REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.05.2015

BEFORE
THE HON'BLE ANIL KUMAR, J.

Civil Revision No. 6 of 2006

Ram Suman Pandey & Ors. ...Revisionists
Versus
Smt. Guddi Devi & Anr. ...Opp. Parties

Counsel for the Revisionists:
Mohan Singh

Counsel for the Opp. Parties:
Arti Ganguly, Hemant Kumar Mishra

C.P.C. Section 115-Civil Revision-against order allowing application under order IX rule 6-Trail Court found not only sufficient but good cause-held-proper-no illegality or irregularity-shown-can not be interfered.

Held: Para-18
In the instant case when an application for recall of the ex-parte order dated 07.03.2005 has been moved to which objection has been filed by the revisionist after taking into consideration the cause which has been shown by the defendant-respondent, the trial court has come to the conclusion that there exists sufficient cause rather good reason has been shown by the defendant-respondent for his previous non-appearance in the proceeding of the suit, allowed by order dated 23.12.2005, thus, I do not find any illegality or infirmity in the same.

Case Law discussed:
1993(11) LCD 1177; 2000 (18) LCD 757; 2012 (12) SCC 693; 1955 AIR (SC) 425; 1985 (3) LCD 394; 1955 AIR (SC) 425; 1985 (3) LCD 394; 2002 AIR (Ald) 360; 1993(11) LCD 1177; 2000 (18) LCD 757; 1955 AIR (SC) 425; 2012 (12) SCC 693.

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

1. Heard Sri Mohan Singh, learned counsel for revisionists, Sri Hemant Kumar Mishra, learned counsel for respondents and perused the record.

2. Undisputed facts of the present case are that the revisionists-plaintiffs filed a suit for permanent injunction registered as Regular Suit No. 80 of 2003 in the Court of Civil Judge (Sr. Div.), Lucknow, thereafter an application has been moved with a prayer to proceed ex-parte against the defendant under Order VIII Rule 10 CPC, allowed by order dated 07.03.2005.

3. On 10.11.2015, defendant-respondent moved an application on 10.11.2005 for recall of the order dated 07.03.2005 to which objection has been filed by the revisionists-plaintiffs, allowed by order dated 23.12.2005 with a cost of Rs. 50/- under challenge in the present civil revision.

4. Sri Mohan Singh, learned counsel for revisionists while challenging the impugned order submits that no sufficient reason/good cause has been shown by the defendant for his non-appearance in the matter in question, so, there is no justification or reason on the part of court below to pass the impugned order dated 23.12.2005 recalling the order dated 07.03.2005. In support of his argument he has placed reliance on the following judgments :-

1. Punjab National Bank Vs. Vijai Kumar Dhariwal and others, 1993(11) LCD 1177.

2. Prahlad Singh and another Vs. Niyaz Ahmad and others, 2000 (18) LCD 757.

3. B. Madhuri Goud Vs. B. Damodar Reddy, 2012 (12) SCC 693.

5. Accordingly, he submits that the impugned order dated 23.12.2005 being contrary to law, liable to be set aside.

6. Sri Hemant Kumar Mishra, learned counsel for respondents-defendants while supporting the impugned order submits that after takint into consideration the cause shown by the defendant for non-appearing on the date when the suit was fixed and order dated 07.03.2005 has been passed to proceed ex-parte against him, the court below has allowed the application for recall of the said order by an order dated 23.12.2005 with a cost of Rs. 50/-, hence, there is no illegality or infirmity in the impugned order, accordingly, present revision liable to be dismissed. In support of his argument he has placed reliance on the judgment given by Hon'ble the Apex Court in the case of Sangram Singh Vs. Election Tribunal, Kotah, 1955 AIR (SC) 425, Bajrang Bahadur Tripathi Vs. Suraj Kumar and others, 1985 (3) LCD 394, Lal Bahadur Vs. IInd Addl. Munsif, Fatehpur and others, 2002 AIR(Ald) 360.

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

8. In order to decide the controversy involved in the present case, it will be appropriate to go through the relevant provisions as provided under Order IX Rule 6 CPC and Order IX Rule 7 CPC.

"Order IX Rule 6:-

6. Procedure when only plaintiff appears-- (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then--

(a) When summons duly served--if it is proved that the summons was duly served, the Court may

make an order that the suit shall be heard ex parte.

(b) When summons not duly served--if it is not proved that the summons was duly serve, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time--if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2)Where it is owing to the plaintiffs' default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement. "

Order IX Rule 7:-

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance--Where the Court has adjourned the hearing of the suit ex-parte and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day, fixed for his appearance.

The application under Order IX Rule 7 CPC as it is evident from the reading of the aforesaid Rule, can be filed at or before the next date fixed for hearing. In the instant case admittedly the application under Order IX rule 7 CPC was filed by the petitioners on 06.08.94. It was the date after the next date fixed under order IX rule-6 CPC.

9. While incorporating the provisions of order IX Rule 7 CPCHon'ble the Apex Court in the case of Sangram Singh Vs. Election Tribunal, Kotah, 1955 AIR (SC) 425, has held as under:-

" We have seen that if the defendant does not appear at the first hearing, the Court can proceed ex parte, which means that it can proceeded without a written statement; and Order IX, rule 7 makes it clear that unless good cause is shown the defendant cannot be related to the position that he would have occupied if he had appeared. That means that he cannot put in a written statement unless he is allowed to do so, and if the case is one in which the Court considers a written statement should have been put in, the consequences, entailed by Order VIII, rule 10 must be suffered.

What those consequences, should be in a given case is for the Court, in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases an order awarding costs to the plaintiff would meet the ends of justice : an adjournment can be granted or a written statement can be considered on the spot and issues framed. In other cases, the ends of justice may call for more drastic action.

Now when we speak of the ends of justice, we mean justice not only to the defendant and to the other side but also to witnesses and others who may be inconvenienced. It is an unfortunate fact that the convenience of the witness is ordinarily lost sight of in this class of case and yet he is the one that deserves the greatest consideration. As a rule, he is not particularly interested in the dispute but he is vitally interested in his own affairs which he is compelled to abandon because a Court orders him to come to the assistance of one or other of the parties to a dispute. His own business has to suffer. He may have to leave has family and his affairs for days on end. He is usually out of pocket. Often he is a poor man living in an out of the way village and may have to trudge many weary miles on foot.

And when he gets there, there are no arrangements for him. He is not given accommodation; and when he reaches the Court, in most places there is no room in which he can wait. He has to loiter about in the verandahs or under the trees, shivering in the cold of winter and exposed to the heat of summer, wet and miserable in the rains : and then, after wasting hours and sometimes days for his turn, he is brusquely told that he must go back and come against another day. Justice strongly demands that this unfortunate section of the general public compelled to discharge public duties, usually at loss and inconvenience to themselves, should not be ignored in the overall picture of what will best serve the ends of justice and it may well be a sound exercise of discretion in a given case to refuse an adjournment and permit the plaintiff to examine the witnesses present and not allow the defendant to cross examine them, still less to adduce his own evidence. It all depends on the particular case.

But broadly speaking after all the various factors have been take into consideration and carefully weighed, the endeavour should be to avoid snap decisions and to afford litigants a real opportunity of fighting out their cases fairly and squarely. Costs will be adequate compensation in many cases and in others the Court has almost unlimited discretion about the terms it can impose provided always the discretion is judicially exercised and is not arbitrary. "

10. In the case of Bajrang Bahadur Tripathi Vs. Suraj Kumar and others, 1985 (3) LCD 394, this Court after placing reliance on the judgment given by Hon'ble the Apex Court in the case of Arjun Singh Vs. Mohindra kumar and others, AIR 1964 SC 993, held as under:-

"Obviously this rule would apply where the hearing of the suit ex parte has been adjourned. Where the hearing has not been adjourned, this rule will not be attracted. Pronouncement of judgment is not a part of the hearing of the suit. In the present case the entire hearing had concluded on 15-2-1985 and only judgment remained to be pronounced. As such, the defendant's application under Order IX, Rule 7 was misconceived and was rightly rejected by the Court below. Once it is held that the application was not maintainable, the question of its being liberally dealt with does not arise at all. However, the authorities relied upon by the learned Counsel for submitting that the application should be liberally dealt with and the direction should be exercised in favour of hearing may be noticed. The first authority relied upon in this behalf is Ramji Das v. Mohan Singh, 1978 ARC 496. This was a case under Order IX, Rule 13, of the Code of Civil Procedure. The next decision relied upon by the learned Counsel is The Special Land Acquisition Officer, Bangalore v. Adinarayan Setty, AIR 1959 SC 429. The learned Counsel did not invite my attention to any particular portion of this judgment. This was a case under the Land Acquisition Act and the propositions laid down by their Lordships primarily concerned the assessment of compensation. Arjun Singh v. Mohindra Singh, AIR 1964 SC 993, is of no assistance to the applicant; rather it is against him. It was held in this case by their Lordships that inherent power of the Court cannot override the express provisions of the statute and that Order IX, Rule 13 exhaust the whole gamut of situations that might arise owing to non-appearance of defendant during the course of trial. In this very case it is also laid down by their Lordships that where the hearing has been completed and the case has been fixed for pronouncement of judgment, Order IX, Rule 7 is not attracted. The applicant did not apply under Order IX, Rule 13 after the ex parte decree had been passed. In the circumstances, in view of the observations made by their Lordships the applicant had no right to claim setting aside of ex parte order. Smt. Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597, has no application to the facts of the present case. In this case Smt. Maneka Gandhi's passport was impounded without giving her opportunity of hearing. It was held by their Lordships of the Supreme Court that the proceeding for impounding, the passport was quasi-judicial in nature and before impounding the passport, opportunity of hearing was required to be given. In case on hand the applicant was served with the summons and he had put in appearance. He had notice of the date fixed for hearing and yet he failed to appear before the Court. It is not a case where opportunity of hearing was not given to the applicant. The opportunity of hearing was given but he did not avail of the same. In Savitri Amma Seethamma v. Artha Karthy, (1983) 1 SCC 401 : AIR 1983 SC 318, it was held that the non-appearance of a counsel at the time of hearing on account of being busy elsewhere was a sufficient cause to entitle a party for restoration of the proceedings. This judgment has no application to the facts of the present case. In Shankar Baksh Singh v. Maheshwar

Dayal, AIR 1931 Oudh 159, a Division Bench of the Oudh Chief Court held that the discretion conferred under Order IX, Rule 7, of the Code of Civil Procedure should be liberally exercised. However, this authority could be of assistance to the assistant only if application under Order IX, Rule 7 was maintainable. As held herein above, the application of the applicant was not maintainable. Accordingly, this authority is of no assistance to the applicant." (See also Lal Bahadur Vs. IInd Addl. Munsif, Fatehpur and others, 2002 AIR(Ald) 360).

11. In the case of Punjab National Bank Vs. Vijay Kumar Dhariwal, 1993 (11) LCD 1177, this Court has held as under:-

"Having gone through the judgment of the Court below and heard the learned Counsels for the parties I have not been able to find that any finding has been recorded by the Court below on the question of good cause for previous non-appearance of the defendant. There being no finding if good cause for previous non-appearance has been shown or established the Court below could not proceed with the passing of the order it had passed. When the law requires certain things to be done and conferred a power to doing that things in certain specified manner then by necessary implication what follows from it is that act has got to be done or that particular powers have got to be exercised in that manner alone and not otherwise, other modes of exercise of that power are closed, See State of Uttar Pradesh v. Singham Singh , A.I.R. 1964 S.C. 358.

12. And in the case of Prahlad Singh and another Vs. Niyaz Ahmad and others, 2000 (18) LCD 757, it has been held as under:-

"Learned counsel for the petitioner in support of his submission referred to and relied upon the decision of the Apex Court in Arjun Singh u. Mohindra Kumar and others. AIR 1964 SC 993, and the decision of this Court in Bajrang Bahadur Tripathi v. Suraj Kumar, 1985 (3) LCD 394. In Arjun Singh's case, the controversy Involved was as to whether an order passed in exercise of power under Order IX, Rule 7. C.P.C. rejecting the application to set aside the order to proceed ex parte would operate as res Judicata. In the present case, the application under Order IX, Rule 7, C.P.C. was dismissed. The order of dismissing the said application has become final; but the petitioner again filed an application under Order IX, Rule 7, C.P.C. The question was as to whether the subsequent application was hit by principle of res judicata, The Courts below answered the said question in affirmative. In Arjun Singh's case (supra), it was held that the order passed under Order IX, Rule 7, C.P.C. will not operate as res Judicata while dealing with an application under Order IX, Rule 13, C.P.C. In the present case, so far, the decree has not been passed ex parte. In case the suit is decreed, it would be open to the petitioner to file an application under Order IX, Rule 13. C.P.C. Thus the decision in Arjun Singh's cose has got no application to the facts of this case.

13. In Bajrang Bahadur Tripathi's case (supra) aforesaid decision of the Supreme Court came to be considered, after taking into consideration the said decision, it was ruled as under by this Court :

"The learned counsel for the plaintiff-opposite parties submitted that after ex parte evidence had already been recorded, the defend ant-applicant had no

right to make application under Order IX. Rule 7, and, therefore, the said application was misconceived and had been rightly rejected by the Court below. For making this submission that the application, at the stage at which it was moved, was not maintainable, the learned counsel has relied upon Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993. In this case, it was held by their Lordships that if the entirety of the hearing had been completed and only judgment remained to be pronounced. Order IX. Rule 7 was not applicable".

"Arjun Singh v. Mohindra Stngh and others, AIR 1964 SC 993, is of no assistance to the applicant ; rather it is against him. It was held in this case by their Lordships that Inherent power of the Court cannot override the express provisions of the statute and that Order IX, Rule 7 and Order IX, Rule 13 exhaust the whole gamut of situations that might arise owing to non-appearance of defendant during the course of trial. In this very case it is also laid down by their Lordships that where the hearing has been completed and the case has been fixed for pronouncement of Judgment, Order IX, Rule 7 is not attracted. The applicant did not apply under Order IX, Rule 13 after the ex parte decree had been passed. In the circumstances. In view of the observations made by their Lordships the applicant had no right to claim setting aside of ex parte order".

14. In this case, as stated above, the trial court directed to proceed ex parte on 19.5.1994 and fixed for 15.7.1994 for hearing. On 15.7.1994 the plaintiff-respondent produced his evidence as ex parte. Thereafter the application under Order IX. Rule 7. C.P.C. was filed on 6.8.1994 which was apparently not maintainable. The subsequent application filed by the petitioner again under Order IX, Rule 7. C.P.C. on 11.8.1994 for the same relief i.e. for setting aside the order dated 15.7.1994, the said application was clearly barred by Section 11, C.P.C."

13. Thus, the settled provisions of law in regard to provisions of Order IX Rule 7 CPC is to the affect that when defendant appears and assigns good cause for his previous non-appearance he may, upon such terms as the Court directs as to costs or otherwise, be allowed to be heard and answer to the suit as if he had appeared on the day, fixed for his appearance.

14. So far as the good cause and sufficient cause for non-appearance is concerned, the said words has been interpreted by the Hon'ble the Superme Court in the case of Sangram Singh Vs. Election Tribunal, Kotah, 1955 AIR (SC) 425, as under:-

"Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

The existence of such a principle has been doubted, and in any event was condemned as unworkable and

impractical by O'Sullivan, J. in Hariram v. Pribhdas(1). He regarded it as an indeterminate term "liable to cause misconception" and his views were shared by Wanchoo, C. J. and Bapna, J. in Rajasthan: Sewa Ram v. Misrimal(1). But that a law of natural justice exists in the sense that a party must be heard in a Court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in Balakrighna Udayar v. Vasudeva Ayyar(3), and especially in T. M. Barret v. African Products Ltd.(1) where Lord Buckmaaster said "Do forms or procedure should ever be permitted to exclude the presentation of a litigant's defence". Also Hari Vishnu's case which we have just quoted.

In our opinion, Wallace, J. was right in VenkataSubbiah v. Lakshminarassimham(5) in holding that "One cardinal principle to be observed in trials by a Court obviously is that a party has a right to (1) A.I.R 1945 Sind 98,102 (2) A.I.R. 1952 Raj. 12,14.

(3) A.I.R. 40 Mad. 793, 800 (4) A.I.R. 1928 P.C. 261, 262.

(5) A.I.R. 1925 Mad. 1274.

appear and plead his cause on all occasions when that cause comes on for hearing", and that "It follows that a party should not be deprived of that right and in fact the Court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it".

Let us now examine that Code; and first, we will turn to the body of the Code. Section 27 provides that "Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim".

15. And in the case of B. Madhuri Goud Vs. B. Damodar Reddy, 2012 (12) SCC 693, after placing reliance on its earlier judgment in the case of Moniben Devraj Shah Vs. Municipal Corpn., 2012 (5) SCC 157, held as under:-

"23. What needs to be emphasised is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

24. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

16. Further, Order IX Rule 6 covers the case of a defendant who did not appear at all on the first hearing date and suit was adjourned after declaring hm ex parte, as also a defendant who absented after filing written statement. In both cases the ex - parte order only covered the period during which the defendant was actually absent and it did not act as a bar to his resuming appearance in the suit at

the stage in which it then was if he appeared subsequently and wanted to put forward his evidence. The rule is applicable if the defendant wants the court to retrace its steps and to be allowed to file written statement. But if the defendant wants to proceed from the stage already reached, he will have an absolute right without obtaining the court's permission to take part in the proceeding.

17. Accordingly, Order IX Rule 7 cannot be read to mean that defendant cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared. He cannot be stopped from participating in the proceeding simply because he did not appear in the first or some other hearing. He will have to show good cause for his previous absence, only if he desires to be relegated back to the position in which he would have been put if he had appeared at the previous hearings, so that the proceedings in his absence could be reopened.

18. In the instant case when an application for recall of the ex-parte order dated 07.03.2005 has been moved to which objection has been filed by the revisionist after taking into consideration the cause which has been shown by the defendant-respondent, the trial court has come to the conclusion that there exists sufficient cause rather good reason has been shown by the defendant-respondent for his previous non-appearance in the proceeding of the suit, allowed by order dated 23.12.2005, thus, I do not find any illegality or infirmity in the same.

19. For the foregoing reason, the revision lacks merit and is dismissed.

20. Office is directed to send the lower court record to the court concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.05.2015

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Rent Control No. 59 of 2011

Km. Damyanti Manoocha ...Petitioner
Versus
A.D.J. Faizabad & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Aslam Khan, M.A. Khan

Counsel for the Respondents:
Manish Kumar, I.D. Shukla, S.K. Mehrotra

(A)Small Causes Court Act, Section 25-Power of Revisional Court-very limited-whether of a tenant is chief tenant or subtenant-being question of fact-can not be touched by revisional court.

Held: Para-39
In the present case, learned Revisional Court has exceeded in his jurisdiction in view of the law settled regarding Section 25 of the Provincial Small Causes Courts Act by reappreciating the evidence de novo and coming to a different conclusion. If the Revisional Court was of the view that the findings of the trial court suffer from any infirmity, legal weakness or otherwise erroneous, it has power to remand the case to the trial court for recording a fresh finding after laying down appropriate guidelines. But it was not within the competence of the Revisional Court to reassess the evidence himself and record his own findings of fact in place of one recorded by the trial court which was based on appreciation of evidence.

(B)U.P. Act No. 13 of 1972-Section-2(1)(g)-applicability-where tenancy

being quite old-running since 1946-rate of rent can be enhanced-while passing ejectment-provisions of Section 2(1)(g) not applicable-except other provisions of the Act.

Held: Para-51

Considering the law laid down by Hon'ble the Apex Court in Lachoo Mal vs. Radhey Shyam (1971) 3 SCR 693, it is clarified that this direction of enhancement of the rate of rent/ damages is made in spite of the fact that by virtue of Section 2 (1) (g) of Act No.13 of 1972, the applicability of Section 2 (1) (g) is waived. Meaning thereby that either of the party shall not be entitled to take the benefit of Section 2 (1) (g) of Act No.13 o f 1972 and other provisions of Act No.13 of 1972 shall continue to apply.

Case Law discussed:

2000(2) ARC 344; 2000(2) ARC 739; 1990 (1) ARC 517; [2010 (1) ARC 473]; AIR 1966 (Alld) 280; [1966 AWR 274]; AIR 1973 (Alld.) 217; (2004) 4 Supreme Court Cases 794; (2007) 4 Supreme Court Cases 306; (2008) 7 Supeme Court Cases 722; Civil Appeal No. 2147 of 1980; 1984 (2) LCD 189; [2008 (1) ARC 70]; AIR 1965 SC 1585; AIR 1969 SC 1344; 1995 Supp (4) SCC 675; JT 1998 (8) 157; JT 1999 (10) SC 51:2000 SCFBRC 27; 1965 ALJ 989 (DB); 1998 (2) ARC 575; 2004 (2) ARC 64; 2004 (2) ARC 652; ADJ 2004 (2) ARC 652; AIR 2011 SC 1940.

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

1. Heard learned counsel for the petitioner, learned counsel appearing for the opposite party no.14 and perused the record.

2. This writ petition has been filed with the prayer to issue a writ of certiorari for quashing the judgment and order dated 31.01.2011, passed by the opposite party no.1.

3. The brief facts of the case are that the petitioner (landlady) had filed the suit for ejectment, arrears of rent and damages against the opposite party no.14 and others on the ground that the said shop was taken on rent by Gauri Shanker in the name & Style of firm Gauri Shanker Shyam Behari. The opposite party no.14 being daughter's son was not entitled to inherit the tenancy rights but since he was alleging to be a partner of the firm Gauri Shanker Roop Narain, therefore, he has been arrayed as a party. It was alleged that the shop in dispute was not in the tenancy of any firm rather it was in a tenancy of Gauri Shanker in his individual capacity. The landlady was not residing at Faizabad as she was Lecturer in Jaipur. When she came to Faizabad, she came to know that the shop in dispute was partitioned, which has changed its nature and diminished its utility. The firm Shyam Behari Shiv Das and the firm M/s Gauri Shanker Roop Narain are sub-tenants, therefore, no notice was required to be served upon them. As per the rent deed dated 13.03.1946, the tenant was not given the right to sub-let the shop. The tenancy was terminated by notice dated 31.01.1981.

4. The suit was contested by the opposite party no.14 and admitted the petitioner to be the landlady and the rate of rent. It was alleged that Gauri Shanker and Shyam Behari were real brothers and Gauri Shanker was the Karta of joint Hindu family, and Shyam Behari was the member. On the death of Gauri Shanker, his three daughters and Roop Narain in whose favour Smt. Rampati executed a will on 09.01.2009 became tenants. Gauri Shanker was carrying business in the firm name and style Shyam Behari Shiv Das and they are carrying on their respective business since April, 1972. The suit was also contested by the defendant nos.1, 6, 7 and 9, who also admitted the petitioner to

be landlady but they denied the fact of sub-letting. All the defendants have taken the plea that the shop was taken on rent by the firm Gauri Shanker Shyam Behari and Shiv Das was the partner. It was also alleged that the rent was paid by the firm.

5. After appreciating the evidence on record, the Judge, Small Cause Courts came to the conclusion that the original tenant had sub-let the said shop and there was no illegality in the notice and thereby the application was allowed by the judgment and order dated 01.10.2008.

6. The said judgment was challenged in Civil Revision No.144 of 2008 whereby the learned Revisional Court had found that the shop was given on rent to both Gauri Shanker and Shyam Behari, therefore, there was no sub-letting. Learned Revisional Court also came to the conclusion that Shiv Das was also partner in the said firm, but the original tenancy remained in the name of Gauri Shanker Shyam Behari. Learned Revisional Court also came to the conclusion that there was no violation of terms and conditions of the rent agreement and there was no sub-letting. Accordingly, the learned Revisional Court allowed the revision and set aside the judgment and order dated 01.10.2008 by the judgment and order dated 31.01.2011.

7. At the very outset, learned counsel for the petitioner has requested to treat this writ petition under Article 227 in place of Article 226 of the Constitution of India.

8. Learned counsel for the petitioner has submitted that the learned Revisional Court exceeded in his powers as provided under Section 25 of the Small Cause Courts Act and the Revisional Court cannot reappraise the evidence. It has also been submitted that Section 3 (e) and 7 (f) of the Old Act also do not permit for inducting the partner and under new act also and in view of the provisions of Sections 11 and 16, the sub-letting is prohibited. It has also been submitted that the rent deed was executed only by Gauri Shanker and not by Shyam Behari. Therefore Shyam Behari was not the tenant, but learned Revisional Court has misread the evidence on record and the findings are perverse.

9. In support of his submission, learned counsel for the petitioner has relied upon the case Vijay Kumar Gupta vs. Smt. Savitri Devi and another reported in 2000 (2) ARC 344, in which Hon'ble Single Judge of this Court has held that if occupation of the petitioner is in violation of provisions of Sections 11 and 13 of the Act, he is liable to be evicted.

10. Learned counsel for the petitioner has also relied upon the case Om Prakash and others vs. IInd Additional District Judge, Saharanpur and others reported in 2000 (2) ARC 739, in which Hon'ble Single Judge of this Court has held that in the revisional jurisdiction under Section 25 of the Small Cause Courts Act, the Revisional Court is bound by findings of fact reached by the trial court and it has no power to examine de novo findings of fact. It has further been held that Revisional Court has no jurisdiction to reassess or reappraise the evidence in order to determine the issues of fact. It has further been held that if the Revisional Court defers, it should remand the case for redecision.

11. Reliance has also been placed in the case of Jagjit Singh vs. District Judge, Dehradun and others reported in 1990 (1)

ARC 517, in which the Hon'ble Single Judge of this Court has held that even the consent of landlord in accepting the rent cannot defeat the provisions of Sections, 11, 13, 15 and 31 of the Act No.13 of 1972.

12. Reliance has also been placed in the case of Bhagwan Swarup (Dead) through LRs. vs. Smt. Hamida Khatoon (Dead) and others reported in [2010 (1) ARC 473], in which, in interpreting the provisions of Section 25 of the Small Cause Courts Act, the Hon'ble Single Judge of this Court has held that powers of Revisional Court under Section 25 of Small Cause Courts Act is limited and it is not open to the Revisional Court to reverse the findings of fact and to come to its own conclusion.

13. Learned counsel for the petitioner has also relied upon the case Mohd. Ishaq vs. State of U.P. & others reported in AIR 1966 (Alld) 280, in which the Full Bench of this Court has held that when a tenant-in-chief vacates the accommodation by sub-letting it to another person, then the District Magistrate is required to pass an order under Section 7 to the owner to let it to another person. This law is regarding U.P. (Temporary) Control of Rent & Eviction Act, 1947. The similar view has also been taken in the case of Sardar Harbans Singh Sethi vs. Rent Control and Eviction Officer, Nainital and others reported in [1966 AWR 274].

14. Reliance has also been placed upon the case Kunj Behari Lal Gupta vs. Shri Shivji Maharaj, Birajman Mandir and another reported in AIR 1973 (Alld.) 217, in which Hon'ble the Single Judge of this Court has held that the term 'tenant' in Section 2 (g) does not include persons enjoying benefit of contract of lease as assignees.

15. On the other hand, learned counsel for the opposite party no.14 (tenant) has submitted that the Revisional Court has ample jurisdiction in case it finds that the evidence on record has not been considered. It has also been considered that the firm is in existence since long and all the receipts of rent have been issued in the joint name. It has also been submitted that there is no sub-tenancy and the learned Judge, Small Causes Court had not appreciated the evidence on record in right perspective. Therefore, learned Revisional Court had interfered with the findings. It has also been submitted that the Revisional Court can consider the evidence, which has not been considered by the trial court, and thereby no illegality or error of law has been committed by the Revisional Court.

16. In support of his submission, learned counsel for the opposite party no.14 has relied upon the case Parvinder Singh vs. Renu Gautam and others reported in (2004) 4 Supreme Court Cases 794, in which the Hon'ble Supreme Court has held as under:-

"The rent control legislations which extend many a protection to the tenant, also provide for grounds of eviction. One such ground, most common in all the legislations, is subletting or parting with possession of the tenancy premises by the tenant. Rent control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession of the premises, in breach of the contract or the law, which act is often done with the object of

illegitimate profiteering or rack renting. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sublet the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal the transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant".

17. Reliance has also been placed upon the case Amar Nath Agarwalla vs. Dhillon Transport Agency reported in (2007) 4 Supreme Court Cases 306, in which Hon'ble the Supreme Court has held as under:-

"The question is whether carrying on business by one of the partners of the firm which was originally the tenant amounts to sub-letting of the premises by the original tenant.

In Murli Dhar v. Chuni Lal and Ors., (1969) RCR 563 this Court had repelled the contention that the old firm and the new firm being two different legal entities, the occupation of the shop by the new firm was occupation by the legal entity other than the original tenant and such occupation proved sub-letting. Repelling the contention this Court held:-

"This contention is entirely without substance. A firm, unless expressly provided for the purpose of any statute which is not the case here, is not a legal entity. The firm name is only a compendious way of describing the partners of the firm. Therefore, occupation by a firm is only occupation by its partners. Here the firms have a common partner. Hence the occupation has been by one of the original tenants."

In Mohammedkasam Haji Gulambhai v. Bakerali Fatehali (Dead) by LRs., Reported in [1998] 7 SCC 608 this Court observed:

"There is absolute prohibition on the tenant from sub-letting, assigning or transferring in any other manner his interest in the tenanted premises. There appears to be no way around this subject of course if there is any contract to the contrary between the landlord and the tenant. In a partnership where the tenant is a partner, he retains legal possession of the premises as a partnership is a compendium of the names of all the partners. In a partnership, the tenant does not divest himself of his right in the premises. On the question of sub-letting etc. the law is now very explicit. There is prohibition in absolute terms on the tenant from sub-letting, assignment or disposition of his interest in the tenanted premises."

The same principle was reiterated by this Court in Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy, reported in [2005] 1 SCC 481 wherein this Court held:

"The mere fact that another person is allowed to use the premises while the lesses retains the legal possession is not enough to create a sub lease. Thus, the thrust is, as laid down by this Court, on finding out who is in legal possession of the premises. So long as the legal possession remains with the tenant the mere factum of the tenant having entered into partnership for the purpose of carrying on the business in the tenancy premises would not amount to sub-letting. In Parvinder Singh vs. Renu Gautam (2004) 4 SCC 794, a three-Judge Bench of this Court devised the test in these terms: (SCC P. 799, Para 8) "If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant."

Applying these principle to the instant case, it is patent that one of the partners of the firm which was the original tenant has continued in legal possession of the premises as a partner of another firm constituted after dissolution of the original firm. Thus the legal possession is retained by a partner who was one of the original tenants. In these circumstances, we find no fault with the finding of the High Court there was no sub-letting of the premises and hence the suit for eviction deserved to be dismissed."

18. Learned counsel for the opposite party no.14 has also relied upon the case Nirmal Kanta (Dead) through Lrs vs. Ashok Kumar and another reported in (2008) 7 Supreme Court Cases 722, in which the Hon'ble Supreme Court in para-16 has held as under:-

"16. What constitutes sub-letting has repeatedly fallen for the consideration of this Court in various cases and it is now well-established that a sub-tenancy or a sub-letting comes into existence when the tenant inducts a third party/stranger to the landlord into the tenanted accommodation and parts with possession thereof wholly or in part in favour of such third party and puts him in exclusive possession thereof. The lessor and/or a landlord seeking eviction of a lessee or tenant alleging creation of a sub-tenancy has to prove such allegation by producing proper evidence to that effect. Once it is proved that the lessee and/or tenant has parted with exclusive possession of the demised premises for a monetary consideration, the creation of a sub-tenancy and/or the allegation of sub-letting stands established."

19. Reliance has also been placed upon the judgment of Hon'ble Supreme Court delivered in the case Civil Appeal No.2147 of 1980; Jagdish Prasad vs. Smt. Angoori Devi decided on March 15, 1984 reported in 1984 (2) LCD 189, in which Hon'ble the Supreme Court has held as under:-

"The legal position having been totally misconceived by the trial court and

there being an assumption of the position which the landlord was required to prove by evidence, the revisional authority entitled to Point out the legal error and rectify the defect. This is all that had been done by the Additional District Judge.

In the case of Syed Yakoob v. K.S. Radhakrishna & Ors.,(1964) SCR64, a Constitution Bench of this Court indicated the scope of interference in a certiorari proceeding by saying that a writ of certiorari is issued for correcting the errors of jurisdiction committed by the courts or tribunals in cases where they exceed their jurisdiction or fail to exercise it or exercise it illegally or improperly. i.e. where an order is passed without hearing the party sought to be affected by it or where the procedure adopted is opposed to principles of natural justice. A caution was indicated by saying that the jurisdiction to issue a writ of certiorari is a supervisory one and in exercising it, the court is not entitled to act as a court of appeal. That necessarily means that the findings of fact arrived at by the inferior court or tribunal are binding. An error of law apparent on the face of the record could be corrected by a writ of certiorari, but not an error of fact, however, grave it may appear to be."

20. Learned counsel for the opposite party no.14 has also placed reliance upon the judgment of this Court delivered in Writ Petition No.14768 of 1990; Abdul Hamid vs. IXth ADJ, Bulandshahr and other, decided on May 11, 2007 reported in [2008 (1) ARC 70], in which Hon'ble Single Judge of this Court in paras-9, 11 and 14 has held as under:-

"9. In Hari Shanker and other v. Girdharilal, AIR 1963 SC 698, the Supreme Court held that a decision given according to law would not be set aside except on certain errors of law. A division bench of this Court in Laxmi Kishore and another v Har Prasad Shukla, AIR 1979 AWC 746 held that the Court exercising revision power under Section 25 does not possess jurisdiction to determine issues of fact itself by entering into the evidence and assessing it. The revisional Court had no jurisdiction to reassess or reappraise the evidence the evidence or determine an issue of fact but, the revisional Court would be justified to interfere in a finding of fact where it finds that the trial court had based its finding on no evidence or that the findings was perverse or that it had ignored a vital piece of material evidence."

The Division Bench held-

"As already seen, a Court acting under Section 25 of the provincial Small Cause Courts Act has no such power. The power to determine question of fact has been expressly taken away."

And further held-

"The Court deciding a revision under Section 25 of the Provincipal Small Cause Courts Act has to satisfy itself that the trial Courts' decree or order is according to law. Of course, the Revisional Court should keep in mind the Supreme Court's dictum in Naicker' case that a wrong decision on fact is also a decision according to law."

And further held-

"If it finds that there is no evidence to sustain a finding on a particular issue of fact, it can ignore that finding. Same will be the case where that findings is based only on inadmissible evidence. In such cases, the Court will be justified in deciding the question of fact itself, because the evidence is all one way. No assessment is needed. The Court can also decide the revision only a question of law

or some preliminary point of law, viz, validity of notice, is sufficient or its decision.

But, if it finds that a particular finding of fact is vitiated by an error of law, it has power to pass such order as the justice of the case requires, but it has no jurisdiction to reassess or reappraise the evidence in order to determine an issue of fact for itself. If it cannot dispose of the case adequately without a finding on a articular issue of fact, it should send the case back after laying down proper guidelines. It cannot enter into the evidence, assess it and determine an issue of fact."

"11. In the light of the aforesaid judgments, the revisional Court can ignore a finding on a particular issue of fact, if it finds that there was no evidence to sustain such a finding on that particular issue. The revisional Court could also ignore a finding where it was based on inadmissible evidence. The revisional Court, if it finds that a particular finding of fact was vitiated by an error of law, it had power to pass such order as the justice of the case may require".

"14. In the light of the aforesaid, this Court holds that the revisional Court rightly ignored the findings given by the trial court and correctly assessed the evidence in coming to the conclusion that the petitioner had constructed additional rooms. The revisional Court was within its power and was competent to assess the evidence which was in consonance of the powers provided under Section 25 of the Provincial Small Cause Courts Act. It was not necessary for the revisional Court to remit the matter back to the trial Court for reconsideration".

21. In view of the above, the following points need to be adjudicated.

(i) What are the power of Revisional Court under Section 25 of Small Causes Courts Act and whether it can re-appreciate the evidence on record or not ?

(ii) Whether the shop in question was sub-letted or not ?

22. In the present case, learned trial court after appreciating the evidence of both the parties has come to the conclusion that the basis of tenancy was of the agreement dated 13.03.1946. It has also been come to the conclusion that in breach of conditions of agreement dated 13.03.1946, there was sub-letting of the shop in question, therefore, the tenant was liable to be evicted.

23. Learned Revisional Court has drawn the conclusion that Shiv Das was a business partner but he was not sub-tenant. Learned Revisional Court has also come to the conclusion that Gauri Shanker and Shyam Behari both were joint tenants. Therefore the findings of learned court below are wrong and accordingly the revision was allowed and the judgment and decree dated 01.10.2008 was set aside.

24. From the pleadings and evidence of both the parties, it is not disputed that the basis of tenancy was the rent deed dated 13.03.1946. Both the courts below have interpreted this rent deed in their own way. The main consideration before the trial court was (i) whether the shop in question was in the sole tenancy of Gauri Shanker, or (ii) whether the shop in question was in joint tenancy of Gauri Shanker and Shyam Behari or (iii) whether the tenancy was in the name of partnership firm M/s Gauri Shanker Shyam Behari.

25. Learned trial court has come to the conclusion that it was in the sole tenancy of Gauri Shanker while learned

Revisional Court has come to the conclusion that it was in the joint tenancy of Gauri Shanker and Shyam Behari. The plea was also raised before the Revisional Court that because the said shop was in the tenancy of firm Gauri Shanker Shyam Behari, therefore Shiv Das could not be inducted as partner in the firm without the consent of the landlady. This contention was not accepted by the Revisional Court.

26. As far as powers of Revisional Court under Section 25 of Provincial Small Causes Courts Act are concerned, Section 25 reads as under:-

"25. Revision of decrees and orders of Courts of Small Causes.-The District Judge, for the purpose of satisfying himself that a decree or order made in any case decided by a Court of Small Causes was according to law, may of his own motion, or on the application on an aggrieved party made within thirty days from the date of such decree or order, call for the case and pass such order with respect thereto as he thinks fit :

Provided that in relation to any case decided by a District Judge or Additional District Judge exercising the jurisdiction of a Judge of Small Causes, the power of revision under this section shall vest in the High Court."

27. Section 25 of the. Small Causes Courts Act came to be interpreted before the Apex Court and this Court in number of cases. By the Apex Court and this Court, it has consistently been held that the District Judge or the High Court, in exercise of powers under Section 25 of the Small Cause Courts Act, has got limited jurisdiction. In the revision under the aforesaid Section, the Court could see that the decree or order in any case decided by the Court of Judge Small Causes was according to law or not.

28. In the State of Kerala v. K.M.C. Abdula and Company, AIR 1965 SC 1585, while considering the provisions of Section 12 of Madras General Sales Tax Act, which was analogous to the provisions of Section 25 of the aforesaid Act, the Apex Court has held as under :

"There is an essential distinction between an appeal and revision. The distinction is based on difference implicit in the said two expressions. An appeal is a continuation of the proceeding; in fact the entire proceedings are before the appellate court and it has power to scrutinize the evidence subject to the statutory limitation prescribed. But in the case of a revision whatever powers the revisional authority may or may not, does not have power to review the evidence unless statute specifically conferred on it that power."

29. In Malini Ayappa Naicker v. Seth Manghraj Udhaudas, AIR 1969 SC 1344, it was ruled by the Supreme Court that while exercising the power under Section 75 (1) of Provincial Insolvency Act, which is analogous to the provisions of Section 25 of the Small Cause Courts Act, the High Court is by and large bound by the findings of fact reached by the District Court. It was also observed that a wrong decision on facts by a competent authority is also a decision according to law and the Revisional Court has no power to review the findings of fact reached by the trial court.

30. In Dr. D. Sankaranarayanan v. Punjab National Bank, 1995 Supp (4) SCC 675, it was held as under :

"We are of the view that the learned counsel for the appellant is right when he contends that the revision petition was treated by the High Court as if it were a second appeal and upon a reassessment of the evidence, the findings of facts of the first appellate court were reversed."

"Thus, in our view, the revisional power of High Court under Section 25 of the Act not being an appellate power. It is impermissible for the High Court to reassess the evidence in a revision petition filed under Section 25 of the Act."

31. In Rafat Ali v. Sugni Bai and others, JT 1998 (8) SC 157, the Apex Court taking into consideration the decision in Sri Raj Laxmi Dyeing Works v. Rangaswami, JT 1998 (4) SC 46, as well as in Sarla Ahuja v. United India Insurance Company Ltd., JT 1998 (7) SC 297, ruled that the High Court should not interfere with the findings of fact merely because it does not agree with the findings of the subordinate authority and that it was not open to the High Court to substitute the findings of the Lower Courts with its own findings in exercise of its limited supervisory jurisdiction.

32. Similar view has been taken by the Supreme Court in Ramdoss v. K. Thangavelu, JT 1999 (10) SC 51: 2000 SCFBRC 27, wherein while considering the scope of Section 25 of the T. N. Buildings (Lease and Rent Control) Act, 1960 which is analogous to the provisions of the Act, it was ruled as under :

"The High Court, under Section 25 of the Act, can call for and examine the record of the appellate authority in order to satisfy itself as to regularity of such proceedings or the correctness, legality or propriety of any decision or orders passed therein."

33. Beginning with Ram Narain v. K. L. S. Vishwakarma, 1965 ALJ 989 (DB) and another Division Bench's decision in Laxmi Kishore and another v. Har Prasad Shukla, 1981 ARC 545, this Court has consistently taken the view that in exercise of powers under Section 25 of the Provincial Small Cause Courts Act, the Revisional Court has got no jurisdiction to re-appraise the evidence and to substitute its own findings on the questions of fact in place of findings recorded by the trial court. A reference in this regard may be made to the decisions in Prayag Narain Gaur v. Muneshwar Das and anothe,. 1979 ARC 341; Gopal Krishna Andley u. Vth Additional District Judge, Kanpur and others, 1982 (1) ARC 45 ; Fakir Chand v. IInd Additional District Judge, Aligharh and others, 1984 (1) ARC 68; Jagdish Prasad v. Angoori Devi, 1984 (1) ARC 679; Manmohan Dixit v. Additional District Judge/Special Judge (E. C. Act), Jalaun at Orai and others, 1996 (2) ARC 561 ; Smt. Fatima Begum and others v. IVth Additional District Judge, Jhansi and others, 1997(2) ARC 107 and Durga Prasad and others v. VIIth Additional District Judge, Kanpur Nagar and others, 1998 (1) ARC 470.

34. In view of the above, the law is settled that the Revisional Court could ignore the finding of fact recorded by the trial court and could record its own finding where the finding of the trial court is based on no evidence or there is absolutely no evidence on record to sustain a particular finding of fact, or it is based on inadmissible evidence or the same is perverse in the sense that no reasonable man could have ever reached to the conclusion arrived at by the Court below.

35. In 1998 (2) ARC 575, Murti Shri Laxman Ji Maharaj v. Panna Lal Sahu and another, it was ruled as under:-

"If the Revision Court was of the view that the finding of the trial court suffered from any infirmity, legal weakness or otherwise was erroneous, it had the power to remand the case to the trial court for recording a fresh finding after laying down appropriate guidelines but it was not within the competence of the Revisional Judge to assess the evidence himself and record his own finding of fact in place of the one recorded by the trial court which was based on appreciation of evidence."

36. The law relied upon by learned counsel for the opposite parties in Laxmi Kishore and another vs. Har Prasad Shukla, AIR 1979 AWC 746 also says that the Revisional Court would be justified to interfere in a finding of fact where it finds that the trial court had based its finding on no evidence or that the findings were perverse or that it had ignored a vital piece of material evidence. The reliance has also been placed upon the case Mool Narain Mehrotra vs. Smt. Gulab Devi and others, 1987 (2) ARC 411, in which it has been held that the Revisional Court could also ignore a finding where it was based on inadmissible evidence. The Revisional Court, if it finds that a particular finding of fact was vitiated by an error of law, it had power to pass such order as the justice of the case may require.

37. Considering all the aforesaid law regarding powers of the Revisional Court, and applying the principles laid down in the aforesaid law in the context of the pleadings, documentary evidence and the findings, it cannot be said that the trial court has based its finding on no evidence. It can also not be said that the findings of trial court had ignored any vital piece of material evidence. It can also not be said that the findings were based on inadmissible evidence. It cannot be disputed that in the present case learned Revisional Court has reassessed the evidence on record de novo and has drawn a different conclusion reversing the findings of fact arrived by the trial court. It is undisputedly a finding of fact that who was the tenant i.e. Gauri Shanker in a sole capacity or Gauri Shanker and Shyam Behari in the joint capacity or the firm Gauri Shanker Shyam Behari. The impact of decision of all these three aspects of tenant shall be far reaching. If Gauri Shanker is found to be sole tenant then the position shall be different and the question of sub-tenancy may arise. But if Gauri Shanker and Shyam Behari were the joint tenants then the heirs of Shyam Behari may also be treated to be the tenant after the death of Shyam Behari. But if the firm Gauri Shanker Shyam Behari is treated to be tenant then Shiv Das cannot be said to be sub-tenant because the apex court in Parvinder Singh vs. Renu Gautam and others (supra) has held as under:-

"The rent control legislations which extend many a protection to the tenant, also provide for grounds of eviction. One such ground, most common in all the legislations, is subletting or parting with possession of the tenancy premises by the tenant. Rent control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession of the premises, in breach of the contract or the law, which act is often done with the object of illegitimate profiteering or rack renting. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into

existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sublet the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal the transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant".

38. In Amar Nath Agarwalla vs. Dhillon Transport Agency (supra) the Hon'ble Apex Court has further held that one of the partners of the firm which was the original tenant has continued in legal possession of the premises as a partner of another firm constituted after dissolution of the original firm, the legal possession is retained by a partner who was one of the original tenants and it cannot be said to be sub-letting of the premises.

39. As held above, it is question of fact that whether Gauri Shanker was sole tenant or Gauri Shanker and Shyam Behari were joint tenant or M/s Gauri Shanker Shyam Behari were tenant is a question of fact. The findings of both the courts below are in conflict with each other. In the present case, learned Revisional Court has exceeded in his jurisdiction in view of the law settled regarding Section 25 of the Provincial Small Causes Courts Act by reappreciating the evidence de novo and coming to a different conclusion. If the Revisional Court was of the view that the findings of the trial court suffer from any infirmity, legal weakness or otherwise erroneous, it has power to remand the case to the trial court for recording a fresh finding after laying down appropriate guidelines. But it was not within the competence of the Revisional Court to reassess the evidence himself and record his own findings of fact in place of one recorded by the trial court which was based on appreciation of evidence.

40. In these circumstances, there is error of jurisdiction committed by the Revisional Court and I am of the view that the learned Revisional Court has exceeded his jurisdiction.

41. In view of the above legal position, the writ petition deserves to be allowed and the judgment and order dated 31.01.2011 passed by the learned Additional District Judge, Court No.9, Faizabad is liable to be set aside.

42. In Khursheeda v. ADJ, 2004 (2) ARC 64 and H.M. Kichlu v. ADJ 2004 (2) ARC 652, it has been held that while granting relief against eviction to the tenant in respect of building covered by Rent Control Act or while maintaining the said relief already granted by the courts below, writ court is empowered to enhance the rent to a reasonable extent.

43. In the aforesaid authority of Khursheeda (supra), reliance was placed upon the Supreme Court authority of M.V. Acharya v. State of Maharashtra, AIR 1998 SC 602 : 1998 SCFBRC 75, where it was held that it was essential to provide for periodical enhancement of rent under the Rent Control Acts. The Supreme Court has further held that frozen rents are giving rise to lawlessness and landlords out of frustration are approaching muscle man to get the premises vacated and courts of law are becoming redundant in this sphere. This authority has been followed by the Supreme Court in Satyawati Sharma (dead) by L.Rs. v. Union of India and another, (2008) 5 SCC 287: 2008 (71) AlR 499 : 2008 (3) ARC 1.

44. Under U.P. Rent Control Act, there is no provision of enhancement of rent after October, 1972 (Except where landlord is public charitable or public religious institution (Section 9-A) or Government is tenant (Section 21 (8). In the aforesaid authority of Khursheeda the authority of Supreme Court AIR 1996 SC 2410 : 1996 SCFBRC 471, Shangrila Food Products Ltd. v. Life Insurance Corporation of India is placed in paragraph 11 of which is quoted below:-

"It is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. Thus jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorily, before invoking the jurisdiction of the High court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief."

45. Thereafter in para-8 of the aforesaid authority of Khursheeda, it was held as under :-

"Rent Control Act confers a reasonable advantage upon the tenant of protection against arbitrary eviction. Tenant under the Rent Control Act cannot be evicted except on specific grounds like bona fide need of the landlord, arrears of rent, subletting and material alternation etc. This advantage is also coupled with the advantage of immunity from enhancement of rent. The latter advantage cannot be said to be either reasonable or equitable. The Supreme Court in the aforesaid authority of S.F.P. v. L.I.C., AIR 1996 SC 2410, has laid down that while granting relief to a party the writ court can very well ask the said party to shed the unfair advantage which it gained under the impugned order. By slightly extending the said doctrine it may safely be held that while granting the reasonable advantage to the tenant conferred upon him by the Rent Control Act the tenant may be asked to shed the unreasonable arbitrary advantage conferred upon him by the said Rent Control Act. The writ court therefore while granting or maintaining the relief against arbitrary ejectment ot the tenant can very well ask the tenant to shed the un-reasonable benefit of the Rent Control Act granted to him in the form of immunity against enhancement of rent, however inadequate the rent might be. Tenant will have to shed the undue advantage of immunity from enhancement of rent under the Rent Control Act to barter his protection from arbitrary eviction provided for by the said Act."

46. Thereafter in H.M. Kitchlu v. ADJ, 2004 (2) ARC 652, it has been held that the same principle of enhancement of rent to a reasonable extent may be made applicable while dismissing the writ petition of the landlord for the reason that by doing so writ court approves the protection of Rent Control Act granted to the tenant by the courts below.

47. Further in Mohd. Ahmad vs. Atma Ram Chauhan AIR 2011 SC 1940 (arising out of proceedings under Section 21 of U.P. Rent Control Act), it has been held as under:-

"According to our considered view majority of these cases are filed because landlords do not get reasonable rent akin to market rate."

48. The present tenancy is quite old since 1946, and since then the value of rupee has gone down by more than 100 times. It is the right of every landlord to get proper return of his property. The prices of land and building have also touched a new heights.

49. The trial court has enhanced the rate of rent from 01.02.1981 to 18.08.2000 at the rate of Rs.100/- per month and from 18.08.2000 to the date of actual possession the rent/ damages has been fixed Rs.1000/- per month. The litigation between the parties is still going on since 1981 for which about 34 years have passed and it is not sure that when this litigation will come to an end.

50. Certainly, the tenant must be in a gaining position from the said shop. Therefore, considering all facts and circumstances of the case and considering the Apex Court judgments and the judgments of this Court referred above, the rent/ damages is enhanced to Rs.2000/- per month with effect from 01.10.2008 for a period of five years i.e. upto 30.09.2013 and Rs.3000/- per month from 01.10.2013 for a further period of five years.

51. Considering the law laid down by Hon'ble the Apex Court in Lachoo Mal vs. Radhey Shyam (1971) 3 SCR 693, it is clarified that this direction of enhancement of the rate of rent/ damages is made in spite of the fact that by virtue of Section 2 (1) (g) of Act No.13 of 1972, the applicability of Section 2 (1) (g) is waived. Meaning thereby that either of the party shall not be entitled to take the benefit of Section 2 (1) (g) of Act No.13 o f 1972 and other provisions of Act No.13 of 1972 shall continue to apply.

52. Accordingly, the writ petition is allowed. The judgment and order dated 31.01.2011 passed by the learned Additional District Judge, Court No.9, Faizabad is set aside and the matter is remanded to the District Judge, Faizabad who shall either himself or by transferring it to any Additional District Judge, shall decide the revision afresh in view of the aforesaid legal position after affording opportunity of hearing to both the parties. Every endeavour shall be done to decide the revision expeditiously and, if possible, within six months.

53. The parties are directed to appear before the District Judge, Faizabad on 28.05.2015 for further hearing.

54. Let arrears of rent/damages be paid within three months from today as directed above, failing which, it shall be recoverable with the assistance of the Court.

55. Office is directed to send the certified copy of this order to the court concerned for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.05.2015

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.
THE HON'BLE RAJAN ROY, J.

W.P. No. 644 (SB) of 2015

Chandrapal Singh ...Petitioner
Versus
Chairman-cum-Managing Director,
Allahabad Bank & Anr. ...Respondents

Counsel for the Petitioner:
Vijai Prakash Tiwari and Mohd. Naeem

Counsel for the Respondents:
Vinay Shanker

Constitution of India, Art.-226-Dismissal of Branch Manager-on conviction on offence under Prevention of Corruption Act-prior infliction of punishment as per provision of Allahabad Bank Officer (Employees Discipline and Appeal Rules-notice issued-considering reply and conduct of petitioner-dismissal order passed-unless acquitted in appeal-can not be interfered by Writ Court-petition dismissed.

Held: Para-7
We have also perused the relevant rules which permit dismissal from service in such circumstances and we do not find any violation of the rules or the law in the present case. In these circumstances we do not find it a fit case for interference under Article 226 of the Constitution of India.

Case Law discussed:
(2010) 8 SCC 537; 1985 (51) FLR 362 (SC); 1995 SCC (L & S) 686; (2009) 9 SCC 24; W.P. No. 459 (SB) of 2015; Spl. Appl. (D) No. 219 of 2015; (2014) 7 SCALE 434.

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Mr. Vijai Prakash Tiwari, learned counsel for the petitioner as well as Mr. Gopal Kumar Srivastava, learned counsel for opposite parties.

2. By means of this writ petition the petitioner has challenged the order dated 19.06.2013 passed by the disciplinary authority dismissing the petitioner from service, as also the appellate order dated 20.12.2014 rejecting his appeal against the said order.

3. The facts of the case, in brief, are that the petitioner who is the erstwhile Manager, Naka Branch of Allahabad Bank, was convicted by the Special Judge (CBI) Court No.1, Lucknow vide judgment dated 14.08.2012. in Criminal Case No.4/2004, under Section 7 of the Prevention of Corruption Act, 1988 and was awarded a sentence of rigorous imprisonment for four years with fine of Rs.10,000/- and in default of payment of fine simple imprisonment for 6 months as also rigorous imprisonment for five years with a fine of Rs.15000/- in default simple imprisonment for one year under Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988. Both the sentences were to run concurrently. Based on the aforesaid conviction the disciplinary authority issued an office memorandum dated 14.02.2013 to the petitioner under Regulation 11 of the Allahabad Bank Officers Employees (Discipline and Appeal) Regulations, 1976 read with Section 10(1) (b) (i) of the Banking Regulations Act, 1949, read with Regulation 4 (j) of the Regulations, 1976,

calling upon him to submit his representation on the proposed penalty within 10 days to which the petitioner submitted his reply. After analyzing the reply of the petitioner the impugned order dated 19.06.2013 was passed by the disciplinary authority dismissing the petitioner from service. Thereafter an appeal was preferred by the petitioner which has also been rejected by the appellate authority by order dated 20.12.2014 giving cogent reasons based on the provisions of the Rules 1976, Banking Regulation Act, 1949, certain decisions of the Supreme Court reported in (2010)8 SCC 537 (Sushil Kumar Singhal Vs. Regional Manager, Punjab National Bank). Being aggrieved this writ petition has been filed challenging the aforesaid orders.

4. The contention of learned counsel for the petitioner was that the disciplinary/appellate authority have not considered the conduct of the petitioner leading to his conviction and have passed the order on the premise as if such conviction automatically entailed dismissal from service which was contrary to the Constitution Bench decision in the case of Union of India and another Vs. Tulsi Ram Patel, reported in 1985 (51) FLR 362 (SC).

5. The learned counsel for the Bank on the other hand submitted that the impugned orders do not suffer from any error as they have been passed in terms of the relevant provisions in the Rules as well as the pronouncement of the Supreme Court in the case of Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera reported in 1995 SCC (L&S) 686 and Southern Railway Officers Association and another Vs. Union of India and others, reported in (2009) 9 SCC 24 holding that a convicted bank employee cannot be allowed to continue in service.

6. Having heard learned counsel for the parties and perused the records we are unable to accept the contention of learned counsel for the petitioner. In the impugned order it is clearly mentioned that the said order was being passed after "carefully considering the ground of conduct of Sri Chandrapal Singh which led to his conviction". Based thereon the disciplinary authority formed the opinion that the circumstances of the case warranted imposition of penalty of dismissal from service. It is also relevant to refer a recent decision of this Court in Writ Petition No. 459 (SB) of 2015 Manoj Kumar Vs. Union of India and others, decided on 09.04.2015, wherein considering the Division Bench judgment of this Court dated 25.03.2015 rendered in Special Appeal (Defective) No. 219 of 2015 State of U.P. Vs. Prem Milan Tiwari, the case of Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera (supra), and the case of Government of A.P. And another Vs. B. Jagjeevan Rao, reported in (2014) 7 SCALE 434 as well as Union of India and another Vs. Tulsi Ram Patel (supra) were considered and following the said judgments, especially S. Nagoor Meera's case (supra) it was observed that "Regard being had to the aforesaid enunciation of law and keeping in view the expected standard of administration, conviction on the charge of corruption has to be viewed seriously and unless the conviction is annulled, an employer cannot be compelled to take an employee back in service." the Court declined to interfere during subsistence of conviction. In our view in the impugned order the disciplinary

authority has not only considered the conduct of the petitioner which has led to his conviction based on the provisions of criminal law under which he has been convicted for indulging in corruption, but it is also difficult to fathom that any other view of the matter could have been taken by the disciplinary authority in the facts of the present case considering the seriousness of the criminal offence for which the petitioner has been convicted. We may also refer to the decision of the Supreme Court in the case of Allahabad Bank Vs. Deepak Kumar Bhola, reported in (1998)9 SCC 265 wherein in a matter of suspension the Supreme Court observed that it would be unsuitable that a Bank should allow an employee to continue on duty when he is facing serious charges of corruption and misappropriation of the money. Accordingly it quashed the judgment of the High Court quashing the order of suspension of an employee of Allahabad Bank. In the case at hand the petitioner has already been convicted on charges of corruption under the Prevention of Corruption Act, therefore, he is not entitled to continue in service unless the conviction is set aside in the appeal filed by him against the same.

7. We have also perused the relevant rules which permit dismissal from service in such circumstances and we do not find any violation of the rules or the law in the present case. In these circumstances we do not find it a fit case for interference under Article 226 of the Constitution of India.

8. Consequently relief no. 2 prayed in the writ petition also cannot be granted by this Court at this stage.

9. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.05.2015

BEFORE
THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Service Single No. 2200 of 2015

NR-20124W, Lt. Col. (Military Nursing Services) Madhu Lata Gaur ...Petitioner
Versus
Armed Force Tribunal Regional Bench & Ors. ...Respondents

Counsel for the Petitioner:
P.N. Chaturvedi, Vinay Pandey

Counsel for the Respondents:
A.S.G.

(A) Constitution of India, Art.-226- Maintainability of Writ Petition-against order passed by Army Tribunal-Statutory provision of appeal-cannot be allowed to bypassed-petition dismissed.

Held: Para-17
In view of the aforesaid legal proposition, it is imminently clear that the writ petition filed by the petitioner assailing the order of the Tribunal is not maintainable and as such this Court is not inclined to exercise discretionary writ jurisdiction under Article 226 of the Constitution and the writ petition is liable to be dismissed.

(B)Constitution of India, Art. 14-binding precedent-Law laid down by Supreme Court-binding upon all High Courts-can not be ignored-even certain relevant provisions not brought to notice of Supreme Court.

Held: Para-16
Before parting, it may be pointed out that the law declared by Hon'ble Supreme Court is binding on all courts, including High courts, and High courts

cannot ignore it on the ground that relevant provisions were not brought to the notice of the Apex Court or that the Apex Court laid down the legal position without considering all the points, and therefore its decision is not binding. See: [Ballabhdas versus Municipal Committee, (1970) 2 SCC 267].

Case Law discussed:
Civil Appeal No. 7400 of 2013; [(2004) 3 UPLBEC 2389]; (2010) 8 SCC 110; AIR 1997 SC 1125; (2005) 7 SCC 492; (2001) 14 SCC 337; 2012 (8) SCC 524

(Delivered by Hon'ble Dr. Devendra Kumar Arora, J.)

1. By means of present writ petition, the petitioner has questioned the correctness and validity of the judgment and order dated 16.02.2015 passed by the Armed Forces Tribunal, Regional Bench, Lucknow, (in short referred to as 'Tribunal') in O.A. No. 274 of 2015 as also the order dated 13.03.2015 passed in Review Application No. 1 of 2015.

2. The petitioner, who was granted commission in Military Nursing Service was served with a show cause notice dated 30.9.2014 by the competent authority which was assailed by the petitoner before the Tribunal by filing Original Application No. 274 of 2014. The said Original Application was dismissed by the Tribunal vide its judgment and order dated 16.2.2015 being premature.

3. Hence this writ petition.

4. A preliminary objection has been raised by Shri S.B. Pandey, Assistant Solicitor General of India regarding maintainability of the writ petition. According to him, the instant writ petition has been filed challenging the order of the Tribunal, which is not maintainable in view of the recent judgment of the Apex Court rendered in Civil Appeal No. 7400 of 2013; Union of India and others Vs. Major General Srikant Sharma and another, decided on 11.03.2015.

5. Elaborating his argument, learned counsel for the respondents submitted that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and cannot be permitted to invoke the extra- ordinary jurisdiction of the High Court to issue a prerogative writ as the writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum.

6. It has further been argued on behalf of Union of India that the High Court cannot entertain writ petitions under Article 226 of the Constitution of India contrary to the law enacted by the Parliament being the Armed Forces Tribunal 2007 which is a special enactment exclusively provided for an appellate remedy by way of leave before the Court.

7. Refuting the allegation of the respondents, learned counsel for the petitioner on the strength of Full Bench Judgement of this Court in Mahesh Chandra Ex-LNK/CI Vs. Union of India and others; [(2004) 3 UPLBEC 2389], vehemently argued that the instant writ petition cannot be thrown away on the ground of availability of alternative remedy. In an attempt to substantiate his assertions, Learned counsel for the petitioner has drawn attention of the court towards conclusion nos. iv, v, vi and vii drawn in the aforesaid judgement, which read as under:

"(iv). Having said this, it needs to be emphasised that the existence of jurisdiction and the nature of its exercise have distinct connotations in constitutional law. The Armed Forces Tribunal is constituted by legislation which provides for a specialized and efficacious administration of justice in matters falling within its jurisdiction under the provisions of the Act. This is coupled with the need to maintain discipline in the Armed Forces;

(v) The Armed Forces Tribunal is a Court of first instance and ordinarily, matters which fall within the purview of its jurisdiction have to proceed for adjudication before the Tribunal and the Tribunal alone. Against the decision of the Tribunal, there is a statutory remedy of an appeal which is provided under Sections 30 and 31 to the Supreme Court;

(vi) Since a statutory remedy of an appeal is provided, the principles which are well established for the exercise of the jurisdiction under Article 226, would warrant that the High Court should be circumspect and careful while determining as to whether any case for the exercise of jurisdiction under Article 226 of the Constitution is made out;

(vii) The jurisdiction under Article 226 has not been abrogated as it could not have been, being a basic and essential feature of the Constitution."

8. Thus this court is required to first answer the question regarding maintainability of the writ petition against the order passed by the Armed Forces Tribunal, Regional Bench, Lucknow.

9. With regard to maintainability of the writ petition and availing alternative remedy, it would be apt to reproduce the law propounded by the Apex Court in United Bank of India v. Satyawati Tondon (2010)8 SCC 110 observed as under:-

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

10. In Shri Kant Sharma's case [supra] which has been relied by the Union of India, the question raised before the Apex Court was whether the right of appeal under Section 30 of the Armed Forces Tribunal Act, 2007 against an order of Armed Forces Tribunal with the leave of the Tribunal under Section 31 of the Act on leave granted by the Supreme Court, or bar of leave to appeal before the Supreme Court under Article 136(2) of the Constitution of India, will bar the jurisdiction of the High Court under Article 226 of the Constitution of India regarding matters related to Armed Forces.

11. The Apex Court after examining various case laws rendered on the subject and provisions of the Armed Forces Tribunal Act, 2007 summarized the conclusions as under:-

"37. Likelihood of anomalous situation

If the High Court entertains a petition under Article 226 of the Constitution of India against order passed by Armed Forces Tribunal under Section 14 or Section 15 of the Act bypassing the machinery of statute i.e. Sections 30 and 31 of the Act,

there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court. Section 30 provides for an appeal to this Court subject to leave granted under Section 31 of the Act. By clause (2) of Article 136 of the Constitution of India, the appellate jurisdiction of this Court under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any court or Tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves before the High Court under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition under Article 226 of the Constitution against the order of Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under Section 30 with leave to appeal under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under Article 226 of the Constitution under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy under Section 30 read with Section 31 Armed Forces Act.

38. The High Court (Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of Act. However, we find that Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India.

12. It would be relevant to add that in the case of L. Chandra Kumar Vs. Union of India and others, reported in AIR 1997 SC 1125, on which reliance has been placed by the petitioner, a seven Judges Constitution Bench of Hon'ble Supreme Court held as under:-

"Though judicial review in the basic feature of the Constitution, the vesting of power of judicial review in an alternative institutional mechanism, after taking it away from the High Courts, would not do violence to the basic structure so long as it was ensured that the alternative mechanism was an effective and real substitute for the High Court."

13. In the case of Central Coalfields Ltd. vs. State of Jharkhand and others (2005) 7 SCC, 492, it has been held that :

"If there is statutory alternative remedy available to a person under an statute itself, in that case the writ petition should not be entertained under Article 226 of the Constitution of India and the petitioner is directed to avail the alternative statutory remedy."

14. In Nivedita Sharma Versus Cellular Operator Assn Of India and others; (2001)14 SCC 337 the Apex Court noticed that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

15. In Cicily Kallarackal vs. Vehicle Factory 2012(8) SCC 524 the Apex Court issued a direction of caution that it will not be proper exercise of the jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeal lies before the Apex Court.

16. Before parting, it may be pointed out that the law declared by Hon'ble Supreme Court is binding on all courts, including High courts, and High courts cannot ignore it on the ground that relevant provisions were not brought to the notice of the Apex Court or that the Apex Court laid down the legal position without considering all the points, and therefore its decision is not binding. See: [Ballabhdas versus Municipal Committee, (1970) 2 SCC 267].

17. In view of the aforesaid legal proposition, it is imminently clear that the writ petition filed by the petitioner assailing the order of the Tribunal is not maintainable and as such this Court is not inclined to exercise discretionary writ jurisdiction under Article 226 of the Constitution and the writ petition is liable to be dismissed.

18. For the reasons aforesaid, the writ petition is dismissed being not maintainable. It is clarified that this Court has not delve into the merits of the case.

19. Costs easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.05.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
HON'BLE SHRI NARAYAN SHUKLA, J.

Misc. Bench No. 3146 of 2015 with Misc. Bench No. 1779 of 2015

Lok Prahari Thru. General Secy. [PIL] .Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
S.N. Shukla (In Person)

Counsel for the Respondents:
C.S.C., Abhinav N. Trivedi, V.K. Dubey

Constitution of India, Art. 226-Public Interest Litigation-Petitioner seeking direction-to declare MLA seat vacant-on disqualification after conviction-in criminal case-although conviction and execution of sentense stayed-suspended by Appellate Court-in view of provisions Section 8(3) of Representation of people Act-held-once similar prayer refused in shape of PIL-keeping in view of decision of Lily Thomas case-petition misconceived.

Held: Para-13
Thus, it is clear that notwithstanding the declaration of Section 8(4) of the Act as ultra vires, the Supreme Court has protected the consequence of the exercise of the power contained in Section 389(1) of the Code so that where the appellate court in the exercise of the power stays the conviction, the disqualification which would otherwise stand attracted will not operate from the date on which the conviction has been stayed.

Case Law discussed:
(2007) 2 SCC 574; (2013) 7 SCC 653; (1995) 3 SCC 513; (2007) 1 SCC 673; (2001)7 SCC 231.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.

1. The third respondent was elected as a Member of the State Legislative Assembly on 8 March 2012 from the Mirzapur Sadar - 396 seat. Presently, he holds the office of a Minister of State in the State Government. On 28 February 2015, he was convicted by the Chief Judicial Magistrate of offences under Sections 353, 504 and 506 of the Penal Code. The third respondent was sentenced to imprisonment of two years under Section 353 and to a fine of rupees two thousand (or in default to imprisonment of three months); to imprisonment for two years in respect of the offence under Section 504 and to a fine of rupees two thousand (or in default to imprisonment of three months); and in respect of the offence under Section 506 to imprisonment for three years and to a fine of rupees five thousand (or in default to imprisonment of six months).

2. On 10 March 2015, while admitting the appeal filed by the third respondent, the District and Sessions Judge, Mirzapur directed his release on bail and that the execution of the sentence would remain suspended. The third respondent had also sought a suspension of the conviction during the pendency of the criminal appeal specifically stating that he was a Member of the Legislative Assembly from the Mirzapur Assembly Constituency and that if the judgment and conviction were not stayed, he would incur a disqualification under Section 8(4) of the Representation of the People Act, 19511. The application for stay of the conviction was heard on 10 March 2015 and was deferred to 13 March 2015. The relevant part of the order of the District and Sessions Judge dated 10 March 2015 reads as follows:

"5ख प्रार्थना पत्र अपीलार्थी की ओर से इस आशय का प्रस्तुत किया गया है कि अपीलार्थी वर्तमान में मिर्जापुर विधानसभा क्षेत्र से विधायक है और यदि उसके विरूद्ध उपरोक्त निर्णयादेश का प्रभाव स्थगित नहीं किया गया तो ैमबजपवद 8;4द्ध वि त्मचतमेमदजंजपवद वि च्मवचसम ।बजए 1951 के अधीन विधानसभा से उसकी सदस्यता समाप्त हो जायेगी और भविष्य में चुनाव नहीं लड़ सकेगा तथा उसकी अपूर्णनीय क्षति होगी। अतएव आक्षेपित दोषसिद्धि का आदेश तथा उसका कियान्वयन अपील के निस्तारण तक स्थगित करने की कृपा की जाये।

उभय पक्ष को सुना गया एवं आक्षेपित निर्णायादेश का अवलोकन किया।

पत्रावली वास्ते आदेश दिनांक – 13.3.2015 को प्रस्तुत हो। अवर न्यायालय की पत्रावली तत्काल की जाये।"

3. On 13 March 2015, the Sessions Judge referred to the submission of the third respondent that if the judgment of conviction was not stayed, he would incur a disqualification. The Sessions Judge also noted that the third respondent had already been released on bail on 10 March 2015. After referring to the judgment of the Supreme Court in Navjot Singh Sidhu Vs. State of Punjab and another2; Lily Thomas Vs. Union of India and others3; and Basant Kumar Chaudhary Vs. Union of India and others4, the Sessions Judge passed the following order.

"आदेश

आक्षेपित निर्णयादेश का कियान्वयन अपील के निस्तारण तक निलम्बित किया जाता है। प्रार्थना पत्र 5 ख का निस्तारण तदनुसार किया जाता है।

पत्रावली अग्रिम नियत तिथि दिनांक – 10.4. 2015 को सुनवाई हेतु प्रस्तुत हो।"

4. A writ petition was filed before this Court at Allahabad, inter alia, seeking a declaration that the third respondent stood disqualified as a Member of the Legislative Assembly; for the withdrawal of all facilities provided as a State Minister; for a declaration of the seat as

vacant to facilitate a bye-election; and a restraint against the third respondent from functioning either as a Member of the Legislative Assembly or as a State Minister.

5. The effect of the order of the District and Sessions Judge was considered in a judgment of a Division Bench of this Court dated 21 April 2015, where it was held as follows:

"In the present case, as the record before the Court indicates, initially by an order dated 10 March, 2015 the fifth respondent was enlarged on bail and the execution of the sentence or "दण्डादेश" was suspended. The order of the Sessions Judge dated 10 March, 2015 specifically notes that an application had been filed by the fifth respondent stating that he was a sitting member of the Legislative Assembly and would incur a disqualification if the conviction was not stayed. An application for stay of the conviction and sentence was moved by the fifth respondent on 10 March, 2015 specifically drawing the attention of the Sessions court to the legal position. Upon hearing the application, the Sessions Judge by a separate order dated 13 March, 2015 directed that the implementation of the judgment under challenge would stand suspended pending the disposal of the appeal. There was no occasion for the Sessions Judge, Mirzapur to pass this order if the conviction, as prayed, was not being stayed. The execution of the sentence had already been suspended by the previous order dated 10 March, 2015 and if the application for stay of the order of the conviction was to be rejected, the Sessions Judge would have proceeded to pass an order of rejection of the application. On the contrary, the order of the Sessions Judge would indicate that the implementation of the entire judgment under appeal was suspended pending the disposal of the appeal and the application was accordingly disposed of. Having regard to this background and the plain terms of the order dated 13 March, 2015 we are unable to accept the submission of the petitioner that what was stayed, was only the implementation of the order, resulting only in a suspension of the sentence. The record and the plain terminology of the order would indicate to the contrary."

6. Consequently, the Division Bench held that the disqualification under Section 8(3) of the Act would not be attracted once the Sessions Judge had stayed the conviction on 13 March 2015. The writ petition was accordingly dismissed.

7. Two writ petitions are before the Court in these proceedings. The first writ petition by Lok Prahri seeks (i) a mandamus to the Principal Secretary in the Vidhan Sabha to issue a notification that the third respondent stands disqualified as a Member of the Legislative Assembly with effect from the date of his conviction; (ii) a writ of quo warranto to the third respondent; (iii) a declaration that the continuance of the third respondent after his conviction is illegal; and (iv) a direction to the Election Commission of India to take further action for filling up the seat. Similar relief has been sought in the companion writ petition in which a writ of quo warranto has been sought.

8. The submission which has been urged on behalf of the petitioners is that in the judgment of the Division Bench at

Allahabad, this Court construed the order of the Sessions Judge, Mirzapur dated 13 March 2015 as having stayed the conviction. This aspect has not been reagitated. However, it has been sought to be urged that notwithstanding the stay of conviction, the disqualification of the third respondent would not stand obviated since (i) the consequence of the seat falling vacant under Article 190(3)(a) of the Constitution stands attracted upon the disqualification under Article 191(1)(e) and the seat shall thereupon automatically become vacant; and (ii) the subsequent order of stay granted by the Sessions Judge, by which the conviction was stayed would not obliterate the disqualification which was attracted the moment the third respondent was convicted of an offence punishable with imprisonment of a term of not less than two years under Section 8(3) of the Act.

9. At the outset, we must note that though strictly as a matter form, no writ of quo warranto was sought in the proceedings which took place before this Court at Allahabad, the basis and foundation of these proceedings as in those which were filed at Allahabad, is the same. The submission is that the third respondent incurred a disqualification under Section 8(3) of the Act upon his conviction and sentence for an offence carrying a term of imprisonment of not less than two years and that the order of the Sessions Judge dated 13 March 2015 did not obliterate the disqualification. We must of course note the distinction in the submissions which were urged before the Court at Allahabad and in the present proceedings. In the proceedings at Allahabad, what was sought to be urged was that the Sessions Judge by his order dated 13 March 2015 had not stayed the conviction. This submission was inquired into and specifically rejected by the Division Bench at Allahabad. Those proceedings were in the nature of a petition filed in the public interest as are the two writ petitions which form the subject matter of these proceedings at Lucknow. All the issues which could and ought to have been raised at Allahabad must be treated as having been governed by and adjudicated upon by the Division Bench in its judgment dated 21 April 2015. The remedy of a party which is aggrieved by the judgment delivered by the Division Bench at Allahabad on 21 April 2015 would be to espouse the remedies available in law against that judgment.

10. Be that as it may, and since the submission which has been urged before this Court has been canvassed on merits as well, for the completeness of the record, we deem it appropriate to deal with the submission. The submission proceeds on the basis that under Section 8(3) of the Act, a person who is convicted of an offence and sentenced to imprisonment for not less than two years shall be disqualified from the date of the conviction and shall continue to be disqualified for a further period of six years since his release. Article 190(1) of the Constitution provides for disqualifications for membership. Sub-clause (e) of clause (1) of Article 191 of the Constitution provides that a person shall be disqualified for being chosen as and for being a Member of the Legislative Assembly or a Legislative Council of a State if he is so disqualified by or under any law made by Parliament. Article 190(3) of the Constitution provides that in such a situation, if a Member of a House of the Legislature of a State becomes

subject to any of the disqualifications mentioned, inter alia, in clause 1 of Article 191, his seat shall thereupon becomes vacant. The submission which is urged is that the disqualification stands attracted the moment an order of conviction is passed with the result that the seat would fall vacant and a subsequent stay which is granted of the conviction would not obliterate this effect.

11. In Lily Thomas (supra), the Supreme Court held the provisions of Section 8(4) of the Representation of the People Act to be ultra vires. Section 8(4) of the Act stipulated that notwithstanding anything contained in sub-sections (1), (2) or (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a Member of Parliament or the Legislature of a State take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the Court. In paragraph 30 of the judgment in Lily Thomas (supra), the Supreme Court noted that once a person who was a Member of either House of Parliament or the House of the State Legislature becomes disqualified by or under any law made by Parliament under Article 102(1)(e) and Article 191(1)(e) of the Constitution, his seat would automatically fall vacant by virtue of Article 101(3)(a) and Article 190(3)(a) of the Constitution and it was not open to Parliament to make a provision under Section 8(4) of the Act to defer the date on which the disqualification of a sitting Member would have effect. Having held this, the Supreme Court also dealt with the submission that if this interpretation would be adopted, a sitting Member of Parliament or of the State Legislature who suffers from a frivolous conviction by the trial court of an offence under sub-sections (1), (2) or (3) of Section 8 of the Act, would be remediless and would suffer immense hardship as he would stand disqualified on account of the conviction in the absence of sub-section (4) of Section 8 of the Act. This submission in regard to the severe consequences of the declaration of Section 8(4) of the Act as ultravires was dealt with in the judgment of the Supreme Court by adverting to the power conferred under Section 389 (1) of the Code of Criminal Procedure, 19735 upon the appellate court. The Supreme Court adverted to the decision in Rama Narang Vs. Ramesh Narang6 as having laid down the principle of law that the appellate court under Section 389(1) of the Code has the jurisdiction to stay the execution not only of the order of sentence but of the conviction itself. In fact, for convenience of reference, we extract hereinbelow from the decision in Rama Narang's case:

"19. That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the appellate court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we

see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code."

12. This power of the appellate court under Section 389(1) of the Code was specifically adverted to in the decision of the Supreme Court in Lily Thomas (supra) while holding provisions of Section 8(4) of the Representation of the People Act as ultra vires. In fact, after referring to the judgment in Ravikant S. Patil Vs. Sarvabhouma S Bagali7, the Supreme Court held as follows:

"...Therefore, the disqualification under sub-sections (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the appellate court under Section 389 of the Code or the High Court under Section 482 of the Code." (emphasis supplied)

13. Thus, it is clear that notwithstanding the declaration of Section 8(4) of the Act as ultra vires, the Supreme Court has protected the consequence of the exercise of the power contained in Section 389(1) of the Code so that where the appellate court in the exercise of the power stays the conviction, the disqualification which would otherwise stand attracted will not operate from the date on which the conviction has been stayed.

14. The reliance which has been placed on behalf of the petitioners upon the judgment of the Supreme Court in B.R. Kapur Vs. State of Tamil Nadu and another8, would not advance the case any further. In that case before the Constitution Bench, there was a conviction under Section 120-B of the Penal Code read with Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 and of offences under Section 409 of the Penal Code. The Madras High Court while suspending the sentence of imprisonment, dismissed the petition seeking a stay of the conviction. The Supreme Court held that the suspension of the execution of the sentence consequently did not remove the disqualification. B.R. Kapur's case was therefore one where there was no stay of the conviction but only a suspension of the sentence of imprisonment.

15. For these reasons and upon careful consideration of the submissions which have been urged on behalf of the petitioners, we find no merit in the writ petition. We hence also see no reason to accede to the prayer of the petitioner in person to refer the case to a larger bench. The petition is, accordingly, dismissed. There shall be no order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.05.2015

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Revision No. 3312 of 2013

Ravi ...Revisionist

Versus

State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Ravindra Sharma, Sri A.C. Srivastava, Sri A.P. Singh Raghav, Sri Saurabh Gour, Sri Sushil Shukla, Sri A.B.L. Gaur.

Counsel for the Opp. Parties:
A.G.A., Sri Gaurav Kakkar.

Cr.P.C. Section 401-Criminal Revision-against order passed by Session Judge-affirming order by Juvenile Justice Board-on ground if released on bail-shall cause moral, psychological safety of applicant-damaged without consideration of under taking given by mother-held-rider contained under section 12(1) not applicable-prayer for bail of delinquent minor-liable to allow.

Held: Para-23
At the cost of repetition it can be summerized that there is no adverse report or material that minor cannot be improved under guardianship of his mother. Even the report of the District Probation Officer, Gautam Budh Nagar is not supported by any material as to how minor will fall in company of bad elements if released on bail. The observation of the District Probation Officer in absence of any supporting material becomes bald and vague. Consequently, the same is to be ignored in a situation when mother of the delinquent juvenile promises to work for improvement of her son.

Case Law discussed:
2009 Cr.L.J. 2002; 2006 (4) ALJ 353; 2007 Cr.L.J. 612.

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard learned counsel for the revisionist, Sri Gaurav Kakkar, learned counsel for the opposite party no.2 and the learned AGA for the State.

2. By means of the instant revision, the revisionist Kusum mother/natural guardian wife of Jatanvir has sought bail of her minor son Ravi in Case Crime No.184 of 2013 under Sections 147, 148, 149, 452, 302, 307 I.P.C. and 7 Criminal Law Amendment Act, Police Station Dadari, District Gautam Budh Nagar, with the prayer that the impugned judgment and order dated 16.11.2013 passed by the learned Sessions Judge, Gautam Budh Nagar, in Criminal Appeal No.79 of 2013, Ravi Vs. State of U.P. affirming the order dated 11.10.2013 passed by the Juvenile Justice Board, Gautam Budh Nagar, be set aside and the application moved for bail of delinquent minor be allowed.

3. The relevant facts of this case in a nutshell are that the first information report was lodged on 24.04.2013 at 19:30 hours, at Police Station Dadari, District Gautam Budh Nagar, at the instance of the Phuttan Singh-opposite party no.2 whereupon the allegations were made against the delinquent juvenile Ravi and others alleging the commission of crime under Sections 147, 148, 149, 452, 302, 307 I.P.C. and 7 Criminal Law Amendment Act. The matter was investigated into and after completion of the investigation, charge sheet was submitted against the delinquent juvenile.

4. During course of the proceedings, an application was moved on behalf of the revisionist that Ravi be declared to be a juvenile as he was less than 18 years of age on the date of the incident whereupon after consideration of the matter, the Juvenile Justice Board, Gautam Budh Nagar, declared juvenile vide order dated 18.09.2013.

5. Thereafter, an application for bail was moved by the revisionist before the Juvenile Justice Board in Case Crime No.184 of 2013 under Sections 147, 148, 149, 452, 302, 307 I.P.C. and 7 Criminal Law Amendment Act. The Juvenile Justice Board, after considering the case, rejected the bail application vide order dated 11.10.2013 on the ground that in

case the juvenile is released on bail, his release would have adverse impact upon him on physical, moral and psychological side.

6. Feeling aggrieved by the bail rejection order dated 11.10.2013, the revisionist filed Criminal Appeal No.79 of 2013 before the appellate court, whereupon, after consideration of the appeal, the appellate court dismissed the appeal vide judgment and order dated 16.11.2013 affirming the order dated 11.10.2013 passed by the Juvenile Justice Board, Gautam Budh Nagar. Hence this revision.

7. Learned counsel for the revisionist submits that the parameters required to be considered for granting or not granting the bail to the delinquent minor are to be read in context to the mandate contained under Section 12 of the Act, and the gravity of the offence will not be a guiding factor while considering the bail application of the delinquent juvenile.

8. Learned AGA has opposed the prayer so made and has submitted that the learned Sessions Judge was basically guided by the material on record particularly by the fact that in case the delinquent minor is released on bail there is likelihood of his repeating the offence, which under the circumstances, was justified conclusion and no interference is required by this Court.

9. Considered the above submissions and also perused the orders impugned in the instant revision.

10. In view of above rival submissions the moot point involved in this revision for adjudication relates to the fact as to whether the bail to the delinquent juvenile in conflict with law will have to be considered on the strength of the merits of the case, or on gravity of offence or on the parameters as laid down under Section 12 of the Act.

11. Before dealing with the matter, it would be appropriate to take into account Section 12 of the Act which is extracted hereinunder:

"12. Bail of juvenile.-(1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety 1[or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person] but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

12. The above law as contained under sub-section (1) of Section 12 of the Act categorizes a situation when bail to a delinquent juvenile can be refused.

13. In so far as the mandate of the aforesaid Section 12 of the Act relating to the grant of bail to a delinquent juvenile is concerned,.....the only exception given for rejecting a bail stipulates to the extent that he shall not be so released if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

14. In view of the mandate aforesaid, it is obvious that if the aforesaid conditions are existing and there is reasonable likelihood of minor coming into association with any known criminal or he is likely to be exposed to moral, physical or psychological danger or his release would defeat the ends of justice, then the bail to the delinquent juvenile in conflict with law will not be allowed.

15. Even as per settled position of law, the merits/gravity of the offence will not be the sole guiding factor for disposal of the bail application of the delinquent juvenile in conflict with law. It is true that the first information report has been lodged against the revisionist under Sections 147, 148, 149, 452, 302, 307 I.P.C. and 7 Criminal Law Amendment Act but gravity of the offence loses significance in view of the paragraph nos.4, 5 and 6 of the affidavit filed in support of the supplementary affidavit to the instant revision, wherein, it has been specifically stated that the mother of the juvenile is willing to reform her child. This positively indicates that she is ready to take custody of her son with a will to improve his life.

16. However, it has been opined by the District Probation Officer that if the delinquent juvenile is released on bail, possibility of the delinquent juvenile falling into company with the known criminal or there being physical, moral or psychological danger to the safety of the delinquent juvenile cannot be ruled out. But there is total absence of any supporting material regarding above observation as to why such specific opinion has been formed by the District Probation Officer without there being any supporting material giving rise to the possibility of the minor falling into company with the known criminal or there being physical, moral or psychological danger to the minor or to defeat the ends of justice. In view of above backdrop of the facts, it can be conveniently observed that the bail application of the minor cannot be opposed simplicitor on the ground of gravity of the offence particularly when parents/guardian of the delinquent juvenile in conflict with law are ready to do reformative act on their part for upliftment of their child. Consequently, the rider/exception contained under Section 12 (1) is not applicable on account of want of supporting material.

17. So far as the report of the District Probation Officer is concerned, I pored over the same. It indicates that the parents of the juvenile exercise lesser supervision over the juvenile and in absence of proper care and in the event of his release on bail, there is possibility of juvenile falling into association with the known criminal or anti social elements.

However, the observation so made is not supported by any relevant material on record and mere hypothetical equation will not, ipso facto, term bald finding into certainty and this finding cannot be acted upon by this Court, as such any finding recorded by the District Probation Officer is pre-supposed to contain at least some relevant and cogent material so that the Court may take notice of the same and may analyze the material so placed on record as to whether the juvenile, if released on bail, will reasonably fall into company with known criminal and would be adverse to his physical, moral and psychological interest and upliftment. Therefore, the report of the District Probation Officer, Gautam Budh Nagar, is liable to be discarded for the reasons aforesaid.

18. The Juvenile Justice Board, Gautam Budh Nagar completely overlooked this particular aspect of the case, while rejecting the bail application. Even learned Sessions Judge while deciding Criminal Appeal No.79 of 2013 was very much influenced by the gravity of the offence and did not take into account the fact that the parents of the minor are willing to reform their child and there is nothing on record which may reflect that the mandate as laid down under sub-section (1) of section 12 of the Act will be violated, in case the delinquent minor is released on bail. In absence of any such clear cut finding based upon sufficient supporting material that the release of the delinquent juvenile will be in violation of the conditions contained under Section 12 (1) of the Act, it would not be proper to give primacy to gravity of the offence alone. The pertinent point is whether the release would bring the minor into association with any known criminal or will put him into physical, psychological or moral danger or it would defeat the ends of justice. In that perspective, it was incumbent upon the learned Sessions Judge, Gautam Budh Nagar to have taken into consideration the aforesaid mandate as contained under sub-section (1) of Section 12 of the Act. Even the report of the District Probation Officer admittedly lacks any relevant and supporting material, which may, indicate any reasonable possibility that in case juvenile is released on bail the ends of justice would be defeated.

19. Learned counsel for the revisionist submits that the natural guardian Kusum on behalf of the delinquent minor undertakes to exercise the complete control over the delinquent and will not bring him into association with any know criminal or will not put him in such situation that will put the minor into physical, mental or psychological danger and the delinquent will not repeat the offence alleged against him and he would be reformed.

20. In the case of A Juvenile v. State of Orissa: 2009 Cr.L.J. 2002 it has been held:-

"7. A close reading of the aforementioned provision shows that it has been mandated upon the Court to release a person who is apparently a juvenile on bail with or without surety, howsoever heinous the crime may be and whatever the legal or other restrictions containing in the Cr. P. C. or any other law may be. The only restriction is that if there appear reasonable grounds for believing that his release is likely to bring him into association with any known criminal or expose him to any moral,

physical or psychological danger or his release would defeat the ends of justice, he shall not be so released."

21. In the case Sanjay Chaurasia v. State of U. P. and another:2006 (4) ALJ 353 it has been laid down by this court as under:-

"10. In case of the refusal of the bail, some reasonable grounds for believing above-mentioned exceptions must be brought before the Courts concerned by the prosecution but in the present case, no such ground for believing any of the above-mentioned exceptions has been brought by the prosecution before the Juvenile Justice Board and Appellate Court. The Appellate Court dismissed the appeal only on the presumption that due to commission of this offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of the revisionist will be in danger and his release will defeat the ends of justice but substantial to this presumption no material has been brought before the Appellate Court and the same has not been discussed and only on the basis of the presumption, Juvenile Justice Board has refused the Bail of the revisionist which is in the present case is unjustified and against the spirit of the Act."

22. In the case of Ravi-Ul-Islam v. State (NCT, Delhi): 2007 Cr.L.J. 612 it has been held as under:-

"6. Looking at the Social Investigation Report, it is difficult to come to the conclusion that the release of the juvenile would bring him into association of any known criminal or expose him to any physical or moral danger or his release would defeat the ends of justice. Accordingly, in view of the specific provisions of Section 12 of the said Act, the petitioner would be clearly entitled to be released on bail."

23. At the cost of repetition it can be summerized that there is no adverse report or material that minor cannot be improved under guardianship of his mother. Even the report of the District Probation Officer, Gautam Budh Nagar is not supported by any material as to how minor will fall in company of bad elements if released on bail. The observation of the District Probation Officer in absence of any supporting material becomes bald and vague. Consequently, the same is to be ignored in a situation when mother of the delinquent juvenile promises to work for improvement of her son.

24. In view of the above, the prayer for bail made on behalf of the delinquent minor is liable to be allowed.

25. Consequently, the order impugned dated 11.10.2013 passed by the Juvenile Justice Board, Gautam Budh Nagar on the bail application of the delinquent juvenile in conflict with law and the impugned judgment and order dated 16.11.2013 passed by the learned Sessions Judge, Gautam Budh Nagar, in Criminal Appeal No.79 of 2013 are hereby set aside and the prayer made for grant of bail to the delinquent juvenile through his mother who is natural guardian Kusum wife of Jatanvir is allowed.

26. Let the revisionist Ravi through his natural guardian/mother be released

on bail in Case Crime No.184 of 2013 under Sections 147, 148, 149, 452, 302, 307 I.P.C. and 7 Criminal Law Amendment Act, Police Station Dadari, District Gautam Budh Nagar, on his mother Kusum furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Gautam Budh Nagar with an undertaking that in case the delinquent juvenile is released on bail and is given in her custody she will not create any situation which will bring the delinquent juvenile into association with any known criminal or expose to him moral, physical and psychological danger or any situation when the delinquent juvenile may repeat the offence in question and she will work for improvement of the delinquent juvenile.

27. Accordingly, the instant revision is allowed.

28. Let a copy of this order be certified to the Juvenile Justice Board, Gautam Budh Nagar, at the earliest.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2015

BEFORE
THE HON'BLE AJAI LAMBA, J.
THE HON'BLE AKHTAR HUSAIN KHAN, J.

Misc. Bench No. 3758 of 2015

Nafeesa ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
S.K. Sharma

Counsel for the Respondents:
Govt. Advocate

Constitution of India, Art.-226-Writ Petition-seeking direction-to the Magistrate-to record her statements under Section 164 Cr.P.C.-as earlier statements based upon pressure of her husband-held-if individual permitted to approach directly-very purpose of investigate frustrated-sole domine of investigation agency-no such direction required-even otherwise petitioner will get opportunity to give statements as prosecution witness before Trail Court-petition dismissed.

Held: Para-13, 15, 19

13. In the opinion of this Court, investigation is a searching enquiry for ascertaining facts; detailed or careful examination. Such Investigation is to be conducted by an investigating agency. In case persons individually are permitted to create "evidence in the process of investigation", the process of investigation would be interfered.

15. Considering the above it becomes illusory and apparent that only a police officer or an investigator can sponsor a witness to a Magistrate for recording of statement under Section 164 Cr.P.C.

19. The petitioner would have the option to give statement in court when she is produced as a prosecution witness. It would be for the Trial Court to consider the statement (s) of the prosecutrix and conclude whether offence has been committed or not.

Case Law discussed:
(2000) 1 SCC 272.

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

1. The question raised by way of this petition is as to whether a witness, of his own has the right to approach a Magistrate to record his statement under Section 164 Cr.P.C.; and whether such Magistrate is under a legal obligation to record the statement of such witness under Section 164 Cr.P.C., when

investigation in a criminal offence is going on?

2. The petition seeks issuance of a writ in the nature of Mandamus, directing the investigating agency to record statement of the petitioner under Section 164 Cr.P.C. in open Court.

3. It has been pleaded in the petition that the petitioner lodged false F.I.R. on the basis of fabricated facts under pressure from her husband, bearing Case Crime No. 358 of 2014, under Sections 376 and 506 I.P.C., police station Laharpur, district Sitapur (First Information Report dated 9th September, 2014, Annexure-1). It has further been pleaded that the petitioner is an illiterate person with no knowledge of law. The petitioner did not know the accused.

4. In paras-9 to 11 of the petition, it has been pleaded that under threat of her husband and the investigating officer of the case, the petitioner gave her statement under Section 164 Cr.P.C. against Nasru, son of Buddha.

5. The petitioner moved application before the Additional Chief Judicial Magistrate-I, Sitapur for recording her statement a second time under Section 164 Cr.P.C., which has not been allowed. Appropriate directions be issued so that second statement of the prosecutrix is recorded under Section 164 Cr.P.C.

6. None appears for the petitioner.

7. We have taken note of the conceded position of the petitioner that she is author of F.I.R., Annexure-1, making allegation of commission of serious offence, like rape. Subsequently, during the course of investigation, on the initiation of the investigating officer, statement of the petitioner was recorded under Section 164 Cr.P.C. The petitioner supported the prosecution case, as contained in the F.I.R. version.

8. At a later juncture, however, the petitioner has developed the case that the earlier statement given to the police under Section 154 Cr.P.C. for registration of F.I.R., and given as a witness under Section 164 Cr.P.C. during the course of investigation, were false, under pressure and coercion of husband of the petitioner. It is in this backdrop of facts that the petitioner wants to give another statement under Section 164 Cr.P.C. in regard to the same incident, and not in addition, however, giving a different version and hue to the incident.

9. It appears that the statement has not been recorded by the Magistrate because the investigating officer did not move an application for recording of such statement.

10. By virtue of this petition, the petitioner seeks a writ in the nature of Mandamus, directing the Magistrate and the investigating agency to record statement of the petitioner under Section 164 Cr.P.C.

11. Law in regard to recording of statement under Section 164 Cr.P.C. has been clarified by the Hon'ble Supreme Court of India in the case of Jogendra Nahak and others Vs. State of Orissa and others, (2000) 1 SCC 272 (paragraphs 19, 22, 23 and 24). The following has been held :-

"19. In the scheme of the above provisions there is no set or stage at which

a magistrate can take note of a stranger individual approaching him directly with a prayer that his statement may be recorded in connection with some occurrence involving a criminal offence. If a Magistrate is obliged to record the statements of all such persons who approach him the situation would become anomalous and every Magistrate's court will be further crowded with a number of such intending witness brought up at the behest of accused persons.

22. If a Magistrate has power to record statement of any person under Section 164 of the Code, even without the investigating officer moving for it, then there is no good reason to limit the power to exceptional cases. We are unable to draw up a dividing line between witnesses whose statements are liable to be recorded by the Magistrate on being approached for that purpose and those not to be recorded. The contention that there may be instances when the investigating officer would be disinclined to record statements of willing witnesses and therefore such witnesses must have a remedy to have their version regarding a case put on record, is no answer to the question whether any intending witness can straightaway approach a Magistrate for recording his statement under Section 164 of the Code. Even for such witnesses provisions are available in law, e.g. the accused can cite them as defence witnesses during trial or the court can be requested to summon them under Section 311 of the Code. When such remedies are available to witnesses (who may be sidelined by the investigating officers) we do not find any special reason why the Magistrate should be burdened with the additional task of recording the statements of all and sundry who may knock at the door of the court with a request to record their statements under Section 164 of the Code.

23. On the other hand, if the door is opened to such persons to get in and if the Magistrates are put under the obligation to record their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrates courts for the purpose of creating record in advance for the purpose of helping the culprits. In the present case, one of the arguments advanced by accused for grant of bail to them was based on the statements of the four appellants recorded by the Magistrate under Section 164 of the Code. It is not part of the investigation to open up such a vista nor can such step be deemed necessary for the administration of justice.

24. Thus, on a consideration of various aspects, we are disinclined to interpret Section 164(1) of the Code as empowering a Magistrate to record the statement of a person unsponsored by the investigating agency. The High Court has rightly disallowed the statements of the four appellants to remain on record in this case. Of course, the said course will be without prejudice to their evidence being adduced during trial, if any of the parties requires it."

12. Considering the law laid down by the Hon'ble Supreme Court of India, and extracted hereinabove, it becomes clear that a Magistrate cannot take note of an individual approaching him directly with a prayer that his/ her statement may be recorded in connection with some occurrence involving a criminal offence. If liberty is given to anybody, and everybody, to approach a Magistrate for recording of statement under Section 164 Cr.P.C. in connection with an occurrence involving criminal offence, and if

Magistrates are put under an obligation to record their statement, there is every likelihood that persons sponsored by accused/ culprits might be asked to approach court of the Magistrate for creating record/ evidence in defence with the purpose to help an accused/benefactor. If such a provision is made by way of giving liberty to a person unsponsored by the investigating agency to give statement under Section 164 Cr.P.C., entire investigation process would be derailed.

13. In the opinion of this Court, investigation is a searching enquiry for ascertaining facts; detailed or careful examination. Such Investigation is to be conducted by an investigating agency. In case persons individually are permitted to create "evidence in the process of investigation", the process of investigation would be interfered.

14. It is the duty of the investigating agency to conduct investigation. When it is felt relevant and necessary, the investigating officer makes an application to the magistrate to record statement of a witness under Section 164 Cr.P.C. Such statement becomes a part of investigation record under Chapter XII of the Code of Criminal Procedure. This process would surely be interfered, if persons on their own claim a right to give statement under Section 164 Cr.P.C. Surely such a statement cannot be construed in pursuance of investigation by the concerned investigating agency. 'Investigation' has been defined under Section 2(h) as follows:

"2(h)"investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf".

15. Considering the above it becomes illusory and apparent that only a police officer or an investigator can sponsor a witness to a Magistrate for recording of statement under Section 164 Cr.P.C.

16. Considering the averments made in the petition, we are of the considered opinion that while exercising extraordinary writ jurisdiction, such direction, as sought in the petition, cannot be given. The investigating agency is required to proceed as per law. Ordinarily, a direction is not required to be given to the investigating agency to investigate a case in a particular manner. A witness can be produced before the Magistrate for recording his/her statement under Section 164 Cr.P.C. only by the investigating officer. Apparently, the petitioner has already given her statement once under Section 164 Cr.P.C., on the asking of the investigating agency.

17. From the pleadings in the petition, it has become evident that the petitioner concedes that she knowingly gave a false statement. Clearly, the petitioner can be proceeded against for giving a statement that is false to her knowledge and belief.

18. At this stage, in these proceedings, it cannot even be deduced whether the earlier version given by the petitioner was truthful or the case set up in this petition is truthful.

19. The petitioner would have the option to give statement in court when she is produced as a prosecution witness. It

would be for the Trial Court to consider the statement (s) of the prosecutrix and conclude whether offence has been committed or not.

20. The question posed to the Court is answered in the negative, for the reasons recorded above.

21. Considering the law as noticed above, as also the peculiar facts and circumstances of the case, this Court would not like to interfere in the process of investigation by way of issuing direction to the magistrate to record statement of the petitioner under Section 164 Cr.P.C.

22. Petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.05.2015

BEFORE
THE HON'BLE AJAI LAMBA, J.
THE HON'BLE AKHTAR HUSAIN KHAN, J.

Misc. Bench No. 4153 of 2015

Smt. Manju Misra ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Gopal Trivedi, Lalit Kishore Pandey

Counsel for the Respondents:
Govt. Advocate, Arun Sinha, Riyaz Ahmad

Constitution of India, Art.-226-Mandamus-praying stay from arrest-offence under Section 420, 467, 468, 504, 506, 471 IPC-as in sale transaction-neither beneficiary-nor transferor- evidence being documentary nature no recovery of any article required-nor custodian interrogation requires-held-in view of Smt. Hema Misra case-if evidence submitted under Section 173-unto 10 days from notice no arrest-in case of arrest conditional bail be given.

Held: Para-15
Keeping in view the facts and circumstances of the case, in context of the law, as laid down by Hon'ble supreme Court of India in Hema Mishra's case (supra), as extracted above, we are of the considered opinion that manifest injustice would be caused if the petitioner is taken in custody. The petitioner admittedly is not a beneficiary in the transaction. The evidence is documentary in nature. No recovery is to be affected from the petitioner. Custodial interrogation of the petitioner is not required during investigation proceedings.

Case Law discussed:
AIR 2014 SC 1066

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

1. This petition seeks issuance of a writ in the nature of certiorari quashing First Information Report lodged as Case Crime No.131 of 2015 under Sections 420, 504, 506, 467, 468, 471 I.P.C., P.S. Bakshi Ka Talab, district Lucknow (Annexure-1).

2. In the second prayer, the petition seeks issuance of a writ in the nature of mandamus directing the Investigating Officer not to arrest the petitioner in connection with Case Crime No.131/2015 under Sections 420, 504, 506, 467, 468, 471 I.P.C., P.S. Bakshi Ka Talab, district Lucknow .

3. Learned counsel appearing for the petitioner states at the outset that the petitioner does not press the petition in regard to the first prayer, noted above. The petitioner presses for grant of second prayer in view of peculiar facts and

circumstances of the case, viz. the first Information Report is against a number of persons. The petitioner is only one of such accused, however, not a beneficiary in the transaction.

4. Contention of learned counsel for the petitioner is that the petitioner is not a beneficiary; rather will not get the property at issue on account of actions of the main accused. It has been alleged in the First Information Report that Rajnish Kumar Mishra, vide sale-deed executed on 31.12.2014, sold the property in question in favour of complainant (respondent No.3), represented by Mr. Siddharth Sinha, Advocate (Caveator). Just four months thereafter, the property was gifted to the petitioner by Rajnish Kumar Mishra through a gift deed executed on 6.4.2015. The petitioner did not have any intention to frustrate the right/title of private respondent Preeti, which was gained through execution of sale-deed, prior to execution of the Gift Deed.

5. Contention of learned counsel for the petitioner is that the petitioner had no role to play in the transaction. No overt act can be attributed to the petitioner. The documents are registered and can be procured from the office of Sub Registrar. The petitioner has no knowledge of any exclusive fact which is required to be extracted by way of interrogation of the petitioner.

6. Learned counsel appearing for the caveator admits the facts, as noted above. It has been admitted that the petitioner is not the transferor of the property, nor appears to be the beneficiary.

7. Learned counsel for the parties pray for disposal of the case at this stage itself.

8. We have heard learned counsel.

9. In the considered opinion of the Court, case of the petitioner is clearly distinguishable from that of transferor of the property, Rajnish Kumar Mishra.

10. In Hema Mishra versus State of U.P. AIR 2014 SC 1066, in paras 22, 28, 35, 36 and 37, the Hon'ble Supreme Court of India has held the following :

"22. I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pin-point what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India.

28. I would like to remark that in the absence of any provisions like Section 438 of Cr.P.C. applicable in the State of Uttar Pradesh, there is a tendency on the part of the accused persons, against whom FIR is lodged and/or charge-sheet is filed in the Court to file Writ Petition for quashing of those proceedings so that they are able to get protection against the arrest in the interregnum which is the primary motive for filing such petitions. It is for this reason that invariably after the lodging of FIR, Writ Petition under Article 226 is filed with main prayer to

quash those proceedings and to claim interim relief against pre-arrest in the meantime or till the completion of the trial. However, the considerations which have to weigh with the High Court to decide as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against the arrest. Since the grounds on which such an FIR or charge sheet can be quashed are limited, once the Writ Petition challenging the validity of FIR or charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out .

35. It would be pertinent to mention here that in light of above mentioned statements and cases, the High Court would not be incorrect or acting out of jurisdiction if it exercises its power under Art.226 to issue appropriate writ or direction or order in exceptional cases at the behest of a person accused of an offence triable under the Act or offence jointly triable with the offences under the Act.

36. It is pertinent to mention that though the High Courts have very wide powers under Art.226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision.

37. Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a devise to advance justice and not to frustrate it. The powers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Art.226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Art.226 is not to be exercised liberally so as to convert it into Section 438,Cr.P.C. proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as to back door entry via Art.226. On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Art. 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified."

11. The Court is of the considered opinion that the Court is required to balance the equities while considering petition for issuance of a writ in the nature of mandamus directing the investigating officer not to arrest a person accused of committing an offence.

12. No person can be deprived of his personal liberty, except in accordance with the procedure established by law. The procedure in such cases, has been provided under the Code of Criminal Procedure, 1973. The investigation of a case is required to be conducted under Chapter XII of the said Code. A person

accused of committing a cognizable offence can be arrested by the investigating agency.

13. This Court, however, is required to deliberate various aspects of the case, while ruling on petition of an accused approaching this Court for issuance of a writ in the nature of mandamus, as sought by the petitioner. In view of the judgment rendered by the Hon'ble Supreme Court of India in Hema Mishra's case (supra), writ in the nature of mandamus can be issued, in case petitioner shows exceptional circumstances. In the considered opinion of the Court, the various parameters to be considered would include seriousness/gravity of the offence; role played by the accused approaching the Court, in the incident/transaction; antecedents/criminal history of such accused petitioner; nature of offence allegedly committed; chances of the accused/ petitioner escaping from the clutches of law, or delaying the process of investigation or trial; in case relief is granted, whether it would result in interference with investigation process; whether the investigating agency apprehends that a fact would be discovered as a consequence of information received from the accused; whether custodial interrogation of accused/petitioner is required for effective investigation; and whether there is prima facie evidence/material available to indicate involvement of the petitioner in commission of the crime. These aspects, as noted above, are some, and not all the factors to be considered while weighing the liberty of such person vis-a-vis public interest and interest of effective investigation.

14. The petitioner is required to make out a special/exceptional case for grant of relief, as sought by her. It is markedly to be seen whether the petitioner/ accused has been evading the process of law. The larger interest of the public or the State is required to be considered while contemplating whether relief of pre arrest bail is to be given, or not.

15. Keeping in view the facts and circumstances of the case, in context of the law, as laid down by Hon'ble supreme Court of India in Hema Mishra's case (supra), as extracted above, we are of the considered opinion that manifest injustice would be caused if the petitioner is taken in custody. The petitioner admittedly is not a beneficiary in the transaction. The evidence is documentary in nature. No recovery is to be affected from the petitioner. Custodial interrogation of the petitioner is not required during investigation proceedings.

16. Rajnish Kumar Mishra, the main accused executed a gift deed in favour of the petitioner. The pleaded case of the petitioner is that the petitioner had no knowledge of the earlier sale-deed executed in favour of respondent No.3. In such circumstances, involvement of the petitioner in the crime appears to be remote. Equity and law, considered in context of the facts, demand that the prayer pressed by the petitioner is allowed.

17. Liberty is a precious right of every citizen of the country. It would be miscarriage of justice if the petitioner is allowed to be taken in custody. The petitioner is entitled to protection of the Court, particularly because by way of arrest of the petitioner and curtailing his liberty, interest of investigation shall not be advanced. Effective investigation can be conducted even without arrest of the petitioner, in view of the facts and

circumstances, noted above. The offence per se is not against the public; rather involves transfer of property having civil consequences. The transaction has civil complexion. The respondents have not drawn attention of the Court towards any material which would indicate that petitioner has criminal antecedents. In the opinion of the Court, this is one of the exceptional cases, in which extraordinary writ jurisdiction is required to be invoked.

18. In view of above, a writ in the nature of mandamus is issued. It is directed that in the event of arrest in Case Crime No.131 of 2015 under Sections 420, 504, 506, 467, 468, 471 I.P.C., P.S. Bakshi Ka Talab, district Lucknow, the petitioner shall be enlarged on bail on her furnishing bail bonds to the satisfaction of the arresting/Investigating Officer, subject to the following conditions :

(1) The petitioner shall make herself available for interrogation as and when required;

(2) The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court, or to the investigating agency; and

(3) The petitioner shall not leave India without the previous permission of the Court.

It is further directed that this order shall subsist till 10 days after the petitioner receives a notice of filing of investigation report under Section 173 CrPC, within which period, the petitioner would be at liberty to apply for regular bail. The time thus granted would not be extended by this Court.

It is specifically provided that the prosecuting agency would be at liberty to approach this Court for withdrawing the concession granted to the petitioner, in case the petitioner violates any of the conditions imposed by this Court.

19. The petition is allowed in the above terms.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.05.2015

BEFORE
THE HON'BLE ARVIND KUMAR TRIPATHI, J.
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Appeal No. 4479 of 2008

Santosh Kumar Mishra ...Appellant
Versus
State of U.P. . ...Opp. Party

Counsel for the Appellant:
Sri K.K. Tripathi, Sri Aman Khan, Sri M.K. Tripathi, Sri Mohd. Aman Khan, Sri T.K. Mishra

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

Criminal Appeal-conviction for offence under Section 323, 376, 504 IPC-prosecution fully proved charges-beyond doubt-evidence of complainant and victim are clinically convincing-punishment inflicted by Trail Court-confirmed-appeal dismissed.

Held: Para-14
On the basis of above discussion we are of the considered opinion that prosecution side had proved the charges leveled against the accused-appellant regarding allegation of rape and trial Court had rightly passed the judgment in this regard. The evidences of complainant and of victim are

convincing, therefore judgment of trial court regarding conviction of accused for offences punishable under sections 376, 323, 504 and 506 IPC is found correct. The findings of trial court and judgment of conviction for those charges are hereby confirmed.

(B)SC/ST (prevention of atrocities) Act 1989-Section 3(2)(v)-rape committed-to fulfill undue lust-rather to take revenge of being scheduled caste-finding and conviction by Trail Court-not sustainable-set-a-side appeal allowed partly.

Held: Para-18
On the basis of above discussion it is explicitly clear that charged offence of rape had not been committed because victim-complainant was a member of SC/ST community. This offence appears to had been committed only for satisfying the lusty desire of appellant. In such a case offence punishable under section 3(2)(v) of Scheduled Castes or Schedule Tribes Act has not been committed. Therefore the finding of of trial Court holding the appellant guilty for the offence under SC/ST Act is erroneous and is hereby set aside.

Case Law discussed:
AIR 2006 SC 1267; (2007) 2 SCC 170

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. This appeal has been preferred against the judgment of conviction and punishment dated 16.07.2008 passed by Special Judge SC/ST Act, Kanpur Dehat in Special S.T. No. 80 of 2002 (arising out of crime no. 40 of 2001) State v. Santosh Mishra under sections 323, 376, 504, 506 IPC and section 3(2)(v) of the Scheduled Castes or Schedule Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as "SC/ST Act"].

2. Prosecution case in brief is that complainant Shyam Narayan (PW-2) and his wife Smt. Meera Devi (PW-1) belong to chamar caste and are resident of village Indalpur, p.s. Shivrajpur, district Kanpur Dehat. On 03.04.2001 at about 05:00 p.m. in evening complainant's wife Meera Devi was cutting grass near the field of Raman Shukla of his village, then accused Santosh Mishra came from behind, grabbed her neck, closed her mouth and forcibly dragged in the field of Raman Shukla where he raped Meera Devi. When she raised alarm the complainant reached there and saw that Santosh Mishra was lying over the body of Meera Devi in necked condition. When complainant raised alarm then Santosh Mishra had scuffle with him, due to which neck of complainant was wounded by nails of accused Santosh Mishra. During this episode Sri Krishna, Awadhesh, and other villagers came there and saw that Santosh Kumar Mishra was abusing and threatening them. Complainant went directly to police station Shivrajpur for lodging report, but his report was not lodged, then he approached senior officers of police and thereafter he again moved application dated 07.04.2001 to S.S.P. Kanpur Dehat on which case crime no. 40 of 2001 under Section 323, 354, 376, 504 and 506 IPC and Section 3(1)(X) SC/ST Act was registered.

3. After completion of investigation, police had submitted charge-sheet for offences punishable under Section 323,376, 504 and 506 SIPC and Section 3(2)(v) SC/ST Act. On the basis of said charge-sheet, special session trial no. 80 of 2012 (State Vs. Santosh Mishra) was registered.

4. Special Judge (SCST Act) / Addl. Sessions Judge, Kanpur Dehat had framed charge of offences on 11.12.2002 against

accused for several offences to which accused pleaded not guilty and claimed his trial. Thereafter charges were amended and replaced by fresh charges on 06.04.2005 for offences under Section 323, 354, 376, 504 and 506 IPC read with Section 3(2)(v) SC/ST Act . Accused again pleaded not guilty and claimed to be tried.

5. In oral evidences prosecution side had examined PW-1 Meera Devi (victim), PW-2 Shyam Narayan (complainant), PW-3 C.O. J.P. Tiwari, PW-4 Dr. Pushpa Gurnani, PW-5 lady constable Anju Shukla and PW-6 Dr. R.B Gautam. They proved documentary evidences of prosecution side.

6. After closure of prosecution evidence statement of accused under Section 313 CrPC was recorded in which he had denied the prosecution case and stated that on 2.4.2001 Meera Devi was damaging wheat crop in the garb of grazing grass when he objected then Meera Devi had started abusing after that on 05.04.2001 Meera Devi , Lalita and Shyam Narayan had put their cow and goat in the field of wheat, on which they had quarreled, due to this enmity complainant had lodged wrong report and false case was registered. As per defence evidence, accused had examined DW-1 Santosh Kumar, DW-2 Ram Nath and DW-3 Ram Swaroop.

7. After affording opportunity of hearing prosecution of defence side Special Judge SC/ST Act / Additional Sessions Judge, Kanpur Dehat had passed judgment dated 16.07.2008 by which accused Santosh Mishra was convicted for the charges of Section 323, 376, 504, 506 IPC and Section 3(2)(v) SC/ST Act. Accused was acquitted from the charge of Section 354 IPC. Thereafter trial court had afforded opportunity of hearing to accused on quantum of sentence and passed the order of punishment and sentenced on 16.07.2008, by which accused was convicted six months rigorous imprisonment for charge under Section 323 IPC, 10 years rigorous imprisonment and Rs. 2,000/- fine (in default of payment of three months additional imprisonment), for charge under Section 376 IPC, six months rigorous imprisonment, for charge under Section 504 IPC, six months rigorous imprisonment for offence under Section 506 IPC and imprisonment for life and Rs. 2,000/- (in default of payment of three months imprisonment), for the charge of Section 3(2)(v) SC/ST Act. The trial court had also directed that all sentences would run concurrently. Aggrieved by this judgment of conviction and sentence dated 16.07.2008 accused had preferred present appeal

8. The argument of learned counsel for the appellant was that there was contradiction in evidences of prosecution witnesses, therefore, they should be treated as believable. Since prosecution side had failed to prove the charges against appellant, therefore impugned judgment based on false evidences should be set aside. Learned AGA had confronted the argument of appellant side and contended that two witnesses of fact, namely, PW-1 Meera Devi (victim) and PW-2 Shyam Narayan (complainant) had proved the charges framed against accused appellant therefore appeal should be dismissed.

9. The alternative argument of learned counsel for the appellant was that event if chargse of offences of Indian Penal Code are accepted to be proved in that case also charge of offence under

Section 3(2)(v) SC/ST Act is not proved. His argument was that prosecution side had not proved that alleged offencse of rape etc. were committed because the victim belong to SC/ST community; therefore the conviction under Section 3(2)(v) SC/ST Act is erroneous and should be set aside. His contention was that in any case sentence of 10 years imprisonment for offence under Section 376 IPC in present case is excessive which should be mitigated.

10. We have considered the rival contentions and perused the records.

11. It is admitted case that medico-legal examination of victim was performed very late on 08.04.2001 in which no evidence regarding rape was found, and PW-4 Dr. Pushpa Gurnani had stated that no opinion about rape can be given. She had also stated that victim was habitual to sexual intercourse and also stated that sperms can be found within 72 hours of the incident. In the present case medico-legal examination performed after about 5 days so the absence of medical evidence about commission of intercourse or rape is not unlikely. But in this case two witnesses of facts were examined by prosecution side which are PW-1 Meera Devi (victim) and PW-2 Shyam Narayan (complainant).

12. We have examined the statement of PW-1 (victim) who had specifically stated that at the time of incident appellant had committed rape with her when she was mowing the grass in the field. At that time accused appellant had used forced and shut her mouth, dragged her by neck and raped her in the field of Pramod Shukla by inserting his private part in her vagina. She had tried resist and cut his hand, then his hand was removed from her mouth and she raised alarm. Then her husband came there with other persons, who had tried to catch the accused but he escaped from the spot. In this incident her blouse was torn. That day report by her husband could not be lodged. Her medical examination was conducted after a few days. Police had come after 5-6 days and taken her blouse and dhoti in custody. During cross-examination the victim stated that she had not suffered any injury but her husband had got some scratches on his neck. PW-2 complainant Shyam Narayan had stated that on 03.04.2001 at about 05:00 p.m. he was watering crop of wheat in the field and his wife was cutting grass at the boundary of field of Ramesh Shukla, then accused Santosh Mishra had forcibly taken his wife in the field of Raman Shukla and raped. On alarm of his wife, he alongwith Sri Krishna, Awadhesh and Naresh came on spot and saw that incident and shouted, then accused fled away after abusing and threatening them. His report was not lodged same day in police station, then he had approached S.S.P., D.I.G and other police officers, thereafter his report was lodged. During cross-examination PW-2 stated that at the time of incident accused had pushed him and ran away. At that time he had seen that accused was committed rape with his wife in naked state.

13. The evidences of two witnesses of facts, namely, PW-1 Meera Devi (victim) and PW-2 Shyam Narayan (complainant) supported each other and appear to be credible which are also supported by other formal evidences. The findings of facts regarding proving of charges against accused were recorded by learned Sessions Judge in impugned judgment holding that rape of Meera Devi was committed by accused-appellant. The findings of trial Court to this effect are

based on proper appreciation of evidence which are plausible and convincing. Though defence side had examined three defence witnesses, namely, DW-1 Santosh Kumar, DW-2 Ram Nath and DW-3 Ram Swaroop, but these witnesses had given evidence regarding incident of scuffle and manhandling happened between accused and complainant on 05.04.2001. They had also given evidence of fact regarding altercation between accused and complainant on other dates, but they had not given any evidence regarding incident of 03.04.2001 for which charges were framed against accused appellant. For the incident of 03.04.2001, the evidence of defence witnesses are useless and have no value because admittedly they had not given any credible evidence regarding incident of 03.04.2001 as mentioned in the charge.

14. On the basis of above discussion we are of the considered opinion that prosecution side had proved the charges leveled against the accused-appellant regarding allegation of rape and trial Court had rightly passed the judgment in this regard. The evidences of complainant and of victim are convincing, therefore judgment of trial court regarding conviction of accused for offences punishable under sections 376, 323, 504 and 506 IPC is found correct. The findings of trial court and judgment of conviction for those charges are hereby confirmed.

15.Section 3(2)(v) of the Scheduled Castes or Schedule Tribes (Prevention and Atrocities) Act, 1989 reads as under:

"3(2) whoever, not being a member of Scheduled Caste or Schedule Tribe-

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine"

16. The provision of Section 3(2)(v) of the SC/ST Act, as noted above provides that a person can be punished under this provision only when he commit such offence against person of SC/ST community on the ground that such a person/victim is a member of SC/ST. From the evidence, it appears that alleged act of rape had been committed by accused-appellant for satisfying his lust and not for any other reason. It was not the prosecution case that rape was committed because victim belongs to scheduled caste community. At least there is no evidence in this regard. Therefore, we are of well thought-out opinion that accused-appellant cannot be punished for offence punishable under Section 3(2)(v) of SC/ST Act. Hon'ble Supreme Court in Dinesh @ Buddha v. State of Rajasthan, AIR 2006 SC 1267 has held as under:

"15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

16. In view of the finding that Section 3(2)(v) of the Atrocities Act is not applicable, the sentence provided in Section 376(2)(f), IPC does not per se become life sentence."

17. Hon'ble Supreme Court in Ramdas v. State of Maharashtra, (2007) 2 SCC 170 has held as under:

"11. At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a Scheduled Caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a Scheduled Caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."

18. On the basis of above discussion it is explicitly clear that charged offence of rape had not been committed because victim-complainant was a member of SC/ST community. This offence appears to had been committed only for satisfying the lusty desire of appellant. In such a case offence punishable under section 3(2)(v) of Scheduled Castes or Schedule Tribes Act has not been committed. Therefore the finding of of trial Court holding the appellant guilty for the offence under SC/ST Act is erroneous and is hereby set aside.

19. Accordingly this appeal is partly allowed. The punishment awarded to appellant, in in Special S.T. No. 80 of 2002 (arising out of crime no. 40 of 2001) State v. Santosh Mishra, p.s. Shivrajpur, Kanpur Dehat passed by the Court of Addl. Sessions Judge/ Spl. Judge (SCST Act), Kanpur Dehat is amended. The appeal is confirmed for the conviction and punishment of charge u/ss 323, 376, 504, 506 IPC. But the conviction and punishment for the charge u/s 376 IPC read with section 3(2)(v) of Scheduled Castes or Schedule Tribes Act is set aside and accused-appellant is acquitted of the said charge. All sentences would run concurrently and the period already undergone in jail by accused-appellant in this case will be adjusted in his punishment.

20. The copy of this judgment be sent to concerned Superintendent Jail Superintendent and also to Sessions Judge, Kanpur Dehat for ensuring compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

C.M.W.P. No. 6976 of 2015

Rahul Upadhyay ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan, Sri J.H. Khan, Sri Gulrej Khan

Counsel for the Respondents:
C.S.C., A.S.G.I./2015/0253, Sri Pankaj Mehrotra

(A)National Highways fee (Determination of Rates and Collection) Rules 2008-Rule 3(1)-Exemption on imposition toll fee-issued by notification dated 02.01.2015-state government under agency of union government executed contract on 29.03.2014 for three years-whether such notification of exemption applicable retrospectively-?-held-'No'.

Held: Para-8
In other words, the exemption is with prospective effect, from the date of notification. The fact that the petitioner has an existing contract would not result in the notification becoming retrospective. It is trite law that an instrument of a statutory character does not become retrospective merely because it may operate on some events which may have taken place in the past. No accrued rights have been taken away. The contract provides that it is capable of being terminated. Its term can be curtailed.

(B)National highways fee (determination of rates and collection)Rules 2008 Rule 3(1)-Right of contractor to collect toll fee in term of contract executed on 29.03.2014 for 3 years-exemption notification having applicability with prospective effect-whether can be enforced under writ jurisdiction?-held-'No'-in view of clause 17 schedule I of contract-petitioner to invoke arbitration clause-no reason to entertain the petition.

Held: Para-9
Basically, the petitioner is a collection agent for the State for collecting the toll on the use of the bridge under the terms of the contract. At the highest, the contractor can have a grievance that as a result of the exemption which has been granted in exercise of the power conferred by the proviso to Rule 3 (1) of the Rules of 2008, the petitioner has been deprived of the benefit of the collection of the toll which would have otherwise been permissible under the terms of the contract. This is a grievance which is redressable and quantifiable in monetary terms. Such a contract cannot be enforced by specific performance. The claim of the petitioner would sound in damages for which an arbitral remedy is provided in Clause 17 of Schedule I of the contract dated 29 March 2014. We, accordingly, leave it open to the petitioner to invoke arbitration by adopting suitable proceedings in accordance with law.

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, J.)

1. The petitioner has sought to challenge the legality of a notification issued by the Union Government in the Ministry of Road Transport and Highways on 2 January 2015 in exercise of the power conferred by Rule 3 of the National Highways Fee (Determination of Rates and Collection) Rules, 20081. By the notification, the Central Government has exempted eight bridges in the State of Uttar Pradesh from the levy of a user fee. The bridge in question to which the petition relates is at serial number four and is described as Tons (Katka-Setu) at Kilometer 430 of NH-76E (35). A contract was entered into between the petitioner and the State Government acting as an agency of the Union Government on 29 March 2014 for the collection of a fee for a period of three years from 1 April 2014 to 31 March 2017. The Union Ministry of Road Transport and Highways issued a notification on 2 January 2015 exempting the imposition of the levy of a user fee on eight bridges including the bridge covered by the contract to the petitioner. The power has been exercised under the Rules of 2008.

2. Rule 3 (1) provides as follows:

"3. Levy of fee. - (1) The Central Government may by notification, levy fee for use of any section of national highway, permanent bridge, bypass or tunnel forming part of the national highway, as the case may be, in accordance with the provisions of these rules:

Provided that the Central Government may, by notification, exempt any section of national highway, permanent bridge, bypass or tunnel constructed through a public funded project from levy of such fee or part thereof, and subject to such conditions as may be specified in that notification."

3. Two submissions have been urged on behalf of the petitioner. The first is based on the proviso to sub-section (3) of Section 7 of the National Highways Act, 1956. Section 7 provides as follows:

"7. Fees for services or benefits rendered on national highways. - (1) The Central government may, by notification in the Official Gazette, levy fees at such rates as may be laid down by rules made in this behalf for services or benefits rendered in relation to the use of ferries, permanent bridges the cost of construction of each of which is more than rupees twenty-five lakhs and which are opened to traffic on or after the 1 April 1976, temporary bridges and tunnels on national highways and the use of sections of national highways.

(2) Such fees when so levied shall be collected in accordance with the rules made under this Act.

(3) Any fee leviable immediately before the commencement of this Act for services or benefits rendered in relation to the use of ferries, temporary bridges and tunnels on any highway specified in the Schedule shall continue to be leviable under this Act unless it is altered in exercise of the powers conferred by sub-section (1):

Provided that if the Central Government is of opinion that it is necessary in the public interest so to do, it may, by like notification, specify any bridge in relation to the use of which fees shall not be leviable under this sub-section."

4. The submission is that the proviso which is extracted above under which the Central Government has been empowered to exempt the payment of fees in public interest leviable on any bridge is a proviso which applies to the entire Section 7 and not only to Section 7 (3). The second submission is that the notification which has been issued on 2 January 2015 cannot apply retrospectively to contracts which were executed prior to the date of notification and hence, to that extent it is ultra vires in so far as it affects accrued rights.

5. Under Section 7 (1), the Union Government has been empowered to levy fees at such rates as may be prescribed by rules made in that behalf for services or benefits rendered inter alia in relation to the use of ferries and permanent bridges the cost of construction of each of which is in excess of rupees twenty-five lakhs and which are opened to traffic on or after 1 April 1976, as well as temporary bridges and tunnels on national highways. Sub-section (3) deals with fees leviable immediately before the commencement of the Act for services or benefits rendered in relation to the use of ferries, temporary bridges and tunnels on any highway

specified in the Schedule. These fees under sub-section (3) were to continue to be leviable under the Act unless and until they were altered in exercise of the powers conferred by sub-section (1). The proviso which follows is evidently a proviso to sub-section (3) of Section 7. This is evident from two aspects. The first is the plain language of the proviso which stipulates that the Central Government may, if it is of the opinion that it is necessary in public interest to do so, specify that fees shall not be leviable "under this sub-section" on any bridge specified. The expression "under this sub-section" is in reference to sub-section (3). Secondly, the proviso which is preceded by a colon. A colon in grammatical use is a punctuation which is associated with what immediately precedes it. Hence, there would be no merit in the submission that the proviso qualifies the entire Section 7.

6. The power which has been exercised by the Central Government is under the proviso to Rule 3 (1) of the Rules of 2008 under which the Central Government has been empowered to issue a notification exempting any section of a national highway, permanent bridge, bypass or tunnel constructed through a public funded project from the levy of such fee or part thereof.

7. The second submission is that the power to issue a notification under the proviso to Rule 3 (1) of the Rules of 2008 has been exercised retrospectively by taking away accrued rights and hence, is unlawful.

8. We find no element of retrospectivity in the notification dated 2 January 2015. The notification expressly states that the Central Government "hereby exempt" all eight bridges in the State of Uttar Pradesh mentioned in the notification from the levy of a user fee. In other words, the exemption is with prospective effect, from the date of notification. The fact that the petitioner has an existing contract would not result in the notification becoming retrospective. It is trite law that an instrument of a statutory character does not become retrospective merely because it may operate on some events which may have taken place in the past. No accrued rights have been taken away. The contract provides that it is capable of being terminated. Its term can be curtailed.

9. That leads to the Court to the basic question as to the remedy which is available to a contractor, such as the one in the present case, who claims to have a contract for the collection of a toll. In the contract which has been entered into between the petitioner and the State on 29 March 2014, there is an arbitration agreement in Clause 17 of Schedule I of the contract. Basically, the petitioner is a collection agent for the State for collecting the toll on the use of the bridge under the terms of the contract. At the highest, the contractor can have a grievance that as a result of the exemption which has been granted in exercise of the power conferred by the proviso to Rule 3 (1) of the Rules of 2008, the petitioner has been deprived of the benefit of the collection of the toll which would have otherwise been permissible under the terms of the contract. This is a grievance which is redressable and quantifiable in monetary terms. Such a contract cannot be enforced by specific performance. The claim of the petitioner would sound in damages for which an arbitral remedy is provided in Clause 17 of Schedule I of the contract dated 29 March 2014. We,

accordingly, leave it open to the petitioner to invoke arbitration by adopting suitable proceedings in accordance with law.

10. For these reasons and leaving it open to the petitioner to invoke arbitration, we see no reason to entertain the petition, which is, accordingly, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.04.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Misc. Writ Petition No. 8053 of 2015

Jangali Pasi ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri R.S. Shukla

Counsel for the Respondents:
A.G.A.

Constitution of India-Art.-226-Writ petition-scope of interference discussed where statutory remedy of appeal provided under Section 18 of U.P. Gangsters and anti social activities (prevention) Act 1986-against ceasure of property-writ court declined to interfere-on two grounds-discussed.

Held: Para-27 & 28

27. In such a situation if release is refused, then an appellate forum with co-extensive powers should be available and that is what Section 18 purports to do when it recites the words any order or judgment. This is analogous to Section 452 of the Cr.P.C. and therefore the legislature was conscious of also making a provision that Chapter XXIX will mutatis mutandis apply.

28. Even though the writ jurisdiction may not be barred in appropriate matters as held in Badan Singh's case (supra) but if the statutory remedy of appeal is available, then filing of writ petitions stands obviated for at least two reasons. First that in an appeal all questions of fact and law can be pleaded, evidence led and be adjudicated. Secondly, ordinarily questions of fact that may be disputed, cannot be gone into in the exercise of jurisdiction under Article 226 of the Constitution.

Case Law discussed:
AIR 1987 Alld. 235; 2013 (8) SCC 368; 2012 (76) ACC page 187; 2001 ALJ page 2852; 2012 (6) ADJ page 231; 2008 (63) ACC page 687; 2015 (1) JIC 435 Alld.; 2010 (3) ADJ page 69; 2001 Cr.L.J. 949 page 4; 2000 Cr.L.J. Page 949.

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

1. The petitioner who is a member of the scheduled caste, has come up before this Court questioning the order of the District Magistrate, Kaushambi dated 18.12.2014 arising out of proceedings of attachment and refusal to release a truck that had been seized invoking the provisions of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986. The background in which this seizure was made is to the effect that the petitioner was implicated in three other criminal cases, namely, Case Crime No.117 of 2012 under Section 379 IPC r/w Section 136 of the Indian Electricity Act, Case Crime No.140 of 2012 under Section 379 IPC r/w Section 136 of the Indian Electricity Act and the third case being Case Crime No.146 of 2012 under Sections 399/401 IPC.

2. It appears from the record that the truck in question bearing registration no. U.P 70 N 9212 is registered in the name of the petitioner and the same came to be seized in the aforesaid criminal cases. Learned counsel for the petitioner submits that the petitioner has been bailed out in the said criminal cases, but on the strength of the same cases the petitioner has been booked under Section 2/3 of the 1986 Act, where also he has been bailed out on 14.8.2013 by the competent court.

3. The truck was seized in Case Crime No.146 of 2012. A release application was filed where it was noticed that the said truck was also subject matter of seizure in Case Crime Nos.140 of 2012 and 117 of 2012 as noted above. The truck had already been released in the said cases on 15.5.2013. Consequently, a release order was also passed on 22.1.2014 in relation to Case Crime No.146 of 2012. The said orders have been filed on record.

4. However, since the petitioner had been booked under the Gangster Act, the said truck became subject matter of detention after putting the petitioner to notice on the ground that this truck appears to have been purchased from sources that have its genesis in the cases of theft registered against the petitioner. An ex parte order was passed against the petitioner on the basis of a police report on 30.7.2014 attaching the said truck under the provisions of the 1986 Act. The petitioner filed his objection that is on record whereafter the impugned order has been passed by the District Magistrate observing that since the petitioner has not been able to give effective details with regard to the source of his earnings from where he has acquired this truck and the information given is unclear, his objection deserves to be rejected.

5. The case of the petitioner was that he had received a reimbursement against the insurance policy of his son who had died, and that money had been utilized by him that was transacted through a Post Office and a Bank account whereafter it was ultimately utilized for the purchase of the truck through a finance company.

6. The learned District Magistrate has opined that from the said Post Office transaction is not clear as to whether the amount had been received by the applicant or not and how much further amount had been financed by the private finance company referred to in the objection. Similarly, the transaction through the State Bank of India in relation to the said reimbursement of the policy amount is also not clear. It is this order that is assailed herein.

7. Having heard Sri Shukla, learned counsel for the petitioner, and Sri A.K. Sand, learned A.G.A., the prayer made by Sri Shukla in this petition is to the effect that if the District Magistrate Kaushambi was refusing to release the attached property, which is a truck, in terms of Section 15 read with Section 16 of the U.P. Gangsters & Anti Social Activities (Prevention) Act, 1986 then he ought to have referred the matter to the Court of the Special Judge for determination and having failed to do so, the impugned order is vitiated as it does not comply with the provisions of Section 16(1) of the Act.

8. Sri Shukla, learned counsel for the petitioner, submits that the District Magistrate was under a legal obligation to do so and having failed to exercise his jurisdiction, the impugned order deserves to be quashed with a direction to the District Magistrate to adopt the procedure

under Section 16 for deciding the issue of release as per the provisions aforesaid.

9. Sri A.K. Sand, learned A.G.A., contends that this petition is absolutely premature, inasmuch as, even if the District Magistrate has not referred the matter to the learned Special Judge, the petitioner ought to have moved an application in terms of the aforesaid provision for a reference to the special court. Apart from this, he also contends that after an order is passed by the court of competent jurisdiction under Section 17 of the Act then there is a further remedy to the petitioner of filing an appeal in terms of Section 18 of the Act, hence there should be no interference.

10. At the outset it may be mentioned that the validity of the Act has been upheld by this Court in the case of Ashok Kumar Dixit Vs. State, AIR 1987 Alld. 235 and considered by the Apex Court in the case of Dharmendra Kirthal Vs. State of U.P. 2013 (8) SCC 368. Unfortunately no rules appear to have been framed by the State of U.P. as desired inspite of a query raised by this court vide order dated 28.11.2011 in Criminal Misc. Bail Application No.26805 of 2011, Akbar Vs. State of U.P. 2012 (76) ACC Page 187.

11. In order to appreciate the aforesaid controversy, it would be appropriate to put on record that the 1986 Act was framed by the legislature to make special provisions for the prevention of and for coping with gangsters and anti social activities and for matters connected therewith or incidental thereto. In the instant case, we are concerned with the procedure to be adopted for attachment and release of the property of an alleged gangster in terms of Sections 14 to 17 of the Act and further as to whether an appeal would be maintainable as urged by the learned A.G.A. under Section 18 if an order is passed by the court in terms of Section 16(3)(b) of the Act.

12. To appreciate the controversy the provisions of Sections 14 to 18 of the Act are extracted hereinunder :-

14. Attachment of property.- (1) If the District Magistrate has reason to believe that any property, whether moveable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall, mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property - (1) Where any property is attached under Section 14, the claimant thereof may within three months from the date of knowledge of such attachment make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the

claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by Court -(1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section(1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such Court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3) (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3) the Court, shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No.5 of 1908), in respect of the following matters, namely :-

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

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits.

(d) requisitioning any public record or copy thereof from any Court or office:

(e) issuing commission for examination of witness or documents;

(f) dismissing a reference for default or deciding it ex parte:

(g) setting aside an order of dismissal for default or ex parte decision

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything of the contrary contained in the Indian Evidence Act, 1872 (Act No.1 of 1872), notwithstanding.

17. Order after inquiry - If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property

by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

18. Appeal - The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgement or order of a Court passed under the provisions of this Act.

13. A perusal thereof leaves no room for doubt that as per sub-section (2) of Section 15 if the District Magistrate has refused to release the property then he shall refer the matter with his report to the court having jurisdiction to try an offence under this Act under Section 16(2) of Act. Sri Shukla is not wrong in contending that if the District Magistrate has refused to release the property then a reference has to be made to the court having jurisdiction to try the offence under the Act.

14. Sub-section (3)(a) of Section 16 obliges the court that on receipt of reference under sub-section (1) or an application under sub-section (2), the court can fix a date for inquiry and put the concerned person to notice and thereafter is obliged to pass orders under clause (b) of sub-section (3) read with Section 17 of the Act as may be necessary. For the purpose of inquiry under Section 16(3) on a reference the court has extensive powers of a civil court as that of trying a suit. It is thus clear that the matter has to be referred to the court if the District Magistrate has refused to release the property. The assessment and adjudication on evidence led, is within the powers of the court as the outcome thereof leads to the civil consequences directly relating to the attached property.

15. A further perusal of the said section would also demonstrate that the court where the matter is referred has further powers of disposal of such property in case it is not released inasmuch as the Act does not indicate any power available with the District Magistrate authorizing him for disposal of the property. Secondly, the application which has been referred to in sub-section (2) of Section 16 is against refusal to attach and not refusal to release. In the circumstances, the learned A.G.A. is not correct in his submission that the person claiming such property can move an application in the given circumstances. The application can only be moved when there is a refusal to attach either by the State Government or by any other person concerned. The issue of release is therefore either before the District Magistrate and if he refuses to do so then the reference has to be made to the court concerned.

16. In the instant case the District Magistrate vide ex parte order dated 30.7.2014 had rejected the request for release and on an application to set aside the ex parte order has proceeded to decide the same once again by the impugned order dated 18.12.2014 rejecting the application moved by the petitioner and has maintained the earlier order dated 30.7.2014. We are of the considered opinion that the District Magistrate was under an obligation to have referred the matter with his report to the court having jurisdiction as per Section 16(1) for release of such property which had admittedly not been done as is evident from a perusal of the order dated 18.12.2014.

17. Coming to the question of availability of a remedy against such orders to the petitioner, Section 18 of the

1986 Act makes a provision for appeal. The said section has already been extracted hereinabove. The provision of appeal would be available only after an order is passed by a court of competent jurisdiction.

18. Having said so the other contention raised by the learned A.G.A. deserves to be answered as to whether an appeal would be maintainable after an order of the nature presently involved is passed by the competent court. In this regard the decision in the case of Badan Singh @ Baddo Vs. State of U.P. and others reported in 2001 ALJ Page 2852 has been placed before the Court. The said judgment of a learned Single Judge of this Court holds in paragraph 9 as follows :-

"I shall now advert to the argument advanced by the learned A.G.A. as to the maintainability of the writ petitions on the ground of availability of alternative remedy under S.18 of the Act. To answer the question, it is necessary to allude to S.18 which reads as under :

"18 Appeal. The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgment or order of a Court passed under the provisions of this Act."

9. CHAPTER XXIX of the Code of Criminal Procedure, 1973 under caption 'Appeal' contains twenty three sections running from Ss. 372 to 394. Section 372 provides that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. Section 373 makes provision for appeal against order passed under S. 117 and 121, Cr.P.C. Under S.374 appeal lies to the Supreme Court and the High Court against the order of conviction. Section 375 bars appeal against the order of conviction on the accused admitting his guilt. Section 376 provides that no appeal shall lie in petty cases. Under S. 377 right has been conferred on the State Government to move in appeal against inadequacy of sentence. Section 378 provides for filing appeal against the order of acquittal. Section 379 makes provision for appeal to the Supreme Court against the order of the High Court reversing acquittal to conviction. Special right to appeal in certain cases is provided under S.380. Sections 381 and 382 prescribe the procedure for filing of appeal in the Court of Sessions and the manner of hearing. The Act is a penal Statute and Section 3 thereof prescribes punishment to be awarded to a gangster as well as public servant rendering illegal help or support to a gangster. No separate procedure is prescribed to challenge the order of conviction or acquittal passed by the Special Judge in exercise of power conferred by the Act. So, on a conspectus of CHAPTER XXIX, Cr.P.C. and Ss. 3 and 18 of the Act what appears is that appeal would lie against the order of conviction or acquittal under the Act and not against the order of attachment of the District Magistrate or the order of the Special Court on the reference made by the District Magistrate. Even assuming that Section 18 has the application and orders of the District Magistrate and the Special Court can be challenged by way of appeal yet I would hold that the writ petition under Art. 226 of the Constitution is maintainable when the very order of attachment passed by the District Magistrate is illegal, arbitrary and without jurisdiction. For arriving at such conclusion, I derive support from the

decision of the Apex Court in Whirlpool Corporation V. Registrar of Trade marks, Mumbai (1998) 7 JT (SC) 243 where it is laid down that availability of effective and efficacious remedy will not operate as bar to approach the High Court under Art. 226 of the Constitution in at least three contingencies, namely where writ petition has been filed for enforcement of fundamental rights, or where there has been violation of principle of natural justice or where the order or proceedings are without jurisdiction or vires of an Act is challenged."

19. The said judgment was cited before a learned Single Judge raising a preliminary objection to the maintainability of the appeal on the strength of the aforesaid observations. The matter came to be considered in Criminal Appeal No.3000 of 2003, Kailash Sahkari Awas Samiti Vs. State of U.P. & others and another learned Single Judge upon a consideration of all the relevant provisions of the Act as well as the Criminal Procedure Code ruled as under vide order dated 2.2.2010 to the following effect :-

"x x x x x x x x x

I have heard both the sides and have pondered over rival submissions. Since the bone of contention between rival sides require interpretation of a statutory provision of an enacted statute, consideration of the whole of the said statute seems to be un-eschewable to foresee legislative intent of the section to be interpreted and while undertaking that exercise a glimpse of the Act indicates that the Act was enacted to contain gangsterism and anti social activities within the State of U.P. which has attained menacing dimensions. The Act was brought to life on 19.3.1986, on which date it was published in the U.P. Gazette part one. Section 1 of the Act mentions it's title and extent of application, Section 2 provides definitions and meaning of various words occurring under the Act. Section 2 (f) which is of some importance to the present controversy provides that the words and phrases used but not defined in the Act but defined under the Code of Criminal Procedure, 1973 or the Indian Penal Code shall have the respective meanings assigned to them in those statutes. Section 3 of the Act provides for penalty for offences under the Act, whereas section 4 lays down special rule of evidence to be applied in the trial of offences under the Act. Section 5 to 10 contemplates creation of special Courts to try offences under the Act, eligibility of the presiding Judge, place of sitting of special courts and the nature of offences to be tried and procedure to be followed by it. Without volumenising, it is recorded that according to section 10 of the Act Special Judge shall have the Power of a Session's Judge and shall follow the same warrant trial procedure which is to be followed by a Magistrate unless the offence is punishable with imprisonment not exceeding three years, in which case it can try the offence in a summary way in consonance with sections 263 to 265 of the code. Section 11 provides for protection to the witnesses whereas section 12 mentions that the trial under the Act shall have precedence over the trial of other cases. Section 13 registers the power to transfer the cases to regular Courts by the Special Court if it finds that the offences being tried by it is not triable by it. From section Section 14 to section 17, the Act provides for attachment of property and it's release. Section 14 lays

down that if the District Magistrate has reason to believe that any property, whether movable or immovable, possessed by any person has been acquired by gangsterism as a result of commission of any offence under the Act, then the District Magistrate can order attachment of such property irrespective of the fact whether cognizance of such offence has been taken by any Court or not. Sub Section 14 (2) provides that provisions of Cr.P.C. shall applied mutatis mutandis to every attachment carried out under the Act. Section 14(3) and (4) provides for appointing of an administrator over the attached property by the District Magistrate and for police help to administer such property. Section 15 of the Act provides for applying for release of the property by any claimant through an application made to the District Magistrate within three months from the date of the knowledge of attachment. Section 15(2) enact that if the District Magistrate is satisfied about the case of the claimant then he can direct the release of the property from attachment and thereafter the property shall be handed over to the claimant. Perusal of the Section 16 of the Act indicate that if no representation is made within the specified period of three months from the date of the knowledge of attachment or the District Magistrate does not release the property to the claimant as is provided under Section 15(2) of the Act then he (District Magistrate) shall refer the matter with his report to the Court having jurisdiction to try the offences under the Act. Section 16(2) postulates that if the District Magistrate does not act under Section 14(1) of the Act to attach the property, or releases the property under Section 15(2) of the Act then the State Government or any person aggrieved by such refusal or release can make an application to the Court having jurisdiction to try an offence under this Act for inquiry for the purposes of determining whether any property has been acquired by gangsterism or not? Pendente lites such inquiry, the court has been conferred with the power to order for attachment of such property as was done in the instant case. Section 16(3) of the Act, which is in two parts contemplates in sub section (a) that the Court on a reference under Sub Section (1) of Section 16 or on an application under Sub Section (2) of the said section shall conduct an inquiry and sub section (b) provides that on the date so fixed the Court shall hear the parties, receive evidences produced by them, take such further evidences as it considered necessary and decide whether the property was acquired by a gangster as a result of commission of an offence under the Act or not and then shall pass an order under Section 17 as the case may be which is necessary in its opinion. Section 16(4) confers same power on the Court under the Act which is possessed by a civil court under Code of Civil Procedure 1908 in matters of inquiry. Section 16(5) of the Act legislates that the burden of proving that the property or any part thereof has not been acquired by gangsterism or by commission of any offence under the Act shall be on the person claiming the release of the property irrespective of any provision to the contrary contained in the Indian Evidence Act. Section 17 of the Act provides that upon such an inquiry if the Court finds that the property was not acquired by a gangster as a result of commission of any offence under the Act then the Court shall order for release of such property to the person from whose

possession it was attached. In any other case, the Court may make such orders as it deems fit for disposal of such property either by attachment, confiscation or delivery to any person entitled to possession thereof or otherwise. Section 18, which is the apple of discard between the rival sides, legislates and provides for applicability of chapter XXIX of the Code in an appeal preferred under the Act. For a clear understanding of the legislative intent, Sections 17 and 18 of the Act are reproduced below:- .

"17. Order after inquiry- If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

18. Appeal- The provisions of Chapter XXIX of the Code shall mutatis mutandis, apply to an appeal against any judgment or order of a Court passed under the provisions of this Act."

From the two referred statutory provisions it is abundantly clear that Sections 14 to 17 of the Act, which deals with attachment/non attachment or release of any property in question is analogous to sections 451, 452, and 457 of the Code. For a ready reference, the aforesaid provisions of Cr.P.C. are registered herein below:-

"451. Order for custody and disposal of property pending trial in certain cases- When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposal of.

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

(a) property of any kind or document which is produced before the Court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

452. Order for disposal of property at conclusion of trial- (1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate,

who shall thereupon deal with it in the manner provided in sections 457, 458 and 459.

(4) Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

(5) In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

457. Procedure by police upon seizure of property-

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

What is noticeable here is that an order under sections 452 and 453 of the Code is appealable under section 454 thereof. The special provision has been enacted under the Act for a solemn purpose to deter an individual and /or public to acquire property by commission of offences under the Act and thereby to curb the activities of gangsterism. Attachment and release of property or any order of such a nature dealing with disposal of any property by a court has serious consequences of far reaching effects and it impinges upon the right to property of an individual and consequently, under the code such types of orders are made appealable under section 454 thereof. For a ready reference Section 454 Cr.P.C. is reproduced below:-

"454. Appeal against orders under section 452 or section 453.- (1) Any person aggrieved by an order made by a Court under section 452 or section 453, may appeal against it to the Court to which appeals ordinarily lie from convictions by the former Court.

(2) On such appeal, the Appellate Court may direct the order to be stayed pending disposal of the appeal, or may modify, alter or annul the order and make any further orders that may be just.

(3) The powers referred to in sub-section (2) may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in subsection (1) was made."

Now, turning towards the Act it is recorded that the Act is not a self contained Code. For innumerable aspects of trial procedure and for many

interlocutory matters it falls back on the Code. What is of significance here is that the Act does not provide anywhere what orders are appealable and what are not? Under section 18 only this much has been legislated that chapter XXIX of the Code shall mutatis mutandis apply to an appeal against any judgment and order of a court passed under the provisions of this Act. Thus the Act confers right to appeal against all orders and judgment of a court under it as the words " an appeal" and "any judgment and order" occurring in section 18 are of enormous magnitude. In consonance with the Principles of interpretation of Statute and harmonious construction of various statutes, these words should be taken to preserve all appeals provided under the Code. The meaning attached to these words can not be restricted in it's scope only to take in it's purview convictions and sentences passed under the Act. Divastation of once property has got enormous detrimental civil consequences which even can not be recouped in future and in such matters the remedial remedy of appeal can and should not be squeezed from an aggrieved person by the courts when they are called upon to fillup the grey areas left by the legislature in matters of interpretation of a statutory provision. It seems that it is because of this reason that section 454 has been enacted in the code and therefore benefit of the said right under the Act to an individual should not be denied against consequentially analogous orders, especially when there is no legislative intent to the contrary, as the Act is silent on the aspects as to which orders are appealable and which are not?

Another dimensional facet of the involved issue is that courts are required to adopt warrant trial or summary trial procedures while prosecuting an accused as is mandated under section 10 of the Act. Various orders in those trial procedures are appealable. Once the Act does not carve out any exception in matters of appeal in those trial procedures, it will be very injudicious to read them in a statute (Act), as doing so will amount to legislate, which the courts are not capable of. Besides 454, other exempler appealable sections are 86, 341, 351, and 449 of the Code. More over the two trial procedures, in it's application to offences under the Act and those of IPC and other statutes, can not be bifurcated into two. If the trial procedure provides for filing of an appeal against any order passed during the trial , then those orders shall be appealable under the Act as well. Drawing of such an opinion can be countenanced even on the basis of the words used in section 372 of the code as well which falls under chapter XXIX thereof. Section 372 of the Code postulates that no appeal shall lie from any judgment or order of a criminal Court except as is provided in the Code or in any other law for the time being enforce. The said section clearly indicates that an appeal shall lie from a judgment and order of a criminal court, if it is so provided under the Code or under any other statute in vogue. This section, therefore, imbibes in itself all appeals under Sections 86,341,351, 454 and 449 of the code. In this connection, Section 386 (d) is also noticeable and is of much significance as it provides as follows:-

"386. Powers of the Appellate Court.- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or section 378, the accused, if he appears, the Appellate Court may, if it

considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) .....

(b) .....

(c) .....

(d) in an appeal from any other order, alter or reverse such order;

(e) ....."

Thus a co-joint reading of Section 372 and 386(d) of the code conspicuously lays down maintainability of all appeals provided under the code. Since section 17 of the Act is an analogous provision of sections 451, 452 and 457 Cr.P.C., the same will be appealable under chapter XXIX of the Code as all appeals under the Act has to be dealt with under that chapter. I am also fortified in my view from the phraseology of Section 18 f the Act, which provides that the provisions of appeal under Chapter XXIX shall mutatis mutandis apply to an appeal under the Act. Section 18 has been couched in a general phraseology and, therefore, it has to be read in conjunction with chapter XXIX of the Code. Eikly, in matters of appeal under Section 15 of the Act Cr.P.C. will also apply as Section 2 of the Act specifically provides for its application. It will be preposterous to cogitate that the offences under the Gangsters Act, which is an off shoot of various offences mentioned under the penal code and other statutes will be tried differentially and will have different appealable sections than that of Cr.P.C. If the legislative intend was that only a conviction and sentence passed under the Act be made appealable, the legislature would have provided for such an eventuality which it has not done consciously as it was conscious of the fact that the attachment, confiscation or disposal of property in any manner has got serious consequences as it even impinges upon the right to property of a citizen of this country. To accept the argument of learned counsel for the respondents, in this respect will lead to hazardous consequences. If a person is deprived of his property without any right of appeal, that will be in direct contradiction with the provisions of Code of Criminal Procedure. In such a view the appeal provided for under Section 18 of the Act takes into its purview all the appeals which are provided for under the Code of Criminal Procedure.

Turning towards, the decision relied upon by the counsel for the respondents, it is to be noted that in the said judgment Hon'ble Single Judge has himself observed thus:-

"No separate procedure is prescribed to challenge the order of conviction or acquittal passed by the Special Judge in exercise of power of Chapter XXIX Cr.P.C. and Sections 3 and 18 of the Act what appears is that appeal would lie against the order of conviction or acquittal under the Act and not against the order of attachment of the District Magistrate or the order of the Special Court on the reference made by the District Magistrate. Even assuming that Section 18 has the application and orders of the District Magistrate and the Special Court can be challenged by way of appeal yet I would hold that the writ petition under Article 226 of the Constitution is maintainable when the very order of attachment passed by the District Magistrate is illegal, arbitrary and without jurisdiction."

(underline emphasis mine)

Thus the aforesaid judgment Badan Singh (Supra), does not rule out maintainability of an appeal against an order passed under Section 17 of the Act.

Further, I find that the appeal was admitted by this Court vide order dated 10.7.2003. The State did not object maintainability of an appeal at that stage and, therefore, also I am of the considered view that the instant appeal is maintainable for challenging an order passed under section 17 of the Act and therefore I reject the preliminary objection raised by the counsels for the respondents 2 to 18.

This appeal will now be listed on 8.2.2010 for further final hearing on merits as part heard.

20. The appeal after having been held to be maintainable by the aforesaid order, the same was decided on merits by the learned Single Judge vide judgment dated 22.5.2012 reported in 2012 (6) ADJ Page 231 Kailash Sahkari Awas Samiti Vs. State of U.P. & others. This issue of having decided the preliminary objection of the maintainability of the appeal was again referred to in the final judgment in paragraph 15 which is quoted hereinunder :-

"A priory, a preliminary objection was raised by the respondents counsel regarding maintainability of this appeal in this court, which issued was decided as preliminary issue and it was held that appeal is maintainable as section 372 of the Code (Cr.P.C.) read with section 18 of the Act read jointly preserves all the appeals provided for under the Code. It was noted that the Act is not a self-contained Code and for trial procedure it falls back on the provisions of the Code. It was further noted that since chapter XXIX of the code applies mutatis mutandis to appeals under the Act, hence in view of section 372 of the Code appeal against attachment or release of property shall be maintainable under the Act, just as appeal u/s 454 of the Code is maintainable. It was also noted that the appeal was entertained on 10.7.2003 and Act does not prohibit entertaining appeal against attachment under Section 18.

After deciding preliminary objection, appeal was heard on merits."

21. Another decision that holds that an order passed under Section 17 of the Act is subject to an appeal is that of Manzoora Vs. State of U.P. & others, 2008 (63) ACC page 687. Appeals have been entertained by this Court in such matters and have been decided, one of which is Shashi Kant Chaurasiya Vs. State of U.P. 2015 (1) JIC 435 Alld. Two other judgments, even though short and not loaded with reasons, but straight to the point are State of U.P. Vs. Manoj Kumar Pandey 2010(3) ADJ Page 69 para 10 extracted hereinunder :-

"An objection about the maintainability of the appeal was initially raised by the respondents but it was subsequently given up and was not pressed. Neither party has, therefore, addressed the Court on this question. However, since Section 18 of the Act provides for the appeal against the judgment or order of the Court passed under the Act and the impugned judgment and order have been passed by the Court under Section 17 of the Act, therefore, the appeal is maintainable."

22. and the division bench decision in the case of Krishna Murari Agrawal Vs. D.M. Jhansi & others, 2001 Cr.L.J. 949 para 4 that is already extracted hereinafter.

23. A learned Single Judge of this Court in Government Appeal No.6042 of

2010, State of U.P. Vs. Nasim Khan & others after noting the Division Bench judgment in the case of Manzoora (supra) came to a prima facie opinion that an appeal against an order of release/partial release as aforesaid and passed under Section 17 of the 1986 Act is not maintainable. It was further commented by the learned Single Judge that the remark in Manzoora's case was made casually without going through the provisions of Section 18 of the Act as well as Chapter XXIX of the Criminal Procedure Code and then proceeded to make a reference before a division bench for consideration vide his order dated 28.1.2015 which is extracted hereinunder :-

"Present appeal has been filed by State of U.P. under Section 18 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 against judgement and order dated 23.7.2010 passed by Additional Sessions Judge, Court No.6/Special Judge Gangster Act, Allahabad in Miscellaneous Case No.5 of 2009 (Nasim Khan Vs. State of U.P.), Miscellaneous Case No.3 of 2009 (Abdul Nafis Vs. State of U.P.), Miscellaneous Case No.4 of 2009 (Sayeed Khan and another Vs. State of U.P.), Miscellaneous Case No.2 of 2009 (Nizam Vs. State of U.P.) and Miscellaneous Case No.6 of 2009 (Salim Khan Vs. State of U.P.) arising out of Crime No.254 of 2007, under section 2/3 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, Police Station Handia, District Allahabad whereby Additional Sessions Judge, Court No.6/Special Judge Gangster Act, Allahabad has allowed applications under section 16 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 moved in aforesaid each miscellaneous case and has set aside order dated 30.1.2009 passed by District Magistrate, Allahabad under section 14(1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

Affidavits have already been exchanged between the parties.

Shri Narendra Dev Roy, learned A.G.A. appeared for State of U.P. Shri Daya Shankar Mishra as well as Shri Mukhtar Alam appeared for respondents.

I have heard learned A.G.A. as well as learned counsel for respondents and perused the record.

Learned A.G.A. contended that impugned judgement and order passed by Additional Sessions Judge, Court No.6/Special Judge Gangster Act, Allahabad is against provisions of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 as well as evidence on record .

Learned A.G.A. contended that impugned judgement and order dated 23.7.2010 passed by Additional Sessions Judge, Court No.6/Special Judge Gangster Act, Allahabad should be set aside and impugned order 30.1.2009 passed by District Magistrate, Allahabad should be restored.

Learned counsel for respondents contended that impugned order has been passed under section 17 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as "Act") and there is no provision of appeal against order passed under section 17 of Act either in the Act or in Chapter XXIX of Criminal Procedure Code which has been made applicable on appeals against judgement and order passed under the Act per section 18 of the Act.

Learned counsel for respondents further contended that learned trial court has passed impugned judgement and order after having considered all evidence and submissions made by the parties. The impugned judgement and order passed by trial court is in accordance with provisions of the Act as well as evidence on record.

Learned counsel for respondents contended that appeal has no merit and it should be dismissed.

In reply learned A.G.A. contended that appeal is maintainable against impugned judgement and order in view of Section 18 of the Act.

Learned A.G.A. placed reliance upon judgement of Division Bench of this High Court rendered in the case of Manzoora Vs. State of U.P. through Secretary Home, Government of U.P., Lucknow and others, reported in 2008(63) ACC 687.

In view of contentions made by the parties following points for determination arise in this appeal:

1. Whether appeal filed by State of U.P. is maintainable in view of Section 18 of the Act against impugned judgement and order passed by trial court.

2. Whether impugned judgement and order passed by trial court is against provisions of the Act as well as evidence on record.

Admittedly, District Magistrate, Allahabad passed order of attachment of property of respondents under section 14-(1) of the Act against which respondents made representation before District Magistrate for release of property under section 15(1) of the Act. But District Magistrate, Allahabad did not release property attached and referred the matter under section 16-(1) of the Act to the court having jurisdiction to try offence under the Act, whereupon trial court made inquiry under section 16(3) of the Act and ultimately passed impugned order under section 17 of the Act whereby he has allowed the applications of respondents moved under section 15-(1) of the Act and has set aside order dated 30.1.2009 passed by District Magistrate, Allahabad under section 14(1) of the Act.

Section 18 of the Act provides provisions for appeal. Section 18 of the Act is reproduced below:

"The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgement or order of a Court passed under the provisions of this Act".

Reading of Section 18 of the Act shows that it does not speak about judgements and orders which are appealable. It says only that Chapter XXIX of the Code (Criminal Procedure Code) shall mutatis mutandis apply to an appeal against any judgement or order of a Court passed under the provisions of the Act.

In view of Section 18 of the Act it is relevant to go through provisions of Chapter XXIX of the Criminal Procedure Code.

Heading of Chapter XXIX of the Criminal Procedure Code is "appeals". This Chapter consists of Sections 372 to 394, out of which Section 372 provides that no appeal shall lie from any judgement or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. Section 373 of the Chapter provides provision for appeal against orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour.

Section 374 of the Chapter provides provision for appeal from convictions.

Section 375 of the Chapter provides that notwithstanding anything contained

in Section 374, where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal.

Section 376 of the Chapter provides provision for no appeal by convicted person in certain petty cases.

Section 377 of the Chapter provides provision for appeal by State Government against the sentence on the ground of its inadequacy.

Section 378 of the Chapter provides provision for appeal in case of acquittal.

Section 379 of the Chapter provides provision for appeal against conviction by High Court in certain cases.

Section 380 of the Chapter provides that notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appellable judgement or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

Section 381 of the Chapter provides provisions that appeal to the Court of Session shall be heard by the Sessions Judge or by an Additional Sessions Judge.

Section 382 of the Chapter provides that appeal shall be made in the form of petition in writing.

Section 383 of the Chapter provides procedure of appeal when appellant is in jail.

Section 384 of the Chapter provides provision for summary dismissal of appeal.

Section 385 of the Chapter provides procedure for hearing of appeals not dismissed summarily.

Section 386 of the Chapter provides provisions regarding powers of the appellate court.

Section 387 of the Chapter contains provisions regarding judgements of subordinate appellate court.

Section 388 of the Chapter provides that order of High Court on appeal shall be certified to lower court.

Section 389 of the Chapter provides provisions regarding suspension of sentence during pendency of appeal or release of appellant on bail.

Section 390 of the Chapter provides provisions regarding arrest of accused in appeal from acquittal.

Section 391 of the Chapter provides that appellate court may take further evidence itself or direct it to be taken by a Magistrate, or when the appellate court is a High Court, by a Court of Session or a Magistrate.

. Section 392 of the Chapter provides procedure where Judges of Court of Appeal are equally divided.

Section 393 of the Chapter provides that judgements and orders passed by an Appellate Court upon an appeal shall be final, except in the cases provided for in Section 377, Section 378, sub-section (4) of Section 384 or Chapter XXX.

Section 394 of the Chapter provides provisions regarding abatement of appeals.

After having gone through Chapter XXIX of Criminal Procedure Code it is apparent that this Chapter provides provisions for appeal against judgement and order of conviction or acquittal or order requiring securing or refusal to accept or rejecting surety for keeping peace or good behaviour. In this Chapter there is no provision for appeal against order passed in respect of attachment, release or disposal of property. There is no provision either in Section 18 or anywhere in Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 also to provide right of appeal against order passed under section 17 of Act by trial court regarding release or

disposal of property attached by District Magistrate under section 14(1) of the Act where as section 372 of Chapter XXIX of Criminal Procedure Code clearly provides that no appeal shall lie from any judgement or order of a criminal court except as provided by Criminal Procedure Code or by any other law for timing being in force. In view of section 18 of the Act and Chapter XXIX of Criminal Procedure Code order passed under section 17 of the Act is not an appelable order.

But in the case of Manzoora Vs. State of U.P. and others (2008) 63 A.C.C. 687, Honourable Division Bench of this High Court in a writ petition filed against order passed by District Magistrate under section 14(1) of the Act has made a remark to the effect that the order passed under section 17 of the Act is subject to an appeal to the High Court under section 18. This remark has been made casually without going through provisions of section 18 of the Act as well as Chapter XXIX of Criminal Procedure Code.

In the case of Mamleshwar Prasad and another Vs. Kanhaiya Lal (dead) through L. Rs., 1975 (2) S.C.C. 232, Hon'ble Apex Court in para 7 of the judgement has observed as follows:

"Certainty of the law, consistency of rulings and comity of courts - all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents."

In the case of State of U.P. and another Vs. Synthetics and Chemicals Limited and another, 1991 (4) S.C.C. 139, Hon'ble Apex Court in para 40 of judgment has observed as follows:

"Incuria" literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young Vs. Bristol Aeroplane Co. Ltd. (1994) 1 KB 718 : (1944) 2 All ER 293. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

In view of above pronouncements of Honourable Apex Court I am of the view that the issue as to whether order passed under section 17 of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 is an appelable order and appeal is maintainable under section 18 of the Act should be referred to Division Bench for consideration.

Let the records be placed before Hon'ble The Chief Justice for order."

24. We have been informed that the said reference is still pending before a division bench and has not yet been answered.

25. Since this issue has been raised before us by the learned A.G.A., we proceed to deal with the same in the light of the facts stated hereinabove. To us, it appears that the learned Single Judge who has made the reference on 28.1.2015 has not noticed the judgment in the case of Kailash Sahkari Awas Samiti (supra). The other two judgments that have also not been noticed are the division bench judgment in the case of Krishna Murari Agrawal (supra) and the

decision of the learned Single Judge in the case of State of U.P. Vs. Manoj Kumar Pandey (supra). We also find that the learned Single Judge while making the reference has not referred to the provisions particularly Sections 5, 451, 452 and 457 of the Criminal Procedure Code that have been compared with analogous provisions in the case of Kailash Sahkari Awas Samiti (supra) along with the provisions of appeal under Section 454 of the Code read with Section 18 of the 1986 Act. In our opinion, the learned Single Judge in the case of Kailash Sahkari Awas Samiti (supra) has rightly distinguished the case of Badan Singh (supra) by observing that it does not rule out the maintainability of an appeal against an order passed under Section 17 of the Act. The conclusion drawn in the case of Kailash Sahkari Awas Samiti (supra) finds our approval for all the reasons given therein inasmuch as, even if an appeal is a creature of statute, yet in view of the provisions of Section 18 of the 1986 Act read with Chapter XXIX of the Criminal Procedure Code we find that a provision of appeal is necessary and has to be interpreted as such because the property attached in such proceedings can be confiscated as well under Section 17 of the 1986 Act. This provision, therefore, is plenary and peremptory in nature thereby depriving a person of his property by operation of law. The power of confiscation is positively imperious, even though the order of the District Magistrate or the court concerned before whom the reference is made does not appear to be final. In the circumstances they are subject to recall or otherwise appealable.

26. In such a situation, where there is a constitutional mandate under Article 300-A that no person should be deprived of property save by authority of law, then the provision of an appeal against an order of confiscation is necessary, inasmuch as, to allow the order of the court to become final in a matter of confiscation of property would be depriving a person to question and contest this matter before a higher forum that is inbuilt intentionally by the legislature in the Statute. We say this because it will not be possible for a person to claim the property in question through any other mode or source of law except through a writ petition. There is no doubt that property acquired through unlawful means and being an outcome of crime cannot be claimed as a matter of right but at the same time a law that provides for attachment, release or confiscation of such property should be capable of, and visited with a procedure, so as to adjudicate any claim arising therefrom in a fair and reasonable manner.

27. The 1986 Act therefore has to be read as a complete Code in itself so as to provide such benefit of appeal which the legislature appears to have intended under Section 18. Applying the interpretive tool, Section 18 categorically provides an appeal against any judgment or order and then mutatis mutandis applies Chapter XXIX of the Cr.P.C. to such an appeal. Judges while interpreting such provisions have to adopt the legalistic method as well as the pragmatistic method as they are said to wear two hats. This distinguishes them from mere umpires and they enjoy a more certain interpretive freedom by applying reasoning through analogy in order to interpret and explain cannons of statutory construction. Applying the said principles, we are also of the opinion that Section 18 does not contain any prohibitive language nor does it give a restrictive meaning to the right of appeal against any judgment or order under the Act which is a special act. This therefore includes the right of an appeal against an order refusing to release attached property. The interpretation has to be meaningful and that

which advances the cause of justice. That also checks infallibility and rules out any possibility of failure or miscarriage of justice. There is yet a dimension to ponder. If ultimately the prosecution ends in acquittal or there is a probability of acquittal then a release of attached property has to be adjudicated. There is yet another grey area, namely what happens to attached property if the proceedings abate due to the death of an undertrial under the Gangsters Act. Should the property be automatically refused to be released or released to the heirs of the deceased. In the former case if the trial fails to end up in conviction in such a contingency due to the death of an undertrial, then the question of release has to be determined but in the latter case can the attached property be released automatically even if no proof is provided by the heirs of the mode of acquisition of the property. In both cases an adjudication has to be made at the instance of the State Government or any interested person. In such a situation if release is refused, then an appellate forum with co-extensive powers should be available and that is what Section 18 purports to do when it recites the words any order or judgment. This is analogous to Section 452 of the Cr.P.C. and therefore the legislature was conscious of also making a provision that Chapter XXIX will mutatis mutandis apply.

28. Even though the writ jurisdiction may not be barred in appropriate matters as held in Badan Singh's case (supra) but if the statutory remedy of appeal is available, then filing of writ petitions stands obviated for at least two reasons. First that in an appeal all questions of fact and law can be pleaded, evidence led and be adjudicated. Secondly, ordinarily questions of fact that may be disputed, cannot be gone into in the exercise of jurisdiction under Article 226 of the Constitution. This has been held in a short judgment in the case of Krishna Murari Agarwal Vs. District Magistrate, Jhansi & others, 2000 Cr.L.J. Page 949, extracted hereinunder :-

"1. The property of the petitioner was attached under Section 14(1) of the U.P. Gangsters & Anti Social (Activities) Prevention Act, 1986 by order of the District Magistrate, Jhansi.

2. The petitioner made a representation against the order of attachment under Section 16(1) of the said Act. The District Magistrate by his order dated 12.10.2000 rejected the representation and referred the matter with his report to the Special Judge (Gangsters Act) in accordance with Section 16(1) of the Act. It is this order which is subject-matter of challenge in the present writ petition.

3. We have heard Sri UK Saxena, learned counsel for the petitioner at considerable length and have perused the record.

4. The question whether the property attached has been acquired by a gangster as a result of the commission of an offence under U.P. Gangsters & Anti Social Activities (Prevention) Act, 1986 is a pure question of fact. The claim of the petitioner that the property has not been acquired by commission of an offence or that it is an ancestral property can only be established by appraisal of the evidence. It will be open to the petitioner to lead oral and documentary evidence in support of his claim before the Special Judge (Gangsters Act) where the matter has been referred. Such appraisal of evidence is not possible in the present proceedings under Article 226 of the Constitution of India. The Act provides a complete machinery as against the decision of the Court an appeal lies under Section 18 of the Act.

5. In these circumstances we do not consider it a fit case for interference under Article 226 of the Constitution of India.

6. Learned counsel for the petitioner has submitted that the house of the petitioner has been attached and he is suffering great hardship and, therefore, a direction may be issued to the Special Judge concerned to decide the proceedings at an early date.

7. Taking into consideration the entire facts and circumstances of the case, it is directed that the proceedings referred to the Special Judge by the District Magistrate under Section 16(1) of the Act shall be concluded as expeditiously as possible preferably within three months of the filing of a certified copy of this order before the Court concerned. It is understood that the petitioner will co-operate with the enquiry and will not seek adjournments unless absolutely necessary.

8. Subject to the observations made above, the writ petition is dismissed."

29. The reasoning given by the learned Single Judge in the case of Kailash Sahkari Awas Samiti (supra) appears to be perfect and sound whereas the apprehension expressed in the referring order dated 28.1.2015 does not appear to have noticed the same. For all the reasons given hereinabove and for the reasons given by the learned Single Judge, referred to hereinabove, we approve of the ratio of the decision in the case of Kailash Sahkari Awas Samiti (supra).

30. Why is a statutory appeal necessary and what is the purpose of providing an appeal has been very elaborately dealt with by the Apex Court explaining its philosophy in the celebrated decision of Sita Ram and others Vs. State of U.P. (1979) 2 SCC Page 656. Thus, the importance of a provision of appeal cannot be diluted and the learned Single Judge in the case of Kailash Sahkari Awas Samiti (supra) was fully justified in interpreting Section 18 to be available for such purpose. Retention of property may not be a guaranteed fundamental right, but it is reasonable to construe that deprivation of property without authority of law is unconstitutional and leads to civil consequences of a permanent nature. We, therefore, extract para 25, portion of para 31, paras 41, 42 and 45 of Sita Ram's case (supra) to the following effect :-

25. At the threshold, we have to delineate the amplitude of an appeal, not in abstract terms but in the concrete context of Article 134 read with Article 145 and order XXI Rule 15 and s. 384 of the Criminal Procedure Code, 1973. The nature of the appeal process cannot be cast in a rigid mould as it varies with jurisdictions and systems of jurisprudence. This point has been brought out sharply in "Final Appeal". The learned authors ask :

But what does 'appeal' really mean : indeed, is it a meaningful term at all in any universal sense ? The word is in fact merely a term of convenient usage, part of a system of linguistic shorthand which accepts the need for a penumbra of uncertainty in order to achieve universal comprehensibility at a very low level of exactitude. Thus, while 'appeal' is a generic term broadly meaningful to all lawyers in describing a feature common to a wide range of legal systems, it would be misleading to impute a precise meaning to the term, or to assume, on the grounds that the word (or its translated equivalent) has international currency, that the concept of an appeal means the same thing in a wide range of systems.

On any orthodox definition, a appeal includes three basic elements: a decision (usually the judgment of a court or the ruling of an administrative body) from which an appeal is made; a person or persons aggrieved by the decision (who is often, though by no means necessarily party to the original proceedings) and a reviewing body ready and willing to entertain the appeal.

The elasticity of the idea is illumined by yet another passage which bears quotation:

'Appeals' can be arranged along a continuum of increasingly formalised procedure, ranging from a condemned man in supplication before his tribal chief to something as jurisprudentially sophisticated as appeal by certiorari to the Supreme Court of the United States. Like Aneurin Bevan's elephant an appeal can only be described when it walks through the court room door..... The nature of a particular appellate process-indeed the character of an entire legal system-depends upon a multiplicity of interrelated (though largely imponderable) factors operating within the system. The structure of the courts; the status and rule (both objectively and subjectively perceived) of judges and lawyers, the form of law itself-whether, for example it is derived from a code or from judicial precedent modified by statute; the attitude of the courts to the authority of decided cases; the political and administrative structure of the country concerned-whether for example its internal sovereignty is limited by its allegience to a colonizing power. The list of possible factors is endless, and their weight and function in the social equation defy precise analysis."

In short, we agree in principle with the sum-up of the concept made by the author:

Appeal, as we have stressed, covers a multitude of jurisprudential ideas. The layman's expectation of an appeal is very often quite different from that of the lawyer and many an aggrieved plaintiff denied his 'just' remedy by judge or jury has come upon the disturbing reality that in England a disputed finding of fact can seldom, if ever, form the basis of an appeal. Similarly, a Frenchman accustomed to a narrowly legalistic appeal incessation, subject to subsequent reargument in a court below, would find little familiarity in the ponderous finality of the judgment of the House of Lords. And a seventeenth-century lawyer accustomed to a painstaking search for trivial mistakes in the court record, which formed the basis of the appeal by writ of error, would be bewildered by the great flexibility and increased sophistication of a jurisprudential argument which characterize a modern appeal.

31. x x x x x A single right of appeal is more or less a universal requirement of the guarantee of life and liberty rooted in the conception that men are fallible, that Judges are men and that making assurance doubly sure, before irrevocable deprivation of life or liberty comes to pass, a full-scale re-examination of the facts and the law is made an integral part of fundamental fairness or procedure.

41. Going to the basics, an appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below.... An appeal, strictly so called, is one "in which the question is, whether the order of the court from which the appeal is brought was right on the materials which that court had before it" (per Lord Davey, Ponnamma v. Arumogam, (1905) A.C. at p.390) .... A right of appeal, where it exists, is a matter of substance, and not of procedure (Colonial Sugar Refining Co. v. Irving, (1905) AC 369 and Newman v. Klausner, (1922) 1 K.B. 228). Thus, the right of appeal is para mount, the procedure for

hearing canalises so that extravagant prolixity or abuse of process can be avoided and a fair workability provided. Amputation is not procedure while pruning may be.

42. Of course, procedure is within the Court's power but where it pares down prejudicially the very right, carving the kernal out, it violates the provision creating the right. Appeal is a remedial right and if the remedy is reduced to a husk by procedural excess, the right becomes a casualty. That cannot be.

45. An appeal is a re-hearing, and as Viscount Cave laid down, it was the duty of a court of appeal in an appeal from a judge sitting alone to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment where the credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly."

31. Having considered the above, we therefore find ourselves in full agreement with the judgment of the learned Single Judge in the case of Kailash Sahkari Awas Samiti (supra) which lays down the law correctly and an appeal against an order refusing to release attachment under Section 17 of the 1986 Act would be maintainable under Section 18 of the same Act.

32. After having held that, we partly allow this petition with a direction to the District Magistrate to proceed to refer the matter to the court concerned and to that extent the impugned order dated 18.12.2014 stands modified. The District Magistrate ought to have reflected on the provisions of Sections 15 and 16 of the 1986 Act carefully but such errors may keep on recurring as Rules do not appear to have been framed inspite of the query raised by this Court in Akbar's case (supra). Once the reference is made to the court concerned, as indicated above, then the matter shall be disposed off by the court in accordance with the provisions quoted hereinabove and the law indicated in this regard. The aforesaid process be completed expeditiously and the District Magistrate shall pass appropriate orders preferably within four weeks' from the date of production of a certified copy of this order before him. Once the matter reaches the court, the court shall endeavour to dispose of the same under the provisions of the 1986 Act read with Criminal Procedure Code preferably within three months thereafter.

33. A copy of this judgment may also be placed on the record of Government Appeal No.6042 of 2010 for information and the Reporting Section of the High Court shall also take notice of this judgment to proceed for reporting such appeals filed under Section 18 of the 1986 Act. The learned Government Advocate may apprise the State Government as well the learned Advocate General of this judgment so as to expedite considering framing of appropriate Rules as observed hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2015

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Writ-C No. 8762 of 2015

Ravindra and Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kundan Rai

Counsel for the Respondents:
C.S.C., Sri D.D. Chauhan, Sri Prabhakar Dubey

Constitution of India, Art.-226-Fisheries Rights-whether inheritable?-held-'yes'-petitioner's mother granted license of fisheries rights-having validity upto 2018-on death of original licensee-petitioner being a legal heirs-claimed license in his favor-District Magistrate rejected-saying - such rights not inheritable-held-illegal.

Held: Para-6
This type of controversy has earlier came up before this Court in the writ petition no. 5536 of 2005 (Mohan Lal Vs. State of U.P.and others) decided on 9.2.2005, wherein this Court has held that the fishery lease is inheritable. Not only in that case, but in another Writ (C) No. 7322 of 2014 (Smt. Sonmati Vs. State of U.P. and others), this Court has held that fishery lease is inheritable. In view of the law laid down by this Court in the aforesaid cases, I am of the opinion that the Collector has erred in rejecting the petitioners' application holding that the petitioners have no right to perform fishery right on the strength of the earlier lease executed in favour of their mother. The question as to whether the petitioners are the sons of the original lessee or not, this is a question of fact and that can be examined by the District Magistrate but so far as their inheritable right is concerned, that cannot be denied in view of the law laid down by this Court in the case of Mohan Lal and Smt.Sonmati (supra).

Case Law discussed:
W.P. No. 5536 of 2005; Writ(C) No. 7322 of 2014

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

1. Learned counsel for the petitioner is permitted to correct the description of respondent no. 3 and serve copy of the writ petition to Sri D.D.Chauhan, learned counsel for the Gaon Sabha.

2. Heard Sri Kundan Rai, learned counsel for the petitioners, learned Standing Counsel for the State respondents, Sri D.D.Chauhan, learned counsel for the Gaon Sabha and Sri Prabhakar Dubey, learned counsel for the respondent no. 4.

3. By means of this writ petition, the petitioners have prayed for issuing a writ of certiorari quashing the order dated 21.1.2015 passed by the Collector/Zila Aadhikari, Sant Kabir Nagar in Misc. Case No. 8 (Ravindra and others Vs. Shoba Devi and others) by which the petitioners' application, for permitting them to perform their fishery right over pond situated over Plot No. 290-Ka (measuring about 0.376 hectare) situated in Village Dharmsinghva Tappa Patana Pargana Bansi Purab Tehsil Mehadawal District Sant Kabir Nagar, has been rejected.

4. While assailing this order, learned counsel for the petitioners submits that fishery lease is inheritable and the Collector concerned has erred in rejecting the petitioners' application on the ground that after the death of the petitioners' mother in whose favour lease was executed, the period of lease has come to an end and the petitioner cannot be permitted to inherit the same.

5. The facts giving rise to this case are that a lease was executed in favour of the petitioners' mother Smt. Chandrawati Devi for performance of fishery right over the pond mentioned hereinabove. The lease was executed for the period of ten years and was operative till 31.12.2018. Later on, the petitioners' mother has died and after the death of the mother, the respondents have started hindrance in performance of fishery right by the petitioners. In that eventuality, the petitioners have approached this Court through Writ Petition No. 64996 of 2014. The aforesaid writ petition was disposed

of on 2.12.2014 with the liberty to the petitioner to make a representation/application before the Collector/District Magistrate Sant Kabir Nagar. Pursuant thereto, the representation was filed. The Collector has rejected the petitioners' application on the ground that after the death of the original lessee, the period of lease has come to an end and stand cancelled and the heirs and legal representatives cannot inherit the same.

6. This type of controversy has earlier came up before this Court in the writ petition no. 5536 of 2005 (Mohan Lal Vs. State of U.P.and others) decided on 9.2.2005, wherein this Court has held that the fishery lease is inheritable. Not only in that case, but in another Writ (C) No. 7322 of 2014 (Smt. Sonmati Vs. State of U.P. and others), this Court has held that fishery lease is inheritable. In view of the law laid down by this Court in the aforesaid cases, I am of the opinion that the Collector has erred in rejecting the petitioners' application holding that the petitioners have no right to perform fishery right on the strength of the earlier lease executed in favour of their mother. The question as to whether the petitioners are the sons of the original lessee or not, this is a question of fact and that can be examined by the District Magistrate but so far as their inheritable right is concerned, that cannot be denied in view of the law laid down by this Court in the case of Mohan Lal and Smt.Sonmati (supra).

7. In view of foregoing discussions, the writ petition succeeds and is allowed. The impugned order dated 21.1.2015 passed by the Collector/Zila Aadhikari, Sant Kabir Nagar in Misc. Case No. 8 (Ravindra and others Vs. Shoba Devi and others) is hereby quashed with the direction to pass a fresh order in this regard in accordance with law looking into the order passed in this petition and earlier decisions of this Court as mentioned hereinabove expeditiously but not later than two months from the date of filing of certified copy of the order of this Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Misc. Writ Petition No. 10050 of 2015

Sagar Malik ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Zia Naz Zaidi, Sri Rajul Bhargava

Counsel for the Respondents:
A.G.A.

Constitution of India, Art.-226-Petitioner a gang leader-continue in jail-state government exercising power u/s 268 in terms of Section 417 (I) Cr.P.C.-issued direction transferring petitioner from Muzaffar Nagar to district jail Varanasi-before passing impugned transfer order-following principle of natural justice-only reason disclosed that his uncle and other family members are confined in same jail at Muzaffar Nagar-can not be basis-order impugned not suffer from any infirmity requires no interference-rather petitioner at Varanasi having video conferencing system-having full choice of engagement of lawyers-no prejudice going to caused-petition dismissed.

Held: Para-18
In our opinion, the Magistrate has only given a permission for transfer to another Jail and the reasons given are

the existence of an eminent possibility of a gang war. Apart from this, the petitioner in his objection had only taken a plea that since his uncle and relatives are lodged in the same Jail, he should not be transferred. No other plea has been taken in the said objection. Thus, principles of natural justice have been complied with and the petitioner had filed an objection which has been noticed where after the impugned order has been passed by the learned Magistrate. Merely because the relatives of the petitioner are lodged in the same Jail, the same cannot be a ground to refuse transfer and, therefore, the order of the Magistrate does not suffer from any infirmity or perversity calling for an interference. The said order has now been already executed with the issuance of a Government Order on 26.2.2015 which has not been challenged. In the aforesaid circumstances, when the principles of natural justice have been complied with and sufficient reasons have been indicated in the order permitting transfer, we do not find any good ground to interfere with the same at least at this stage.

Case Law discussed:
(2012) 13 SCC 192; AIR 1991 SC 746; W.P. No. 6719(M/B) of 2002; 1991 JIC 95.

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

1. This petition questions the order of the Chief Judicial Magistrate dated 25.2.2015 whereby the learned Magistrate has passed an order granting permission to transfer the petitioner to some other Jail from the District Jail at Muzaffarnagar where he had been detained.

2. Learned A.G.A. for the respondent - State Sri Nitin Sharma had been called upon to obtain instructions as well in the matter. A written instructions signed by the Superintendent of Jail, Muzaffarnagar, dated 27.4.2015 has been placed before the Court.

3. The petitioner was arrested on 16.2.2015 in the circumstances as indicated in the F.I.R. It appears that one Vikky Tyagi, an alleged gang leader, had gone to attend his case in the Court of Xth Addl. District Judge, Muzaffarnagar, on 16.2.2015 when he was attacked by several persons including the petitioner, who allegedly fired shots leaving him dead in the court premises. It is in this background that the petitioner is alleged to have indulged into a gang war as Vikky Tyagi himself is narrated to be one of the leaders of the gang and came to be taken into custody.

4. This background led to the moving of an application by the Superintendent of Jail for transferring the petitioner to some other Jail and it is this application, which has been disposed of as a misc. application by the order impugned dated 25.2.2015. The Court has recorded that after receipt of the said application, the same was served on the petitioner calling upon him to give a reply to the same by 21.2.2015. The petitioner admitted having received the said application on 20.2.2015 and thereafter moved an application on 21.2.2015 itself in the shape of an objection, a certified copy whereof is Annexure No.3 to the writ petition, wherein the petitioner has stated that the petitioner's uncle and other relatives are already detained in Muzaffarnagar Jail and, therefore, he is safe with his family members hence he should not be transferred to any other Jail. He is alleged to have moved another application on 23.2.2015 praying for time to give a further reply and also to file documents with regard to his juvenility.

5. Learned Counsel for the petitioner Ms. Zaidi and Mr. Rajul Bhargava have urged that without giving any further

opportunity, the impugned order was passed and, therefore, the same is in violation of principles of natural justice.

6. The court below has recorded that several other accused of the gang of Vikrant alias Vikky Tyagi are lodged in the same Jail and there is every likelihood of a serious gang war. The petitioner himself has disclosed his age to be about 19 years and, therefore, it is not necessary at this stage to consider any plea of juvenility. It has further been recorded that in the aforesaid background if the petitioner is transferred to some other Jail, then no prejudice will be caused and rather it would be in the interest of the petitioner and his security.

7. The Court further recorded that in view of the Apex Court decision in the case of State of Maharashtra and others Vs. Saeed Sohail Sheikh and others, (2012) 13 SCC 192, opportunity has been given to the petitioner who has filed his objection and, as such, natural justice having been complied with, permission was granted to transfer the petitioner to some other Jail. Directions were issued to take ample security measures and medical care of the petitioner while doing so.

8. It is this impugned order, which has been challenged contending that the order is in violation of principles of natural justice as no further time had been granted and secondly it violates the fundamental rights of the petitioner for which reliance has been placed on the decision in the case of Francis Coralie Mullin Vs. Administrator for the Union Territory of Delhi, AIR 1991 SC 746 and the decision in the case of State of Maharashtra and others Vs. Saeed Sohail Sheikh and others (supra).

9. The contention of the learned Counsel for the petitioner is that the petitioner would not be able to meet his relatives or engage a Counsel of his choice if transferred to a far off Jail as the petitioner has now been sent to a Jail at Varanasi almost 800 kms. away and, therefore, if transfer is necessary, he may be shifted to a Jail in some nearby district.

10. The written instructions that have been produced by the learned A.G.A. are extracted here under:-

''प्रेषक,
अधीक्षक,
जिला कारागार, मुजफ्फरनगर।
सेवा में,
शासकीय अधिवक्ता,
माननीय उच्च न्यायालय,
इलाहाबाद।
पत्रांक– 889/यू0टी0/2015,
विषयः किमिनल मिस0 रिट पिटीशन सं0–10050/2015, सागर मलिक बनाम उ0प्र0 राज्य व अन्य में प्रतिशपथ पत्र दाखिल करने के सम्बन्ध में।
महोदय,
कृपया उपर्युक्त विषयक अपने कार्यालय के पत्रांक – किमिनल/4457, दिनांक – 24.04.2015 का सन्दर्भ ग्रहण करने की कृपा करे। उक्त क्रम में आख्या निम्नवत् है।
1 यह कि याची को सर्वप्रथम अ0सं0–443/2015, धारा–147, 148, 149, 504, 506, 302, 120बी आई0पी0सी थाना–सि0ला0 के वाद में माननीय न्यायालय रिमाण्ड मजिस्ट्रेट, मुजफ्फरनगर के आदेशानुसार दिनांक–17.02.2015 को इस कारागार में निरूद्ध किया गया। तदुपरान्त याची के विरूद्ध माननीय न्यायालय मुख्य न्यायिक मजिस्ट्रेट, मुजफ्फरनगर द्वारा अ0सं0–463/15, धारा–25 आर्म्स एक्ट थाना–सि0ला0 का अभिरक्षा वारंट दिनांक–24.02.15 को इस कारागार पर प्राप्त कराया गया।
2 याची द्वारा दिनांक 16.02.15 को कुख्यात अपराधी विक्रान्त उर्फ विक्की की न्यायालय परिसर में गोली मारकर हत्या कर दी गयी थी। विक्की त्यागी के केस. के कई बन्दी जिला कारागार, मुजफ्फरनगर में निरूद्ध है, उनके द्वारा सागर मलिक के साथ कोई अप्रिय घटना घटित की जा सकती थी। इस कारण याची सागर मलिक को सुरक्षा के दृष्टिगत इस कारागार से अन्यत्र जनपद की कारागार पर स्थानान्तरित करने हेतु इस कार्यालय के पत्रांक – 32/यू0टी0/2015, दिनांक – 17.02.2015 द्वारा माननीय न्यायालय मुख्य न्यायिक मजिस्ट्रेट

मुजफफरनगर से अनुमति प्रदान किये जाने हेतु अनुरोध किया गया।

3 माननीय न्यायालय मुख्य न्यायिक मजिस्ट्रेट मुजफफरनगर द्वारा दिनांक–19.02.15 को करागार के प्रार्थना पत्र की प्रति अभियुक्त को प्रदान करने के आदेश के साथ सुनवाई की तिथि – 12.02.2015 नियत की गई। याची को पत्र की प्रति दिनांक – 20.02.15 को प्राप्त करा दी गयी तथा दिनांक – 21.02.2015 को माननीय न्यायालय को इसकी रिपोर्ट प्रेषित कर दी गयी। याची द्वारा नोटिस के जवाब में अपना उत्तर प्रस्तुत किया गया जिसे भी माननीय न्यायालय को दिनांक – 21.02.15 को भेज दिया गया।

4 याची सागर मलिक को सुरक्षा के दृष्टिगत अन्यत्र दूरस्थ कारागार पर जहां विडीयो कांनफ्रेंसिक की सुविधा उपलब्ध है, स्थानान्तरित करने हेतु दिनांक – 23.02.15 को जिला मजिस्ट्रेट मुजफफरनगर से कार्यवाही करने हेतु अनुरोध किया गया।

5 याची दिनांक 23.0215 को माननीय न्यायालय मुख्य न्यायिक मजिस्ट्रेट मुजफफरनगर के समक्ष स्थानान्तरण पर सुनवाई के समय अपना पक्ष रखने हेतु प्रस्तुत किया गया।

6 शासनादेश सं0 – 45/2015/656 जे0एल0/22–3–15–100 (18)/2015, दिनांक– 26.02.15 जिसमें विचाराधीन बन्दी सागर मलिक को प्रशासनिक आधार पर जिला कारागार वाराणसी स्थानान्तरित करने की अनुमति प्रदान की गयी, फैक्स के माध्यम से जिला मजिस्ट्रेट, मुजफफरनगर को प्राप्त हुआ। जिला मजिस्ट्रे द्वारा आदेश दिनांक – 26.02.15 को कारागार पर भेजा गया।

7 शासन का आदेश प्राप्त होने पर बन्दी को पूर्ण सुरक्षा व्यवस्था में दिनांक – 26.02.15 को जिला कारागार वाराणसी स्थानान्तरित कर दिया गया।

8 याची सागर मलिक को जिला कारागार वाराणसी सीानान्तरण माननीय न्यायालय मुख्य न्यायिक मजिस्ट्रेट मुजफफरनगर से न्यायिक अनुमति प्राप्त कर व शासनादेश के अनुपालन में किया गया है।

अतः प्रश्नगत याचिका बलहीन है व निरस्त किये जाने योग्य है।

भवदीय
अधीक्षक
जिला कारागार मुजफ्फरनगर''

11. A perusal thereof clearly indicates about the possibility of a gang war in the Jail at Muzaffarnagar. This fact has also been noticed by the Court. It has also been noticed that the petitioner was given an opportunity to file an objection as indicated above. In paragraph No.4 of the instructions, it has been categorically stated that the facility of Video Conferencing has to be made available and, as such, he has been transferred to Varanasi where such facilities are available.

12. What is more revealing is that the State government has issued a Government Order on 26.2.2015 for transferring the petitioner from Muzaffarnagar to Varanasi Jail. To our mind, this power has been exercised in terms of Section 417 (1) of the Criminal Procedure Code, extracted herein below:-

"417. Power to appoint place of imprisonment.--(1) Except when otherwise provided by any law for the time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined."

13. The Uttar Pradesh Jail Manual provides for a complete procedure for lodging of prisoners and their transfer from one prison to another. For this, one has to turn to the Prisoners Act, 1900 and the U.P. Jail Manual.

14. Sri A.K. Sand, learned A.G.A., has provided assistance to the Court by pointing out the Decision Bench in the case of Raghuraj Pratap Singh alias Raja Bhayya and another Vs. State of U.P. and others, Writ Petition No.6719 (M/B) of 2002, decided on 11.12.2002 that took stock of a previous Division Bench judgment in the case of Balram Singh Yadav Vs. State of U.P. and others, 1991 JIC 95, and extensively dealt with the provisions under the Prisons Act and the Prisoners Act read with the provisions of U.P. Jail Manual to point out that

paragraph No.8 of Chapter II of the U.P. Jail Manual lays down the powers indicating lodging of under trials and specially to para 409-A of the said Manual which extends the applicability of all rules in the Jail Manuals to under trial prisoners as in the case of convicts. The Court then went on to discuss paras 137 and 138 of the Jail Manual relating to transfer and held that the power so exercised for transfer from one prison to another is well within the competence of the authorities empowered to do so. The power, therefore, vests with the State Government to transfer and such power appears to have been exercised with the passing of the Government Order dated 26.2.2015.

15. The provision that empowers that courts to issue directions to the officer-in-charge of a prison is Section 267 of the Cr.P.C. under Chapter XXII thereof, but at the same time Section 268 Cr.P.C. again empowers the State Government to refuse removal of a prisoner subject to the conditions enumerated in sub Section (2) thereof. Apart from this, it is the judgment in State of Maharashtra Vs. Saeed Sohail Sheikh (supra) that spells out the necessity of the courts granting permission for such transfer.

16. The petitioner has nowhere challenged the said order dated 26.2.2015 passed by the State Government and as indicated in the instructions received from the State Government. The Court/Magistrate concerned has only granted permission but the place of imprisonment has been fixed by the State Government in exercise of such powers.

17. In the absence of any challenge to the order of the State Government, the only question remains as to whether the permission granted by the Court is justified or not.

18. In our opinion, the Magistrate has only given a permission for transfer to another Jail and the reasons given are the existence of an eminent possibility of a gang war. Apart from this, the petitioner in his objection had only taken a plea that since his uncle and relatives are lodged in the same Jail, he should not be transferred. No other plea has been taken in the said objection. Thus, principles of natural justice have been complied with and the petitioner had filed an objection which has been noticed where after the impugned order has been passed by the learned Magistrate. Merely because the relatives of the petitioner are lodged in the same Jail, the same cannot be a ground to refuse transfer and, therefore, the order of the Magistrate does not suffer from any infirmity or perversity calling for an interference. The said order has now been already executed with the issuance of a Government Order on 26.2.2015 which has not been challenged. In the aforesaid circumstances, when the principles of natural justice have been complied with and sufficient reasons have been indicated in the order permitting transfer, we do not find any good ground to interfere with the same at least at this stage.

19. Now one of the grounds which has been additionally argued before us is about the distance of the transferred prison namely to Varanasi which according to the petitioner will not only cause inconvenience but would also violate his fundamental rights. Having given our anxious consideration the background in which the petitioner has been shifted cannot be ignored. Secondly, the system of Video Conferencing is

already available at Varanasi and, therefore, the question of any long journey being undertaken by the petitioner at this stage affecting his rights does not arise. To the contrary at Muzaffarnagar his rival gang is also lodged in the same Jail which itself is an impending danger. Thirdly, the question of engaging a Counsel of his choice at this stage cannot be an impediment and would not violate any of his fundamental rights inasmuch as the petitioner is not being prohibited from engaging any Counsel of his choice. The transfer to a far off Jail can also be countenanced with the fact that the district of Varanasi itself has a large number of lawyers practising on the criminal side, who can cater to and give proper advice in such a case. After all whenever a litigant enters the portals of a Court, he has to opt and choose a lawyer as it cannot be supposed that all litigants have retainer lawyers from before. The choice of lawyers does not get limited nor does their engagement get prohibited. The petitioner is well within the State of U.P. This argument even otherwise would not be available to the petitioner inasmuch as the learned Counsel have time and again stated that they do not oppose the transfer of the petitioner to any nearby district. Thus, this plea also does not in any way help the petitioner in assailing the impugned order as he would still have to engage a lawyer whenever required.

20. Consequently, the shifting of the petitioner is in his own interest and for the time being does not prejudice his cause occasioning any miscarriage of justice or failure of justice. The order passed by the Magistrate, therefore, has to be upheld.

21. The issue of interference with such orders has also been dealt with by a Division Bench in the case of State of U.P. through Principal Secretary (Prison), U.P., Lucknow Vs. Fast Track Court No.2, Maharajganj, and others, 2008 (63) ACC 317, that has followed the ratio in the case of Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and another, (2005) 3 SCC 284.

22. It goes without saying that if and when any necessity arises or in such circumstances exists that may indicate the re-transfer of the petitioner from one Jail to another, it would be open to the competent authority to exercise such powers in accordance with law which may be necessary on the basis of material on record.

23. In view of the aforesaid reasons and the circumstances of the case, we do not find any fundamental rights of the petitioner being violated so as to cause interference inasmuch as the Court had applied it's mind fairly and objectively and after giving an opportunity to the petitioner. Paragraph No.35 of the judgment in the case of State of Maharashtra and others Vs. Saeed Sohail Sheikh and others (supra) is the ratio of the said judgment and which appears to have been complied with by the Magistrate while passing the order which has now taken the shape of the Government Order dated 26.2.2015 whereupon the petitioner has been transferred to Varanasi.

24. Consequently, there is no merit in the writ petition. The writ petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2015

BEFORE
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No. 10486 of 2015

Amit Kumar Gaur ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri P. N. Dwivedi

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

Cr.P.C. Section 482-Prayer for quashing charge-sheet-offence under Section 419, 420, 467, 468 IPC-based on compromise-neither verified-nor acted upon-even after death of complainant-neither charge can be quashed-nor interference with proceeding required-application rejected.

Held: Para-7
Considering all the facts and circumstances, at this stage it cannot be said that no offence is made out against the applicants. All the submissions made at the bar relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C.

Case Law discussed:
A.I.R. 1960 S.C. 866; 1992 SCC (Cr.) 426; 1992 SCC (Cr.) 192; 2005 SCC (Cr.) 283; (2012) 10 SCC 303; 2004 (57) ALR 290; 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard learned counsel for the applicant and learned AGA for the State.

2. This application under Section 482 Cr.P.C. has been filed for quashing the impugned charge-sheet dated 29.12.2005 as well as entire proceedings of Criminal Case No. 3354 of 2006, State Vs. Rajesh Pandit arising out of Case Crime No. 300 of 2005, under Sections 420, 467, 468, 469, 471 IPC, Police Station-Sadar Bazar, District-Mathura pending in the court of Additional Chief Judicial Magistrate, Court No. 1, Mathura.

3. Learned counsel for the applicant submitted that the applicant is shown only as a marginal witness in the disputed sale deed and he is not a beneficiary of the sale deed. Moreover, the first informant namely Leela Bihari Das (now deceased) had filed an affidavit before the Chief Judicial Magistrate, Mathura in the same case crime number to the effect that being misguided by his neighbours, he had lodged the aforesaid F.I.R. The accused persons had never cheated him and had not committed any forgery. The parties have entered into a compromise and the informant does not want to proceed in the present criminal case any further.

4. On the aforesaid grounds learned counsel has made submission to quash the charge-sheet in the aforesaid case crime number.

5. Learned AGA has raised a preliminary objection that the charge-sheet was filed in the year 2005 on which the cognizance was taken in the year 2006. After expiry of such a long period the applicant has come before this Court for quashing of the charge-sheet that too on the basis of an affidavit of a person (first informant) who is dead and there is no one to inform the court about the actual position.

6. Learned A.G.A. has further contended that as all the offences in which the applicant is charge-sheeted are not compoundable so the charge-sheet

cannot be quashed on the ground that the parties have settled their dispute in terms of the compromise. Moreover as the compromise (Annexure No. 6) has not been been duly proved by the parties in the court hence it is just like a waste paper and no reliance can be placed upon it.

7. Considering all the facts and circumstances, at this stage it cannot be said that no offence is made out against the applicants. All the submissions made at the bar relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283. Although criminal proceedings may be quashed under inherent jurisdiction if the parties have compromised even in the non-compoundable cases as per the law laid down by the Apex Court in Gian Singh Vs. State of Punjab (2012) 10 SCC 303, and also in Narinder Singh and others Vs. State of Punjab Criminal Appeal No. 686 of 2014 decided on 27th March 2014, in which Honble Supreme Court has quashed the criminal proceedings involving section 307 of IPC. However, in the present case, as the complainant has died and the compromise deed filed by the applicant as Annexure No. 6 does not reflect that it has ever been duly verified and accepted by the court concerned, no reliance can be placed on it for quashing of the charge-sheet.

8. Hence, the prayer for quashing the entire proceeding as well as charge sheet submitted in the aforesaid case is refused.

9. However, it is directed that in case the applicant appears and surrenders before the court below within 30 days from today and applies for bail, his prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290 as well as judgement passed by Hon'ble Apex Court reported in 2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.

10. It is made clear that the applicant will not be granted any further time by this Court for surrendering before the Court below as directed above.

11With the aforesaid directions, this application is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2015

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE AMAR SINGH CHAUHAN, J.

C.M.W.P. No. 14897 of 2015

Ruchi Kashyap ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mahipal Singh

Counsel for the Respondents:
C.S.C., Sri M.C. Chaturvedi, Sri S.C. Dwivedi

Constitution of India. Art.-21-petitioner seeking protection from her father on

apprehension of life danger-petitioner being major working in private MNC-competent to take decision-petitioner not disclosed her living place-missing FIR already lodge-no interference required-petitioner to appear before concern police station-who may take appropriate steps-if violence allegation-found recourse of law under Domestic Violence Act 2005-petition disposed of.

Held: Para-9

From the assertions made in the writ petition, we are of the opinion that it is not a case of threat perception of her life which warrants a security cover to be provided to her. Article 21 of the Constitution should not be invoked in this cavalier fashion. It is sacrosanct provision, which should be invoked with full responsibility. From the assertions made in the writ petition, it is clear that a case of a domestic violence, if any could be made out. In such a situation, the petitioner could approach the appropriate forum under the Protection Of Women From Domestic Violence Act, 2005. The writ forum is not the appropriate forum for such purpose.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. We have heard Sri Mahipal Singh, the learned counsel for the petitioner, the learned Standing Counsel for the State and Sri M.C.Chaturvedi, the learned counsel for the respondent no.4.

2. In this petition, the petitioner has dragged her father, respondent no.4 to this Court with the prayer that she should be given protection by the State against her father as she feels threatened that her life would be in danger by the action of her father. The allegation, in short is, that the petitioner has become major, has a pan card and is working in a private firm and that her father is forcing her to get married to a stranger against her wishes. In this regard, the petitioner's father is threatening her and sometimes beats her up. The petitioner contends that in this regard, she moved an application before the Senior Superintendent of Police (hereinafter referred to as the SSP), Meerut on 13.03.2015 bringing all these facts to his knowledge and, on her application, the SSP directed the Station House Officer (hereinafter referred to as the SHO), Brahampuri to conduct an enquiry and ensure that no untoward incident happens. The petitioner contends that without making due enquiry, the SHO lodged a missing report on 14.03.2015 at the instance of her father presumably in retaliation to her application. This necessitated the petitioner to rush to this Court in filing this writ petition.

3. By our order dated 23.03.2015, we had directed the SSP to file a counter affidavit indicating as to why a missing report was lodged when the petitioner was present before him on 13.03.2015. The counter affidavit filed by the SSP indicates that the petitioner had approached her on 13.03.2015 and on her application, had directed the SHO to investigate and ensure that no untoward incident takes place. The counter affidavit further reveals that on the father's application, a missing report was lodged on 14.03.2015. Unfortunately, the counter affidavit does not reveal as to what investigation was done on the petitioner's application. It is apparently clear that the SHO did not make the relevant and desired investigation on the petitioner's application, but proceeded on the father's application. This is some what strange and undesirable. The police is required to take an independent and impartial stand.

4. Be that as it may. The present situation is, that the petitioner is present in person before this Court. Respondent no.4, namely, the father is also present. Before lunch we had directed the learned counsel for both the parties to give an opportunity to the parties to speak to each other since the petitioner is the daughter of respondent no.4. During lunch recess, the parties met and it transpires that the petitioner is adamant in living alone and does not want to reside with her father though she has indicated that her father could visit her whenever he desires.

5. Respondent no.4, being the father, is anxious for the welfare and safety of her daughter and, in that scenario, if he has used harsh words or if he has given a threat in some manner, it was only for the protection of her welfare and it does not mean that there was a perceptible threat on the life of the petitioner. Nothing has come forward before this Court to indicate that a real threat perception exists. In fact, the prayer made by the petitioner before this Court is, that she should not be harassed in any manner and that the respondents should be restrained from interfering in her life. Prayer no.3 is with regard to providing security by the State machinery on the apprehension of threat to her life from her father and her relatives.

6. The law is very clear. Article 21 of the Constitution of India provides that every citizen has a right to live with dignity and with respect. If a real threat perception exists, the Court will definitely interfere in the matter and provide a security cover. But merely, on an apprehension, a security cover cannot be provided.

7. In the facts and circumstances, which has been depicted in the writ petition and what we have stated aforesaid, we are of the opinion that on such bald assertion and on mere allegation of apprehension about her life, no security can be provided to the petitioner by the State.

8. The learned counsel for the respondent no.4, i.e., the father has made a statement that if petitioner desires to live independently she could do so without any fear from him and that he will not come in the way of her living a peaceful life. The learned counsel for respondent no.4 submitted that the father is only apprehensive about her welfare and if the petitioner chooses to live her life in her own fashion, she could do so without any interference.

9. From the assertions made in the writ petition, we are of the opinion that it is not a case of threat perception of her life which warrants a security cover to be provided to her. Article 21 of the Constitution should not be invoked in this cavalier fashion. It is sacrosanct provision, which should be invoked with full responsibility. From the assertions made in the writ petition, it is clear that a case of a domestic violence, if any could be made out. In such a situation, the petitioner could approach the appropriate forum under the Protection Of Women From Domestic Violence Act, 2005. The writ forum is not the appropriate forum for such purpose.

10. From the counter affidavit of the SSP it is clear that the petitioner is major and is working in a private firm. She has the freedom and liberty to live her life according to her own choice and will. No one can come in her way, not even her father, respondent no.4. We, however,

find that the father has lodged a missing report, which is being investigated by the police. The petitioner has categorically stated that she is living somewhere but has not disclosed her residential address.

11. We, accordingly, dispose of the writ petition directing the petitioner to appear before the SHO, Brahampuri, District Meerut within ten days from today and disclose her residential address. Upon such information being provided to the police, the SHO will consign the missing report to the records. In the event, the petitioner feels that her father or any of her relatives is subjecting her to any act from which she feels threatened, it would be open to the petitioner to move an application before the appropriate forum for redressal of her grievance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2015

BEFORE
THE HON'BLE YASHWANT VARMA, J.

C.M.W.P. No. 15797 of 2015

Ram Pyare Pal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri B.K. Mishra, Sri H.N. Singh

Counsel for the Respondents:
C.S.C., Sri Shyam Kumar Gupta, Sri Sunil Kumar Singh, Sri N.L. Pandey

(A) Constitution of India, Art.-226-Writ petition maintainability-petitioner being member of general body-challenging election process of management-on ground of not inclusion of name of 54 members-materially effect the result-admittedly the petitioner already on role of election-no individual rights of petitioner-going to affected-not within aggrieved person-petition on behalf of petitioner-not maintainable.

Held: Para-9
In the judgments referred to above this Court has taken the consistent view that an individual member does not have a right to assail the decision or action taken in respect of a society or association of which he was a member unless his rights personally get effected by the impugned action.

(B)Constitution of India, Art.-226-Writ jurisdiction-scope of interference with process of election-discussed-in view of Apex Court decision-when election process started-either Civil Court or High Court no jurisdiction to interfere.

Held: Para-14
This Court is of the clear opinion that any interference in the matter at this stage would clearly stall and affect the process of elections which has already been set in motion. This Court must necessarily bear in mind the fact that the finalization of a list by the Assistant Registrar by virtue of exercise of powers under the Act, 1860 is based upon a prima facie view taken by him.

Case Law discussed:
2010 (1) ADJ 262; 2013 (10) ADJ 532; 2006 (6) AWC 6354; AIR 1980 SC 1612; 2000 (8) SCC 216; 1997 (1) UPLBEC 415; 1997 (3) ESC 1807; 2010 (1) ADJ 262; 2004 (11) SCC 247; 2014 (5) ADJ 263.

(Delivered by Hon'ble Yashwant Varma, J.)

1. The challenge in the present petition is to an order dated 4th March, 2015 in terms of which the electoral college of the Society Sri Tilak Kisan Laghu Madhyamik Vidyalaya, Kamhariya, Post Padari Bazar, Tehsil Salempur, District Deoria has come to be finalized and an election schedule

announced by the District Basic Education Officer, Deoria. As was noticed by this Court in its order dated 26th March, 2015, the learned counsel for the respondent No. 3 had raised a preliminary objection with regard to the maintainability of the writ petition and it was on the said objection alone that the learned counsel for parties were heard and orders reserved.

2. The basic grievance of the petitioner, who is a member of the General Body of the Society, is the non-inclusion of the names of 54 members in the list finalized by the respondent No. 5. Sri H.N. Singh, learned Senior Counsel appearing in support of the writ petition has submitted that the said respondent is patently illegal for that the non-inclusion of the 54 members will materially affect the results of the election. He has further submitted that insofar as the State of U.P. is concerned, the legislature by enacting U.P. Act No. 23 of 2013, has consciously added Section 4B to the Societies Registration Act, 1860 (hereinafter referred to as the "Act, 1860") as a consequence of which, it was incumbent upon the respondent to undertake an inquiry into the membership of the General Body.

3. However, firstly this Court necessarily needs to consider the preliminary objection raised by Sri Pandey. Sri Pandey, learned counsel appearing for the contesting respondents has submitted that the petitioner is a member of the General Body of the Society whose name stands included in the list finalized by the Assistant Registrar. He submits that the petitioner would have no locus standi to challenge or assail the non-inclusion of 54 members. He submits that if there be any cause which may exist against the impugned order, the same would inhere only in those 54 members and not in the petitioner.

4. Learned counsel has further submitted that this Court has on more than one occasion held that the finalization of an electoral college and a challenge thereto, should not be entertained by this Court inasmuch as it would clearly derail the election process and in any view of the mater it is always open to an aggrieved person to challenge the elections as a whole after completion of the process.

5. In support of his above submission, Sri Pandey has relied upon the following judgments of this Court: (i) Ratan Kumar Solanki Vs. State of U.P. & Others 2010 (1) ADJ 262; (ii) Comm. Of Management Maharana Pratap Vidyalaya Vs. State of U.P. 2013 (10) ADJ 532; (iii) Uttam Nishad Vs. State of U.P. 2006 (6) AWC 6354.

6. Responding to the above submissions, Sri H.N. Singh, learned Senior Counsel has submitted that the petitioner being an active member of the Society was clearly entitled to assail the orders passed by the Assistant Registrar finalizing the Electoral College and the consequential order passed by the District Basic Education Officer announcing the election programme. Placing reliance upon the judgments of the Hon'ble Supreme Court of India in Bar Council of Delhi Vs. Surjeet Singh and others AIR 1980 SC 1612, he submits that an individual member does have a right to challenge an order finalizing a voter list as is sought to be done in the facts of the

present case. Responding to the submission of Sri Pandey that this Court should lay its hands off deciding upon the validity of the orders impugned herein at this stage. Sri Singh, learned Senior Counsel has relied upon the judgment rendered by the Apex Court in Election Commission of India Vs. Ashok Kumar and others 2000 (8) SCC 216. Referring particularly to Para 20 of the report, Sri Singh submits that as was held by the Apex Court, the present challenge was not designed to interfere with the progress of elections but to accelerate the completion of a valid election.

7. Having heard learned counsel for parties, this Court finds that the fact that the name of the petitioner finds mention in the Electoral College finalized by the Assistant Registrar is not disputed. What has constrained the petitioner to approach this Court is the non-inclusion of 54 members in the said list.

8. The issue of the locus of a member of the Association drawing up proceedings of this nature was earlier considered by this Court on various occasions and in fact as early as in 1951 in Indian Sugar Mills Association through its President Shri Hansraj Swaroop Vs. Secretary to Government, Uttar Pradesh Labour Department and others; AIR 1951 All 1. Again this issue cropped up and fell for consideration before a Division Bench of this Court in Dr. P.P. Rastogi Vs. Meerut University 1997 (1) UPLBEC 415 and Vimla Devi Vs. Deputy Director of Education 1997 (3) ESC 1807.

9. In the judgments referred to above this Court has taken the consistent view that an individual member does not have a right to assail the decision or action taken in respect of a society or association of which he was a member unless his rights personally get effected by the impugned action.

10. Noticing the above referred judgments, a Division Bench of this Court in 2010 (1) ADJ 262 summed up the legal position in Paragraph 24 as under:

"24. What is discernible from the above discussion is where the right of an individual is affected or infringed, and, he has no other effective remedy, if such rights of the individual concerned are borne out from the statute or the provision of bye-laws etc. having the flavour of statute, a writ petition at his instance may be maintainable subject to attracting the condition where the Court may decline to interfere namely availability of alternative remedy, delay, laches etc. but where a legal right of an individual is not directly affected, a writ petition expousing the cause of the collective body or other members of the collective body would not be maintainable at the instance of an individual who himself is not directly affected. We may add here that in a given case, if it is found that an election was held by an imposter and he is supported by DIOS or other educational authorities, such an action of DIOS as also the election can be challenged by the individual member since it cannot be said that he is not a person aggrieved but whether a writ petition at his instance would be maintainble or he can challenge the election by filing a civil suit etc., would be a different aspect of the matter and has to be considered in each and every case considering the facts, relevant provision and other relevant aspects of the matter."

11. In light of the above position, this Court finds that in the facts of the present case, the instant writ petition does

not espouse the rights of the petitioner individually. This petition admittedly seeks to espouse and canvass the interest of 54 members whose names have not been included in the Electoral List. The non-inclusion of these 54 members does not directly affect any legal right inhering in the petitioner. The Court must bear in mind the law succinctly summarised in Ratan Kumar Solanki (supra) where this Court held that where a writ petition has been preferred merely for espousing the cause of the collective body or other members of the collective body, by an individual member, the same would not be maintainable.

12. As noticed above, the name of the Petitioner already stands included in the electoral college. He is therefore not directly affected by the order impugned. In the opinion of the Court, therefore, the Petitioner clearly lacks the locus standi to maintain the writ petition.

13. Insofar as the reliance placed by Sri Singh on Bar Council of Delhi (supra) is concerned, suffice it to state that the Apex Court in the facts of the said case found that the electoral list itself was null and void having been prepared on the basis of a proviso to rule 3 (j) which was found to be invalid. The judgment in Election Commission (supra) has no application to the facts of this case inasmuch as this petition is clearly not aimed at accelerating the process of election.

14. Coming then to the second aspect of the matter and that is whether this Court should, in fact, interfere with the order impugned at this stage. This Court is of the clear opinion that any interference in the matter at this stage would clearly stall and affect the process of elections which has already been set in motion. This Court must necessarily bear in mind the fact that the finalization of a list by the Assistant Registrar by virtue of exercise of powers under the Act, 1860 is based upon a prima facie view taken by him. Even if there be competing claims at this stage and the Assistant Registrar proceed to finalise the Electoral College, the authority is not really adjudicating a dispute conclusively. He is at this stage only accepting a list of members which he finds to be prima facie constituting the valid general body. In fact, it would be apposite to notice what the Apex Court held in this regard in A.P. Aboobaker Vs. Distt. Registrar 2004 (11) SCC 247. In para 3 of the report the Apex Court held as under:-

" .....The Division Bench of the High Court was right in taking the view that the list accepted by the District Registrar did not become final; if the appellant was aggrieved, it was open to him to establish his claim in a competent court/forum. To us, it appears even the District Registrar did not adjudicate any dispute as such. It was only a question of accepting, prima facie, the list of members of the governing body. If the appellant's claim was right and justified, merely becauses the District Registrar accepted the list of the governing body of members by E.R. Aboobaker, it did not prevent him from estbalishing his claim in a competent court."

15. Following the above a learned Single Judge of our Court in Gyan Bharti Shiksha Sadan and another Vs. State of Uttar Pradesh 2014 (5) ADJ 263 held as follows in paragraph 34:

" ....Thus the dispute of the office bearers are decided under S. 4 of the Societies Registration Act by the

Registrar on the basis of prima facie satisfaction, as he has to deal with them for performing his administrative functions under the various provisions of the Act as detailed above. The aggrieved parties are left open to adopt the remedies available such as civil suit."

16. It is perhaps in the above backdrop that this Court in Committee of Management, Maharana Pratap Vidyalaya (supra) held as follows:

"9. In order to avoid a large number of writ petitions filed for quashing the orders passed by the educational authorities during the process of elections and in seeking directions to them, we hereby declare that the principles of law laid down by the Supreme Court in N.P. Ponnuswami v. Returning Officer, AIR 1952 SC 64; Harcharan Singh v. Mohinder Singh and others, AIR 1968 SC 1500; Mohinder Singh Gill and another v. The Chief Election Commissioner, AIR 1978 SC 851; Jyoti Basu and others v. Debi Ghosal and others, AIR 1982 sc 983; Harikrishna Lal v. Bau Lal Marandi, (2003) 8 SCC 613 and Shyamdeo Pd. Singh v. Naval Kishore Yadav, (2000) 8 SCC 46, restraining the Courts from interfering in the process of election after the elections are notified is equally applicable to the elections of the office bearers of the committee of management of the societies as well as the Committee of Management to be elected in accordance with the provisions of the scheme of administration of the educational institutions. The principles of law that the Courts should keep their hands off in electoral matters and that all election disputes must be tried by the Election Tribunal, is also incorporated in the Constitution of India under Article 329 (b) for the elections of the Parliament or to the house or either house of the legislature, under Article 243 O for the elections of Panchayats and Article 243 ZG in the matter of elections of the municipalities.

10. There is no reason as to why these time tested and settled principles should not be made applicable to the elections of the office bearers of the societies and for the Committee of Management under the scheme of administration of the educational institutions.

11. We have every reason to believe that in future the Court will refuse to interfere in the process of elections until the elections are concluded and will refuse to entertain election disputes and relegate the parties to approach the Election Tribunals or to file civil suit to challenge the results of the elections."

17. Accordingly and in view of the above, this Court declines to entertain this writ petition and it is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.05.2015

BEFORE
THE HON'BLE MANOJ MISRA, J.

Application U/S 482 No. 19266 of 2014

Saroj Yadav & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri I.N. Yadav, Sri Alok Kumar Yadav

Counsel for the Opp.Parties:
A.G.A., Sri M.C. Yadav, Sri Manoj Yadav

Cr.P.C.-Section 482-Quashing of criminal proceeding-offence under Section 419 and 420 IPC-on ground in absence of

ingredients of cheating-no offence made out-dispute being purely civil nature-no effort made to pay balance amount of sale consideration and get sale deed registered-in absence of particular of date in agreement deed-period would be3 years-mere execution of sale deed in favor of third party-except breach of contract-no offence made out impugned compliant including proceeding-amounts abuse of the process of Court-quashed.

Held: Para-9 & 10

9. It has not been demonstrated either in the complaint or in the counter affidavit that there was some period fixed for performance under the contract and that third party sale took place within that period. Further, there is nothing in the complaint to show that within three years of the agreement for sale or within any stipulated period fixed by the agreement, on any specific date, effort was made to demand specific performance of the agreement by tendering the balance sale consideration to the applicants. The bald allegation that an additional Rs.50,000/- was taken by the accused is also not supported by mention of any date or written receipt. Under the circumstances, mere execution of sale deed in favour of third party after lapse of more than three years from the date of the agreement would not be sufficient to presume that there existed any dishonest intention on the part of the applicants at the time of entering into an agreement.

10. In view of the discussion made above, the complaint does not disclose commission of any offence except a simple breach of contract, which can be resolved in civil proceedings, if otherwise not barred by limitation. Accordingly, the impugned complaint as also the consequential proceeding would amount to abuse of the process of Court and, therefore, to secure the ends of justice the same deserves to be quashed.

Case Law discussed:

(2009) 14 SCC 696; (2003) 3 SCC 11.

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

1. Heard Sri Alok Kumar Yadav for the applicants; the learned AGA for the State; Sri Manik Chandra Yadav for the opposite party no.2 and perused the record.

2. The instant application under Section 482 CrPC has been filed seeking quashing of the proceeding of case no.1376 of 2013 (Uma Shankar Bhattacharya Vs. Dinesh Singh Yadav and others), under Sections 419 and 420 IPC, police station Daraganj, district Allahabad, pending in the Court of Special Chief Judicial Magistrate, Allahabad.

3. Briefly stated the facts giving rise to this application are that the opposite party no.2 filed a complaint against the applicants alleging therein that Saroj Yadav (applicant no.1) had entered into a registered agreement for sale dated 9th March, 2007 with the complainant thereby agreeing to execute sale deed in respect of her share in House no. 82/62, Matiyara Road for which the applicant no.1 took Rs.1 lac by way of earnest money and, thereafter, further sum of Rs.50,000/- was taken by her husband Dinesh Singh Yadav (applicant no.2) and his brother Ravi Karan Yadav (applicant no.3), but despite having taken Rs.1,50,000/- they did not execute sale deed in favour of the complainant and, later, on 7th May, 2011, a sale deed was executed in favour of one Suman Bajpayee for a sum of Rs.6,50,000/-. Similar allegations have been made in the statements recorded under sections 200 and 202 CrPC.

4. The quashing of the complaint and the proceeding in pursuance thereof has been sought on the ground that the

allegations made in the complaint only make out a civil cause of action, inasmuch as, there is nothing in the complaint or in the statement in support thereof to suggest that there had been a dishonest intention on the part of the applicants from the very beginning that is at the time of entering into agreement for sale. It has been submitted that in the agreement for sale, the total consideration for the sale was fixed at Rs.2,50,000/- and as balance payment was not made and more than three years passed from the date of the agreement, sale deed was executed in favour of third party. It has been argued that ordinarily where no date is fixed for execution of sale deed, the limitation for instituting a suit for specific performance on the agreement for sale would be three years from the date of execution of agreement and since, admittedly, no suit was instituted within the period of limitation, the complaint, which has been lodged after six years from the date of the agreement, is nothing but abuse of the process of law. It has also been pleaded that the complainant had failed to arrange for the balance amount therefore he cannot claim now that the applicants have failed to execute the sale deed despite promise. It has been submitted that the complaint has been lodged only after the civil proceeding had become barred by time, which clearly goes to show malicious intention on the part of opposite party no.2 in filing the complaint.

5. Some dispute with regards to the amount advanced to the applicants is also there but that is not relevant for deciding this case.

6. Learned counsel for the opposite party no.2 submitted that since the applicant no.1 had received part of the sale consideration and the applicant no.2 had, subsequently, received further amount of Rs.50,000/- and without returning back the money to the opposite party no.2, they have sold the property to a third party clearly shows that they had been dishonest.

7. Before the court proceeds to assess whether a case has been made out for quashing of the complaint, it would be useful to first discuss the law on the issue as to whether in a case of simple breach of contract an offence of cheating would be made out or not, if so, then under what circumstances. In the case Dalip Kaur v. Jagnar Singh, (2009) 14 SCC 696, the apex court, in paragraph 10 of the report, observed that: "If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code." Likewise in the case of Ajay Mitra v. State of M.P. (2003) 3 SCC 11, a three judges bench of the apex court, after noticing several judgments, held, that in order to constitute an offence of cheating the intention to deceive should be in existence at the time when the inducement was offered. Unless the complaint showed that the accused had dishonest intention at the time complainant parted with the money, it would not amount to an offence of cheating but may amount to a breach of agreement.

8. In view of the law noticed above, in a case of a breach of contract to make out a case for criminal prosecution of a

person who is guilty of such breach for an offence of cheating what is essential to be alleged in the complaint/ statement made in support thereof or the police report, as the case may be, is that there had been a dishonest intention on the part of such person from the very beginning that is since the inception of the agreement. Existence of such dishonest intention can also be inferred from the conduct of the accused narrated in the complaint / statement made in support thereof or the police report, as the case may be.

9. Coming to the facts of the instant case, from a perusal of the complaint and the statement made in support thereof there is nothing to show that any false promise was made by the accused at the time of entering into the agreement so as to deceive or to induce the complainant to part with money for entering into an agreement to purchase the property. There is also nothing in the complaint or the statement made in support thereof to show that the accused had dishonest intention from the very beginning that is since the time of entering into the agreement in question. Mere non performance of an agreement for sale would not amount to commission of an offence of cheating in absence of any allegation that there had been dishonest intention since the very beginning. Such dishonest intention cannot also be inferred from the conduct of the accused inasmuch as they have transferred the property to a third party after three years from the date of the agreement for sale which, ordinarily, is the period of limitation to institute a suit for specific performance, unless there is some other date fixed for its performance. It has not been demonstrated either in the complaint or in the counter affidavit that there was some period fixed for performance under the contract and that third party sale took place within that period. Further, there is nothing in the complaint to show that within three years of the agreement for sale or within any stipulated period fixed by the agreement, on any specific date, effort was made to demand specific performance of the agreement by tendering the balance sale consideration to the applicants. The bald allegation that an additional Rs.50,000/- was taken by the accused is also not supported by mention of any date or written receipt. Under the circumstances, mere execution of sale deed in favour of third party after lapse of more than three years from the date of the agreement would not be sufficient to presume that there existed any dishonest intention on the part of the applicants at the time of entering into an agreement.

10. In view of the discussion made above, the complaint does not disclose commission of any offence except a simple breach of contract, which can be resolved in civil proceedings, if otherwise not barred by limitation. Accordingly, the impugned complaint as also the consequential proceeding would amount to abuse of the process of Court and, therefore, to secure the ends of justice the same deserves to be quashed.

11. The application is allowed. The complaint as well as the proceeding of case no.1376 of 2013 (Uma Shankar Bhattacharya Vs. Dinesh Singh Yadav and others), under Sections 419 and 420 IPC, police station Daraganj, district Allahabad, pending in the Court of Special Chief Judicial Magistrate, Allahabad are hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2015

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE AMAR SINGH CHAUHAN, J.

C.M.W.P. No. 25953 of 2015

Shiv Charan ...Petitioner
Versus
Allahabad Bank AMU Branch, Aligarh & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sudhanshu Pandey

Counsel for the Respondents:
C.S.C., Sri Tarun Verma, Sri J.S. Pandey

Securitisation and Reconstruction of financial Asset and Enforcement of Security Interest Act 2002-Section 14 (I)-words and expressions-word 'shall' used held-mandatory-application without affidavit-can not allowed by District Magistrate-quashed.

Held: Para-10
From the aforesaid decision of the Supreme Court in Standard Chartered Bank (Supra), we are of the opinion that the word 'shall' used in the first proviso to Section 14(1) of the Act is mandatory. It is an essential requirement for the Bank that the application filed under Section 14 must be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor indicating the ingredients contemplated under sub clause (i) to sub clause (ix) to the first proviso. Non filing of the affidavit in our opinion would be fatal.

Case Law discussed:
[2014(6) SCC-1]; [2013(9) SCC 620].

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner is the guarantor and father of respondent nos. 5 and 6 who took a cash credit limit of rupees seventy five lacs in a partnership firm known as S.R. Tractors in 2012 in which they were the partners. The petitioner stood guarantee for the cash credit limit by depositing the title deeds of his residential house no. 5/298A, Lohia Nagar Banna Devi, G.T. Road, Aligarh. It transpires that the accounts of respondent nos. 5 and 6 became NPA on 31.5.2014 pursuant to which a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'Act') dated 2.6.2014 was issued demanding a sum of Rs. 44.92 lacs. Thereafter, symbolic possession under Section 13(4) was also taken on 29.8.2014. It further transpires that the respondent bank filed an application dated 30.10.2014 before the District Magistrate under Section 14 of the Act praying for actual physical delivery of possession. On this application, the Additional District Magistrate (F&R), respondent no. 3 issued an order dated 4.3.2015 for delivery of physical possession pursuant to which the Additional City Magistrate, respondent no. 5 issued an order dated 21.4.2015 fixing 6.5.2015 for taking physical possession. The petitioner being aggrieved by the application of the respondents under Section 14 of the Act filed an application under Section 17 before the Debt Recovery Tribunal. The Tribunal by an order dated 1.5.2015 rejected the stay application relying upon a decision of the Supreme Court in the case of Harshad Govardhan Sondagar Vs. International Reconstruction Company Ltd. and others [2014 (6) SCC-1] on the ground that the order under Section 14 of the Act cannot be challenged on an application under Section 17 of the Act. The petitioner being aggrieved has filed the present writ petition.

2. We have heard Sri Sudhanshu Pandey, learned counsel for the petitioner

and Sri Tarun Verma for the respondent bank.

3. Since there is no factual controversy and only a legal point has to be decided, we are proceeding to dispose of the writ petition at the admission stage itself without calling for a counter affidavit.

4. The contention of the learned counsel for the petitioner is that the District Magistrate alone can decide the application under Section 14 of the Act and that there is no power to delegate it to any subordinate officer. The second ground urged is that the application of the bank under Section 14 of the Act is required to be accompanied by an affidavit which is mandatory and which has not been done in the instant case. It was urged that non filing of the affidavit was fatal to the disposal of the application under Section 14 and such application without being accompanied by an affidavit could not be allowed.

5. Sri Tarun Verma, learned counsel for the bank, on instructions received to him, submitted that the District Magistrate has full authority and power to delegate his power to any subordinate officer under the Act and the mere fact that the application was not accompanied by an affidavit, was not fatal to the disposal of the application since all the ingredients required in the affidavit were present and existing in the application. Learned counsel submitted that non filing of an affidavit at best could be termed as an irregularity curable and which was not fatal to the disposal of the application under Section 14 of the Act.

6. Having heard the learned counsel for the parties, we find that Section 14 (1) gives power to the District Magistrate or to the Chief Metropolitan Magistrate to assist the secured creditor in taking possession of the secured assets. Section 14 (1A) provides that the District Magistrate or the Chief Metropolitan Magistrate may authorize any officer subordinate to him to take possession of such assets and document relating thereto and to forward such assets and documents to secured creditor. This Sub Section (1A) to Section 14 of the Act was inserted by Act No. 1 of 2013. In the light of this provision, it is clear that the District Magistrate could delegate the power to any officer subordinate to him for the purpose of taking possession of such secured assets to the secured creditor. In the light of the aforesaid, the submission of the learned counsel for the petitioner on this issue cannot be accepted.

7. By Act No. 1/2013 a proviso was also added to Section 14(1) which required that where an application is filed by a secured creditor for the purpose of taking possession of a secured asset, the said application shall be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor which would contain nine ingredients. For facility, proviso to Section 14(1) is extracted hereunder:

"Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor, declaring that--

(i)the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii)the borrower has created security interest over various properties and that the Bank or Financial Institution is

holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii)the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv)the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v)Consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non performing asset;

(vi)affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower.

(vii)The objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower'

(viii)the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix)that the provisions of this Act and the rules made thereunder had been complied with:

8. This provision was considered by the Supreme Court in Standard Chartered Bank Vs. V. Noble Kumar and others [2013 (9) SCC 620] whereas the Supreme Court analysed the nine sub clauses of the proviso indicating that the following information must be furnished in the affidavit, namely that there was a loan transaction under which a borrower is liable to repay the loan amount with interest; that there was a security interest created in a secured asset belonging to the borrower; that the borrower committed a default in the repayment; that a notice contemplated under Section 13(2) was in fact issued; that in spite of such a notice, the borrower did not make the repayment; that the objections of the borrower was considered and rejected and the reasons was communicated to the borrower.

9. The Supreme Court held that this insertion was done in order to provide safeguards to the interest of the borrower and that this provision stipulates that a secured creditor who is seeking the intervention of the Magistrate under Section 14 was required to file an affidavit furnishing the information contemplated under various sub-clauses (i) to (ix) of the proviso. The Supreme Court further held that the affidavit containing the aforesaid information was necessary as it would obligate the Magistrate to pass suitable orders regarding taking and delivery of possession of the secured asset only after being satisfied with the contents of the affidavits. The Supreme Court further held that the satisfaction of the Magistrate under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit and only after recording the satisfaction that the Magistrate could pass appropriate orders regarding taking of possession of the secured assets.

10. From the aforesaid decision of the Supreme Court in Standard Chartered Bank (Supra), we are of the opinion that the word 'shall' used in the first proviso to

Section 14(1) of the Act is mandatory. It is an essential requirement for the Bank that the application filed under Section 14 must be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor indicating the ingredients contemplated under sub clause (i) to sub clause (ix) to the first proviso. Non filing of the affidavit in our opinion would be fatal.

11. Sri Tarun Verma, learned counsel for the bank has conceded that in the instant case no affidavit was filed. Consequently, the application could not have been allowed by the District Magistrate.

12. Consequently, for the reasons stated aforesaid, the impugned order of the Additional District Magistrate dated 4.3.2015 and the consequential order dated 21.4.2015 passed by the Additional City Magistrate being illegal, cannot be sustained and are hereby quashed. The writ petition is allowed.

13. It would be open to the respondent bank to proceed afresh by filing a fresh application under Section 14 in accordance with the provisions of the Act.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

C.M.W.P. No. 33208 of 1990

Love Prasad Dwivedi & Ors. ..Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajiv Sharma, Sri Amit Saxena, Sri J.L. Yadav

Counsel for the Respondents:
S.C., J.P.Nigam

Uttar Pradesh Retirement Benefits Rule 1961-Rule 3(8)-qualifying period of pension-petitioner promoted on post of ADO on 02.12.88 for 90 days-extended from time to time continued till regularization 01.02.2000-retired between 31.10.2012 to 31.01.2015-regular promotion on 16.11.2012-whether the period of regular promotion on officiating promotion shall be counted for qualifying service-held-from the date of officiating promotion-reasons discussed.

Held: Para-13-14

13. Proviso to Rule 3(8) itself prescribes that continuous temporary service without interruption followed by confirmation shall count as qualifying service. Thus, it is wholly immaterial that the service of the petitioner was regularised on 1.2.2001, as he was continuously working since the date of initial appointment. Though earlier his working was against a temporary establishment, as there was no sanctioned post but after temporary post was sanctioned and later on converted into permanent post, the service so rendered, fully qualifies for being counted for purpose of payment of pension and retiral benefits.

14. For the aforesaid reasons, the Court finds that the petitioners had rendered qualifying pensionary service with effect from the date of his promotion in the year 1988 and which shall be treated as service qualifying for pension.

Case Law discussed:
2012 Law Suit (All) 2208; Spl. Appeal No. 445 of 2011; 2006 (8) ADJ 371, 2011 (4) AWC 3564.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Amit Saxena, learned counsel for the petitioners and Shri Prashant Rai, learned Standing Counsel for the State respondents.

2. By means of present writ petition, the petitioners have prayed for quashing the impugned order dated 25.11.1990 (Annexure No.4 to the writ petition) passed by the respondent no.3. By the amendment application allowed on 29.7.2013, they have further prayed for direction in the nature of mandamus commanding the respondents to promote them on the post of Assistant Development Officer (Co-operative) on regular basis w.e.f. 20.12.2001 and to grant all consequential benefits to them, which will flow from the aforesaid regular promotion.

3. Shri Amit Saxena, learned counsel for the petitioners states that Shri Hariom Srivastava-petitioner no.6 filed an appeal, which was allowed and his services had been regularized. The petitioner no.6 is also receiving the pension and as such, he does not have any grievance. Shri Amit Saxena states that at present, he has instructions only with regard to petitioner nos. 1, 2 and 4. He does not have any instructions with regard to petitioner nos. 3 and 5.

4. Brief facts giving rise to the present case are that the petitioner nos. 1 to 4 were appointed as Cooperative Supervisors on 22.7.1978, 18.7.1978, 3.3.1960 and 3.17.1978 respectively and the petitioner no.5 was appointed as Gram Vikas Adhikari on 29.11.1956. The petitioner nos. 1 to 5 were eventually promoted as Assistant Development Officer (Cooperative) for 90 days vide an order dated 2.12.1988 (Annexure No.1 to the writ petition). Thereafter, they were given extension from time to time and as such the petitioners are working as Assistant Development Officer (Cooperative) since December, 1988.

5. Learned counsel for the petitioners submits that the post of Assistant Development Officer (Cooperative) falls under the State Government and they have been paid salary from the State exchequer. The petitioners are continuously discharging their duties with utmost satisfaction to their superior officers since the year 1988. Finally the petitioner no.1 retired on 31.7.2013; petitioner no.2 retired on 31.1.2015 and petitioner no.4 superannuated on 31.10.2012. By the order dated 16.11.2012 the respondents promoted the petitioner nos. 1 and 2 on regular basis from the date of their taking over charge.

6. Learned counsel for the petitioners that the petitioners were discharging their duties as Assistant Development Officer (Panchayat) since the year 1988, and they have already completed the minimum required period for pension. Under U.P. Regularization of Ad-hoc Promotion (On Post Outside the Purview of Public Service Commission) Rules, 1988, as amended on 20.12.2011, the petitioners became entitled for regular promotion by virtue of the fact that they were fully qualified for promotional post of Assistant Development Officer (Panchayat) and had already completed more than three years of service on the said post, and regular vacancies were in existence. Rule 4 of the Regularization Rules of 1988 provides that such ad-hoc appointees shall be promoted before any regular appointment is made against such vacancy under the Rules and therefore, the petitioners were entitled for regular promotion since 20.12.2001 itself. He further submits that once the petitioners had been promoted on ad-hoc basis and no person had joined on such posts and

the petitioners could not have been reverted back, they became entitled for regular promotion on the basis of Regularization Rules, 1988. The petitioners were promoted on ad-hoc basis and were in fact treated to be regular promotee throughout for the period of 25 years by deducting the GPF and granting them all service benefits including pay scales and increments of regular Assistant Development Officers.

7. Learned counsel for the petitioners has placed his reliance on a Division Bench judgment of this Court in Amrendra Narain Srivastava vs. State of UP and others 2012 LawSuit (All) 2208. The relevant paragraph nos. 6, 7, 10, 11, 12 and 13 are reproduced hereinafter:-

"6. It is submitted by Shri Ashok Khare, that under the Uttar Pradesh Retirement Benefits Rules, 1961, the qualifying service, defined in Rule 3 (8), means service, which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations. Rule 3 (8) is quoted as below:-

"Rule 3 (8)- "Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment.

(ii) periods of service in a work-charged establishment, and

(iii) periods of service in a post, paid from contingencies, shall also count as qualifying service.

Note- If service rendered in a non-pensionable establishment, work-charged establishment or in a post paid form contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionble establishment, it will not constitute an interruption of service."

7. Regulation 368 of the Civil Services Regulations, provides that service does not qualify, unless the officer holds a substantive office in a permanent establishment. Regulations 368 and 369 provides as follows:-

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

369. An establishment, the duties of which are not continuous but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed qualifies but the concession of counting as service the period during while the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was again re-employed."

10. The petitioner was appointed in temporary capacity in Zila Parishad on 21.3.1983. The non-government medical hospitals of Zila Parishad were provincialised on 8.11.1990. The petitioner's option for absorption in the State Ayurvedic and Unani Medical Services was accepted, and that he was taken as a Medical Officer, Ayurvedic

and Unani on adhoc basis. There is no denial, that he held a substantive office in a permanent establishment. His services ultimately came to be regularized on 16.3.2005 without any break. At no point of time the petitioner, after his absorption, was not in substantive office, which was not in permanent establishment. His services, therefore, have to be counted with effect from the date of his absorption and the joining in the State Government.

11. The qualifying service, as defined in sub-rule (8) of Rule 3, includes the service, which qualifies for pension in accordance with the provisions of Section 368 of Civil Services Regulation. The petitioner does not fall in any of the exceptions inasmuch as the period of his temporary service was not in a non-pensionable establishment after he was regularized in the State Government.

12. For the aforesaid reasons, we find that the petitioner has rendered qualifying pensionary service with effect from the date of his joining in the State Government on his option, and which shall be treated as service qualifying for pension and for which under the Government Orders, by which the hospitals were provincialised, the contribution of his pension has been deposited by the Zila Parishad.

13. The objection, that the contribution of pension, has not been deposited in the relevant account head, is too technical to be accepted. The amount has been credited to the account of the State Government in the Treasury. It is for the Treasury Officer to appropriate the amount in the correct account head. An error in depositing the amount in the wrong account head cannot be treated to have taken away the right of petitioner to pension based upon his continuance in the State Government beginning from 1991.

14. The writ petition is allowed. The impugned order dated 20.9.2011 is quashed. The petitioner shall be entitled to pension with effect from 01.2.1991, the date on which he joined in the State Government. The State Government will calculate his pension and issue the pension payment order within two months. The entire arrears of pension shall be paid over to him within a period of three months."

8. Learned counsel for the petitioner has also relied upon the judgment in Special Appeal No.445 of 2011 (Bhuneshwar Rai vs. State of UP & ors) decided on 18.9.2014. Paragraph-5 of the judgment is reproduced herein below:-

"5. In support of his aforesaid contention, learned counsel for the appellant has relied upon the judgment rendered by the Apex Court in the case of Punjab State Electricity Board and another versus Narata Singh, 2010-Laws (SC)-2-40, which has been relied upon by the learned Single Judge of this Court in the case of Mohd. Mustafa versus State of U.P., (2010 (1) ADJ-329 (All)(LB). holding that where the petitioner has put in 23 years of service including 113 months and 11 days i.e. 9 years 5 months & 11 days of regular service then denial of pension for not having completed 10 years of regular service, was not proper. In that case, the Court directed the respondents to grant pensionary benefit to the petitioner considering him to have completed 10 years of regular service and pay him regularly every month from the date of retirement. The State of U.P. preferred an appeal against the aforesaid judgment in re: Mohd. Mustafa versus State of U.P.(Special Appeal Defective No. 254 of 2013), State of U.P. and others

versus Prem Chandra and others wherein the Court relying upon the judgment of the Apex Court in Punjab Electricity Board (supra) vide its judgment dated 13.5.2013 held that the provisions of regulation 370 of the U.P. Civil Service Regulation have to be read down in line with the judgment of the Apex Court. Aggrieved , the State of U.P. preferred SLP (Civil) No. CC 22271 of 2013, State of U.P. and others versus Prem Chandra and others before the Apex Court, which was dismissed vide judgment and order dated 7.1.2014."

9. Learned counsel for the petitioners submits that as per Rule 3(8) of the Uttar Pradesh Retirement Benefit Rules, 1961, the petitioners had completed 10 years of qualifying service and are, thus, entitled to pensionary benefits. He has placed reliance on the judgment of this Court reported in 2006 (8)ADJ 371, 2011 (4) AWC 3564.

10. On the other hand, learned Standing Counsel does not dispute the legal position. He submits that since the petitioners had not completed 10 years of service from the date of regularisation, and therefore, they were rightly not paid pension and other retiral benefits.

11. Rule 3(8) of the Rules, defines "qualifying service" as under:-

"Rule 3 (8)- "Qualifying service" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Services Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non- pensionable establishment.

(ii) periods of service in a work-charged establishment, and

(iii) periods of service in a post, paid from contingencies, shall also count as qualifying service.

Note- If service rendered in a non-pensionable establishment, work-charged establishment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionble establishment, it will not constitute an interruption of service."

12. Regulation 368 and 369 of the Civil Services Regulations reads as under :-

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

369. An establishment, the duties of which are not continuous but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed qualifies but the concession of counting as service the period during while the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was again re-employed."

13. Proviso to Rule 3(8) itself prescribes that continuous temporary

service without interruption followed by confirmation shall count as qualifying service. Thus, it is wholly immaterial that the service of the petitioner was regularised on 1.2.2001, as he was continuously working since the date of initial appointment. Though earlier his working was against a temporary establishment, as there was no sanctioned post but after temporary post was sanctioned and later on converted into permanent post, the service so rendered, fully qualifies for being counted for purpose of payment of pension and retiral benefits.

14. For the aforesaid reasons, the Court finds that the petitioners had rendered qualifying pensionary service with effect from the date of his promotion in the year 1988 and which shall be treated as service qualifying for pension.

15. In the aforesaid facts and circumstances the impugned order dated 25.11.1990 (Annexure No.4 to the writ petition) and the order dated 16.11.2012 (Anneuxre RA No.2 to the rejoinder affidavit), cannot be sustained to the effect that the petitioners are not eligible for pensionary benefits as they do not have qualifying service of ten years and are quashed.

16. The writ petition is allowed. The respondents are directed to finalise the petitioners' pension treating them to be promoted on the post of Assistant Development Officer (Co-operative) on regular basis w.e.f. 20.12.2001 under the Regularization Rules of 1988 and quantify the retiral benefits payable to them and to pay the same to them within three months from the date of production of certified copy of this order before the respondents.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

C.M.W.P. No. 34386 of 2011

Dr. Gorakhnath ...Petitioner
Versus
Judge, Small Causes Court, Gorakhpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.M. Misra, Sri H.R. Mishra, Sri Kamlesh Kumar Mishra, Sri Narayan Das

Counsel for the Respondents:
Sri A.K. Pandey, Sri Ashutosh Kumar

Small Causes Court Act 1887-Section 17- whether provisions of Section 17 requiring the tenant to deposit entire decreetal amounts mandatory or directory ?-held-mandatory-no court can ignore the said requirement.

Held: Para-12
The Division Bench considered the judgment rendered in Kedarnath (supra) and held that the provisions of Section 17 of the Act is mandatory and non compliance thereof would entail dismissal of the application, non-compliance cannot be condoned or overlooked by the Court. There is no provision in the statute that would provide either for extension of time or to condone the default in depositing the rent within the stipulated period, the Court does not have the power to do so.

Case Law discussed:
AIR 2002 SC 5825:2002 (1) ARC 186; 2005 (1) ARC 253; 2002 (1) ARC 440; 2006(4) Supp. ARC 571; 2010 (1) ARC 432; 2012 ACJ 1738

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

1. Supplementary affidavit filed today on behalf of the petitioner, is taken

on record. Learned counsel appearing for the respondents states that reply to the said affidavit is not required.

2. Heard Sri H.R. Mishra, Senior Advocate assisted by Sri Kamlesh Kumar Mishra, learned counsel appearing for the petitioner and Sri A.K. Pandey, learned counsel for the respondents.

3. The respondent/landlord IInd set filed a suit for eviction and arrears of rent before Small Cause Court at Gorakhpur being Suit No. 106 of 1993. The suit was decreed against the petitioner/tenant on 23 December 1998. The petitioner filed a restoration application under Order 9 Rule 13 of the Code of Civil Procedure on 23 November 2002 for setting aside the ex parte judgment and order. The petitioner admittedly did not deposit the entire decretal amount as required in terms of the proviso to Section 17 of the Small Causes Court Act, 18871. On 8 September 2006, the restoration application was rejected by the Court on the ground that mandatory provision of proviso to Section 17 of the Act 1887 was not complied. On 4 January 2011, the petitioner moved another application (27-Ga) before the Small Causes Court, for recalling the earlier order dated 8 September 2006 and praying that the application under Order 9 Rule 13 of the C.P.C. be decided by permitting the petitioner to deposit the decretal amount. The Court vide order dated 16 April 2011 rejected the application being barred by res judicata.

4. The petitioner is assailing the order dated 16 April 2011 passed by the Small Causes Court, Gorakhpur rejecting the application (27-Ga) of the petitioner, and a direction has been sought that the restoration application (4-Ga) dated 23 November 2002 be decided on merit.

5. It is made clear that the order dated 8 September 2006 rejecting the restoration application is not being assailed.

6. It is not disputed by learned counsel for the petitioner that the provisions contained in proviso to Section 17 of the Act 1887 was not complied with. The learned counsel would submit that the language of the proviso is directory in nature and not mandatory, therefore, in the interest of justice, the judgment and decree should be recalled and the suit be heard on merits.

7. In rebuttal, Sri A.K. Pandey, learned counsel appearing for the respondents IInd set would submit that proviso to Section 17 of the Act, 1887 is a mandatory provision and not directory, it is not in dispute that the petitioner had not deposited the entire decretal amount, there is no illegality or infirmity in the impugned order.

8. The court below vide order dated 8 September 2006 noted that the judgment and decree was passed on 23 December 1998 whereas the application under Order 9 Rule 13 of the C.P.C. was filed supported by an affidavit dated 23 November 2002. It was admitted by the petitioner in the application that due to wrong legal advise, mandatory provisions of Section 17 of the Act 1887 was not complied with, accordingly, the application was rejected. The petitioner on 4 January 2011 moved another application to recall the above mentioned order stating that due to inadequate legal advice, he was not aware of the provisions contained in Section 17 of the Act, 1887.

It was further stated that the petitioner realised the mistake, consequently, filed an application to recall the order dated 8 September 2006 which has been rejected by the impugned order being an application for the same cause of action. The record would, thus, reflect that the requirement of depositing the decretal amount in terms of Section 17 of the Act 1887 was not complied by the petitioner.

9. The Apex Court in Kedarnath vs. Mohan Lal Kesarwari and others2, held as follows:

"A bare reading of Section 17(1) Proviso shows that the legislature have chosen to couch the language of the proviso in a mandatory form and there is no reason to interpret, construe and hold the nature of the proviso as directory. An application seeking to set aside an ex-parte decree passed by a Court of Small Causes or for a review of its judgment was to be accompanied by a deposit in the court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the Court in its discretion subject to a previous application by the applicant seeking direction of the Court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application dispensation may be filed. It may be filed at any time up to the time of presentation of application for setting aside ex-parte decree or for review and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the Court to make a prompt order. The delay on the part of the court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the court."

10. This Court in the case of Khilla Devi @ Manju Singh v. Vishwa Mohini3, Jai Prakash v. Gulab Singh Rathor4, Dinesh Kumar Dubey v. Ganga Shankar Tiwari5 and in Raj Kumar and another vs. Neeraj Kumar Singhal,6 held that the compliance of Section 17 of the Act is mandatory for the maintainability of an application under Order IX, Rule 13 C.P.C.

11. A Division Bench in Raj Kumar Makhija and others vs. M/s S.K.S. And Company and others7, on a reference made regarding the scope of Section 17 of the Act held that a bonafide mistake on the part of the applicant in not depositing the entire decretal amount cannot be condoned under Section 17 of the Act, the application would be liable to be rejected. The reference before the Court was as follows:

"Whether the proviso to Section 17 of the Provincial Small Causes Courts Act completely bars any rectification or removal of a bona fide error after the expiry of the period of limitation when substantial compliance by way of deposit of the decretal amount and furnishing security has been made within the period of limitation particularly when Section 5 of the Limitation Act, 1963 has been made applicable to Order IX Rule 13 of the Code of Civil Procedure?"

12. The Division Bench considered the judgment rendered in Kedarnath (supra) and held that the provisions of Section 17 of the Act is mandatory and non compliance thereof would entail dismissal of the application, non-

compliance cannot be condoned or overlooked by the Court. There is no provision in the statute that would provide either for extension of time or to condone the default in depositing the rent within the stipulated period, the Court does not have the power to do so.

13. The Constitution Bench of the Supreme Court in Radhey Shyam and another vs. Chhabi Nath and others,8 held that writ petition under Article 226 of the Constitution is not maintainable against a judicial order of a court .The Court approved the ratio laid down in Shalini Shetty and another vs. Rajendra Shankar Patil9, that no petition can be entertained in writ jurisdiction being a dispute between landlord and tenant i.e. amongst private parties.

14. For the reasons and law stated herein above, I do not find any illegality or irregularity in the impugned order dated 16 April 2011 passed by first respondent, Judge Small Causes Court, Gorakhpur.

15. The writ petition is dismissed, both on merit and maintainability.

16. Interim order, if any, stands vacated.

17. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

C.M.W.P. No. 36019 of 2008

Madhusudan Agarwal ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Bajpai

Counsel for the Respondents:
C.S.C.

Payment of Gratuity Act 1972-Section 4(6)-deductions from gratuity-without full fledged disciplinary enquiry-merely on basis of show cause notice-held none of contingencies of Section 4(6) of Act-fulfilled-principle of Natural Justice-violated-deduction order quashed-with direction to refund all recovered amount with 9% interest.

Held: Para-14
It is admitted case that in the present matter no departmental enquiry has taken place. Only on the basis of show cause the department had proceeded into the matter and took final decision and held that the petitioner was liable to pay Rs.5,86,562/-, which is against the principle of natural justice. While in service neither preliminary nor full fledged departmental enquiry has been made in the matter. No adverse material has been brought on record against the petitioner in his career.

Case Law discussed:
{2015 (2) ADJ 673 (DB)(LB)}; 2015 (3) ADJ 305 (DB); 2009 (2) SLJ 105; (2007) (2) BLJR 2847); Letters Patent Appeal No. 113 of 2012.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Anil Kumar Bajpay, learned counsel for the petitioner and Shri Pankaj Rai, learned Addl. Chief Standing Counsel for the respondents.

2. By means of the present writ petition, the petitioner has prayed for following reliefs:-

"(i) to issue a writ, order or direction, in the nature of certiorari, quashing the impugned order dated 25.7.2007 passed by the Superintending Engineer, Bulandshahr Circle, Public Works Department, Bulandshahr (Annexure-I to the writ petition).

(ii)to issue a writ, order or direction, in the nature of certiorari, quashing the information letter dated 20.03.2008 by which Rs.5,86,562/- has been deducted from the gratuity and encashment i.e. Rs.3,02,000/- from gratuity and Rs.2,36,562/- from encashment and has been paid vide Cheque No.510698 by the Executive Engineer, Provincial Division, Public Works Department, Bulandshahr (Annexure-IA to the writ petition).

(iii)to issue a writ, order or direction, in the nature of mandamus, directing the respondents to release the amount to the tune of Rs.5,86,562/- which was deducted from the gratuity and encashment as intimated to the petitioner vide letter dated 20.03.2008 along with interest @ 12%.

(iv)to issue a writ, order or direction, in the nature of mandamus, directing the respondents to also pay temporary imprest fro a sum of Rs.51,000/- and Rs.12,621/-.

(v) to award the cost of the petitioner to the petitioner."

3. Brief facts giving rise to the present writ petition are that the petitioner was initially appointed as Overseer in the year 1970. Later on the said designation was changed to Junior Engineer. The career of the petitioner was always unblemished and nothing adverse except the present incidence had been brought on record by the respondents. The petitioner has attained the age of superannuation on 31.7.2007. Shri Rajendra Prasad Sharma, who was then posted as Executive Engineer, Provincial Division, Public Works Department, Bulandshahar had issued an order on 2.12.2006 asking the petitioner to hand over the charge of store to Shri V.P. Singh-II, Junior Engineer with immediate effect.

4. Serious allegations have been levelled by the petitioner against Shri Rajendra Prasad Sharma, the details of which have been averred in para 6 of the writ petition. But at the time of argument the counsel for the petitioner has not pressed the relief against the Executive Engineer.

5. It has also been averred in the writ petition that Shri Rajendra Prasad Sharma was transferred on 19.12.2006 and at his place Shri S.R. Verma was posted as Executive Engineer since 19.12.2006 to 30.12.2006. Thereafter, in a very short span many Executive Engineers came on the said post, the details of which have been given in para 8 of the writ petition. Shri Rajendra Prasad Sharma had again taken over as Executive Engineer at Bulandshahar and passed a detailed order on 17.2.2007 appointing two Asstt. Engineers to assume the charge and by the same order authorisation of the petitioner to receive maxphalt (bitumen) from the Indian Oil Corporation, Mathura was cancelled on the ground that 2 and ½ months had elapsed and he failed to hand over the charge and, therefore, why not the disciplinary proceedings may be initiated against the petitioner. It has been contended that the petitioner on 20.2.2007 had handed over the charge to Shri V.P. Singh in pursuance to order dated 2.12.2006 along with all details of the store, but the reason best known to Shri V.P. Singh, he had not made any

endorsement on the charge, the details of which have been averred in Annexure 4 to the writ petition.

6. For measurement of the stock position the Committee was constituted and as on 23.2.2007 the total stock of 291.883 metric tones were shown in the measurement book. The Chief Engineer, Public Works Department vide Office Memo dated 7th January, 1984 had issued circular by which it had been indicated that in case person has been transferred and is not handing over charge within the appointed day, then after expiry of three days the Executive Engineer shall appoint a committee of two Asstt. Engineers, who shall be of the same division but shall not be the Asstt. Engineer, who is holding the charge of such Junior Engineer. In the instant case the Asstt. Engineer-I was holding the charge of store in which the petitioner along with Shri V.P. Singh were posted.

7. Learned counsel for the petitioner submits that in utter disregard to the said office memo Shri Sharma has manoeuvred the things according to his own in order to get the result as per his own desire and to falsely implicate the petitioner. Learned counsel for the petitioner also submits that in the present matter on 17.3.2007 Shri V.P. Singh-II, Junior Engineer in whose favour assumption of charge was sought to be made had issued bitumen to Shri Anil Kumar twice and continued to release the stock material to the contractors of the department, which was not noticed by the Committee. In pursuance to the letter dated 15.3.2007 the Committee has submitted report on 17.2.2007 by which it had been indicated that 39.64 metric tones bitumen was found short. In this background Shri Sharma had issued a letter to the petitioner on 20th March, 2007 by which it had been indicated that as per the stock register the total bitumen of department's store should have been 331.323 metric tones, whereas after physical verification it was only 291.68 metric tones of bitumen, hence there is a shortfall of 39.64 metric tones and as such the petitioner was called for an explanation. Immediately in response to the said show cause notice the petitioner had responded that he had already given charge on 20.2.2007 along with stock position and as such no shortfall was found at the relevant time. Therefore, he was not liable for this shortfall. In this background on 7.6.2007 the petitioner was served with detailed show cause on the ground that the petitioner had not handed over the charge, therefore, the committee was constituted and after physical verification it was found that the bitumen to the tune of 39.64 metric tones worth Rs.8,49,928/- was found deficient. In has also been stated under the aforesaid facts that as to why suitable proceedings may not be initiated under CCS Rules against the petitioner. A detailed reply had been submitted by the petitioner on 20.6.2007 in which the allegations of malafide have been levelled against the then Executive Engineer and it is categorically stated that he had already handed over the charge on 20.2.2007. A deliberate attempt had been made by Shri Sharma so that at the fag end of his career, his entire service may be ruined and retiral benefits may be forfeited.

8. Learned counsel for the petitioner vehemently submits that the track record of the petitioner was unblemished. All the allegations were malafide against the petitioner and serious allegations were

also levelled against Shri Sharma for illegal demand but the petitioner could not fulfil the same, therefore, he was falsely implicated. He has also submitted that in the present matter no enquiry had been initiated and in the absence of any regular enquiry the liability could not be fasten over the petitioner and as such the amount could not be realised from the gratuity as well as from the retiral benefits. He has also submitted that surprisingly initially the deficiency of 39.62 metric tones of bitumen was alleged but subsequently it had been reduced to 27.343 metric tone worth Rs.5,86,562/-.

9. Learned counsel for the petitioner has also apprised to the Court that on 4.6.2007 the bitumen measuring 39.62 metric tone was handed over to Shri V.P. Singh-II. The same has also been brought on record as Annexure No.17. In this regard the petitioner had also communicated to the Executive Engineer that once Shri V.P. Singh-II had already received the said bitumen on 4.6.2007, therefore, the show cause notice dated 25.7.2007 was liable to be quashed. He submits that the illegal deduction of the amount from the gratuity cannot be sustained. It is well settled law that the amount can only be recovered from the gratuity strictly in accordance with law and as such no procedure has been adopted by the department.

10. In support of his submissions, learned counsel for the petitioner has placed reliance on a judgment of this Court in Ghanshyam Das Varshney v. State of U.P. & Ors. {2015 (2) ADJ 673 (DB) (LB)} in which the Court held that in the matter of allegations of committing certain irregularities proper enquiry should be conducted. Without holding proper enquiry the punishment cannot be awarded to the employee. The petitioner has also placed reliance on a recent judgment of this Court in Bankey Bihari Chauhan v. State of U.P. & Ors. reported in 2015 (3) ADJ 305 (DB) in which a Division Bench of this Court held that adjustment of huge amount from gratuity is not permissible unless the employee is terminated in view of Section 4 (6) of the Payment of Gratuity Act, 1972. The Court has held that recovery from the gratuity can only be made after fulfilling the conditions as contained in Section 4 (6) of the Act. The Court has allowed the appeal and quashed the recovery order from gratuity. The recovered payment was ordered to be paid along with interest as per sub-section (3A) of Section 7 of the Act. The relevant portion of the judgment are quoted as under:-

"Section 4 (6) of the Act provides for the circumstances in which the gratuity of an employee, whose services have been terminated, can be forfeited. Section 4 (6) is in the following terms:

"4. Payment of gratuity. - (1) ... ...

(6) Notwithstanding anything contained in sub-section (1), -

(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited, -

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

In the decision of the Supreme Court in Jaswant Singh Gill Vs Bharat Coking Coal Limited4, it has been held that termination of services for any of the causes enumerated in sub-section (6) of Section 4 of the Act is imperative before the gratuity can be forfeited. The same principle has been followed in a more recent decision of the Supreme Court in State of Jharkhand Vs Jitendra Kumar Srivastava, 2013 (2) ESC 554 (SC).

In the present case, it is not in dispute that the services of the appellant were never terminated. The appellant continued to be in service and retired on attaining the age of superannuation. In the circumstances, the basic pre-condition for the forfeiture of gratuity under Section 4 (6) of the Act was not fulfilled. We may also note that Regulation 63 of the Regulations provides for penalties and clause (4) thereof provides for the recovery from pay or deposit at the credit of an employee of the whole or part of a pecuniary loss caused to the Corporation by negligence or breach of an order. The Regulations must necessarily be harmonized with the provisions of the Act and cannot override the express statutory provision. In any event, it is clear that even Regulation 63 contains no such provision of recovery from gratuity. In these circumstances, we are of the view that the action for recovery from gratuity was contrary to law and in the teeth of the express provision of the Act. The learned Single Judge, with great respect, was not justified in dismissing the petition on the ground that the appellant had not challenged the order of penalty or the appellate order. For the purposes of the present proceedings, it is not necessary for the Court to enquire into the grievance of the appellant that he was not served with the appellate order. Moreover, we may clarify that the learned counsel for the appellant has only confined himself to the payment of gratuity. Even if the order of penalty has attained finality, as is urged on behalf of the employer, any recovery or adjustment of the amount of gratuity has to be made by following the statutory provisions contained in the Act. Since the conditions set out in Section 4 (6) of the Act for forfeiture of the gratuity have not been fulfilled, the action of the employer was ultra vires."

11. Per contra learned Addl. Chief Standing Counsel submitted that the petitioner was incharge of the departmental godown and later on it was found that bitumen measuring 27.34 metric tone was deficient in the record and only after physical verification the loss of Rs.5,86,562/- was recovered from the petitioner. He has also submitted that vide order dated 12.12.2006 there was clear cut direction to the petitioner to hand over the charge to Shri V.P. Singh of the store-godown but the petitioner had not followed the direction issued by the superiors and as such he was responsible for the shortfall of the bitumen. He further submitted that in the present matter on account of this mess a committee of two Assistant Engineers was constituted on 17.2.2007 and in their presence the measurement had been made and as such 291.683 metric tone bitumen were verified in the godown. Even at the time of verification the petitioner was very much present and also made endorsement over the said verification. Therefore, at this belated stage a plea cannot be taken by the petitioner that such verification had not taken place in his presence. Thus, the writ petition is liable to be dismissed on the ground that admittedly the department had sufferred loss,

which was liable to be recovered from the retiral benefits of the petitioner.

12. Heard rival submission and perused the record.

13. In the present matter the detailed show cause was given on 20.3.2007 by which it had been indicated that after verification it had been found that 39.64 metric tone of bitumen was fallen short in the godown. While issuing the impugned show cause notice the Executive Engineer observed that the matter was serious in nature. The petitioner was asked to submit his reply within three days' time otherwise the matter would be referred to the higher authorities for departmental enquiry. In response to the show cause the petitioner had responded immediately with details refuting the allegations and with categorical averment that at the time of handing over the charge there was no shortfall. Even Shri V.P. Singh, who has taken over the charge from the petitioner had also acknowledged the receiving of 39.62 metric tone of bitumen on 4.6.2007, which has also been brought on record as Annexure 17 to the writ petition. But it is surprised to note that merely on the basis of show cause notice and in the absence of any departmental enquiry how the department had reached to the conclusion that it had sufferred financial loss. Even the department had not shown any details regarding any full fledged enquiry in the matter or it had tried to ascertain the correct position from the godown. At one place the loss of 39.62 metric tone bitumen was found, whereas in the same letter the department came to the conclusion that only loss of 27.343 metric tone bitumen was occurred amounting to Rs.5,86,562/-. It is relevant to indicate that while passing the impugned order dated 25.7.2007 the Executive Engineer, Bulandshahar had observed as under:-

"अधिशासी अभियन्ता प्रा0ख0, बुलन्दशहर ने अपने पत्रांक 2406/2ए बजट, दिनांक 24.7.07 द्वारा अधिशासी अभियन्ता, नि0 ख0–2, बुलन्दशहर के उपरोक्त पत्र व अवर अभियन्ता के प्रत्यावेदन को समायोजित करते हुए श्री मधुसूदन अवर अभियन्ता के विरूद्ध 27.343 मै0टन बिटुमिन की कमी, जिसकी लागत रू0 586562.00 आती है, की शासकीय हानि के लिये श्री मधुसूदन अवर अभियन्ता को दोषी ठहराया है। अतः श्री मधुसूदन अवर अभियन्ता, प्रा0ख0, लो0नि0वि, बुलन्दशहर से शासकीय हानि रू0586562.00 मात्र की वसूली किये जाने के आदेश पारित किये जाते हैं। अधिशासी अभियन्ता प्रा0ख0लो0नि0वि0, बुलन्दशहर यह सुनिश्चित हो लें कि प्रत्येक दशा में उक्त धनराशि की वसूली श्री मधुसूदन अवर अभियन्ता के वेतन, ग्रेच्युटी आदि देयों के भुगतान से पूर्व कर लें। यदि अवर अभियन्ता के उक्त देयों से वांछित धनराशि की वसूली पूरी नही होती है तो वांछित धनराशि की वूसली श्री मधुसूदन अवर अभियन्ता की चल–अचल सम्पत्ति से किये जाने हेतु सम्बंधित जिलाधिकारी के माध्यम से कार्यवाही ही जाये।"

14. It is admitted case that in the present matter no departmental enquiry has taken place. Only on the basis of show cause the department had proceeded into the matter and took final decision and held that the petitioner was liable to pay Rs.5,86,562/-, which is against the principle of natural justice. While in service neither preliminary nor full fledged departmental enquiry has been made in the matter. No adverse material has been brought on record against the petitioner in his career.

15. The judgments cited by learned counsel for the petitioner fully support his case. It is not in dispute that services of the petitioner were never terminated. The petitioner continued to be in service and retired on attaining the age of superannuation. In the circumstances, the basic pre-condition for the forfeiture of gratuity under Section 4 (6) of the Gratuity Act, 1972 was also not fulfilled.

16. It has also been held time and again that the retiral benefits like pension,

gratuity or leave encashment are not bounty or grace but are earned by the employee through the years of service of a company. They are an employee's security after retirement.

17. In Dr. Dudh Nath Pandey v. The State of Jharkhand & Ors., 2009 (2) SLJ 105 (Jharkhand), the Division Bench of Jharkhand High Court after scanning various case laws on the subject held that the conditions precedent for imposing penalty of withholding pension is that there should be a finding in departmental enquiry or judicial proceeding that the pensioner committed grave misconduct in the discharge of his duty while in office. The Court held that leave encashment also cannot be withheld since that is paid in lieu of unutilized leave as it partakes the character of salary.

18. In Dr. Dudh Nath Pandey v. The State of Jharkhand (2007 (2) BLJR 2847), the Full Bench of Jharkhand High Court has held that there is no power for the Government to withhold Gratuity and Pension during the pendency of the departmental proceeding or criminal proceeding. There is no power with the government to withhold Leave Encashment at any stage either prior to the proceeding or after conclusion of the proceeding.

19. In the matter of leave encashment the Full Bench of Punjab and Haryana High Court in Punjab State Civil Supplies Corporation Ltd. & Ors. v. Pyare Lal (Letters Patent Appeal No.113 of 2012) has held that the amount of leave encashment is payable to the retiring employee notwithstanding the pendency of the departmental enquiry or criminal proceedings.

20. In the present matter, leave the question of finding, even the proper enquiry was not conducted. Only on the basis of show cause the amount has been withheld from the encashment without giving any opportunity to the petitioner, which is against the principle of natural justice.

21. In view of the above, the order impugned dated 25.07.2007 cannot be sustained and is hereby set aside. The writ petition is allowed. The petitioner will be entitled for all the retiral benefits, which is due to him. The recovered amount shall be paid to the petitioner alongwith 9% interest calculated from the date, when it is payable till the date of its actual payment. The same shall be given to the petitioner within a period of three months from the date a certified copy of this order is produced before the authority concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.04.2015

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

C.M.W.P. No. 36320 of 2009

Smt. Vimla Devi Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

Uttar Pradesh State Aided Educational Institute Employees Contribution Rules 1964-Rule-18-Qualifying period of service for pension-petitioner working assistant teacher in primary section attached to intermediate college-taken grant in aid 01.10.89-retired on 30.06.2001-denied

pensionary benefit as was working in boys section while similarly situated other teacher of girl wings given pensionary benefit-held-cut of date of G.O. 28.01.2004 already quashed-as per rule 18 working on temporary or officiating service followed without interruption by confirmation-would be counted pension benefit.

Held: Para-21 & 22

21. Rule-18 of the Rules, 1964 articulates that the amount of pension that may be granted shall be determined by the length of qualifying service. Rule-19 contemplates that the service will not count for pension unless the employee holds a substantive post on a permanent establishment. However, in respect of temporary or officiating service, it provides that the continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service.

22. From a simple reading of the aforesaid provisions, it instantly brings out that a teacher of the primary section is entitled for pension in terms of the Rules, 1964 and the Government Order dated 28th January, 2004 is merely clarificatory in nature. Moreover, the cut-off date mentioned in the said Government order has already been struck down by this Court in Mangali Prasad Verma (supra).

Case Law discussed:

Writ-A No. 17819 of 2007; Writ-A No. 28679 of 2009; W.P. No. 75746 of 2005; W.P. No. 17033 of 2012; 2009 (2) UPLBEC 1557.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner is a retired Assistant Teacher of a Primary School. She has moved this writ petition under Article 226 of the Constitution for issuance of a writ of certiorari to quash the order dated 12th June, 2008 passed by the Additional Director of Education (Secondary), U.P., Allahabad, the third respondent, whereby her representation for sanction of pension has been rejected.

2. The essential facts are that Gurukul Sarvodaya Inter College, Panchali Khurd, District Meerut1 is a recongnised educational institution, wherein education is imparted from Class-I to Class-XII. The Institution receives the financial aid out of the State fund. It is governed by the provisions of the Uttar Pradesh Intermediate Education Act, 1921 (U.P. Act No. II of 1921)2 and the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (U.P. Act No. 24 of 1971)3. Initially, the primary section from Classes I to V, attached to the Institution, was not receiving grant-in-aid. It was first time brought on the grant-in-aid list with effect from 01st October, 1989, therefore, it also came under the purview of the Act, 1971.

3. The petitioner was initially appointed as an Assistant Teacher in the primary section of the Institution on 01st July, 1964. She reached her age of superannuation on 30th June, 2001. The grievance of the petitioner is that she has not been sanctioned pension. When several representations having been made by the petitioner for sanction of pension remained pending, the petitioner along with four other similarly placed Assistant Teachers of primary section of another institution, namely, Gurunanak Girls Inter College, Kankarkhera, Meerut approached this Court under Article 226 of the Constitution by means of Civil Misc. Writ Petition No. 1565 of 2008 (Smt. Sushila Thapar and others v. State of U.P. and others). The aforesaid four other Assistant Teachers, who joined the said writ petition along with the petitioner, were also appointed between 1966 and 1969 and they retired from service between 2001 and 2002. The said writ petition was disposed of by this Court vide order dated 09th January,

2008 with a direction upon the authority concerned to take appropriate decision in the matter and pass a reasoned and speaking order.

4. After the order of this Court, the petitioner submitted a detailed representation, wherein she stated that there was regular deduction from her salary against the General Provident Fund (GPF) and Insurance and she has submitted her option for the pension. She had also cited the examples of Sri Radhey Shyam Verma, who was an Assistant Teacher in the Primary Section of D.A.V. Inter College, Kankarkhera, Meerut, and Sri Ajab Singh, Assistant Teacher of Primary Section, who were sanctioned pension on 15th March, 2004. In compliance of the order of this Court dated 09th January, 2008, the third respondent vide impugned order dated 12th June, 2008 rejected the claim of the petitioner, whereas he sanctioned the pension to the co-petitioners (aforementioned other four Assistant Teachers) of Writ Petition No. 1565 of 2008. In the impugned order the only ground mentioned is that the petitioner was appointed in the attached Primary Section of a Boys Higher Secondary School, whereas the other petitioners of the said writ petition were appointed in the girls institution. Against this background, the petitioner has filed the present writ petition.

5. A counter affidavit has been filed on behalf of the respondents, wherein it has been admitted that the Institution is governed by the provisions of the Act, 1971 and it is receiving financial aid from the State fund with effect from 01st October, 1989. It is also stated that the petitioner has been receiving salary from the salary-payment account of the State since 01st October, 1989. The principle stand taken in the counter affidavit, as averred in paragraphs-6 and 11 thereof, is that by a Government Order dated 28th January, 2004 the State Government has sanctioned the benefit of pension, family pension, gratuity and G.P.F. to the teachers of attached boys/girls primary section from the date of issuance of the said Government Order i.e. 28th January, 2004, and in view of the provisions of the said Government Order, the teachers who retired prior to enforcement of the said Government Order are not entitled for the pension. Therefore, as the petitioner stood retired prior to 2004, the said benefit is not applicable to her.

6. I have heard Sri Ashok Khare, learned Senior Advocate, assisted by Sri Siddhartha Khare, learned counsel for the petitioner, and the learned Standing Counsel.

7. Sri Ashok Khare submitted that the petitioner is entitled to pension under the provisions of the Uttar Pradesh State Aided Educational Institution Employee's Contributory Provident Fund-Insurance-Pension Rules, 19644, under which the benefit of pension is available to all categories of Government aided institutions and the distinction sought to be drawn by the third respondent is wholly misconceived and artificial. He further submitted that the facts of the identical matters in the cases of Sri Radhey Shyam Verma and Sri Ajab Singh, referred to above, have not been properly addressed in the impugned order. Lastly, Sri Khare has placed reliance on a judgment of this Court in the case of Mangali Prasad Verma v. State of U.P. and others5 and Sri Krishna Prasad Yadav and others v. State of U.P. and others6.

8. Learned Standing Counsel has supported the reasons mentioned in the impugned order and has also invited the

attention of the Court to paragraphs-6 and 11 of the counter affidavit.

9. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record.

10. It is a common ground of the parties that the petitioner was appointed as an Assistant Teacher in the Primary Section of the Institution on 01st July, 1964 and retired on 30th June, 2001 and the Institution was sanctioned the financial aid w.e.f. 01st October, 1989. The State Government issued a Government Order dated 28th January, 2004 to the effect that benefit of the pension, family pension, gratuity and G.P.F. shall be admissible to the teachers of the primary sections attached to the higher secondary schools with effect from the date of issuance of the said Government Order.

11. The aforesaid Government Order dated 28th January, 2004 came to be considered by this Court in Mangali Prasad Verma (supra) and this Court found that the condition and the cut off date mentioned in the said Government order are arbitrary and discriminatory amongst the teachers who retired before 28th January, 2004. The Court also found that the said Government Order is only clarificatory in nature. The relevant part of the judgment is extracted hereunder:

"The condition and cut-off date mentioned in the Government Order dated 28.1.2004 is arbitrary and discrimination amongst the teachers who retired before 28.1.2004. The pension is not being claimed or to be provided under the Government Order dated 28.1.2004 but that is only clarification. Merely due to the fault from part of the respondents for deduction from the salary of the petitioner towards G.P.F., etc. and delay in issuing the clarification, it cannot be accepted that the petitioner is not entitled for the pension under Rules, 1964, though it was applicable to the Primary teachers as well as teachers of the higher secondary education."

12. In the said case, the Court has relied upon earlier judgments of this Court in the cases of Smt. Shanti Solanki v. State of U.P. and others7, Lal Chandra Singh v. State of U.P. and others8, and Smt. Ram Keshi Devi v. State of U.P. and others9.

13. From the record it transpires that when the order of this Court in Mangali Prasad Verma (supra) was not complied with, a contempt proceeding, being Contempt Application (Civil) No. 6286 of 201310, was taken out by the petitioner therein. My attention has been drawn to the short counter affidavit filed by the State authorities in the said contempt proceeding. In paragraph-3 of the said short counter affidavit, which was sworn by the Director of Education (Secondary), U.P., Lucknow, it has been stated that the State Government is sympathetically considering the matter of such teachers who have retired prior to issuance of the Government Order dated 28th January, 2004 for making them entitled to receive pension and there are several thousands teachers who would get benefit if the Government takes decision in their favour. A supplementary affidavit of compliance was also filed in that case and the pension was paid to the petitioner therein.

14. In the case of Mangali Prasad Verma (supra) the facts were identical to the case in hand. In the said case also the primary section of the institution was

brought on the grant-in-aid list on the same date i.e. 01st October, 1989 and the petitioner therein was appointed in 1961 in the primary section on the post of Assistant Teacher and he retired on 30th June, 1995. Thus, the law laid down in the aforesaid case applies to the present facts with full force.

15. In Sri Krishna Prasad Yadav (supra) also similar issue was involved and this Court following the decision of Mangali Prasad Verma (supra), allowed the claim of the petitioner therein.

16. In addition to above, the State Government has framed the Rules, 1964 and they have been made applicable w.e.f. 01st October, 1964. These Rules have been made applicable to the institutions run either by the Local Body or by a private management and recognised by the competent authority for the purposes of payment of grant-in-aid. The said Rules have been made applicable to the following institutions:

(1) Primary Schools;
(2) Junior High Schools;
(3) Higher Secondary Schools;
(4) Degree Colleges; &
(5) Training Colleges.

17. Rule 4 of the Rules, 1964 provides three types of service benefits, viz., contributory provident fund, insurance and pension (Triple Benefit Scheme). Rule 5(g) defines the word "employee" in the following terms:

"(g) 'Employee' means a permanently employed person borne on the whole-time teaching or non-teaching establishment of an aided institution, excluding (a) the inferior staff, and (b) the ministerial staff of the institutions maintained by a Local Body."

18. The expression 'Institution' has been defined in Section 5(l) of the Rules, 1964, as under:

"(l) 'Institution' means an aided school or college referred to in Rule 3 above."

19. Rule-5(p) of the Rules, 1964 gives the meaning of 'pension', thus:

"(p) 'Pension' means the pension payable to an employee under the rules Chapter V of these Rules."

20. Chapter V of the Rules, 1964 deals with the pension. Rule 17 prescribes the eligibility for pension which, insofar as is material for this case, reads as under:

"17. An employee shall be eligible for pension on—

(i) retirement on attaining the age of superannuation or on the expiry of extension granted beyond the superannuation age;

(ii) voluntary retirement after completing 25 years of qualifying services;

(iii) retirement before the age of superannuation under a medical certificate of permanent incapacity for further service; and

(iv) discharge due to abolition of post or closure of an institution due to withdrawal of recognition or other valid causes."

21. Rule-18 of the Rules, 1964 articulates that the amount of pension that may be granted shall be determined by the length of qualifying service. Rule-19

contemplates that the service will not count for pension unless the employee holds a substantive post on a permanent establishment. However, in respect of temporary or officiating service, it provides that the continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service.

22. From a simple reading of the aforesaid provisions, it instantly brings out that a teacher of the primary section is entitled for pension in terms of the Rules, 1964 and the Government Order dated 28th January, 2004 is merely clarificatory in nature. Moreover, the cut-off date mentioned in the said Government order has already been struck down by this Court in Mangali Prasad Verma (supra).

23. After careful consideration of the matter, I am of the considered opinion that the petitioner is entitled for pension and the view taken by the third respondent is not sustainable. Hence, the impugned order dated 12th June, 2008 passed by the third respondent is set aside. As no factual dispute is involved in the matter and the impugned order was based on misconstruction of the Government Order dated 28th January, 2004, wherein the cut off date has been fixed, no useful purpose would be served to send the matter back to the authority concerned for consideration afresh as this Court has already declared the cut off date as arbitrary in the case of Mangali Prasad Verma (supra). Accordingly, the respondents are directed to extend the benefit of the Government Order dated 28th January, 2004 and the Rules, 1964 to the petitioner for payment of pension with effect from 30th June, 2001 within a period of four months from the date of communication of a certified copy of this order. The petitioner is entitled for the arrears of pension with interest at the rate of 9% per annum with effect from 30th June, 2001 till the date of actual payment. The respondents are further directed to permit the petitioner to deposit the Management's contribution, if not already made, within a period of two months and after deposit of the contribution, she will be entitled for the pension, as directed above.

24. Accordingly, the writ petition is allowed.

25. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2015

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

C.M.W.P. No. 36900 of 2000

Surendra Nath Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.K. Mishra

Counsel for the Respondents:
C.S.C.

U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rule 1991-Rule-4-Punishment withholding integrity-beyond competence awarding minor or major punishment- order being contrary to law is nullity-quashed.

Held: Para-12

Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The

disciplinary authority is bound to give strict adherence to the said rules.

Case Law discussed:
Writ A No. 32261 of 2011; J.T. 2012 (4) SC 105; W.P. No. 32261 of 2011.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri S.K. Mishra, learned counsel for the petitioner and the learned standing counsel for the respondent.

2. This writ petition has been filed challenging the order dated 3rd April, 2000 passed by the Respondent No.2 whereby the punishment awarded to the petitioner by the subordinate authorities withholding his integrity has been upheld.

3. Learned counsel for the petitioner submits that there is no provision in Rule 4 of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules 1991 for awarding punishment by withholding integrity and, as such, the order of punishment as upheld by the impugned order dated 3rd April, 2000 is wholly without authority of law. In support of his submissions he relies upon the judgment of this Court in Writ A No. 32261 of 2011, Surendra Kumar Singh Vs. State of U.P. and others dated 23rd September, 2013.

4. Learned standing counsel submits that the petitioner was habitual of committing mistakes and, therefore, after due inquriy and after affording him opportunity, he was lawfully punished by withholding his integrity.

5. I have carefully considered the submissions of learned counsel for the parties.

6. Briefly stated the facts of the present case are that the petitioner was Assistant Sub Inspector (Ministerial)/ Assistant Accountant in 4th Batalian, P.A.C., Allahabad. A show cause notice dated 23.7.1999 was issued to him for punishing him by withholding his integrity for the year 1998 on the ground that he has not recorded factual aspects in his noting on the provident fund advance application of Constable Vijay Shankar pandey. The petitioner submitted reply dated 12.8.1999 through Senior Superintendent of Police, Allahabad. His explanation was not accepted and an order dated 10th September, 1999 was passed by the Commandant, 4th Battalion, P.A.C., Allahabad withholding his integrity.

7. Aggrieved with this order, the petitioner filed an appeal under Rule 22 (i) of the U.P. Police Officer of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the Rules) before the D.I.G., P.A.C. Kanpur, U.P. Kanpur through proper channel which was dismissed by order dated 5th February, 2000. Against this order the petitioner filed a revision before the next higher authority under Rule 23 of the Rules which was dismissed by the impugned order dated 3rd April, 2000. Aggrieved with this order the petitioner has filed the present writ petition.

8. In paragraph No.4 of the impugned order it is stated that for the irregularities committed by the petitioner, a show cause notice was issued to him by the competent authority and charges levelled against him were found proved.

9. It is undisputed that in the matter of disciplinary proceedings the petitioner is governed by the provisions of the aforesaid Rules, 1991. Rule 4 of the Rules

1991 provides for major penalties as well as minor penalties which may be imposed upon a police officer for good and sufficient reasons. Rule 4 of the Rules 1991 does not provide for penalty by way of withholding integrity. Under the circumstances, the impugned order dated 3rd April, 2000 awarding punishment of withholding integrity, is wholly without authority of law and, therefore, cannot be sustained.

10. In the case of Vijay Singh Vs. State of U.P. and others J.T. 2012 (4) SC 105 in para 11 Hon'ble Supreme Court held as under:

"11. The issue involved herein is required to be examined from another angle also. Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one. (Vide: Bachhittar Singh v. State of Punjab & Anr., AIR 1963 SC 395; Union of India v. H.C. Goel, AIR 1964 SC 364; Mohd. Yunus Khan v. State of U.P. & Ors., (2010) 10 SCC 539; and Chairman-cum-Managing Director, Coal India Ltd. & Ors. v. Ananta Saha & Ors., (2011) 5 SCC 142).

Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules.

Thus, the order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the appellant."

11. In Writ Petition No. 32261 of 2011 Surender Kumar Singh Vs. State of U.P. and others dated 23rd September, 2013 held in paragraph No.8 as under:

"8. Similar issue, i.e., with regard to imposition of punishment of withholding of integrity in respect of police officers of subordinate rank, has been considered earlier also by this Court and such orders of punishment have been set aside holding that punishment, not prescribed in Rules, cannot be imposed. These judgements are in Writ Petition No. 49071 of 2012, Abdul Kadir Khan and another Vs. State of U.P. and others, decided on 22.03.2012 (by Hon'ble Ram Surat Ram (Maurya), J.); Writ Petition No. 25665 of 2012, Narendra Singh Yadav Vs. State of U.P. and others, decided on 23.05.2012 (by Hon'ble Amreshwar Pratap Sahi, J.); Writ Petition No. 58153 of 2006, Surendra Nath Rai Vs. State of U.P. and others, decided on 06.09.2012 (by Hon'ble Devendra Pratap Singh, J.); Writ Petition No. 58154 of 2006, Sanjay Kumar Singh Vs. State of U.P. and others, decided on 21.12.2012 (by Hon'ble Sunil Hali, J.); Writ Petition No. 7190 (SS) of 2011, Ram Kumar Vs. State of U.P. and others, decided on 17.01.2013 (by Hon'ble Ritu Raj Awasthi, J.); Writ Petition No. 52328 of 2011, Abdul Qadir Khan Vs. State of U.P. and others, decided on 23.01.2013 (by Hon'ble Dilip Gupta, J.); Writ Petition No. 1386 of 2008, Phool Chandra Prasad and another Vs. State of U.P. and others, decided on 04.03.2013 (by Hon'ble Tarun Agarwala, J.); Writ Petition No. 34465 of 2012, Akhilesh Kumar Vs. State of U.P. and others, decided on 26.07.2013 (by Myself); and, Raj Kumar Gautam Vs. State of U.P. and others, 2013(2) ADJ 80 (by Myself). Besides above, a Division Bench of this Court has also expressed same view in Writ Petition No. 1315 (SB) of 2003, Satya Deo Sharma Vs. State of U.P. and others, decided on 02.04.2010 (by Hon'ble Rajiv Sharma, J. and Hon'ble Arvind Kumar Tripathi (II), J.)."

12. Thus imposition of punishment of withholding of integrity in respect of a police officer of subordinate rank, is without authority of law since such punishment is not provided in Rule 4 of the Rules 1991. Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one. Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules.

13. Thus the punishment of withholding integrity awarded to the petitioner and upheld by the impugned order dated 3rd April, 2000 being outside the purview of Rule 4 of the Rules 1991, is a nullity. Consequently the impugned order is set aside.

14. In result the writ petition succeeds and is hereby allowed. However there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

C.M.W.P. No. 45926 of 2006

Badrul Hasan Alvi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.F.A. Naqvi

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Benefit of salary and other consequential benefit-working promotional post purely temporary arrangement-promotion with stipulation of reversion on appointment of regular selected candidates or any infirmity in working-admittedly for 34 years working on promotional post-junior and other similarly situated persons getting benefit-held-by long period of working petitioner-possessing experience-rejection of claim as per regulation 1993 on ground of not possessing requisite qualification-not proper-petitioner entitled for every consequential benefit as junior engineer.

Held: Para-17
The judgements cited by learned counsel for the petitioner are fully applicable to the petitioner's case. If a worker gains sufficient experience after serving several years in the department, he cannot be refused confirmation on the ground that he did not possess requisite qualifications. The petitioner worked on the promoted post for a substantial period of time without being questioned by the respondents and at the fag end of his retirement he cannot be denied confirmation.

Case Law discussed:
1990 AIR (SC) 371; Civil Appeal No. 2835 of 2015; (1993) 3 SCC 237.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri S.F.A. Naqvi, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. By this writ petition the petitioner has prayed for following reliefs:-

"(i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dt.19.05.2006 passed by respondent no.2 (Annexure No.1).

(ii) issue a writ, order or direction in the nature of mandamus directing and commanding the respondents to regularize the services of the petitioner on the post of Junior Engineer as well as to grant super time pay scale in the said cadre with effect from the date upon which the petitioner was promoted upon the post of Junior Engineer and all other consequential benefits, which in normal circumstance is payable to a confirmed Junior Engineer.

(iii) issue a writ, order or direction in the nature of mandamus directing and commanding the respondents to pay interest at the permissible rate, which this Hon'ble Court may deem fit and proper upon all the financial benefits which are liable to be paid by the respondent authorities in pursuance of grant of consequential reliefs claimed in relief no.2.

(iv) issue a writ, order or direction, which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(v) award the cost of the petition in favour of the petitioner."

3. Brief facts giving rise to the writ petition are that the petitioner was appointed on the post of Civil Draftsman vide order dated 16th August, 1967. Thereafter, the petitioner was promoted on the post of Overseer by order dated 25.10.1972. The post of Overseer is now known as Junior Engineer. While promoting the petitioner on the post of Overseer it was mentioned in the promotion order dated 25.10.1972 that in case the work of the petitioner was not found satisfactory or a qualified Overseer is appointed, the petitioner will be reverted back to his original post of Draftsman. It is submitted by learned counsel for the petitioner that the petitioner was working on the post of Junior Engineer till he attained the age of superannuation in the year 2006. It is submitted that at the time of initial induction in service he had the requisite qualifications. No other person was appointed on the said post in which the petitioner was working. It is averred that the entire career of the petitioner was unblemished and the petitioner was never granted any adverse entry during his career. It is also submitted that under Rule 4 of the U.P. Government Servant Confirmation Rules, 1991 the petitioner is fully qualified to be confirmed on the said post.

4. It is also submitted that other similarly placed persons who were appointed simultaneously with the petitioner as Draftsman were promoted and confirmed on the post of Junior Engineer after 1972 and they were also awarded consequential benefits. This shows that the petitioner was discriminated by the respondents. In paragraphs 14, 15 and 16 of the writ petition the petitioner has given the examples of similarly situated persons, who have been promoted and confirmed on the post of Junior Engineer.

5. Learned counsel for the petitioner prayed that the petitioner should be promoted and confirmed on the post of Junior Engineer by the department and all consequential benefits should also be given to him.

6. Petitioner's learned counsel further submits that it is well settled that the person who had worked for a considerable long period on a particular post and had obtained practical experience he should not be denied regularisation on the said post. It was mentioned in the promotion order that the petitioner will be reverted back to his original post of Draftsman if his work will not be

found satisfactory or a qualified Overseer (Junior Engineer) is appointed on the said post. Neither any complaint was ever lodged against the petitioner nor any qualified person was appointed on the said post, hence, the petitioner should be confirmed on the post of Junior Engineer.

7. The petitioner has made several representations to the respondents to promote him on the said post but the respondents had not paid any attention on the grievance of the petitioner. Aggrieved with this attitude of the respondents the petitioner had earlier filed a writ petition bearing Writ Petition No.889 of 2006 (Badrul Hasan Alvi v. State of U.P. & Ors.) in which Hon'ble Court has passed the following order on 6.1.2006:-

"Petitioner on the strength of his working as Junior Engineer since 1972 seeks regularisation as well as other monetary benefits which have become legally due to him as a consequence to the regularisation. Petitioners in that regard has already made a representation dated 13.4.2005 which is pending consideration before respondent no. 3. Hence the present writ petition.

In the facts and circumstances of the case writ petition is disposed of with a direction upon respondent no. 2 to consider and decide the representation by means of a reasoned speaking order strictly in accordance with law preferably within four weeks from the date a certified copy of this order is filed before him. Respondent no. 2 shall pass a reasoned speaking order."

8. In pursuance of the order passed by this Hon'ble Court the respondents considered the claim of the petitioner and rejected the same by the impugned order dated 19.5.2006 stating that as he is not holding the requisite qualifications for the said post, he cannot be regularised on the post.

9. Learned counsel for the petitioner, in support of his claim, has placed reliance on the judgement in Bhagwati Devi v. Delhi State Mineral Development Corporation, 1990 AIR (SC) 371 in which it was held that the workers not possessing prescribed educational qualification at the time of appointment and they gained sufficient experience after service of several years, confirmation of such employees cannot be refused on the ground that at the time of appointment they did not possess requisite qualifications. If a worker is allowed to work for a considerable length of time, it would be hard and harsh to deny him the confirmation in the respective post on the ground that he lacks the prescribed qualifications.

10. Learned counsel for the petitioner has also placed reliance on a recent judgment of Hon'ble Supreme Court in Civil Appeal No.2835 of 2015 (Amarkant Rai vs. State of Bihar & ors) decided on 13.3.2015. The relevant paragraph nos. 11 to 17 of the judgment are reproduced hereinafter:-

"11. As noticed earlier, the case of the appellant was referred to Three Members Committee and Three Members Committee rejected the claim of the appellant declaring that his appointment is not in consonance with the ratio of the decision laid down by this Court in Umadevi's case (supra). In Umadevi's case, even though this Court has held that the appointments made against temporary or ad-hoc are not to be regularized, in para 53 of the judgment, it provided that irregular appointment of duly qualified persons in duly sanctioned posts

who have worked for 10 years or more can be considered on merits and steps to be taken one time measure to regularize them. In para 53, the Court observed as under:-

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

The objective behind the exception carved out in this case was prohibiting regularization of such appointments, appointed persons whose appointments is irregular but not illegal, ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years.

12. Elaborating upon the principles laid down in Umadevi's case (supra) and explaining the difference between irregular and illegal appointments in State of Karnataka & ors vs. M.L. Kesari & ors (2010) 9 SCC 247, this Court held as under:

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi (3), if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

13. Applying the ratio of Umadevi's case, this Court in Nihal Singh & ors vs. State of Punjab & ors (2013) 14 SCC 65 directed the absorption of the Special

Police Officers in the services of the State of Punjab holding as under:

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is-the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

14. In our view, the exception carved out in para 53 of Umadevi is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 03.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits be paid from 01.01.2010.

15. Considering the facts and circumstances of the case that the appellant has served the University for more than 29 years on the post of Night Guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the appellant retrospectively w.e.f. 03.01.2002 (the date on which he rejoined the post as per direction of Registrar).

16. The impugned order of the High Court in LPA No.1312 of 2012 dated 20.02.2013 is set aside and this appeal is allowed. The authorities are directed to notionally regularize the services of the appellant retrospectively w.e.f. 03.01.2002, or the date on which the post became vacant whichever is later and without monetary benefit for the above period. However, the appellant shall be entitled to monetary benefits from 01.01.2010. The period from 03.01.2002

shall be taken for continuity of service and pensionary benefits.

17. The appeal is allowed in terms of the above. No order as to costs."

11. Learned counsel for the petitioner has also placed reliance on the judgement of Hon'ble Supreme Court reported in (1993) 3 SCC 237 (Bhaskar Gajanan Kajrekar v. Administrator, Dadra and Nagar Haveli), in which in paragraphs 3 to 7 it is observed as under:-

"3. Kajrekar was not given pension on the ground that throughout his service he worked on officiating basis and was never appointed substantively to any of the posts held by him. Kajrekar challenged the action of the respondents, denying pension to him, before the Central Administrative Tribunal, Bombay. The Tribunal rejected his application on the ground that he retired from service without holding lien on any substantive post and as such was not entitled to pension under Rule 13 of the Central Civil Services (Pension) Rules, 1972 (the Rules). The application of Kajrekar was disposed of ex-parte by the Tribunal and his prayer for restoration and hearing was also rejected. These appeals by way of special leave petitions are against the orders of the Central Administrative Tribunal.

4. It is not disputed that the post of Chief of Police under Dadra and Nagar Haveli Administration was declared permanent with effect from June 14, 1967. On that date the appellant had already put in about thirteen years of service but his case for confirmation was not considered on the ground that there were no Recruitment Rules for the post in existence. The Recruitment Rules for the post of Chief of Police under the Administration of Dadra and Nagar Haveli came into force on January 19, 1980. The said Rules provided "by transfer on deputation" as the method of recruitment to the post of Chief of Police. The Recruitment Rules have no relevance to the question of confirmation of the appellant as he had retired from service on January 31, 1977 much before the coming into force of the Recruitment Rules. It was incum- bent on the respondents to have considered the question of confirmation of the appellant before his retirement, specially when he was being retired after serving the respondents for twenty three years. It was wholly arbitrary on the part of the respondents to have kept the appellant as an unconfirmed employee for a period of twenty three years on the ground that there were no Recruitment Rules for the post he was holding.

5. The Union Territory of Dadra and Nagar Haveli in its counter filed in this Court has stated that after the publication of the Recruitment Rules 63 a Departmental Promotion Committee was convened on July 4, 1981 for considering the question of confirmation of the appellant as Chief of Policy. The Departmental Promotion Committee did not recommend the appellant for confirmation on the ground that during the course of his service, two departmental enquiries were instituted against the appellant. The enquiries could not be completed before the appellant's retirement and the findings were made available thereafter. The proceedings of the Departmental Promotion Committee further show that as a result of the enquiries Rs. 4,000 was to be deducted from the gratuity amount of the appellant as a measure of punishment. The Departmental Promotion Committee found that the confidential reports of the appellant for the last three years were good but the Committee declined to recommend confirmation because of the two enquiries.

6. It is not disputed that the findings in the two enquiries were never communicated to the appellant during the period of his service. Those were served on him only after retirement. The question of his confirmation which was due in the year 1967 could not have been linked with the enquiries which were initiated at a much later stage. The Departmental Promotion Committee should have considered the appellant for confirmation on the basis of the record of the appellant as existed in the year 1967/1968. There is no material before us to show that the service record of the appellant prior to 1970 was adverse in any manner rather the averments made by the appellant in the rejoinder to the effect that there was nothing adverse against him on the record prior to 1971, have not been controverted. Even the Departmental Promotion Committee found the confidential reports of the appellant for the last three years as good. We are of the view that on the availability of a permanent post of Chief of Police on June 14, 1967 the appellant was entitled to be confirmed against the said post. It was wholly arbitrary for the respondents to have deferred the question of confirmation of the appellant on the ground that there were no Recruitment Rules. We, therefore, hold that the appellant having served the respondents for about thirteen years on June 14, 1967 when the post of Chief of Police was made permanent and there being nothing adverse against him at that point of time, he was entitled to be confirmed in the said post. In that view of the matter the appellant was a confirmed employee when he retired from service on July 31, 1977.

7. We, therefore, direct the respondents to treat the appellant as having 64 been retired as a confirmed employee and fix his pension and other post-retiral benefits on that basis. We further direct the respondents to complete the pension case of the appellant within three months from today and pay him all the arrears of the pension within two months thereafter alongwith 12% interest on the said arrears. We allow the appeals with costs which we quantify as Rs. 10,000."

12. Learned counsel for the petitioner submits that in the similar circumstances the department had promoted one Shri Ram Dutt Sharma son of Shri Asha Ram Sharma, who had passed only High School and was working as Civil Draftsman, was confirmed in the cadre of Junior Engineer. He had been placed at Sl.No.14-A in the seniority list between Shri Vakil Ahmad (Sl.No. 14) and Shri Hari Mohan Yadav (Sl.No. 15) vide order dated 27.6.1992, whereas in the case of the petitioner, the respondents had denied the right on the ground that the petitioner did not have the requisite qualification. It had also been reiterated that Shri Ram Dutt Sharma had also not obtained any such degree or diploma from the Rural Engineering College and had been placed in the cadre of Junior Engineer and as such discrimination has been made, which is also violative of Art.14 of the Constitution of India.

13. Controverting the petitioner's stand, learned counsel for the respondents states that the petitioner was initially appointed on the post of Civil Draft Man. He did not have the requisite qualifications for the post of Junior Engineer/ Overseer as provided under the Rules. By the promotion order dated 25.10.1972 it was clearly stated that the petitioner is temporarily posted on the post of Overseer/ Junior Engineer in a stop gap arrangement subject to qualified Overseer is appointed or his work and

conduct is found satisfactory. The sole contention of the respondents is that the petitioner did not have the requisite qualifications for the post of Junior Engineer and the impugned order has been passed reasonably.

14. Having heard the rival contentions of learned counsel for the parties, perusing the record and considering the judgements cited at the bar, I find that the petitioner was appointed on the post of Civil Draft Man on 16th August, 1967. He was promoted on the post of Overseer (now known as Junior Engineer) by order dated 25.10.1972. After serving on the promoted post for about 34 years, he retired after attaining the age of superannuation. The department slept over the matter of the petitioner for about 34 years and the petitioner had been regularly working on the post of Junior Engineer without being confirmed. When after making repeated representations nothing has been done by the respondents, he had taken the shelter of writ jurisdiction. When writ court has given some relief of deciding representation, the department awakened and passed the impugned order at the fag end of the retirement of the petitioner. The department has overlooked the service of the petitioner for about 34 years and passed the impugned order merely on the ground that he did not have requisite qualification for the post. The promotion order was passed with the condition that the petitioner will work on the post until the regularly selected candidate joins or his work and conduct was found unsatisfactory. The petitioner's work and conduct was never questioned by the respondents at any point of time in 34 years of service on promoted post and no qualified Overseer was appointed on the said post.

15. In the present matter while denying the claim of the petitioner the respondents have set out their case that although the petitioner was appointed on the post of Civil Draftsman but did not have the requisite qualifications for the post of Junior Engineer/ Overseer as per the U.P. Engineering Service (Irrigation Department) (Group-B) Service Regulations, 1993, governing the recruitments, and terms and conditions of the appointment. Even in the order dated 25.10.1972 it was clearly provided that the petitioner was temporarily promoted to the post of Overseer in a stop gap arrangement with condition that in case qualified Overseer is appointed by the Director, Agriculture, the petitioner will be reverted.

16. It is not disputed that the petitioner had been given charge vide order dated 25.10.1972 as Overseer in a stop gap arrangement with condition that in case qualified Overseer is appointed by the Director, Agricultural, the petitioner would be reverted. Nowhere the respondents had denied the fact that since 25.10.1972 the petitioner had not worked over the said post or he was not fit for the said assignment and as such he could not perform the technical work. Therefore, at this belated stage, the respondents cannot take this plea that at the initial stage in the year 1972 the petitioner did not have the requisite qualification and as such he is not entitled for the Super Time Pay Scale and other benefits of Junior Engineer. It is admitted case that the petitioner continued to discharge the duty on the post of Junior Engineer/ Overseer. Therefore, at such belated stage after lapse of more than 34 years of his career the department is precluded from taking technical view that at the initial stage while assigning the work the petitioner did not have requisite qualifications. Admittedly the petitioner discharged his duties with utmost sincerity and no adverse material has been

placed before this Court to indicate that the petitioner failed to do substantial justice with the said post.

17. The judgements cited by learned counsel for the petitioner are fully applicable to the petitioner's case. If a worker gains sufficient experience after serving several years in the department, he cannot be refused confirmation on the ground that he did not possess requisite qualifications. The petitioner worked on the promoted post for a substantial period of time without being questioned by the respondents and at the fag end of his retirement he cannot be denied confirmation.

18. With the aforesaid observations, the writ petition is allowed. The impugned order dated 19.05.2006 is hereby set aside. The petitioner is entitled to get all the benefits, which have been given to similarly situated persons, from the same date. The said exercise shall be completed by the respondents within a period of two months from the date of production of certified copy of this order.

19. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

C.M.W.P. No. 54978 of 2014

Raj Kumar Agarwal ...Petitioner
Versus
Suresh Chandra Jain ...Opp. Party

Counsel for the Petitioner:
Sri S.N. Verma, Sri Sarvan Kumar Mishra

Counsel for the Respondents:
Sri Amitabh Patel

C.P.C.-Order IX Rule 13-Application to recall ex-parte decree-without showing sufficient cause for non appearance-judgment passed on merit-can not be recalled-without disclosing date and particular of negotiation on compromise-mere story of compromise can not be believed-Courts below-justified in rejection of application to recall the judgment passed on merit.

Held: Para-23
In such circumstances, I do not find any merit in the contention of the petitioner. The Court below was not justified in rejecting the application to recall the judgment and ex parte decree merely on the ground that the judgment and decree was passed on merits.

Case Law discussed:
(2009) 2 SCC 205; 1964 SC 993; (2011) 3 SCC 545; (2000) 3 SCC 54; AIR 1962 SC 257; AIR 1930 Cal 488; (2005) 1 SCC 787.

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

1. Heard learned counsel for the parties.

2. The respondent/landlord filed an application under Section 21 (1)(a) of Act No. 13 of 1972 for release of the shop in dispute. The application was allowed ex-parte on 12 December 2011 by the Prescribed Authority. Aggrieved, petitioner made an application under Order 9 Rule 13 of Code of Civil Procedure stating that he could not appear on the date of hearing for the reason that he was trying to settle the dispute outside the Court with the respondent/landlord. The settlement could not be reached, therefore, he did not appear on the date fixed for hearing. The Authority by order

dated 10 April 2012 rejected the application noting that the application was not maintainable as the release application was decided on merits. Aggrieved, by the order dated 10 April 2012 rejecting the application under Rule 13 of Order 9 and the decree, the petitioner has approached this Court in writ jurisdiction.

3. The submission of the learned counsel for the petitioner is that on 25 October 2011, the evidence of the petitioner was closed, however, the Court permitted the petitioner for filing the evidence on 18 November 2011. On 18 November 2011 the petitioner appeared, but, the date was adjourned for 22 November 2011. On the said date the petitioner did not appear taking a plea that he was trying to settle the matter out side the Court. On 22 November 2011 the case was directed to come up for argument on 1 December 2011, finally the release application was decided on merits on 12 December 2011. The Court below upon noting the aforementioned dates and the conduct of the petitioner rejected the application to recall the judgment and decree holding that since the application was decided on merits, the application under Order 9 Rule 13 is not maintainable.

4. It is contended on behalf of the petitioner that the petitioner could not appear after 18.11.2011 on a bona fide belief that a compromise would be effected between the parties, therefore, the petitioner may be given an opportunity and the matter be decided upon rehearing the petitioner.

5. In an application under Order 9 Rule 13 to recall an ex parte judgment and decree, the petitioner would have to establish that he was prevented by any sufficient cause from appearing when the case/suit was called on for hearing. It is admitted that the petitioner was participating in the proceedings and appeared on 18 November 2011, thereafter, the petitioner did not appear on the pretext that effort was being made to settle the matter outside the Court, therefore, the petitioner was aware of the date next fixed in the case for 22 November 2011. On the said date the petitioner did not appear on the plea of negotiation and settlement. But it is urged that no settlement could be arrived at between the parties, therefore, it was incumbent upon the petitioner to have enquired from his counsel the next date fixed on 22 November 2011, the date of which the petitioner admittedly had knowledge. The Court fixed 1 December 2011 for argument and finally the release application was decided on 12 December 2011.

6. This rule requires an application by the defendant and if the defendant satisfies the court that (i) the summons was not duly served; or (ii) he was prevented by any sufficient cause from appearing when the suit was called out for hearing, the court will set aside the decree passed against him and appoint a day for proceeding with the suit.

7. The language of the rule is plain, express and unambiguous and the grounds mentioned therein are exhaustive.

8. As provided in Rule 6, the suit may proceed ex parte against the defendant only when it is proved by the plaintiff to the satisfaction of the court that the defendant did not appear even though the summons was duly served. In

that case, an ex parte decree may be passed against him. Therefore, if the defendant satisfies the court that the summons was not duly served upon him, the court must set aside the ex parte decree passed against him.

9. The expression "sufficient cause" has not been defined anywhere in the Code. It is a question to be determined in the facts and circumstances of each case. The words "sufficient cause" must be liberally construed to enable the court to exercise powers ex debito justitaie. A party should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part. Necessary materials should be placed on record to show that the applicant was diligent and vigilant. Improper advice of advocate may be a good ground to set aside ex parte decree but it cannot be accepted as a sufficient cause in all cases. Conversely, if "sufficient cause" is not shown, ex parte decree cannot be set aside. "The right and this duty is a sine qua non of judicial procedure. An order setting aside ex parte decree is judicial, it must be supported by reasons. (Refer: Mahesh Yadav vs. Rajeshwar Singh1)

10. If there are delaying tactics and non-cooperation on the part of the party, he cannot seek indulgence of the court. The test to be applied is whether the party honestly intended to remain present at the hearing of the suit and did his best to do so.

11. In Arjun Singh vs. Mohindra Kumar AIR2 Supreme Court observed that every good cause is a sufficient cause and must offer an explanation for non-appearance. The only difference between a "good cause" and "sufficient cause" is that the requirement of a good cause is complied with on a lesser degree of proof than that of a "sufficient cause".

12. When an application for setting aside ex parte decree is made by the defendant, the court should consider whether the defendant was prevented by "sufficient cause" from appearing before the court when the suit was called out for hearing. "Sufficient cause" is a question of fact.

13. The following causes have been held to be sufficient for the absence of the defendant;

(1)bona fide mistake as to the date of hearing;
(2)Late arrival of a train;
(3)sickness of the counsel;
(4)fraud of the opposite party;
(5)mistake of pleader in noting wrong date in diary;
(6)negligence of next friend or guardian in case of minor plaintiff or defendant;
(7)death of relative of a party;
(8)imprisonment of party;
(9)strike of advocates;
(10)no instructions pursis by a lawyer, etc.

14. The following causes, on the other hand, have been held not to be sufficient for absence of the defendant for setting aside an ex parte decree;

(1)dilatory tactics;
(2)bald statement of noting wrong date in diary;
(3)negligence of party;
(4)counsel busy in other court;
(5)suit of high valuation;

(6)absence of defendant after prayer for adjournment is refused;

(7)hardship of defendant;

(8)absence to get undue advantage;

(9)mere thinking that the case will not be called out; not taking part in proceedings, etc.

15. The Supreme Court in Parimal vs. Veena3 was considering the scope and ambit of an application under Order 9 Rule 13. In the facts of that case, the trial court recorded that the notice of the petition was served upon the applicant who refused to accept the notice, subsequently, when served the applicant again refused to accept the notice thereafter, the notice was published in a daily and was sent to the applicant at her address.

16. In these circumstances, the application under Order 9 Rule 13 filed by the applicant on the plea that she was not residing at the said residence but was residing with her brother. The trial court rejected the application. The Supreme Court held that the presumption of publications stood rebutted by a bald statement made by the applicant that she was living at a different address with her brother. The Apex Court reversed the order passed by the High Court, as the application was not considered in the right perspective regarding substituted service. The Court observed as follows:

"However, in case the matter does not fall within the four corners of Order 9 Rule 13 CPC, the Court has no jurisdiction to set aside an ex parte decree. The manner in which the language of the second proviso to Order 9 Rule 13 CPC has been couched by the legislature makes it obligatory on the appellate Court not to interfere with an ex parte decree unless it meets the statutory requirement."

17. Material date for deciding "sufficient cause" for non-appearance by the defendant is the date on which ex parte decree was passed and not his previous negligence or past defaults. In G.P. Srivastava v. R.K. Raizada4, the Supreme Court observed:

"The 'sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstance anterior in time. If sufficient cause' is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier."

18. Since the Code makes specific provision for setting aside ex parte decree, no inherent power can be exercised to set aside such decree.

19. As Rankin, L.J. stated, "I entirely dissent from the view that, if no case is made out under that rule (Rule 13), it is open to the learned Judge to enlarge the rule by talking about Section 151." (Refer: Manohar Lal vs. Seth Hira Lal5, K.B. Dutt vs. Shamsuddin Shah6).

20. Remedy against an ex-parte decree has two options (1) to file a regular appeal (2) to file an appeal for setting aside the order in terms of Order 9 Rule 13. Both the proceedings are available simultaneously.

21. In Bhanu Kumar Jain v. Archana Kumar & Anr7 the Supreme Court held as follows:

"26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard 9 to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

22. Applying the principles of law upon the facts of the case. The petitioner in the application has not made any averment for his absence from 22 November 2011 to 12 December 2011. The application under Order 9 Rule 13 was moved on 5 January 2012. It would appear that the absence of the petitioner on the date of hearing was deliberate and willful without sufficient cause, the plea that the petitioner was negotiating with respondent/landlord was not acceptable as the entire application is silent as to when the negotiation commenced and the date on which it failed. It is also not the case of the petitioner that under the garb of negotiation, the petitioner was kept in dark, the respondent/landlord proceeded with the case behind the petitioner's back.

23. In such circumstances, I do not find any merit in the contention of the petitioner. The Court below was not justified in rejecting the application to recall the judgment and ex parte decree merely on the ground that the judgment and decree was passed on merits.

24. For the reasons stated herein above, this Court is not inclined to interfere with the impugned order though for other reasons.

25. The amount of rent deposited by the petitioner while filing the present writ petition which was converted from revision shall be paid by the Court below to the respondent within six weeks from the date of service of certified copy of this order.

26. The writ petition is dismissed.

27. No order as to costs.
