APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.03.2012

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

Special Appeal No. 07 of 1994

Bijendra Singh ...Appellants
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rajesh Misra
Sri P.K.Singh

Counsel for Respondent:
C.S.C

High Court Rules- Chapter VIII Rules 5- Special Appeal-against judgment by Single judge-arises out from order of appellate authority-held-order passed by Single Judge become final-cannot be challenged under special Appeal-appeal not maintainable.
Case law discussed:
1996(2) A.W.C. 981

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

1. This Special Appeal is directed against the order dated 06.12.1993 passed by learned Single Judge dismissing the writ petition.

2. The appellant-petitioner who was a constable in the U.P. Police filed writ petition challenging the order dismissing him from service dated 22.02.1992 passed the Senior Superintendent of Police, Bulandshahr and the appellate order dated 30.10.1993 passed by the Deputy Inspector General of Police, Meerut Range, Meerut rejecting his appeal.

3. Heard counsel for the parties.

4. Since the order under challenge in the writ petition was the appellate order passed by the DIG, Meerut Range, Merrut, the same quasi judicial order the present special appeal against the order dismissing the writ petition is not maintainable in view of the special provisions under Chapter VIII Rule 5 of the High Court Rules, 1952.

5. The law in this regard has already been settled by a Division Bench of this Court in the case of **State of U.P. And others Vs. Chandi Prasad Bhardwaj** reported in 1996(2)A.W.C. 981, wherein the Division Bench of this Court has held as under:

"As the order of the appellate authority has, become final by the judgment of the learned Single Judge, the order from which the appeal arose cannot alone be challenged in the special appeal, for it cannot be said that though the appellate order is bad, yet the original order which was confirmed in appeal is good. Once it is found that the writ petition was filed against an appellate order and that appellate order was quashed on the original side by a learned Single judge of the High Court, it has to be held that appeal does not be under Rule 5 of Chapter VIII of the Rules of the Court"

6. We, therefore, hold that the appeal is not maintainable. The same is hereby dismissed.

7. There shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2012

BEFORE
THE HON'BLE SUNIL HALI,J.

Civil Misc. Writ Petition No. 57 of 2001

Paras Nath Yadav and another
...Petitioner
Versus
Commissioner, Azamgarh and others
...Respondent

Counsel for the Petitioner:
Sri Satya Prakash
Sri R.L.Yadav
Sri Harindra Prasad

Counsel for the Respondents:
C.S.C.
Sri Anuj Kumar
Sri I.K.Upadhyay

Constitution of India, Article 226- Principle of Natural Justice-violation thereof-when allegation of fraud or misinterpretation-non compliance of Principle of Natural Justice-not fetal-lease granted under family planning scheme beyond scope of category given in Section 198-A of Act-held-Patta itself nonest-no statutory right going to be effected-warrant no interference under Writ jurisdiction.

Held: Para 6

A person can claim protection of rules of natural justice where he has an existing right which is sought to be taken away. The petitioner admittedly had no existing right which was being taken away without following the rules of natural justice. It is for the protection of vested legal rights, which entitles him a right of hearing but where there exists no right, no hearing is required.

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

1. Both the aforementioned writ petition involving identical questions of law and facts have been heard together and are being decided by a common judgment treating WRIT - C No. - 57 of 2001 as leading case.

2. The petitioner was allotted a patta of the plot no. 469-Ka measuring 90 decimal, 469-Ka measuring .90 decimal and 479-Ka measuring .007 decimal situated in village Malpur Lohrai in the year 1988. An approval was granted by the Sub-Divisional Officer and possession of the property was handed over to the petitioner. The allotment was made in favour of the petitioner under the category of having undergone family planning. An application was moved by respondent no. 4 seeking cancellation of allotment on the ground that the order of allotment has been passed in violation of Section 198-A(1) of the U.P. Z.A. & L.R. Act (in short as 'the Act').

3. On this being brought to the notice of the Additional Commissioner, a report from the concerned agency was obtained. The objections were filed by the petitioner to the said report on 30.12.1996. It also appears that the opportunity was given to the petitioner for leading his evidence but he could not present on the date when the case was fixed. On his failure to appear, the order impugned was passed on 31.3.1998, canceling patta granted in his favour.

4. An application for recalling of the order was filed on the ground that it was an exparte order. After hearing the parties, a detailed order was passed by

the Collector holding that the proceedings were not exparte. A revision preferred against the aforesaid order also stands dismissed. Under these circumstances, the present petitions have been filed.

5. The only ground taken by the petitioner is that he was not heard before cancellation order was passed by the Collector. The petitioner has been allotted patta under the category of having undergone family planning. This fact has not been disputed by the petitioner. While scanning section 198-A(1) of the Act, there is no category which provides that those persons who have undergone family planning would be allotted patta. The allotment order issued in favour of the petitioner is ex facie in contravention of the provisions of Section 198-A(1) of the Act. The Collector in his order has held that the allotment has been made in favour of the petitioner in violation of the provisions of Section 198-A(1) of the Act. After having held that the petitioner has been allotted patta in violation of the provisions of Section 198-A(1) of the Act, allotment was cancelled.

6. The contention of the learned counsel for the petitioner is that an exparte proceeding was initiated against the petitioner which is in violation of the rules of natural justice. On facts, it transpires that the petitioner had filed his objection and was provided an opportunity by the prescribed authority to lead his evidence. He failed to appear before the Enquiry Officer on the date. Consequently, the order was passed canceling his Patta. The other aspect of the matter is whether the petitioner was prejudiced by non-observance of rules of natural justice. It be seen that the petitioner had obtained an allotment of patta in violation of the provisions of section 198 of Act. He claims that allotment of patta was made on the basis that he had undergone family planning which is not a category mentioned in the aforesaid Act for allotment of the patta. The allotment of patta was perse in violation of provisions of Section 198 of the Act and for all purposes it is non est in the eyes of law. The aggrieved party can not take protection of the rules of natural justice in such cases. The order obtained by mis-representation or fraud is void ab-initio and it is always to be treated as non-existent. A person can claim protection of rules of natural justice where he has an existing right which is sought to be taken away. The petitioner admittedly had no existing right which was being taken away without following the rules of natural justice. It is for the protection of vested legal rights, which entitles him a right of hearing but where there exists no right, no hearing is required.

7. I, therefore, find no reason to interfere with the order impugned passed by the courts below. Both the writ petitions are accordingly dismissed.

8. A prayer is made by the learned counsel for the petitioner that the petitioner may be permitted to approach the Gaon Sabha for allotment of the land. No such direction can be issued by this Court. It is for the petitioner to approach the Gaon Sabha in case he is entitled under the law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.03.2012

BEFORE
THE HON'BLE UMA NATH SINGH, J
THE HON'BLE RITU RAJ AWASTHI, J.

Special Appeal No. 73 of 2012

Rajendra Prasad Upadhyaya 529 (S/S) 2012 ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rajan Roy
Sri Sanjay Singh

Counsel for Respondent:
CSC

Constitution of India, Article 226-Writ jurisdiction-alternative remedy-Punishment without following procedure under rules-no proper opportunity claimed-can not be dismissed on ground of alternative remedy-dismissal by Single judge outrightly without having counter affidavit-held not proper.

Held: Para 26

The learned Single Judge while dismissing the writ petition on the ground of availability of alternative remedy did not address itself on the plea of violation of principles of natural justice in the departmental enquiry and relegated the appellant to avail departmental remedy, we are of the considered opinion that the impugned order requires interference. In cases of violation of principles of natural justice and denial of reasonable opportunity to defend in the disciplinary proceedings, the writ petition is fully maintainable and it shall not be normally dismissed on the ground of availability of alternative remedy, as was the position in the present case.

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

1. This special appeal arises out of the final order dated 30.01.2012 passed in Writ Petition No. 529 (SS) of 2012 (Rajendra Prasad Upadhyaya Versus State of U.P. and others), wherein on preliminary objection raised by the learned Standing Counsel, the writ petition was dismissed on the ground of availability of alternative remedy to the petitioner at the admission stage.

2. Since the grounds raised in the appeal relates to the maintainability of the writ petition in the background of existence of alternative remedy, which are purely legal in nature, thus, we have proceeded to decide the special appeal at the admission stage with the consent of parties' counsel.

3. Heard Mr. Anil Tiwari, learned Senior Advocate, assisted by Mr. Rajan Roy, learned counsel for appellant and Smt. Sangeeta Chandra, learned Additional Chief Standing Counsel for State and perused the record.

4. Sworn of unnecessary facts, suffice is to mention that the writ petition before the learned Single Judge was filed against the punishment order dated 31.12.2011 challenging the punishment of reduction in rank to the post of Chowkidar and withholding of increment for the year 2006-07 alongwith punishment of reprimand.

5. As per appellant-petitioner, he was initially appointed as *Mate* in the Irrigation Department in the year 1972 and thereafter promoted on *adhoc* basis as junior clerk in the year 1977 and confirmed on the said post in 1978. As a consequence of re-

structuring of the clerk cadre, the appellant was designated and given the pay scale of senior clerk in the year 1996. On a complaint made by one Sri Ajay Singh, the then President, U.P. State Employees Union, an inquiry was held against the appellant in the year 2009. After the receipt of charge-sheet, the appellant had demanded certain documents which could not be provided to him and as such no reply to the charge-sheet was submitted, the inquiry officer had submitted an ex-parte inquiry report on the basis of which a show cause notice was issued. The appellant in his reply denied the alleged charges levelled against him and the findings of the inquiry officer and pleaded that he was not provided adequate opportunity of defence in the inquiry proceedings.

6. Moreover, in the inquiry proceedings out of five charges, three were not found proved by the inquiry officer, whereas the finding with regard to remaining two charges, apparently, were not sustainable as they were in gross violation of Rule 9(2) and 9(4) of the U.P. Government Servants (Discipline & Appeal) Rules, 1999 (hereinafter referred to as the 'Rules of 1999') as well as the law laid down by Hon'ble the Apex Court in the cases of *(i) State of U.P. vs. T.P. Lal Srivastava (1996) 10 SCC 702*, (ii) *State of U.P. vs. Saroj Kumar Sinha (2010) 2 SCC 772*, (iii) *Roop Singh Negi vs. Punjab National Bank (2009) 2 SCC 570,* wherein it has been held that in case a delinquent employee had avoided to submit reply, he had forfeited his right to submit reply, nonetheless the disciplinary authority is not absolved of the duty to hold an ex-parte enquiry to find out whether or not the charges have been proved.

7. The arguments at considerable length have been raised by both the parties but the controversy revolves around the sole question as to whether the appellant-petitioner be relegated to avail the departmental remedy of appeal and in the presence of such remedy, whether the writ petition is maintainable or not.

8. The existence of alternative remedy is not an absolute bar, is a legal proposition, which does not require any detailed reasons. It is also not open to debate that in case an alternative efficacious remedy is available, the High Court normally would not interfere straight-way under Article 226 of the Constitution of India. It is also established principle of law that self restraint is exercised by the High Court in dealing with such matters, which otherwise can be looked into by the Special Forum or Statutory Authorities. Merely the bar in granting any interim relief by a Special Forum or Tribunal created for the purpose of adjudicating such disputes would also not be a ground in itself to permit the aggrieved person to by-pass the alternative remedy and to entertain the petition straight-way in writ jurisdiction unless there are some cogent reasons for permitting such a challenge straight-way in writ jurisdiction. The exceptions, however, have been well defined by the Apex Court as well as this Court in a number of judgements.

9. In the case of *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others, [(1998) 8 SCC],* the Supreme Court has laid down the principles for the guidance for the High Court in determining the forum in a matter where efficacious alternative remedy is available and has observed that the power

to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus; Mandamus; Prohibition, Quo Warranto and Certiorari, for the enforcement of any of the fundamental rights contained in Part-III of the Constitution but also for "any other purpose".

10. The Supreme Court further held that under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition but the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least following contingencies, namely,-

(i) where the writ petition has been filed for the enforcement of any of the Fundamental Rights;

or

(ii) where there has been a violation of principle of natural justice; or

(iii) where the, order or proceedings are wholly without jurisdiction; or

(iv) the vires of an Act is challenged.

11. The question with regard to maintainability of the writ petition in presence of an alternative remedy was considered at length in one of the judgment of this Court i.e. in the case of *Subodh Kumar Trivedi vs. State of U.P. and others*, *[2001 (1) AWC 515].* The relevant paras of which are quoted below:

"15. In the case of Rashid Ahmed v. Municipal Board, Kairana, AIR 1950 SC 163, The Supreme Court observed that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another case, namely K.S. Rashid and Son v. Income Tax Investigation Commissioner, AIR 1954 SC 207, where the Apex Court while reiterating the above proposition held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by a significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

16. In the case of State of U.P. v. Mohd. Nooh, AIR 1958 SC 86, a specific and clear rule was laid down as under:

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies".

17. This proposition was considered by a Constitution Bench of this Court in A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani, AIR 1961 SC 1506, and affirmed and followed in the following words:

"The passages in the judgment of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court".

18. Another Constitutional Bench decision in Calcutta Discount Co. Ltd. v. ITO, Companies Distt., AIR 1961 SC 372, laid down as under:

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income-tax Act."

19. The Supreme Court in the case of Whirlpool Corporation (supra), on consideration of various judgements has observed as under:

"Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

20. In the case of Collector of Monghyr vs. Keshav Prasad Goenka, AIR 1962 SC 1694, it was held that the High Court has a discretion to grant relief under Article 226 even if an alternative remedy is available.

21. In the case of M.G. Abrol v. M/s. Shantilal and Company, AIR 1966 SC 197, the Supreme Court observed that the existence of an alternative remedy does not oust the jurisdiction of the High Court but it is one of the circumstances to be taken into consideration by the High Court while exercising its discretionary jurisdiction.

22. The two exceptions of doctrine of availability of alternative remedy were reiterated in the case of Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, AIR 1969 SC 556, namely :

(i) where the proceedings are taken under a law which is ultra vires and

(ii) the action complained of is violative of the principles of natural justice.

23. The Supreme Court in the case of State of West Bengal v. North Adlai Coal Co. Ltd. (1971) 1 SCC 309, laid down that entertaining a writ petition without the litigant having exhausted the alternative remedy available to him is a rule of practice rather than a rule of jurisdiction. The High Court has the power to entertain a writ petition even if the litigant has not exhausted the remedies available to him.

24. On the question of entertaining a writ petition when the writ petitioner complains that the action taken is without jurisdiction, the Supreme Court in the case of Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, (1987) 4 SCC 525, held that in such case, the writ petition was maintainable notwithstanding the existence of an alternative remedy.

25. Even the High Court can try issues of fact as has been observed by the Supreme Court in the case of Om Prakash v. State of Haryana, (1971) 3 SCC 792, that there is no rule that the High Court cannot try issues of fact. In each case, the High Court has to consider whether the party seeking the relief has an alternative remedy which is equally efficacious.

26. Reliance has also been placed upon the case of M/s. Lakshmiratan Engineering Works Ltd. v. Asstt. Commissioner (Judicial I, Sales Tax Kanpur Range, Kanpur and another, AIR 1968 SC 488, for defining the term 'entertain'. In this case, the Supreme Court, while interpreting Section 9 of the U.P. Sales Tax Act, 1948, observed as follows :

"In our opinion, these cases have taken a correct view of the word 'entertain' which according to dictionary also means 'admit to consideration'. It would, therefore, appear that the direction to the Court in the proviso to Section 9 is that the Court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by the Court for the first time."

27. In the case of Devi Lal Sahu v. Union of India, 1991 UPLBEC 480, the order of removal from service was under challenge against which an appeal was provided, the removal order was challenged as being violative of principle of natural justice, the Court entertained the writ petition after holding that the relief may be granted, though the alternative remedy was available.

28. In the case of Centurary Spinning and Manufacturing Co. Ltd. and another v. Ulhasnagar Municipal Council and another, (1970) 1 SCC 582, the Apex Court found that the parties claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high handed, arbitrary or unjust is entitled to a hearing of writ petition.

29. In the case of Nathi Mal Ram Sahai Mal and others v. V.C., Meerut, 1998 UPLBEC 161, the Apex Court held that the existence of alternative remedy has been held to be no bar where it is alleged that the provision is ultra vires or action is

in violation of the Principle of natural justice.

30. The learned counsel for the petitioner further placed reliance upon the case of Dr. Shyam Narain Pandey v. V.C. Gorakhpur University, 1985 UPLBEC 99, in which the impugned order was found to be wholly void and ineffectual under law, the Apex Court observed that the writ petition cannot be dismissed on the ground of alternative remedy after hearing has been done on merits.

31. In the case of Hirdai Narain v. Income Tax Officer, Bareily, AIR 1971 SC 33, the petitioner was having an alternative remedy of filing a revision before the Commissioner of Income Tax but the High Court entertained the writ petition. The Apex Court observed that Hirday Narain could have moved the Commissioner in revision because at the date on which the petition was moved the period prescribed by Section 33A of the Act had not expired. Their Lordship further held that the revision for an order correcting the order of the Income-tax Officer under Section 35 was not moved, the High Court would not be justified in dismissing the petition as not maintainable, which was entertained and heard on merits.

32. In the case of Ashok Kumar and others v. Managing Director, U.P. Leather Development and Marketing Corporation and another, 1986 (16) LCD 6, relying upon the cases Jai Kishan and other v. U.P. Cooperative Bank Ltd., 1989 (2) UPLBEC 144 (DB) and Hirday Narain v. I.T.O., Bareilly, AIR 1971 SC 33, the Division Bench of this Court observed that if an order is void and the petition does not involve controversial question of facts, the Court may not refuse to exercise its jurisdiction. The pendency of the writ petition for several years in the High Court was also taken to be a justifiable ground for not relegating the petitioners to get their grievances redressed under the provisions of the Industrial Disputes Act. Holding that in such circumstances it will not in any manner advance the cause of justice if after the lapse of several years this Court is to tell the workmen to go to the Labour Court for seeking redressal of their grievances more so in a case where there was no controversy over the relevant facts.

33. Reliance has also been placed upon the case Ashok Kumar and others v. Managing Director, U.P. Leather Development and Marketing Corporation and another, 1986 (16) LCD 6, the High Court after observing that the rule of exhaustion of statutory remedy, before a writ will be granted, is a rule of policy, convenience and discretion rather than a rule of law and it further observed that this is a matter of discretion of the Court which is to be exercised according tot he facts and circumstances of each case.

34. In the case of Akhilesh Kumar Saxena v. Director of Education (Secondary) U.P., Lucknow, 1999 (17) LCD 904, the Division Bench of this Court observed that where the Court has entertained the petition staying operation of the impugned order after exchange of affidavits the Court should not have disposed of the matter finally only by dismissing the petition on the ground of alternative remedy. In view of this, the appeal was allowed setting aside the order and directing that the writ petition be disposed of finally after hearing on merits.

35. In the case of Sudhakar Malviya v. Benaras Hindu University, 1997 (2) ESC 1213, it has been held that the High Court was wrong in dismissing a writ petition on the ground of availability of an alternative remedy when the writ petition had been entertained and had remained pending for 11 years. This was a case where statutory remedy under Section 68 of the State Universities Act was available to the petitioner but he has directly approached the High Court under Article 226 of the Constitution against the impugned order and the High Court dismissed the writ petition on the ground of availability of alternative remedy under Section 68 of the State Universities Act.

36. From the catena of decisions of the Supreme Court following propositions broadly flow:

(i) Statutory alternative remedy is not an absolute bar for the High Court to entertain a writ petition under Article 226 of the Constitution.

(ii) Refusal to entertain a writ petition on existence of statutory alternative remedy is a self imposed restriction for which following considerations weigh, namely;

(a) alternative remedy is adequate,efficacious and speedy.

(iii) The High Court can try issues of fact but may not entertain petition where disputed question of facts have to be determined and in such cases the petitioner may be relegated to the statutory alternative forum.

(iv) If a writ petition has been entertained despite there being a statutory remedy, which may be adequate, and the said petition has remained pending for considerable period then there would be little justification for relegating the petitioner to the alternative remedy, unless there are valid and cogent reasons for doing so.

(v) Even if there exists an adequate alternative, efficacious, speedy remedy in the alternative forum, the High Court may entertain the writ petition in the following circumstances.

(a) for enforcement of any of the fundamental rights,

(b) where there has been a violation of principle of natural justice,

(c) where the order or proceedings are wholly without jurisdiction, or

(d) the vires of the Act is challenged.

Lastly, it depends upon the facts and circumstances of each case as to whether the discretion of entertaining the writ petition in the teeth of the statutory remedy has to be exercised or not."

12. The submission of learned counsel for appellant-petitioner is that the disciplinary proceedings against the appellant suffers from gross violation of principles of natural justice, firstly, at the stage of inquiry and thereafter at the stage of issuing show cause notice as well as passing of the final order of punishment. Initially the appellant was denied the relevant documents on account of which he could not submit his reply to the charge-sheet resulting in the submission of ex-parte inquiry report by the inquiry officer. The

inquiry officer had wrongly proceeded ex-parte.

13. Even if the inquiry officer had to proceed ex-parte it was obligatory upon him to hold an inquiry and prove the charges on the basis of evidence by recording his findings after discussing such evidence but this was not done by the inquiry officer as would be evident from a bare perusal of his findings in respect of charge no.3 and 5, which shows that he has simply treated the same proved merely on account of non submission of reply by the appellant.

14. It is also contented that charge nos.1, 2 and 4 were not found proved by the inquiry officer against the appellant and the disciplinary authority while issuing the show cause notice under Rule 9(4) of the Rules of 1999 did not differ with the findings of the inquiry officer in respect of the same, yet while passing the final order of punishment he differed with the inquiry officer. The disciplinary authority could not have done so without complying with the mandatory provisions of Rule 9(2) by recording the reasons for differing with the finding of the inquiry officer and thereafter communicating the same under Rule 9(4), since this was not done there was gross violation of the said provisions and the principles of natural justice rendering the entire proceedings and the final order of punishment unsustainable.

15. The learned State counsel on the other hand submitted that there is no illegality or infirmity in the impugned order . It is the discretion of the Court whether to entertain the writ petition or to relegate the appellant/petitioner to exhaust the statutory alternative remedy available under law.

16. It is contended that in case there is violation of Rules especially Rule 9(2) and 9(4) of the U.P. Government Servant (Discipline & Appeal) Rules, 1999 as averred by the appellant, then he should have first availed the remedy available under the said Rules itself before invoking the extra-ordinary jurisdiction of this Court.

17. In support of her submission Smt. Sangeeta Chandra, learned Additional Chief Standing Counsel relied upon the decision of the Supreme Court in the case of *N.P. Ponnuswami (appellant) vs. The Returning Officer, Namakkal Constituency, Namakkal, Salem Distt and others-(respondents); The Union of India and State of Madhya Bharat-Interveners, [1952(39) A.I.R. Supreme Court 64],* wherein it has been held that in case right or liability is created by a Statute, redressal shall be first availed in the forum created under the said Statute itself. The relevant paragraph-12 of the said judgment is reproduced as under:

"12. It is now well-recognized that where a right or liability is created by a statute which gives a special remedy for en- forcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes J. in Wolverhampton New Water Works Co. v. Hawkes- ford(1) in the following passage :-

"There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law and that li- ability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law;there, unless the

statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it..... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspaper Ltd., (1919) A.C. 368 and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. 1935 A.C. 532 and Secretary of State v. Mask & Co., 44 Cal. W.N. 709; and it has also been held to be equally applicable to enforcement of rights: (see Hurdutrai v. Official Assignee of Calcutta, 52(Cal) W.N. 343, at p. 349. That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

18. Reliance has also been placed upon the case of *State of U.P. and another Vs. Labh Chand, [A.I.R. 1994 Supreme Court 754]*, where it was held that when a Statutory Forum or Tribunal is specially created by a statute for redressal of specified grievances of persons on certain matters, the High Court should not normally permit such persons to ventilate their specified grievances before it in the writ jurisdiction under Article 226 of the Constitution.

19. The case of *U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and another, [(2005) 8 Supreme Court Cases, 264]*, has been placed in support of submission that the adequate and speedy statutory remedy normally cannot be allowed to be bye-passed.

20. Relying upon the decision of the Supreme Court in the case of *United Bank of India Vs. Styawati Tondon and others, [(2010) 8 Supreme Court Cases 110],* and in the case of *Kanaiyalal Lalchand SAchdev and others vs. State of Maharashtra and others, [(2011) 2 SCC 782].* The learned Additional Chief Standing Counsel further submitted that where the alternative remedy is available under a statute the Court must relegate the appellant-petitioner to that forum.

21. In the case of *Kanaiyalal Lalchand Sachdev and others (supra)* in paragraph 21 and 22, the legal position has been summarized, which is reproduced as under:

"21. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well-settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See: Sadhana Lodh Vs. National Insurance Co.

Ltd. & Anr.5; Surya Dev Rai Vs. Ram Chander Rai & Ors.6; State Bank of India Vs. Allied Chemical Laboratories & Anr.7). In City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala & Ors.8, this Court had observed that:

The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

22. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate etc. are involved, an efficacious statutory remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution."

22. We have considered the submissions made by the parties' counsel.

23. Before the writ court the appellant-petitioner had assailed the impugned order of punishment mainly on the ground of violation of principles of natural justice and violation of Rules under U.P. Government Servants (Discipline and appeal) Rules, 1999. It was the specific case of the appellant that he was not provided adequate opportunity of defence in the departmental inquiry, the disciplinary authority while awarding the punishment had disagreed with the findings of the inquiry officer and had awarded the punishment in violation of Rules 9(2) & 9(4) of the Rules of 1999. The disciplinary proceedings against the appellant suffers from gross violation of principles of natural justice firstly at the stage on enquiry and thereafter at the stage of show cause notice as well as passing of the final punishment order. Further even if, the enquiry officer has to proceed ex-parte it was obligatory upon him to hold an inquiry and prove the charges on the basis of evidence by recording his findings after discussing such evidence but this was not done by the inquiry officer and the charges were simply treated to be proved merely on account of non-submission of reply to the charge-sheet by the appellant.

24. So far as the legal proposition that the existence of alternative remedy is not an absolute bar, it does not require any adjudication as the law laid down by the Supreme Court as well as this High Court is well settled. In order to summarize the

aforesaid legal position we reiterate the same as under-

(i) Statutory alternative remedy is not an absolute bar for the High Court to entertain a writ petition under Article 226 of the Constitution.

(ii) Refusal to entertain a writ petition on existence of statutory alternative remedy is a self imposed restriction broadly based on following considerations, namely;

(a) alternative remedy is adequate, efficacious and speedy.

(b) writ petitions involving complex and disputed question of facts may be relegated to statutory alternative forum;

(iv) If a writ petition has been entertained despite there being a statutory remedy, which may be adequate, and the said petition has remained pending for considerable long time then there would be little justification for relegating the petitioner to the alternative remedy, unless there are valid and cogent reasons for doing so.

(v) Even if there exists an adequate alternative, efficacious speedy remedy in the alternative forum, the High Court may entertain the writ petition in the following circumstances.

(a) for enforcement of any of the fundamental rights,

(b) where there has been a violation of principle of natural justice,

(c) where the order or proceedings are wholly without jurisdiction, or

(d) the vires of the Act is challenged.

25. It will depends upon the facts and circumstances of each case as to whether the discretion of entertaining the writ petition in the light of the availability of statutory remedy has to be exercised or not. There cannot be any straight jacket formula or a hard and fast rule so as to either entertain such writ petition or throw it away at the threshold asking the petitioner to approach the alternative forum.

26. The learned Single Judge while dismissing the writ petition on the ground of availability of alternative remedy did not address itself on the plea of violation of principles of natural justice in the departmental enquiry and relegated the appellant to avail departmental remedy, we are of the considered opinion that the impugned order requires interference. In cases of violation of principles of natural justice and denial of reasonable opportunity to defend in the disciplinary proceedings, the writ petition is fully maintainable and it shall not be normally dismissed on the ground of availability of alternative remedy, as was the position in the present case.

27. Since the writ petition was dismissed on the very first date without calling for counter affidavit, therefore, it would be appropriate that the matter may be remanded back to the learned Single Judge to decide the writ petition on merit.

28. In this view of the matter the special appeal is allowed and the order dated 30.1.2012 passed by the learned Single Judge in W.P. No. 529 (SS) of 2012 is hereby set aside. The matter is remanded back to the learned Single

Judge with a request to decide the same on merits in accordance with law. The parties shall appear before the writ Court as and when the case is listed. Cost made easy.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2012

BEFORE
THE HON'BLE SYED RAFAT ALAM, C.J.
THE HON'BLE RAN VIJAI SINGH,J.

Special Appeal No. - 385 of 2012

Yogendra Kumar, Constable No. 98 C.P. and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Vijay Gautam

Counsel for the Respondents:
C.S.C.

U.P. Police Officer Subordinate Rank (Punishment and Appeal) rules 1991-Rule-17 (1) (b)-suspension on contemplation of enquiry-contention that no enquiry pending under Rule-17 (1) (b)-suspension order not legally sustainable held-mere quoting wrong provision can not invalidate order if otherwise good-however enquiry be concluded within specific period-Appeal disposed of.

Held: Para 6

In the case in hand, since the authority, in the order of suspension, in place of Rule 17 (1) (a), has mentioned Rule 17 (1) (b), the same cannot be said to be invalid in view of the law laid down in State of Karnataka Vs. Muniyalla (supra) as for the reasons given in the impugned order of suspension, the appellants could be placed under suspension.

Case law discussed:
AIR 1985 SC 470

(Delivered by Hon'ble Syed Rafat Alam, C.J.)

1. This is an intra-court appeal under the Rules of the Court against the order of the learned Single Judge dated 07.02.2012.

2. We have heard learned counsel for the appellants and the learned Standing Counsel for the respondents.

3. It appears that the appellants, along with one S.I. Salamat Kha, being aggrieved by order dated 19.01.2012 placing them under suspension pending enquiry, filed Writ Petition No. 6888 of 2012, which has been disposed of by the learned Single Judge vide order dated 7th February, 2012 directing the respondents to complete the disciplinary proceedings contemplated against the appellants within three months from the date of presentation of a certified copy of the said order subject to appellants' cooperation in the said proceeding. The aggrieved appellants, therefore, preferred this appeal.

4. Shri Vijai Gautam, learned counsel for the appellant vehemently contended that the order of suspension, impugned in the writ petition, has been passed under Rule 17 (1) (b) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the 'Rules') by the Senior Superintendent of Police, Etah - respondent no.3. He submits that an order of suspension under the said Rule ca only be passed against a police officer in respect of whom an investigation, enquiry or trial relating to a criminal charge is pending. He submits that since there is no investigation/enquiry or trial relating to any criminal charge pending against the appellants, therefore, the order of suspension cannot sustain.

5. We do not find any force in the submission of the learned counsel for the appellants. From the order of suspension, it is apparent that the appellants have been placed under suspension in contemplation of enquiry in respect of certain charges of misconduct. Rule 17 (1) (a) of the Rules provides that a police officer against whom an enquiry is contemplated or is proceeding, may be placed under suspension. However, in the said order of suspension, in place of Rule '17 (1) (a)', Rule '17 (1) (b)' has been mentioned. IIt is well settled legal position that merely because an order has been made under a wrong provision of law, it does not become invalid so long as there is some other provision of law under which the order could be validly made. Mere recital of a wrong provision of law does not have the effect of invalidating an order which is otherwise within the power of the authority making it. **(See State of Karnataka Vs. Muniyalla, AIR 1985 SC 470).**

6. In the case in hand, since the authority, in the order of suspension, in place of Rule 17 (1) (a), has mentioned Rule 17 (1) (b), the same cannot be said to be invalid in view of the law laid down in State of Karnataka Vs. Muniyalla (supra) as for the reasons given in the impugned order of suspension, the appellants could be placed under suspension.

7. It is also well settled legal position that an officer against whom an enquiry is contemplated or any proceeding is going on, can be placed under suspension.

8. We, therefore, do not find any error in the order of the learned Single Judge.

9. However, considering the submissions made and direction issued by the learned Single Judge to complete the enquiry within a period of three months subject to cooperation being rendered by the appellants, it is provided that in the event the proceeding is not concluded for any justifiable ground despite cooperation rendered by the appellants, it would be open to the respondents to consider to revoke the order of suspension.

10. With the above order, this appeal stands finally disposed of.

APPELLATE JURISDICTION
CIVIL SIDED
DATED: ALLAHABAD 17.02.2012

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE DINESH GUPTA, J.

Special Appeal No.826 of 2006

U.P. Power Corporation Limited & others ...Appellants
Versus
Smt. Satyabhama Devi ...Respondent

Counsel for the Petitioner:
Sri A.K. Mehrotra

Counsel for the Respondents:
Sri Prabhakar Awasthi

Constitution of India, Article 226-delay in payment of Death cum retirement benefits-means of social support-direction of compound interest 10 %-held proper but not to be treated precedent for another case-Rs. 29000/-cost awarded for harassment.

Held: Para 8

After hearing learned counsel for the parties, on perusal of record and for all the reasons stated above, the Court is of the view that learned counsel for the appellant has not been able to show its bonafide for not paying the retiral dues to the petitioner-respondent in time,

whereas as per submission of learned counsel for the petitioner-respondent, it is evident that the department has knowingly delayed payment of retiral dues. There is no illegality or infirmity in the order impugned passed in the writ petition directing appellant to pay entire death cum post retiral benefit. However, so far as compound interest @ 10% from the due date till the date of actual payment is concerned, the Court find that Smt. Satyabhama Devi- widow of the deceased employee has been harassed and made to run from pillar to post for getting death cum post retiral benefit which shows inhuman face of the appellant. Death cum post retiral benefits are means of social support and status of a government employee so that he may not be thrown on the road after death of bread earner. In view of this, we uphold the award of interest @ 10% as directed by learned Single Judge, but this direction to pay interest is confined to the facts and circumstances of this case only and shall not be treated as a precedent.

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

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

2. This special appeal has been filed challenging the validity and correctness of the judgment and order dated 24.5.2006 passed in Civil Misc. Writ Petition No. 25527 of 2006: Smt. Satyabhama Devi Vs. State of U.P. & others, by which writ petition was disposed of directing respondents-appellants to pay entire post retiral benefit along with compound interest @ 10% from the due date till the date of actual payment to the respondent-petitioner, preferably within period of three months from the date of production of certified copy of the order.

3. Brief facts of the case are that petitioner's husband Late K.N. Tiwari, who was working as Junior Engineer in U.P. Power Corporation Limited at Allahabad, expired on 12.3.2001 during service period. After his death, it was duty of the respondent authorities to pay full pension, G.P.F. and time scale to his widow/respondent, but it appears that due to arbitrary action of the respondents these dues were not paid despite her repeated requests. Thereafter, she moved a representation dated 2.8.2005 before the authorities for redressal of her grievances regarding payment of post retiral and death benefits. The Managing Director, U.P. Power Corporation Limited, Lucknow by means of his office communications dated 20. 1. 2006 and 21.1.2006 directed the Executive Engineer, Power Distribution, to expedite the payment of pension, G.P.F. and time scale to the petitioner. When the order of Managing Director was not acted upon the petitioner preferred writ petition no. 25527 of 2006: Smt. Satyabhama Devi Vs. State of U.P. & others which was disposed of 24.5.2006. Relevant portion of the order dated 24.5.2006 reads thus:

"In these circumstances, respondents are directed to pay entire post retiral benefit to her, preferably within period of three months from the date of production of certified copy of this order. Needless to say that on total amount which is due, 10% compound interest shall be payable from the due date till the date of actual payment. As far as gratuity amount is concerned, on the said amount, statutory interest shall be payable. It is made clear that 10% compound interest which has been directed to be paid, qua the said amount it is further directed that it would be

open to the respondents to recover the said amount from the employee concerned who are eventually held responsible for delay in ensuring payment of retiral dues."

4. Learned counsel for the appellant has assailed the aforesaid judgment dated 24.5.2006 impugned in the present special appeal on the ground that direction for payment of compound interest is incorrect as it has been passed without appreciating the conduct of the respondent regarding completion of certain formalities which had not been complied with by him. It is stated that for these reasons, the department is not at fault if payment of retiral cum death benefits could not be made to the heirs of the deceased employee; and that petitioner-respondent is not the only heir of the deceased employee there being other heirs also of deceased employee, therefore the direction by the writ court for payment of compound interest @ 10% from the date it became due to the petitioner-respondent till the date of its actual payment is liable to be quashed.

5. In support of his case, learned counsel for the appellant has relied upon Annexures- A-1 to A-17 filed along with an affidavit in support of stay application. In the affidavit, it has been averred that petitioner did not complete the requisite formalities due to which payment of retiral benefits has been delayed for which the appellant is not responsible. It is stated by him that in the aforesaid facts and circumstances, it was not possible for the appellant to make the payment to the petitioner. It is lastly submitted that appellant is not much aggrieved by direction to pay the death cum retiral dues which the department is liable to pay as directed by the learned Single Judge in the impugned order, but aggrieved by the rate of interest directed to be paid by the department.

6. Per contra, learned counsel for the respondent has submitted that certain documents which were required to be filled up by the petitioner/respondent, were available with the department itself and asking to complete necessary formalities by the department shows that the appellant is deliberately delaying payment of retiral dues to the petitioner which was to be paid on the death of deceased employee. The department is, therefore, wholly responsible for payment of retiral benefits along with compound interest @ 10% as directed by learned Single Judge.

7. Before analysing the facts and law, we note that the documents filed by the appellant along with affidavit and application on which heavy reliance has been placed by the counsel for the appellant for shifting the burden upon the petitioner-opposite parties in the appeal for extracting the appellant from the rigours of payment of death cum retiral dues with interest as directed by the order impugned in the appeal. On examination of documents A-1 to A-17 filed along with the affidavit, it is revealed that all the aforesaid documents are not only irrelevant, but have been issued by the department after the impugned judgment and do not help the case of the appellant. Hence these documents cannot be taken into account for the purpose of challenging the validity and correctness of the impugned order as they were not before the writ court for its consideration. This feeble attempt of the appellant to shift his burden on the opposite party is in

order to deny payment of interest on delayed payment of death cum post retiral dues to the heirs of the deceased employee.

8. After hearing learned counsel for the parties, on perusal of record and for all the reasons stated above, the Court is of the view that learned counsel for the appellant has not been able to show its bonafide for not paying the retiral dues to the petitioner-respondent in time, whereas as per submission of learned counsel for the petitioner-respondent, it is evident that the department has knowingly delayed payment of retiral dues. There is no illegality or infirmity in the order impugned passed in the writ petition directing appellant to pay entire death cum post retiral benefit. However, so far as compound interest @ 10% from the due date till the date of actual payment is concerned, the Court find that Smt. Satyabhama Devi- widow of the deceased employee has been harassed and made to run from pillar to post for getting death cum post retiral benefit which shows inhuman face of the appellant. Death cum post retiral benefits are means of social support and status of a government employee so that he may not be thrown on the road after death of bread earner. In view of this, we uphold the award of interest @ 10% as directed by learned Single Judge, but this direction to pay interest is confined to the facts and circumstances of this case only and shall not be treated as a precedent.

9. The special appeal is, accordingly, dismissed with costs of Rs.20,000/- on the appellant which is to be paid within a period of one month from today.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2012

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE DINESH GUPTA,J.

Special Appeal No. - 1574 of 2008

Smt. Aasha Kumari ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Jai Narain

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Change of Designation from sweeper to Dai-C.M.O. Considering her experience as Dai-sought guidelines from Director-who taken view in absence of Rule, Regulation or G.O.-designation can not be changed-Single Judge rightly declined to interfere-appellant based her claim for allotment of work of Dai as both sweeper as well as Dai are group 'D' post-misconceived-appeal dismissed.

Held: Para 12

The appointments are strictly adhered according to the sanctioned post. Therefore, the Director General in his order dated 21.8.2008 in this regard has rightly observed that in absence of any Rule or Regulation or Government Order neither the post of designation can be changed nor the service record could be corrected by making any entry in this regard. Once the order of the Director General dated 21.8.2008 is upheld by us, the consequential order dated 25.8.2008 passed by the Chief Medical Superintendent (Female) Hospital at Agra would also be upheld. The appellant has utterly failed to establish that her designation could have been changed in

absence of any Rule or Regulation or provisions or Government Orders. There is no illegality or infirmity in the impugned judgment and order, hence no interference is required by this Court in it in this appeal.

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

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

2. This special appeal has been filed challenging the validity and correctness of the judgment and order dated 29.9.2008 passed in Civil Misc. Writ Petition No. 51205 of 2008, Smt. Asha Kumari versus State of U.P. and others whereby the aforesaid writ petition had been dismissed.

3. The facts culled out from the record in a nut-shell are that the petitioner was appointed as Sweeper on 15.2.2005 by the Competent Authority after following due procedure. On 8.5.2008 the appellant being well qualified and having sufficient experience of working as 'Dai' moved an application before the Regional Joint Director (Health) and Chief Medical Superintendent, District Women Hospital, Agra stating therein that the work 0.00"of 'Dai' be taken from her. Her application having been approved and allowed by the respondents, she was allowed to perform her duties as 'Dai'. An entry to this effect has been made in her service book by the competent authority.

4. It is stated that thereafter in the first week of September, 2008 the appellant got knowledge about the impugned orders dated 21.8.2008 and 25.8.2008 passed by the respondents by which she was restrained from performing the duties of 'Dai'. Therefore, the impugned orders are illegal and void abinitio.

5. The instant special appeal has been filed challenging the aforesaid impugned order on the grounds that the posts of Sweeper and 'Dai' are class IV post, both are non-technical posts for which essential qualification, salary and other emoluments are the same; that merely by changing her post from Sweeper to 'Dai' the status of post would not change in the aforesaid conditions; that the hospital where the appellant is working is for females only and work of 'Dai' is required more than the work of Sweeper; that the appellant is having experience of 'Dai' and is the competent authority considering this fact merely has changed her post from Sweeper to 'Dai'. He has not committed any illegality. It is also stated that that the impugned order challenged in the writ petition has been passed exparte without affording any opportunity of hearing to the appellant but this aspect has not been considered in the impugned judgment and order, hence the same being erroneous on facts and in law, is liable to be quashed by this Court.

6. It appears that on the application of the appellant that she has experience of 'Dai' work of this post may be taken from her instead of the work of Sweeper. However, apart from taking work from her on the post of 'Dai' her designation was also changed to 'Dai' in her service record. Therefore, the Chief Medical Superintendent, (Female) Hospital at Agra by her letter dated 10.7.2008 sought guidance from the Director General, (Medical and Health Services), U.P. In response thereof, the Director General U.P. by his letter dated 21.8.2008 informed the Chief Medical Officer that there are no Government orders for changing the designation of a class IV employee and therefore, the order 31.5.2009 passed by

the Chief Medical Superintendent, Agra changing the designation of the appellant is illegal. He therefore, directed that Smt. Asha Kumari be shown as having been appointed on her substantive post as Sweeper in the service book i.e. the post on which the appellant had been initially appointed. The letter/order dated 21.8.2008 reads thus:-

''प्रेषक,

महानिदेशक,
चिकित्सा एवं स्वास्थ्य सेवायें,
उ0प्र0।

सेवा में,

मुख्य चिकित्सा अधीक्षिका,
महिला चिकित्सालय, आगरा।

पत्र संख्या–4डी / 1/95/08 /6420 लखनऊ दिनांक 21.8.2008

विषयः– श्रीमती आशा, सफाई कर्मचारी किया गया पद परिवर्तन निरस्त किए जाने के संबंध में।

महोदया,

उपर्युक्त विषयक कृपया अपने पत्र संख्या–म0चि0/पद परिवर्तन/ च0से0/2008/708, दिनांक 10.7.2009 का संदर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा श्रीमती आशा, सफाई कर्मचारी का किया गया पद परिवर्तन के सम्बन्ध में मार्गदर्शन की अपेक्षा की गयी है।

उपरोक्त के संबंध में अवगत कराना है कि चतुर्थ श्रेणी के पद परिवर्तन से सम्बन्धित किसी प्रकार का शासनादेश उपलब्ध नहीं है, इसलिए तत्कालीन प्रमुख चिकित्सा अक्षीक्षिका द्वारा किया गया आदेश दिनांक 31.5.2009 नियम विरूद्ध है।

अतः आपको निर्देशित किया जाता है कि श्रीमती आशा सफाई कर्मचारी का किया गया पद परिवर्तन तत्काल प्रभाव से अपने स्तर से निरस्त कराना सुनिश्चित करें, तथा कृत कार्यवाही से अधोहस्ताक्षरी को भी अवगत कराने का कष्ट करें।

उक्त पत्र निदेशक (प्रशासन) की सहमति से जारी किए जा रहे हैं।

भवदीय–
ह0
(ओ0एस0तोमर)

संयुक्त निदेशक (बालरोग)''

7. Accordingly, by order dated 25.8.2008, Chief Medical Superintendent, (Female) Hospital at Agra informed the appellant that in pursuance of the order dated 21.8.2008 she would be working as Sweeper on her post on which she was appointed that order of charge of designation from Sweeper to 'Dai' was cancelled and correction accordingly be made in her service book. The order dated 25.8.2008 reads thus:-

''कार्यालय, मुख्य चिकित्सा अधीक्षिक, महिला चिकित्सालय, आगरा।

दिनांक 25.8.2008

आदेश

महानिदेशक, चिकित्सा स्वास्थ्य सेवायें उ0प्र0 लखनऊके पंजीकृत पत्र ..... 1/95/89/6420 दिनांक 21.9.2009 के द्वारा श्रीमती आशा, सफाई कर्मचारी का दिया गया पद परिवर्तन तत्काल प्रभाव से निरस्त किया जाता है। उक्त की प्रविष्टी सम्बन्धित कर्मचारी की सेवा पुस्तिका में अंकित कर दी जाये। श्रीमती आशा अपने मूल पद सफाई कर्मचारी के पद पर कार्य करती रहेगीं।

मुख्य चिकित्सा अधीक्षिका
महिला चिकित्सालय, आगरा।

पृष्ठांकन संख्या–म0चि0/च0श्रे0/पद/परि0/2008/1116 दिनांक अपरोक्तानुसार
प्रतिलिपि– निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1. निदेशक, प्रशासन, चिकित्सा एवं स्वास्थ्य सेवायें उ0प्र0 स्थ्वास्थ्य भवन उ0प्र0 लखनऊ।

2. अपर निदेशक, चिकित्सा स्वास्थ्य एवं परिवार कलयाण आगरा मण्डल आगरा।

3. जिला अधिकारी महोदय, आगरा।

4. अपर जिला अधिकारी (नगर) आगरा।

5. प्रीाारी अधिकारी, जन शिकायत, कल्क्टरी, आगरा।

6. मेट्न, महिला चिकित्सालय, आगरा को इस आशय के साथ पत्र की प्रति सम्बन्धित व कर्मच0ारी को अपने स्तर से प्राप्त कराना सुनिश्चित करें।

7. श्रीमती आशा, सफाई कर्मचारी, महिला चिकित्सालय, आगरा।''

8. It is these two orders dated 21.8.2008 and 25.8.2008 which have been impugned in Civil Misc. Writ Petition No. 51205 of 2008. The aforesaid writ petition was dismissed vide judgment and order dated 29.9.2008. For ready reference it is reproduced below.

" Heard learned counsel for the petitioner as well as learned Standing counsel for the respondents and have perused the records.

The petitioner was appointed as Sweeper. She claims that she be permitted to work as Aaya (maid) on which post she has sufficient experience. The application of the petitioner in this regard has been rejected on the ground that there is no such rule to permit a Sweeper to work as Aaya (maid), learned counsel for the petitioner has also, in this writ petition, not been able to show any provisions or rule under which a Sweeper can be asked to work as Aaya (maid).

The petitioner was selected as Sweeper and she could have had some grievance if work of Sweeper was not taken and some other work was being taken. In the present case, the respondents want the petitioner to work as Sweeper on which post the petitioner had been appointed and thus she cannot have any such grievance.

The writ petition is dismissed."

9. It is in the aforesaid facts that petitioner has sought relief of quashing the impugned orders dated 21.8.2008 and 25.8.2008 (Annexures-1 and 2 to the writ petition) passed by the respondents. The petitioner has also prayed that a direction may be issued to the respondents to regularize his services on the post of 'Dai' and she may be allowed to perform her duties as 'Dai' without any interruption.

10. Sri Ashok Pal Singh (A.P. Singh), Advocate holding brief of Sri Jai Narain, learned counsel for the appellant has not advanced any oral arguments except requesting the Court to notice the grounds which have been taken in the special appeal.

11. Learned Standing counsel submits that the appellant may be having experience of 'Dai' but she was initially appointed on the post of Sweeper. He submits that in absence of any rule or regulation for change of designation of an employee of Health department the appellant cannot be designated as 'Dai' in place of Sweeper. According to him, it is wholly irrelevant that both the Sweeper and 'Dai' are class IV posts having same procedure and qualifications for appointment, also having emoluments and salary and that by changing her designation from Sweeper to 'Dai' would not change her status. He has also refuted the grounds relied upon by the learned counsel for the appellant stating that the judgment of the learned Single Judge is not erroneous on facts and in law as the appellant has not been able to establish any illegality or infirmity in the impugned judgment on facts and in law. Merely having experience of 'Dai' would not entitle the appellant for

change of her designation from the post of Sweeper to post of 'Dai'.

12. After hearing learned counsel for the parties we are of the opinion that essential qualifications and procedures for appointment on the post of Sweeper and 'Dai' are the same and what matter is that the strength of the sanction post of 'Dai' and Sweeper is distinct and separate. Admittedly, also the petitioner has moved an application for allowing her to work as 'Dai' but she has not moved any application for changing her post from the post of Sweeper on which she was initially appointed and was working to the post of 'Dai'. She has also not made any request for changing designation in her service record in anticipation of her designation being changed to the post of 'Dai' from the post of Sweeper. No Rules or Regulations or Government Orders provide for change of designation in such matter for the simple reason that sanction strength of establishment consist of different posts and if designation is changed according to the whim of the authority, the sanction of post would loose its importance for example if the designation of the appellant is changed as 'Dai' and an entry to this effect in her service book is accordingly made, a post of Sweeper would become vacant whereas post of 'Dai' came into existence in excess strength of post of 'Dai' sanctioned by the Government. The appointments are strictly adhered according to the sanctioned post. Therefore, the Director General in his order dated 21.8.2008 in this regard has rightly observed that in absence of any Rule or Regulation or Government Order neither the post of designation can be changed nor the service record could be corrected by making any entry in this regard. Once the order of the Director General dated 21.8.2008 is upheld by us, the consequential order dated 25.8.2008 passed by the Chief Medical Superintendent (Female) Hospital at Agra would also be upheld. The appellant has utterly failed to establish that her designation could have been changed in absence of any Rule or Regulation or provisions or Government Orders. There is no illegality or infirmity in the impugned judgment and order, hence no interference is required by this Court in it in this appeal.

13. For the reasons stated above, the special appeal is accordingly, dismissed. No order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.03.2012

BEFORE
THE HON'BLE DINESH GUPTA,J.

Criminal Revision No. - 1758 of 2003

Paras Nath Yadav ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri D.S. Pandey

Counsel for the Respondent:
Sri Sudeep Dwivedi
Sri Kamal Krishna
Sri Faraj Fazami
A.G.A.

Criminal Revision-under section 397 and 401 against order if acquitted-Power of High Court explained-very limited particularly where revision preferred by private person-no Govt. appeal filed against acquittal-no illegality, perversity or wrong appreciation of evidence found-NO occasion for interference with finding of facts recorded by Trail Court found-revision rejected.

Held: Para 24

The sole ground raised by learned counsel for the revisionist is regarding absence of information of death of the deceased to the complainant or his family members, but the court relying upon the defence evidence, gave a categorical finding that the complainant was informed and he and other family members were present at the time of cremation of the deceased. This finding is based on appreciation of evidence and there is no reason to discard this finding. Thus, after going through the judgment and entire record of the case, the court is of the opinion that the findings recorded by the learned trial Judge are based on appreciation of evidence, there is no manifest illegality or blatant irregularity which lead to miscarriage of justice and there is no occasion for this court to interfere with the findings recorded by the trial court.

Case law discussed:

(2010) 2 Supreme Court Cases (Criminal) 1002; 2002 Supreme Court Cases (Criminal) 1181; 2004 Supreme Court Cases (Criminal) 692; (2008) 2 Supreme Court Cases (Criminal) 89; AIR 1962 SC 1788; AIR 1951 SC 316

(Delivered by Hon'ble Dinesh Gupta,J.)

1. This revision is preferred against the judgment and order dated 2.5.2003 passed by the Additional Sessions Judge (Fast Track Court No.1), Jaunpur in Sessions Trial No.88 of 1997 (State Versus Subhash and others) acquitting the accused opposite parties u/ss.498A, 304 B and 201 I.P.C. and Sections 3/4 Dowry Prohibition Act.

2. The prosecution case in brief is that a First Information Report was lodged by complainant Paras Nath Yadav the revisionist on 1.3.1996 at Police Station Machhli Shahar, District-Jaunpur that the marriage of his daughter Pramila Devi aged 22 years was performed in May, 1990 and sufficient dowry was given at the time of marriage. In April, 1993 his daughter went t"o her in law's house and when she returned to her house she told the complainant and other family members that her husband and other in-laws have demanded motor cycle. The complainant tried to persuade the accused persons and sent his daughter to her in-law's house. On 25.2.1996 one Awadhesh Yadav who is related to accused Subhash informed the complainant that his daughter had expired and when the complainant enquired he was informed by some neighbours that his daughter had expired after consuming some poisonous substance and she was cremated without any information to the complainant.

3. After investigation charge sheet was submitted against accused opposite parties no.2 to 4 who were committed to the court of Sessions to face trial u/ss. 498A, 304 B and 201 I.P.C. and Sections 3/4 Dowry Prohibition Act. After framing charges, the accused opposite parties were tried and the evidence was recorded. The son of the complainant was examined as P.W.1, complainant was examined as P.W.2, the Investigating Officer Hari Shankar Yadav was examined as P.W.3 and constable Rajendra Prasad Dwivedi was examined as P.W.4. In defence the accused persons examined Awadhesh Narayan Yadav as D.W.1 and Dr. Mansha Ram Singh, Medical Officer of Primary Health Centre, Baraipar, Machhli Shahar, District- Jaunpur was examined as D.W.2 and also produced the marriage card of the deceased and the papers relating to her treatment.

4. After hearing learned counsel for the parties, the learned Sessions Judge

acquitted the accused persons from the charges levelled against them vide judgment and order dated 2.5.2003.

5. Feeling aggrieved with the aforesaid judgment and order, the complainant has preferred this revision.

6. At this stage, learned A.G.A. informed the court that the State has not filed any appeal against the order of acquittal by the Sessions Judge. The office has also reported that no Government Appeal has been filed relating to the same case crime number.

7. Heard learned counsel for the revisionist and the learned counsel appearing for accused-opposite parties no.2 to 4 as well as learned Additional Government Advocate.

8. Learned counsel for the revisionist submitted that the order dated 2.5.2003 passed by learned Additional Sessions Judge is wholly illegal and against the law and facts and is liable to be set aside. The learned trial Judge has mis-interpreted the evidence lead by prosecution and wrongly relied upon false and forged defence evidence.

9. Learned counsel for the revisionist further submitted that the complainant was not informed by the accused persons regarding the death of his daughter and she was cremated in absence of the complainant or his family members which clearly shows mala fide intention of the accused persons and this fact was established by the prosecution that deceased was cremated without any information to the complainant. The prosecution has clearly established the demand of dowry by the accused persons and the deceased was subjected to cruelty relating to demand of dowry but the trial court has illegally and arbitrarily passed the impugned judgment without considering this aspect of the matter.

10. Learned counsel for the accused opposite parties submitted that the prosecution and the complainant have completely failed to establish their case beyond reasonable doubt in order to bring the case within the ambit of Section 304-B of Indian Penal Code. For this the prosecution has to establish that the death of the deceased was caused within seven years of the marriage; secondly the death of a woman must have been caused by burns or bodily injury or occurs otherwise than in normal circumstances; thirdly soon before her death the woman must have been subjected to cruelty or harassment by her husband or any relative of her husband. Therefore, the cruelty must be for or in connection with 'dowry death' and it is only when the aforementioned ingredients are made out that such death can be called dowry death. In the present case, the prosecution has clearly failed to stablish that the death of the woman had occurred within seven years of her marriage; that the death was not under normal circumstances; that there was cruelty by the husband or his family members before the death and that such cruelty was in connection with demand of dowry. Learned Sessions Judge has given categorical finding on all the aforesaid ingredients and has negated the prosecution version.

11. Learned counsel further submitted that under the revisional power the High Court has no jurisdiction to interfere with the findings recorded by the trial court or to re-appreciate the evidence

specially when the said jurisdiction was invoked by a private complainant. He further submitted that Section 401-B Cr.P.C. clearly prohibits conversion of finding of acquittal into one of conviction. In support of his contention, he relied on Sheetala Prasad and others **vs.** Sri Kant and others (2010) 2 Supreme Court Cases (Criminal) 1002, Jagannath Choudhary and others **vs**. Ramayan Singh and another 2002 Supreme Court Cases (Criminal) 1181, Balijeet Singh and another **vs**. State of Haryana 2004 Supreme Court Cases (Criminal) 692 **and** Johar and others vs. Mangal Prasad and another (2008) 2 Supreme Court Cases (Criminal) 89.

12. Before entering into merits of the revision the scope of interference by the High Court in revision against an order of acquittal is to be looked into. Section 401 Cr.P.C. Deals with the powers of the High Court in revision.

"401. High Court's powers of revision - (1) In the case of any proceedings the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under the Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly".

13. In **Jagannath Choudhary** (supra) the court while dealing with the powers of the revisional court relied upon earlier judgments of supreme court in K.Chinnaswamy Reddy v. State of A.P. AIR 1962 SC 1788 and D.Stephens v. Nosibolla AIR 1951 SC 196 which clearly formulates the extent of jurisdiction by the revisional court.

14. In **D. Stephens** (supra) the apex court observed as under:-

"The revisional jurisdiction conferred on the High Court under S.439 of the Code of Criminal Procedure is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under S.417. It could be exercised only in exceptional cases where the interests of

public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record".

15. The apex court also relied upon Logendranath Jha v. Polai Lal Biswas AIR 1951 SC 316 in which the court observed as below:-

"Though sub-s.(1) of S.439 of the Criminal Procedure Code authorises the High Court to exercise in its discretion any of the powers conferred on a Court of appeal by S.423, yet sub-s.(4) specifically excludes the power to 'convert a finding of acquittal into one of conviction'. This does not mean that in dealing with a revision petition by a private party against an order of acquittal, the High Court can in the absence of any error on a point of law reappraise the evidence and reverse the findings of facts on which the acquittal was based, provided only it stops short of finding the accused guilty and passing sentence on him by ordering a re-trial". "

16. These two cases clearly law down the limits of the jurisdiction of the High Court to interfere with an order of acquittal in revision. In particular Logendranath Jha (supra) it was held that it is not open to a High Court to convert a finding of acquittal into one of conviction in view of the provisions of Section 439(4) Cr.P.C. and that the High Court cannot do this even indirectly by ordering retrial.

17. The court further held that it is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private persons, though the State may not have thought fit to appeal, but this jurisdiction should be exercised by the High Court only in exceptional cases specially when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub section(4) of Section 439 Cr.P.C. forbids a High Court from converting a finding of acquittal into one of conviction.

18. Thus, relying on the decisions of **Logendranath Jha, D. Stephens** and **Chinnaswamy Reddy** (supra) the apex court in **Jagannath Choudhary** (supra) held in para 10 as under-

"10.While it is true and now well-settled in a long catena of cases that exercise of power under Section 401 cannot but be ascribed to be discretionary - this discretion, however, as is popularly informed has to be a judicious exercise of discretion and not an arbitrary one. Judicial discretion cannot but be a discretion which stands "informed by tradition, methodised by analogy and disciplined by system" - resultantly only in the event of a glaring defect in the procedural aspect or there being a manifest error on a point of law and thus a flagrant miscarriage of justice, exercise of revisional jurisdiction under this statute ought not to be called for. It is not to be lightly exercised but only in exceptional situations where the justice delivery system requires interference for correction of a manifest illegality or prevention of a gross miscarriage of justice. In Nosibolla : Logendranath Jha and Chinnaswamy Reddy (supra) as also in Thakur Das (Thakur Das (Dead) by

LRs v. State of Madhya Pradesh and Anr., 1978 (1) SCC 27) this Court with utmost clarity and in no uncertain terms recorded the same. It is not an appellate forum wherein scrutiny of evidence is possible; neither the revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible. It is restrictive in its application though in the event of there being a failure of justice there can said to be no limitation as regards the applicability of the revisional power."

19. In **Sheetala Prasad and others** (supra) the apex court in held as under:-

"12. This Court has heard the learned counsel for the parties at length and considered the evidence forming part of the record.

13. The High Court was exercising the revisional jurisdiction at the instance of a private complainant and, therefore, it is necessary to notice the principles on which such revisional jurisdiction can be exercised. Sub-section (3) of Section 401 of Code of Criminal Procedure prohibits conversion of a finding of acquittal into one of conviction. Without making the categories exhaustive, revisional jurisdiction can be exercised by the High Court at the instance of private complainant (1) where the trial Court has wrongly shut out evidence which the prosecution wished to produce, (2) where the admissible evidence is wrongly brushed aside as inadmissible, (3) where the trial Court has no jurisdiction to try the case and has still acquitted the accused, (4) where the material evidence has been overlooked either by the trial Court or the appellate Court or the order is passed by considering irrelevant evidence and (5) where the acquittal is based on the compounding of the offence which is invalid under the law. By now, it is well settled that the revisional jurisdiction, when invoked by a private complainant against an order of acquittal, cannot be exercised lightly and that it can be exercised only in exceptional cases where the interest of public justice require interference for correction of manifest illegality or the prevention of gross miscarriage of justice. In these cases, or cases of similar nature, retrial or rehearing of the appeal may be ordered."

20. In **Johar and others** (supra) the apex court observed that the State did not prefer any appeal against the judgment of the trial Judge. The revisional jurisdiction of the High Court in terms of Section 397 read with Section 401 Cr.P.C. is limited. The High Court did not point out any error of law on the part of learned trial Judge. It was not opined that any relevant evidence has been left out of its consideration or irrelevant material has been taken into consideration. The High Court not only entered into the merit of the matter but also analysed the depositions of all the witnesses. It sought to re appreciate the whole evidence. One possible view was sought to be substituted by another possible view. In this case the apex court also relied on Logendranath Jha and D. Stephens (supra).

21. From the above discussion, it is clear that the High Court has very limited revisional power particularly in the cases of revision by a private person against order of acquittal and in such cases where the State has not filed any appeal against the order of learned Sessions Judge. Now in the light of the above legal proposition

the court has to see whether the judgment of the learned trial Judge suffers from any manifest illegality or gross miscarriage of justice. The learned Sessions Judge while dealing with the facts of the case gave a categorical finding that the death of the woman had not occurred within seven years of her marriage. This finding is based on the evidence lead by the defence. Initially the prosecution had not produced any evidence in respect of the date of marriage of the deceased and the accused. On the contrary, the defence produced the witness of marriage who was a middle man in the marriage. The witness also produced the marriage card which established that the marriage of the deceased with the accused was in fact performed on 16.05.1986 and relying on evidence of the defence the learned Sessions Judge has given a categorical finding that the death of the deceased had not occurred within seven years of marriage. This finding does not suffer from any illegality or there is wrong appreciation of evidence. It was the duty of the prosecution to rebut the evidence lead by the defence if they really wanted to controvert the evidence lead by the accused persons. But inspite of it they have not produced any evidence in rebuttal.

22. Insofar as the finding in respect of death of the deceased is concerned, the defence has examined the doctor who treated the deceased before her death and also filed the papers regarding treatment. The prosecution again failed to rebut the evidence lead by the accused persons and the learned Sessions Judge relying upon the evidence rightly gave a finding that the death of the deceased was not caused in abnormal circumstances.

23. In respect of demand of dowry, cruelty and harassment the court also came to the conclusion that the prosecution has not been able to prove the demand of dowry, harassment or cruelty towards the deceased. This finding is also based on appreciation of evidence lead by the prosecution. There is no mis-appreciation of evidence nor any evidence has been left to be considered by the trial Judge.

24. The sole ground raised by learned counsel for the revisionist is regarding absence of information of death of the deceased to the complainant or his family members, but the court relying upon the defence evidence, gave a categorical finding that the complainant was informed and he and other family members were present at the time of cremation of the deceased. This finding is based on appreciation of evidence and there is no reason to discard this finding. Thus, after going through the judgment and entire record of the case, the court is of the opinion that the findings recorded by the learned trial Judge are based on appreciation of evidence, there is no manifest illegality or blatant irregularity which lead to miscarriage of justice and there is no occasion for this court to interfere with the findings recorded by the trial court.

25. In view of the above discussions, the revision has no merits and it is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2012

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE ASHOK PAL SINGH, J.

First Appeal From Order No. 3074 of 2011

The New India Assurance Company Ltd. ...Petitioner
Versus
Om Babu @ Hari Babu and others ...Respondents

Counsel for the Petitioner:
Sri Saurabh Srivastava

Counsel; for the Respondents:
.....

Motor Vehicle Act 1988-Section 173-Accident Claim Tribunal-direction-insurance company to pay entire amount of compensation to the claimants with liberty to recover from vehicle owner-in view of law laid down by Apex Court-warrant no interference-seeking direction to protect interest by Tribunal-in case owner fails to pay-same can be raised before execution court itself-however if appeal filed by claimant or by vehicle owner-liberty given to Insurance Company to contest the same.

Held: Para 38, 39 and 40

In view of the above discussion, we are of the opinion that the Tribunal did not commit any illegality in directing the Appellant-Insurance Company to make deposit of the amount of compensation, and recover the same from the insured person i.e. the owner of the vehicle in question-respondent no. 2 herein.

After making deposit of the amount awarded under the impugned award, it will be open to the Appellant-Insurance Company to initiate appropriate proceedings for recovery of the amount from the owner of the aforesaid vehicle in question (respondent no. 2 herein), and seek appropriate directions in such proceedings.

It is made clear that in case any appeal is filed by the claimant-respondent no. 1 or by the owner of the aforesaid vehicle in question (respondent no. 2 herein), it will be open to the Appellant-Insurance Company to contest the same on the grounds legally open to the Appellant-Insurance Company.

Case law discussed:
2004 (2) TAC 12 (SC); 2005 (1) TAC 4 (SC); AIR 1998 SC 588; 2004 (3) SCC 297: 2004 (1) T.A.C.321:AIR 2004 SC 1531; (2007) 3 S.C.C. 700: 2007(2) TAC 398 (SC); 2008(1) T.A.C.803 (SC); 2004(3) SCC 297: 2004 (1) T.A.C. 321: AIR 2004 SC 1531; 2007 (2) T.A.C. 398 (S.C.); 2008 (1) T.A.C. 803 (S.C.) 2004 (2) T.A.C. 12 (SC); 2005 (1) T.A.C. 4 (SC); 2007 (1) T.A.C. 20 (All.); 2009 (1) A.W.C. 355

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

1. The present Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Order/Award dated 27.5.2011 passed by the Motor Accidents Claims Tribunal, Auraiya in Motor Accident Claim Case No.65 of 2004 filed by the claimant-respondent no.1 on account of the injuries sustained by him in an accident which took place on 18.12.2003 at about 1.30 P.M.

2. The case set-up in the Claim Petition was that on 18.12.2003, the claimant-respondent no.1 was going on a Tempo bearing Registration No. UP 75 B 9104 (hereinafter also referred to as "the vehicle in question") from Auraiya to Bhikhaipur; and that at about 1.30 P.M., when the vehicle in question (Tempo) reached near Jalaun Crossing, it overturned on account of rash and negligent driving

by its Driver resulting in serious injuries to the claimant-respondent no.1.

3. The respondent no.2 was the owner of the vehicle in question while the Appellant-Insurance Company was the insurer of the vehicle in question. The respondent no.3 was the Driver of the vehicle in question.

4. After exchange of pleadings between the parties, the Tribunal framed Issues in the said Claim Case.

5. Evidence was led in the said Claim Case.

6. Having considered the material on record, the Tribunal recorded its findings on various Issues.

7. The Tribunal, inter-alia, held that the accident in question took place on account of rash and negligent driving by the Driver of the vehicle in question (Tempo) resulting in serious injuries to the claimant-respondent no.1.

8. The Tribunal further held that it was not established that the Driver of the vehicle in question was having valid Driving Licence for driving the vehicle in question at the time of the accident.

9. The Tribunal further held that the vehicle in question was duly insured with the Appellant-Insurance Company at the time of the accident.

10. In view of the above findings, the Tribunal passed the impugned Judgment and Order/Award dated 27.5.2011, inter-alia, awarding to the claimant-respondent no. 1, compensation amounting to Rs. 1,19,334/- with interest at the rate of 6% per annum with effect from one year prior to the date of Award till the date of final payment.

11. However, in view of the above finding recorded by the Tribunal that it was not established that the Driver of the vehicle in question was having valid Driving Licence for driving the vehicle in question at the time of the accident, the Tribunal directed that the amount of compensation would initially be paid by the Appellant-Insurance Company, and thereafter, the Appellant-Insurance Company would have right to recover the same from the owner of the vehicle in question (respondent no.2 herein).

12. We have heard Sri Saurabh Srivastava, learned counsel for the Appellant-Insurance Company, and perused the record.

13. Sri Saurabh Srivastava, learned counsel for the Appellant-Insurance Company submits that having held that the aforesaid vehicle in question was being run against the terms and conditions of the Insurance Policy, the Tribunal erred in directing the Appellant-Insurance Company to pay the amount of compensation and thereafter recover the same from the owner of the vehicle in question, i.e., respondent no. 2 herein.

14. Sri Saurabh Srivastava submits that in any case, the interest of the Appellant-Insurance Company as against the owner of the vehicle in question (respondent no. 2 herein) should have been properly secured so that after making the payment of compensation under the impugned award, the Appellant-Insurance Company would be able to recover the same from the owner of the aforesaid

vehicle in question. Sri Saurabh Srivastava has relied upon the following decisions in this regard:--

1.Oriental Insurance Company Ltd. Vs. Sri Nanjappan & Others, 2004(2) TAC 12 (SC).

2.National Insurance Company Vs. Challa Bharathamma, 2005(1) TAC 4 (SC).

15. We have considered the submissions made by Shri Saurabh Srivastava, learned counsel for the Appellant-Insurance Company.

16. As regards the submission made by Sri Saurabh Srivastava that the Tribunal erred in directing the Insurance company to make the payment of compensation and thereafter recover the same from the owner of the vehicle in question, it is pertinent to refer to the relevant provisions of the Motor Vehicles Act, 1988.

17. Sub-section (5) of Section 147 of the Motor Vehicles Act, 1988 lays down as under:--

"147. Requirements of policies and limits of liability--(1) to (4).....

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

18. The above-quoted provision thus provides that an insurer issuing a policy of insurance under Section 147 of the said Act, shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

19. Sub-section (1) of Section 149 of the Motor Vehicles Act, 1988 provides as follows:-

" 149. Duty of insurers to satisfy judgements and awards against persons insured in respect of third party risks-- *(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163-A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.*

(2) to (7). . . . . ."

20. The above-quoted provision thus provides that in case any judgment or award is obtained against any person insured by the policy, then the insurer shall

pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and interest. This will be so even though the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy.

21. In view of the above provisions, we are of the opinion that the directions given by the Tribunal requiring the Appellant-Insurance Company to make the deposit of compensation awarded under the impugned award and thereafter recover the same from the owner of the aforesaid vehicle in question, is in accordance with law, and the same does not suffer from any infirmity.

22. The above conclusion is supported by various decisions of the Apex Court:

1.Oriental Insurance Co.Ltd. Vs. Inderjit Kaur and others, AIR 1998 SC 588.

2.National Insurance Company Ltd. Vs. Swaran Singh , 2004 (3) SCC 297: 2004 (1) T.A.C.321:AIR 2004 SC 1531.

3.National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, (2007) 3 S.C.C700: 2007(2) TAC 398 (SC).

4.Prem Kumari & Others Vs. Prahlad Dev & Others, 2008(1) T.A.C.803 (SC).

23. In ***Oriental Insurance Co. Ltd. v. Indrajit Kaur and others, AIR 1998 SC 588,*** their Lordships of the Supreme Court opined as under (paragraph 7 of the said AIR):

"7. We have, therefore, this position. Despite the bar created by S.64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Ss.147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured."

(Emphasis supplied)

24. This decision thus supports the conclusion mentioned above on the basis of Sections 147(5) and 149(1) of the Motor Vehicles Act, 1988.

25. In ***National Insurance Co.Ltd. v. Swaran Singh, 2004(3) SCC 297: 2004 (1) T.A.C. 321: AIR 2004 SC 1531,*** their Lordships of the Supreme Court held as follows(paragraph 105 of the said AIR):

"105. The summary of our findings to the various issues as raised in these petitions is as follows:

(I) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this

paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, interalia, in terms of Section 149(2) (a) (ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance Companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicles;the burden of proof wherefor would be on them.

(v) The Court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply " the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver,(a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance Companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes

inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Sections 149 (2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears as land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

(Emphasis supplied)

26. Proposition nos.(vi) and (x), reproduced above, support the conclusion that the direction given by the Tribunal in the award impugned in the present case is in accordance with law.

27. In ***National Insurance Co.Ltd. v. Laxmi Narain Dhut, 2007 (2) T.A.C. 398 (S.C.),*** their Lordships of the Supreme Court considered the decision in ***National Insurance Co.Ltd. v. Swaran Singh*** (supra) and held as under (paragraph 35 of the said TAC):

"35. As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the license was a fake one. Once it is established the natural consequences have to flow.

In view of the above analysis the following situations emerge:

*(1) The decision in **Swaran Singh's case** (supra) has no application to cases other than third party risks.*

(2) Where originally the license was fake one, renewal cannot cure the inherent fatality.

(3) In case of third party risks the insurer has to indemnify the amount and if so advised to recover the same from the insured.

(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

The High Courts/Commissions shall now consider the matter afresh in the light of the position in law as delineated above.

The appeals are allowed as aforesaid with no order as to costs."

(Emphasis supplied)

28. In view of the above decision, it is evident that in case of third party risks, the decision in ***National Insurance Co.Ltd. v. Swaran Singh and others*** (supra) would apply, and the insurer has to indemnify the amount to the third party and thereafter may recover the same from the insured.

29. In ***Prem Kumari & others vs. Prahlad Dev and others, 2008(1) T.A.C. 803 (S.C.),*** their Lordships of the Supreme Court have reiterated the view expressed in ***National Insurance Company Limited. Vs. Laxmi Narain Dhut's case*** (supra) explaining the decision in ***National Insurance Company Limited Vs. Swaran Singh and others*** (supra), and held as under (paragraphs 8 and 9 of the said TAC):

*"8. The effect and implication of the principles laid down in **Swaran Singh's case** (supra) has been considered and explained by one of us (Dr.Justice Arijit Pasayat) in **National Insurance Co.Ltd. v. Laxmi Narain Dhut, (2007) 3 S.C.C. 700: 2007 (2) T.A.C. 398.** The following conclusion in para 38 are relevant:*

"38. In view of the above analysis the following situations emerge:

*(1) The decision in **Swaran Singh's case** (supra) has no application to cases other than third party risks.*

(2) Where originally the license was a fake one, renewal cannot cure the inherent fatality.

(3) In case of third-party risks the insurer has to indemnify the amount, and if so advised, to recover the same from the insured.

(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

*9. In the subsequent decision **Oriental Insurance Co.Ltd v. Meena Variyal & others, (2007) 5 S.C.C. 428: 2007 (2) T.A.C. 417,** which is also a two Judge Bench while considering the ratio laid down in **Swaran Singh's case** (supra) concluded that in a case where a person is not a third party within the meaning of the Act, the Insurance Company cannot be made automatically liable merely by resorting to **Swaran Singh's case** (supra). While arriving at such a conclusion the Court extracted the analysis as mentioned in para 38 of **Laxmi Narain Dhut** (supra) and agreed with the same. In view of consistency, we reiterate the very same principle enunciated in **Laxmi Narain Dhut** (supra) with regard to interpretation and applicability of **Swaran Singh's** case (supra)."*

(Emphasis supplied)

30. In view of the above decisions, it is evident that the directions given by the Tribunal requiring the Appellant-Insurance Company to deposit the amount awarded under the impugned award in the first instance, and thereafter, recover the same from the owner of the vehicle in question, are valid and legal.

31. As regards the submission made by Sri Saurabh Srivastava that the interest of the Appellant-Insurance Company should be protected as against the owner of the vehicle in question (respondent no. 2 herein) so that in case the Appellant-Insurance Company deposits the amount of compensation, it may be able to recover the same from the owner of the aforesaid vehicle in question, it is pertinent to refer to the decisions relied upon by Sri Saurabh Srivastava.

32. In ***Oriental Insurance Company Ltd. Vs. Sri Nanjappan and others, 2004(2) T.A.C.12 (SC)*** (supra), their Lordships of the Supreme Court opined as under (Paragraph 7 of the said T.A.C.):

"7. Therefore, while setting aside the judgment of the High Court we direct in terms of what has been stated in Baljit Kaur's case 2004(1) T.A.C.366(SC)(supra) that the insurer shall pay the quantum of compensation fixed by Tribunal, about which there was no dispute raised to the respondents-claimants within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured. The appeal is disposed of in the aforesaid terms, with no order as to costs."

(Emphasis supplied)

33. In ***National Insurance Company v. Challa Bharathamma, 2005 (1) T.A.C. 4 (SC)***(supra), it was laid down as follows (Paragraph 13 of the said T.A.C):-

"The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.

Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case considering the Quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

(Emphasis supplied)

34. In our opinion, the directions contemplated in the above decisions may be sought by the Appellant-Insurance Company before the Executing Court when the Appellant-Insurance Company, after depositing the amount awarded under the impugned award, moves appropriate application before the Executing Court to recover the said amount from the insured person, i.e. the owner of the vehicle in question (respondent no. 2 herein), while the claimant files an application for the execution of the award or for the release of the amount deposited by the Appellant-Insurance Company. We are refraining from expressing any opinion in this regard.

35. We may, however, refer to two decisions of this Court wherein the above decisions of the Supreme Court have been considered.

36. In ***Smt. Bhuri and others Vs. Smt. Shobha Rani and others, 2007 (1) T.A.C. 20 (All.),*** a learned Single Judge of this Court held as under (paragraph 5 of the said T.A.C.):-

"5. From the aforesaid case law, as referred to by the learned Counsel for the parties, it would be evident that in spite of the fact that the insurer is not made liable to compensate the claimants under the policy under Section 149 of the Motor Vehicles Act, still the liability of payment, under the law as developed by the Apex Court in this context, has been assigned to the Insurance Company. At the same time, the Insurance Company has also been given liberty to recover the said amount from the insured within the provisions of the Motor Vehicles Act itself and without taking the burden of filing a suit for that purpose. This principle of law was initially propounded in ***Baljit Kaur's case*** *(supra) and it has been followed in the aforesaid cases referred to by the parties concerned. But in the subsequent cases more especially in* ***Nanjappan's case*** *(supra) it has also been observed that before releasing the amount under deposit before the Court the insured/owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the Insurance Company will pay to the claimants. After that notice the Court may direct the attachment of the offending vehicle as part of the security and could also pass appropriate orders in accordance with law. In case of default it shall be open to the Court to direct realisation of the amount from the insured/owner by disposal of security or from any other property or properties of the owner of the vehicle. Therefore, all these modes have been provided by the Apex Court for the insurer to make recovery from the insured. But from*

all these directions as given by the Apex Court, the purport is that the Court shall not undermine the interest of the claimants for whose welfare the Supreme Court has been developing this law through all these cases even by interpreting otherwise the liability of the insurer with Section 149 of the Motor Vehicles Act. Thus, what is the crux of the matter in the present case is that the revisionists-claimants cannot be made to suffer even if the insured/owner of the vehicle does not furnish security or does not appear before the Court in pursuance to the notice issued to him. The burden of recovering the amount within the provisions of the Act itself has been placed upon the insurer in the aforesaid judgments of the Apex Court. The claimants who have obtained the award in their favour have not been made to suffer through any observation made by the Supreme Court in these cases. Thus, in the aforesaid view of the matter, what I feel is that it would be just and proper if the Court below is directed to first take resort to the issuance of notice to the insured/owner of the vehicle and thereafter only the money under deposit before the Court should be released in favour of the claimants."

(Emphasis supplied)

37. In ***National Insurance Company Limited Vs. Smt. Khursheeda Bano and others, 2009 (1) A.W.C. 355,*** a Division Bench of this Court laid down as follows (paragraph 4 of the said A.W.C.):

"4. Learned counsel has cited the judgment of the Supreme Court in ***National Insurance Company Ltd. v. Challa Bharathamma and others, (2004) 8 SCC 517****, to establish that the claim of the insurance company should be secured by the owner. We have no quarrel with such proposition. What we want to say is that unless and until an appropriate application in the selfsame proceeding is made by the insurance company for the purpose of recovery, the question of furnishing security by the owner cannot arise. Such situation is yet to ripe. At this stage, we are only concerned with the payment of compensation to the claimants which cannot be stalled and has got nothing to do with the dispute regarding liability between the owner and the insurance company. The sufferer is a third party. Moreover, in such judgment, the Division Bench of the Supreme Court has categorically held " considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability." In effect it is a stop-gap arrangement to satisfy the award as soon as it is passed. The judgment of 3 Judges' Bench of the Supreme Court in* ***National Insurance Co,Ltd v. Swaran Singh and others, (2004) 3 SCC 297,*** *also speaks in para 110 that the Tribunal can direct that the insurer is liable to be reimbursement by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Therefore, the intention of the Legislature as well as the interpretation by the Supreme Court and different High Courts is well settled to the extent that under no circumstances payment of compensation to the claimants will be stalled. Even at the cost of the repetition we say, it has nothing to do with the dispute with regard to liability of owner or insurer, which can be considered in the separate application in the selfsame cause or in an execution application in connection thereto to be initiated by the insurance company."*

(Emphasis supplied)

38. In view of the above discussion, we are of the opinion that the Tribunal did not commit any illegality in directing the

Appellant-Insurance Company to make deposit of the amount of compensation, and recover the same from the insured person i.e. the owner of the vehicle in question-respondent no. 2 herein.

39. After making deposit of the amount awarded under the impugned award, it will be open to the Appellant-Insurance Company to initiate appropriate proceedings for recovery of the amount from the owner of the aforesaid vehicle in question (respondent no. 2 herein), and seek appropriate directions in such proceedings.

40. It is made clear that in case any appeal is filed by the claimant-respondent no. 1 or by the owner of the aforesaid vehicle in question (respondent no. 2 herein), it will be open to the Appellant-Insurance Company to contest the same on the grounds legally open to the Appellant-Insurance Company.

41. The amount of Rs.25,000/- deposited by the Appellant-Insurance Company while filing the present appeal, will be remitted to the Tribunal for being adjusted towards the amount to be deposited by the Appellant-Insurance Company, as per the directions given in the impugned award.

42. Subject to the above observations, the Appeal filed by the Appellant-Insurance Company is dismissed.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.03.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Service Single No. 5412 of 1999

Chandra Bhwan Pushpakar ...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri Ajmal Khan
Sri S.P. Tewari

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 14 and 16- appointment on post of Sinchpal-petitioner Stood first in merit-candidates placed at Serial no. 4 and 5-appointed after training-but ignored the petitioner-authorities unable to explain their discriminatory action-held entitled to get appointment from the date of juniors appointment-with all consequential benefits-salary for the period of non working shall be recovered from erring officer.

Held: Para 9

Be that as it may, petitioner neither can be left at the mercy of respondents nor can be denied complete justice otherwise this Court will be failing in its constitutional obligation of doing justice in all perspective so as to uphold confidence of the people in the system of administration of justice and also to maintain their faith that ultimately they would get wholesome justice in the hands of law. The respondents have denied appointment to petitioner on wholly nonest, illegal and unfounded reasons despite having discriminated him in the matter of appointment and thereby denying his constitutional right

of earning livelihood by getting employment without any fault on his part. The petitioner therefore is entitled for a direction with respect to his appointment and consequential benefits.

Case law discussed:

1991(3)SCC 47.

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

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

2. The petitioner has sought a mandamus commanding respondents to appoint him on the post of Seenchpal from the date persons junior to him, i.e. lower in merit, were appointed and given regular posting.

3. It is stated that certain posts of Seenchpal were advertised pursuant whereto petitioner applied and selected. He was given training but after completion of training he was not given appointment though persons lower in merit to petitioner were given appointment. The petitioner raised dispute and submitted representation. Vide Annexure 8 to the writ petition, which is a letter dated 22.3.1999 sent by Superintending Engineer, 16th Circle, Irrigation Work, Pratapgarh, to the Chief Engineer, it was informed that admittedly petitioner was first in merit and persons at serial No.4 and 5 in merit were given regular appointment as "Seenchpal" by Executive Engineer Raibareilly, Sharda Nahar ignoring petitioner's higher merit, hence petitioner's claim for appointment is justified and he should be so appointed. However nothing proceeded further hence the petitioner preferred this writ petition.

4. In the counter affidavit respondents have said that after receipt of letter dated 22.3.1999 sent by Superintending Engineer, the matter was under consideration before Chief Engineer but in the meantime, a Government Order was issued on 5.5.1999 imposing ban on further appointments on the post of Seenchpal declaring it a dying cadre. Hence petitioner could not be appointed on the said post.

5. It is however not disputed in the counter affidavit that petitioner was at serial no.1 in the merit list. While persons at serial no.4 and 5 were appointed by concerned Executive Engineer the petitioner was ignored. No justification is given, why those lower in merit were appointed by competent authority as 'Seenchpal' ignoring higher merit of petitioner. Evidently, non appointment of petitioner despite his higher merit is sheer arbitrary, discriminatory and illegal. It also shows selective discriminatory treatment by appointing authority. Instead of taking any action against the said authority, respondents higher authorities have tried to blame petitioner relying on subsequent Government order dated 5.5.1999 which has nothing to do in the matter since petitioner's claim rests on the fact that persons lower in merit have already been appointed, therefore he has a right to be appointed from the date, persons lower in merit were appointed.

6. It cannot be doubted that no person has a right of appointment. The only right conferred under Articles 14 and 16(1) of the Constitution is the right of consideration for employment. However, it does not mean that after making such consideration, an authority can proceed to make appointments arbitrarily ignoring consequences of consideration i.e. select list prepared by competent authority after consideration of all eligible candidates for employment. It is not unworthy to mention that once selection

is made and an authority proceeded to make appointment, it is bound to follow merit list and any deviation therefrom and that too without any reason would make the appointments arbitrary and discriminatory. A Constitution Bench of Apex Court in **Shankarsan Dash Vs. Union of India, 1991(3) SCC 47 in para 7** observed that once authorities proceed to make appointment, they shall follow select list and shall make appointment in the order in which persons are selected and placed in the select list. The relevant observation are as under:

"if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

7. In the present case, discriminatory treatment in the hands of appointing authority was virtually admitted as is evident from Superintending Engineer's letter dated 22.3.1999 (Annexure 8 to the writ petition) yet respondents chose not to seek any explanation from appointing authority as to why he made selective arbitrary appointments ignoring merit list. Instead of redressing grievance of the petitioner, the respondents have tried to defend non appointment of petitioner before this Court by referring to some subsequent events like a Government Order dated 5.5.1999, which would have no application to the facts of this case. The Government Order restrained future appointment and not process of appointment which has already been initiated and completed with certain abberations. The respondents were under an obligation to remove those anomalies so as to put every thing in order but they have failed to do so. It appears that despite proven illegality on the part of appointing authority in making appointments ignoring merit list, higher authorities had chosen not to take any action against the said official, may be for the reason which is not just, legal and valid but travels in the realm of malice in law. This is nothing but a facet of corrupt activities on the part of State authorities whereby illegal and arbitrary action of an authority is trying to be shielded under the cloak of an unfounded defence, may be with a hope that a similar shield would be available to other authorities when they would commit such illegality.

8. It appears that authorities have chosen to observe principle of mutual back scratching. It is this attitude on the part of superior Executive which encourage others (lower cadre) to indulge into more corrupt activities. It spread and encourage corruption among executive. They work even if illegally but with a sense of guaranteed impunity like assurance against any penal action. A time has come when illegal action of executive should be viewed seriously and checked and be penalized appropriately so as to leave a lesson to others not to continue or to be encouraged to make such illegal act in future. The appointing authority is guilty of making illegal appointments by ignoring higher merit of petitioner but, simultaneous responsibility and accountability on the part of higher authorities in overlooking this act of appointing authority and leaving it unpunished cannot be appreciated but must be condemned in the strongest words. In other words, by their conduct, all the respondents are guilty of abatement and commitment of an illegal act.

9. Be that as it may, petitioner neither can be left at the mercy of respondents nor can be denied complete justice otherwise

this Court will be failing in its constitutional obligation of doing justice in all perspective so as to uphold confidence of the people in the system of administration of justice and also to maintain their faith that ultimately they would get wholesome justice in the hands of law. The respondents have denied appointment to petitioner on wholly nonest, illegal and unfounded reasons despite having discriminated him in the matter of appointment and thereby denying his constitutional right of earning livelihood by getting employment without any fault on his part. The petitioner therefore is entitled for a direction with respect to his appointment and consequential benefits.

10. In view of the above, this writ petition is allowed. The respondents are directed to consider and appoint petitioner on the post of Seenchpal from the date persons lower in merit to him were so appointed with all consequential benefits. It is made clear that for all purposes petitioner's appointment shall be from the date when persons lower in merit to him were appointed. The petitioner shall also be entitled to all consequential benefits including arrears of salary for the entire period. Since non payment of salary to petitioner is the outcome of an illegal and patent discriminatory act on the part of appointing authority by ignoring merit list and making appointments of persons lower in merit, State Exchequer should not be allowed to be burdened of payment of salary for the period an incumbent has not worked and person responsible for such a situation must be accountable for the same.

11. I, therefore, further direct that respondent no.1 shall be at liberty to recover amount of salary which would be paid to the petitioner in view of his appointment from the date persons lower in merit were appointed, i.e. the amount payable to the petitioner pursuant to this judgment for the period he actually could not perform any work, from the officer concerned namely appointing authority who made illegal appointments ignoring merit after making such enquiry as permissible in law. Proportionate realisation can also be made from higher authorities who despite of knowledge failed to take any corrective measure.

12. The writ petition is accordingly allowed in the manner and as per the observations/directions made above.

13. The petitioner shall also be entitled to cost which I quantify to Rs.5,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 11760 of 2011

Committee of management Lala Babu Baijal Memorial Inter College, Lodipur, District Ghaziabad and another
...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri N.L.Pandey
Sri N.N.Pandey.

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 14 and 16- vires of G.O. Imposing ban an appointment of class 4th employee-in recognizes institution-governed by Board-except from out sourcing-being

contrary to the provision of Inter Mediate education Act-without abolition of class to 4th post duly created-violation of Art. 14 and 16 of constitution-evidently-explosive arbitrary, irrational, illogical unreasonable-held ultra vires.

Held: Para 64

In my view, therefore, though the concept of making available the staff to perform Class-IV job by outside agency though termed "Outsourcing" but it is nothing but a system of supply of work force through a contractor or a person who satisfy the term "contractor" for all purposes though termed as "outsourcing". Hence the system as contemplated in Para 2 of impugned G.O. is evidently exploitative, arbitrary, unreasonable, irrational, illogical, hence violative of Article 14 and 16 of the Constitution.

Case law discussed

Writ Petition No. 36249 of 2011, Luv Kush Pandey Vs. State of U.P. Others, 2006(4) ESC 2786(para34), JT 2008(4) SC 317, AIR 1962 Alld 413, AIR 1957 ALL 70, 1993 Supp.(3) SCC 181, 1994 Supp. (I) SCC 44, 1970(1) SCC 108, 1977 (1) SCC 554, 1977(2) SCC 457, 1979 (2) SCC 124, 1993(3) SCC 575, 1975(3) SCC 76, 1970 SLR 768, State of Mysore Vs. G.B.Puroshit,C.A. No. 1965, 1974(1) SCC 317, 2008 (1) ESC 595, 1970 (1) SCC 108, 1997(1)SCC 554, 1993 Supp(3) SCC 575, Devendra Nayak and another Vs. State of U.P. And others, Writ Petition No. 55988 of 2009, A.J.Patel and others Vs. The State of Gujrat and others, AIR 1965 Guj 234a.,

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

1. With the consent of learned counsel for the parties since common questions of law and facts have been raised in all these matters, I proceed to decide these matters finally under the Rules of this Court at this stage by this common judgment.

2. In this bunch of writ petitions the core issue relates to the Government Order *(hereinafter referred to as the "G.O.")* No. Ve.Aa-2-27/Dus-59(M)/2008, dated 06.01.2011 issued by Sri Anoop Mishra, Principal Secretary, Finance U.P. Government, Lucknow addressed to various Principle Secretaries of different departments and Directors of different departments. The subject of G.O. is sanctioned Pay Band and Grade Band as modified/upgraded for Class-IV cadre of aided educational/technical educational institutions in the revised pay scale pursuant to 6th Pay Commission recommendation. Though in the writ petitions entire G.O. is challenged but during the course of arguments the learned counsels for petitioners have confined their attack only to Para 2 thereof. Para 2 says that in future no appointment on Class-IV posts (except the junior cadre of technical posts) shall be made and vacancies of Class-IV posts shall be managed by the system of outsourcing.

3. The relevant para 2 of G.O. dated 06.01.2011 reads as under:

"2. मुझे यह कहने का निर्देश हुआ है कि भविष्य में चतुर्थ श्रेणी के किसी भी पद (कनिष्ठ वर्ग के प्राविधिक पदों को छोड़कर) पर नियुक्ति नहीं की जायेगी तथा चतुर्थ श्रेणी के रिक्त होने वाले पदों के सम्बन्ध में केवल आउट सोर्सिंग के माध्यम से व्यवस्था की जाय।

परन्तु उक्त व्यवस्था उत्तर प्रदेश सेवा काल में मृत सरकारी सेवकों के आश्रितों की भर्ती नियमावली 1974 के अन्तर्गत समूह "घ" के पदो पर की जाने वाली नियुक्ति के संबंध में लागू नहीं होगी।"

"2. I am directed to say that in future appointments shall not be made on any Class IV posts (except on the junior cadre of technical posts) and the Class IV posts falling vacant shall be managed only by outsourcing.

But the said provision shall not apply to the appointments to be made on the

Group D posts under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules 1974."
(English translation by the Court)

4. Some of the writ petitions have been filed by Committee of Managements of Secondary Schools and Colleges challenging para 2 of G.O. dated 06.01.2011 as it deny them power of appointment on Class-IV posts in their respective educational institutions. Some of the writ petitions have been filed by candidates who have been selected for appointment on Class-IV posts for various secondary educational institutions but educational authorities have denied approval or recognition to such selection in view of the ban imposed vide para 2 of G.O. dated 06.01.2011.

5. The respondents-State of U.P. and its authorities have filed counter affidavit in some of the writ petitions and learned counsels for the parties have agreed to read the said counter affidavits in all matters. For referring the pleadings in counter affidavit, the parties have referred to Writ Petition No. 27387 of 2011 and this Court shall also proceed to refer pleadings in the aforesaid counter affidavit.

6. Sri Ashok Khare, Senior Advocate has advanced his submissions in Writ Petition No. 62476 of 2011, 62616 of 2011 and 74197 of 2011. Sri N.L. Pandey, Advocate in Writ Petition No. 11760 of 2011; Sri A.N. Rai, Advocate in Writ Petition No. 63197 of 2011 and Sri G.K. Singh, Advocate in Writ Petition No. 8492 of 2012 have made their submisisons. The other learned counsels appearing for petitioners have adopted the submissions advanced by the above learned counsels.

7. The basic ground of challenge is that the impugned G.O. is ultra vires of Section 16(G) of U.P. Intermediate Education Act, 1921 (*hereinafter referred to as the "Act, 1921")* and Regulation 100 Chapter III of Regulations framed under Act, 1921. It is even otherwise arbitrary, irrational and violative of Article 14 and 16 of the Constitution of India. Constituting an encroachment on managements' right to manage their institutions, it is also violative of Article 19 of the Constitution. It is also submitted that correctness of G.O. came to be examined by this Court in **Writ Petition No. 36249 of 2011, Luv Kush Pandey Vs. State of U.P. and others**, decided on 14.10.2011 wherein the Court did not decide the question of vires of aforesaid G.O. but held that the cases where vacancies occurred and selections were made before issuance of aforesaid G.O., the same would not be governed by aforesaid G.O.

8. Sri Ashok Khare, learned Senior Advocate submitted that Writ Petitions No. 62467 of 2011 and 74179 of 2011 are squarely covered by aforesaid judgment of Lucknow Bench in **Luv Kush Pandey (supra).**

9. Sri G.K. Singh, Advocate in particular submitted that G.O. is also not protected by reference to Section 9 of Act, 1921 inasmuch as every order is not referable to the said provision. It is applicable where immediate action is needed. The present G.O. is addressed to all the departments and not confined to educational institutions. By no stretch of imagination, even otherwise, it touches upon Section 9 of Act, 1921. He also placed reliance on a Division Bench judgment of this Court in **Satish Kumar Vs. State of**

UP and others, 2006(4) ESC 2786 (para 34).

10. As already said, the respondents have filed their counter affidavits in some of the cases and the counter affidavit filed in Writ Petition No. 27387 of 2011 has been referred. It is pleaded therein that Chapter 2.2 para 2.2.9 of 6th Central Pay Commission Report Vol. 1 provides that a separate running Pay Band, designated as 1S scale is being recognized for posts belonging to Group-D. However, the same shall not be counted for any purpose as no future recruitment is to be made in this grade. All the present employees belonging to Group-D, who possess prescribed qualification, for entry level in Group-C, will be placed in Group-C Running Pay Band straightaway w.e.f. 01.01.2006. Other Group-D employees who do not possess qualification are to be retrained and thereafter be upgraded and placed in Group-C Running Pay Band. Till such time they are retrained and redeployed, they will be placed in 1S scale. The Pay Commission has said that 1S scale is not a regular or permanent pay scale and for the existing employees it shall operate only till the time, existing Group -D staff is placed in Group-C Running Pay Band. The mechanism for placing Group-D staff in revised Group-C Running Pay Band has been discussed in detail in Chapter 3.7 relating to Group-D staff. Group-D employees who are not placed in Group-C Pay Band straightaway will be given the band after retraining without any loss of seniority vis a vis those in Group-D who possessed higher qualification, redeployed and were placed in Group-C Running Pay Band w.e.f. 01.01.2006. It also refers to para 2.2.10 of 6th Pay Commission Report providing that so far as future recruitment is concerned no direct recruitment in 1S scale will take place and this scale will be operated for regulating emoluments during training period of candidates who do not possess the minimum qualification of matric. The Commission expressed its view that candidates not possessing minimum qualification of matric and/or ITI cannot be recruited in Government as all jobs in Government requires same level of skill.

11. Respondents have further pleaded, that, Since 6th Pay Commission Recommendations were implemented by State Government in respect to its employees also, a policy decision was taken regarding pay revision and the State Government issued G.O. No. Ve.Aa.-2-2052/Dus-59(M)/2008 dated 08.09.2010 applicable to various departments of State Government providing therein that no recruitment in future on Class-IV posts (except the lowest cadre of technical post) shall be made and future vacancies in Class-IV shall be managed by "outsourcing". The aforesaid G.O. was clarified by subsequent G.O. No. Ve.Aa.-2-3226/Dus-59(M)/2008 dated 04.01.2011 that restriction against future recruitment in Class-IV posts shall not be applicable for compassionate appointments. It was further clarified by another G.O. No. Ve.Aa.-2-26/Dus-59(M)/2008 dated 06.01.2011 (Annexure-CA-4 to the counter affidavit) issued to various departments of Government stating that benefit of revised pay and Grade Band would be notionally applicable from 01.01.2006 and actual benefit/payment shall be admissible w.e.f. 08.09.2010. In respect to educational institutions aided by State Government similar G.O. No. Ve.Aa.-2-27/Dus-59(M)/2008, dated 06.01.2011 was issued and in furtherance thereof the impugned G.O. dated 06.01.2011 has also been issued. By another G.O. No. 4/1/2008-Ka-2/2008 (Annexure-CA-6 to the counter

affidavit) it was also clarified by Government that in outsourcing, provision of reservation shall also be observed strictly.

12. It is said that the G.O. dated 06.01.2011 having been issued in furtherance of acceptance of 6th Pay Commission, the recommendations whereof have been accepted by Government, it is not open to petitioners to challenge the same partly while retaining benefit of recommendations of 6th Pay Commission in all other aspects.

13. So far as recommendations relating to Pay Revision as made by 6th Pay Commission and accepted by Government that is a different matter since it is not the case of respondents that Pay Commission had the jurisdiction to deal with matter of recruitment and appointment of employees and officers of Government. In my view, it would not be necessary for this Court to look into this aspect further for the reason that validity of Para 2 of G.O. dated 06.01.2011 has to be considered in the light of statutory provisions of Act, 1921, the Regulations framed thereunder and also the Constitutional provision, i.e., Articles 14, 16 and 19.

14. Before coming to other aspects of the matter the Court finds it prudent to examine the meaning of the term "Outsourcing". It is neither a technical term nor a term of art. I also could not find its origin in the ancient times but appears to have gain momentum in recent past, i.e., with the advancement of managerial policies in the field of information technology etc. It is only when the scope, extent, purpose and objective of "Outsourcing" would be clear, it would be more convenient to examine the correctness of Para 2 of G.O. in the light of statutory provisions as referred to hereinabove and other relevant provisions which this Court shall discuss a bit later.

15. When this Court enquired from the learned Additional Advocate General as to what the Government mean by asking the educational institutions to go for "Outsourcing" instead of making recruitment of Class-IV posts, he simply replied that educational institutions shall not have to recruit any Class-IV employee on their own but may have their work done, meant to be performed by Class-IV employees, by employing persons from labour suppliers or the organizations engaged in the work of "Outsourcing". He was immediately confronted, whether it amounts to a contract labour supply to which he said that exactly that is not the purpose but to some extent there may be some similarity.

What is Outsourcing

16. When this Court proceed to consider the meaning and ambit of the term "Outsourcing"; immediate questions arise (a) what is outsourcing; (b) what can be outsourced; (c) where one can find outsourcing resources; and, (d) is it a unikind of system or multiple kind.

17. The term "outsourcing" is not a very commonly recognized term in various Dictionaries but some recent and revised editions contain this term and define it.

18. The "**Concise Oxford English Dictionary Indian Edition"** (11th Edition Revised) (2008) published by Oxford University Press, New Delhi at page 1017 defines the term "outsourcing" as under:

"Outsourcing-obtain by contract from an outside supplier."

19. "Wikipedia" describes the term "outsourcing" as "the process of contracting a business function to someone else". In the commercial word particularly among the managerial class, the term "Outsourcing" is known in various ways. According to some "Outsourcing" is any task, operation, job or process that can be performed by employees of company, but is instead, contracted to a third party for a significant period of time. Hiring a temporary employee when a regular employee in an institution is on leave is not "Outsourcing". According to some others "Outsourcing" is contracting with other company or persons to do a particular function. Normally outsourcing is resorted to such functions which are considered "non-core to the business". Another definition or meaning of "Outsourcing" is that it is simply farming out of services to a third party. The central idea, therefore, discerned from above is, that, "Outsourcing" is the process of contracting a function to someone else. Its opposite is "Insourcing".

20. "Insourcing" has been identified as a mean to ensure, control, compliance and to gain competitive differentiation through vertical integration or the development of shared services. "Insourcing" is also called as vertical integration.

21. "Outsourcing" is considered to be something more than purchasing and more than consulting. It is a long term results oriented relationship for a whole activity normally commercial over which the Provider has a large amount of control and managerial discretion. "Outsourcing" is the use of outside business relationship to perform necessary business activities and processes in lieu of internal capabilities. The most common forms of outsourcing presently known are "Information Technology Outsourcing" (ITO), "Business Process Outsourcing" (BPO) and Knowledge Process Outsourcing" (KPO). Business Process Outsourcing encompasses, Call Center Outsourcing, Human Resources Outsourcing, Finance and Accounting Outsourcing and Claims Processing Outsourcing.

22. The organizations want to seek "Outsourcing" normally take into account the issues like, cost savings, focus on core business, cost restructuring, improvement of quality, access and availability of better knowledge and experience, operational expertise, access to talent, capacity management, catalyst for change, enhancement for capacity of innovation, reduction of time in production of a product for supply to the market, Commodification, Risk Management, Tax Benefit, Venture Capital, Scalability, Creating Leisure Time, Reducing Liability, Revenue etc.

23. "Outsourcing", therefore, is the use of outside business relationship to perform necessary business activities and processes in lieu of internal capabilities. Those who provide "Outsourcing" facilities are called Outsourcing Partners, Outsourcing Suppliers and Providers. Those who go to purchase outsourcing services are called "Buyers" and "Users" in common parlance. The key to the definition of "Outsourcing" is the aspect of transfer of control. In Outsourcing, the Buyer normally does not instruct Supplier how to perform its task but, instead, focuses on communicating what results it want to buy. It leaves the process of accomplishing those results to supplier.

24. There are different kinds of outsourcing, namely, Tactical Outsourcing,

Strategic Outsourcing, Transformational Outsourcing etc.

25. Though the term "outsourcing" as such has not been considered in detail by Courts but its purport and object can be discerned in the context the same has been referred to in certain decisions.

26. In **Common Cause (A Regd. Society) Vs. Union of India and others, JT 2008 (4) SC 317** the Court considered a situation where a committee is appointed by the Court but with a further authority to issue orders to authorities or to public. Deprecating this practice in para 36 of the judgement the Court said:

"36. We would also like to advert to orders by some Courts appointing committees giving these committees power to issue orders to the authorities or to the public. This is wholly unconstitutional. The power to issue a mandamus or injunction is only with the Court. The Court cannot abdicate its function by handing over its powers under the Constitution or the C.P.C. or Cr.P.C. to a person or committee appointed by it. ***Such 'outsourcing' of judicial functions is not only illegal and unconstitutional,*** *it is also giving rise to adverse public comment due to the alleged despotic behaviour of these committees and some other allegations. A committee can be appointed by the Court to gather some information and/or give some suggestions to the Court on a matter pending before it, but the Court cannot arm such a committee to issue orders which only a Court can do." (emphasis added)*

27. The above discussion clearly suggest and demonstrate that outsourcing does contemplate performance of job or function or work by a body outside the buyer or purchaser and the service provided himself perform the job through its own agencies and it cannot be equated with the supply of labour or employees by a third party. The two connote different situations, functions and idea. They are not same and identical. In the system of labour supplier there is an introduction of middleman who make the workers available as a commodity without creating any employer and employee relationship with principle employer and the contract labour but outsourcing as such is not the involvement of a middleman for arranging the labour force bit it is the system where a particular kind of job or performance itself is performed by third party, i.e., the service provided through his own man and it is the own result which is made available to purchaser or buyer.

28. Regarding the merits and demerits of outsourcing there are different views but this Court is not required to go therein since the discussion about "Outsourcing" made above was only in furtherance to understand what the G.O. intend to do, in effect, and, whether in view of relevant provisions of statute, it is permissible to do so.

Relevant Statutes

29. The relevant statutes which have been referred to by both sides are Act, 1921 and U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 *(hereinafter referred to as the "Act, 1971").*

30. Act, 1921 is pre-constitutional enactment. Prior thereto the secondary education was also governed and managed by Allahabad University. Act 1921 was enacted to establish a Board to take place of Allahabad University for regulating and

supervising High School and Intermediate Education system in U.P. and prescribe courses therefor. It constituted Board of High Schools and Intermediate, U.P. *(hereinafter referred to as the "Board").*

31. Here a question incidentally may also arise as to the status of "Board". This came up for consideration before a Division Bench of this Court in **Ghulam Haqqani Khan Vs. State Of Uttar Pradesh And Ors, AIR 1962 Alld. 413**. Two separat but concurrent judgments were rendered by Hon'ble B. Mukerji and S.C. Manchanda, JJ. The two questions formulated by Bench are stated in para 33a of the judgment, reads as under:

"(1) Whether the Board is a statutory authority, and if so, whether it is possible to create a statutory body as a department of Government?

(2) If the Legislature under Act II of 1921; has fixed the ambit and scope of the powers to be exercised by such statutory body can any one else interfere therewith or enlarge their scope?"

32. Hon'ble Manchanda, J. observed that the Legislature intended the Board to be independent only in certain respects subject to overriding fiscal and general administrative control of Government. It referred to and relied on a G.O. dated 13.04.1951 stating that the office of Board of High School is separate from that of Director of Education and appointments to higher clerical posts in any one of those offices are to be confined to clerks of that office only. This means that for certain purposes Board is treated separate from Education Department and normally higher clerical posts are not interchangeable. It further observed that there is no inherent impossibility in a statutory authority being at the same time a department of Government unless the Act itself, which creates the authority, gives it a separate legal status, i.e., provides it with the right of perpetual succession, a common seal, right to sue and to be sued in its own name. Such a body as the Board, cannot have a separate legal existence for all purposes. It must, necessarily, in the matter of administration and fiscal control, be under the authority of someone else. His Lordship also observed that:

"It is true that the Act itself nowhere says that it shall be a department of Government but when the historical background is taken into consideration the appointments of the staff from the very inception of the Board were made by the Government, salaries to the ministerial staff were paid by the Government; the appointments, transfers, suspension and removal were always by the Government--the budget provisions for the Board were made by the State Government--shows that the Board was always treated as a department of Government for all purposes other than those powers which the Act itself had specifically conferred and made the Board autonomous to that extent."

33. In the concurring judgment, Hon'ble B. Mukerji, J. in para 10 said:

"10. It was not shown to us that the Board was ever treated as a Corporation or a body incorporated or it exercised any privileges peculiar to such bodies. I could think of no law, and none was shown to us, on which it could be contended that simply because a certain body was created by statute that body could not function as a Department of Government so as to be outside the scope of the executive power of

the Governor under Article 154 of the Constitution. Clause (2) (b) of this Article conferred powers on Parliament and the State Legislature under which either could confer by law functions on any authority subordinate to the Governor but because of the provisions of Clause (2) (a) the Governor could not exercise 'Executive power' where such functions had been, conferred on any other authority by any existing law."

34. Again a Hon'ble Single Judge of this Court in **Sangam Lal Dube Vs. Director of Education and another, AIR 1957 All 70** considered "Board's" status. Therein an order was passed by Director of Education transferring Sri Sangam Lal Dube who was working as Clerk in Board to the office of Government Normal School, Aligarh. The power of Director was challenged on the ground that Board is not part of Education Department and, therefore, Director has no such power. The contention was upheld in para 30 of the judgment, which reads as under:

"30. Various provisions of the Code and Financial Hand Book were placed before me to show that the powers of the Director and that of the Board are mutually exclusive. District powers are given to the Secretary of the Board and to the Deputy Director of Education. It is not necessary for me to refer to all of them, but in my opinion the Board cannot be regarded as a part of the Education Department of the State so as to be under the control of the Director of Education.

Apart from it as I have already indicated the power to punish the staff of the Board has been given to the Secretary and I find that in the present case the transfer was in fact punishment awarded to the petitioner. The Director had in my opinion no power to transfer him. There is another aspect of the matter to be considered. If the Board of Education is a body created under the Act the staff of the Board is not a part Of the Education Department. The transfer to some other office in fact amounts to termination of the services of the petitioner in the office and re-employment in another office and in that view of the matter also the opportunity should have been given to the petitioner."

35. I, however, do not find any contradictory opinion expressed in the later two judgment for the reason that the Hon'ble Single Judge has simply held that Board is not a part of Education Department but did not held that it cannot be treated to be a Department of Government for any purpose whatsoever which was the decision taken by Division Bench in **Ghulam Haqqani Khan (supra).**

36. Section 2 sub-section (a) of Act, 1921 defines "Board" as the Board of High School and Intermediate Education and its constitution is provided in Section 3. The members of Board can be removed by the State Government as provided in Section 3-A and the term of the office of members is provided in Section 4. Section 5 contemplates that the Board shall be reconstituted before expiry of term of office of members under Section 4. The constitution of Board in Section 3 and its functions as provided in Section 7 makes it clear that Board is a statutory body, independent of Government, having several members connected with Government or its various institutions but also several members belonging to other bodies like, Kendriya Vidyalaya Sangathan, State Legislative Assembly, State Legislative Council and private recognised institutions

not maintained by the State Government etc. The State Government, however, has been conferred with power to address the Board with reference to any of the work conducted or done by Board and also to communicate it the Government views on any matter with which the Board is concerned. Under sub-section (3) and (4) of Section 7 of Act, 1921 the State Government can issue directions "consistent with the Act" which the Board shall be obliged to comply. The State Government also has power to make amendment in the regulations without making any reference to Board.

37. Thus, initially when Act, 1921 was enacted, power and authority enjoyed by private managements of educational institutions left intact, i.e., remained untouched. However, subsequently, it was found that protection is needed to avoid mismanagement of institutions and, therefore, a major amendment was made in 1958 extending and enlarging statutory power of supervision by the educational authorities upon the private management. This included provisions relating to framing of scheme of administration which would include provisions relating to management and conduct all the affairs of institution concerned, Power of approval of scheme of administration, and certain matters relating to staff of the College. In fact Section 16-A to 16-G were inserted by U.P. Act No. 36 of 1958.

38. For the purpose of present case Section 16-G is relevant which has also been relied, referred to and read repeatedly by learned counsels for the parties.

39. Section 16-G deals with "conditions of service of Heads of institutions, teachers and other employees". Sub-section (1) and (2) thereof reads as under:

"16-G. Conditions of service of Heads of institutions, teachers and other employees.- *(1) Every person* ***employed in*** *a recognized institution shall be governed by* ***such conditions of service*** *as may be prescribed by regulations and any agreement between the management and such employee in so for as it is inconsistent with the provisions of this Act or with the regulations shall be void.*

(2) Without prejudice to the generality of the powers conferred by sub-section (1), regulations may provide for-

(a) the period of ***probation****, the conditions of* ***confirmation*** *and the procedure and conditions for* ***promotion*** *and* ***punishment,*** *including* ***suspension*** *pending or in contemplation of* ***inquiry*** *or during the pendency of* ***investigation, inquiry or trial*** *in* ***any criminal case*** *for an offence involving moral turpitude and the* ***emoluments for the period*** *of suspension and* ***termination of service*** *with notice;*

(b) the scales of ***pay*** *and* ***payment of salaries;***

(c) ***transfer*** *of service from one recognized institution to another;*

(d) grant of ***leave*** *and* ***Provident Fund*** *and* ***other benefits****; and*

(e) ***maintenance of record of work and service."***

(emphasis added)

40. The conditions of service for which Regulations framed under Section

16-G, are provided in Chapter-III of the Regulations under Act, 1921.

41. Chapter I deals with "Scheme of Administration" and contains provisions in respect to subject covered by Sections 16-A, 16-B and 16-C. Chapter-II deals with "Appointments of Heads of institutions and teachers" with reference to Section 16-E, 16-F and 16-FF". The "conditions of service" with reference to Section 16-G are contained in Chapter-III.

42. Regulation 100 apply various provisions of Chapter-III to Class-III and Class-IV staffs of Secondary Schools and Colleges. This provision was inserted by notification No. 7/562-5-8 dated 10.03.1975 and reads as under:

"100. लिपिक, जिसमें पुस्तकालयाध्क्ष भी सम्मिलित है, के सम्बन्ध में प्रबन्ध समिति तथा चतुर्थ श्रेणी कर्मचारी के सम्बन्ध में आचार्य/ प्रधानाध्यापक नियुक्ति प्राधिकारी होगा। लिपिकों, जिसमें पुस्तकालयाध्यक्ष भी सम्मिलित हैं, तथा चतुर्थ श्रेणी कर्मचारियों की नियुक्ति, परिवीक्षा, जिसकी अवधि एक वर्ष की होगी, स्थायीकरण एवं सेवा शर्तों आदि के संबंध में आवश्यक परिवर्तन सहित ऊपर के विनियम 1, 4 से 8, 10, 11, 15, 24 से 26, 30, 32 से 34, 36 से 38, 40 से 43, 45 से 52, 54, 66, 67, 70 से 73 तथा 76 से 82 के प्रावधान लागू होंगे, किन्तु चतुर्थ श्रेणी कर्मचारियों के सम्बन्ध में विनियम 77 से 82 के प्रावधान तभी लागू होंगे जब इस सम्बन्ध में राज्य सरकार द्वारा आवश्यक निर्देश निर्गत किये जायेंगे। इन कर्मचारियों के सम्बन्ध में विनियम 9, 12, 13, 14, 16 से 20, 27, 28, 54, 55 से 65 तथा 97 के प्रावधान लागू नहीं होंगे।"

43. These Regulations talk of probation, confirmation etc., i.e., the provisions relating to conditions of service and confirmation. The existing provisions, therefore, under Act, 1921 read with Regulations framed thereunder nowhere control, check or obstruct the power of management of a Secondary institution regarding recruitment and appointment of Class-III and Class-IV staff in any manner except to the extent of providing conditions relating to eligibility etc. and that too in the context of the fact that in recognised and aided educational institutions the payment of salary to the staffs is the responsibility of State Government and, therefore, the number of posts of Class-III and Class-IV staffs is also regulated by State Government, otherwise in all matters management of an educational institution (Secondary) is free and enjoy the power of recruitment and appointment of Class-III and Class-IV staff to the extent it requires for smooth working and functioning of institution.

44. The regulation of payment of salary is vide Act, 1971 which is applicable to the institutions which are recognised and receiving maintenance grant from the State Government. Section 10 of Act, 1971 makes the State Government liable for payment of salary of teachers and employees of every institution in respect of any period after 31.03.1971. It is in this context vide Section 9 a restriction has been imposed upon an institution not to create a new post of teacher or other employee except with the previous approval of Director or such other Officer as may be empowered in that behalf by Director. Here also the power of creation of post has been left with institution but in order to attract the provisions of Act, 1971 for a valid creation of post, an approval by Director or other officer as empowered by Director, is necessary. There is no power of abolition of any post in an institution conferred upon the Director or any officer. Power of appeal cannot be identified with power of creation but it is only regulatory.

45. A comprehensive reading of various provisions of Act, 1921 and in

particular Section 16-G it is thus evident that power to frame Regulations has been conferred in respect to matters relating to "conditions of service" and nothing else. The term "conditions of service" is not wide enough to include every stage commencing from recruitment or appointment and thereafter. There is a distinction between the term "recruitment" and "conditions of service". It is worthwhile to mention that in Article 309 of the Constitution both these terms have been used in respect to Legislative power and in that context have been considered by Courts.

46. In service jurisprudence three terms are of wide application, have a definite concept and well known to those who deal in the subject. This is called "common parlance". These three terms are "recruitment", "appointment" and "conditions of service".

47. The meaning of term "recruitment" and its distinction vis a vis "appointment" came to be considered in **Prafulla Kumar Swain Vs. Prakash Chandra Misra, 1993 Supp. (3) SCC 181** and the Court said that the term "recruitment" connotes and signifies enlistment, acceptance, selection or approval for appointment. Certainly, this is not actual appointment or posting in service. In contradiction thereto the word "appointment" means the actual act of posting a person to a particular office. Similarly, in **K. Narayanan Vs. State of Karnataka, 1994 Supp. (I) SCC 44** the Court said that "recruitment" according to dictionary meaning "enlistment". It is a comprehensive term and includes any method provided for inducting a person in public service. However, in the context of the case the Court proceeded to observe that appointment, selection, promotion, deputation are well known methods of recruitment and even appointment can be made by transfer.

48. The term "conditions of service" is also no more res integra having been considered and defined by Courts time and again.

49. One of the earliest known case considering the term "conditions of service" is **North West Frontier Province Vs. Suraj Narain Anand, Vol. LXXV Indian Appeals 343.** Therein Privy Council considered the term "conditions of service" as mentioned in Section 243 of Government of India Act, 1935. It says that the term "conditions of service" must mean all the conditions on which a man serves and they must include inter alia the tenure of his service, the method by which he may be dismissed or reduced in rank etc.

50. In **State of Madhya Pradesh Vs. Shardul Singh, 1970(1) SCC 108** the Court explain the expression "conditions of service" as under:

"The expression "conditions of service" is an expression of wide import. It means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc."

51. In **I.N. Subba Reddi Vs. Andhra University, 1977(1) SCC 554** the Court explain the term as under:

"The expression 'conditions of service' means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his

retirement and even beyond it, in matters like pension etc."

52. Same view was taken in para 6 of the judgment in **Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and another, 1977(2) SCC 457.**

53. **In Lily Kurian Vs. Sr. Lewina and others, 1979(2) SCC 124** in para 13 of the judgment, the Court referred to above decisions and observed that the expression "conditions of service" includes everything from the stage of appointment to the stage of termination of service and even beyond including the matter pertaining to disciplinary action.

54. Again it came for consideration in **Syed Khalid Rizvi and others Vs. Union of India and others, 1993(3) SCC 575**. The Court formulated a question, whether seniority is a condition of service or part of rules of recruitment. It observed that conditions of service may be classified as salary, confirmation, promotion, seniority, tenure or termination of service etc. The Court considered whether a right to promotion and right to be considered for promotion constitute a condition of service. Referring to a Constitution Bench decision in **Mohd. Shujat Ali and others Vs. Union of India and others, 1975(3) SCC 76** the Court observed that a rule which confers a right to actual promotion or a right to be considered for promotion is a rule prescribing a condition of service. It also refers to another Constitution Bench decision in **Mohd. Bhakar Vs. Krishna Reddy, 1970 SLR 768** observing that any rule which affects the promotion of a person relates to his condition of service. Then it also refers to a further earlier judgment of Apex Court in **State of Mysore Vs. G.B. Purohit, C.A. No. 2281 of 1965**, decided on 25.01.1967 to hold that a rule which merely effects chances of promotion cannot be regarded as varying a condition of service. Chances of promotion are not conditions of service. Same view was reiterated in a later Constitution Bench decision in **Ramchandra Shankar Deodhar and others Vs. The State of Maharashtra, 1974(1) SCC 317.** All these decisions were harmonized by Court in Syed Khalid Rizvi (supra) observing that if an employee was initially recruited into service according to Rules and promotion was regulated in the same Rules to higher echelons of service, in that arena, promotion may be considered to be condition of service.

55. In a Division Bench decision of this Court the above decisions have been referred to and this Court in **Dr. Rajeev Ranjan Mishra and others Vs. State of U.P. and others, 2008)(1) ESC 595** has said:

*"The distinction between rule of "recruitment" and "condition of service" is no more res integra having already been settled by the Apex Court in a catena of cases. In **State of U.P. Vs. Shardul Singh 1970(1) SCC 108** the Apex Court held that the term "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment till retirement and even pension etc. It was reiterated in **I.N. Subbareddy Vs. State of A.P. 1997(1) SCC 554. In Syed Khalid Rizvi Vs. Union of India 1993 Supp (3) SCC 575** the Apex Court held where a rule permits relaxation of provisions pertaining to "conditions of service", the same would be applicable to the condition after appointment to the service in accordance with rules. It also*

held that that "conditions of recruitment" and "conditions of service" are distinct and the latter is preceded by an appointment according to rules, the former cannot be relaxed."

"Part 3, 4 and 5 contain rules of recruitment which includes rules pertaining to reservation, eligibility and other qualifications with respect to nationality, educational qualifications, age, character, marital status, physical fitness etc. and procedure for recruitment. The rules pertaining to 'recruitment' cannot be relaxed by exercising power under Rule 26 since such rules are not relaxable."

56. The above decision has been followed in **Devendra Nayak and another Vs. State of U.P. and others, Writ Petition No. 55988 of 2009,** decided on 24.02.2011.

57. There is a Full Bench judgment of Gujarat High Court also dealing with this issue in **A.J. Patel and others Vs. The State of Gujarat and others, AIR 1965 Guj 234a.** The judgment was rendered by Hon'ble K.T. Desai, C.J. and in para 27, with reference to the terms "recruitment" and "conditions of service" mentioned in Article 309 of the Constitution, His Lordship said:

"From this Article it is evident that rules relating to the recruitment of persons to public services and posts are distinct from rules relating to the conditions of service. The conditions of service are conditions applicable to persons who have been appointed to public services and posts. The terms and condition relating to recruitment and relating to appointment to public services and posts must, therefore, be regarded as distinct and different from the conditions of service governing persons on their appointment to public services and posts."

58. In the context of above exposition of law, if this Court looks into Section 16-G it is evident that it talks of only "conditions of service" of such person who is employed in a recognised institution. Therefore, to attract Section 16-G authorising the competent authority to frame Regulations thereunder, the condition precedent is that the person must be employed in a recognised institution. The Regulations relating to condition of service presupposes an existing employed person. That being so, in my view, Section 16-G authorised the competent regulation framing authority to make Regulations dealing with "conditions of service" to a stage which comes after employment of a person in a recognised institution and not earlier thereto. This is how sub-section (1) of Section 16-G confers general powers of regulation framing. The above view is further fortified from the fact that various categories in respect whereto the conditions of service can be laid down by regulations all come after appointment of a person and not till the stage of appointment. Besides, Section 16-G, no other provision has been shown to this Court authorising the Board or Government to frame regulations dealing with recruitment and appointment of staffs, teaching and non-teaching, of a recognised institution. The only other provision whereby the State Government possesses certain power either to modify, rescind or make any Regulations or to issue instructions to the Board in a particular manner, is Section 9 but it is also restricted, i.e., only in the matters which are consistent with this Act, i.e., Act, 1921 and not beyond thereto. Therefore, Section 9 would also

cover only those subjects which are consistent with the Act and not otherwise.

59. The impugned G.O. in the opening paragraph deals with the subject, pay scale, which is admittedly a condition of service and, therefore, there cannot be any apparent objection with regard to Legislative power or competence of the State Government in issuing the aforesaid G.O. But Para 2 thereof deals with a subject which has nothing to do with revision of pay scale as such. It hampers the power of Management or employer regarding recruitment and appointment of Class-IV employees in a recognised institution. Apparently this power is not shown to be supported by any provision of Act, 1921. To my mind it would not be included within the provision of Section 16-G also. Once it is evident that the power is not referable to Act, 1921, or any other statute, this would be ex facie ultra vires. For this reason alone this Court could have no hesitation in holding Para 6 of G.O. dated 06.01.2011, ultra vires and illegal in so far as it restrain the Management of recognised Secondary Educational Institutions from recruiting and appointing non-teaching staffs, i.e., Class-IV posts.

60. Even otherwise, Para 2 of G.O. to my mind would be contrary to certain regulations which provides the procedure and manner in which appointment shall be made by Secondary Educational Institutions on Class-III and Class-IV posts. There is no prohibition in making appointment on Class-IV posts against sanctioned posts available in recognised educational institutions. The G.O. in question cannot be said to be a regulation framed under Act, 1921. It also does not satisfy the condition precedents so as to partake the nature of an order issued by State Government under Section 9(3) and (4) of Act, 1921. The G.O. is basically a general order issued to various departments with respect to revision of pay and in that context it has been issued in reference to Secondary Educational Institutions also.

61. Moreover, in the context of what it has permitted to be done by educational institutions, there also I am of the view that this order is palpably arbitrary, discriminatory, exploitative in nature and, therefore, suffers the voice of contravening constitution provision under Article 14 and 16. It is not a case where requirement of Class-IV staffs in educational institutions has been done away. The existing sanctioned posts of Class-IV have not been abolished. It is nobody's case that henceforth educational institutions shall not require any Class-IV staffs in its functioning. What it suggests and try to endeavour is that the educational institutions shall not employ Class-IV staff directly on their own so as to function and discharge the duties of Class-IV staff under the administrative and otherwise control of institution, but, the work supposed to be performed by Class-IV staff would be required to be done through the staff made available by an outside agency and by that agency's staffs. In true sense though it is termed "outsourcing", but it does not satisfy the requirement of term "outsourcing", as discussed above.

62. The normal functions of Class-IV staff in a secondary educational institution is ringing of bell, opening of class rooms, cleaning, providing stationary etc. from office to class teachers, taking files and other documents like examination copies etc. from one place to other and similar other menial job. All this work of Class-IV has to be performed by a person present in

educational institution itself. It cannot be performed sitting outside the educational institution. Therefore, what the G.O. suggests is that for performing menial job of Class-IV, the workers shall be made available by a third party, by whatever name it may be called, may be a labour supplier, may be a Service Provider or else but in effect it amounts to introduction of a "middleman" for arranging Class-IV employees to perform the job of Class-IV in educational institutions for which the institutions shall pay the service charges which would include wages/salary of such person (Class-IV) and also the service charges of third party. This is nothing but a kind of contract labour arrangement.

63. Introduction of a middlemen where the requirement is perennial, continuous and permanent has been deprecated time and again and many statutes enacted with an objective to exclude middleman have been held to be in public interest. This is really strange that herein the State Government intend to introduce a system of middleman when it is not already there. Learned Additional Advocate General also could not explain that besides wages/salary of the person who would be available to educational institution for performing the job of Class-IV employee, the service charges to third party would also be paid and in these circumstances how it can be an arrangement for saving the cost. To this query he could not reply at all.

64. In my view, therefore, though the concept of making available the staff to perform Class-IV job by outside agency though termed "Outsourcing" but it is nothing but a system of supply of work force through a contractor or a person who satisfy the term "contractor" for all purposes though termed as "outsourcing". Hence the system as contemplated in Para 2 of impugned G.O. is evidently exploitative, arbitrary, unreasonable, irrational, illogical, hence violative of Article 14 and 16 of the Constitution.

65. This Court has also considered Para 2 of G.O. dated 06.01.2011 in **Luv Kush Pandey (supra)** and has referred to various statutory provisions in Act, 1921 and Regulations framed thereunder. However, while reading down the G.O. so as not to cover the vacancies occurred before issuance of said order, the Court has observed as under:

"Learned counsel for the State has not been able to satisfy the object behind banning the regular process of appointment against a clear vacancy on class IV post and getting it filled up by outsourcing.

The outsourcing, not being a matter of recruitment under the Act and the Regulations, could not have been introduced by means of a Government Order. It is also to be taken note of that in the instant case the vacancy had occurred on 28.2.2010, i.e. much before the issuance of Government Order dated 6.1.2011. Prior permission was granted by the Director of Education on 21.12.2010, i.e. before issuance of the aforesaid Government Order. The appointment, however, was made after issuance of the Government Ord0.79"er dated 6.1.2011. The vacancy having occurred prior to the Government Order dated 6.1.2011, cannot be taken to be a future vacancy so as to restrain the Principal from filling up the post for both the reasons aforesaid, viz. (1) the restraint order could not have been issued for banning the appointment on a clear vacancy of class IV post through regular process of appointment and substituting it

by a new method of appointment which is not envisaged under the Act and the Regulations framed thereunder and also for the reason that the aforesaid ban, if at all is to be upheld then it has to be read down for appointments on future vacancies i.e. which had occurred after the issuance of the Government Order dated 6.1.2011 and not for the vacancies which had occurred earlier."

66. In the aforesaid decision this Court though has doubted the correctness of Para 2 of G.O. but has not ultimately adjudicated thereon and left the issue open since the facts in that case show that vacancies had occurred prior to G.O. dated 06.01.2011 and, therefore, the Court by merely reading down the G.O. upheld selection made by educational institution on Class-IV posts. The observations therein, however, show that Court doubted the justification of Government's decision for banning regular appointment on Class-IV posts and getting it filled up by outsourcing but did not make a final adjudication on this aspect. This is evident from the question posed by Court, as is evident from following:

"The question, however, arises whether the State Government could have issued a blanket restraint order on making appointment on a class IV post on which (1) vacancy has occurred prior to the issuance of the banning order dated 6.1.2011, (2) the vacancy has occurred after the aforesaid Government Order dated 6.1.2011, and (3) whether such a ban can be imposed for making appointment as per the statutory provision and allowing appointment by adopting the process of outsourcing."

67. Since the wider issue of validity has not been decided therein, it cannot be said that except to the extent the G.O. in question has been read down by this Court, rest of G.O. stands affirmed by aforesaid judgment. A judgment is a binding precedence to the extent a issue is raised, argued and decided therein. It is not to be read as a statute. It cannot be read to cover something to which it has made no adjudication. I, therefore, find no obstruction in proceeding to consider the validity of Para 2 of G.O. dated 06.01.2011 in these sets of writ petitions where this issue has been specifically raised, argued and the Court has been called upon to adjudicate thereon.

68. In the result, following writ petitions are decided in the following manner:

(A) The Writ Petitions No. 11670 of 2011, 27387 of 2011, 27388 of 2011, 45111 of 2011, 33140 of 2011, 64630 of 2011, 68199 of 2011, 68591 of 2011, 68592 of 2011, 62476 of 2011, 63197 of 2011 and 1432 of 2012 are allowed to the extent that Para 2 of G.O. dated 06.01.2011 is struck down in its application to Secondary Educational Institutions recognised by the Board and governed by provisions of Act, 1921 and the Regulations framed thereunder, being illegal, arbitrary, unconstitutional and ultra vires.

(B) Writ Petitions No. 62616 of 2011, 50905 of 2011, 8492 of 2012, 49269 of 2011, 63653 of 2011, 67140 of 2011, 61539 of 2011, 62465 of 2011, 631 of 2012 and 74197 of 2011 are allowed to the extent that orders impugned passed by State Government/educational authorities, pursuant to Para 2 of G.O. dated 06.01.2011, which has already been struck down, as above, are hereby set aside. They are directed to pass fresh order in

accordance with law and in the light of the observations made above.

(C) The Educational Authorities are also directed not to obstruct the process of selection and appointment on Class-IV posts in Secondary Educational Institutions only on the basis of Para 2 of G.O. Dated 06.01.2011.

69. The Writ Petition No. 45708 of 2011 is disposed of directing the competent educational authorities to pass appropriate order on the matter of approval on selections made in educational institutions concerned for appointment on Class-IV posts expeditiously and in any case within a period of one month from the date of production of a certified copy of this order.

70. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.03.2012

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE D.K. UPADHYAYA,J.

Misc. Bench No. 12898 of 2011

Chandradev Ram Yadav(Karaili)Minister Small Scale ...Petitioner
Versus
Lokayukta U P 14 B Mall Avenue Lal Bahadur Shastri Marg ...Respondents

Counsel for the Petitioner:
Sri Anupam Mehrotra

<u>Advocate Act, 1961-Section-30</u>-Ban on appearance of Advocate before up-lokayukta-by virtue of notification dated 09.06.2011 provision of Section 30 of Act-fully applicable denial by up Lokayukta-held-not proper-person facing enquiry has right to appear through Counsel.

Held: Para 17

To the extent above, there appears to be no room of doubt that in view of the notification of the Government of India, the Advocates have right to appear before the Lokayukta. However, the appearance of Advocates does not mean that the person against whom the investigation is pending, has got right to represent the cause only through the counsel. The Lokayukta has got right to call for and ensure personal appearance of person against whom the investigation is pending, and to pass appropriate order in compliance of the statutory provisions during the course of investigation. However, the Lokayukta may not restrain the Advocates from appearing before him/her to contest the cause of a person against whom investigation is pending under the Act.

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

1. Present writ petition under Article 226 of the Constitution of India has been preferred feeling aggrieved with the respondent Lokayukta in not permitting an Advocate to appear and contest the pending investigation under Lokayukta and Uplokayukta Act, 1975 (in short the Lokayukta Act).

2. Sri Anupam Mehrotra learned counsel for the petitioner submits that in view of notification dated 9.6.2011, issued by the Central Government, under Section 30 of the Advocates Act, 1961, the Advocates may appear before the Lokayukta also apart from other authorities where the evidence is recorded during the course of a proceeding.

3. The petitioner, who is a Former Cabinet Minister of the State of U.P., is facing investigation before the Lokayukta of the State with regard to certain misconduct alleged to have been committed by him while discharging obligation as Cabinet Minister of the State of U.P. During the course of investigation, the petitioner tried to defend his cause through an Advocate but it was declined by the Lokayukta. Hence, the present writ petition has been preferred.

4. Apart from claiming relief in the nature of mandamus to permit an Advocate to appear and defend the petitioner's cause before the Lokayukta, a prayer has also been made that the pending proceeding before the Lokayukta suffers from lack of jurisdiction hence it be set aside.

5. So far as the petitioner's prayer to quash the proceeding before the Lokayukta is concerned, we are of the view that it is always open to petitioner to approach the Lokayukta with regard to alleged illegality on which the Lokayukta may record his finding in accordance with law. However, the argument advanced by the petitioner's counsel to the effect that an Advocate is entitled to appear before the Lokayukta, requires consideration. Accordingly, we entertain the writ petition and record our finding to the limited extent with regard to right of Advocates to appear before the Lokayukta.

6. The Lokayukta is appointed under Section 3 of the Lokayukta Act for the purpose of conducting investigation relating to a complaint of citizen. The power conferred on the State Government to appoint the Lokayukta, has been provided under Section 3 of the Lokayukta Act which provides that the Lokayukta shall be appointed after consultation with the Chief Justice of the High Court of Judicature at Allahabad and the leader of the Opposition in the Legislative Assembly, and if there be no such Leader a person elected in this behalf by the members of the Opposition in that House in such manner as the Speaker may direct.

7. Section 7 of the Lokayukta Act deals with the matters which may be investigated by Lokayukta or Up-Lokayukta. For convenience, Section 7 is reproduced as under:

7.Matters which may be investigated by Lokayukta or Up-Lokayukta--

(1) Subject to the provisions of this Act and on a complaint involving a grievance or an allegation being made in that behalf, the Lokayukta may investigate any action which is taken by, or with the general or specific approval of,--

i) a Minister or a Secretary; and

(ii) any public servant referred to in sub-clause (ii) or sub-clause (iv) of clause (j) of Section 2; or

(iii) any other public servant being a public servant of a class or sub-class of public servants notified by the State Government in consultation with the Lokayukta in this behalf.

(2) Subject to the provisions of this Act and on a complaint a grievance or an

allegation being made in that behalf, an Up-Lokayukta may investigate any action which is taken by or with the general or specific approval of any public servant not being a Minister, Secretary or other public servant referred to in sub-section (1).

(3) Notwithstanding anything contained in sub-section (2), the Lokayukta may, for reasons to be recorded in writing, investigate any action which may be investigated by an Up-Lokayukta under that sub-section.

(4) Where two or more Up-Lokayuktas are appointed under this Act, the Lokayukta may, by general or special order, assign to each of them matters which may be investigated by them under this Act:

Provided that no investigation made by an Up-Lokayukta under this Act and no action taken or thing done by him in respect of such investigation shall be open to question on the ground only that such investigation related to a matter which is not assigned to him by such order."

8. A plain reading of the aforesaid provisions, reveals that subject to provisions of the Act, on a complaint involving a grievance or an allegation being made in that behalf, the Lokayukta may investigate and recommend to Government.

9. Section 8 of the Lokayukta Act provides that Lokayukta/Up-Lokayuktas shall not conduct any investigation except on a complaint made under and in accordance with Section 9 of the Lokayukta Act. Section 9 contains to the provisions with regard to complaints. For convenience, Section 9 is reproduced as under:

9. Provisions relating to complaints--(1) Subject to the provisions of this Act, a complaint may be made under this Act to the Lokayukta or an Up-Lokayukta--

(a) in the case of a grievance, by the person aggrieved;

(b) in the case of an allegation, by any person other than a public servant;

Provided that, where the person aggrieved is dead or is for any reason unable to act for himself, the complaint may be made by any person who in law represents his estate or, as the case may be, by any person who is authorised by him in this behalf:

[Provided further that in the case of a grievance involving a complaint referred to in sub-clause (ii) of clause (d) of Section 2, the complaint may be made also by an organization recognised in that behalf by the State Government.]

(2) Every complaint shall be accompanied by the complainants' own affidavit in support thereof and also affidavits of all persons from whom he claims to have received information of facts relating to the accusation, verified before a notary, together with all documents in his possession or power pertaining to the accusation.

(3) Every complaint and affidavit under this section as well as any schedule or annexure thereto shall be verified in the manner laid down in the Code of Civil

Procedure, 1908, for the verification of pleadings and affidavits respectively.

(4) Not less than three copies of the complaint as well as of each of its annexures shall be submitted by the complainant.

(5) A complaint which does not comply with any of the foregoing provisions shall not be entertained.

(6) Notwithstanding anything, contained in sub-sections (1) to (5), or in any other enactment, any letter written to the Lokayukta or Up-Lokayukta by a person in police custody, or in a gaol or in any asylum or other place for insane persons, shall be forwarded to the addressee unopened and without delay by the Police Officer or other persons in charge of such gaol, asylum or other place, and the Lokayukta or Up-Lokayukta, as the case may be, may entertain it and treat it as a complaint, but no action in respect of such complaint shall be taken unless it is accompanied or subsequently supported by an affidavit under sub-section (2)."

10. Keeping in view the provisions contained in sub-section (2) of Section 9 read with sub-section (5) of Section 9, condition precedent for Lokayukta to exercise jurisdiction is that the complaint must be filed accompanied by complainant's own affidavit in support thereof along with the affidavit of all other persons from whom, he claims to have received information disclosing the facts relating to accusation. The affidavit should be verified before a Notary together with all documents in possession of the complainant and should be duly verified in accordance with provisions contained in the Code of Civil Procedure. Lokayukta cannot proceed unless the complainant complies with the provisions contained in sub-section (2), (3) and (4) of Section 9 of the Act subject to exception provided in sub-section (6) of Section 9 of the Act. The provisions contained in Section 9 of the Act being procedural in nature, hence in the event of non-compliance of statutory requirement the Lokayukta may direct the complainant to furnish affidavit in terms of provisions contained in sub-section (2) and (3) of Section 9 of the Act, before proceeding with the investigation.

11. The procedure with regard to investigation by Lokayukta has been provided under Section 10 of the Lokayukta Act. For convenience, Section 10 is reproduced as under:

10. Procedure in respect of investigations--(1) Whether the Lokayukta or an Up-Lokayukta proposes (after making such preliminary inquiry, if any, as he deems fit) to conduct any investigation under this Act, he--

(a) shall forward a copy of the complaint to the public servant concerned and the competent authority concerned;

(b) shall afford to the public servant concerned an opportunity to offer his comments on such complaint; and

(c)may make such orders as to the safe custody of documents relevant to the investigation as he deems fit.

(2) Every such investigation shall be conducted in private, and in particular, the identity of the complainant and of the public servant affected by the

investigation shall not be disclosed to the public or the press whether before, during or after the investigation:

Provided that, the Lokayukta or an Up-Lokayukta may conduct any investigation relating to a matter of definite public importance in public, if he, for reasons to be recorded in writing, thinks fit to do so.

(3) Save as aforesaid, the procedure for conducting any such investigation shall be such as the Lokayukta or, as the case may be, the Up-Lokayukta considers appropriate in the circumstances of the case.

(4) The Lokayukta or an Up-Lokayukta may, in his discretion, refuse to investigate or cease to investigate any complaint involving a grievance or, an allegation, if in his opinion--

(a) the complaint is frivolous or vexatious, or is not made in good faith; or

(b) there are no sufficient grounds for investigating or, as the case may be, for continuing the investigation, or

(c) other remedies are available to the complainant and in the circumstances of the case it would be more proper for the complainant to avail of such remedies.

(5) In any case where the Lokayukta or an Up-Lokayukta decides not to entertain a complaint or to discontinue any investigation in respect of a complaint, he shall record his reasons therefor and communicate the same to the complainant and the public servant concerned.

(6) The conduct of an investigation under this Act in respect of any action shall not affect such action, or any power or duty of any public servant to take further action with respect to any matter subject to the investigation."

12. A plain reading of Section 10 reveals that Lokayukta or Up-Lokayukta may conduct any investigation under the Lokayukta Act and for the purpose, shall forward a copy of the complaint to the public servant and the competent authority concerned. The Lokayukta may make such orders as to the safe custody of documents relevant to the investigation as he deems fit. It shall be obligatory on the part of the Lokayukta that the investigation may be conducted in private, and in particular, the identity of the complainant and of the public servant affected by the investigation, shall not be disclosed to the public or the press whether before, during or after the investigation. However, proviso (2) of Section 10 further provides that Lokayukta or an Up-Lokayukta may conduct any investigation relating to a matter of definite public importance in public, if he, for reasons to be recorded in writing, thinks fit to do so. Accordingly, it appears that ordinarily, the investigation conducted by the Lokayukta shall be in private without disclosing identity of complainant or the public servant to the people. However, in appropriate cases for the reasons to be recorded, the Lokayukta or Up-Lokayukta may conduct any investigation of public importance in public. But while holding an investigation in public, it shall be obligatory on the part of the Lokayukta to record its reason for going in public.

13. Section 11 of the Lokayukta Act further empowers the Lokayukta to record evidence. Sub-section (2) of Section 11, provides that Lokayukta or Up-Lokayuktas shall have powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908, for summoning and enforcing the attendance of any person and examining him on oath, requiring the discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any Court or office, and issuing commission for the examination of witnesses or documents. Sub-section (3) of Section 11 provides that any proceeding before the Lokayukta or an Up-Lokayukta shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code. For convenience, Section 11 is reproduced as under:

"11. Evidence--(1) Subject to the provisions of this section, for the purpose of any investigation (including the preliminary inquiry, if any, before such investigation) under this Act, the Lokayukta or an Up-Lokayukta may require any public servant or any other person who in his opinion is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such documents.

(2) For the purpose of any such investigation (including the preliminary enquiry) the Lokayukta or an Up-Lokayukta shall have all the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Central Act No.5 of 1908), in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requiring any public record or copy thereof from any Court or office;

(e) issuing commission for the examination of witnesses or documents;

(f) such other matters as may be prescribed.

(3) Any proceeding before the Lokayukta or an Up-Lokayukta shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code (Central Act No.45 of 1860).

(4) Subject to the provisions of sub-section (5), no obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to the State Government or any public servant, whether imposed by any enactment or by any rule of law, shall apply to the disclosure of information for the purpose of any investigation under this Act and the State Government or any public servant shall not be entitled in relation to any such investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by any enactment or by any rule of law in legal proceedings.

(5) No person shall be required or authorised by virtue of this Act to furnish any such information or answer any such

question or produce so much of any document--

(a) as might prejudice the security of the State or the defence or international relations of India (including India's relations with the Government of any other country or with any international organisation), or the investigation of detection of crime; or

(b) as might involve the disclosure of proceedings of the Cabinet of the State Government or any Committee of that Cabinet.

and for the purpose of this sub-section a certificate issued by the Chief Secretary certifying that any information, answer or portion of a document is of the nature specified in clause (a) or clause (b), shall be binding and conclusive.

(6) Subject to the provisions of sub-section (4), no person shall be compelled for the purpose of investigation under this Act to give any evidence or produce any document which he could not be compelled to give or produce in proceedings before a Court."

14. While making submission with regard to right of Advocates to appear before the Lokayukta, Sri Anupam Mehrotra learned counsel invited attention to the fact that the proceeding pending before the Lokayukta is judicial proceeding where evidence is recorded and a person is examined on oath. Accordingly, relying upon Section 30 of Advocates Act, 1961, it has been stated by the petitioner's counsel that being a judicial proceeding or even if Lokayukta is Tribunal or authority authority having right to record evidence, Advocates shall have right to appear before the Lokayukta. Section 30 of the Advocates Act, 1961 is reproduced as under:

"30. Right of advocates to practice--Subject to the provisions of this Act, every advocate whose name is entered in the (State roll] shall be entitled as of right to practice throughout the territories to which this Act extends.--

(I) in all courts including the Supreme Court;

(ii) before any tribunal or person legally authorised to take evidence and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice."

15. The Government of India, Ministry of Law and Justice has issued notification dated 9.6.2011. According to the notification as published in Lucknow Law Times Vol. LII, Issue 10, October 25, 2011 provides that in exercise of powers conferred by sub-section 3 (ii), of Section 1 of the **Advocates Act, 1961** (25 of 1961), the Central Government hereby appoints the 15th day of June, 2011 as the date on which Section 30 of the said Act shall come into force. For convenience, the notification dated 9.6.2011 is reproduced as under:

"[409] Ministry of Law and Justice (Deptt. of Legal Affairs), Noti. No.S.O. 1349 (E), dated June 9, 2011, published in the Gazette of India, Extra., Part II, Section 3 (ii), dated 9th June, 2011, p. 1, No.1139

[F.No.8(5)/88-IC]

In exercise of powers conferred by sub-section 3 (ii), of Section 1 of the **Advocates Act, 1961** (25 of 1961), the Central Government hereby appoints the 15th day of June, 2011 as the date on which Section 30 of the said Act shall come into force."

16. Number of cases cited by the learned counsel for the petitioner, need not be considered keeping in view the fact that Union of India has issued notification making Section 30 operative from the 15th day of June, 2011. Section 30 of the Advocates Act confers on Advocates the right to practise throughout the territories to which the Act extends. Thus, in all courts including Hon'ble Supreme Court, Advocates have right to appear and practise and represent the cause of litigants. Under Clause (2) of Section 30, the Advocates have got further right to appear before any Tribunal or person legally authorised to check the evidence. Undoubtedly, the Lokayukta has got power to take evidence keeping in view the statutory provisions contained in the Act. Accordingly, the Advocates have right to appear before the Lokayukta in view of the notification issued by the Union of India (supra).

17. To the extent above, there appears to be no room of doubt that in view of the notification of the Government of India, the Advocates have right to appear before the Lokayukta. However, the appearance of Advocates does not mean that the person against whom the investigation is pending, has got right to represent the cause only through the counsel. The Lokayukta has got right to call for and ensure personal appearance of person against whom the investigation is pending, and to pass appropriate order in compliance of the statutory provisions during the course of investigation. However, the Lokayukta may not restrain the Advocates from appearing before him/her to contest the cause of a person against whom investigation is pending under the Act.

18. To the extent as above, the writ petition is allowed. Subject to the order passed by the Lokayukta and in compliance of statutory provisions, the petitioner may be represented by the Advocate before the Lokayukta of the State of U.P. during the pendency of investigation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2012

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE DINESH GUPTA,J.

Civil Misc. Writ Petition No. 15112 of 2002

Vinod Kumar Sharma ...Petitioner
Versus
State of U.P. Thru' Secy. Rural Development and others ...Respondents

Counsel for the Petitioner:
Sri Anshu Chowdhary

Counsel for the Respondents:
Sri Yogendra Kumar Yadav
C.S.C.

Constitution of India, Article 226- Recovery of excess payment consequent to cancellation of promotional pay-without opportunity of hearing to petitioner-on ground the C.D.O. Was not empowered-undisputed-that petitioner completed 14 years regular service-no quarrel regarding entitlement of 1st P.P. After completing 14 years Service-if C.D.O. Not empowered commissioner

ought to have rectified but cancellation order-wholly uncalled for-order impugned quashed with direction to pay 1st P.P. From the date of completion of 14 years service with full satisfaction.

Held: Para 14

Issuance of order for grant of Time pay scale in pursuance of the G.O. dated 2.12.2000 was only formal and the Commissioner if vested with power for granting Time Pay Scale ought to have ratified the order of the CDO instead of cancelling it and issuing order of recovery which appears to be illegal on face of it as the petitioner was not being paid extra salary or any amount which he was not entitled to receive the same, therefore, recovery could not be made from him.

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

1. Heard Sri Anshu Chaudhary, learned counsel for the petitioner, Sri Yogendra Kumar Yadav, learned Standing counsel on behalf of the State of U.P. and perused the record.

2. This writ petition has been filed for quashing the order dated 30th March/1st April, 2002 and consequential order dated 4.4.2002 passed by respondent nos. 2 and 3 respectively.

3. The petitioner has prayed that the respondents may be directed not to recover alleged excess amount paid as salary to him from his salary.

4. The writ petition has been challenged on the ground that the impugned order has been passed in utter violation of principle of natural justice in as much as no notice or opportunity whatsoever was afforded to the petitioner before passing of the impugned order; that this order has been passed by ignoring the law laid down by the Apex Court as well as by this Court that once right accrues in favour of an employee, it cannot be taken away in such an arbitrary manner as has been done by the authority by the order impugned. It is stated that even if it is alleged that the employee was not entitled to it; even then the said order is against the law as it is well settled principle of law that the salary once paid to an employee cannot be recovered unless it is obtained by him by playing fraud or by misrepresentation upon the employer.

5. It is submitted that in the present case no such finding has been recorded by respondent no.2 in the impugned order, hence the amount paid to the petitioner in view of the order dated 11.6.2001 cannot be recovered and that in so far as the Government Order dated 13th May, 1999 is concerned, the financial and executive powers are vested in the Executive Director in so far as District Rural Development Agency, is concerned but as he had not passed the order therefore, it cannot be said to be bad on the ground that he was not empowered to grant promotional grade to the petitioner except the Commission. Even otherwise, the impugned orders are bad in law, arbitrary, unjust and illegal.

6. The facts culled out from the records in a nut-shell are that the petitioner was initially appointed on 3.5.1986 as Investigator (Technical) by the District Magistrate, Aligarh in District Rural Development Agency (hereinafter referred to as 'DRDA'). His services were regularized vide order dated 11.2.1987. However, on bifurcation of the District Aligarh in the year 1997, a new District namely, Hathras was carved out. On

account of creation of new District Hathras, the petitioner was transferred on the same post of Investigator (Technical) by the District Magistrate, Aligarh vide order dated 3rd July, 1998 to the District of Hathras which he was holding in District Aligarh.

7. By G.O. dated 2.12.2000 it was provided that those employees who put in 8 years of continuous service would be placed in Time Scale. This Government order is appended as Annexure-3 to the writ petition. In view of the fact that the petitioner had completed 8 years of service he was granted Time Scale/Additional Increments by the Project Director vide his order dated 22nd July, 1995. Since it was also provided in the aforesaid Government order dated 2.12.2000 that those employees who were in Time Scale under the Government Order dated 8.3.1995 would be placed in promotional pay scale on completion of 14 years satisfactory service. the Chief Development Officer/Executive Director, District Rural Development Agency, respondent no.3, vide his order dated 16.3.2001. This order was subsequently modified vide order dated 11.6.2001 granting promotional pay scale to the petitioner w.e.f. 3.5.2000 in furtherance of the Government order dated 10.4.2001. Accordingly, the petitioner was given promotional pay scale, which is the date on which he had completed of 14 years satisfactory service.

8. By the impugned order dated 30th March/1st April, 2002 the Commissioner, Rural Development, U.P. set aside the order dated 11.6.2001 passed by the Chief Development Officer/Executive Director, respondent no.3. He has further directed that the amount which the petitioner has received w.e.f. 3.5.2000 in pursuance of the order dated 11.6.2001 granting him promotional pay scale be recovered from the salary of the petitioner. Pursuant to thereof the petitioner was communicated that recovery is to be made from his salary, which has been paid to him allegedly in excess, in the promotional pay scale.

9. Counsel for the petitioner submits that the grievance of the petitioner is that he was entitled to the promotional pay scale w.e.f. 3.5.2000, hence salary of the promotional pay scale granted to him from the aforesaid date could not have been recovered by the State Government without affording him an opportunity of hearing and such action was against all cannons of principle of natural justice. He has placed before us the impugned order to establish that it has been passed primarily on the ground that Chief Development Officer/Executive Director had no power to grant promotional pay scale and he has exercised powers not vested in him. The petitioner in this regard has relied upon the order dated 13th May, 1999 in support of his case which was passed by the Secretary, State of Uttar Pradesh. It provides that the Executive Director of the DRDA is competent to exercise the financial as well as administrative powers. A copy of this order is appended as Annexure-9 to the writ petition.

10. It is then submitted by him that since right has accrued to the petitioner having been granted Time Pay Scale according to his entitlement, therefore, question of recovery of alleged excess in the order of recovery impugned in the writ petition is not only a misnomer. According to him, as nothing in excess of

salary to which he was entitled to having been paid to him the impugned order suffers from the vice of being in violation of principles of being illegal, arbitrary and against the principles of natural justice.

11. Learned counsel for the respondents submits that Chief Development Officer/Executive Director, respondent no.3 was not empowered or authorize to grant Time Pay Scale to the petitioner w.e.f. 3.5.2000 i.e. the date on which he alleges to have become entitled to after putting 14 years of service, therefore, the impugned order for recovery from the petitioner has rightly been passed.

12. After hearing counsel for the parties and on perusal of record we find that it has no where been disputed in the counter affidavit that the petitioner was not entitled to the promotional pay scale w.e.f. 3.5.2000, which was granted to him by the Chief Development Officer/Executive Director, respondent no.3 vide order dated 30th March/1st April, 2002 on serving the department for 14 years of continuous and satisfactory service. The claim of the petitioner in the nature of promotion by selection, rather is a claim where he became entitled to Time pay scale automatically on putting 14 years satisfactory service as per G.O. dated 2.12.2000.

13. In our considered opinion, the Chief Development Officer/Executive Director could have passed the order as he was exercising the powers parallel to that of the District Magistrate, who is the appointing authority of the district. In case any irregularity or an illegality was committed by the CDO in granting time scale, the Commissioner could have very well ratified the same as grant of time pay scale to the petitioner w.e.f. 3.5.2000 was automatic on putting 14 years of satisfactory service as provided in G.O. dated 2.12.2000 but there was no occasion for its cancellation.

14. From the record also it appears that no action has been taken by the State Government against the CDO/Executive Director, respondent no.3 for alleged exercise of power not vested in him. Even if the Commissioner would have passed the order granting Time Pay Scale to the petitioner he would also have granted it w.e.f. 3.5.2000 i.e. the day the petitioner had completed 14 years of continuous and satisfactory service. It is not the case of respondents that petitioner was not entitled to Time pay scale, w.e.f. 3.5.2000, rather the stand of respondents is that CDO/ Executive Director could not have passed the order and it ought to have been passed by the Commissioner. Since in any case the date of grant of pay scale would be 3.5.2000, there is no question of any excess payment of salary to him which is sought to be recovered by the impugned order. Issuance of order for grant of Time pay scale in pursuance of the G.O. dated 2.12.2000 was only formal and the Commissioner if vested with power for granting Time Pay Scale ought to have ratified the order of the CDO instead of cancelling it and issuing order of recovery which appears to be illegal on face of it as the petitioner was not being paid extra salary or any amount which he was not entitled to receive the same, therefore, recovery could not be made from him.

15. Nothing has been placed before us by the respondents that Commissioner has power to grant Time Pay Scale to the

petitioner and not the Chief Development Officer/Executive Director and Head of the Department.

16. For all the reasons stated above we quash the impugned orders dated 30th March/1st April,2002 and dated 4.4.2002 passed by respondent nos. 2 and 3 respectively. However, in the facts and circumstances of the case noted above and in order to bring finality to any irregularity in the orders passed by the CDO/Executive Director, we further direct the Commissioner to ratify the order with effect from the date the appellant has completed 14 years of satisfactory service.

17. The writ petition is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.20633 of 1988

Shyam Chandra Pathak ...Petitioner
Versus
The U.P. State Food And Essential Commodities Corporation ...Respondents

Counsel for the Petitioner:
Sri Janardan Sahai
Sri Sanjiv Ratna
Sri Sharad Kumar Srivastava
Sri D.N. Singh

Counsel for the Respondents:
Sri Srikant Shukla
S.C.

Constitution of India, Article 226- Regularization Claimed based upon judgments-prior to Uma Devi Case-ad-hoc employees working long period-not entitled for regularization-if appointed without post, without following process of recruitment-not entitled for regularization.

Held: Para 6

So far as Judgment of Hon'ble Single Judge relied by learned counsel for petitioner are concerned, all the judgments have been rendered before 10.4.2006 on which date Constitution Bench of Apex Court rendered decision in Secretary, State of Karnataka Vs. Uma Devi, 2006 (4) SCC 1 and held that all the judgments contrary thereto stand overruled and thus those judgments are no more applicable in view of aforesaid Constitution Bench Judgment. Moreover, it is also well settled that benefit of interim order cannot be extended in case ultimately petitioner is not successful in establishing his right.

Case law discussed:
Civil Misc. Writ Petition No. 20398 of 1988, Rakesh Kumar Saxena Vs. U.P. State Food and Essential Commodities Corporation Ltd. and others; Special Appeal No. (7) of 2008, Tek Chand and others Vs. U.P. State Food and Essential Commodities Corporation Ltd. and others; 2001 (1) AWC 287 (SC); Shivaji Singh and others v. High Court of Judicature at Allahabad and others, Civil Misc. Writ Petition No.52755 of 2002; 2006 (2) AWC 1738; 2006 (4) SCC 1; 2007 (2) ESC 987; AIR 1975 Allahabaad 280; 1986 (4) LCD 196; AIR 1994 Allahabad 273; JT 2009 (2) SC 520; J.T. 2009 (10) SC 309

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

1. Heard learned Counsel for petitioner and Sri Srikant Shukla for respondents 1 and 2.

2. Petitioner was engaged on purely ad hoc basis and by means of impugned order he has been terminated since his services were no longer required.

3. Learned counsel for petitioner relied on judgments of this Court in **Civil**

Misc. Writ Petition No. 12974 of 1987 (V.K. Gupta Vs. Regional Manager, U.P.) decided on 8.11.2005, **Civil Misc. Writ Petition No. 21346 of 1999 (Dinesh Singh Vs. U.P. State Food And Essential Commodities Corporation Ltd.** decided on 5.1.2006, **Civil Misc. Writ Petition No. 24833 of 1988 decided on 14.2.2006 and Civil Misc. Writ Petition No. 2193 of 1989 Rajendra Singh Vs. U.P. State Food and Essential Commodities Corporation Ltd.** decided on 23.3.2006 and contended that since he has worked for long time pursuant to an interim passed by this Court in the present case, he should be allowed to continue.

4. Firstly I come to the merits of case as to whether petitioner is entitled for relief or not. This issue in a similar matter has been considered by this Court in **Civil Misc. Writ Petition No. 9826 of 1990 Shree Prakash Misra Vs. State of U.P. & others)** decided on 14.9.2009 and it has been held as under:

"4. From the facts narrated in the writ petition, however, it appears that the petitioner was appointed as a seasonal clerk on ad hoc basis for a period of three months in U.P. State Food and Essential Commodities Corporation Ltd, (hereinafter referred to as the "Corporation") and posted at Sewarhi Purchase Centre. Thereafter he was further employed for another period of three months by order dated 15.01.1985 and so on. After amendment of the U.P. Regularisation of Ad hoc Appointments (on Posts Outside the Purview of the Public Service Commission), Rules 1979 (hereinafter referred to as the "1979 Rules") and extension of the cut off date as 01.10.1986 the petitioner claimed regularisation and it appears that the Deputy Finance Manager (Purchase) made a recommendation on 14.06.1998 for sanction of a post whereagainst the petitioner may be considered for regularisation and thereafter this writ petition has been filed.

5. *Admittedly, from the facts stated in the writ petition it is evident that there was no post available whereagainst the petitioner could have been appointed or regularised or made permanent in service. It further appears that seeking a similar relief some other writ petitions were filed and one of such is* ***Civil Misc. Writ Petition No. 20398 of 1988, Rakesh Kumar Saxena Vs. U.P. State Food and Essential Commodities Corporation Ltd. and others,*** *which was dismissed by this Court vide judgement dated 26.10.2006 and the said judgement of Hon'ble Single Judge has been confirmed in* ***Special Appeal No. (7) of 2008, Tek Chand and others Vs. U.P. State Food and Essential Commodities Corporation Ltd. and others,*** *dismissed on 07.01.2008.*

6. It is well settled that in the absence of any post neither the question of regularisation nor permanence is permissible. Besides the appointment made for a fixed term or ad hoc appointment does not confer any right upon the incumbent concerned to claim regularisation unless it is provided under the statutory rules. The judgement of this Court in ***Jai Kishan (supra)*** *has no application to the facts of this case inasmuch as this aspect has already been considered by a Division Bench of this Court in* ***Dukhi Singh Vs. State of U.P. and others, 2007(4) ADJ 186*** *and it has been held that was a case decided in the absence of any defence taken by the respondents, and it has no universal application to other matters. The validity of cut off date prescribed under 1979 Rules*

has already been upheld by this Court in several cases. In ***Subedar Singh and others v. District Judge, Mirzapur and another, 2001 (1) AWC 287 (SC)*** *the Hon'ble Apex Court confirmed the judgment of a Division Bench of this Court upholding the cut of date as 1.10.1986 fixed under the U.P. Regularization of Ad hoc Appointment (On Posts outside the Purview of U.P. Public Service Commission) Rules, 1979, as amended by Second (Amendment) Rules, 1989 where this Court held as under:*

".....One of the relevant considerations for regularisation is the length of the service rendered by the ad hoc employee ... but we see no rationale behind the view that all the employees even if they had put in only one day of service as ad hoc should have been made eligible to be considered and, therefore, the cut off date specified in Rule 10 is irrational. .... What should be the length of service is a matter of policy to be decided by the Rule making authority. Further, length of service is not the only criterion to be taken into consideration while making such decision. There can be no rule of thumb in such matters. It is not beyond the competence of the Rule making authority to limit eligibility to the employees who joined service as ad hoc employees upto a specified date..."

7. *The judgment of this Court was confirmed by the Hon'ble Apex Court on merit, agreeing with the reasoning and the conclusion given in the judgment, as is apparent from para 3 of the judgment, in Subedar Singh (supra) wherein the Hon'ble Apex Court held as under:*

"... The High Court has examined all the contentions by a detailed discussion of the relevant provisions of the Rules and we do not find infirmities with the reasoning and conclusions of the High Court in the impugned judgment. No rule, law or regulation, nor even any administrative order had been shown to us on the basis of which the appellants could claim the right of regularisation, in the aforesaid premises, we do not find any merit in any of these appeals which accordingly stands dismissed but in the circumstances, there will be no order as to costs."

8. *Again the cut of date of 30.6.1998 provided in U.P. Regularization of Ad hoc Appointment (on posts outside the Purview of U.P. Public Service Commission) Rules, 1979, as amended in 2001 came up for consideration before a Hon'ble Single Judge in* ***Shivaji Singh and others v. High Court of Judicature at Allahabad and others, Civil Misc. Writ Petition No.52755 of 2002*** *decided on 8.8.2003 and the Hon'ble Single Judge upheld the aforesaid cut of date. The matter went in Special Appeal No.705 of 2003 and upholding the cut of date a Division Bench held as under:*

"It further observed that the proposed amendment substituting the cut off date did not create two classes of persons. It created only one class of persons who possessed requisite qualification for regular appointment at the time of ah hoc appointment and had been directly appointed on ah hoc basis on or before 30.6.1998 and was continuing on service as such on 20.12.2001 and had further completed 3 years of service. From the scheme underlying the amendment only one class of person had been taken up for consideration for regularisation i.e. a person who filled all the 3 conditions given in Rule 4 of the Rules 2001."

9. Following the aforesaid two judgments another Division Bench of this

*Court in **Vinita Singh and others** v. **State of U.P. and others, 2006 (2) AWC 1738** has upheld the cut of date 30.6.1998 provided U.P. Regularization of Ad hoc Appointment (on posts within the Purview of U.P. Co-operative Institutional Service Board) Regulation 1985, as amended vide notification dated 24.3.1993.*

*10. Besides, the matter is also covered by the decisions of this Court in **Rakesh Kumar Saxena (supra)** and **Tek Chand (supra).** The writ petition, therefore, lacks merit and is accordingly dismissed. Interim order, if any, stands vacated.*

5. Learned counsel for petitioner could not make any submission to distinguish the aforesaid judgment.

6. So far as Judgment of Hon'ble Single Judge relied by learned counsel for petitioner are concerned, all the judgments have been rendered before 10.4.2006 on which date Constitution Bench of Apex Court rendered decision in **Secretary, State of Karnataka Vs. Uma Devi, 2006 (4) SCC 1** and held that all the judgments contrary thereto stand overruled and thus those judgments are no more applicable in view of aforesaid Constitution Bench Judgment. Moreover, it is also well settled that benefit of interim order cannot be extended in case ultimately petitioner is not successful in establishing his right. The service rendered pursuant to an interim order would not give any benefit to petitioner. This issue has been considered by a Division Bench of this Court (in which I was also a member) in **Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools, Region-1, Meerut and others, 2007(2) ESC 987** and the Court held as under:

*"An interim order passed by the Court merges with the final order and, therefore, the result brought by dismissal of the writ petition is that the interim order becomes non est. A Division Bench of this court in **Shyam Lal Vs. State of U.P. AIR 1968 Allahabad 139,** while considering the effect of dismissal of writ petition on interim order passed by the court has laid down as under:*

"It is well settled that an interim order merges in the final order and does not exist by itself. So the result brought about by an interim order would be non est in the eye of law if the final order grants no relief. The grant of interim relief when the petition was ultimately dismissed could not have the effect to postponing implementation of the order of compulsory retirement. It must in the circumstances take effect as if there was no interim order."

7. The same principal has been reiterated in the following cases:

(A) AIR 1975 Allahabad 280 Sri Ram Charan Das V. Pyare Lal.

"In Shyam Lal Vs. State of U.P., AIR 1968 All 139 a Bench of this Court has held that orders of stay of injunction are interim orders that merge in final orders passed in the proceedings. The result brought about by the interim order becomes non est in the eye of law in final order grants no relief. In this view of the matter it seems to us that the interim stay became non est and lost all the efficacy, the commissioner having upheld the permission which became effective from the date it was passed."

(B) 1986 (4) LCD 196 Shyam Manohar Shukla V. State of U.P.

"It is settled law that an interim order passed in a case which is ultimately dismissed is to be treated as not having been passed at all (see Shyam Lal V. State of Uttar Pradesh) Lucknow, AIR 1968 Allahabad 139 and Sri Ram Charan Das v. Pyare Lal, AIR 1975 Allahabad 280 (DB)."

(C) AIR 1994 Allahabad 273 Kanoria Chemicals & Industries Ltd. v. U.P. State Electricity Board.

"After the dismissal of the writ petitions wherein notification dated 21.4.1990 was stayed, the result brought about by the interim orders staying the notification, became non est in the eye of law and lost all its efficacy and the notification became effective from the beginning."

8. Recently also in **Raghvendra Rao etc. Vs. State of Karnataka and others, JT 2009 (2) SC 520** the Apex Court has observed:

"It is now a well-settled principle of law that merely because an employee had continued under cover of an order of Court, he would not be entitled to any right to be absorbed or made permanent in the service. ....."

9. So far as the service rendered by petitioner for long time is concerned, it is well settled that long continuance, if the appointment has not been made strictly in accordance with law, would not confer any right upon incumbent to hold the post. The Apex Court in **Shesh Mani Shukla (supra) J.T. 2009 (10) SC 309** held:

"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."

10. In view of above, I find no merit in the writ petition. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2012

BEFORE
THE HON'BLE SATYA POOT MEHROTRA,J.
THE HON'BLE MRS. SUNITA AGARWAL,J.

Civil Misc. Writ Petition No. 34918 of 1993

IInd Lt.Shatrughan Singh Chauhan
...Petitioner
Versus
Union of India & another ...Respondents

Counsel for the Petitioner:
Sri Sudhanshu Dhulia
Sri B.N. Singh
Sri S.K. Shukla
Sri Chandra Narain Tripathi
Sri Murlidhar

Counsel for the Respondents:
Sri S.N. Srivastava
Sri Shishir Kumar
Sri S.K. Rai
Sri K.L. Grover
Sri U.N. Sharma (S.S.C.)
C.S.C.

Constitution of India, Article 226/227 with Army Act-Section-34-member of

Arm Forces-punishment-of 7 years rigorous imprisonment by Court Martial-matter relates to Service-not covered under Section 14 (3) (a)-petition stood transferred before Army Tribunal.

Held: Para 10

The cause of action of the present Writ Petition as noted above, is evidently such as falls within the jurisdiction of the Tribunal after enforcement of the Act. This is evident from the provisions contained in Section 14 read with Section 3(o) of the said Act as well as Section 15 of the said Act. It may be mentioned that cause of action of the present Writ Petition would not fall within the exception given in sub-clause (iv) of clause (o) of Section 3 of the said Act, as in the present case Summary General Court Martial of the petitioner was held wherein seven years rigorous imprisonment was awarded.

Case law Discussed:

2010 (3) ADJ 593; 2010 (4) ADJ 251 (DB); Order dated 28.10.2010 passed in Special Appeal Defective No. 218 of 2006 [Anil Kumar Singh Vs. Union of India & Another]; Order dated 6.12.2010 passed in Civil Misc. Writ Petition No. 21559 of 2002 [Smt. Indrawati Singh Vs. Union of India and others];Order dated 6/12/2010 passed in Civil Misc. Writ Petition No. 21559 of 2002 [Smt. Indrawati Singh Vs. Union of India and others]; Order dated 20th January 2011 passed in Civil Misc Writ Petition No. 43411 of 1999 [Ic-40241h Major Anil Kumar Vs. Union of India and others].

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

1. Case called out in the revised list.

2. Shri Chandra Narain Tripathi, learned counsel for the petitioner and Shri S.K. Rai, learned counsel for the respondents are present.

3. The petitioner was holding the post of Second Lieutenant in the Indian Army. The petitioner was charged, and he faced Court Martial at Niyari in the year 1991. By the order dated 7.8.1991, the Court Martial sentenced the petitioner for seven years rigorous imprisonment and also cashiered the petitioner from the service. The said order dated 7.8.1991 was confirmed by the order dated 4.11.1991 passed by the GOC-in-Command (Northern Command).

4. The petitioner filed Post Confirmation Petition under Section 164(2) of the Army Act, 1950 before the Central Government and the Chief of Army Staff. By the order dated 10.8.1993, the Union of India, Ministry of Defence dismissed the said Post Confirmation Petition filed by the petitioner.

5. The present Writ Petition was thereafter filed by the petitioner, inter-alia, praying for quashing the said orders dated 7.8.1991, 4.11.1991 and 10.8.1992.

6. Thus, the subject matter of the Writ Petition pertains to service matter in respect of the petitioner as well as the sentence awarded to the petitioner by the Court Martial. The petitioner, as is evident from a perusal of the Writ Petition, was a member of the Armed Forces covered by the Army Act, 1950.

7. ***In Devi Saran Mishra Vs. Union of India and Others, 2010 (3) ADJ 593*** (paragraphs 23, 24, 25, 26 and 27), a learned Single Judge of this Court has considered in detail the provisions of the Armed Forces Tribunal Act, 2007

(in short "the Act") in the light of various judicial decisions, and has held that in case, the cause of action involved in a Writ Petition is such as falls within the jurisdiction of the Tribunal after enforcement of the Armed Forces Tribunal Act, 2007, such cause of action has to be adjudicated upon in the first instance by the Tribunal. It is only after the decision of the Tribunal, that the matter would come to the High Court under Article 226/227 of the Constitution of India.

8. In view of this, it has been laid down that the Writ Petitions pending before this Court, wherein, the cause of action is such as would fall within the jurisdiction of the Tribunal after enforcement of the Armed Forces Tribunal Act, 2007, would stand transferred to the Tribunal for adjudication in view of Section 34 of the said Act.

9. The above decision of the learned Single Judge has been followed by the Division Benches of this Court in the following decisions:

(A) Order dated 22.03.2010 passed in Civil Misc. Writ No. 15363 of 2007 [(Late) Brig. (Retd.)Gaj Raj Singh Siwach & others Vs. Union of India & others], since reported in 2010 (4) ADJ 251 (DB).

(B) Order dated 28.10.2010 passed in Special Appeal Defective No. 218 of 2006 [Anil Kumar Singh Vs. Union of India & Another].

(C) Order dated 6.12.2010 passed in Civil Misc. Writ Petition No. 21559 of 2002 [Smt. Indrawati Singh Vs. Union of India and others].

(D) Order dated 6/12/2010 passed in Civil Misc. Writ Petition No. 21559 of 2002 [Smt. Indrawati Singh Vs. Union of India and others]

(E) Order dated 20th January 2011 passed in Civil Misc Writ Petition No. 43411 of 1999 [Ic-40241h Major Anil Kumar Vs. Union of India and others].

10. The cause of action of the present Writ Petition as noted above, is evidently such as falls within the jurisdiction of the Tribunal after enforcement of the Act. This is evident from the provisions contained in Section 14 read with Section 3(o) of the said Act as well as Section 15 of the said Act. It may be mentioned that cause of action of the present Writ Petition would not fall within the exception given in sub-clause (iv) of clause (o) of Section 3 of the said Act, as in the present case Summary General Court Martial of the petitioner was held wherein seven years rigorous imprisonment was awarded.

11. In view of the above, it is apparent that the present Writ Petition is to be transferred to the Tribunal under Section 34 of the Act.

12. We direct accordingly.

13. The Registry is directed to take appropriate steps in this regard.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALAHABAD 20.03.2012

BEFORE
THE HON'BLE ARUN TANDON,J.

Civil Misc. Writ Petition No. 37087 of 2011

Ram Narain Singh ...Petitioner
Versus
D.I.O.S. and others ...Respondents

Counsel for the Petitioner:
Sri K.J.Khare
Sri A.K.Pandey
Sri P.N.Saxena
Sri Brijesh Kumar Singh
Sri K.K.Singh
Sri R.N.Singh
Sri S.N.Singh

Counsel for the Respondents
Sri H.L.Pandey
Sri A.K.Malviya
Smt. Maya Bajpai
C.S.C.

Constitution of India,Art-226- Appointment on short term vacancy-caused due to medical leave of Mr. 'A'-after death of 'A'-short term vacancy automatically converted in substantive vacancy-continuation on strength of interim order-no right to claim regularization under section 33b(i) of Board Act 1982 can be claimed.

Held: Para 7

In view of the aforesaid, this Court has no hesitation to record of merely because the petitioner has continued because of interim order passed by this Court in present writ petition which is otherwise liable to be dismissed on merits, he will get no right to seek regularisation on the strength of his working under the interim order.

Case law discussed:
(1997) 2 SCC 556

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

1. Petitioner before this Court seeks quashing of the order of Principal of Mahabir Intermediate College, Malikpura, Ghazipur dated 08.11.1991 and a writ of mandamus directing the respondents to permit the petitioner to continue as ad-hoc Lecturer (Civics) in the said institution and to pay him salary accordingly. Facts in short on record are as follows.

2. One Chandrika Rai, who was working as Lecturer (Civics) in Mahabir Intermediate College, applied for medical leave w.e.f. 01.08.1989 for a period of six months. This leave was sanctioned under the order dated 14.12.1989. Against this short term vacancy, the petitioner was appointed for a period of six months w.e.f. 11.08.1989 by the Committee of Management. The said appointment was approved by the District Inspector of Schools under order dated 14.12.1989. The leave vacancy was extended from time to time and the petitioner also continued to function with the approval of the District Inspector of Schools during these extended period. The last approval granted by the District Inspector of Schools is dated 07.03.1991, copy whereof is enclosed as Annexure-2 to this petition. Chandrika Rai is stated to have expired on 06.11.1991 accordingly the principal of the institution informed the petitioner that his services would come to an end on 07.11.1991.

3. It is against the order dated 07.11.1991, the present writ petition has been filed. Learned counsel for the petitioner could not demonstrate any illegality in the order of the principal. It is settled law that once a short term vacancy is converted into substantive vacancy, the appointment against short term vacancy comes to an automatic end by operation of law reference Surendra Kumar Srivastava vs. State of U.P. 2007 (1) ESC 118. In view of the said Division Bench judgment of this Court, this Court hardly finds no good ground to interfere with the order of the principal. The letter of the principal is only an intimation of the true and correct legal position qua the non-continuance of the petitioner and the consequences which follow.

4. Shri P.N. Saxena, Senior Counsel, appearing for the petitioner, contended that because of the interim order granted by this Court in the present writ petition, the petitioner has continued in employment and in between Section 33-B (1) has been added to the U.P. Secondary Service Selection Board Act, 1982. As per the Section 33-B an ad-hoc appointee against short term vacancy appointed prior to 14th May, 1991 have been directed to be regularised if the vacancy stood converted into substantive vacancy on satisfaction of the conditions mentioned in the said section. It is his case that the petitioner is entitled to such regularisation.

5. The contention raised by Shri Saxena does not appeal to this Court. Petitioner's continuance in the institution was because of an interim order passed by this Court and not because of any independent right. The interim order would merge in the final order. Therefore, when this Court come to a conclusion that there is no illegality in the order of principal putting an end to the engagement of the petitioner and the writ petition lacks merit. The interim order would automatically fall with the dismissal of the writ petition.

6. The Hon'ble Supreme Court in the case of ***N. Mohanan Vs. State of Kerala and others*** reported in ***(1997) 2 SCC 556*** has explained that no rights are conferred because of the continuance under the interim order of the Hon'ble High Court and the status of the employee will not be altered only because of he has continued under the interim order.

7. In view of the aforesaid, this Court has no hesitation to record of merely because the petitioner has continued because of interim order passed by this Court in present writ petition which is otherwise liable to be dismissed on merits, he will get no right to seek regularisation on the strength of his working under the interim order.

8. In view of the aforesaid, no relief can be granted. Accordingly, writ petition is dismissed. Interim order, if any, stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc Writ Petition No. 44864 of 2005

M/s Pradhan Prabandhak, Kishan Sahkari Chini Mill through General Manager ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Singh
Sri A.K. Mishra
Sri V.B. Mishra

Counsel for the Respondents:
Sri Anoop Trivedi
Sri Vinod Upadhyay
Sri M.K. Singh
C.S.C.

Constitution of India, Article 226- Employee of Cooperative Society Sugar Mill-reference under Section 4 (b) of Industrial Dispute Act?-whether proper-held-'Non' provision of Industrial dispute either state or central Acts are applicable-except under provision of 1965 of Act-order of reference-Quashed.

Held: para 12

So far as objection that issue with respect to non application of industrial Dispute Act was not raised before the Labour Court is concerned, the award itself shows that the aforesaid objection was raised but has been decided by Labour Court against the petitioner-employer. The said view is contrary to Apex Court's decision in Ghaziabad Zila Sahkari Bank (supra) and, therefore, the issue decided by Labour Court against the petitioner-employer has to be answered in its favour and if that is so, the award itself cease to be a valid one. The Labour Court, therefore, has no jurisdiction in the matter.

Case law discussed:
2007 (11) SCC 756; 2011 (131) FLR 391; Special Appeal No. 1906 of 2008 (Brij Bhushan Singh and another Vs. State of U.P. and others)

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

1. Heard Sri V.B. Mishra, Advocate, for petitioner and Sri Vinod Upadhyay, Advocate, for contesting respondent no. 4-workman.

2. Writ petition is directed against the award of Labour Court dated 28.9.2004 in Adjudication Case No. 27 of 2002. The workman-respondent no. 4 raised an industrial dispute regarding his confirmation from crushing session 1997-98. The State Government in exercise of power under Section 4-K of U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "U.P. Act, 1947") vide notification dated 9.4.2002 made following reference:

''क्या सेवायोजकों के द्वारा अपने कर्मचारी श्री विक्रम सिंह पुत्र श्री विनयपा लिपिक को पेराई सत्र 1997–98 से स्थायी घोषित करते हुए पद के अनुरूप वेतनमान न दिया जाना उचित तथा/ अथवा वैधानिक है। यदि हां तो सम्बन्धित श्रमिक किस क्षतिपूर्ति (रिलीफ)/ हितलाभ अनुतोष आदि पाने का अधिकारी है तथा अन्य किस विवरण सहित?''

3. By impugned award dated 28.9.2004 the Labour Court has answered reference in favour of workman.

4. Learned Counsel for petitioner submitted that petitioner is a Co-operative Society Sugar Mill and is governed by the provisions of U.P. Cooperative Societies Act, 1965 (hereinafter referred to as "Act, 1965") therefore the provisions of Industrial Disputes Act are not applicable

in view of Apex Court's decision in **Ghaziabad Zila Sahkari Bank Vs. Addl. Labour Commissioner 2007 (11) SCC 756.**

5. On the contrary, Sri Upadhyay learned counsel appearing for workman submitted that neither such objection was raised before Labour Court nor there is such averment in the entire writ petition and, therefore, for the first time this objection cannot be allowed to be raised before this Court. He relied on a Single Judge decision of this Court in **Rama Shanakr Vaish Vs. Presiding Officer Labour Court 2011 (131) FLR 391.**

6. The question as to whether the dispute relating to service matter of an employee and an employer which is a Co-operative Society can be raised under provisions of Industrial Disputes Act, 1947 (hereinafter referred to as "Central Act, 1947") or U.P. Act, 1947 came to be considered **in Ghaziabad Zila Sahkari Bank (supra)** and the Apex Court in para 36 said as under:

"36. *It was submitted by learned senior counsel that, The U.P. Cooperative Societies Act, 1965 has been enacted to further the Cooperative movement in the State of U.P. and for providing for functions and responsibilities of Cooperative Societies and the authorities invested with their supervision, guidance and control. Thus the objects and reasons for the enactment of the said Act is not to regulate the service conditions of the employees of the cooperative societies and the Act only incidentally provides Sections 121 & 122 to regulate the terms and conditions of all employees of the Cooperative Societies, Officers, Supervisors and other employees. It was submitted that only those employees who are not covered by the provisions of the U.P. Industrial Disputes Act would fall within the ambit of Sections 121 and 122 of the U.P. Cooperative Societies Act. On the other hand, the U.P. Industrial Disputes Act, 1947 has been held to be a special statute in matters of settlement of Industrial disputes arising out of the terms and conditions of service of employees who fall within the definition of workmen, provided they are employed in establishments covered by the said Act. In regard to various establishments which have their own services rules, the U.P. Industrial Disputes Act will still apply to workmen employed therein. Learned senior counsel cited various decisions of this Court in the case of U.P. State Electricity Board and Anr. v. Hari Shankar Jain and Ors. 1978 (4) SCC 16, Life Insurance Corporation of India v. D.J. Bahadur (1981) 1 SCC 315, Allahabad District Cooperative Ltd. v. Hanuman Dutt Tiwari (1981) 4 SCC 431 and Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke (1976) 1 SCC 496 in support of this contention."*

7. Thereafter the Court also considered whether dispute relating to service conditions of employee of Co-operative Societies would be governed by Section 70 or not, which was specifically raised in para 39 of judgment, and answered it in para 40 and 41 as under:

"41*. This is further strengthened by Rule 130 (2) which provides that if the Resolution is not covered by Section 128 then it becomes operative immediately.*

Application of Labour Laws

42. *The learned senior counsel submitted that the legislature has specifically provided in the provisions of the U.P. Cooperative Societies Act itself that the Labour Laws will apply to the employees of the cooperative societies, in Regulation 103 and in non-enforcement of Section 135. The fact that Section 135 has not been brought into force indicates clearly that (a) in order to exclude Labour laws there must be statutory exclusion (b) failing such an exclusion Labour Law will apply. In this case, there is a fact that an exclusion however under Section 135 has not been brought into force."*

8. Thereafter, non-enforcement of Section 135 was also considered from para 42 and onwards and in para 56, 61, 62 and 65, the Court said as under:

"56. *The present dispute is not "any dispute relating to the constitution, management or the business of a cooperative society" and, therefore, the machinery provided in Section 70 or 128 of the U.P. Cooperative Societies Act would not be available to the employees of the Bank to enforce the settlement."*

"61. *The general legal principle in interpretation of statutes is that 'the general Act should lead to the special Act'. Upon this general principle of law, the intention of the U.P legislature is clear, that the special enactment UP Co-operative Societies Act, 1965 alone should apply in the matter of employment of Co-operative Societies to the exclusion of all other Labour Laws. It is a complete code in itself as regards employment in co-operative societies and its machinery and provisions. The general Act the UPID Act, 1947 as a whole has and can have no applicability and stands excluded after the enforcement of the UPCS Act. This is also clear from necessary implication that the legislature could not have intended 'head-on-conflict and collision' between authorities under different Acts. In this regard reference can be made to Co-operative Central Bank Ltd. and Ors. v. The Additional Industrial Tribunal, Andhra Pradesh and Ors. (1969) 2 SCC 43 where this Court observed that:*

"Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred for decision to the Registrar under Section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society; but the meaning given to the expression "touching the business of the society", in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required

to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society. Further, the position is clarified by the provisions of Sub-section (4) of Section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute referred to him under Section 61, by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the Rules and bye-laws. On the face of it, the provisions of the Act, the rules and the bye-laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. For the purpose of bringing facts to our notice in the present appeals, the Rules framed by the Andhra Pradesh Government under the Act, and the bye-laws of one of the appellant Banks have been placed on the Paper-books of the appeals before us. It appears from them that the conditions of service of the employees of the Bank have all been laid down by framing special bye-laws. Most of the conditions of service, which the workmen want to be altered to their benefit, have thus been laid down by the bye-laws, so that any alteration in those conditions of service will necessarily require a change in the bye-laws. Such a change could not possibly be directed by the Registrar when, under Section 62(4) of the Act, he is specifically required to decide the dispute referred to him in accordance with the provisions of the bye-laws. It may also be noticed that a dispute referred to the Registrar under Section 61 of the Act can even be transferred for disposal to a person who may have been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator by the Registrar. Such person or arbitrator, when deciding the dispute, will also be governed by the mandate in Section 62(4) of the Act, so that he will also be bound to reject the claim of the workmen which is nothing else than a request for alteration of conditions of service contained in the bye-laws. It is thus clear that, in respect of the dispute relating to alteration of various conditions of service, the Registrar or other person dealing with it under Section 62 of the Act is not competent to grant the relief claimed by the workmen at all. On the principle laid down by this Court in Deccan Merchants Co-operative Bank Ltd. Vs. Dalichand Jugraj Jain AIR 1969 SC 1320, therefore, it must be held that this dispute i0.79"s not a dispute covered by the provisions of Section 61 of the Act. Such a dispute is not contemplated to be dealt with under Section 62 of the Act and must, therefore, be held to be outside the scope of Section 61.

62. *Further this Court observed in R.C. Tiwari v. M.P. State Co-operative Marketing Federation Ltd. (1997) 5 SCC 125 that:*

"3....He also places reliance on Section 93 of the Societies Act which states that nothing contained in the Madhya Pradesh Shops and Establishments Act 1958, the M.P. Industrial Workmen (Standing Orders) Act, 1959 and the M.P. Industrial Relations Act, 1960 shall apply to a Society registered under this Act. By necessary implication, application of the Act has not been excluded and that, therefore, the Labour Court has

jurisdiction to decide the matter. We find no force in the contention. Section 55 of the Societies Act gives power to the Registrar to deal with disciplinary matters relating to the employees in the Society or a class of Societies including the terms and conditions of employment of the employees. Where a dispute relates to the terms of employment, working conditions, disciplinary action taken by a Society, or arises between a Society and its employees, the Registrar or any officer appointed by him, not below the rank of Assistant Registrar, shall decide the dispute and his decision shall be binding on the society and its employees. As regards power under Section 64, the language is very wide, viz., "Notwithstanding anything contained in any other law for the time being in force any dispute touching the constitution, management or business of a Society or the liquidation of a Society shall be referred to the Registry by any of the parties to the dispute." Therefore, the dispute relating to the management or business of the Society is very comprehensive as repeatedly held by this Court. As a consequence, special procedure has been provided under this Act. Necessarily, reference under Section 10 of the Societies Act stands excluded. The judgment of this Court arising under Andhra Pradesh Act has no application to the facts for the reason that under that Act the dispute did not cover the dismissal of the servants of the society for which the Act therein was amended."

Similar view was taken by this Court in Belsund Sugar Co. Ltd. v. State of Bihar (1999) 9 SCC 620, Allahabad Bank v. Canara Bank (2000) 4 SCC 406, State of Punjab v. Labour Court (1980) 1 SCC 4 and U.P.SEB Vs. Shiv Mohan Singh (2004) 8 SCC 402."

***"65.** We are therefore of the view that the Asst. Labour Commissioner (ALC)'s jurisdiction was wrongly invoked and his order dated 15.03.2003 under Section 6H, U.P. Industrial Disputes Act, 1947 is without jurisdiction and hence null and void and it can be observed that, in view of the said general legal principle, it is immaterial whether or not the government has enforced Section 135 (U.P. Cooperative Societies Act) because, in any case the said provision (Section 135) had been included in the Act only by way of clarification and abundant caution."*

9. It is clear from above judgement that even a dispute relating to service conditions of an employee of Co-operative Society would be governed by provisions of Act, 1965 and Central Act, 1947 or U.P. Act, 1947 would have no application despite that Section 135 has not been enforced.

10. A Division Bench of this Court (in which I was also a member) in **Special Appeal No. 1906 of 2008 (Brij Bhushan Singh and another Vs. State of U.P. and others)** and other connected matters decided on 19.12.2008 referring to the Apex Court decision in **Ghaziabad Zila Sahkari Bank (supra)** observed as under:

"It is said that Section 135 has not been enforced so far but the question as to whether despite of non-enforcement of Section 135 of 1965 Act, the Central Act, 1947 or U.P. Act, 1947 would apply to the employees of a cooperative society governed by the provisions of 1965 Act

and the rules and regulations framed thereunder came to be considered in Ghaziabad Zila Sahkari Bank Ltd. Vs. Addl. Labour Commissioner and others, JT 2007(2) SC 566 and it was held that Section 135 has been added only by way of clarification and abundant caution and, therefore, where the provisions are contained in 1965 Act, the labour laws and in particular the U.P. Act, 1947 would not be applicable. It is also said that 1965 Act alone would apply in the matter of employment of cooperative societies to the exclusion of all other laws since it is a complete code in itself as regards employment in cooperative societies and its machinery etc. In para 78 of the judgement the Apex Court held:

"It is relevant to mention here that the services of the employees of the Bank are governed by service regulations 1975 framed under the Act of 1965, which provides complete machinery and adjudication. Moreover, the provisions under Section 70 of the U.P. Cooperative Societies Act, 1965 is elaborate in this regard, which provides complete machinery that if there is any dispute between the employers and the employees of the Cooperative Society, the matter shall be referred to the Arbitrator as provided under Section 70 of the U.P. Cooperative Societies Act, 1965. Section 70 of the U.P. Cooperative Societies Act and Section 64 of the M.P. Cooperative Societies Act are pari materia and this Court in the matter of R.C. Tewari vs. M.P. State Cooperative Marketing Federation Ltd. 1997 (5) SCC 125 held that Labour Court and Industrial Laws are not applicable where complete machinery has been provided under the provisions of the Cooperative Societies Act and in such view of the matter the Ld. Additional Labour Commissioner U.P. has no jurisdiction to pass orders in the nature it has been passed."

11. Hon'ble Single Judge however in **Rama Shankar (supra)** has not considered the above exposition of law laid down in Division Bench decision that the dispute even relating to conditions of service of employer-Co-operative Society and its employee are to be looked into under the provisions of Act, 1965 and Industrial Disputes Acts have no application. Therefore the aforesaid judgment is per incuriam.

12. So far as objection that issue with respect to non application of industrial Dispute Act was not raised before the Labour Court is concerned, the award itself shows that the aforesaid objection was raised but has been decided by Labour Court against the petitioner-employer. The said view is contrary to Apex Court's decision in **Ghaziabad Zila Sahkari Bank (supra)** and, therefore, the issue decided by Labour Court against the petitioner-employer has to be answered in its favour and if that is so, the award itself cease to be a valid one. The Labour Court, therefore, has no jurisdiction in the matter.

13. In the result, writ petition is allowed. Impugned award dated 28.9.2004 (Annexure 3 to writ petition) is hereby set aside.

14. However, this order shall not preclude the respondent-workman to take such legal recourse as permissible in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2012

BEFORE
THE HON'BLE S. K. SINGH, J.
THE HON'BLE PANKAJ NAQVI, J.

Civil Misc. Writ Petition No. 45321 of 2008

Vinod Kumar Srivastava ...Petitioner
Versus
Secretary, Public Works Department and others ...Respondents

Counsel for the Petitioner:
Sri Gyanendra Kumar Singh
Sri Vipin Sinha

Counsel for the Respondents:
C.S.C.

Constitution of India , Article 226- Punishment-allegation against three persons-common and same-exhonorating two others-punishment against petitioner-held-discriminatory-not sustainable.

Held: Para 23

On the facts and totality of the circumstances we are satisfied that the respondents while awarding punishment to the petitioner have failed to consider the fact that charges against two other employees were the same but they were not punished, and thus have discriminated against the petitioner by inflicting a punishment and, therefore, the order passed by the respondent no. 1 is liable to be quashed.
Case law discussed:
(2010) 5 SCC 783; (2007) 7 SCC 206

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

1. Heard Sri Vipin Sinha, learned Advocate in support of this writ petition and learned Standing Counsel.

2. By means of this writ petition, petitioner has prayed for quashing of the impugned order dated 23.5.2006 passed by the respondent no. 1 (annexure no. 10) by which in the disciplinary proceedings punishment of (i) censor (ii) stoppage of one increment with cumulative effect was given.

3. For disposal of the writ petition, facts in brief will suffice.

4. Petitioner was working as Assistant Engineer in Public Works Department in district Basti. In respect to widening of Duddhi - Lumbini - Mani Road on the charge of use of sub standard material, when in the night of 9.10.2001 a visit of the Minister concerned took place, some shortcomings were pointed out, upon which suspension of several officers followed and it is thereafter correspondence between higher officials and disciplinary proceedings started, resulting into the impugned action.

5. Submission is that the enquiry in the charge has not proceeded in the fair manner and although disciplinary proceedings proceeded against other officers also but all have been exonerated and the petitioner has been singled out for ulterior motive.

6. It is further submitted that departmental enquiry proceeded against D. P. Roy, Assistant Engineer and Sunil Kumar, Junior Engineer who were posted along with the petitioner for the same work and for the same charge but the proceedings against D. P. Roy was finally dropped and against Sunil Kumar also nothing wrong was found and he was

exonerated and thus in an arbitrary manner petitioner has been punished.

7. Submission is that charge of sub standard material in completion of Duddhi - Lumbini Road related to Km. 97 against other officers also noted above who were associated with the same work but as no material on merits of charge was found against anyone, that has to apply for the petitioner also.

8. It is further submitted that in respect to two charges i.e. (i) at km. 97 level is not proper/lepan is not good (ii) at km. 98 the portion of the road which was widened is slightly low and painting is not good, the enquiry officer himself has found that second charge of the road being slightly uneven is not established and so far the first charge about "lepan not being proper" some discrepancies were found. Submission is that both aspects were interlinked. As two rainy season intervened after the initial work and no maintenance grant was also given in two years, the slight technical discrepancy as pointed out and that too only against the petitioner although, D. P. Roy, Assistant Engineer and Sunil Kumar, Junior Engineer were all at par cannot make the petitioner alone responsible and, therefore, it is a case where for no justification petitioner has been taken to task.

9. Submission is that the disciplinary authority has not taken into account the representation of the petitioner in relation to the enquiry officer's report and the ground that for same work at the same place two other co-ordinate officers have been exonerated and, therefore, it is just an arbitrary and whimsical exercise which needs to be quashed by this court.

10. In response to the aforesaid, learned Standing Counsel submits that various submissions in respect to facts as advanced can be matter of examination from the record and in no case petitioner can take any advantage about the exoneration and dropping of the proceedings against D. P. Roy, Assistant Engineer and Sunil Kumar, Junior Engineer. As the enquiry officer has found one charge to be partially established if the disciplinary authority has awarded punishment then no exception can be taken to it.

11. Before dealing with the arguments on merits, we are to just notice the order of this Court dated 2.2.2011 wherein the submission of the petitioner side against adopting two standards in respect to same charge, for the same project, same length and period in which construction of road was there was noticed.

12. The order of this Court dated 2.2.2011 is hereby quoted -

"It is submitted by Sri Vipin Sinha assisted by Sri Gynendra Kumar Singh for the petitioner that in respect of first part of both the charges, namely, unevenness on the sides of the road, the enquiry officer has exonerated the petitioner. The petitioner has been found guilty only of short-coming in painting of the road and punished by awarding a censure entry and withholding of one increment, permanently.

It is stated that inspection was made in the night after two years of completion of works. By that time the road was affected by heavy rain in two seasons. Along with the rejoinder affidavit, the

petitioner has annexed orders for exonerating Sri D.P. Rai Assistant Engineer and Sri Sunil Kumar Junior Engineer, on the same charges and in respect of same project, length and period of the road.

Learned standing counsel prays for and is allowed to weeks time to file supplementary counter affidavit."

13. After the orders of this Court, State has filed Supplementary Counter Affidavit in April, 2011.

14. So far the averment/argument from the petitioner side that against D. P. Roy and Sunil Kumar the charge was the same and it was in respect to same project, about same length and period has not been specifically denied and a vague and evasive reply has been given just to conclude, by taking shelter of the report of the enquiry officer. The portion of the averment as made in para 4, 16 and 21 of the Rejoinder Affidavit are hereby quoted for convenience -

"4.....Sri D. P. Roy, Assistant Engineer, who is also posted along with the petitioner on the said Road and he is also found guilty in the inspection made by the Hon'ble Minister but there was no any disciplinary proceedings initiated against Sri D. P. Roy, which is apparent from the order dated 8.3.2002.

16.....Firstly for the same charges the petitioner's - Junior Engineer, namely, Sunil Kumar was exonerated from the said charge who is also posted on kilometer 97 - 99 but the petitioner was punished for the same without any rhyme or reason.

21.....The case of the petitioner as well as that of Sri D. P. Roy are the same as the same charges were levelled against the petitioner and Sri D. P. Roy but Sri D. P. Roy has been exonerated while the petitioner has been punished for the same and the Junior Engineer - Sunil Kumar who was also posted along with the petitioner and he also has been exonerated for the same charges and the petitioner has been punished for the same."

15. In the Supplementary Counter Affidavit there is just general denial and vague averment about proof of the charges against the petitioner and about no proof against others.

16. Petitioner has annexed the copy of the order passed in case of Sunil Kumar and at the same time the order passed in respect to D. P. Roy and copy of the charges also which we will just notice for the conclusion that the charges against all the three are the same, for the same project and for the same length/period of the road.

17. Annexure no. 3 to the rejoinder affidavit is the copy of the enquiry officer's report in the matter of Sunil Kumar which suggests about the charge against him which is to the following effect -

"KM. 97 ME LEPAN THIK NAHI HAI. SATAH SAMTAL NAHI HAI"

18. The finding of the enquiry officer is that on account of traffic congestion the old road is found to be damaged in sufficient length and at the same time two rainy seasons intervened. It has been further stated that no final

payment has yet been made and only running payment has been made and the contract is not yet complete.

19. There appears to be no dispute about the fact, from the facts stated above that in respect to the same project, same length/period of the road all the three i.e. the petitioner, D. P. Roy and Sunil Kumar were together. There is further no dispute that no maintenance grant was there for about two years and two rainy seasons intervened upon which slight damage, if any, to the work in question can be duly noticed. The work contract was still not complete and only running payment was made. In view of the circular issued by the department itself (annexure no. 4 to the rejoinder affidavit) about lepan/painting work of the road Junior Engineer is responsible to the extent of 30% and the Assistant Engineer to the extent of 15%. It appears to be a case where after about two years of the initial work the Minister concerned just visited the site while going on the way and he reported the matter to the competent official, upon which impugned exercise was undertaken. Another Assistant Engineer and another Junior Engineer engaged with the petitioner were not found at fault.

20. Above mentioned facts leads to a situation that no action against two officers has been taken, although in different enquiries, in relation to the same project, same site, same length, period of the road nothing adverse by lapse of time and for various other reasons so stated in the enquiry officer's report dated 24.9.2004 (annexure no. 3 to rejoinder affidavit), is found then why the petitioner alone is to be punished. The Junior Engineer has been exonerated on the ground that nothing wrong on merit of charge was found. Factum of lapse of two years, two rainy seasons have intervened, no maintenance grant being there and as such it is a case where same factual premises can apply to the petitioner also. All these aspects were stated by the petitioner in his representation (annexure no. SA-2) but nothing has been taken into account and the impugned order has been passed.

21. At this stage we can refer certain decisions of the Apex Court which deals with the issue of imposing different punishment for different delinquent if the charges are the same and opinion has been expressed that the charge being same and identical in relation to one and the same incident giving of different punishment would be discriminatory. It has been observed by the Apex Court in the case of **(2007) 7 SCC 206 Bongaigaon Refinary & Petrochemicals Ltd. and others Vs. Girish Chandra Sarma :**

"18. After going through the report and the finding recorded by the Division Bench of the High Court, we are of opinion that in fact the Division Bench correctly assessed the situation that the respondent alone was made a scapegoat whereas the decision by all three Committees was unanimous decision by all these members participating in the negotiations and the price was finalised accordingly. It is not the respondent alone who can be held responsible when the decision was taken by the Committees. If the decision of the committee stinks, it cannot be said that the respondent alone stinks; it will be arbitrary. If all fish stink, to pick one and say only it stinks is unfair

in the matter of unanimous decision of the Committee."

22. In another decision given by the Apex Court in the case of **State of U. P. and others Vs. Raj Pal Singh reported in (2010) 5 SCC 783,** following observation has been made :

"5. Though, on principle the ratio in aforesaid cases would ordinarily apply, but in the case in hand, the High Court appears to have considered the nature of charges levelled against the five employees who stood charged on account of the incident that happened on the same day and then the High Court came to the conclusion that since the gravity of charges was the same, it was not open for the disciplinary authority to impose different punishments for different delinquents. The reasoning given by the High Court cannot be faulted with since the State is not able to indicate as to any difference in the delinquency of these employees.

6. It is undoubtedly open for the disciplinary authority to deal with the delinquency and once charges are established to award appropriate punishment. But when the charges are same and identical in relation to one and the same incident, then to deal with the delinquents differently in the award of punishment, would be discriminatory. In this view of the matter, we see no infirmity with the impugned order requiring our interference under Article 136 of the Constitution."

23. On the facts and totality of the circumstances we are satisfied that the respondents while awarding punishment to the petitioner have failed to consider the fact that charges against two other employees were the same but they were not punished, and thus have discriminated against the petitioner by inflicting a punishment and, therefore, the order passed by the respondent no. 1 is liable to be quashed.

24. For the reasons given above, this writ petition succeeds and is allowed.

25. The impugned order dated 23.5.2006 passed by the respondent no. 1 (annexure no. 10) is hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2012

BEFORE
THE HON'BLE SUNIL HALI,J.

Civil Misc. Writ Petition No. 51274 of 2007

Harendra Panwar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam
Sri Seemant Singh
Sri Shailendra

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- cancellation of appointment-on concealment of criminal case pendency-in column II of application for-requirement of conviction in criminal case-no requirement of disclosure of registration of any FIR-without recording satisfaction for unsuited for appointment-subsequent fair acquittal-cancellation of appointment-held-not proper.

Held: Para 16

From the aforesaid discussion, it clearly appears that in the impugned order no

satisfaction has been recorded by the appointing authority that the petitioner is not suitable to be appointed with reference to nature of suppression and nature of criminal case. Merely because the information with respect to the registration of the case has been withheld would not dis-entitle the petitioner to be appointed as no satisfaction has been recorded by the appointing authority that the nature of allegations so levelled against the petitioner are of such nature which would dis-entitle him to be appointed on the said post. Mere concealment of this information in itself would not tantamount to cancellation of his appointment as the necessity of supplying this information is not contemplated either by the instructions issued in terms of the G.O. dated 28.4.1958 or by the form required to be filled up by the petitioner.

Case law discussed:

Ram Kumar Vs. State of UP decided in Civil Appeal No. 7106 of 2011 on 9.8.2011 ; Special Appeal No. 1515 of 2007 in re Sanjesh Yadav Vs State of UP and others decided on 18.1.2012

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

1. In nut shell the case of the petitioner is that for making appointment of Constable an advertisement was issued calling application from the eligible candidates. In pursuance to the advertisement petitioner applied for the said post and after due completion of selection process petitioner was selected from District Etawah and was appointed as a Constable in the Police Department on 26.11.2005. After completion of the post recruitment training the petitioner was posted as Constable in District Etawah on 28.6.2006. Selection of the petitioner has been cancelled by the respondent vide order dated 18.8.2007 passed by respondentno. 2. Reasons for cancellation of the appointment are that the petitioner did not disclose that a criminal Case bearing Case Crime No. 32 of 2005, under Sections 147, 148, 149, 307, 504, 506 IPC at P.S. Kandhala, District Muzaffar Nagar was registered against him. This order is subject matter of challenge before this Court.

2. Contention of learned counsel for the petitioner is that registration of an F.I.R. against the petitioner was not to his knowledge and he acquired the knowledge only after he had submitted his form/affidavit to the respondents. Other contention raised is that in terms of the instructions issued by the respondents vide G.O. No. 4694 dated 28.4.1958 instructions have been issued for the purposes of verification of character and antecedents of the Government Servants before their first appointment. These instructions do not envisage that petitioner is required to disclose any information regarding his character and antecedents. It enjoins upon the authority to verify the Character and antecedents of the petitioner. It is further submitted that the Character Verification of the petitioner was verified by the concerned police station before appointment and in the said report it has been mentioned that the petitioner has already been acquitted in the aforesaid criminal case vide judgement and order dated 15.9.2005 and it was the respondents who after being satisfied appointed the petitioner on 26.11.2005. It is further submitted that the impugned order of dismissal has been passed without issuing any show cause notice or without conducting any disciplinary proceedings after affording an opportunity of hearing to the petitioner and hence the same is patently illegal, arbitrary and is liable to be quashed.

3. Last ground taken by the petitioner is that in column 11 of the form required to be filled in by the petitioner whereby he is required to indicate as to whether he has been convicted by any competent Court. There is no requirement of furnishing the details or information regarding registration of the criminal case against the applicant. Impugned order proceeds on the assumption that the petitioner is required to disclose this information which is not factually correct. Consequently, when the authorities came to know about his involvement in a criminal case, the appointment of the petitioner on the post of Constable was cancelled for suppressing the information.

4. On the other hand stand of the respondents is that it is incumbent upon the petitioner to disclose the information regarding pendency of criminal case against him so as to enable the authorities to examine the antecedents and character of the applicant. Admittedly, petitioner has not disclosed these facts as such has obtained the appointment order by concealing the same. Consequence of such concealment would result in the cancellation of his appointment as provided by the instructions and form required to be filled up by the applicant. It is in the light of this the appointment of the petitioner has been cancelled.

5. Heard learned counsel for the petitioner, learned Standing Counsel and perused the material on record.

6. As a pre-requisite for being appointed as a Govt. servant the antecedents and character of the applicant is required to be verified by the appointing authority. The mode and manner in which such verification is required to be done is contained in the said G.O. dated 28.4.1958. Various steps are required to be taken by the concerned authority in ascertaining and verifying the character and antecedents of the applicant. Every direct recruit to any service will be required to produce a certificate of conduct and character from the head of the Institution where he last studied; (b) certificates of character from the two persons and in case of doubt appointing authority may either ask further references or may refer the case to the District Magistrate concerned may then make such further enquiry as he considers necessary.

7. Clause 4 of the said G.O. states that in cases of direct recruits to the service other than those mentioned in paragraph nos. 3(c) and (d) verification shall not be necessary as a matter of routine except in cases of doubt when the procedure mentioned in paragraph no. 3(b) shall be followed.

8. Clause 8 of the G.O. provides that every person recruited to the service would be required at the time of joining his appointment to fill up the form appended as annexure no. 3 to the |G.O. If he is found to have made a false statement in this connection, he would be discharged forthwith without prejudice to any other action that may be considered necessary.

9. Character of the candidate for direct recruitment must be such as to render him suitable in all respect for employment in service or post to which he is sought to be appointed. It would be the duty of the appointing authority to satisfy itself on this question. What has been contemplated by the G.O. dated 28.4.1958 is that character and antecedents of the appointee shall have to be verified by

having an overview of his personality in respect of his moral character and integrity. This is to enable the appointing authority to draw its satisfaction as to whether a person is fit to be appointed to the said post. In case it is found on verification that the Character and antecedents of the petitioner is not good, satisfaction to that extent has to be recorded by the appointing authority as contemplated by the Government Order.

10. The question that falls for consideration in this case is as to whether the petitioner by withholding the information regarding the registration of a criminal case can be deprived of the said appointment.

11. In order to examine this question, it would be seen as to what information was required to be furnished by the petitioner under the G.O. dated 28.4.1958 which is said to have been concealed by him resulting in cancellation of his appointment. It is stated that the petitioner did not disclose that a case has been registered against him while filling up his form/affidavit before the appointing authority. In order to appreciate this aspect reference has to be made to the Government Order as well as the form/ affidavit which is required to be filled up by the petitioner requiring him to disclose such information. While examining the G.O. there is no such obligation caste on the appointee to disclose any such information. However, the petitioner is required to disclose in Column 11 of the form appended as Annexure No. 3 to the writ petition the information that whether the petitioner has been convicted in any case or not. There is no other information required to be disclosed by the petitioner. Nothing has been brought on record by the other side that the petitioner was required to disclose that there was a case registered against him. As already stated herein above only information which was required to be disclosed by the petitioner was as to whether he was convicted in any criminal case or not.

12. Admittedly, petitioner has not been convicted in any case. Question of withholding of the information which is not required to be given by the petitioner cannot become a ground for cancellation of his appointment. What has been stated in the impugned order is that on verification of his character and antecedents it has come to the knowledge of the respondents as reported by Superintendent of Police, Muzaffar Nagar that a an FIR bearing Case Crime No. 32 of 2005 has been registered against the petitioner in which charge sheet under sections 147, 149, 504, 506 IPC has been submitted before the competent court but the applicant did not disclose this information to the respondents while filling his affidavit/verification certificate.

13. It is trite in law that mere involvement in a criminal case is not an impediment for appointment to the post of Constable. Moreover, after a person has been already acquitted from the criminal charges, stigma attached to a person is obliterated and, as such, the applicant cannot be denied the appointment. Moreover, a conviction results in ineligibility for appointment in Government service, but since the applicant has already been acquitted of the criminal charges, he is eligible for appointment. It is only in case a person is convicted in such a criminal case he becomes dis-entitled to such appointment. It is in this context column 11 requires this declaration to be made by the applicant.

Mere registration of a case in itself would not be a ground for cancellation of appointment. Even if this fact has not been disclosed by the petitioner if required to be done even then appointment cannot be cancelled. What is important is that while recording its satisfaction, appointing authority may on verification of the conduct, antecedents and character come to a conclusion that the overall profile of the petitioner is not conducive for his appointment on the post appointment can be declined. This will depend upon many factors including the reputation of the person, his behaviour in the public, his integrity and morality etc. This assessment is required to be made by the appointing authority before certifying the antecedents and character of the person. It will be important to mention here that the notes attached to Column 3 of the G.O. dated 28.4.1958 itself provides that a conviction need not of itself involve the refusal of a certificate of good character. Stands of conviction should be taken into consideration if it involves no moral turpitude or association with crimes of violence or with a movement which has as its object to overthrow by violent means a Government. The G.O. itself contemplates that every conviction would not necessarily result in refusal of certificate of character issued in favour of the petitioner.

14. Reliance has been placed by the learned counsel for the petitioner on catena of judgments. In **Ram Kumar Vs. State of UP decided in Civil Appeal No. 7106 of 2011 on 9.8.2011** wherein the Hon'ble Apex Court observed as under:

" ?.....but it appears from the order dated 08.08.2007 of the Senior Superintendent of Police, Ghaziabad, that he has not gone into the question as to whether the appellant was suitable for appointment to service or to the post of constable in which he was appointed and he has only held that the selection of the appellant was illegal and irregular because he did not furnish in his affidavit in the proforma of verification roll that a criminal case has been registered against him. As has been stated in the instructions in the Government Order dated 28.04.1958, it was the duty of the Senior Superintendent of Police, Ghaziabad, as the appointing authority, to satisfy himself on the point as to whether the appellant was suitable for appointment to the post of a constable, with reference to the nature of suppression and nature of the criminal case. Instead of considering whether the appellant was suitable for appointment to the post of male constable, the appointing authority has mechanically held that his selection was irregular and illegal because the appellant had furnished an affidavit stating the facts incorrectly at the time of recruitment."

15. In **Special Appeal No. 1515 of 2007 in re Sanjesh Yadav Vs State of UP and others decided on 18.1.2012,** Division Bench of this Court relying upon the judgment rendered in Ram Kumar Vs. State of UP decided in Civil Appeal No. 7106 of 2011 on 9.8.2011 has observed as under:

"...The criminal case no. 243 of 1995 had been decided on 19.10.2004 resulting into acquittal of the appellant. No appeal had been preferred by the State against the order of acquittal of the appellant. Therefore, it can not be said that the appellant had concealed any information or his character and antecedents were not such that he could not be given appointment in a disciplinary force.

9. In the present case also misstatement of fact has been made in the affidavit by the appellant, but at no point of time, it was considered as to whether the incumbent was suitable for appointment to the service, wherein he was appointed or not. Following the dictum of Apex Court in the aforesaid case, the appeal deserves to be allowed."

16. From the aforesaid discussion, it clearly appears that in the impugned order no satisfaction has been recorded by the appointing authority that the petitioner is not suitable to be appointed with reference to nature of suppression and nature of criminal case. Merely because the information with respect to the registration of the case has been withheld would not dis-entitle the petitioner to be appointed as no satisfaction has been recorded by the appointing authority that the nature of allegations so levelled against the petitioner are of such nature which would dis-entitle him to be appointed on the said post. Mere concealment of this information in itself would not tantamount to cancellation of his appointment as the necessity of supplying this information is not contemplated either by the instructions issued in terms of the G.O. dated 28.4.1958 or by the form required to be filled up by the petitioner.

17. Considering the facts and circumstances of the case, the writ petition deserves to be allowed and is hereby allowed. The order impugned dated 18.8.2007 passed by respondent no. 6 is hereby quashed. Respondents are directed to take back the petitioner in service within a period of one month from the date of production of certified copy of this order. However, it is further held that the petitioner is entitled to all consequential benefits except back wages for the period he remained out of service.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2012

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 64423 of 2008

Arvind Kumar Sonkar ...Petitioner
Versus
State of U. P. and others ...Respondents

Counsel for the Petitioner:
Sri P.C. Pandey

Counsel for the Respondents:
Sri J.N. Maurya
C.S.C.

Constitution of India, Article 226-arrears of salary-petitioners were appointed as Police Constable-after completing their Training-Services dispensewith by exercising power under Rule 8 (2) (b) of U.P. Police Subordinate Rank Punishment and appeal) Rules 1991-as per direction contained in special appeal-medical board examined and found them fit-consequently reinstated in service-now arrear of salary denied on "No work No pay" principle held-where the employee willing to work but not allowed-entitled full wages for period during which deprived to work-direction for continuity in service with all consequential benefits given.

Held: Para 7

The petitioners must have been given appointment after they were found to be medically fit. However, in pursuance of some letter of the Director General of Police fresh medical examination was conducted in which all the petitioners were declared to be medically unift and the same was found to be incorrect by

the Medical Board constituted under the direction of this Court. The shortcomings on which they were found medically fit such as colour vision and blindness, bilateral flat foot etc. cannot be said to be temporary in nature so as the same was not found in the subsequent medical examination. The same are permanent in nature. It is, thus, clear that the services of the petitioners were dispensed with wrongly and illegally on incorrect report which certified them to be medically unfit. Since the petitioners are not at fault for disengagement, they were clearly entitled for payment of arrears of salary for the said period as well as other consequential benefits and there is no justification to deny the said benefits.

Case law discussed:

AIR 1999 SC 3265

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

1. Heard learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

2. Pleadings have been exchanged between the parties and with the consent of the learned counsel for the parties, these petition are being disposed of finally.

3. Undisputed facts are that the petitioners in this bunch of writ petition were recruited in 2004 as Constable in Provincial Armed Constabulary 20th Battalion PAC, Azamgarh. After completing the training successfully, they were posted at 12th Battalion, Fatehpur. An order dated 25.7.2007 was passed by the Commandant dispensing with the services of the petitioner purported to be passed in exercise of powers conferred by Rule 8 (2) (b) of the U. P. Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991. The said order was challenged by the petitioners by filing separate writ petitions which were bunched together. Learned Standing Counsel was directed to produce the relevant record on the basis of which the orders under Rule 8 (2) (b) were passed. On record being produced, it was found that the petitioners were medically re-examined on 19.7.2007 and since they were found to be medically unfit for various reasons such as colour blindness, bilateral flat foot etc., their services were dispensed with under Rule 8 (2) (b). The learned single Judge finding that the petitioners were recruited in Police force wherein medical fitness was of paramount consideration, directed constitution of Special Medical Board for fresh medical examination consisting of two Ophthalmologists. The learned single Judge further directed that based on same report, the competent authority will re-consider the matter and take decision. The matter went up in special appeal. Vide judgment and order dated 21.11.2007, the Division Bench of this Court modified the order of the learned single Judge by constituting three members Board and the medical examination to be carried out by the Board in Lucknow. The Division Bench further directed that there will be two separate Boards, one for the purposes of eye test and the other for the physical test. The Boards will be consisting of three Doctors, one from a Government Hospital, one from Sanjay Gandhi Post Graduate Institute, Lucknow and the third from the King George Medical College, Lucknow. In pursuance to the aforesaid direction of the Division Bench, Medical Board was constituted which examined all the petitioners and found them to be medically fit. As a consequence vide order dated 18.1.2008 all the petitioners were reinstated back. Thereafter all the petitioners made application for the arrears of salary and other benefits such as seniority etc. When no decision was taken, they approached this Court by filing separate writ petitions which were disposed of directing the Commandant,

12th Battalion, P. A. C., Fatehpur to consider and decide the representation by means of a reasoned and speaking order. In pursuance to the aforesaid orders passed by this Court, vide order dated 22.8.2008, the claim made by the petitioners for arrears of salary and other consequential benefits has been rejected applying the principle of "No Work No Pay'.

4. It is contended by the learned counsel for the petitioners that the services were terminated wrongly and illegally on the basis of an alleged wrong medical report which was subsequently found to be incorrect by the Medical Board constituted under the orders of this Court as such they cannot be faulted with so as to deny the wages of the said period as well as other consequential benefits.

5. In reply, learned Standing Counsel referring to the averments made in the counter affidavit has submitted that since the earlier termination was not recalled or set aside rather after their medical re-examination since they were found fit and have been re-employed as such they are not entitled to any salary or other benefits for the said period.

6. I have considered the arguments advanced by the learned counsel for the parties and perused the record.

7. The petitioners must have been given appointment after they were found to be medically fit. However, in pursuance of some letter of the Director General of Police fresh medical examination was conducted in which all the petitioners were declared to be medically unift and the same was found to be incorrect by the Medical Board constituted under the direction of this Court. The shortcomings on which they were found medically fit such as colour vision and blindness, bilateral flat foot etc. cannot be said to be temporary in nature so as the same was not found in the subsequent medical examination. The same are permanent in nature. It is, thus, clear that the services of the petitioners were dispensed with wrongly and illegally on incorrect report which certified them to be medically unfit. Since the petitioners are not at fault for disengagement, they were clearly entitled for payment of arrears of salary for the said period as well as other consequential benefits and there is no justification to deny the said benefits.

8. In the case of ***Registrar (Administration), High Court of Orissa, Cuttack Vs. Sisir Kanta Satapathy (dead) by L. Rs. and another, AIR 1999, SC 3265***, the Apex Court has held that if an employee was willing to work but arbitrarily deprived from discharging his duties, should be paid his wages. The ratio of the aforesaid judgment is squarely applicable in the facts of the present case. All the petitioners were duly discharging their duties. There is no reason to believe that they were not willing to work. It is only on account of a medical report, which was subsequently found to be wrong and incorrect for which the respondents have no justification, there is no hesitation in holding that the petitioners were deprived from working arbitrarily.

9. In view of the above facts and circumstances, all the writ petitions succeed and stand allowed. The order dated 22.08.2008 passed by the Commandant 12th Battalion P. A. C., Fatehpur is quashed. A further writ of mandamus is issued commanding the respondents to treat the petitioner in continuous service with effect from 25.7.2007 to 18.1.2008 and also

pay them the arrears of salary for the said period with all other consequential benefits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN,J.
THE HON'BLE MRS. SUNITA AGARWAL,J.

Civil Misc. Writ Petition No. 66066 of 2011

Brij Mohan and others ...Petitioners
Versus
State of U.P. Thru Special Secy. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Awasthi
Sri Pramod Kumar Singh
Sri R.K.Jain

Counsel for the Respondents:
C.S.C.
Sri Suresh Singh
Sri Zafar Naiyar

Land Acquisition Act-Section 48-A-representation for exemption from acquisition-rejected-on ground possession already taken-prior issuance of G.O.-before taking possession no notice given to petitioners-No signature of tenure holders on Dakhalnama memo-found rejection on pertext acquisition completed before existence of Govt. order-hence can not be released-not available-can not be allowed to adopt pick and choose Policy-order quashed-direction for fresh consideration issued.

Held: Para 40

In view of the foregoing discussions, it is clear that the reasons given by the State Government for rejecting the claim of the petitioners under Section 48 of the Act for release of their land, are erroneous. The State Government in its order dated 11th October, 2011 has essentially given two reasons for rejecting the claim. Firstly the possession has been taken on 15th July, 2009 and 27th July, 2009 which land is in possession of the Authority, hence the same cannot be released and secondly before issuance of the Government order dated 27th August, 2010 the acquisition of land was already complete in accordance with law. We have already held that possession of the land in dispute was not taken in accordance with law on 15th July, 2009 and 27th July, 2009 hence the findings of the State Government that release cannot be made under Section 48 of the Act is erroneous. The view of the State Government that acquisition has already completed prior to issue of the Government order dated 27th August, 2010 is also not correct. We have already repelled the submission of learned counsel for the respondents that the Government order dated 27th August, 2010 is not applicable with regard to acquisition of petitioners' land. Thus both the reasons given in the order dated 11th October, 2011 is unsustainable.

Case law discussed:
2009 ADJ 441; 2009 (1) ADJ 535; 2010 (7) ADJ 329; 2010 (10) SCC 282; 2011 (11) ADJ 1; A.I.R. 1975 SC 1767; 1996 (4) SCC 212; (2011) 5 SCC 394; (2011) 7 SCC 639; 2004 (1) AWC 206; (1988) 1 SCC 50; (2003) 11 SCC 772 (II); 2010 (3) SCC 621

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

1. These four writ petitions have been filed by the farmers of four villages, namely, Kansera, Jikarpur, Jahangarh and Tappal of district Aligarh claiming withdrawal of acquisition of their agricultural land under Section 48 of the Land Acquisition Act, 1894.

2. The issues raised in these writ petitions being common, they have been

heard together and are being decided by this common judgment.

3. Pleading in Writ Petition No.66066 of 2011 are complete which is being treated as leading writ petition. It is sufficient to refer the facts and pleadings in Writ Petition No.66066 of 2011 to decide all the four writ petitions, which are as follows; notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) dated 31st March, 2009 proposing acquisition of an area of 72.5249 hectares of land was issued. The inquiry under Section 5A of the Act was dispensed with invoking Sections 17(1) and 17(4) of the Act. The declaration under Section 6 was issued on 28th May, 2009. The aforesaid acquisition was challenged in this Court by filing writ petitions by land owners. The acquisition was made for Yamuna Expressway running from NOIDA to Agra and five parcels located along with the said expressway. The writ petitions challenging the notifications dated 31st March, 2009 and 28th May, 2009 in respect of villages, namely, Jahangarh, Kansera, Jikarpur, Tappal and Kripalpur of district Aligarh were dismissed along with batch of writ petitions led by writ petition of ***Narendra Road Lines*** by a Division Bench of this Court vide judgment and order dated 2nd July, 2010 which is reported in 2010(7) ADJ 329. Some of the petitioners, who are the petitioners in these writ petitions, have also assailed the notifications, which writ petition was also dismissed i.e. Writ Petition No.46617 of 2009 decided on 11th August, 2010. The petitioners neither took the compensation nor entered into any agreement as offered by the State and raised protest regarding acquisition of their land despite upholding of notifications under Sections 4 and 6 of the Act. Large number of farmers including the petitioners raised their protest against the acquisition and the amount of compensation offered for the land. The State Government took a policy decision on 27th August, 2010 with regard to five villages of district Aligarh, namely, Kansera, Jikarpur, Kripalpur, Jahangarh and Tappal providing for various benefits including compensation at the rate of Rs.570/- per square meter on the basis of the recommendation of the State Level Committee. The Government order dated 27th August, 2010 was issued on the above subject by which nine directives were issued pertaining to acquisition of land of the aforesaid five villages. One of the decisions taken by the State Government was that if any farmer is not ready for the acquisition of his land at the rate of Rs.570 per square meter, his land be not acquired without his consent. Petitioners claim that they are throughout in possession and sown crops over the land in dispute. Petitioners submitted representation to the State Government on 2nd November, 2010 requesting that acquisition for development of township in Tappal be cancelled and the name of villagers of the aforesaid five villages be restored in the revenue records. A writ petition being Writ Petition No.40117 of 2011 was filed by Brij Mohan and others in this Court raising a grievance that representation submitted by the petitioners under Section 48 of the Act pending before State Government be directed to be considered and their land be directed to be released. The said writ petition was disposed of by a Division Bench of this Court by order dated 21st July, 2011 directing the authority concerned to consider the grievance of the petitioners. After the order of this Court, notice dated 27th September, 2011 was issued to various villagers of the aforesaid five villages by the Special Land Acquisition Officer, Aligarh and the petitioners were also asked to appear before the State Government on 30th

September, 2011. Some of the petitioners appeared before the State Government on 30th September, 2011 and submitted their representations. In the representation they specifically referred to sub-paragraph (2) of paragraph 1 of the Government order 27th August, 2010 which provided that the land of those farmers be not acquired who do not accept the compensation at the rate of Rs.570/- per square meter without their consent. The State Government vide its order dated 11th October, 2011 rejected the application under Section 48 of the Act and refused to release the land. The Writ Petition No.66066 of 2011 has been filed challenging the aforesaid decision dated 11th October, 2011, praying for following relief:-

"(i) Issue an appropriate writ, order or direction in the nature of certiorari quashing Order dated 11th October, 2011, passed by the Under Secretary, Industrial Development, State of U.P. contained in Annexure No.9 to the writ petition.

(ii) Issue an appropriate writ, order or direction in the nature of Mandamus directing the Respondent Authorities not to interfere with the actual physical cultivatory possession of the Petitioners over their respective lands as mentioned in para 3 of the writ petition and not to take any coercive action against the Petitioner for their dispossession of the land in dispute. ....."

4. Writ Petition No.72604 of 2011 has been filed by villagers of villages Jikarpur and Mazra Udaipura Tappal praying for following relief:-

"(i) Issue a writ, order or direction in the nature of mandamus commanding the Respondent No.1 to entertain the representation of the petitioners on being so presented and to decide it in the light of the policy decision of the State dated 27.8.2010 within a reasonable period of time, as may be fixed by this Hon'ble Court.

(ii) Issue an appropriate, writ order or direction declaring that after announcement and implementation of Policy dated 27.8.2010 (Annex.-1) the land in question stands denotified under Section 48 of the Land Acquisition Act. ....."

5. In Writ Petition No.1341 of 2012 (Radha Charan and others vs. State of U.P. and others), which has been filed by 14 villagers of village Jahangarh challenging the order dated 29th April, 2011 by which the representation of the petitioners under Section 48(1) of the Act was rejected, following prayers have been made:-

"(i) Issue an appropriate, writ order or direction declaring that the Policy decision dated 27.8.2010 (Annexure No.3) amounts to a decision under section 48 of the Land Acquisition Act to withdraw the acquisition proceedings relating to the land in dispute.

(ii) Issue an appropriate writ, order or direction in the nature of certiorari quashing Order dated 29th April, 2011 contained in Annexure No.9 to the Writ Petition.

(iii) Issue an appropriate writ, order or direction in the nature of Mandamus directing the respondent Authorities not to interfere with the actual physical cultivatory possession of the Petitioners over their respective lands as mentioned in para 3 of the writ petition and not to take any coercive action against the Petitioner for their dispossession of the land in dispute. ....."

6. Writ Petition No.2656 of 2012 has been filed by three petitioners of Mazra Udaipura Tappal, praying for following relief:-

"(i) Issue an appropriate writ, order or direction in the nature of mandamus commanding the Respondent No.1 to consider the grievance of the Petitioners pending before it by way of representation contained in ***Annexure No.4*** *to the writ petition in the light of the Policy decision of the State dated 27.8.2010 (Annexure No.1) and the facts stated in para 26 of the writ petition within a reasonable period of time as may be fixed by this Hon'ble Court.*

(ii) Issue an appropriate, writ order or direction declaring that after announcement and implementation of Policy dated 27.8.2010 (Annexure No.1) and the facts stated in para 26 of the writ petition the land in question stands denotified under section 48 of the Land Acquisition Act.

(iii) Issue an appropriate writ, order or direction in the nature of Mandamus commanding the respondents not to take any coercive action against the Petitioners seeking coercive action of dispossession of the Petitioners from their respective lands stated in para 2 of the writ petition and the facts stated in para 26 of the writ petition without deciding the representation about fraudulent transaction of the Respondent Authorities by a reasoned and speaking or after deciding the representation of the petitioners (Annexure No.4) by a detailed and speaking reasoned order.

....."

7. From the facts and relief in the aforesaid four writ petitions, it is clear that petitioners have come to this Court praying that their land, which was included in the notifications under Sections 4 and 6 of the Act, be released by the State Government exercising its jurisdiction under Section 48 of the Act in the light of the Government order dated 27th August, 2010 by which the State Government took a policy decision not to acquire land of those farmers who are not agreeable to accept the compensation at the rate of Rs.470/- per square meter.

8. Counter affidavits have been filed by the State Government, Yamuna Expressway Industrial Development Authority as well as Jay Pee Infratech Limited, which has been impleaded as respondent No.7 in Writ Petition No.66066 of 2011. In the counter affidavit filed by the State, it has been stated that the State Government took a decision for construction of Taj Expressway in the year 2001 towards east of Yamuna from NOIDA to Agra and subsequently Taj Expressway Authority changed the name as Yamuna Expressway Industrial Development Authority (hereinafterinafter referred to as the Authority) by notification dated 11th July, 2008. The acquisition for expressway was challenged in this Court which was dismissed in writ petition of ***Balbir Singh and others vs. State of U.P. and others*** (reported in 2009 ADJ 441). Another writ petition challenging the acquisition for interchange of the expressway was also dismissed by this Court in ***Nand Kishore Gupta and others vs. State of U.P. and others*** (reported in 2009(1) ADJ 535) and by another judgment in ***Narendra Road Lines Pvt. Ltd. vs. State of U.P. and others*** [reported in 2010(7) ADJ 329] the acquisition was upheld. The Apex Court also affirmed the land acquisition by its judgment in ***Nand Kishore Gupta and others vs. State of U.P. and others***

[reported in 2010(10) SCC 282]. Supporting the order dated 11th October, 2011 passed by the State Government rejecting the application under Section 48(1) of the Act, it has been stated that possession of the land of Jikargarh was taken on 15th July, 2009 and possession of the land of village Jahangarh and Tappal was taken on 27th July, 2009 and the land has vested in the State and could not be released under Section 48 of the Act. It is further pleaded that the Government order dated 27th August, 2010 shall apply prospectively. It has been stated that in August, 2010 due to agitation by some farmers the scheme of development of the land was proposed to be closed. It has further been stated that several villagers have entered into agreement and taken compensation.

9. The Yamuna Expressway Industrial Development Authority has also filed a counter affidavit. In its counter affidavit it has raised similar pleadings. It has been stated that acquisition proceedings had been completed prior to issuance of Government order dated 27th August, 2010 and possession of the land was taken and delivered to the Authority on 15th July, 2009 and 27th July, 2009, hence the application filed by the petitioners under Section 48 of the Act has rightly been rejected. It has further been pleaded that name of the Authority has also been recorded in the revenue records. It has further been pleaded that after obtaining possession of the land, the land has been leased to the Concessionaire (M/s Jay Pee Infratech Limited), hence the petitioners do not have any right over the land in dispute.

10. A counter affidavit has also been filed by the J.P. Infratech Limited in the leading writ petition. The case of J.P. Infratech Limited (hereinafter referred to as the Company) is that the project envisaged construction of an access controlled expressway and further development of 25 million square meters of land along with expressway at five different locations. A concession agreement dated 7th February, 2003 was executed between the Authority and Jai Prakash Industries Limited and the Company was incorporated as special purpose vehicle under the orders of the Authority for implementing the project. It is stated that writ petitions challenging the project have been dismissed by this Court including a public interest litigation and the notifications issued for acquisition of land were also upheld by this Court as well as the Apex Court. It is further stated that after taking possession by the Authority lease deeds were executed with regard to villages Tappal, Jahangarh and Jikarpur on 30th December, 2010 by the Authority. It has further been pleaded that once the land stands duly appropriated to the project, the State Government retains no power to release the same from the acquisition. The Authority was transferred the possession on 23rd July, 2009 and 27th July, 2009 and upon execution of the lease deeds the land has been transferred to the Company which is in physical possession and is carrying on development on the land. Certain photographs have also been filed as Annexure CA-8 to the counter affidavit showing boundary pillars for land development. With regard to Government order 27th August, 2010 it has been pleaded that the said Government order can have only prospective application and the said Government order has no application in respect of the land which has already vested in the acquiring body.

11. Sri Ravi Kiran Jain, learned Senior Advocate, appearing for the petitioners challenging the order dated 11th October,

2011 passed by the State Government rejecting the application under Section 48(1) of the Act in the leading writ petition, submits that the said order does not contain any reason and shows complete non application of mind. It is submitted that when the State Government has taken a decision on 27th August, 2010 for not acquiring the land of those villagers who do not agree to compensation at the rate of Rs.570/- per square meter, the land stood withdrawn from acquisition under Section 48 of the Act. Sri Jain submits that the order dated 27th August, 2010 issued by the State Government has to be treated as an order withdrawing the land from acquisition under Section 48 of the Act. The policy decision dated 27th August, 2010 has been referred to as a policy decision luring illiterate farmers to come into the trap and forego their demand against the acquisition by accepting illusory offers. It has further been submitted that possession of petitioners' land has never been taken by the respondents in accordance with law. The petitioners still continue in physical possession of their land and are sowing crops. Sri Jain further submits that there is no material brought on the record by the respondents in the counter affidavit to indicate that at any point of time physical possession of the land has been taken. Referring to possession memo dated 27th July, 2009 (Annexure-3 to the writ petition), learned counsel for the petitioners submits that claiming transfer of possession to the Authority is not a possession memo which can be relied since it does not contain signature of any of the petitioners or any independent witness and contains only the signatures of officials of the Authority and the Special Land Acquisition Officer which possession memo cannot be accepted to be a document transferring the possession. Sri Jain further submits that possession having never been taken by the respondents, the findings recorded by the State Government that possession has been taken, hence release cannot be made under Section 48 of the Act, is erroneous and is refusal to exercise the power under Section 48 of the Act. It is further submitted by learned counsel for the petitioners that present is not a case where matter needs to be remanded to the State Government again to take a decision for release under Section 48 of the Act, rather this Court in these writ petitions itself may declare that the land stand released under Section 48 of the Act. It has further been submitted that the Company, the concessionaire, has no right before the State Government under Section 48 of the Act and the prayer made by the Company that it should be heard in proceedings under Section 48 of the Act be not accepted.

12. Sri Zafar Naiyar, learned Additional Advocate General appearing on behalf of the State, refuting the submissions of learned counsel for the petitioners, contends that the order of the State Government rejecting the application under Section 48 of the Act of the petitioners in leading writ petition is perfectly valid and justified. It is submitted that possession was taken of the land in dispute on 15th July, 2009 and 27th July, 2009 which findings have been recorded by the State Government based on the reports and materials received from the Authority and other records and the same need no interference by this Court in these writ petitions. It is submitted that possession having already been taken and the petitioners having been dispossessed from the land in dispute, the release of land cannot be made under Section 48 of the Act. It is further submitted that name of the petitioners are not in the revenue records which fact has even been stated in the

representation dated 2nd November, 2010 of the petitioners and thus they are not in possession of the land in dispute. Insofar as the Government order dated 27th August, 2010 is concerned, the said Government order does not help the petitioners since the said Government order has only prospective application and shall apply to land acquired subsequent to the said Government order. It is submitted that since the land acquisition proceedings with regard to land of the petitioners have already been finalised, no benefit can be claimed by the petitioners of the aforesaid Government order dated 27th August, 2010. Sri Naiyar further submits that the State Government having decided not to release the land, the petitioners cannot insist that their land be released.

13. Learned counsel for the Authority has also adopted the arguments of the learned Additional Advocate General and submitted that the possession has already been taken by the Authority whose name is recorded in the revenue records.

14. Sri Yashwant Varma, learned counsel appearing for the Company, submits that lease having already been executed in favour of the Company after possession has been taken by the Authority on 15th July, 2009 and 27th July, 2009, the State Government does not have any power or authority to release the land under Section 48 of the Act. He submits that entire land covered by the acquisition is a part of integrated project of six lane access expressway as well as five land parcels allocated for development and no part of it can be released, the project having already been upheld in various writ petitions by this Court. It is further submitted by Sri Varma that no benefit can be taken by the petitioners of the Government order dated 27th August, 2010 since the said Government order at best can prospectively apply and has no application to the land which was acquired earlier to the said Government order.

15. Learned counsel for the parties have referred to and relied on various judgments of this Court as well as the Apex Court which shall be referred to while considering the respective submissions of learned counsel for the parties in detail.

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

17. There is no dispute between the parties that acquisition of land under the Act relating to the land in question, has already been upheld by this Court as well as the Apex Court and no challenge is raised in these writ petitions regarding acquisition of land. The prayer in these writ petitions is regarding release of the land under Section 48 of the Act. Thus in these writ petitions only issue to be considered is the claim of the petitioners for release of their land under Section 48 of the Act.

18. Section 48 of the Act provides that Government shall be at liberty to withdraw from acquisition any land of which possession has not been taken. Section 48 of the Act is quoted below:-

"48. Completion of acquisition not compulsory, but compensation to be awarded when not completed.- *(1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.*

(2) Whenever the Government withdraws from any such acquisition, the

Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings there under, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

(3) The provision of Part III of this Act shall apply, so far as may be, to the determination of the compensation payable under this section."

19. For exercising the power under Section 48 of the Act the pre condition is that possession of the land has not been taken. In the event possession of the land has been taken either under Section 16 or Section 17(1) of the Act, the land vests absolutely in the Government free from all encumbrances. Once the land vests in the Government, the withdrawal cannot be claimed under Section 48 of the Act either by the State Government or at the instance of the land owners. Thus the first issue to be considered is as to whether possession of the land has been taken by the State/Authority or the petitioners continue to be in possession over the land so as to claim withdrawal under Section 48 of the Act.

20. The notification under Section 4 read with Section 17(1) and 17(4) of the Act with regard to villages Jahangarh, Tappal and Jikarpur was issued on 31st March, 2009. The declaration under Section 6 of the Act was issued on 28th May, 2009. The case of the respondents is that the possession was taken of the land of aforesaid villages on 15th and 27th July, 2009. The petitioners have filed copy of the possession memo dated 15th July, 2009 and 27th July, 2009 as Annexure-3 to the leading writ petition. A perusal of the possession memo indicate that the said possession memo contains the signatures of the Special Land Acquisition Officer as well as the officials of the Authority only and there are no signatures of any independent witness or any of the land holders. The question as to how the possession of agricultural land shall be taken in the land acquisition proceedings came for consideration recently before a Full Bench of this Court in which one of us (Justice Ashok Bhushan) was also a member in the case of ***Gajraj and others vs. State of U.P. and others*** reported in 2011(11) ADJ 1. The Full Bench after referring to and relying on judgments of the Apex Court in the cases of ***Balwant Narayan Bhagde vs. M.D. Bhagwat and others*** reported in A.I.R. 1975 SC 1767, ***Balmokand Khatri Educational and Industrial Trust vs. State of Punjab*** reported in 1996(4) SCC 212 and ***Banda Development Authority, Banda Vs. Moti Lal Agarwal & Ors,*** reported in ***(2011) 5 SCC 394 ,*** while considering similar possession memo as claimed in the present case, has held that the aforesaid possession memo are not the possession memo and such document cannot be treated to be valid possession memo/panchnama nor the same can be treated to be sufficient to constitute taking of possession. It is useful to refer to paragraphs 357 to 362 of the said judgment, which are to the following effect:-

"357. *In* ***Banda Development Authority's*** *case (supra) the Apex court again considered manner of taking possession and after considering earlier judgment following principle was laid down in paragraph 37 which is quoted as below:*

37. The principles which can be culled out from the above noted judgments are:

i) No hard and fast rule can be laid down as to what act would constitute taking of possession of the acquired land.

ii) If the acquired land is vacant, the act of the State authority concerned to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.

iii)If crop is standing on the acquired land or building/structure exists, mere going on the spot by the authority concerned will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the authority concerned will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

iv)If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.

v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3-A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the Court may reasonably presume that possession of the acquired land has been taken.

***358.** The last judgment relied by petitioners is judgment of the apex court in **Prahlad Singh's** case. In the said case apex court held that no evidence was shown by the respondent to show that possession was taken in the presence of independent witness and their signatures were obtained in the Panchanama. Paras 20 and 22 which are relevant are quoted below:*

"20 If the present case is examined in the light of the facts which have been brought on record and the principles laid down in the judgment in Banda Development Authoritys case it is not possible to sustain the finding and conclusion recorded by the High Court that the acquired land had vested in the State Government because the actual and physical possession of the acquired land always remained with the Appellants and no evidence has been produced by the Respondents to show that possession was taken by preparing a panchnama in the presence of independent witnesses and their signatures were obtained on the panchnama."

22. Respondent Nos. 3 to 6 have not placed any document before this Court to show that actual possession of the acquired land was taken on the particular date. Therefore, the High Court was not right in recording a finding that the acquired land will be deemed to have vested in the State Government."

***369.** In the main writ petition no.37443 of 2011 in the counter affidavit filed by the State it has been stated that possession of land was transferred to Greater NOIDA on*

5.9.2008 and 12.1.2009 the relevant averment regarding delivery of possession has been made in paragraph 12(e) which is quoted below:

The Greater Noida Development Authority deposited 70% of the compensation amount (10% of the compensation amount had already been deposited by the Greater Noida Authority before submitting the proposal for issuance of Section 4 Notification), as required under the Land Acquisition Act, before sending the proposal for issuance of declaration under Section 6. The proposal was sent to the State Government vide letter no.144/10 dated 24.06.08 and the State Government after being satisfied with the proposal issued declaration under Section 6(1)/17(1) on 30.06.2008. After the declaration under Section 6(1)/17(1), notices under Section 9 were issued to the land owners, and after expiration of fifteen days time as stipulated in the notices, possession of land was transferred to Greater Noida Development Authority on 05.09.2008, for an area of 572.592 hectares, and on 12.01.2009 for an area of 1.453 hectares. True photocopies of the possession memo dated 05.09.2008 and 12.01.2009 are being filed herewith and marked as ANNEXURE NOS. CA-5 AND CA-6 respectively to this counter affidavit.

360. *The possession memos dated 5.9.2008 and 12.1.2009 has been filed as Annexures 5 and 6 to the counter affidavit of the State. Both the possession memos state "the possession of land as detailed below included in notification as mentioned above of Village Patwari, Tehsil Dadari is being transferred to acquiring department/greater NOIDA Industrial Development authority." (translated in English)*

361. *The said memo has been signed by 5 officials of greater NOIDA authority and Special Land Acquisition officer Gautam Budh Nagar. The possession memo does not contain signatures of any of the land holders or any witnesses. It is useful to refer two specific pleadings in writ petitions regarding possession. In writ petition no.47502 of 2011 Jugendra and others Vs. State of U.P. following was stated in paragraph 6 of the writ petition:*

"That, subsequent to the acquisition proceedings a notice purporting to be a notice under Section 9 of the Act aforesaid was also issued and it is said that the possession of entire land in village Tusiyana, Pargana and Tehsil Dadri district Gautam Budh Nagar and being 293.015 Hectare was taken. Photostat copy of the procession memo as prepared and shown to have been executed between the authorities of the State Government and Greater Noida, is being filed herewith and is marked as Annexure-5 to this writ petition. As would appear from a perusal of possession memo also, none of the petitioners have signed the aforesaid possession memo and the possession memo is only a departmental document not signed by any of the petitioners. Thus at no point of time the possession of the land in dispute has been validly taken from the petitioners.

362. *Copy of the possession memo as claimed by the State dated 2nd February, 2007 was also filed as Annexure 5 to the writ petition. The possession memo Annexure 5 to the writ petition also contains the statement "details of the land possession of which is being transferred to acquiring body/greater NOIDA Industrial Development authority". The said memo has again been signed by four officers of the greater NOIDA authority and Additional*

District Magistrate Land Acquisition, Gautam Budh Nagar. The aforesaid possession memo are not the possession memo or the document showing taking of possession by the State. There is no occasion to transfer the possession to the greater NOIDA authority by the State unless the possession is obtained by the State. Further more, as held in the judgment of the apex court as noticed above even if the land is vacant the State authority has to go to the spot and prepare a Panchanama which ordinarily be treated as sufficient to constitute taking of possession. The possession memo filed by the State in the counter affidavit can not be termed to be a Panchanama since signatures of any Panch (independent witness) are absent. Thus the taking of possession by the respondent can not be said to be in accordance with the law. Thus we find substance in the submission of the learned counsel for the petitioners that possession was not taken by the State authorities of land in accordance with law and possession memo which has been filed by the State authorities can not be treated to be valid possession memo evidencing taking of possession."

21. Although the State Government as well as the Authority in their counter affidavits have mentioned taking of possession on 15th July, 2009 and 27th July, 2009 but they have not referred to any other materials claiming taking of possession of the land except possession memo filed as Annexure-3 to the leading writ petition. The petitioners in the writ petitions have categorically pleaded that they are in actual physical possession and possession was never taken by any of the respondents. In the order impugned in leading writ petition, the State Government has referred to the reports received from Special Land Acquisition Officer, Aligarh stating that possession of the land of village Jikargarh was taken on 15th July, 2009 and possession of the land of the villages Jahangarh and Tappal was taken on 27th July, 2009. The State Government has, without referring to any material or giving any reason, jumped on the conclusion that the land was transferred to the Authority on 15th July, 2009 and 27th July, 2009 respectively and the same is in possession of the Authority. As stated above, the possession of the land as alleged by the respondents having not been taken in accordance with law as declared by the Apex Court in aforementioned cases, it cannot be held that the possession of land has been taken by the respondents. The view of the State Government in its order dated 11th October, 2011 (Annexure-9 to the leading writ petition) and similarly in the order dated 29th April, 2011 which is challenged in Writ Petition No. 1341 of 2012 cannot be accepted.

22. The submission of the learned counsel for the respondents is that the fact that petitioners are not in possession of the land in dispute is clear from the petitioners' representation dated 2nd November, 2010 (Annexure-5 to the leading writ petition) wherein they have prayed that their names be got recorded in the revenue records. A perusal of the representation dated 2nd November, 2010 (Annexure-5 to the leading writ petition) does not indicate that petitioners at any point of time admitted that they are not in possession of the land in dispute. The petitioners have rather prayed that the declaration of the State Government dated 27th August, 2010 for cancelling the township be implemented and the name of the farmers be recorded in the revenue records. The fact that in the revenue records the name of the Authority has been recorded does not conclusively prove that the

Authority is in actual physical possession of the land in dispute. The Apex Court in the case of ***State of Madhya Pradesh vs. Narmada Bachao Andolan and another*** reported in (2011)7 SCC 639, had occasion to consider the consequence of entries in revenue records regarding physical possession. Following was laid down by the Apex Court in paragraph 152, which is as under:-

"152. *In view of the above, it becomes crystal clear that none of the tenure holders, so far the land in dispute is concerned, has been evicted/dispossessed. All the tenure holders are enjoying the said land without any interference. The tall claims made by the respondents before the High Court were totally false. The High Court was not justified in entertaining their applications in this regard, without verifying the factual aspects. In such a fact-situation, as the actual physical possession has not yet been taken by the authorities and the entries in the revenue records etc. are not the conclusive proof, therefore, the State Government is competent to exercise its power under Section 48 of the Act 1894. However, it will be subject to the decision on another relevant issue regarding submergence of the land in dispute permanently or temporarily which is to be considered hereinafter."*

23. We thus hold that possession having not been taken by the respondents in accordance with law, the claim of the petitioners under Section 48 of the Act cannot be rejected on the ground that possession has been taken by the Authority.

24. Now comes the submission of the petitioners' counsel that by Government order dated 27th August, 2010 the land stood withdrawn from the acquisition and nothing more was required to be done for withdrawal. Learned counsel for the petitioners has placed reliance on the Government order dated 27th August, 2010 (sub-paragraph (2) of paragraph 1) where the State Government provided that if any farmer is not ready to accept the compensation at the rate of Rs.570/- per square meter, his land be not acquired without his consent. Learned counsel for the petitioners has further attacked on various other measures as mentioned in the said Government order, which according to the petitioners' counsel was with the object of luring the farmers to forego their demand. The Government order dated 27th August, 2010, which is relevant for deciding the issues raised in these writ petitions, is to the following effect:-

"....

औद्योगिक विकास अनुभाग–3 लखऊ – दिनॉक 27 अगस्त, 2010

विषय –यमुना एक्सप्रेस–वे परियोजना के अन्तर्गत जनपद अलीगढ के पॉच ग्रामों–कन्सेरा, जिकरपुर, कृपालपुर, जहानगढ एवं टप्पल में रू0570/– प्रति वर्गमीटर का मुआवजा किसानों को दिये जाने के संबंध में।

महोदय,

उपर्युक्त विषयक राजस्व विभाग के शासनादेषसंख्या–1252/1–13–1–20 (29)/2004 राजस्व अनुभाग–13, दिनॉक17–8–2010 के प्रस्तर–5 के प्राविधानों के अन्तर्गत जनपद अलीगढ़ में भूमि अधिग्रहण के संबंध में किसानों से आम सहमति न बनने की दषामें मण्डलायुक्त की अध्यक्षता में गठित समिति द्वारा जनपद अलीगढ़ में यमुना एक्सप्रेस वे परियोजना हेतु अधिग्रहीत की जा रही भूमि से प्रभाविक कृषकों द्वारा किये जा रहे आन्दोलन को समाप्त कराने के प्रयास में भूमि के मुआवजे के अतिरिक्त अनुग्रह राषि बढाये जाने हेतु उक्त शासनादेष के प्राविधानों के अनुरूप गठित राज्य स्तरीय समिति के विचारार्थ अपनी संस्तुतियां प्रेषित की है। मण्डल स्तरीय समिति की उपर्युक्त संस्तुतियों पर राज्य

स्तरीय समिति द्वारा दिनॉक 27–8–2010 को आहूत बैठक में सम्यक विचारोपरान्त की गयी संस्तुति के दृष्टिगत मुझे यह कहने का निर्देष हुआ है कि शासन द्वारा यमुना एक्सप्रेस वे परियोजना के अन्तर्गत लैण्ड फोर डेवलेपमेन्ट एवं इण्टरचेंज हेतु जनपद अलीगढ़ के 05 ग्रामों कन्सेरा, जिकरपुर, कृपालपुर, जहानगढ एवं टप्पल में मुआवजा देने के संबंध में निम्नलिखित का अनुमोदन प्रदान किया जाता है:–

(1) यमुना एक्सप्रेस वे परियोजना की लैण्ड फॉर डेवलपमेन्ट एवं इण्टरचेंज हेतु अर्जित की जा रही भूमि से प्रभावित 05 ग्रामों में अधिग्रहीत भूमि के प्रतिकर निर्धारण हेतु पूर्व में निर्धारित की गयी दर रू0436/– प्रति वर्गमीटर (रू0 412/– प्रति वर्गमीटर प्रतिकर दर + रू0 24/– प्रति वर्गमीटर अनुग्रह राशि) में विशेष धनराशि बढ़ाकर रू0570/– प्रति वर्गमीटर (रू0 412/– प्रति वर्गमीटर प्रतिकर दर व रू0 158/– प्रति वर्ग मीटर अनुग्रह राशि) की जाय।

(2) यदि कोई किसान रू0 570/– प्रति वर्ग मीटर की दर से अपनी भूमि अधिग्रहण करने से सहमत न हो, तो उनकी सहमति के बिना उसकी भूमि का अधिग्रहण नहीं किया जाये।

(3) लैण्ड का डेवलपमेन्ट परियोजना में 7 प्रतिशत आबादी भूमि इस परियोजना हेतु अधिग्रहण से प्रभावित किसानों हेतु आरक्षित किया जाय।

(4) इस परियोजना हेतु भूमि अधिग्रहण से पूर्णतः भूमिहीन हो रहे परिवार के एक पारिवारिक सदस्य को उसकी योग्यता के अनुरूप कन्सेशनेयर कम्पनी में सेवायोजित कराया जाय।

(5) शासनादेश संख्या–1252/1–13–10–20(29)/2004, राजस्व अनुभाग–13 दिनॉक 17–8–2010 में दी गयी सुविधए प्रदत्त की जाय।

(6) किसानों की भूमि पर कब्जा लेने में खड़ी फसल नष्ट होने की अवस्था में नष्ट फसल का उचित मुआवजा दिया जाय।

(7) किसानों की भूमि पर स्थित परिसम्पत्तियों जैसे पेड़, बोरिंग, दीवार, भवन आदि की क्षतिपूर्ति मुआवजा धनराशि अतिरिक्त रूप से दिया जाय।

(8) अधिग्रहित ग्रामों के क्षेत्र में चिकित्सा एवं शिक्षा की सुविधायें मुहैया करायी जानी है। कन्सेशनेयर कम्पनी इस हेतु आवश्यक अवस्थापना का सृजन करेगी।

(9) संदर्भित योजना से प्राभावित ग्रामों के टूटे–फूटे रास्तों की मरम्मत प्राथमितकता के आधार पर कराया जाये।

2– कृपया उपरोक्तानुसार अनुपालन सुनिश्चित किया जाय।

भवदीय,

(वी0एन गर्ग)
प्रमुख सचिव

25. From the subject of the aforesaid Government order, as quoted above, it is clear that the Government order was issued on the subject of providing compensation of Rs.570/- per square meter to the farmers. The Government order further mentions about the agitation of the farmers and with intend to control the agitation of the farmers, the Government order was issued providing several benefits. The said Government order further clearly contemplates in sub-paragraph (2) of paragraph 1 that if a farmer does not agree for acquisition of land at the rate of Rs.570/- , his land be not acquired without his consent. The submission of the petitioners' counsel is that the said Government order is itself a declaration under Section 48 of the Act for withdrawal of the land and the petitioners' land stood withdrawn after issuance of the Government order dated 27th August, 2010 since none of the petitioners have either accepted compensation or given their consent for acquisition at the rate of Rs.570/- per square meter. Although in the Government order the State Government came with the decision that the land of those farmers who do not agree for taking compensation at the rate of Rs.570/- per square meter shall not

be acquired without their consent but it cannot be said that by the Government order itself without anything more the land stood released under Section 48 of the Act.

26. Learned counsel for the Company has placed reliance on the judgment of the Apex Court in the case of ***Rajinder Singh Bhatti and others vs. State of Haryana and others*** reported in (2009)11 SCC 480 where the Apex Court was considering the provisions of Sections 48(1) and 48(2) of the Act in context of lapse of acquisition under Section 11-A of the Act. It was submitted before the Apex Court that the land owners were entitled for compensation under Section 48(2) of the Act since the award was not given by the Land Acquisition Officer within the time allowed and the acquisition stood withdrawn. The Apex Court while considering the nature of withdrawal of acquisition under Section 48 and lapse under Section 11-A, laid down following in paragraphs 27 and 28 of the judgment which are as under:-

"27. *In the context of Section 48, the word "withdraw" is indicative of the voluntary and conscious decision of the government for withdrawal from the acquisition; statutory lapse under Section 11- A is entirely different. The object of Section 11-A is to arrest delay in making award. An obligation is cast on the Collector under Section 11-A to make the award within the time prescribed therein failing which statutory consequence follows namely, acquisition proceedings lapse automatically.*

28. *This Court in Abdul Majeed said:*

The word `withdraws' would indicate that the Government by its own action voluntarily withdraws from the acquisition; the Government has necessarily to withdraw from the acquisition, in other words, there should be publication of the withdrawal of the notification published under Section 4(1) and the declaration published under Section 6 by exercising the power under Section 48 (1). Sub-section (2) of Section 48 would then apply. In this case, admittedly, the Government had not exercised the power under Section 48(1) withdrawing from the notification under Section 4(1) or the declaration under Section 6. The statutory lapse under Section 11-A is distinct different from voluntary act on the part of the Government. Therefore, it must be by withdrawal of the notification by voluntary act on the part of the State under Section 48(1). Under these circumstances, the appellant is not entitled to avail of the remedy of sub-section (2) of Section 48."

27. One of the points for consideration before the Apex Court in the aforesaid case was "whether the decision of the Government for withdrawal of acquisition under Section 48(1) is required to be published in the Official Gazette?". Relying on earlier judgments, the Apex Court held that decision of the Government for withdrawal from acquisition has to be published in the Official Gazette. Following was laid down by the Apex Court in paragraphs 30, 31 and 32 of the said judgment, which are as under:-

"30. *The question now needs to be considered is: whether the decision of the Government for withdrawal of acquisition under Section 48(1) is required to be published in official gazette?*

31. *It is true that Section 48 does not in express terms require the decision of the government for withdrawal of acquisition to be published in the 1 8 official gazette. In*

Abdul Majeed, this Court has held that there should be publication of the withdrawal of the notification published under Section 4(1) and declaration under Section 6 by exercising power under Section 48(1). Even on first principles, such requirement appears to be implicit. The Act provides for the publication of notification and declaration under Sections 4 and 6 of the Act in official gazette. Obviously the withdrawal from land acquisition proceedings by taking resort to Section 48(1) of the Act also must be in the like manner. As a matter of fact, this aspect is no more res integra.

32. *In Larsen & Toubro Ltd. vs. State of Gujarat And Ors., (1998) 4 SCC 387, the identical contentions which have been advanced before us by the senior counsel were raised in that case. Section 21 of the General Clauses Act, 1897 was also pressed into service there. This Court considered:*

"30. It was submitted by Mr. Salve that Section 48 of the Act did not contemplate issue of any notification and withdrawal from the acquisition could be by order simpliciter. He said that Sections 4 and 6 talked of notifications being issued under those provisions but there was no such mandate in Section 48. It was thus contended that when the statute did not require to issue any notification for withdrawal from the acquisition, reference to Section 21 of the General Clauses Act was not correct. Section 21 of the General Clauses Act is as under:

"21. Power to issue, to include power to add to, to amend, vary or rescind, notifications, orders, rules or bye-laws.--Where by any Central Act, or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

Mr. Salve said that Section 21 expressly referred to the powers being given to issue notifications etc. under an Act or Regulation and under this that power included power to withdraw or rescind any notification in a similar fashion. It was therefore submitted that when Section 48 did not empower the State Government to issue any notification and it could not be read into that provision that withdrawal had to be issued by a notification. His argument, therefore, appeared to be that on correct interpretation of Section 21 of the General Clauses Act before reaching the stage of Section 48, the State Government could withdraw notifications under Sections 4 and 6 of the Act by issuing notifications withdrawing or rescinding earlier notifications and that would be the end to the acquisition proceedings. We do not think that Mr. Salve is quite right in his submissions. When Sections 4 and 6 notifications are issued, much has been done towards the acquisition process and that process cannot be reversed merely by rescinding those notifications. Rather it is Section 48 under which, after withdrawal from acquisition is made, compensation due for any damage suffered by the owner during the course of acquisition proceedings is determined and given to him. It is, therefore, implicit that withdrawal from acquisition has to be notified.

31. Principles of law are, therefore, well settled. A notification in the Official Gazette is required to be issued if the State Government decides to withdraw from the

acquisition under Section 48 of the Act of any land of which possession has not been taken".

In view of the legal position exposited by this Court in the case of Larsen & Toubro Ltd., with which we respectfully agree, we hold, as it must be, that decision of the government for withdrawal from acquisition has to be published in the official gazette. We answer point (two) in affirmative."

28. Thus the Government order dated 27th August, 2010 can itself not be treated to be an order withdrawing the acquisition. It is also relevant to note that although the Government order referred to five villages and provided for enhancement of compensation at the rate of Rs.570/- per square meter along with certain other benefits, the Government order cannot be read to be withdrawal of acquisition of land of the aforesaid five villages. It has come on the record that large number of villagers entered into agreement and accepted the compensation. The said Government order cannot be treated to be an order withdrawing acquisition of five villages in view of the fact that the Government order proposes to enhance the compensation and large number of land holders have entered into the agreement and accepted compensation. The Government while issuing the Government order dated 27th August, 2010 has not considered as to which of the land holders have accepted the compensation or are ready to accept compensation and which are not ready to accept compensation. Thus the Government order dated 27th August, 2010 cannot be read as an order withdrawing acquisition of land of aforesaid five villages as contended by the learned counsel for the respondents, although, as observed above, the Government order contains a clear stipulation that those villagers who are not agreeable to acquisition of their land at the rate of Rs.570/- per square meter, their land be not acquired. We are thus of the view that even after issuance of the Government order dated 27th August, 2010, the State Government is required to consider the claim of those land holders who pray for withdrawal of their land and to decide their claim in accordance with the Government order dated 27th August, 2010.

29. The submission, which has been pressed by the learned Additional Advocate General and other counsel for the respondents, that the Government order dated 27th August, 2010 has no application with regard to acquisition in question, now needs to be considered. The submission is that the Government order dated 27th August, 2010 shall prospectively apply and the same could be applied only with regard to acquisition which is made subsequent to the Government order. The Government order dated 27th August, 2010, as quoted above, was issued on the subject of grant of compensation at the rate of Rs.570/- per square meter to the farmers of five villages mentioned therein under the Yamuna Expressway Project. The said Government order specifically mentioned that with regard to acquisition of land in district Aligarh, no agreement could be arrived in the meeting headed by Divisional Commissioner and the said Committee submitted its report to the State Level Committee recommending increase of compensation which was considered by the State Level Committee on 27th August, 2010 and with regard to five villages approval was granted by the State Government for increasing compensation. The said Government order was, thus, clearly issued with regard to acquisition

proceedings which were underway in the aforesaid five villages as no agreement could be arrived for compensation. Thus the submission of the respondents that the Government order dated 27th August, 2010 ought to have been applied prospectively and shall not applicable on the acquisition of petitioners' land cannot be accepted since the above submission is contrary to the very purpose and object of the Government order.

30. Learned counsel for the petitioners has also attacked the policy decision dated 27th August, 2010 terming it as a policy mischievously luring the illiterate farmers to come into the trap and forego their demand under acquisition. In view of the fact that petitioners are claiming benefit of the Government order dated 27th August, 2010 insofar as it contains decision that those farmers who do not accept the compensation, their land need not be acquired without their consent, we find it unnecessary to consider the attack of the petitioners on the policy as the same is wholly irrelevant for the issues to be decided in the present writ petition.

31. Learned counsel for the petitioners has further contended that if the order dated 11th October, 2011 is set-aside, the matter need not be remanded to the State Government for deciding withdrawal of acquisition. Learned counsel for the petitioners has also placed reliance on a Division Bench judgment of this Court in the case of ***Ram Gopal Varshney and others vs. State of U.P. and others*** reported in 2004(1) AWC 206 in which judgment following was laid down in paragraph 7:-

*"**7.** ... in' Special Land Acquisition Officer, Bombay and Ors. v. Godrej and Boyce. (1988) 1 SCC 50. wherein the Hon'ble Supreme Court held that the Government is competent to withdraw from the acquisition proceedings and while doing so, the Government is neither required to afford opportunity of hearing to the land owners nor required to record any reasons for such a withdrawal. At the most, land owners may be held entitled to claim compensation under Sub-section (2) of Section 48 in such an eventuality. But notification under Section 48(1) cannot be held to be only mode of withdrawal of the proceedings. But withdrawal is permissible only prior to vesting of the land In the State free from all encumbrances."*

32. Reliance has also been placed on the judgment of the Apex Court in the case of ***Special Land Acquisition Officer, Bombay and others vs. M/s Godrej and Boyce,*** reported in (1988)1 SCC 50 wherein the Apex Court has held that Government is competent to withdraw acquisition and while doing so no reason is required. It is submitted that no particular mode of withdrawal has been prescribed under Section 48 of the Act. The Government order dated 27th August, 2010 amounts withdrawal and the matter need not be remanded. Reliance has also been placed on the judgment of the Apex Court in the case of ***Mulla Gulam Ali and Safia Bai D. Trust Vs. Deelip Kumar and Company*** reported in (2003)11 SCC 772(II) which was a case regarding exemption from operation of rent Act qua a Public Charitable Trust. The Apex Court did not accept the prayer to remand the matter to the High Court for deciding the question of waiver. The reason for not accepting the prayer for remand has been mentioned by the Apex Court itself in following words:-

"We do not think so. The question has been answered by the Trial Court and the

First Appellate Court categorically to the effect that after the termination of the rental agreement what was paid were only arrears of rent for prior period. We do not think any useful purpose will be served in sending the matter back to the High Court on this appeal."

33. The above matter arose out of a suit in which evidence was led and there was judgment of the trial Court and first appellate Court and on the said background the Apex Court took the view that trial Court and first appellate Court having answered the issue, no purpose would be served in remitting the matter to the High Court. The said case does not help the petitioners in the present case.

34. We have already observed that Government order dated 27th August, 2010 itself cannot be read as an order withdrawing the petitioners land from acquisition and furthermore the order under Section 48 of the Act for withdrawal from acquisition is to be notified. Thus even after quashing the order dated 11th October, 2011 in leading writ petition, the withdrawal of the acquisition shall not be automatic as a specific decision of the State Government regarding withdrawal and notification thereafter shall be necessary for withdrawal of the petitioners' land from acquisition. Thus even if the order dated 11th October, 2011 is quashed, it will be necessary that the matter be again considered by the State Government and appropriate decision be taken under Section 48 of the Act.

35. Learned counsel for the petitioners has also referred to two judgments on the scope of purposive interpretation. There is no dispute to the proposition, as referred to by the learned counsel for the petitioners, on the principle of statutory interpretation. The submission of learned counsel for the petitioners that no useful purpose shall be served in remanding the matter back to the State Government, thus, cannot be accepted. The reconsideration of the petitioners' claim under Section 48 of the Act and thereafter notifying the order, if any, is necessary for completing the withdrawal from acquisition. The submission of the petitioners' counsel that by Government order dated 27th August, 2010 the acquisition stood lapsed or withdrawn cannot be accepted.

36. The submission of Sri Yashwant Varma, learned counsel for respondent No.7 is that the State Government has no competence to pass any order under Section 48 of the Act in view of the fact that the project of land development has already been granted by the State to the respondent No.7 and concession agreement has already been executed between the Authority and the respondent No.7. The submission is that the land having been appropriated to the project, the State Government retains no power to release the same from the acquisition. There is no dispute that the project was granted and concession agreement was also executed on 7th February, 2003 between the Authority and Jay Prakash Industries Limited. The acquisition proceedings for acquiring the land in question were initiated by notification dated 31st March, 2009 resulting in declaration under Section 6 of the Act dated 28th May, 2009 i.e. much subsequent to execution of the concession agreement. Section 48 of the Act is a statutory provision which cannot be diluted by any agreement or grant of contract by the State. The grant of project or execution of concession agreement between the predecessor in interest of respondent No.7

and the State cannot eclipse the statutory power and jurisdiction given to the State Government under Section 48 of the Act. No restraint on the power of the State Government under Section 48(1) of the Act can be put by any agreement entered between the State and any other authority. The submission of Sri Varma that the State does not retain its power under Section 48 of the Act to withdraw from the acquisition cannot be accepted. Thus the submission of learned counsel for the respondent No.7 that the State cannot exercise power under Section 48 of the Act cannot be accepted. The power under Section 48 of the Act exercised by the State despite execution of any agreement or grant of project in appropriate cases.

37. Now comes the last submission of the petitioners' counsel that respondent No.7 in leading writ petition (J.P. Infratech Limited) be not given an opportunity before the State Government in the event the matter is remanded back to the State Government for reconsideration. Learned counsel for the petitioners has relied on the Division Bench judgment of this Court in ***Ram Gopal Varshney's*** case (supra) where this Court laid down that the Government while withdrawing from acquisition is not required to record any reason. In this context, it is relevant to notice two decisions of the Apex Court. In ***Larsen and Toubro's*** case (supra) the acquisition was proceeded under Part VII of the Act for the company which was withdrawn by the Government by issuing an order. One of the submissions made before the Apex Court that the Company for whose benefit the acquisition was being made, was not given an opportunity before decision was taken by the Government for withdrawal from acquisition. The Apex Court after noticing its earlier judgment in the case of ***Special Land Acquisition Officer, Bombay and others vs. M/s Godrej and Boyce*** laid down that ***Special Land Acquisition Officer, Bombay and others vs. M/s Godrej and Boyce*** case was no authority laying down the proposition that in all cases where power was exercised under Section 48 of the Act, it was open to the State Government to act unilaterally. It is useful to quote following observations of the Apex Court in ***Larsen and Toubro's*** case (supra), which are in paragraphs 29, 30 and 31:-

"29. *..... This Court observed that the decision in Godrej and Boyce case was no authority laying down the proposition that in all cases where power was exercised under Section 48 of the Act it was open to the State Government to act unilaterally and that it could withdraw from acquisition without giving any reason or for any reason whatsoever. The Court observed as under:*

"In an acquisition under Part VII of the Act, Position of the company or the body for which the land acquired is quite different from that of the owner of the land. As a result of withdrawal from the acquisition whereas the owner of the land is ordinarily not likely to suffer any prejudice or irreparable loss, the company for whose benefit the land was to be acquired, may suffer substantial loss."

The Court examined the reasons given by the State withdrawing from acquisition and held that the decision of the Government to withdraw from acquisition was based upon misconception of the correct legal position and that such a decision had to be regarded as arbitrary and not bona fide. Then the Court said as under:

"Particularly, in a case where as a result of a decision taken by the Government other party is likely to be prejudicially affected, the Government has to exercise its power bona fide and not arbitrarily. Even though Section 48 of the Act confers upon the State wide discretion it does not permit it act in an arbitrary manner. Though the State cannot be compelled to acquire land compulsorily for a company its decision to withdraw from acquisition can be challenged on the ground that power has been exercised mala fide or in an arbitrary manner. Therefore, we cannot accept the submission of the learned counsel for the State that the discretion of the State Government in this behalf is absolute and not justiciable at all."

30. *It was submitted by Mr. Salve that Section 48 of the Act did not contemplate issue of any notification and withdrawal from the acquisition could be by order simpliciter. He said that Section 4 and 6 talked of notification being issued under those provisions but there was no such mandate in Section 48. It was thus contended that when statute did not require to issue any notification for withdrawal from the acquisition, reference to Section 21 of the General Clauses Act was not correct. Section 21 of the General Clauses Act is as under:*

"21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws.- Where by any Central Act, or Regulation, a power to issue notification orders, rules, or bye-laws is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction, and conditions, if any, to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

Mr. Salve said that Section 21 expressly referred to the powers being given to issue notifications etc. under an Act or Regulations and under this that poser included power to withdraw or rescind any notification in the similar fashion. It was therefore submitted that when Section 48 did not empower the State Government to issue any notification and it could not be read into that provision that withdrawal had to be issued by a notification. His argument, therefore, appeared to be that on correct interpretation of Section 21 of the General Clauses Act before reaching the stage of Section 48, the State Government could withdraw notifications under Sections 4 and 6 of the Act by issuing notification withdrawing or rescinding earlier notifications and that would be the end to the acquisition proceedings. We do not think that Mr. Salve is quite right in his submissions. When Sections 4 and 6 notifications are issued, much has been done towards the acquisition process and that process cannot be reversed merely be rescinding those notification. Rather it is Section 48 under which, after withdrawal from acquisition is made, compensation due for any damage suffered by the owner during the course of acquisition proceedings is determine and given to him. it is, therefore, implicit that withdrawal from acquisition has to be notified.

31. *Principles of law are, therefore, well settled. A notification in the Official Gazette is required to be issued if the State Government decides to withdraw from the acquisition under Section 48 of the Act of any land of which possession has not been taken. An owner need not be given any notice of the intention of the State Government to withdraw from the acquisition and the State Government is at liberty to do so. Rights of the owner are well*

protected by sub-section (2) of Section 48 of the Act and if he suffered any damage in consequence of the acquisition proceedings, he is to be compensated and sub-section (3) of Section 48 provides as to how such compensation is to be determined. There is, therefore, no difficulty when it is the owner whose land is withdrawn from acquisition is concerned. However, in the case a company, opportunity has to be given to it top show cause against any order which the State Government proposes to make withdrawing from the acquisition. Reasons for this are not far to seek. After notification under Section 4 is issued, when it appears to the State Government that the land in any locality is needed for a company, any person interested in such land which has been notified can file objections under Section 5-A(1) of the Act. Such objections are to be made to the collector in writing and who after giving the objector an opportunity of being heard and after hearing of such objections and after making such further enquiry, if any, as the Collector thinks necessary, is to make a report to the State Government for its decision. Then the decision of the State Government on the objections is final. Before the applicability of other provisions in the process of acquisition, in the case of company, previous consent of the State Government is required under Section 39 of the Act nor unless the company shall have executed the agreement as provided in Section 41 of the Act. Before giving such consent, Section 40 contemplates a previous enquiry. then compliance with Rules 3 and 4 of the Land Acquisition (Company) Rules, 1963 is mandatarily required. After the stage of Section 40 and 41 is reached, the agreement so entered into by the company with the State Government is to be published in the Official Gazette, This is Section 42 of the Act which provides that the agreement on its publication would have the same effect as if it had formed part of the Act. After having done all this, State Government cannot unilaterally and without notice to the company withdraw from acquisition. Opportunity has to be given to the company to show cause against the proposed action of the State Government top withdraw from acquisition. A declaration under Section 6 of the Act is made by notification only after formalities under part VII of the Act which contains Section 39 to 42 have been complied and report of the Collector under Section 5-A(2) of the Act is before the State Government who consents to acquire the land on its satisfaction that it is needed for the company. A valuable right, thus, accrues to the company to oppose the proposed decision of the State government withdrawing from acquisition. The State Government may have sound reasons to withdraw from acquisition but those must be made known to the company which may have equally sound reasons or perhaps more which might persuade the State Government to reverse its decision withdrawing from acquisition. In this view of the matter it has to be held that Yadi (Memo) dated 11.4.91 and Yadi (Memo) dated 3.5.91 were issued without notice to the appellant (L&T Ltd.) and are, thus, not legal."

38. Although present is not a case where acquisition was made under Part VII of the Act as has already been held by the judgments of this Court as well as the Apex Court wherein acquisitions in question were challenged, but it has come on the record that the Company has been granted project for carrying out the land development and the respondents have also brought on the record the lease deeds executed by the Authority in their favour subsequent to the notifications issued under Sections 4 and 6

of the Act, the Company is thus beneficiary of the acquisition and we are of the view that it is also an appropriate party which has sufficient locus to be heard in proceedings under Section 48 of the Act. Thus the submission of the petitioners' counsel that no liberty be granted to the Company to be heard in proceedings under Section 48 of the Act cannot be accepted.

39. The Apex Court in the case of ***Hari Ram and another vs. State of Haryana and others*** reported in 2010(3) SCC 621 had occasion to consider Section 48 of the Act. The Apex Court laid down following in paragraphs 13 and 41 of the said judgment which are as under:-

"13. *Section 48 of the Act empowers the Government to withdraw from the acquisition of the land provided possession has not been taken. The said power is given to the Government by a statutory provision and is not restricted by any condition except that such power must be exercis0.79"ed before possession is taken. The statutory provision contained in Section 48 does not provide for any particular procedure for withdrawal from acquisition.*

41. *The Government has obligation of acting with substantial fairness and consistency in considering the representations of the landowners for withdrawal from acquisition whose lands have been acquired under the same acquisition proceedings. The State Government cannot pick and choose some landowners and release their land from acquisition and deny the same benefit to other landowners by creating artificial distinction. Passing different orders in exercise of its power under Section 48 of the Act in respect of persons similarly situated relating to same acquisition proceedings and for same public purpose is definitely violative of Article 14 of the Constitution and must be held to be discriminatory."*

40. In view of the foregoing discussions, it is clear that the reasons given by the State Government for rejecting the claim of the petitioners under Section 48 of the Act for release of their land, are erroneous. The State Government in its order dated 11th October, 2011 has essentially given two reasons for rejecting the claim. Firstly the possession has been taken on 15th July, 2009 and 27th July, 2009 which land is in possession of the Authority, hence the same cannot be released and secondly before issuance of the Government order dated 27th August, 2010 the acquisition of land was already complete in accordance with law. We have already held that possession of the land in dispute was not taken in accordance with law on 15th July, 2009 and 27th July, 2009 hence the findings of the State Government that release cannot be made under Section 48 of the Act is erroneous. The view of the State Government that acquisition has already completed prior to issue of the Government order dated 27th August, 2010 is also not correct. We have already repelled the submission of learned counsel for the respondents that the Government order dated 27th August, 2010 is not applicable with regard to acquisition of petitioners' land. Thus both the reasons given in the order dated 11th October, 2011 is unsustainable.

41. Similarly in Writ Petition No.1341 of 2012 order dated 29th April, 2011 has been challenged. The State Government in the said order has relied upon the lease agreement executed in favour of the Company and it was held that under the Government order dated 27th August, 2010

the land cannot be released. The order dated 29th April, 2011 relates to village Tappal with regard to which possession was claimed to have been taken on 27th July, 2009 which possession memo has already been considered while deciding leading writ petition. The possession memo has been brought on record as Annexure-10 to the Writ Petition No.1341 of 2012 which is the same possession memo which has been considered in the leading writ petition. Thus for the aforesaid reasons, the view of the State Government that possession stood transferred to the Company cannot be accepted and the order dated 29th April, 2011 deserves to be set-aside on the same ground.

43. In view of the above, all the writ petitions stand allowed in following manner:-

(1)The order dated 11th October, 2011 impugned in Writ Petition No.66066 of 2011 and the order dated 29th April, 2011 impugned in Writ Petition No.1341 of 2012 are set-aside.

(2)A writ of mandamus is issued directing the State Government to take a fresh decision with regard to claim of the petitioners in all the writ petition for release of their land under Section 48 of the Act in accordance with the Government order dated 27th August, 2010.

(3)Parties shall maintain status quo with regard to nature and possession of the land in question as existing on the date till the matter is decided by the State Government under Section 48 of the Act.

44. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2012

BEFORE
THE HON'BLE VINEET SARAN,J.
THE HON'BLE ASHOK PAL SINGH,J.

Civil Misc. Writ Petition No. 71057 of 2011

Sri Ram Umrao ...Petitioner
Versus
Managing Director Indusland Bank Ltd. and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Umrao

Counsel for the Respondents:
Sri B.K. Srivastava
Sri Anubhav Chandra
C.S.C.

Constitution of India, Article 226- Recovery of loan of Rs. 11,30000/- payable within 48 monthly installments-petitioner already deposited Rs. 14,53136 against liability of Rs. 15,55000-44-even after deposit of substantial part-forcible custody of vehicle by agent-neither duly appointed-nor as per terms of guidelines issued by Reserve Bank of India-petitioner subjected to an immanence harassment-contrary to law laid down by Apex Court-Bank to re-deliver the possession of vehicle in running condition-with exemplary cost of Rs. one Lakh imposed.

Held: Para 23

For the foregoing reasons, this writ petition succeeds and is allowed. The " Final Notice After Repossession" dated 24.09.2011 (Annexure-4 to the writ petition) is quashed and the respondents are directed to hand over the possession of the vehicle (truck bearing registration no. UP-78-BT 1485) to the petitioner forthwith but not later than seven days from the date petitioner files a certified

copy of this order before the respondent no.3-Branch Manager, Indusland Bank Ltd. It is further provided that the petitioner shall not be liable to pay any interest on the loan amount from the date when the possession of the vehicle of the petitioner has been taken from the petitioner and till the date such possession is re-delivered to the petitioner. It is also made clear that the repossession of the vehicle will be given to the petitioner in a perfect running condition free from all encumbrances and in case there is any dispute with regard to the condition of the vehicle, the petitioner shall be entitled to raise his grievance either with the Bank or take suitable legal action against the respondent-Bank.

Case law discussed:

(2007) 2 SCC 711; Citicorp. Maruti Finance Ltd. Vs. S.Vijayalaxmi in Civil Appeal No. 9711 of 2011 decided on 14.11.2011

(Delivered by Hon'ble Vineet Saran,J.)

1. The petitioner had taken a loan of Rs. 11,30,000/- from the respondent-Bank for purchase of a truck. The said loan was granted by the bank on 2.2.2008 and was repayable in 48 monthly instalments ending on 07.01.2012. The petitioner committed default in payment of certain instalments and thus the Bank is said to have issued a notice dated 01.09.2011 to the petitioner mentioning that the sum of overdue instalments in the account of the petitioner was Rs. 2,22,031/- as on 01.09.2011. Besides that, additional finance charges of Rs. 99,915/- plus legal expenses of Rs. 1,000/- along with personal visiting charges of Rs. 1,000/- were also leviable and thus a total amount of Rs. 3,23,946/- was determined as payable by the petitioner. As per the said notice, the said amount was to be paid by the petitioner in seven days. When the same was not paid, on 20.09.2011 the possession of the vehicle of the petitioner which was financed, was taken from the petitioner allegedly through the recovery agent. Thereafter on 24.09.2011 the "Final Notice After Repossession" was given to the petitioner calling upon him to pay a sum of Rs. 5,31,177/- as the settlement amount, within seven days and take possession of the vehicle. Challenging the said "Final Notice After Repossession" dated 24.09.2011 this writ petition has been filed. A further prayer has also been made for a direction in the nature of mandamus commanding the respondent-Bank to release the truck of the petitioner bearing registration no. U.P.-78-BT-1485.

2. We have heard Sri R.S.Umrao, learned counsel for the petitioner as well as Sri B.K.Srivastava, learned Senior Counsel appearing for the respondent-Bank and perused the record. Pleadings between the parties have been exchanged and with consent of the learned counsel for the parties, this writ petition is being disposed of at the admission stage itself.

3. The submission of the learned counsel for the petitioner is that the entire procedure of taking over possession of the vehicle of the petitioner was illegal inasmuch as due process of law has not been adopted by the respondent-Bank and it has resorted to taking forcible possession of his vehicle allegedly through its recovery agent, who was neither duly nor properly appointed by the Bank in terms of the guidelines issued by the Reserve Bank of India. According to his submission, the person taking possession of the vehicle was not even the agent who was appointed by the Bank but some other person. It is also contended by the learned counsel for the petitioner that the overdue amount found to be payable (as per the statement of account of the Bank itself issued on 26.08.2011) was

only Rs. 1,11,864.33 paise whereas the overdue amount shown in the notice dated 1.9.2011 was Rs. 2,22,021/- and what is now being demanded by the respondent-Bank vide the impugned notice dated 24.09.2011 is an highly inflated amount of Rs. 5,31,177/- which is wholly arbitrary and cannot be justified in law.

4. Sri B.K.Srivastava, learned Senior Counsel, justifying the action of the respondent-Bank, has submitted that the appointment of the recovery agent by the Bank was in terms of the "Repossession Agency Agreement" executed on 02.08.2011 between the respondent-Bank and one M/s Baiswara Associates of Kanpur and thus the action of the Bank in taking possession of the vehicle through such agency was fully justified. It is further submitted that the respondent-Bank has validly included such other charges as were payable by the petitioner under the loan agreement executed by the petitioner with the Bank on 02.02.2008 and in case there was any dispute with regard to the amount sought to be recovered from or paid by the petitioner, the petitioner could have approached the Bank and the matter could have been settled between the parties.

5. In the light of the aforesaid submissions made by the learned counsel for the parties, we are to examine the action and manner of the respondent-Bank in taking over possession of the vehicle of the petitioner which was financed by the Bank and also the determination of the overdue amount by the respondent-Bank as payable by the petitioner.

6. Before proceeding any further, it would be relevant to mention that in view of increasing cases of harassment of the defaulting borrowers by recovery agents engaged by the Banks and to stop the eroding reputation of the Banking Sector as a whole, the Reserve Bank of India, on April 24, 2008, has also issued certain guidelines, some of which are as follows:-

(1) Banks should have a due diligence process in place for engagement of recovery agents in conformity with the earlier guidelines of Reserve Bank of India on outsourcing of financial services.

(2) Banks should inform the borrower the details of agency firms.

(3) Banks to ensure that agents carry with them copy of notice, authorization letter and identity card during recovery process.

(4) Whenever recovery agency is changed bank to notify the borrower of such change.

(5) The notice to borrower and the authorization letter of the agent should, among other details, to also include the telephone number of the recovery agency.

(6) Banks to ensure tape recording of the content/text of the calls made by recovery agents to the customers and vice versa.

(7) In case a grievance/complaint has been lodged by a borrower banks are not to forward his case to recovery agency till they have finally disposed of the grievance of the concerned borrower.

(8) Each bank to have a mechanism whereby the borrower's grievance with regard to recovery process can be addressed and the details of such mechanism furnished to the borrower.

(9) Banks to ensure that their recovery agents are properly trained.

(10) Banks to ensure that repossession clause in contract with the borrower is legally valid and clearly brought to the notice of the borrower.

(11) Terms and Conditions of repossession clause in the contract to contain provisions regarding notice period before taking possession; circumstances under which notice period can be waived; the procedure for taking possession of the security; a provision regarding final chance to be given to the borrower for repayment of loan before the sale/auction of the property; the procedure for giving repossession to the borrower and the procedure for sale/auction of the property.

7. Along with the counter affidavit, the "Repossession Agency Agreement" dated 02.08.2011 between the Bank and the said M/s Baiswara Associates has been filed as Annexure CA-5. The said agreement contains the "Obligations of the Agent', which includes sending of information/telegram along with the authorization letter issued by the Bank to the concerned police station where the asset is available and where the act of repossession is to be carried out and furnish proof of such service to the Bank. Similar information is also to be sent to the concerned police station where the borrower/co-borrower resides. Certain documents are also required to be kept and made readily available for production, such as copy of loan agreement, copies of reminders/notices, copy of authorization letter etc. by the agent at the time of taking repossession of a vehicle. The agent immediately on seizure is required to get an inventory list prepared, of the items available in the vehicle under the signature of the borrower/driver along with signature of the two witnesses. The said agreement also contains certain obligations of the Bank which includes sending of information immediately after repossession by the Bank to the concerned police station under whose jurisdiction the vehicle is repossessed, to the borrower/co-borrower and to the police station where the branch office is located. The said agreement also provides that the agent shall not sub-delegate the authority given to him to any other person. Along with the agreement the "KYC of Repossession Agency" has also been enclosed. The said KYC form provides for information regarding the particulars of the agency and the names of its employees. In its particulars the name of repossession agency has been disclosed as Baiswara Associates of Kanpur with Mr. Sanjeev Singh as its sole proprietor. However, no mention of any employee has been made in the column meant for name of its employees.

8. Sri Srivastava does not dispute the fact that as per the guidelines of the Reserve Bank of India, the agents are also supposed to undergo training, which would mean that either the proprietor of the agency or its employees who are responsible for execution should undergo such training. In the absence of the names of the employees in the KYC of the agent and there being no material placed on record by the respondent-Bank to show that the proprietor of the Baiswara Associates himself was a trained person to take possession of the vehicle, the genuineness of the agency, and the validity of the agreement with the agency itself becomes doubtful. Besides this, it is not the case of the Bank that information of the appointment of the recovery agent or its change was ever given

to the borrower, as is required under the RBI guidelines.

9. As such from the above it cannot be said that the agent appointed by the Bank was a duly or properly appointed agent as per the guidelines issued by the Reserve Bank of India who had disclosed complete information at the time of agreement including the names of its employees who were to act on behalf of the agency or that the Bank had performed its obligations while appointing such agent, as per the RBI guidelines.

10. The repossession agency agreement is dated 02.08.2011 and repossession of the vehicle of the petitioner has been taken allegedly by the agency on 20.09.2011. As stated by Sri. Srivastava, learned Senior Counsel for the respondent-Bank, the repossession has been taken by its authorized agency by M/s Baiswara Associates but a bare perusal of the "Repossessed Vehicle Inventory List" which is dated 20.09.2011 (and has been enclosed as Annexure-CA-4 to the counter affidavit filed by the Bank) would be sufficient to belie his said statement. The seal affixed on the said inventory is that of "JCS Financial Services & Parking Security, Pakri, Kanpur Nagar" and signed by its official concerned on 20.09.2011at 5.15 p.m. In the entire document the name of the agency with which the Bank had entered into an agreement, namely, "M/s Baiswara Associates' has neither been mentioned nor there is any seal affixed of the said agency. Thus, prima facie M/s Baiswara Associates, which was the agent appointed by the Bank, had not taken the possession of the vehicle of the petitioner. From the documents produced by the Bank also it cannot be said that it was any officer or employee of the agency (M/s Baiswara Associates) appointed by the Bank who had taken repossession of the vehicle of the petitioner. Even otherwise, it has nowhere been stated or any material placed on record by the Bank to show that the agent had carried out its obligations of informing the concerned police stations i.e. from where the vehicle was seized and where the petitioner(borrower) was residing, prior to taking possession of the vehicle. The document with regard to repossession also does not bear the signature of two witnesses, as was required under the own agreement filed by the Bank. On behalf of the petitioner, it bears only the signature of the alleged driver.

11. It is thus clear from the above that not only the recovery agent had taken the repossession in violation of the terms and conditions as laid down in the own agreement of the Bank with the agency, but the agent M/s Baiswara Associates authorized by the Bank had sub-delegated its authority to another agent in gross violation of the specific prohibitory condition laid down by the Bank.

12. The Apex Court in the case of ***ICICI Bank Ltd. Vs. Prakash Kaur*** (2007)2 SCC 711 has deprecated the practice of the Banks of hiring recovery agents and deputing muscle-men, to seize the vehicles and has observed that the Banks should resort to the procedure recognized by law for taking possession of the vehicle of the borrowers, who may have committed default in payment of the instalments. Observation by the Apex Court was made in the following terms: (SCC Page 714, para16):-

"16 - Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the

Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are muscle-men, is deprecated and needs to be discouraged. The Bank should resort to procedure recognized by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics."

13. In the above case of ICICI Bank Vs. Prakash Kaur (supra), it has also been observed by the Apex Court that the recovery of loan or seizure of vehicles could be done only though legal means. This observation was made by the Apex Court in the following terms (SCC Page 720, para 28):-

" 28 - In conclusion, we say that we are governed by the rule of law in the country. The recovery of loans or seizure of vehicles could be done only through legal means. The banks cannot employ goondas to take possession by force."

14. In yet another case ***Citicorp. Maruti Finance Ltd. Vs. S.Vijayalaxmi*** in Civil Appeal No. 9711 of 2011 decided on 14.11.2011, the Apex Court consisting of a Bench of three Judges (Hon'ble Altmas Kabir, Hon'ble Cyriac Joseph and Hon'ble Surinder Singh Nijjar, JJ) has on the issue of illegal and/ or wrongful recovery of vehicles by use of force has reiterated its above view as under:-

"The aforesaid question has since been settled by several decisions of this Court and in particular in the decision rendered in ICICI Bank Ltd. Vs. Prakash Kaur (supra). It is, not, therefore, necessary for us to go into the said question all over again and we reiterate the earlier view taken that even in case of mortgaged goods subject to Hire-Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates such recovery to be effected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by the Reserve Bank of India as well as the Appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot be struck down."

15. It would also be not out of place to mention here that it has not been the case of the respondent- Bank that they complied with the guidelines of the Reserve Bank of India. As such, the whole action of the respondent-Bank in taking back the possession of the vehicle of the petitioner, details of which have been given here-in-above, cannot be justified and it clearly appears that the Bank had resorted in taking repossession of the vehicle by the help of muscle-men.

16. It thus becomes evident that the repossession was taken by the Bank in flagrant violation of the guidelines issued by the Reserve Bank of India and also the law laid down by the highest Court of the country.

17. No doubt an agreement had been entered into between the petitioner and the bank which provides for "Lender's Right' which may include the right of the Bank to

take possession of the vehicle in case of default, but what is to be considered here is as to whether the Bank itself could determine that there was a default and thereby start proceedings to take possession of the vehicle financed by it without resorting to the procedure prescribed by law. In the present case, what we notice is that no prior information was given to the petitioner before taking possession of the vehicle. In the counter affidavit a notice is said to have been sent to the petitioner on 01.09.2011, a copy of which has been filed as Annexure CA-3 to the counter affidavit. From a perusal of the said notice dated 01.09.2011 it is clear that neither the name mentioned in the notice is that of the petitioner nor the address is that of the petitioner which is given in the impugned notice (Final Notice After Repossession) dated 24.09.2011 which is the one which was received by the petitioner. The notice dated 01.09.2011 is addressed to "Sri Ram Maurya s/o Sri Ayodhya Prasad Maurya, R/o Kunderampur, Post Birhai, Tehsil Ghatampur, District Kanpur (U.P.)" whereas the name of the petitioner in the notice dated 24.09.2011 "Sri Ram Umrao s/o Ayodhya Prasad, R/o Kunderampur, Amouli, Fatehpur". Thus from the above it is clear that the respondent-Bank has proceeded against the petitioner even without giving a valid notice to him, meaning thereby there was no occasion for the petitioner to reply to the Bank about the correctness of its notice or to produce evidence to show as to whether there was any default made by him till such date or not.

18. In case of default in repayment of its loan, it is always open for the Banks to get the agreement with its borrower enforced through the process of law. Under the common law, the Bank could have approached the Court for enforcement of the agreement. Even the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Act of 2002") which gives special power to the Bank for realization of its dues also provides for certain safeguards. Section 13(2) of the Act of 2002 has been interpreted by the Apex Court in the case of Mardia Chemicals that the borrower has a right to submit his reply to the said notice. Pursuant to the decision of the Apex Court, sub section (3A) of the Section 13 has been inserted making it obligatory on the financial institutions (including Banks) to pass an order after considering the reply submitted by the borrower. It is only thereafter that proceedings for taking over possession can be initiated under Section 13(4) of the Act of 2002.

19. The Bank or financial institution cannot be permitted to take a decision on their own that there has been a default and proceed to take possession of the hypothecated vehicle without giving an opportunity to the borrower to present his case. In this manner the Banks would be judging their own cause with the right of execution, as they themselves would unilaterally determine that there has been a default and proceed to execute their own decision by taking possession of the hypothecated vehicle through their own appointed agencies, which may be muscle-men. Adopting such a recourse would clearly be a blatant violation of the mandate of Hon'ble Supreme Court.

20. Coming to the next issue, which is with regard to the amount which is said to be due to be paid by the petitioner, it may be observed that as per the statement of account issued by the Bank on 26.08.2011

(Annexure-2 to the writ petition) the overdue found as on the said date was Rs. 1,11,864.33 paise. Then by the alleged notice dated 01.09.2011 brought on record by the Bank, which is admittedly addressed to a wrong person, the overdue amount as on 01.09.2011 has been shown to be Rs. 2,22,031/- plus additional finance charges of Rs. 99,915/- plus other charges amounting to Rs. 3,23,946/-. The learned counsel for the Bank, when asked as to under which provision the additional finance charges of Rs. 99,915/- had been added, miserably failed to justify the said amount. However, the unilateral increase in the overdue amount did not stop here. By the time possession of the vehicle was taken after the notice dated 01.09.2011 and merely 24 days had passed, the said amount had swollen to Rs. 5,31,177/- as would be clear from the impugned notice dated 24.09.2011. Not only this, along with the counter affidavit the Bank is said to have obtained an affidavit from the petitioner on 02.12.2011 mentioning that as on 30.11.2011 the amount due was Rs. 5,65,000/-. Along with the counter affidavit the respondent-Bank has also filed the statement of account as on 03.01.2012 which shows that the overdue amount as on that date was Rs. 3,21,298.43 paise. Then respondent-Bank has also filed the settlement proposal dated 04.01.2012 according to which on the said date the settlement amount was Rs. 5,25,504.13 paise. Thus from the own statements of account of the Bank as well as the notice issued to the petitioner, it is prima facie evident that there is a huge variation in the amount which has been found to be over due or to be paid by the petitioner.

21. In the facts of the present case, from the own records of the respondent-Bank it is clear that the petitioner has been put to an immense harassment. As per the statement of account dated 26.08.2011, and the total amount which was due to be paid by the petitioner till that date was Rs. 15,65,000.33 pise, whereas he already had paid till then Rs. 14, 53,136/- meaning thereby that the petitioner had paid a very substantial part of the loan amount and still the respondent-Bank resorted to the action of taking possession of the vehicle of the petitioner in an illegal and arbitrary manner without following the process of law.

22. Admittedly, in the present case no proper notice addressed to the petitioner had ever been issued prior to the taking over of possession of the vehicle on 20.09.2011. The respondent-Bank was so callous that it did not even bother to ensure that the notice dated 01.09.2011 was sent at the correct address with correct name of the petitioner. It is noticed that even the impugned "Final Notice After Repossession" dated 24.09.2011 also does not give the details as to how the amount of Rs. 5,31,177/- was recoverable and the same appears to have been issued in a mechanical manner without even mentioning the fact as to on which date the due notice had been given to the petitioner, as the column in that regard has been left blank. As such, the impugned notice dated 24.09.2011 is liable to be quashed. Such action of the respondent-Bank, in firstly issuing the notice to a wrong person and then taking possession of the vehicle of the petitioner through an agency which was not at all appointed by it and the agency with which agreement was made by the Bank not appointed as per the guidelines of the Reserve Bank of India and above all the procedure adopted by the agency taking possession of the vehicle of the petitioner on 20.09.2011 being in complete violation of the Banks own agreement and guidelines of the Reserve Bank of India, cannot at all be justified.

23. For the foregoing reasons, this writ petition succeeds and is allowed. The " Final Notice After Repossession" dated 24.09.2011 (Annexure-4 to the writ petition) is quashed and the respondents are directed to hand over the possession of the vehicle (truck bearing registration no. UP-78-BT 1485) to the petitioner forthwith but not later than seven days from the date petitioner files a certified copy of this order before the respondent no.3-Branch Manager, Indusland Bank Ltd. It is further provided that the petitioner shall not be liable to pay any interest on the loan amount from the date when the possession of the vehicle of the petitioner has been taken from the petitioner and till the date such possession is re-delivered to the petitioner. It is also made clear that the repossession of the vehicle will be given to the petitioner in a perfect running condition free from all encumbrances and in case there is any dispute with regard to the condition of the vehicle, the petitioner shall be entitled to raise his grievance either with the Bank or take suitable legal action against the respondent-Bank.

24. The high handed and illegal manner in which the Bank has repossessed the petitioner's vehicle through an agent, which cannot but be described but as by use of "musclemen", inspite of the repeated directions of the Apex Court and the manner in which the petitioner has been harassed, we also impose an exemplary cost of Rs. 1,00,000/- (Rs. One Lakh) to be paid to the petitioner by the respondent-Bank so that in future it may deter the Bank from taking such recourse for realization of dues, as has been resorted to in the present case.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2012

BEFORE
THE HON'BLE SUDHIR KUMAR SAXENA, J

Criminal Revision No. 635 of 2011
connected with
Criminal Misc. Writ Petition No. 17658 of 2010

Manoj Anand ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri A.M. Tripathi

Counsel for Respondent:
Sri Nipun Singh
Govt. Advocate

(A) Constitution of India, Article 226-Non Protection of women from Domestic violence Act-2005, Section 23- Interim maintenance of Rs. 5000/- granted under section 23 of the Act-considering income of Rs. 28738/-per month-cannot be termed as excessive-warrant no interference-petition dismissed.

Held: Para 6

This Court is not exercising its appellate jurisdiction. The court below is yet to decide the apliction finally after recording the evidence. Even otherwise considering the income of petitioner the amount awarded cannot be said to be excessive as such impugned orders do not suffer from any such error of law which may warrant interference by this Court in its jurisdiction under Article 226 of the Constitution of India, as such writ petition has no force and is liable to be dismissed.

(B) Protection of women from domestic violence Act 2005-Section 31-

Prosecution for non compliance of interim maintenance order-held-not proper-section 20(4)(5) and (6) provides complete mechanism for compliance of order of maintenance-wife is not remediless-order passed under section 23 is redundant.

Held: Para 14

For this purpose power has been given in the Act itself. Section 28 of the Act provides for procedure and says that all proceedings under sections 12, 18, 19, 20, 21 and 23 shall be governed by the provisions of Criminal Procedure Code. Sub section (2) of section 28 further enables the Court to lay down its own procedure for disposal of an application under sub section (2) of section 23 of the Act. This gives sufficient indication as to how application u/s 23 will be dealt with and how the orders passed thereon will be enforced. While section 20 (1) (d) contains provision for maintenance. Sub section (4) (5) and (6) of section 20 provide for mechanisum to ensure compliance of order for maintenance.

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

1. The Criminal Revision as well as the Writ Petition arise out of same proceedings, as such they are being disposed of by this common order.

2.. Heard learned counsel for the parties, learned A.G.A. and perused the record.

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3. The facts in short are that Smt. Veenu Anand wife filed an application u/s 12 of The Protection of Women from Domestic Violence Act, 2005 (in short the Act). In the aforesaid case she also filed an application u/s 23 of the Act for interim order. The said aplication was allowed on 20.3.2010 and a sum of Rs. 5,000/- per month was ordered as interim maintenance. This order was challenged in appeal but appellate court dismissed the appeal and confirmed the order of interim maintenance. These orders have been challenged by learned counsel in W.P. 17658 of 2010 on the ground that no evidence was recorded and it is not clear as to what was the violence caused to the applicant.

4. The argument is fallacious as the court was deciding an application for interim maintenance. Evidence was yet to be adduced. Section 23 enables the Magistrate to pass exparte order on the basis of affidavit. Moreover court has gone in detail and found that the income of husband is Rs. 28,738/- per month. The applicant was admittedly wedded wife of petitioner Manoj Anand. Petitioner has not denied the fact of marriage or income or the fact of separate living.

5. In these circumstances learned Magistrate after examining the attending circumstances gave order of interim maintenance. It cannot be said that the order suffers from any error of law. The appellate court has examined the submissions of husband in detail and has confirmed the order of interim maintenance.

6. This Court is not exercising its appellate jurisdiction. The court below is yet to decide the apliction finally after recording the evidence. Even otherwise considering the income of petitioner the amount awarded cannot be saidto be excessive as such impugned orders do not suffer from any such error of law which may warrant interference by this Court in its jurisdiction under Article 226 of the

Constituion of India, as such writ petition has no force and is liable to be dismissed.

Criminal Revision 635 of 2011

7. Criminal Revision is directed against the order passed by the Magistrate under section 31 of the Act. It appears that in pursuance of the order passed by this Court in Misc. Application No. 22856 of 2010 whereby lower Court was directed to decide the application u/s 31 of the Act within a month, impugned order has been passed. By impugned order dated 22.1.2011 learned Magistrate has proceeded to punish revisionist husband u/s 31 of the Act for failure to pay the interim maintenance ordered on 20.3.2010, which order has been upheld as above. It may be relevant to mention that in writ petition there was no interim order.

8. Learned couns0.00"el submits that section 31 of the Act is not attracted to the present case. Same is quoted below for ready reference:

31. Penalty for breach of protection order by respondent - (1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under su-section (1) shall as far as practicable be tried by the Magistrate who has passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section (1), the Magistrate may also frame charges under section 498-A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

9. Section 31 of the Act applied to the protection order. Protection order has been defined u/s 2 (10) of the Act as protection order means an order made in terms of section 18. Section 18 gives details of protection orders that may be passed by the Magistrate. Section 18 is reproduced below:

18. Protection Orders- The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from -

(a) committing any act of domestic violence,

(b) adiding or abetting in the commission of acts of domestic violence;

(c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;

(d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;

(e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;

(f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;

(g) committing any other act as specified in the protection order.

10. From the above it is clear that the order passed for the maintenance or interim maintenance is not included or covered by section 18. Thus there is substance in the contention of revisionist that power u/s 31 was not available to the Magistrate to implement the order of interim maintenance passed under section 23 of the Act and proceed to punish him for the breach thereof. Even clause (g) of Section 18 which includes, any other act as specified in Protection order would not include the order of interim maintenance.

11. Order passed under Section 23 of the Act cannot be implemented under Section 31 of the Act. The Act is punitive in nature and the provisions are to be construed strictly. In my view such act/breach could not be made punishable which legislature did not intend, as such impugned order cannot be sustained.

12. Learned counsel for the wife, opposite party would submit that Act is a complete Code and it cannot be presumed that any order passed under the Act will be left uncomplied and there will be no provision to implement the same.

13. Provisions of the Act are to be construed in a manner so as to advance the purpose of the Act and it cannot be presumed that legislature did not intend to ensure compliance of order of interim maintenance. If this argument is accepted, Section 23 would become redundant or inoperable.

14. For this purpose power has been given in the Act itself. Section 28 of the Act provides for procedure and says that all proceedings under sections 12, 18, 19, 20, 21 and 23 shall be governed by the provisions of Criminal Procedure Code. Sub section (2) of section 28 further enables the Court to lay down its own procedure for disposal of an application under sub section (2) of section 23 of the Act. This gives sufficient indication as to how application u/s 23 will be dealt with and how the orders passed thereon will be enforced. While section 20 (1) (d) contains provision for maintenance. Sub section (4) (5) and (6) of section 20 provide for mechanisum to ensure compliance of order for maintenance.

15. More over in exercise of power conferred by section 37 rules have been framed for carrying out the provisions of the Act. Rule 6 (5) lays down the procedure as such it cannot be said that section 23 being not capable of enforcement is redundant or in operable.

16. In view of above this revision is liable to be allowed.

17. In the result the Writ petition is dismissed with no cost. The criminal revision is allowed. The order dated

22.1.2011 is set aside. Learned Magistrate is directed to pass appropriate order in accordance with law on the application for compliance of order passed under section 23 of the Act.
