SPECIAL ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2012

BEFORE
THE HON'BLE DEVI SUNIL AMBWANI, J.
THE HON'BLE ADITYA NATH MITTAL, J.

Reference Case No. - 01 of 1989

In the matter of the Council of the Institute of Chartered Accountants of India ...Petitioner
Versus
Shri R.L.Narula ...Respondent

Counsel for the Petitioner:
Sri Vinod Swarup

Counsel for the Respondents:
Sri V.K.Singh
Sri A.K.Srivastava
Sri K.K.Shangloo
Sri R.B.Singhal

Chartered Accountants Act,1949Section 21(5)-reference on basis of enquiry report the council found guilty of professional misconduct-committed by Respondent-disciplinary committee after considering each and every aspect found violation of the provision of Regulation 32-B-decision of Disciplinary Committee as well as council based on record-conclusion drawn by self speaking order suffers from no illegality of perversity-reference answered against respondent.

Held: Para-17

In the facts and circumstances, as discussed above, we are of the view that the decision of the Disciplinary Committee as well as of the Council are based on material on record. Both the authorities have taken into consideration all the aspects and explanations submitted before it. The conclusions are drawn by a self-speaking detailed order. We do not find any illegality or perversity in the findings of the disciplinary Committee and the Council. There is no sufficient reason to interfere with the findings recorded against the respondent. The reference is liable to be answered against the respondent.

Case Law discussed:
AIR 1958 SC 72

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. This reference has been filed under Section 21(5) of the Chartered Accountants Act, 1949 (hereinafter called the 'Act' for short) in respect of R.L. Narula, Chartered Accountant.

2. The facts of the case are that R.L. Narula, Chartered Accountant, failed to pay stipend due to his articled clerk, Neeraj Kumar Jain, as required by Regulation 32-B of the Chartered Accountants Regulations, 1964 (hereinafter called the 'Regulations' for brevity). The Council of the Institute of Chartered Accountants of India, upon enquiry, came to the conclusion that the respondent was guilty of professional misconduct and, accordingly, referred the case to the Disciplinary Committee.

3. The Disciplinary Committee, after hearing the parties and recording evidence, came to the conclusion that the respondent had violated the provision of Regulation 32B of the Regulations within the meaning of Sections 21 and 22 of the Act read with clause (1) of part II of the Second Schedule to the Act.

4. Considering the report of the Disciplinary Committee, the Council of the Institute gave its finding and recommended that the name of the respondent be removed from the register of Members for a period of 15 days.

5. After receipt of reference, notice to R.L. Narula, Chartered Accountant, was issued by this Court, who has submitted his objections.

6. We have heard Sri Vinod Swaroop, learned counsel for the Institute of Chartered Accountants of India, and Sri K.K. Shangloo, learned counsel for the respondent.

7. Learned counsel for the respondent has submitted that the report of the Disciplinary Committee is erroneous and the charges are not cogently proved against him. It has also been submitted that the respondent had sent the amount of stipend by hand to the complainant, who refused to accept it. Subsequently, the same was sent by registered post, which was also refused by the complainant. A cheque of Rs. 3,752.50 P. was thereafter sent on 22.6.1987 to the Institute for delivery to the complainant, which shows the efforts of payment by the respondent. It has also been submitted that the Council has blindly concurred with the erroneous report of the Disciplinary Committee and since no stipend was proved to be due any more to the complainant, hence the finding of the Disciplinary Committee is liable to be set aside. It has further been submitted that if any technical violation of Regulation 32B of the Regulations is found by this Court, the respondent is, at the most, liable to be reprimanded for the same. The punishment awarded to the respondent is liable to be set aside and the respondent should be given the benefit of doubt.

8. Learned counsel for the applicant has submitted that the reply of the respondent is incorrect, misconceived and contrary to record. As per Regulation 32-B of the Regulations, the respondent was under obligation to make timely payment of the stipend to the complainant and efforts made by the respondent, subsequent to the complaint made against him, were nothing but an after thought, which could not absolve the respondent from the consequences of violation of Regulation 32-B of the Regulations.
Regulation 32-B of the Regulations provides as under :

"32-B -- Stipend to Articled Clerks.

(1) Every member engaging an articled clerk on or after 1st July 1973 shall pay to such clerk a minimum monthly stipend at the rates specified in sub-regulation (2) or in sub-regulation (3) hereof, as the case may be.

(2) If the normal place of service of an articled clerk is situated in Bombay, Calcutta, Delhi, New Delhi, Kanpur or Madras- the following shall be the minimum rates of the stipend payable under Sub-regulation (1) :

(a) In respect of the first year of articled training ..... Rs 60/- per month

(b) In respect of the second year of articled training ..... Rs. 100/- per month

(c) In respect of the remaining period of articled training ... Rs. 150/- per month

(3) If the normal place of service of an articled clerk is situated in a place other than the places specified in sub-regulation (2) hereof, the minimum rates at which such employer shall pay stipend under sub-regulation (1) hereof shall be computed at 50% of the respective rates

for the various stages of articled training specified in Sub-regulation (2) hereof :

Provided that nothing contained in this regulation shall entitle an articled or audit clerk registered with effect from a date prior to 1st July 1973, to any stipend under sub-regulation (2) or (3) hereof.

Explanation : For the purpose of determining the rate at which stipend is payable under sub-regulation (2) or sub-regulation (3) hereof, the period of articled training of the clerk under any previous employer or employers (not being any such period prior to the 1st July. 1973) shall also be taken into account.

(4) The stipend under sub-regulation (2) or (3) hereof, as the case may be, shall be paid by the member to an articled clerk either (a) by a crossed account payee cheque every month against a stamped receipt to be obtained from the articled clerk; or (b) by depositing the amount every month in an account opened by the articled clerk in his own name with a branch of the bank to be specified by the member."

9. The complainant started his training with effect from 28.2.1984 and a Savings Bank A/c. No. 3425 was opened with the Punjab National Bank on 22.1.1985. The said account was closed on 19.6.1986. It was alleged in the complaint that R.L. Narula, while getting the above account opened, got issued a cheque book bearing cheque Nos. 895541 to 895550 and got all the cheques blankly signed so that any amount, if deposited in this account, may be withdrawn by R.L. Narula.

10. As per provisions of Regulation 32-B of the Regulations, the monthly stipend was to be paid every month against a stamped receipt to be obtained from the articled clerk or by depositing the amount every month in an account opened by the articled clerk in his own name with a branch of the bank to be specified by the Member. Accordingly, the first stipend became due on 31.3.1984 and so on. The respondent has alleged that on 9.5.1987 a draft of Rs. 2,250.50 P. was sent to the complainant but he refused to accept it. Later on, the said draft was sent by registered post on 11.5.1987, which was also refused by the complainant. Subsequently, on 22.6.1987, a cheque of Rs. 3,750.50 P. was sent to the Institute for delivery to the complainant.

11. It is relevant to mention that the complaint was made on 28.7.1986 regarding non-payment of stipend, which was required to be paid on monthly basis. All the efforts shown by the respondent started in the month of May, 1987, which is much latter even after the complaint. No explanation has been given as to why the stipend was not paid on monthly basis, becoming due since 31.3.1984. Certainly, the respondent could have deposited the amount of stipend in the S.B. A/c. opened by the complainant, regarding which the respondent was having due knowledge. The complainant has also categorically stated that no transaction took place in the said account and an interest of 0.8 paise and 0.12 paise were credited in this account upto the date of closure of the account on 19.6.1986. As mentioned above, the complaint was made on 28.7.1986, i.e. even prior to the date of making complaint the stipend was not either deposited in the S.B. A/c. nor paid in cash against a stamped receipt.

Therefore, the alleged attempt of payment of stipend to the complainant is wholly misconceived and devoid of any substance.

12. The proceedings regarding professional misconduct are not a civil proceeding, but a quasi-judicial proceedings. The test applicable to prove the guilt of a charged person should be applied in such proceedings. In the instant case there appears to be no reasonable doubt about the fact that the respondent has not paid the monthly stipend to the complainant in view of Regulation 32-B of the Regulations. The subsequent efforts made by the respondent can only be said to be an after thought with a view to avoid disciplinary proceeding.

13. In ***Council of the Institute of Chartered Accountants and another v. B. Mukherjea*** *(AIR 1958 SC 72)* the Hon'ble Apex Court, considering the jurisdiction of High Court under Section 21 of the Act, has held as follows :

"In hearing references made under S. 21, sub-s. (1), the High Court can examine the correctness of the finding recorded by the statutory bodies in that behalf. The High Court can even refer the matter back for further inquiry by the Council and call for a fresh finding. It is not as if the High Court is bound in every case to deal with the merits of the finding as it has been recorded and either to accept or reject the said finding. If, in a given case it appears to the High Court that, on facts alleged and proved, an alternative finding may be recorded, the High Court can well send the case back to the Council with appropriate directions in that behalf. The powers of the High Court under S. 21, sub-s. (3) are undoubtedly wide enough to enable the High Court to adopt any course which in its opinion will enable the High Court to do complete justice between the parties."

14. In our opinion, the Council was wholly justified to form the opinion that the respondent was guilty of professional misconduct. The Disciplinary Committee for enquiry had afforded full opportunity of hearing to the respondent and has also recorded statements made by the parties and has taken into consideration the documents produced by the parties. In the enquiry report, the Disciplinary Committee has discussed each and every aspect of the matter at length and has come to the conclusion that the respondent has not at all taken seriously the provision of Regulation 32-B of the Regulations, which required him to pay the stipend by crossed account payee cheques every month. The Committee has also come to the conclusion that the claim of the respondent that he paid Rs. 4,000/- to the articles clerk for the period from 1.7.1985 onwards was also not acceptable to the Committee.

15. The copy of the report of the Disciplinary Committee was sent to both the complainant and respondent and they were asked to send their written representations, if any. Both the complainant and the respondent had also submitted their written representations dated 25.1.1988 and 5.2.1988 respectively and both of them appeared in person before the Council and also made oral submissions. The report dated 9.9.1987 was considered in 132nd meeting of the Council on 12.2.1988 and the Council, after considering the written and oral submissions of the respondent, did not find any merit. The Council, concurring

with the conclusion of the Disciplinary Committee and the reasons given by it, found that the respondent is guilty of professional misconduct within the meaning of Section 21 read with Section 22 of the Act for contravention of Regulation 32-B of the Regulations in respect of the charge of non-payment of stipend to the complainant and recommended to this Court that the name of the respondent be removed from the register of Members of the Institute for a period of 15 days.

16. The intendment and object of the Act is to maintain the standard of the profession of Chartered Accountant at a high level and it prescribes certain code of conduct to the members, which they must follow.

17. In the facts and circumstances, as discussed above, we are of the view that the decision of the Disciplinary Committee as well as of the Council are based on material on record. Both the authorities have taken into consideration all the aspects and explanations submitted before it. The conclusions are drawn by a self-speaking detailed order. We do not find any illegality or perversity in the findings of the disciplinary Committee and the Council. There is no sufficient reason to interfere with the findings recorded against the respondent. The reference is liable to be answered against the respondent.

18. As the matter is pending since long, in the circumstances of the case, the removal of the name of the respondent from the Register of Members for a period of five days would meet the ends of justice.

19. Accordingly, the reference is answered in favour of the applicant and against the respondent with the modification that the name of the respondent shall be removed from the Register of Members for a period of five days only.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.09.2012

BEFORE
THE HON'BLE DHARNIDHAR JHA, J.
THE HON'BLE ASHOK PAL SINGH, J.

Contempt Application (Criminal) No. 3 of 2012

IN RE ...Applicant
Versus
Shri Anil Kumar Jindal & others ...Respondents

Counsel for the Petitioner:
A.G.A
Sri A.B.N.Tripathi

Counsel for the Respondents:
Sri V.M.Zaidi
Sri Jitendra Kumar Shishodia

Contempt of Court Act, 1971-Section 19-District Consumer Forum whether a Court?-held-within strict sense of Court-although not a Court-but possessing all trappings like Court-is Court within the ambit of Section 10 of Contempt Act.

Held: Para-57

In view of the above, we are of the view that although a District Forum exercising judicial function under the Consumer Protection Act is not a Court within the strict sense of a 'Court' but due to having all the trappings of a 'Court' is a 'Court' in the context of Section 10 of the Contempt of Courts Act.

Constitution of India-Art.227-District Consumer Forum-being Court within scope of 5-10 of contempt Act-High Court can exercise supervisory power.

Held: Para-66

In view of the above we are of the firm view that a High Court has the power of superintendence also over the District Consumer Forums and Commissions lying within its territorial jurisdiction and that being so such District Consumer Forums and Commissions established under the Consumer Protection Act are also covered within the ambit and scope of "courts subordinate to the High Court" in the context of Section 10 of the Contempts of Courts Act 1971.

Case Law discussed:

(2009) 9 SCC 221; (2011) 8 SCC 539; (2003) 2 SCC 412; (2010) 11 SCC 1; 1995 Supplementary 3 SCC 81; 1950 Supreme Court 188; (2000)5 SCC 355; 2 SCC 651; AIR 1956 SC 614; AIR 1956 Supreme Court 66; AIR 1956, Supreme Court 153; AIR 1967 Supreme Court 1494; (2003) 3 SCC 563; (2011) 10 SCC 316; (2010) 11 SCC 1; (1995) Supplementary 3 SCC 81; (2003) 2 SCC 412; AIR 1981 SC 723: 1981 Cr.L.J. 283

(Delivered by Hon'ble Ashok Pal Singh, J.)

1. A legal preliminary objection has been raised about non maintainability of the present contempt proceedings, which have been initiated against the contemnor an Advocate, under Section 10 of the Contempt of Courts Act, 1971 (hereinafter referred to as "Act") regarding the alleged contempt committed by him of the District Consumer Forum, Muzaffarnagar.

2. We have heard Sri V.M.Zaidi, learned counsel for the contemnor as also learned AGA for the State respondent.

3. It has been submitted by the learned counsel for the contemnor that Section 10 of the Act empowers the High Court to punish only in respect of contempts of courts subordinate to it and a District Consumer forum is neither a court nor a court subordinate to the High Court. As such the High Court has no jurisdiction to punish a person of any Act of contempt of Consumer Forum and the proceedings initiated against the contemnor by High Court are misconceived. In support of his argument learned counsel has relied upon **Malay Kumar Ganguly Vs. Sukumar Mukherjee (2009) 9 SCC 221 and Ethopian Airlines Vs. Ganesh Narayan Saboo (2011) 8 SCC 539.**

4. On the other hand learned AGA has argued in support of the jurisdiction being vested with the High Court to initiate contempt proceedings even in respect of contempt committed of a Consumer Forum. According to him the Consumer Forum has all the trappings of the Court and as such under Section 10 of the Act is a Court and also subordinate to the High Court.

5. Before proceeding any further it will be necessary to have a look at the relevant statutory provisions of the Contempt of Courts Act 1971 of the Act. Section 2 of the said Act defines Contempt of Courts.

6. Civil Contempt is defined by its Section 2(b) as under:-

"2(b) civil contempt " means wilful disobedience to any judgement, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court ".

While Criminal Contempt is defined in Section 2(c) as under:-

"2(c) criminal contempt " means the publication (whether by words. spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court ; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii)interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner ;"

7. Section 10 of the Act, which empowers the High Court to take cognizance of a contempt in respect of a Court subordinate to it reads as under:-

"Power of High Court to punish contempts of subordinate courts*- Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it as it has and exercises in respect of contempts of itself :*

Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.(45 of 1860)".

8. In the background of the aforesaid statutory provisions and the submissions made by the learned counsels the questions, which require our considerations are:

(i) Whether a District Consumer Forum is a Court, and

(ii) If yes, whether a District Consumer Forum is subordinate to the High Court.

9. In case the above two questions are answered in affirmative this Court would then be well within its jurisdiction to decide the present contempt proceedings.

10. At the very outset as regards the first question, it will be pertinent to mention that the expression "Court" has no where been defined in the Act. However, certain decisions of the Supreme Court may be referred to derive its correct import in which it has been used in the Act.

11. In **State of Karnataka Vs. Vishwabharathi House Building Cooperative Society, (2003) 2 SCC 412** Supreme Court took the view that Consumer Forums are not courts but are quasi judicial bodies or authorities or agencies. However, it may be noted that this decision was given in the context where competence of the parliament was under challenge before the Supreme Court on the ground that parallel Courts cannot be established by the Parliament, which may run parallel to Civil Courts.

12. In **Malay Kumar Ganguly (supra)** relied upon by the present contemnor the Supreme Court considering the nature of proceedings before Consumer Redressal Forum and Commissions held in it para 43 as under :-

"Proceedings before the National Commission are although judicial proceedings, yet at the same time, it is not a Civil Court within the meaning of the Code of Civil Procedure. It may have all the

trappings of a Civil Court yet it cannot be called a Civil Court."

13. **In Ethopian Airlines (supra)** also relied upon by the present contemnor in context of Section 86 CPC while considering the nature of proceeding before Consumer Redressal Forum and Commissions, held in its para 66 as under :-

" In particular CPC specifically refers to the District Courts, the High Court and the Supreme Court and makes little if any reference to other quasi judicial fora like the Consumer redressal bodies at issue here".

14. In **Union Bank of India Vs. Madras Bar Association (2010) 11 SCC 1** a constitutional Bench of the Supreme Court holding Consumer forum to be a Statutory Tribunal created under a statute made an attempt to make a fine distinction between the tribunals and courts in its para 45 as under :-

"45. Though both courts and tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and tribunals. They are:

(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are tribunals. But all tribunals are not courts.

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a judicial member and a technical member who is an 'expert' in the field to which the tribunal relates. Some highly specialised fact-finding tribunals may have only technical members, but they are rare and are exceptions.

(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and the Evidence Act, requiring an elaborate procedure in decision making, tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of the Evidence Act."

15. It is thus seen that the context in which the aforementioned decisions of **Vishwa Bharti House Building Cooperative Society, Malay Kumar Ganguly, Ethopian Airlines and Madras Bar Association** were rendered by the Supreme Court, it was considering therein the question as to whether Consumer Forum and Commissions could be termed as 'Court' in its strict sense, within the meaning of Civil Procedure Code.

16. **In Canara Bank Vs. Nuclear Power Corporation Ltd., 1995 Supplementary 3 SCC 81** in its para 26 of the report observed as under:-

" 26. In our view, the word `court' must be read in the context in which it is used in a statute. It is permissible, given the context, to read it as comprehending the courts of civil judicature and courts or some tribunals exercising curial, or judicial powers."

17. **In Bharat Bank Limited Delhi Vs. Employees of Bharat Bank, AIR 1950 Supreme Court 188**, a five member Bench

of Supreme Court, while dealing with the question whether an Industrial Tribunal constituted under the Industrial Tribunal Disputes Act 1947 was a Court for the purpose of Article 136 of the Constitution of India observed that Industrial Tribunal has all the trappings of the court. To be more pertinent it was observed in para 7 of his judgement by Fazal Ali, J. one the of the members as under:

" Now, there can be no doubt that the industrial tribunal has, to use a well known expression 'all the trappings of a court' and performs functions which cannot but be regarded as judicial. This is evident from the rules by which the proceedings before the tribunal, are regulated. It appears that the proceeding before it commences on an application which in many respects is in the nature of a plaint. It has the same powers as are vested in a Civil Court under the Code of Civil Procedure when trying a suit, in respect of discovery, - inspection, granting adjournment, reception of evidence taken on affidavit, enforcing the attendance of witnesses; compelling the production of documents, issuing commissions, etc. It is to be deemed to be a Civil Court within the. meaning of Ss. 480 and 482, Criminal P.C. 1898. It may admit and call for evidence at any stage of the proceeding and has the power to administer oaths. The parties appearing before it have the right of examination, cross examination and re-examination and of addressing it after all evidence has been called. A party may also be represented by a- legal practitioner with its permission."

18. **In P. Sarthy Vs. S.B.I. (2000)5 SCC 355**, the Supreme Court was of the view that the term 'court' in Section 14 of the Limitation Act 1963 meant any authority or tribunal having the trappings of a Court.

19. In **Kihoto Hollohan Vs. Zachillhu (1992) Supplementary 2 SCC 651**, a constitution Bench of the Supreme Court held that all the tribunals may not be courts, but all courts are tribunals.

20. In **Ram Narayan Vs. Simla Banking and Industrial Co. Ltd., AIR 1956 SC 614,** the Supreme Court held that a tribunal, which exercised jurisdiction for executing a decree would be a 'court' for the purpose of the Banking Companies Act.

21. In **Brijnandan Sinha Vs. Jyoti Narayan, AIR 1956, Supreme Court 66** considering the question whether a Commissioner appointed under the Public Servant (Enquiries) Act 1850 was a Court within the meaning of Section 3 of the Contempt of Courts Act 1952, which is forerunner of the present Section 10 of the Act, it was held by the Supreme Court that in order to constitute a court in strict sense of the term, an essential condition is that the court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgement, which has finality and authoritativeness, which are the essential tests of a judicial pronouncement.

22. In **Virendra Kumar Satyawadi Vs. State of Punjab, AIR 1956, Supreme Court 153**, a Bench consisting of three other learned Judges of Supreme Court presided over by Hon'ble B.K.Mukherjea, Chief Justice, while examining the question as to whether returning officer deciding on the vailidity of the nomination papers under Section 36(2) of the Representation of People Act, 1951 was a court within the

meaning of Section 193 IPC laid down as under:

" that what distinguishes a Court from quasi judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgement. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduced evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter of a consideration of evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a Court as distinguished by quasi judicial tribunal, what has to be decided is whether having regard to the provisions of the Act possess all the attributed of the Court."

23. In **Thakur Jugal Kishore Sinha Vs. Sitamarhi, Central CooperativeBank Limited, AIR 1967 Supreme Court 1494,** the question that arose for consideration before the Supreme Court was as to whether the Assistant Registrar of the Cooperative Societies, an authority under the Bihar and Orissa Cooperative Societies Act, 1935 was a Court for the purposes of Contempt of Courts Act 1952. In the light of the ratio of its previous decisions rendered in Bharat Bank's case, Brijnandan Sinha's case and Virendra Kumar's case, it was held by the Supreme Court therein as under:-

"that to determine whether statutory authority was functioning as a Court, the provisions of the statute concerned have to be looked into".

24. After examining the provisions of the Act and the powers, duties and functions of the Assistant Registrar therein, the Supreme Court in the aforesaid decision of Thakur Jugal Kishore Sinha reached to a conclusion that the Assistant Registrar in adjudicating upon a dispute rendered under Section 48 of the Bihar and Orissa Cooperative Societies Act 1935 for all intents and purposes was a Court discharging the same functions and duties in the same manner as a Court of law is expected to do.

25. In **K.Shamrao Vs. Assistant Charity Commissioner (2003) 3 SCC 563**, the Supreme Court held Assistant Charity Commissioner appointed under Section 5 Bombay Public Trust Act 1950 (as applicable to Karnataka), to be a 'Court' for the purposes of Contempt of Courts Act 1971.

26. **In Trans Mediterranean Airways Vs. Universal Exports and another (2011) 10 SCC 316,** Apex Court made a strenuous effort to find out the meaning of term 'Court' as given in various renowned dictionaries. Therein it was observed by the Apex Court that in Oxford Advance Learner Dictionary (8th Edition) it has been defined as " the place where legal trials take place and where crimes, etc, are judged ". According to Oxford Thesaurus of English (3rd Edition) its synonyms are as under : " Court of Law, Law Court, Bench, Bar, Court of Justice, Judicature, Tribunal, Forum, Chancery, Assizes, Courtroom". The Chamber's Dictionary (10th Edition) has described a court as " a body of person assembled to decide causes". In Straud's Judicial Dictionary (5th Edition), the word court has been described as " a place where justice is judicially ministered, and is derived" and is further observed, " but such a matter involves a judicial act, which may be brought up on certiorari".

27. In the aforesaid decision of **Trans Mediterranean Airways Vs. Universal Exports and another** a question had cropped up before the Supreme Court as to whether National Commission under the Consumer Protection Act was a court. This question was to be decided by the Supreme Court in the context of the Carriage Air Act, 1972 and the Warsaw Convention of 1929. After a careful consideration of aforementioned dictionary meanings of the term ' court' and its earlier decisions rendered in Union of India Vs. Madras Bar Association **(2010) 11 SCC 1**, Bharat Bank Limited Vs. Employees (supra), Brijendra Sinha Vs. Jyoti Narayan (supra) and and Canara Bank Vs. Nuclear Power Corporation of India Limited and others,**(1995) Supplementary 3 SCC 81** the supreme court observed as under :

"The above dictionary meaning and decision of this Court in the case of Canara Bank and also the observations of the Constitution Bench decision of this Court in Madras Bar Association reveal that word "Court" must be understood in the context of a body that is constituted in order to settle disputes and decide rights and liabilities of the parties before it. "Courts" are those bodies that bring about resolutions to disputes between persons. As already mentioned, this Court has held that the Tribunal and Commissions do not fall under the definition of 'Court'. However, in some situations, the word "Court" may be used in a wide, generic sense and not in a narrow and pedantic sense, and must, in those cases, be interpreted thus."

28. In **State of Karnataka Vs. Vishwabharathi House Building Cooperative Society, (2003) 2 SCC 412,** the Supreme Court took the view that by virtue of Section 25 and Section 27 of the Consumer Protection Act there is a legal fiction created in giving tribunals like the Consumer Forum, the powers of a Court.

29. Taking into account its aforesaid decision rendered in State of Karnataka Vs. Vishwabharathi House Building Cooperative Society and several others decisions, the Supreme Court in Trans Mediterranean Airways Vs. Universal Exports and another (supra) bringing Consumer Forums and Commissions established under Consumer Protection Act (referred to as CP Act) within the sweep and ambit of 'Court' in context of Carriage Air Act, 1972 (referred to as CA Act) and Warsaw Convention reached to a further conclusion as under:-

" The use of the word "Court" in Rule 29 of the Second Schedule of the CA Act has been borrowed from the Warsaw Convention. We are of the view that the word "Court" has not been used in the strict sense in the Convention as has come to be in our procedural law. The word "Court" has been employed to mean a body that adjudicates a dispute arising under the provisions of the CP Act. The CP Act gives the District Forums, State Forums and National Commission the power to decide disputes of consumers. The jurisdiction, the power and procedure of these Forums are all clearly enumerated by the CP Act. Though, these Forums decide matters after following a summary procedure, their main function is still to decide disputes, which is the main function and purpose of a Court. We are of the view that for the purpose of the CA Act and the Warsaw Convention, the Consumer Forums can fall within the meaning of the expression "Court" "

30. In view of the aforesaid decisions, it thus becomes clear that the word 'court'

used in the Act cannot be interpreted in its narrow and pedantic sense as a Court or Civil Court in its strict sense but has to be interpreted in its wide generic sense providing a greater conspectus to its meaning. We in the present matter are therefore not concerned as to whether Consumer Forum in their precise nature are courts or quasi judicial bodies or authorities or agencies but what we are concerned about is as to whether in the context of Section 10 of Contempt of Courts Act 1971, they are exercising their main functions as a Court or in other words are having 'the trappings of a Court'. In case these forums are exercising their judicial power akin to that of a Court, there is no reason not to treat them a Court in the context of Section 10 of contempt of Courts Act 1971.

31. In order that an authority exercising a judicial authority, can be termed to be having 'the trappings of a Court' following tests must be satisfied by such authority:-

(i) Nature of power exercised by the authority. The power entrusted to the authority must be judicial power of the State meaning thereby, the authority must be enjoined to adjudicate between the parties. There must be a lis between the contesting parties presented before the authority for adjudication and decision.

(ii) The source of the power must emanate from the statute and must not be based merely on agreement between the parties. The power must statutorily flow and must continue to inhere in the authority subject to the limitation engrafted by the statute conferring such power.

(iii) The manner of exercise of power must partake of essential attributes of 'Court'.

(iv) The resultant or end product of the exercise of such power by the authority must result in a binding decision between the parties concluding the lis between the parties so far as the authority is concerned. The said decision must be definitive and must have finality and authoritativeness.

32. In the light of the aforesaid tests let us now consider the relevant statutory scheme of Consumer Protection Act, 1986 under which its authorities function.

33. The statement of objects and reasons of the Consumer Protection Act 1986 enumerates its necessity to provide better protection of the interest of consumers. The salient feature of the Statement of Objects and Reasons of the CP Act are as under:

"1. The CP Act aims to protect the interests of the consumers and provide for speedy resolutions of their disputes with regard to defective goods or deficiency of service. The Statement of Objects and Reasons of the CP Act are as under:

The Consumer Protection Bill, 1986 seeks to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer councils and other authorities for the settlement of consumer disputes and for matter connected therewith.

2. It further seeks, inter alia, to promote and protect the rights of consumers such as -

(a) the right to be protected against marketing of goods which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;

(d) the right to be heard and to be assured that consumers interest will receive due consideration at appropriate forums;

(e) the right to seek redressal against unfair trade practices or unscrupulous exploitations of consumers; and

(f) right to consumer education.

3. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.

4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central levels. These quasi- judicial bodies will observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non- compliance of the orders given by the quasi-judicial bodies have also been provided. "

34. The relevant provisions of Consumer Protection Act that are required to be noticed for answering the question before us are Sections 2, 7, 9, 10,11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 23, 24, 24B, 25, 27 and 27A.

35. Section 2 contains definitions wherein amongst others definition of complainant, consumer and consumed disputes have been provided.

36. Section 7 of the said Act provides a constitution of the State Consumer Protection Council to promote and protect within the State, the rights of the consumers with the objects as quoted (supra).

37. Section 9 provides for establishment of the consumer dispute redressal agencies making provision for establishment of Consumer Disputes Redressal Forum known as District Forum to be established by the State Government in each district and also making provision for a Consumer Disputes Redressal Commission known as State Commission by every State Government and for making a further provision for a establishment of a National Consumer Disputes Redressal Commission to be established by the Central Government.

38. Section 10 provides composition of a District Forum, which is to be headed by a person who is, or has been, or is qualified to be a District Judge and consist of two other members.

39. Section 11 provides pecuniary jurisdiction of the District Forum.

40. Section 12 provides the manner in which a complaint has to be made before the District Forum.

41..Section 13 lays down the mode and manner in which complaint received by the District Forum are required to be dealt with. Its Sub-section 3 requires that every complaint shall be heard as expeditiously as possible and endeavour shall be made to decide the complaint within a period of three months from the date of receipt of notice by opposite party, where the complaint does not require analysis or testing of commodities and within five months where analysis or testing of commodities are required. Its Sub-section 3(B), 4 and 5 requires special attention because of which they are being reproduced as under:-

"(3B) Where during the pendency of any proceeding before the District Forum, it appears to it necessary, it may pass such interim order as is just and proper in the facts and circumstances of the case.

(4) For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:--

(i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;

(ii) the discovery and production of any document or other material object producible as evidence;

(iii) the reception of evidence on affidavits;

(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

(v) issuing of any commission for the examination of any witness, and

(vi) any other matter which may be prescribed.

(5) Every proceeding before the District Forum shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Code (45 of 1860), and the District Forum shall be deemed to be a civil court for the purposes of section 195, and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974). "

42. Section 14 provides for the directions, which can be issued by the District Forum arriving at a satisfaction of the allegations contained in the complaint about the defects in goods or the deficiency in service.

43. Section 15 provides for an appeal from the order made by the District forum to the State Commission.

44. Section 16 provides for composition of the State Commission. According to which it has to be presided by a person who is, or has been, a Judge of a High Court appointed by the State Government. Its also has to consist of two other members.

45. Section 17 provides for the jurisdiction of the State Commission including its pecuniary jurisdiction to entertain the complaints.

46. Section 19 provides for an appeal from a decision of the State Commission to the National Commission.

47. Section 20 deals with the composition of the National Commission. It is to be headed by a President, who would be a person who is, or has been, Judge of the Supreme Court and appointed by the Central Government in consultation with the Chief Justice of India and also having other members not less then four in number.

48. Section 21 provides for jurisdiction of the National Commission including its pecuniary jurisdiction to entertain the complaints.

49. Section 23 provides for a limited appeal to the Supreme Court from an order made by the National Commission i.e. when the same is made in exercise of its original power as conferred by Special Clause (i) of Clause (A) of Section 21.

50. Section 24 speaks about the finality of orders. According to it every order of a District Forum, State Commission or National Commission shall, if no appeal has been preferred against such order under the provisions of the said Act be final.

51. Section 24(B) provides for the administrative control of the National Commission over all the State Commission in certain matters and about the administrative control of State Commission over all its District for a within its jurisdiction in those certain matters.

52. Section 25 provides power of attachment of the property, awarding of damages and for issuing a certificate of any amount due from any person under an order made by District Forum, State Commission or the National Commission through Collector to recover the said amount in the same manner as arrears of land revenue.

53. Section 27 provides for penalties. Its Subsection (1), (2) and (3) are as under:-

" Penalties. -- (1) Where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousands rupees but which may extend to ten thousand rupees, or with both:

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974), the District Forum or the State Commission or the National Commission, as the case may be, shall have the power of a Judicial Magistrate of the first class for the trial of offences under this Act, and on such conferment of powers, the District Forum or the State Commission or the National Commission, as the case may be, on whom the powers are so conferred, shall be deemed to be a Judicial Magistrate of the first class for the purpose of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) All offences under this Act may be tried summarily by the District Forum or the State Commission or the National Commission, as the case may be."

Section 27(A) provides appeal against order passed under Section 27.

54. So far as the first test of nature of power exercised by Consumer Protection authorities is concerned, it is evident from the aforesaid statutory scheme that the authorities are to exercise compulsory judicial power of the State so as to adjudicate disputes between the parties i.e. Consumers and traders/ Service Providers. These authorities are entrusted to determine the lis between the parties in a judicial manner. As regards the second test, it is also clear from the aforesaid scheme that the authority and power to adjudicate upon the lis between the parties are entrusted to the authorities therein by the Act and not by the appropriate Government. Thus the source of power to adjudicate so far as these quasi judicial authorities are concerned is none other than the statute itself. The Forums & Commissions are clearly the creatures of the statute invested with the power to exercise the judicial power of the State.

55. As regards the third test the statutory scheme itself indicates that all the relevant trappings of a 'court' are available to the authorities while deciding a lis between the parties. While Section 13 specifically empowers the authorities to act like any other Civil Court in respect of certain matters. Section 25 & 27 provides teeth to the authorities for getting their orders executed and imposing fines in case of default by a party to the lis. It is also clear from the said scheme that in order to resolve a lis the authorities are to follow a judicial procedure of adjudication which is one of the essential attributes of a Court.

56. Lastly coming to the fourth test relating to the resultant or end produce, it is clear from the provisions of Section 24 that the authorities enjoin finality of their orders. The orders passed by them attaining finality becomes binding between the parties.

57. In view of the above, we are of the view that although a District Forum exercising judicial function under the Consumer Protection Act is not a Court within the strict sense of a 'Court' but due to having all the trappings of a 'Court' is a 'Court' in the context of Section 10 of the Contempt of Courts Act.

58. The first question involved for our consideration is thus decided in affirmative.

59. As regards the second question involved in the matter, it will be appropriate to peruse the relevant provisions contained in Article 227 of the Constitution of India, which read is as under :-

" **227. Power of superintendence over all courts by the High Court.-**

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction .

(2) Without prejudice to the generality of the foregoing provision, the High Court may-

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces. "

60. It can thus be noticed that except for the Court or Tribunal constituted by or under any law relating to the Armed Forced all Courts or Tribunals lying within the jurisdiction of a High Court will be covered by the general power of superintendence of that High Court.

61. In **S. K. Sarkar Vs. Vinay Chandra, AIR 1981 SC 723: 1981 Cr.L.J. 283**, a question arose before the Supreme Court as to whether a Board of Revenue functioning under the U.P.Zamindari Abolition and Land Reforms Act was a court subordinate to the High Court as contemplated by Section 10 of the Contempts of Courts Act 1971, whose contempt can be taken cognizance of by the High Court. The Supreme Court observed as follows:-

62. "The phrase" courts subordinate to it" used in Section 10 is wide enough to include above courts, who are judicially subordinate to the High Court, even though administrative control over them under Article 235 of the Constitution does not vest in the High Court. Under Article 227 of the Constitution, the High Court has the power of superintendence over all courts and tribunal throughout the territories in relation to which it exercises jurisdiction. The court of Revenue Board, therefore, in the instant case, is a court "subordinate to the High Court" within the contemplation of Section 10 of the Act."

63. It will also be appropriate to have a perusal of Rule 4B of the Chapter III of the **Allahabad High Court Rules, 1952** as amended upto date under which allocation of executive and administrative work has been made by the Allahabad High Court for its Administrative Judges each of whom has been assigned the charge of one or more sessions division for a period of one year by its Chief Justice. In the matters listed therein for Administrative Judges matter no.1 reads as under:-

"1. Review of judicial work of Subordinate Courts, Tribunals, District Consumer Forums and all other Special Courts and control of their working including inspection thereof, to record entries in the character rolls of the officers posted in the division assigned to the Administrative Judge."

(Emphasis supplied by us)

64. It appears that the above rule by which an Administrative Judge has been empowered to make a review of judicial

work or to make inspection of District Forum lying within the Sessions Division assigned to him has been framed by its framers keeping in mind the High Courts' general power of superintendence over all the courts and tribunals given to it under Article 227 of the Constitution of India.

65. The aforesaid rule also thus lends support to the view that the Court of Consumer Forum and Commissions lying within the territorial jurisdiction of a High Court are subordinate to the High Court so far as its general power of superintendence over them as provided under Article 227 of the Constitution of India is concerned.

66. In view of the above we are of the firm view that a High Court has the power of superintendence also over the District Consumer Forums and Commissions lying within its territorial jurisdiction and that being so such District Consumer Forums and Commissions established under the Consumer Protection Act are also covered within the ambit and scope of "courts subordinate to the High Court" in the context of Section 10 of the Contempts of Courts Act 1971.

67. The second question involved for our consideration is also thus decided in affirmative.

68. In view of the above discussion we find that the preliminary objection raised by the contemnor about non maintainability of the present contempt proceeding has no force and as such is rejected.

69. Let the case be listed in the next cause list for further orders.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.09.2012

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

First Appeal From Order No. 6 of 2009

Union of India through the General Manager, Northern Railway, Baroda House, New Delhi (Respondent in O.A. Before R.C.T.). ...Appellant

Versus

Ashok Kumar Pal ...Respondent

Counsel for the Petitioner:
Sri Anil Srivastava

Counsel for the Respondents:
Sri R.P.Singh

Railway Claim Tribunal Act1987-Section 23-Appeal-Railway Act 1989-Section 124-Appeal against award of Railway Tribunal-on ground as deceased not bona fide passenger-claim itself not maintainable-from appraisal of evidence Tribunal recorded finding of fact regarding bona fide passenger-claimant being natural heirs of and dependent of deceased-petition maintainable-having liability nature of 'no fault'.

Held: Para-18
In view of above, it is established from the evidence adduced by the claimant that deceased was travelling as a bonafide passenger of Train No. 2 E.K (EMU) passenger train in second class on 13th February, 2001 when 'untoward incident' was occurred at Pata railway station and as such the son of deceased being dependent and only legal heir/legal representative is entitled to claim compensation for the aforesaid 'untoward incident' from railway administration.

Code of Civil Procedure-Section 34 readwith Section 3 of Interest Act 1978- Award of interest with retrospective effect-in absence of specific provision in Act-general principle of C.P.C. As well as interest Act-interest can be awarded-compounding interest after expiry of 60 days from the publication of award-shall be payable-award impugned modified accordingly.

Held: Para-30

Having considered the respective submission for the learned counsel for the parties, we are of the view that award of penal interest from retrospective date would be illegal and, therefore, would not be sustainable. However, the interest awarded as penal interest by the tribunal would be payable after 60 days from the date of award, if the appellant had committed default in making the deposit of the amount of awarded compensation before the tribunal or before this Court within 60 days from the date of award passed by the Tribunal.

Case Law discussed:

(2008) 9 SCC 527; AIR 1987 SC 1086; 2009 (2) T.A.C. 644 (All); 2009 (7) SCC 372; (1999) 3 SCC 257; 2004 (2) SCC Page 370; 2009 (7) SCC 372

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. This appeal under Section 23 of the Railway Claims Tribunal Act, 1987 has been preferred against an award dated 29.09.2008 in Claim Case No. O.A. 0300199 decided by Railway Claims Tribunal, Lucknow (in short 'R.C.T'), wherein an award of Rs. 4 lac was passed with pendente lite and future simple interest @ 6% per annum on account of death of Ram Singh Pal in an accident occurred on 13th February, 2001. It was further directed that in default of payment of amount under award including interest and costs within 60 days the simple interest would be payable at rate of 7%.

2. The facts in brief are that one Ram Singh Pal was travelling by train No. 2-E.K (EMU) passenger train in second class with ticket No. 08347 from Bharthana to Phahpund railway station on 13th February, 2001. When train was at Pata railway station, Ram Singh Pal fell down from the train and died in the train accident. Claim petition was preferred by his son Ashok Kumar Pal, respondent/claimant, the only legal heir of deceased Ram Singh Pal.

3. The petition has been contested by the appellant respondent challenging the fact that deceased was not a bonafide passenger. The deceased fell down on his own negligence and as such this accident is not covered within the definition of 'untoward incident' as defined in Section 123 read with Section 124 A of Railway Act, 1989 (for short the 'Act').

On the basis of the pleading of the parties the tribunal framed 4 issues:-

i. Whether the deceased was a bonafide passenger?

ii. Whether the accident in question comes within the ambit of 'untoward incident'?

iii. Whether the appellant is only dependent of the deceased?

iv. To what relief?

4. In support of claim petitioner Ashok Kumar Pal examined himself and also examined one Shushila Devi who was also travelling with deceased in the same

compartment and was relative of the deceased, thus she is an eyewitness.

5. After death of Ram Singh Pal, an inquest was prepared of deceased Ram Singh Pal, wherein it was mentioned that railway ticket having ticket No. 08347 was found. Ration card was also brought on record to show that petitioner Ashok Kumar Pal is only legal heir.

6. From the side of appellant/opposite party Sri Alok Kumar, Inspector Commercial has been produced as witness.

7. After hearing the parties, the tribunal held that the deceased was travelling in the train with the valid ticket and the accident was occurred due to jerk when train leave the station as such the incident covered under the definition of untoward incident. The claimant being only dependent of the deceased being son is entitled to scheduled compensation of Rs. 4,00,000/- as provided under Railway Accidents and Untoward Incidents (Compensation) Rules of 1990 (for short 'Rules').

8. We have heard learned counsel for the parties and perused the record.

9. The counsel for the appellant, Sri Anil Srivastava assailed the award on the following grounds.

I. The deceased was not a bonafide passenger.

II .The alleged accident does not come within the ambit of untoward incident.

III. There is no provision either in the Railway Act or under RCT Act or Rules made thereunder for award of interest. Moreover, the Tribunal was also not having any jurisdiction to award panel interest from retrospective date.

Pint No.I and II

10. To decide question no.1 and 2 certain statutory provision required to be considered which are quoted here in below:-

Section 2(29) of the Railways Act defines 'passenger' to mean a person travelling with a valid pass or ticket.

Section 123(c) "untoward incident" means-

i. the commission of a terrorist act within the meaning of sub- section(1)of Section 3 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

ii. the making of a violent attack or the commission of robbery or dacoity; or

iii. the indulging in rioting, shoot-out or arson,

by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or

2. the accidental falling of any passenger from a train carrying passengers.

Section 124-A of the Railways Act with which we are concerned states :

" **124-A.** Compensation on account of untoward incident. - When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:

Provided that no compensation shall be payable under this section by the railway administration if the passenger dies or suffers injury due to -

(a) suicide or attempted suicide by him;

(b) self-inflicted injury;

(c) his own criminal act;

(d) any act committed by him in a state of intoxication or insanity;

(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

Explanation - For the purposes of this section, "passenger" includes -

(i) a railway servant on duty; and

(ii) a person who has purchased a valid ticket for travelling by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident."

11. Now the marshaling of fact is required to be made in the light of the legal provisions mentioned above.

12. Deceased of this case Sri Ram Singh Pal fell down from the train and died. An inquest has been performed upon the corpus of deceased Ram Singh Pal. The railway ticket bearing No. 08347 of second class from Bharthana to Phahpund railway station of dated 13th February, 2001 was found from the body of the deceased. These facts are not disputed by appellant's counsel. In view of these admitted fact, the deceased Ram Singh Pal was having a valid ticket to travel in the aforesaid train at the time of accident. Therefore, the deceased was 'passenger' within the meaning of Section 2(29) of the Act and explanation of Section 124(A) of the Act, therefore. It is also established that Ram Singh Pal was bonafide passenger of the train, fell down from the train and succumbed to the injuries, therefore, the accident will fall within the ambit of 'untoward incident' as defined in Section 123 (c) of the Act.

13. Whether on account of this 'untoward incident' the dependent of deceased would be entitled for compensation? This question ought to be decided in the light of provision contained in Section 124 (A) of the Act. Section 124 (A) is in two parts the main body of section 124 (A) provides that when an 'untoward incident' occurred the question whether or not there has been any wrongful act, neglect or default on the part of railway administration, the passenger on account of sustaining injuries or in case of death the

dependents of passenger would claim compensation from the railway administration. It shows that this part of Section 124 (A) is based on principle of no fault liability of the bonafide passenger.

14. The second part of Section 124(A) contains a proviso which provides incidents not covered in the main body of Section 124(A). These exceptions carved out in proviso to Section 124(A) provide the grounds on which the railway administration can oppose and defeat the claim for compensation under Section 124(A). Therefore, the railway administration has to plead and prove the exceptions enumerated in proviso to Section 124 (A) to defeat the claim of compensation. Thus it is clear from the scheme of Section 124-A that no fault liability relates to bonafide passenger but strict liability relates to the railway administration.

15. In ***Union of India v. Prabhakaran Vijay Kumar and Ors. (2008) 9 SCC 527***, the Hon'ble Supreme Court, while considering the provisions of Sections 123(c)(2), 124-A and 127 of the Railways Act, 1989 and the expression "untoward incident" held that the provisions of Section 124-A is in the nature of a no-fault liability in case of railways accidents and a bonafide passenger travelling on a train would be entitled to compensation for such untoward incident irrespective of who was at fault therefor.

16. The Hon'ble Supreme Court in **Prabhakaran Vijaya Kumar case(Supra)** has discussed in detail the provisions regarding award of compensation under Section 124-A of the Act. It was held therein that if it is proved that person received injuries in the train accident or in case of death, the deceased, is a bonafide passenger he or dependent legal heirs of deceased need not plead any wrongful act, negligent or default on the part of railway administration. However if railway administration wants to defeat the claim of compensation the railway administration has to prove any one of the exception mentioned in the proviso to Section 124 (A). This means that to defeat the claim of compensation the railway administration must plead and prove the exception mentioned in proviso to section 124(A). Thus, after carving out an exception of English law laid down in **Rylands v. Flether** in the light of Constitution Bench decision in the case of ***M.C.Mehta and others vs. Union Of India and others, AIR 1987 SC 1086*** held that the provisions contained in section 124-A of the Act is an example of blending of principles of no fault liability and strict liability.

17. The Division Bench of this Court in **Smt. Akhtari V. Union of India through C.M., NER, Gorakhpur reported in 2009 (2) T.A.C. 644 (All)**. had discussed in detail the provision contained in the Act and explained the words used 'accident' and 'untoward incident' in the light of different authorities of Hon'ble Supreme Court and other High Courts also. The word 'bonafide passenger' was also discussed in detail and the application of the same was extended keeping in view the legislative intend behind introducing the provision of compensation in the matter of 'untoward incident'. It was observed that it is a welfare legislation.

18. In view of above, it is established from the evidence adduced by the claimant

that deceased was travelling as a bonafide passenger of Train No. 2 E.K (EMU) passenger train in second class on 13th February, 2001 when 'untoward incident' was occurred at Pata railway station and as such the son of deceased being dependent and only legal heir/legal representative is entitled to claim compensation for the aforesaid 'untoward incident' from railway administration.

19. No evidence has brought on record from the side of the railway administration by which any of the exception given in the proviso to Section 124 (A) could be established, therefore, the railway administration has failed to defeat the claim filed on account of 'untoward incident' by respondent/claimant.

20. Therefore we do not find any illegality or perversity in awarding the scheduled compensation to the Respondent/Claimant

21. The point No. I and II are accordingly decided.

Point No. III

22. It is true that there is no provision in the Railways Act or RCT Act or Rules made thereunder to award interest. However, it is well settled that where there is no provision to award interest in the matters relating to money decree the interest may be awarded keeping in view the provisions contained under Interest Act and Section 34 of Civil Procedure Code. The statutory provisions contained in Section 3 of the Interest Act and Section 34 of Civil Procedure Code are reproduce hereinbelow:-

Provisions of the Interest Act, 1978 and the Code of Civil Procedure.

Section 3 of the Interest Act 1978, which confers power on the Court to allow interest reads as follows :

"3. Power of Court to allow interest.- (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,-

(a) If the proceedings relate to a debt payable by virtue of written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) If, the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings :

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings interest shall not be allowed under this section for the period after such repayment.

(2) Where, in any such proceedings as are mentioned in sub-section (1),-

(a) Judgment, order or award is given for a sum which, apart from interest on

damages, exceeds four thousand rupees, and

(b) The sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death,

then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the Court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the Court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section,

(a) shall apply in relation to -

(I) Any debt or damages upon which interest is payable as of right by virtue of any agreement; or

(ii) Any debt or damages upon which payment of interest is barred, by virtue of all express agreement;

(b) Shall affect -

(i) The compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) The provisions of rule 2 of Order 11 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) Shall empower the Court to award interest upon interest."

Civil Procedure Code; Section "34. Interest.- (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, (with further interest at such rate not exceeding six per cent, per annum as the Court deems reasonable on such principal sum from) the date of the decree to the date of payment, or to such earlier date as the Court thinks fit :

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I. - In this sub-section, "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 (5 of 1970).

Explanation II. - For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability-)

(2) Where such a decree is silent with respect to the payment of further interest

(on such principal sum) from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie."

23. So far as the award of interest is concerned the question is not **res integra.** It is no doubt true that there is no provision either in the act or in Rules made under Act to award interest in the case covered under Section 124 and 124(A) of the Railway Act, but it is clear that the Court, while making a decree for payment of money is entitled to award interest at the current bank rate or contractual rate as it deems reasonable to be paid on the principal sum adjudged to be payable and/or awarded, from the date of claim or from the date of the order or decree for recovery of the outstanding dues. There is also hardly any room for doubt that interest may be claimed on any amount decreed or awarded for the period during which the money was due and yet remained unpaid to the claimants.

24. In ***Thazhathe Purayil Sarabi & Ors. Versus Union of India & Another reported in 2009 (7) SCC 372,*** after considering the statutory provisions contained in Interest Act and Section 34 of Civil Procedure Code and relying upon **Three Judge Bench** of Hon'ble Supreme Court in ***Hindustan Construction Co. Ltd Vs. State of J & K,(1992) 4 SCC 21*** and ***Jagdish Rai and others Vs. Union Of India , (1999) 3 SCC 257*** held that interest may be awarded in the matter of awarding compensation under Section 124-A of the Act. The relevant paragraphs No.36,37,38 and 39 are quoted here in below;

"36. In the instant case, the claim for compensation accrued on 13th November, 1998, when Kunhi Moosa, the husband of the Appellant No. 1, died on account of being thrown out of the moving train. The claim before the Railway Claims Tribunal, Ernakulam, (O. A. No. 68/1999) was filed immediately thereafter in 1999. There was no delay on the part of the claimants/appellants in making the claim, which was ultimately granted for the maximum amount of Rs. 4 lakhs on 26th March, 2007.

37. Even if, the appellants may not be entitled to claim interest from the date of the accident, we are of the view that the claim to interest on the awarded sum has to be allowed from the date of the application till the date of recovery, since the appellant cannot be faulted for the delay of approximately 8 years in the making of the Award by the Railway Claims Tribunal. Had the Tribunal not delayed the matter for so long, the appellants would have been entitled to the beneficial interest of the amount awarded from a much earlier date and we see no reason why they should be deprived of such benefit.

38. As we have indicated earlier, payment of interest is basically compensation for being denied the use of the money during the period which the same could have been made available to the claimants. In our view, both the Tribunal, as also the High Court, were wrong in not granting any interest whatsoever to the appellants, except by way of a default clause, which is contrary to the established principles relating to payment of interest on money claims.

39. We, therefore, allow the appeal and modify the order of the High Court dated 24-5-2007 affirming the order of the Trial Court and direct that the awarded

sum will carry interest @6% simple interest per annum from the date of the application till date of the Award and, thereafter, at the rate of 9% per annum till the date of actual payment of the same. "

25. Now the second fold of the argument of appellant's counsel relates to awarding of penal interest.

26. The counsel for the appellant after relying upon a judgment of Hon'ble Apex Court reported in ***2004 (2) SCC Page 370 (National Insurance Co. Ltd versus Keshav Bahadur & Ors.)*** submits that in this case their lordships have held that award of penal interest from retrospective date amounts to penalty for which the courts/tribunal have no authority. The relevant paragraph 13 of the aforesaid report is quoted herein below:-

"13. Though Section 110-CC of the Act (corresponding to Section 171 of the new Act) confers a discretion on the Tribunal to award interest, the same is meant to be exercised in cases where the claimant can claim the same as a matter of right. In the above background, it is to be judged whether a stipulation for higher rate of interest in case of default can be imposed by the Tribunal. Once the discretion has been exercised by the Tribunal to award simple interest on the amount of compensation to be awarded at a particular rate and from a particular date, there is no scope for retrospective enhancement for default in payment of compensation. No express or implied power in this regard can be culled out from Section 110-CC of the Act or Section 171 of the new Act. Such a direction in the award for retrospective enhancement of interest for default in payment of the compensation together with interest payable thereon virtually amounts to imposition of penalty which is not statutorily envisaged and prescribed. It is, therefore directed that the rate of interest as awarded by the High Court shall alone be applicable till payment, without the stipulation for higher rate of interest being enforced, in the manner directed by the Tribunal."

27. Learned counsel for the claimant relied upon para 39 of judgment in ***Thazhathe Purayil Sarabi & Ors. Versus Union of India & Another reported in 2009 (7) SCC 372*** and submitted that there is no impediment in awarding the prospective penal interest in case of making default of payment after stipulated period. Para 39 is reproduced again;

"39. We, therefore, allow the appeal and modify the order of the High Court dated 24-5-2007 affirming the order of the Trial Court and direct that the awarded sum will carry interest @6% simple interest per annum from the date of the application till date of the Award and, thereafter, at the rate of 9% per annum till the date of actual payment of the same."

28. We find force in the arguments of the counsel for respondent.

29. The Tribunal has awarded the statutory scheduled amount of Rs. 4,00,000/- as provided in scheduled made under Rule 3 of the Rules and as such the RCT has rightly decided the amount of compensation payable to the claimant.

30. Having considered the respective submission for the learned counsel for the parties, we are of the view that award of penal interest from retrospective date would be illegal and, therefore, would not

be sustainable. However, the interest awarded as penal interest by the tribunal would be payable after 60 days from the date of award, if the appellant had committed default in making the deposit of the amount of awarded compensation before the tribunal or before this Court within 60 days from the date of award passed by the Tribunal.

31. The point No. III is accordingly decided.

32. In view of above, the appeal deserve to be allowed in part. The order required to be modified.

33. No other ground has been raised or pressed by the appellant.

34. The appeal is **partly allowed.** The award of penal interest at the rate of 7% per annum in place of pendente lite and future simple interest @ 6% per annum in case of default of payment of compensation within 60 days from the date of award is set aside. However, if entire amount under award has not been deposited within 60 days, the rate of interest on unpaid amount would be at the rate of 7% prospectively payable after two months from the date of award.

35. The amount deposited by the appellant in this Court or before the Tribunal shall be adjusted against the amount if due against the appellant. The remaining amount, if any, shall be deposited by the appellant before the Tribunal. The amount deposited before this Court, if any, be remitted to the Tribunal forthwith but not later than a month. The Tribunal after deposit of the amount shall disburse the same expeditiously to the claimant say within six weeks.

36. Registrar of this Court shall take fallow up action.

37. There shall be no order as to costs.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.09.2012

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

Civil Revision No. - 96 of 2012

B.P. Singh & Others ...Petitioners
Versus
Ramesh Chandra Rai and another ...Respondents

Counsel for the Petitioner:
Sri Jaspreet Singh

Counsel for the Respondents:
Sri Rakesh Pandey
Sri S.L. Dubey

Code of Civil Procedure-Section 115-Revision-order rejecting Application to return the plaint-plea of bar of Civil Suit under section 111 of Cooperative Societies Act-not available in a Suit of permanent Injunction-Trail Court rightly exercised its desecration by rejecting the application as dispute not related to dispute of membership of society-plea of bar of Civil Jurisdiction not available.

Held: Para 8

As mentioned earlier, the suit is for permanent injunction by which the plaintiff has prayed that a decree for permanent injunction be granted and defendant nos. 2 to 5 be restrained from interfering in peaceful possession and enjoyment of plaintiff over the disputed plot or from entering into the premises to the said plot, in any manner whatsoever. Ouster of jurisdiction is not

to be easily inferred. Bar of jurisdiction is to be established by cogent reasonings. In a civil suit, plaintiff is the 'dominus litus', and the plaint can only be rejected through a meaningful-not formal-reading of the plaint. If it is manifestly vexatious and meritless, in the sense of not disclosing a cause of action or clear right to sue, the Trial Court should exercise his power under Order VII Rule 11 C.P.C.

Case Law discussed:

[2007 (67) ALR 677]; [1997 (30) ALR 416]; [2012 (30) LCDE 1413 (SC)]; AIR 1966 SC 153

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

1. Heard learned counsel for the revisionist as well as learned counsel for opposite party No. 1.

2. This revision has been preferred against the order dated 31.08.2012 passed by learned Additional Civil Judge (Senior Division), Court No. 24, Lucknow in regular suit No.252/2012 (Ramesh Chandra vs. Sarla Verma and Ors.), by which the application of the defendant, before this Court, for rejecting the plaint under Order VII Rule 11 C.P.C., has been rejected. The said application was numbered as paper No. 16 A, in which, it was averred by the revisionists (Defendant Nos. 2 to 5), that plaintiff's father was a member of the society, who had died on 03.04.1974 and, as such, the disputed plot has been mutated in the name of plaintiff's mother. A complaint was made to the Deputy Commissioner (Housing) by one Baladutt Shetty and a suit was also instituted under Section 70 U.P. Co-operative Societies Act, in which an award was made on 22.06.2004 and the appeal against the award is pending and; the suit is barred by time; which is also defective, because of non-impleadment of necessary parties. That the jurisdiction of Civil Court is barred under Section 70 U.P. Co-operative Societies Act and the plaint deserves to be rejected under Order VII Rule 11 C.P.C.. The defendant filed objection 28 C. After hearing both the parties, the learned Trial Court has rejected the application and has observed that the dispute before the Civil Court does not relate to any dispute regarding membership of the society and, as such, the Court has jurisdiction to try the suit.

3. A perusal of the copy of plaint contained in Annexure no. 1 shows that the suit for permanent injunction has been filed on the simplicitor ground that the plaintiff is legal owner of the suit property. Mode of ownership has been described from para-3 to para- 7, in which all the contents have been mentioned. The defendants are indulging in fraudulent act, as such, defendant No. 1 has again executed the subsequent sale-deed in favour of the defendant Nos. 2 to 5 and, as such, the execution was being processed and the suit was filed under Section 111 of U.P. Co-operative Societies Act. Section 111 of the U.P. Co-operative Societies Act is reproduced below:-

Bar of Jurisdiction of court- Save as expressly provided in this Act, no civil or revenue court shall have any jurisdiction in respect of-

(a) the registration of a co-operative society or its bye-laws or of an amendment of a bye-law;

(b) the supersession or suspension of a Committee of Management.

(c) any dispute required under Section 70 to be referred to the Registrar; and

(d) any other order or award made under this Act.

4. In view of this provision, the Civil Court shall not have jurisdiction to try a case where registration of a Co-operative Society or its bye-laws are, in question or the subject-matter relate to supersession or suspension of Management Committee, or any dispute under Section 70 has been preferred to any order or award made under this Act. The learned trial Court rightly observed that this is a suit relating to property dispute.

5. Learned counsel for the revisionist relied upon the law laid down by this court in ***Smt.Vidyawati and Ors. vs. XIIth Additional District Judge, Kanpur and Ors.[2007 (67) ALR 677]***. This authority does not help the revisionist, as this judgment relate to a dispute when two persons were claiming to be members of the society and the validity of membership had to be decided. Similarly, the law laid down by a Division Bench of this Court in Maqsood Khan v. A.D.J. Bulandshahar [1997 (30) ALR 416] relate to law in favour of party by the Co-operative Society, and, as such, the matter falls as a dispute under Section 70 of U.P. Co-operative Societies Act.

6. Learned counsel for the revisionist relied upon the law laid down by the Hon'ble Apex Court in ***Church of Christ Charitable Trust v. M/s. Poonniamman Educational Trust [2012 (30) LCDE 1413 (SC),*** *in which it was held, "It is clear that in order to consider Order VII Rule 11, the Court has to look into the averments in the plaint and the same can be exercised by the trial Court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in Raptakos Brett & Co. Ltd. V. Ganesh Property (1998) 7 SCC 184 and Mayar (H.K) Ltd. and Others v. Owners & Parties, Vessel M.V. Fortune Express and Others, (2006) 3 SCC 100.*

7. Rule 11(d) shows, "Where the suit appears from the statement and the plaint to be barred in any law", the barring law, as argued by learned counsel for the revisionist falls under Section 111 of U.P. Co-operative Societies Act, which has been reproduced above. The dispute, as enumerated in the plaint, does not disclose dispute relating to registration of a Co-operative Society or its bye- laws, nor it relates to the supersession or suspension of Committee of Management nor against any order or award made under U.P. Co-operative Societies Act, nor it is a dispute as enumerated in Section 70 of the U.P. Co-operative Socieities Act.

8. As mentioned earlier, the suit is for permanent injunction by which the plaintiff has prayed that a decree for permanent injunction be granted and defendant nos. 2 to 5 be restrained from interfering in peaceful possession and enjoyment of plaintiff over the disputed plot or from entering into the premises to the said plot, in any manner whatsoever. Ouster of jurisdiction is not to be easily inferred. Bar of jurisdiction is to be established by cogent reasonings. In a civil suit, plaintiff is the 'dominus litus', and the plaint can only be

rejected through a meaningful-not formal-reading of the plaint. If it is manifestly vexatious and meritless, in the sense of not disclosing a cause of action or clear right to sue, the Trial Court should exercise his power under Order VII Rule 11 C.P.C.

9. At this stage, it is noteworthy that, if a clever drafting has created the illusion of a cause of action, it is incumbent upon the Trial Judge to nip in the bud, at the first hearing, by examining the party searchingly under Order X C.P.C.

10. An application for rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the court would not be entitled to consider the case of the defence. *(See Popat and Kotecha Property v. SBI Staff Assn. (2005) 7 SCC 510)*

11. In view of the fact and keeping in view of the legal angle, the impugned order is in consonance with law and need no interference.

12. On the other score, in view of the law laid down by a full Bench of the Hon'ble Apex Court in the case of ***Pandurang Dhoni Chougule vs Maruti Hari Jadhav reported in AIR 1966 SC, 153***, in which it has been held, *"It is well-settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court, which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under Section 115."*, the revision is not maintainable.

13. On the basis of the discussions made above, the revision is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.09.2012

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Application No. 1335 of 1999

Dr. Ajay Sharma ...Applicant
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Tarun Kumar Srivastava

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 482-Summoning Order to face trail-offence under Section 304-A I.P.C.-applicant being doctor-negligently put plaster in hand of deceased-caused death after 14 days-admittedly no post mortem conduced to ascertain the cause of death-negligence of treatment not established-Trail Court as well as revisional court wrongly over sighted this aspect complaint if prima facie constitute no offence-order impugned quashed.

Held: Para-7

Having considered the submissions I am of the opinion that it is an admitted case of the prosecution that the post mortem of deceased was not conducted and due to which the cause of death could not be ascertained hence the liability of the applicant for being negligent in conducting the medical treatment of the victim cannot be established to make out an offence u/s 304-A I.P.C. Hence from the material on record it is apparent that the present case falls in one of the category mentioned in the case of State of Haryana Vs. Bhajan Lal AIR 1992 SC 604 The Apex Court held that where the allegations made in F.I.R. or the complaint even if taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. The Court can quash the proceedings in exercise of its inherent power u/s 482 Cr.P.C. In another case reported in 2004 (6) SCC 422 Suresh Gupta (Dr) Vs. Government of NCT of Delhi. The Apex Court justified the powers of High Court to quash the proceedings u/s 482 Cr.P.C. where from the perusal of complaint u/s 304-A I.P.C. no offence is made out.

Case Law discussed:

AIR 1992 SC 604; 2004 (6) SCC 422

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

1. Heard Sri Tarun Kumar Srivastava, learned counsel for the applicant, learned A.G.A. for the State and perused the record.

2. Notice was issued to opposite party No. 3 in pursuance of this Court order dated 10.5.1999. The Chief Judicial Magistrate, Bijnor submitted its report dated 8.6.1999 stating therein that the notice of the aforesaid application u/s 482 Cr.P.C. has been served and received by opposite party No. 3 through the concerned police station. The report of C.J.M. is on record. Inspite of service of notice on opposite party No. 3 he has not appeared in person or through his counsel; thus notice to him is sufficient.

3. Brief facts of the case is that a F.I.R. was lodged by opposite party No. 3 against the applicant as case Crime No. 492 of 1996 under section 304-A I.P.C. P.S. Kotwali District Bijnor alleging that his daughter namely Roosi received a fracture in her hand when she had gone at the house of one Harpal of village Ghazipur for which she was given medical treatment by the accused applicant. The applicant tied plaster in the hand of the girl and handed over to her mother who is wife of opposite party No. 3, thereafter the girl expired in the evening. After investigation final report was submitted by the police. Against which opposite party No. 3 filed a protest petition on which the learned Magistrate passed order on 18.2.1998 summoning the applicant to face trial u/s 304-A I.P.C. Thereafter being aggrieved by the said summoning order the applicant has preferred a revision which was dismissed by the lower revisional court on 26.11.1998 hence the present application u/s 482 Cr.P.C. has been filed challenging the order of lower revisional court as well as the order passed by the Chief Judicial Magistrate.

4. It has been contended by the learned counsel for the applicant that the applicant is a doctor. He is M.S. in Orthopedics and doing practice since 1985.

5. It has been submitted that the F.I.R. of the incident was lodged after 21 days of the incident by opposite party No. 3 alleging false allegations against

the applicant that he has been negligent in giving treatment to the victim who subsequently died. It is admitted case of the prosecution that no post mortem of the deceased was conducted as is also evident from the protest application filed by opposite party No. 3. The learned Magistrate while passing the summoning order has held that no doubt that post mortem of the deceased was not conducted but prima facie cognizable offence is made out against opposite party for which he was summoned for facing trial u/s 304-A I.P.C. Learned counsel for the applicant has contended that when the cause of death of deceased could not ascertained then the trial of the applicant u/s 304-A I.P.C. is wholly unwarranted hence the proceedings against the applicant should be quashed. He further submits that as opposite party No. 3 is a practicing lawyer in the district court Bijnor for harassing the applicant and for ulterior motive has initiated the present proceedings against him. He urged the lower revisional court without their being legal evidence on record has illegally rejected the revision of the applicant and confirmed the summoning order.

6. Learned A.G.A. on the other hand has tried to justify the orders passed by the courts below but he could not dispute the fact that the post mortem of the deceased was not conducted and cause of death could not be known. The learned A.G.A. could not point out any material to show which may warrant the trial of the applicant.

7. Having considered the submissions I am of the opinion that it is an admitted case of the prosecution that the post mortem of deceased was not conducted and due to which the cause of death could not be ascertained hence the liability of the applicant for being negligent in conducting the medical treatment of the victim cannot be established to make out an offence u/s 304-A I.P.C. Hence from the material on record it is apparent that the present case falls in one of the category mentioned in the case of **State of Haryana Vs. Bhajan Lal AIR 1992 SC 604** The Apex Court held that where the allegations made in F.I.R. or the complaint even if taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. The Court can quash the proceedings in exercise of its inherent power u/s 482 Cr.P.C. In another case reported in **2004 (6) SCC 422 Suresh Gupta (Dr) Vs. Government of NCT of Delhi.** The Apex Court justified the powers of High Court to quash the proceedings u/s 482 Cr.P.C. where from the perusal of complaint u/s 304-A I.P.C. no offence is made out.

8. In the above facts and circumstances of the case the petition under section 482 Cr.P.C. is allowed and the impugned orders dated 26.11.1998 passed by the revisional Court in Criminal Revision No. 145 of 1998 and dated 18.2.1998 passed by the Chief Judicial Magistrate, Bijnor are hereby quashed as well as the further proceedings pending before the C.J.M. Bijnor is also quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.09.2012

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Service Single No. 2055 of 2011

Raj Dutt Tiwari S/O Kishun Dutt Tiwari & Ors ...Applicant
Versus
State Of U.P. Thru Principal Secretary Home & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shesh Nath Bharadwaj

Counsel for the Respondents:
C.S.C.

U.P. Police Group-D Employees Service Rules 2009-petitioners working on Class 4th Post-challenging dismissal order passed under Rule 1999-on ground petitioner being class 4th employee governed by U.P. Govt. Servant Group-D Employees Rules 1985-held-misconceived in view of Section 29 of Rule 2009 itself Service Condition of Class 4th employee working in Police Department-for all purpose are member of Police Force-dismissal order warrant no interference.

Held: Para 11

This Court is of the view that petitioners being employed in Police Department are for all purposes part of police force, as such, it cannot be said that Police Act, 1861 will apply on petitioners. The service conditions of petitioners while working on Class-IV post in Police Department are to be governed by 2009 Rules and the matters which are not precisely covered by 2009 Rules are to be governed by U.P. Government Servants (Discipline & Appeal) Rules, 1999 which is very much clear from Rule 29 of 2009 Rules.

Case law discussed:
Special Appeal No. 169 of 2012 (Krishna Murari Vs. State of U.P. and others)

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

1. Heard learned counsel for petitioners as well as learned Standing Counsel.

2. Under challenge is the validity of U.P. Police Group-D Employees Service Rules, 2009 (in short 2009 Rules).

3. Learned counsel for petitioners submits that petitioners being class-IV employees working in Police Department cannot be treated to be police officers as the Police Act, 1861 and U.P. Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991 (in short 1991 Rules) are not applicable to the petitioners.

4. Contention is that the impugned Rules have been framed in exercise of powers under Section 2 and sub-sections 2 and 3 of Section 46 of Police Act, 1861 and as such the impugned Rules are *Ultra Vires* and beyond the Rule making powers of the State Government under Section 46(2) and (3) of Police Act, 1861.

5. It is further submitted that service conditions of petitioners were governed under Uttar Pradesh Government Servant Group-D Employees Service Rules, 1975 as amended in 1985 (in short 1985 Rules) and the petitioners are similarly situated class-IV employees as of other departments of State Government.

6. Learned Standing Counsel on the other hand submitted that it is totally misconceived to say that petitioners while working in Police Department are not part

of police force. The petitioners are class-IV employees and there were no separate service rules governing them and as such in exercise of powers under Police Act, 1861 State Government has framed Rules to govern the service conditions of such class-IV employees employed in Police Department. There is no infirmity or illegality in the impugned 2009 Rules.

7. It is further submitted that after coming into force 2009 Rules it cannot be said that the service conditions of petitioners would be governed by any other Rules such as Uttar Pradesh Government Servant Group-D Employees Service Rules, 1975 as amended in 1985-86.

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

9. It is to be noted that the Division Bench of this Court in ***Special Appeal No. 169 of 2012 (Krishna Murari Vs. State of U.P. and others)*** had considered the applicability of 2009 Rules wherein it was held that earlier service conditions of Class-IV employees working in Police Department were governed by 1985 Rules which after notification of the 2009 Rules stood superseded. It was further observed by the Division Bench that the matters which are not precisely covered by 2009 Rules are to be governed by 1991 Rules as provided under Rule 29 of 2009 Rules.

10. The relevant paragraph of the judgment and order dated 10.4.2012 passed in Special Appeal No. 169 of 2012 on reproduction reads as under:

"On due consideration of rival submissions, we are of the view that earlier the service conditions of the appellant-writ petitioner were governed by the 1985 Rules which after notification of the 2009 Rules stood superseded. However, the matters not precisely covered by the 2009 Rules were to be governed by the 1999 Rules as provided vide Rule 29 of the 2009 Rules.

Admittedly, upto the stage of serving of charge-sheet, the respondents followed the procedure as prescribed under Rule 7 of the 1999 Rules. It was only thereafter that they deviated from the correct procedure. They acted under some wrong impression that since the 2009 Rules have been framed in exercise of powers under the U.P. Police Act, it has changed the status of the appellant-writ petitioner from being a cook to an officer. The 2009 Rules do not provide so anywhere in any provision, and had there been a clear intention that the appellant-writ petitioner, being a Group-D employee, has been included in the category of subordinate police officers, the 2009 Rules would have explicitly provided it, particularly in the matter of disciplinary proceedings."

11. This Court is of the view that petitioners being employed in Police Department are for all purposes part of police force, as such, it cannot be said that Police Act, 1861 will apply on petitioners. The service conditions of petitioners while working on Class-IV post in Police Department are to be governed by 2009 Rules and the matters which are not precisely covered by 2009 Rules are to be governed by U.P. Government Servants (Discipline & Appeal) Rules, 1999 which is very much clear from Rule 29 of 2009 Rules.

12. Rule 29 of 2009 Rules reads as under:

*"29- **Regulation of other Subjects:** In regard to the matters not specifically covered by these Rules or by special orders, person appointed to a post in the service shall be governed by the rules, regulations and orders applicable generally to Government Servants serving in connection with the affairs of the State."*

13. As such it is to be observed that provisions of 1991 Rules would not be applicable on the petitioners.

14. Since the Court has come to conclusion that Police Act, 1861 would be fully applicable to the class-IV employees working in Police Department, as such it can be concluded that there is no infirmity or illegality in U.P. Police Group-D Employees Service Rules, 2009 so for as its challenge on such ground is concerned.

15. With the aforesaid observations, the writ petition is disposed of.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2012

BEFORE
THE HON'BLE MRS. JAYASHREE TIWARI, J.

Criminal Revision No. 2738 of 2009

Anoop Gulati ...Revisionist
Versus
State of U.P.and others
...Opposite Parties

Counsel for the Revisionist:
Sri Arun K. Singh-I

Counsel for the Opposite Parties:
A.G.A.
Sri G.S.Chaturvedi
Sri Vivek Prakash Mishra

Criminal Revision-against dismissal of complaint passed by Magistrate under Section 203-on ground from perusal of complaint and the statement of witness-no offence under Section 420, 467, 468,471,504, 506 I.P.C. Made out, considering civil-nature dispute pending of Civil Suit-dismissal of complaint-held-proper.

Held: Para 29

Thus, from the perusal of the record, it comes out that learned Magistrate has not out rightly rejected the complaint and has not taken cognizance of the same holding that adequate remedy can be granted by the civil court but he has duly taken cognizance of the matter on the complaint case and proceeded to record the statements under Section 200 & 202 Cr.P.C. and thereafter considering the material evidence on record, has passed the order under Section 203 Cr.P.C.

Case law discussed:
AIR 1954 SC 307; 2010 (9 ADJ 599; 2009 AIR SCW 2449; 2009 (5) ADJ 649; AIR 2001 SC 3014; AIR 2001 SC 3846 (1); AIR 1972 SC 1607; AIR 2001 SC 12960; 2011 AIR SCW 6385; AIR 2006 SC 2780

(Delivered by Hon'ble Mrs. Jayashree Tiwari, J.)

1. Heard learned counsel for the revisionist, learned A.G.A. as well as learned counsel for the respondents and perused the record.

2. The present criminal revision has been filed for quashing the order passed by the learned Magistrate in Complaint Case No. 5657/2008, whereby learned Magistrate after taking cognizance of the complaint and after recording the statements under Sections 200 and 202 Cr.P.C. and also perusing the material evidence on record had dismissed the compliant under Section 203 Cr.P.C. holding that no prima facie, case is made out.

3. The main contention of the learned counsel for the revisionist is that even if, a matter is liable to be determined by the Competent Court of civil jurisdiction, even then the criminal proceedings against the said present revision can also be drawn and thus he submitted that learned Magistrate in dismissing the complaint has acted erroneously.

4. In this respect, counter affidavit has been filed by the learned counsel for the respondents and against which rejoinder affidavit have been exchanged.

5. Learned counsel for the revisionist referred to the decisions of Apex Court rendered in various prominent cases which are as follows : ***M.S. Sheriff v. State of Madras and others,*** AIR 1954 SC 307, wherein their Lordships in paragraphs 15 and 16 as under:

"15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decision in the civil and criminal Courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of the Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interest demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under S.476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

6. In yet another decision rendered in ***Khurram Siddiqui v. Km. State of U.P.,*** 2010 (9)ADJ 599, this court in paragraphs 4,8 and 9 has laid down as under:

"4. Learned Chief Judicial Magistrate was of the view that the dispute is of civil nature and the question whether or not the sale deed is a forged document, can only be decided by the Civil Court. It was also held that a litigation is also pending in the Revenue Court. Learned Chief Judicial Magistrate relying on Indian Oil Corporation v. NEPC India Ltd and others, (2006)VI SCC 736, formed the opinion that criminal proceeding in regard to a civil dispute should not be permitted to proceed.

8.It is thus well settled that a civil as well as criminal proceeding in regard to same act may be launched and continued simultaneously. If certain acts constitute an

offence, the criminal proceeding cannot be held up or kept in abeyance till the finalization of the civil proceeding. Therefore the views of the Courts belongs were not correct.

9.What was required from the learned Magistrate, was to see whether the facts stated in the application moved under Section 156(3) constituted commission of any cognizable offence or not. In other words, it was the duty of the Magistrate to see whether or not the facts put forth before him had disclosed that the impugned sale deed was a forged document fabricated by the respondent No.2 for grabbing the waqf property. If it was so, what offence was made out from the facts disclosed. These aspects of the matter have not been given any consideration by the learned Magistrate as well as by the learned Additional Sessions Judge while passing the impugned orders."

7. In another judgement pronounced in the case of ***Mahesh Choudhary v. State of Rajasthan and Another,*** 2009 AIR SCW 2449, the Apex Court in paragraph 14 has held as under:

"It is also well settled that save and except very exceptional circumstances, the court would not look to any document relied upon by the accused in support of his defence. Although allegations contained in the Complaint Petition may disclose a civil dispute, the same may by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue. For the purpose of exercising its jurisdiction, the superior courts are also required to consider as to whether the allegations made in the FIR or Complaint Petition fulfill the ingredients of the offences alleged against the accused.

8. In yet another pronouncement made in the case of ***Tapas Adhikari and another v. State of U.P. and Another,*** 2009 (5) ADJ 649, this Apex Court in paragraph 8 has held as under:

"8.....So far as the pendency of civil suit is concerned, the proceedings in civil or revenue Courts are filed for the purpose of obtaining different reliefs. The criminal proceedings may not be quashed in case such proceedings are barred by law or the fabrics of the proceedings is parallel of the civil in nature for constituting any offence. Its remedy is available in civil or revenue Courts but on the basis of allegation, prima facie, any criminal offence is made out, the same may not be quashed only on the ground that civil proceedings are pending. It is well settled proposition of law that civil and criminal proceedings may run parallel, therefore, on account of pendency of the civil suit, the proceedings of the present case cannot be quashed...."

9. In another decision rendered in the case of ***M. Krishnan v. Vijay Singh and another,*** AIR 2001 SC 3014, the Apex Court in paragraphs 5 and 11 has propounded as under:

"5.Accepting such a general proposition would be against the provisions of law inasmuch as in all cases of cheating and fraud, in the whole transaction, there is generally some element of civil nature. However, in this case the allegations were regarding the forging of the documents and acquiring gains on the basis of such forged documents. The proceedings could not be quashed only because the respondents had filed a civil suit with respect to the aforesaid documents. In a criminal court the allegations made in the complaint have to be established independently,

notwithstanding the adjudication by a civil Court. Had the complainant failed to prove the allegations made by him in the complaint, the respondents were entitled to discharge or acquittal but not otherwise. If mere pendency of a suit is made a ground for quashing the criminal proceedings, the unscrupulous litigants, apprehending criminal action against them, would encouraged to frustrate the course of justice and law by filing suits with respect to the documents intended to be used against them after the initiation of criminal proceedings or in anticipation of such proceedings. Such a course cannot be the mandate of law. Civil proceedings, as distinguished from the criminal action, have to be adjudicated and concluded by adopting separate yard-sticks. The onus of proving the allegations beyond reasonable doubt, in criminal cases, is not applicable in the civil proceedings which can be decided merely on the basis of the probabilities with respect to the acts complained of. The High Court was not, in any way, justified to observe:

"In my view, unless and until the civil Court decides the question whether the documents are genuine or forged, no criminal action can be initiated against the petitioners and in view of the same, the present criminal proceedings and taking cognizance and issue of process are clearly erroneous."

11. The impugned judgment being contrary to the settled position of law is thus not sustainable. The appeal is allowed and the impugned judgment of the High Court is set aside by upholding the order of the Trial Magistrate dated 3-8-1998. The Trial Magistrate shall now proceed in the matter in accordance with law."

10. In the case of ***Kamladevi Agarwal v. State of West Bengal and others,*** AIR 2001 SC 3846(1) the Hon'ble Supreme Court in paragraphs 15, 16 and 17 has held as under:

"15. We have already noticed that the nature and scope of civil and criminal proceedings and the standard of proof required in both matters is different and distinct. Whereas in civil proceedings the matter can be decided on the basis of probabilities, the criminal case has to be decided by adopting the standard of proof of "beyond reasonable doubt". A Constitution Bench of this Court, dealing with the similar circumstances, in M.S. Sheriff v. State of Madras, AIR 1954 SC 397 held that where civil and criminal cases are pending, precedence shall be given to criminal proceedings. Detailing the reasons for the conclusions, the Court held:

"As between the civil and criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has

forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under S.476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

16. In the present case we have noticed that before issuance of the process, the Trial Magistrate had recorded the statement of the witnesses for the complainant, perused the record including the opinion of the expert and his deposition and prima facie found that the respondents were guilty for the offence for which the process was issued against them. The High Court rightly did not refer to any of those circumstances but quashed the proceedings only on the ground:

"Consideration is and should be whether any criminal proceeding instituted before a court subordinate to this court should be allowed to continue when the very foundation of the criminal case, namely, forgery of document is under scrutiny by this court in a civil proceeding instituted by same person, i.e. the complainant in the criminal case. In my considered view it would not be proper to allow the criminal proceeding to continue when the validity of the document (deed of dissolution is being tested in a civil proceeding before the court. Judicial propriety demands that the course adopted by the Hon'ble Supreme Court in this case of Manju Gupta (supra) and Sardool Singh (supra) should be followed. If such course of action is adopted by this court, that would be in consonance with the expression used in Section 482 of the Code of of Criminal Procedure- "or otherwise to secure the ends of justice." In both the cases referred to above civil suits were pending, where the validity and genuineness of a document was challenged. It was held by the Hon'ble Supreme Court that when the question regarding validity of a document is subjudice in the civil courts, criminal prosecution, on the allegation of the document being forged, cannot be instituted."

17. In view of the preponderance of authorities to the contrary, we are satisfied that the High Court was not justified in quashing the proceedings initiated by the appellant against the respondents. We are also not impressed by the argument that as the civil suit was pending in the High Court, the Magistrate was not justified to proceed with the criminal case either in law or on the basis of propriety. Criminal cases have to be proceeded with in accordance with the procedure as prescribed under the Code of Criminal Procedure and the pendency of a civil action in a different Court even though higher in status and authority, cannot be made a basis for quashing of the proceedings."

11. While examining the scope of Section 203 Cr.P.C. the Hon'ble Supreme Court in the case of ***Debendra Nath***

Battacharya v. The State of West Bengal and another, AIR 1972 SC 1607 in paragraphs 7 and 8 has held as under :

"7. It has to be remembered that an order of dismissal of a complaint under Section 203, Criminal Procedure Code has to be made on judicially sound grounds. It can only be made where the reasons given disclose that the proceedings cannot terminate successfully in a conviction. It is true that the Magistrate is not debarred, at this stage, from going into the merits of the evidence produced by the complainant. But, the object of such consideration of the merits of the case, at this stage, could only be to determine whether there are sufficient grounds for proceedings further or not. The mere existence of some grounds which would be material in deciding whether the accused should be convicted or acquitted does not generally indicate that the case must necessarily fail. On the other hand, such grounds may indicate the need for proceeding further in order to discover the truth after a full and proper investigation. If, however, a bare perusal of a complaint or the evidence led in support of it show that essential ingredients of the offence alleged are absent or that the dispute is only a civil nature or that there are such patent absurdities in evidence produced that it would be a waste of time to proceed further the complaint could be properly dismissed under Section 203, Criminal Procedure Code.

8. What the Magistrate had to determine at the stage of issue of process was not the correctness of the probability or improbability of individual items of evidence on disputable grounds, but the existence or otherwise of a prima facie case on the assumption that what was stated could be true unless the prosecution allegations were so fantastic that they could not reasonably be held to be true."

12. In ***S.N. Palanitkar v. State of Bihar and another,*** AIR 2001 SC 12960 while examining the scope of section 203 of Code of Criminal Procedure Code, the Hon'ble Apex Court in paragraphs 15,16 and 17 has held as under :

"15. In case of a complaint under Section 200, Cr.P.C. or IPC a Magistrate can take cognizance of the offence made out and then has to examine the complainant and the witnesses, if any, to ascertain whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The words 'sufficient ground' used under Section 202 have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction.

16. This Court in ***Nirmaljit Singh Hoon v. The State of West Bengal and others,*** *(1993)(3)SCC 753), in para 22, referring to scheme of Sections 200-203 of Cr.P.C. has explained that "The section does not say that a regular trial of adjudging truth or otherwise of the person complained against should take place at that stage, for, such a person can be called upon to answer the accusation made against him only when a process has been issued and he is on trial. Section 203 consists of two parts. The first part lays down the materials which the Magistrate must consider, and the second part says that if after considering those materials there is*

in his judgment not sufficient ground for proceeding, he may dismiss the complaint. In ***Chandra Deo Singh v. Prakash Chandra Bose*** *(1964 (1)SCR 639) where dismissal of a complaint by the Magistrate at the stage of Section 2092 inquiry was set aside, this Court laid down that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed (p.653) that where there was prima facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue a process could not be refused. Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case."*

17. In ***Smt. Nagawwa v. Veeranna Shivalingappa Kongalgi*** *(1976(3) SCC 736) this Court dealing with the scope of inquiry under Section 202 has stated that it is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint (a) on the materials placed by the complainant before the Court (b) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; (C) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. It is also indicated by way of illustration in which cases an order of the Magistrate issuing process can be quashed on such case being "where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused."*

13. In ***Dr. Subramaniam Swamy v. Dr. Manmohan Singh,*** 2012 AIR SCW 1249 the Hon'ble Supreme Court in paragraph 26 has held as under:

"Before proceeding further, we would like to add that at the time of taking cognizance of the offence, the Court is required to consider the averments made in the complaint or the charge-sheet filed under Section 173. It is not open for the Court to analyse the evidence produced at that stage and come to the conclusion that no prima facie case is made out for proceeding further in the matter. However, before issuing the process, it is open to the Court to record the evidence and on consideration of the averments made in the complaint and the evidence thus adduced, find out whether an offence has been made out. On finding that such an offence has been made out the Court may direct the issue of process to the respondent and take further steps in the matter. If it is a charge-sheet filed under Section 173 Cr.P.C., the facts stated by the prosecution in the charge-sheet, on the basis of the evidence collected during investigation, would disclose the offence for which cognizance would be taken by the Court. Thus, it is not the province of the Court at that stage to embark upon and shift the evidence to come to the conclusion whether or not an offence has been made out."

14. While dealing with the power of attorney, the Hon'ble Supreme Court of India in S***uraj Lamp and Industries v. State of Haryana,*** 2011 AIR SCW 6385, in paragraph 13 has held as under:

"13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee."

15. In yet another decision rendered in ***M/s Indian Oil Corporation v. M/s NEPC India Ltd. And Others***, AIR 2006 SC 2780 the Hon'ble Supreme Court in paragraph 10 has held as under:

"10. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors,. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In **G. Sagar Suri v. State of U.P**. *[2000(2) SCC 6361, this Court observed:*

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice".

While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

16. In light of the aforesaid rulings as also in accordance with the provisions of law as enunciated in the Act, the submission of the learned counsel for the revisionist is to be taken into consideration.

17. The contention of the learned counsel for the revisionist that both civil and criminal proceedings can be simultaneously drawn with regard to the cause of action in which remedy lies in the civil side also, it is not appropriate to drop the criminal

proceedings merely on the ground that civil court is the competent court to hear and decide the matter in controversy. Considering the matter from the angle raised from the side of the learned counsel for the revisionist, it is apparent that in the instant case, learned Magistrate on filing a complaint has proceeded according to the procedure prescribed under Sections 200 & 202 Cr.P.C.. So far as the contention that learned Magistrate has dropped the proceedings merely on the ground that the civil court is competent to grant remedy is not sustainable as is the argument advanced by the learned counsel for the revisionist.

18. In the instant case before us the complaint case no. 5657 of 2008 was proceeded by the learned Magistrate by taking cognizance of complaint case and proceeded to record the statement under Section 200 Cr.P.C. and thereafter the statement of his wife as P.W.1 was recorded under Section 202 Cr.P.C. After recording the statement under Section 202 Cr.P.C., learned Magistrate proceeded in accordance with the provisions of the procedure prescribed for trial on a complaint case. In this regard, it is expedient to go through the provisions as enunciated under Sections 203 and 204 Cr.P.C. which lays down as follows :-

Section 203 Cr.P.C.

"Dismissal of complaint- If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing,"

Section 204 Cr.P.C.

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

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

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

19. Thus, the procedure prescribed for proceedings with regard to the complaint case after recording the statement of the complainant and witnesses and the result of the inquiry or investigation (if any) under section 202 Cr.P.C., the Magistrate is of the opinion that there is no sufficient ground for proceeding exits and he was dismissed the complaint.

20. On the other hand, learned Magistrate opines that there is sufficient ground for proceedings, then he may proceed to issue summon in a summon case and warrant in a warrant case or summon accordingly.

21. In the instant case before us, it is not the case where the learned Magistrate has refused to take cognizance of a criminal case on the ground that the matter pertains mainly to the civil litigation. On filing a complaint, learned Magistrate has proceeded the inquiry as provided for trial on the complaint case and recorded the statement under Sections

200 and 202 Cr.P.C. and in furtherance of the proceedings, learned Magistrate has considered the relevant material evidence and has passed the order under Section 203 Cr.P.C. as he opines that there is no sufficient ground for proceedings in the case.

22. Learned Magistrate has passed a detailed and well reasoned order. Now for summoning an accused in a complaint case, it is important to see whether sufficient ground exists for summoning the accused applicant and whether a prima facie, case is made out or not.

23. Learned Magistrate has held that the perusal of the certified copies of the documents on record leads to the registered power of attorney which bears the signature of the complainant and which is not disputed by the comp. Learned Magistrate has further opined and given reasons that power of attorney is duly registered document signed by two witnesses before the Sub-Registrar Ghaziabad. It bears the photographs of the complainant as well as the opposite party no.1. Learned Magistrate has also opined that the offence under Sections 467, 468 and 471 I.P.C. deal with forgery of valuable security, will etc., forgery for purpose of cheating, using as genuine a forged document or electronic record is to be there.

24. Learned Magistrate has also opined in accordance with law that admissions of the complainant in the complaint as well as on oath statements before the Court, his signature are admitted on the registered power of attorney. Hence, the learned Magistrate came to the conclusion that forgery in the signature is not present and the offences under Sections 467, 468 and 471 I.P.C. are not made out. So far as the the offences under Sections 504 and 506 I.P.C. are concerned, the basic allegations making out a case there under are not contained either in the complaint or in the statements before the Court. As such, the averments regarding the offence under Sections 504 and 506 I.P.C. in the complaint case, learned Magistrate has opined that there is no prima facie, offence alleged are made out.

25. So far as Sections 420 and 415 I.P.C. are concerned, learned Magistrate has opined and given reasons that perusal of the complaint and the evidence lead in support of it show that the power of attorney is a registered document. Meaning thereby that both the parties must have appeared before the office of the Sub-Registrar, Ghaziabad. Further the power of attorney bears photographs of both the complainant and the opposite party at the bottom. It is impossible to believe the story of the complainant that he was deceived to sign the power of attorney which was registered and contained photographs of the complainant and opposite party. Hence, the question of intentionally deceiving the complaint does not arise.

26. Learned Magistrate has given cogent reasons and came to the conclusion that prima facie, offence alleged in the complaint are not made out from the inquiry made under Section 200 and 202 Cr.P.C. and has passed the order under Section 203 Cr.P.C. In addition, learned Magistrate has also quoted a ruling of Hon'ble Supreme

Court (2006) 6 SCC 736 in case of ***Indian Oil Corporation v. NEPC India Ltd.,*** wherein it has been held that :-

"Any effort to settle civil disputes and claims which do not involve any criminal offence, by applying pressure through criminal prosecution, should be deprecated and discouraged".

27. Learned Magistrate has further observed that case is of a civil nature and the ingredients of Sections 420, 467, 468, 41, 504 and 506 I.P.C. are not made out and hence there does not exist a prima facie, case and no sufficient grounds for issuing process against the opposite parties and dismissed the complaint.

28. A perusal of the detailed order, learned Court has given reasons in a well discussed manner which clearly shows that the powers have been duly and legally exercised by the learned Magistrate, while proceedings on a criminal complaint. As such, the contention of the learned counsel for the revisionist reveals that criminal case can run side by side is not denied by the Court. The court has proceeded on the relevant inquiry under Sections 200 and 202 Cr.P.C. and on consideration of the entire material evidence on record and oral statement has given his well reasoned opinion for dismissing the complaint and no prima facie, offence appears to have been made out. More, so in addition, the Court has also stated a ruling of the Hon'ble Supreme Court and observed that it was a matter of civil litigation and no prima facie, offence as alleged are made out. It was not a case similarly where the Court has not taken cognizance and not proceeded mainly on the ground that the case is of a civil nature. The Court has proceeded on the criminal case in accordance with the provisions prescribed and after inquiry and consideration of the material evidence came to the opinion that no prima facie, offence is made out and hence, dismissed the complaint.

` 29. Thus, from the perusal of the record, it comes out that learned Magistrate has not out rightly rejected the complaint and has not taken cognizance of the same holding that adequate remedy can be granted by the civil court but he has duly taken cognizance of the matter on the complaint case and proceeded to record the statements under Section 200 & 202 Cr.P.C. and thereafter considering the material evidence on record, has passed the order under Section 203 Cr.P.C.

30. So far as the contention that order passed by the learned Magistrate is not proper because he has dropped the criminal proceedings on the ground that civil court is competent court is not made out.

31. Apparently, the order so passed is well reasoned and well discussed. At this stage, I do not find any illegality or irregularity in the order so passed which may vitiate the proceedings. In the circumstances, the revision, therefore, appears to have force in itself and is liable to be dismissed as such.

32. The criminal revision is accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.09.2012

BEFORE
THE HON'BLE DR. SATISH CHANDRA, J

Misc. Single No. – 3862 of 2012

M/S Pantaloon Retail (India)
...Applicant
Versus
The Chief Controlling Revenue Authority/Board Of Revenue & Ors
...Respondents

Counsel for the Petitioner:
Sri Abhishek Kumar
Sri Kaushik Chaterji

Counsel for the Respondents:
C.S.C.

(A) Transfer of Porperty Act-Section 107-Lease and Licence-difference between the two explained-'Lease' denotes contract having relationship of land lord-tenant either for life or limited period-while word "licence"-denotes a right of permission to do an act or permission to carry some business or the act-which without licence would be unlawful.

Held: Para-28

A licence is also distinguished from a lease. As per "Corpus Juris Secundum", a licence generally provides the licencee with less rights in real estate than a lease. If the contract gives exclusive possession of the premises against all the word, including the owner it is a lease, but if it merely confers of a privilege to occupy the premises under the owner, it is a licence. Accordingly, a licence in a property is the permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein, and is thus subject to management and control retained by the owner.

(B) Indian Stamp Act-Section 33/44-A-Demand of stamp duty with 200% penalty of deficit amount-plea that the deed being licence for period of 9 years-stamp duty of Rs. 100/- sufficient-authorities wrongly treated as 'lease' held-mere use of word 'licence' in the deed can not decide the nature of document-exclusive possession and profit of land disclose nature of lease-authorities rightly put demand of extra-stamp duty-but following the ratio of law of Appex Court in Shyam Oil Mill-penality reduced @ 100% instead of 200%.

Held Para-33:

In the instant case, the petitioner has paid stamp duty of Rs.100/- on the said instrument (MOU), by considering it as a deed of licence. But fact remains that mere use of the words 'licence' or 'licencee' would not be sufficient to hold that the the said instrument (MOU) is a licence. Simply, using the word licence will neither be regraded conclusive nor determinative.

Case Law discussed:
AIR 1999 SC 2607; AIR 1965 Supreme Court Page 1092, paragraph 8; AIR 1957 Supreme Court Page 657 paragraph 29; AIR 1958 Supreme Court Page 341 para 5; AIR 1966 Supreme Court , page 1295 para5; AIR 1970 Supreme Court Page 253 Para 7; 2008 VOL. 2 AWC Page 1879 Paragraph 7, Allahabad, 354 III APP.3D 171, 289 III Dec. 420, 819 N.E.2d 1220(2d Dist.2004); (1960) 1 SCR 368; (1974) 1 SCC 202; (2011) 5 SCC 270; (2006) 286 ITR 251 MP

(Delivered by Hon'ble Dr. Satish Chandra, J.)

1. By this writ petition, the petitioner has assailed the orders dated 29.06.2011 passed by the Additional District Magistrate (Finance & Revenue), Lucknow in Case No.264/Stamp/ 2008 under section 33/47-A of the Indian Stamps Act as well as the order dated 28.05.2012 passed by Chief Controller Revenue Authorities under section 56 (1) A of the Indian Stamps Act in Appeal No.64 of 2011-12.

2. The facts in narrow compass are that the petitioner and M/s Sahara India Commercial Corporation Ltd. had executed an instrument on 15.07.2005 known as "Memorandum of understanding" (MOU), where both the parties agreed that the petitioner will have a space about 9455.30 sq.ft. (Super area) in a commercial complex known as Saharaganj, Hazratganj, Lucknow on "licence basis" initially, for a period of three years and the said period shall also be renewable and the same has already been renewed for a total period of 9 years.

3. The petitioner has paid stamp duty of Rs.100/- on the said instrument (MOU), by considering it as a **deed of licence**, but the stamp authorities considered the said instrument as a **lease deed** and demanded stamp duty of Rs.33,93,500/=. The penalty was also imposed to the tune of Rs.67,87,000/- @ 200%-. Thus, the total liability of Rs.1,01,80,500/- was saddled upon the petitioner alongwith interest at the rate of 1.5% per month on the deficient amount, from the date of execution of deed till the payment. Being aggrieved, the petitioner has filed the present writ petition.

4. With this backdrop, Sri Abhishek Kumar, learned counsel for the petitioner submits that the instrument is nothing, but is a **deed of licence** and the same cannot be treated as a **lease agreement**. He also submits that the question regarding the distinction between the lease and licence is a vexed one and does not have any mathematical solution and it is the intention of the parties. For this purpose, he relied on the ratio laid down in the case of **Delta International Ltd. vs. Shyam Sundar Ganeriwala reported in AIR 1999 SC 2607,** where it was observed that:

"To find out whether the document creates lease or licence real test is to find out 'the intention of the parties', keeping in mind that in cases where exclusive possession is given, the line between lease and licence is very thin."

5. Learned counsel further submits that the **lease** or **licence** is a matter of contract between the parties. Section 107 of the Transfer of Property Act provides that lease of immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the lessee and the lessor. This contract between the parties is to be interpreted or construed on the well laid principles for construction of contractual terms viz for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having double intendment one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing only what he had a right to do.

6. Learned counsel also submits that in the instant case the intention of the parties is to create the **licence** , and not the **lease.** The same can be observed by examining the deed minutely and critically.

7. Regarding the interpretation of the fiscal statutes, he also alleges that taxing statutes will have to be interpreted strictly. For this purpose, he relied on the ratio laid down in the following cases:

1. **The Board of Revenue Uttar Pradesh vs. Rai Sahab Siddha Nath**

Mehrotra reported in AIR 1965 Supreme Court, page 1092, paragraph 8;

2. A.V.Fernandez vs. The State of Kerala reported in AIR 1957 Supreme Court, page 657 paragraph 29; 3

3. The Central India Spinning and Weaving and Manufacturing Company Ltd. vs. The Municipal Committee, Wardha reported in AIR 1958 Supreme Court, page 341, para 5; and

4. The State of Punjab vs. M/s Jullundur Vegetables Syndicate reported in AIR 1966 Supreme Court, page 1295, para5.

8. Regarding the penalty, learned counsel submits that the penalty @ 200% imposed by the authorities below is totally against the law as the same was imposed in an arbitrary and illegal manner. For this purpose, he relied on the ratio laid down in the following cases:

1. M/s Hindustan Steel Ltd. Vs. State of Orissa reported in AIR 1970 Supreme Court, page 253, paragraph 7; and

2. Smt. Asha Kapoor vs. Additional Commissioner reported in 2008 Volume (2) AWC, page 1879, paragraph 7, Allahabad.

9. According to him, in the present case, no finding has been recorded by the authorities below as to why the penalty is being imposed. It has only stated in a cursory manner that petitioner has deliberately evaded the stamp duty. The cursory observations made by the appellate authority is not substantiated by any material as it is clear from the deed in question that the parties have agreed to create the **licence**. The instrument in question was rightly executed as **licence deed** by paying the stamp duty of Rs.100/-.

10. Further, Stamp Act being a taxing statute is required to be interpreted strictly and since the document in question is a **licence,** hence, it can not be required to be levied with the duty of stamp required for **lease.** No reason has been assigned for imposing penalty and mere cursory observation has been made by the appellate authority. Lastly, he made a request that the impugned orders may kindly be set aside.

11. On the other hand, Sri D.R.Misra, learned counsel for the department relied on the order passed by the lower authorities. He submits that the petitioner is a Company registered under the Companies Act and as per the instrument (MOU), the area has been taken on the rent ,initially, for three years but the same was extended. Now the total period of tenancy is **9 years.** The rate of Rs.70.00 per sq. ft. was agreed. There is a provision for enhancement of the rent at the rate of 15%. Thus, the rent for **9 years** comes to Rs.7,63,53,383/=. Accordingly, the deficit of stamp comes to Rs.33,93,500/=, which is supposed to be paid by the petitioner.

12. Learned counsel further submits that the essence of contract describes stamp duty payable on an instrument and from a perusal of instrument entitled 'memorandum of understanding', it is crystal clear that the same comes within the ambit and scope of Section 2(16) (b) of Indian Stamp Act and accordingly, as per Clause 35 (a) (iii) of Schedule-I-B of Indian Stamp Act, the instrument which has been entered into between the petitioner and M/s Sahara India Commercial Corporation, the requisite

stamp duty is payable upon the said instrument as the same is an agreement of tenancy. He read out Clause 35 (a) (iii) of Schedule-I-B of Indian Stamp Act, which is reproduced as under:

35. *Lease, including an under-lease or sub-lease and* ***any agreement to let or sublet.***

(a) Where by such lease the rent is fixed and no premium is paid or delivered-

(iii) where the lease purpose to be for a term exceeding five years but not exceeding ten years.

13. He also submits that the stamp duty is payable equally on the 'Agreement for lease' or 'Lease agreement' in view of provisions of Clause-35 of Parishishit-1(a) and as such, once the essence of instrument entitled 'memorandum of understanding' describes the terms and conditions in the nature of '**lease agreement**' thereby disclosing the facts in respect to the payment of lease rent in respect to the property in question, in these circumstances, the stamp duty is payable upon the said instrument in accordance with law.

14. Learned counsel further alleges that as per the terms of the instrument entered into between the parties for the **period of 9 years,** there is a provision for enhancement of 15% rent every year and the rent on super area of having 9455.30 sq. ft. has been fixed as Rs.70/- per sq.mt. per month, as such, on calculating the **rent of 9 years,** the amounts comes to Rs.7,63,53,383 and on which there is a deficit stamp duty of sum of Rs.33,93,500/= which is payable by the petitioner. Accordingly, the instant writ petition filed by the petitioner being devoid of merit and is liable to be dismissed with costs.

15. After hearing both the parties, it appears that on 05.07.2005, the petitioner and M/s Sahara India Commercial Corporation Ltd. have executed "Memorandum of Understanding" (MOU) to have super area of 9455.30 sq. ft. (carpet are: 6303.53 sq. ft.) spread over ground floor in the commercial complex of Saharaganj, Hazratganj, initially for a period of three years, which is renewable. The monthly licence fee was fixed @ of Rs.70/- per sq.ft. per month, calculated on super build up area. Escalation in the monthly fee was fixed @ of 15% increase every three year over the last prevailing rate. It appears from the impugned orders that initially, the lease was executed for three years but it has been extended for a **total period of nine years**. In the said MOU, as per Clause 24, it was specifically mentioned that

"This agreement shall never be construed as a tenancy agreement, lease agreement or otherwise, creating any other right/interest in the property in favour of second party, which is not at all the intentions of the parties."

16. At the strength of this Clause, learned counsel for the petitioner submits that the agreement will have to be examined as per the intention of the parties and the intention of the parties is to create the **licence,** and certainly, not the **lease**.

17. Needless to mention that the term '**lease**' is defined under section 105 of Transfer of Property Act, which is reproduced as under:-

"S.105. Lease defined- A lease of immovable property is transfer of a right to

enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transfer by the transferee, who accepts the transfer on such terms."

18. Further, Section 2(16) of Indian Stamp Act, 1899 provides the definition of lease. The said provision reads as under:-

2(16) "Lease" means a lease of immovable property, and also

(a) a patta;

(b) a kabuliyat or other undertaking in writing, not being a counterpart of a lease, a cultivate occupy or pay or deliver rent for immovable property;

(c) any instrument by which tolls of any description are let;

(d) any writing on an application for lease intended to signify that the application is granted;

(e) any instrument by which mining lease is granted in respect of minor minerals as defined in clause (e) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957.

19. On the other hand, Section 52 of Easement Act provides the definition of licence. The said provision reads as under:-

"Section 52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a ***licence."***

20. Moreover, Section 62 (C) of the Easement Act, 1882 itself provides that a licence is deemed to be revoked when it has been either granted for a limited period or acquired on condition that it shall become void on the performance or non-performance of a specified Act, and the period expires, or the condition is fulfilled.

21. In the instant case, the petitioner heavily relied on the ratio laid down by the Hon'ble Supreme Court in the case of **Delta International** (supra), but the said judgment was regarding to run a petrol service station. In 1985, Delta International Ltd. filed a Civil Suit No.491/85 in the High Court of Calcutta for a perpetual injunction restraining the defendants and / or their servants, agents and assigns from using any of the fixtures, fittings and occasions lying at suit premises; for damages, for wrongful use and occupation of the premises i.e. the date of termination of **lease and licence** as claimed in the plaint and for degree of possession of the said premises and other reliefs.

22. But in the instant case, the facts and circumstances are quite different and the said ratio laid down in the case of **Delta International** is not applicable.

23. Needless to mention that the ratio will have to be applied in the identical facts and circumstances of the case. .

24. It may not be out of place to mention that the word '**lease**' is frequently used to designate the contract by which the relation of land-lord and tenant is created.

Accordingly, a lease is a species of contract for the possession and profits of land and tenements, either for life, or for a certain period of time, or during the pleasure of parties, or a contract for the possession and profits of land, for a determinate period with the recompense of rent. Thus, a lease may regarded as a conveyance or grant of an estate or interest in real property, for a limited term with condition attached.

25. On the other hand, a **licence** is a right or permission granted by some competent authority to carry on business or to do an act which, without such licence, would be illegal. In other words, it is a formal or official permit or permission to carry on some business or do some act which, without the licence, would be unlawful and the word 'licence' and 'permit' are often used synonymously.

26. Regarding the property, a **licence** is simply the authority to enter the land of another and perform a specified act or series of acts without obtaining any permanent interest in the land. It is a permit or privilege to do what otherwise would be trespass, or tort or otherwise unlawful. An example is that a ticket holder has a licence to watch the movie in a particular show in the hall.

27. If the instrument or agreement grants an interest or a right to use and occupy the land, it may not be construed as a mere licence, notwithstanding it is called a licence by the parties, as observed in the case of **Dargis vs. Paradise Park, Inc., 354 III APP. 3D 171, 289 III Dec. 420, 819 N.E.2d 1220 (2d Dist. 2004).**

28. A licence is also distinguished from a lease. As per "**Corpus Juris Secundum**", a licence generally provides the **licencee** with less rights in real estate than a lease. If the contract gives exclusive possession of the premises against all the word, including the owner it is a lease, but if it merely confers of a privilege to occupy the premises under the owner, it is a licence. Accordingly, a **licence** in a property is the permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein, and is thus subject to management and control retained by the owner.

29. As a further distinction between a **licence and a lease**, the latter conveys an interest in the land, requires a writing to comply with the statute of frauds, and transfers possession, while the former merely excuses acts done by one on the land in the possession of another that without a licence would be trespasses, and conveys no interest in land. Further, a **lease** is corporeal and the licence an incorporeal and the absence of consideration is more indicative of a **licence** than a **lease.**

30. In the case of **Associated Hotels of India vs. R.N.Kapoor reported in (1960) 1 SCR 368,** wherein it was observed:

"...If a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property."

31. Further, it is quite clear that the distinction between lease and licence is

marked by the last clause of section 52 of the Easement Act as by reason of a licence, no estate or interest in the property is created. In the case of ***Qudrat Ullah vs. Municipal Board, Bareilly reported in (1974) 1 SCC 202,*** wherein it was observed:-

"....If an interest in immovable property, entitling the transferors to enjoyment is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a license is the legal result."

32. Further, in the case of ***Pradeep Oil Corporation vs. Municipal Corporation of Delhi and anr. reported in (2011) 5SCC 270,*** wherein it was observed that:

"We may also notice the undisputed fact that in the present case the parties have agreed that for the purpose of determination of the agreement three calendar months' notice had to be given. Undoubtedly, such clause in the document in question has a significant role to play in the matter of construction of document. Clearly, if the parties to the agreement intended that by reason of such agreement merely a license would be created, such a term could not have been inserted."

33. In the instant case, the petitioner has paid stamp duty of Rs.100/- on the said instrument (MOU), by considering it as a deed of licence. But fact remains that mere use of the words '**licence**' **or** '**licencee**' would not be sufficient to hold that the the said instrument (MOU) is a licence. Simply, using the word licence will neither be regraded conclusive nor determinative.

34. Moreover, if a contract is for the exclusive possession and profits of the land, it is a lease and not a licence, no matter in what nomenclature, the rent is to be paid. Further, in the said MOU, as per **clause 19,** it has been specifically mentioned:

"Either or both parties may terminate this agreement any time after the date of opening of shop by serving written notice of six months to the other parties..."

35. Moreover, it is well settled legal position that a **licence** can be revoked **at any time** at the pleasure of the licensor. Thus, by merely stating that a transaction is a licence, not a lease, its nature can not be changed.

36. In view of above, the instrument in question (MOU) is a tenancy agreement, specially by looking upon the length of the **period of nine years,** the same will have to be treated as tenancy/lease agreement.

37. Needless to mention that by an agreement, the petitioner can not override the legal provisions. Hence, there is no infirmity in the order passed by the lower authorities, though I agree with the submission made by the learned counsel for the petitioner that taxing statutes will have to be interpreted strictly. Therefore, the petitioner will have to pay the deficiency of the stamp duty as per the Indian Stamps Act.

38. For the similar reasons, the penalty is leviable, but looking into the peculiar facts and circumstances of the instant case, the penalty @ of Rs.200% seems to be on higher side. By taking a lenient view as per the ratio laid down in the case of **Shyam Oil Mills vs. CIT (2006) 286 ITR 251 MP,** the penalty is reduced @

of 100%. Thus, the petitioner will get the partial relief from the orders passed by the lower authorities.

39. Accordingly, the writ petition is partly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

Misc. Single No.3980 of 2004.

Smt. Chandra Kali ...Applicant
Versus
Board of Revenue & others
...Respondents

Counsel for the Petitioner:
Sri Balram Yadav

Counsel for the Respondents:
C.S.C.
Sri S.K. Mehrotra

U.P.Land Revenue Act-Section 220-Power of Review-can be exercised by Board of Revenue-Commissioner can not exercise such power in absence of Statutory provision-order passed by Board of Revenue setting aside the review order passed by commissioner-held valid.

Held: Para 9 & 10

From the perusal of the abovesaid Section, it is clear that only the Board of Revenue has got power to review its earlier order under the Land Revenue Act and no any other authority has been vested with the said power.

It is well settled proposition of law that power to review is given to an authority by the statute itself and that particular authority can exercise the same and in the absence of such provisions, no other authority can exercise the powers of review.

Case Law discussed:
AIR 1987 SC 2186

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

1. Heard Shri Satyendra Singh, learned counsel for the petitioner, learned State Counsel as well as Shri I. D.Shukla, learned counsel for the respondent and perused the record.

2. Facts in brief of the present case are that the controversy involved in the present case relates to plot no. 353 khata no.111 situated in village Karmaganj, Tehsil Kunda, District-Pratapgarh recorded in the name of one Smt. Mahdei who died on 14.10.1982

3. After the death of Smt. Mahdei, petitioner moved an application for mutating his name in the revenue record in respect of the land in question on the basis of Will deed, rejected by order dated 24.1.1987 passed by Naib Tehsildar, challenging the petitioner by filing an appeal under Section 21. of the U.P. Land Revenue Act, 1901 (hereinafter referred to as the Act), dismissed by order dated 26.8.1998 (Annexure No.3) passed by the appellate authority/Deputy Collector Kunda, Pratapgarh.

4. Order dated 26.8.1998 has been challenged by the petitioner by filing a revision bearing Revision No.144 of 1998, dismissed by order dated 26.10.1999 (Annexure No.4) passed by revisional authority/Additional Commissioner. Thereafter, on 17.11.1999, he filed a review application, allowed by order dated 25.11.2002 (Annexure No.5) passed by the Additional Commissioner.

5. Order dated 25.11.2002 was challenged by the contesting respondent, dismissed by order dated 19.1.2004 (Annexure No.6) passed by Board of Revenue, U.P., Lucknow against which a review has been filed by the contesting respondent, allowed by order dated 26.7.2004 (Annexure No.1) passed by Board of Revenue, U.P., Lucknow.

6. Aggrieved by the said order, the present writ petition has been filed.

7. After hearing learned counsel for the parties, the first and foremost question which is to be decided is whether the action on the part of the Additional Commissioner thereby passing the order dated 17.11.1999 and reviewing his earlier order dated 26.10.1999 is a correct exercise or not.

8. In order to decide the said controversy, it is appropriate to go through the provisions as provided under Section 220 of the Land Revenue Act quoted herein below:-

"Power of Board to review and alter its order and decrees-

(1) The Board may review, and may rescind, alter or confirm any order made by itself or by any of its members in the course of [business connected with settlement].

(2) No decree or order passed judicially by it or by any of its members shall be so reviewed except on the application of a party to the case made within a period of ninety days from the passing of the decree or order, or made after such period if the applicant satisfied the Board that he had sufficient cause for not making the application within such period.

(3) Members not empowered to alter each other's orders- A single member vested with all or any of the powers of the Board shall not have power to alter or reverse a decree or order passed by the Board or by any member other than himself."

9. From the perusal of the abovesaid Section, it is clear that only the Board of Revenue has got power to review its earlier order under the Land Revenue Act and no any other authority has been vested with the said power.

10. It is well settled proposition of law that power to review is given to an authority by the statute itself and that particular authority can exercise the same and in the absence of such provisions, no other authority can exercise the powers of review.

11. In the case of ***Dr. Smt. Kuntesh Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur and others AIR 1987 SC 2186,*** Hon'ble the Apex Court has held as under:-

"It is now well established that a quasi judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice Chancellor in considering the question of approval of an order of dismissal of the Principal, acts as a quasi judicial authority. It is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice Chancellor. In the

circumstances, it must be held that the Vice Chancellor acted wholly without jurisdiction in reviewing the order dated January 24, 1986 by her order dated March 7, 1987. The said order of the Vice Chancellor dated March 7, 1987 was a nullity."

12. In view of the abovesaid facts, the order dated 26.7.2004 (Annexure No.1) passed by Board of Revenue, U.P., Lucknow that the Additional Commissioner has got no power to review its earlier order dated 26.10.1999 is perfectly valid, needs no interference by this Court under Article 226 of the Constitution of India.

13. For the foregoing reasons, the writ petition is dismissed. However, as prayed, the petitioner, if so advised, may approach appropriate forum for redressal of his grievances which he has raised in the present writ petition.

REVISIONAL JURISDICTION
CRIMIMNL SIDE
DATED: ALLAHABAD 21.09.2012

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Criminal Revision No. 4959 of 2009

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

Counsel for the Petitioner:
Sri Gaurav Kakkar

Counsel for the Respondents:
Govt. Advocate
Sri C.P. Upadhyaya
Sri Vivek Singh

Criminal Revision-Against rejecting objection of applicant-on ground without following procedure under Section 208 and 209-statement of such witness could not be recorded-without examination under Section 202-held-where complaint lodged by Additional Session Judge for offence punishable U/S 182/195 I.P.C.-provision of 202 and 203 not applicable as such the question compliance of provisions of Section 208 do not arise.

Held: Para 18

In this case the complaint was lodged by an Additional Sessions Judge and looking into the facts and circumstances that the offence punishable under Section 195 IPC is exclusively triable by the court of Sessions, the case was committed to the court of Sessions. In these circumstances, I do not find any violation of the provisions of Section 209 of Cr.P.C. Moreover, offence punishable under Section 195 IPC is exclusively triable by the court of sessions hence there was no illegality in committing the case to the court of sessions. No doubt Section 209 provides that the case shall be committed to the court of sessions after complying with the provisions of Sections 207 and 208 Cr.P.C. but as mentioned above, the statements of the witnesses were not recorded in view of the fact that the complaint was lodged by an Additional Sessions Judge in discharge of his official duties and there was no need to examine the complainant as well as witnesses in view of the provisions of proviso to Section 200 Cr.P.C., the question of compliance of provisions of Section 208 Cr.P.C. do not arise.

Case Law discussed:
1980 (17) ACC 165; 1999 (38) ACC 679; 2000 (1) JIC 815 (SC); 1999-JIC -2-554

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. Heard Sri Gaurav Kakkar, learned counsel for the revisionist and learned

A.G.A. for the opposite parties. Sri Vivek Singh, Advocate has also put in appearance.

2. This criminal revision has been filed against order dated 5.11.2009, passed by Additional Sessions Judge (Fast Track Court No.2), Bijnor in Session Trial No.644 of 2008 (State Vs. Harpal) and against order dated 26.10.2009.

3. A complaint against the revisionist was lodged by Sri J.K.S. Negi, the then 4th Additional District Judge, Bijnor in continuation to his judgment dated 21.11.2000, for the offences punishable under Section 182/195 I.P.C. The said complaint was registered by the Chief Judicial Magistrate and after taking cognizance the case was committed to the court of Sessions. The prosecution wanted to examine Shiv Kumar as P.W.-1 and Jodha Singh as P.W.-2, regarding which objection was taken by the revisionist and moved an application Kha-19 on 26.10.2009, which was rejected on 5.11.2009.

4. The main contention of learned counsel for the revisionist is that the court has not followed the procedure laid down in Section 208 and 209 Cr.P.C. and could not record the statement of such witnesses, who were not examined under Section 202 Cr.P.C.

5. By this revision, the order dated 26.10.2009 as well as 5.11.2009 have been challenged. As far as the order dated 26.10.2009 is concerned, the revisionist instead of cross examining the witnesses, moved an application Kha-19. The Court invited the objections of A.D.G.C. (Criminal) and fixed 3.11.2009 for disposal. To my opinion, there is no illegality or perversity in the order dated 26.10.2009 because by order dated 26.10.2009, the court has not only entertained the application moved by the revisionist but has also invited objections from the ADGC (Criminal). In any case, if any application is moved and objections are invited, that can be regarded as a final order and no grievance has been caused to the revisionist by the order dated 26.10.2009. Hence the revision against order dated 26.10.2009 is not maintainable.

6. As far as the order dated 5.11.2009 is concerned, it is a detailed order and learned lower court has considered all aspects of the matter. It is relevant to point out that the Session Trial No.587 of 1998 "State Vs. Shiv Kumar and another", under Sections 364 and 307 I.P.C., P.S. Mandavar, District Bijnor was decided by the then 4th Additional Sessions Judge, Bijnor (Sri J.K.S. Negi, H.J.S.), who has acquitted the accused persons and has clearly drawn a conclusion that the complainant of that case Harpal Singh had falsely implicated accused persons Shiv Kumar and Jodha Singh and had given the false information to the police. Accordingly, in judgment itself it was pointed out that necessary action be taken against Harpal Singh for lodging false report to the police.

7. In the said continuation, the Presiding Officer (Sri J.K.S. Negi) discharging his official duties had filed a complaint before the Chief Judicial Magistrate. The Chief Judicial Magistrate after taking cognizance of the matter, summoned the accused persons. In the trial, the prosecution examined Shiv Kumar as P.W.-1 and Jodha Singh as P.W.-2, regarding which an application in the form of objection 19-Kha was submitted before the court concerned.

8. The revisionist had relied upon ***Ram Adhar and another Vs. State of U.P. another, 1980 (17) ACC 165,*** in which it has been held that if a witness has not been examined under Section 202 Cr.P.C., then such witness cannot be examined in the course of trial before the sessions court.

9. In complaint cases, after the complaint has been presented, the statement of the complainant is recorded under Section 200 Cr.P.C. and during the course of enquiry the magistrate may, if he thinks fit, take evidence of witnesses on oath. Proviso to section 202(2) also provides that if it appears to the magistrate that the offence complaint is triable exclusively by the court of sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.

10. It is also relevant to point out that proviso to Section 200 Cr.P.C. provides that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint.

11. In view of proviso to Section 200 Cr.P.C., it was not incumbent upon the Chief Judicial Magistrate to examine the complainant and the witnesses.

12. Learned lower court has relied upon ***Laxmi Narain Singh Vs. State of U.P. and others, 1999 (38) ACC 679,*** in which it has been held that if a complaint has been filed by the Judicial Officer, in discharge of his official duties then provisions of Section 202 and 203 Cr.P.C. shall not be attracted and the case will proceed like a police challani case.

13. Learned lower court has also relied upon ***Rozi and others Vs. State of Kerala and others, 2000 (1) JIC 815 (SC)***, in which Hon'ble Supreme Court has held that if any private person has submitted a complaint for an offence exclusively triable by the court of sessions then the objection must be raised at the first stage.

14. The proviso to Section 200 Cr.P.C. is very much clear which provides that when the complaint is in writing, the magistrate need not to examine the complainant and the witnesses if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint.

15. In these circumstances, the magistrate has not committed any error in not recording the evidence of witnesses under Section 202 Cr.P.C. Certainly the complaint under Section 182/195 IPC has been filed by the Additional Sessions Judge in discharge of his official duties and after recording the findings in the judgment dated 21.11.2000, hence it was not necessary for the Chief Judicial Magistrate to record the evidence of witnesses under Section 202 Cr.P.C. and those witnesses can very well be examined during the course of trial.

16. Learned counsel for the revisionist has submitted that provisions of Section 208 and 209 Cr.P.C. have been violated. Section 208 deals with the supply of copy of the statements and documents to accused in other cases triable by the court of sessions. Admittedly, the statements of witnesses were not recorded in view of proviso to Section 200 Cr.P.C., hence the question of supply a copy of statements under Section 208 Cr.P.C. does not arise.

17. Section 209 deals with the commitment of the case to the court of sessions when offence is triable exclusively by the court of sessions.

18. In this case the complaint was lodged by an Additional Sessions Judge and looking into the facts and circumstances that the offence punishable under Section 195 IPC is exclusively triable by the court of Sessions, the case was committed to the court of Sessions. In these circumstances, I do not find any violation of the provisions of Section 209 of Cr.P.C. Moreover, offence punishable under Section 195 IPC is exclusively triable by the court of sessions hence there was no illegality in committing the case to the court of sessions. No doubt Section 209 provides that the case shall be committed to the court of sessions after complying with the provisions of Sections 207 and 208 Cr.P.C. but as mentioned above, the statements of the witnesses were not recorded in view of the fact that the complaint was lodged by an Additional Sessions Judge in discharge of his official duties and there was no need to examine the complainant as well as witnesses in view of the provisions of proviso to Section 200 Cr.P.C., the question of compliance of provisions of Section 208 Cr.P.C. do not arise.

19. Learned A.G.A. has also drawn my attention towards the fact that present revisionist Harpal Singh had moved a petition under Section 482 Cr.P.C. before this Court which was registered as Criminal Misc. Application No.3883 of 2001 and was dismissed vide order dated 30.8.2007.

20. Another Criminal Revision No.136 of 2001 "Harpal Vs. State of U.P." was also filed by the present revisionist which was also dismissed vide order dated 18.2.2008.

21. The above conduct of the present revisionist shows that he simply intended to delay the proceedings against him for one reason or the other.

22. My attention has also been drawn towards ***Laxmi Narain Singh Vs. State of U.P., 1999-JIC-2-554***, in which this Court has held that if the complaint has been filed by a judicial authority under Section 195 Cr.P.C. then provisions of Section 202 and 203 Cr.P.C. are not applicable and the complaint has to be proceeded with as if it was instituted on a police report.

23. In view of the above discussion, I do not find any illegality in the impugned order dated 5.11.2009. The revision is dismissed and the revisionist is directed to appear before the court concerned on the date fixed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.09.2012

BEFORE
THE HON'BLE DEVENDRA KUMAR ARORA, J

Misc. Single No. 4984 of 2012

M/S Viraj Construction (P) Ltd.
...Applicant
Versus
Civil Judge (S.D) Lucknow & others
...Respondents

Counsel for the Petitioner:
Sri Sachin Garg
Sri Alok Saran

Counsel for the Respondents:
Sri Manish Kumar

Constitution of India, Article-226- Grant of temporary injunction-principle discussed-if trail Court from pleading, affidavit and materials on record not satisfied about prima faci case, balance of convenience and irreparable loss-declined to grant ex-parte injunction in absence of defendant-rightly issued notice-such order neither arbitrary nor illegal-can not be interfered by Writ Court.

Held: Para-17

In the instant case, it appears that the petitioner has failed to prove that he has a prima facie case as well as balance of convenience in his favour and, therefore, trial court refused to grant exparte interim injunction. There appears no legal error in the impugned order dated 30.8.2012 by which notices have been issued to the respondents. The court below has committed no error in issuing notices to the respondents rather it is perfectly in accordance with law.

Case Law discussed:

[2010 (28) LCD 1712]; JT 2009 (15) SC 33; (1993) 3 SCC 161; (1992) SCC 719

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

1. Heard Shri N.K. Seth, learned Senior Advocate, assisted by Shri Sachin Garg, Advocate for the petitioner and Shri Mohd. Arif Khan, learned Senior Advocate, assisted by Shri Rajiv Singh Chauhan and Shri Mohd. Babar Khan, Advocates for the opposite party no.4.

2. By means of present writ petition, the petitioner is seeking a writ of certiorari for quashing the order dated 30.08.2012, passed by the Civil Judge (Senior Division), Lucknow (In-Charge) in Regular Suit No.1121 of 2012 (M/s Viraj Constructions Pvt. Ltd. Vs. Dr. Rajendra Tewari & others), by which the learned Trial Court while issuing notices to the private respondents, fixed date 16.9.2012 for disposal of the application no. C-6 moved by the plaintiff (petitioner herein) under Order 39 Rule 1 & 2 readwith section 151 C.P.C. and declined to grant ex-parte temporary injunction with the observation that he did not find sufficient ground for passing ex-parte interim injunction.

3. Facts of the case, in brief, are that in the year 1987, a partition amongst Smt. Laxmi Bai Chawla, Sri Ram Prakash Chawla, Sri Shanti Swaroop Chawla and Sri Charanjeet Lal Chawla had taken place vide partition deed dated 22.4.1987 which was duly registered in the office of the Sub Registrar, Lucknow. By virtue of the said partition, Sri Ram Prakash Chawla became the absolute owner of the Khasra Plot No. 92 measuring out 8 Bigha, 9 Biswa and 15 Biswansi and on his death on 16.3.2000, his wife Smt. Devki Narain Chawla, sons Sri Harish Kumar Chawla, Sri Ashok Kumar Chawla and Sri Bharat Bhushan Chawla became absolute owner of the said khasra plot no. 92 & 254. The petitioner purchased plot no. 92,measuring about 1.993 Hectares, situated at village Semra, pargana, tehsil and district Lucknow and is in possession of the same. The petitioner purchased the said plot through separate sale deeds dated 18.7.2011 (Annexures No. 5to 8) from the legal heirs and representatives of late Ram Prakash Chawla, namely, Smt. Devki Narain Chawla, S/Sri Ashok Chawla, Harish Chawla and Bharat Bhushan Chawla.

4. After purchase of the said plot no. 92, the petitioner became owner of the same and, as such, he moved applications

for mutation vide Appln. nos. 3323/2011-12 to 3326/2011-12 before the Tehsildar (Judicial) Sadar, Lucknow and the same are pending waiting their own turn for disposal. Opposite Party No. 11 (Mithilesh Kumar) who is the alleged Attorney of Sri Charanjeet Lal Chawla, in collusion and conspiracy with Dr. Rajendra Tewari (opposite party no. 2) sold the said khasra plot no. 92, measuring about 0.240 hectares in favour of Dr. Rajendra Tewari (opposite party no. 2) by virtue of fraudulent sale deed dated 30.7.1999 (Annexure No. 9). He further sold a plot of same area from Khasra No. 92 to Dr. Shashi Singh (Opposite Party No. 3) vide sale deed dated 30.7.1999 (Annexure No. 10).

5. As per the partition deed dated 22.4.1987, Sri Charanjeet Lal Chawla was having no right , title or interest in the khasra plot no. 92 and, as such, the two sale deeds dated 30.7.1999 are sham transaction and they are null and void conferring no right, title or interest in favour of Dr. Rajendra Tiwari (Opposite Party no. 2) or Dr. Shashi Singh (Opposite Party No. 3). Dr. Rajendra Tewari as well as Dr. Shashi Singh (Opposite Parties no. 2 & 3) both were fully aware about the said partition deed dated 22.4.1987, executed between Sri Ram Prakash Chawla , Sri Shanti Swaroop Chawla, Sri Charamjeet Lal Chawla and Smt.Laxmi Bai Chawla and they were also fully aware about the fact that the khasra plot no. 92 had fallen into the share of Sri Ram Prakash Chawla. Thereafter it appears that Dr. Shashi Singh and Dr. Rajendra Tewari (Opposite Parties No. 2 & 3) sold a part of the aforesaid khasra plot no. 92 to Smt. Rekha Devi by virtue of fraudulent sale deed dated 4.8.2011 (Annexure No. 11). When the petitioner came to know about the sale deed dated 30.7.1999 as well as sale deed dated 4.8.2011, he opposed the mutation application before the Tehsildar, Lucknow. Smt. Rekha Devi (Opposite Party No. 4) on 18.8.2012 came to the property of the petitioner alongwith some anti-social elements and tried to grab the said plot no. 92. The petitioner approached the Court of Civil Judge (Senior Division), Lucknow on 22.8.2012 by filing Regular Suit No. 1121 of 2012 (M/s Viraj Constructions Pvt. Ltd. vs. Dr. Rajendra Tewari and others) seeking declaration of sale deed as well as for permanent injunction. The petitioner also filed an application under Order 39, Rules 1 & 2 read with section 151 of C .P.C. With the prayer that during pendency of suit, the opposite parties may be restrained from interfering with the peaceful possession of the petitioner over plot no. 92. On the said application, notices were issued to the opposite parties no. 2 to 11 vide order dated 30.8.2012 thereby fixing 16.9.2012 for disposal of the said application. Being aggrieved for not passing exparte order in his favour, the petitioner has approached this Court.

6. Shri Mohd. Arif Khan, learned Senior Advocate, who has put in appearance on behalf of opposite party no.4, while opposing the writ petition, raised a preliminary objection with respect to maintainability of the writ petition. In support of his submission, Shri Khan placed reliance on the judgment of this Court reported in ***[2010 (28) LCD 1712], Hari Chaitanya Brahmananda vs. Civil Judge (Junior Division), Court No.15, Sultanpur and others.***

7. I have heard learned counsel for parties and perused the record.

8. It is not disputed that the petitioner has filed a suit for permanent injunction registered as Regular Suit No. 1121 of 2012 (M/s Viraj Constructions Pvt. Ltd. vs. Dr. Rajendra Tewari & others) in the court of Civil Judge (Senior Division), Lucknow and he moved an application for temporary injunction which was heard on 30.8.2012 and notices were issued to opposite parties no. 2 to 11, fixing 16.9.2012 by the said impugned order dated 30.8.2012.

9. From perusal of order dated 30.8.2012, it is evident that the court below declined to pass any interim injunction in favour of the plaintiff/ petitioner without giving an opportunity of hearing to the opposite parties and issued notices to the private opposite parties accordingly.

10. Now, the question arises is as to what principles should be followed by the court below in the matter of grant of ad interim injunction. Of course, grant of injunction is within the discretion of the court and such discretion is not to be exercised in favour of the plaintiff only. Before granting interim injunction the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and that the balance of convenience is also in his favour and refusal of injunction would cause irreparable injury to him.

11. It is well settled that in order to get an order of injunction, one has to prove that he has made out a prima facie case in his favour. The Hon'ble Supreme Court in **Civil Appeal Nos. 7966 -7967 (Arising out of SLP Nos. 9165 -9166/2009), Kashi Math Samsthan and another vs. Srimad Sudhindra Thirtha Swami and another, reported in JT 2009 (15) SC 33**, has expressed its view in para 13, which reads as under:

It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted.

12. Further, the Hon'ble Apex Court in the case of **Shiv Kumar Chadha Vs. Municipal Corporation of Delhi, (1993) 3SCC 161**, has held that a party is not entitled to an order of injunction as a matter of right. The relevant para reads as under:-

" It has been pointed out repeatedly that a party is not entitled to an order of injunction as a matter of right or course, grant of injunction is within the discretion of the court and such discretion is not to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injection is, thus, to maintain the status quo. The Court grants

such relief according to the legal principles- ex debito justitiae. Before any such order is passed the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and that the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him".

13. In the case of **Dalpat Kumar vs. Prahlad Singh, reported in (1992) SCC 719** the Hon'ble Supreme Court held that the phrases "Prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice.

14. In **Woodroffe's Law Relating to Injunctions, 2nd revised and enlarged Edn., 1992, at page 56 in para 30.01,** it is stated that-

"an injunction will only be granted to prevent the breach of an obligation (that is a duty enforceable by law) existing in favour of the applicant who must have personal interest in the matter. In the first place, therefore, an interference by injunction is founded on the existence of a legal right, an applicant must be able to show a fair prima facie case in support of the title which he asserts."

15. As per the **Law Quarterly Review Vol. 109, page 432 (at p. 446), A.A.S. Zuckerman under the title "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies,** the Court considering an application for an interlocutory injunction has four factors to consider; first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm outweighs any irreparable harm that the defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation.

16. In view of the aforesaid factual background, this Court is of the view that in a suit for injunction while disposing of an application for temporary injunction, the Court should inquire on affidavit, evidence and other materials placed before it to find a strong prima facie case, balance of convenience and irreparable loss before granting injunction in favour of a person/plaintiff. However, in case the Court has any doubt in its mind in spite of material evidence and documents placed by a person/plaintiff in support of his case for grant of temporary injunction, and prior to granting the same, issues notices to the defendant calling upon him to file objections, then the said action on the part of the court is neither illegal nor arbitrary rather the same is in conformity to the principles of natural justice and is in accordance with law.

17. In the instant case, it appears that the petitioner has failed to prove that he has a prima facie case as well as balance of convenience in his favour and, therefore, trial court refused to grant exparte interim injunction. There appears no legal error in the impugned order dated 30.8.2012 by which notices have been issued to the respondents. The court below has committed no error in issuing notices to the

respondents rather it is perfectly in accordance with law.

18. On repeated query, learned counsel for the petitioner failed to point out any irreparable loss caused to him by not granting interim injunction in his favour and which may warrant immediate interference by this Court.

19. In view of the above, I do not find any good reason to interfere with the matter.

20. The writ petition lacks merit and is, therefore, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2012

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE VIRENDRA VIKRAM SINGH, J.

Civil Misc. Writ Petition no. 13312 of 2011

Neeraj Chaurasia and another
...Petitioner
Versus
Uttar Pradesh Power Corporation Ltd. and another ...Respondents

Counsel for the Petitioner:
Sri Saurabh Basu
Sri U.N. Sharma
Sri Vishal Singh

Counsel for the Respondents:
Sri Sandeep Kumar Srivastava
Sri Dharemdra Vaish

Constitution of India-Article 226-cancellation of Board's Resolution-by which selection list of accounts officer canceled-petitioner duly selected on post of Accounts Officer-not given appointment-no reason given for cancellation-either by Board resolution or in counter affidavit-certainly selected candidates has no right to appointment-at the same time Board can not act arbitrary manner-cancellation without reason-held-illegal direction to issue appointment within 3 month given.

Held: Para 8

Thus from the affidavits of the respondents as also from the perusal of the resolutions of the board it is quite evident that the selection in question has been turned down by the board without there being any ground in existence for the same. There is no mention at all that the selected candidates including the petitioners had any fault or fraud on their part or that the petitioners or any of the selected candidate did not have the requisite qualification for their appointment to the post of Accounts Officer in the Board of the respondents. Thus there was no illegality or irregularity in the selection process nor was there any wrong act on the part of the petitioners. Under the prevailing circumstances it is evident that the respondent Board has cancelled the select list without any reason or rhyme in an arbitrary manner.

Case law discussed:
(1993) SCC 573; (1991) 3 SCC 47; (2003) 7 SCC 285; (1999) 6 SCC 49

(Delivered by Hon'ble Virendra Vikram Singh, J.)

1. The petitioners, by filing the present petition, have prayed for issue of mandamus for cancellation of the resolution and approval thereof, whereby the select list including the name of the petitioners for the appointment of the Accounts Officer in the respondent's department was cancelled. The petitioners applied for the appointment on the post of Accounts Officer, in response to the advertisement Annexure1 dated

12.11.2004, made by the respondents, for 31 posts of Accounts Officer. The petitioners applied for their appointment and after the test and the interview held by the respondents, they were declared successful and their name found place in the select list, Annexure 2 published on 19.10.2005. The petitioners thereafter waited for the appointment letter for a reasonable time and when they did not receive any response, they filed a writ petition no. 65306 of 2006 before this Court. This writ petition was finally disposed of with a direction to the respondents to decide the representation within a period of three months in the matter of issuance of appointment letter. Despite the direction of this Court the representation of the petitioners was not decided within the stipulated period. The petitioners then filed the contempt petition no. 3543 of 2007, which was decided in terms of the compliance affidavit on behalf of the respondents that, "the appointment to the post of accounts officer is under administrative consideration and the candidates will be intimated accordingly in due course." The petitioners thereafter approached the respondents by way of seeking information under the right of information. After a strenuous exercise they were informed that by way of the resolution of the respondent board, the entire examination and the select list has been cancelled. By way of the present writ petition the petitioners have prayed for quashing the resolution of the respondent board canceling the examination and for the issuance of appointment letters to the petitioners.

2. On behalf of the respondents vide the counter affidavit, dated 27.9.2011, it was put forth that the respondent Board has got unfettered powers to vary the number of appointments and under the exercise of such powers they have cancelled the examination and the select list. No ground for the cancellation of the examination or the select list was at all required to be mentioned. This Court having observed such a situation, on 14.2.2012 passed following order,

"Though the petitioners do not have indefeasible right for appointment in pursuance of the select list, the respondent corporation must disclose valid reasons for which selection was cancelled."

3. With this observation the Court granted time to the respondents to file counter affidavit giving the reasons for the cancellation of selection while annexing the resolution of the Board. In compliance to the orders of the Court the respondents have filed the supplementary counter affidavit annexing the resolution of the board dated 3rd November 2008, along with its approval dated 29.12.2008. It has also been mentioned that the information about the cancellation of the examination was widely published in the newspapers and the same was also available on the website of the respondents. However no ground for the cancellation of the selection and the select list was mentioned in this supplementary counter affidavit. On behalf of the petitioners the affidavits of the respondents have been controverted.

4. Heard learned counsels of the parties and perused the record.

5. The contention of the respondent corporation is that merely because the name of a candidate appears in the select list, he would not become entitled to

appointment gathers force,but whether such powers are unfettered has been considered by the Apex Court in the case of ***Mrs Asha Kaul and another Vs State of J&K (1993) SCC 573*** while holding as follows:

"It is true that mere inclusion in the select list does not confer upon the candidate included therein an indefeasible right to appointment but that is only one aspect of the matter. The other aspect is the obligation of the Government to act fairly. The whole exercise can not be reduced to a farce. Having sent a requisition/request to the commission to select a particular number of candidates for a particular category, in pursuance of which the commission issues a notification, holds a written test, conducts interviews, prepares a select list and communicates to the Government?the Government can not quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment. We do not think that any Government can adopt such a stand without any justification today".

6. This aspect has also been dealt with by the Constitutional Bench of the Apex Court in the case of ***Shankarsan Dash Vs Union of India,(1991)3 SCC 47.*** The following observation of the Apex Court need be quoted:

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidate acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill the vacancies has to be taken bonafide for appropriate reasons. And 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. Thus the argument on behalf of the respondents that they have unfettered right to cancel the selection prima facie appears to be unfounded. Such right could only have been exercised if there existed sufficient grounds for the same and the respondents before this Court were bound to disclose such grounds.

8. It is evident from the counter affidavit of the respondents that no reason was put forward on their behalf for the cancellation of the selection. This is also evident from the orders of this Court dated 14.2.2012, referred to above. After the orders of the Court the supplementary counter affidavit was filed along with the copy of the resolutions of the Board. By way of the supplementary counter affidavit as well, no reason for the cancellation of the selection could be put forward. The learned counsel for the respondents also failed to mention any good reason for the cancellation of the selection. The resolution of the board numbered as Seventy five(24)/08 dated 3rd Nov. 2008 shows in the left column the proposal for the cancellation of the selection in question along with the start

of new selection and on the right side column the recommendation of the board has been mentioned. In either of the two columns no ground for the cancellation of the selection has been given. The other letter dated 29.12.2008 simply bears the approval of the recommendation that too without showing any ground at all. Thus from the affidavits of the respondents as also from the perusal of the resolutions of the board it is quite evident that the selection in question has been turned down by the board without there being any ground in existence for the same. There is no mention at all that the selected candidates including the petitioners had any fault or fraud on their part or that the petitioners or any of the selected candidate did not have the requisite qualification for their appointment to the post of Accounts Officer in the Board of the respondents. Thus there was no illegality or irregularity in the selection process nor was there any wrong act on the part of the petitioners. Under the prevailing circumstances it is evident that the respondent Board has cancelled the select list without any reason or rhyme in an arbitrary manner. The only question now remains to be decided is, whether the respondents have unfettered right to cancel the selection, without even disclosing the grounds therefor?

9. In the case of ***Union of India Vs Rajesh P.U.Puthuvalnikathu (2003)7 SCC 285,*** the Apex Court held that where it was possible to weed out the beneficiaries of the irregularities or the illegalities from amongst the selected candidates whose selection was not vitiated in any manner. The Supreme Court further held that in such a case," the competent authority completely misdirected itself in taking such an extreme and unreasonable decision of canceling the entire selection, wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational." With this finding the order was passed for giving appointments.

10. Again in the case of ***Purushottam Vs Chairman, M.S.E.B. and another (1999)6 SCC 49,*** the Apex Court while replying the question that whether a duly selected person for being appointed and illegally kept out of employment on account of untenable decision on the part of the employer,can be denied the said appointment, held that,

"The right of the appellant to be appointed against the post to which he has been selected cannot be taken away on the pretext that the said panel in the meantime expired and the post has already been filled up by some body else."

11. This proposition applies to the present case wherein the respondents have utterly failed to mention any ground for the cancellation of the selection.

12. With the discussion made above we hold that the recommendation of the respondent Board for the cancellation of selection dated 3rd November 2008 and its approval dated 29.12.2008 were totally unwarranted without there being any reason at all for the cancellation of the selection in question. The Court considers it just and necessary to issue mandamus to cancel these resolutions as

also the decision of the Board for the cancellation of the selection.

13. The writ petition is hereby allowed. The resolution of the respondent Board dated 3rd November 2008 and its approval dated 29.12.2008, are hereby quashed. The respondents are hereby issued a writ of mandamus to grant appointment to the petitioners for the post of Accounts Officer within a period of three months. It is being made clear that the appointments so made shall be given effect prospectively.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 14120 of 1988

Harihar Nath Shukla ...Petitioner
Versus
Managing Director, Uttar Pradesh Rajya Sahkari Bhumi vikas Bank Ltd. and others ...Respondents

Counsel for the Petitioner:
Sri Pradeep Chandra
Sri R.S.Srivastava
Sri Vinod Sinha

Counsel for the Respondents:
Sri C.B.Gupta
Sri J.A.Tiwari
Sri R.S.Shukla
SC

U.P. Co-operative Societies Employees Service Regulations, 1975-Regulation 85-Dismissal order-without holding oral enquiry-unless request made by employee oral enquiry not necessary-held-misconceived when major punishment inflicted-oral enquiry must-order quashed with direction to hold enquiry within 6 month-if not concluded-petitioner entitled for all consequential benefits.

Held: Para 14

The occasion to afford opportunity to the delinquent employee contemplated under the aforesaid Regulation at different stages during the oral enquiry, would arise only when an oral enquiry is held. The Enquiry Officer is obliged to give an opportunity to the delinquent employee to participate in oral enquiry and examine the witnesses of the department. Even mere absence of reply of charge sheet shall not result in deeming in the charges proved. In the present case the petitioner has clearly denied charges. Therefore, non-holding of oral enquiry, in view of this Court, shall vitiate the entire proceedings.

Case law discussed:
1997 (1) LLJ 831; 2000 (1) U.P.L.B.E.C. 541; 2001 (2) UPLBEC 1475; Chandra Pal Singh Vs. Managing Director, U.P. Co-operative Federation & Ors. (Special Appeal No.533 of 2004) decided on 12.10.2006; Salahuddin Ansari Vs. State of U.P. & Ors. (Writ Petition No.19481 of 2003 decided on 18.2.2008; Writ Petition No.13553 of 2004 (Nirmal Singh Vs. State of U.P. & Ors.) decided on 3.4.2007; 2007 (3) ESC 1533; writ petition No. 44002 of 2005, Shiv Shanker Saxena v. State of U.P. and Ors. decided on 3.3.2006

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

1. Heard Sri Vinod Sinha and Sri Mahesh Sharma, learned counsel for the petitioner and Sri C.B.Gupta, learned counsel for the respondent-Bank.

2. A major penalty of removal from service has been imposed upon the petitioner Harihar Nath Shukla, son of Mahabir Shukla working as Field Officer in U.P. Rajya Sahkari Bvhumi Vikas Bank Ltd. *(hereinafter referred to as "the Bank")* vide order dated 26.4.1988, passed by

Managing Director of the Bank, which has given a cause of action to the petitioner to approach this Court assailing the aforesaid order on the ground that without conducting any oral enquiry whatsoever, the impugned order of major penalty has been passed and therefore it is in violation of principles of natural justice as also procedure prescribed in Regulation 85 of U.P. Cooperative Societies Employees Service Regulations, 1975 *(hereinafter referred to as "1975 Regulations").*

3. The petitioner was initially appointed as Assistant Branch Accountant, subsequently promoted as Branch Accountant in 1969 and then as Field Officer on 22.2.1978. He was placed under suspension on 26.8.1983 which followed a charge sheet dated 20.9.1984 (Annexure 3 to the writ petition). Five charges were levelled against the petitioner. One R.K.Agarwal, General Manager was appointed Enquiry Officer who had issued the aforesaid charge sheet. The petitioner submitted a detailed reply (Annexure 4 to the writ petition) denying all the charges levelled against him. No oral enquiry in accordance with the procedure prescribed in Regulation 85 was held by the enquiry officer and he straightaway submitted inquiry report dated 22.11.1985. It appears that the said enquiry report was submitted by one Gopal Gupta, Regional Manager, Jhansi and it was addressed to Sri R.K.Agarwal, General Manager, Headquarter, Lucknow. In the said report all the five charges were held proved. Pursuant thereto a show cause notice dated 24/27.6.1986 was issued to the petitioner as to why he should not be removed from service. The petitioner by letter dated 11.7.1986 required the Managing Director to make available copies of reports which were relied on in the enquiry report to enable him to submit an effective reply. The said request was declined by letter dated 4.10.1986 issued by General Manager (Administration).

4. The petitioner while reiterating the necessity of requisite documents, submitted representation/reply dated 24.10.1986 to the show cause notice. Another reply was submitted by him on 1.12.1986. The petitioner, however, mentioned that he is still awaiting the reports and documents relied by enquiry officer, copies whereof were not given to him and after receiving the same would submit further reply. The respondent no.1 thereafter passed the impugned order of punishment of removal.

5. Sri Vinod Sinha, learned counsel for the petitioner contended that the impugned order is vitiated and nullity in law for the reasons that before imposing penalty of removal, enquiry officer did not conduct any oral enquiry whatsoever and even the documents relied by enquiry officer in his report were not submitted or furnished to the petitioner despite repeated requests and it is another reason for vitiating the entire proceedings.

6. My attention was drawn to the averments made in paras 14 and 15 of the writ petition and reply contained in paras 9 and 10 of the counter affidavit. The petitioner's contention that oral enquiry was not conducted has been replied very vaguely in the counter affidavit.

7. This Court, after hearing Sri Vinod Singh, learned counsel for the petitioner, on 18.9.2012 specifically required from Sri C.B.Gupta, Advocate, appearing for the respondent-Bank to tell clearly whether any oral enquiry was ever conducted and if so, place before the Court record, if any, to

show as to on what date the oral enquiry was conducted and in what manner it was conducted, if at all.

8. Sri C.B.Gupta sought adjournment on 18th and 19th September, 2012 both but on 20th September, 2012 categorically stated that there is nothing on record to show that any oral enquiry was ever held against the petitioner. He, however, also could not dispute that for the purpose of disciplinary enquiry, Regulation 85 of 1975 Regulations would govern the proceedings in hand.

9. Thus the respondents could not show and place any material before this Court that any oral enquiry at all was conducted by the Enquiry Officer.

10. No doubt, Regulation 85 (1)(c) of 1975 Regulation provides that if no explanation in respect of charge sheet is received or the explanation submitted is unsatisfactory, the competent authority may award the appropriate punishment considered necessary, but the same would be applicable where no Enquiry Officer has been appointed and the charge sheet has been issued by the disciplinary authority itself or at a stage before appointing the Enquiry Officer. In such a case, it would, however, be incumbent upon the disciplinary authority itself to take and consider such evidence as available to prove the charge and thereafter pass a reasoned and speaking order. However, where an Enquiry Officer is appointed, under Regulation 85 (iv) of 1975 Regulation, he is bound to conduct oral enquiry wherein the employee would have a right to examine the witnesses and contradict evidence, if any, produced by the employer in such enquiry. From the record this Court is satisfied that the Enquiry Officer has submitted enquiry report without holding any oral enquiry whatsoever in which the employee would have been given opportunity to disprove the charge(s).

11. The learned counsel for the respondents, however, sought to defend the disciplinary proceedings on the ground that under 1975 Regulation, unless the employee requests for an opportunity, to be heard in person, it was not necessary to hold oral enquiry. In my view, where the major punishment like dismissal or removal is likely to be imposed, the Enquiry Officer is bound to hold oral enquiry wherein first of all the department must prove the charge and thereafter the delinquent employee shall have an opportunity to repel such evidence by producing his evidence.

12. An oral enquiry would be necessary even if the delinquent employee has failed to submit reply to the charge sheet. In **State of U.P. & another Vs. T.P. Lal Srivastava, 1997 (1) LLJ 831,** the Hon'ble Apex Court held that even if the employee has failed to submit reply to the charge sheet, it would not absolve the Enquiry Officer from proceeding with the oral enquiry and submit report as to whether charge is proved or not. After recording of evidence, he will find out whether the charge is proved or not and submit report to the disciplinary authority.

13. In **Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541**, a Division Bench of this Court considering the question as to whether holding of an oral enquiry is necessary or not, held that if no oral enquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in **Subhash Chandra Sharma Vs.**

U.P.Cooperative Spinning Mills & others, 2001 (2) UPLBEC 1475 and Laturi Singh Vs. U.P. Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 6th May, 2005.

14. The aforesaid exposition of law makes it clear that the delinquent employee has a right to defend himself at different stages. When the charge sheet is served upon him, he has right to submit his reply and in case he does not submit reply, that itself would not amount to admission of guilt or that the charge stand proved. If the allegations are serious and may result in major penalty, the disciplinary authority may appoint Enquiry Officer. Such Enquiry Officer, thereafter would have to fix a date for oral evidence. At this stage the delinquent employee has a right to participate in the oral enquiry, examine witnesses, if produced by the department, and after the evidence of the department is completed, the delinquent employee may produce evidence in his defence. During the course of oral enquiry, the delinquent employee has right to participate at every stage and date and if there is any failure in participation on one or more occasions, the Enquiry Officer cannot deny him participation from the subsequent stage. The delinquent employee can participate at subsequent other stage. The Enquiry Officer, after completion of oral enquiry, will submit its report after discussing the entire material and if any charge is proved, the disciplinary authority shall supply a copy of the enquiry report to the delinquent employee and he would again have a right to submit reply to the enquiry report. This procedure is further fortified from the scheme of Regulation 85 (1), which provides that the delinquent employee shall be served with a charge sheet and shall be given opportunity to submit explanation within a reasonable time, which shall not be less than 15 days. Regulation 85 (1)(b) thereafter provides that the delinquent employee can produce evidence in defence and cross-examine the witnesses, if any, and also to be given opportunity for further being heard in person, if he so desires. The occasion to afford opportunity to the delinquent employee contemplated under the aforesaid Regulation at different stages during the oral enquiry, would arise only when an oral enquiry is held. The Enquiry Officer is obliged to give an opportunity to the delinquent employee to participate in oral enquiry and examine the witnesses of the department. Even mere absence of reply of charge sheet shall not result in deeming in the charges proved. In the present case the petitioner has clearly denied charges. Therefore, non-holding of oral enquiry, in view of this Court, shall vitiate the entire proceedings.

15. The above view has been reiterated by this Court in **Chandra Pal Singh Vs. Managing Director, U.P. Co-operative Federation & Ors. (Special Appeal No.533 of 2004)** decided on 12.10.2006, **Salahuddin Ansari Vs. State of U.P. & Ors. (Writ Petition No.19481 of 2003** decided on 18.2.2008 and **Writ Petition No.13553 of 2004 (Nirmal Singh Vs. State of U.P. & Ors.)** decided on 3.4.2007. The Division Bench in **Chandra Pal Singh (supra)** after referring to the earlier judgments in **State of U.P. Vs. T.P.Lal Srivastava (supra) and Subhash Chandra Sharma (supra)** said:

"In our view, where the major punishment like dismissal or removal is likely to be imposed, the Enquiry Officer is bound to hold oral enquiry wherein first of all the department must prove the charge and thereafter the delinquent employee

shall have an opportunity to repel such evidence by producing his evidence."

16. In view of the above exposition of law, the impugned order of removal dated 26.4.1988 cannot sustain.

17. The question now arise as to what relief should be granted to the petitioner after 24 years. Whether as a result of setting aside of impugned order of removal, he is automatically entitled for entire consequential benefits like reinstatement and full backwages or the relief should be moulded differently.

18. It cannot be disputed that charges levelled against the petitioner, if correct and proved, are serious and may entail a major penalty. However, on the contrary, it is also evident that petitioner by now has crossed the age of superannuation and therefore, at this stage, punishment of dismissal and removal is improbable. But that would not mitigate the problem. Still if the charges are proved, an appropriate punishment, whatever permissible in law, can be imposed. In this regard I find some assistance from a Division Bench judgment of this Court in **General Manager, National Thermal Power Corporation Ltd. Vs. Gurucharan Singh, 2007(3) ESC 1533,** where issue no.4 relates to similar controversy and while adjudicating thereupon, the Court refers to various decision of Apex Court and this Court and said as under:

*"21. ...In **Managing Director, ECIL v. B. Karunakaran JT 1993(6) SC 1 :(1993) 4 SCC 727** it was held that the question whether an employee would be entitled for back wages and other benefits from the date of his dismissal to the date of his reinstatement should be left to be decided by the departmental authorities in accordance with Rules and in the light of the culmination of the proceedings and their outcome.*

*22. In **V.J. Alexander (supra)** while setting aside the order of dismissal on the ground of denial of adequate opportunity, the Court in para 16 held as under:*

"On a conspectus of the decisions aforestated, we veer around the view that in cases where order of dismissal or removal of a delinquent employee is interfered with on the ground of some procedural lacuna or defect in the domestic enquiry and it is not examined independently by the Court whether the charges against the delinquent employee are established on the material on record which exercise is impermissible in Court's certiorari jurisdiction under Article 226 of the Constitution except, perhaps, where such exercise is considered by the Court convenient and feasible on admitted facts brought before it, the Court should demolish the order of removal or dismissal passed by the departmental authority and remit the matter to the disciplinary authority to follow the procedure from the stage at which fault was committed and take action according to law. Pending such enquiry delinquent employee must be deemed to be under suspension entitled to such subsistence allowance as may be admissible subject, of course, to the fulfilment of the pre-requisite conditions, if any, laid down in the relevant Service Rules/Regulations/Executive Orders. In cases where the Court finds on consideration of the material on record, that the charges levelled against the delinquent employee are not sustainable and he is entitled to be exonerated then in that event, notwithstanding the delay that may have taken place, it may direct

reinstatement of the employee with consequential benefits unless the case falls within any exceptional category and the Court finds that the reinstatement of delinquent employee would be prejudicial to the larger interest of the establishment."

23. In ***Banaras Hindu University, Varanasi and Ors. v. J.N. Tripathi (supra)*** *it was held that " an order for payment of full back wages is not to be passed as a matter of course in every case in which the order of dismissal is set aside or quashed by the High Court."*

24. Same is the view taken in ***writ petition No. 44002 of 2005, Shiv Shanker Saxena v. State of U.P. and Ors.*** *decided on 3.3.2006. Thus, we are also of the view that the Hon'ble Single Judge instead of directing for reinstatement of the petitioner with entitlement of entire arrears of salary, ought to have directed that during the course of disciplinary inquiry the petitioner/employee shall be treated under suspension and paid his subsistence allowance. Further for the period, he had been wrongly dismissed and remained out of job for that period also he should be paid subsistence allowance. The entitlement of the petitioner for full wages shall depend on the outcome of the inquiry whereafter disciplinary authority shall pass appropriate orders in terms of the relevant Standing Orders and law."*

19. In the result, the writ petition is allowed. The impugned order of dismissal dated 26.4.1988 (Annexure 11 to the writ petition) is set aside. The respondents are at liberty to proceed afresh after the stage of receiving reply of charge sheet from the petitioner and after holding an enquiry under Regulation 85 and shall pass a fresh order within six months from the date of production of a certified copy of this order.

20. In case the above procedure is followed, petitioner's entitlement for arrears of salary and other consequential benefits would follow the final order passed by respondents-competent authority. In case the respondents failed to follow the procedure, as directed above, and do not pass a final order within time prescribed above, the petitioner shall be entitled for all consequential benefits, as are permissible in law, under relevant rules and regulations etc.

21. The petitioner shall also entitled to cost, which I quantify to Rs.10,000/-

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2012

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

Civil Misc. Writ Petition No. 19063 of 1999

M/S Swadeshi Cotton Mills ...Petitioner
Versus
Labour Court,(II) U.P. Kanpur & Others ...Respondents

Counsel for the Petitioner:
Sri Devendra Pratap
Sri Siddharth.Singh

Counsel for the Respondents:
C.S.C.
Sri N.P. Singh
Sri J.P. Gupta

U.P. Industrial Dispute Act, 1947-Labor Court Award-challenged on grounds-no back wages could be given in absence of specific pleading regarding no gainfully worked elsewhere, Secondly-non applicability of the provisions of Section 17-B of Central Industrial Dispute Act-

held-in view of law laid down by Apex Court in U.P.S.R.T.C. Vs. Surendra Singh-award regarding payment of wages even after retirement, coupled with the fact of non consideration of gainful working neither award nor interim order sustainable-accordingly with necessary modifications-order impugned quashed.

Held: Para 10 and 11

It may be noted that the provisions of Section 17-B are contained in the Industrial Disputes Act, 1947 (Central Act) and no such provisions exist in the the U.P. Industrial Disputes Act, 1947 and there is no other provision under the U.P. Industrial Disputes Act, 1947 which is equivalent to the provisions of Section 17-B of the Industrial Disputes Act, 1947 (Central Act). Moreover, as regards applicability or non-applicability of Section 17-B of the Industrial Disputes Act, 1947 (Central Act) to the case under the U.P. Industrial Disputes Act, 1947, the Supreme Court in Civil Appeal No. 359 of 2007 arising out of SLP (C) No. 882 of 2007 U.P.S.R.T.C. Versus Surendra Singh has held that the provisions of Section 17-B of the Industrial Disputes Act, 1947 (Central Act) do not exist in the U.P. Industrial Disputes Act, 1947.

Thus, in view of the above settled proposition of law, I am of the view that the labour court could not have been awarded back wages to the respondent no. 2, workman in absence of any pleading on the part of the workman that he was not gainfully employed anywhere after the termination of his service on 31.07.1991. Moreover, the provisions of Section 17-B of the Industrial Disputes Act, 1947 (Central Act) do not find place in the U.P. Industrial Disputes Act, 1947 and therefore, applying the law laid down by the Supreme Court in the case of U.P.S.R.T.C. Versus Surendra Singh (supra), direction no. 3 in the interim order also could not have been given.

Case law discussed:

(2005) 5 SCC 591; (2006) 1 SCC 479; (2006) 7 SCC 180; (2008) 8 SCC 664

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

1. This writ petition has been filed by the petitioner challenging the order dated 27.03.1997 as published in the official Gazette on 04.10.1997 passed by Labour Court (II) U.P., Kanpur, respondent no. 1.

2. The facts of the case, in brief, are that, the respondent no. 2, Prem Narain was working as Weaver in the petitioner establishment. He was transferred from one loom to another. He failed to carry out the order of transfer. He was issued a chargesheet on 09.08.1991 to which he submitted his reply on 13.08.1991. Departmental proceedings were initiated against the respondent no. 2/workman and thereafter by an order dated 31.10.1991, petitioner's services were terminated.

3. Aggrieved by the order dated 31.10.1991, the petitioner raised an industrial dispute which was registered as Adjudication Case No. 46 of 1993. As a preliminary issue, on the question as to whether termination of service of the petitioner was according to the principles of natural justice or not, the labour court vide its award dated 15.05.1996 held that the services of the respondent no. 2/workman were terminated illegally and in the departmental proceedings the principles of natural justice had not been complied with. This order was never challenged by the petitioner/Mills and the said order became final.

4. The labour court further proceeded to hear the matter and thereafter, by the impugned award dated 27.03.1997 published on 04.10.1997 directed that the respondent no. 2/workman would be entitled for

reinstatement in service and he will also be entitled for entire salary and back wages for the period from the date when his services were terminated.

5. I have heard Sri Siddharth Singh, learned counsel for the petitioner company and Sri J. P. Gupta, holding brief of Sri N.P. Singh, learned counsel for the respondent no. 2, workman.

6. No doubt the order of termination dated 31.10.1991 passed by the petitioner Mills terminating the services of the respondent no. 2 workman was set aside by the labour court vide its order dated 15.05.1996 and that order was never challenged by the petitioner Mills and therefore, became final but it is also not disputed between the parties that the respondent no. 2 workman in the ordinary course superannuated on 01.07.1997 and therefore, on the date when the award was published on 04.10.1997, the respondent no. 2, workman could not have been reinstated in service. Therefore, the only question which now remains for consideration is as to whether the order of the labour court for awarding the back wages to the respondent no. 2 workman from the date of termination of his service i.e. on 31.10.1991 till date of his reinstatement would be a valid order and whether such an order could be made at all and whether at this stage such an order could be given effect considering the fact that the workman had retired from service on 01.07.1997.

7. From a perusal of the impugned award, it can be seen that there is no discussion of any pleadings by the workman that after the termination of his services, he was not gainfully employed anywhere inasmuch as it is only in these circumstances that the award for back wages could have been made by the labour court. A perusal of the impugned award does not reveal that any such pleading was made by the respondent no. 2, workman or any such issue was ever raised before the labour court. Therefore, before awarding back wages, it was incumbent upon the labour court to have considered this aspect of the matter as to whether the respondent no. 2, workman had been gainfully employed after his services were terminated. In the absence of any positive finding of the labour court and in the absence of pleadings by the respondent no. 2, workman, as back wages could not have been awarded automatically. The consistent view of this Court as well as the Supreme Court is that no back wages can be awarded to the workman automatically in the absence of any pleading by him that during the period he was out of service on account of termination or otherwise, he was not gainfully employed:-

The Supreme Court in ***(2005) 5 SCC 591, General Manager, Haryana Roadways vs. Rudhan Singh*** has held as follows:-

"8. There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job

and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calender year."

In ***(2006) 1 SCC 479, U.P. State Brassware Corpn. Ltd. and another vs. Uday Narain Pandey*** the Supreme Court has held as follows :-

"22. No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P. Industrial Disputes Act."

42. A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

61.It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman"

Therefore, the Court has held as follows:-

45. The Court, therefore, emphasised that while granting relief application of mind on the part of the Industrial Court is imperative. Payment of full back wages, therefore, cannot be the natural consequence.

In ***(2006) 7 SCC 180, U.P.S.R.T.C. vs. Mitthu Singh*** the Supreme Court has held as follows:-

"12. Since limited notice was issued with regard to payment of back wages, we do not enter into the larger question whether the action of terminating the services of the respondent was legal, proper and in consonance with law. But we are fully satisfied that in the facts and circumstances of the case, back wages should not have been awarded to the

respondent workman. In several cases, this Court has held that payment of back wages is a discretionary power which has to be exercised by a court/tribunal keeping in view the facts in their entirety and neither straitjacket formula can be evolved nor a rule of universal application can be laid down in such cases.

16. Thus, entitlement of a workman to get reinstatement does not necessarily result in payment of back wages which would be independent of reinstatement. While dealing with the prayer of back wages, factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate court/tribunal."

In ***(2008) 8 SCC 664, State of Maharashtra and others vs. Reshma Ramesh Meher and another*** the Supreme Court has held as follows:-

"24. It is true that once the order of termination of service of an employee is set aside, ordinarily the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back wages, which is independent of reinstatement. While dealing with the prayer of back wages, factual scenario, equity and good conscience, a number of other factors, like the manner of selection, nature of appointment, the period for which the employee has worked with the employer etc., have to be kept in view. All these factors and circumstances are illustrative and no precise or abstract formula can be laid down as to under what circumstances full or partial back wages should be awarded. It depends upon the facts and circumstances of each case."

8. At the time of admission of this writ petition on 10.05.1999, this Court had been pleased to pass the following order:-

Heard Sri Devendra Pratap, learned counsel for the petitioner.

Issue notice to respondent no. 2, who may file counter affidavit within six weeks. List thereafter.

In the meantime the impugned award dated 27.03.1997, annexure-12 to the writ petition, shall remain stayed provided:

(1) the back wages to the extent of 50 per cent payable under the award are deposited with the concerned Labour Court within two months from today.

(2) a sum equal to wages payable to the workman from the date of the award till the last preceding month is paid to the respondent workman within two months from today; and,

(3) wages at the rate admissible under Section 17-B of the Industrial Disputes Act, 1947 for the succeeding months shall be paid to the respondent-workman, month by month basis, till further orders of this Court ***(see Dena Bank Vs. Kirti Kumar T. Patel AIR 1998 SC-511).***

The back wages so deposited, in terms of this order, shall be invested in some Nationalized Bank by the concerned Labour court under an interest earning term deposit scheme initially for a period of one year, subject to further renewal.

This deposit shall be subject to the ultimate decision of this petition.

In the event of default in complying with any of the aforementioned conditions, the present stay order shall automatically come to an end and award in question shall become enforceable and recovery proceedings, if any, shall revive.

9. With regard to the condition no. 2 in the interim order, it may be noted that if the petitioner had superannuated w.e.f. 01.07.1997 no such direction to pay wages to the workman from the date of the award till the last preceding month could have been directed. Therefore, directions no. 2 in the interim order could not have been given.

10. Besides, so far as the direction no. 3 in the interim order is concerned, the petitioner department had filed an application dated 21.07.1999 for modification of the said direction on the ground that it was not possible to comply with the direction in the interim order to pay back wages to the respondent no. 2 workman at the rate admissible under Section 17-B of the Industrial Disputes Act, 1947 as the workman had already superannuated on 01.07.1997. It may be noted that the provisions of Section 17-B are contained in the Industrial Disputes Act, 1947 (Central Act) and no such provisions exist in the the U.P. Industrial Disputes Act, 1947 and there is no other provision under the U.P. Industrial Disputes Act, 1947 which is equivalent to the provisions of Section 17-B of the Industrial Disputes Act, 1947 (Central Act). Moreover, as regards applicability or non-applicability of Section 17-B of the Industrial Disputes Act, 1947 (Central Act) to the case under the U.P. Industrial Disputes Act, 1947, the Supreme Court in Civil Appeal No. 359 of 2007 arising out of SLP (C) No. 882 of 2007 ***U.P.S.R.T.C. Versus Surendra Singh*** has held that the provisions of Section 17-B of the Industrial Disputes Act, 1947 (Central Act) do not exist in the U.P. Industrial Disputes Act, 1947. The judgment is short and is reproduced in its entirety as follows:-

"Leave granted.

This appeal has been filed by the U.P. State Road Transport Corporation against an interim order passed by the High Court of Allahabad by which the High Court has modified the interim order granted by it staying the operation of the award to the extent that the appellant shall comply with the provisions of Section 17-B of the Industrial Disputes Act, 1947.

It is not in dispute that the provisions of Section 17-B of the Industrial Disputes Act do not exit in the U.P. Industrial Disputes Act. In this view of the matter, question of compliance of the said provision does not arise at all. Accordingly, the impugned order is set aside. This, however, shall not preclude the respondent from making fresh application for grant of interim relief in his favour in accordance with law. Since the appeal is pending, we direct the High Court to dispose of the appeal preferred by the appellant within a period of six months from this date positively without granting any unnecessary adjournments to either of the parties.

Accordingly, the appeal is allowed to the extent indicated above. There shall be no order as to costs."

11. Thus, in view of the above settled proposition of law, I am of the view that the labour court could not have been awarded back wages to the respondent no. 2, workman in absence of any pleading on the part of the workman that he was not gainfully employed anywhere after the termination of his service on 31.07.1991. Moreover, the provisions of Section 17-B of the Industrial Disputes Act, 1947 (Central Act) do not find place in the U.P. Industrial Disputes Act, 1947 and therefore, applying the law laid down by the Supreme Court in the case of U.P.S.R.T.C. Versus Surendra Singh (supra), direction no. 3 in the interim order also could not have been given.

12. Since, the provisions of Section 17-B of the Industrial Disputes Act, 1947 (Central Act) do not find any place or mention in the U.P. Industrial Disputes Act, 1947 and no such direction no. 3 for paying wages under Section 17-B of the Industrial Disputes Act, 1947 could have been given, therefore, the modification application stands allowed in terms of the observations made herein above.

13. In view of the above stated position, this writ petition is, therefore, allowed. The impugned award dated 27.03.1997 as published on 04.10.1997 is quashed.

14. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2012

BEFORE
THE HON'BLE VIJAY PRAKASH PATHAK, J.

Criminal Misc. Application No. 24958 of 2007

Arjun Singh Bhadoriya and others ...Applicants
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri R.N.Sharma
Sri A.K.Sharma

Counsel for the Respondents:
Govt. Advocate
Sri Alkesh Singh Chauhan
Sri Suneel Kr. Dubey

Cr.P.C.-Section-482-quashing of Criminal Proceeding-offense under Section 498-A I.P.C.-readwith ¾ D.P. Act-on ground as per version of FIR-incident took place at Jaipur-where F.I.R. was lodged by daughter of complainant-during investigation all allegation found baseless-present FIR by father of complainant for same incident at Mainpuri-allegation of demand of Dowry and "MARPIT' took place at Jaipur-non of alleged misdeed committed at Mainpuri-Court at Mainpuri has no jurisdiction-entire proceeding quashed-being abuse of process.

Held: Para 20

In view of the aforesaid consideration, in my opinion, the Court at Mainpuri has no jurisdiction to enquire into or try the offences which are alleged to have committed at Jaipur. Moreover, the FIR had already been lodged by Smt. Alka Bhadoriya at Jaipur regarding torture, ill-treatment and demand of dowry against the applicants, in which final report has

been submitted by the police after investigation and the notices have been issued to her by the concerned Magistrate and the matter is still pending there. Hence, the proceedings before the Court of C.J.M., Mainpuri are nothing but an abuse of process of the court, which are liable to be quashed and this application is liable to be allowed.

Case Law discussed:

(2007) 1 Supreme Court Cases (Cri) 336; 2004 Supreme Court Cases (Cri) 2134

(Delivered by Hon'ble Vijay Prakash Pathak, J.)

1. This application under Section 482 Cr.P.C. has been filed by the applicants Arjun Singh Bhadoriya and three Others with the prayer to quash the charge sheet dated 10.3.2006 filed in Case Crime No. C-15 of 2006, under Sections 498-A, I.P.C. and D.P. Act, P.S. Kotwali Mainpuri and the summoning order dated 26.7.2006 passed by the Chief Judicial Magistrate, Mainpuri and the entire proceeding in case no. 1218 of 2006 State Vs. Dinesh Bhadoriya and Others under Sections 498-A I.P.C. and D.P. Act, Police Station- Kotwali, District- Mainpuri pending in the Court of C.J.M., Mainpuri.

2. The facts of the case are that opposite party no.2, Ram Prakash Singh Chauhan filed an application under Section 156(3) Cr.P.C. before C.J.M., Mainpuri against Dinesh Singh Bhadoriya and four others with the allegations that her daughter Alka was married with Dinesh Bhadoriya, resident of 82, Krishna Nagar Officers Enclave, Jhotwada, Jaipur (Rajasthan) on 9.2.2004. In the marriage sufficient gifts and dowry were given but the accused persons were not satisfied with the said dowry and started to demand a Maruti Car and when the complainant went to Jaipur to take her, they clearly told him that unless Maruti Car is provided, his daughter will not be sent with him. It is further alleged that due to non fulfillment of their said demand, the accused persons used to commit mar-peet with his daughter about which she complained to him on telephone. Thereafter, the complainant alongwith others went to Jaipur and tried to subside the matter and assured the accused persons that he will fulfill their demand after arranging the money. He also took a loan of Rs. two lakhs and paid the same to Dinesh Singh (husband) for his business purposes but thereafter, seeing that his demands are not being fulfilled and inspite of assurance given by complainant, Dinesh Singh and his family members started to harass the victim again. In the meantime, a daughter was born to Alka and on 27.11.2005, the accused sent her only in the clothes she was wearing to Mainpuri and since then she has been residing with the complainant at Mainpuri. Thereafter, Dinesh Singh also told him on telephone that unless a Maruti Car is provided, he is not ready to keep his daughter.

3. The said application of the complainant was directed to be registered as FIR and hence an FIR was registered as case Crime No. C-15 of 2006 at P.S.- Kotwali, Mainpuri on 9.2.2006, under Sections 498-A IPC and D.P. Act. The said FIR was investigated by the police of Kotwali Mainpuri and after investigation, the Investigating Officer submitted charge sheet against the applicants and Dinesh Singh Bhadoriya, husband of the victim. On the said charge sheet the learned C.J.M. took cognizance and summoned the accused persons.

4. Hence, the present petition has been filed to quash the said charge sheet, summoning order and the entire proceeding of the aforesaid case.

5. In the petition filed on behalf of the applicants, it has been averred that applicant no.1 is the father-in-law, applicant no.2 is mother-in-law, applicant no.3 is Devar of Smt. Alka and applicant no.4 is an extremely old man aged about 70 years, retired from service, who is living in a separate house about 10 k.ms. away. The marriage of Smt. Alka Bhadoriya and Dinesh Singh was solemnized on 9.2.2004 without any dowry. After marriage Dinesh Singh Bhadoriya was keeping his wife Smt. Alka with full love and affection but immediately after marriage Smt. Alka Bhadoriya started pressurizing her husband to live separately and she did not participate in daily domestic work with her mother-in-law. In such circumstance, the applicant no.1 and 2 decided for a family partition between them and their sons and accordingly family partition was made, in which it was agreed that Dinesh Singh Bhadoriya, husband of Smt. Alka will be owner and in possession of a shop known as Bhadoriya Paint House situated in Khatipura Circle-Ke-Pas, Chhota Bara Road, Jaipur. Accordingly Smt. Saroj Bhadoriya (applicant no.2), executed a registered gift-deed on 9.9.2004 in favour of his son Dinesh Singh Bhadoriya in respect of the shop, which was registered by Sub-Registrar. Thereafter, the applicant no.1 and 2 also returned to Smt. Alka her entire *Stridhan* and domestic articles for which Smt. Alka also executed a deed receiving the *Stridhan* and the articles given at the time of marriage by her father and this deed was also duly signed as witness by her father Sri Ram Prakash Singh Chauhan (complainant). It is also stated that since 9.9.2004, Dinesh Singh Bhadoriya and his wife Smt. Alka Bhadoriya have been residing separately in a house situated in Mohalla Habib Marg Moti Nagar, Jaipur. The applicant No.1 on 10.9.2004 had got a public notice published in daily newspaper *"Rajasthan Patrika"* informing that all the relations with his son Dinesh Singh Bhadoriya and his wife came to an end and they have been evicted from House no. 82, Krishna Colony Officers Enclave Jhotbara Jaipur, (Rajasthan). Subsequently, Smt. Alka Bhadoriya got executed a sale-deed in respect of the said shop in her favour by her husband on 15.9.2004. Thereafter, on 11.1.2005, Smt Alka in order to extract money from the applicant no.1 and 2, filed an application under Section 156 (3) Cr.P.C. in the Court of Additional Civil Judge (Jr.Div.) / Judicial Magistrate Court No.13, Jaipur praying to direct the concerned S.O. of Police Station to lodge an FIR against the applicants for demanding dowry and harassment. On 11.1.2005, learned Magistrate directed the S.O. concerned to submit report and investigate the matter and thereafter on 15.1.2005 an FIR was lodged against the applicants at P.S. Mahila Thana North, Jaipur, which was registered as Crime No. 6 of 2005, under Sections 498-A, 406 IPC. The concerned Investigating Officer recorded the statements of Smt. Alka and other witnesses under Sectioin 161 of Cr.P.C. and after investigation, he submitted a final report in the said case on which the A.C.J.M. Court No. 13, Jaipur issued notice to Smt. Alka but till date she has not appeared in the Court. Thereafter, on 19.1.2006, father of Smt. Alka Bhadoriya filed an application under Section 156(3) Cr.P.C. against the applicants and Dinesh Singh Bhadoriya in

the Court of C.J.M., Mainpuri on false and vague allegations in respect of the same occurrence alleged to be committed in Jaipur (Rajasthan), on which an FIR was directed to be registered and thereafter investigation was made and charge sheet was submitted by the police before C.J.M., Mainpuri (which is subject matter of the present petition).

6. In counter affidavit filed on behalf of opposite party no.2, several facts about marriage of Alka Bhadoriya with Dinesh Singh Bhadoriya and relations of the applicants with her have been admitted while several other facts have been denied. The filing of application under Section 156(3) Cr.P.C. by Smt. Alka Bhadoriya on 11.1.2005 in the Court of Additional Civil Judge (Jr. Div.) / Judicial Magistrate, Court No. 13, Jaipur and order of the Court, directing the Station Officer concerned to submit the report and investigate the matter, investigation of the matter by Investigating Officer after registering the case under Section 498-A, 406 IPC and thereafter submitting of the final report, all these facts have not been denied and it is stated that she (Smt. Alka Bhadoriya) has not received any notice issued by the Jaipur Court against the said final report submitted in the case lodged by her.

7. In counter affidavit, it is also stated that the demand of Rs. 50,000/- was made by the applicants from Alka Bhadoriya and she was tortured physically and mentally. It is also stated that another FIR has been lodged for another incident, hence, it was not barred by law. It is also stated that even before their marriage when the applicants came to the complainant's house at Mainpuri in *Goad-bharai* (engagement) *ceremony*, a Maruti Car was demanded as an essential requirement for marriage and in the marriage, the said demand was repeated and as such the Court at Mainpuri has jurisdiction to pass order and take cognizance against the applicants.

8. In rejoinder affidavit, the contents of the petition have been reiterated.

9. Heard Sri Brijesh Sahai, learned counsel for the applicants, Sri Alkesh Singh Chauhan, learned counsel for the opposite party no.2 and learned AGA for the State and perused the record.

10. Learned counsel for the applicants has submitted that Smt. Alka Bhadoriya daughter of the complainant Ram Prakash Chauhan (opposite party no.2) had already filed an application under Section 156(3) Cr.P.C. before the concerned Magistrate at Jaipur (Rajasthan) against the applicants for demand of dowry, torture and harassment, in which after investigation, a final report was submitted by the Investigating Officer and now the present FIR got lodged by her father Ram Prakash Chauhan (opposite party no.2) at Police Station- Kotwali, Mainpuri (U.P.) on similar facts and regarding the incidents alleged to have taken place at Jaipur is not maintainable and the order taking cognizance by C.J.M., Mainpuri on the charge sheet submitted by police after investigation is without jurisdiction as regarding the incident alleged to have taken place at Jaipur (Rajasthan), the Court of CJM at Mainpuri (U.P.) has no jurisdiction to enquire into or try the said offences alleged to have committed at Jaipur. He placed reliance upon a verdict of Hon'ble Apex Court reported ***in (2007) 1 Supreme Court Cases (Cri.) 336***

MANISH RATAN AND OTHERS VS. STATE OF M.P. AND ANOTHER and another verdict of Hon'ble Apex Court reported ***in 2004 Supreme Court Cases (Cri) 2134 Y. ABRAHAM AJITH AND OTHERS VS. INSPECTOR OF POLICE, CHENNAI AND ANOTHER.***

11. On the other hand learned counsel for the opposite party no.2 has submitted that an application under Section 156 (3) Cr.P.C. was filed by the complainant- opposite party no.2 before the C.J.M., Mainpuri, regarding another incident, hence, it was not barred by law. It is also argued that demand of dowry was a continuing offence and in relation to said demand, daughter of the complainant was tortured and harassed, hence, Mainpuri Court has jurisdiction as she was turned out of the house and was residing in Mainpuri alongwith her parents. He also submitted that at the time of marriage itself, the demand of Maruti Car was made, which took place at Mainpuri. Hence, the Court at Mainpuri has jurisdiction to try the same.

12. I have considered the said arguments advanced on behalf of the parties' counsel and case laws as referred to above by the learned counsel for the applicants.

13. The Hon'ble Apex Court in its verdict given in ***MANISH RATAN AND OTHERS VS. STATE OF M.P. AND ANOTHER*** (supra) has held that offence cannot be said to be continuing one only because complainant was forced to leave her matrimonial home and stayed with her parents. In the said matter the facts were that the father of the victim got lodged a complaint with police at Jabalpur alleging that the appellants have been ill-treating his daughter and demanding dowry. Subsequently the victim also got lodged an FIR alleging that her husband and in-laws ill-treated her so much that she had to leave the matrimonial home and went to live with her parents at Datia. It was held that in view of Section 177 Cr.P.C., which ordains that offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed, the offence in question must be inquired into and tried by Court at Jabalpur and not by Court at Datia where no part of cause of action arose.

14. In another verdict ***Y. ABRAHAM AJITH AND OTHERS VS. INSPECTOR OF POLICE, CHENNAI AND ANOTHER*** (supra), the Hon'ble Apex Court has been pleased to held that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. However, the said rule is subject to several exceptions but no such exception is applicable to the case at hand. It was held that the Magistrate concerned had no jurisdiction to deal with matter as no part of cause of action for initiation of proceeding against the accused arose within his local jurisdiction. The facts of the said case were that complaint was filed under Sections 498-A and 406 I.P.C. and Section 4 D.P. Act, 1961 against husband and his relations by the wife at Chennai where she came to stay after leaving her husband's house which was situated in Nagercoil, wherein all the offences were alleged to have taken place at Nagercoil. It was observed that the said offences are not continuing ones. No part of cause of action arose at Chennai. Considering Sections 177 and 178 of Cr.P.C., the Magistrate at Chennai had no

jurisdiction to deal with the matter and proceedings were therefore quashed.

15. Now coming to the facts of the present case, admittedly the FIR was earlier got lodged by Smt. Alka Bhadoriya daughter of opposite party no.2 against the applicants and two others, excluding her husband Dinesh Singh Bhadoriya, which was registered as case crime No. 6 of 2005 on 15.1.2005, under Sections 498-A and 406 IPC, with the allegations that her marriage took place on 9.2.2004 with Sri Dinesh Bhadoriya son of applicant no.1 and 2, in which huge amount was given as dowry but when she came for the first time to Jaipur as newly bride, the accused no. 1 and 2 started torturing and misbehaving with her for bringing less dowry and when after one month she was going to her parent's house, she was allowed to go on the condition that she will be kept only if she brings Rs. 50,000/- as dowry. It was also alleged that the accused No.1 had also tried to outrage her modesty but she did not lodge the report for the same when he tendered a written apology. It is also alleged that certain articles including her jewelery were taken away by the accused persons and the same are in their possession. It is also alleged that ultimately on 9.9.2004, the complainant (Smt. Alka) and her husband were thrown out from the house and her entire *Stridhan* has been forcibly kept detained by the accused persons. Thereafter, she went to Moti Nagar Vaishali Nagar, Jaipur, where she is residing in the house of her uncle Rajpal Singh since 9.9.2004. It is also alleged that on 12.12.2004, the accused persons came there and committed mar-peet with her, abused her and again demanded dowry.

16. The said matter was investigated by the police of police Station Mahila Thana, Uttar Jaipur City and after investigation, a final report dated 15.2.2005 was submitted stating therein that the entire allegations were found to be incorrect as the complainant (Smt. Alka Bhadoriya) wanted to live with her husband separately from her in-laws. Her husband Dinesh Bhadoriya was also owner of a firm named Paint House but as he was not doing any labour, hence, could not earn income from the said shop and consequently he asked his father for money and when his father refused to do so, he put the complainant ahead in the picture and in the garb of the dowry case, he started to blackmail his father.

17. Now the FIR has been got lodged by opposite party no.2 Ram Prakash Singh Chauhan, father of Smt. Alka Bhadoriya, which was registered as Case Crime No. C-15 of 2006 on 9.2.2006 at P.S. Kotwali Mainpuri against the applicants and Dinesh Singh Bhadoriya, husband of Smt. Alka Bhadoriya. In this FIR, it has been alleged by the complainant that marriage of his daughter Alka was solemnized with Dinesh Bhadoriya, resident of Jaipur (Rajasthan) on 9.2.2004, but after marriage Dinesh Singh Bhadoriya and his family members were not satisfied with the gifts and dowry and started demanding a Maruti Car and when the complainant went to take his daughter from Jaipur, they clearly told him that unless Maruti Car is provided, they will not send his daughter. Thereafter, they started committing mar-peet in pursuance to their demand of dowry, which was informed him by his daughter on telephone. Thereafter, the complainant went to Jaipur and tried to subside the matter with Dinesh Singh and

others and assured them that he will fulfill their demand and also took a loan of Rs. 2 lakhs and provided it to Dinesh Singh for doing business, but thereafter they again started to repeat their said demand and ultimately on 27.11.2005 Alka (daughter of the complainant) was sent to Mainpuri in the clothes that she was wearing and since then she is residing at Mainpuri.

18. On perusal of the entire allegations made in the aforesaid FIR, it is apparent that none of the incidents as alleged in the said FIR have taken place at Mainpuri and all the alleged incidents of demand of dowry, committing mar-peet etc. are said to have taken place at Jaipur and the only date mentioned is 27.11.2005, on which date it is alleged that the daughter of the complainant was sent to Mainpuri in the clothes that she was wearing and since then she is residing at Mainpuri.

19. Considering the entire contents as stated in the FIR, even if is taken as it is, none of the incident is alleged to have taken place at Mainpuri. Moreover, Smt. Alka, daughter of the complainant-opposite party no.2 had already got an FIR lodged against the applicants, excluding her husband Dinesh Kumar Bhadoriya, at Jaipur and after investigation in the matter, a final report was submitted before the concerned Magistrate in which notices were also issued to her. Now with almost similar facts the present FIR has been got lodged at P.S. Kotwali, Mainpuri including one additional incident said to have taken place on 27.11.2005 about which it is alleged that on that date Smt. Alka was sent to Mainpuri by the applicants only in the clothes that she was wearing and since then she is residing at Mainpuri. Thus, from the said allegation, it cannot be said that the incident had taken place at Mainpuri or it was a continuing offence as has been held by Hon'ble Apex Court in its verdict ***MANISH RATAN AND OTHERS VS. STATE OF M.P. AND ANOTHER*** (supra).

20. In view of the aforesaid consideration, in my opinion, the Court at Mainpuri has no jurisdiction to enquire into or try the offences which are alleged to have committed at Jaipur. Moreover, the FIR had already been lodged by Smt. Alka Bhadoriya at Jaipur regarding torture, ill-treatment and demand of dowry against the applicants, in which final report has been submitted by the police after investigation and the notices have been issued to her by the concerned Magistrate and the matter is still pending there. Hence, the proceedings before the Court of C.J.M., Mainpuri are nothing but an abuse of process of the court, which are liable to be quashed and this application is liable to be allowed.

21. Accordingly, this application is allowed and further proceedings in pursuance of the charge sheet dated 10.3.2006 submitted in Case Crime No. C-15 of 2005, under Section 498-A, I.P.C. and D.P. Act, P.S. Kotwali Mainpuri and summoning order dated 26.7.2006 passed by the Chief Judicial Magistrate, Mainpuri and the entire proceedings in case no. 1218 of 2006 State Vs. Dinesh Bhadoriya and Others under Section 498-A I.P.C. and D.P. Act pending before C.J.M., Mainpuri are hereby quashed. However, the complainant-opposite party no.2 may redress his grievance, if he so chooses, before appropriate Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 30085 of 2006

Kishan Lal ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Pradeep Chandra

Counsel for the Respondents:
C.S.C.

Code of Civil Procedure-Order1 Rule 10-impleadment application-suit for specific performance-during pendnecy of suit petitioner purchased the disputed property-held-Transferee is necessary and proper property.

Held: Para 3

If Ganga Ram had transferred the property to the petitioner before filing of the suit then it would have been necessary for the plaintiffs to implead the petitioner as subsequent purchaser. Accordingly, if petitioner purchased the property during pendency of the suit he could very well apply for his impleadment as subsequent purchaser. The lower revisional court has wrongly distinguished the authority of the Supreme Court reported in Amit Kumar Shaw and Anr. Vs. Farida Khatoon and Anr. AIR 2005 SC 2209 : (2005) 11 SCC 403 : 2005 (2) ARC 174. It has been held in the said authority that if during pendency of the suit interest is transferred then transferee is a necessary or at least proper party as it is a case of assignment.

Case law Discussed:
AIR 2005 SC 2209: (2005) 11 SCC 403: 2005 (2) ARC 174.

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

1. List revised. No one appears for the respondents. Heard learned counsel for the petitioner.

2. Respondents No.2 & 3 and one Keshav since deceased and survived by respondents No.4 to 7 have filed a suit for specific performance against respondent No.8, Ganga Ram in the form of O.S. No.437 of 1997 for specific performance of a registered agreement for sale alleged to have been executed by Ganga Ram defendant in favour of the plaintiffs on 31.10.1991. During pendency of the suit, petitioner filed an impleadment application stating therein that through registered sale deed dated 23.08.1999 (during pendency of suit) he had purchased the property in dispute from Ganga Ram. The impleadment application was opposed by the plaintiffs. Trial Court/ Civil Judge, Junior Divison, Jhansi rejected the impleadment application on 18.08.2004. Against the said order petitioner filed Civil Revision No.153 of 2004, which was dismissed by A.D.J./ Special Judge, (DAA), Jhansi on 22.04.2006, hence this writ petition.

3. The courts below rejected the application placing reliance upon certain authorities according to which a rival claimant to the ownership is not a necessary or proper party in a suit for specific performance. However, in the present case, the situation is different. Petitioner did not claim that at the time of execution of the agreement he was the owner and Ganga Ram was not the owner. Petitioner's case is that during pendency of the suit Ganga Ram, the defendant had transferred the property to him. If Ganga Ram had transferred the property to the petitioner before filing of the suit then it would have

been necessary for the plaintiffs to implead the petitioner as subsequent purchaser. Accordingly, if petitioner purchased the property during pendency of the suit he could very well apply for his impleadment as subsequent purchaser. The lower revisional court has wrongly distinguished the authority of the Supreme Court reported in **Amit Kumar Shaw and Anr. Vs. Farida Khatoon and Anr. AIR 2005 SC 2209 : (2005) 11 SCC 403 : 2005 (2) ARC 174.** It has been held in the said authority that if during pendency of the suit interest is transferred then transferee is a necessary or at least proper party as it is a case of assignment.

4. Accordingly, writ petition is allowed. Impugned orders are set aside. It is directed that petitioner shall be impleaded in the suit as defendant No.2. However it is clarified that petitioner will not be entitled to take any plea which can not be taken by the defendant No.1.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ABHINAVA UPADHYA, J.

Civil Misc. Writ Petition No. 32317 OF 2012

Hare Krishna Public School ...Petitioner
Versus
Project Manager Dedicated, Freight Corridore Corp. & Others
...Respondents

Counsel for the Petitioner:
Sri Ashish Agrawal

Counsel for the Respondents:
C.S.C.
Sri Govind Saran

<u>Railways Act 1989-Section 20 A (1) (as amended by Act 2008)</u>-Land Acquisition for Railway by notification under Section 20 A (1) on dated 10.02.2009-substance published on 06.03.2009-Deceleration under Section 20 E (1) dated 15.02.2010 published on 18.02.2010-well within one week-held-acquisition proceeding legal-petition to quash acquisition proceeding-dimissed.

Held: Para 26

In view of foregoing discussions. we are of the view that declaration issued under Section 20E(1) of the Railways Act, dated 15th February, 2010 published in the gazette on 18th February, 2010 was well within one year from the date of publication of substance of notification i.e. 6th March, 2009. Thus the prayer of the petitioner for quashing the entire acquisition proceeding on the aforesaid ground cannot be accepted.

<u>Case Law discussed:</u>
2011 (3) AWC 3112=2011 (11) SCC 100; (1995) 1 SCC 133; (1995) 2 SCC 497; (1997) 8 SCC 47; Special Civil Application No.6097 of 2010 (Raghjibhai Kanjibhai Kharsan vs. Union of India) decided on 17th January, 2011; S.B. Civil Writ Petition No.9839 of 2011 (Pushpa Devi Maloo vs. Land Acquisition Officer and others) decided on 2nd April, 2012

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

1. The petitioner by this writ petition, has prayed for quashing the entire proceedings for acquisition of land initiated by notification dated 10th February, 2009 published in the Gazette of India in exercise of power under Section 20A(1) of the Railways Act, 1989 (hereinafter referred to as the Railways Act).

2. We have heard Sri Ashish Agrawal, learned counsel for the petitioner, Sri S.P. Gupta, learned

Advocate General for respondents No.1, 2 and 3 and Sri Govind Saran appearing for respondents No.1 and 4.

3. Brief facts of the case as emerge from pleadings of the parties are; the petitioner is purchaser of Plot No.270/2 by sale deed dated 11th April, 2008. A notification dated 10th February, 2009 under Section 20A(1) of the Railways Act, as amended by the Railways (Amendment) Act, 2008, was published in the Gazette of India notifying its intention to acquire the land situate in district Aligarh for carrying out special railway project, namely, Eastern Dedicated Freight Corridor. Plot No.270 was also included in the notification. The substance of notification was also published in local newspaper "Amar Ujala" dated 6th March, 2009. The declaration of acquisition as contemplated by Section 20E of the Railways Act was issued by gazette notification dated 15th February, 2010 published in the gazette of India Extra Ordinary dated 18th February, 2010. The substance of notification dated 15th February, 2010 was also published in the newspapers on 4th March, 2010. The petitioner claimed to have filed objection on 26th March, 2010. The award was passed by the Special Land Acquisition Officer on 19th January, 2011. The petitioner, after coming to know about the award, made an application to the Special Land Acquisition Officer requesting that Plot No.270/2 should not be acquired and an application to above effect was submitted by the petitioner on 16th March, 2012. The petitioner was communicated by letter dated 23rd March, 2012 that objection raised by the petitioner after 29th February, 2010 cannot be accepted since the land acquisition was proposed keeping in view the alignment of railway track after considering all technical aspects, hence the land of the petitioner cannot be exempted from acquisition. The petitioner has come up in this writ petition challenging the entire acquisition proceedings as well as the order dated 23rd March, 2012.

4. Sri Ashish Agrawal, learned counsel for the petitioner, challenging the entire acquisition proceedings, has submitted that notification under Section 20A(1) of the Railways Act having been published on 10th February, 2009 and declaration under Section 20E(1) having not been published within one year from 10th February, 2009, the entire acquisition has lapsed and ceased to have any effect by virtue provisions of Section 20E(3) of the Railways Act. He submits that the relevant date for reckoning one year period for publication of declaration under Section 20E(1) is the date when notification under Section 20A(1) was published i.e. 10th February, 2009 and the declaration having been published on 15th/18th February, 2010, the notification dated 10th February, 2010 shall cease to have any effect and the entire acquisition proceedings deserve to be set-aside on this ground alone. He further submits that the date of publication of substance of notification in local newspapers as contemplated under Section 20S(4) of the Railways Act is not relevant for reckoning the period of one year. He further submits that requirement of publication of substance of the notification under Section 20A(4) is only procedural requirement and non compliance of the same may have different consequences but the said publication is not relevant

for reckoning the period of one year. He has placed reliance on a judgment of the Apex Court in the case of ***Dedicated Freight Corridor Corporation of India vs. Subodh Singh and others*** reported in 2011(3) AWC 3112 = 2011(11) SCC 100.

5. Sri S.P. Gupta, learned Advocate General, refuting the submissions of learned counsel for the petitioner, contends that relevant date for start of limitation is the date when substance of notification is published in local newspapers and the publication in the local newspapers having been made on 6th March, 2009, the declaration issued by notification dated 15th February, 2010 published on 18th February, 2010 is within the period of one year. He submits that Section 20A(4) mandates publication of substance of notification in the newspapers and the publication of notification under Section 20A(1) shall be complete only when the substance is published in the local newspapers. He submits that the judgment of the Apex Court in ***Dedicated Freight Corridor's*** case (supra) is not applicable in facts of the present case since in the said case the Apex Court was considering the provisions of Section 20E(1) in context of Sections 20F(2) and (4) of the Railways Act. Sri Gupta has also placed reliance on judgments of Gujarat High Court and Rajasthan High Court considering Sections 20A and 20E of the Railways Act and submitted that Gujarat High Court and Rajasthan High Court have taken the view that running of limitation of one year period shall start from the date when the notification under Section 20A(1) is published in local newspapers.

6. Sri Govind Saran, learned counsel for the Railways, has adopted the submissions raised by Sri S.P. Gupta and submitted that declaration under Section 20E(1) has been issued within the period of limitation and there is no error in issuing the declaration. Sri Saran has also placed reliance on the judgments of Gujarat High Court and Rajasthan High Court in support of his submissions.

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

8. Before we proceed to consider the rival submissions raised before us, it is useful to have a look on the statutory provisions of the Railways Act.

9. Chapter-IVA has been inserted in the Railways Act by Act No.11 of 2008 providing for "Land Acquisition for a Special Railway Project". Section 20A relates to power to acquire land, Section 20B contains power to enter for survey, Section 20C provides for evaluation of damages during survey, measurement etc, Section 20D deals with hearing of objection and Section 20E deals with declaration of acquisition. Section 20A, 20D and 20E, which are relevant in the present case, are as follows:-

*"**20-A. Power to acquire land, etc.**- (1) Where the Central Government is satisfied that for a public purpose any land is required for execution of a special railway project, it may, by notification, declare its intention to acquire such land.*

(2) Every notification under sub-section (1), shall give a brief description of the land and of the special railway

project for which the land is intended to be acquired.

(3) The State Government or the Union territory, as the case may be, shall for the purposes of this section, provide the details of the land records to the competent authority, whenever required.

(4) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which shall be in a vernacular language.

20-D. Hearing of objections, etc.- *(1) Any person interested in the land may, within a period of thirty days from the date of publication of the notification under subsection (1) of Section 20-A, object to the acquisition of land for the purpose mentioned in that sub-section.*

(2) Every objection under sub-section (1), shall be made to the competent authority in writing, and shall set out the grounds thereof and the competent authority shall give the objector an opportunity of being heard, either in person or by a legal practitioner, and may, after hearing all such objections and after making such further enquiry, if any, as the competent authority thinks necessary, by order, either allow or disallow the objections.

Explanation.-For the purposes of this sub-section, "legal practitioner" has the same meaning as in clause (i) of sub-section (1) of Section 2 of the Advocates Act, 1961 (25 of 1961).

(3) Any order made by the competent authority under sub-section (2) shall be final.

20-E. Declaration of acquisition.- *(1) Where no objection under sub-section (1) of Section 20-D has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objections under sub-section (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification, that the land should be acquired for the purpose mentioned in sub-section (1) of Section 20-A.*

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under subsection (1) of Section 20-A for its acquisition, but no declaration under sub-section (1) of this section has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:

Provided that in computing the said period of one year, the period during which any action or proceedings to be taken in pursuance of the notification issued under subsection (1) of Section 20-A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority."

10. As noted above, the bone of contention between the parties is as to whether one year period provided for issuance of declaration under Section 20E(1) of the Railways Act shall begin from the date of notification issued under Section 20A(1) or from the date when the cause of substance of notification is published in the local newspapers. Section 20A(1) provides that where the Central Government is satisfied that for a public purpose any land is required for execution of a special railway project, it may **by notification declare its intention to acquire such land.** Sub-section (4) of Section 20A mandates that competent authority **shall** cause the substance of the notification to be published in two local newspapers.

11. Section 20D of the Railways Act, which provides for hearing of objection, contemplates that any person interested in the land may, within a period of **thirty days from the date of publication of the notification** under Sub-section (1) of Section 20A of the Railways Act, object to the acquisition of land. Section 20D uses the phrase ".... 30 days from the date of publication of notification under sub-section (1) of Section 20A".

12. Section 20E(3) provides that where a notification has been published under sub-section (1) of Section 20A and no declaration has been published **within a period of one year from the date of publication,** the said notification shall cease to have any effect. Section 20E(3) also uses the phrase "from the date of publication of that notification". The words "that notification" obviously refer to notification under Sub-section (1) of Section 20A. Both the sections 20D(1) and 20E(3) contemplate "publication of notification" issued under Sub-section (1) of Section 20A. The word "notification" has been defined in Section 2(26) of the Railways Act in following manner:-

"2(26) "Notification' means a notification published in the Official Gazette."

13. The notification under Section 20A(1) is thus required to be published in the official gazette. The word "notification" itself inhere the concept of publication in the official gazette that is why in Section 20A(1) of the Railways Act the legislature had not used the words "publication of the notification in the official gazette" because publication in the official gazette is already contemplated in the word "notification". In sub-section (4) of Section 20A the legislature has provided for publication of the substance of the notification in two local newspapers. The words "notification to be published" have been used in sub-section (4). Sections 20D(1) and 20E(3), as quoted above, use the phrase "publication of the notification". The use of the words "notification to be published" in Section 20A(4) has to be given some meaning because legislature does not waste a single word or use any superfluous word in a statute which is one of the accepted principles of statutory interpretation.

14. The interpretation, which we have put to the words "notification to be published" as used in Section 20A (4) has to be tested in another manner also. Suppose under Section 20D(1), which also uses the words "publication of the notification", the date of notification as

published in the official gazette under Section 20A(1) is taken for the start of period of 30 days of limitation for filing an objection, the land owner may not see gazette publication and thus shall be deprived of exercising his right of objection within 30 days and in the event the publication of substance of notification is after one month from the date of publication of notification in the official gazette, he may have no right of objection even though he may file an objection within 30 days from the date the substance of notification was published. Putting this interpretation to Section 20D(1) shall obviously defeat the purpose and object of providing 30 days time to a land owner to submit his objection to the proposed acquisition of land. Thus we have no doubt that the words "publication of the notification" occurring under Section 20D(1) has to be interpreted to mean the publication of substance of the notification as contemplated by Section 20A(4). If any other meaning is put to the aforesaid words that will defeat the very purpose and object of Section 20D of the Railways Act.

15. When for the purposes of Section 20D the words "publication of the notification" are to be treated to be publication of substance of the notification in two local newspapers, we cannot impute any other meaning of the words "publication of the notification" under Section 20E(3) since Section 20E(3) also uses the same words "publication of the notification". The embargo in issuing declaration under Section 20E(1) has been put with the object and purpose that declaration under Section 20E be issued within a period of one year so that the proceeding may not keep on hanging for a period longer than one year. One year period has been prescribed keeping in view the statutory scheme which provides for filing of objection within one month giving opportunity by the competent authority to an objector and after deciding the objection filed under Section 20D(1). In series of the events beginning from declaration of intention by the Central Government to acquire land by notification all steps have to be given meaning and purpose. The submission of the learned counsel for the petitioner that sub-section (4) of Section 20A is only procedural and may have different consequences but is not relevant for reckoning the limitation, cannot be accepted.

16. The Apex Court had occasion to consider as to whether publication of the substance of notification is mandatory or not under Section 4 of the Land Acquisition Act, 1894 in the case of ***State of Haryana and another vs. Raghubir Dayal*** reported in (1995)1 SCC 133. Section 4 of the Land Acquisition Act, 1894 provides for publication of the notification in the official gazette as well as in two daily newspapers and also public notice of the substance of notification in the locality. Following was laid down by the Apex Court in paragraph 4 of the said judgment:-

*"**4.** ..... It is true that the publication of the substance of the notification under Section 4(1) in the locality is mandatory. The object of publication of notification under Section 4(1) is that the owner of the land sought to be acquired has to exercise his valuable right to file his objections under Section 5-A. The*

publication of the substance of such notification in the locality must, therefore, be mandatory."

17. The Apex Court had also occasion to consider the question as to which is the date to be taken for reckoning the period of limitation for issuing a declaration under Section 6 of the Land Acquisition Act, 1894 in several cases. In the case of ***Krishi Utpadan Mandi Samiti and another vs. Makrand Singh and others*** reported in (1995)2 SCC 497, the Apex Court laid down following in paragraphs 4 and 5:-

*"**4.** The question, therefore, is that which date of the publications in three steps i.e. publication in the Gazette, two news papers and local publication to be the last date for the purpose of computing three years limitation prescribed in Clause (i) of the proviso to s.6(1) of the Act. Prima facie, it gives an impression that the last of any of the three steps puts in motion, the running of limitation of three years. But on deeper probe, it does not appear to be so and such a construction would easily defeat the public purpose and deflects the course of justice. So it is necessary to understand the scheme and policy of the Act to get the crux of the question. It is seen that Sub-s.(1) of s.4 gives power of eminent domain to the State to acquire the land, whenever it appears to it that the land is needed or likely to be needed for any public purpose or for any company, by a notification published in the official gazette and two daily newspapers circulating in that area and at least one of them should be in the regional language and also the Collector is enjoined to cause public notice of the substance of notification to be given at convenient places in the said locality in which the land is situated. It is also mentioned thereunder that the last date of such publication and the giving of such public notice "being hereinafter referred to " as the date of publication of the notification. It would be seen that the purpose of notification under s.4(1) is an intimation to the owner or person having an interest in the land that government exercised the power of eminent domain in relation to his land and for public purpose his land is needed or likely to be needed; puts an embargo on his freedom to deal with the land as an unencumbered land and also pegs the price of the land prevailing as on that date. It also is a caveat to the Collector to make the award under s. 11 as well as to determine the market value prevailing as on the last of the dates to be the date and the award should be made within a period prescribed by s. 11-A. Lest the entire acquisition shall stand lapsed. The word 'hereinafter' is for such purposes as well as for the purpose of determination of the compensation under Chapter III of the Act as well. Therefore, the word "hereinafter" referred to as the last date of the publication of the notification is the date from which the prevailing prices of the land is to be computed etc.*

***5.** Clause (i) of the proviso to s.6(1) mandates the publication of the declaration in the official gazette and it should be within three years from the date of the publication of the notification under s.4(1) i.e. the last of the dates referred to in s.4(1). The word 'publish' emphasises the act accomplished i.e. declaration under s.6(1) being published in the official Gazette. The last date under s.6(2) shall be the date for the purposes "hereinafter referred to" would*

be not for computing the period of three years prescribed in Clause (i) of proviso to s.6(1) of the Act as it was already done, but purposes to be followed hereinafter. Otherwise language would have been "hereinbefore done". Sub-s.(2) as such did not prescribe any limitation within which the declaration under s.6(1) or other steps hereinafter to be taken, in other words, the steps to be taken thereafter in making the award under s. 11 or in computation of the period prescribed in s. 11A. The publication of the declaration in two daily newspapers having circulation in the locality one of which in the regional language and the publication of the substance of the declaration in the locality are ministerial acts and is a procedural part. It appears that these publications are required to be done to make the declaration published in the manner, to be conclusive evidence of the public purpose under s.6(1) and also to provide limitation to make the award under s. 11 by the Collector. In other words, the limitation prescribed under s. 11A is for the purpose of making the award and if the Collector fails to do so, the entire proceeds under s.4(1) and 6(1) shall stand lapsed. If this consistent policy of the Act is understood giving teeth to the operational efficacy to the scheme of the Act and public purpose the Act seeks to serve, we are of the considered view that publication in the official gazette already made under Clause (i) of proviso to subs.(1) of s.6 is complete, as soon as the declaration under s.6(1) was published in the official gazette. That will be the date for the purpose of computation of three years period from the last of the dates of the publication of the notification under s.4(1). The procedural ministerial acts prescribed under sub-s.(2) are only for the purpose of the procedure to be followed "hereinafter", 'in other words, the steps to be taken subsequent to the publication of the declaration under s.6(1) of the Act. We cannot agree with Sri Rana, the learned senior counsel, that the date of making the declaration by the Secretary to the Government or the authorised officer is the date for computing period of three years. Equally, we cannot agree with the learned counsel for the respondents, Sri Padhaya, that publication of the substance being the last date from which the period of three years needs to be computed. Acceptance of either contention would easily defeat the public policy under the Act by skillful manner or management with the lower level officials. The High Court, therefore, was not right in its conclusion that since declaration was published in the newspapers on June4, 1987, after the expiry of three years, the declaration under s.6(1) and the notification under s.4(1) stood lapsed. It is clearly illegal. The further contention of the learned counsel for the respondent that other contention raised in the writ petitions need to be dealt with and so the cases need to be remanded; has no force for the reason that though they were pleaded but the parties have chosen to argue only the above contention. So it is not a fit case for remand. The writ petitions would stand dismissed. The appeals are accordingly allowed but in the circumstances without Costs."

18. Similar was the view taken by the Apex Court in the case of ***Eugenio Misquita and others vs. State of Goa and others*** reported in (1997)8 SCC 47.

19. Much reliance has been placed by the learned counsel for the petitioner on the judgment of the Apex Court in ***Dedicated Freight Corridor's*** case (supra). In the said case the Apex Court had occasion to consider Section 20E and 20F of the Railways Act. It is useful to note the facts of the said case and issues decided. The notification under Section 20A was issued and thereafter declaration under Section 20E(1) was issued on 12th December, 2008 (gazetted on 16th December, 2008). The public notice referring to the notification dated 12th December, 2008 was published in the newspapers on 20th February, 2009. An order was passed by the competent authority determining the compensation under Section 20F(1) on 8th February, 2010. The acquisition was challenged before the Apex Court and it was contended that since the award was published one year after the publication of substance in newspapers, the acquisition proceeding lapsed as contemplated by Section 20F(2). The Apex Court considered the issue in context of Sections 20E and 20F. One of the questions which was framed for consideration was, "Whether the period of one year, stipulated under Section 20-F(2) of the Act, for making the award, has to be reckoned from the date of publication of the declaration under Section 20-E(1) of the Act in the Official Gazette or from the date of any subsequent publication of the declaration in newspapers". The Apex Court in the said judgment had laid down that for purposes of computing period of one year for making an award as contemplated by Section 20F(2), the date of declaration under Section 20E(1) has to be taken a beginning point of limitation and the date of publication of substance of notification is not relevant. There cannot be any dispute to the proposition laid down by the Apex Court in the aforesaid case. It is also relevant to note that Apex Court while considering the issue of beginning point for reckoning the limitation for giving the award has also referred to Section 20A(4) and has laid down that there is a contrast in the statutory scheme as laid down by Section 20A(4) as well as the scheme as laid down in Section 20F which is clear from the observations of the Apex Court made in paragraph 6 of the said judgment. Paragraph 6 of the said judgment is reproduced below:-

*"**6.** . Sub-section (1) of section 20E of the Act provides that the central government shall, on receipt of the report of the competent authority, declare by notification that the land should be acquired for the purpose mentioned in section 20A(1). Sub-section (2) of section 20E of the Act provides that on the publication of such declaration by notification, by the central government, under sub-section (1), the lands shall vest absolutely in the central government free from all encumbrances. Clause (26) of section 2 defines "notification" as a notification published in the official gazette. Section 20E thus requires the notification to be published only in the official gazette. The section does not require the notification of declaration to be published in any newspaper or by any other mode. By way of contrast, we may refer to section 20A(4) relating to preliminary notification and 20F(4) relating to public notice inviting claims before making the award of the Act. Section 20A(4) requires that in addition to publication of a notification by the central government,*

of the declaration of its intention to acquire any land, the competent authority shall cause the substance of the notification to be published in two local newspapers one of which will be in a vernacular language. Section 20F(4) of the Act requires that before proceeding to determine the compensation, the competent authority shall give a public notice in two local newspapers inviting claims. Wherever newspaper publication is required, it has been specifically provided by the legislature. The absence of a similar provision in section 20E for publication in newspapers, makes it clear that the publication of the declaration under section 20E(1) is complete when it is published in the official gazette. The publication of the notification under section 20E(1), or its substance, in any newspaper, is not therefore a requirement under the Act. Even if it is published in any newspaper, such publication will be only for general information and will not serve any purpose under the Act."

20. The ratio of the judgment of the Apex Court, as quoted above, clearly distinguishes the statutory scheme under Section 20A in context to Section 20E and statutory scheme of Section 20F in context to Section 20E. The Apex Court in the said case was considering the starting point of limitation for purposes of Section 20F(2) which is entirely different from the scheme given under Section 20A. Thus the aforesaid judgment does not help the petitioner in the present case and is clearly distinguishable, rather the said judgment supports the interpretation which has been put by us of Section 20A(4) where while referring to Sections 20E and 20A(4) following was observed, "..... By way of contrast, we may refer to Section 20A(4) relating to preliminary notification and 20F(4) relating to public notice inviting claims before making the award...". Thus the Apex Court itself has also referred to provisions of Section 20A(4) as contrast to statutory scheme under Section 20F.

21. Now we come to the judgment of the Rajasthan High Court and Gujarat High Court relied by the learned Advocate General. The Gujarat High Court in Special Civil Application No.6097 of 2010 ***(Raghjibhai Kanjibhai Kharsan vs. Union of India)*** decided on 17th January, 2011 had considered the same issue which has come up in the present case as to whether the period contemplated under Section 20E(3) of the Railways Act is to be reckon from the date of publication of the notice in gazette or from the date of publication of the notification in the newspapers. The facts of the said case were noted in paragraph 4 of the judgment, which is quoted below:-

*"**4.** As noted hereinabove, the notification was published in a gazette on 10.2.2009 under Sub-section (1) of Section 20A. But, this very notification was published in newspaper on 27.2.2009. Whereas, the notification under sub-section (3) of Section 20E was published on 24.2.2010. The contention of the petitioner is that if one year is to be reckoned from the date of publication of the notification in a gazette, one year has already expired on 9.2.2010 and therefore, this notification under Section 20E(3) is beyond the period prescribed and therefore, notification dated 10.2.2009 shall cease to have any effect."*

22. The Gujarat High Court after considering the rival submissions laid down following in paragraphs 8, 8.1, 9 and 10, which are as under:-

*"**8.** The Court after giving thoughtful consideration to the rival submissions of the learned advocates for the parties, is of the opinion that requirement under the law of "publishing notification in a newspaper' is not an empty formality. It is definitely with "a purpose' and that "purpose' is that the public at large takes "note' of the same and "acts' on the same. That being so the date of publication in newspaper is to be given due recognition. This recognition can be given by reckoning the period prescribed from the date of publication of notification in a newspaper.*

***8.1.** Learned advocate for the respondent authorities submitted that the Act being recent one, i.e. of 1989, he is not able to lay hand on any decision wherein period for publication of a notification under Section 20E(3) is reckoned from the date of publication of the notification under Section 20A(1) of the Act in a newspaper. He submitted that if his submission that period be reckoned from the date of publication in newspaper is accepted, it is not going to cause any absurd result and it is not going to cause any prejudice either. In support of his submission that no prejudice is going to be caused to the petitioner, he submitted that though the notification was published in a Government gazette under Section 20A(1) on 10.2.2009 and the same was published in newspaper on 27.7.2009 till the filing of the petition, the petitioner has not filed any objection, as contemplated under the law, meaning thereby the petitioner has not objected to the acquisition of his land.*

***9.** The learned advocate for the respondent Railways also submitted that the present acquisition of the land is for the purpose of Special Railway Project, Western Dedicated Freight Corridor, which is going to be as important as an "artery' in human body. He submitted that accepting the submission of the learned advocate for the petitioner will amount to allowing a too technical submission to frustrate the object of very important project.*

***10.** The Court has found the submissions of learned advocate for the railway acceptable, and is convinced of the fact that in the matter of publication of the notification under Section 20E(3) of the Act, "the period is to be reckoned from the date of publication of the notification in a newspaper and not in a official gazette'."*

23. The Rajasthan High Court in S.B. Civil Writ Petition No.9839 of 2011 (***Pushpa Devi Maloo vs. Land Acquisition Officer and others)*** decided on 2nd April, 2012 had considered the same issue and laid down following in paragraphs 8 and 9:-

*"**8.** Consequently, for the purpose of a declaration under Section 20E(1), the period of one year within which such a declaration has to be made is to be reckoned from the date of publication of the substance of notification under Section 20A(4) in two local newspapers which completes the Section 20A of the Act of 1989 process. The language of Section 20E(3) of the Act of 1989 also mandates that a declaration under*

Section 20E(1) has to be made within one year from the publication of the acquisition proceedings under Section 20A(4) of the Act of 1989. Publication of the notification is under Section 20A(4) of the Act of 1989 and has to be contra-distinguished from the gazetting of the notification under Section 20A(1) of the Act of 1989 and not confused with it. Hence Section 20E(3) of the Act of 1989 also provides that the period will be reckoned from the date of publication of the notification. I find no force in the contention of the counsel for the petitioner that the publication of the notification referred to Sub-section 3 of Section 20E of the Act of 1989 pertains to the gazetting of the notification with reference to section 20A(1) of the Act of 1989 and not to publication thereof under Section 20A(4) thereof. If the notification under Section 20A of the Act of 1989 were to be complete only on being gazetted, there would be no requirement in Sub-section 4 of Section 20A of the Act of 1989 of its publication. In my considered view, the word publication under Sub-section 3 of Section 20E of the Act of 1989 refers to the publication under Sub-Section 4 of Section 20A of the Act of 1989.

9. *In the aforesaid context, the substance of the notification under Section 20A(1) of the Act of 1989 having been published on 21/22.06.2009 and the declaration under Section 20E(1) having been made on 23.01.2010 well within one year, it is wholly valid, legal and regular and no legal deficiency can be attributed thereto. This view also finds support in the judgment of the Gujarat High Court in the case of Raghjibhai (Supra). As far as the contention of the counsel for the petitioner with regard to the judgment of the Hon'ble Supreme Court in the case of Dedicated Freight Corridor Corporation of India (Supra) is concerned, I am afraid that the said judgment is of no succour to the petitioner as the said judgment only seeks to interpret Section 20E(1) of the Act of 1989 with reference to the making of an award under Section 20F(2) of the Act of 1989 and has no manner of concern or relation to the interpretation of Section 20A(1) and Section 20A(4) of the Act of 1989 juxtaposed to Section 20E(3) of the Act of 1989. The issue in the present writ petition is totally foreign to the matter before the Hon'ble Supreme Court. "*

24. Against the judgment of the learned Single Judge of Rajasthan High Court in ***Pushpa Devi's*** case (supra), special appeal was filed before the Division Bench and the Division Bench dismissed the appeal by affirming the view of the learned Single Judge in ***Pushpa Devi's*** case (supra). The judgment of the Division Bench dated 18th May, 2012 was in D.B. Special Appeal (Writ) No. 566 of 2012. The Division Bench after considering the provisions of Sections 20A(1), 20A(4), 20E(1) and 20E(3) had laid down following in paragraphs 15, 16 and 17:-

*"**15.** A conjoint reading of sub-sections (2) to (4) of Section 20A makes it clear that unless a notification, which is issued under sub-section (1) gives a brief description, as required under sub-section (2) and unless the details thereof is furnished to the competent authority, as required under sub-section (3) and unless the said notification is published by the competent authority in two local newspapers, one of which shall be in a*

vernacular language, the proceedings under Section 20A of the Act cannot be said to be completed. If any of the chain between sub-sections (1) to (4) of Section 20A is missing then the notification issued under sub-section (1) can be declared as illegal or vitiated. The notification, which is issued and published in Gazette of India under sub-section (1) is required to be published in two local newspapers also by the competent authority under sub-section (4), one of which shall be in a vernacular language also. Therefore, the period of one year used in sub-section (3) of Section 20A of the Act will commence from the date of publication of two local newspapers, one of which shall be in a vernacular language under sub-section (4) of Section 20A and not from the publication of notification in Gazette of India alone under sub-section (1) of Section 20A of the Act.

16. *Now, we examine the contention of learned counsel for the appellant that the words "published under sub-section (1) of Section 20A for its acquisition" used in sub-section (3) of Section 20E are concerned, the later part of this sub-section (3) has used the words "within a period of one year from the date of publication of that notification". These words "from the date of publication of that notification" make it abundantly clear that the notification has to be published not only in the Gazette of India, as required under sub-section (1), but it has to be published under sub-section (4) of Section 20A of the Act. If the notification was not required to be published in two daily newspapers, one, in vernacular language, then there was no necessity to introduce sub-section (4) in Section 20A and further there was no necessity to use, word, "publication of that notification" in sub-section (3) of Section 20E of the Act. The legislature has intentionally used the word "publication" in sub-section (3) of Section 20E. If notification was required to be published in Gazette only, then using of word "notification" was sufficient, as word notification has already been defined under Section 2(26) that, it means notification published in the Official Gazette. Therefore, the limitation of one year for the purpose of issuance of declaration for acquisition under Section 20E of the Act will commence from the date of last publication of the notification in two local newspapers, one which shall be in a vernacular language. It is pertinent to mention that unless the notification is published in two local newspapers, one of which shall be in a vernacular language, the publication of notification under sub-section (1) of Section 20A cannot be said to be completed. In these circumstances, we find no force in the submission of learned counsel for the appellant. Since notification under Section 20A(1) was issued on 6th November, 2008, it was published in two local newspapers including a paper in a vernacular language on 21st June, 2009 and 22nd June, 2009 and notification/ declaration under Section 20E of the Act was issued on 23rd January, 2010, therefore, it was well within time. The period of limitation of one year in the present case will commence from 22nd June, 2009. The notification under Section 20E was issued on 21st January, 2010 and it was published in Gazette of India on 23rd January, 2010, therefore, it was well within time, the same view has been taken by the learned Single Judge while dismissing the writ petition*

of the petitioner. We find that the reasons assigned by learned Single Judge are absolutely legal and justified and no interference in the same is called for.

17. *Learned counsel for the appellant also submitted that the notification was earlier issued for land to be acquired for Chomu, Mujamabad and Phulera but another or the second notification was issued only in respect of Chomu and Mujamabad and not for Phulera. The petitioner is aggrieved only in respect of land situated in Phulera and since there is no second notification for Phulera, therefore, proceedings are vitiated. We do not find any substance in the submission of learned counsel for the appellant in this regard. There is no bar in issuing another or second notification. He is required to challenge the notification on the basis of relevant provisions of law. He has not pointed out any illegality in issuance of the notification. Therefore, we find no force in his this submission also. "*

25. The submission of of learned Advocate General thus finds full support from the aforesaid decisions of the Gujarat High Court and Rajasthan High Court.

26. In view of foregoing discussions. we are of the view that declaration issued under Section 20E(1) of the Railways Act, dated 15th February, 2010 published in the gazette on 18th February, 2010 was well within one year from the date of publication of substance of notification i.e. 6th March, 2009. Thus the prayer of the petitioner for quashing the entire acquisition proceeding on the aforesaid ground cannot be accepted.

27. In view of the above, we do not find any error in the declaration dated 15th February, 2010 under Section 20E(1) gazetted on 18th February, 2010 and none of the prayer of the petitioner can be allowed.

28. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2012

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No.37158 of 2012

M/s. Dynamic Education Systems (International) Limited and another ...Petitioner
Versus
Bank of Baroda & others ...Respondents

Counsel for the Petitioner:
Sri S.D. Singh

Counsel for the Respondents:
Sri Anadi Krishna Narayana
Sri V.D. Chauhan
Sri Manish Mehrotra.

Constitution of India, Article 226- Doctrine of "forum conveniens" explained-company located in M.P.-direction of company residing in M.P.-Bank who advanced loan situated in M.P.-property auctioned and saled in M.P.-held-most appropriate forum for all parties would be state of M.P.-court declined to exercise discretionary power-petition dismissed by evoking Doctrine of "forum conveniens".

Held: Para 23

It is in this context that the doctrine of *"forum conveniens"* has to be examined and having so examined it and in view of the decisions rendered by the Supreme

Court and the Delhi High Court referred to above, there is no manner of doubt that the more appropriate forum for all the parties to agitate the matter would be the Madhya Pradesh High Court.

Case law discussed:

(2007) 6 SCC 769; AIR 2011 DELHI 174; (2004) 6 SCC 254; AIR 1976 SC 331; AIR 2010 Delhi 43

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

1. M/s. Dynamic Education Systems (International) Limited (hereinafter referred to as the 'Company') having its registered office at Indore in Madhya Pradesh and its Director who resides in Indore have filed this petition for quashing the order dated 24th April, 2012 passed by the Debts Recovery Appellate Tribunal at Allahabad by which the three Appeals filed under Section 20 of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the '1993 Act') for setting aside the order dated 29th July, 2011 passed by the Debts Recovery Tribunal at Jabalpur, have been dismissed. The three Appeals were filed before the Debts Recovery Tribunal at Jabalpur under Section 30 of the 1993 Act to assail the orders passed by the Recovery Officer of the Debts Recovery Tribunal at Jabalpur in Original Application/Execution Case No.84 of 2005. The petitioners have also sought the quashing of the orders passed by the Debts Recovery Tribunal at Jabalpur as also the orders passed by the Recovery Officer of the Debts Recovery Tribunal, Jabalpur.

2. It transpires from the records of the writ petition that the petitioner-Company having its registered office at Indore in the State of Madhya Pradesh was granted a loan of Rs.1.60 Crores by the Bank of Baroda having its Branch office at Indore (hereinafter referred to as the 'Bank') and for this purpose the property belonging to the Company situated in Indore was mortgaged in favour of the Bank. The petitioner-Company committed default in the payment of the loan amount and the Bank filed Original Application No.114 of 2003 before the Debts Recovery Tribunal at Jabalpur under Section 19 of the 1993 Act. The Debts Recovery Appellate at Jabalpur issued the recovery certificate on 19th October, 2005. The mortgaged property of the Company was auctioned on 14th December, 2006 and sale was made in favour of respondent no.4-M/s. Dodeja Builders Pvt. Ltd., Indore. It is against the orders passed by the Recovery Officer of the Debts Recovery Tribunal at Jabalpur, that the petitioner-Company filed three Appeals before the Debts Recovery Tribunal at Jabalpur under Section 30 of the 1993 Act. These appeals were dismissed by the Debts Recovery Tribunal at Jabalpur on 29th July, 2011 against which three Appeals were filed by the Company before the Debts Recovery Appellate Tribunal at Allahabad under Section 20 of the 1993 Act. These appeals have been dismissed by the common order dated 24th April, 2012.

3. The orders passed by the Recovery Officer, Debts Recovery Tribunal at Jabalpur, the order passed by the Debts Recovery Tribunal at Jabalpur and the order passed by the Debts Recovery Appellate Tribunal at Allahabad have been assailed in this petition.

4. A preliminary objection has been raised by Sri Vikram D. Chauhan, learned counsel appearing for the auction purchaser and Sri Manish Mehrotra, learned counsel appearing for the respondent-Bank that since the petitioner-

Company has its registered office at Indore, the respondent-Bank which gave the loan is in Indore and the auction purchaser is also in Indore, this Court should refuse to exercise its discretionary jurisdiction by invoking the doctrine of "*forum conveniens*' and in support of this contention, they have placed reliance upon the decision of the Supreme Court in **Ambica Industries vs. Commissioner of Central Excise, (2007) 6 SCC 769** and the Full Bench of five Judges of the Delhi High Court in **M/s. Sterling Agro Industries Ltd. Vs. Union of India & Ors., AIR 2011 DELHI 174.**

5. Sri S.D. Singh, learned counsel for the petitioners has, however, submitted that as the order passed by the Debts Recovery Appellate Tribunal at Allahabad is also under challenge in this petition, part of cause of action has arisen within the territorial jurisdiction of this Court and, therefore, this Court will have the jurisdiction to entertain the writ petition. In support of his contention, he has placed reliance upon the decision of the Supreme Court in **Kusum Ingots & Alloys Ltd. Vs. Union of India & Anr. (2004) 6 SCC 254.** It is also his submission that even if the doctrine of "*forum conveniens'* is applied, then too the writ petition can be entertained by this Court.

6. Learned counsel for the parties have suggested that the preliminary objection should be decided first.

7. The first issue that needs to be decided is whether part of cause of action has arisen within the territorial jurisdiction of this Court.

8. In this connection learned counsel for the petitioner has placed reliance upon the decision of the Supreme Court in **Kusum Ingots & Alloys Ltd. (supra)** and has submitted that since the order passed by the Debts Recovery Appellate Tribunal at Allahabad is also under challenge in this petition, part of cause of action has arisen within the territorial jurisdiction of this Court.

9. In **Kusum Ingots & Alloys Ltd. (supra)**, the appellant-Company which had its registered office at Mumbai obtained a loan from Bhopal Branch of the State Bank of India. Notice for repayment of the loan was issued from Bhopal under the provisions of "The Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002' (hereinafter referred to as the "2002 Act'). The writ petition was filed by the appellant-Company in the Delhi High Court to question the vires of the 2002 Act. It was submitted by the appellant-Company before the Delhi High Court that since the constitutionality of a Parliamentary Act was in question, the Delhi High Court would have the jurisdiction to entertain the writ petition. The petition was dismissed by the Delhi High Court on the ground of lack of territorial jurisdiction. It is in this context that the Supreme Court examined whether cause of action wholly or in part had arisen within the territorial jurisdiction of the Delhi High Court for the writ petition to be maintainable. The Supreme Court dealt with "cause of action" and the scope of the power conferred on the High Court under Article 226(2) of the Constitution and observed that even if a small fraction of cause of action accrues within the territorial jurisdiction of a High Court, the said High Court will have the jurisdiction and the relevant observations are as follows:-

"6. Cause of action implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitutes the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted inter alia to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Negatively put, it would mean that everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action. Its importance is beyond any doubt. For every action, there has to be a cause of action, if not, the plaint or the writ petition, as the case may be, shall be rejected summarily.

7. Clause (2) of Article 226 of the Constitution of India reads thus:

"(2) The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. "

8. Section 20(c) of the Code of Civil Procedure reads as under :

"20. *Other suits to be instituted where defendants reside or cause of action arises.*--Subject to the limitation aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction -

(a) - (b) * * *

(c) the cause of action, wholly or in part, arises. "

9. Although in view of Section 141 of the Code of Civil Procedure the provisions thereof would not apply to a writ proceedings, the phraseology used in Section 20(c) of the Code of Civil Procedure and Clause (2) of Article 226, being in pari materia, the decisions of this Court rendered on interpretation of Section 20(c) of CPC shall apply to the writ proceedings also. Before proceeding to discuss the matter further it may be pointed out that the entire bundle of facts pleaded need not constitute a cause of action as what is necessary to be proved before the petitioner can obtain a decree is the material facts. The expression material facts is also known as integral facts.

10. **Keeping in view the expressions used is Clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter."**

(emphasis supplied)

10. And after referring to the decision of the Supreme Court in **Nasiruddin Vs. State Transport Appellate Tribunal, AIR 1976 SC 331,** the Supreme Court in the aforesaid decision in **Kusum Ingots & Alloys Ltd. (supra)** pointed out that the place from where an appellate order or a revisional order is passed may give rise to a part of cause of action although the original order is at a place outside the said area and the relevant observations are as follows:-

"25. The said decision is an authority for the proposition that the place from

where an appellate order or a revisional order is passed may give rise to a part of cause of action although the original order was at a place outside the said area. When a part of the cause of action arises within one or the other High Court, it will be for the petitioner to choose his forum.

.....

27. **When an order, however, is passed by a Court or Tribunal or an executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in a given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable at both the places. In other words, as order of the appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority."**

(emphasis supplied)

11. The aforesaid decision leaves no manner of doubt that though the orders against which the Appeals were filed before the Debts Recovery Appellate Tribunal at Allahabad were passed by the Authority/Officer in Indore, part cause of action would arise within the territorial jurisdiction of this Court as the order passed by the Debts Recovery Appellate Tribunal at Allahabad is also under challenge in this petition. The petition, therefore, can be entertained in the Allahabad High Court.

12. The question, however, that needs to be considered is whether even in such a situation, this Court should, in its discretion, decline to entertain the writ petition by invoking the doctrine of *"forum conveniens'*.

13. In Black's Law Dictionary, "forum conveniens' has been defined as follows:

"The court in which an action is most appropriately brought, considering the best interests and convenience of the parties and witnesses."

14. In **Kusum Ingots & Alloys Ltd. (supra),** the Supreme Court observed that even if part of cause of action has arisen with the territorial jurisdiction of a High Court, it can still decline to entertain the writ petition by invoking the doctrine of *"forum conveniens'* and the observations are :-

"30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. **In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.** *[See Bhagat Singh Bagga v. Dewan Jagbir Sawhany, AIR 1941 Cal 670; Madanlal Jalan v. Madanlal, (1945) 49 CWN 357; Bharat Coking Coal Limited v. Jharia Talkies & Cold Storage (P) Ltd. 1997 CWN 122; S.S. Jain & Co. v. Union of India, (1994) 1 CHN 445 and New Horizons Ltd. v. Union of India, AIR 1994 Delhi 126]."*

(emphasis supplied)

15. In **Ambica Industries (supra),** the Supreme Court made similar observations:-

"41. Keeping in view the expression "cause of action" used in Clause (2) of Article 226 of the Constitution of India, indisputably **even if a small fraction thereof accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter though the doctrine of *forum conveniens* may also have to be considered."**

(emphasis supplied)

16. In **Mosaraf Hossain Khan Vs. Bhagheeratha Engg. Ltd. & Ors., (2006) 3 SCC 658**, the Supreme Court also observed:-

"29. **The High Courts, however, must remind themselves about the doctrine of forum non conveniens also.** [See Mayar (H.K.) Ltd. v. Owners & Parties, Vessel M.V. Fortune Express, (2006) 3 SCC 100; (2006) 2 Scale 30]: (AIR 2006 SC 1828)"

(emphasis supplied)

17. The doctrine of *"forum conveniens'* was also elaborately examined by the Full Bench of five Judges of the Delhi High Court in **M/s. Sterling Agro Industries Ltd. (supra)**. The petitioner-Company was located in the State of Madhya Pradesh. The initial order was passed by the Assistant Commissioner of Customs, District Bhind in the State of Madhya Pradesh, the appellate order was passed by the Commissioner (Appeals) Customs and Central Excise and Service Tax at Indore in the State of Madhya Pradesh but the revisional order was passed by the Government of India, Ministry of Finance, Department of Revenue, New Delhi. The writ petition was filed in the Delhi High Court as the petitioner was not satisfied with the order passed by the Revisional Authority and for the petition to be entertained in the Delhi High Court reliance was placed on the earlier Full Bench decision of three Judges of the Delhi High Court in **New India Assurance Company Limited Vs. Union of India & Ors., AIR 2010 Delhi 43** in which the following observations were made :-

"For the foregoing reasons, we hold that where an order is passed by an appellate authority or a revisional authority, a part of cause of (sic action) arises at that place. When the original authority is situated at one place and the appellate authority is situated at another, a writ petition would be maintainable at both the places. **As the order of appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate having regard to the fact that the petitioner is dominus litis to choose his forum, and that since the original order merges into the appellate order, the place where the appellate authority is located is also forum conveniens."**

(emphasis supplied)

18. The Full Bench of five Judges in **M/s. Sterling Agro Industries Ltd. (supra)** agreed with the Full Bench of three Judges in **New India Assurance Company Ltd. (supra)** to the extent that the order of the appellate authority constitutes a part of cause of action so that the writ petition can be entertained in the High Court within whose jurisdiction the appellate authority is situated, but the Full Bench did not agree with the conclusion

drawn by the earlier Full Bench that the place where the appellate authority is located is also *"forum conveniens'* and observed that the same may not be the singular factor to compel the High Court to decide the matter on merits as the High Court can still refuse to exercise its discretionary jurisdiction by invoking this doctrine. According to the Full Bench it is obligatory on the part of the Court to see the convenience of all the parties before it and the relevant observations are as follows:-

"31. **The concept of forum conveniens fundamentally means that it is obligatory on the part of the court to see the convenience of all the parties before it. The convenience in its ambit and sweep would include the existence of more appropriate forum, expenses involved, the law relating to the lis, verification of certain facts which are necessitous for just adjudication of the controversy and such other ancillary aspects.** The balance of convenience is also to be taken note of. Be it noted, the Apex Court has clearly stated in the cases of Kusum Ingots (supra), Mosaraf Hossain Khan (supra) and Ambica Industries (supra) about the applicability of the doctrine of forum conveniens while opining that arising of a part of cause of action would entitle the High Court to entertain the writ petition as maintainable.

32. The principle of forum conveniens in its ambit and sweep encapsulates the concept that a cause of action arising within the jurisdiction of the Court would not itself constitute to be the determining factor compelling the Court to entertain the matter. **While exercising jurisdiction under Articles 226 and 227 of the Constitution of India, the Court cannot be totally oblivious of the concept of forum conveniens. The Full Bench in New India Assurance Co. Ltd. (supra) has not kept in view the concept of forum conveniens and has expressed the view that if the appellate authority who has passed the order is situated in Delhi, then the Delhi High Court should be treated as the forum conveniens. We are unable to subscribe to the said view.**

33. In view of the aforesaid analysis, we are inclined to modify the findings and conclusions of the Full Bench in New India Assurance Company Limited (supra) and proceed to state our conclusions in seriatim as follows:

(a) **The finding recorded by the Full Bench that the sole cause of action emerges at the place or location where the tribunal/appellate authority/revisional authority is situate and the said High Court (i.e., Delhi High Court) cannot decline to entertain the writ petition as that would amount to failure of the duty of the Court cannot be accepted inasmuch as such a finding is totally based on the situs of the tribunal/appellate authority/revisional authority totally ignoring the concept of forum conveniens.**

(b) Even if a miniscule part of cause of action arises within the jurisdiction of this court, a writ petition would be maintainable before this Court, however, the cause of action has to be understood as per the ratio laid down in the case of Alchemist Ltd. (supra).

(c) **An order of the appellate authority constitutes a part of cause of action to make the writ petition maintainable in the High Court within**

whose jurisdiction the appellate authority is situated. Yet, the same may not be the singular factor to compel the High Court to decide the matter on merits. The High Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.

(d) **The conclusion that where the appellate or revisional authority is located constitutes the place of forum conveniens as stated in absolute terms by the Full Bench is not correct as it will vary from case to case and depend upon the lis in question.**

(e) The finding that the court may refuse to exercise jurisdiction under Article 226 if only the jurisdiction is invoked in a mala fide manner is too restricted/ constricted as the exercise of power under Article 226 being discretionary cannot be limited or restricted to the ground of mala fide alone.

(f) **While entertaining a writ petition, the doctrine of forum conveniens and the nature of cause of action are required to be scrutinized by the High Court depending upon the factual matrix of each case in view of what has been stated in Ambica Industries (supra) and Adani Exports Ltd. (supra).**

(g) The conclusion of the earlier decision of the Full Bench in New India Assurance Company Limited (supra) "that since the original order merges into the appellate order, the place where the appellate authority is located is also forum conveniens" is not correct.

(h) Any decision of this Court contrary to the conclusions enumerated hereinabove stands overruled."

(emphasis supplied)

19. To examine this aspect, it will be appropriate to reproduce the description of the parties in the writ petition which is :-

"1. M/s. Dynamic Education Systems (International) Limited having its registered office at 224, Khatiwala Tank, Manikbagh Road, Indore M.P. through its Director Sri Ravindra Pillai, S/o Sri Raghav Pillai, R/o 224, Khatiwala Tank, Manikbagh Road, Indore M.P.

2, Sri Ravindra Pillai, S/o Sri Raghav Pillai, R/o 224, Khatiwala Tank, Manikbagh Road, Indore M.P

.....Petitioners

Versus

1. Bank of Baroda, Branch 13, Old Palasiya, A.B. Road, M.P. through its Branch Manager.

2. Smt. Annu Jain, W/o Sri Rakesh Jain, R/o 57, Shiv Shakti Nagar, Indore (M.P.)

3. Vaibhav Jain, S/o Sri Rakesh Jain, R/o 57, Shiv Shakti Nagar, Indore (M.P

4. M/s. Dodeja Builders Pvt. Ltd. Mohit Palace, 387, Khatiwala Tank in front of Dwarika Garden, Indore (M.P.) through its Director.

5. Chairperson, Debts Recovery Appellate Tribunal, Allahabad.

.....Respondents"

20. From the description of the parties and the facts stated in the writ petition, it is seen that the petitioner-Company is located in the State of Madhya Pradesh, its Director is residing in the State of Madhya Pradesh, the Bank which had advanced loan to the petitioner-Company is situated in the State of Madhya Pradesh, the property that was auctioned and sold is situated in the State of Madhya Pradesh and the auction purchaser is also in the State of Madhya Pradesh.

21. In M/s. Starling Agro Industries (supra), the Full Bench of the Delhi High Court observed that it is obligatory for the Court to see the convenience of the parties before it and the convenience will include the existence of more appropriate forum, expenses involved, the law relating to the lis, verification of certain facts which are necessary for adjudication of the controversy.

22. It is also stated by learned counsel for the respondents that the Bank has in fact filed a writ petition in the Madhya Pradesh High Court as it also felt aggrieved by the order passed by the Debts Recovery Appellate Tribunal at Allahabad.

23. It is in this context that the doctrine of *"forum conveniens'* has to be examined and having so examined it and in view of the decisions rendered by the Supreme Court and the Delhi High Court referred to above, there is no manner of doubt that the more appropriate forum for all the parties to agitate the matter would be the Madhya Pradesh High Court.

24. The Court, therefore, refuses to exercise its discretionary jurisdiction by invoking the doctrine of *"forum conveniens'*.

25. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2012

BEFORE
THE HON'BLE AMITAVA LALA, A.C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Review Application No. 80076 of 2012.
IN
Civil Misc. Writ Petition No. 37510 of 2011.

M/s. Chauhan Road Lines and another ...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Applicants /Petitioners:
Mr. R.N. Singh, Sr. Advocate
Sri G.K. Malviya
Sri G.K. Singh
Sri V.K. Singh

Counsel For the Respondents:
Mr. Prakash Padia
S.C.
A.S.G.I.

Constitution of India, Article 226-Review Application-mode of drafting with overall dignity to the Court should be-instead of using hard word "manifestly erred"-descent and guarded words be used.

Held: Para 2

Before entering into the grounds of review, we want to make it clear that there should be a discipline in drafting of review application/s because it is normally placed before the Court which has passed the original order but not before any appellate Court. Therefore, the review application is to be made with

descent and guarded words like "escaped from the notice" etc. and not with harsh words like "erred in holding" or "manifestly erred in holding" or "failed to appreciate" etc., which are normally used in the case of appeal from one Court to its superior Court. Necessity of making the review application is not to embarrass a Judge in person forgetting his rigour and magnanimity but to address the chair, which has passed the original order, to re-apprise the fact and law. Therefore, an application for review can be pursued by eloquence and not by the words of war. Hence, instead of putting any cost for such type of drafting, we warn the petitioners to be careful in future.

(Delivered by Hon'ble Amitava Lala, A.C.J.)

Amitava Lala, ACJ.-- This review application has been made by the applicants, the petitioners in the writ petition, seeking review of the judgement and order dated 31st January, 2012, basically for two reasons: firstly, admittedly no notice or opportunity of hearing was given to the petitioners in respect of the enquiry by the enquiry committee, which fact has escaped from the notice of the Court in coming to conclusion and the Court has held that opportunity was given to the petitioners to associate with the enquiry; and secondly, there was no statement on the part of the petitioners that the period of contract has been extended for one year more after the expiry of the period of contract but is extendable for one year, however, due to order of blacklisting the period of contract was not extended by the respondents.

2. Before entering into the grounds of review, we want to make it clear that there should be a discipline in drafting of review application/s because it is normally placed before the Court which has passed the original order but not before any appellate Court. Therefore, the review application is to be made with descent and guarded words like "escaped from the notice" etc. and not with harsh words like "erred in holding" or "manifestly erred in holding" or "failed to appreciate" etc., which are normally used in the case of appeal from one Court to its superior Court. Necessity of making the review application is not to embarrass a Judge in person forgetting his rigour and magnanimity but to address the chair, which has passed the original order, to re-apprise the fact and law. Therefore, an application for review can be pursued by eloquence and not by the words of war. Hence, instead of putting any cost for such type of drafting, we warn the petitioners to be careful in future.

3. Let a copy of the aforesaid observations be also circulated by the Registrar General of this Court amongst the Bar to be careful in making review applications in each and every Court of justice for all time to come.

4. **So far as merit is concerned,** the Court in the judgement dated 31st January, 2012 has held as follows:

"The Committee has given opportunity to the transporter to associate with the enquiry."

5. However, the petitioners-applicants submitted that no notice or opportunity of hearing was given to the petitioners in the enquiry and this averment has not been denied by the respondents. In this regard, the respondents themselves have stated in paragraph-56 of the counter affidavit as under:

"56. .... There was no requirement for the Corporation to associate the petitioner with the said enquiry. Moreover, nothing has been stated that what prejudice has been caused to the petitioner even if the petitioner was not permitted to associate with the enquiry. ...."

6. Therefore, the applicants are correct in saying that this part of the fact has escaped from the notice of the Court which is a good ground of review.

7. So far as second ground is concerned, we can distinctly remember that Mr. R.N. Singh, learned Senior Counsel appearing for the petitioners, had placed the matter at the time of admission of the writ petition by saying that the period of contract has been extended by the respondents for one year more on one hand and, on the other hand, petitioners' entire fleet has been blacklisted. The Court had accepted such verbal submission of the learned Senior Counsel even when no objection was raised by the learned Counsel for the respondents-Indian Oil Corporation. Thereafter, when the Court was about to pronounce the judgement only on such submission, Mr. Prakash Padia, learned Counsel appearing for the respondents-Indian Oil Corporation, categorically stated that the period of contract was not extended after the period of two years, therefore, the contract is over by March/April, 2011. Hence, the writ petition is infructuous. Thus, no relief could be granted to the petitioners by the Court and accordingly under the judgement and order dated 31st January, 2012 no relief had been granted. Therefore, now the explanation of Mr. R.N. Singh that the period is extendable, cannot be a logical ground for the purpose of review. It would have been a logical ground had the authority, in one hand, extended the period of contract and, on the other hand, imposed the blacklisting, which is definitely total non-application of mind and arbitrary action and cannot stand at all. But the case of the petitioners is not so. Hence, the second ground of Mr. Singh cannot be accepted.

8. So far as additional issue as to what is the date of completion of two years of blacklisting, particularly when from the order impugned it appears to be two years from the date of order dated 24th June, 2011, is concerned, Mr. R.N. Singh has contended that two years' period will be completed by 14th September, 2012 from the date of blacklisting i.e. 14th September, 2010 but by virtue of this order dated 24th June, 2011 it appears to be extended by 24th June, 2013. However, Mr. Padia has clarified the position in paragraph-7 of the supplementary counter affidavit by saying that two years' period, which started from 17th September, 2010, will come to an end on 16th September, 2012. Therefore, by no means it can be construed that the period is going to expire by 24th June, 2013.

9. In view of the aforesaid discussions, we are of the view that the equitable principles can be applied in this situation in favour of the petitioners particularly when the matter is under Article 226 of the Constitution of India and also on the basis of the following observations made in the order dated 31st January, 2012:

"According to us, it is a matter of blacklisting, that too not with regard to one or two vehicles of a transporter but in respect of the entire fleet, **which were not**

involved in the alleged malpractice. When such type of decisions are to be taken by any authority, it has to be very much cautious about passing of such drastic order of blacklisting the entire fleet. When the respondents themselves are adjudicators, they should be sincere in coming to appropriate conclusion so that the order of blacklisting may not seem to be disproportionate."

10. Thus, in totality, we find that the petitioners succeed in first issue and also in the additional issue but do not succeed in the second issue. Therefore, our overall view is that the writ petition should not be treated as dismissed but as disposed of. Opportunity of hearing will be given to the petitioners by the enquiry committee. Since admittedly the period of blacklisting for two years has already ended by 16th September, 2012, the entire fleet of the petitioners are free to render their business. However, the involved vehicle, being TT No. UP 80 BJ 9458, and the vehicle apprehended to be involved, being TT No. UP 78 AN 2061, can be called upon in case of enquiry by giving opportunity of hearing to the petitioners and that too within a limited period, which by no means will go beyond one month from the date of communication of this order .

11. Accordingly, the review application is disposed of, however, without any order as to costs.

12. However, passing of this order will in no way affect the petitioners' right, if any, to proceed before the appropriate Court/ forum/authority independently in accordance with law, if any further development has taken place between the period from reserving the judgement and its pronouncement.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2012

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 38098 of 1994

Akhilesh Kumar @ Babloo ...Petitioner.
Versus
Commandant, 47 P.A.C. Vahini (Task Force), Bareilly & Ors ...Respondents

Counsel for the Petitioner:
Sri V.C. Katiyar
Sri Umesh Chandra Mishra
Sri V.K. Singh
Sri G.K. Singh
Sri Sharad Chandra
Sri V.K. Katiyar

Counsel for the Respondents:
C.S.C.

Constitution of India,Article 226-cancellation of appointment-on ground of false declaration in affidavit as no criminal case pending against him-on verification it was found the F.I.R. Was lodged in which petitioner also a co-accused-while in charge sheet as well as in order sheet and character certificate issued by D.M.-petitioner no where in existence in list of accused-when petitioner not aware with the fact of F.I.R.-no question of false deceleration-petition allowed-consequential directions given.

Held: Para 21

In the present case along with the supplementary affidavit the petitioner has filed the entire proceedings before the Chief Judicial Magistrate to show that at any stage, no summon or notice has been issued to the petitioner. It was

averred that the petitioner was not aware about the alleged FIR and the criminal proceeding. These averments of the supplementary affidavit have not been disputed. It is undisputed that in the chargesheet the name of the petitioner was not mentioned. On enquiry, it was found that his name has been falsely implicated. On these facts it can be believed that the petitioner was not aware about the alleged FIR and the alleged criminal proceeding. When the petitioner was not aware about the alleged FIR and criminal proceeding it was not expected from him to disclose about such proceeding. Thus, on these facts it cannot be said to be a case of wilful and deliberate misrepresentation on the part of the petitioner. Moreover, the respondent no. 1 has sought the report about the character verification and the certificate from the District Magistrate. The District Magistrate in his reports dated 20.10.1994 and 15.11.1994 has categorically certified the character of the petitioner and has observed that he is suitable for the services of the State and the Central Government. There is no contrary finding on record.

Case law discussed:

Civil Appeal No. 7106 of 2011, Ram Kumar Vs. State of U.P. & others, decided on 19.8.2011; Special Appeal No. 1991 of 2011, Satyendra Singh, Recruit Constable Vs. State of U.P. and others; JT 2011 (3) SC 484; Civil Misc. Writ Petition No. 47984 of 2010; Amit Kumar, Recruit Constable Vs. State of U.P. and others, decided on 2.5.2011; 1997 SCC (L& S) 492; (2003) 3 SCC 437; AIR 2008 SC page 1083 (2008) SCC 222

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

1. By means of the present writ petition, the petitioner is seeking a writ of mandamus commanding the respondent nos. 1 and 2 to admit the petitioner in the batch selected on 2.8.1994 as Police P.A.C. Constables and direct to join as such.

2. The brief facts of the case are that in pursuance of the advertisement published in the month of May-June, 1994 for the recruitment of the Police/P.A.C. Constables the petitioner applied. On 2.8.1994 the petitioner underwent various tests in the Police Lines, Farrukhabad, namely, written test, measurement test, medical test and interview. The petitioner cleared all the tests and has been called upon by the 37, P.A.C. Vahini (Task Force) Bareilly between 6.9.1994 to 11.9.1994. It is the contention of the petitioner that out of the selected candidates, 80 have been asked to join the 47 P.A.C. Vahini (Task Force) Bareilly for training but 9 candidates, including the petitioner were refused enrolment, six of whom were under height and three on the basis of character verification. The joining of the petitioner has been withheld on the ground that a criminal case no. 265A of 1994 was pending against him and for that a report was called from respondent no. 3. For character verification Sri R.N. Singh, Sub-Divisional Magistrate was authorized to discharge the function of the District Magistrate and he called for a report from the D.G.C. (Criminal) Farrukhabad. The D.G.C. (Criminal) Farrukhabad submitted a copy of the chargesheet in case crime no. 265 A of 1994 in which 8 persons were chargesheeted and the petitioner's name was no where there. The copy of the chargesheet dated 4.8.1994 is Annexure-1 to the writ petition.

3. It appears that a clarification has been sought that why the petitioner's name had not figured in the chargesheet. The Police Station on 27.8.1994 submitted the report stating therein that the case against the petitioner was found false in the investigation so his name was dropped in the chargesheet. Thereafter, the

Commandant, 47 P.A.C. Vahini (Task Force), Bareilly, directed the Senior Superintendent Police to obtain the opinion of the District Magistrate, Farrukhabad on the point. It appears that Sri R.N. Singh, S.D.M., In-charge District Magistrate vide his letter dated 20.9.1994 asked the D.G.C. (Criminal) for opinion whether on the facts and circumstances the petitioner is suitable for the Government service or not. On the said letter itself the D.G.C. (Criminal) Farrukhabad has given his opinion on 21.9.1994 that as per the police report there is no criminal case pending against the petitioner and the case, which was registered, was found false hence in my opinion he is suitable for the State service. On the instruction of respondent no. 1, respondent no. 3 has recorded the statement of the petitioner on 20.9.1994. In the statement it is stated that a false FIR was lodged in which the name of the petitioner was mentioned and on inquiry the involvement of the petitioner was found false and accordingly in the charge sheet the name of the petitioner has not been stated. However, it is stated that no case is pending in any of the court. By the letter dated 20.10.1994 Sri R.N. Singh, Incharge District Magistrate sent all the necessary papers to the Senior Superintendent of Police, Farrukhabad and further expressed his opinion that the petitioner is suitable for the Government service. He further stated that for the purposes of the verification of the character and issue of certificate in this regard he has been authorized by the District Magistrate. When the S.S.P., Farrukhabad required the opinion for the signature of the District Magistrate himself, the District Magistrate by his letter dated 15.11.1994 wrote a letter agreeing with the view of Sri R.N. Singh, Incharge District Magistrate and further certified the character of the petitioner and expressed his opinion that he is suitable for the Government service. It is the contention of the petitioner that despite the character certificate was being issued by the District Magistrate and the fact that the petitioner was found suitable for the Government service the petitioner has not been sent for training and has not been allowed to join. At this stage the petitioner filed the present writ petition.

4. On 30.11.1994 while entertaining the writ petition and directing the the respondents to file counter affidavit, this Court has passed an interim order directing the respondents that the "name of the petitioner shall be sent for police training. The petitioner shall, however, not be issued appointment letter till further orders of this Court." The writ petition has been admitted on 3.8.1995. The matter was taken up on 3.8.1995. It was contended on behalf of the petitioner that in spite of the order dated 30.11.1994, which was communicated to the respondent on 8.12.1994, the name of the petitioner has not been sent for the aforesaid training. This Court further directed the respondents to comply with the order dated 30.11.1994 within ten days.

5. Counter and rejoinder affidavits have been exchanged.

6. Heard Sri V.K. Singh, learned counsel for the petitioner and Sri Pankaj Rai, learned Additional Chief Standing Counsel for the respondents.

7. Learned counsel for the petitioner submitted that in the FIR the name of the petitioner has wrongly been mentioned though the petitioner was not at all involved. The FIR was lodged on

15.5.1994. A supplementary affidavit has been filed annexing the ordersheet of the proceedings before the Chief Judicial Magistrate to show that at no point of time any summon or notice has been issued to the petitioner. The averment in this regard has been made in the supplementary affidavit dated 21.7.1995. This averment is not disputed. The petitioner was not at all aware about any FIR lodged against him or any proceeding pending before the criminal court against him. In the chargesheet the name of the petitioner was not mentioned inasmuch as on inquiry it was found that the name of the petitioner has been falsely implicated. An affidavit was given on 20.8.1994 stating therein that no criminal case is pending against him under the bonafide belief inasmuch as the petitioner was not aware about the alleged criminal case. He submitted that the District Magistrate is the competent authority to issue the character verification certificate. In the character verification certificate, as referred herein above, it has been categorically stated that the petitioner was not found involved in criminal proceeding and he is suitable for the Government service. Once this certificate has been given by the District Magistrate, who alone is the competent to issue the certificate, no other authority has a jurisdiction to dispute and sit over the certificate of the District Magistrate. The only requirement for the Government service is that the person should be suitable for the Government post after the character verification and once the District Magistratre, who is the competent authority, has given the certificate, there is no reason to deny the appointment to the petitioner. Reliance has been placed on a recent decision of the Apex Court in ***Civil Appeal No. 7106 of 2011, Ram Kumar Vs. State of U.P. & others, decided on 19.8.2011*** which has been followed by the Division Bench in ***Special Appeal No. 1991 of 2011, Satyendra Singh, Recruit Constable Vs. State of U.P. and others.*** He also placed reliance on the decision of the Apex Court in the case of ***Commissioner of Police and others Vs. Sandeep Kumar, reported in JT 2011 (3) SC 484*** and the decision of the learned Single Judge of this Court in ***Civil Misc. Writ Petition No. 47984 of 2010, Amit Kumar, Recruit Constable Vs. State of U.P. and others, decided on 2.5.2011.***

8. Learned Standing Counsel submitted that for the purposes of the verification of character and antecedent, the petitioner was required to submit affidavit. In the affidavit a categorical declaration has been made by the petitioner that against him neither any case has been registered nor any criminal case is pending against him. However, on verification it was found that a criminal case was pending. Preliminary inquiry was conducted and it was found that wrong declaration has been made by the petitioner hence the petitioner could not be sent for training. Iit is very much clear that at the time of filing of the affidavit, the criminal case was pending against the petitioner. In the aforesaid affidavit, it has been clearly mentioned that in case any of the averments mentioned in the affidavit is found incorrect then candidature of the petitioner would be cancelled without any notice and in this background as the declaration which was made in the affidavit has been found incorrect and wrong declaration has been made by the petitioner, the petitioner's services has been dispensed with by cancellation of his appointment.

9. He placed reliance on the decisions of the Apex Court in the case of ***Delhi Administration Vs. Sushil Kumar, reported in 1997 SCC (L& S) 492*** and in the case of ***Kendriya Vidyalaya Sangathan and others Vs. Ram Ratan Yadav, reported in (2003) 3 SCC 437.***

10. I have considered the rival submissions and perused record.

11. In the case of ***State of Haryana Vs. Dinesh Kumar, reported in AIR 2008 SC page 1083 (2008) SCC 222,*** the Apex Court held that there has to be deliberate and wilful misrepresentation, and in case the applicant was not aware of his involvement in any criminal case or pendency of any criminal prosecution against him, then it cannot be held that he made misrepresentation. In the said case information sought was as to whether he has ever been arrested, and the applicant thererin was wanted in criminal case and had got stay order fro the Court, in this background information was furnished in negative the Hon'ble Apex Court took the view that it may be case of mistake impression but not the case is deliberate impression.

12. In the case of Delhi Administration Vs. Sushil Kumar (Supra), the Apex Court held as follows:

"Verification of the character and antecedents is one of the important criteria to text whether the selected candidates is suitable to a post under the State. Though the respondent was found physically fit, passed the written test and interview and was provisionally selected. On account of his antecedent record, the appointing authority found it is not desirable to appoint a person of such record as a Constable in the discipline force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted. The Tribunal, therefore, was wholly unjustified in giving the directing for reconsideration of his case. Though he was discharged or acquitted of the criminal offences, the same has nothing to do with the question. What would be relevant is the conduct of character of the candidate to be appointed to a service and not the actual result thereof. If the actual result happened to be in a particular way the law will take care of the consequences."

13. In the case of ***Kendriya Vidyalaya Sangthan Vs. Ram Ratan Yadav*** (Supra) the Apex Court held as follows:

"It is not in dispute that the criminal case registered under Sections 323, 341, 294, 506-B read with Section 34 IPC was pending on the date when the respondent filed the attestation from. Hence, the information given by the respondent as against columns 12 and 13 as "No is plainly suppression of material information and it is also a false statement.....The requirement of filling columns 12 and 13 of the attestation form was for the purpose of verification of character and antecedents of the respondent as on the date of filling and attestation of the form. Suppression of material information and making a false statement has a clear bearing on the character and antecedents of the respondent in relation to his continuance in service.

The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify the character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of employment and all other aspects had the direction to terminate his services, which is made expressly clear in para 9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 was not to find out either the nature or gravity of the offence or the result of the criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not. The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature. In the present case the respondent was to serve as a Physical Education Teacher in Kendriya Vidyalaya. The character, conduct and antecedents of a teacher will have some impact on the minds of the students of impressionable age. The appellants having considered all the aspects passed the order of dismissal of the respondent from service. The Tribunal after due consideration rightly recorded a finding of fact in upholding the order of dismissal passed by the appellants. The High Court was clearly in error in upsetting the order of the Tribunal. The High Court was again not right in taking note of the withdrawal of the case by the State Government and that the case was not of a serious nature to set aside the order of the Tribunal on the ground as well. The respondent accepted the offer of appointment subject to the terms and conditions mentioned therein with his eyes wide open. Para 9 of the said memorandum extracted above in clear terms kept the respondent informed that the suppression of any information may lead to dismissal from service. In the attestation form, the respondent has certified that the information given by him is correct and complete to the best of his knowledge and belief; if he could not understand and contents of columns 12 and 13, he could not certify so. Having certified that the information given by him is correct and complete, his version cannot be accepted. The order of termination of services clearly shows that there has been due consideration of various aspects. In this view, the agreement of the learned counsel for the respondent that as per para 9 of the memorandum, the termination of service was not automatic, cannot be accepted."

14. In the case of ***Ram Kumar Vs. State of U.P. and others*** (Supra) the appellant applied for the post of Constable. He was selected and appointed as a male constable and deputed for training. Thereafter it was reported that a criminal case was registered against the appellant and the said criminal case has been disposed of by the Additional Chief Judicial Magistrate, Etawah on 18.7.2002 and the appellant was acquitted by the Court. However, in his affidavit dated 12.6.2006 it was averred that no criminal case was pending. The appointment of the

petitioner has been cancelled. The writ petition filed against the cancellation of the appointment has been dismissed by the learned Single Judge and said order has been confirmed in Special Appeal by the Division Bench. Being aggrieved by the order of the Division Bench, Special Leave to Appeal No. 7162 of 2011 has been filed. The Apex Court has held as follows:

"We have carefully read the Government Order dated 28.4.1958 on the subject 'Verification of the character and antecedent of government servants before their first appointment' and it is stated in the Government order that the Governor has been pleased to lay down the following instructions in supercession of all the previous orders:

"The rule regarding character of candidate for appointment under the State Government shall continue to be as follows:

The character of a candidate for direct appointment must be such as to render him suitable in all respects for employment in the service or post to which he is to be appointed. It would be duty of the appointing authority to satisfy itself on this point."

It will be clear from the aforesaid instructions issued by the Governor that the object of the verification of the character and antecedents of government servants before their first appointment is to ensure that the character of a government servant for a direct recruitment is such as to render him suitable in all respects for employment in the service or post to which he is to be appointed and it would be a duty of the appointing authority to satisfy itself on this point.

The order dated 18.7.2002 of the Additional Chief Judicial Magistrate had been sent along with the report dated 15.1.2007 of the Jaswant Nagar Police Station to the Senior Superintendent of Police, Ghaziabad, but it appears from the order dated 8.8.2007 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 28.4.1958, 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.

In Kendriya Vidyalaya Sangathan and others vs. Ram Ratan Yadav (Supra) relied on by the respondents, a criminal case had been registered under Sections 323, 341, 294, 506-B read with Section 34 IPC and was pending against

the respondent in that case and the respondent had suppressed this material in the attestation form. The respondent, however, contended that the criminal case was subsequently withdrawn and the offences in which the respondent was alleged to have been involved were also not of serious nature. On these facts, this Court held that the respondent was to serve as a Physical Education Teacher in Kendriya Vidyalaya and he could not be suitable for appointment as the character, conduct and antecedents of a teacher will have some impact on the minds of the students of impressionable age and if the authorities had dismissed him from service for suppressing material information in the attestation form, the decision of the authorities could not be interfered with by the High Court. The facts of the case in Kendriya Vidyalaya Sangathan and others Vs. Ram Ratan Yadav (Supra) are therefore materially different from the facts of the present case and the decision does not squarely cover the case of the appellant as has been held by the High Court.

For the aforesaid reasons, we allow the appeal, set aside the order of the learned Single Judge and the impugned order of the Division Bench and allow the writ petition of the appellant and quash the order dated 8.8.2007 of the Senior Superintendent of Police, Ghaziabad. The appellant will be taken back in service within a period of two months from today but he will not be entitled to any back wages for the period he has remained out of service. There shall be no order as to costs."

15. The Apex Court has considered and distinguished the decision in the case of **Kendriya Vidyalaya Sangathan and others vs. Ram Ratan Yadav (Supra)** in the manner referred herein above.

16. In the case of ***Commissioner of Police and others Vs. Sandeep Kumar (Supra)***, the Apex Court has taken a view that cancellation of candidature to the post of temporary Head Constable for the suppression and failure to disclose in the verification roll/ application about his involvement in an incident resulting in a criminal case under Sections 325/34 IPC when the candidate was a young man, was not justified. In the said case, the matter was finally compromised and the candidate was acquitted.

17. The Division Bench of this Court in Special Appeal No. 1991 of 2011, Satyendra Singh, Recruit Constable Vs. State of U.P. and others wherein the appointment of the petitioner was cancelled on the ground that at the time of recruitment he filed false affidavit in relation to column provided for declaration in respect of criminal cases registered or pending against him as he failed to disclose the case crime no. 137A of 2001, under Sections 336, 323, 325, 504 and 506 IPC in which vide judgment and order dated 13.9.2006 passed by the Chief Judicial Magistrate, Etawah the petitioner was acquitted following the decision in the case of Ram Kumar Vs. State of U.P. (Supra) referred herein above, has held the cancellation of the appointment as unjustified.

18. In my view character and antecedent of the person is an important aspect to be considered at the time of giving the appointment in a Government service. Little lapse and compromise in this regard may lead to a serious consequences. Therefore, before giving the appointment

there should be micro scrutiny of the character and antecedent. It is equally important that the person to whom appointment is being given should come with clean hand. There should not be any deliberate and wilful misrepresentation, concealment of fact and disclosure of incorrect fact, on the part of person concerned, and if it so happens such person should be dealt with strong hand to set the example for others and may not be considered for Government service.

19. Foundation of police or any other force is based on discipline, faithfulness, sincerity and honesty. These forces, all time are accountable to public at large. If any one of the above is missing, system can not work and is bound to collapse. Therefore, in case of appointment in police or any other force character and antecedent has to be strictly examined. If a person of criminal background is appointed as police personnel one can understand its consequences.

20. From the above, in my view the following position emerges :

(1) The object of the verification of the character and antecedent of the Government servants before their first appointment is to ensure that the character of the Government servants for a direct recruitment must be such as to render him suitable in all respect for employment in the service or post to which he is to be appointed and it would be duty of the appointing authority to satisfy itself on this point.

(2) It is necessary to examine whether there was deliberate and wilful misrepresentation and concealment of fact. Whether the misrepresentation was deliberate and wilful and the petitioner was aware about his involvement in any criminal case or pendency of any criminal prosecution against him. If the answer is negative then it cannot be said that the person made misrepresentation, but if the answer is in affirmative then it is a case of misrepresentation and such person should not be appointed and strict action should be taken for such misrepresentation and concealment of fact.

21. In the present case along with the supplementary affidavit the petitioner has filed the entire proceedings before the Chief Judicial Magistrate to show that at any stage, no summon or notice has been issued to the petitioner. It was averred that the petitioner was not aware about the alleged FIR and the criminal proceeding. These averments of the supplementary affidavit have not been disputed. It is undisputed that in the chargesheet the name of the petitioner was not mentioned. On enquiry, it was found that his name has been falsely implicated. On these facts it can be believed that the petitioner was not aware about the alleged FIR and the alleged criminal proceeding. When the petitioner was not aware about the alleged FIR and criminal proceeding it was not expected from him to disclose about such proceeding. Thus, on these facts it cannot be said to be a case of wilful and deliberate misrepresentation on the part of the petitioner. Moreover, the respondent no. 1 has sought the report about the character verification and the certificate from the District Magistrate. The District Magistrate in his reports dated 20.10.1994 and 15.11.1994 has categorically certified the character of the petitioner and has observed that he is suitable for the services of the State and the Central Government. There is no contrary finding on record.

22. In view of the foregoing discussion, I am of the view that the respondent no. 1 is not justified in withholding the appointment of the petitioner. In case if the petitioner has not been sent for training he may be sent immediate thereof in case if he has completed the training in pursuance of the direction of this Court, he may be allowed to join the post. However, the petitioner is not entitled for the salary for the period during which he has not worked. The respondent no. 1 is directed to comply the aforesaid direction within two weeks from the date of production of certified copy of this order.

23. The writ petition stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 45155 of 2012

Suryajeet Rajbhar and another
...Petitioner
Versus
State Of U.P. Thru Chief Secy. And Others
...Respondents

Counsel for the Petitioner:
Sri Tara Chand Kaushal
Sri L.D. Rajbhar

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 341, 342- Declaration of the Caste 'Bhar' equivalent to Scheduled Tribes-reliance placed upon caste certificate issued by the state authority-held-in absence of presidential notification-no such relief could be granted even by Writ Court.

Held: Para 12

The certificate recites that the community of the petitioners is being treated equivalent to a scheduled tribe. In the opinion of the Court the certificate cannot travel beyond the Presidential Notification.Treating a denotified tribe equivalent to a scheduled tribe for the purpose of any benefit by the State does not amount to a declaration that the denotified tribe is a Scheduled Tribe which is also beyond the powers of the State Government. The contention, therefore, of the learned Standing Counsel is correct that the relief as prayed for to treat the petitioners as scheduled tribe cannot be granted by the Court.

Case law discussed:
2005 Volume (1) AWC Page 811; 2005 AWC (5) Page 4298; 2010 Volume 10 ADJ Page 390

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

1. Heard Sri L.D. Rajbhar and Sri Tara Chand Kaushal, learned counsel for the petitioners and perused the records.

2. These two petitioners before this Court are aggrieved by the action of the Respondents not allowing the petitioners to attend the counselling which was scheduled to be held with effect from 14th July, 2012 in relation to engineering courses to which admission is granted under a joint entrance examination conducted by the respondent-State Government.

3. The petitioners contend that they have qualified in the entrance examination but they further claimed the benefit of reservation claiming themselves to be belonging to the "Bhar" caste which according to them is a denotified tribe and is of the same status and equivalent to a Scheduled Tribe.

4. The brochure under which the said entrance examination has been conducted notifies that reservation for denotified tribes in the entrance examination is not permissible and denotified tribes are not recognized as scheduled tribes.

5. The petitioners contend that this provision in the brochure is unconstitutional and is even otherwise unsupportable by law, as such, the petitioners deserve the benefit of reservation treating them to be Scheduled Tribes as indicated in their caste certificate and other documents on record. A supplementary affidavit has been filed bringing on record an administrative memorandum of the Central Government dated 15th April, 1951 on the basis whereof learned counsel contends that the intention of the government is clearly to extend such a privilege to the petitioners as they are not inconsistent with any other provision of law. Learned counsel has also relied on the list of denotified Tribes which has been appended along with the supplementary affidavit together with a questionnaire giving answers under the Right to Information Act dated 12th February, 2008 from the Indian Institute of Technology, Roorki to substantiate the submissions. Under the said information given by the IIT, Roorki, learned counsel submits that the said institution has been extending the benefit for admission to such tribes and it is continuing since 1962.

6. Sri Rajbhar further submits that this benefit has been extended in other states as well and not only this, this Court had also observed that in view of the directions already issued to the Central Government/Competent Authority, the matter deserves to be considered by the respondents in the light of the observations made in various decisions including the Division Bench Judgment in the case of **Subhash Chandra and another Vs. Delhi Subordinate Services Selection Board and others 2010 Volume (1) Page 128**. It is, therefore, urged that in view of the aforesaid background, the claim of the petitioners deserves to be allowed and they should be extended the privilege of being treated as Scheduled Tribes for the purpose of admission through the joint entrance examination.

7. The matter had been adjourned to enable the learned Standing Counsel, Sri Sandeep Mukerjee to assist the Court on the issues so raised along with the decisions of this Court as well as the provisions in this regard.

8. Sri Mukerjee has advanced his submissions by citing the first decision given by this Court in the case of **Vijay Prakash Vs. State of U.P. and another 2005 Volume (1) AWC Page 811** to contend that inclusion of a Schedule Tribe is dependent upon a Presidential Notification to be issued in terms of Articles 341 and 342 of the Constitution of India. The petitioners' caste/tribe does not find mention in any Presidential Notification. He contends that this issue relating to the same caste of the petitioners has been elaborately dealt with in the aforesaid decision and the claim of the petitioners therein has been negatived. The petitions were dismissed holding that the "Bhar" caste is not a Scheduled Tribe and the State Government has already included the said caste in the other backward category. The aforesaid ratio of the case has been upheld by a Division

Bench in a special appeal filed against the aforesaid judgment of the learned Single Judge reported in V**ijay Prakash Vs. State of U.P. and another 2005 AWC (5) Page 4298** where it has been further held that in the event if the Court attempts to include the said denotified tribe in the list of Scheduled Tribes, the same would be infringing upon the rights of the Scheduled Tribes by decreasing their quota proportionately which is impermissible and can only be done by taking recourse to Articles 341 and 342 of the Constitution of India.

9. This Court, however, took some contrary decisions in between but when the same came to notice they were reversed by the latest Division Bench Judgment of this Court in the case of **Registrar Registrar, Vibhagiya Parikshyan (U.P.) Vs. Dinesh Kumar 2010 Volume 10 ADJ Page 390** where it has been categorically clarified that a denotified Tribe can not be equated as a Scheduled Tribe and more so such a mandamus cannot be issued by the Court. It has further been clarified in paragraph 11 that the judgments rendered by the learned Single Judge to the contrary stands overruled. Apart from this, in paragraph 5 of the said Division Bench Judgment it has been mentioned that the Akhil Bhartiya Rajbhar Maha Sabha had approached the Apex Court by filing a writ petition No. 126 of 1986 which was disposed of on 8th October, 1987 observing that the question whether the denotified tribes of Rajbhar should be included or not has to be determined by the competent authority and the said proceedings, if pending, may be concluded expeditiously.

10. The Court, therefore, concluded that this was beyond the realm of any adjudication by this Court to either include or exclude any caste or tribe from the Presidential Notification issued under Articles 341 and 342 of the Constitution of India.

11. Sri Mukerjee therefore, on the strength of the aforesaid judgments further submits that the decision relied upon by the learned counsel for the petitioners in the case of Subhash Chandra (supra) also does not come to their aid, inasmuch as the observations made in the said judgment in no way help the petitioners to bring the community of Bhar or Rajbhar within the fold of a Scheduled Tribe and the observations, at the best, can be interpreted by the Central Government in the exercise of its administrative powers provided the same is supported by any notification under Articles 341 and 342 of the Constitution of India. In order to locate a particular community or a caste as belonging to a Scheduled Tribe or not, such an exercise can be undertaken if there is any administrative circular but the circular by itself cannot be treated to be a notification under Articles 341 and 342 of the Constitution of India.

12. Having heard learned counsel for the parties and having perused the caste certificates of the petitioners which are annexure-3 to the writ petition, it is evident that the petitioners belong to Bhar caste and they have been issued the said certificates in view of the government order dated 17.12.1958 as amended from time to time. The certificate recites that the community of the petitioners is being treated equivalent to a scheduled tribe. In the opinion of the Court the certificate

cannot travel beyond the Presidential Notification.Treating a denotified tribe equivalent to a scheduled tribe for the purpose of any benefit by the State does not amount to a declaration that the denotified tribe is a Scheduled Tribe which is also beyond the powers of the State Government. The contention, therefore, of the learned Standing Counsel is correct that the relief as prayed for to treat the petitioners as scheduled tribe cannot be granted by the Court.

13. In view of conclusions drawn herein above and the ratio of the decisions cited at the Bar, the petitioners cannot be extended the benefit of getting the privilege of a Schedule Tribe in the absence of a Presidential notification under Articles 341 and 342 of the Constitution of India.

14. The Writ Petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 46389 of 2012

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

Counsel for the Petitioner:
Sri Preet Pal Singh Rathore

Counsel for the Respondents:
C.S.C.
Sri Mahesh Narain Singh

Constitution of India, Article 226-Prayer for quashing entire consolidation proceeding-on ground allotment of Chak over Pond-without following provisions of Roadside Control Act-petitioners have alternative remedy to file objection under Section 6 of the Consolidation of Holding Act-strict in accordance with grounds mentioned in Section 17 of the Act-without ex hosting alternative remedy-direct Writ Petition-not maintainable.

Held: Para 8

From the perusal of section 6 of the Act read with Rule 17 of the Rules, it transpires that the power of cancellation of the notification under section 4 of the Act is vested with the State Government under section 6 of the Act and the grounds for cancellation are mentioned in Rule 17 of the Rules. The petitioners herein, it appears, have done no spade work and the writ petition has been filed on the bald allegations without there being any concrete detail with regard to the irregularities in the consolidation proceedings.

Case law discussed:
2004 (96) RD 454; 2006 (101) RD 792; 1998 (8) SCC

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

1. This writ petition has been filed with the following prayers:

"1. issue a writ order or direction in the nature of certiorari call for record and quashing the entire consolidation proceedings of the Gram Panchayat Dhharaul, Tehsil Chandausi, District Sambhal.

2. issue a writ order or direction in the nature of mandamus directing the respondents for not to make interfere in the peaceful possession of the respective land of the petitioners in pursuance of present consolidation proceedings.

3. issue a writ order or direction in the nature of mandamus directing the respondent no. 2 to decide the representation dated 21.7.2012 (annexure no. 1) of the petitioner immediately within some specific time.

4. issue a writ order or direction in the nature of mandamus directing the respondents to restart the consolidation operation proceedings afresh in the Village Panchayat of the petitioners in respect of Kabza Parivardhan and in view of the preparation of Aakar Patra - 5 and 23 in respect of village Dhharaul, Tehsil Chandausi, District Sambhal.

5. issue a writ order or direction in the nature of mandamus directing the respondents to serve the copy of notification U/s 4 of Consolidation of Holdings Act in respect of the village of the petitioners immediately within some specific time.

6. issue a writ order or direction in the nature of mandamus directing the respondent nos. 1 and 2 to take necessary penal action against the respondents consolidation authorities in accordance with law, for their faults and irregularities committed in the consolidation proceedings in the village of the petitioners.

7. issue any other writ order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

8. To award the cost of the petition to the petitioners."

2. Heard Sri Preet Pal Singh Rathore, learned counsel for the petitioners, Sri M.N. Singh, learned counsel for the Gaon Sabha and learned Standing Counsel appearing for the State - respondents.

3. This writ petition appears to have been filed by 26 petitioners with the allegations that more than 300 tenure holders, out of 500 tenure holders, of Village Dhharaul, Pargana and Tehsil Chandausi, District Bhim Nagar are aggrieved by the continuance of the consolidation proceedings and pray for quashing of the same.

4. It is contended that amongst the aggrieved tenure holders, the members of the consolidation committee have also signed the representation, which has been made to the Divisional Comissioner, Moradabad Division, Moradabad. The allegations are that the notification under section 4 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as, 'the Act') was issued in the year 2005 and at present, the proceedings with regard to the carving of chak is going on. In the submissions of Sri Rathore, the consolidation authorities are committing irregularities, like allotment of chak over the ponds and they are also not following the procedure of U.P. Road Side Control Act.

5. A preliminary objection has been raised by the learned Standing Counsel stating therein that for redressal of petitioners' grievance, neither the Divisional Commissioner nor the Deputy Director of Consolidation is competent. In his submissions, the petitioners have efficacious remedy under section 6 of the Act read with Rule 17 of the U.P. Consolidation of Holdings Rules, 1954 (hereinafter referred to as, 'the Rules') and

in case the petitioners are aggrieved, they may approach to the State Government / competent authority to whom such power has been delegated, for redressal of their grievance.

6. In the submissions of Sri Rathore, the entire consolidation proceedings should be quashed for the various irregularities committed by the consolidation authorities. In support of his submissions, he has placed reliance upon the judgments of this Court in the cases of ***Smt. Saroj Sharma Vs. State of U.P. and Others,*** 2004 (96) RD 454 and H***arpal Singh and Others Vs. State of U.P. and Others,*** 2006 (101) RD 792.

7. I have heard learned counsel for the petitioners and learned Standing Counsel. For appreciating the controversy, the provisions contained under section 6 of the Act and Rule 17 of the Rules are reproduced hereinunder:

"6. Cancellation of notification under Section 4. *(1) It shall be lawful for the State Government at any time to cancel the notification made under Section 4 in respect of the whole or any part of the area specified therein.*

(2) Where a notification has been cancelled in respect of any unit under sub-section (1), such area shall, subject to the final orders relating to the correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operations with effect from the date of cancellation.

Rule 17. Section 6. *The notification made under Section 4 of the Act, may among other reasons, be cancelled in respect of whole or any part of the area on one or more of the following grounds, viz, that -*

(a) the area is under a development scheme of such a nature as when completed would render the consolidation operations inequitable to a section of the peasantry;

(b) the holdings of the village are already consolidated for one reason or the other and the tenure - holders are generally satisfied with the present position;

(c) the village is so torn up by party factions as to render proper consolidation proceedings in the village very difficult; and

(d) that a co-operative society has been formed for carrying out cultivation in the area after pooling all the land of the area for this purpose."

8. From the perusal of section 6 of the Act read with Rule 17 of the Rules, it transpires that the power of cancellation of the notification under section 4 of the Act is vested with the State Government under section 6 of the Act and the grounds for cancellation are mentioned in Rule 17 of the Rules. The petitioners herein, it appears, have done no spade work and the writ petition has been filed on the bald allegations without there being any concrete detail with regard to the irregularities in the consolidation proceedings. Therefore, the cases cited by the petitioners in the cases of ***Smt. Saroj Sharma*** and ***Harpal Singh*** (supra) are of no avail. In the case of Harpal Singh (supra), it appears, the notification was issued in the year 1960 and the writ

petition was filed in the year 2006, almost 46 years after the date of notification, and this Court has interfered and quashed section 4 notification on the ground that during these long years, valuation of the land has gone much higher and that aspect has to be considered. So far as in the case of ***Smt. Saroj Sharma*** (supra) is concerned, the facts of that case are also different from the facts of this case. Otherwise also, sitting under Article 226 of the Constitution of India, this Court is not supposed to enter into the factual controversy and investigate the fact and record any finding over that, particularly, in the circumstances when the efficacious remedy is available under the Act and Rules.

9. The Apex court in numerous cases has observed that where alternative remedy is available the court must move on very slow pace in entertaining the writ petition under Article 226 of the Constitution of India. In R***ashid Ahmed Vs. Municipal Board Kairana*** AIR 1950 Supreme Court 163, the Apex Court held 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 ***Rashid Case namely K.S. Rashid and Son Vs. Income Tax Investigation Commission*** AIR 1954 S.C. 207 where the Supreme Court reiterated the proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to entertain in a petition under Article 226 of the Constitution of India. This proposition was again considered by a Constitution Bench of the Apex Court in ***A.V.Venkateswaran, Collector of Customs Vs. Ramchand Sobhraj Wadhwani*** AIR 1961 Supreme court 1506 and another Constitution Bench decision in ***Calcutta Discount Co. Ltd. Vs. ITO, Companies Distt.*** AIR 1961 Supreme court 372.

10. In ***Whirlpool Corporation Vs. Registrar of Trade Marks*** 1998 (8) SCC the Apex court although held that the High Court should have entertained the writ petition instead of throwing the person to avail the alternative remedy but in that case the order passed by the authority concerned was without jurisdiction and therefore the Apex Court had taken the view that if the order was without jurisdiction, the writ petition should have been entertained instead of throwing it at threshold. In this case, the competent authority has yet not been approached for redressal of their grievance. This Court is already overburdened, therefore, in view of the availability of the efficacious alternative remedy, I refuse to exercise the discretion under Article 226 of the Constitution of India by entertaining this writ petition.

11. In view of that, I am not inclined to interfere in this matter. No relief, as prayed for, can be granted under Article 226 of the Constitution of India. The writ petition is disposed of with the liberty to the petitioners to file a detailed representation with careful spade work giving details of the irregularities before the State Government / competent authorities to whom such power has been conferred, for redressal of their grievance alongwith certified copy of the order of this Court. In case such representation is made, that may be considered and decided on its own merit in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2012

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 47087 of 2012

Rajendra Kumar Bajpai ...Petitioner
Versus
Shailesh Kumar Shukla and another ...Respondents

Counsel for the Petitioner:
Sri S.K. Nigam

Counsel for the Respondents:
.....

Code of Civil Procedure-Order 41 Rule 27-Additional evidence-application refused by Trail Court-Appeal-held not maintainable-only in regular appeal such application can be entertain strict in accordance with scope of Order 41 Rule 27.

Held: Para 10

In view of totality of the facts and circumstances, I am of the opinion that the application for additional evidence before the appellate court below that was seized with the misc. appeal was not maintainable and the court below has not committed any error of law in rejecting the same.

Case law discussed:
AIR 1993 Alld. 67

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

1. Heard learned counsel for the petitioner.

2. This writ petition is directed against the order dated 27.07.2012 rejecting petitioner's application for additional evidence in misc. appeal arising out of an interim injunction order.

3. The submission of learned counsel for the petitioner is that additional evidence in appeal is permissible under Order 41 Rule 27 C.P.C.

4. The above misc. appeal is directed against the order dated 11.8.06 passed by the court of first instance. The court of first instance on an application for interim injunction instead of granting an ex parte order directed for issuing notices to the other side and posted the application for consideration thereafter vide order dated 11.08.06. The said appeal is not against any final order which determines the rights of the parties on the basis of any evidence. Therefore, in appeal also only the matter with regard to grant of any interim injunction has to be considered on the basis of the pleadings and the material on record without any aid of evidence. Any evidence adduced in such misc. appeal will not be part of evidence in the suit. Therefore, even if the provisions of Order 41 C.P.C. as a whole have been made applicable to misc. appeals filed under Order 43 by virtue of Rule 2 of Order 43 C.P.C., it would not be applicable for the purposes of adducing additional evidence.

5. Similarly, the power of the appellate court to take additional evidence as contemplated by Section 107 C.P.C. would not come into play in a misc. appeal especially one arising from an order passed on interim injunction application as the question of additional evidence arises only when evidence had been previously recorded in the suit.

6. The provisions of Order 41 Rule 27 C.P.C. are applicable in three contingencies

where the trial court has refused to admit evidence which ought to have been admitted; the additional evidence sought to be produced could not be produced despite due diligence before the trial court; and/or where the appellate court requires any evidence to enable it to pronounce judgment or for any substantial cause The question of adducing the evidence would only arise where some evidence has already been adduced. The stage for adducing additional evidence has not arrived in appeal as the evidence has so far not recorded by the trial court.

7. In view of the aforesaid facts and circumstances, I am of the opinion that the provisions of Order 41 Rule 27 C.P.C. permitting additional evidence cannot be applied to misc. appeals from an interlocutory order passed on the interim injunction application.

8. His Lordships of this in **Kailash Nath Singh Vs. The District Judge, Mirzapur and another AIR 1993 Alld. 67** held that the appellate court while hearing an appeal arising out of misc. proceedings is not supposed to entertain an application for the amendment of the plaint and the only course open is to direct moving of the amendment application before the trial court or for its consideration by the trial court on disposal of the appeal on merits.

9. It is only on a regular appeal filed that the appellate court exercises the jurisdiction of the trial court and is competent to take evidence which is not the position when the appellate court is hearing a misc. appeal.

10. In view of totality of the facts and circumstances, I am of the opinion that the application for additional evidence before the appellate court below that was seized with the misc. appeal was not maintainable and the court below has not committed any error of law in rejecting the same.

11. The writ petition is devoid of merits and is dismissed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ABHINAVA UPADHYA, J.

Civil Misc. Writ Petition No. 55433 of 2007

Amolak Nath ...Petitioner
Versus
Shri Keshav Ji Gaudia Math Dharamshala Trust, Mathura ...Respondents

Counsel for the Petitioner:
Sri Rahul Sahai

Counsel for the Respondents:
Sri Sachin Kumar Sharma
Sri Amar Nath Sharma
Sri Anjani Kumar Mishra
Sri Ashutosh Shukla

U.P. Act 13 of 1972-Section-2(1) (bb)-Exemption from operation of Act-Registered Trust deed-executor for himself as karta of family including his brother and sons-lost the control and management of Dharmshala with profounder-property dedicates for public purpose-all rights title ownership transferred to-a public endowment-consequently provisions of rent control not applicable-view taken in Ram Ratan Sharma, B.R. Arora and Ashok Kumar

Case-held-correct law-petition dismissed.

Held: Para 17 and 18

The present being a case where trust deed clearly indicates severance of rights of erstwhile owners from the property. The submission that it is not a public trust has rightly been rejected by the Courts below. The finding recorded by the courts below that the property is a public religious and charitable trust is based on consideration of relevant materials including the registered trust deed dated 13.12.1954 and memorandum of association of society and other materials on record. The submissions on the basis of which the petitioner sought to impugn the judgment have been found to be without any substance.

In view of what has been stated above, we are of the view that Dharmshala is a public religious trust and there is no reason to disagree with the three judgements of Hon'ble Single Judge concerning the same Dharmshala.

Case law discussed:

AIR 1976 S.C. 871; AIR 1981 SC 798; AIR 2003 SC 1685

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

1. The learned Single Judge while hearing this writ petition, by order dated 13.11.2007 formulated following three questions to be answered by larger Bench.

A. Whether the trust deed dated 13.12.1954 registered on 20.12.1954 executed by Shri Nand Kishore for himself and as Manager and Karta of the Joint Hindu family including his brothers and Jagan Prasad and Madan Lal, sons and heirs of Gursaran Das @ Baijnath, chela of Baba Garib Das, resident of Mathura proves the nature and origin of endowment and shows that the control and management of the dharmshala is retained with the founder or his descendants and that the property were dedicated for the purposes of maintenance of dharmshala belonging to the founder himself, to show that the endowment was of private nature?

B. Whether after vesting the management in the Gaudia Vedanta Society' and its member the founders retained any control over the management?

C. Whether the judgements in writ petition No. 54930 of 2003, Ram Ratan Sharma son of Tulsi Das Vs. District Judge, Mathura dated 17.2.2004; writ petition No. 46342 of 2007, Baldeo Raj Arora Vs. Shree Keshav Ji Gauriya Math Dharmshala dated 24.9.2007 and writ petition No. 45694 of 2007, Ashok Kumar & Ors. Vs. Sri Keshavji Gauriya Math Dharmshala Trust & Ors. Dated 3.10.2007 holding that the building was a public charitable trust exempt under section 2 (1)(bb) of the Act?

2. Hon'ble the Chief Justice by order dated 4.1.2008 directed the matter to be placed before a Division Bench. By order dated 8.7.2008, the matter has been placed before this Bench for answering the reference.

3. Brief facts of the case which are necessary to be noted for answering the reference are; a small cause suit No. 22 of 2003 was filed by Keshavji Gaudia Math (hereinafter referred as 'respondent') in the court of Judge Small Cause, Mathura praying for

eviction from the two shops in question and for payment damages. The case of the plaintiff in the suit was that respondent in the proceedings is tenant at the rate of Rs. 45/- per month in the two shops as described in the plaint of which the plaintiff is the owner and the landlord. 30 days' notice dated 24.5.2003 was served on the tenant terminating the tenancy. The plaintiff claimed to be religious charitable trust on which provisions of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 are not applicable. It was pleaded that the Trust has passed resolution on 27.3.2003 to open a clinic, library and Pyau in the shops in question and looking to the aforesaid need, the decision was taken to terminate the tenancy. The tenant filed written statement in which it was pleaded that the provisions of U.P. Act No. 13 of 1972 are applicable on the premises in question. The allegations of the plaintiff that the property in question is a public religious charitable trust was denied. It was pleaded that the U.P. Act No. 13 of 1972 are applicable. No resolution has been passed as alleged by the plaintiff. Notice given by the plaintiff was duly replied. The suit was resisted by the tenant. The Judge Small Cause Court vide its judgment and order dated 20.2.2004 decreed the suit for eviction directing the tenant to hand over the possession within four months. The tenant filed a revision in the Court of District Judge being revision No. 17 of 2004 which revision has been dismissed by the judgment and order of the Additional District Judge dated 23.2.2007. Trial Court as well as the revisional Court held that property in question is a public religious trust and the provisions of U.P. Act No. 13 of 1972 are not applicable. It was held that the tenancy has been rightly terminated by notice under section 106 of the Transfer of Property Act. The trial court, while decreeing the suit has relied on oral and documentary evidence which was on record including the trust deed dated 13.12.1954 executed in favour of Keshavji Gaudia Math Dharmshala. The writ petitioner i.e. the tenant has filed the present writ petition challenging the judgment and order of the Judge Small Causes Court dated 20.2.2004 as well as the revisional Court judgment dated 23.2.2007.

4. Sri Rahul Sahai, learned Counsel for the petitioner challenging the orders passed by the courts below contended that the respondent i.e. plaintiff is not a public charitable/religious trust hence, the provisions of U.P. Act No. 13 of 1972 were applicable and both the courts below committed error in holding that the plaintiff is a public religious charitable trust. Referring to the trust deed filed as Annexure-6 to the writ petition, it is contended that various terms and conditions of the deed indicate that the trust was created with the sole object for improvement and better management of the Dharmshala and the trust was not a public charitable trust rather it was handed over to the trustee as named in the deed only for the purpose of improvement and better management of the Dharmshala, which does not change the character of a private Dharmshala into a public charitable/religious trust. Learned Counsel for the petitioner has referred to various portions of the trust

deed which shall be hereinafter referred to in support of his submissions.

5. We have heard learned counsel for the petitioner and has perused the record.

6. The questions 'A' and 'B' as noted above being inter-related are with regard to the interpretation of trust deed dated 13.12.1954. The question 'C' relates to three judgements of this Court in which judgements, this Court held Keshavji Gaudia Math as a public charitable/public religious institution in proceedings which were initiated by the trust for eviction of three other tenants, who were tenants of the same land lord. This Court in following three judgements dismissed the writ petitions filed by the tenant challenging their eviction.

(I) Judgement dated 17.2.2004 in writ petition No. 54930 of 2003, Ram Ratan Sharma Vs. District Judge

(II) Judgement dated 24.9.2007 in writ petition No. 46342 of 2007, Baldeoraj Arora Vs. Shri Keshav Ji Gauriya Math

(III) Judgement dated 3.10.2007 in writ petition No. 45694 of 2007, Ashok Kumar & others Vs. Keshavji Gauriya Math

7. In the aforesaid three writ petitions filed by tenants challenging their eviction passed in suit filed by Keshav Ji Gaudia Math, it was held that the trust was a public charitable/public religious institution and it is exempted from applicability of U.P. Act No. 13 of 1972 by virtue of Section 2(1)(bb). Learned Single Judge expressed his doubts on the ratio of the said judgements and framed question No. C in that regard.

8. Now questions No. 'A' and 'B' are taken together. The principles and parameters for finding out whether a trust is a public trust or a private trust, came for consideration before the apex Court in several decisions. Before we proceed to consider the fact of the present case and the trust deed dated 13.12.1954, it is useful to refer to following judgements of the apex court wherein the issue came for consideration.

9. The apex Court in AIR 1976 S.C. 871, **Dhaneshwarbuwa Guru Purshottam-buwa owner of Shri Vithal Rukhamal Sansthan Vs. The Charity Commissioner, State of Bombay** had occasion to consider the test to find out the principles of law for determination of an endowment whether public or private trust. Following was laid down in paragraphs 30,31 and 44:

*"**30.** The principles of law for determination of the question whether an endowment is public or private are fairly well- settled. This Court observed in Deoki Nandan v. Murlidhar as follows:-*

"The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter, they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the

latter they constitute a body which is incapable of ascertainment".

***31.** This Court further held:*

"When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshippers, and that the purpose of the endowment is the maintenance of that worship for the benefit of worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers".

***44.** When the origin of an endowment is obscure and no direct oral evidence is available, the Court will have to resolve the controversy about the character of the trust on documentary evidence, if any, the object and purpose for which the trust was created, the consistent manner in which the property has been dealt with or managed by those in charge, the manner in which the property has long been used by the public, the contribution of the public, to all intents and purposes, as a matter of right without the least interference or restriction from the temple authorities, to foster maintenance of the worship the accretion to the trust property by way of grants from the state of gifts from outsiders inconsistent with the private nature of the trust, the nature of devolution of the property, are all important elements in determination of the question whether a property is a private or a public religious endowment. We are satisfied that in this case all the above tests are fulfilled."*

10. In AIR 1981 SC. 798 **Radhakanta Deb and another Vs. The Commissioner of Hindu Religious Endowments, Orissa,** the apex Court again considered the test which may provide sufficient guidelines for determination of facts of each case whether an endowment is public or private nature. Following was laid down in paragraphs 7 and 14:

***7.**The question as to whether the religious endowment is of a private nature or of a public nature has to be decided with reference to the facts proved in each case and it is difficult to lay down any test or tests which may be of universal application. It is manifest that where the endowment is lost in antiquity or shrouded in mystery, there being no document or revenue entry to prove its origin, the task of the court becomes difficult and it has to rely merely on circumstantial evidence regarding the nature of the user of the temple. In the instant case, however, as there are two documents which clearly*

show the nature of the endowment, our task is rendered easier. It is well settled that the issue whether a religious endowment is a public or a private one must depend on the application of legal concept of a deity and private endowment, as may appear from the facts proved in each case. The essential distinction between a private and a public endowment is that whereas in the former the beneficiaries are specified individuals, in the latter they are the general public or class of unascertained people. This doctrine is well-known and has been accepted by the Privy Council as also by this Court in a large catena of authorities. This being the essential distinction between the nature of a public or a private endowment, it follows that one of the crucial tests to determine the nature of the endowment would be to find out if the management of the property dedicated is in the hands of the strangers or members of the public or in the hands of the founders or their descendants. Other factors that may be considered would be the nature of right of the worshippers, that is to say, whether the right to worship in the temple is exercised as of right and not as a matter of concession. This will be the strongest possible circumstance to indicate that the endowment was a public one and the beneficiaries; are the worshippers and not particular family. After all, an idol is a juristic person capable of holding property and the property dedicated to the temple vests in the deity. If the main worshippers are the members of the public who worship as a matter of right then the real purpose is to confer benefit on God. Some of the circumstances from which a public endowment can be inferred may be whether an endowment is made by a person who has no, issue and who after installing the deity entrusts the management to members of the public or strangers which is a clear proof of the intention to dedicate the temple to public and not to the members of the family. Where, however, it is proved that the intention of the testator or the founder was to dedicate the temple merely for the benefit of the members of the family or their descendants, the endowment would be of a private nature.

14. *Thus, on a conspectus of the authorities mentioned above, the following tests may be laid down as providing sufficient guidelines to determine on the facts of each case whether an endowment is of a private or of a public nature:*

(1) Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right;

(2) The fact that the control and management vests either in a large body of persons or in the members of the public and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large;

(3) Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple

is retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of the maintenance of the temple belonging to the founder himself, this will be a conclusive proof to show that the endowment was of a private nature.

(4) Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment."

11. The third decision, which is relevant is AIR 2003 SC 1685 **Kuldip Chand and another Vs. Advocate General of Himachal Pradesh.** In Kuldip Chand's case the question which was up for consideration was as to whether by mere use of a premises as a Dharmashala for about 125 years would lead to an inference that the same belongs to a public trust. One of the tests which was propounded in the aforesaid case was that a dedication for public purposes and for the benefit of the general public would involve complete cessation of ownership on the part of the founder and vesting of the property for the religious object. It was laid down in the said case that if the complete control is retained by the owner, the dedication cannot be said to be complete. Following was laid down in paragraphs 21,39 and 40:

21.*It is beyond any dispute that a Hindu is entitled to dedicate his property for religious and charitable purposes wherefor even no instrument in writing is necessary. A Hindu, however, in the event, wishes to establish a charitable institution must express his purpose and endow it. Such purpose must clearly be specified. For the purpose of creating an endowment, what is necessary is a clear and unequivocal manifestation of intention to create a trust and vesting thereof in the donor and another as trustees. Subject of endowment, however, must be certain. Dedication of property either may be complete or partial. When such dedication is complete, a public trust is created in contra-distinction to a partial dedication which would only create a charity. Although the dedication to charity need not necessarily be by instrument or grant, there must exist cogent and satisfactory evidence of conduct of the parties and user of the property, which show the extinction of the private secular character of the property and its complete dedication to charity. [See Menakuru Dasaratharami Reddi vs. Duddukuru Subba Rao (supra)]*

39. *A dedication for public purposes and for the benefit of the general public would involve complete cessation of ownership on the part of the founder and vesting of the property for the religious object. In absence of a formal and express endowment, the character of the dedication may have to be determined on the basis of the history of the institution and the conduct of the founder and his heirs. Such dedication may either be compete or partial. A right of easement in favour a community or a part of the community would not constitute such dedication where the owner retained the property for himself. It may be that right of the owner of the property is*

qualified by public right of user but such right in the instant case, as noticed hereinbefore, is not wholly unrestricted. Apart from the fact that the public in general and/or any particular community did not have any right of participation in the management of the property nor for the maintenance thereof any contribution was made is a matter of much significance. A dedication, it may bear repetition to state, would mean complete relinquishment of his right of ownership and proprietary. A benevolent act on the part of a ruler of the State for the benefit of the general public may or may not amount to dedication for charitable purpose.

40. *When the complete control is retained by the owner be it be appointment of a Chowkidar; appropriation of rents, maintenance thereof from his personal funds dedication cannot be said to be complete. There is no evidence except oral statements of some witnesses to the effect that Raj Kumar Bir Singh became its first trustee. Evidence adduced in this behalf is presumptive in nature. How such trust was administered by Raj Kumar Bir Singh and upon his death by his successors in interest has not been disclosed. It appears that the family of the donor retained the control over the property and, therefore, a complete dedication cannot be inferred far less presumed. Furthermore, a trust which has been created may be a private trust or a public trust. The provisions of Section 92 of the Code of Civil Procedure would be attracted only when a public trust comes into being and not otherwise.*

12. The present is a case where the registered trust deed dated 13.12.2004 is on record and learned Counsel for the petitioner harps on the interpretation of the aforesaid trust deed. The emphasis which has been laid by learned Counsel for the petitioner is that trust deed itself stipulates that deed of trust was created with the sole object of improvement and better management of Dharmshala. He further submits that the owner did not part with the ownership and control of the Dharmshala was handed over to the trustee for improvement and better management which cannot be read as creation of a public trust.

13. The main question which is to be answered in the present writ petition is as to whether the building belongs to or vested in a public charitable or public religious institution so as to take it out of purview of U.P. Act No. 13 of 1972. Section 2(1)(bb) provides for exemption from operation of the Act. Section 2(1) (bb) which is relevant is quoted below:

*"**2. Exemption from operation of Act.**-(1) Nothing in this Act shall apply to the following, namely*

(bb) any building belonging to or vested in a public charitable or public religious institution;"

14. The present is a case where the registered deed of trust is available, which is a primary document to determine the issue by reading the trust as a whole and deciphering from the trust deed as to whether it created a public trust or private trust. Copy of

the trust deed has been filed as Annexure-6. The Dharmshala earlier belonged to Nand Kishore and certain other persons, who were the owner and manager of Dharmshala, executed the trust deed. Following portion of trust deed has been relied by learned Counsel for the petitioner

"Times are very hard and living has become costly. Every property is liable to decay if steps are not taken to improve it. It is not within our means to improve the Dharmshala. After mature deliberations amongst ourselves and our friends, relatives and well-wishers, we have arrived at this conclusion that for the improvement and better management of the Dharmshala we religious persons who may be in a position to improve the present condition of the Dharmshala and may not allow it to be deteriorated. Accordingly we approached Swami Bhakti Projan Keshab Maharaj and some other members of the Gaudiya Vendanta society to kindly agree to serve on the trust committee as trustees and to manage and improve the Dharmshala. The said Swamijis have out of piety agreed to our proposal, provided a regular trust deed is executed, and the powers of the trust committee and of the trustee are defined and laid down in a proper deed. We also consider this proposal to be sound, so that the trust may function properly on well defined lines. Moreover no proper trust deed has been executed and no rules and regulations have been framed for the proper management of the trust, and it is urgently necessary that a proper deed of trust should be drawn up for the purpose. We, accordingly, out of our own free will and without coercion or intimidation from any quarter, execute this deed of trust with the sole object of improvement and better management of the Dharmshala of which the full description is given below in the schedule.

We, our heirs, successors-in-interest representatives and assignees are and shall be bound down by the terms of this deed and shall never have any power to repudiate it or any of its terms. This deed of Trust will stand, last and be in force for ever."

15. Learned Counsel for the petitioner from the aforesaid portion of the trust deed submits that the deed of the trust was executed with the sole object of improvement and better management of Dharmshala and owner never parted with the ownership or their control and trustees were there only to manage the Dharmshala hence, it has no public character. A perusal of the above quoted portion of the trust deed clearly records that the owners were unable to manage the Dharmshala and they themselves approached the Swami Bhakti Projan Keshab Maharaj and some other members of the Gudia Vendanta society to kindly agree to manage the dharmshala as trustee. The contents in subsequent paragraph of the deeds by the Board of trustees indicate that none of the nominee or representatives of any of the erstwhile owners of Dharmshala were trustee nor they retain any kind of control in the management of the trust. There was a clear stipulation in the deed that the heirs, successors-in-interest representatives and assignees of the erstwhile owner shall have no power to

repudiate the trust deed or any of its terms. The Judge Small Cause court considered the memorandum of Gaudia Vedanta Society and returned a finding that the plaintiff society is a religious charitable institution.

16. The submission on which much emphasis has been pressed by learned counsel for the petitioner is that the owners never parted with their ownership or control, has no legs to stand in view of the specific contents in the trust deed to the contrary, which is recorded after paragraph 12 of the trust deed. While describing the property the executor clearly recorded that all their right, title or interest vests in the Board of trustees henceforth which is a clear indication of severance of rights and title of the executors from the property in question. Following is stated, while describing the property after paragraphs 12 of the deed:

" Pucca two storied Chaukhandidar building including gate, steps and four shops known as Dharmshala, water rate No. 1977 (Old No. 1848) and the Municipal Tax per year Rs. 83/- situate in the Mohalla Ganeshpura, Kanstila, Mathura of which possession has been given to be trustees and all our right, title, interest and managerial rights including the right to collect rent etc. in the said property now vest in the said Board of Trustee."

17. The present being a case where trust deed clearly indicates severance of rights of erstwhile owners from the property. The submission that it is not a public trust has rightly been rejected by the Courts below. The finding recorded by the courts below that the property is a public religious and charitable trust is based on consideration of relevant materials including the registered trust deed dated 13.12.1954 and memorandum of association of society and other materials on record. The submissions on the basis of which the petitioner sought to impugn the judgment have been found to be without any substance.

18. Now comes the question No. C as to whether the three judgements of this court noted above holding that the provisions of Act No. 13 of 1972 are not applicable on the Dharmshala, are to be followed or not in this writ petition. Hon'ble Single Judge while referring the matter vide reference dated 13.11.2007 has shown his respectful disagreement with the view taken by Hon'ble Single Judge in the aforesaid three judgements in so far as the three judgements held the Dharmshala to be a public religious and charitable trust. In view of what has been stated above, we are of the view that Dharmshala is a public religious trust and there is no reason to disagree with the three judgements of Hon'ble Single Judge concerning the same Dharmshala. In judgment of this Court dated 24.9.2007 in writ petition No. 46342 of 2007, Baldeoraj Arora repelling the similar contention, the Hon'ble Single Judge of this Court held as follows:

"Copy of the trust deed has been annexed as Annexure'2' to the writ petition. The argument of the learned counsel for the petitioner is that even tough through the Trust deed

management of the Trust and its property ws handed over to the plaintiff, however, the ownership continued to be of that person who created the trust i.e. Nand Kishore. I do not accept this argument. First of all, after creation of trust owners/executors of the trust deed are divested of their ownership and secondly in the Trust deed (at page 17 of the paper book) it is specifically mentioned....."

19. in view of the aforesaid, the answer of the questions ABC is as follows:

A. The trust deed dated 13.12.1954 registered on 20.12.1954 executed by Shri Nand Kishore for himself and as Manager and Karta of the Joint Hindu family including his brothers and Jagan Prasad and Madan Lal, sons and heirs of Gursaran Das @ Baijnath, chela of Baba Garib Das, resident of Mathura proves the nature and origin of endowment and shows that the control and management of the dharmshala is not retained with the founder or his descendants and that the property was dedicated for the public charitable purpose to a public charitable institution to which trust right, title and ownership was transferred. The trust deed dated 13.12.1954 cannot be read as creating any private endowment.

B. After vesting the management in the Gaudia Vedanta Society' and its member the founders did not retain any control over the management.

C. The judgements in writ petition No. 54930 of 2003, Ram Ratan Sharma son of Tulsi Das Vs. District Judge, Mathura dated 17.2.2004; writ petition No. 46342 of 2007, Baldeo Raj Arora Vs. Shree Keshav Ji Gauriya Math Dharmshala dated 24.9.2007 and writ petition No. 45694 of 2007, Ashok Kumar & Ors. Vs. Sri Keshavji Gauriya Math Dharmshala Trust & Ors. Dated 3.10.2007 holding that the building was a public charitable trust exempt under section 2 (1)(bb) of the Act lays down correct law.

20. In view of the above discussions and our answers, we find that there is no merits in any of the submissions of learned Counsel for the petitioner and the judgement of Judge Small Cause Courts does not suffer from any error which may warrant any interference by this Court in exercise of writ jurisdiction. The writ petition is dismissed.The interim order stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2012

BEFORE
THE HON'BLE DEVENDRA PRATAP SINGH, J.

Civil Misc. Writ Petition No. 60917 of 2008.

Uma Pati Tripathi ...Applicant
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Ashish Chitranshi
Sri Ashok Khare

Counsel for the Respondents:
C.S.C.

Constitution of India-Article 226-Promotion-petitioner a class 4th employee-claimed promotion of class 3

post under 20 % quota-rejected on ground the remaining two vacancy fall under reserved quota-held illegal-in-promotion reservation not available in view of law laid down by Apex Court in case of U.P. Power Corporation case.

Held: Para-6

This stand of the respondents in the counter affidavit does not appear to be correct. Once the computation of the percentage is on the basis of sanctioned post of Junior Clerks, promotion to the post of Senior Clerk has to be taken into consideration as that is the entry point of the group 'D' employees. Otherwise, the percentage has to be calculated taking into account all the sanctioned group 'C' post, including Senior Clerks, Head Clerks etc. The department cannot blow hot and cold in the same breath and the stand taken would be arbitrary as it does not satisfy the criteria of rationality. The entry point for group 'D' employees is the post of Junior Clerk and therefore, if any promotee from group 'D' is further promoted, he would leave a vacancy for the group 'D' promotion. Thus the first argument of the petitioner is bound to be accepted.

Case Law discussed:

2012 (2) UPLBEC 1222; AIR 2007 SC 71

(Delivered by Hon'ble Devendra Pratap Singh, J.)

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

2. This petition is directed against an order dated 24.10.2008 by which the claim of the petitioner for promotion to class 'C' post has been rejected.

3. Brief facts are that the petitioner was appointed as a class IV employee in the office of Block Development Officer, Saidpur district Ghazipur in April 1991 and his services were regularized on 11.10.1996. In pursuance of Government orders dated 31.8.1982 and 8.9.1995, a total of 20% class 'C' post are reserved for promotion of class 'D' employees. In pursuance of an order dated 26.6.2004 issued by the Block Development Officer, Ghazipur inviting applications from Group 'D' employees for being promoted in the 20% quota to the Group 'C' post the petitioner, being duly qualified, along with others had applied. However, no action was taken though others were promoted to the post of junior clerk. Thus, the petitioner preferred Writ Petition No. 43289 of 2008 and a learned Single Judge of this Court disposed it off with a direction to the respondents to consider his claim, vide order dated 22.8.2008.

4. In pursuance thereof, the present impugned order has been passed. It has been held therein that in the 20% quota for promotion from class 'D' post only four posts were available in the class 'C' category wherein two persons Nazir Ahmad and Sirajul Islam belonging to the general category had been promoted and the remaining two posts fell in the reserved quota and since the petitioner belongs to general category, he is not entitled to be promoted.

5. It is urged that Shri Nazir Ahmad and Shri Sirajul Islam, both have been promoted to the post of senior clerks and therefore four vacancies, including in the reserved category, are still vacant for the purposes of promotion on the post of junior clerk. It is further urged that the Apex Court in the case of **U.P. Power Corporation Ltd. Vs. Rajesh Kumar and others** *[2012 (2) UPLBEC 1222*], decided along with a large bunch, has held, that Section 3(7) of the U.P. Public

Servants (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (hereinafter referred to as the '1994 Act') and Rule 8-A of U.P. Government Servants Seniority Rules, 1991, to be ultra vires and therefore, there can be no reservation and promotion and thus even assuming the factual statement in the impugned order, the two posts have to be filled up on merits.

6. A perusal of impugned order shows that the 20% of the 22 sanctioned post of Junior Clerks has been taken into consideration for identifying 4 posts for promotion from group 'D'. It is further evident therefrom that Sirajul Islam and Nazir Ahmad were promoted to the post of Junior Clerk from group 'D'. But the petitioner has annexed a seniority list to show that both the persons have already been promoted to the post of senior clerk several years ago and in para 15 of the writ petition it is stated that the said two posts are still available in the cadre of Junior Clerks. However, in the counter affidavit a stand has been taken that once they were appointed as Junior Clerks after promotion from group 'D' their subsequent promotion to the post of Senior Clerk would make no difference and the two posts would be deemed to be filled. This stand of the respondents in the counter affidavit does not appear to be correct. Once the computation of the percentage is on the basis of sanctioned post of Junior Clerks, promotion to the post of Senior Clerk has to be taken into consideration as that is the entry point of the group 'D' employees. Otherwise, the percentage has to be calculated taking into account all the sanctioned group 'C' post, including Senior Clerks, Head Clerks etc. The department cannot blow hot and cold in the same breath and the stand taken would be arbitrary as it does not satisfy the criteria of rationality. The entry point for group 'D' employees is the post of Junior Clerk and therefore, if any promotee from group 'D' is further promoted, he would leave a vacancy for the group 'D' promotion. Thus the first argument of the petitioner is bound to be accepted.

7. So far as the second argument of learned counsel for the petitioner is concerned, it also has substance. A perusal of the impugned order shows that reservation in favour of scheduled castes and scheduled tribes has been given in pursuance of the 1994 Act and the only section relevant for promotion is Section 3(7). The validity of Section 3(7) of the 1994 Act and Rule 8-A of U.P. Government Servants Seniority Rules, 1991 were called in question before a Division Bench of our High Court which held that the same was ultra vires as they run counter to the ratio laid down in **M. Nagraj & others Vs. Union of India & others** *[AIR 2007 SC 71]*. The judgment of this Court has been upheld by the Apex Court in the case of Rajesh Kumar and others (supra). Therefore, even assuming that the two remaining posts for promotion from group 'D' employees are available, in view of the aforesaid judgment of the Apex Court they would have to be filled up in accordance to the promotion rules and would not be reserved for any category.

8. For the reasons above, this petition succeeds and is allowed and the impugned order dated 24.10.2008 is hereby quashed. The respondents shall reconsider the claim of the petitioner and other eligible candidates in accordance

with the observations made hereinabove. The exercise may be completed within a period of six weeks from the date of submission of a certified copy of this order.
