeed apply. (Vide Alexander Rodger V. Comptoir D' Escompte (1871) LR 3 PC 465: 17 ER 120). One of the first and highest duties of all courts is to take care that an act of court does no harm to suitors."

6. In the instant case, the complaint was filed on 6.2.1995, after serving notice of demand on 14.1.1995 (as per the complaint allegations). The cause of action to institute the complaint arose when no payment was made within 15 days from the date of service. Thus, the right to lodge the complaint accrued only on expiry of 15 days to be counted from 14.1.1995. As the complaint was filed on 6.2.1995 that is, within 30 days from the date of expiry of the 15 days notice, it was well within the period of limitation provided under clause (b) of Section 142 of the Negotiable Instruments Act, 1881. In the circumstances, the proceedings are not barred by limitation. Accordingly, on this ground, the summoning order cannot be faulted.

7. As regards the contention that in absence of the original of the cheque the Court could not have issued process, I am of the view that at the stage of issuance of process, the Court is required to see whether a prima facie case is made out or not. Question of admissibility and reliability of secondary evidence is to be tested and assessed at a later stage, when challenge is made to the execution /issuance of the concerned cheque. Thus, the summoning order cannot be faulted on this ground.

8. With regards to the submission that the statement of Jitendra Nath Trivedi could not have been relied, as he was neither examined in Court nor he presented the complaint, I am of the view that this would not make a material

difference at the stage of summoning. It is noteworthy that the complaint was presented on behalf of Allahabad Bank, which is a public sector bank constituted under the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970, which is a Central Act. Moreover it is a Government Company under section 617 of the Companies Act. Therefore, by virtue of Section 21 clause Twelfth of Indian Penal Code read with Section 2(y) of the Code of Criminal Procedure, its branch Manager, who presented the complaint, would be a "public servant" and, as such, by virtue of the decision of the Apex Court in the case of **National Small Industries Corporation Ltd. V. State (NCT of Delhi) (2009) 1 SCC 407 (vide paragraphs 16, 19 and 20 of the judgment)** the benefit of the proviso to Section 200 CrPC i.e. exemption from examination of the complainant and the witnesses, would be available, even though Allahabad Bank (the Company) was the complainant. Accordingly, the summoning order cannot be faulted on this ground as well.

9. Before parting, the Court expresses deep anguish at the prevailing state of affairs that in a matter like this, the court below took 17 years to issue process, when the statement under section 200 CrPC, which was not even required by law, was recorded 17 years back. Matters under section 138 of the Negotiable Instruments Act, 1881 are to be dealt with utmost expedition otherwise the very purpose, for which the provision was inserted in the Act, would stand frustrated.

10. For the reasons mentioned above, I do not find any illegality, impropriety or jurisdictional error in the summoning order. The revision application is, accordingly, dismissed.

11. The Registry is directed to send a copy of this order to the court concerned, within three weeks from today, for information.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2012

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

Civil Misc. Writ Petition No. 11261 of 2000

Committee of Management Shri Narang Sanskrit Maha Vidyalaya, Ghughli, Maharajganj ...Petitioner

Versus

Director of Education & others ...Respondents

Counsel for the Petitioner:
Dr.H.N.Tripathi

Counsel for the Respondents:
C.S.C.
Sri Anil Tiwari

U.P. State Universities Act, 1963-Section 60-D-Single operation order passed by DIOS-without affording opportunity to the management-Sanskrit Maha Vidyalaya-only Deputy Director-held-competent to pass such order-held-order without jurisdiction-quashed.

Held: Para 9

From a reading of the said provisions there is no doubt that the power to instruct the bank that the Salary Payment Account shall be operated by the Dy. Director or by some other officer duly authorised by him vests with the Dy. Director of Education. There is nothing on the record nor is it

demonstrated from the impugned order that any power was conferred upon the DIOS for directing single operation. Therefore, so far as the first question is concerned, it is established from the impugned order itself that the same is wholly without jurisdiction having been passed by the DIOS without any authorization to that effect by the Deputy Director as contemplated by the second proviso of Section 60-D of the U.P. State Universities Act, 1973.

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

1. This writ petition has been filed by the petitioner challenging the order dated 19.2.2000 by which the District Inspector of Schools, Maharajganj (DIOS) has ordered for single operation in the Institution known as Shri Narang Sanskrit Mahavidyalaya, Ghughli, Maharajganj (the Institution).

2. The Institution is duly recognized and aided and is imparting education from the level of Prathama upto Acharya. The Institution is affiliated to the Sampurnanand Sanskrit University, Varanasi and also received granted-in-aid from the State Government and is governed by the provisions of the U.P. State Universities Act, 1973.

3. The contention of the petitioner is that the respondent no. 1 Director of Education, Shiksha Samanya 2 Vistar Anubhag, Allahabad by his letter dated 25.5.1995 sanctioned different posts in the Institution and also directed for making appointment in the Institution with the approval of the Vice Chancellor of the University. In terms of the said order and direction, appointments were made in the Institution on 30.11.1995, which were also approved by the Vice Chancellor of the University, Annexure-1 to the writ petition, is the list of 8 teachers. These 8 teachers were accordingly given appointment on 10.12.1995 and they were working as such in the Institution. Their salaries have also been duly paid from time to time. It is further stated that without any notice or reason the payment of salaries of the teachers has been suspended by the State Government and therefore, the teachers filed writ petitions no. 48351 of 1999 and 48352 of 1999. These writ petitions were disposed of by this Court on 18.11.1999 with a direction to the DIOS to decide the representation of the petitioners-teachers in accordance with law within a period of three months.

4. The contention of the petitioner further is that all of sudden an order has been passed on 13.1.2000 whereby a direction has been given by the DIOS to lodge an FIR against the Committee of Management of the Institution on the ground that for the 8 teachers, who were appointed in the Institution, there was no approval by the Vice Chancellor and, therefore, these appointments have been fraudulently made and salaries have been paid to them illegally. The said order dated 13.1.2000 was challenged by the petitioner in writ petition no. 4613 of 2000 and on 4.2.2000 this Court issued notices to the parties and also stayed the operation of the impugned order to the extent regarding direction for lodging of the F.I.R. but directed that other proceedings may go on.

5. The contention of the petitioner is that in the meantime, the impugned order dated 19.2.2000 was passed for single operation, which is the subject matter of challenge in this writ petition.

6. I have heard Dr. H.N. Tripathi, learned counsel for the petitioner and the

learned Addl. Chief Standing Counsel appearing for the State respondents.

7. The submission of Dr. Tripathi is that the DIOS who has passed the impugned order is not competent to pass the said order inasmuch as under the second proviso of Section 60-D of the U.P. State Universities Act, 1973, the said power vests in the Dy. Director of Education or by any other officer as may be authorised by him in that behalf. The second submission of Dr. Tripathi is that before passing the impugned order of single operation, no show cause notice nor opportunity of hearing was given to the petitioner-Committee of Management and the entire proceedings and finding of the fraudulent appointments of the teachers was taken behind the back of the petitioner and, therefore, the impugned order is bad in law being ex-parte and violative of principles of nature justice inasmuch as it visits the petitioner with civil consequences.

8. So far as the first submission raised by Shri Tripathi is concerned, a reference may be made to the provisions of Section 60-D of the Act and second proviso thereto, which reads as under:

"60-D. ***Procedure for payment of salary in case of certain colleges.****-(1) The management of every college shall for the purposes of disbursement of salaries to its teachers and employees open in a scheduled bank or a co-operative bank or post office, a separate account (thereinafter in this Chapter called 'Salary Payment Account') to be operated jointly by a representative of the management and by the Deputy Director or such other officer as may be authorised by the Deputy Director in that behalf :*

.....
.....

Provided further that in the case referred to in sub-section (3), or where in any other case after giving to the Management an opportunity of showing cause, the Deputy Director is of opinion that it is necessary or expedient so to do, the Deputy Director may instruct the bank that the Salary Payment Account shall be operated only by himself, or by such other officer as may be authorised by him in that behalf and may at any time revoke such instruction."

9. From a reading of the said provisions there is no doubt that the power to instruct the bank that the Salary Payment Account shall be operated by the Dy. Director or by some other officer duly authorised by him vests with the Dy. Director of Education. There is nothing on the record nor is it demonstrated from the impugned order that any power was conferred upon the DIOS for directing single operation. Therefore, so far as the first question is concerned, it is established from the impugned order itself that the same is wholly without jurisdiction having been passed by the DIOS without any authorization to that effect by the Deputy Director as contemplated by the second proviso of Section 60-D of the U.P. State Universities Act, 1973.

10. So far as the second question raised by Shri Tripathi that no opportunity of hearing was given before passing the impugned order is concerned, from a perusal of the impugned order it transpires that it does not disclose anywhere that any opportunity of hearing was given to the petitioner-Committee of Management or that any show cause notice was issued to

the petitioner or at any stage the petitioner was heard before the impugned order was passed. The impugned order is of single operation which takes away the power vested in the Committee of Management and before any such power could have been passed show cause notice or opportunity of hearing ought to have been given to the petitioner. The impugned order of single operation visits the petitioner with civil consequences and the law in this regard is well settled and followed from time time right from the case of Dr. Bina Pani Dey till date the law laid down by the Supreme Court consistently has been that the order which visits a person with civil consequences, opportunity of hearing must be given otherwise such an order cannot survive on the anvil of natural justice. Learned standing counsel was not able to point out from the counter affidavit whether any opportunity of hearing was given to the petitioner before passing the impugned order nor whether any sanction had been granted before passing the order of single operation.

11. In the above backdrop, I find that the impugned order is absolutely illegal, arbitrary, violative of principles of natural justice and without jurisdiction and deserves to be quashed.

12. For the aforesaid reasons, the writ petition is allowed and the impugned order dated 19.2.2000 passed by the District Inspector of Schools, Maharajganj is quashed.

13. It will however be open for the competent authority to proceed afresh in the matter strictly in accordance with the provisions of Section 60-D and the second proviso thereof of the U.P. State Universities Act, 1973 after affording adequate opportunity of hearing to the petitioner and thereafter to take a decision in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 1959 of 1976

Ram Narain ...Petitioner
Versus
D.D.C. & Others ...Respondents

Counsel for the Petitioner:
Sri S.L. Yadav

Counsel for the Respondents:
Sri A. K. Singh
Sri H.S.N. Tripathi
S.C.

U.P. Consolidation of Holdings Act-Section-48-Power of Review-once revision decided on merit-recall and review application rejected-in garb of compromise-can not be reviewed-in absence of statutory provisions.

Held: Para 14

In view of the Full Bench decision of this Court, it is now well settled that the DDC has no power of review, and once the order dated 3.1.1974, by which the revision was dismissed after hearing both the parties and the review application filed by the respondents was also dismissed after hearing both the parties on 15.3.1974, there was no occasion for the DDC to entertain the review application and set aside the earlier order on the basis of compromise. Therefore, I am of the considered opinion that the impugned order dated

21.3.1975, passed by the DDC is without jurisdiction and the same is liable to be set aside.

Case law discussed:

1997 (88) RD 562

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

1. Through this writ petition, the petitioners have prayed for issuing writ of certiorari quashing the orders dated 21.3.1975 and 27.7.1976 passed by the Deputy Director of Consolidation (in short, "DDC") in revision no. 854/199 and revision no. 855/200, in between Rehman Vs. Sanjira. Vide order dated 21.3.1975, the DDC has set aside the order dated 3.1.1974 and decided the case in terms of the compromise, whereas vide order dated 27.7.1976, the restoration application, filed by the petitioners, who claim themselves to be the purchasers of the land in dispute from Sanjira, who was the respondent in the aforesaid revisions.

2. Heard Sri S.L. Yadav, learned counsel for the petitioners and learned Standing Counsel.

3. It is stated in the writ petition that Chak No. 21 Village Sonughat and plots in chak no. 14 Village Pipra Chandrabhan were recorded in the basic year in the name of Kurban S/o Bandhoo. During the consolidation proceedings the chaks were formed in the name of Kurban and respondent nos. 3 to 5 did not lay their claim till the allotment of the chaks in the name of Kurban. On 9.11.1977, after death of Kurban, his mother Sanjira (widow of Bandhu) filed objection under section 12 of the U.P. Consolidation of Holdings Act, 1953 before the Assistant Consolidation Officer, Deoria for being recorded over the plots in dispute in place of late Bandhu, being widow of Bandhu (father of Kurban and mother of deceased). The Assistant Consolidation Officer vide order dated 29.7.1972, decided the case in favour of Sanjira holding her to be the mother of Kurban, deceased and widow of Bandhu and ordered her name to be recorded over the chaks belonging to deceased Kurban. Against the order dated 29.7.1972, the respondent no. 3 filed an appeal before the Settlement Officer of Consolidation on the ground that Smt. Sanjira was not mother of Kurbaan and he was only heir, hence name of Sanjira may not be entered in place of the deceased. The appeal was allowed vide order dated 29.7.1972 and by setting aside the order of Assistant Consolidation Officer, the matter was remanded back before the Consolidation Officer.

4. After remand, it appears, Sanjira and Rehman have entered into compromise, but the Consolidation Officer did not accept the compromise and the case was decided on merit. The Consolidation Officer, vide order dated 12.2.1973, directed to record the name of Sanjira over the chaks in dispute, copy of this order has been brought on record as annexure 1 to the writ petition. The Consolidation Officer has also recorded that the compromise was not in accordance with the rules, therefore, he declined to accept the compromise and passed the order on the basis of material produced before him on merit.

5. Thereafter, two appeals were preferred by the respondent Rehman before the Settlement Officer of Consolidation and the appeals were dismissed on 25.6.1973. The copy of the judgment has been brought on record as annexure 2 to the writ petition. Against the order passed by the Settlement Officer of Consolidation, dismissing the petitioners' appeals, two revisions were filed by the respondent no. 3 before the DDC.

The revisions were heard and decided vide order dated 3.1.1974, by which the revisions were dismissed.

6. It appears, thereafter restoration / review application was filed before the DDC and the review application was dismissed vide order dated 15.3.1975, holding that earlier order was passed on merit, therefore, there was no question to recall the order. This order has been brought on record as annexure 4 to the writ petition.

7. The petitioners herein have purchased the land in dispute through registered sale deed on 22.10.1973 for the consideration of Rs. 20,000/- and applied for mutating his name. The said proceeding is still pending and in this proceeding, Rehman has filed objection.

8. However, after the order dated 3.1.1974, by which the revisions filed by respondent no. 3 were dismissed and order dated 15.3.1974 dismissing the review application of respondents, Sanjira died on 6.3.1975. After her death, it appears, a compromise was entered in between Sanjira (showing her to be alive), Rehman and Islam (the respondent nos. 3 and 4) on 14.3.1975, in which it was agreed upon that in place of Kurban (deceased), only respondent no. 3 was the heir. The copy of the compromise has been brought on record as annexure no. 6 to the writ petition. It is stated, in paragraph 14 of the writ petition, that when the compromise was entered into, Sanjira had already died and on the basis of the compromise, the same DDC, Sri Sukhdeo Prasad Tripathi, set aside the earlier order dated 3.1.1974 and decided the case in terms of the compromise. This order was passed on 21.3.1975. The petitioners, who are purchasers of the land, have filed the restoration application, but the same was dismissed.

9. Sri Yadav contends that once the revision was dismissed on 3.1.1974 on merit and the review application was also dismissed on 15.3.1974, it was not open for the DDC to re-open the issue in terms of the compromise, particularly, in the circumstances when the petitioners have already purchased the land on 22.10.1973 and in the application for mutating his name, respondent no. 3 has already filed objection. On the date of compromise, it was in the notice of the respondents that third party right has already been created in the meantime.

10. A counter affidavit has been filed by Sri A.K. Singh. At some stage, Sri H.S.N. Tripathi has also filed Vakalatnama. The case has been taken in the revised list, neither Sri A.K. Singh nor Sri H.S.N. Tripathi has appeared in the Court.

11. In the counter affidavit, filed by the respondents, it is stated that the order dated 15.3.1975, dismissing the review application for reviewing the order dated 3.1.1974, was passed in the absence of the counsel for the respondents. It is also stated that the alleged sale deed dated 22.10.1976 was executed during the pendency of the revision, therefore, the same is hit by section 52 of the Transfer of Property Act. Otherwise also, the aforesaid sale deed was not brought in the notice of the DDC. It is also stated that the order dated 3.1.1974 was passed ex parte. The death of Sanjira has also been disputed by stating that she died on 28.4.1975, instead of 6.3.1975.

12. The short question involved in this case is as to whether the DDC has got power of review to review his own order

once the order has been passed on merit. In the submissions of Sri Yadav, the review application was not maintainable as the DDC has no power to review his own judgment which was passed on merit after hearing all concerned. In support of his submissions, he has placed reliance upon the Full Bench judgment of this Court in the case of ***Smt. Shivraji and Others Vs. Deputy Director of Consolidation and Others,*** 1997, (88) RD 562, where this Court has held that the DDC is not vested with any power of review of his order, therefore, cannot re-open the proceedings and cannot review or revise his earlier order.

13. Here in this case, the factum of the judgments, either passed by the Consolidation Officer or the DDC dated 3.1.1974 has not been denied by the respondents. The DDC, while rejecting the restoration application filed by the petitioners, has observed that Sanjira has not died on 6.3.1975, but she died on 28.4.1975. For deciding the case, it is not material as to whether Sanjira has died on 6.3.1975 or 28.4.1975, the crucial point is as to whether, after the dismissal of the revisions on 3.1.1974 and rejection of the review applications on 15.3.1975, was it open for the DDC to re-open the issue on the basis of the compromise and decide the same in terms of the compromise, when Sanjira, assuming has entered into the compromise after executing the sale deed in the year 1973. It may be noticed that the order dated 21.3.1975, setting aside the order dated 3.1.1974, was passed on the basis of compromise in between Sanjira, Rehman and Islam dated 14.3.1975, whereas the review application filed by the respondents was dismissed on 15.3.1975 by the same DDC in presence of both the parties. It is surprising that when the parties have entered into compromise on 14.3.1975, why it was not brought in the notice of the DDC on 15.3.1975, on which date review application was rejected, after hearing both the parties. The Full Bench of this Court in the case of ***Smt. Shivraji*** (supra), in paragraph 36, has held as under:

"36. Coming to the provisions of the U.P. Consolidation of Holdings Act, it is our considered view that the consolidation authorities, particularly the Deputy Director of Consolidation while deciding a revision petition exercises judicial or quasi judicial power and, therefore his order is final subject to any power of appeal or revision vested in superior authority under the Act. The consolidation authorities, particularly the Deputy Director of Consolidation, is not vested with any power of review of his order and, therefore, cannot reopen any proceeding and cannot review or revise his earlier order. However, as a judicial or quasi judicial authority he has the power to correct any clerical mistake / arithmetical error, manifest error in his order in exercise of his inherent power as a tribunal."

14. In view of the Full Bench decision of this Court, it is now well settled that the DDC has no power of review, and once the order dated 3.1.1974, by which the revision was dismissed after hearing both the parties and the review application filed by the respondents was also dismissed after hearing both the parties on 15.3.1974, there was no occasion for the DDC to entertain the review application and set aside the earlier order on the basis of compromise. Therefore, I am of the considered opinion that the impugned order dated 21.3.1975, passed by the DDC is without jurisdiction and the same is liable to be set aside.

15. The matter may be examined from another angle also. It is well settled that when the rights and liability are created under the statute then in that eventuality, the same has to be seen and decided in accordance with the provisions contained under the aforesaid statute and if the statute becomes silent at particular stage, meaning thereby the statute intends to attach finality to the proceeding at that very stage and after that, in absence of any provision, the proceeding cannot be re-opened under that statute, as at one stage finality has to be attached to the proceeding. However, it can be challenged before the higher forum.

16. In the result, the writ petition succeeds and is allowed. The orders dated 21.3.1975 and 27.7.1976 passed by the Deputy Director of Consolidation in revision no. 854/199 and revision no. 855/200, (Rehman Vs. Sanjira) are hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.08.2012

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.

Writ Petition No. 453 (SB) of 2006

S.P. Srivastava ...Petitioner
Versus
State of U.P. and another ...Respondents

<u>Constitution of India, Article 226</u>- Dismissal order-petitioner working as Assistant Sale Tax Commissioner-passed wrong assessment order-causing pecuniary loss to Government-order passed by exercising Quasi-judicial order-subject to appeal and revision-no allegation regarding personal benefit-even enquiry conducted ignoring the procedure under Rule-held-order not sustainable-however considering retirement of petitioner-no direction for fresh enquiry-but salary for period under which was out of job during period of dismissal-not given except pension gratuity for entire period of working till age of superannuation.

Held: Para 21 and 39

Therefore, in view of the aforementioned discussion, it is clear that the petitioner in exercise of lawful jurisdiction while working on the post of Deputy Commissioner Assessment Trade Tax passed the assessment orders and without any oral enquiry these orders were held by the inquiry officer to be wrong. Mere wrong exercise of lawful jurisdiction cannot be said to be misconduct. There was no charge against the petitioner that they passed such orders for extraneous consideration. Perusal of the inquiry report shows that no witness was examined to prove the case of the department and only on the basis of the charges and the assessment orders and the written reply submitted by the petitioner, the inquiry was concluded.

Since the petitioners have attained the age of superannuation and have retired from service, therefore, it is not desirable to direct enquiry afresh from the stage of charge-sheet. Therefore they shall be entitled only for the consequential financial benefits. The pension of the petitioners shall be recalculated treating them to be in service till the date of their superannuation, they shall not be entitled to the salary for the period during which they remained out of job because of the dismissal order. The orders of the recovery of amount are also hereby quashed. The exercise for consequential benefits shall be carried out within three months from today.

<u>Case law discussed:</u>
(1999) 7 SCC 409; [1992 (3) SCC 124]; [2007 (4) SCC 247]; [2008 (26) LCD 1522]; [2003

(21) LCD 610]; (1863) 143 ER 414; (1993) 3 SCC 259; (1998) 7 SCC 66; JT 1996 (3) SC 722; 2001 (19) LCD 513; 2006 (24) LCD 1521; 2008 (16) LCD 891; [2011 (29) LCD 626]

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

1. Since common question of facts and law are involved in both the aforementioned writ petitions, as such, the same are being disposed of by a common judgment.

2. The petitioners in both the aforementioned writ petitions, feeling aggrieved by the order of the disciplinary authority punishing them with the punishment of dismissal from service and also with recovery of the amount of damage which was caused to the department by their alleged misconduct, have preferred the aforementioned writ petitions.

3. In brief, the facts of Writ Petition No. 453 (SB) of 2006 are as under:-

Petitioner Sheetala Prasad Srivastava was appointed as Sales Tax Officer on 20.08.1976. Subsequently, he was promoted on 26.7.1996 on the post of Assistant Commissioner, Trade Tax (now known as Deputy Commissioner, Trade Tax) on 25.7.2002. He was transferred to Bahraich as Assistant Commissioner (Assessment Trade Tax). On re-designation of post, he was designated as Deputy Commissioner Assessment Trade Tax with effect from 15.11.2002. On 22.7.2003, he was placed under suspension on the ground that he had passed assessment orders in some cases prejudicial to the interest of revenue and also prepared refund vouchers hurriedly.

4. Feeling aggrieved by the order dated 22.7.2003, the petitioner had approached this Court by filing writ petition No. 1020 (S/B) of 2003. During the pendency of the said writ petition, the Additional Commissioner, Grade-I, Trade Tax, Lucknow, who was appointed as Enquiry Officer, served a charge sheet dated 20.9.2003. Subsequently, a Division Bench of this Court, vide order dated 9.10.2002, disposed of the writ petition finally with a direction that the petitioner shall file reply to the charge sheet within 15 days and thereafter the inquiry be completed within a period of six weeks and enquiry report thereafter shall be submitted within 15 days.

5. In compliance of the order dated 9.10.2002, petitioner submitted his reply, but on account of change of Inquiry Officers, the enquiry could not be concluded as directed by this Court and as such, the petitioner moved a representation before the Inquiry Officer for revocation of his suspension, which was forwarded, vide letter dated 31.12.2003 to the Secretary, Tax recommending the revocation of suspension of the petitioner. However, the Government turned down the said recommendation vide order dated 17.3.2004.

6. Against the above inaction of the opposite parties, the petitioner had again approached this Court by filing writ petition No. 475 (SB) of 2004, raising grievance that the order passed in his earlier writ petition has not been complied with.

7. According to the petitioner, on considering the assertions made in the above writ petition, a Division Bench of this Court, vide order dated 7.4.2004, directed the State to seek instructions from the authorities concerned as to why the enquiry is not being completed, despite the orders passed by this Court as well as the stage of enquiry. It was also directed to the State to indicate the reasons for not concluding the

enquiry and also the proposed action, which might be taken against the erring officers (if any). Counsel for the petitioner submitted that after order dated 7.4.2004 being passed by this Court, the Inquiry Officer felt annoyed and concluded the inquiry proceedings within five days vindictively and arbitrarily by holding that the charges levelled against the petitioner stands proved and also submitted its report dated 26.4.2004. On the basis of the said vindictive enquiry report dated 26.4.2004, a show cause notice was issued to the petitioner, to which the petitioner submitted his reply on 27.5.2004, denying therein all the charges levelled against him.

8. Submission of the petitioner is that since no action on the said inquiry report was taken and as such, this Court, vide order dated 11.4.2005, as an interim measure, in writ petition No. 475 (S/B) of 2004, stayed the further operation of the order of suspension dated 22.7.2003 and further directed the opposite parties to reinstate the petitioner in service within a week from the date of receipt of a certified copy of the order. However, liberty was granted to the opposite parties to conclude the disciplinary proceedings against the petitioner, in accordance with law. In compliance of the order dated 11.4.2005, the petitioner was reinstated in service on 26.5.2005 and was transferred as Deputy Commissioner Enforcement Trade Tax, Gorakhpur. Thereafter, vide impugned order dated 22.3.2006, the petitioner was dismissed from service and an amount of Rs. 51,52,906/- (Rs. Fifty One Lac Fifty Two Thousand Nine Hundred Six only) was directed to be recovered from him. Hence writ petition No. 453 of 2006 (S/B) was filed.

9. Factual matrix of Writ Petition No. 575 SB of 2006 are that the petitioner was also working in the Trade Tax Department on the post of Trade Tax Officer, which was re-designated as Assistant Commissioner, Trade Tax. From 3.8.2001 to 9.7.2003, he was discharging his duties in district Bahraich. During this period, some assessment orders prejudicial to the interest of revenue were passed by him in exercise of his official duties which were alleged to be against provisions of some circulars of the department and allegedly caused damage to the department. He was transferred to Lucknow and while serving at Lucknow, he was placed under suspension vide order dated 22.7.2003. The petitioner moved a representation requesting cancellation of his suspension order. Petitioner filed Writ Petition No. 1134 SB of 2005 challenging his suspension order. The said writ petition was disposed of finally vide judgment and order dated 8.7.2005 directing the State Government to take final decision in the matter within six weeks. Since the said judgment and order dated 8.7.2005 was not complied with by the respondents, therefore, a Writ Petition No. 1540 (SB) of 2005 was filed by the petitioner. A Division Bench of this Court, vide order dated 14.9.2005, stayed the order of suspension. Subsequently, after completion of the inquiry, the petitioner was dismissed from service and an amount of Rs. 1,40,265 (Rs. One Lac Forty Thousand Two Hundred Sixty Five only) was ordered to be recovered from him. Hence writ petition No. 575 (S/B) of 2006 was filed.

10. Grievance of petitioners in both the writ petitions is that the Inquiry Officer had not correctly appreciated the reply submitted by them and have concluded the inquiry hurriedly. It is further submitted that the principles of natural justice were

violated in conducting the said inquiry. It is further submitted that the amount directed to be recovered from the petitioners cannot be termed as loss of revenue to the State on account of wrong assessment orders passed by the Assessing Officers as the same can be reopened in exercise of the powers by the Revisional Authority and in case, the turnover has escaped assessment, then the same can also be reopened by the Assessing Authority itself. Since no assessment order was passed in the said cases, therefore, it cannot be presumed that there was any loss of revenue to the State. On the basis of this argument, it is submitted that no recovery could have been directed against them.

11. So far as the point of loss to the department is concerned, learned counsel for petitioner has placed reliance on a letter dated 19.10.2004 sent by Special Commissioner, Trade Tax, U.P., Lucknow, addressed to Deputy Commissioner, Kar Evam Nibandhan Anubhag, U.P., in which, it is mentioned that there is no evidence on record regarding the loss of revenue to the department.

12. The arguments of learned counsels for the petitioners are that the petitioners being quasi-judicial authority, in exercise of their lawful jurisdiction, they have passed assessment orders wherein the turnover was assessed and the tax was imposed. Such quasi-judicial exercise of power cannot be termed to be misconduct unless and until the same is perverse or not based on record. It is further submitted that mere error of judgment cannot be termed as misconduct. In the present case there is no charge against the petitioner that they passed such orders for extraneous consideration. The Enquiry Officer, without any evidence on record, held that the charges stands proved on the basis of the assessment orders passed by them and the explanation submitted by them. This act of the inquiry officer was done in utmost haste manner without any oral enquiry.

13. Learned Counsel for the State has submitted that in this case, due opportunity was afforded to the petitioners to defend themselves and keeping in view all the materials available before the inquiry officer, enquiry report was submitted, which was accepted by the disciplinary authority and accordingly, the petitioner was punished, therefore, the impugned order does not suffer from any illegality, hence, no interference is called for in exercise of jurisdiction under Article 226 of the Constitution of India.

14. We have gone through the pleadings and materials available on record.

15. It is an admitted fact that the petitioners were exercising a quasi-judicial jurisdiction and have passed assessment orders with regard to several traders, which were the subject matter of the enquiry. There was no complaint made against the petitioner and further with regard to charge against the petitioners that they got the refund vouchers prepared very hurriedly, the same is in the interest of the Department insofar as on the excess amount the Department has to pay the interest upto the date of issuance of refund voucher.

16. Learned Counsel for the petitioners have placed reliance upon the pronouncement of Hon'ble the Apex Court in the case of ***Zunjarrao Bhikaji Nagarkar Vs. Union of India and others (1999) 7 SCC 409,*** wherein Hon'ble Apex Court, in paragraphs-41, 42 and 43, has held as under:-

"41. When penalty is not levied, the assessee certainly benefits. But it cannot be said that by not levying the penalty the officer has favoured the assessee or shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. The record in the present case does not show if the disciplinary authority had any information within its possession from there it could form an opinion that the appellant showed "favour" to the assessee by not imposing the penalty. He may have wrongly exercised his jurisdiction. But that wrong can be corrected in appeal. That cannot always form a basis for initiating disciplinary proceedings against an officer while he is acting as a quasi-judicial authority. It must be kept in mind that being a quasi-judicial authority, he is always subject to judicial supervision in appeal.

42. Initiation of disciplinary proceedings against an officer cannot take place on information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. Merely because penalty was not imposed and the Board in the exercise of its power directed filing of appeal against that order in the Appellate Tribunal could not be enough to proceed against the appellant. There is no other instance to show that in similar case the appellant invariably imposed penalty.

43. If every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi-judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi-judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi-judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge- sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi-judicial authority. The entire system of administrative adjudication whereunder quasi-judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings."

17. In the case of ***Union of India Vs. A.N. Saxena reported in [1992 (3) SCC 124],*** Hon'ble Apex Court has held as under:-

"It was argued before us by learned counsel for the respondent that as the respondent was performing judicial or quasi-judicial functions in making the assessment orders in question even if his actions were wrong they could be corrected in an appeal or in revision and no disciplinary proceedings could be taken regarding such actions."

18. In the aforementioned case of ***A.N. Saxena (Supra)*** Hon'ble Apex Court has also observed as under:

"On a reading of the charges and the allegations in detail learned Additional Solicitor General has fairly stated that they

do not disclose any culpability nor is there any allegation of taking any bribe or of trying to favour any party in making the orders granting relief in respect of which misconduct is alleged against the respondent."

19. Reliance has also been placed on the pronouncement of a judgment of Hon'ble Apex Court in the case of ***Ramesh Chander Singh Vs. High Court of Allahabad and another*** reported in ***[2007 (4) SCC 247]*** wherein it has been held in paragraph-12 as under:-

"12. This Court on several occasions has disapproved the practice of initiation of disciplinary proceedings against officers of the subordinate judiciary merely because the judgments/orders passed by them are wrong. The appellate and revisional courts have been established and given powers to set aside such orders. The higher courts after hearing the appeal may modify or set aside erroneous judgment of the lower courts. While taking disciplinary action based on judicial orders, the High Court must take extra care and caution."

20. IN the aforesaid legal position, it is abundantly clear that in the absence of any complaint against the petitioner it can only be inferred that it was the opinion of the inquiry officer that the assessment orders were not in accordance with the circulars of the department. The perusal of the inquiry report clearly establishes that on the basis of the same facts, which were mentioned in the assessment orders, inquiry officer took a different view in the matter. Mere wrong orders passed by a competent authority cannot be termed to be misconduct, unless and until such orders, prima facie, proved to be mala fide, biased or passed for extraneous considerations. Hon'ble the Apex Court has also held that such wrong orders can be corrected in appeal/ revision. The very purpose of providing remedy of revision/appeal is, that the law expects that the wrong orders, if passed by the authorities, can be corrected by way of revision/appeal. So far as question of loss of revenue is concerned, there is a report on record to the effect that no loss of revenue has been assessed. Merely on the basis of presumption that if the orders would have been passed otherwise then the higher revenue would have been recovered, it can not be termed to be loss of revenue. Unless and until assessment orders for imposition of tax is passed till then it cannot be said that there was any loss of revenue. Therefore, the order for the recovery of the loss caused to the department also does not appear to be sustainable under the law.

21. Therefore, in view of the aforementioned discussion, it is clear that the petitioner in exercise of lawful jurisdiction while working on the post of Deputy Commissioner Assessment Trade Tax passed the assessment orders and without any oral enquiry these orders were held by the inquiry officer to be wrong. Mere wrong exercise of lawful jurisdiction cannot be said to be misconduct. There was no charge against the petitioner that they passed such orders for extraneous consideration. Perusal of the inquiry report shows that no witness was examined to prove the case of the department and only on the basis of the charges and the assessment orders and the written reply submitted by the petitioner, the inquiry was concluded.

22. A Division Bench of this Court in the case of ***Parasu Ram Singh Vs. Secretary of Agriculture, U.P. Lucknow***

and others reported in ***[2008 (26) LCD 1522]*** has held as under:

"This Court has already held that after the charge sheet is given to a delinquent employee an oral enquiry is must, whether the employee requests for it or not. The record which has been produced before us reveals that after submission of reply to the charge sheet, no date or time was fixed by the Enquiry Officer for recording of evidence of the witnesses on behalf of the Department to prove the charges as also for the defence witnesses for holding the enquiry. We are of the view that the petitioner was not given proper opportunity of hearing and no oral enquiry as required by law was held."

23. A Division Bench of this Court in the case of ***Radhey Kant Khare Vs. U.P. Cooperative Sugar Factories Federation Ltd.*** reported in ***[2003 (21) LCD 610]*** has also held as under:-

"8. After a charge sheet is given to the employee an oral enquiry is a must, whether the employee requests for it or not. Hence a notice should be issued to him indicating him the date, time and place of the enquiry. On that date the oral and documentary evidence against the employee should first be led in his presence vide A.C.C. Ltd. v. Their Workmen (1963) II LLJ 396 (SC). Ordinarily, if the employee is examined first it is illegal vide Anand Joshi v. MSFC 1991 LIC 1666 Bom., S.D. Sharma v. Trade Fair Authority of India 1985 (II) LLJ 193, Central Railway v. Raghubir Saran 1983 (II) LLJ 26. No doubt in certain exceptional cases the employee may be asked to lead evidence first, vide Firestone Tyre and Rubber Co. Ltd. v. Their Workmen AIR 1968 SC 236, but ordinarily the rule is that first the employer must adduce his evidence. The reason for this principle is that the charge sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. Where no witnesses were examined and no exhibit or record is made but straightaway the employee was asked to produce his evidence and documents in support of his case it is illegal vide P.C. Thomas v. Mutholi Co-operative Society Ltd. 1978 LIC 1428 Ker, and Meenglas Tea Estate v. Their Workmen AIR 1963 SC 1719."

24. In the facts of present case, there is no oral inquiry. The perusal of the inquiry report establishes that no witness was examined, therefore, the inquiry report and the orders of dismissal passed thereon cannot be sustained in view of the aforementioned factual and legal position.

25. Natural justice has a prime role to play in the matter where the justice has to be secured. Natural justice is another name for common-sense justice.

26. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense/ liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

27. The expressions "natural justice" and "legal justice" do not present a watertight classification. It is the substance

of justice, which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

28. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as *audi alteram partem* rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. After all, it is an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of **Cooper V. Wandsworth Board of Works (1863) 143 ER 414** the principle was thus stated: (ER p.420)

"[E]ven God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam' (says God), "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?"

29. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Inquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than decision in a quasi-judicial enquiry. [emphasis supplied]

30. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statue or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative

order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil rights but of civil liberties, material deprivations and non-pecuniary damages in its wide umbrella comes everything that affects a citizen in his civil life.

31. In ***D.K. Yadav Vs. J.M.A. Industries;*** (1993) 3 SCC 259 the Apex Court while laying emphasis on affording opportunity by the authority which has the power to take punitive or damaging action held that orders affecting the civil rights or resulting civil consequences would have to answer the requirement of Article 14. The Hon'ble Apex Court concluded as under: -

"The procedure prescribed for depriving a person of livelihood would be liable to be tested on the anvil of Article 14. The procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. Article 14 has a pervasive procedural potency and versatile quality, equalitarian in its soul and principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable, and not arbitrary, fanciful or oppressive."

32. In ***National Building Construction Corporation v. S. Raghunathan;*** (1998) 7 SCC 66, the Apex Court in unequivocal words that a person is entitled to judicial review, if he is able to show that the decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he is informed the reasons for withdrawal and the opportunity to comment on such reasons.

33. At this juncture, it would be relevant to produce relevant portion of paragraph 34 of the judgment rendered in ***State Bank of Patiala and others v. S.K.Sharma,*** JT 1996(3) SC 722. Though this decision was given in a service matter but the Hon'ble Apex Court has dealt with the principles of natural justice and the result, if it is not followed:-

Where the enquiry is not governed by any rules/regulations/ statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e. between "no notice"/"no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e. in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice, in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this

principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.)

While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

34. In **M/s Mahatma Gandhi Upbhokta Sahkari Samiti vs. State of U.P. and others** 2001(19)LCD 513 the controversy involved was that the order of cancellation was passed on the basis of inquiry conducted by Sub Divisional Magistrate but the copy of the inquiry report on which reliance was placed was not furnished to the petitioner. A Division Bench of this Court held that when report of inquiry has been relied upon, that report has to be furnished to the person, who is affected by the same.

35. The said legal position has been reiterated and followed in a number of decisions rendered by this Court in the case of **Dori Lal vs. State of U.P. and others** 2006(24)LCD 1521, it has been held that the order cancelling the licence passed without the petitioner being provided the copy of the resolution of the village Panchayat as well as the enquiry report, if any and without being afforded opportunity of submitting explanation and hearing amounts to gross violation of principle of natural justice and hence the order is liable to be quashed.

36. In **Rajpal Singh vs. State of U.P. and others** 2008(16) LCD 891, it has been held by this Court that non-furnishing of the inspection report of the Supply Inspector, which was relied upon for cancellation of the licence, amounts to violation of principle of natural justice, hence, the order of cancellation as well as the appellate order was not sustainable in the eyes of law.

37. Recently, a co-ordinate bench of this Court in **Sita Devi vs. Commissioner, Lucknow & others** reported in [2011(29) LCD 626] held that the action of the authority in passing the order of cancellation without supplying the copy of the preliminary enquiry report while proving the charges against the petitioner on the basis of said enquiry report is hit by the grave legal infirmity and whole action of the authority is in great disregard of the principles of natural justice.

38. For the reasons aforesaid, both the writ petitions deserve to be allowed and are hereby allowed. A writ of certiorari is hereby issued to quash the impugned orders dated 22.3.2006 passed by respondent no. 1 in captioned Writ Petition No. 452 (SB) of 2006 and Writ Petition No.575 (SB) of 2006.

39. Since the petitioners have attained the age of superannuation and have retired from service, therefore, it is not desirable to direct enquiry afresh from the stage of charge-sheet. Therefore they shall be entitled only for the consequential financial benefits. The pension of the petitioners shall be recalculated treating them to be in service till the date of their superannuation, they shall not be entitled to the salary for the period during which they remained out of job because of the dismissal order. The orders of the recovery of amount are also

hereby quashed. The exercise for consequential benefits shall be carried out within three months from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 41351 of 2012

Swami Nath Pal ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Ram Dawar

Counsel for the Respondents:
C.S.C.

U.P. Regularization of Daily Wages appointment on Group-D post Rules 2001-Rule-4-regularization of daily wager working since 1993-admittedly working after cut of date-no direction could be issued-however considering long time working the government either consider regularization by amending rules or give preferential treatment by giving waitage in regular selection

Held: Para 6

However, it is an alarming situation that for 19 years petitioner is working on daily wages basis. There must be thousands of such employees who are working on daily wage posts for more than ten years in different departments of Government of U.P. having been appointed after 29.06.1991. Government must take a decision either for regularising their services by amending the Rules of 2001 or by filling up the posts by regular appointment by providing due weightage to those employees who are working on daily wages basis for a long time particularly more than ten years.

Case law discussed:
2001 (1) AWC 196; AIR 1992 SC 2130; AIR 2006 SC 1806

(Delivered by Hon'ble Sibghat Ullah Khan, J.)

1. Heard learned counsel for the petitioner.

2. The case of the petitioner is that he is a daily wage employee since 1993 in U.P. Irrigation Department posted at Jaunpur but his services have not been regularised. He is being paid increased pay-scale (Paragraph-9 of the writ petition) but he has not been regularised. The prayer is that respondents may be directed to regularise the services of the petitioner on the post of Beldar in the Department of Irrigation, Division Jaunpur. The second prayer is that salary under regular pay-scale may be directed to be paid to the petitioner. Learned counsel for the petitioner has placed reliance upon two authorities. One is of this Court reported in **Betu Prasad Vs. State of U.P., 2001 (1) AWC 196** and the other is of the Supreme Court reported in **State of Haryana Vs. Piara Singh, AIR 1992 SC 2130.** However after the judgment of the Supreme Court reported in **Secretary, State of Kiarnataka Vs. Uma Devi AIR 2006 SC 1806**, the scenario has completely changed.

3. State of U.P. has framed U.P. Regularisation of Daily Wages Appointment on Group-D Posts Rules, 2001., Rule-4 of which provides that only such daily wages employees can be regularised who were directly appointed on daily wage basis on Group-D posts in government service before June 29, 1991. As the petitioner was appointed in 1993

hence the said Rules cannot be applied to him.

4. Salary in regular pay-scale cannot be provided to daily wagers, however minimum salary must be paid and according to the own case of the petitioner the minimum salary is being paid to him since 2008 (para-9 and Annexure-V of the writ petition).

5. Accordingly, no relief can be granted to the petitioner. Writ Petition is therefore dismissed.

6. However, it is an alarming situation that for 19 years petitioner is working on daily wages basis. There must be thousands of such employees who are working on daily wage posts for more than ten years in different departments of Government of U.P. having been appointed after 29.06.1991. Government must take a decision either for regularising their services by amending the Rules of 2001 or by filling up the posts by regular appointment by providing due weightage to those employees who are working on daily wages basis for a long time particularly more than ten years.

7. Office is directed to supply a copy of this order free of cost to Sri S.P. Mishra, learned standing counsel for sending the same to Principal Secretary, Irrigation and Chief Secretary, Government of U.P.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2012

BEFORE
THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.

Rent Control No. - 73 of 2012

Mukesh Gupta ...Petitioner
Versus
Special Judge (P.C.Act) Lucknow and another ...Respondents

Counsel for the Petitioner:
Sri Sudeep Kumar
Sri Avdhesh Kumar Pandey

Counsel for the Respondents:
Sri Manish Kumar
Sri Ankit Srivastava

Code of Civil Procedure-Order 15 Rule-5-striking out of defense-inspite of putting appearance on several adjourn dates-petitioner/tenant failed to deposit the arrears of rent, for use and occupation-consequently defense struck of which-allowed to get finality-now on highly belated stage prayer for quashing entire proceeding can not be granted-considering long term of harassment of land lord as well as wastage of precious time of Court-with exemplary cost of Rs. 25000/ imposed-petition disposed of with direction first to deposit entire amount with cost on adjourn date then opportunity of cross examination be given.

Held: Para 16

Under these circumstances, the writ petition is devoid of merits and is, hereby, dismissed with special cost of Rs.25,000/-. However, the learned Trial Court may exercise its discretion liberally, if the petitioner deposits entire amount of Rs.4,23,500/-, due as against him and the cost of Rs.25,000/- on the date fixed before the learned Trial Court

and may allow him to cross examine PW1 but, shall not adjourn the case so as to delay its disposal.

Case Law discussed:

2005 (1) S.C.C. 705; 2005 AIR SCW 2070; AIR 1977 SC 2421; 2000 SCFBRC 321; 2003 AIR SCW 7158; (2010) 2 SCC 114; (2010) 2 SCC 114; AIR 1983 S.C. 1015; 2010 (2) ARC 260; 2008 (1) ARC 436

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. Counter affidavit filed on behalf of opposite party no.2 is taken on record.

2. Heard learned counsel for the petitioner and learned counsel for opposite parties and perused the records of the case.

3. This writ petition has been preferred by the petitioner with a prayer that a writ be issued in the nature of certiorari quashing the order dated 21.12.2011 passed in SCC Suit No.94 of 2010 pending in the Court of Special Judge (Prevention of Corruption Act), Lucknow, further prayer is that the order for rejection of application for impleadment be also quashed which has been passed on 16.03.2012, another prayer is for quashing of the orders dated 28.05.2012 and 7.8.2012.

4. Relevant facts are that the petitioner is defendant in SCC Suit No.94 of 2010 which has been filed against him by respondent no.2 and is being heard by respondent no.1.

5. The defendant/petitioner filed written statement on 4.5.2011 but did not deposit any amount of rent, damages for use and occupation, court fees, counsels' fees or interest till date. Several dates have been fixed by the learned Trial Court but no amount has been deposited by the defendant/petitioner.

6. The landlord/respondent no.2 has specifically stated in para no.6 of the counter affidavit that Rs.4,23,500/- is due as against the tenant as on today. The defence of the petitioner was struck of vide order dated 20.12.2011 but he did not prefer any revision nor challenged the order anywhere. This order has attained finality between the parties. Now at the final stage he has filed this writ petition with a prayer to quash all the proceedings of the learned Trial Court in one stroke. The respondent no.2 has filed his evidence as PW1 on 6.4.2012 but the petitioner has not cross examined the respondent no.2 and continued to get the case adjourned on one pretext or the other exhibiting a growing tendency of the litigants to linger on the eviction proceedings on one pretext or the other.

7. In *Atmaram Properties v.Federal Motors, reported in 2005 (1) S.C.C. 705,* the Hon'ble Apex Court has held as under:

"The landlord / tenant litigation constitutes a large chunk litigations between in the courts and tribunals. The litigation goes on for unreasonable length of time and the tenants in possession of the premises do not miss any opportunity of filing appeals or revisions so long as they can, thereby, afford to perpetuate the life or litigation and continued in occupation of the premises."

8. In Gayatri Devi & ors. v. Shashi Pal Singh, reported in 2005 AIR SCW

2070, the Hon'ble Apex Court has held as under:

"This appeal demonstrates how a determined and dishonest litigant can interminably drag on litigation to frustrate the results of a judicial determination in favour of the other side.....

On 1.11.1987 the appellant committed perhaps the gravest blunder of her life of letting out the suit property to the respondent-tenant at a monthly rent of Rs.1300/-, which subsequently came to be increased to Rs.1500/- w.e.f. 1.1.1990.....

The history of this litigation shows nothing but cussedness and lack of bona fides on the part of the respondent. Apart from his tenacity and determination to prevent the appellants from enjoying the fruits of the decree, there appears to be nothing commendable in the case. Even before us the same arguments of fraud, and that the appellants were not legally owners of the suit property, were pleaded.....

In our view, the conduct of the respondent deserves condemnation which we indicate by imposition of exemplary costs of Rs.20,000/- on the respondent."

9. In *T.Arivandandam v. T.V. Satyapal and another reported in AIR 1977 SC 2421,* the Hon'ble Supreme Court has held:

"The sharp practice or legal legerdemain of the petitioner, who is the son of the 2nd respondent, stultifies the court process and makes decree with judicial seals brutum fulmen. The long arm of the law must throttle such litigative caricatures if the confidence and credibility of the community in the judicature is to survive."

10. Later on in *Rajappa Hanamantha Ranoji v. Mahadev Channabasappa & ors, reported in 2000 SCFBRC 321,* the Hon'ble Supreme Court has held as under:

"It is distressing to note that many unscrupulous litigants, in order to circumvent orders of the courts adopt dubious ways and take recourse to ingenious methods including filing of fraudulent litigation to defeat the orders of the courts. Such tendency deserves to be taken serious note of and curbed by passing appropriate orders and issuing necessary directions including imposing or exemplary costs."

11. In *Ravinder Kaur v. Ashok Kumar & anr. reported in 2003 AIR SCW 7158,* the Hon'ble Supreme Court has held as under:

"Courts of law should be careful enough to see through such diabolical plans of the judgment-debators to deny the decree-holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing law's delay and bringing bad name to the judicial system."

12. In *Dalip Singh v. State of U.P. and others, reported in (2010) 2 SCC 114,* the Hon'ble Supreme Court has held as under:

"In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

13. The Hon'ble Supreme Court in the above said case has further held as under:

"In K.D. Sharma v. Steel Authority of India Ltd. and others (2008) 12 SCC 481, the court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same rule was reiterated in G. Jayshree and others v. Bhagwandas S. Patel and others (2009) 3 SCC 141."

14. This is the experience of this Court that in last 40 years, a new breed of litigants has cropped up. Those, who belong to this breed, do not have any respect for truth. They shamelessly resort falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new breed of litigants, the Courts have, from time to time evolved new rules and, it is now well established, that the litigants, who attempt to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, are not entitled to any relief interim or otherwise. I find force while holding this by the law laid down in *Dalip Singh v. State of U.P. (2010) 2 SCC, 114* by Hon'ble Supreme Court. The Hon'ble Apex Court has held in *Welcome Hotel v. State of A.P. AIR 1983 S.C. 1015* that a party who has mislead the Court in passing an order in its favour, is not entitled to be heard on the merits of the case.

15. In view of the discussions as made above, the petitioner is unnecessarily dragging the landlord into this controversy and getting the disposal of case delayed by hook or by crook. Reliance has been placed by the petitioner on the judgments passed by this Court in *Pyare Lal v. District Judge, Lucknow and others reported in 2010 (2) ARC 260 and Mahesh Kumar v. Shibbo Singh & anr, reported in 2008 (1) ARC 436,* which are of no help.

16. Under these circumstances, the writ petition is devoid of merits and is, hereby, dismissed with special cost of Rs.25,000/-. However, the learned Trial Court may exercise its discretion liberally, if the petitioner deposits entire amount of Rs.4,23,500/-, due as against him and the cost of Rs.25,000/- on the date fixed before the learned Trial Court and may allow him

to cross examine PW1 but, shall not adjourn the case so as to delay its disposal.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.08.2012

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Misc. Bench No. - 2965 of 2012

M/S. Fartuna Foundations Engineers & Consultant (Pvt.)Ltd. ...Petitioner
Versus
Industrial Financial Corporation Of India Ltd. And Others ...Respondents

Counsel for the Petitioner:
Sri A.P.Singh
Sri A S Rakhra

Counsel for the Respondents:
Sri G S Mishra

Constitution of India, Article 226- quashing of auction-sale proceeding - after fall of hamper-highest bidder fail to deposit 25% of auction sale amount- admittedly deposited 25 % amount on next date-held-vitiate entire proceeding of auction and sale-accordingly quashed.

Held: Para 12

In view of above, there appears to be no room of doubt that immediately after fall of hammer it shall be necessary for the auction purchaser to deposit 25 per cent of the amount of bid. Non-deposition shall vitiate the auction and sale proceeding. Accordingly, the writ petition deserves to be allowed on this solitary ground.

Case law discussed:
AIR 1950 SC 163; AIR 1969 SC 556; AIR 1954 SC 403; AIR 1953 SC 252; AIR 1961 SC 372; AIR 1967 SC 549; 2000 (10) SCC 482; 2002 (3) SCC; AIR 1990 SC 772; 2001 (9) SCC 99; 1980 (2) SCC 437

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

1. Heard Shri A.P.Singh, learned counsel for the petitioner and Shri G.S.Mishra learned counsel for the opposite parties no. 1 to 3. According to office report, notice was served on opposite party no. 4 but he didn't turn up. There is endorsement in the order sheet with regard to sufficiency of service of notice on opposite party no. 4. With the consent of parties' counsel, we proceed to decide the writ petition finally at admission stage.

2. Shri G.S. Mishra, learned counsel for the respondents has vehemently argued that the controversy may be relegated to alternative forum i.e. Tribunal. However, after hearing learned counsel for the parties at length, we are of the view that the petition may be decided on pure question of law, hence, it is not necessary to relegate the matter to alternative forum. It has been settled by a catena of decisions of Hon'ble Supreme Court that the statutory alternative remedy is no bar for this Court to exercise power under Art. 226 of the Constitution of India in case petition does not involved disputed question of facts vide **AIR 1950 SC 163, Rasid Ahmad Vs. Municipal Board Kairana; AIR 1969 SC 556, Babu Ram Vs. Zila Parishad; AIR 1954 SC 403, Himmat Lal Vs. State of Madhya Pradesh,AIR 1953 SC 252, State of Bombay Vs. United Motors, Calcutta Discount Company Vs. I.T.O. AIR 1961 SC 372; Bhopal Sugar Industry Vs. STO, AIR 1967 SC 549,2000 (10) SCC 482, Union of India Vs. State of Haryana, 2002 (3) SCC, Maharashtra State Judicial Services Association Vs. High Court of Judicature at Bombay,AIR 1990 SC 772, Salonah T. Company Vs. Superintendent of Taxes; 2001 (9) SCC 99, T.N.Transport Corporation VS.**

Neethivalangan and 1980 (2) SCC 437, Shiv Shankar Dal Mill VS. State of Haryana.

3. The present writ petition under Article 226 of the Constitution of India has been preferred by the petitioner challenging the impugned auction and sale proceeding dated 15.3.2012. Various grounds have been raised by the petitioner while assailing the impugned auction and sale proceeding, in which the respondent no. 4 stood as the highest bider. However, the petition may be decided on only one ground, hence, leaving other grounds open, we proceed to decide finally on the solitary ground raised by the petitioner keeping in view the averment contained in Para 6 of the writ petition. According to para 6 of the writ petition, auction and sale proceeding took place on 15.3.2012. Admittedly, under the terms and condition it was incumbent upon the highest bidder to deposit 25 per cent of the sale amount immediately and rest 75 per cent be deposited within 30 days. For convenience Para 6 of the writ petition is reproduced as under:-

"That it is respectfully submitted that the opposite party no. 4 was declared successful bidder on 15.3.2012 in respect of property, in question, and did not deposit 25% of the sale amount with the officer conducting the sale despite the fact the opposite party no. 4 was declared successful bidder on 15.3.2012. The opposite parties particularly Recovery Officer and Recovery Inspector of Debts Recovery Tribunal permitted the opposite party no. 4 to deposit 25% of the sale amount 16.3.2012 and by further permitting the opposite party no. 4 to deposit rest of the amount within 30 days from 15.3.2012. It is wholly without jurisdiction and contrary to law."

4. The averment contained in para 6 of the writ petition has not been categorically denied by the respondents. The reply to Para 6 of the writ petition is reproduced as under:-

"Para 14 to the counter affidavit:-

That the contents of para 6 as stated are wrong, false and misleading hence denied. The defendant no. 4 highest bidder had deposited 25% of the bid amount in the given time and rest 75% amount has not been deposited within the time as provided and they have moved an application dated 13.4.2012 to set aside the auction and refund of Rs. 2,29,75,000.00 (25 % of the bid amount) against it, the Opposite Party no. 1 has filed their objection praying therein to forfeit the earnest money as per Section 58 and the property may be put for sale forthwith. Application dated 13.4.2012 and its objection is being filed as Annexure no. C-2 and C-3 respectively. However, no prejudice has been caused to the petitioner."

5. During the course of hearing, learned counsel for the respondent admits that the auction took place on 15.3.2012 but 25 % of the total amount was deposited on the next date i.e. 16.3.2012. Admittedly, terms and condition with regard to deposit of an amount was not fulfilled by the auction purchasers.

6. Shri A.P.Singh, learned counsel for the petitioner had invited attention to the Schedule II and III of the Income Tax Act, which admittedly apply in view of Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

7. Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act,

1993, for convenience, is reproduced as under:-

*"**Application of certain provisions of Income Tax Act**--The provisions of the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the income tax:*

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act."

8. In view of above, the procedure contained in Rule 57, Part III of the Schedule II of the Income Tax Act regulate the auction and sale proceeding. Rule 57 of the Schedule II of the Income Tax Act, a copy of which has been filed as Annexure-4 to the writ petition, is reproduced as under:-

***"Deposit by purchaser and resale in default--**(1) On every sale of immovable property, the person declared to be the purchaser shall pay, immediately after such declaration, a deposit of twenty-five per cent on the amount of his purchase money, to the officer conducting the sale; and, in default of such deposit, the property shall forthwith be resold.*

(2)The full amount of purchase money payable shall be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of the sale of the property."

9. A plain reading of Rule 57, Schedule II of the Income Tax Act, reveals that on every sale of immovable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase money to the officer conducting the sale.

10. Admittedly, in the present case, 25 per cent of the amount was not deposited by the auction purchaser. UPZA and LR Act and Rules framed thereunder contains para-materia provision with regard to deposit of 25 per cent of the sale amount. While dealing with the para-materia provision a Division Bench of this Court in a case reported in **2006 (24) LCD 1, M/s Swadeshi Polytex Limited Vs. Board of Revenue, U.P. and others** (Judgement delivered by one of us, Hon'ble Justice Devi Prasad Singh), held that in case 25 per cent of the auction money is not deposited by the auction purchaser, it shall vitiate the auction.

11. It may be noted that in the case of Swadeshi Polytex Limited (supra) while considering the paramateria provision, the Apex Court judgement has been relied upon which deals with the similar situation. For convenience, para 38 of the said judgement is reproduced as under:-

*"38. A division bench of this Court in a case reported in **2000 (2) AWC 1505, Manminder Singh Vs. Chandra Cold Storage & others** held that the deposition of the entire amount by the auction purchasers will not create any right unless the auction is held in accordance to statutory provisions. It has been further held that thirty days clear notice is mandatory to hold an auction and sale in pursuance to provision contained in the Act and Rules framed thereunder. It has been further held that 25% of the amount should also be deposited immediately.*

Keeping in view the infirmity in the auction and sale proceedings, the Division Bench while exercising powers under Special Appeal had upheld and affirmed the judgment of Hon'ble Single Judge of this Court whereby the auction and sale was set-aside on account of non-compliance of statutory provisions under the Act and Rules.

Relevant portion from the case of Manminder Singh (supra) is reproduced as under:-

"We agree that the view taken in Raghunath Prasad (supra) and accordingly held that the appellant herein acquired no right in the property merely because he had deposited the entire amount offered by him at the auction sale. On merit also, the auction sale was liable to be set-aside firstly due to the reason that thirty days clear notice was not given and secondly, because 25% of the amount of the bid was not deposited "immediately" as stipulated by Rule 285D of the Rules of 1952 in asmuchas the deposit by Cheque was not a valid deposit as per law laid down by the Apex Court in Mahmood Ahmad Khan (dead) through L.Rs V.Ranbir Singh and others, 1995 AWC 896. We are of the view that the auction sale was not sale at all in the eye of law and 25% of the purchased money had not been deposited "immediately" on the appellant being declared as the highest bidder. In the circumstances, it would be deemed that no sale had taken at all as held by the Apex Court in Mani Lal Mohan Lal V. Syed Ahmad, AIR 1954 SC 349."

12. In view of above, there appears to be no room of doubt that immediately after fall of hammer it shall be necessary for the auction purchaser to deposit 25 per cent of the amount of bid. Non-deposition shall vitiate the auction and sale proceeding. Accordingly, the writ petition deserves to be allowed on this solitary ground.

13. In view of above, writ petition is allowed. A writ in the nature of certiorari is issued, quashing the impugned auction and sale proceeding dated 15.3.2012 held in pursuance to sale notice/proclamation, a copy of which has been filed as Annexure-2 to the writ petition and the consequential order dated 16.3.2012, a copy of which has been filed as Annexure-1 to the writ petition with consequential benefit. Respondents may proceed a fresh with the auction and sale proceeding keeping in view the observation made hereinabove and in accordance with law expeditiously.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.08.2012

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.

Writ Petition No.1034 (S/B) of 2012

Amitabh Thakur ...Petitioner
Versus
Union of India and others
...Opposite parties

Constitution of India, Article 226- Alternative Remedy-petitioner seeking remedy to from Rules/Regulations-regarding promotion of the members of all India Services-plea that the petitioner not seeking any personal relief-hence direction to-approach before Central Administrative Tribunal-can not be an alternative forum-at most Writ Petition be converted in Public Interest Litigation-held-in view of L.Chandra Kumar case only Tribunal has jurisdiction to entertain such original application-second prayer for conversion into P.I.L.

also not tenable in service matters-petition dismissed.

Held: Para 13 and 14

It may be noted that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the extra ordinary jurisdiction of the High Court to issue a prerogative writ as the writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum.

During the course of arguments, learned Counsel for the petitioner submitted that the instant matter may be treated as Public Interest litigation for the reason petitioner is not seeking relief for himself alone but for the cadre. In this regard, we would like to point out that in service matters Public Interest Litigation is not maintainable [Duryodhan Sahu (Dr) v. Jitendra Kumar Mishra (2004) 3 SCC 363, Dattaraj Nathuji Thaware vs. State of Maharashtra and others (2005)1 SCC 590]. In Hari Bansh Lal. V Sahodar Prasad Mahto and others (2010)9 SCC 655 the Apex Court propounded that except for a writ of quo warranto, public interest litigation is not maintainable in service matters. Thus the request of the petitioner is refused.

Case law discussed:

[1997 Supreme Court Cases (L&S) 577]; [(2002) 5 Supreme Court Cases 521]; (2010) 8 SCC 110; (2004) 3 SCC 363; (2005) 1 SCC 590; (2010) 9 SCC 655

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

1. The instant writ petition has been filed in the Registry on 13.7.2012, under the heading "Miscellaneous Bench" but the Stamp Reporter on the basis of relief claimed by the petitioner opined that the matter is cognizable by the Bench dealing with "Service Bench" matter. Accordingly, the instant writ petition was placed by the Registry before this Court having jurisdiction of "Service Bench" on 17.7.2012.

2. On 17.7.2012, Sri Asok Pande, learned Counsel for the petitioner has submitted that though he had filed the instant writ petition under the heading "Miscellaneous Bench" but the Stamp Reporter has marked the instant writ petition as "Service Bench" and sent it to this Court. In order to verify the facts, we summoned the Stamp Reporter, who submitted before us that on account of the relief so claimed by the petitioner in the instant writ petition, it has been marked as a matter of "Service Bench" and as such Counsel for the petitioner was requested in writing to correct the heading, who declined to do so and, as such, the Stamp Reported sent the matter to the Computer Section for listing the same before the Service Bench. He submits that the report so submitted on 13.7.2012 is also on record. Consequently, Sri Asok Pande, learned Counsel for the petitioner prayed that he may be granted time to file objection to the report submitted by the Stamp Reporter and as such, this Court, vide order dated 17.7.2012, granted time to Sri Asok Pande to file objection to the report of the Stamp Reporter.

3. In compliance of the order dated 17.7.2012, Sri Asok Pande, learned Counsel for the petitioner has filed an objection to the report of the Stamp Reporter on 19.7.2012. Thereafter, this Court, vide order dated 19.7.2012, directed the Stamp Reporter to submit his reply to the objection, so filed by the petitioner's Counsel.

4. Pursuant to the order dated 19.7.2012, the Stamp Reporter has submitted a report dated 23.7.2012, which is reproduced as under :

"In compliance with the order dated 19.07.2012 passed in the above noted writ petition, it is respectfully submitted that while passing the writ petitions preferred under Article 226/227 of the Constitution of India, the provisions of Chapter XXII of High Court Rules and the orders passed by the Hon'ble the Chief Justice, time to time, are followed to decide the forum etc. in question. The last order dated 30.03.2010 passed by the Hon'ble Acting Chief Justice in his regard is enclosed herewith for the kind perusal of Hon'ble the Court, **as per directions the service matters of Class III and Class IV employees are heard by Hon'ble the Single Judge and of the officers of Class I and Class II are to be heard by the Division Bench of this Hon'ble Court.**

Further, it is respectfully submitted that different Benches are constituted to decide such matters, as allotted by Hon'ble the Chief Justice, time to time. The instant writ petition has been filed showing the group as Misc. Bench, whereas the contents of the petition as well as the prayer clause clearly shows that the matter relates to the framing of promotion rules and promotion etc. of the officers of the All India Services, i.e. Indian Administrative Services, Indian Police Services and Indian Forest Services, e.g., in para 1 of the petition, it has been categorically been stated that the petitioner is filing the present writ petition for the writ of mandamus against the respondents to frame proper rules or regulations with regard to the promotion matters of officers of the All India Services including the Police Services to which the petitioner belong. The prayer clause of the writ petition also shows that the relief has been claimed for (i) to frame proper rules and/or regulations with regard to promotion matters of officers of the All India Services including Indian Police Services, and (ii) to quash all promotion of the officers made so far.

Keeping in view the contents of the writ petition and the prayer clause the petition has been passed as Service Bench matter and the Learned Counsel for the petitioner was requested and informed on phone to correct the group of the case. The said fact is mentioned in the office report dated 13.07.2012.

So far as the objection of the Learned Counsel for the petitioner is concerned as mentioned in para 4 of his objection dated 19.07.2012, it is respectfully submitted that the said objection appears to be misconceived keeping in view the Standing Orders of Hon'ble the Chief Justice.

Submitted for the kind perusal and suitable orders/directions."

5. For proper adjudication of the matter, we think it appropriate to reproduce the reliefs claimed by the petitioner in the instant writ petition as well as the Standing Order dated 30.3.2010 of the Hon'ble Chief Justice, which are as under :

PRAYER

"Wherefore, it is most respectfully prayed that this Hon'ble Court may be pleased to -

(a) Issue a writ of Mandamus directing the concerned respondents to immediately frame proper Rules and/or Regulations as regards promotion related matters of the officers of the All India Services (including the Indian Police Service) in accordance with the provisions contained in section 3 of the All India Services Act 1951.

(b) Issue a writ of Mandamus directing the concerned respondents to cancel/quash all the promotions of the officers of the All India Services (including the Indian Police Service) made so far in the absence of such proper Rules and/or Regulations."

"Standing Order dated 30.3.2010

ORDER

In modification of earlier orders in this regard, passed in exercise of the powers under proviso (a) to Rule 2- Chapter V of the Rules of the Court, 1952, Volume-I and all other powers enabling in this behalf, I hereby order and direct that with immediate effect :-

A. Writ petitions relating to services of the following categories shall also be heard and disposed of by an Hon'ble Judge sitting singly :-

i. Teachers upto Intermediate College

ii. Employees of Class-III and IV, including those of educational institutions, armed forces and employees of the High Court.

Provided that if the relief claimed in the writ petition relates to a **service which matter is cognizable by Division Bench**, then that writ petition shall also be heard and disposed of by a Bench of two Hon'ble Judges.

and all other writ petitions relating to services shall be heard and disposed of by a Bench of two Hon'ble Judges.

B. Writ Petition challenging the orders of the **Chancellor** relating to service or otherwise shall be heard and disposed of by a Bench of two Hon'ble Judges."

6. From the perusal of the reliefs, reproduced hereinabove, claimed by the petitioner through the instant writ petition and the report of the Stamp Reporter dated 23.7.2012 as well as Standing Order dated 30.3.2010 of Hon'ble Chief Justice, we are of the view that the Stamp Reporter has rightly placed the matter before this Bench having jurisdiction of "Service Bench" matter. Therefore, the plea of the petitioner's Counsel that the instant writ petition is cognizable by a Bench dealing with "Miscellaneous Bench", is hereby rejected.

7. Now, we have heard Sri Asok Pande, learned Counsel for the petitioner and Sri Neeraj Chaturvanshi, learned Counsel for the Union of India on merit.

8. Sri Neeraj Chaturvanshi, learned Counsel for the Union of India has raised a preliminary objection that the petitioner has got equally efficacious alternative remedy by filing Original Application before the Central Administrative Tribunal, to which learned counsel for the petitioner instead of advancing any submission on the ground of alternative remedy has started arguing the matter on merit, saying that through the instant writ petition, the petitioner did not seek any relief for himself but it has been filed in the nature of Public Interest Litigation so as to frame proper rules/regulations as regards promotion related matters of the officers of the All India Services including the Indian Police Service in accordance with the provisions contained in Section 3 of the All India Services Act, 1951. Moreso, the Central Administrative Tribunal is not a competent authority to issue a writ in the nature of Mandamus directing the Union of India to frame such Rules/Regulations.

9. The Apex Court in the case of ***L. Chandra Kumar Versus Union of India and others*** [1997 Supreme Court Cases (L&S) 577 has held that the Tribunals are competent to hear the matters where the vires of statutory provisions are questioned and also have power to test the vires of subordinate legislations and rules and as such, the Tribunal would very well look into the illegality of the Government Orders, which are being assailed in the instant writ petition.

10. The Apex Court in the case of ***Secretary, Minor Irrigation & Rural Engineering Services, U.P. and others Versus Sahngoo Ram Arya and another*** [(2002) 5 Supreme Court Cases 521], has held that when the statute has provided for the constitution of a Tribunal for adjudicating the disputes of a government servant, the fact that the Tribunal has no authority to grant an interim order is no ground to bypass the said Tribunal. It was also held that in an appropriate case after entertaining the petitions by an aggrieved party, if the Tribunal declines an interim order on the ground that it has no such power then it is possible that such aggrieved party can seek remedy under Article 226 of the Constitution but that is no ground to bypass the said Tribunal in the first instance itself.

11. Recently, the Apex Court in **United Bank of India v. Satyawati Tondon** (2010)8 SCC 110 observed as under:-

"It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but there can be no reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc and that the particular legislation contains a detailed mechanism for redressal of his grievance."

12. Thus by a series of decisions it has been settled that the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ, if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

13. It may be noted that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the extra ordinary jurisdiction of the High Court to issue a prerogative writ as the writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum.

14. During the course of arguments, learned Counsel for the petitioner submitted that the instant matter may be treated as Public Interest litigation for the reason petitioner is not seeking relief for himself alone but for the cadre. In this regard, we would like to point out that in service matters Public Interest Litigation is not maintainable **[Duryodhan Sahu (Dr) v. Jitendra Kumar Mishra** (2004) 3 SCC 363, **Dattaraj Nathuji Thaware vs. State of Maharashtra and others** (2005)1 SCC 590]. In **Hari Bansh Lal. V Sahodar Prasad Mahto and others** (2010)9 SCC 655 the Apex Court propounded that except for a writ of *quo warranto*, public interest litigation is not maintainable in service

matters. Thus the request of the petitioner is refused.

15. For the reasons aforesaid, the writ petition is dismissed on the ground of availability of alternative remedy before the Tribunal.

16. Lastly, learned Counsel for the petitioner also requested for granting permission to approach the Apex Court, which is refused as there is no substantial question of law involved in the matter. The issue raised in the writ petition is already settled by number of decisions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.08.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Single No. - 7028 of 2011

C/M Evergreen Higher Secondary School Badhuwa Mau ...Petitioner
Versus
State of U.P. Thru. Secy. Revenue and others ...Respondents

Counsel for the Petitioner:
Mohd. Babar Khan

Counsel for the Respondents:
C.S.C.
Sri R.N. Gupta

U.P. Zamindari Abolition & Land Reform Act 1950, Section-122-B-cancellation of Patta-petitioner running school over the plot in question-moved application with offer to hand over land of equal valuation-under provisions of Section 161-plots in question are Banjar Land-having no public utility-direction given to the authority concern to take appropriate decision-till final decision no coercive method be adopted.

Held: Para 11

Thus, in view of the aforesaid facts and also taking into consideration that the land in question is a banzar/barren land of Gaon Sabha, which is not of public utility, so in the interest of justice writ petition is disposed of with a direction that the petitioner shall offer a land equal to the area of land which is the subject matter of the present case on which the petitioner's school is running at the same circle rate as per the provisions provided under Section 161 of the U.P. Z.A. & L.R.Act, 1950 within a period of four weeks from today to the opposite party no.3/Sub-Divisional Officer, Tehsil Sandila, District-Hardoi and the said authority shall pass appropriate order within a further period of four weeks and if the Sub-Divisional Officer, Tehsil Sandila, District-Hardoi/opposite party no.3 accepts the proposal in question, land in dispute will be vested with the petitioner.

Case law discussed:
2010 (28) LCD 1343; (1993) 1 SCC 645

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

1. Heard Mohd. Babar Khan, learned counsel for the petitioner, learned State Counsel as well as Shri R. N. Gupta, learned counsel appearing on behalf of opposite party no.5 and perused the record.

2. The controversy in the present case relates to land recorded as plot no.384 area 0.253 hectares and plot no.434 area 0.253 hectares situated at village Badhuwa Mau, post Raison, Tehsil Sandila, District Hardoi.

3. As per version of the petitioner, the same has been allotted to the petitioner by means of the resolution dated 20.11.2003 (Annexure No.3) passed by opposite party no.5/Pradhan, Gram

Sabha Bdhuwa Mau, Tehsil Sandila, District-Hardoi. Thereafter, the petitioner constructed an institution in the name and style of Evergreen Higher Secondary School and at present more than 500 students are studying.

4. Subsequently, in the matter in question a proceeding under Section 122-B of the U.P.Z.A. & L.R. Act has been initiated against the petitioner on the ground that the land in question is a banzar/barren land, cannot be allotted by way of patta/lease in favour of the petitioner and in the said proceeding lastly an order dated 27.10.2010 has been passed against him by which the patta of the land in question has been cancelled and a penalty of Rs.10,116/- has been imposed. Aggrieved by the said fact, the present writ petition has been filed by the petitioner.

5. Learned counsel for the petitioner submits that the petitioner is ready to offer equal area of land to the Gaon Sabha as per the circle rate in view of the provisions as provided under Section 161 of the U.P. Z.A. & L.R.Act, 1950 (hereinafter refereed to as the Act). In this regard a supplementary affidavit has already been filed sworn by Mohd. Irfan Khan dated 29.11.2011, accordingly, it has been submitted that the land in dispute be given to him and be recorded in the revenue record.

6. Learned counsel for the petitioner in support of his offer placed reliance on the judgment given by this Court in the case of ***Ram Bhujharat Singh Inter College Erstwhile Janta Janardan Vs. Board of Revenue, U.P. Lucknow and Ors. 2010 (28) LCD 1343*** wherein paragraph nos. 6 and 7 held as under:-

" Para 6- Thus, he submits that if this court does not interfere in the matter, the Institution, which is in the interest of students may be finished. He further informs that likewise several other institutions have been allotted the land where the Schools are running wihtout any action adverse against them. However, though he claims his substantive right of allotment under Section 195 of the U.P.Z.A. & L.R.Act, but I am of the view that the same is not open for the private educational institution.

Para 7- The lease was granted on 1.8.1967 and 5.10.1974 in favour of the petitioner. Since I am of the view that the land could not have been allotted to the petitioner-Institution i.e. private Institution by the Land Management Committee, the possession or long entry of the lessee, cannot create a perpetual right in his favour. However, considering the submission of the learned counsel for the petitioner that under the bonafide belief of his right accrued on the basis of lease, the petitioner already constructed a building and further in the legitimate expectation, he extends his willingness to offer the other private land of the same very area to the Gaon Sabha, in the interest of justice, I hereby restrain the authorities concerned to take any action against the petitioner subject to offer made by the petitioner of the private land, as aforesaid, within three months and thereafter the proceeding of exchange shall be completed within next three months. If the petitioner fails to offer the same very land within the period stipulated here-in-above, the authorities would be at liberty to proceed against him."

7. And also on the judgment and order dated 12.5.2011 passed in Writ Petition No.2455 of 2011, on reproduction reads as under:-

"Application is allowed.

Order dated 22.4.2011 is corrected as under :

"Heard Sri Rajeev Singh Chauhan learned counsel for the petitioner and learned Standing Counsel for opposite parties no. 1 to 3 and Sri R.N. Gupta for opposite party no. 4.

The petitioner has very fairly stated before this court that the land on which the Inter College has been constructed does belong to land of Gaon Sabha. He does not challenge the impugned orders on merits. He says that he is willing to give equivalent land to the Gaon Sabha which is available with him. He argues that since the college has been constructed and students are studying, hence in the interest of students as well as the other villager in general the college may not be demolished and education may not be disrupted. There is a provision of Section 161 U.P.Z.A. & L.R. Act for such purpose.

The petitioner says that he has moved application under Section 161 within two weeks.

If such an application is moved within two weeks from today before the Collector / Additional Collector, the same shall be decided on merits after hearing the parties positively within a period of three months from the date of filing of the application.

In case the application is allowed the orders impugned in this writ petition dated 28.3.2011 and 11.1.2011 (as contained in Annexure nos. 1 & 2 to the writ petition) shall merge int he order of Collector / Additional Collector, but in case of failure these orders shall revive automatically and the stay granted by this court shall stand vacated automatically. No further orders will be required.

Till that decision by the Collector / Additional Collector the orders impugned shall remain stayed."

8. In view of the abovesaid facts, learned counsel for the petitioner requests that the present writ petition may also be disposed of in terms of the said judgment.

9. Shri R. N. Gupta, learned counsel for the respondent as well as learned State Counsel have no objection to the abovesaid prayer.

10. As per the the abovesaid facts and taking into consideration that at present on the land in dispute, an institution in the name and style of *"Evergreen Higher Secondary School"* is running and imparting education to 500 students to achieve the Constitutional goal as provided under Article 21 of the Constitution of India. While interpreting the same Hon'ble the Supreme Court in the case of ***Unni Krishnan vs. State of A. P. (1993) 1 SCC 645***, held that it is implicit in Article 21 that every child upto 14 years has a fundamental right to free education. After that it is subject to limits of economic capacity and development of the State as well as Right to Education Act, 2009.

11. Thus, in view of the aforesaid facts and also taking into consideration that the land in question is a banzar/barren land of Gaon Sabha, which is not of public utility, so in the interest of justice writ petition is disposed of with a direction that the petitioner shall offer a land equal to the area of land which is the subject matter of the present case on which the petitioner's school is running at the same circle rate as per the provisions provided under Section 161 of the U.P. Z.A. & L.R.Act, 1950 within a period of four weeks from today to the opposite party no.3/Sub-Divisional Officer, Tehsil Sandila, District-Hardoi and the said authority shall pass appropriate order within a further period of four weeks and if the Sub-Divisional Officer, Tehsil Sandila, District-Hardoi/opposite party no.3 accepts the proposal in question, land in dispute will be vested with the petitioner.

12. For a period of two months or till the decision is taken by the Sub-Divisional Officer, Tehsil Sandila, District-Hardoi/opposite party no.3 no coercive measure shall be taken against the petitioner.

13. If the petitioner fails to offer the proposal in question within the statutory period as stated herein above, the authorities are at liberty to proceed against him in accordance with law.

14. With the above observations, writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.08.2012

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition No. 1567 of 1997 (S/S)

Vishnu Kumar ...Petitioner
Versus
Presiding Officer, Labour Court Faizabad and another ...Opp. Parties

U.P. Industrial Dispute Act 1947-Section 33-C(2)-claim for arrears of wages-alleging to be Seasonal Chaukidar-status of petitioner still under consideration-unless until status, nature of duty adjudicated-proceeding under Section 33-C-(2) not maintainable.

Held: Para 20

In the light of the observations made above without disputing the definition of seasonal workman as given under the Standing Order, I find that the petitioner's status of Seasonal Chaukidar is yet to be determined by the Labour Court. Therefore, I am of the view that until and unless same is determined finally, the petitioner has no right to claim any benefit arising out of the said status under Section 33 C(2) of the Industrial Disputes Act. Therefore, I do not find error in the award dated 26.10.1996, passed by the Presiding Officer, Labour Court, Faizabad.

Case law discussed:

1999 (82) FLR 137; C.M.W.P. No. 6878 of 1992; 2009 (123) FLR 773; AIR 1964 Supreme Court 743; 1996 (2) Supreme Court 562; 2010 (125) FLR 523; 1983 Supreme Court Cases (L&S) 527 (1983) 4 SCC 293; AIR 1964 Supreme Court 752; (1995) 1 Supreme Court Cases 235; AIR 1968 SC 218

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

1. Heard Mr Radhey Shyam Mishra , learned counsel for the petitioner and

Mr P.K. Sinha, learned counsel for the respondents.

2. Petitioner has challenged the order dated 26.10.1996, passed by the Labour Court Faizabad in Case No. 22 of 1994 under Section 33 -C of the Industrial Disputes Act, 1947 with the prayer to compute his wages in terms of notification dated 31.1. 1991 whereby wage structures of the different kind of employees in the Vaccum Pan Sugar Factories have been revised.

3. The petitioner claims his status as a Seasonal Guard in the factory of opposite party no. 2. It is stated that he worked during the crushing season 1982-83 to 1992-93, but he was not paid the wages as was admissible to the Seasonal Guards of the factory. He claimed difference of salary amounting to Rs.41723. 25. The claim was referred for its adjudication under Section 33-C (2) of the Industrial Disputes Act, 1947 and was registered as Case No. 22/1994.

4. The respondents contested the matter and contended that the petitioner was purely a Daily Wages employee. He was never engaged as a Seasonal Guard in the mill, therefore, he was not entitled for the revised pay applicable to the seasonal guard. It was also stated that the recommendation of the Wage Board is not applicable to the daily wager employees. Their matter is covered under the payment of Minimum Wages Act. It is further stated that so far as payment of minimum wages is concerned, same has been paid to the petitioner. The respondent also raised objection against the maintainability of the case. After hearing both the parties the Labour Court framed preliminary question as follows;

" Whether the instant case is legally maintainable under Section 33-C(2) of the Industrial Disputes Act?"

5. Petitioner's case before the Labour Court was that at the time of engagement he was paid Rs.200/- per month. Subsequently the same was increased to Rs.600/- per month. He also claimed that he worked as a Guard alike to seasonal permanent employee. He also admitted that till that time he was not declared as seasonal permanent employee. Moreover, he also produced two witnesses ,namely, Madhav Raj Awasthi and Shri Ram in his support, who also admitted that the petitioner was not declared by any court as seasonal permanent guard.

6. In defence the employer produced a document brought on record in the case of C.B. Case No. 23 of 1993 which reveals that before Concillation Officer the petitioner prayed to declare him as a Seasonal Guard and pay the wages in accordance with the recommendation of Third Wage Board.

7. The Labour Court adjudicated upon the matter and on the basis of averments of the employer as well as employee it held that the petitioner was not a seasonal permanent employee. Therefore, he is not entitled for the payment under the pay structure fixed by the said notification on the recommendation of the wage board. That being so the petitioner has no right to claim the determination of wages under Section 33-C of the Industrial Disputes Act. Before this Court also, the learned counsel for the petitioner Mr Radhey Shyam Mishra took the same stand as was taken earlier.In support of his

submission he also cited following decisions;

(I) Ajaib Singh Vs. Sirhind Co-operative marketing -cum-Processing Service Society 1999 (82) FLR 137,

(ii) Awadhesh Singh Vs. The Kisan Sahkri Chini Mills U.P. Ltd. and others(Allahabad High Court) C.M. W.P.No.6878 of 1992,

(iii) Purshottam and others Vs. Managing Director U.P. State Sugar Corporation Ltd. 2009(123) FLR 773,

(iv) The Central Bank of India Vs. P.S. Rajgopalan AIR 1964 Supreme Court 743,

(v) National Council for Cement and Building Materials Vs. State of Haryana and others 1996(2) Supreme Court 562

(vi) Dwarikesh Sugar Industries Ltd. Vs. Presiding officer, Labour Court Rampur 2010 (125) FLR523,

(vii) D.P. Maheshwari Vs. Delhi Administration and others 1983 Supreme Court Cases (L&S) 527 (1983) 4 SCC 293.

8. In the cases of **D.P. Maheshwari and Dwarikesh Sugar Industries** (supra) should make an effort to adjudicate upon the issue finally instead of taking preliminary issue . In the case of **Ajaib Singh** (supra) Hon'ble Supreme Court held that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay.

9. In the case of the **Central Bank of India Ltd**.(supra), Hon'ble the Supreme Court has held that policy of the Legislature in enacting Section 33 C is to provide a speedy remedy to the individual workman to enforce or execute their existing rights. It was further held that the claim under Section 33-C (2) clearly postulates that the determination of the question about computing the benefit in terms of money may in some cases have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-section (2). The Court further held that Section 33 C(2) takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers.

10. In the case of **Purshottam and others** (supra) this Court considered the definition of " seasonal workmen" as defined in para B 1(II) of the Standing Order, 1972 applicable in the sugar factories. The definition of "Seasonal Workman' is quoted hereunder:-

"(II) " A Seasonal Workman' is one who is engaged only for the crushing season provided that if he is a retainer, he shall be liable to be called on duty at any time in the off-season and if he refuses to join or does not join, he shall lose his lien as well as his retaining allowance. However, if he submits a satisfactory explanation of his not

joining duty, he shall only lose his retaining allowance for the period of his absence."

11. In light of the aforesaid provisions this Court observed that there is no category like " casual" employees rather there is classification of workmen under para B of the said order ,namely, permanent, seasonal, temporary, probationers, apprentices and substitutes and considering the fact that it is not a case of the respondent that the petitioners were not engaged in a season, this court declared the petitioners as seasonal workmen and further held that the word" casual" mentioned in the impugned order means seasonal employees.

12. In the case of **Awadhesh Singh**(supra) this Court further dealt with the standing order 1988 and held that it is not possible to accept the respondent's case that the petitioner was engaged to meet any casual requirement of the mill. The word" casual" in the context of employment normally means irregular or a happening by chance. Having allowed the petitioner to work as sheet writer/ weighment clerk successively during the major part of three crushing seasons, the respondents cannot be permitted in absence of any material to say that the appointment of the petitioner was made to meet any casual requirement occurring by chance. The petitioner has to be treated as a seasonal workman entitled to the reliefs claimed in the writ petition .

13. In order to discuss the scope of Section 33 C(2) of the Industrial Disputes Act (in short "the Act'), Mr P.K. Sinha, learned counsel for the respondents drew the attention of his Court towards the provisions of Section 33-C (2) of the Act which is reproduced hereunder;

"Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any questions arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government(within a period not exceeding three months).

14. He further drew the attention of this Court towards the Full Bench decision in the case of the **Bombay Gas Co. Ltd. Vs. Gopal Bhiva and others reported in AIR 1964 Supreme Court 752**. Hon'ble Suprme Court discussed the scope and effect of the provisions of Section 33-C (2) of the Act and the extent of the jurisdiction conferred on the Labour Court by it in light of the decision given in the case of Central Bank of India (supra).

15. On the point of limitation Hon'ble the Supreme Court held that the words" Section 33-C(2) are plain and unambiguous and it will be duty of the Labour Court to give effect to the said provisions without any consideration of limitation. On the question of right of the employee for entitlement of claim the Hon'ble Suprme Court expressed the opinion as under;

"It is true that in dealing with claims like bonus, industrial adjudication has generally discouraged laches and delay,

but claims like bonus must be distinguished from claims made under S. 33 C(2). A claim for bonus, for instance, is entertained on grounds of social justice and is not based on any statutory provisions. In such a case, it would, no doubt be open to industrial adjudication to have regard to all the relevant considerations before awarding the claim and in doing so, if it appears that a claim for bonus was made after long lapse of time, industrial adjudication may refuse to entertain the claim, or Government may refuse to make reference in that behalf, But these considerations would be irrelevant when claims are made under S.33 C(2) where these claims are, as in the present case, based on an award and are intended merely to execute the award. In such a case, limitation cannot be introduced by industrial adjudication on academic ground of social justice. It can be introduced, if at all, by the legislature. Therefore, we think that the Labour Court was right in rejecting the appellant's contention that since the present claim was belated, it should not be awarded."

16. In the case of **Municipal Corporation of Delhi Vs. Ganesh Razak and another, reported in (1995) 1 Supreme Court Cases 235** Hon'ble the Supreme Court discussed the nature of proceeding under Section 33-C(2) of the Act and after considering its constitution Bench decision given in the case of **Central Bank of India** (supra) Hon'ble Supreme Court held that the power of the Labour Court under Section 33 -C(2) extends to interpretation of the award or settlement on which the workman's right rests, like the Executing Court's power to interpret the decree for the purpose of execution, where the basis of the claim is referable to the award or settlement, but it does not extend to determination of the dispute of entitlement or the basis of the claim if there be no prior adjudication or recognition of the same by the employer. The Hon'ble Supreme Court further referred to another decision of **Bombay Gas Co. Ltd Vs. Gopal Bhiv** (supra) and held that the proceedings contemplated by Section 33-C(2) are analogous to execution proceedings and the Labour Court, like the Executing Court in the execution proceedings governed by by the Code of Civil Procedure , would be competent to interpret the award on which the claim is based. It is obvious that the power of the Executing Court is only to implement the adjudication already made by a decree and not to adjudicate a disputed claim which requires adjudication for its enforcement in the form of the decree. It also refers the decision of **Chief Mining Engineer, East India Coal Co. Ltd. Vs Rameshwar** AIR 1968 SC 218 in the following manner;

"It was held that the right to the benefit which is sought to be computed under Section 33-C(2) must be " an existing one, that is to say, already adjudicated upon or provided for". The propositions on the question as to the scope of Section 33 C (2) deducible from the earlier decisions of this Court were summarized and they including the following namely (SCR pp.142-144).

(1)The legislative history indicates that the legislature, after providing broadly for the investigation and settlement of disputes on the basis of collective bargaining, recognized the need of individual workmen of a speedy remedy to enforce their existing

individual rights and therefore inserted Section 33-A in 1950 and Section 33-C in 1956. These two sections illustrate cases in which individual workman can enforce their rights without having to take recourse to section 10 (1) and without having to depend on their union to espouse their case.

(3) Section 33-C which is in terms similar to those in Section 20 of the Industrial Disputes(Appellate Tribunal) Act, 1950 is a provision in the nature of an executing provision.

(5) Section 33-C (2) takes within its purview cases of workmen who claim that the benefit to which they are entitled should be computed in terms of money even though the right to the benefit on which their claim is based is disputed by their employees. It is open to the labour Court to interpret the award or settlement on which the workman's right rests.

(7) Though the court did not indicate which cases other than those under sub-section (1) would fall under sub-section (2), it pointed out illustrative cases which would not fall under sub-section (2) viz, cases which would appropriately be adjudicated under Section 10(1) or claims which have already been the subject matter of settlement to which Sections 18 and 19 would apply.

(8)Since proceedings under Section 33-C(2) are analogous to execution proceedings and the labour court called upon to compute in terms of money the benefit claimed by a workman is in such cases in the position of an Executing Court, the Labour Court like the Executing Court in execution proceedings governed by the Code of Civil Procedure, is competent under Section 33-C (2) to interpret the award or settlement where the benefit is claimed under such award or settlement and it would be open to it to consider the plea of nullity where the award is made without jurisdiction."

17. Ultimately Hon'ble the Supreme Court held that when a claim is made before the Labour Court under Section 33-C(2) that Court must clearly understand the limitations under which it is to function. It cannot arrogate to itself the functions - say of an Industrial Tribunal which alone is entitled to make adjudication in the nature of determinations (1) plaintiff's right to relief(ii) corresponding liability of the defendant including whether the defendant is, at all, liable or not or proceed to compute the benefit by dubbing the former as " Incidental' to its main business or computation. Hon'b;e Supreme Court further held that Labour court has no jurisdiction to first decide to workmen's entitlement and then to proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33 C (2) of the Act. It is only when entitlement has been earlier adjudicated or recognized by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33-C(2) like that of the Executing Court's power to interpret the decree for the purpose of its execution.

18. The respondent has also filed a supplementary counter affidavit stating

therein that the petitioner filed C.B. Case before the Concillation Officer, Faizabad through Shramik Kalyan Union, Chini Mill Nawabganj, Gonda for declaring him as a seasonal chaukidar in 1993 which was registered as C.B. Case No. 23 of 1993. The Concillation Officer on 2.9.1994 issued directions to keep the petitioner in engagement in the forthcoming crushing season and ensure the payment of wages. The respondent challenged the said order before this Court through writ petition being W.P.no. 5616(S/S) of 1994. This Court by means of order dated 5th April, 2012 quashed the directions issued by the Concillation Officer and directed the Concillation officer to proceed further with concillation proceedings which is pending consideration.

19. In light of the aforesaid fact, learned counsel for the respondent submitted that thus petitioner's claim to declare his status as a Seasonal Chaukidar is yet to be adjudicated upon. Therefore, at this stage , until and unless his status is finally determined, he cannot claim any benefit arising out of the status as claimed under the proceedings initiated under Section 33-C(2) of the Industrial Disputes Act.

20. In the light of the observations made above without disputing the definition of seasonal workman as given under the Standing Order, I find that the petitioner's status of Seasonal Chaukidar is yet to be determined by the Labour Court. Therefore, I am of the view that until and unless same is determined finally, the petitioner has no right to claim any benefit arising out of the said status under Section 33 C(2) of the Industrial Disputes Act. Therefore, I do not find error in the award dated 26.10.1996, passed by the Presiding Officer, Labour Court, Faizabad.

21. Accordingly the writ petition stands dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2012

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.
THE HON'BLE ARVIND KUMAR TRIPATHI (II), J.

First Appeal No. - 364 of 2011

Smt. Prem Jyoti and others ...Petitioner
Versus
Smt. Sushila Goel and another ...Respondents

Counsel for the Petitioner:
Sri Sami Ullah Khan
Sri V.M. Zaidi

Counsel for the Respondents:
Sri Ram Krishna Mishra

Family Courts Act 1984-Section 19- Appeal against order passed by Civil Court-execution proceeding subsequently transferred to Family Court-shall be treated to be possessed by competent jurisdiction-appeal against order passed by execution Court-held-not maintainable-except the order passed under Section 7 of Family Court Act.

Held: Para 9

The Family Courts Act 1984 has been enacted to provide for the establishment of family courts with a view to promote cancellation in, and secure speeding settlement of disputes relating to marriage and family affairs and for matters connected therewith. Section-7 of the Act deals with the jurisdiction of

family court. Family Court shall be deemed for the purposes of exercising jurisdiction to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the family courts extends. Explanation to sub section one delineates the various suits and proceedings regarding which a family court has jurisdiction. A family court is also a civil court and when it exercises jurisdiction other than the jurisdiction as mentioned in Section-7 of the Family Court Act, the order passed in such other suits or proceedings will not be amendable to appeal under Section 19 of the Family Courts Act. Only such orders which are passed by the court exercising the jurisdiction as enumerated in Section-7 will be subject matter of appeal under Section 19 of the Family Court Act.

Case law discussed:

(1980) 4 SCC 354

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

1. The present appeal has been filed under Section 19 of the Family Court Act 1984 against the order dated 26th September,2011 in Execution Case No. 13 of 2009 (Smt. Sushila Goel Vs. Krishna Mohan Goel and another). The court below by the order under appeal has rejected the objections purporting to have been filed under Section 47 of CPC., by the appellants herein.

2. The background facts may be noticed in brief. The decree holder Smt. Sushila Goel obtained a decree of divorce from the court of Civil Judge (Senior Division), Etawah as also decree for payment of maintenance, in Case No.1133/1988 decided on 23rd January, 2008. Under the said decree, it has been provided that Smt. Sushila Goel, decree holder is entitled to get a sum of Rs.10,00000/- as permanent alimony. She filed the Execution Case No. 14 of 2008 at Etawah. The said decree has been transferred to district Meerut and ultimately it reached to Family Court, Meerut. Before the transferee court, the present appellants, namely, Prem Jyoti and others filed objections under Section 47 CPC claiming that after the passing of the decree, the judgment debtor has executed three sale deeds dated 3rd May, 2008, 5th May,2008 and 12th May, 2008 in her favour. She also claims that she is legally wedded wife of the deceased judgment debtor. The court below by the order under appeal has dismissed the objections on the ground that the sale deeds are fictitious transactions. The sale deeds have been executed after passing of the decree with intention to avoid the payment of the decreetal amount.

3. When the appeal was taken up, a preliminary objection with regard to its maintainability was raised by the learned counsel for the respondent decree holder. He submits that the appeal under Section 19 of the Family Court is not maintainable as it arises out of execution proceedings relating to execution of a decree passed by the civil court.

4. In reply Sri V.M. Zaidi, learned Senior Counsel for the appellant submits that the decree has been transferred to the Family Court and every order and judgment passed by family court, except an interlocutory order, is appealable under Section 19 of the family court. Elaborating the argument, it was submitted that decree has been transferred to Meerut in exercise of power under Section 42 of the CPC.

5. We have considered the respective submissions of the learned counsel for the parties and perused the record. It could not be disputed by the learned counsel for the appellant that the order has been passed on execution side of the civil court decree. Section 18 of the Family Court Act provides for the execution of decrees and orders passed by a Family Court. It has been provided that a decree passed by the Family Court shall have the same force and affect as a decree or order of the civil court and shall be executed in the same manner as is prescribed by the Civil Procedure Code for the execution of decrees and orders. It follows that even a decree passed by the family court is liable to be executed as a decree of civil court and the provisions relating to the execution of decrees and orders of civil court would apply.

6. Section 42 of Civil Procedure Code deals with the powers of the court in executing transferred decree. The transferee Court shall have the same powers in respect of transferred decree as if it had been passed by itself.

7. Section 42 of Civil Procedure Code has been amended by U.P. Civil Laws (Reforms and Amendment Act) in the State of U.P. In Section 42 for the expression "as the court which pass it" substituted in place of "as if it had been passed by itself". The effect of the said amendment was considered by the Apex Court in the case of ***Mahadeo Prasad Singh and another Vs. Ram Lochan and others (1980) 4 SCC 354.*** It has been held that the effect of such substitution was that the powers of the transferee Court in executing the transferred decree became co-terminus with the powers of the court which had passed it.

8. In the case on hand, the decree has been passed by civil court and in any view of the matter particularly Section 18 of the Family Court, such decree is liable to be executed as a decree of civil court. It may be placed on record that even family court has a power of civil court. Merely because a civil court decree for the purposes of execution has been transferred to a court having family court jurisdiction will not in any manner convert the decree as if passed by family court or similarly, any order passed on the execution side by a family court shall not be treated as an order passed by family court within the meaning of Section 19 of the Family Court Act.

9. The Family Courts Act 1984 has been enacted to provide for the establishment of family courts with a view to promote cancellation in, and secure speeding settlement of disputes relating to marriage and family affairs and for matters connected therewith. Section-7 of the Act deals with the jurisdiction of family court. Family Court shall be deemed for the purposes of exercising jurisdiction to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the family courts extends. Explanation to sub section one delineates the various suits and proceedings regarding which a family court has jurisdiction. A family court is also a civil court and when it exercises jurisdiction other than the jurisdiction as mentioned in Section-7 of the Family Court Act, the order passed in such other suits or proceedings will not be amendable to appeal under Section 19 of the Family Courts Act. Only such orders which are passed by the court exercising the jurisdiction as enumerated in Section-

7 will be subject matter of appeal under Section 19 of the Family Court Act.

10. We have taken similar view in First Appeal No. 46 of 2007 (Rajiv Madan Vs. Smt. Achala Madan) decided on 30.7.2012. The relevant paragraph is quoted below:

We have given careful consideration to the above submission of the learned counsel for the appellant but it is difficult to agree with him. Indisputably, the order under appeal has been passed on the execution side by civil court. Even if a decree or order is passed by the Family Court for the purposes of execution, the remedy under section 19 of the Family Court shall not be available and the only remedy to an aggrieved party will be to challenge the order passed by the executing court in the same manner as is prescribed by the Code of Civil Court while executing a decree.

11. In view of the above, we are of the opinion that the present appeal is not maintainable. It is dismissed accordingly.

12. At the end, learned counsel for the appellant submits that the appellant may be permitted to convert the appeal into revision. We provide that the appellant may seek appropriate remedy before the appropriate forum and seek condonation of delay.

13. The office is directed to return the certified copies of the judgment and order of the court below within a week.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2012

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

Civil Misc. Writ Petition No. 18865 of 1997

The District Cooperative Bank Ltd Jaunpur ...Petitioner
Versus
The Labor Court, U.P. at Varanasi and another ...Respondents

Counsel for the Petitioner:
Sri Devendra Pratap Singh

Counsel for the Respondents:
C.S.C.
Sri K P Agarwal
Sri S.N. Dubey
Suman Sirohi
Sri V.K. Singh
Ms. Sumati Rani Gupta
Sri S.K. Singh

U.P. Industrial Dispute Act 1947 Section 33-C-(2)-Award of Labor Court regarding payment of wages-without adjudication of reference-order under Section 33-C-(2) execution in nature-in absence of adjudication-order passed u/s 33-C-(2)-held-exercise of excessive of power-not sustainable.

Held: Para 14

There being no such determination by a court of competent jurisdiction with regard to termination or dispensation of services of the respondent no.2, the provisions of Section 33-C (2) of the Industrial Disputes Act were not applicable and therefore, the award dated 10.03.1997 suffers from the vice of excessive jurisdiction and is accordingly, set aside. The writ petition is allowed.

Case law discussed:
(1978) 2 SCC in Para No. 4; (1995) 1 SCJ 177; (2001) 1 SCC 73; (2005) 8 SCC

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

1. By this petition, the petitioner is challenging the award dated 10.03.1997 passed by the Labour Court, Varanasi in Misc. Case No.85 of 1995 and 60 of 1996.

2. The claim of the respondent no.2 is that he was employed in the petitioner-District Cooperative Bank, Jaunpur on the post of Clerk in the year 1963-1964. He was placed under suspension by order dated 23.04.1967 and thereafter neither any charge sheet was given to him nor any inquiry was held but he was never reinstated in service. He also submitted an application claiming a sum of Rs.6,68,576/- as arrears of wages for the period from 23.04.1967 upto 30.06.1995. The respondent no.2 further submitted that several representations were made by him all of which went unheeded.

3. On behalf of the petitioner-Bank, it is submitted that the respondent no.2 studied L.L.B. course and thereafter he was registered with the U.P. Bar Council and his registration number is 26/1971 and with effect from January, 1971 the respondent no.2 has been practicing as a lawyer. The submission of the management is that if the petitioner had completed his legal studies and did his three years L.L.B. course and thereafter was also registered with the U.P. Bar Council and was a practicing Advocate from January, 1971, the question of his being a workman under the management upto 30.06.1995 does not arise, therefore, the very case set up by the respondent no.2 was false and fictitious.

4. I have heard Sri D.P. Singh, learned counsel for the petitioner, Ms. Sumati Rani Gupta, learned counsel for the respondent no.2 and learned Standing Counsel for the respondent no.1.

5. The contention of the learned counsel for the respondent no.2 throughout is that with effect from 23.04.1967 the respondent no.2 was placed under suspension and thereafter he has not worked under the petitioner-bank. On the other hand, the submission of the learned counsel for the petitioner is that the petitioner was never interested in working in the bank and instead during this period he completed his three years L.L.B. course and he was registered with the U.P. Bar Council and his registration number is 26/1971 and that he started practice with effect from January, 1971.

6. These facts are not disputed and also find mention in the award of the Labour Court and have not been dislodged by the respondent no.2 before the Labour Court. The question, therefore, is manifestly settled that if the respondent no.2 had done his L.L.B. course which ordinarily would have taken at least three years to complete and he starting practice in January, 1971 and was also registered with the U.P. Bar Council this only further buttresses the contention of the petitioner is that the respondent no.2 was never interested in service and he never worked with effect from 23.04.1971.

7. The question with regards to the dispensation of service of respondent no.2 with effect from 1967 has not been adjudicated by any court of competent jurisdiction and unless it is held by a court of competent jurisdiction that the dispensation of services of respondent no.2 with effect from 23.04.1967 was in fact bad in law, it cannot be presumed that the respondent no.2 was in the services of the

management particularly in the light of the fact that the respondent no.2 during this period also completed his three years L.L.B. course and started legal practice in January, 1971, therefore, by no stretch of imagination it shows that the respondent no.2 continued working under the management with effect from 23.04.1967 to 30.06.1995.

8. Unless and until the services of the respondent no.2 are held to have been terminated or dispensed with validly by any court of competent jurisdiction, no claim for wages could be made under the provisions of Section 33-C (2) of the Industrial Disputes Act.

9. The proceedings under Section 33-C (2) of the Industrial Disputes Act have been held to be in the nature of execution proceedings, as such, the proceedings can only be resorted to if the rights of aggrieved parties are adjudicated by a court of competent jurisdiction through a decree, order or award.

10. The Supreme Court in the case of **M/s Punjab Beverages Pvt. Ltd. Vs. Suresh Chand and another reported in (1978) 2 SCC** in Para No.4 held as follows:-

"4.....*It is now well settled, as a result of several decisions of this Court, that a proceeding under section 33C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from his employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. But the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer. (Vide Chief Mining Engineer, East India Coal Co. Ltd. v. Rameshwar) It is not competent to the Labour Court exercising jurisdiction under section 33C(2) to arrogate to itself the functions of an industrial tribunal and entertain a claim which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under section 10 of the Act."*

11. The Supreme Court in the case of **Municipal Corporation of Delhi Vs. Genesh Razak & and another reported in (1995) 1 SCJ 177** in Para No.12 held as follows:-

"The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workmen to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under Section 33-C(2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33-C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognised by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is

treated as incidental to the Labour Court's power under Section 33- C(2) like that of the Executing Court's power to interpret the decree for the purpose of its execution."

12. The Supreme Court in the case of **State Bank of India Vs. Ram Chandra Dubey and others reported in (2001) 1 SCC 73** in Para No.8 held as follows:-

"The principles enunciated in the decisions referred by either side can be summed up as follows:

Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under Section 33C(2) of the Act. The benefit sought to be enforced under Section 33C(2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33C(2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not granted necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made."

13. The principle of law enunciated by the Supreme Court in the case of Genesh Razak (Supra) and in the case of Ram Chandra Dubey (Supra) have been reiterated in Para Nos.11 and 12 by the Supreme Court in the case reported in **(2005) 8 SCC State of U.P. Vs. Brij Pal Singh.**

14. There being no such determination by a court of competent jurisdiction with regard to termination or dispensation of services of the respondent no.2, the provisions of Section 33-C (2) of the Industrial Disputes Act were not applicable and therefore, the award dated 10.03.1997 suffers from the vice of excessive jurisdiction and is accordingly, set aside. The writ petition is allowed.

15. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2012

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE S.V.S. RATHORE, J.

Writ Petition No. 1048 (S/B) of 2011

Janmejai Singh ...Petitioner
Versus
State of U.P. and another
...Opposite parties

U.P. Recruitment of Dependants of Government Servant Dying in Harness Rules 1974-compassionate appointment-claimed directly on Class II post-on ground of equality-as other dependents

of P.C.S. Officers were given appointment on class II post-petitioner being L.L.B. And dependents of Joint Director in ICDS Lucknow-can not be appointed on Class III post-held-if such appointment given as per qualification of dependents-other more qualified candidates shall be deprived from right of consideration-violative of Article 14-apart from that two wrong will not make right-in another word violation of article 14-can not be claimed negatively.

Held: Para 22

The appointment of a son of PCS Officer on the post of Class II on the ground that his qualifications justifies such appointment, would be a negation of the object and purpose of compassionate appointment. If such considerations are to be taken into account, the son of IPS Officer should be offered the post equivalent to IPS and that a son of Addl. District Judge should be given a similar post, if he/she possesses LLB degree. The rule cannot be stretched beyond its purpose, to violate Art.14 and 16 of the Constitution of India.

Case law discussed:

1994 (68) FLR 1191; JT 1996 (6) S.C. 7; (1998) 5 SCC 192; (1998) 2 SCC 412; (2007) 6 SCC 162; (2009) 7 SCC 205; (2007) 2 SCC 481; (2007) 6 SCC 162; (2009) 7 SCC 205; (1996) 1 SCC 334; (1997) 3 SCC 321; (2000) 4 SCC 186; (2002) 4 SCC 666; AIR 2005 SC 565; AIR 2006 SC 1142

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

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

2. Through the instant writ petition under Article 226 of the Constitution of India, the petitioner challenges the order dated 28.12.2010 passed by the Principal Secretary, Bal Vikas Sewa Evam Pushtahar, Lucknow (opposite party No.1) contained in Annexure No. 1 to the writ petition, whereby the petitioner's representation for promotion was rejected.

3. According to the petitioner, his father Sheo Pratap Singh, while working as Joint Director in ICDS, Lucknow, died on 28.11.2004 due to heart attack. Immediately thereafter, his mother preferred an application/representation to opposite party No.2-the Director, Bal Vikas Sewa Evam Pushtahar, Lucknow, requesting therein that her son i.e. petitioner be given appointment according to his qualification on compassionate ground under the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 [hereinafter referred to as ***"1974 Rules"***]. The Secretary, Government of U.P., vide letter dated 22.3.2006 directed the opposite party No. 2 to appoint the petitioner on Class III post.

4. Pursuant to the letter dated 22.3.2006, opposite party No.2 has passed an order dated 10.5.2006 for appointment of the petitioner on Class III post and informed the petitioner to join on the post of Class III. On receipt of the appointment letter dated 10.5.2006, petitioner approached the Director, Bal Vikas Sewa Evam Pustahar (opposite party No.2) and requested him that since he is a student of L.L.B. and very soon he is going to complete L.L.B. Course and his father was a PCS Officer and as such, he may be considered for appointment on Class II post according to his qualification but his request was rejected by the opposite party No.2 vide order dated 15.1.2009.

5. On receipt of the order dated 15.1.2009, petitioner preferred an application under Right to Information Act, wherein it was requested to give

information how many PCS Officers died since 2001 and how many dependents of PCS officers, who were given appointments, to which the petitioner received information on 11.6.2009, by which, department has informed the petitioner that since 2001, 22 PCS officers died and out of 22, 9 dependents of the PCS Officers were appointed in the different departments. On perusal of the said information, petitioner came to know that total 9 dependents of the PCS Officers were appointed on Class II post. Thereafter, the petitioner has preferred a fresh representation, raising the above grievances, but no heed was paid and as such, petitioner approached this Court by filing writ petition No. 413 of 2010 (S/B). A co-ordinate Bench of this Court, vide order dated 7.4.2010, disposed of the writ petition by granting liberty to the petitioner to make a fresh representation, in addition to the pending one, with detailed facts before the authority concerned and the authority concerned was directed to consider and decide the same on merit.

6. In compliance of the order dated 7.4.2010, the State Government considered the petitioner's representation and rejected it vide order dated 28.12.2010. Feeling aggrieved, petitioner has preferred the instant writ petition under Article 226 of the Constitution of India, inter alia on the grounds that opposite party No. 1 erred in rejecting the claim of the petitioner for appointment on the post of Class II insofar as the opposite party No.1 while rejecting petitioner's claim ignored the judgment and order dated 7.4.2010 passed by this Court, wherein this Court directed to consider the petitioner's claim alike similarly situated candidates.

7. Learned Counsel for the petitioner submits that by the impugned order dated 28.12.2010, opposite party No.1 has rejected the claim of the petitioner on the ground that when he was given appointment on Class III post, petitioner did not raise any objection, which is totally wrong and erroneous insofar as when the petitioner came to know about the joining of the other similarly situated candidate on Class II post, he immediately approached the department and requested for his joining on Class II but the opposite parties never considered the case of the petitioner. He submits that though similarly situated persons were given appointment on Class II post on compassionate ground but the petitioner has been denied appointment on Class II post, which is in violation of Article 14, 16 and 21 of the Constitution.

8. Refuting the submissions advanced by the petitioner's counsel, learned Standing Counsel submits that in compliance of the order dated 5.7.2011 passed by this Court in the instant writ petition, an information from different departments were collected relating to compassionate appointments made on Class II posts and on perusal of the same, it reflects that these appointments on compassionate ground were made in the scale of Class II and outside the purview of Public Service Commission. He submits that no compassionate appointment has been made on Class II posts which are within the purview of the Uttar Pradesh Service Commission and as such, all such appointments are in consonance with the provisions of 1974 Rules. He further submits that vide Government Order dated 27.6.2012, it has been made clear that no compassionate appointment will be given on Class I and Class II posts. Thus, the petitioner's representation has rightly been

rejected by the opposite party No.1 and the petition deserves to be dismissed.

9. Learned Standing Counsel has relied upon the judgments of the Supreme Court in ***Umesh Kumar Nagpal Vs. State of Haryana & Ors.***, 1994 (68) FLR 1191; ***State of Bihar & Ors. Vs. Samsuz Zoha,*** JT 1996 (6) S.C. 7; ***Director of Education (Secondary) & Anr. Vs. Pushpendra Kumar & Ors.***, (1998) 5 SCC 192; ***State of U.P. & Ors. Vs. Paras Nath,*** (1998) 2 SCC 412; I.G. ***(Karmik) & Ors. Vs. Prahalad Mani Tripathi,*** (2007) 6 SCC 162, and ***General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi & Ors.***, (2009) 7 SCC 205. He submits that in all these decisions the Supreme Court has laid down the legal principles based on the purpose of giving compassionate appointment and has interpreted various rules including the Rules of 1974 regarding constitutionality and permissibility of such appointments. The rules of compassionate appointments are by way of exception to general rules and must be given strict interpretation.

10. In ***National Institute of Technology v. Niraj Kumar Singh,*** (2007) 2 SCC 481, the Supreme Court held :-

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

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

11. In another case, namely, ***I.G. (Karmik) v. Prahalad Mani Tripathi,*** (2007) 6 SCC 162, the Apex Court held as under :-

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

12. The State Government has defended its decision to give compassionate appointment on Class-III post both on the interpretation of Rule 5 of the Rules of 1974, and also on the ground that there is no post in any cadre in Class-II within the purview of U.P. Public Service Commission. The petitioner has been offered appointment in Class III post on a vacant post. There is no such policy of the State Government to create post of Class II on temporary basis for compassionate appointment based on the post held by the deceased PCS Officer. There is no negative content in Article 14 and 16 of the

Constitution of India and thus the Court should not issue writ of mandamus, for perpetrating illegality in the name of equality. Equal treatment is given amongst equals, and if there has been any breach of rules, the Court may not insist upon committing same breach all over again in offering public employment.

13. In ***Uttaranchal Jal Sansthan Vs. Laxmi Devi,*** (2009) 7 SCC 205 the Supreme Court held that equality cannot be applied, when it arises out of illegality. Art.14 carries with it positive effect.

14. In ***Chandigarh Administration Vs. Jagjit Singh,*** (1995) 1 SCC 745, the Supreme Court held in paragraph 8 as follows:-

"Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal / unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again. The illegal / unwarranted action must be corrected, if it can be done according to law - indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law - but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition."

15. The ratio of the judgment in Chandigarh Administration (supra) was followed in ***Yadu Nandan Garg Vs. State of Rajasthan***, (1996) 1 SCC 334; ***State of Haryana Vs. Ram Kumar Jain, (***1997) 3 SCC 321; ***C.S.I.R. Vs. Dr. Ajai Kumar Jain,*** (2000) 4 SCC 186; and ***Narpat Singh Vs. Jaipur Development Authority,*** (2002) 4 SCC 666. The principle can be applied in a different way, by saying that two wrongs do not make one right. The Court should decide the cases on correct legal principles and not by multiplying illegality vide ***Anand Buttons Vs. State of Haryana,*** AIR 2005 SC 565 and ***Kastha Niwarak GSS Maryadit Indore Vs. President Indore Development Authority***, AIR 2006 SC 1142.

16. It is not denied that the petitioner's mother is receiving family pension on the untimely and unfortunate death of her husband and she would thus receiving pension amount per month out of benefits given on the services rendered by her husband.

17. In order to decide the controversy, it would be apt to reproduce Rule 5 of the Rules of 1974, which are as under :-

"5. **Recruitment of a member of the family of the deceased. -** (1) In case a Government servant dies in harness after

the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person-

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

(ii) is otherwise qualified for Government service, and

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

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

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

18. The Rules of 1974 were framed by the State in terms of the proviso to Article 309 of the Constitution of India and provide for appointment on compassionate grounds in suitable employment in government service on the post except the post, which is within the purview of U.P. Public Service Commission, in relaxation to normal recruitment rules. Class-II post in the State Government are within the purview of U.P. Public Service Commission except those posts, which are created on temporary basis as Officers on Special Duty in the exigency of service.

19. In ***Director of Education (Secondary) & Anr. Vs. Pushpendra Kumar & Ors***. (Supra), the Supreme Court considered the orders passed by the High court by which directions were given to appoint the applicants, as dependents of the government servant dying in harness in the Education Department on Class-III post provided he possesses necessary qualifications for the post. The Supreme court held interpreting Regulations 101, 103, 104, 106, 107 and Regulation 105-A of Chapter III of the Regulations made under Section 16G of the U.P. Intermediate education Act that if vacancy in non-teaching cadre for the time being does not exist in any recognised aided institutions, then the appointment shall be made against the supernumerary non-teaching post of Class-IV category and such post shall be deemed to have been created for this purpose and be continued till a vacancy becomes available. It was held that object underlying the provision for grant of compassionate appointment is to enable the family of the deceased employee, to tide over sudden financial crisis resultant due to death of bread earner, which has left the family in penury and without any means of livelihood. Out of humanitarian

consideration and having regard to the fact, that unless some source of livelihood is provided family would not be able to both ends meets, provisions are made for giving gainful employment to one of the dependent of the deceased, which may be eligible for such appointment. Such a provision makes a departure from the general provision providing for employment, after following particular procedure. The rule is in nature of exception to the general provision. An exception cannot subsume main provision to which its exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. The compassionate appointment should not entirely interfere with the right of the persons, who are eligible for appointment to seek employment against the post, which would have been available to them but for the provisions of the enabling appointments made on compassionate ground of the dependent of the deceased employee.

20. The rule of compassionate appointment has an object to give relief against destitution. It should not be treated as rule to give alternate employment or an employment commensurate with the post held by the deceased government servant. It is not by way of giving similarly placed life to the dependents of the deceased by creating a supernumerary or ex-cadre post. The object of giving compassionate appointment should not be lost while relaxing the rules.

21. In the same judgment in ***Pushpendra Kumar (Supra)*** the Supreme court held that there may be more meritorious person than the dependent of the deceased employee, who would be deprived of their right of being considered for such appointment and thus the appointment on Class-IV post by way of providing immediate relief should not be misunderstood to provide an employment with equal pay of the post, which was held by the deceased.

22. The appointment of a son of PCS Officer on the post of Class II on the ground that his qualifications justifies such appointment, would be a negation of the object and purpose of compassionate appointment. If such considerations are to be taken into account, the son of IPS Officer should be offered the post equivalent to IPS and that a son of Addl. District Judge should be given a similar post, if he/she possesses LLB degree. The rule cannot be stretched beyond its purpose, to violate Art.14 and 16 of the Constitution of India.

23. The illustrations given in representation of the petitioner are apparently illustrations of compassionate appointment given by stretching the rules beyond the object and purpose of enacting the rule of compassionate appointment. We do not have a case of any person, who was given appointment after the year 2001 on Class II. The circumstances in which the rules were relaxed, are not before us nor are we required to examine it. A comparison will neither serve rule of equality nor rule of equity. It is well known principle of law that two wrongs do not make one right and that illegal act should not be perpetrated in the name of serving the principle of equality. The equality is served of adhering to the rule of law, and not by violating rule of law.

24. The terminal benefits of father received by the petitioner's mother, and the family pension does not place him in such

a financial distress, that the Court may consider to grant him an appointment equal to the post and status as per his qualification. We are not dealing with the case of providing maintenance but a case to provide immediate financial relief to a person, who has lost his father in unfortunate circumstances. The compassion in such case should not overreach the purpose for which the rule has been enacted.

25. The petitioner has been offered appointment on Class-III post in the pay scale of Rs.3050-75-3950-80-4590/-. From perusal of the records, it reflects that petitioner has not chosen to join on the post offered to him.

26. Before parting with the matter, we may observe that some of the appointments given by the State Government on compassionate grounds, on the post of Class II, to the dependents of the deceased PCS officers since 2001 have raised issues of equal treatment of the dependents in the matter of compassionate appointment. The appointments made selectively in respect of some of the dependents of the deceased PCS officers, for the reasons, which we have not found it proper to inquire are likely to raise issues of equality and will continue to cause apprehensions in the minds of similarly situate dependents of public servants. We thus find it appropriate and expect that the State Government will either amend the Rules of 1974, or to provide for guidelines in respect of such appointments. The State Government may consider to grant relaxations under such guidelines. The amendments of the rules or prescription of guidelines will put rest to apprehensions and speculations in such appointments and will avoid litigation. The State Government must demonstrate fairness and reasonableness in such matters.

27. For the reasons aforesaid, the writ petition is dismissed with liberty to the petitioner to join on the Class-III post offered to him. If due to lapse of time the offer has been withdrawn, the State Government will make the offer again to the petitioner, to join.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2012

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 8647 of 1987

Ramesh Chandra ...Petitioner
Versus
Chief Inspector and another ...Respondents

Counsel for the Petitioner:
Sri K.P.Agarwal
Ghazala Bano Qadri

Counsel for the Respondents:
Sri D.P. Singh
S.C.

Constitution of India, Article 226- rejection order-claim for exemption of age limit-on basis of previous working-rejected-without disclosing any reason-held-illegal recording reason is sole of the body of order-order in absence of reasons-order like dead body not sustainable rejection order quashed with direction to pass fresh order.

Held: Para 15

We have perused the order of the Director Factories, Uttar Pradesh dated 4.11.1986, communicated on behalf of the State Government, rejecting the

petitioner's application for age relaxation under proviso to Rule 9 of the Rules. The said order simply states that the State Government has rejected the application as it was not possible to grant any age relaxation. The aforesaid order is undoubtedly a non-speaking order. It does not contain any reason for rejecting the petitioner's application for grant of relaxation in age limit.

Case law discussed:

AIR 1974 SC 87; AIR 1981 SC 1915; AIR 1990 SC 2205; AIR 1990 SC 1984

Delivered by the Hon'ble Satya Poot Mehrotra, J.)

1. Petitioner was appointed as a Welfare Officer Grade III in Swadeshi Cotton Mills, Naini, Allahabad, respondent No.2 in accordance with the U.P. Factories Welfare Officers Rules, 1955 (hereinafter referred to as "the Rules") vide appointment letter dated 21.11.1985. He joined on 23.11.1985. On the date of appointment the petitioner was slightly overage. He was more than 26 years of age. His date of birth happened to be 1.3.1959. Petitioner applied to the State government for age relaxation. He contended that his prior service as Labour Welfare Officer with M/s. Kanpur Chemical (P) Ltd., Kanpur from 11.9.1984 to 21.11.1985 i.e. for one year two months and ten days be excluded and the relaxation in age by the said period be granted. The application of the petitioner was rejected vide order dated 4.11.1986 and consequently vide order dated 21.4.1987 the petitioner was informed that in view of prescribed age limit of 26 years, as he was found overage by eight months and 22 days on the date of appointment, his services would stand automatically terminated w.e.f. 21.5.1987.

2. The aforesaid two orders dated 4.11.1986 rejecting the application of the petitioner for exemption in age limit and the consequential order dated 21.4.1987 terminating his services have been assailed by the petitioner by filing this writ petition.

3. The parties have exchanged necessary affidavits and they have agreed for final disposal of the writ petition on the basis of the pleadings on record.

4. We have heard Ms. Ghazala Bano Quadri and Sri D.P. Singh, counsel for the parties.

5. The main plank of the argument of the petitioner is that proviso to Rule 9 of the Rules empowers the State Government to relax the upper age limit up to a period during which the person has worked as Welfare Officer earlier. The petitioner having worked as Welfare Officer earlier from 11.9.1984 to 21.11.1985, his age limit was liable to be relaxed by the said period. The State Government in refusing to grant relaxation has acted in an arbitrary manner and the order to this effect passed by the State Government is completely a non-speaking order.

6. The petitioner is legally entitled for consideration of his application for grant of age relaxation in view of statutory provision contained in proviso to Rule 9 as well as Rule 13 of the Rules. For the sake of convenience the relevant proviso to Rule 9 and Rule 13 are quoted below:

"9. Age and qualifications. - *No person may be appointed as a Welfare Officer unless -*

(a) ...
(b) (i)...
(ii)...
(iii) he is not less than 21 years and not more than 26 years of age in case of appointment to Grade III:

(c)...
(d)...
(e)...

Provided firstly, that in the case of person, who has worked as a Welfare Officer under these rules, or the Factories Welfare Officers' Rules, 1949, the upper age limit may be relaxed by the State Government up to a period during which he worked as such officer:
....."

"13. Exemption. - The State Government may, if it is satisfied that it is expedient so to do, exempt any person from all or any of the qualifications or age restriction prescribed in Rule 9 if such person -

(i) is a graduate from a University established by law, and

(ii) has had three years in the case of Grade I, two years in the case of Grade II, and one year in the case of Grade III, practical experience of work concerning or relating to the welfare of labour:

Provided that no application for exemption under this rule shall be entertained after the person concerned has already been appointed."

7. A plain reading of the aforesaid provisions of Rules indicate that though the necessary minimum age for appointment as Welfare Officer Grade III is 21 years and a maximum of 26 years but the same can be relaxed by the State Government provided the person has earlier worked as Welfare Officer either under these Rules or under the Factories Welfare Officers' Rules, 1949.

8. Rule 13 provides for exemption in age if a person is a Graduate from a University and is having working experience concerning to the welfare of labour for a period of three years as Grade I Officer, two years as Grade II Officer and one year as Grade III officer. However, no application for exemption under Rule 13 is permissible after the person concerned has been appointed.

9. Petitioner applied for exemption/age relaxation after his appointment, therefore, Rule 13 may not be strictly applicable but certainly petitioner was entitled for consideration of his application for age relaxation under proviso to Rule 9 of the Rules.

10. The petitioner in his application clearly stated that he took employment as Labour Welfare Officer Grade III in M/s. Kanpur Chemical (P) Ltd. on 11.9.1984 in accordance with U.P. Factories Welfare Officers' Rules, 1955 and at that time he was less than 26 years in age. He worked there till 21.11.1985 on which date he was issued a fresh letter of appointment as Welfare Officer Grade III by respondent No.2. He was entitled to age relaxation in the matter of grant of appointment for the period he had worked with M/s. Kanpur Chemical (P) Ltd..

11. It is said that law governs man and reason the law. Reasons are the links between materials on which conclusions are based and the actual conclusions.

They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi judicial and reveal nexus between the facts and conclusions reached vide ***AIR 1974 SC 87 Union of India Vs. Mohan Lal Kapoor and AIR 1981 SC 1915 Uma Charan Vs. State of Madhya Pradesh.***

12. In short, fair play requires recording of germane and relevant precise reasons when an order affects the right of a citizen or a person irrespective of the fact whether it is judicial, quasi-judicial or administrative. Decision or order of any statutory or public authority bereft of reasoning would be arbitrary, unfair and unjust, violative of Article 14 of the Constitution of India.

13. In ***State of West Bengal Vs. Atul Krishan Shaw and another AIR 1990 SC 2205,*** the Supreme Court observed "giving of reasons is an essential element of administration of justice. A right to reason is, therefore, indispensable part of the sound system of judicial review.

14. In ***S.N. Mukherjee Vs. Union of India AIR 1990 SC 1984*** it has been held that the object underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action. The expanding horizons of principles of natural justice provides for recording of reasons.

15. We have perused the order of the Director Factories, Uttar Pradesh dated 4.11.1986, communicated on behalf of the State Government, rejecting the petitioner's application for age relaxation under proviso to Rule 9 of the Rules. The said order simply states that the State Government has rejected the application as it was not possible to grant any age relaxation. The aforesaid order is undoubtedly a non-speaking order. It does not contain any reason for rejecting the petitioner's application for grant of relaxation in age limit.

16. The respondents have not brought on record any order of the State Government rejecting the exemption application of the petitioner. The only order in this regard available is the impugned order dated 4.11.1986. The said order is completely uninformed by reasons.

17. The impugned order does not in any manner show that the authorities had applied mind to the relevant aspects in refusing age relaxation to the petitioner.

18. It is settled legal position, as discussed above, that even an administrative order which have the effect of visiting a person with civil consequences have to be passed adhering to the principles of natural justice which includes recording of reasons unless specifically dispensed with by the relevant Rules or Statute. Learned counsel for the respondents has failed to show any provision by which recording of reasons for granting or refusing age relaxation has been dispensed with. Thus, there is nothing on record to indicate application of mind by the authority concerned to the facts and circumstances culminated in the formation of opinion to refuse age relaxation and to reject his claim for relaxation in age.

19. In view of above, the orders dated 21.4.1987 and 4.11.1986 (Annexure 5 and 7 to the petition) are quashed and a writ of mandamus is issued directing

respondent No.1 to reconsider the grant exemption in the matter of age limit as provided under Rule 9 of the U.P. Factories Welfare Officers Rules, 1955.

20. The writ petition is allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE PRAKASH KRISHNA, J.

Central Excise Appeal No. - 142 of 2004

Commissioner Of Customs & Central Excise ...Petitioner
Versus
M/S Majestic Auto Ltd ...Respondents

Counsel for the Petitioner:
Sri K.C. Sinha
S.S.C.
Sri A K Nigam
Sri A K Rai
Sri B.K.S. Raghuvanshi

Counsel for the Respondents:
Sri Piyush Agrawal

Central Excise Act, 1944-Section-35-G-Power of Custom Excise and Service Tribunal regarding reduction of penalty-than amount of penalty specified under Section 11 AC-held-liability to pay penalty equal to excise duty so determined-as such is simultaneous and consequential-hence the provisions of Section 11 AC being mandatory-either adjudication authority or tribunal-has no authority to impose penalty other than the liability under section 11 AC

Held: Para 14

From the proposition as laid down in above cases, the ratio deducible is that the quantum of the penalty equal to the duty determined as contemplated by Section 11AC is mandatory and there is no discretion in the adjudicating authority or the Tribunal to impose different amount of penalty. In a case where penalty is leviable under section 11AC on fulfilment of the conditions as enumerated in Section 11AC, the penalty equal to the amount of duty determined is mandatory and there is no discretion in the Tribunal to reduce the said penalty. However, as laid down by the apex Court in Union of India Vs. Rajasthan Spinning and Weaving Mills (supra), the penalty under section 11AC can be imposed only when conditions mentioned in Section 11AC exist. The authorities have no discretion in fixing the quantum of penalty and penalty equal to the duty must be imposed once section 11Ac is made applicable.

Case law discussed:
2009 (238) ELT 3; 1998 (99) ELT 33; 1999 (112) E.L.T. 772; 2005 (182) E.L.T. 289; 2008 (231) E.L.T. 3

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

1. This appeal under section 35G (2) of the Central Excise Act, 1944 has been filed against the judgment and order dated 20.7.2004, passed by Custom Excise and Service Tax Appellate Tribunal in Appeal No. E/642/2004-B. The appeal has been admitted by this court on the following substantial question of law:

"i) Whether the appellate Tribunal on the facts and circumstances of the case could reduce the penalty amount, which is less than the amount of penalty specified under section 11 AC of the Central Excise Act, 1944."

2. The brief facts of the case which are necessary to be noted for deciding this appeal are; M/s Majestic Auto Ltd. (respondent in this appeal) are engaged in the manufacture of two wheelers scooters

and mopeds. A team of Central Excise Officers of Preventive Unit Meerut-I made a surprise visit to the factory premises on 10.1.2011. The officers conducted physical verification of the finished goods. On comparison of stock of finished goods, it was found that 276 numbers of two wheelers of different models were in excess and 365 number of two wheelers of different models were short. A Panchnama was prepared on the spot. The stock of excess finished goods were seized which were subsequently released on bond along with bank guarantee. A show cause notice dated 8.7.2001 was issued to the respondents as to why -

(i)Seized 276 nos of two wheelers should not be confiscated under rule 173Q(I(b) of CEA, 1994.

(ii)Duty amounting to Rs. 6,23,391 and automobile Cess of Rs. 4870 should be recovered under section 11A of CEA, 1994 in respect of the 365 nos of two wheelers found short.

(iii)Why interest under section 11AB may not be recovered.

(iv)And why penalty under rule 173Q of CEA, 1994 may not be imposed.

3. The adjudicating officer by order dated 25.10.2001 confiscated the seized two wheelers. However, since the goods were provisionally released a fine of Rs. 5 lacs in lieu of confiscation was imposed. Demand of Rs. 6,23,391/- levied on 365 numbers of two wheelers found short was confirmed. A penalty of Rs. 6,23,391/- was also imposed. An appeal was filed by the respondent to the Commissioner of Appeals, who by order dated 29.10.2003 rejected the appeal, while upholding the order in original. The respondent filed further appeal before Custom Excise and Service Tax Appellate Tribunal against the order of Commissioner Appeals. The Tribunal reduced the redemption fine of Rs. 2 lacs and further reduced the penalty of Rs. 3 lacs. Subject to above modification, the order impugned in the appeal was upheld. The appeal was accordingly disposed of.

4. Sri V.K. Singh Raghubansi, learned Counsel appearing for the appellant challenging the order of the Tribunal contended that the Tribunal committed an error in reducing the penalty. He submitted that under section 11AC of the Central Excise Act, 1944 (hereinafter referred to Act, 1944) the imposition of penalty equal to the duties determined is mandatory. He submits that there is no discretion with the Tribunal to reduce the penalty and the order of the Tribunal reducing the penalty is without jurisdiction. It is further submitted that the Tribunal while reducing the penalty has not given any reason for such reduction.

5. Sri Piyush Agrawal, learned Counsel for the respondent refuting the submissions of learned counsel for the appellant contended that the Tribunal for good and sufficient reason has reduced the penalty and the power to reduce the penalty has to be read in the Tribunal in doing complete justice between the parties. He submits that imposition of penalty is not mandatory and the imposition of penalty is permissible only on fulfilling the conditions as enumerated under section 11AC. He submits that pre-condition for imposition of penalty being not satisfied infact no penalty was liable to be levied on the respondent. Reliance has been placed by Sri Agrawal on the judgements of the apex Court in 2009(238) ELT 3 **Union of India Vs. Rajasthan Spinning & Weaving Mills,**

1998 (99) ELT 33 **State of Madhya Pradesh Vs. Bharat Heavy Electrical** and 1999 (112) E.L.T, 772 **Zunjarrao Bhikaji Nagarkar Vs. Union of India.**

6. We have considered the submissions of learned counsel for the parties and have perused the record.

7. The question to be answered in the appeal is as to whether under section 11 AC, the Tribunal has jurisdiction to reduce the amount of penalty. Before we proceed to consider the respective submissions, it is useful to look into the provisions of Section 11AC. Section 11 AC of the Act, 1944 is as follows:

"SECTION 11AC. Penalty for short-levy or non-levy of duty in certain cases. -- *The amount of penalty for non-levy or short-levy or non-payment or short payment or erroneous refund shall be as follows :-*

(a) where any duty of excise has not been levied or paid or short-levied or short paid or erroneously refunded, by reason of fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined;

(b) where details of any transaction available in the specified records, reveal that any duty of excise has not been levied or paid or short-levied or short-paid or erroneously refunded as referred to in sub-section (5) of section 11A, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to fifty per cent of the duty so determined;

(c) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (b) is paid within thirty days of the date of communication of order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent of the duty so determined;

(d) where the appellate authority modifies the amount of duty of excise determined by the Central Excise Officer under sub-section (10) of section 11A, then, the amount of penalties and interest payable shall stand modified accordingly and after taking into account the amount of duty of excise so modified, the person who is liable to pay duty as determined under subsection (10) of section 11A shall also be liable to pay such amount of penalty or interest so modified.

Explanation.--For the removal of doubts, it is hereby declared that in a case where a notice has been served under sub-section (4) of section 11A and subsequent to issue of such notice, the Central Excise Officer is of the opinion that the transactions in respect of which notice was issued have been recorded in specified records and the case falls under sub-section (5), penalty equal to fifty per cent of the duty shall be leviable.

(2)Where the amount as modified by the appellate authority is more than the amount determined under sub-section (10) of section 11A by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be

counted from the date of the order of the appellate authority in respect of such increased amount." to be tallied

8. Section 11 AC has been inserted in the Act by Act No. 33 of 1996 w.e.f. 28.9.1996. Further amendment in Section 11 AC was brought by Act No. 10 of 2000.

9. A plain reading of Section 11AC indicates that where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined. The payment of penalty thus is simultaneous and consequential to the payment of duty under sub-section (10) of Section 11A. Thus, when fraud, collusion or any wilful misstatement or suppression of fact or contravention of any of the provisions of the Act or Rules with intent to evade payment of duty is proved, apart from payment of duty, payment of penalty is consequential. The use of word "shall" indicates an imperative requirement and the payment of penalty is with object to punish person who evade duty on account of fraud collusion or wilful misstatement and with intention to evade payment of duty. The question is as to whether when the Statute itself provides the amount of penalty equal to the duty, whether any discretion is to be read in the adjudicating authority or the appellate authority to reduce the amount of penalty. The answer to the said question is to be found out from the scheme of the Act itself. Proviso to Section 11AC contains a circumstance where a reduced penalty of 25% can be paid by a person on whom duty has been determined under sub-section (2) of Section 11A. The circumstance is that when duty so determined along with interest is paid within 30 days from the date of commencement of the order of the Central Excise Officer, the amount of penalty be 25% which has also be paid within 30 days. Thus, the circumstance in which the amount of penalty can be reduced is also provided under section 11 AC itself. To read any discretion to reduce the amount of penalty contrary to the scheme of the Act shall be adding words to Section which is impermissible on principles of statutory interpretation. When the benefit of reduced penalty of 25% is envisaged on payment within 30 days of the duty along with interest and penalty reading any discretion to reduce the penalty in the authorities even though the payment is not made within 30 days, shall not be in consonance with the scheme of the Act. Thus, reduction of penalty when has been statutory contemplated in one situation any other circumstance for reduction of penalty cannot be read into the provision. Thus, when condition for imposing penalty under section 11 AC are fulfilled, no discretion can be read into the adjudicating authority or the appellate authority to impose any other penalty not contemplated under section 11AC. The issue had come for consideration before the apex Court in several cases. In 1999 (112)ELT 772 **Zunjarrao Bhikaji Nagarkar Vs. Union of India,** the provisions of Section 11AC and Rule 173 came for consideration in context of initiation of disciplinary inquiry against a Collector/Commissioner of Central Excise in not levying penalty even though duty was determined under section 11A(2). The apex Court laid down in the said case that imposition of penalty was not

discretionary. In context of Rule 173Q, it was held that it is only the amount of penalty which is discretionary in Rule 173Q. The penalty could have been levied not exceeding three times of the duty, the three times, the value of the executable goods. However, under section 11AC there is no variable with regard to amount of penalty and the amount of penalty to be imposed is statutorily fixed. It is relevant to refer to paragraphs 30, 31,32 of the judgment which are to the following effect:

"30. *Two principal issues arise for our consideration: (1) if levy of penalty under Rule 173Q was obligatory and (2) was there enough background material for the Central Government to form a prima facie opinion to proceed against the officer on the charge of misconduct on his failure to levy penalty under Rule 173Q. Appellant has contended that it is only now after insertion of Section 11AC in the Act that levy of penalty has become mandatory and that it was not so under Rule 173Q. This contention does not appear to be correct. In both Rule 173Q and Section 11AC the language is somewhat similar. Under Rule 173Q "such goods shall be liable to confiscation" and the person concerned "shall be liable to penalty" not exceeding three times the value of excisable goods or five thousand rupees whichever is greater. Under Section 11AC the person, who is liable to pay duty on the excisable goods as determined "shall also be liable to pay penalty equal to the duty so determined". What is the significance of the word "liable" used both in Rule 173Q and Section 11AC? Under Rule 173Q apart from confiscation of the goods the person concerned is liable to penalty. Under Section 11AC the word "also" has been used but that does not appear to be quite material in interpreting the word "liable" and if liability to pay penalty has to be fixed by the adjudicating authority. The word "liable" in the Concise Oxford Dictionary means, "legally bound, subject to a tax or penalty, under an obligation". In Black's Law Dictionary (sixth edition), the word "liable' means, "bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution.... Obligated; accountable for or chargeable with. Condition of being bound to respond because a wrong has occurred. Condition out of which a legal liability might arise.... Justly or legally responsible or answerable".*

31*. When we examine Rule 173Q it does appear to us that apart from the offending goods which are liable to confiscation the person concerned with that shall be liable to penalty upto the amount specified in the Rule. It is difficult to accept the argument of the appellant that levy of penalty is discretionary. It is only the amount of penalty which is discretionary. Both things are necessary: (1) goods are liable to confiscation and (2) person concerned is liable to penalty. We may contrast the provisions of Rule 173Q and Section 11AC with Section 271 of the Income-tax Atc, 1961. This Section, prior to amendment in 1988, stood as under :*

"Failure to furnish returns, comply with notices, concealment of income, etc. 271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) in the course of any proceedings under this Act is satisfied that any person -

(a) has failed to furnish the return of total income which he was required to furnish under sub-section (1) of Section 139

or by notice given under sub-section (2) of section 139 or section 148 or has failed to furnish it within the time allowed and in the manner required by sub- section (1) of section 139 or by such notice as the case may be, or

(b) has without reasonable cause failed to comply with a notice under sub-section (1) of section 142 or sub- section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,--

(i) in the cases referred to in clause (a),-

(a) in the case of a person referred to in sub-section (4A) of section 139, where the total income in respect of which he is assessable as a representative assessee does not exceed the maximum amount which is not chargeable to income-tax, a sum not exceeding one per cent of the total income computed under this Act without giving effect to the provisions of sections 11 and 12 for each year or part thereof during which the default continued;

(b) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the assessed tax for every month during which the default continued.

Explanation.- In this clause "assessed tax" means tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C;

(ii) in the cases referred to in clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent but which shall not exceed fifty per cent of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income;

(iii)in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income: ..."

***32.** It would, thus, be seen that under provisions of Section 271 of the Income Tax Act in the first instance there is a discretion with the assessing authority whether to impose any penalty or not and if the assessing authority finds that it is a case for imposition of penalty then it has no discretion in the matter and the certain amount of penalty depending on the facts and circumstances of each case has to be imposed subject to the maximum limit mentioned in the section"*

10. Although in the above case, the apex Court took the view that when the penalty was not levied, the assessee was certainly benefited but there was nothing to show that officer had favoured the assessee and no misconduct can be proved against the officer hence, the disciplinary proceedings were quashed. But the argument that imposition of penalty was discretionary was rejected. The judgment of the apex Court in **State of Madhya**

Pradesh Vs. Bharat Heavy Electrical (supra) has been relied by learned counsel for the appellant in which case, the apex Court interpreted the provisions of Section 7(5) of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976. The High Court struck down the said provisions on the ground that it was confiscatory in nature and ultra-vires. Section 7(5) contained a provision that registered dealers shall be liable to pay the penalty equal to 10 times the amount of entry tax payable. The arguments before the apex Court on behalf of the State was that provisions of Section 7(5) was to be read down and the submission on behalf of the State was advanced that ten times is the maximum limit and not a fixed amount of penalty and there was no discretion in for imposition of lesser penalty. The apex Court on the aforesaid fact set aside the judgment of the High Court and held Section 7(5) as intra-vires. Following was laid down in paragraphs 11 to 13:

*" **11.** In our opinion Mr. Sanghi is right in submitting that Section 7 should be read as containing a rebuttable presumption. This would mean that it will be open to the registered dealer to satisfy the authorities concerned that the non-submission of the statement under sub-section [1] and [2] of Section 7 was not with the intention to facilitate the evasion of the entry tax. In other words, sub-section [5] of Section 7 places the burden of proof on the registered dealer to show that the non-submission of the statement under sub-sections [1] and [2] of Section 7 was not with a view to facilitate the evasion of entry tax. If a registered dealer is unable to satisfy the authorities in this regard then in the absence of satisfaction, the presumption is that non-submission of statement has facilitate the evasion of entry tax. Construing Section 7(5) to contain a rebuttable presumption it does not suffer from any vice. It cannot then he held invalid as conducted by the High Court. It is the misconstruction of the provision which misted the High Court to the contrary conclusion.*

***12.** It is not necessary for us to decide whether the provision for levy of penalty equal to ten times the amount of entry tax would be confiscatory and therefore, ultra vires since Mr. Sanghi, in fairness, submitted that the State treats is as the maximum limit and not fixed amount of penalty leaving no discretion for imposition of lesser penalty. This stand of the State itself concedes that the assessing authorities are not bound to levy fixed penalty equal to ten times the amount of entry tax whenever the provision of Section 7[5] are attracted. Depending upon the facts of each case the assessing authority has to decide as to what would be the reasonable amount of penalty to be imposed the maximum being ten times the amount of the entry tax. So construed sub-section [5] of Section 7 cannot be regard as confiscatory. Consequently, this also cannot be a ground for holding Section 7[5] to be ultra vires.*

***13.** From the aforesaid it follows that Section 7[5] has to be construed to mean that the presumption contained therein is rebuttable and secondly the penalty of ten time the amount of entry tax stipulated therein is only the maximum amount which could be levied and the assessing authority has the discretion to levy lesser amount, depending upon the facts and circumstances of each case. Construing Section 7[5] in this manner the decision of the High Court that Section 7[5] is ultra vires cannot be sustained."*

11. The above judgment does not help the respondent in the present case for two reasons; firstly a provision which is under consideration in the present appeal under section 11AC was not up for consideration in the said case and secondly, the learned counsel for the State itself has conceded that amount of penalty i.e. 10 times was not a fixed amount and there was a discretion in the authority for imposing the penalty and the presumption was rebuttable. The said judgment was thus on concession as made by learned counsel for the State before the apex Court hence, the said judgment is of no help to the respondent in the present case.

12. The next judgment to be considered is the judgment of the apex Court in 2005 (182) E.L.T. 289 **Commissioner of Central Excise, Chandigarh-I Vs. Dabur (India) Ltd.** In the said case also the Tribunal had reduced the quantum of penalty. On an appeal filed by the Commissioner Central Excise, the apex Court noticed the submission but the question as to whether the Tribunal had power to reduce the penalty was left open and not decided. The judgment of the apex Court in 2008 (231) E.L.T. 3 **Union of India Vs. Dharmendra Textile Processors** had occasion to consider Section 11AC of the Act. The questions which was up for consideration was as to whether there was a scope for levying penalty below the prescribed minimum under section 11AC. After considering the earlier judgment, it was held that there is no scope for any discretion in imposing the penalty. It is useful to refer to paragraphs 2,8,13,14 and 26 which are as follows:

*"**2.** A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. 2007 (8) SCALE 304. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the `Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the `IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the `Rules') and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund and Anr. MANU/SC/8185/2006: AIR2006SC2287 and was of the view that the basic scheme for imposition of penalty under Section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench.*

***8.** It is submitted that various degrees of culpability cannot be placed on the same*

pedestal. Section 11AC can be construed in a manner by reading into it the discretion. That would be the proper way to give effect to the statutory intention....

***13.** It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements.*

***14.** Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. See Institute of Chartered Accountants of India v. Price Waterhouse 1977 6 SCC 312. The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner (1846) 6 MOO PC1, the courts cannot aid the legislature's defective phrasing of an Act, they cannot add or mend, and by construction make up deficiencies which are left there. See State of Gujarat v. Dilipbhai Nathjibhai Patel MANU/SC/0989/1998 : [1998]2SCR56 . It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. See Stock v. Frank Jones (Tipton) Ltd 1978 (1) ALL ER 948. Rules of interpretation do not permit the courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. The courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in Vickers Sons")*

***26.** In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given."*

13. Again in **Union of India Vs. Rajasthan Spinning & Weaving Mills** (supra), the provision of Section 11AC came up for consideration. In the said case, the judgment of the Apex Court in Dharmendra Textile *(supra)* was also considered. Paragraphs 17 to 23, which are relevant, are quoted as below:

***"17.** The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

***18.** One can not fail to notice that both the proviso to Sub section 1 of Section 11A and Section 11AC use the same expressions: "...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty...." In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under*

Section 11A (1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.*

20. *At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam,J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows:*

2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. MANU/SC/3182/2007 :2007 (8) SCALE 304. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the `Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the `IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the `Rules') and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund and Anr. MANU/SC/8185/2006 : AIR2006SC2287 and was of the view that the basic scheme for imposition of penalty under Section 271(1)(c) of IT Act, Section 11AC of the Act

and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench.

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows:

26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered....

***21**. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.*

***22.** There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows:*

5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in Section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned Counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that

itself indicates scope for discretion but that is not the case here.

23. *The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under Sub-section (2) of Section 11A. That is what Dharamendra Textile decides"*

14. From the proposition as laid down in above cases, the ratio deducible is that the quantum of the penalty equal to the duty determined as contemplated by Section 11AC is mandatory and there is no discretion in the adjudicating authority or the Tribunal to impose different amount of penalty. In a case where penalty is leviable under section 11AC on fulfilment of the conditions as enumerated in Section 11AC, the penalty equal to the amount of duty determined is mandatory and there is no discretion in the Tribunal to reduce the said penalty. However, as laid down by the apex Court in Union of India Vs. Rajasthan Spinning and Weaving Mills (supra), the penalty under section 11AC can be imposed only when conditions mentioned in Section 11AC exist. The authorities have no discretion in fixing the quantum of penalty and penalty equal to the duty must be imposed once section 11Ac is made applicable.

15. In view of the foregoing discussions, the question of law is answered in favour of the revenue in following manner.

"The appellate Tribunal had no discretion to reduce the amount of penalty as specified under section 11 AC"

16. The appeal is allowed. Parties shall bear their own cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 24853 of 1989

Brij Nandan Gupta ...Petitioner
Versus
III Addl. District Judge, Rampur and another ...Respondents

Counsel for the Petitioner:
Sri A.K. Gupta
Sri B.K. Pandey
Sri B.R.Pandey
Sri K. Ajit

Counsel for the Respondents:
S.C.
Sri J.S.Tomar
Sri Murlidhar
Sri Pradeep Kumar

U.P. Urban Building (Regulation of Letting Rent and Eviction) Act 1972-Section 21 (1) (a)-suit for eviction and released-without following mandatory provisions of serving notice upon tenant-held-incompetent-suit not maintainable-notice send through registered post-without acknowledgement -denial of receiving by tenant on oath-burden of proof lies upon Land lord to produce report regarding service of letter-in absence of such exercise-service-can not be preassumed upon tenant-suit rightly dismissed as not maintainable.

Held: Para 26

In the facts and circumstance of this case, it cannot be disputed that denial of service of notice dated 20.9.1982 by the tenant on oath was sufficient to rebut presumption of service of registered notice upon him and onus then shifted upon the landlord to prove service. In absence of any service of such notice, application under Section 21(1)(a) was not entertainable being barred by first proviso to Section 21(1)(a) of Act, 1972.

Case law discussed:

AIR 1918 PC 102; AIR 1958 All 369; (1990) 3 SCJ 325; AIR 1990 SC 1215; AIR 1963 SC 822; AIR 1954 Bom 159; AIR 1972 Pat 142; (2011) 3 SCC 556; AIR 1970 All 446; (2009) 5 SCC 399; (2001)8 SCC 540; (1998) 1 SCC 732;

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

1. Heard Sri K.Ajit, learned counsel for the petitioner. None appeared for the respondents though the case has been called in revised list.

2. The petitioner is purchaser of land in dispute subsequently and the tenant was occupying the premises in question before such purchase. The petitioner filed an application under Section 21(1)(a) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No.13 of 1972) (hereinafter referred to as "Act, 1972") for eviction and release which was allowed by Trial Court but the same has been reversed by Appellate Court on the ground that notice contemplated under Section 21(1)(a) first proviso was not served upon the tenant, therefore application itself was not entertainable by the Court below. Aggrieved by Appellate Court order dated 16th September, 1989, present writ petition has been filed by the landlord petitioner.

3. It is contended that a notice was issued by registered post, hence presumption lie that it must have been served upon the addressee in view of Section 114 (g) of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872"), and, the Revisional Court has committed a patent error of law in not appreciating the above provision and its legal consequence.

4. In order to appreciate the above contention and correctness of the judgment of the Appellate Court, it would be pertinent to have a bird eye view to the relevant facts in brief.

5. The respondent -tenant was occupying first floor of the house in dispute namely a residential house situated at Rajdwara Road, Rampur owned by one Sri Jagat Prakash Gupta Son of Sri Raghunandan Prasad, R/o Moh. Jain Mandir Rampur since before 1981. The petitioner purchased aforesaid house from erstwhile owner Sri Jagan Prakash Gupta through a registered sale deed dated 13th April, 1981. The petitioner sent a registered notice dated 20th September, 1982 (by Registered Post, Acknowledgement Due) to the respondent tenant Radhey Shyam Bhatiya (since deceased and now his legal heirs are substituted as respondents No.2/1 to 2/6) informing him about transfer of ownership to the petitioner and putting him on notice of six months to vacate the premises and hand over vacant possession to petitioner. Another notice of the same date i.e. dated 20.9.1982 is said to have been sent by petitioner informing the respondent tenant to pay rent to the petitioner since he has purchased the house in question. This notice is also said to have been sent by registered post acknowledgement due.

6. It is alleged that respondent tenant stopped payment of rent whereafter another notice was given on 8.11.1982 terminating his tenancy on expiry of 30 days since he was in arrears of rent having not paid the same from 13th April, 1981 to 31st October, 1982 and onwards. A forth notice issued on 12.12.1983 by petitioner through his counsel Sri R.C.Srivastava determining tenancy of respondent-tenant and asking him to hand over vacant possession of premises to petitioner. Thereafter an application under Section 21(1)(a) of Act, 1972 was filed before Prescribed Authority, Rampur registered as P.A. Case No.13 of 1984.

7. On the part of respondent-tenat, it is claimed that rent was regularly paid to the owner of house in question. He has also pleaded that after the death of owner of the house in question namely Raghunandan Prasad and a number of legal heirs came to own property therefore petitioner's contention that Sri Jagat Prasad Gupta was the sole owner of accommodation in question and could have sold the entire accommodation in his own rights to the petitioner is not correct. The receipt of notices dated 8.11.1982 on 12.12.1983 was admitted. It is also said that the notice was replied by tenant on 10.12.1982 wherein he informed of a serious doubt regarding genuinity of ownership of petitioner and said that he would deposit rent in Court. Subsequently vide application under Section 30(2) of Act, 1972 registered as Misc. Case No.17/83 (Radhey Shyam Vs. Brij Nandan Gupta), rent was deposited in the Court and the said matter is pending. It was also admitted that notice dated 12.12.1983 was received on 14.12.1983 and was also replied on 14.1.1984 acknowledged by petitioner on 17.1.1984. A notice dated 25.2.1983 was received from one Sri Ashwani Kumar Son of Sri Rajendra Prasad and grand son of Raghunandan Prasad asking the tenant to pay rent of the disputed accommodation to him and not to any other person.

8. The Trial Court after exchange of pleading and evidence etc. formulated five issues as under:

"1. क्या प्रार्थी विवादित मकान का लैण्ड लार्ड है।"

"1. Whether applicant is landlord of house in dispute."

"2. क्या यह वाद धारा 21 (ए) के प्रावेजो के द्वारा वांछित नोटिस न दिये जाने के कारण दोष पूर्ण है।"

"2. Whether this case is bad due to non service of prescribed notice under Proviso to Section 21(a)."

^"3. क्या विवादित मकान की प्रार्थी को वास्तविक एवं सद्भावनापूर्ण आवश्यकता है।"

"3. Whether the applicant is in real and bona fide need of the house in dispute."

"4. क्या तुलनात्मक कठिनाई का सिद्धांत प्रार्थी के पक्ष में है।"

"4. Whether principle of comparative hardship is in favour of the applicant."

"5. क्या प्रार्थी कोई अनुतोष प्राप्त करने का अधिकारी है।"

"5. Whether applicant is entitled for any relief."

(English Translation by the Court)

9. The issue No.1 was decided vide Prescribed Authority's judgment dated 7.10.1988 in favour of petitioner holding him landlord within the definition of

"landlord" under section 3(j) of Act, 1972. Similarly issue no. 2 was also decided in his favour holding that a valid notice under Section 21(1)(a) was issued and tenant failed to prove its non service. Having said so, issues No.3 and 4 relating to bona fide need an comparative hardship were also determined in favour of the petitioner-landlord and as a result whereof the suit was decreed. The accommodation in question was released in favour of petitioner-landlord and tenant was directed to hand over possession of the vacant accommodation to the petitioner-landlord.

10. Aggrieved by Prescribed Authority's judgment dated 7.10.1988, the respondent -tenant preferred Rent Control Appeal No.103 of 1988. The appellate Court decided vide judgment dated 16.9.1989 confirming findings of Trial Court on issue No.1 in favour of the petitioner-landlord.

11. The second question argued before it at length was non compliance of requirement of giving notice under Section 21(1)(a) i.e. issue No.2. It is this issue which has been answered in favour of tenant and the findings of Trial Court on issue No.2 have been reversed by lower Appellate Court. In respect to issues No.3 and 4, namely bona fide need and comparative hardship, the lower Appellate Court has observed that in view of subsequent events namely death of petitioner-landlord, elder son, for whose benefit the need was stressed in the application got mitigated also for the reason that he can get further construction on the accommodation he already possessed separately, and that is how can meet his requirement. The Lower Appellate Court held that compelling need of landlord no more survive which would justify eviction of tenant from accommodation in question. Though findings on issues No.3 and 4, recorded by lower Appellate Court are based on irrelevant considerations and cannot be sustained in law in view of this Court but since issue no.2 goes to the root of the matter wherein this Court finds that the lower Appellate Court was justified in holding that no valid notice was demonstrated to have been served upon the tenant as contemplated in Section 21(1)(a), therefore application under Section 21(1)(a) itself was not maintainable, this court finds no reason to go on for recording a final opinion on issues No.3 and 4.

12. Where a property is already in occupation of a tenant before its purchase by another person, an application for release of such building under Section 21(1)(a) cannot be filed unless conditions provided in proviso thereto are satisfied. It reads as under:

"Provided that where the building was in the occupation of a tenant since before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds, mentioned in clause (a), unless a period of three years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application, and such notice may be given even before the expiration of the aforesaid period of three years."

13. A perusal of the above shows that there is a restriction upon the Prescribed Authority to entertain the application on the grounds mentioned in Section 21(1)(a);

(a) unless the purchaser landlord show that period of three years has elapsed since the date of such purchase; and

(b) The landlord has given a notice in that behalf to the said tenant not less than six months before such application.

14. The proviso however permits issuance of notice to the tenant even before expiry of three years but it must be six month notice and application under Section 21(1)(a) shall be entertained only after expiry of three years from the date of purchase.

15. In the present case, petitioner landlord purchased building in question on 13.4.1981 and filed application before Prescribed Authority in May, 1984, to be more precise 11th May, 1984. The application therefore was filed after expiry of three years and twenty seven days from the date of purchase. The landlord claims that six months' notice, as contemplated in proviso to Section 21(1)(a) was given to the tenant on 20th September, 1982. The said notice was put in transmission for onwards service upon the tenant by registered post acknowledgement due. Two other notices dated 8.11.1982 and 12.12.1983 sent by petitioner landlord for termination of tenancy have been acknowledged by the tenant but he has seriously disputed receipt/service of the notice dated 20th September, 1982 which the landlord alleged as compliance of Section 21(1)(a) first proviso of Act, 1972. If this notice was not served upon tenant, an application under Section 21)1)(a) was not entertainable by Prescribed Authority at all. It is a jurisdictional question and therefore has to be proved by landlord beyond doubt by adducing relevant evidence.

16. On behalf of landlord it is contended that evidence adduced to draw an inference of service upon the tenant was "receipt of registered post" and copy of the registered notice. It is contended that once a registered letter has been sent which mentions correct address of the addressee, presumption is that it must have reached the addressee unless proved otherwise. Therefore onus to show that the said notice was not received by tenant lie on him which he failed to discharge.

17. In my view, this contention of Sri K.Ajit, Advocate is thoroughly misconceived. Presumption under Section 114(g) of the Evidence Act is rebuttable. Once the addressee deny receipt/service of registered letter, the addresser has the onus to show that it was actually served received upon or received by the addressee or he refused to receive the same though sought to be served upon him by the postal agent. In the present case no such evidence has been adduced by petitioner landlord to discharge initial onus lie upon him once service/receipt of notice dated 10.9.1982 was denied by respondent-tenant not only in his written statement but also by filing an affidavit before the Courts below.

18. Here is not a case where either acknowledgement was received by the landlord containing signature of tenant or that letter/notice was received with endorsement of Postman that it was refused by the tenant. In fact neither registered letter was received back by the landlord nor acknowledgement was received by him. It is in these circumstances presumption that letter sent by registered post at the correct address must be deemed to have been served upon the tenant and denial of tenant about its service/receipt itself would not be sufficient unless he prove otherwise would not lie and this is not the correct approach to answer the problem.

19. It cannot be doubted that presumption of certain facts as illustrated in Section 114 is stronger when a letter is sent by registered post to the addressee. **(See Harihar Benerji Vs. Ram Sahai Rai, AIR 1918 PC 102; and Balgovind Vs. Bhargova Book Depot, AIR 1958 All 369).**

20. It also cannot be disputed, if a notice is sent by landlord to the tenant by registered post and acknowledgement is received back by the landlord containing signature of the tenant, presumption of service would have to be drawn against the tenant unless tenant prove otherwise by adducing relevant evidence as held in **Green View Radio Service Vs. Laxmibai Ramji, (1990) 3 SCJ 325.**

21. Similarly, if a notice has been sent by landlord by registered post and it is received back with an endorsement made by an official of Post Office namely Postman that it was refused by the addresee, presumption of service upon addressee shall be drawn unless the tenant prove that the letter was never offered to him by the Postman and endorsement made thereon is not correct. The tenant's bare denial would not be sufficient in such a case and he will have to prove his case by adducing relevant evidence. Such denial can be by making statement on oath and in such case onus would shift on the landlord to prove that refusal was by the tenant which he can show by summoning the postman and adducing his oral evidence. However, this is one aspect of the matter. Sometimes from the conduct of tenant or other circumstances, his denial even if on oath, can justifiably be disproved by the Court without having Postman examined. There is no hard and fast rule on this aspect as observed by the Apex Court in **Anil Kumar Vs. Nanak Chandra Verma, AIR 1990 SC 1215.**

22. But these cases however have no application to the present case for the simple reason that here neither any third party intimation is available with the landlord that the tenant was served with the notice but he declined to receive the same nor acknowledgement has received/come in the hands of landlord containing signature of tenant to show its service. The only thing available in the present case is the fact that a registered letter with acknowledgement due sent by landlord to the tenant on correct address. In such a case tenant's bare denial supported with an affidavit is sufficient rebuttal unless proved otherwise by landlord. Without anything further namely availability of acknowledgement containing signature of tenant or the postal agent's endorsement of refusal etc., the addressee may rebut the presumption by making statement on oath denying service of the registered letter. I need not to burden this judgment with the catena of decisions on this aspect except simply referring to a few one namely **Radha Kishan Vs. State of U.P., AIR 1963 SC 822; Appa Bhai Moti Bhai Vs. Lakshmi Chand Zaver Chand, AIR 1954 Bom 159 and Ram August Vs. Vindeshwari, AIR 1972 Pat 142** which fortify the view I have taken hereinabove.

23. Thus onus lie upon the landlord to prove his case by producing the best evidence. Under the Post Office Act, if addresser of a registered letter makes enquiry from Post Office about service of registered letter upon addressee, he could have received a reply therefrom and that could have been an evidence of service of notice. Similarly, the Postman could have been examined by summoning him.

Unfortunately the landlord has chosen to follow non of these.

24. Learned counsel for the petitioner has relied on Apex Court's decision in **Samittri Devi & Anr. Vs. Sampuran Singh & Anr. (2011) 3 SCC 556.** The Court has observed therein that a letter if sent on a correct address and its certificate of posting has been received from the Post Office, presumption can be drawn that in normal course of business it would have been served upon the addressee in absence of any pleading alleging anything otherwise in respect to the certificate of posting or denial of the addressee about its service. The Apex Court relied and referred to an earlier decision of the Privy Council in **Harihar Banerji Vs. Ramsashi Roy, (supra)** and Full Bench judgment of this Court in **Ganga Ram Vs. Phulwati, AIR 1970 All 446.** The question of presumption under Section 114 in this case is not the core issue in the matter. Moreover the Court also said that service if denied by addressee the position would be different. But here is a case where addressee has specifically come up with a case that he was never served with the alleged notice and has sworn the above statement on oath. It is in this background the question is whether presumption of service is conclusive or it is so strong that a bare denial of tenant is not sufficient unless he further prove it. Obviously a negative fact would not be required to be proved. In such cases, in absence of anything further, the landlord would have to prove the factum of service of notice by adducing positive evidence since presumption under Section 114 is rebuttable. The aforesaid judgment therefore lends no help to the petitioner since there was no denial of service of notice by the addressee.

25. So far as rigour of proviso to Section 21(1)(a) is concerned, that notice is mandatory. The issue is squarely covered by Apex Court's decision in **Nirbhai Kumar Vs. Maya Devi & Ors.** (2009) 5 SCC 399 wherein the three Judge Bench of Apex court has held that it is mandatory and has overruled its earlier decision in **Anwar Hasan Khan Vs. Mohd. Shafi, (2001) 8 SCC 540.** An earlier two judge Bench judgment in **Martin & Harris Ltd. Vs. Vith Additional Distt. Judge & Ors. (1998) 1 SCC 732** has been affirmed by the larger Bench of Apex Court in N**irbhai Kumar (supra).**

26. In the facts and circumstance of this case, it cannot be disputed that denial of service of notice dated 20.9.1982 by the tenant on oath was sufficient to rebut presumption of service of registered notice upon him and onus then shifted upon the landlord to prove service. In absence of any service of such notice, application under Section 21(1)(a) was not entertainable being barred by first proviso to Section 21(1)(a) of Act, 1972.

27. The discussion above led to inescapable inference that the Lower Appellate Court's findings on issue No.2 that notice under Section 21(1)(a) first proviso having not been served upon the tenant, application was not competent and not maintainable cannot said to be faulty legally or otherwise. Hence it warrants no interference.

28. The writ petition lacks merit. Dismissed with costs which I quantify to Rs.5,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition no. 13747 of 1995

Smt. Manmohan Kaur ...Petitioner
Versus
Additional Commissioner (J) Bareilly and others ...Respondents

Counsel for the Petitioner:
Sri S.D. Pathak
Sri D.Pathak
Sri Rakesh Pathak

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Requirement of recording reasons- rejection of Section 5 Application as well as dismissal of Appeal-without disclosing any reasons for unsatisfactory explanation for condonation of delay- similarly dismissal of earlier appeal-held- without considering the impact of dismissal of earlier appeal without recording any reason of non-satisfaction- order impugned-unsustainable delay in filling appeal condoned-direction issue to decide appeal on its merit.

Held: Para 8

Having perused the pleadings on record as also the impugned order, no reasons have been given by the appellate authority as to why the explanation given by the petitioner for delay in filing the appeal was not satisfactory and it is primarily on this ground that the appeal has been held to be not maintainable as barred by time. The dismissal of another appeal has been stated by way of a fact in the order. There is no indication as to how the said dismissal governs the appeal filed by the petitioner and as to what is the impact of the said order in another appeal.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Shri S.D. Pathak, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. This writ petition arises out of proceedings under the U.P. Imposition of Ceiling on Land Holdings Act, 1960. The Prescribed Authority proceeded in the matter and vide order dated 21st of March, 1994 declared certain land as surplus.

3. The petitioner claiming herself to be a divorced wife of Gurubachan Singh filed an appeal against the said order on the ground that she had no knowledge of the said order.

4. The appeal was filed on 31st March, 1995. An application under Section 5 of the Indian Limitation Act was filed supported by an affidavit, a copy whereof has been filed along with writ petition as Annexure No. 2. The petitioner disclosed reasons about the non-filing of the appeal within time and also the date of knowledge whereafter the learned counsel for the petitioner made an inspection of the file and accordingly instituted the appeal.

5. The learned Additional Commissioner has dismissed the appeal on two grounds namely, the explanation given by the petitioner in support of the Section 5, application does not appear to be satisfactory and even otherwise another appeal against the same order had already been dismissed.

6. The writ petition was entertained and an order directing the parties to maintain status quo as regards to the land in dispute was passed on 24.5.1995.

7. A counter affidavit has been filed stating therein that during the proceedings before the Prescribed Authority the statement of the petitioner was recorded on 2nd of April, 1993 and, therefore, it cannot be said that the petitioner had no knowledge about the proceedings before the Prescribed Authority. It has further been stated that an appeal filed by another person against the same order has already been dismissed and, therefore, there was no ground made out for entertaining the same.

8. Having perused the pleadings on record as also the impugned order, no reasons have been given by the appellate authority as to why the explanation given by the petitioner for delay in filing the appeal was not satisfactory and it is primarily on this ground that the appeal has been held to be not maintainable as barred by time. The dismissal of another appeal has been stated by way of a fact in the order. There is no indication as to how the said dismissal governs the appeal filed by the petitioner and as to what is the impact of the said order in another appeal.

9. In the absence of any cogent reasons on both grounds the impugned order dated 17.4.1995 is unsustainable.

10. The writ petition is allowed. The order dated 17.4.1995 is hereby quashed.

11. Keeping in view the facts and circumstances of the case as also the reasons given in support of the delay condonation application, it would be appropriate that the same is considered by this Court itself instead of remanding the said issue after a lapse of 17 years. The delay is accordingly condoned as the explanation is satisfactory and the appeal will be treated to be within time and will be disposed of on merits as expeditiously as possible by the appellate authority after giving an opportunity of hearing to the State as well.

12. Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 65093 of 2011

Satya Narain Tiwari ...Petitioner
Versus
Pt. Neelkanth Trust ...Respondent

Counsel for the Petitioner:
Sri Kailash Nath Kesharwani

Counsel for the Respondents
Anil Kumar Sharma

U.P. Urban Building (Regulation of Letting Rent & Eviction) Act 1972 Section 20 (4)-Striking and of defence-default in payment of rent w.e.f. 01.05.1976-.registered notice fixing 25.09.1987-employees were on strike-written statement filed on 25.09.1987 with application seeking permission to deposit entire rent-after several adjournment on 08.04.1988 permission granted-compiled only after 13 years on 23.05.2000-both Courts below refused to extend benefits-held- 08.04.1988 being "first date of hearing" no deposit made-no question of extending benefits under section 20 (4) arises-petition dismissed.

Held: Para 25 and 26

Applying the dictum laid down in the above authorities, it is evident from the order sheet that written statement was taken on record by the Court below on 5th February, 1988 and thereafter 8th April, 1988 was fixed for final hearing. Therefore it is 8th April, 1988 which, in my view, would be the date of "first hearing" by which time the petitioner ought to have make payment in order to claim benefit under Section 20(4) C.P.C. which admittedly he has failed.

Moreover, even if I consider the order dated 8th April, 1988 passed by Court below permitting the petitioner to tender amount of rent [by allowing his application 6-C] in one week, and further indulgence is allowed to the petitioner, that would also make no difference in the present case since in the entire month of April, 1988 no compliance was made by the petitioner. The actual payment for the first time was made by him only on 23.5.2000, which is much beyond the date of "first hearing", which according to me would be 8th April, 1988.

Case law discussed:

1981 ARC 1; 1981 ARC 463; 1985 (2) ARC 461; 1996 (2) ARC 255; 1995 (3) SCC 407; 1993 (4) SCC 406; 1999 (8) SCC 31; 2002 (3) SCC 49; AIR 2002 SC 2520; 2001 (2) AWC 1468; 2004 (56) ALR 460; 2004 (57) ALR 233; 2005 (60) ALR 697; 2006 (3) ARC 657; 2006 (2) ARC 208

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

1. Heard Sri Kailash Nath Kesharwani, learned counsel for the petitioner and Sri Anil Kumar Sharma, learned counsel for the respondents. Since pleadings are complete, as requested and agreed by learned counsel for the parties, I proceed to decide the matter under the Rules of the Court at this stage.

2. The petitioner is a tenant in the premises **i.e. second and third storey** of a house situated at Mohalla Akalganj, District Etawah. S.C.C. Suit No.33 of 1987 was filed by respondent in the Court of Judge, Small Causes, Etawah vide plaint dated 10.8.1987 alleging that petitioner-tenant has committed default in payment of rent since 1st May, 1976 till date. A registered notice was issued on 17/18.2.1987 demanding rent and terminating tenancy. The notice was served upon the petitioner-tenant on 21.2.1987. He replied by advocate's notice dated 9.3.1987 denying the very ownership of respondent on the premises in question and disputed relationship of landlord and tenant. Another notice was served upon petitioner vide registered letter dated 21.3.1987 terminating his tenancy on the ground of denial of ownership and the said notice was also served on 23.3.1987.

3. Though the tenant was alleged to be in default of payment of rent since 01.5.1976 but in the suit filed, the arrear of rent was claimed only for the preceding three years. The relief of eviction of tenant was also sought. The suit was registered issuing notice fixing 25.9.1987.

4. It is not in dispute that on 25.9.1987, employees of Court were on strike. Thereafter on 3.10.1987, the petitioner filed written statement dated 25.9.1987 along with an application No.6-C seeking permission of the Court below to pay rent by Tender. This application was allowed on 8.4.1988 permitting petitioner-tenant to make payment of rent by Tender within a week on its own risk. The rent for the period of 1.5.1976 to 31.3.2000 was deposited by Tender dated 23.5.2000 (Annexure 4 to the writ petition).

5. In the Court below the petitioner sought benefit of Section 20(4) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act 1972") alleging that he deposited the entire rent and other charges on the "first date of hearing" but this contention has not found favour in both the Courts below and they have recorded findings against him.

6. Sri Keserwani, learned counsel appearing for the petitioner contended that 25.9.1987 was the "first date" fixed after issuing notice but on that date there was a strike of employees. There was no function, administrative or judicial. Hence it cannot be said that 25.9.1987 was the "first date of hearing". On the very next date i.e. 3.10.1987 he submitted application seeking permission of trial Court for payment of rent as demanded by landlord by Tender but the said application was deferred on about 3 or 4 occasions and it is only on 8.4.1988 the same was allowed. The petitioner complied the same. Still he has not been given the benefit of Section 20(4) against eviction. It is said that both the Courts below have erred in law in deciding this issue against him. In support, he placed reliance on Apex Court's decision in **Ved Prakash Wadhwa Vs. Vishwa Mohan 1981 ARC 1, Bimal Chand Jain Vs. Sri Gopal Agarwal 1981 ARC 463** and two Single Judge judgment of this Court in **Ram Autar Dubey Vs. VIIth Additional District Judge, Gorakhpur & others 1985 (2) ARC 461**; and, **Gulam Mohinuddin Khan Vs. 1st Additional District Judge, Rampur & Ors. 1996 (2) ARC 255.**

7. Sri Anil Kumar Sharma, learned counsel appearing for the respondent-landlord however submitted that even if what is contended by learned counsel for the petitioner is accepted to the extent that 25.9.1987 may not be considered to be "first date of hearing", admittedly when application of the petitioner was allowed on 8.4.1988, it was incumbent upon him to make deposit in order to get the benefit of Section 20(4) of Act 1972 but no such compliance was made and it is only after about 13 years i.e. on 23.5.2000 entire arrears of rent was deposited along with interest and expenses. This cannot be said to have been done on the "first date of hearing", inasmuch as, it cannot be said that the "first date of hearing" got extended till the year 2000. The Courts below thus have rightly held that petitioner was disentitled for benefit under Section 20(4) of Act 1972 though default in payment of rent since May, 1976 is virtually admitted.

8. The fact, which is not disputed in this case, is that summons issued to the petitioner by trial Court mentioned the date of appearance of defendant as 25th September, 1987. It is also not in dispute that on 25th September, 1987 the Court could not function due to strike of employees. The case was taken up then on 3rd October, 1987 when tenant presented his application No. 6-C and also filed an application seeking permission of trial Court to pay the rent etc. by Tender. On the aforesaid application, trial Court could pass order on 8th April, 1988. It allowed a week's time to the petitioner tenant to make payment, as requested by him in the application 6-C submitted on 3rd October, 1987

9. For consideration of petitioner's application 6-C, the trial Court fixed 12th October, 1987 whereafter it was adjourned to 4th December, 1987 and 5th February, 1988. The petitioner filed his written statement on payment of cost on 5th

February, 1988. However, his application 6-C was heard by trial Court and after hearing both the sides the same was allowed on 8th April, 1988 permitting him to make payment by Tender within a week. The next date fixed was 8th July, 1988.

10. However, this order dated 8.4.1988 was not complied with. No payment was made as directed on 8th April, 1988. On the contrary, arrears of rent, interest, litigation expenses etc. were paid on 23rd May, 2000 as is evident from Annexure 4 to the writ petition.

11. Learned counsel for the petitioner relied on certain Tenders, said to have been submitted by him in December, 1987 and onwards making payment of regular rent commencing from 11th August, 1987 and onwards on different dates and copies of these tenders collectively have been filed as Annexure 7 to the writ petition. However, the said payments do not include entire arrears of rent, interest and cost of litigation as provided in Section 20(4) of Act, 1972.

12. From record it is evident that such payment for the first time was made by petitioner on 23rd May, 2000 and not before that.

13. The petitioner's submission is that 'first date of hearing' should be considered sometimes in May, 2000 when he deposited the entire amount as contemplated under Section 20(4) vide tender dated 23.5.2000 (copy of tender has placed as Annexure 4 to the writ petition).

14. The only question up for consideration is, "What is the date of first hearing in this writ petition".

15. Learned counsel for the respondent-landlord submitted that even if 25th September, 1987 may not be treated to be the date of first hearing, and giving maximum latitude to the tenant if it is taken when the Court applied its mind for the first time, the date of first hearing even in that case cannot be beyond 8th April, 1988 or 15th April, 1988 which would take into consideration period of one week allowed by trial Court for making payment to the petitioner.

16. The expression "first hearing" has been explained in Section 20(4) Explanation (a) and reads as under:

"the expression "first hearing" means the first date for any step or proceeding mentioned in the summons served on the defendant."

17. This expression has been considered by Apex Court in **Ved Prakash Wadhwa (supra)**. It was held that the date of "first hearing would not be before a date fixed for preliminary examination of parties and framing of issues". Similar was the view taken in an earlier judgment also in **Advaita Nand Vs. Judge, Small Cause Court, Meerut, 1995 (3) SCC 407.**

18. A three-Judge Bench of Apex Court also considered this issue in **Siraj Ahmad Siddiqui Vs. Prem Nath Kapoor, 1993 (4) SCC 406** and said as under

"The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit. Does the definition of the expression 'first

hearing' for the purposes of Section 20(4) mean something different? The "step or proceedings mentioned in the summons" referred to in the definition should we think, be construed to be a step or proceeding to be taken by the court for it is, after all, a "hearing" that is the subject matter of the definition, unless there be something compelling in the said Act to indicate otherwise; and we do not find in the said Act any such compelling provision. Further, it is not possible to construe the expression "first date for any step or proceeding" to mean the step of filing the written statement, though the date for that purpose may be mentioned in the summons, for the reason that, as set out earlier, it is permissible under the Code for the defendant to file a written statement even thereafter but prior to the first hearing when the court takes up the case, since there is nothing in the said Act which conflicts with the provisions of the Code in this behalf. We are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary."

19. Again it was considered in **Sudarshan Devi Vs. Sushila Devi, 1999(8) SCC 31** and held that the date fixed for hearing of the matter is the date of first hearing and not the date fixed for filing of written statement. The Court observed that emphasis in the relevant provision is on the word "hearing". The Court also relied on its earlier decision in **Ved Prakash Wadhwa (supra).**

20. The matter again came to be considered in **Mam Chand Pal Vs. Shanti Agarwal (Smt.), 2002 (3) SCC 49**. Therein the suit was filed on 5.12.1988 and summons were issued fixing 19th January, 1989 for filing of written statement and 27th January, 1989 for hearing. The defendant was not served. The order was passed for service of notice on the defendant by publication fixing 3.7.1989 for hearing. By mistake in the publication, the date of hearing was shown as 26.4.1989 instead of 3.7.1989. On 26.4.1989, Presiding Officer was not available having proceeded for training. The case was thereafter adjourned to 11.5.1989 and further gone on adjournment for one or the other reasons on several dates. The Court held that in the present case 26th April, 1989 would not be regarded as "first date of hearing" since on that date the Presiding Officer was not available. In para 7 the court said, "where the Court itself is not available it could not be treated as the date of first hearing".

21. In **Ashok Kumar & Ors. Vs. Rishi Ram and others, AIR 2002 SC 2520**, the Court noticed distinction between the phraseology in Order XV, Rule 5 C.P.C. and Explanation (a) to sub-section (4) of Section 20 of Act, 1972 and in para 8, said:

"Rule 1 of Order V speaks of issue of summons. When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day specified therein. Rule 2 thereof enjoins that the summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. Rule 5 of Order V says that the Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit which shall be noted in the summons. However, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit. It may be apt to notice here that Sub-section

(3) of Section 20 of the Act was deleted in U.P. Civil Laws Amendment Act, 1972 with effect from September 20, 1972 and Rule 5 was inserted in Order XV of the Civil Procedure Code which deals with disposal of the suit at the first hearing. Explanation 1 to Rule 5 of Order XV defines the expression "first hearing" to mean the date for filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned. But the said expression, as noticed above, is defined in Clause (1) of Explanation to Sub-section (4) of Section 20. Section 38 of the U.P. Act says that the provisions of the said Act shall have effect notwithstanding anything inconsistent therewith contained in the Transfer of Property Act or in Code of Civil Procedure, therefore, the definition contained in Clause (a) of Explanation to Sub-section (4) of Section 20 of the Act will prevail over the definition contained in Rule 5 of Order XV of the Code of Civil Procedure as applicable to the State of U.P. It is too evident to miss that in contra-distinction to the "filing of written statement" mentioned in the definition of the said expression contained in Rule 5 of Order XV, the language employed in Clause (a) of the Explanation to Section 20(4) of the U.P. Act, refers to 'the first date for any step or proceeding mentioned in the summons served on the defendant'. In our view those words mean the first date when the court proposes to apply its mind to identify the controversy in the suit and that stage arises after the defendant is afforded an opportunity to file his written statement."

22. In para 12 of the judgment in **Ashok Kumar (supra),** considering the above observation and also relying on its earlier decisions in **Sudershan Devi (supra), Advaita Nand (supra)** and **Siraj Ahmad Siddiqui (supra),** the Court said:

"Now adverting to the facts of the case on hand it has been noticed above that the suit was posted on May 20, 1980 for final disposal but that date cannot be treated as the first hearing of the suit as the Court granted time till July 25, 1980 to the tenant for filing written statement. On July 25, 1980 time was extended for filing written statement and the suit was again adjourned for final disposal to October 10, 1980. Inasmuch as after giving due opportunity to file written statement the suit was posted for final disposal on October 10, 1980 it was that date which ought to be considered as the date fixed by the Court for application of its mind to the facts of this case to identify the controversy between the parties and as such the date of first hearing of the suit."

23. It also held that once the date of "first hearing" is determined and thereafter the case is adjourned, the date of first hearing of the suit would not change on every adjournment of the suit for final hearing.

24. Thus the effective date of first hearing of the suit sould be, when the Court proposed to apply its mind. Therefore it would be the date fixed earliest for final disposal/hearing and not adjourned for reasons attributable to the defendant-tenant. There are certain decisions of this Court also and I need not to burden this judgment giving in detail all such judgments except of making reference of some of those hereto i.e **Mohd. Salim alias Salim Uddin Vs. 4th Addl. District Judge, Allahabad & Ors. 2001(2) AWC 1468, Har Prasad Vs. Ist A.D.J., Etah 2004 (56) ALR 460, Jai Ram Dass Vs. Iind Addl. District Judge, Jhansi & Ors. 2004(57) ALR 233,**

Chaturbhuj Pandey Vs. VI A.D.J., Kanpur & Ors. 2005 (60) ALR 697, Hira Lal & Ors. Vs. Ram Das 2006 (3) ARC 657 and Saadat Ali Vs. J.S.C.C., Moradabad & ors. 2006 (2) ARC 208.

25. Applying the dictum laid down in the above authorities, it is evident from the order sheet that written statement was taken on record by the Court below on 5th February, 1988 and thereafter 8th April, 1988 was fixed for final hearing. Therefore it is 8th April, 1988 which, in my view, would be the date of "first hearing" by which time the petitioner ought to have make payment in order to claim benefit under Section 20(4) C.P.C. which admittedly he has failed.

26. Moreover, even if I consider the order dated 8th April, 1988 passed by Court below permitting the petitioner to tender amount of rent [by allowing his application 6-C] in one week, and further indulgence is allowed to the petitioner, that would also make no difference in the present case since in the entire month of April, 1988 no compliance was made by the petitioner. The actual payment for the first time was made by him only on 23.5.2000, which is much beyond the date of "first hearing", which according to me would be 8th April, 1988.

27. Hence default on the part of petitioner stand proved and also that he did not pay entire rent etc on first date of hearing. The findings recorded by Courts below against the petitioner therefore cannot be said erroneous in any manner.

28. The judgment cited by petitioner in **Ved Prakash Wadhwa (supra)** has already been discussed above but that does not lend any support to him in any manner. So far as rest of the judgments in **Bimal Chand Jain (supra)** of Apex Court and two jugments of this Court i.e. **Ram Autar Dubey (supra) and Gulam Mohiuddin Khan (supra)** are concerned, having gone through the same, I do not find that these judgments reflect light upon the question as to what would be the date of first hearing in the present case. Hence these judgments have no application to the present case.

29. No other argument advanced.

30. In the result the wit petition being devoid of merits is dismissed.

31. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2012

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE HET SINGH YADAV, J.

Civil Misc. Writ Petition no. 39386 of 2007

Kamal Jeet Singh ...Petitioner
Versus
The General Officer Commanding In Chief And Others ...Respondents

Counsel for the Petitioner:
Sri Siddhartha

Counsel for the Respondents:
Sri Mohd. Isa Khan
S.C.

(A). Constitution of India, Article 226- Writ Petition-alternative remedy-inspite of statutory remedy of revision-petition pending since long pleading exchange between the parties-petition can be decided on merit.

Held: Para 26

However, the present Writ Petition is pending since 2007. Affidavits have been exchanged between the parties. In the circumstances, we are of the view that it will not be appropriate to dismiss the Writ Petition on the ground of availability of alternative remedy of filing revision under Rule 15 of the Rules, 1937, i.e. the Cantonment Fund Servants Rules 1937.

(B) Practice of Procedure-requirement of recording reasons-even administrative authority is bound to record reason in support of its conclusions-appeal dismissed confirming order passed by disciplinary authority-no reasons recorded for its satisfaction-held-order not sustainable-quashed.

Held: Para 15

It is further relevant to note that the Appellate Authority has merely reproduced the charges against the petitioner and the gist of the Inquiry Report. The Appellate Authority has not dealt with the various grounds raised by the petitioner in his Appeal No. reason has been given by the Appellate Authority for agreeing with the order of the Disciplinary Authority and for differing from the recommendation made by the Principal Director, Defence Estates, Central Command. In our opinion, the order passed by the Appellate Authority is not a speaking order.

Case law discussed:

(2008) 3 Supreme Court 469; (2009) 4 Supreme Court Cases 240

(Delivered by Hon'ble Satya Poot Mehrotra, J.)

1. We have heard Shri Siddharth, learned counsel for the petitioner and Shri Mohd. Isa Khan, learned counsel for the respondents. The Affidavits have been exchanged between the parties, and with the consent of learned counsel for the parties, the Writ Petition is being disposed of at this stage.

2. The petitioner has filed the present Writ Petition under Article 226 of the Constitution of India, interalia, praying for quashing the order dated 14.6.2004 (Annexure No. 6 to the Writ Petition) passed by the respondent no.2 (Cantonment Board, Meerut) and the Appellate Order dated dated 27.4.2007 (Annexure No. 8 to the Writ Petition) passed by the respondent no. 1 (General Officer, Commanding-In-Chief, Central Command, Lucknow Cantt).

3. As per the averments made in the Writ Petition, the petitioner was appointed on the post of Pound Keeper on 2.8.1976. The petitioner was promoted/appointed as Stenographer by Office Order dated 20.5.1983. Thereafter, the petitioner was further promoted in the Supervisory Grade by the Cantonment Board and was posted as Accountant and further on 10.12.1998, the petitioner was posted as Revenue Superintendent in the Cantonment Board, Meerut. While the petitioner was posted as Revenue Superintendent, Meerut, he was placed under suspension on 7.11.2002, and an inquiry was ordered against the petitioner, and the Memorandum of Charge dated 4.12.2002 was served upon the petitioner. Copy of the Memorandum of Charge has been field as Annexure No. CA-2 to the Counter Affidavit filed on behalf of the respondents.

4. Four charges were levelled against the petitioner in the said Memorandum, namely,

"Article No. 1:- Shri Kamal Jeet Singh while functioning as Revenue Superintendent during the period 03.12.1998 to 7.11.2002 has committed gross misconduct unbecoming of public servant; thus violated the provisions of Rule 3 of CCS (Conduct) Rules, 1964.

Article No. 2:-That during the aforesaid period and while functioning in the aforesaid office, the said Sri Kamal Jeet Singh has misused his official position for personal monetary gain in violation of the provisions of Contonments Act, 1924.

Article No.3:- That during the aforesaid period and while functioning in the aforesaid office, the said Shri Kamal Jeet Singh has received illegal gratification for transfer of liquor shop which is in gross violation of conduct rules and his conduct is unbecoming of public servant.

Article No. 4:- That during the aforesaid period and while functioning in the aforesaid Office, the said Shri Kamal Jeet Singh was found involved in allowing illegal hoardings in Cantt Area without permission of the Competent Authority and without deposit of revenue in Cantt Fund treasury. He thus committed gross misconduct and is guilty of misuse of official position for personal monetary gains in violation of provisions of CCS (Conduct) Rules, 1964."

5. The inquiry proceedings were thereafter conducted against the petitioner. The Inquiry Officer submitted his report, copy whereof has been filed as Annxure No. 3 to the Writ Petition.

6. As regards, the charge contained in Article no.1, the Inquiry Officer found the petitioner guilty.

7. As regards, the charge contained in Article No.2, the Inquiry Officer found the petitioner "guilty (to be partially blamed)."

8. As regards, the charge contained in Article No. 3, the Inquiry Officer dismissed the said charge.

9. As regards, the charge contained in Article No.4, the Inquiry Officer held the petitioner "guilty (to be partially blamed)."

10. It further appears that the matter was thereafter placed before the Cantonment Board. The Cantonment Board in its meeting held on 24. 9.2003 resolved that the Inquiry Report be given to the petitioner to make his representation/ submission in writing to the Disciplinary Authority, if the petitioner wished to do so. Copy of the Inquiry Report was accordingly sent to the petitioner whereupon the petitioner made his representation dated 27.10.2003, copy whereof has been filed as Annexure No.4 to the Writ Petition. After submission of the representation by the petitioner, the matter was placed before the Cantonment Board alongwith Office Note. Being Disciplinary Authority, the Cantonment Board on 14.6.2003 passed the resolution awarding punishment to the petitioner. The said resolution, as contained in Annexure No. 6 to the Writ Petition, is as under:

"364. Considered in details. Resolved that Shri Kamal Jeet Singh be reverted one grade below in non-

supervisory post alongwith withholding of 02 annual increments without commutative effect. The pay & allowances for the period of suspension be restricted to the subsistence allowance already paid and the period of suspension be treated as ECL. Further resolved that he be re-instated in the service with immediate effect."

11. The petitioner thereafter filed an appeal before the Appellate Authority as per the provisions contained in Rule 14 of the Cantonment Fund Servants Rules, 1937 (hereinafter also referred to as "the Rules, 1937"), framed in exercise of the powers conferred by Section 280 of the Cantonments Act, 1924. Copy of the Appeal has been filed as Annexure No. 7 to the Writ Petition.

12. It appears that the Appeal submitted by the petitioner was processed by the Director, Defence Estates, Central Command, as well as the Principal Director, Defence Estates, Central Command, and they made recommendations that the Appeal submitted by the petitioner be allowed. It was specifically stated in the recommendations that the charges against the petitioner did not stand proved. The Appellate Authority, thereafter considered the matter and passed the order dated 27.4.2007 rejecting the Appeal submitted by the petitioner. In the said order, the Appellate Authority referred to recommendation made by the Principal Director, Defence Estates, Central Command and observed that: *" As per the findings of PDDE CC vide note sheet No. 13 dated 06 Sept. 05, the charges against the appellant do not stand proved fully, however, the seriousness of charges proves that case of Shri Kamaljeet Singh does not merit reversion to his earlier post or scale of pay."* (Emphasis supplied).

13. A perusal of the recommendation made by the Principal Director, Defence Estates, Central Command shows that the Principal Director, Defence Estates, Central Command was in agreement with the note/ finding of the Director, Defence Estates, Central Command that " *the charges against the charged official (-i.e. the petitioner-) do not stand proved."* **(Emphasis supplied).**

14. Thus, the Appellate Authority has not correctly appreciated the recommendation made by the Director, Defence Estates, Central Command which was agreed to by the Principal Director, Defence Estates, Central Command.

15. It is further relevant to note that the Appellate Authority has merely reproduced the charges against the petitioner and the gist of the Inquiry Report. The Appellate Authority has not dealt with the various grounds raised by the petitioner in his Appeal No. reason has been given by the Appellate Authority for agreeing with the order of the Disciplinary Authority and for differing from the recommendation made by the Principal Director, Defence Estates, Central Command. In our opinion, the order passed by the Appellate Authority is not a speaking order.

16. Learned counsel for the petitioner has placed reliance upon the Judgement in ***Divisional Forest Officer, Kothagudem and others Vs. Madhusudhan Rao, (2008) 3 Supreme Court Cases 469,*** wherein the Apex Court

has held as under(paragraphs 19 and 20 of the said SCC):

"19. Having considered the submissions made on behalf of the respective parties and also having regard to the detailed manner in which the Andhra Pradesh Administrative Tribunal had dealt with the matter, including the explanation given regarding the disbursement of the money received by the respondent, we see no reason to differ with the view taken by the Administrative Tribunal and endorsed by the High Court. No doubt, the Divisional Forest Officer dealt with the matter in detail, but it was also the duty of the appellate authority to give at least some reasons for rejecting the appeal preferred by the respondent. A similar duty was cast on the revisional authority being the highest authority in the Department of Forests in the State. Unfortunately, even the revisional authority has merely indicated that the decision of the Divisional Forest Officer had been examined by the Conservator of Forests, Khammam wherein the charge of misappropriation was clearly proved. He too did not consider the defence case as made out by the respondent herein and simply endorsed the punishment of dismissal though reducing it to removal from service.

20. *It is no doubt also true that an appellate or revisional authority is not required to give detailed reasons for agreeing and confirming an order passed by the lower forum but, in our view, in the interests of justice, the delinquent officer is entitled to know at least the mind of the appellate or revisional authority in dismissing his appeal and/or revision. It is true that no detailed reasons are required to be given, but some brief reasons should be indicated even in an order affirming the views of the lower forum."* **(Emphasis supplied).**

17. Learned counsel for the petitioner further placed reliance upon the Judgement in ***Chairman, Disciplinary Authority, Rani Laksmi Bai Kshetriya Gramin Bank Vs. Jagdish Sharan Varshney & Others, (2009) 4 Supreme Court Cases 240,*** wherein the Apex Court has held as under (paragraph 5 of the said SCC):

5.In our opinion, an order of affirmation need not contain as elaborate reasons as an order of reversal, but that does not mean that the order of affirmation need not contain any reasons whatsoever. In fact, the said decision in ***Prabhu Dayal Grover's case [(1995) 6 SSC 279)]*** *has itself stated that the appellate order should disclose application of mind. Whether there was an application of mind or not can only be disclosed by some reasons, at least in brief, mentioned in the order of the appellate authority. Hence, we cannot accept the proposition that an order of affirmation need not contain any reasons at all. That order must contain some reasons, at least in brief, so that one can know whether the appellate authority has applied its mind while affirming the order of the disciplinary authority."* **(Emphasis supplied).**

18. It is, thus, evident that even if the Appellate Authority agrees with the order of the Disciplinary Authority, it (Appellate Authority) is required to give its reasons, though brief reasons, so that the delinquent officer may know that the Appellate Authoity has applied its mind in

dismissing his Appeal and in affirming the order of the Disciplinary Authority.

19. In the present case, we find that the Appellate Authority has rejected the Appeal filed by the petitioner and has upheld the order of the Disciplinary Authority dated 14.6.2004, despite the recommendations to the contrary made by the Principal Director, Defence Estates, Central Command and the Director, Defence Estates, Central Command. However, the Appellate Authority has not given any reason for agreeing with the order of the Disciplinary Authority and for differing from the said recommendations made by the Principal Director, Defence Estates, Central Command and the Director, Defence Estates, Central Command. The Appellate Authority has also not dealt with the various grounds raised in the Appeal submitted by the petitioner.

20. In view of the above, the order dated 27.4.2007 passed by the Appellate Authority is liable to be quashed.

21. Before parting with the case, we may refer to one submission made on behalf of the respondents that against the order dated 27.4.2007 passed by the Appellate Authority, the petitioner has got further remedy of filing revision under Rule 15 of the Rules, 1937, i.e. the Cantonment Fund Servants Rules, 1937, and therefore, the Writ Petition be dismissed on the ground of availability of alternative remedy.

22. We have considered the submission made by the learned counsel for the respondents.

23. Rules 14 and 15 of the Rules, 1937 are reproduced below:

*" **14. (1)** Any servant on whom any of the penalties specified in rule 11 has been imposed by the Board shall, within thirty days of the date of delivery of the copy of the documents showing the grounds on which the penalty has been imposed, be entitled to appeal to the Officer Commanding-in-Chief, the Command, and the decision of the Officer Commanding-in-Chief, the Command shall, subject to the provision of rule 15, be final.*

***(2)** A copy of the order passed by the Officer Commanding-in Chief, the Command shall be delivered to him personally or by registered post.*

***15.(1)** Any person on whom penalty has been imposed by the Board and who is aggrieved by the order of the Officer Commanding-in-Chief, the Command under rule 1 4 may, within thirty days of the delivery to him of such order, submit an application to the Central Government which may, after inquiry as it deems fit, revise such order, if it is satisfied that the Board or the said Officer has acted illegally with material irregularly.*

***(2)** Every such application shall be accompanied by a copy of the order of the Officer Commanding-in-Chief, the Command against which application is made and shall be submitted through the Board and the Officer Commanding-in-Chief, the Command. While forwarding the application, the Board shall attach thereto the whole proceedings together with the service book of the servant, if any."*

24. Thus, a person aggrieved by an order passed in the appeal under Rule 14 of the Rules, 1937 may file revision under Rule 15 of the said Rules.

25. Hence, it was open to the petitioner to file Revision under Rule 15 of the Rules, 1937 against the order dated 27.4.2007 passed by the Appellate Authority.

26. However, the present Writ Petition is pending since 2007. Affidavits have been exchanged between the parties. In the circumstances, we are of the view that it will not be appropriate to dismiss the Writ Petition on the ground of availability of alternative remedy of filing revision under Rule 15 of the Rules, 1937, i.e. the Cantonment Fund Servants Rules 1937.

27. In view of the above discussion, the Writ Petition filed by the petitioner deserves to be allowed and the order dated 27.4.2007 passed by the Appellate Authority (Annexure No. 8 to the Writ Petition) is liable to be quashed, and the matter is liable to be remitted to the Appellate Authority for considering the Appeal of the petitioner afresh in accordance with law and keeping in view the observations made in this Judgement.

28. The Writ Petition filed by the petitioner is accordingly allowed. The order dated 27.4.2007 (Annexure No. 8 to the Writ Petition) passed by the Appellate Authority is quashed. The matter is remitted to the Appellate Authority for considering the Appeal submitted by the petitioner afresh in accordance with law and keeping in view the observations made in this Judgement.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2012

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 55323 of 2004

Smt. Shushila Devi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel or the Petitioner:
Sri R.N.Singh
Sri B.R.Singh
Sri R.N.Tripathi
Sri S.C.Dubey
Sri S.K. Srivastava

Counsel for the Respondent:
C.S.C.
Sri Pushpendra Singh

Constitution of India, Article 226-Family Pension-husband of petitioner transferred from Chunar to Ballia in the year 1978-since then where-about not known-claim of family pension on presumption of civil death-authorities required the degree from Court-held-once admittedly petitioner's husband drawn salary upto 14.06.1977-burden of proof lies who contradicted the presumptions of Civil death under Section 108 Evidence Act-direction issued accordingly.

Held: Para 6

Section 108 of the Act provides that the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving

that he is alive is shifted to the person who affirms it. It is the case of the petitioner that it has not been heard by any person that her husband, Laxmi Narain Dubey is alive. Therefore, her claim that Laxmi Narain Dubey is not traceable since 1978 is dead, has to be accepted and the burden is now shifted on the other side to prove that he is still alive in view of Section 108 of the Act.

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

1. The petitioner is the widow of Laxmi Narain Dubey, who was employee in civil police.

2. The contention of the petitioner is that her husband has been transferred in the year 1973 in police station Chunar, district Mirzapur. Later on he has been transferred in Moradabad Training College and thereafter, in the year 1978 he has been transferred to Ballia and since then he is not traceable. The petitioner being wife claiming the family pension on the ground that in view of Section 108 of the Indian Evidence Act, 1872 (hereinafter referred to as the "Act") her husband is not traceable for more than seven years he is deemed to have died. When the claim of the petitioner has not been decided and the pension and other dues have not been paid, the present writ petition has been filed.

3. Counter affidavit has been filed by learned Standing Counsel. In para 11 of the counter affidavit it has been admitted that Sri Laxmi Narain Dubey was employee in the civil police. In para 11 it is admitted that as per the record he has been paid salary upto 14.06.1977. Some doubt has been raised on account of the date of birth of the son of Laxmi Narain Dubey, which was claimed to be 31.12.1983 while claiming compassionate appointment and, therefore, the petitioner has been asked to produce the order of the Court regarding the civil death.

4. Learned Standing Counsel submitted that let the petitioner may approach the Senior Superintendent of Police, Ballia for her claim and he may be directed to consider the same and pass appropriate order.

5. I have heard the submission of learned counsel for the parties.

6. Section 108 of the Act provides that the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. It is the case of the petitioner that it has not been heard by any person that her husband, Laxmi Narain Dubey is alive. Therefore, her claim that Laxmi Narain Dubey is not traceable since 1978 is dead, has to be accepted and the burden is now shifted on the other side to prove that he is still alive in view of Section 108 of the Act.

7. In view of the above, the Court is of the view that let the petitioner may file fresh representation before Senior Superintendent of Police, Ballia and he is directed to decide the claim of the petitioner within two months from the date of filing of the representation in accordance to law having regard to section 108 of the Act, by a speaking order.

8. With the aforesaid observation, the writ petition stands disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2012

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Writ Petition No.-13639 of 2010

Yogendra Sagar ...Petitioner
Versus
State of U.P. & another ...Respondents

Counsel for the Petitioner:
Sri Dileep Kumar
Sri Rajesh Mishra

Counsel for the Respondents:
Govt. Advocate
Sri Ashwani Kr. Awasthi
Sri Bheshaj Puri
Sri Manish Tewari
Sri R.P. Pandey

Constitution of India-Article 226-Delay in filing criminal revision-facts stated in affidavit remained uncontroverted-rejection-held-not proper instead of remanding-delay in filing revision condoned-revisional court directed to decide revision on its merit.

Held: Para 15

Normally we would remanded the matter to the revisional court for re-consideration of the Section 5 application but in the facts of the case, as noticed above, we find that the statement made on oath by the petitioner had come un-controverted. He has successfully explained the reasons for the delay in filing of the revision. We, hold that Section 5 application made by the petitioner, deserves to be granted. It is, accordingly allowed. Revision filed by the petitioner shall be treated to be within time.

Case law discussed:
1984 (3) SCC 46

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

1. We have heard Sri Dileep Kumar, learned counsel on behalf of the petitioner, learned A.G.A. on behalf of the State Authorities and Sri R.P.Pandey on behalf of complainant-respondent No.2 and have perused the record.

2. Petitioner before this Court seeks quashing of the order of the Additional Chief Judicial Magistrate., Court No.2, District Badaun dated 18.08.2009 as also the order passed by the Lower Revisional Court namely Session Judge, Badaun dated 6.7.2010 .

3. Counsel for the parties have agree that the present writ petition may be disposed of at this stage itself specifically in view of the order proposed to be passed by this Court.

4. It is not necessary for us to detail all the facts giving rise to the present petition. Facts relevant for deciding the present writ petition alone are being stated, which are as follows:

5. On the basis of protest petition, filed by Kuldeep Kishore Sharma, respondent No.2 and the statements made by Jyoti Sharma, prosecutrix under Section 200 Cr.P.C., as well as by Ramesh Chand Sharma, P.C. Sharma, Dharmendra Sharma, the Magistrate has summoned the petitioner namely Yogendra Sagar under Section 376(g) I.P.C. and other co-accused namely Tajendra Sagar and Neeraj Sharma alias Meenu under Section 366, 376(g) I.P.C. vide order dated 18.8.2009.

6. Not being satisfied with the summoning order, the petitioner Yogendra Sagar filed revision before the Session Judge being Revision No.2 of 2010. Since the revision was barred by limitation, he also made an application under Section 5 of the Limitation Act for condoning the delay in filing of the revision. The application under Section 5 of the Limitation Act has been rejected under order impugned dated 6.7.2010.

7. The order of the revisional Court is being challenged on the ground that it proceeds on misconception of facts and is even otherwise unsustainable in the eye of law.

8. It is the case of the petitioner that the order under challenge in the revision was admittedly made on 18.8.2009. The limitation prescribed for filing of the revision against such order is 90 days. The revision infact was presented before the Session Judge on 21.12.2009 i.e. after one month delay.

9. The Sessions Judge has dismissed the Section 5 application after recording that the petitioner has not been able to establish as to how he obtained knowledge of the order dated 18.08.2009 only on 21.12.2009 and secondly the affidavit in support of Section 5 application was filed by the pairokar of the petitioner and not by the petitioner himself. It has been noticed that an affidavit has been filed by the petitioner but at a later point of time stating therein that he was at Lucknow during the relevant period.

10. We have examined the order of the Session Judge and find that he has adopted an hyper technical attitude in rejecting the Section 5 application.

11. It has to remembered that all courts of law are constituted for furtherance of interest of substantial justice and not to obstruct the same on technicalities. When substantial justice and technicalities are pitted against each other, the interest of substantial justice must prevail. An order on merit is always welcome viz.a vis. an order on technicalities.(**Ref. Ghanshyam Das & Others Vs. Dominion of India & Others; 1984 (3) SCC, 46).**

12. When judged in light of the law so declared we have no hesitation to record that the order dated 6.7.2010 is more technical than required.

13. From the records we find that the affidavit filed in support of Section 5 application wherein on oath it was stated that the revisionist obtained knowledge of the summoning order only on 21.12.2009, as also the affidavit of the revisionist of the effect that he was at Lucknow during the relevant period had gone un-controverted. There being no challenge to the statement so made on oath the Court could not have easily brush aside the same on the plea that the revisionist could not disclose as to how he had received the knowledge of the order on 21.12.2009. Un-controverted evidence had to be accepted.

14. We are, therefore, of the opinion that the order dated 06.07.2010 cannot be legally sustained. It is hereby quashed.

15. Normally we would remanded the matter to the revisional court for re-consideration of the Section 5 application but in the facts of the case, as noticed above, we find that the statement made on oath by the petitioner had come un-controverted. He has successfully

explained the reasons for the delay in filing of the revision. We, hold that Section 5 application made by the petitioner, deserves to be granted. It is, accordingly allowed. Revision filed by the petitioner shall be treated to be within time.

16. It may be recorded that Sri R.P.Pandey, learned counsel on behalf of complainant as well as A.G.A. on behalf of State, have agreed that Section 5 application may be disposed of by this Court itself and that they have no objection to such a decision being taken by the High Court.

17. We direct that the Session Judge, Badaun shall proceed to hear and decide the revision on merits without granting any un-necessary adjournment to either of the parties. The revision shall be decided by means of reasoned order within four weeks from the date a certified copy of this order is filed before the Revisional Court. The parties shall produce the certified copy of this order before the Court concerned within three weeks from today.

18. In order to keep the record straight it may also be noticed that counsel for the respondent No.2 has pointed out that against the summoning order dated 18.8.2009 of the Magistrate, an application under Section 482 was filed by one of the co-accused namely Tejendra Sagar being Criminal Misc.Application No.26758 of 2009. The same has been dismissed by the High Court on 21.10.2009. Against the order of the High Court, Tejendra Sagar filed Special Leave to Appeal before the Apex Court being Special Leave to Appeal (Crl) No.8717 of 2009 which has been dismissed by the Apex Court on 30.11.2009.

19. With the aforesaid directions the writ petition is allowed.

20. Interim order, if any, stands discharged.

21. It is clarified that we have not expressed any opinion on merits of summoning order dated 18.8.2009 passed by the Magistrate.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2012

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

Habeas Corpus Writ Petition No. - 21540 OF 2012

Smt. Arti & another ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri S.S. Shah
Smt. Farida Jamal

Counsel for the Respondents:
A.G.A.
Sri Abhishek Pandey

Constitution of India, Article 226-Habeas Corpus Writ Petition-17 years old girl-seeking freedom from wrongful confinement from the custody of her father-as per medical examination she is about 17 years-variation of 3 years as allowed by Apex Court-age of petitioner come as 20 years-she is not an accused no induced for illegal custody-held-free to join the company of a man of her choice-argument that after getting custody she was married with another man-being never choice of petitioner-direction issued to join company of a man of her choice.

Held: Para 6

We were, simply, fortifying ourselves that the lady has a right to exercise her option as a matter of exercising her liberty and freedom granted under the constitution to chose her own life partner and our views stand vindicated that in absence of an allegation and the lady being major had all the rights to walk out of her parents house, out of her own volition, to go with a man of her choice to settle down in her life and there was no legal impediment in the affairs of Smt. Arti and no one including respondent no. 4 could have been within his right to create any impediment in enjoyment of right of freedom and liberty of choosing a life partner. We, as such, direct the Superintendent Nari Niketan to set Smt. Arti free so that she walks out of the institution freely and goes wherever she likes.

Case law discussed:

A.I.R. 1982 SC 1297

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

1. Sri Abhisekh Pandey, Advocate appears on behalf of respondent no. 4, father of Smt. Arti- petitioner no. 1. Sri R. A. Mishra, learned A.G.A. has placed before us the original copy of the report of the Medical Board regarding assessment of age of petitioner no. 1 Smt. Arti as per which the Board of Doctors had assessed her to be aged about 17 years.

2. We had passed a detailed order on 02.07.2012, on which date petitioner no. 1 Smt. Arti was produced under police custody from the custody of her father respondent no. 4. We had held the very order handing over the custody of petitioner no. 1 to respondent no. 4, her father as unsustainable in law as the authority who had passed the order did not have that jurisdiction, inter alia, for the reason that the S. D. M., Rampur, Maniharan could have acted in the matter only when there was full-fledged application under Section 97 Cr.P.C. he had also noticed unfortunate consequences, which had entailed due to the passing of a completely illegal order by applying a jurisdiction, which was never vested in S.D.M., Rampur Maniharan and had high-lighted the plight of the lady being forced to marry to another man whom she did not like nor chose as her life partner.

3. We had under the above circumstances noted that the order of the S.D.M., Rampur Mahiharan and the action of father of Smt. Arti, respondent no. 4 was quite unconstitutional and unsustainable in law. Under the above premises, we had directed Smt. Arti to be taken back to Superintendent, Nari Niketan, Meerut and, accordingly, she is lodged there presently.

4. The learned counsel appearing for father, respondent no. 4 contests the prayer of the petitioners to allow Smt. Arti to enjoy her freedom by being released from custody she has presently been put in on the ground that the lady was got married to a man after respondent no. 4 got her custody by virtue of an order passed by the S. D. M., Rampur, Maniharan on 26.04.2012.

5. The learned A.G.A. also contests the prayer of petitioners on the ground that petitioner-Smt. Arti was aged about 17 years and she was below 18 years of age and she could not be directed to be set free and the custody of the father could be the only legal custody. The contention of Sri Mishra, the learned A.G.A. hinges upon the medical report, we have just noted. We simply want to refer to the case of **Jaya Mal Vs. Home Secretary, Government of Jammu and Kashmir** reported in **A.I.R. 1982 SC 1297** which is widely being followed by all courts to hold that three

years have to be added to the age of a victim of an offence whose age has been medically assessed. Following that particular principle, if we add up three years to 17 years which is the age assessed by the Board of Doctors, we obtain 20 years, which could be said to be the approximate age of Smt. Arti. She is not a victim of an offence. There is no case registered on allegation that she was enticed or taking away rather she herself walked into the police station seeking protection of Nanauta Police on account of the supposed threat to her life at the hands of respondent no. 4 and others. These are all noted by the S.D.M., Rampur Maniharan, in his order dated dated 30th of December, 2011 and accordingly the lady was handed over to the Officer Incharge of that particular police station, who prayed for keeping the lady in custody of Superintendent, Mahila Sharnalaya, Meerut, from where, we have noted earlier, the lady was handed over to her father.

6. As regards the liberty of a person, there could not be any particular age as the constitution does not provide 18 years of age. Age of under 18 years of a lady could be relevant only when we are called upon to consider the release of such a lady, if there is a report of commission of offences under Section 363, 366 and 366A I.P.C.. There being no case registered and also there being no allegation coming from any corner whatsoever that the lady was taken or enticed away by any one, we can not suppose things which are not available to us from the record. As such, the contention of the counsel for the respondent no. 4 or the learned A.G.A, in our opinion, does not hold good because when the constitution does not require liberty to be granted to any person of any particular age then it is universally available to all who live within the territory of India irrespective of the fact, whether he is a citizen of India or is an outsider. We were, simply, fortifying ourselves that the lady has a right to exercise her option as a matter of exercising her liberty and freedom granted under the constitution to chose her own life partner and our views stand vindicated that in absence of an allegation and the lady being major had all the rights to walk out of her parents house, out of her own volition, to go with a man of her choice to settle down in her life and there was no legal impediment in the affairs of Smt. Arti and no one including respondent no. 4 could have been within his right to create any impediment in enjoyment of right of freedom and liberty of choosing a life partner. We, as such, direct the Superintendent Nari Niketan to set Smt. Arti free so that she walks out of the institution freely and goes wherever she likes.

7. The learned counsel appearing on behalf of respondent no. 4 was raising a preliminary objection also on the ground that the lady had got married to a man after her custody was handed over to his father, respondent no. 4. We have already detailed the circumstances under which the marriage was thrust upon the lady against her will and she had pointed out to us as may appear from our earlier order dated 02.07.2012, that she was deeply humiliated and brutalized on account of being subjected to the rituals of such a marriage and desires of a man, who was never a man of her liking or choice.

8. In our opinion, it could be falling some where between a void and voidable marriage and could not have the sanction of law because a marriage forced upon a major lady could not be upheld under the facts and circumstances we have just noted as it simply appears violative of her fundamental

human rights of marrying a man of her own choice, specially, when she had already got herself married to a man. Such marriage if upheld would only continue violation of the basic human right of the lady.

9. With the above, which we have recorded presently, we finally dispose of the present petition.

10. Learned A.G.A has filed a photocopy of the medical report after we have dictated the order and that be kept on record as part of the present proceeding.

11. Let learned A.G.A. inform the Superintendent Nari Niketan, Meerut about the order ofsetting Smt. Arti free, immediately.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2012

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition no. 14097 of 1993

G.N. Shukla ...Petitioner
Versus
S.D.O. Sadar district Agra and others ...Respondents

Counsel for the Petitioner:
Sri S. Prakash
Sri D. Tiwari
Sri Upasana Dubey
Sri V.Singh

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

Constitution of India, Article 226- Principle of "Natural Justice"-violation thereof-when not fetal-explained-dismissal on ground of deliberate disobedience to the order of superior, negligence in performance of duty inspite of transfer petitioner failed to handover the public documents despite of best effort-ultimately F.I.R. Lodged-in disciplinary proceeding all charges proved-nothing whisper by the petitioner for not giving the charge to the new transfree-violation of Principle of Natural Justice mere technical plea-has no substance-petition dismissed.

Held: Para 12 and 14

In the facts of the case, there is absolutely no averment in the present writ petition qua the petitioner having handed over the official records or that the finding recorded in that regard being bad. No prejudice has been pleaded nor shown due to non-supply of the enquiry report.

In these set of circumstances, this Court has no hesitation to record that the plea of violation of principles of natural justice is only a technical plea, which has no substance. Petitioner has hopelessly failed to establish any prejudice which may have been caused to him because of non-supply of the enquiry report.

Case law discussed:
AIR 2006 SC 644; (2006) 3 SCC 150; (2008) 9 SCC 31

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

1. Heard learned counsel for the parties.

2. Petitioner before this Court was working as the Lekhpal in the revenue department of the State of Uttar Pradesh. Petitioner was transferred vide order dated 6th January, 1993 from area Nagla Padi to area Angoothi, Tehsil Sadar, District Agra. He was directed to handover the charge including the official records in his possession to Sri Prakash Chandra Jain. Despite relieving officer having visited the

residence of the petitioner for taking over the government records, the same were not handed over. All attempts for the purpose failed. Petitioner was, therefore, placed under suspension vide order dated 30th January, 1993 and an departmental enquiry was initiated.

3. For non-deposit of the official records, a first information report was also lodged. Petitioner admittedly filed a writ petition before this Court being writ petition no. 8593 of 1993, challenging the order of suspension as well as the order of transfer, wherein no interim order was granted. As per paragraph-24 of the present writ petition, the writ petition remains pending.

4. Petitioner submitted his reply to the charge memo, thereafter, the enquiry officer submitted his report and it was recorded that despite order of transfer having been issued and despite there being a direction to the petitioner to hand over the charge including the official records to Mr. Prakash Chandra Jain, he has neither jointed at the transferred place nor he has handed over the official records.

5. On the basis of the enquiry report so received, the Competent Authority after considering the material on record, found that the petitioner has deliberately not handed over the official records. It was held that there was deliberate disobedience of the lawful orders of the higher authority and negligence in performance of duties by the petitioner. Petitioner was accordingly dismissed from service under order dated 12th April, 1993.

6. It is against this order that the present writ petition has been filed.

7. Two grounds have been pressed for challenging the order of punishment, (a) petitioner has been acquitted of the criminal charge and (b) enquiry report was never made available to the petitioner and therefore, the order of punishment is bad. For the second proposition, learned counsel for the petitioner has placed reliance upon the judgment of the Apex Court in the case of Managing Director, ECIL, Hyderabad etc.ect. vs. B. Karunakar, etc. etc. reported in AIR 1994 SC 1074.

8. So far as the first ground raised on behalf of the petitioner is concerned, suffice to record that the Apex Court, in the case of **South Bengal State Transport Corporation vs. Swapan Kumar Mitra & Ors**. reported in *AIR 2006 SC 644,* has explained that acquittal in the criminal case will not absolve the petitioner of the charges, which were under consideration in departmental enquiry. Therefore, in view of the judgment of the Apex Court as aforesaid the first ground raised on behalf of the petitioner must fail.

9. So far as the second ground raised on behalf of the petitioner is concerned, the law, as laid down by the Apex Court in the case of Managing Director, ECIL (Supra) has been explained in subsequent judgments of the Apex Court and it has been laid down that mere plea of violation of principles of natural justice will not suffice, prejudice caused must also be shown.

10. In **Syndicate Bank & Ors. Vs. Venkatesh Gururao Kurati; (2006) 3 SCC 150,** the Apex Court held as under:-

"To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to

him for non-observance of principles of natural justice."

11. Similarly, in **Haryana Financial Corporation & Anr. Vs. Kailash Chandra Ahuja;** (*2008) 9 SCC 31,* the Apex Court held that a party must satisfy the Court as what prejudice has been caused to it by non observance of those principles.

12. In the facts of the case, there is absolutely no averment in the present writ petition qua the petitioner having handed over the official records or that the finding recorded in that regard being bad. No prejudice has been pleaded nor shown due to non-supply of the enquiry report.

13. This Court made a pointed query to the learned counsel for the petitioner to point out from any pleading on record or from the document, as to when the petitioner handed over the official records, which were in his custody while working as Lekhpal before issuance of the order of transfer. Learned counsel for the petitioner hopelessly failed to refer to any pleading or any evidence on record for disputing the finding qua the official records have not been handed over by the petitioner.

14. In these set of circumstances, this Court has no hesitation to record that the plea of violation of principles of natural justice is only a technical plea, which has no substance. Petitioner has hopelessly failed to establish any prejudice which may have been caused to him because of non-supply of the enquiry report.

15. For the said reasons, this Court finds no good ground to interfere with the order of punishment.

16. The present writ petition is accordingly dismissed.

17. Interim order, if any, stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2012

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition no. 3172 of 1996

Bhagwan Singh and others ...Petitioner
Versus
District Basic Shiksha Adhikari and Others ...Respondents

Counsel for the Petitioner:
Sri R.N. Sharma

Counsel for the Respondents:
C.S.C.
Sri K.S. Shukla
Sri S.G. Hasnain

Constitution of India, Article 226-cancellation of appointment as assistant teacher in Primary School-petitioner were appointed on compassionate ground on class IVth post-representation for appointment as assistant teacher duly recommended by Education Superintendent-appointment letter issued-after joining their appointment canceled with direction to join their original post of class 4th-held-proper-after joining as class 4th-compassionate appointment can not be claimed as assistant teacher-recommendation of education superintendent meaningless-petition dismissed.

Held: Para 21

Even if it is assumed that services on the post of Assistant Teacher were vacant, the same were to be filled up by

promotion or by direct recruitment in the manner prescribed in the Recruitment Rule. The case of the petitioners is not that they had taken their benefit under the dying in harness rules for the first time as benefits of employee of Government Servant who had died in harness. Therefore, they had no right to be re-appointed for a second time, afresh, as Assistant Teacher under the U.P. Dependents of Government Servants Dying in Harness Rules, particularly when they had taken their option and exhausted it earlier.

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

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

2. This writ petition has been filed claiming that petitioners are working in Different Basic Primary Schools under the Control of Nagr Nigam, Agra. Petitioner no. 1, Bhagwan Singh was appointed on 28.04.1996 on the post of Class IV employee in Balika Basic Primary School Naya Gher, Agra on compassionate ground in place of his mother late Shanti Devi who expired on 12.12.1989. Petitioner no. 2 was appointed on 19.07.1985 on compassionate ground in place of his father late Jagannath Prasad Dubey who was Headmaster in Basic Primary School, Khawaspura, Agra, Cantt. Agra. Petitioner no. 3 who was initially appointed on 20.07.1990 on the post of Class IV employee in Basic Primary School Rajendra on compassionate ground in place of his father Sri Ram Ji Lal Srivastava who was Headmaster in Basic Primary School, Motiya Ki Bagichi.

3. It has also stated that vide his letter dated 27.06.1995, The Education Superintendent (Shiksha Adhikshak) Nagar Nigam, Agra, respondent no. 2, recommended the case of the petitioners to respondent no. 1 mentioning therein that 122 posts of Assistant Teachers are vacant and the petitioners may be appointed on any posts.

4. Counsel for the petitioners submits that all the petitioners were qualified to be appointed as Assistant Teachers and theie representations with regard to the same are pending before the District Basic Education Agra and in this regard the aforesaid letter dated 27.06.1995 and 24.07.1995 were issued recommending appointment of the petitioners on the vacant posts of Assistant Teachers that: respondent no.2 issued an appointment letter dated 02.11.1995 appointing the petitioner no. 1 as Assistant Teacher in Basic Primary School Billochpura: petitioner no. 2 as Assistant Teacher in Basic Primary School Nagla Singho, Agra and petitioner no. 3 as Assistant Teachers in Basic Primary School Nagla Mahadeo, Agra.

5. Pursuant thereto all the petitioners joined in their respective schools where they had been appointed on the post of Assistant Teacher on 04.11.1995. However, respondent no. 1 thereafter issued a letter dated 06.12.1995 to the petitioners for showing cause within three days as to under which circumstances, the petitioners were given appointment under dependents of deceased dying in harness Rules 1974 for the reason that petitioners had already exhausted their discretion of compassionate appointment on Class-IV posts.

6. It is stated that without affording any opportunity to the petitioner another letter dated 11.12.1995, was issued by the respondent no. 2 terminating the services of the petitioners w.e.f. 06.12.1995, suo-moto, from the post of Assistant teachers, directing them to join there substantive

posts as Class-IV employee on which they had been given compassionate appointment. Copy of this letter has been appended as Annexures no. 11-A and 11-B to the writ petition, respectively. Subsequently, the Basic Shiksha Adhikari, Agra also terminated the services of the petitioners from the post of Assistant Teachers vide letter dated 05.01.1996, appended as Annexure no. 12 to the writ petition, wherein it was stated that in absence of any receipt or any reply within the stipulated time pursuant to the show cause notice their appointments are being canceled on the ground that petitioners have obtained the appointment by concealment of facts of having already availed the benefit of compassionate appointment earlier.

7. The order impugned aforesaid is assailed by the petitioners on the ground that respondent nos. 1 and 2 have no jurisdiction to review their own orders simply on false and flimsy grounds of concealment of facts by the petitioner in respect of earlier appointment of Clalss IV posts under dying in harness rules. It is also assailed on the ground that it is obvious from letter dated 24.07.1995 (Annexure no. 1 to the writ petition) that respondents were aware of the facts that petitioners were working on the post of Class IV employee having been appointed on the said posts under the dying in harness rules. It is stated that in fact the petitioners have not concealed any fact from the respondents and the order impugned passed by respondent no. 1 is illegal as he cannot sit in appeal over his own judgment.

8. It is urged that respondent no. 1 was estopped in law from passing any order canceling appointment of the petitioners as all the facts regarding compassionate appointment of the petitioners on Class Iv employee were in his knowledge: that respondent no. 1 has no jurisdiction to pass the impugned order as it was wholly against the principles of legitimate expectations in the circumstances of the case and even otherwise also the act of the respondent in passing the impugned order will cast stigma in the services of the petitioners in future as the same contains false statement of concealment of facts for appointment on the basis of Assistant Teachers.

9. It is stated that in view of the facts and circumstances, the petitioners would suffered irreparable loss and injury in case the order impugned dated 11.12.1995 passed by respondent no. 2 (appended as Annexure nos. 11-A and B) and impugned order dated 05.01.1996 passed by the respondent no. 1 appended as Annexure no. 12 to the writ petition is also not quashed.

10. In the counter affidavit filed by Chief Standing Counsel on behalf of U.P. Basic Shiksha Parishad, it is averred that petitioners had been given appointment as Class IV employee as per Rules and the petitioners having onces accepted the appointment on Class IV posts, cannot claim any other appointment under the category of Dependant of persons dying in harness rules. They could however, make an application for fresh appointment as general candidate, to be appointed under the relevant recruitment Rules.

11. Learned Standing Counsel has urged that the petitioners have procured the appointment as Assistant Teachers by playing fraud on the concerned department as appointment of these posts were procured by the petitioners without disclosing the facts that they have already availed the benefits under the category of dependent of government employee under dying in

harness Rules. Moreover, the appointment of the petitioners as Assistant Teacher was conditional subject to termination without any notice if it was found that any information given by them was concealed. It is stated that even otherwise, the services of the petitioners being purely temporary could be terminated without any notice but in the instant case apart from above, temporary services of the petitioners as Assistant Teacher were terminated as soon as fraud payed by them came to the knowledge of the respondent-authorities by giving them show cause notice, which the petitioner deliberately avoided.

12. In the circumstances, the department having no other alternative or option, other than to proceed on the basis of record and the facts which had not been controverted by the petitioners before termination of their services.

13. In the rejoinder affidavit filed on behalf of respondents no. 1, 2 and 3, the facts averred in the writ petition have been reiterated. However, in addition, it has been stated that the petitioners categorically denied from guilty of playing fraud and allegations in this respect has been made irresponsible only with ulterior motive to prejudice the Court.. The allegation of fraud played by the petitioners is said to be nothing but an eye wash, which is apparent from the detailed fact mentioned in the writ petition. It has also been reiterated that neither any fact was concealed or misrepresented nor any fraud was played by the petitioners for being appointed as Assistant Teachers.

14. A supplementary affidavit on behalf of the petitioners has also been filed wherein it has been stated that petitioner no. 2 has passed B.A. Final with Arts subject in 1995 from Agra University, Agra and thereafter during the year 1997 he has passed M.A. with Sanskrit Subject from Agra University. Copy of the mark-sheeet are appended as Annexure no. 2 to the supplementary affidavit.

15. Similarly petitioner no. 3 is said to have been passed High School in 1982 and Intermediate Education in 1991 form U.P. at Allahabad. A copy his mark-sheet has been appended as Annexure no. 3 to the Supplementary affidavit. It is stated that petitioner no. 1, Bhagwan Singh passed high school in 1966 from U. P. High School Board and intermediate in 1970 from Intermediate Education U.P. Allahabad as a regular students of Muphide-E-Aam Inter College Agra and has passed B.Sc degree in 1977 with science subject from Agra University Agra. Copy of the same are appended as Annexure no. 1 to the supplementary affidavit.

16. Counsel for the petitioners has placed the aforesaid mark-sheet and Rule 10 of U.P. Basic Shiksha Karmachari Varg Niyamawali, 1993 which provided the academic qualification for appointment of Assistant Teachers in the Primary School and in the Junior High School.

Rule 10 reads as under:

"शैक्षिक योग्यता– न्यूनतम शैक्षिक योग्यता निम्नवत होगीः–

क. नर्सरी विघालयों की अघ्यापिकाएं– मान्यता प्राप्त प्रशिक्षण विघालय से प्राप्त नर्सरी प्रशिक्षण।

ख. जूनियर बेसिक विघालयों के अघ्यापक/ अघ्यापिका– प्रशिक्षित हाई स्कूल। पुराने प्रशिक्षित जूनियर हाई स्कूल उत्तीर्ण अघ्यापक/ अघ्यापिका भी नियुक्त किये जा सकते हैं।

ग. सीनियर बेसिक विघालयों में जिन विषयों के अध्यापक/ अध्यापिका की सीधी भर्ती होनी है– उक्त विषय लेकर इण्टरमीडिएट तक प्रशिक्षित।"

17. On the basis of above mark-sheet and Rule 10, it is argued that petitioners were entitled to be appointed as Assistant Teacher in consonance with their educational qualification.

18. After hearing counsel for the parties and on perusal of record, it is apparent that petitioners had been appointed as Class IV employee under the U.P. Dependents of Government Servant Dying in Harness Rules 1974. They had exercised their option and had joined their posts. The compassionate appointment is an exception to normal mode of recruitment. Once the petitioners exercised the same their option on existed post, they could not have exercised their option again for the same cause which was redressed by the appointment as Class-IV employees.

19. Petitioners were to be promoted as Assistant Teacher, they could have only been promoted in accordance with Rules or in case of vacancy depart to be filled up by direct recruitment in the manner prescribed in the aforesaid rules. The petitioners were given show cause notice as to why their appointment as Assistant Teacher be not cancelled for concealment of facts. The show cause notice was not replied to by the petitioners and as such it can not be said that no opportunity was given to the petitioners before cancellation of their appointment as Assistant Teacher. The show cause notice clearly states that petitioner had to explain for their appointment as Assistant Teacher which they had obtained by concealment of facts that they had been earlier appointed on compassionate ground be not cancelled. The show cause notice read thus:

" कारण बताओ नोटिस

आपकी नियुक्ति शिक्षा विभाग के अर्न्तगत शासन की राजाज्ञा संख्या/ 850/15.5.84.30/82 दिनांक 8–4–84 के अनुसान मृतक आश्रित कोटे के अर्न्तगत चतुर्थश्रेणी कर्मचारी के पद पर नगर निगम आगरा के अन्तर्गत की गई थी। ज्ञातव्य हो कि उपरोक्त लाभ आपको पूर्व में प्रदान कर दिया गया था।

आपने उपरोक्त तथ्यों को छुपाते हुए मृतक आश्रित के रूप में इस कार्यालय को दुवारा आवेदन पत्र दिया और इस कार्यालय के आदेश संख्या/लेखा 4684–87/95–96 दिनांक 2–11–95 के द्वारा पुनः नियुक्ति प्राप्त कर ली जो आप द्वारा तथ्यों को छुपाकर, विभाग को धोका देकर,शासनादेश के विरूद्ध अनियमित रूप से नियुक्ति प्राप्त की गई है। जो अवैधानिक है तथा स्वतः ही समाप्त हो गई है जैसा कि नियुक्ति पत्र में पूर्व में ही अंकित है।

आप तीन दिन के अन्दर इस कार्यालय की लिखित रूप में स्पष्ट करें कि आप द्वारा यह कुकृत्य किन परिस्थितियों में किया था। क्यों न आपके इस कृत्य के लिए आपनके विरूद्ध कठोर अनुशाशनात्मक कार्यवाही करते हुए आपके पूर्व पद को भी समाप्त कर दिया जाय।

जिला बेसिक शिक्षा अधिकारी

आगरा।"

20. It appears that instead of abolishing even the earlier post of Class IV employee and taking strict disciplinary action only their services from the post of Assistant Teacher had been cancelled by following order:-

"नियुक्ति निरस्तीकरण

इस कार्यालय के आदेश संख्या / लेखा / दि0/ 5473–77/95–96 दिनांके 6–12–95 के द्वारा दिये गये कारण बताओं नोटिस का जवाब निर्धारित तिथि तक इस कार्यालय को प्राप्त न होने के कारण इस

कार्यालय के आदेश संख्या/ लेखा/ 4684–87/95–96 दिनांक 2–11–95 के द्वारा आपने तथ्य छिपाकर, विभाग को धोका देकर, अनियमित रूप से शासनादेश के विपरीत प्राप्त की गई अध्यापक पद पर नियुक्ति तत्काल प्रभाव से निरस्त की जाती है।

जिला बेसिक शिक्षा अधिकारी

आगरा।''

21. Even if it is assumed that services on the post of Assistant Teacher were vacant, the same were to be filled up by promotion or by direct recruitment in the manner prescribed in the Recruitment Rule. The case of the petitioners is not that they had taken their benefit under the dying in harness rules for the first time as benefits of employee of Government Servant who had died in harness. Therefore, they had no right to be re-appointed for a second time, afresh, as Assistant Teacher under the U.P. Dependents of Government Servants Dying in Harness Rules, particularly when they had taken their option and exhausted it earlier.

22. For all the reasons stated above the appointment of the petitioners as Assistant Teacher which was rightly cancelled. It may be that the respondent no. 2 had by his letter dated 27.06.1995, recommended the appointment of the petitioners but that recommendation could not have been given weight as the case of the petitioners on the post of Assistant Teacher was not governed by appointment under dying in harness rules particularly after having availed the benefits of appointment on compassionate ground under the U.P. Dependants Governemtn Servant Dying in Harness Rules earlier.

23. For all the reasons stated above, the writ petition is dismissed.

24. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2012

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE ADITYA NATH MITTAL, J.

Civil Misc. Writ Petition No. 922 of 2012

Deep Kumar Tewari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.P. Singh
Sri Ghaus Beg

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-fitness certificate of vehicle-without paying arrear of Road Tax-argument both are distinct one-hence petitioner can not be compelled to deposit Road Tax-held-provisions of Section 39, 56 and 66 of Motor Vehicle Act 1988 read with section-4 (2) (A) of U.P. Motor Vehicle Taxation Act 1997 are mandatory-each and every conditions are necessary for state carriage on transport vehicle to play on public road-no such relief can be granted-petition dismissed.

Held: Para 14

he interdependence of the provisions of Section 39, 56 and 66 of Motor Vehicle Act, 1988 and the provisions of the U.P. Motor Vehicle Taxation Act, 1997, are for the purposes of maintaining the strict regime of regulations to allow a transport vehicle or stage carriage to ply on the road. Each of the conditions is necessary for plying the vehicle and thus it cannot be said that the vehicle may be subjected to fitness certificate,

independent of payment of tax/ advance tax.

Case law discussed:

AIR 1983 Allahabad 178; AIR 2005 SC 1431

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

1. We have heard Shri B.P. Singh, learned counsel for the petitioner. Shri A.C. Tripathi, Standing Counsel appears for the respondents.

2. The petitioner is owner of vehicle no.U.P.75A-7437 (Bus). The permit of the vehicle is valid upto 17th January, 2030. The fitness certificate expired on 31.10.2010 and there are dues of tax under the U.P. Motor Vehicle Taxation Act, 1997 of Rs.95,400/- on which penalty amount has been imposed. The petitioner has also not paid the advance tax.

3. The petitioner applied for fitness certificate without paying the arrears of tax and advance tax, on which the Asstt. Regional Transport Officer (Admn.), Fatehpur has informed him by letter dated 18.5.2012 that he may deposit the arrears of tax, penalty and advance tax as well as the fitness fees of Rs.920/- and obtained fitness certificate.

4. By this writ petition the petitioner has prayed for grant/ issue of certificate of fitness in respect of vehicle, under Section 56 of the Motor Vehicle Act, 1988 read with Rule 39 of the Motor Vehicle Rules, 1998 without payment of the full amount of tax. He has also prayed for quashing the letter dated 18.5.2012, by which he has been informed by the A.R.T.O. to obtain fitness certificate after depositing the tax, advance tax and fitness fees.

5. Learned counsel for the petitioner has relied upon the Division Bench judgment of this Court in **Sushil Kumar v. The Regional Transport Authority, Lucknow, AIR 1983 Allahabad 178** in which it was held that endorsement of renewal on permit cannot be withheld on the ground of arrears of tax. The Court held that there is separate procedure for realisation of tax and which is not connected or correlated with the renewal of permit and allowed the prayer for endorsement on the permit leaving it open to the department to realise the tax.

6. The petitioner has also relied upon **State of Orissa & Ors. v. Bijaya C. Tripathy, AIR 2005 SC 1431,** in which it was held that Section 66 prevents the use of vehicle as transport vehicle without a permit. It does not, however, prohibit driving of such vehicle on public road. Even in the absence of a valid permit the vehicle remains a transport vehicle, which is capable of being used on road so long as vehicle has valid certificate of fitness and valid registration certificate.

7. Shri A.C. Tripathi, learned counsel appearing for the State submits that the registration under Section 39 and the award of fitness certificate under Section 56 are correlated to each other. The transport vehicle shall not be deemed to be validly registered for the purposes of section 39, unless it carries the certificate of fitness. He submits that tax under the U.P. Motor Vehicle Taxation Act, 1997, in respect of stage carriage has to be paid under Section 4 (2A), which provides for imposition of tax in advance. The owner of the vehicle has an option to pay instead of monthly tax in advance a quarterly or yearly tax at such rate as may be notified by the State Government. Under Section 20 the Taxation Officer has powers to recover the tax, which includes arrears of tax or

additional tax or penalty as land revenue. Under sub-section (2) the tax, additional tax and penalty is the first charge on the motor vehicle including its accessories in respect whereof it is due. Under Section 22 the transport vehicle can be detained by an officer authorised by the State Government, if it is used by a person without payment of tax, additional tax or penalty. The vehicle may be seized and detained for the purposes subject to such steps as may be considered necessary for safe custody of the motor vehicle for non-payment of the tax. The vehicle can be taken to nearest police station or any other place specified by him with report of seizure within 48 hours to the concerned Taxation Officer. The vehicle shall be released by Taxing Officer immediately on payment of tax, additional tax, penalty or other amount due.

8. Rule 67 of the U.P. Motor Vehicle Rules, 1998 made under the Motor Vehicles Act, 1998 provides for conditions of grant of permit. Clause (ii) of Rule 67 provides that vehicle covered of such permit shall in no case be used in any public place until tax levied by the State Government and payable in respect thereof has been duly paid and if such tax is not duly paid within such period as may be specified in the U.P. Motor Vehicle Taxation Act, 1997.

9. A combined reading of these provisions would show that the provisions for obtaining registration under Section 39; certificate of fitness under Section 56; necessity of obtaining of permit under Section 66 and conditions thereof in Section 67 of the U.P. Motor Vehicle Rules; and payment of tax under the U.P. Motor Vehicle Taxation Act, 1997, are interrelated. The judgment in Sushil Kumar's case (Supra) was rendered under the old Act in which the provisions of obtaining permit and the condition of permit under Section 66 of the Motor Vehicle Act and Rule 67 of the U.P. Motor Vehicle Rules were not considered.

10. In State of Orissa & Ors. v. Bijaya C. Tripathy (Supra) the Supreme Court held that it cannot be said that transport vehicle cannot be plied on public road without a permit. What is prohibited by Section 66 of the Motor Vehicle Act is that the vehicle cannot be used as a transport vehicle in any public place without a permit. The vehicle can be, if the owner so desires, used for the purposes other than transport vehicle such as vehicle for use of the family on public road.

11. The petitioner has neither pleaded nor taken a stand that he wants to use the vehicle for his personal use and does not intend to use the vehicle as stage carriage.

12. The necessity of obtaining the fitness certificate cannot be overemphasised. A vehicle cannot be plied on road unless it is roadworthy. In order to protect the conditions of the roads and to prevent accidents, the legislature has under Section 56 provided for certificate of fitness to be mandatory. Section 56 further provides that unless vehicle carries fitness certificate, it cannot be deemed to be validly registered for the purposes of Section 39.

13. The registration of the vehicle is necessary for obtaining permits as well as the fitness certificate. The provisions of the U.P. Motor Vehicle Taxation Act, 1997 empowers an officer authorised by the State Government to seize the vehicle if it is being plied on the road without payment of notified tax. The tax in respect of stage carriage are to be paid in advance under Section 4 (2A), failing which the vehicle

may be seized and detained until taxes are paid.

14. The interdependence of the provisions of Section 39, 56 and 66 of Motor Vehicle Act, 1988 and the provisions of the U.P. Motor Vehicle Taxation Act, 1997, are for the purposes of maintaining the strict regime of regulations to allow a transport vehicle or stage carriage to ply on the road. Each of the conditions is necessary for plying the vehicle and thus it cannot be said that the vehicle may be subjected to fitness certificate, independent of payment of tax/ advance tax.

15. Rule 73 of the Central Motor Vehicle Rules, 1989 provides a tax clearance certificate to be submitted to the authorised testing station for grant or renewal of certificate of fitness. Rule 39 of these Rules, provides for grant of certificate of fitness on an application on Form SR-12 to the registering authority on the authorised testing station. The form provides for enclosures of certificate. Similar clearance certificate is required under Rule 73 of these rules, which provides for payment of tax to the State Government as condition of grant of fitness certificate. Rule 73 of the Central Motor Vehicle Rules, 1989; Rule 39 of the U.P. Motor Vehicle Rules, 1998 and Form SR-12 are quoted as below:-

"39. Certificate of fitness-Grant and issue- *(1) For the purpose of Section 56, the prescribed authority shall be the registering authority. An application for the issue of a certificate of fitness, shall be made in Form SR-12 to the registering authority or the authorised testing station in whose functional area the vehicle is kept or whose functional area includes the major portion of the route or area to which the permit relating to the vehicle extends.*

(2) The registering authority or the authorised testing station, by whom certificate of fitness was issued, may endorse thereon the date, appointed for the next inspection of the vehicle and the owner shall cause the vehicle to be produced for inspection accordingly.

(3) If the certificate has not been endorsed as provided in sub-rule (2) the owner shall, not less than one month before the date of expiry of the certificate, make an application in Form SR-13 and cause the vehicle to be produced for inspection on such date and at such time and place as the registering authority may thereafter, upon reasonable notice, appoint.

(4) If the owner fails to produce the vehicle on the date appointed under sub-rule (2) or on the date, time and place appointed under sub-rule (3) he shall be liable to pay an amount equivalent to and in addition to the amount of fee specified at Serial 11 of the Table of Rule 81 of the Central Rules.

(5) There shall not be more than one certificate of fitness in respect of any vehicle.

(6) If, owing to mechanical breakdown or other cause, a vehicle is, after the expiry of the certificate of fitness, outside the functional area of the registering authority by whom the certificate of fitness is tobe issued, the registering authority may without prejudice to any penalty, to which the owner or the driver may have become liable, if the vehicle is, in his opinion, fit for use, by endorsement in Form SR-14

and subject to such conditions as he may specify, authorise its use for such time as may reasonably be necessary for the vehicle to return to the area of the registering authority by whom the certificate of fitness is to be issued, and the vehicle may be driven to such area in accordance with such endorsement, but shall not be used after return to that area until the certificate of fitness has been issued:

Provided that no authorised testing station situated outside the area of jurisdiction in which the owner should have obtained the certificate of fitness, shall issue such authorisation to any vehicle under this sub-rule.

(7) If a vehicle is damaged at any time so as to be unfit for ordinary use and may in the opinion of any registering authority safely be driven at a reduced speed to a place of repairs, and if the registering authority is satisfied that it is necessary that the vehicle should be so driven, any registering authority may by endorsement in Form SR-15 specify the time within which and the conditions, including speed limit, subject to which the vehicle may be driven to a specified destination for the purpose of repairs.

(8) Where a prescribed authority cancels a certificate of fitness under sub-section (4) of Section 56, it shall-

(a) supply to the owner or the person in charge of the vehicle reasons in writing for such cancellation;

(b) issue to the said owner or the person temporary authorisation for the removal of the motor vehicle in Form SR-16 specifying the time and the conditions subject to which the vehicle may be driven to a specified destination for the purpose of repairs.

Form SR-12

[See Rule 39 (1)]

Application for certificate of fitness grant/ renewal

PART A

(To be filled in by the appellant)

To,

The Registering Authority/Authorised Testing Station.....

I hereby apply for the issue/ renewal of certificate of fitness as required by Section 56 of the Motor Vehicles Act, 1988 of the vehicle described below:

Registration mark of vehicle.....

Name of owner.....

Place where the vehicle is ordinarily kept.....

Name of Manufacturer of vehicle.....

Manufacturer's model, or if not knowledge wheel base.....

Type of vehicle.....

Chassis number.....

Engine number.....

Particulars of any previous certificate of fitness granted in respect of vehicle.....

Authority by which granted/ renewed.....

Date when certificate of fitness ceased to be valid.....

Reasons for cessation of validity.....

I enclose herewith tax clearance certificate required under Rule 73 of the Central Rules.

Dates:.....

Signature or thumb-

impression of applicant.

73. Tax clearance certificate to be submitted to the testing station- *No authorised testing station shall accept an application for the grant or renewal of a certificate of fitness unless the same is accompanied by a tax clearance certificate in such form as may be specified by the State Government, from the Regional Transport Officer or motor vehicle inspector having jurisdiction in the area to the effect that the vehicle is not in arrears of motor vehicle tax or any compounding fee referred to in sub-sections (5) and (6) of Section 86."*

16. In the end the petitioner prayed for an order to allow him to deposit half arrears of tax for obtaining fitness certificate. We do not find any good ground to entertain the prayer as the tax is payable as soon as the incident of payment of tax in the charging section falls. In the present case the taxes are paid in advance. There is no provisions under the Act or the Rules to defer the liability of payment of tax.

17. The writ petition is **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.07.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Misc. Single No. - 4192 of 2009

Jai Singh ...Petitioner
Versus
State of U.P.Thorugh Collector Barabanki ...Respondent

Counsel for the Petitioner:
Sri Abdul Rasheed

Counsel for the Respondents:
C.S.C.
A.S.G.
Sri Alka Saxena
Sri Sharad Tewari

U.P. Agricultural Credit Act 1973-Section 11-A- Recovery of Agricultural dues-petitioner borrowed Rs. 2 Lacs for purchase of Tractor-committed some default in payment of installments-under Agricultural Debt relief scheme, 2008-amount of Rs. 2,21017/ waived as such on 01.04.2008. only Rs. 47059 plus interest-found due against petitioner-against that Bank issued R.C. For Rs. 2,11,534/- and recovered Rs. 2 Lacs by putting the Tractor as well other immovable property on auction sale-without asking the petitioner to deposit balance amount of Rs. 47059/ nor followed the procedure for auction sale Respondents not proceeded on Transparent, valid and just manner-no due date fixed for deposit of balance amount held-not only recovery certificate but all subsequent proceeding-nullity-causing serious harassment, embarrassment-amount to depriving from constitutional right of Art. 21 and 300-A of Constitution-

Recovery proceeding quashed-with coast of 10 Lacs.

Held: Para 33 and 63

The height of irresponsibility and illegality on the part of respondents may further be demonstrated from the fact that Section 11-A confers jurisdiction upon Bank to issue a recovery certificate only when the agriculturist fails to pay the amount due together with interest on the due date. After giving benefit of Scheme, 2008, and recalculating dues, the Bank found balance of Rs. 47059/- only as on 01.04.2008. There is nothing on record to show, when and by which date, the petitioner was required to deposit aforesaid sum of Rs. 47059/- and what was the due date for that purpose. Even thereafter adding amount of interest fell due w.e.f. 01.04.2008 and onwards, there is nothing on record to show that before issuing recovery certificate dated 23.01.2009, any demand was raised to petitioner to pay the said outstanding dues so as to constitute a "due date". In fact after determining outstanding dues of Rs. 47059/- pursuant to Scheme, 2008, though a certificate was issued by Bank to petitioner on 18.09.2008 (Annexure-1 to the writ petition) but neither before that nor after that petitioner was ever required to deposit the aforesaid sum of Rs. 47059/- by a particular date. Hence, there was no occasion to infer that petitioner-agriculturist has failed to deposit outstanding dues by due date entitling the Bank to issue certificate of recovery under Section 11-A of Act, 1973. In the circumstances, since no right or authority accrued to the Bank to issue a recovery certificate under Section 11-A of Act, 1973, not only the recovery certificate but all subsequent proceedings are a nullity in the eyes of law.

The petitioner's Tractor which has already been sold long back, mere restoration thereof, after almost three years, would not restore the situation back to petitioner since depreciation and deterioration of something like Tractor is very fast and has its own impact. This Court finds it really very hard and disheartening that the respondents holding responsible offices could proceed in such an illegal manner, that too with impunity, without showing any compassion and heart to the helplessness of petitioner, causing virtually state of ruination to him.

Casea law discussed:

1999 (4) AWC 3520; JT 2011 (8) SC 232; 1972 AC 1027; 1964 AC 1129; JT 1993 (6) SC 307; JT 2004 (5) SC 17; (1996) 6 SCC 530; (1996) 6 SCC 558; AIR 1996 SC 715; AIR 1979 SC 49; 2009 (13) SC 643; 2009 (2) SCC 592; JT 2007 (3) SC 112; AIR 1979 SC 429; AIR 2006 SC 182; AIR 2006 SC 898; (2007) 9 SCC 497; (2009) 6 SCALE 17; (2009) 7 SCALE 622; JT (2009) 12 SC 198; 1997 (1) SCC 34; 1997 (6) SCC 339; 2001 (7) SCC 231; 2004 (9) SCC 319; AIR 2005 SC 2755

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

1. Heard Sri Abdul Rasheed, Advocate for petitioner, Sri Vishnu Dev Shukla, Brief Holder for respondents no. 1, 3 and 5, Sri Sharad Tewari, Advocate for respondent no. 2 and Smt. Alka Saxena, Advocate for respondent no. 4.

2. This case is an illustration of high handedness of Government officials and financial institutions to ruin a poor farmer/ Agriculturist by snatching away whatever little he possesses for his sustenance. It demonstrates that once a poor fellow falls in the trap of borrowing a little money from a public sector financial institution, he gets trapped in the iron vice of wrongful demand, erroneous determination of outstanding dues, non acknowledgement of amount paid by him and ultimately goes to the extent of

losing whatever little he possess in the name of property, whether moveable and immoveable through process of recovery by duress.

3. It is really unfortunate that in a country boasting of its main vocation as "agriculture", and most of the people are engaged in farming, though constituting small or marginal farmers having small holdings, still after more than six decades, not only find it difficult to arrange their two square meals for family but in the fond hope of development founded on dreamy schemes launched by Government, they ultimately dash their entire hopes and expectations. Many a times property and life also.

4. I would like to first narrate factual matrix of this unfortunate case which has caused an extraordinary and grave injustice to poor petitioner, a small farmer, who fell in the trap of borrowing and consequential unmindful recovery in the hands of respondents no. 1 to 4 which shall demonstrate how the petitioner has been subjected to patent illegal and arbitrary proceedings .

5. The petitioner, Jai Singh, resident of Village Maroofpur, Post Mohammadpur, Tehsil Haidergarh, District Barabanki possessed certain land and for the purpose of cultivation thereof and others, decided to purchase a tractor. He looked towards Union Bank of India Branch at Barabanki for financial assistance and applied for advancement of loan of Rs. 2 lacs in the year 2000. The loan was sanctioned on 12.12.2000. It must have actually been paid later on. It appears that petitioner could not deposit regular installments and committed default. The Bank allegedly issued several notices, i.e., 08.11.2001, 25.01.2002, 19.04.2002, 18.06.2002, 19.09.2002, 20.12.2002 and 11.03.2003. It also appears that a recovery certificate itself was issued by Bank on 26.05.2003 for a sum of Rs. 270606/- plus interest w.e.f. 01.03.2003.

6. The aforesaid recovery certificate could not be executed and in the meantime the Bank also accepted certain payments from petitioner though not constituting regular installments.

7. The Government of India in the meantime came with a debt relief scheme, namely, "Agricultural Debt Waiver and Debt Relief Scheme, 2008" *(hereinafter referred to as the "Scheme, 2008")* whereunder the petitioner was found entitled for waiver of a sum of Rs. 221017/-. It is admitted that petitioner was entitled for the said benefit and consequently the aforesaid amount was reimbursed to Bank by Government of India and it was adjusted towards the outstanding dues against petitioner vide certificate of waiver dated 18.09.2008 (Annexure-1 to the writ petition). It is admitted by Bank that after the said adjustment only a sum of Rs. 47059/- plus interest w.e.f. 01.04.2008 remained outstanding against petitioner. However, despite having issued certificate of waiver dated 18.09.2008, the Bank issued a recovery certificate for Rs. 211534/-. The exact date of aforesaid recovery certificate has not been stated by any of the parties but this is evident from record that the petitioner when represented that recovery proceedings initiated by respondents no. 1 to 3 for recovering a sum of Rs. 211534/- is illegal, as no

such amount was due, the Bank issued a revised recovery certificate on 24.01.2009 mentioning the amount claimed to be recovered from petitioner as Rs. 47059/- plus interest at the rate of 12.50% per annum w.e.f. 01.03.2003 (though in the waiver certificate the balance was Rs. 47059/- plus interest w.e.f. 01.04.2008).

8. The respondents-revenue authorities, however, continued to proceed for recovery of Rs. 2 lacs and odd, attached immoveable property of petitioner and put it for auction by auction notice dated 15.05.2009 notified 18.06.2009 as the date of auction vide Annexure-4 to the writ petition. The petitioner's property namely, Khata No. 27, Gata Nos. 10, area 0.665; 135 Kha, area 0.072; 136 Kha, area 0.026; 183, area 0.080; 212 Ka, area 0.104; 213 Kha, area 0.115; 235 Ka, area 0.054; 242, area 1.099; and, 313 A, area 0.415 in total 2.088 acres was attached vide notice dated 15.09.20-09 and by auction dated 18.06.2009 it was put for auction which included besides the property in Khata No. 27, 29 and 102 measuring total area is more than nine acres.

9. Besides, the Deputy Collector also seized petitioner's Tractor No. HMT -UP41-D-2094 owned by petitioner on 09.06.2009 and proceeded to auction the same.

10. The petitioner has made serious allegations against revenue authorities as also the Branch Manager of Bank in commencing and proceeding to go ahead with aforesaid recovery proceedings by auctioning not only the tractor but also immoveable property for recovery of Rs. 2,11,000/- and odd, though as a matter of fact, the total dues against petitioner was only Rs. 47,000/- and odd. The grievance of petitioner is that none was ready to hear him. The petitioner also sought to raise his grievance by sending representations to Chief Minister and Prime Minister on 05.06.2009 and 10.07.2009 and thereafter filed present writ petition.

11. It is not in dispute that pursuant to order passed by this court on 04.08.2009 the petitioner has deposited Rs. 50,000/- with the Bank on 11.08.2009. By means of supplementary affidavit, the petitioner has also placed on record Bank's letter dated 11.08.2009, informing that total outstanding dues against petitioner were only Rs. 66,100/- against which Rs. 63,823/- were received from Tehsil authorities on 31.07.2009, leaving a balance of Rs. 2277/-, and, by adding counsel's fee of Rs. 3415/- the total dues outstanding are Rs. 5692, hence deposit of Rs. 50,000/- made by petitioner cannot be retained by Bank and it sought to refund the amount of Rs. 50,000/- by banker's cheque No. 15070 with request to petitioner to deposit only Rs. 5692/- and obtain no dues certificate.

12. The respondents no. 1 and 3 have filed a counter affidavit sworn by Vinod Kumar, Deputy Collector Haidergarh, Barabanki, stating that citation was wrongly issued by revenue authorities for recovery of Rs. 2,11,543/- on account of lack of clarification in recovery certificate issued by Bank. As soon as the above mistake was discovered, recovery proceedings in respect to immoveable property of petitioner was deferred and

instead of Rs. 2,11,543/- the proceedings continued for Rs. 47059/- only. Since the authorities had withdrawn citation issued for Rs. 2,11,543/- the writ petition has lost cause of action and deserved to be dismissed. It is further stated that in the recovery certificate issued by Bank, at one column Rs. 2,11,543/- was mentioned, and at another Rs. 47059/- was mentioned. The Tehsil authorities, therefore, proceeded to recover Rs. 2,11,543/- and issued citation accordingly. Subsequently, when the mistake was detected and it was found that only Rs. 47059/- and interest thereon was outstanding, the inquiry got conducted through concerned Naib Tehsildar who informed that wrong citation for Rs. 2,11,543/- has been issued though only Rs. 47059/- and interest therein is recoverable. On the aforesaid report of Naib Tehsildar, the Deputy Collector, Haidergarh, passed order on 29.07.2009 not to proceed with auction of immoveable property and recover only Rs. 47059/- alongwith recovery charges. The order dated 29.07.2009 is Annexure-CA-1 to the counter affidavit filed by respondents no. 1 and 3. It is, however, not disputed that Tractor was auctioned on 31.07.2009 for Rs. 63823/- which amount was tendered to the Bank on the same date, i.e., 31.07.2009. It is also stated that as per intimation given by Bank after receipt of Rs. 63823/- from Tehsil authorities, only Rs. 2277/- remain balance and adding interest thereon upto 31.08.2009, recovery charges and counsel's fee, the total comes to Rs. 6693/-. The break up mentioned in Bank's letter dated 08.08.2009, Annexure-CA-2 to the counter affidavit of respondents no. 1 and 3, reads as under:

"वर्तमान बकाया शेष (Present balance dues)	2277.00
ब्याज 31-8-2009 (Interest)	703-00
	2980-00
10: आर.सी. चार्जेज (R.C. charges)	298-00
	3278-00
हाईकोर्ट वकील चार्जेज (High Court Advocate's charge)	3415-00
कुल बकाया 31-8-09 तक (Total balance upto 31.08.09)	6693-00"

13. The petitioner filed an application for impleadment of the auction purchaser, respondent no. 5 alleging that from own showing of respondents no. 1 and 3 in their affidavit sworn on 24.08.2009, the Tractor was attached on 09.06.2009 but they have not disclosed any date of auction of Tractor except bare averment that amount received after auction of Tractor, i.e., Rs. 63823/- was tendered to the Bank on 31.07.2009, i.e., four days ahead when this Court passed an interim order dated 04.08.2009. He, therefore, sought amendment of writ petition by adding certain paragraphs, grounds and relief challenging the auction of his Tractor. It is pleaded that entire alleged auction is nothing but a mischief and illegal collusive act of revenue

authorities as also the auction purchaser and it is in utter violation of the statute.

14. In the rejoinder affidavit to the counter affidavit of respondents no. 1 and 3 the petitioner has reiterated his allegations of various illegalities on the part of revenue authorities as also the Bank resulting in alleged illegal auction of his Tractor. It is further said that the Tractor has been auctioned on throw away price; due to illegalities committed by respondents the petitioner has suffered a huge loss for not being able to produce his agricultural crops due to seizure and attachment of his Tractor as also the immoveable property. The entire action is nothing but a pre-planned conspiracy of Bank Manager as also the revenue authorities, i.e., Deputy Collector and others and their action is not only illegal but has caused serious loss to petitioner in respect to his property and person, both.

15. Respondent no. 2 has also field a counter affidavit through its Advocate Sri Sharad Tiwari sworn on 09.04.2012. It is clearly stated in para 6 thereof that after extending the benefit of Scheme, 2008 to the petitioner, only a sum of Rs. 47059/- plus interest remained due as on 01.04.2008. Though it is mentioned that besides aforesaid amount recovery charges were also due but it does not appear from the record as to on what basis the recovery charges would have fallen due if no recovery proceedings in accordance with law were ever initiated against petitioner. The allegations against the Branch Manager made by petitioner have been denied but in para 8 it is stated that admitted recovery certificate was issued on 23.01.2009. Then in para 15 it is further stated that another recovery certificate for Rs. 66,100/- was issued on 17.06.2009.

16. From the counter affidavit filed by Bank I find reference of three recovery certificates, first is dated 26.05.2003 for Rs. 2,70,606 plus interest w.e.f. 01.03.2003 vide para 4; second is revised recovery certificate dated 23.01.2009 for Rs. 47,059/- vide para 8; and, third is again a revised recovery certificate dated 17.06.2009 for Rs. 66,100/- vide para 15. Besides above, they have also given the date of seizure of Tractor on 09.06.2009 and date of auction thereof on 31.07.2009 and deposit of Rs. 63,823/- with Bank on the same day, i.e., on 31.07.2009. In para 13 it is stated that re-revised recovery certificate dated 17.06.2009 included interest upto 30.06.2009. A copy of re-revised recovery certificate dated 17.06.2009 is Annexure-CA-1 to the counter affidavit of respondent no. 2 wherein outstanding dues up to 30.06.2009 is shown as Rs. 66,100/- plus interest and recovery charges, the total being Rs. 72,710/-.

17. In the above factual backdrop, this Court would consider, whether recovery initiated against petitioner in the present case resulting in loss of his Tractor for all times to come and deprivation of his immoveable property for certain period preventing him from going ahead with agricultural activities thereon, has any sanctity of law at all, the respondents' action is in conformity with statute or not and whether the fault, if any, is only an unintentional error or is malicious.

18. It is not in dispute that loan advanced to petitioner fell in the category of "agricultural loan". Its recovery is governed by provisions of U.P. Agricultural Credit Act, 1973 (hereinafter referred to as the "Act, 1973"). Section 11-A provides procedure for recovery through Collector and reads as under:

11-A. Recovery in the case of personal security.--*(1) Where any amount of financial assistance is granted by a Bank to an agriculturist and* ***the agriculturist fails to pay the amount*** *together with interest* ***on the due date****, then without prejudice to the provisions of Sections 10-B and 11, the local principal officer of the Bank by whatever name called may forward to the Collector a certificate in the manner prescribed, specifying the amount due from the agriculturist.*

(2) The certificate referred to in sub-section (1) may be forwarded to the Collector within three years from the date when the amount specified in the certificate fell due.

(3) On receipt of the certificate, the Collector shall proceed to recover the agriculturist the amount specified therein together with expenses or recovery as arrears of land revenue, and the amount due to the Bank shall be paid after deducting the expenses of recovery and satisfying any Government dues or other prior charges, if any.

Explanation.--*For the the purposes of this section, the expression "Collector" means the Collector of the district in which the agriculturist ordinarily resides or carries on the activities referred to in clause (a) or Section 2 or where any movable or immovable property of the agriculturist is situate, and includes any officer, authorised by him in that behalf."*

19. Though the Bank has referred to recovery certificate issued on 26.05.2003 but it is nobody's case that any such recovery certificate was ever proceeded by revenue authorities against petitioner. It is also not the case of Bank that before issuing such recovery certificate any notice was ever served upon petitioner demanding Rs. 2,70,606/- plus interest from him w.e.f. 01.03.2003. The Court also finds it difficult to understand, how a loan of Rs. 2 lacs sanctioned vide letter dated 12.12.2000 and actually disbursed even thereafter could be swollen to Rs. 2,70,000/- by May, 2003, i.e., within two years and five months. The copy of sanction letter is on record as Annexure-SA-2 to the supplementary affidavit dated 22.06.2012. It shows that petitioner was sanctioned a loan of Rs. 2 lacs at the rate of interest of 12.5% per annum. The aforesaid amount was payable by petitioner in nine years, to be more precise, in 17 equal instalments of Rs. 11,769/- and accrued interest has to fall due in June and December of every years or after marketing of crops, whichever is earlier. The first installment was payable due in December, 2001. The cost of Tractor was shown as Rs. 2,39,500/-. Its date of purchase is not given. The date of actual disbursement of loan to petitioner is also not mentioned anywhere. It could not be clarified to this Court as to how Rs. 2 lacs with interest rate only 12.5% per annum would swollen by more than Rs. 70,000/- within two years and five months from the date of sanction of amount, i.e., 12.12.2000 and not the date of actual disbursement. Unfortunately the date of actual disbursement has not come on record but even if it is treated to be the date of sanction, by no manner of calculation the aforesaid amount could reach to Rs. 2,70,000/- and odd justifying recovery certificate dated 26.05.2003 demanding the aforesaid amount.

20. On the contrary, what this Court finds is that the first installment, as per the sanction letter, as said above, was due in December, 2001 but the Bank alleged to

have sent several notices and the first one is dated 08.11.2001. This Court fails to understand when the very first installment was payable only in December 2001, what was the occasion for Bank to issue a notice on 08.11.2001 since nothing could have fallen due on that date. This itself shows a lack of honest and responsible approach on the part of Bank since very inception.

21. Moreover, even if it is treated that petitioner had committed default by not paying any installment upto December, 2002, since the next installment would have fallen due in June, 2003, the compound interest, if calculated at the rate of 12.5% on the loan amount of Rs. 2 lacs, would come around Rs. 50,000/- and odd and by no stretch of imagination can reach to Rs. 70,606/- plus interest w.e.f. 01.03.2002, which has been mentioned by Bank in its counter affidavit. The erroneous and incorrect determination and demand on the part of Bank from the very initial stages thus also stand fortified.

22. The revenue authorities also do not claim to have proceeded to recover Rs. 2,70,000/- and odd on the basis of alleged recovery certificate dated 26.05.2003. No demand or citation to this effect for Rs. 2,70,606/- is shown to have ever been issued and served upon the petitioner. The Bank also accepted subsequent payments thereafter made by the petitioner. When Scheme, 2008 came into effect, the benefit thereof was extended to petitioner vide certificate dated 18.09.2008. The total outstanding dues against petitioner as on 29.02.2008 was found Rs. 2,68,076/- whereagainst Rs. 2,21,017/- was the amount waived leaving balance of Rs. 47059/- as on 31.03.2008. This is evident from Annexure-1 and 2 to the writ petition read cumulatively.

23. The Bank, however, issued a recovery certificate dated 23.01.2009 even before sending letter dated 11.02.2009 to the petitioner and without mentioning any due date, i.e., the date by which petitioner was required to clear balance dues (as is evident from Annexure-3 to the writ petition). The Bank's counter affidavit (para 4) mentions the date of recovery certificate as 23.01.2009 and also gives particulars of amount as Rs. 47059/- plus interest at the rate of 12.5% per annum from 01.03.2003 though from the certificate dated 18.09.2008 (Annexure-1 to the writ petition) it is evident that at the time of giving benefit of Scheme, 2008, the entire outstanding dues as on 29.02.2008 were taken into account and thereafter adjustment was made. This is also fortified from letter dated 11.02.2009 wherein the Bank has said that present outstanding amount is Rs. 47059/- whereupon the interest has to be included w.e.f. 01.04.2008 and recovery charge. Apparently and evidently, even this recovery certificate dated 23.01.2009 did not give a correct amount recoverable from petitioner. It has also wrongly mentioned in clause (v) the amount claimed as fell due on 01.04.2004, though upto 31.03.2008, the entire dues were calculated and adjusted. This recovery certificate and details given therein do not tally with Bank's certificate dated 18.09.2008 (Annexure-1 to the writ petition) and letter dated 11.02.2009 (Annexure-2 to the writ petition).

24. Even the statement of accounts placed before this court by Bank, Annexure-CA-2 to its counter affidavit for the period of 20.03.2005 to 07.04.2012 shows that in March, 2008 after crediting Rs. 2,21,017/- under Scheme, 2008 the only amount outstanding against petitioner was Rs. 47059/-. It is not the case of Bank that any notice as contemplated, demanding Rs.

47059/- and interest thereon was issued to petitioner at any point of time before issuing recovery certificate dated 23.01.2009. In absence of such demand, it could not have been said that petitioner has failed to pay loan upto due date. Similar is the position in respect to subsequent recovery certificate dated 17.06.2009.

25. There are some more startling facts throwing light on the conduct of respondents.

26. The revised certificate admittedly was received by revenue authorities much before June, 2009 having been issued by Bank on 23.01.2009. It has been stated by Deputy Collector that after receiving revised recovery certificate when it was found by Tehsil authorities that wrong citation has been issued, immediately Naib Tehsildar was directed to enquire into matter and submit his report and thereafter on his report the Deputy Collector passed order dated 29.07.2009, not to proceed with auction of immoveable properties to recover only Rs. 47059/- alongwith recovery charges.

27. Be that as it may, it is also evident from record that petitioner's immoveable property was already attached and seized by revenue authorities and they had put it for auction by notice dated 15.05.2009, notifying 18.06.2009 as the date of auction. The property attached by revenue authorities is a large piece of land and it is not their case that the same would not have fetched sufficient amount to satisfy the demand under recovery. Yet they proceeded to attach petitioner's Tractor on 09.06.2009 and went ahead to auction the same on 31.07.2009. This action is wholly beyond comprehension. When immoveable property was already in the hands of revenue authorities and they could have recovered due amount by auction of said property, what was the occasion to proceed to attach petitioner's Tractor thereafter, i.e., on 09.06.2009.

28. Moreover, with regard to date of auction of said Tractor, nothing has been placed on record by revenue authorities to take this Court into confidence to demonstrate that auction was held validly and strictly in accordance with law. Even this has not been informed as to what was the date notified for such auction and in what manner. It is only on 31.07.2009 but abruptly the auction is said to have been made and amount received from auction purchaser has been deposited in Bank on the same date though under the statute, such an amount was liable to be deposited through a Bank Draft. All these facts lead to an inference that respondents have not proceeded in a transparent, valid and just manner. There is something fishy in the matter and their action besides being illegal is also malicious in law. Somebody somewhere was definitely interested to snatch petitioner's property in one or the other way and in this attempt has also succeeded considerably. It is a different thing that this Court shall not let anybody go scot-free without facing the consequences thereof. The extraordinary hurry shown in proceeding when petitioner determined to come to this Court, is also evident from further facts. This writ petition was prepared on 28.07.2009 and notice was served upon Bank's counsel on 29.07.2009 with clear information that it shall be filed in the Court on 30.07.2009. There was some defect reported by Stamp Reporter which was removed but it took about a day, whereafter writ petition could be presented on 31.07.2009 and was heard on 04.08.2009. The Court found it strange that

total outstanding dues against petitioner was Rs. 47059/- alongwith interest yet, Tehsil authorities were proceeding to recover more than Rs. 2 lacs from petitioner. It was in these circumstances, the Deputy Collector was summoned before this Court to remain present with record on 24.08.2009. This order was passed after hearing learned Standing Counsel as also the counsel for Bank on 04.08.2009. Now immediately thereafter everything is said to have been finalised resulting in extinction of Tractor in the garb of auction, allegedly held on 31.07.2009, and on that day itself the amount is deposited in petitioner's account in the Bank by Amin though under Rule 30 of U.P. Agricultural Credit Rules, 1975 *(hereinafter referred to as the "Rules, 1975")* the aforesaid amount could have been sent to Bank only by way of Bank draft and not otherwise.

29. It is really difficult to understand that on the same day auction could have been completed and thereafter Amin could have got the draft prepared and submitted in the Bank.

30. In observing the above this Court finds it prudent to refer the process of attachments and sale of moveable property as prescribed in U.P. Zamindari Abolition and Land Reforms Rules, 1952 *(hereinafter referred to as the "Rules, 1952").* Under Act, 1973, dues under Section 11-A can be recovered as "arrears of land revenue" by Collector. Further procedure is not provided. For the purpose of procedure, it is U.P. Zamindari Abolition and Lard Reforms Act, 1950 (hereinafter referred to as the "Act, 1950") and Rules framed thereunder which would apply. This is what was observed by this Court in **Ram Pher Yadav Vs. Union Bank Of India and others, 1999(4) AWC 3520.**

31. Section 282 of Act, 1950 empowers the Collector to attach and sale moveable property. Rule 254 of Rules, 1952 empowers the Collector or Assistant Collector In-charge of Sub-division to issue process for attachment and sale of moveable property. Rule 257 contemplates issuance of warrant for sale of moveable property in ZA Form 72, specifying the amount for recovery of which sale has been ordered and also to require the property to be sold in default of such amount after lapse of such period as may be specified. It is not disclosed by revenue authorities at all as to when this warrant for sale under Rule 257 was issued by them and what was the period notified to petitioner demanding him to pay entire amount mentioned therein, failing which his moveable property shall be auctioned. These facts were in the knowledge of revenue authorities and they having failed to disclose details thereof, this Court has no option but to draw inference against them adversely to the extent that procedure laid down in statute regarding auction of moveable property has not been followed.

32. Everything appears to have been done in extra haste, may be to justify and save the authorities from an apparent illegal and unauthorised act on their part which they have tried to explain under the pretext of sheer mistake. The distinction in "mistake" and "deliberate defiance" and "illegality" has to be seen from the manner in which the authorities have proceeded in a particular case since it is difficult to otherwise find a positive evidence.

33. The height of irresponsibility and illegality on the part of respondents may further be demonstrated from the fact that Section 11-A confers jurisdiction upon Bank to issue a recovery certificate only

when the agriculturist fails to pay the amount due together with interest on the due date. After giving benefit of Scheme, 2008, and recalculating dues, the Bank found balance of Rs. 47059/- only as on 01.04.2008. There is nothing on record to show, when and by which date, the petitioner was required to deposit aforesaid sum of Rs. 47059/- and what was the due date for that purpose. Even thereafter adding amount of interest fell due w.e.f. 01.04.2008 and onwards, there is nothing on record to show that before issuing recovery certificate dated 23.01.2009, any demand was raised to petitioner to pay the said outstanding dues so as to constitute a "due date". In fact after determining outstanding dues of Rs. 47059/- pursuant to Scheme, 2008, though a certificate was issued by Bank to petitioner on 18.09.2008 (Annexure-1 to the writ petition) but neither before that nor after that petitioner was ever required to deposit the aforesaid sum of Rs. 47059/- by a particular date. Hence, there was no occasion to infer that petitioner-agriculturist has failed to deposit outstanding dues by due date entitling the Bank to issue certificate of recovery under Section 11-A of Act, 1973. In the circumstances, since no right or authority accrued to the Bank to issue a recovery certificate under Section 11-A of Act, 1973, not only the recovery certificate but all subsequent proceedings are a nullity in the eyes of law.

34. Thus not only wholly illegal proceedings were initiated against petitioner which have resulted in depriving him of his Tractor, sold unauthorisedely by respondents in a manner which has no sanction in law. It has and must have also caused serious harassment, embarrassment etc. to petitioner and his family in various ways. The petitioner's property has been snatched away and he has been deprived thereof by following a procedure which has no sanction in law. In other words, in an illegal manner, the petitioner has been deprived of his property and, therefore, his constitutional right under Article 300-A has been violated. Besides, by keeping petitioner under threat of coercive method of recovery, his fundamental right to live his life peacefully and with dignity has also been interfered and infringed, violating Article 21 of the Constitution. It has also caused loss to the person like petitioner-agriculturist, in losing his land for certain period, depriving him to grow crops thereat which has caused not only a personal loss to petitioner but a loss to national production, may be to a very little extent, but that is certainly there.

35. The authorities, it appears, have acted with a confidence that whatever they shall be doing, would not fall upon them in any manner. At the best, if a Court of law finds anything wrong, it can/shall only quash their orders and nothing more than that. Their attitude appears to have been not to proceed objectively and honestly in the matter but to somehow or other grab property of petitioner, moveable or immoveable, as the case may be, and subject it to public auction so as to give away on throw away prices.

36. In **Delhi Jal Board Vs. National Campaign for Dignity and Rights of Sewerage and Allied Workers and Ors., JT 2011(8) SC 232 t**he Apex Court has reminded the authority of the Court in a case where fundamental rights of a citizen are infringed with such kind of impunity. It say that the Court possess enough power to take care of victimisation of innocent citizen and compensate him appropriately by passing appropriate orders. The Court said

that Article 21 which guarantees right to life and liberty, will be denuded of its significant content if the power of Court is held limited to passing orders of removing Executive's illegal orders/action only and nothing more than that. The Court further said that one of the telling ways in which violation of such right can reasonably be prevented and due compliance with the mandate of Constitution including Article 21 can be secured, is to mulct its violators in payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary. To adopt right to compensation is some palliative for the unlawful acts of instrumentalities, which act or has acted in the name of public interest and which present, for their protection, the powers of the State, as a shield. If civilisation is not to perish in this country as it has perished in some others, it is necessary to educate ourselves into accepting that respect, for the rights of individuals is the true bastion of democracy.

37. In our system, the Constitution being supreme, yet the real power vests in the people of India since the Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and, in particular, when the person subjected to harassment is a poor innocent citizen in the category of farmer/agriculturist. Their plight cannot be allowed to be ignored.

38. The respondents being the State Government, i.e., "State" under Article 12 of the Constitution of India, its officers are public functionaries. As observed under our Constitution, sovereignty vests in the people. Every limb of the constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind the respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large. The respondents have the support of the entire machinery and various powers of the statute. An ordinary citizen or a common man is hardly equipped to match such might of the State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impermissible. This may harm the common man personally but the injury to society is far more grievous.

39. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match inaction in public oriented departments gets frustrated. It erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended or proceed in a wholethrough illegal manner.

40. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast

amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to the occasion otherwise the confidence of common man would shake. It is the responsibility of the Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain the arbitrary and arrogant unlawful inaction or illegal exercise of power on the part of the public functionaries.

41. Commenting against and upon such harassment of a comman man, (referring to observations of Lord Hailsham in **Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027** and Lord Devlin in **Rooks Vs. Barnard and others 1964 AC 1129)** the Apex Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307** said:

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

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

43. Similarly in **Registered Society Vs. Union of India and Others (1996) 6 SCC 530 t**he Apex court said:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

44. In **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558** the Court said:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

45. In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715,** the Court has held:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

46. Though petitioner has levelled serious allegations against Branch Manager about demand of money etc., which I find, have not been substantiated but that by itself would not leave the matter hereat for the reason that an act, which is in the teeth of procedure prescribed in law and can be said

to be unauthorised and illegal, itself would justify an inference that it is actuated for something other than bona fide, if not in fact, then in law, on the part of authorities concerned. In other words, it is a malicious exercise of power, a "malice in law", if not "malice in fact".

47. The Apex Court has summarised "malice in law" in **(Smt.) S.R.Venkatraman Vs. Union of India and another, AIR 1979, SC 49** as under :

"It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another." (Para 8)

48. The Apex Court further in para 9 of the judgment in **S.R. Venkatraman (supra)** observed:

"9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the "public interest', to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power."

49. In **Mukesh Kumar Agrawal Vs. State of U.P. and others JT 2009 (13) SC 643** the Apex Court said :

"We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved."

50. In **Somesh Tiwari Vs. Union of India and others 2009 (2) SCC 592** dealing with the question of validity of an order of transfer on the ground of malice in law, the Apex Court in para 16 of the judgment observed as under:

"16. .... Mala fide is of two kinds--one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal."

51. In **HMT Ltd. and another Vs. Mudappa and others JT 2007(3) SC 112** the Apex Court in paras 18 and 19 defined malice in law by referring to *"Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989"* as under:

"The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse'. In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others."

"19. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide."

52. In brief malice in law can be said when a power is exercised for an unauthorized purpose or on a fact which is claimed to exist but in fact, is non-est or for the purpose for which it is not meant though apparently it is shown that the same is being exercised for the purpose the power is supposed to be exercised. [See **Manager Govt. Branch Press and another Vs. D.B.Belliappa AIR 1979 SC 429; Punjab Electricity Board Vs. Zora Singh and others AIR 2006 SC 182; K.K.Bhalla Vs. State of U.P. and others AIR 2006 SC 898; P. Mohanan Pillai Vs. State of Kerala and others (2007) 9 SCC 497; M.P.State Corporation Diary Federation Ltd. and another Vs. Rajneesh Kumar Zamindar and others (2009) 6 SCALE 17; Swarn Singh Chand Vs. Punjab State Electricity Board and others (2009) 7 SCALE 622 and Sri Yemeni Raja Ram Chandar Vs. State of Andhra Pradesh and others JT (2009) 12 SC 198].**

53. It also answers description of word "corruption" which has taken various shades in our system. In general the well accepted meaning of corruption is the act of corrupting or of impairing integrity, virtue, or moral principle; the state of being corrupted or debased; lost of purity or integrity; depravity; wickedness; impurity; bribery. It further says, *"the act of changing or of being changed, for the worse; departure from what is pure, simple, or correct; use of a position of trust for dishonest gain."*

54. Though in a civilised society, corruption has always been viewed with particular distaste to be condemned and criticised by everybody but still one loves to engage himself in it if finds opportunity, ordinarily, since it is difficult to resist temptation. It is often, a kind, parallel to the word 'bribery', meaning whereof in the context of the politicians or bureaucrats, induced to become corrupt.

55. The Greek Philosopher Plato, in 4th Century BC said, *"in the Republic that only politicians who gain no personal advantage from the policies they pursued would be fit to govern. This is recognised also in the aphorism that those who want to hold power are most likely those least fit to do so."* While giving speech before the House of Lords William Pitt in the later half of 18th Century said, *"Unlimited power is apt to corrupt the minds of those who possess it."* Lord Acton in his letter addressed to Bishop Creighton is now one of the famous quotation, *"Power tends to corrupt and absolute power corrupts absolutely."*

56. Corruption is a term known to all of us. Precise meaning is illegal, immoral or unauthorized act done in due course of employment but literally it means "inducement (as of a public official) by improper means (as bribery) to violate duty (as by committing a felony)." It is a specially pernicious form of discrimination. Apparently its purpose is to seek favourable, privileged treatment from those who are in authority. No one would indulge in corruption at all if those who are in authority, discharge their service by treating all equally.

57. We can look into it from another angle. Corruption also violates human rights. It discriminates against the poor by denying them access to public services and preventing from exercising their political rights on account of their incapability of indulging in corruption, of course on account of poverty and other similar related factors. Corruption is, therefore, divisive and makes a significant contribution to social inequality and conflict. It undermines respect for authority and increases cynicism. It discourages participation of individuals in civilised society and elevates self interest as a guide to conduct. In social terms we can say that corruption develops a range bound field of behaviour, attitude and beliefs.

58. Corruption is antithesis of good governance and democratic politics. It is said, that when corruption is pervasive, it permeates every aspect of people's lives. It can affect the air they breathe, the water they drink and the food they eat. If we go further, we can give some terminology also to different shades of corruption like, financial corruption, cultural corruption, moral corruption, idealogical corruption etc. The fact remains that from whatever angle we look into it, the ultimate result borne out is that, and the real impact of corruption is, the poor suffers most, the poverty grows darker, and rich become richer.

59. It is not that the Apex Court is oblivious of the situation at ground level. It had also occasion to comment thereon time and again. In **Secretary, Jaipur Development Authority Vs. Daulat Mal Jain, 1997 (1) SCC 34:**

". . . . When satisfaction sought in the performance of duties is for mutual personal gain, the misuse is usually termed as 'corruption'."

60. In **High Court of Judicature at Bombay Vs. Shirishkumar Rangrao Patil, 1997(6) SCC 339,** the Court held:

"Corruption, appears to have spread everywhere. No facet of public function has been left unaffected by the putrefied stink of 'corruption'. 'Corruption' thy name is depraved and degraded conduct..... In the widest connotation, 'corruption' includes improper or selfish exercise of power and influence attached to a public office."

61. Again the Court in **B. R. Kapur Vs. State of T.N., 2001(7) SCC 231** said:

". . . . scope of 'corruption' in the governing structure has heightened opportunism and unscrupulousness among political parties, causing them to marry and divorce one another at will, seek opportunistic alliances and coalitions often without the popular mandate."

62. In **State of A.P. Vs. V. Vasudeva Rao, 2004 (9) SCC 319** the Court took judicial notice of this epidemic and said:

". . . The word 'corruption' has wide connotation and embraces almost all the

spheres of our day-to-day life the world over. In a limited sense it connotes allowing decisions and actions of a person to be influenced not by rights or wrongs of a cause, but by the prospects of monetary gains or other selfish considerations."

63. The petitioner's Tractor which has already been sold long back, mere restoration thereof, after almost three years, would not restore the situation back to petitioner since depreciation and deterioration of something like Tractor is very fast and has its own impact. This Court finds it really very hard and disheartening that the respondents holding responsible offices could proceed in such an illegal manner, that too with impunity, without showing any compassion and heart to the helplessness of petitioner, causing virtually state of ruination to him.

64. It is well settled that a person who seeks equity must come with clean hands and do equity. Similarly it applies equally to respondents also when they come to the Court to defend their action.

65. In **Gurpal Singh Vs. State of Punjab and another, AIR 2005 SC 2755** it was held that the Court must do justice by promotion of good faith and prevent law from crafty invasion. No litigant has a right to unlimited draught on the Courts equity and good conscious. The observations though made in a different context but in principle, they apply to the facts of this case also. In my view here is a case which deserve to be allowed with exemplary costs so that it may act deterrent to prevent others not to behove in the similar fashion and may encourage justice to poor and helpless people of this motherland.

66. In the result, the writ petition is allowed. The entire recovery proceedings initiated against petitioner in respect of loan in question are hereby quashed.

67. The petitioner shall be entitled to costs, which I quantify to Rs. 10,00,000/- (Ten lacs), 50% whereof shall be borne by Bank and rest by revenue authorities and State. In case the amount of cost is not paid by respondents, as directed above, within three months from today, after obtaining a certificate from Registrar of this Court on making an application, the said amount shall be recovered as arrears of land revenue by the Collector concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition no. 34286 of 2003

Rakesh Kumar Srivastava ...Petitioner
Versus
Chief Engineer, Irrigation Deptt. U.P. Lko. And others ...Respondents

Counsel for the Petitioner:
Sri M.V. Verma
Sri C.B.Singh
Sri V.K. Singh
Sri S.R. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- selection of Assistant Boring Technician- under Physically Handicapped Quota- neither in advertisement-nor in the application form any column meant for such category-no separate result of P.H. Category of written test prepared-nor candidates required to produce P.H. Certificate at the time of interview- appointment under this category-held- selection neither impartial nor honest-

but malice in law-result of extraneous considerations-quashed direction to issue the salary from erring officer.

Held: Para 55 and 56

This approach taints the entire action of the respondents. It clearly smells foul and stinky. The latent becomes patent. The procedure and the manner in which Selection Committee headed by Chief Engineer himself, who was the appointing authority, have worked, raises serious doubt over its integrity. It shows that the selection was neither impartial nor honest. The Selection Committee has made selection in its own ways, deviating the settled straight procedure, and recommended candidates (irrespective of their merits) in respective categories for which statutory reservation was not available. No justification, no clarification, no explanation whatsoever, for this kind of selection, particularly in respect of the category of Physically Handicapped persons has been attempted to place on record. The dubious nature of selection is writ large. No explanation justifies an inference of extraneous considerations.

In absence of anything to justify bona fide of Selection Committee, this court has no option but to hold the above selection tainted with malice in law. It is vitiated on account of recommendations made without adhering strictly to the merits of candidates vis a vis respective categories of reservation. The Selection Committee carved out a category of reservation which was not attracted to the service and post in question. This action of Selection Committee is tainted with dishonest intention and in absence of anything otherwise, this Court is justified in inferring that they were involved in corrupt activities, prompted by extraneous consideration and for collateral purpose. The selection of certain persons under physically handicapped quota is thus clearly illegal founded on extraneous considerations.

Case law discussed:
2003 (2) SCC 111; 2002 (7) SCC 222; 2002 (3) SCC 496; 2011 (4) ADJ 306; 2010 (3) AWC 2583; J.T. 2009 (10) SC 309; (2009) 3 SCC 250; 2009 (2) SCALE 731; JT 2009 (4) SC 577; 2009 (6) SC 329; 2008 (7) SCC 210; JT 2009 (8) SC 501

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

1. These are the three writ petitions connected with each other since basic facts and issues are common but relief sought by the petitioners are different. Therefore, as requested and agreed by learned counsel for the parties have been heard together.

2. Sri S.U.Upadhyay, Advocate holding brief of Ms. Manisha Pandey, learned counsel for the petitioner in Writ Petition No.69008 of 2006, Sri Deepak Kumar Jaiswal, learned counsel for the petitioners in Writ Petition No.54665 of 2011 and for respondent in Writ Petition No.69008 and learned Standing Counsel for the respondents.

3. Writ petition No.34286 of 2003 (hereinafter referred to as "Writ 'A' ") has been filed by sole petitioner Rakesh Kumar Srivastava assailing result published in daily newspaper "Dainik Jagran" dated 17th July, 2003 (Annexure 5 to the writ petition), of recruitment held for the post of "Assistant Boring Technician" (hereinafter referred to as "A.B.T.") in Irrigation Department of State of Uttar Pradesh.

4. Learned counsel for the petitioners has confined his case during the course of the argument only to the extent the aforesaid result relates to the candidates declared successful in the category of Physically Handicapped

persons. He has also sought a mandamus directing respondents to appoint petitioner on the post of A.B.T. on the ground that petitioner is a general category (Physically Handicapped Person) candidate and there being 183 general vacancies, 5 would fall in Physically Handicapped quota but only one candidate has been declared successful.

5. Writ petition no. 69008 of 2006 (hereinafter referred to as "Writ 'B'") has been filed by Rakesh Dhar Pandey aggrieved by order dated 13th September, 2006 whereby his representation claiming appointment on the post of 'A.B.T.' has been rejected by Chief Engineer, Minor Irrigation, U.P. Lucknow on the ground that vacancies available for Physically Handicapped persons in accordance with prescribed quota are already occupied and no vacancy is available for his appointment. The petitioner has also challenged appointment order dated 10th January, 2006 appointing respondent No.4 on the aforesaid post on the ground that he has secured marks less than the petitioner and therefore, could not have been appointed by overlooking merit of the petitioner and his appointment is wholly illegal and arbitrary.

6. Writ petition No.54665 of 2011 (hereinafter referred to as "Writ 'C' ") has been filed by four petitioners namely Ram Abhilash Patel, Ram Janm Pal, Shiva Kant Tripathi and Mahesh Chand Ojha. They have assailed selection committee's recommendation dated 30th August, 2011 recommending for cancellation of selection and appointment of certain candidates as 'A.B.T.' against the prescribed reservation for Physically Handicapped quota though there was no such quota available. They have also assailed the consequential show cause notice dated 2.9.2011 requiring petitioners to show cause why their appointments be not cancelled.

7. For the purpose of narration of facts, Writ 'B' is taken as the base case except wherever record of other writ petitions would be required to be referred. It may be placed on record that during course of arguments all the counsels have freely referred to the record of all these cases.

8. The facts giving rise to the present dispute are as under:

9. An advertisement was published notifying 401 vacancies of 'A.B.T.' vide advertisement No. 3/Stha-6/Saha.Bo.Te/2003-04. The break up of vacancies to various categories was; 183 General, 97 OBC, 110 SC and 11 ST. There was no mention about reservation of any vacancy for "physically handicapped" persons in the aforesaid advertisement. The petitioners (Writ 'A' & 'B') though disabled/physically handicapped persons suffering more than 40% disability, but applied as a general category candidate, in the absence of any reservation notified for "physically handicapped person". They did not stake their claim in the category of "Physically Handicapped quota". The petitioners (Writ 'A' & 'B') were allotted roll nos.00704 and 00877 respectively. They appeared in written examination held on 22.06.2003, result whereof was declared on 05.7.2003 in which they were declared successful. Interview letters dated 3.7.2003 were issued and they were interviewed on 7.7.2003. At the time of interview, they possess all testimonials along with disability certificate and the

same were produced before Interview Board. The final result was declared on 15.7.2003 wherein certain candidates were shown to have qualified in the category of "Physically handicapped persons".

10. The petitioner (Writ 'A') filed the present writ petition No.34286 of 2003 challenging result declaring candidate successful in various categories under "Physically Handicapped quota" on the ground that despite three percent quota, lessor number candidates have been declared successful in that category. This Court while directing respondents to file counter affidavit, passed an interim order on 14.8.2003 that selection of Physically Handicapped candidates in the list of general category shall be subject to the result of writ petition.

11. Amazed by the situation where certain candidates were declared to have qualified in the category of physically handicapped person though no such reservation was prescribed at any point of time, the petitioner (Writ 'B') claiming benefit in the said category, came to this Court in Writ petition no.35572 of 2003, challenging advertisement as well as the entire selection process, and also, in the alternative, sought a mandamus against official respondents to consider his candidature in "physically handicapped category". The aforesaid writ petition was disposed of vide judgment dated 10th August, 2006 and the relevant extract is as under:

"I direct the respondents to give to the petitioner an opportunity of hearing interview within a period of ten days from the date of production of a certified copy of this order and thereafter declare his result within the next period of one month.

Needless to say that the respondents will consider the case of the petitioner conforming to principles of natural justice, and in accordance with law and the Government circular with regard to the reservations for physically handicapped persons." (emphasis added)

12. Pursuant to above, and direction contained therein, petitioner (Writ 'B') was again issued an interview letter on 24th August, 2006 whereupon he appeared before Selection Committee. However, by order dated 13th September 2006, impugned in this writ petition, Chief Engineer, Minor Irrigation rejected his candidature on the ground that quota for 'physically handicapped' is already full since appointments pursuant to final result have already been made and therefore, no benefit can be given to the petitioner.

13. Assailing appointment of respondent no.4 (Mahesh Chandra Ojha), the petitioner (Writ 'B') has pleaded that he has secured only 63.83 % marks while the petitioner (Writ 'B') had secured 70% of marks, hence, ignoring him (the petitioner), respondent no.4 could not have been appointed and his appointment is patently illegal and arbitrary.

14. Notices were issued to respondents and time for filing counter affidavit was allowed vide order dated 19th December, 2006.

15. A counter affidavit is filed (in Writ 'B') on behalf of respondents No.1, 2 and 3 sworn on 15.2.2007, by Sri R.S.Jurail, Chief Engineer, Minor Irrigation, U.P. Lucknow referring to the

provisions of U.P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) Act, 1993 (hereinafter referred to as "Act, 1993" (as amended in 1997) and says that reservation for physically handicapped persons is applicable only in such post/services which are identified by State Government by notification. The reservation, therefore, is not applicable to all the services/posts unless so identified. He thereafter referred to Government Order dated 7th May, 1999 whereby certain service/posts were identified for the purpose of reservation for physically handicapped persons in Group 'C' and Group 'D' post. He pleaded that the post of 'A.B.T.' of Minor Irrigation Department is not one of the post so identified which would attract reservation for physically handicapped persons under the "Act, 1993". He further says that petitioner's earlier writ petition No.35572 of 2003 was disposed of on 10th August, 2006 but he has filed another writ petition No.46714 of 2005 which is pending. The counter affidavit further says that petitioner has filled the application form and in the column "enquiry about applicability of reservation", he has answered in "negative". Having said so, he has further stated in para 8 of the counter affidavit that pursuant to advertisement dated 2.6.2003, 183 vacancies in general category were advertised and 3% reservation in physically handicapped person was applied in the manner provided in 'Act, 1993' i.e. 1% for blindness or low vision; 1% for hearing impairment; and locomotor disability or cerebral palsy. Only two vacancies in "general category" became available for physically handicapped persons against which one was selected by Selection Committee; and, another was given to one Sri Mahesh Chandra Ojha, pursuant to this Court's order dated 7th December, 2005, in Writ Petition No.47429 of 2005. The order dated 13th September, 2006 passed by him was defended on the ground that it was passed in accordance with law. Since the petitioner had not claimed reservation in "physically handicapped category" in his application form and had not submitted disability certificate at the time of interview, benefit of reservation was neither admissible to him nor could have been extended.

16. Sri Jurail, Chief Engineer also said in his affidavit that there was an order passed on 13th July, 2006 in petitioner's another Writ Petition No.46714 of 2005 directing Chief Engineer, Minor Irrigation to pass appropriate order in respect of candidature of petitioner and pursuant thereto an order was passed on 31st July, 2006 holding that without recommendation by Selection Committee, no person can be appointed. Since the petitioner was not recommended by Selection Committee, hence his claim for appointment cannot be accepted. The official respondents, again reiterated that the post of 'A.B.T.' is not identified to attract reservation for physically handicapped person vide Government Order dated 7th May, 1999, and that the petitioner having also not claimed reservation in the said category is not entitled for appointment under such category.

17. The aforesaid counter affidavit came to be considered by this Court on 19th July, 2010. Having gone through it, this Court found the stand taken by official respondents self contradictory. It

became difficult to understand, how physically handicapped quota has been applied for making appointment of respondent no.4 though no such reservation was available. This Court, accordingly, passed following order requiring learned Standing Counsel to file a supplementary counter affidavit giving detailed facts about the circumstances in which respondent No.4 was appointed.

"Heard learned counsel for the petitioner, learned Standing Counsel for the State-respondents and Sri Deepak Jaiswal, learned counsel for respondent no.4.

Learned Standing Counsel is directed to file a supplementary counter affidavit specifically mentioning therein the reason why the candidature of the petitioner has not been considered inspite of the order passed by this Court in Civil Misc.Writ Petition No. 35572 of 2003 dated 10.8.2006 and will also indicate in the affidavit as to how and why the candidature of Mahesh Chandra Ojha (respondent no.4 in this petition) has been accepted ***when it was a clear stand taken by the authorities in the counter affidavit that there is no quota for handicapped.*** *Learned Standing Counsel is allowed two weeks' and no more time for the aforesaid purpose failing which the Chief Engineer shall appear in person before this Court." (emphasis added)*

18. Pursuant thereto, a supplementary affidavit was filed on 31st July, 2010 sworn by one P. Ram, Chief engineer, Minor Irrigation, U.P. at Lucknow. Therein he attempted to justify appointment of Sri Mahesh Chandra Ojha (respondent No.4) by referring to this Court's judgment 25th August, 2005 passed in writ petition No.57429 of 2005 and dated 7.12.2005 passed in Writ Petition No.74429 of 2005. The Court found the aforesaid defence and reference to the said judgments thoroughly misleading. Thereupon it passed a detailed order on 17th August, 2011, the relevant extract thereof is as under:

"Pursuant to the said order a supplementary counter affidavit has been filed on 31.7.2010, which has been sworn by Shri P. Ram, Chief Engineer, Minor Irrigation, U.P. In paragraph 8 of the said affidavit the stand taken is that Mahesh Chandra Ojha (respondent no.4) was given appointment pursuant to the judgment of this Court dated 25.8.2005 passed in Writ Petition No.57429 of 2005 as also the order dated 07.12.2005 passed in Writ Petition No.74429 of 2005. ***Such facts are totally misleading and contrary to record.*** *Pursuant to order dated 25.8.2005 passed in Writ Petition No.57429 of 2005 Mahesh Chandra Ojha submitted representation dated 5.9.2005 to the Chief Engineer, Minor Irrigation, U.P., who vide order dated 7.10.2005, copy whereof is annexed as annexure 15 to the Writ Petition No.74429 of 2005, rejected his claim. Thereafter, Mahesh Chandra Ojha filed Writ Petition No.74429 of 2005 in which this Court by order dated 7.12.2005 required the respondents to produce the original record as also to file an affidavit specifically disclosing certain facts. It was after the order dated 7.12.2005 when the records were directed to be produced the respondents hurriedly constituted a committee to consider the claim of Mahesh Chandra Ojha for giving appointment under the handicapped quota and accordingly appointment letter dated 10.1.2006 was issued to him based upon*

the recommendations made by the committee on 06.01.2006.

The admitted facts in the case are that an advertisement issued by the department did not provide reservation for physically handicapped. It is admitted by the respondents that even application form did not contain column with regard to the details regarding candidates being physically handicapped. The petitioner is also physically handicapped candidate and has applied under the general category. When the issue with regard to the advertisement, being bad in law, as it did not provide reservation for the physically handicapped, was raised before this Court, the respondents in order to safeguard their selection, granted appointment to Mahesh Chandra Ojha under the physically handicapped category. The petitioner claims to have obtained 70 marks, much higher than that of Mahesh Chandra Ojha, who is said to have secured 63 marks and, therefore, he would have better claim under the handicapped category. It appears that the respondents have not come with clean hand before this Court while placing the facts on record.

List this case on 25.8.2011 at the top. On the said date whoever is posted as Chief Engineer, Minor Irrigation, U.P. shall remain present before this Court along with an affidavit clarifying the facts and circumstances, as recorded above, in this order." (emphasis added)

19. Again a supplementary counter affidavit was filed sworn by Sri P. Ram, Chief Engineer, Minor Irrigation, the contents whereof have been noticed by this Court in order dated 12th September, 2011 which reads as under:

"(i) the post of Assistant Boring Technician was not identified as a post applicable for reservation for physically handicapped persons under Government order dated 7.5.1999.

(ii) the appointments given to Ram Janam Pal, Ram Abhilash Patel, Shiva Kant Tripathi and Mahesh Chandra Ojha were not in accordance with law as no benefit could have been extended to physically handicapped candidates.

(iii) a Committee of four members was constituted to consider the case of the petitioner comprising of three Executive Engineers and the Chief Engineer i.e. the deponent of this affidavit.

(iv) after perusing the history of the case the Committee has resolved that firstly the petitioner cannot be given any benefit of being physically handicap and secondly the appointment given to the aforementioned four candidates being illegal required cancellation of their appointments. The said resolution of the Committee dated 30.8.2011 has been filed as Annexure SCA2.

(v) SCA 3 is a letter dated 1.9.2011 issued by the deponent of this affidavit to the Executive Engineers, Minor Irrigation Divisions, Gorakhpur, Allahabad, Raibareilly and Sitapur directing them to cancel the appointments of the aforementioned four candidates in accordance with law.

(vi) SCA 4 is a bunch of four show cause notices issued by the respective Executive Engineers of the Division to all the four persons requiring them to show cause within a month as to why their appointments be not cancelled."

20. It appears that pursuant to the aforesaid observations and directions, Official respondents finding it difficult to sustain appointment of certain candidates made in the category of "physically handicapped persons", passed orders recommending cancellation of their appointments. Writ 'C' is offshoot of such orders which has been filed by four petitioners, who were beneficiaries, namely, appointees on the post of 'A.B.T.' and whose appointments are now in peril.

21. In Writ 'C', this Court, while entertaining the writ petition, granted an interim order, restraining respondents from taking any further action pursuant to show cause notice dated 2.9.2011, as a result whereof, these four petitioners (Writ-C) are still continuing in service.

22. To complete the facts, one more affidavit may be referred which has been filed on 10.5.2012 by respondent No.2 in Writ 'B'. It has also been sworn by Sri P. Ram, Chief Engineer, Minor Irrigation. In para 3 thereof, he has categorically stated that post of 'A.B.T.' in the Department of Minor Irrigation has not been identified for applying reservation for "Physically Handicapped" persons. It would be appropriate to reproduce own words of respondents, contained in para 3 of supplementary counter affidavit:

"...post of Assistant Boring Technician in the Department of Minor Irrigation, Government of U.P., has not been identified for being reserved for persons with disability, as provided under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, hereinafter referred to as the Act, 1995. In this regard, reference may be had to the Government Order dated 7th May, 1999, whereby in exercise of powers under Section 32 of the Act, 1995, posts have been identified for being reserved for persons with disability, and the post of Assistant Boring Technician in the Department of Minor Irrigation does not find mention in the list of posts, identified in terms of the aforementioned Government Order." (emphasis added)

23. I have heard learned counsel for the parties and perused the record.

24. The theme song of all the petitioners irrespective of the fact whether they are already appointed or not is common, since the interest of petitioners in Writ 'A' and 'B' is also that they should be appointed, which is possible only when benefit of reservation of Physically Handicapped person is allowed to be retained in the service/post in question.

25. On the contrary, learned Standing Counsel had no option but to plead, though in utter desperation that there cannot be a reservation for Physically Handicapped persons on the post of 'A.B.T.' since the aforesaid service/post has not been identified for such a reservation but simultaneously he also tried to protect appointments already made on the ground that due to litigation by those persons and the orders passed by this Court, appointments were made and since those persons have already continued in service for quite some time, they may be allowed to continue.

26. Sri S.U.Upadhyay, Advocate holding brief of Ms. Manisha Pandey, Advocate and Sri Deepak Kumar Jaiswal, Advocate both contended that reservation for "Physically Handicapped" persons is a

constitutional objective and goal, founded on International Convention and Treaty to which Government of India is also a signatory, in furtherance whereof, has promulgated "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act No.1 of 1996)" (hereinafter referred to as "Central Act, 1995"). Therefore, to honour such objective, not only the petitioners of Writ 'C' should be allowed to continue but petitioners of Writ 'A' & 'B' should also be directed to be appointed on the post in question.

27. I have given my serious thoughts to the issue in question and finds that the answer is very straight and simple. However, apparent, wholly illegal and dishonest act on the part of respondents officials has caused some complications including embarrassment and harassment to the petitioners also.

28. There is an angular and naive attempt to shield something which is patently and blatantly illegal. It goes without saying that legislature has intended to provide special benefits in services to "Physically Handicapped persons". The Parliament enacted Central Act, 1995 with the aforesaid objective. Its preamble shows to launch the Asian and Pacific Decade of the Disabled Persons 1993-2002, a meeting was convened by Economic and Social Commission for Asian and Pacific Region and held at Beijing between 1st to 5th December, 1992. It adopted The Proclamation on Full Participation and Equality of People with Disabilities in the Asia and the Pacific region. India was a signatory to this proclamation. The Parliament therefore, found it necessary to enact a suitable legislation for achieving social welfare obligation of State towards prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities; to create barrier free environment, to remove any discrimination, to counteract any situation of abuse and exploitation, to lay down a strategy for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities and to make special provision for integration of persons with disabilities into the social mainstream.

29. Sections 32 and 33, chapter VI of Central Act, 1995, provide for "employment". Section 32 talks of "identification of posts which can be reserved for persons with disabilities" and Section 33 provides for reservation for such persons in every establishment as defined under the Central Act, 1995.

30. In the State of Uttar Pradesh there was already a statute i.e. Act, 1993 which had made provisions for reservation on certain number of posts in public services. To bring the above State Act in conformity with Central Act, 1995, an amendment was made by U.P. Act No.6 of 1997. I need not go in detail to these two statutes and their consequences, for the reason, that in **Sarika Vs. State of U.P. 2005 (4) ESC 2378,** a Full Bench decision of this Court, a question was raised, whether Act, 1993 entitles a physically handicapped persons to claim reservation in public service [in that case it was the post of Civil Judge (Junior Division)] in the absence of identification of the said post by State Government. The Full Bench having gone through the

Central as well as State Act, both, and considering relevant provisions of the two statutes, came to the conclusion that there is no repugnancy in the two statutes in so far as requirement of identification of posts for providing reservation for physically handicapped persons in public services is concerned. The identification is must and unless made, it shall not attract reservation for Physically Handicapped under Act, 1993.

31. Section 32 of Central Act as well as the provisions of State Act, 1993, both, have the same consequences namely both require the State Government to identify posts in the establishment which can be reserved for the persons with defined disabilities. In para 36 of the judgment, the Court in **Sarika (supra),** observed:

"This reservation is, however, subject to identification of 1% of vacancy each i.e. 3% for the persons suffering from blindness or low vision, hearing impairment, and locomotor disability or cerebral palsy. The identification of establishment and the post for such disability, under Sections 32 and 33 of the Central Act, is also required as condition precedent under Section 3(1) (ii) of the State Act. Hence, we find that so far as the conditionally for providing reservation for Physically Disabled Persons, in public service and posts, and the identification of vacancies for each disability is concerned, there is no repugnancy between the provisions of Central Act and the State Act."

32. To the same effect is the observation of Full Bench in **Sarika (supra)** in para 38 which reads as under:

"The identification of posts in question is a sine qua non for extending the benefit of reservation for Physically Disabled Persons. It is so because the persons for which the reservation has been provided may be having such disabilities which may cause obstruction to discharge on such posts in the establishment or public service.

33. It is in these circumstances, in that case, the Full Bench categorically held that in absence of requisite identification of post, a physically handicapped person is not entitled to reservation on the post.

34. Sri Upadhyay, learned counsel for the petitioner in Writ 'B' has sought to refer Apex Court's decision in **Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. & Ors. 2003(2) SCC 111** which was a matter relating to land acquisition under Gujarat Town Planning and Urban Development Act, 1976. I fail to appreciate how that judgment would have any application in the present case and, in my view, the reliance is totally misplaced and misconceived.

35. Learned counsel for petitioner, during course of arguments, referred to para 59 of the judgment in **Bhavnagar University (supra),** which says, *"a decision, as is well-known, is an authority for which it is decided and not what can logically by deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."* The Apex Court in making the aforesaid observations referred to and relied on its earlier decision in **Delhi Administration (NCT of Delhi) Vs. Manoharlal, 2002 (7) SCC 222,**

Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr. 2002 (3) SCC 496. The proposition of law admits no exception and is well settled. I am respectfully bound by it but find it wholly inappropriate for its application to the present case. Here the respondents have categorically come with a case that posts of 'A.B.T.', in Minor Irrigation Department of State of Uttar Pradesh have not been identified for attracting reservation meant for "Physically Handicapped" persons. The relevant Government Order, whereby certain services/posts have been identified to attract such reservation, does not include the post of 'A.B.T.' in the Department of Minor Irrigation.

36. Learned counsel for the petitioners neither could have been able to lay their hands to controvert the aforesaid documentary evidence and/or the stand of respondents nor have been able to place anything otherwise before this Court to show that the post in question has been identified and is available for attracting reservation meant for "Physically Handicapped" persons under Act, 1993.

37. On the contrary, both the learned counsels for the petitioners have tried to argue that since it is the Constitutional mandate to take welfare measures for the benefit of physically handicapped persons, a benevolent approach must be taken by this Court which may fulfill such welfare measures instead of taking strict legalistic approach in this matter.

38. I am afraid this is an argument asking this Court to act in apparent breach of law. The Court is being asked to extend its so called benevolent sympathetic approach for giving public employment to the persons who are not entitled and eligible for the same in law. Any such endeavour on the part of this Court would straightway infringe other eligible and qualified candidate's fundamental right of equal opportunity of employment in public employment enshrined under Article 16 of the Constitution. Rule of law cannot be breached on the so called lenient approach on the ground of benevolence, sympathy etc. It is no doubt true that jurisdiction of this Court under Article 226 is equitable and discretionary but simultaneously a discretion, which would lead apparent breach of law, should not and cannot be exercised.

39. This Court in **Shiv Kumar Dwivedi Vs. State of U.P. & Ors., 2011 (4) ADJ 306,** in para 23, said:

"So far as sympathetic consideration is concerned, as argued by learned counsel for the petitioner it is also well settled that sympathy which is not within the precincts of law cannot be founded basis to grant something which is otherwise impermissible."

40. In **Vibha Srivastava Vs. Cantonment Board Varanasi & Ors., 2010(3) AWC 2583** this Court, in para 22, observed:

"22. Now coming to the second question, I am of the view that the appointment made on a post which is not in accordance with law would not confer any right upon the incumbent either to hold the post or to continue in service on such post in any manner. Mere length of service or lack of any fault on the part of the employee concerned is not relevant inasmuch it is the observance of statutory provisions and not the personal or

individual act on the part of the parties concerned which would decide the rights of the persons to hold the post. If a person does not possess the requisite qualification or is otherwise appointed on a particular post in violation of the statute, he/she cannot claim to have a right to continue in service simply because it has worked for a long time for the reason that estoppel does not apply against statute and any appointment against the statute is void ab initio. Even, on the ground of sympathy, no such relief can be granted since a Court of law is primarily concerned with rule of law consistent with constitutional provision and mere sympathy, which is directly against the statute and constitutional provisions would be a case of misapplication of the understanding of principles of equity and justice. It would be difficult to hold that an action which would be contrary to statute has the effect of violating others' fundamental right of equal opportunity of employment, can be equitable and sympathetic though it is otherwise unconstitutional. A sympathy or equity which will result in upholding illegal and unconstitutional orders or acts can not be considered to be within the four corners of principles of administration of justice in equitable exercise of power under Article 226 of the Constitution. It would be a travesty of justice if we allow the concept of sympathy or equity to influence the mind of the Court even when the action is ex facie illegal and unconstitutional, violative of Article 16 (1) of the Constitution. Recently, the Apex Court has declined to grant any relief to a person merely because it has worked for long time though did not possess requisite qualification at the time of appointment in accordance with rules and the appointment is not in accordance with the procedure prescribed."

41. In **Shesh Mani Shukla Vs. District Inspector of Schools Deoria and others J.T. 2009 (10) SC 309,** the court said:

"It is true that the appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void ab initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ petitioner must establish a legal right in himself and a corresponding legal duty in the State. {See Food Corporation of India & Ors. v. Ashis Kumar Ganguly & Ors. [2009 (8) SCALE 218]}. Sympathy or sentiments alone, it is well settled, cannot form the basis for issuing a writ of or in the nature of mandamus. {[See State of M.P. & Ors. v. Sanjay Kumar Pathak & Ors. [(2008) 1 SCC 456]}"

42. In **State of West Bengal & others Vs. Banibrata Ghosh & others (2009) 3 SCC 250,** such a request was declined to be accepted by the Apex Court observing that it would be a misplaced sympathy.

43. In **D.M. Premkumari Vs. The Divisional Commissioner, Mysore Division and others 2009 (2) SCALE 731,** the Court observed :

"The law is merciless", is a most frequently quoted saying. It has led people to mistakenly think that it is separated from feelings of righteousness. We have become used to the understanding that such emotions as indignation, sorrow and compassion should not exist in legal cases, especially not in judiciary. This, in our view, is a misunderstanding. Judiciary has a very strong sense of justice and it works to maintain social justice and fairness. We hasten to add, judiciary does not believe in misplaced sympathy."

44. Giving reasons for not extending the indulgence in favour of the persons, who have worked for sometimes though not validly appointed, in **State of Bihar Vs. Upendra Narayan Singh & others JT 2009 (4) SC 577,** the Court observed :

"...the Courts gradually realized that unwarranted sympathy shown to the progenies of spoil system has eaten into the vitals of service structure of the State and public bodies and this is the reason why relief of reinstatement and/or regularization of service has been denied to illegal appointees/backdoor entrants in large number of cases..."

45. In **Om Prakash & others Vs. Radhacharan & others 2009 (6) SC 329**, the Court observed:

"It is now a well settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous."

46. In **Subha B. Nair & others Vs. State of Kerala & others 2008 (7) SCC 210**, the Court said :

"This Court furthermore cannot issue a direction only on sentiment/sympathy."

47. In **Jagdish Singh Vs. Punjab Engineering College & others JT 2009 (8) SC 501,** the Court referred to the observations made earlier in **Kerala Solvent Extractions Ltd. Vs. A. Unnikrishnan and another 1994 (1) SCALE 63** with approval as under :

"The reliefs granted by the courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability."

48. The above discussion therefore, leads to an impeccable inference that not even a single vacancy in the cadre of 'A.B.T.' in Minor Irrigation Department of State of Uttar Pradesh can be and could be filled by treating it reserved for "Physically Handicapped" persons under Act, 1993, since the aforesaid service has not been identified for such a reservation

and so long as such identification is not there, this kind of reservation cannot be applied. That being so, the mere fact that certain appointments were made illegally and have continued for some time, cannot be a ground to allow such illegal appointees to continue for the reason that it would amount to permitting an illegality to perpetuate which is impermissible and this Court is under a constitutional obligation to maintain rule of law. Even on the plea of so called sympathy etc., such contention cannot be accepted, particularly in view of the observations of the Apex Court in catena of decisions discussed and referred to hereinabove.

49. Having said so, this Court is also amazed how the respondent could declare some of the candidates selected in the category of "Physically Handicapped" quota without caring to the fact that there is no such reservation. The appointing authority also issued letters of appointment to such candidates.

50. The result of written test was declared by Chief Engineer, Minor Irrigation on 5th July, 2003, a photocopy whereof is on record as Annexure 3 to writ 'C'. The result was in three categories, namely, 'General', 'Scheduled Caste' and 'Other Backward Class'. There was no further sub division like "Dependants of Freedom Fighter", "Physically Handicapped persons", "Ex Servicemen", etc. It is also evident that Chief Engineer, Minor Irrigation himself was Chairman of Selection Committee. The constitution of Selection Committee is available on record. The minutes of Selection Committee dated 15th July, 2003 are Annexure 4 to Writ 'C'. It shows that Sri R.S.Jurail, Chief Engineer was the Chairman of Selection Committee. Other members were Sri Gomti Singh, Director, Minor Irrigation, Sri Naresh Chandra, Superintending Engineer, Sri P.Ram, Executive Engineer/Incharge Superintending Engineer and Sri R.R.P.Kushwaha, Executive Engineer, Headquarter, Lucknow were other members. These proceedings dated 15th July, 2003 were prepared after interview of candidates on 7th, 8th, and 9th July, 2003. It mentions that reservation to "Dependants of Freedom Fighter, Ex Servicemen and Handicapped Persons has been given according to their prescribed quota, suitability and availability of candidates.

51. This Court asked the learned Standing Court to explain where was an occasion for Selection Committee to find out which candidate is liable to be considered in physically handicapped quota when :

(a) no such reservation was published and advertised in the advertisement.

(b) in the application form there was no column requiring candidates to stake his claim regarding reservation in the category of physically handicapped quota.

(c) there was no occasion for any candidate to mention in his application form that he is a Physically Handicapped person entitled to be considered against quota meant for it.

(d) there was no occasion for such candidate to attach any testimonial supporting claim in the category of disabled or physically handicapped person.

(e) in the written test no separate list of selected candidates vis a vis the alleged reserved quota in the category of physically handicapped persons and others was prepared.

(f) interview letters issued to the candidates did not require them to bring any testimonial or evidence or certificate to support their claim as a physically handicapped person.

(g) there is nothing on record to show that Selection Committee informed, in any manner, all the candidates who have appeared in selection that if they satisfy requirement of physically handicappedness up to the prescribed percentage, they should submit their certificates/testimonials staking their claim against vacancy for physically handicapped persons under Act, 1993.

(h) In what manner, the candidates whose results have been declared finally, selected under physically handicapped quota, could inform the selection committee about their candidature in that category, what was the occasion therefore and why similar opportunity of consideration was not extended to other similarly placed persons.

52. Learned Standing Counsel very fairly stated that at least the record is totally silent on this aspect. It does not show in what manner candidates, who were selected and declared successful in physically handicapped category, were so selected. The final result shows that in general category, one candidate bearing Roll No.01392 was declared successful in the category "physically handicapped", while in O.B.C. Category, two such candidates were declared successful bearing roll No.00288 and 04321.

53. In para 15 of writ 'C', petitioners themselves have admitted that though there was no reservation clause for handicapped persons in advertisement no.3 of 2003, but in the final selection list published in newspaper on 17th July, 2003, certain candidates were selected in the category of handicapped. It is said that pursuant to the aforesaid selection, petitioners No.1, 2 and 3 (writ 'C') were issued letters for appointment on 18th July, 2003 but no disability certificates were demanded from them by Executive Engineer while making appointments. In respect of petitioner No.4 (writ 'C') such appointment letter was issued on 10th January, 2006 and there also no such request was made to show disability certificate.

54. It is really surprising and more painful that the petitioner no.4 (Mahesh Chandra Ojha) in Writ 'C' was offered appointment so as to prevent this Court from judicial scrutiny in Writ Petition No.74429 of 2005 filed by Sri Ojha claiming appointment in the category of Physically Handicapped quota wherein the Court found that the candidate securing lessor marks were appointed and Sri Ojha, securing higher marks, was denied such appointment. The Court required learned Standing Counsel to ensure affidavit of Chief Engineer, Minor Irrigation, disclosing as to whether candidates securing lessor marks have been appointed and this order was passed on 7.12.2005. Instead of allowing this Court, a judicial review in the aforesaid matter, the respondents tried to save themselves by offering appointment to Sri

Mahesh Chandra Ojha by issuing letter of appointment on 10th January, 2006.

55. This approach taints the entire action of the respondents. It clearly smells foul and stinky. The latent becomes patent. The procedure and the manner in which Selection Committee headed by Chief Engineer himself, who was the appointing authority, have worked, raises serious doubt over its integrity. It shows that the selection was neither impartial nor honest. The Selection Committee has made selection in its own ways, deviating the settled straight procedure, and recommended candidates (irrespective of their merits) in respective categories for which statutory reservation was not available. No justification, no clarification, no explanation whatsoever, for this kind of selection, particularly in respect of the category of Physically Handicapped persons has been attempted to place on record. The dubious nature of selection is writ large. No explanation justifies an inference of extraneous considerations.

56. In absence of anything to justify bona fide of Selection Committee, this court has no option but to hold the above selection tainted with malice in law. It is vitiated on account of recommendations made without adhering strictly to the merits of candidates vis a vis respective categories of reservation. The Selection Committee carved out a category of reservation which was not attracted to the service and post in question. This action of Selection Committee is tainted with dishonest intention and in absence of anything otherwise, this Court is justified in inferring that they were involved in corrupt activities, prompted by extraneous consideration and for collateral purpose. The selection of certain persons under physically handicapped quota is thus clearly illegal founded on extraneous considerations.

57. This Court can take judicial cognizance that unemployment in the country has almost gone out of proportion. Despite various schemes and efforts on the part of Government, unemployment is virtually beyond control. Sufferance of people is basically on account of lack of resources of earning livelihood causing starvation not only to the individual(s) but to families altogether. It is driving the unemployed youth to find out other ways to get money, may be unlawful. Many a times print and electronic media have published news that for an inferior class of service, the number of applications received are in thousands and lacs. Highly qualified persons are applying for low echelon services. In one such reported matter, candidates having Ph.D., applied for Class IV post. This shows height of unemployment desperation and people's frustration in the unemployed youth. It shows anxiety to have means of earning livelihood at any level, necessary for their sustenance. It is this massive unemployment, which has given a free hand to the people in power and authority to indulge in corrupt activities. Heavy amounts are being taken for getting a person selected for employment particularly in public service. Epidemic of corruption has even spread over constitutional bodies, like Public Service Commission, as we have seen the cases against a few Public Service Commissions going to Apex Court, involving allegations of large scale corruption and illegalities in making selection and recruitment by them.

58. In the present case also respondents, and in particular Chief Engineer, Minor Irrigation, has played a dual role. On the one hand, heading a Selection Committee, in a wholly illegal manner, some candidates were selected finally under the category of "Physically Handicapped" persons and appointment letters were issued. When matter came to this Court, an attempt was made to cover up entire issue by satisfying even those early candidates who tried to unfold their illegal motives and ill designed actions but when similar claim by other candidates continued and Chief Engineer found it difficult to make adjustment, and the things went beyond control, he had no option but to straight away deny such appointment, leading to these writ petitions.

59. Here also respondents have taken a mutually opposite and self destructing stand. On one hand, they supported and tried to protect appointments made in "Physically Handicapped" quota but simultaneously opposed claim of petitioners in Writ 'A' and 'B' pleading that post of 'A.B.T.' having not been identified for reservation of "Physically Handicapped" persons, no appointment in such reserved quota is permissible.

60. The respondents in their own way have tried even to mislead this Court though, as usual, they utterly failed in such an endeavour. The mischief and conduct motivated by extraneous and illegal reasons cannot be condoned. It cannot be said that appointments on the post of A.B.T. in the present case under the category of Physically Handicapped persons has been made legally. It is also evident that pursuant to wholly illegal appointments of certain candidates and, in particular, petitioners (Writ 'C'), a huge public money has been siphoned off in terms of salary to these persons though apparently, and since very inception, their appointment are void ab initio and a nullity in the eyes of law.

61. In these peculiar facts and circumstances, all these writ petitions deserve to be dismissed with the following declarations/directions:

i. No appointment on the post of Assistant Boring Technician in Minor Irrigation Department pursuant to the selection in question in these cases could be made under the category of Physically Handicapped quota. The appointments of petitioners in writ petition no. 54665 of 2011 are wholly illegal and void ab initio. They are, therefore, not entitled for any relief against notices issued to them, impugned in Writ Petition No.54665 of 2011.

ii. For the reasons stated in (i) above, petitioners Writ 'A' & 'B' are also not entitled for any relief i.e. for getting appointment on the post of Assistant Boring Technician pursuant to the selection in question.

iii. The respondents (Appointing Authority) shall be free to cancel appointment, if any, made in the category of 'Physically Handicapped' quota pursuant to selection in question and such action would be taken without any further delay.

iv. The salary paid to the candidates, appointed on the post of Assistant Boring Technician treating certain vacancies reserved for Physically Handicapped

quota, from the date of appointment till the date of their termination, shall be realized in equal proportion from the Appointing Authority as also members of Selection Committee, by State of U.P,. after making such enquiry as prescribed in law. It is made clear that in case Government find responsibility of concerned officials in some different proportion, it shall be free to apportion the amount to be recovered in such proportion. This realization of salary shall be without prejudice to the right of the State Government to take such other action as provided in law.

62. The writ petition is accordingly dismissed with the aforesaid directions.

63. A copy of this order shall forthwith be supplied by the Registrar General to the Secretary, Minor Irrigation, and Chief Secretary, U.P. Government for communication and compliance.
