ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2013

BEFORE
THE HON'BLE SAAEED-UZ-ZAMAN SIDDIQI J.

Rent Control No.29 Of 2012

Mukhtar Begum & Ors ...Petitioner
Versus
Addl. District Judge and AnrRespondents

Counsel for the Petitioner:
Sri Adnan Ahmad
Sri Manish Misra

Counsel for the Respondents:
Manish Kumar

U.P. Urban Buildings & Regulation (Letting and Rent Control) Act 1972-Section-27(7)- Application to release accommodation by Land Lord on ground of bonafied need-allowed by Prescribed authority-during pendancy of rent control appeal-land lord died-application to substitute the heirs as well as bonafide requirement of substituted land lord-rejection on ground after death of original land lord bonafide need automatically comes to an end-held-such approach unknown to judicial system-unreasonable-set-a-side-consequential direction given.

Held: Para-12
By the impugned order the learned Appellate Court has summarily thrown out the landlord in a surreptitious manner by applying its own whims. It is well known that Judges must administer law according to the provisions of law. It is the bounden duty of Judges to discern legislative intention in the process of adjudication. Justice administered according to individual's whim, desire, inclination and notion of justice would lead to confusion, disorder and chaos. Since such tendency is in its primary stage it is giving rise to indiscriminate and frequent petitions before this Court and is leading this Court to colossal delay in administration of justice, in civil cases, in out country. I am bound to mention that the misinterpretation of law by the learned Appellate Court is gross of inexcusable error.

Case Law discussed:
AIR 2001 SC 803; 1997 AIR (SC) 2399; 2008(3) ARC 198; AIR 1999 Supreme Court 3029

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

1. By means of this petition under Article 226 of the Constitution of India, the petitioners have prayed for issue a writ in the nature of certiorari quashing the impugned order dated 08.02.2012 passed by Additional District Judge (Court No.7), Unnao in Rent Appeal No. 1 of 2011.

2. Brief facts of the case are that the petitioners filed P.A. Case No.14 of 2007 for release of accommodation under Section 21(1)(a) of the U.P. Rent Act, 1972 which was allowed by the learned prescribed authority vide judgment and order dated 19.01.2011, against which the tenants preferred the instant appeal in which they moved an application No. 4C to the effect that the landlord has died on 14.03.2011 (during pendency of appeal). The case was instituted by him on the ground of personal need and requirement which has vanished due to death, and as such, the cause of action has perished. The petitioners filed objection 50C against this application, in which the application was opposed on the ground that subsequent to the death of landlord, his widow and two sons have become employment-less and have no source of

income and, as such, cause of action has not come to an end to which the tenant filed rejoinder application alleging therein that his three sons are unemployed. It has further been alleged that since substitution has rightly been carried out in the appeal which shows that bonafide requirement of the landlord has also died.

3. The learned appellate court reached to the conclusion that prescribed authority has allowed the application on the basis of bonafide requirement of the deceased landlord. The landlords who are petitioners before the learned Appellate Court have moved amendment application paper No. 49A seeking addition of bonafide requirement of the sons of the deceased landlord, who are petitioners before this Court. It was sought to be amended that the two sons of the deceased landlord have learnt photography and computer along with their father and they have no other engagement and after the death of the father they have no source of income. This amendment application has been opposed by the tenant opposite party through objection paper No. 57(a). Aggrieved by rejection of application 49-A and the release petition, the landlords have preferred the instant petition.

4. I have heard both the parties and perused the record.

5. The learned appellate court has observed that under Section 21(7)13 of U.P. Rent Act, 1972, the legal representatives of landlord who died during the pendency of the application under clause 9(a) of Sub-section 1, such legal representatives shall be entitled prosecuted such application "further on the basis of their own need in substitute of the need of the deceased" But in spite of this provision of law, the learned appellate court has observed that need of the landlord has come to an end. The learned appellate court has rejected the impugned application paper no. 49(a) and set aside the judgment and order of release dated 22.01.2011 and has given a liberty to the landlord to move fresh application for release under Section 21 of U.P. Rent Act. The impugned order is, itself, violative of the express provision contained in sub-section 7 of Section 27 of U.P. Rent Act No.XIII of 1973 the intention of the legislature is that, where, during the pendency of application for release, the landlord dies, his legal representatives shall be entitled to prosecute such application further on the basis of their own need in substitute of the need of the deceased. The point sought to be urged is that, subsequent development shall have to be taken into account in eviction proceedings, particularly even eviction is sought by a landlord on the ground that the bonfide need the building for his own use or for the use of any member of family.

6. Hon'ble Apex Court has held in **Gaya Prasad Vs. Praddep Srivastava (AIR 2001 SC 803)** which is extracted below:-

"We have no doubt that the crucial date for deciding as to the bona fides of the requirement of the landlord is the date of his application for eviction. The antecedent days may perhaps have utility for him to reach the said crucial date of consideration. If every subsequent development during the post petition period is to be taken into account for judging the bona fides of the requirement pleaded by the landlord there would

perhaps be no end so long as the unfortunate situation in our litigative slow process system subsists. During 23 years after the landlord moved for eviction on the ground that his son needed the building, neither the landlord nor his son is expected to remain idle without doing any work, lest, joining any new assignment or starting any new work would be at the peril of forfeiting his requirement to occupy the building. It is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. If a young entrepreneur decides to launch a new enterprise and on that ground he or his father seeks eviction of a tenant from the building, the proposed enterprise would not get faded out by subsequent developments during the traditional lengthy longevity of the litigation. His need may get dusted, patina might stick on its surface, nonetheless the need would remain intact. All that is needed is to erase the patina and see the gloss. It is pernicious, and we may say, unjust to shut the door before an applicant just on the eve of his reaching the finale, after passing through all the previous levels of the litigation, merely on the ground that certain developments occurred pendente lite, because the opposite party succeeded in prolonging the matter for such unduly long period.

We cannot forget that while considering the bona fides of the need of the landlord the crucial date is the date of petition. In Remesh Kumar vs. Kesho Ram [1992 Suppl. (2) SCC 623] a two-Judge Bench of this Court (M.N. Venkatachalia, J., as he then was, and N.M. Kasliwal, J.) pointed out that the normal rule is that rights and obligations of the parties are to be determined as they were when the lis commenced and the only exception is that the court is not precluded from moulding the reliefs appropriately in consideration of subsequent events provided such events had an impact on those rights and obligations. What the learned Chief Justice observed therein is this:

"The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a cautious cognizance of the subsequent changes of fact and law to mould the relief."

7. In the case of **Kamleshwar Prasad Vs. Pradumanju Agarwal reported in 1997 AIR (SC) 2399** the Hon'ble Apex Court has held as under:-

"Mr. Manoj Swarup, learned counsel appearing for the appellant in this Court urged that the person for whose bona fide requirement the order of eviction has been passed by the appellate authority having died during the pendency of the writ petition. The said bonafide requirement no longer subsists and consequently the High Court should have taken that fact into consideration and should have interfered with the order passed by the appellate authority for the eviction of the tenant.

That apart, the fact that the landlord needed the premises is question for starting a bushiness which fact has been

found by the appellate authority. In eye of law, it must be that on the day of application for eviction which is the crucial date, the tenant incurred the liability of being evicted from the premises. Even if the landlord died during the pendency of the Writ petition in the High Court the bona fide need cannot be said to have lapsed as the business in question can be carried on by his widow or any elder son. In this view to the matter, we find no force in the contention of Mr, Manoj Swarup, learned counsel appearing for the appellant and we do not find any error in the impugned judgment of the High Court under Article 136 of the Constitution. The appeal, accordingly, fails and is dismissed but in the circumstances without any order as to costs."

8. The learned counsel for the opposite party relied upon the judgment laid down in **R.S.Gahlaut Vs. VIIth Additional District Judge, Meerut and another 2008 (3) ARC 198**; but this is not applicable to this case at all.

9. The impugned order passed by the learned appellate court is in contravention of violation of settled rules of justice and contravene the basic principles of natural justice and rules of procedure. It deserve to be quashed.

10. A larger Bench of Hon'ble Apex Court in **Sayed Dastagir Vs. T.R. Gopalakrishna Setty reported in AIR 1999 Supreme Court 3029** has held that:

"In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of ones case for a relief. Such an expression may be pointed, precise, some times vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test, whether he has performed his obligations one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. Same plea may be stated by different persons through different words then how could it be constricted to be only in any particular nomenclature or word. Unless statute specifically require for a plea to be in any particular form, it can be in any form."

11. It has been further been held in the case is that:-

"*Courts cannot draw any inference in abstract or to give such hyper technical interpretation to defeat a claim of specific performance which defeats the very objective for which the said Act was enacted.*"

12. I am afraid the learned Appellate Court has discussed the correct perspective of law in para 10 of its judgment but thereafter it has derailed its finding and rejected the amendment application and dismissed the case itself in a hitlarian way unknown to the judicial system of this country without assigning any cogent reasons. The judgment of the learned Appellate Court shows that it has analyze the law in a perverse manner and has in reaching to unjust conclusions. It

has misread the law and dismissed the amendment as well as entire case on conjectures and surmises. By the impugned order the learned Appellate Court has summarily thrown out the landlord in a surreptitious manner by applying its own whims. It is well known that Judges must administer law according to the provisions of law. It is the bounden duty of Judges to discern legislative intention in the process of adjudication. Justice administered according to individual's whim, desire, inclination and notion of justice would lead to confusion, disorder and chaos. Since such tendency is in its primary stage it is giving rise to indiscriminate and frequent petitions before this Court and is leading this Court to colossal delay in administration of justice, in civil cases, in out country. I am bound to mention that the misinterpretation of law by the learned Appellate Court is gross of inexcusable error.

13. In either case the impugned order passed by the learned appellate court is capricious and unreasonable by which he has turned hostile from law or true law as laid down by the legislature and incorporated by various court and the Hon'ble Apex Court.

14. Original application for release was filed in the year 2007 which deserves to be decided within two months as prescribed under rule 15(3) of the Rules framed under U.P. Rent Act No. XIII of 1972 but for the last 6 years it could not be decided and at this stage the delay has been caused due to the miss-application of law and wrong judgment by the learned appellate court. The impugned application of the petitioners should be allowed and is accordingly allowed. The learned appellate court shall decide the appeal within two months from the date of production of certified copy of this order on merits by applying its judicial mind.

15. In result, the writ petition succeeds and the impugned order dated 08.02.2012, passed by opposite party no.1 is hereby quashed.

16. Let the copy of this order be sent to the learned District Judge, Unnao who may, in turn recall the appeal to its own diary, if not possible then transfer it to some other competent court, without delay.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2013

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

First Appeal No. 47 of 1978

Smt. Vidyawati ...Appellant
Versus
Smt. Raj Dei And Others ...Respondents

Counsel for the Petitioner:
Sri Harguru Charan, Sri A.K. Bajpai
Sri A.R. Khan, Sri Amar Nath Singh
Sri Apurva Kumar, Sri Ashok Bajpai
Sri G.P. Mishra, Sri H.G. Upadhyay
Sri Jai Shree Net, Sri R.B. Tiwari
Sri R.L. Ojha, Sri S.C. Tewari

Counsel for the Respondents:
Sri S.C. Mishra, Sri Dev Kumar Tripathi
Sri R.B. Tewari

Specfic Relief Act 1963-Section 16(a)-Suit for specific performance-decreed without framing issue regarding readiness and willingness-held-judgment became perverse in eye of law-matter remitted

back-Trail Court to frame specific issue give opportunity to lead evidence to the parties-decide suit itself withing time bound period.

Held: Para-11
In view of the law as discussed above, non framing of issues on the point regarding compliance of Section 16 (a) and Section 16 (c) of Specific Relief Act, the judgment becomes perverse in the eyes of law and, as such, the issue to the effect that whether the plaintiff has always been ready and is ready and willing to perform his part of contract must be framed. Consequent upon framing of this issue the parties shall have to be given a right to lead evidence on that issue. Regarding compliance of Section 16 (a) of Specific Relief Act, detailed findings have to be made under issue no.5 in which learned Trial Court has to consider as to whether the ends of justice would successfully meet if the plaintiff is compensated by refunding the amount of earnest money paid by him along with interest, if any. No further issue is required to be made on this point as the Court has to deal with this aspect under issue no.5.

Case Law discussed:
AIR 1928 PC 208; AIR 1983 Madras 169

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

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

2. This appeal was admitted vide order dated 10.05.1998 without framing of any point of determination. As soon as this Court proceeded on to hear so as to frame point of determination, it was found that the only point of determination, at the beginning of the arguments, involved is to the effect; whether the learned Trial Court, who has not framed any issue regarding compliance of Section 16 (c) of Specific Relief Act, the judgment and decree passed by the learned Trial Court is perverse or not?

3. The instant appeal has arisen out of judgment and decree dated 16.03.1978, passed by Second Additional District Judge, Pratapgarh in Original Suit No.44 of 1975 by which the suit for specific performance of agreement to sell has been decreed and the plaintiff has been directed to deposit a sum of Rs.5,000/- within two months. The defendant no.1/1 and 1/2 were directed to execute sale deed in favour of the plaintiff within next two months. It was further directed that defendant no.2 Smt. Vidyawati shall also join that sale. In default, the sale deed would be executed by the Court on their behalf.

4. Brief facts of the case are that an unregistered agreement to sell was executed on 31.12.1974 and a sum of Rs.5,000/- was paid as earnest money as recited in the agreement. The sale was agreed at Rs.10,000/-. The executant of the agreement Surajpal obtained permission to sell from Settlement Officer Concolidation on 12.01.1975. During the period two registered sale deeds were executed regarding said land.

5. Upon consideration of the pleadings of parties learned Trial Court framed as well as 5 issues which runs as follows:-

"1. Whether Suraj Pal original defendant no.1 had agreed to sell the plots in dispute to the plaintiff for Rs.10,000/-?

2. Whether the agreement dated 31.12.74 was executed by him (Suraj Pal)?

3. Whether he was paid Rs.5,000/- by the plaintiff as earnest money at that time (execution of the agreement)?

4. Whether the defendant no.2 is bonafide purchaser for value without notice?

5. To what relief, if any, is the plaintiff entitled?"

6. The learned Trial Court proceeded on to decide issue no.1 to 3 together and all the issues have been decided in favour of plaintiff. Issue no.5 relate to the relief. The learned Trial Court did not make any discussion regarding requirement of law as embodied in Section 16 (a) of Specific Relief Act, 1963 and decided the issue no.5 with following observations:-

"In view of the decision of issue no.1 to 3 in the affirmative and defendant not being found to be a purchaser for value, it is hereby held that plaintiff is entitled to the relief claimed."

7. Learned Trial Court has also not framed any issue to the effect that 'whether the plaintiff has always been ready and willing to perform the essential terms of contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant?. This is the mandatory provision of law which must be averred by the plaintiff in his plaint and he has to prove the same. But, learned Trial Court did not enter into this requirement of law. Since there has been subsequent purchases of land the learned Trial Court was bound to have considered the same and have entered into deciding the dispute as to whether the plaintiff can be compensated in terms of money or specific performance has to be decreed by directing to execute the sale deed, which is also mandatory under Section 16 (a) of Specific Relief Act, 1963.

8. It is well settled that Section 16 of Specific Relief Act, 1963 corresponds to Section 24 of Specific Relief Act, 1877.

In Ardeshir v. Flora Sassoon, AIR 1928, PC 208, Lord Blanesburg observed thus:-

"In a suit for specific performance the plaintiff has to allege, and if the fact is traversed, he is required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, the perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

This was approved by the Supreme Court in Gomathinayagam Pillai v. Palanisami Nadar, AIR 1967 SC 868, Shah, J. speaking for the court observed as follows (at p. 872)-

"The respondent (plaintiff) must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit."

Again in Premraj v. D. L. F. Ltd., (1968) 3 SCR 648: (AIR 1968 SC 1355) Ramaswami, J. peaking for the Bench observed thus (at p. 1357)-

"It is well settled that in a suit for specific performance, the plaintiff should allege that he is ready and willing to perform his part of the contract."

10. In **H.G. Krishna Reddi and Co. v. M.M. Thimmiah and another, AIR 1983 Madras 169,** Division Bench of Madras High Court made following observations:

"Section 16(c) of the Specific Relief Act 1963 is prohibitory and that a duty is cast on courts by a public statute that a specific performance of a contract cannot be granted in favour of a person unless he avers and proves his readiness and willingness to perform his part of the contract. That being the nature of the statute, it would be the duty of the court to see whether the person who seeks to enforce the contract satisfies the mandatory provisions of S. 16 of the Specific Relief Act, 1963. The Privy Council and the Supreme Court have interpreted the section to mean that if the conditions are not satisfied, the court is bound to dismiss the suit. Though no precedent is necessary to support this conclusion of ours we shall refer to two decisions in this context. The first one is shiba Prasad Singh v. Srish Chandra, AIR 1949 PC 297 wherein the Privy Council was called upon to interpret the meaning to be given to the word `mistake' in S. 72 of the Contract Act. The question was not raised, nor evidently argued before the Subordinate Judge and the High Court, and therefore the respondent raised an objection that no argument could be advanced before the Privy Council based on S. 72. However, their Lordships negatived the objections stating that they were unable to exclude from their consideration the provisions of the public statute.

In Surajmull Nagoremull v. Triton Insurance Co. Ltd., (1925) 49 Mad LJ 136 : (AIR 1925 PC 83), the question was whether a contract for sea insurance was valid even though it was not expressed in a sea policy as provided under S. 7 of the Stamp Act 1899. The section had not been pleaded by the defendant in the suit. It was only during the hearing of the appeal before the Privy Council it was discovered that that S. 7 of the Stamp Act provided that no contract of sea insurance would be valid unless the same was expressed in policies of sea insurance. It was argued by the plaintiff that it was too late to plead as an answer to the plaintiff's claim. Lord Sumner observed thus-

"The suggestion may be at once dismissed that is too late now to raise the section as an answer to the claim. No court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispense by a consent of the parties or by a failure to plead or to argue the point at the outset (Nixon v. Albion Marine (1867) LR 2 Exc 338). The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to case, for which a penalty is eligible. The expression of an agreement for sea insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of S. 7 would defeat the provisions of the law laid down therein."

11. In view of the law as discussed above, non framing of issues on the point regarding compliance of Section 16 (a) and Section 16 (c) of Specific Relief Act, the judgment becomes perverse in the eyes of law and, as such, the issue to the effect that whether the plaintiff has always been ready and is ready and willing to perform his part of contract must be framed. Consequent upon framing of this issue the parties shall have to be given a right to lead evidence on that issue. Regarding compliance of Section 16 (a) of Specific Relief Act, detailed findings have to be made under issue no.5 in which learned Trial Court has to consider as to whether the ends of justice would successfully meet if the plaintiff is compensated by refunding the amount of earnest money paid by him along with interest, if any. No further issue is required to be made on this point as the Court has to deal with this aspect under issue no.5.

12. Since the matter is very old as the suit was filed on 29.11.1975, I am reluctant to remand the case but I can't help as after framing of issues the parties shall be given right to lead evidence on that score alone which cannot be done at the ends of this Court as it would snatch away the right of appeal, I am bound to remand back the case.

13. On the basis of discussions as made above, the impugned judgment and decree is set aside, appeal is allowed and the case is remanded back for fresh trial after framing issue no.6 within the requirement of Section 16 (c) of Specific Relief Act. Since the pecuniary jurisdiction of the Civil Judge (Junior Division) and Civil Judge (Senior Division) has been enhanced the file is remitted back to learned District Judge, Pratapgrah who is requested to entrust the case having pecuniary jurisdiction to try the suits up to valuation of Rs.10,000/-. The said Court shall immediately frame issue no.6 and shall afford the parties opportunity to lead evidence on that score alone and shall proceed on with the case on day to day basis as far as possible and shall try to dispose of the suit within two months from the framing of additional issue.

14. Parties shall bear their own costs. The Registry of this Court shall immediately send back the Lower Court Record to learned District Judge, Pratapgarh through Special Messenger within one week from today.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2013

BEFORE
THE HON'BLE RAJES KUMAR, J.

First Appeal From Order No. 151 of 1987

Oriental Insurance Company Ltd.
...Appellant
Versus
Rajendra Kumar and Ors. ...Respondents

Counsel for the Petitioner:
Sri A.B. Saran, Sri Arun Kumar Shukla

Counsel for the Respondents:
Sri R.K. Jain

Motor Vehicle Act 1939- Section 95 (2)(b)(ii)- Liability of Insurance company-vehicle attached with U.P.S.R.T.C met an accident-caused death of certain passengers-tribunal awarded27000/- with interest-appeal on ground insurance company having limited liability of Rs. 5000/-on each-can not be fastened with

liability of comprehensive insurance-held-appellant liable to pay Rs. 5000/- remaining amount payable by vehicle owner.

Held: Para-6

I find substance in the argument of learned counsel for the appellant. The policy is annexed as annexure-1 to the affidavit, which reveals that in respect of the third party risk only statutory premium has been paid and no extra premium has been paid for unlimited liability. The column of unlimited liability is vacant, therefore, the appellant was liable for a sum of Rs.5,000/- for each passenger under Section 95 (2)(b)(ii) of the Act.

Case Law discussed:

(1995) 2 SCC 539; 2002 (3) TAC 434(SC); (1988) 1 S.C.C.; (1995) 2 S.C.C. 539; 2002 (3) T.A.C. 434 (S.C.)

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

1. Notices have been sent to the respondent no.6 by registered post. The office reported that neither undelivered cover nor acknowledgment has been received back after service. Thus, there is sufficient service on the respondent no.6.

2. Heard Sri A.K.Shukla, learned counsel for the appellant. No one appears on behalf of the respondents. 3

3. The appellant is insurer of bus bearing registration no.URU-1566, involved in an accident and was attached with U.P.S.R.T.C. In the accident certain persons sitting in the bus have died and some persons suffered injuries. Tribunal has awarded the compensation at Rs.27,000/- and directed the appellant to pay the compensation along with interest. Present is the case of death.

4. Learned counsel for the appellant submitted that the accident took place on 27.02.1982 and on the date of the accident, under Section 95 (2) (b) (ii) of Motor Vehicles Act, 1939 (hereinafter referred to as the "**Act**") as it existed in respect of each individual passenger there was limited liability of Rs.5,000/- only on the insurance company. He submitted that though the insurance was comprehensive and statutory in respect of the third party risk, no extra premium has been paid in respect of the third party for unlimited liability and, therefore, under Section 95 (2)((b) (ii) of the Act the insurance company is liable to pay only Rs.5,000/- and the balance amount is payable by the owner of the vehicle.

5. In support of the contention, he relied upon the decision of the Apex Court in the case of **New India Assurance Co. Ltd. Vs. Shanti Bai (Smt.) and others**, reported in **(1995) 2 SCC, 539** and the Constitution Bench decision of the Apex Court in the case of **New India Assurance Co. Ltd. Vs. C.M.Jaya and others,** reported in **2002 (3) TAC, 434 (SC).**

6. I find substance in the argument of learned counsel for the appellant. The policy is annexed as annexure-1 to the affidavit, which reveals that in respect of the third party risk only statutory premium has been paid and no extra premium has been paid for unlimited liability. The column of unlimited liability is vacant, therefore, the appellant was liable for a sum of Rs.5,000/- for each passenger under Section 95 (2)(b)(ii) of the Act.

7 The Apex Court in the case of **National Insurance Company Limited Vs. Jugal Kishore and others, reported in (1988) 1 S.C.C**. has held that comprehensive policy only entitles the owner to claim

reimbursement of the entire amount of loss or damage suffered upto the estimated value of of the vehicle. It does not mean that the limit of liability with regard to third party risk becomes unlimited or higher than the statutory liability. For this purpose, a specific agreement is necessary.

8. In the case of New India Assurance Co. Ltd. Vs. Shanti Bai and others, reported in (1995) 2 S.C.C. 539, the Apex Court while dealing with Section 95 (2) of the Act has held as follows :

"These provisions were interpreted by this Court in the case of National Insurance Co. Ltd. v. Jugal Kishore. This Court observed that even though it is not permissible to use a vehicle unless it is covered at least under an "Act only" policy, it is not obligatory for the owner of a vehicle to get it comprehensively insured. In case, however, it is got comprehensively insured, a higher premium is payable depending on the estimated value of the vehicle. Such insurance entitles the owner to claim reimbursement of the entire amount of loss or damage suffered upto the estimated value of the vehicle calculated according to the Rules and Regulations framed in this behalf. It has further observed as under :

"Comprehensive insurance of the vehicle and payment of higher premium on this score, however, does not mean that the limit of the liability with regard to third party risk becomes unlimited or higher than the statutory liability fixed under sub-section (2) of Section 95 of the Act. For this purpose a specific agreement has to be arrived at between the owner and the Insurance Company and separate premium has to be paid on the amount of liability undertaken by the Insurance Company in this behalf."

In the present case, therefore, a comprehensive policy which has been issued on the basis of the estimated value of the vehicle of Rs.2,50,000/- does not automatically result in covering the liability with regard to third policy risk for an amount higher than the statutory amount."

9. The Apex Court has further held that "mere fact that the insurance policy is comprehensive policy, will not help the respondents in any matter."

10. The Constitution Bench of the Apex Court in the case of **New India Assurance Co. Ltd. Vs. C.M. Jaya and others,** reported in **2002 (3) T.A.C. 434 (S.C.)** has held as follows :

"Thus, a careful reading of these decisions clearly shows that the liability of the insurer is limited, as indicated in Section 95 of the Act, but it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability. This view has been consistently taken in the other decisions of this Court.

In the light of what is stated above, we do not find any conflict on the question raised in the order of reference between the decisions of two Benches of three learned Judges in Shanti Bai and Amrit Lal Sood aforementioned and, on the other hand,

there is consistency on the point that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the Insurance Company is neither unlimited nor higher than the statutory liability fixed under Section 95 (2) of the Act. In Amrit Lal Sood's case, the decision in Shanti Bai is not noticed. However, both these decisions refer to the case of Jugal Kishore and no contrary view is expressed.

In the premise, we hold that the view expressed by the Bench of three learned Judges in the case of Shanti Bai is correct and answer the question set up in the order of reference in the beginning is as under :

"In the case of Insurance Company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under Section 95 (2) of the Act and would not be liable to pay the entire amount."

11. In the result, the appeal is allowed. The order of Tribunal is modified to the extent that the appellant is liable to pay only Rs.5,000/- and the balance amount is payable by the owner of the vehicle. However, the appellant is directed to pay the entire amount of compensation and recover the balance amount from the owner of the vehicle.

APPELLATE JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 13.05.2013

BEFORE
THE HON'BLE UMA NATH SINGH, J.
THE HON'BLE MAHENDRA DAYAL, J.

Special Appeal (D) No. 264 Of 2013

with 275/07; 583/07; 182/07; 722/07; 601/11

State of U.P. & Ors. ...Petitioner
Versus
Prem Chandra and Ors.8577(S/S) 2010 ...Respondents

Counsel for the Petitioner:
C.S.C.

Counsel for the Respondents:
Sri A.M. Tripathi

U.P. Civil Services Regulation-Regulation 370- Pensionary benifit-respondents working on daily wages basis-given status of work charge employee in 1984 and 89-stood regularised on 01.04.99 and 24.07.99-retired on 31.01.2009-admittedly worked continuously 21 yrs as work charge employee and 10 years as regular employee-Single Judge following the Judgment of Mohd. Mustfa given parity-in which similar provision of Regularization 3.17 of Punjab Civil Services Rules was quashed by Full Bench in Kesar Chand case-upheld by Apex Court-provisions of Regulation 370 has to be read down with judgment of Apex Court in Punjab Electricity Board-appeal dismissed.

Held: Para-6
On due consideration of rival submissions, we dismiss the special appeal for reasons that the learned Single Judge has granted parity with a similarly situated employee as referred to herein above, namely Mohd. Mustafa; and that in a similar case a Full Bench of the Punjab and Haryana High Court has quashed the provision which was upheld by the Hon'ble Apex Court in appeal: the judgment of the Full Bench has merged into the judgment of the Hon'ble the Apex Court reported in AIR SCW 1670 (Punjab Electricity Board and another v. Narata Singh and another). Thus the provisions of regulation 370 of the U.P. Civil Service Regulation have to be read down in line with judgment of Hon'ble the Apex Court in the absence of challenge to

the validity of the regulation in this petition or in any other petition earlier.

Case Law discussed:
2009(27) LCD 1163; AIR 1988 Punj & Har 265;AIR SCW 1670

(Delivered by Hon'ble Uma Nath Singh, J.)

1. We have heard learned counsel for parties and perused the pleadings of the Special Appeal. This order shall dispose of all the connected appeals, for, they impugn the same cause of action with some what similar facts.

2. The private respondents herein were engaged as the daily wager employees in the Public Works Department at Ghaziabad. Having found their work and conduct satisfactory and up to the mark, they were granted status of work charged employees in the department with effect from 1.7.1989, 1.6.1984 and 1.7.1989 respectively. They were later appointed as Beldar and Chaukidar. It also appears that all the private respondents worked continuously from the date of their engagement till the date of retirement on 31.1.2009. Thus they worked for over 31 years, namely, around 20 years as work charged employees and over 10 years as regular employees. It appears that respondents no.1 and 2 were regularized on 1.4.1999 while no.3 became regular on 24.7.1999.

3. During their engagement as work charged employees several substantive posts became vacant on account of death, retirement and resignation of regular employees, but despite the continuous service they were not considered for regularization. Thus they filed a writ petition before this Court, which has been decided by the impugned order dated 9.9.2011 by granting parity with similarly situated employees, who filed Writ Petition No. 2637(S/S) of 2009: **Mohd. Mustafa versus State of U.P. and others**, which is reported in 2009 (27) LCD 1163, and wherein this Court has granted them the pensionary benefits.

4. Learned counsel for the appellant-State of U.P. argues that since the respondents were engaged for about 20 years as work charged employees and remained regularized for less than 10 years, they do not possess the qualifying service for the purpose of grant of pensionary benefits. Learned counsel referred to Regulation 370 of the U.P. Civil Service Regulation in support of his contention that even though the respondents worked continuously for over 31 years but since they worked for about 20 years in work charged establishment, they failed to qualify for the grant of pensionary benefits in the absence of 10 years regular service with the department.

5. On the other hand, learned counsel for private respondents Shri A.M. Tripathi submitted that there was a parallel provision in Punjab Civil Services Rules, namely, 3.17 (ii) which was considered by a Full Bench of the Punjab and Haryana High Court in the matter of **Kesar Chand v. State of Punjab and others** (reported in AIR 1988 Punj & Har 265) and the provision having not been found sustainable was quashed. The matter was taken up before the the Apex court but the judgment of the Full Bench was upheld. Thus a parallel provision existing in the service regulation of U.P. have to be read down to conform to the judgment of Hon'ble the Apex Court in the case of Kesar Singh (supra).

6. On due consideration of rival submissions, we dismiss the special appeal for reasons that the learned Single

Judge has granted parity with a similarly situated employee as referred to herein above, namely Mohd. Mustafa; and that in a similar case a Full Bench of the Punjab and Haryana High Court has quashed the provision which was upheld by the Hon'ble Apex Court in appeal: the judgment of the Full Bench has merged into the judgment of the Hon'ble the Apex Court reported in AIR SCW 1670 (**Punjab Electricity Board and another v. Narata Singh and another**). Thus the provisions of regulation 370 of the U.P. Civil Service Regulation have to be read down in line with judgment of Hon'ble the Apex Court in the absence of challenge to the validity of the regulation in this petition or in any other petition earlier.

7. Regarding the application for condonation of delay in filing the Special Appeal, as learned counsel for the respondents does not have any objection to the application being allowed it is hereby allowed and the delay as pointed out by the registry is thus condoned.

8. The special appeal, being devoid of merit, is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 21.05.2013

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA,J.

Review Petition No. 368 of 2010

Smt. Meena Singh and others.Petitioners
Versus
Jang Bahadur and others.. .Respondents

Counsel for the Petitioner:
Sri R.K. Sharma

Counsel for the Respondents:
Sri S.P. Shukla

U.P.Zamindari abolition and Land Reforms Act 1955-Rule 285-H-Application to set-a-side auction sale-filed within time-kept pending without disposal-argument that unless entire amount of auction of sale not deposited-before confirmation of sale-mere filing application within time immaterial-held-unless order passed-the treasury challan verified-amount could not be deposited-view taken by collector rightly depreciated no question of Review-application rejected.

Held: Para-11
Under the circumstances, I am of the view that the deposition of the amount is necessarily a condition precedent for setting aside the sale, but not for moving the application for setting aside the sale. The argument as raised by the learned counsel for the respondents/petitioners is worth to be considered that unless the petitioners' application is allowed and the Treasury Form offering the amount to deposit in the Treasury is verified by the Revenue Authority, the same shall not be accepted by the Treasury. It is not in dispute that in the case in hand the petitioners moved the application for setting aside the sale within thirty days from the date of sale, but the same was kept undisposed of, rather the respondents proceeded to confirm the sale.

Case Law discussed:
2006(100)RD 534; 2006(3)AWC 2976; (1996) 6 SCC 755

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

1. Heard Mr.Ratan Kant Sharma, learned counsel for the review petitioners as well as Mr.S.P.Shukla, learned counsel for the petitioners/respondents.

2. Through the instant review petition the petitioners have prayed to review the order dated 6.5.2010, passed by this court in writ petition No.1047 (MS) of 1988.

3. The main ground to review the order passed by this court has been taken that this court has failed to appreciate Rule 285-H of the U.P.Zamindari Abolition and Land Reforms Act (in short U.P.Z.A.&L.R.Act). It is stated that this court has dealt with the case with the findings that once the petitioners' moved the application and offered to repay the entire dues within 30 days from the date of sale, before confirmation, the Collector was under obligation to set aside the sale, but he did not do so, rather he confirmed the auction sale. It is stated by them that deposition of amount is a condition precedence for acceptance of any such application for setting aside the sale, whereas in the case in hand there is no proof of deposition of amount by the petitioners. It is further stated that only moving the application to set aside the sale within time is not sufficient to set aside the sale until and unless it is followed with the deposit of the amount. In support of his submission he cited the decision of this court i.e. **Ghanshyam Singh and others versus Divisional Commissioner, Vindhyachal Division, Mirzapur and others, reported in 2006 (100) RD 534.** In this case this court held that the application is a consequence of the deposit and since no deposit under Rule 285-H of the Rules had been made, therefore, for this reason the application is not maintainable.

4. On the other hand learned counsel for the respondents submitted that through the application the petitioners had shown their intention to deposit the amount, but until and unless they are permitted by the Collector, there was no occasion for them to deposit the same as the government revenue is always deposited with the Treasury. The Treasury does not accept the amount unless it is verified by the Revenue Authority and on moving their application, the Revenue Authority did not pass any order in the matter. He also relied upon another judgment of this court in his support i.e.**Kewal Prasad versus Bank of Baroda and others, reported in 2006 (3) AWC 2976**, in which this court after considering the judgment of **Ghanshyam Singh (Supra)** held that there was no explanation coming forth in the counter affidavit by the respondents as to why the petitioners' application had not been disposed of before the expiry of thirty days. This court further observed that the respondents could not doubt any order having been passed by the Revenue Authority directing the petitioners and permitting them to deposit the amount as required under Rule 285-H.

5. He also raised the question on the locus of the counsel of Review petitioners with the submission that the counsel different to the counsel appeared in the writ petition cannot be permitted to argue the review petition, as has been held by the Hon'ble Supreme Court in the following Cases:-

(1) M.Poornachandran and another versus State of Tamil Nadu and others, reported in (1996) 6 SCC 755.

(2) Tamil Nadu Electricity Board and another versus N.Raju Reddiar and another, reported in AIR 1997 Supreme Court 1005.

6. However, in reply Mr.Ratan Kant Sharma, learned counsel for the review petitioners submitted that he has taken permission from the counsel who appeared earlier in the writ petition to argue the case may be oral, therefore, I do not take objection raised by the learned counsel for the respondents as serious one.

7. Rule 285-H (1) of the Rules speaks that any person whose holding or other immovable property has been sold under the Act may, at any time within thirty days from the date of sale, apply to have the sale set aside on his depositing in the Collector's office.

8. Upon reading the aforesaid provisions, I find that the application for setting aside the sale has to be moved within thirty days from the date of sale, but it is not necessary that the application must be followed with the deposit of the dues, rather the deposition is a condition precedent for setting aside the sale, therefore, the dues necessarily have to be deposited in the Collector's office before setting aside the sale.

9. I am further of the view that once the application for setting aside the sale is moved, it has to be considered by the Collector concerned. He may allow or reject it. If the deposition is taken as a condition precedent for moving the application, in the result of the rejection of the application, the amount deposited with the Collector has to be returned to the defaulter, which would be an useless formality for this purpose. I am further of the view that the deposit of the amount is required to be made only after allowing the application, but necessarily before setting aside the sale as once the application is allowed, the defaulter is under obligation to deposit the dues and thereafter the Collector shall set aside the sale. In contrary if even after allowing the application, the defaulter failed to deposit the amount, there is no reason to set aside the sale.

10. The language as couched in Rule 285-H is unequivocal as it gives right to the person whose holding or immovable property has been sold to apply within thirty days from the date of sale for setting it aside on his depositing in the Collector's office. Thus, the intention of the legislature is very clear as it gives opportunity to the defaulter to move an application for setting aside the sale by offering to deposit the dues and on its acceptance as well as making of such deposit, the Collector shall pass the order setting aside the sale.

11. Under the circumstances, I am of the view that the deposition of the amount is necessarily a condition precedent for setting aside the sale, but not for moving the application for setting aside the sale. The argument as raised by the learned counsel for the respondents/petitioners is worth to be considered that unless the petitioners' application is allowed and the Treasury Form offering the amount to deposit in the Treasury is verified by the Revenue Authority, the same shall not be accepted by the Treasury. It is not in dispute that in the case in hand the petitioners moved the application for setting aside the sale within thirty days from the date of sale, but the same was kept undisposed of, rather the respondents proceeded to confirm the sale.

12. Therefore, I am of the view that it is a clear violation of Rule 285-H on the part of the respondents, which has been discussed in the order passed by this court on 6th of May, 2010.

13. In the result, I do not find error in the order. Consequently the Review petition stands dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Second Appeal No. 438 of 2013

Basic Shiksha Adhikari, Etawah Appellant
Versus
Ram Shankar and Ors. ...Respondents

Counsel for the Appellant:
Sri K. Shahi, Sri Vishnu Kr. Singh

Counsel for the Respondents:
A.G., Sri P.P. Chaudhary
Sri A.K. Rai, Sri Sharad Chandra
Sri V.K. Singh

Code of Civil Procedure. - Section 100-Second Appeal-by the Basic Education officer-without seeking permission from Secretary Basic Education-although before trail Court as well as Lower Appellate Court state Govt. was very well one of the opposite party-when state govt. not choose to file Second Appeal-Basic Education officer working under control of state authority- a govt. servant and officer not working under Basic Education Board-principal secretary Basic Education to hold enquiry and submit report within specified period-appeal dismissed as not maintainable.

Held: Para-15
Let an inquiry be made by Principal Secretary, Basic Education as to how the present appellant has acted in this matter and that too by engaging a counsel not appointed by State of U.P. but by one appointed by Basic Education Board. He shall also make an inquiry to find out in how many such matters, other Basic Education Officers are behaving in similar manner and how much funds from State Exchequer, they have consumed, without knowledge or permission from State of U.P.

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

1. Heard Sri K. Shahi, learned counsel for the appellant and Sri S.P. Gupta, learned Advocate General assisted by Sri P.P. Chaudhary, Advocate for respondent no. 4.

2. This appeal has been preferred by District Basic Education Officer, Etawah against the judgments and decree dated 29.01.2010 passed in Original Suit No. 94 of 1988 and 17.01.2013 passed in Civil Appeal No. 50 of 2011.

3. The suit was instituted by respondents no. 1 and 2 impleading State of U.P. through Collector, Etawah as defendant no. 1, District Basic Education Officer, Etawah as defendant no. 2 and Sri Sant Vinoba Madhyamik Vidyalaya, Jhindua, District Etawah, *(hereinafter referred to as the "institution"*) as defendant no. 3.

4. The plaintiffs instituted aforesaid suit for declaration and permanent injunction against defendants. The suit was decreed with the declaration that defendants shall treat the date of appointment of plaintiffs in the institution as 13.07.1977 and they are working as permanent teacher since then and entitled for all consequential benefits since 01.07.1985. The defendants were also restrained by granting permanent injunction that they shall not interfere in the functioning and working of plaintiffs.

5. Thereagainst it appears that the State of U.P. as well as Basic Education

Officer, Etawah both preferred Civil Appeal No. 50 of 2011 which has been decided by Additional District Judge, Court No. 6, Etawah vide judgment and decree dated 17.01.2013. The Lower Appellate Court has dismissed the appeal.

6. Now only one of the defendant-appellant, i.e., Basic Education Officer, Etawah has come to prefer this appeal under Section 100 C.P.C. impleading plaintiffs and other defendants including State of U.P. as proforma respondents. Further the appeal has been preferred through a private counsel, namely, Sri K. Shahi, Advocate.

7. Learned Standing Counsel on the very first day made a preliminary objection about maintainability of appeal whereupon this Court passed following order on 01.05.2013:

"1. The question which has arisen in this matter is regarding maintainability of this appeal at the instance of District Basic Education Officer, Etawah particularly when the financial liability is that of State and State of U.P., a party before courts below, has not chosen to come in appeal. It is in these circumstances, the first question arisen in this matter is, regarding maintainability of appeal at the instance of District Basic Education Officer, Etawah.

2. Let State of U.P. should come forward with a clear affidavit sworn by Secretary, Basic Education, U.P., Lucknow stating, whether an appeal can be filed before this Court by District Basic Education Officer on his own without any permission of State and without the matter being examined by State; as also, by impleading State of U.P. as one of the respondent. It will also explain, whether District Basic Education Officer is an independent officer in the matter of Basic Education to act on his own manner and if this is so, whether the State Government provides fund to him to be spent at his own discretion without any control or supervision by State of U.P. On this aspect the Principal Secretary, Law and Legal Rememberancer shall also clarify position by filing separate affidavit.

3. Learned Standing Counsel who is representing respondent no. 4 is directed to send a copy of this order to Secretary, Basic Education and Principal Secretary, Law and Legal Rememberancer so that they may file their affidavit in this regard within two weeks.

4. List this matter for further hearing on the question of maintainability of appeal on 16.05.2013.

5. A copy of this order shall be made available to learned Standing Counsel by today itself for information and compliance.

8. Pursuant thereto two affidavits have been filed today. One by Sri Sunil Kumar, Principal Secretary, Basic Education, Government of U.P., Lucknow and another by Sri Shashi Kant Pandey, Principal Secretary, Law, Government of U.P., Lucknow.

9. In both the affidavits they have replied the queries made by this Court and have stated very categorically that a District Basic Education Officer cannot file an appeal on behalf of State against any decree or order against State without permission of State. Where any part of the order is exclusively against the officer concerned in his individual capacity, for example some costs or damages from his

own pocket and not from the funds of State has been directed to be paid, he can file appeal on his own without permission. It is also said that in no manner the District Basic Education Officer can file appeal on behalf of State and he cannot indirectly file appeal for or on behalf of by merely impleading State of U.P. as proforma party. Next it is submitted that when some statute requires an authority to exercise a statutory power at his own discretion, the State Government has no occasion to interfere with such discretion since statutory authority has to exercise power independently. However, in the instant case, the District Basic Education Officer has no independent authority to file any appeal on behalf of State. Lastly, it is said that no funds are provided by State Government to be utilized by District Basic Education Officer at his discretion. The State Government may provide funds for any designated action, directed to be done or performed by District Basic Education Officer, whereupon the State Government has full control and supervision over District Basic Education Officer. In the present case no permission has been sought before filing appeal from State Government and none has been granted by State Government till date.

10. When confronted to the aforesaid statements of Principal Secretary, Law and Principal Secretary, Basic Education, Sri Shahi, learned counsel appearing for appellant stated that under the Basic Education Act and Rules and Regulations framed thereunder, the Basic Education Officer is also an ex-officio secretary of certain committees of Basic Education Board and, therefore, the counsel representing Basic Education Board, can represent a Basic Education Officer for filing a case before the Court and in such matters he can also file case by impleading State of U.P. as respondent.

11. In this case the first question is, whether the appeal in question in view of the above facts and circumstances, is maintainable or not.

12. It cannot be doubted that appeal has not been filed by defendant-appellant in his individual capacity. It is in his official capacity and for the official acts done by him which were subject matter of scrutiny before courts below. It also cannot be doubted that while challenging the Trial Court's judgment and decree before Lower Appellate Court, the State Government joined District Basic Education Officer as an appellant but the State of U.P. has chosen not to challenge the Lower Appellate Court's judgment by filing second appeal. This appeal has been preferred only by District Basic Education Officer, Etawah without any permission from the State Government. In view of the clear stand taken by Secretaries of Government, it cannot be doubted that this appeal by District Basic Education Officer is incompetent. He has no authority to file this appeal by impleading State of U.P. as one of the respondent and without permission of the State Government.

13. Besides, the District Basic Education Officer is an officer appointed by State Government and is a holder of Civil Post. He is not an officer of Basic Education Board which is a statutory autonomous body in which various officials may have certain capacity to function in the Board or its Committees etc. but that will not make District Basic Education Officer as an officer of the

Board. He is not an officer appointed by the Board or under the control of Basic Education Board. For all purposes he is an officer subordinate to State Government, under the administrative and disciplinary control of Secretary, Basic Education, U.P. Government.

14. It is really strange that a District Basic Education Officer could have proceeded directly, without taking care of getting approval etc. from the State Government. Moreover the Secretary, Basic Education has no knowledge or control over such matters, is also surprising. When asked from learned Advocate General, in what circumstances this appeal has been preferred, he states that it has been filed only by appellant in his own capacity. This shows strange and precarious state of affairs in the State where superior officer is not aware of the acts and omissions on the part of subordinate official and also not willing to know about it. He lacks interest and leave everything at the discretion of field officers. He ought to have taken care or precaution to see, whether subordinate officials are performing their functions validly and in accordance with law or not. This shows total inaction, apathy and laxity on the part of Principal Secretary, Basic Education also his incapacity in keeping subordinate officials within the frame work of law.

15. Let an inquiry be made by Principal Secretary, Basic Education as to how the present appellant has acted in this matter and that too by engaging a counsel not appointed by State of U.P. but by one appointed by Basic Education Board. He shall also make an inquiry to find out in how many such matters, other Basic Education Officers are behaving in similar manner and how much funds from State Exchequer, they have consumed, without knowledge or permission from State of U.P.

16. The Principal Secretary, Law is also directed to find out as to in how many matters, cases are being contested by various authorities of State without seeking any permission from Law Department and, if so, what action has been taken by Law Department in such matters.

17. After making such inquiry and taking appropriate action, as directed above, both the above Principal Secretaries, shall submit report before this Court, but not later than a period of six months. This case shall be listed only for this purpose i.e. perusal of compliance report on 02.12.2013.

18. Since I have already found that this appeal as instituted is not maintainable at the instance of District Basic Education Officer, Etawah, for the reasons and subject to directions, stated above, the appeal is dismissed as not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 3177 Of 2006

Sri Vishnu Kumar ...Petitioner
Versus
Judge Small Causes Court Jhansi and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ravi Kant, Sri S.K. Garg

Counsel for the Respondents:
Sri B.N. Singh, Sri Ashish Gupta

Sri H.C. Mishra, Sri Prakash Gupta

U.P. Urban Building(Regulation of Rent and Letting) Act 1972-Section 16(i)(b)-During pendency of release application-prospective allottee move allotment application-RCEO committed great illegality by considering both application simultaneously-Revision Court rightly set-a-side the order-in view of Full Bench decision of Talib Hasan's Case-prospective allottee has no right to resist the release application.

Held: Para-12

It has been settled long back by Full Bench decision of this Court in Talib Hasan and another Vs. 1st Additional District Judge and others, 1986 (1) ARC 1 that no allotment in respect of a building covered by an application under Section 16(1)(b) of the Act can be made unless such an application is rejected. The right of a prospective allottee to have his application considered can, therefore, arise only after rejection of application of the landlord. The Full Bench also observed that neither the Act nor the Rules postulate any right in prospective allottee to file an objection against release application, not does the prospective allottee(s) have any right or interest in the property or claim against the landlord so as to enable him to any hearing in the disposal of release application. The Full Bench further observed that even after deletion of old Rule 13 (4), there is no change in the legal position of a prospective allottee to have any locus standi in the disposal of the release application. The Full Bench made it clear that a prospective allottee has only a contingent right which can be exercised only if the accommodation is not released in favour of the landlord.

Case Law discussed:

1986 (1) ARC 1; Writ A No. 31574 of 2004; 1963 ALJ 725

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

1. The writ petition is directed against the order dated 17th October 2005, passed by Additional District Judge/Special Judge, SC/ST Act, Jhansi, allowing SCC Revision No. 192 of 2004, filed by respondent no.2 and setting aside order dated 19.11.2004 passed by /Small Causes Court in Execution Case no. 4 of 1987.

2. The facts in brief giving rise to the present writ petition may be summarized as under:

3. The dispute relates to house no. 208-C/3 Jhokan Bagh, Civil Lines, Jhansi. Respondents no.3 to 5, namely Smt. Kamla Devi, Smt. Usha Agrawal, Smt. Anjali Agrawal and one Sri Babu Lal Garg, father of petitioner (now deceased), claimed to be owners and landlord of the house in dispute. Earlier, one Ramesh Chandra Agrawal was tenant in the aforesaid house. Petitioner's father (Late) Babu Lal instituted SCC suit no. 14 of 1983, seeking ejectment of the then tenant Sri Ramesh Chandra Agrawal. The parties entered into a compromise as a result whereof, the suit was decreed, vide a compromise decree 04.10.1985. The erstwhile tenant Ramesh Chandra Agrawal, it was alleged, did not honour compromise decree and committed breach, by handing over possession of disputed house to respondent no.2, compelling petitioner's father to institute Execution Case no. 4 of 1987.

4. Respondent no.2, Puran Chandra Agrawal filed objection in the aforesaid execution proceedings, The case set up by him was that as per compromise decree, outgoing tenant Ramesh Chandra Agrawal was to vacate the premises within one year, i.e by 04.10.1986. He informed Rent Control and Eviction Officer (hereinafter referred to as "RCEO") that he is going to vacate the premises by 28.08.1986. Proceeding on the aforesaid information, RCEO notified vacancy on 13.09.1986, pursuant whereto,

certain applications, seeking allotment were filed which included application of respondent no.2 (Pooran Chandra Agrawal) also. RCEO passed an order dated 05.12.1986, allotting the house in question to respondent no.2 and rejected release application of petitioner landlord.

5. Order dated 05.12.1986 was challenged in revision no. 315 of 1986 which was allowed and the order of RCEO was set aside by Additional District Judge, Jhansi vide judgement dated 09.04.1987, remanding the matter to RCEO, for fresh hearing, though declaration of vacancy by RCEO was upheld. Revisional Court took the view that prospective allottee has no right to contest release application of landlord and such application would be considered by RCEO independently.

6. After remand, RCEO vide order dated 31.03.1989, rejected release application of landlord and thereafter proceeded to consider allotment application of prospective allottees. In the meantime, the petitioner landlord challenged order dated 31.03.1989 in Rent Control Revision No. 86 of 1989, which was dismissed on 24.04.1990, whereagainst, landlord came to this Court in writ petition no. 18108 of 1990. Another proceedings arose from Execution Case no. 4 of 1987, emerging from compromise decree dated 04.10.1985 in SCC suit no. 14 of 1983.

7. Therein Pooran Chandra Agrawal filed objection, stating that pursuant to allotment order dated 05.12.1986, he obtained possession on 08.12.1986 and, therefore, decree cannot be executed. The said objection of Pooran Chandra Agrawal was rejected by execution court, vide order dated 02.11.1987, on the ground that allotment order having been set aside by Revisional Court on 09.04.1987, possession of Pooran Chandra Agrawal was unauthorised and illegal. Thereagainst Sri Pooran Chandra Agrawal came in civil revision no. 205 of 1987, which was allowed by Revisional Court on 24.04.1990, and against this order, the petitioner landlord came in writ petition no. 17361 of 1990. Both the aforesaid writ petitions were heard together and decided vide judgement dated 28.05.2004. The order of RCEO dated 31.03.1989 and that of Revisional Court dated 24.04.1990 were quashed. The matter was remanded to RCEO to decide release application afresh. Similarly, writ petition relating to the matter, arising from Execution Case No. 4 of 1987, was allowed by this Court, holding that the view taken by Execution Court that respondent no.2 being outsider, had no locus standi under Order 21 Rule 97 C.P.C., is not correct, since even stranger can file objection therein and therefore objection filed by Pooran Chandra Agrawal, respondent no.2 should be heard on merits.

8. After remand, Execution Court again considered objection of respondent no.2 Pooran Chandra Agrawal, registered as objection as 14-C. It rejected the same by order dated 19.11.2004, whereagainst Revisional Court has allowed the revision and set aside order passed by Execution Court.

9. Learned counsel for the petitioner submitted that even if respondent no.2 has got possession of the house in dispute, it was clearly unauthorised and illegal. Therefore, his objection was rightly rejected by Execution Court and Revisional Court has erred in law by observing that

possession was obtained by him pursuant to allotment letter and subsequent cancellation of that letter shall not render possession of respondent no.2, illegal and unauthorised, so long as the matter after remand is pending before RCEO.

10. Per contra, Sri Ashish Gupta, learned counsel appearing for respondent sought to support the judgement of Revisional Court, reiterating reasons contained therein.

11. In my view, it is not necessary to complicate the matter by getting entrapped into unnecessary legal jargon when some admitted facts and relevant statutory provisions, if put together and in a straight manner, can bring legal consequences on forefront, making the entire thing very transparent and explicit. The compromise decree between erstwhile tenant and landlord is not in dispute. As per the compromise decree, erstwhile tenant was bound to vacate the premises within one year. Whether he vacated the premises within agreed period or beyond that, is not a matter in issue. Suffice it to say that as a result of compromise decree in an eviction suit, the only consequence would be ouster of tenant. So far as the tenanted building is concerned, it would continue to remain in the ambit of rent control statute. The vacant building would be available to RCEO and/or competent authority for being allotted to a prospective allottee, by following the procedure specified in the Rent Control Statute. However, in the meantime, landlord has a right under Section 16 of Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act 1972"), to move an application before RCE0 for getting the vacant building free from allotment by having it released in his favour. If such an application is made by landlord before any allotment is made by RCEO, the latter would be under statutory obligation first to decide the release application of landlord and then only he can proceed with allotment, if had rejected release application and not otherwise.

12. It has been settled long back by Full Bench decision of this Court in **Talib Hasan and another Vs. 1st Additional District Judge and others, 1986 (1) ARC 1** that no allotment in respect of a building covered by an application under Section 16(1)(b) of the Act can be made unless such an application is rejected. The right of a prospective allottee to have his application considered can, therefore, arise only after rejection of application of the landlord. The Full Bench also observed that neither the Act nor the Rules postulate any right in prospective allottee to file an objection against release application, not does the prospective allottee(s) have any right or interest in the property or claim against the landlord so as to enable him to any hearing in the disposal of release application. The Full Bench further observed that even after deletion of old Rule 13 (4), there is no change in the legal position of a prospective allottee to have any locus standi in the disposal of the release application. The Full Bench made it clear that a prospective allottee has only a contingent right which can be exercised only if the accommodation is not released in favour of the landlord. The relevant observations are :

"26. The right of a prospective allottee is not an absolute right. It is contingent upon, firstly, the accommodation being vacant and, secondly, the building being available for

allotment. Rule 13(4), as it stands, at present reinforces this conclusion. It provides that no allotment in respect of a building covered by an application under Section 16 (1) (b) shall be made unless such application is rejected. The right of a prospective allottee to have his application considered hence arise only after the rejection of the landlord's application under Section 16 (1) (b). A fortiori the prospective allottee comes into the picture only after the disposal of the landlord's application for release under Section 16 (1) (b), and, only if the same is rejected.

27. So far, therefore, as the scheme of the Act and the rules framed thereunder is concerned, the same, in our opinion, clearly points to the conclusion that a prospective allottee has no right of objection against the release application filed under Section 16 (1) (b). As mentioned above, this right to have this application considered for allotment accrues only after the rejection of the release application. Indeed the consideration of the applications for allotment is taken up only after the rejection of the application under Section 16 (1) (b). Neither the Act nor the rules framed thereunder thus postulate any right in a prospective allottee to file objections against the release application.

28. The prospective allottee has also no right or interest in the property or claim against the landlord so as to be entitled to any hearing in the disposal of the release application on general principles or doctrine of audi alteram partem.

29. We have reached the above conclusion on a systematic analysis of the statute even without the aid of the old Rule 13 (4). The old Rule 13 (4), in our opinion, which was dropped in 1977, merely recognized the long settled legal position as spelled out by series of decisions rendered on the construction and scope of Rule 5 framed under the 1947 Act. It was purely declaratory in nature and appears to have been inserted by way of reiteration of the existing legal position. Its deletion hence did not, in our considered view, bring about any change in the legal position, namely, that prospective allottees have no locus standi in the disposal of an application for release under Section 16 (1) (b)."

13. Similar view has also been taken by this Court in **Sushil Prakash And Others. vs. Dr. Sachindra Shekher And Others** (WRIT - A No. - 31574 of 2004 decided on 24.01.2013).

14. In the present case, earlier RCEO committed a manifest jurisdictional error by considering allotment application of prospective allottees alongwith release application of landlord and on the same day i.e. 05.12.1986 he rejected release application and passed order of allotment in favour of respondent no.2 Pooran Agarwal. The stage to proceed for considering a vacant building for allotment would have commenced only after rejection of release application. Without appreciating this aspect, RCEO committed manifest error and illegality and, therefore, it has rightly been set right by Revisional Court by allowing landlord's revision vide order dated 09.04.1987. The result of rejection of RCEO's order dated 05.12.1986 was, that, neither respondent no.2 could have enjoyed status of a tenant, occupying disputed building in accordance with law,

in view of Section 13 of Act, 1972, nor his occupation would be authorised and legal. This is clear declaration in Section 13 of Act 1972. The fact of setting aside order dated 05.12.1986 by the Revisional Court, would be as if such order never existed. It would vanish since inception, as if never existed. Therefore, respondent no.2 also could have no authority or validity attached to his occupation of building in dispute.

15. Moreover, it is also on record that despite compromise decree which was pending for execution, there is nothing on record to show that erstwhile tenant handed over vacant possession of the building at any point of time to the landlord. The prospective allottee(s) would have claimed a valid possession of the building allotted to him on rent either from the landlord or from his representative or with his consent from outgoing tenant or from the rent control authorities, as the case may be, but the outgoing tenant cannot hand over possession of the tenanted building directly to a prospective allottee, particularly when he stood a defaulter by not honouring Court decree and execution of compromise decree was already pending before Execution Court.

16. Be that as it may, so far as respondent no.2 is concerned, validity or authority of his possession of disputed building emanated from allotment order dated 05.12.1986 and once it is admitted that the said order has become a nullity in the eyes of law, having been set aside by superior Court, i.e., Revisional Court, in revision preferred under Section 18 of Act 1972, the very basis of claim of respondent no.2 disappeared. His possession immediately became unauthorised and illegal and no benefit or right or interest, whatsoever, can be claimed by respondent no.2 on the basis of an order which does not exist after it having been set aside by Revisional Court.

17. It is one thing to say that a stranger can file objection under Order 21 Rule 97 CPC but it is another thing to suggest that a stranger, though has no legal or otherwise right, interest etc. to keep disputed property in his possession, can be allowed to continue with such possession, and the admitted landlord, seeking execution of compromise decree, would be ousted from taking possession of disputed building either from outgoing tenant who was a party to the compromise decree or from any third person who stands in unauthorized and illegal possession thereof.

18. The Revisional Court in the present matter has not looked into the matter in a just, valid and correct perspective. Therefore, the impugned judgment cannot sustain.

19. On behalf of the respondents, this Court's decision in **Peer Bux Vs. Karam Chand 1963 ALJ 725** has been relied. This decision is based on the provisions of U.P. (Temporary) Control of Rent And Eviction Act, 1947, wherein, I do not find that the Court considered consequence and effect of specific provisions, like Section 13 available in Act 1972 and its effect, on the status of the person, occupying the premises, without any authority of law. With respect to provisions of Act, 1972, which are much in detail and specific now, the law is well settled, that if a person is occupying a premises unauthorisedly, his possession is illegal and the accommodation shall be deemed vacant. The aforesaid decision, therefore, would not

help respondent no.2, in the case in hand, in view of Specific provisions of Act 1972.

20. In the result, the writ petition succeeds and is allowed. Impugned order dated 17th October 2005, passed by Additional District Judge/Special Judge, SC/ST Act, Jhansi, is set aside. The order dated 19.11.2004, passed by the Execution Court is restored and affirmed.

21. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2013

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Service Single No.3802 of 2010

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

Counsel for the Petitioner:
Sri R.B. Srivastava, Sri D.P. Gupta

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226- Arrears of salary-petitioner working beldar-illegally retired- as per order of Tribunal-retirement order set-a-side-reinstated in service after consuming 6 yrs-worked till retirement-held-if willing to work but not allowed-to work petitioner can not be guilty for mistake of department-entitled for salary for the period not allowed to work.

Held: Para-7
In view of the several judgments mentioned above the court is of the considered view that the petitioner was illegally retired. He was working with unblemished career. He was willing to work but was denied to perform duties by the opposite parties-State. He was fit to work is also clear by the fact that when he was allowed to join after six years he performed his duties till his age of superannuation. He was deprived of work and consequent salary because of the mistake of the department. Petitioner can not be held responsible for the same. The petitioner deserves to get the salary of the period claimed i.e. from 1.10.1988 to 18.5.1994 on the scale which would have been applicable to him had he been continued in service, however, without any interest. It is ordered accordingly.

Case Law discussed:
1994 HVD(Alld.) Vol. 1 85; L.C.D. 1996 (14) 360; (2003) 21 LCD 610; (2009) 2 Supreme Court Cases 570

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. Heard Sri R.B. Srivastava learned counsel for the petitioner and learned Standing Counsel for the opposite parties.

2. Petitioner has prayed for a writ in the nature of certiorari quashing the letter no. 74/Camp./ST-M-8/1998 dated 3.11.1998, as contained in Annexure no. 7 to the writ petition.

3. The claim of the petitioner for arrears of salary for the period he has not worked has been rejected by this order. It is necessary for the proper adjudication of the case that some facts may be narrated.

4. The petitioner was appointed as 'Beldar' under the Executive Engineer, Provincial Division, Lok Nirman Vibhag, Fatehpur in the year 1968. Petitioner is an illiterate person. He has submitted that when his service book was prepared in 1972 his case was referred to the medical authority for verification of his date of birth. Petitioner says that his age was verified as 16.9.1938 but somehow it was entered in the service book as 16.9.1928. Therefore, the petitioner who-2- ought to

have been retired on 30.9.1998 was retired on 30.9.1988 after attaining the age of 60 years.

When the petitioner was retired he realized that he has been retired ten years earlier than his actual date of retirement. Petitioner field a Claim Petition No. 442/F/IV/90 (Ram Pal vs. State of U.P. & others) before the U.P. Public Services Tribunal which was finally decided on 12.4.1994 in favour of the petitioner The order passed by the tribunal is being quoted herein below:

"याचिका स्वीकार की जाती है। प्रतिपक्ष को यह निर्देश दिये जाते है कि 1938 को याची की जन्मतिथि मानते हुए उनके सेवानिवृत्ति पर विचार करें। और 1928 के आधार पर सेवानिवृत्ति के आदेश समाप्त किये जाते है। उभय पक्ष अपना–अपना वाद व्यय स्वयं वहन करेंगे।"

6. In compliance of the tribunal's order dated 12.4.1994 the petitioner was allowed to join his duties on 19.5.1994. Petitioner made a claim for payment of salary for the intervening period i.e. from 1.10.1988 to 18.5.1994. Initially the opposite parties were of the view that the payment for intervening period should be made to the petitioner but later on they took u-turn and did not make the payment. State also filed writ petition no. 2237(S/S) of 1997 (State vs. Ram Pal) by the State of U.P. against the order of tribunal was rejected by the High Court. The petitioner ultimately retired on 30.9.1998. The crucial question engaging the attention of this court in this writ petition is whether a person who has not worked during the period he was not in service will be entitled for salary of that period or not. In the present case the petitioner was illegally retired in the year 30.9.1998. He went into litigation and was finally reinstated on 19.5.1994 in pursuance of the tribunal's order. He successfully worked till the age of superannuation and finally retired in the year 1998. Petitioner claims that since he was illegally removed from service and he was willing to work, hence he should be given the salary of the said period in which he was not allowed to work and earn wages for his family by the illegal act / mistake of the department. Petitioner has relied upon following judgments :

i. 1994 HVD (Alld.) Vol. 1 85 (Gulab Chandra Srivastava vs. State of U.P. & others).

"4. It is clear from perusal of the affidavits filed by the parties that neither the petitioner's appointment was challenged nor was he a party in those petitions and further that his appointment order as A.D.G.C. has not been set aside so far by any Court. That apart, even the Government has not cancelled his appointment. Explanation offered in the counter affidavit to the effect that in view of judgment in the aforesaid writ petitions the petitioner was not permitted ot work, is unsustainable. When his appointment has neither been set aside nor cancelled by the court or Government it was incumbent on the respondents to permit him to work. But as the period for which the petitioner was appointed has come to an end on 30.11.1993 no direction can be given to the respondents to permit him to work as A.D.G.C. But he is entitled to get amount of retainer-ship at the prescribed rate. When employee is willing to work but he is not permitted to do so by the employer without any fault on the part of the employee is entitled to to the payment of salary by the employer and the principle of 'nowork no pay' does not apply to such a case. This principle is fully applicable to the instant case. The respondents, as such, should pay

to the petitioner retainer-ship at the prescribed rate."

ii. L.C.D. 1996 (14) 360 (Ajab Singh vs. U.P. State Public Services Tribunal.

"No counter affidavit has been filed till today, i.e. 9.1.1996. In my view, it is settled law that if the termination order is set aside by a court of law, the employee is entitled for the salary and allowances for the intervening period. In the present case, termination order of the petitioner has been set aside by State Public Services Tribunal by itws judgment and order dated 16.12.1993. It has been held by the Tribunal that :-

"...It is clear from the record that no show cause notice was given to the petitoner nor any opportunity was given to explain his position. In these circumstances, it is clear that the order of cessation of services of the petitioner was wholly illegal and is not sustainable in the eyes of law.

The petitioner is not in service since 1980. He shall be deemed to be in continuous service as the order of cessation of service is liable to be quashed."

iii. (2003) 21 LCD 610 (Radhey Kant Khare vs. U.P. Coop. Sugar Factories Federation Ltd.

"In our opinion the appellant was not given proper opportunity of hearing and no oral enquiry as required by law was held. Hence, the dismissal order dated 26.7.1985 is wholly illegal and is hereby quashed. The judgment of the learned Single Judge dated 11.10.1999 is also set aside. The petition is allowed. The petitioner shall be reinstated forthwith. The normal rule is that when the dismissal order is set aside reinstatement with full back wages has to be granted vide Kesoram Cotton Mills v. Gangadhar 1963 II LLJ 371 (SC), M.L. Bose v. Its Employees AIR 1961 SC 1178 etc. We direct that the petitioner shall be reinstated within a month of production of a certified copy of this order before the authority concerned, and he must be given full back wages from 26.7.1985 i.e. the date of dismissal to the date of reinstatement in two months from today along with interest at 10% per annum."

iv.(2007) 7 Supreme Court Cases 689 (Commissioner, Karnataka Housing Board v. C. Muddaiah. "34. We are conscious and mindful that even in absence of statutory provision, normal rule is "no work no pay". In appropriate cases, however, a court of law may , nay must, take into account all the facts in their entirely and pass an appropriate order in consonance with law. The court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so. The court may in the circumstances, direct the authority to grant him all benefits considering " as if he had worked". It, therefore, can not be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a court of law and if such directions are issued by a court, the authority can ignore them even if they had been finally confirmed by the Apex Court of the country (as has been done in the present case). The bald contention of the appellant Board, therefore, has no substance and must be rejected."

v. (2009) 2 Supreme Court Cases 570 (Roop Singh Negi vs. Punjab National Bank & others).

"24. For the aforementioned reasons, the judgment of thee High Court is set aside. The appeal is allowed with costs and the appellant is directed to be reinstated with full back wages. Counsel's fee assessed at Rs. 25,000/-."

7. In view of the several judgments mentioned above the court is of the considered view that the petitioner was illegally retired. He was working with unblemished career. He was willing to work but was denied to perform duties by the opposite parties-State. He was fit to work is also clear by the fact that when he was allowed to join after six years he performed his duties till his age of superannuation. He was deprived of work and consequent salary because of the mistake of the department. Petitioner can not be held responsible for the same. The petitioner deserves to get the salary of the period claimed i.e. from 1.10.1988 to 18.5.1994 on the scale which would have been applicable to him had he been continued in service, however, without any interest. It is ordered accordingly.

8. Writ Petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2012

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE MANOJ MISRA, J.

Civil Misc. Writ Petition No. 5037 Of 2012

Rakesh Dhar Tripathi ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Sharma
Sri Shashi Nandan, Sri Vishnu Gupta

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226- Petition for 'Y' category security-petitioner happend to be minister for higher education, P.W.D. minister, apart from several political activities-earlier provided 'Y' security-withdraw by state government-argument that before withdrawing 'Y' security opportunity of hearing must-held-misconceived-on threat of life two guards and one shadow already provided-family members possess so many fire arms license-state meant for protection of all cirizen-'Y' security having financial burden of Rs. two lacs per month on public exchequer can not be imposed-petition dismissed.

Held: Para-12
We do not find any substance in the contention of the counsel for the petitioner that a person who has been given 'Y' class security must be given an opportunity of hearing before it was withdrawn, or that before taking decision to withdraw the 'Y' class security, the threat perception should be assessed by the State Government. Ordinarily every citizen, is entitled to security, and for that purpose entire security set up is established. Special security is given on the threat perception assessed by a high level committee on the reports submitted by the concerned police authorities. The petitioner was not provided 'Y' class security cover, on assessment of any such threat perception.

Case Law discussed:
2008 (1) ADJ 575 (DB)

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

1. We have heard Sri Shashi Nandan, Senior Advocate, assisted by Sri Vishnu Gupta for the petitioner. Sri V.K. Singh, Additional Advocate General assisted by learned standing counsel appears for the State respondents.

2. The petitioner is aggrieved by withdrawal of 'Y' Class security cover provided to him by the State Government, while he was serving in the Government as Cabinet Minister. The security cover provided to him on 3.2.2008, has been withdrawn on 25.12.2011. He has prayed for the following relief: -

"i) issue a writ, order or direction in the nature of mandamus commanding respondents to provide 'Y' class security cover to the petitioner

ii) issue any other writ, order or direction to which the petitioner might be found entitle in the facts and circumstances of the case."

3. Sri Shashi Nandan submits that the petitioner was President of Allahabad University. He was thrice elected as Member of Legislative Assembly, in the year 1985, 1989 and 1996 from Handia constituency in District Allahabad. He has been Minister of State for Higher Education in the cabinet headed by Sri Mulayam Singh Yadav as Chief Minister in the year 1990-91. He was also State Minister for Higher Education and also the State Minister for Public Works Department during the period 1996-2002 in the then Bhartiya Janta Party Government. He was again elected as Member of Legislative Assembly in 2007 from Handia constituency of Allahabad District, and was Cabinet Minister for Higher Education in the Government formed by Bahujan Samaj Party, till 24.12.2011. He is also member of various educational, social and other organizations and as such protection to the life of the petitioner is necessary and essential for the interest of the society at large, as well as for the members of the family of the petitioner.

4. Sri Shashi Nandan has pointed to the averments made in para nos. 4 to 8 of the writ petition, classifying threat perception, quoted as below.

"4. That Vijay Mishra M.L.A. from Gyanpur is resident of village Khaptiha, Block Saidabad, Tehsil and P.S. Handia which is adjoining village to petitioner's native village Chaur Badera, P.S. Handia, Allahabad. Vijay Mishra, is considere as Mafia Don having nexus with other Mafia Dons. He is an accused in attempt to murder Nand Gopal Gupta, Cabinet Minister In Mayawati Government in 2010. He is also accused in the murder of Sri Rameshwar Pandey the brother of M.P., Bhadohi Sri Gorakh Nath Pandey. He is facing criminal charges in heinous crimes in about 62 criminal cases. Ram Chandra Mishra alias Lal Saheb is brother of aforesaid Vijay Mishra, who is a dreaded criminal involved in a number of heinous crimes and they have formed gang of dreaded criminals. A list of case in which Vijay Mishra is involved is annexed herewith as Annexure No.1 to this writ petition.

5. That murder of Dr. Dharni Dhar Trpathi the real brother of the petitioner was committed in 1980 and in that murder case Vijay Mishra and others were named as accused. The murder trial is still pending against the above mentioned Vijay Mishra.

During election of U.P. Legislative Assembly in 1985 attack to kill the petitioner was made and in that attack there were 30 to 40 marks of bullets on the vehicle in which petitioner was traveling and on other vehicles accompanying him and in the aforesaid incident petitioner shadow was also injured. The aforementioned attack was made by Vijay Mishra and his brother and other dreaded criminals of their gang. In the above

attack one Ram Sajiwan who was accompanying the petitioner was shot dead on the spot at Khaptiha polling centre and his body was burnt by pouring petrol on the body by Vijay Mishra and others.

Attempt to commit murder of the petitioner was again made in 1988 and 2002.

A true copy of various reports published in Hindi Daily News papers giving details of crimes committed by Vijay Mishra and others are collectively annexed herewith and marked as Annexure No.2 to this writ petition.

6. That on 24.2.2006 during election of Block Pramuh attempt to kill the petitioner's family members was made in respect of which F.I.Rs was lodged against aforementioned Vijay Mishra, Ram Chandra Mishra alias Lal Saheb and other persons of their gang. In the above incident indiscriminate firing was made on the vehicle of Narendra Kumar Tripathi alias Munna Tripathi vehicle. However by the grace of God none was killed.

7. That the aforementioned Vijay Mishra also gave contract to kill the petitioner several time complaints were made by the petitioner concern authority and the Government from time to time. True copies of some of complaints are collectively annexed herewith as Annexure No.3 to this writ petition.

8. That there is serious threats to the life of the petitioner and his family members from aforementioned Vijay Mishra, Ram Chandra Mishra alias Lal Saheb and their associates dreaded criminals."

5. Sri Shashi Nandan submits that the petitioner had made several representations regarding threat to his life and on which enquiries were made from time to time by the Senior Superintendent of Police, Allahabad, and it was reported by the District Level Committee, constituted as per Government Order dated 25.4.2001, that there is serious, threat to the life of the petitioner and his family members. He was accordingly given security since 1980. The security was also provided at the residence of the petitioner at Allahabad, and that taking into consideration the serious threat to the life of the petitioner and his family members, the Government provided 'Y 'Class security cover to the petitioner vide order dated 13.2.2008.

6. It is submitted that the State Government has arbitrarily, illegally and all of sudden withdrawn the 'Y' class security cover of the petitioner on 25.12.2011, on the day when he was relieved as Cabinet Minister of the Government of U.P. He submits that no report was obtained to review threat perception of the petitioner, and his family members.

7. Sri V.K. Singh, learned Additional Advocate General appearing for the State respondents submits that the petitioner has been provided security with one shadow and two gunners. The petitioner, and his family members are in possession of several arm licences, which have been detailed in para 16 of the counter affidavit of Sri Ram Jeet Ram, Deputy Superintendent of Police (Intelligence), Allahabad, as follows.

"16. That in reply to the contents of para 15 of the writ petition it is submitted

that the order has been passed on 25.11.2011 and same is well in the knowledge of the petitioner, however, he has not annexed the same. It is further stated that the following security and arm licenses have been given to the petitioner and his family members:-

1 Two Gunner/shadow on full Government expenses.
(a) Petitioner possessed one rifle 315 Bore
(b) One revolver .32 Bore
2) Brother of the petitioner
(a) Rifle 315 Bore\
(b) DBBL Gun Bore
(c) Revolver .32 Bore
3) Real Nephew of the petitioner
(a) Rifle 315 Bore
(b) Revolver .32 Bore

The aforesaid security and arm license fully covers the need of the petitioner alleged by him."

8. Sri V.K. Singh, submits that the petitioner in his representations, annexed with the writ petition, dated 17.3.2002 and 21.3.2002, has always requested for one gunner and two guards, to protect his life. By his representation dated 25.4.2006 also, he has requested for saving his life and family members from the persons, who were enimical to him. In his representation dated 29.12.2011, the petitioner, after he ceased to be the Cabinet Minister of the State, has again referred to the old story of a murder in his family in 1980, and an attempt on his life in the years 1985 and 1988, as well as attempt made on him during his assembly elections in the year 2003, and has requested for restoring 'Y' class security.

9. It is submitted on behalf of the State that 'Z' plus or 'Z' category security is provided only by the Central Government, and 'Y' class or 'X' class security is provided by the State Government. The petitioner was designated as Cabinet Minister, as such he was given 'Y' Class security considering his status and business during the period he was Minister. He submits that 'Y' category security, costs rupees two lacs per month to the public exchequer. Such security cover is ordinarily given to persons having serious threat perception and also Cabinet Minister in the State Government. Since the petitioner was no longer Cabinet Minister, the 'Y' class security was withdrawn, but two guards and one shadow have been provided to him from Government exchequer for his security. That apart, various gun licences have been issued to the petitioner, and his family members. He further submits that at present there is hardly any threat perception to the petitioner, in view of the fact that the person from whom threat to life is claimed, is in jail since long, and is lodged in district jail Meerut.

10. In Gayur Hasan Vs. State of U.P and others [2008 (1) ADJ 575 (DB)], a Division Bench of the Court has considered in detail the provisions and security to the citizens of the country. The Court found that acquiring facility of gunner/security personnel, has become a fashion, denoting status symbol. Just because a person is elected as a representative of people, and he cannot be said to have threat perception to his life from the people who have elected him unless there is something more than than that. A high level committee constituted at district level, under the Government Order dated 27.2.2007, has to consider threat perception, on the representation given by him, and in such case threat

perception can be assessed and security be either provided or rejected. In para 14 of the judgment, the Court observed as follows:-

14. Before parting, however, we find it obligatory on our part to record our dissatisfaction and anguish on the system of providing gunners/security personnels to individuals in the manner it has been implemented while the entire State is reeling under a very difficult law and order situation, not of ordinary kind but of high risk due to large scale terrorist and other activists movement and operations. The State is under a constitutional obligation to provide adequate security to each and every individual resident irrespective of his caste, creed, religion, status, position etc. Life of the most ordinary person is equally important as that of a person holding a high position in the State. We cannot treat ordinary people like ginny pigs whose death only results in number but it is a loss to the nation. Every individual, howsoever, ordinary man he is, is an asset to the State. It is the most pious and solemn obligation of the State to take all possible steps to protect him. The State must inspire and instil full confidence in every individual that his life and liberty is secured from all kinds of scrupulous activities and he can enjoy his constitutional right enshrined under Article 21 without any extra risk, fear etc. The population of the State of U.P., when is already exceeding 20 crores, the number of people employed in security forces namely Police Force is extremely inadequate. As we are informed the entire police force in the State of U.P., has less than 2 lacs of people. Meaning thereby on every 1000 and more persons only one police personnel is available to take care of their security. In such circumstances, if the State withdraw a high number of security personnels for the purpose of providing individual security cover that would be like putting the common and ordinary man at enhanced risk to his life and liberty at the cost of individual security. This can neither be appreciated nor is consistent with the constitutional scheme which treats every individual equal so far as the question of his life and liberty is concerned. Even a little Indian, as said by Hon'ble Krishna Iyer, J is entitled to be treated at par with the mightiest one. The individual security may be necessary in a very few exceptional cases but it cannot be at the cost of collective security of the common man."

11. In the present case on the request of the petitioner and on the threat perception, as it was assessed by the State, the petitioner was provided security with two security guards and one shadow. He was not provided with 'Y' class security before 31.3.2008, even when he was Cabinet Minister in the previous Governments of Samajwadi Party and Bhartiya Janta Party. It is surprising as to how the petitioner, in the present constitutional democratic set up, is manages to get berth in Cabinet in the Government of all the parties. Be that as it may, there is absolutely nothing to show that the petitioner was given 'Y" class security cover prior to 2008, on the assessment of threat perception on his life and on the life of his family members. For that purpose he was already given security of two guards and one shadow, on Government expenses. The 'Y' class security cover was given to him, as a Cabinet Minister of the State. It was later withdrawn just before he ceased to hold the post.

12. We do not find any substance in the contention of the counsel for the

petitioner that a person who has been given 'Y' class security must be given an opportunity of hearing before it was withdrawn, or that before taking decision to withdraw the 'Y' class security, the threat perception should be assessed by the State Government. Ordinarily every citizen, is entitled to security, and for that purpose entire security set up is established. Special security is given on the threat perception assessed by a high level committee on the reports submitted by the concerned police authorities. The petitioner was not provided 'Y' class security cover, on assessment of any such threat perception.

13. In the present case, the petitioner has already been given sufficient security and his family possesses a number of fire arm licenses. The 'Y' class security involves extra-ordinary financial burden on the State Government. The State funds collected by imposing taxes from citizens of the State are meant for the development and security of all the citizens and are not the property of any individual to be claimed as a matter of right.

14. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.04.2013.

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Writ Petition No. 5777(M/S) Of 2012

Irfan ..Petitioner
Versus
State of U.P. and others ...Opp. Parties.

Counsel for the Petitioner:
Sri Vinod Kumar Singh

Counsel for the Respondents:
Govt. Advocate

Indian Forest Act, 1927- 52(A)-Release of vehicle-involved in Transporting Sakhu, Sagon wood-without having valid authority-vehicle driven by the owner of vehicle itself-rightly confiscated- no interference call for-petition dismissed.

Held: Para-16
The above facts leave no room to doubt that petitioner was indulged in transporting the forest produce illegally by means of a Mahendra Pickup vehicle having registration no. UP 40 C 8561 which he at the time of seizure was driving and is also the owner of the same. Thus the same rightly confiscated. The petition has no merit and deserves to be dismissed.

Case Law discussed:
Criminal Revision No. 279 of 1994; 1990 Crl L J; (2004) 4 SCC

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

1. This writ petition under Article 226 of the Constitution of Indian has been filed by the petitioner claiming the reliefs to issue a writ order or direction in the nature of CERTIORARI to quash the impugned orders dated 20.07.2012 passed by the opposite party no. 2 and impugned confiscation order dated 11.07.2011 passed by the opposite party no.3. And further to issue, a writ order or direction in the nature of mandamus commanding the opposite party no. 3 to release the vehicle in question.

2. The brief facts for deciding this writ petition are that a vehicle Mahendra Pickup having registration no. UP 40-C 8561 was seized by the Forest Officials on 18.3.2011 . This vehicle was loaded with cut wood of 'Sagoon' and 'Sakhu'. The Forester of

Bahraich range at 6.30 AM intercepted this vehicle when it was coming from Nanpara side. When documents of wood were asked from the driver of the vehicle, he could not able to show any papers or authority to transport the wood. The Forest Officials took the vehicle along with the driver to Range Office, Bahraich and given in the custody of staff of the range after preparing a receipt. The information of this seizure was given to Divisional Forest Officer , Bahrich Range and Chief Judicial Magistrate , Bahraich. The wood loaded on the aforesaid vehicle was suspected to be of reserve forest. Thereafter, proceedings for its confiscation along with confiscation of the vehicle were sought to be initiated by Divisional Forest Officer, Bahraich vide its letter dated 18.3.2011 and requested to the Authorised Officer/Prescribed Authority for confiscation of wood and vehicle. Consequently the confiscation proceedings were started.

3. After making inquiries about the owner of the vehicle notices were issued to file the objections till 6.4.2011. The owner of the vehicle filed his objection on 28.3.2011. The owner of the vehicle is the present petitioner. After hearing both the sides, Prescribed Authority found that the truck was involved in transporting illegally the forest produced, the wood of Sakhu and Sagwan. The defence taken by owner of vehicle that wood belongs to saw mill of Nizamudin, the Proprietor of Nizamudin Timber Merchant, Gujrahana, Motipur, Bahraich and owned by several persons named by him was found false. The alleged transport permit produced by the owner of vehicle was not found to be in respect of wood which was seized by the Forest Officials. The description of wood mentioned in the transport permit produced by the owner of vehicle was not tallying with the wood seized. The forest officials further found that fake documents were prepared in the form of invoice and reasons for that has also been assigned in the order of confiscation. It was also found that the owner and driver of the vehicle was one and the same person, who could not produce any document at the time of seizure and in the aforesaid circumstances it cannot be said that he was not aware with the illegal transportation of wood,which certainly comes within the definition of forest produced and the same was seized within the forest area. In view of Section 52(A) of Indian Forest Act, 1927, confiscation order dated 11.07.2011 was passed of truck and wood. Owner of the vehicle preferred an appeal before the State Government. The appeal was also dismissed by order dated 20.07.2012. Aggrieved by the aforesaid orders, this writ petition has been preferred.

4. It has been contended by the learned counsel for the petitioner that order of confiscation could not be passed unless it is shown that the vehicle was being used for illegal transportation or for other illegal purpose or for any contravention of provision of Indian Forest Act or Rules or Regulation made thereunder. It was also contended that recovery memo was prepared on 21.3.2011 but the property was seized on 18.3.2011. This by itself is sufficient to be quash the proceeding of confiscation. The learned counsel for the petitioner also relied upon a judgment passed by this court in **Criminal Revision No. 279 of 1994 (Abdul Humid Vs. State of U.P.) decided on 8.12.1994**. In this judgment this court after relying upon the judgment in **State of U.P. And others Vs. Sri Ram Babu 1990 Crl L J, page 87** has held that it is open to the Magistrate to pass order

under section 457 Cr.P.C. for disposal of property even if the property was seized by the Forest Officials.

5. The counter affidavit has been filed on behalf of opposite parties denying the allegation made in the petition and supported the orders impugned. Rejoinder affidavit has also been filed denying the allegation in the counter affidavit and the allegation made in the petition were reiterated.

6. The learned A.G.A. Supported the order passed by the authorities for confiscating the vehicle.

7. Chapter IX of Indian Forest Act deals with penalties and procedure. Section 52 (A) relates to procedure on Seizure. Section 52(D) bar the jurisdiction to be exercised by other authorities in case of seizure of property under section 52 of the Act. Section 53 deals with the release of the property seized under section 52. The provisions of Chapter IX were substantially amended w.e.f. 16.4.2001 by U.P. Act No. 1 of 2001.

8. Section 52(A), 52(B), 52(C), 52(D), 53, 54, 55 and 56 are relevant for deciding this petition. Therefore, they are being reproduced herein below:

"52-A. Procedure on seizure.-(1) Notwithstanding anything contained in this Act or any other law for the time being in force where a forest office is believed to have been committed in respect of any forest produce, which is the property of the State Government. The Officer seizing the property under sub-section (1) of Section 52 shall, without unreasonable delay, produce it together with all the tools, boats vehicles, cattle, ropes, chains and other articles used in committing the offence, before an officer, not below the rank of a Divisional Forest Officer, authorised by the State Government in this behalf, who may, for reasons to be recorded, make an order in writing with regard to custody, possession, delivery, disposal or distribution of such property, and in case of tools, boats, vehicles, cattle, ropes, chains and other articles, may also confiscate them.

(2) The authorised officer shall, without any undue delay, forward a copy of the order made under sub-section (1)to his official superior.

(3) Where the authorised officer passing an order under sub- section (1) if of the opinion that the property is subject to speedy and natural decay he may order the property or any part thereof to be sold by public auction and may deal with the proceeds as he would have dealt with such property if it had not been sold and shall report about every such sale to his official superior.

(4) No order under sub-section (1) shall be made without giving notice, in writing, to the person from whom the property is seized, and to any other person who may appear to the authorised officer to have some interest in such property:

Provided that in an order confiscation a vehicle, when the offender is not traceable, a notice in writing to the registered owner thereof and considering his objections if any will suffice.

(5) No order of confiscation of any tool, boat, vehicle, cattle rope, chain or other article shall be made if any person referred to in sub-section (4) proves to the satisfaction of the authorised officer that any such tool, boat, vehicle, cattle rope, chain or other article was used without his

knowledge or connivance or without the knowledge or connivance of his servant or agent, as the case may be, and that all reasonable precautions had been taken against use of the objects aforesaid for the commission of the forest offence.

52-B. Appeal.-Any person aggrieved by an order of confiscation may, within thirty days of the date of communication to him of such order, prefer an appeal to the State Government and the State Government shall, after giving an opportunity of being heard to the appellant and the authorised officer pass such order as it may, think fit confirming, modifying or annulling the order appealed against and the order of the State Government shall be final.

52-C. Order of confiscation not to prevent any other punishment.- No order of confiscation under Section 52-A or 52.B shall prevent the indication of any punishment to which the person affected thereby may be liable under this Act.

52-D. Bar of jurisdiction in certain cases. - Notwithstanding anything to the contrary contained in this Act or in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, whenever any forest produce belonging to the State Government together with any tool, boat, vehicle, cattle, rope, chain or other article is seized under sub-section (1) of Section 52, the authorised officer under section 52-A or the State Government under Section52-B shall have jurisdiction, to the exclusion of every other officer, court, Tribunal or authority, to make orders with regard to the custody, possession, delivery, disposal or distribution of the property.

53. Power to release property seized under section 52.- Any Forest Officer of a rank not inferior to that of a Ranger who, or whose subordinate, has seized any tools, boats, (vehicles, cattle ropes, chains or other articles) (under section 52, may subject to Section 61-G release) the same on the execution by the owner thereof of a bond for the production of the property so released, if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made (except in respect of cases falling under section 52-A for which the procedure laid down in the section shall be followed).

54. Procedure thereupon.-Upon the receipt of any such report, the Magistrate shall, with all convenient despatch, take such measures as may be necessary for the arrest and trial of the offender and the disposal of the property according to law.

55. Forest-produce, tools, etc., when liable to confiscation.-(1) All timber or forest-produce which is not the property of Government and in respect of which a forest-offence has been committed, and all tools, boats, (vehicles, cattle, ropes, chains and other articles used in committing such forest-offence), (shall subject to section 61-G, be liable) to confiscation.

(2) Such confiscation may be in addition to any other punishment prescribed for such offence.

56. Disposal on conclusion of trial for forest- offence, of produce in respect of which it was committed.-When the trial of any forest- offence is concluded, any forest-produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by a Forest Officer, and, in any other case, may be disposed of in such manner as the court may direct."

9. Section 52A provides the procedure on seizure. The property seized under section 52 would be subject to confiscation. Section 55 deals with those

forest produce which is not the property of the government and in respect of forest offence, which has been committed and all tools, boats, vehicles, cattle, ropes, chains and other articles used in committing the forest offence shall subject to section 61G be liable to be confiscated. The properties confiscated shall become the property of the government under section 55. The ownership of that would be vested in the government free from all encumbrances subject to result of an appeal preferred under section 52(B) or in case no appeal, after expiry of the period of appeal or revision. In case proceedings under section 52(A) once started, the power to release the property seized will not be governed by section 53 and 61 of the Act. The Forest Officer, as mentioned in section 53 or officer empowered by State Government under section 61 have a right to release the property seized subject to such condition and on executing the bond by the owner thereof for the production of the property so released before the Magistrate having jurisdiction to try the offence. But it clearly provides that this power of release not to be exercised in case proceedings under section 52A for confiscation has been started. The scheme provided under Chapter IX of the Indian Forest Act prohibits the exercise of jurisdiction by regular criminal courts in the matter of release of the property seized. In view of the aforesaid provisions of law this petition has to be disposed of.

10. In this case the order of confiscation made by the forest authorities was confirmed in appeal. The wood which was seized by the Forest Officer was kept in a vehicle which was being driven by its owner. Admittedly the wood transported by the truck did not claimed to be his own by the owner of the truck. He was not having any papers authorising him to transport the wood when the seizure was made. However, during the course of hearing under section 52A he pleaded some papers to show that the wood transported by him belongs to sawmill of Nizamudin, but the papers produced by Nizamudin were not found to be connected with the wood seized by the Forest Officer, because the same was not tallying with measurement given in the transit permit produced by the petitioner during the course of hearing of the confiscation proceedings. It was also found that the wood recovered was not separated in pieces by use of mechine but it was hand made separated wood. That too was sufficient to establish that it was not separated wood by use of sawmill of Nizamudin. It was also found by the authorities that the documents produced before them have contained the signature of Nizamuddin in Hindi but when Nizamuddin was examined before him he signed in Urdu. It is also important to notice that the vouchers which have been produced by the petitioner during proceedings 52-A relate to Ram Karan ,Babu and Farid Ali, who were said to be the purchaser of the wood seized, but they have not been examined. The other person Kishan Kumar, who is shown to be the owner of the part of the wood was also not examined. The receipt in favour of Kishan Kumar showing purchase of wood by him from Muna Lal Yadav , but he was also not examined.

11. The findings of fact recorded by Prescribed Authority were confirmed in appeal. In these circumstance it is established beyond doubt that vehicle in question was being used for illegally transporting the aforesaid wood, which

admittedly, was not belonging to the petitioner or any person as stated by the petitioner and as such the truck was rightly confiscated.

12. The arguments raised from the side of the petitioner that recovery memo was prepared on 21.3.2011, but the property was seized on 18.3.2011 has no legs to stand, because the recovery memo was prepared on the basis of receipt no. 060107 dated 18.3.2011 which was prepared at the time of receipt of seized goods by staff at Range office and recovery memo was virtually a formal document evidencing the recovery.

13. At last, the counsel for the petitioner requested for conditional release of truck. The benefit of word 'without knowledge' could not be extended to the present petitioner because he is not only driver of the vehicle but also the owner of vehicle. The judgment relied upon by the learned counsel for the petitioner in **Criminal Revision No. 279 of 1994 (Abdul Humid Vs. State of U.P.)**, is not of any help because this deals with the release of vehicle which was seized under section 52 of the Forest Act and by that time proceeding of confiscation was not there. The Magistrate released the vehicle in view of Section 457 of Criminal Procedure Code as the seizure was also reported to the Magistrate. However the law relied upon by the learned Counsel for the petitioner was prior to amendment by U.P.Act No.1 of 2001, which came into effect with 16.4.2001. Hence the law cited by the learned Counsel for the petitioner does not extend any help to the petitioner.

14. In the case in hand the proceeding of confiscation has been initiated forthwith and concluded so the Magistrate or any other authority was not having any power to release the vehicle. I fortified my view with the judgments of Apex Court reported in **State of West Bengal and Ors. Vs. Sujit Kumar Rana 2004 (4) SCC page 129 and Mohd. Ashique Vs. State of Maharastra, 2009 page 368**.

15. Considering all these facts, it was rightly concluded by the Prescribed Authoritiy and by Appellate Authority that the defence taken by the petitioner was not sustainable and was also rightly found to be involved in illegally transporting the wood and accordingly the same being a forest produce belonging to the government along with vehicle by which it was being transported as contained in section 69, which reads as under :

"69. Presumption that forest-produce belongs to Government.- When in any proceedings taken under this Act, or in consequence of anything done under this Act, a question arises as to whether any forest-produce is the property of the Government, such produce shall be presumed to be the property of the Government untill the contrary is proved."

16. The above facts leave no room to doubt that petitioner was indulged in transporting the forest produce illegally by means of a Mahendra Pickup vehicle having registration no. UP 40 C 8561 which he at the time of seizure was driving and is also the owner of the same. Thus the same rightly confiscated. The petition has no merit and deserves to be dismissed.

17. No other point was pressed or argued by the counsel for the parties

18. The petition lacks merit and is accordingly dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.04.2013

BEFORE
THE HON'BLE ANIL KUMAR SHARMA, J.

Criminal Appeal No. 6338 Of 2009

Preetam Singh ...Appellant
Versus
State of U.P. Opp. Party

Counsel for the Appellant:
Sri P.S. Pundir
Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section 446(3)- application to refund security amount-rejected by trail court-surety bond of appellant forfeited as the accused absconded-appellant deposited surety amount without protest-after being arrest of accused person-application for refund-held misconceived without challenge of forfeiture order-appeal dismissed.

Held: Para-9
It is pertinent to note here that the appellant did not challenge the order passed by the trial court on 7.3.2008, whereby their surety bonds were forfeited by the trial court. The appellant can not challenge that order in this appeal, because they have voluntarily deposited the amount of penalty in the Court on 19.4.2008.

Case Law discussed:
2008(63) ACC 265

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

1. Heard learned counsel for the appellant, learned AGA for the State and perused the impugned order as also the papers filed along with the appeal.

2. The appellant challenges the order dated 2.9.2009, passed by learned Addl. Sessions Judge Court No.2, Muzaffarnagar in Criminal Misc. Case No. 11 of 2008, State Vs. Preetam Singh under section 446 Cr.P.C. by which his application for refund of surety amount had been rejected.

3. It appears that the appellant stood surety for accused Maisar alias Rameshwar for a sum of Rs. 30,000/-. The accused absconded, the surety bond of the appellant was forfeited and recovery warrant for the aforesaid amount was issued against him. This amount was deposited by the appellant before the trial court on 19.4.2008, through an application for permission to deposit the amount. Since the amount was paid by both the sureties under section 446 Cr.P.C. the proceedings were closed and the file was consigned to the record room. On 25.8.2008, the appellant produced the accused in the Court in S.T. No. 875 of 2008 and accordingly he was sent to jail. The same day the appellant filed an application stating that since he has produced the accused the amount of penalty deposited by him be refunded, but the same was rejected by the trial court through the impugned order dated 2.9.2009.

4. Learned AGA has argued that the instant appeal is not maintainable as the impugned order is not an order passed by the trial court under section 446 Cr.P.C.

5. Per contra, learned counsel for the appellant has submitted that the application of the appellant is under section 446 (3) Cr.P.C., so the appeal is maintainable.

6. Perusal of papers filed by the appellant shows that it is not disputed that the appellant stood surety for a sum of Rs. 30,000/- for accused Maisar alias Rameshwar

pertaining to a case under section 147,148, 452, 504, 323, 308 IPC and Section 3 (1) (x) of SC/ST Act. It is also not disputed that accused absconded and the surety bonds of the appellant were forfeited by the trial court vide order dated 7.3.2008. The appellant has not filed complete order sheet of S.T. 875 of 2007. Another accused Km. Pinki was in jail and co-accused Km. Pooja was also absent. The wife of accused Maisar complained to the Court on 7.8.1988 that her husband was kidnapped by his sureties and he is in their possession. The order dated 7.8.2008 further reveals that the sureties of accused Maisar had filed an application on 14.9.2007 for their discharge but the same was rejected by the Court on account of their absence. It means that accused Maisar was not appearing in the Court much before on 4.9.2007. The appellant has also not filed the application dated 19.8.2008, whereby he sought permission of the Court to deposit the amount of penalty amouting to Rs. 30,000/-. It appears that he has acquiesced with the order of imposing penalty against him and without protest he deposited the same in the Court. After deposit of the penalty amount the proceedings under section 446 Cr.P.C. were closed and the file was consigned to the record room.

7. No doubt Section 446 (3) Cr.P.C. provides that "the Court may after recording its reasons for doing so, remit any portion of penalty mentioned and enforce payment in part only." This specific provision stipulates that the prayer for remission can be made before depositing the amount of penalty. The word 'remit' means to transmit (money) in payment; to refrain from exacting (tax or penalty for example) counsel; to pardon, forgive to put off, postpone, to diminish, abate. The word remit can not be construed to mean refund. Had there been any intention of the Legislature that the amount of penalty deposited by the surety voluntarily without protest can be refunded under the provisions of Section 446 Cr.P.C. then the word 'refund' would have also found place along with word 'remit' in alternative. In these circumstances it can not be said that the impugned order falls within the purview of Section 446 (3) Cr.P.C.

8. Learned counsel for the appellant placed reliance on the case of **Jagnnath and another Vs. State of U.P. 2008 (63) ACC 265**. In this case the sureties before forfeiture of their surety bonds filed application before the Court that they have got the accused arrested by the police, so they should be discharged. This application was rejected by the trial court. This Court in appeal by the appellants directed the trial court to reconsider the application of the appellant and pass suitable order thereon on merit in accordance with the requirements of Section 446 (1) Cr.P.C. This case on account of distinguished facts does not help the case of the appellant at all.

9. It is pertinent to note here that the appellant did not challenge the order passed by the trial court on 7.3.2008, whereby their surety bonds were forfeited by the trial court. The appellant can not challenge that order in this appeal, because they have voluntarily deposited the amount of penalty in the Court on 19.4.2008.

10. Learned counsel for the appellant could not inform the Court as to since when accused Maisar alias Rameshwar was absent from the Court on the date fixed in the case.

11. In view of above discussion, in my opinion, the application of the

appellant for refund of penalty amount has been rightly rejected by the trial court through the impugned order. The appeal sans merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.04.2013

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No. 8363 Of 2010

Surya Prakash Tiwari And Ors.Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
Sri Ramesh Pandey

Counsel for the Respondent:
C.S.C.

U.P. Irrigation Department Regularization of Part Time Tube well operators on post of Tube -well operators Rules 1996-as amended by amendment Rules 2008 notifed on 05.05.08- Rule 4-Regularization of part time tube-well operators-regular selection list notified on 09.09.1994-appointment letter could be issued only on 25.05.06 when send on training-hence such appointment can not be treated to be made prior to the cut off date e.g. 30.06.98-can not be regularized-petition dismissed.

Held: Para-29
In the instant case, although, the petitioners were selected for appointment on the post in question and their names find place in the select list published on 09.09.1994 but the order for appointment on the post in question has been issued in the year 2005-2006 after completing all the necessary formalities, so their actual date of appointment in the Department is the date on which they were appointed on the post in question (i.e. in the year 2005-2006) and not 09.09.1994, when the select list was published. Hence, the petitioners were not appointed on the post of part time Tube Well Operators before 30, June, 1998, as per the rule 4 of Regularization Rules 1996. Thus, there is no illegality or infirmity in the impugned order dated 21.04.2004 passed by Engineer in Chief and the petitioner cannot claim any benefit from the letter/order dated 17.03.2005 or on the basis of the argument advanced on their behalf in view of the judgment passed by this Court in the case of Indra Kumar Singh (Supra). So, the same is not applicable in the facts and circumstance of the present case.

Case Law discussed:
208(26) LCD 280; [2006 (4) SCC 1; 1993 (1) SCC 360

(Delivered by Hon'ble Anil Kumar, J)

1. Heard Sri Ramesh Pandey, learned counsel for petitioners, Sri A.N. Trivedi, learned Additional Chief Standing Counsel and perused the record.

2...On07.12.1993, an advertizement was issued/published for selection/appointment on the post of Part-Time Tube Well Operator/Assistant Tube Well Operator. In response to the said advertizement, the petitioners and other candidates submitted their candidature, appeared in the written test as well as interview.

3. On 09.09.1994, the select-list was declared. However, in the meantime, against the judgment and order dated 18.05.1994 passed in Writ Petition No. 3538 of 1992 (Suresh Chand Tiwari Vs. State of U.P. and others), a Special Leave Petition No. 16219 of 1992 was filed before Hon'ble the Supreme Court in which an interim order dated 18.03.1994 was passed, as a result of which, an order dated 04.10.1994 (Annexure No. 3) has been issued by the Engineer-in-Chief,

Department of Irrigation, U.P., Lucknow that no person shall be appointed on the post of Part time Tube Well Operator/Assistant Tube Well Operator.

4. Thereafter, in the matter in issue Writ Petition No. 3144 (SS) of 1995 (Vinay Kumar Upadhyay Vs. State of U.P.) and Writ Petition No. 1453 (SS) of 1998 (Surya Prakash Tiwari Vs. State of U.P. and others) have been filed, disposed by this Court by means of the order dated 21.01.2000 with a direction to authority concerned to look into the controversy involved in the matter, in pursuance to the said fact, an order dated 17.03.2005 has been passed by Engineer-in-Chief/O.P. No. 2 that although cadre of Part time Tube Well Operator/Assistant Tube Well operator has been declared as dying cadre by Government Order dated 17.12.1996 and 14.01.1997, so the post in question are not in existence, however, in terms of the direction given by this Court in the aforesaid matter, a request has been made to the Secretary, Irrigation Department of U.P., Lucknow for giving appointment to the petitioners etc. the relevant portion as mentioned in this regard is quoted below:-

"इससे स्पष्ट है की परिणाम घोषित करने में विभागीय स्तर पर हुआ विलम्ब अनौचित्यपूर्ण था तथा इसमें याचियो को कोई दोष नहीं था जिसके फलस्वरूप याचिगन अवैधानिक रूप से प्रशिक्षण/नियुक्ति पाने से वंचित रह गए ।

मा0 उच्च नयायालय ने अपने निर्णय/परमादेश दिनांक 21.01.2000 में यह कहा है की याचिगानो को यदि नियुक्ति से अवैधानिक रूप से वंचित किया गया हो तो उन्हें नियुक्ति प्रदान की जाये यदि रिक्तियों विधमान हो ।"

5. However, the recommendation as made in the letter/order dated 17.03.2005 passed by O.P. No. 2/Chief Engineer, Irrigation Department has not been adhered to. The petitioners had filed the contempt petition for the purpose of their appointments. Thereafter, Executive Engineer has issued appointment orders on 23.05.2006 (Annexure No. 5) and 28.06.2006 (Annexure No. 6) of the petitioners and in pursuance to the said fact, they were sent for training, after completing the same, posted/given appointment on the post in question in the pay scale of Rs. 3050-4950/- from the date of their joining.

6. Further, for the purpose of regularization of services on Part time tube well operator, in terms of the direction issued by Hon'ble the Apex Court by order dated 18.03.1994 in Special Leave Petition No. 16219 of 1994, a scheme for regularization has been framed in the light of the judgment given by the Apex Court earlier in the case of Piyare Singh.

7. Subsequently, the State of U.P. promulgated the rules known as the Uttar Pradesh Irrigation, Department Regularisation of Part-Time Tube-Well Operators on the post of Tube-Well Operators, Rules, 1996, the said regularization rules provided that those part time Tube-Well Operators who are engaged on or before 20.10.1986 are working on the date of promulgation of rules, shall be considered for regularization and hereafter the State of U.P. amended the cut off date also

presented under rule 4 of Regularization Rules 1996 by means of Uttar Pradesh Irrigation Department Amendment Rules, 2008 and the cut off date in Rule of 1996 was replaced by 30.06.1998, the said amendment Rules 2008 were notified on 05.05.2008.

8. In view of the abovesaid facts, petitioners made a representation claiming the regularization of their services, but no heed paid, so for redressal of their grievances, they approached this Court by filing Writ Petition No. 7671 (SS) of 2008, disposed of by order dated 05.12.2008 with a direction to consider and decide the case of the petitioners for regularization by way of passing speaking and reasoned order. When the matter was under consideration before the Engineer in Chief, Irrigation Department, State of U.P. as per the direction given by this Court, the petitioners submitted another representation on 23.01.2009 (Annexure No. 10) requesting that their services may be regularized under the provisions of Regularization Rules 1996 as amended in 2008. In support of their claim they also stated that the services of similarly situated persons of District Bahraich and Barabanki has been regularized. However, by order dated 24.01.2009, the claim of the petitioners has been rejected by Engineer in Chief, Irrigation Department, State of U.P.

9. In addition to the said fact, it is also submitted by learned counsel for petitioners that although the petitioners are for regularization of their services as per Regularization Rules has been rejected by order dated 21.01.2009 in an arbitrary manner. Thereafter, in the year 2010, a process has been initiated for direct recruitment on the post of Tube Well Operator, so they again submitted a representation dated 11.11.2010 before State Government for regularization of their services on the existing post, but pending consideration. On 06.11.2010, Superintending Engineer, Nalkput Mandal, Gonda issued an advertizement for the purpose of selection/appointment on 32 post by way of directed recruitment. So the present writ petition has been filed challenging the order dated 21.04.2009 passed by Engineer in Chief, Irrigation Department, State of Uttar Pradesh.

10. Sri Ramesh Pandey, learned counsel for petitioners while challenging the impugned order submits that in pursuance to the advertizement issued in the year 1993 for appointment on the post of Tube Well Operator under Executive Engineer, Nal Kup Khand-II, the petitioners submitted their candidature thereafter on the basis of written examination and interview, a select list was declared on 09.09.1994 in which names of the petitioners find place, however, due to the reasons which are not within the control of the petitioners they were not appointed on the post in question. Lastly, in the year 2005-2006, the appointment order have been issued and they were appointed on the post in question in view the direction issued by the Engineer in chief by an order dated 17.03.2005, issued in compliance of the order passed by this Court in Writ Petition No. 3144 (SS) of 1995 (Vinal Kumar Upadhyay Vs. State of U.P. and others) and Writ Petition No. 1453 (SS) of 1998 (Surya Prakash Tiwari Vs. State of U.P. and others). So, in these circumstances, they are deemed to be appointed on 09.09.1994 when the select list was issued, thus, they fulfill all the requisite criteria and condition prescribed for regularization of their services as per Rules 1996 as amended in the year 2008 on the

post of Tube Well Operator. However, in most illegal and arbitrary manner, contrary to law, by an order dated 21.04.2009, the O.P. No. 2/Engineer in Chief, Irrigation Department, State of U.P. has denied the right of the petitioners for regularization of services, so the same is liable to be set aside and the writ petition be allowed. In support of his argument, he placed reliance on the judgment given by this Court in the case of **Indra Kumar singh and another Vs. State of U.P. and others , 2008 (26) LCD 280.**

11. Sri A.N. Trivedi, learned Additional Chief Standing Counsel submits that the State Government had issued notification dated 16.12.1996 and Tubewell Operator Rules were framed known as "Uttar Pradesh Irrigation Department Regularization of Part-Time Tube-Well Operators on the post of Tube-Well Operators Rules, 1996" which provided that all those part time Tub-Well Operators who are engaged on or before 20.10.1986 are working on the date of promulgation of rules, shall be considered for regularization.

12. Eventually the State of U.P. amended the cut off date as prescribed under rule 4 of the Regularization Rules 1996 by means of Uttar Pradesh Irrigation Department (Amendment) Rules, 2008 and the cut off date mentioned in rule 4 of 1996 Rules was replaced by 30.06.1998. The said amendment Rules 2008 were notified on 05.05.2008.

13. Both the aforesaid rules clearly provide that all such Part Time Tube-Well Operators appointed before the cut off date and continuing as such on the date of promulgation of said rules, shall be eligible for regularization.

14. The admitted position in the aforesaid case is that:-

(i)The petitioners were sent for training by means of order dated 25.05.2006 (Annexure No. 5) and after successful completion of training they were to be placed in the pay scale of Rs. 3050-4950 from the date of their joining.

(ii) The petitioners have completed their training and were consequently appointed in 2006 and thus it is apparent that none of the petitioners were either appointed nor have worked as Part Time Tube-Well Operators on or before the cut off date i.e. 30.06.1998.

15. So, the order dated 21.04.2009 (Annexure No. 11) passed by O.P. No. 2, rejecting the claim of the petitioners for regularization is perfectly valid rather in accordance with law as laid down by Hon'ble the Supreme Court in the case of **Secretary, State of Karnataka and others Vs. Uma Devi (3) and others [2006 (4) SCC 1**, for the said purpose he placed reliance in paragraph Nos. 43 and 45 of the said judgment, quoted hereinbelow:-

*"**Para No. 43** - Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Dr. Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College [(1962) Supp. 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be*

shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

Para No. 45 *- It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."*

16. In view of the abovesaid facts, it is requested by learned Additional Chief Standing Counsel that the present writ petition filed by the petitioners lacks merit, liable to be dismissed.

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

18. Admitted facts of the case are that on 07.12.1993, an advertizement was issued/published for selection/appointment on the post of Assistant Tube Well Operator. In the said advertizement, it was provided that after qualifying written examination the incumbent would be sent for one month training without pay and after completion of successful training and passing the consequential test, the final appointment order would be issued.

19. In pursuance to the same, the petitioners submitted their candidature thereafter, appeared in written and interview test in which they passed successfully and on 09.09.1994, a select list was issued for appointment on the post in which the names of the petitioners find place.

20. However, due to litigation which had taken place in the matter in question, as stated in the year 2005-2006, the petitioners were appointed on the post in question. Thereafter, they submitted their grievance for regularization of their services in view of the Uttra Pradesh Irrigation Department Regularization of Part Time Tube-Well Operators on the post of Tube-Well Operators Rules 1996, which has been amended in the year 1998 by means of known as Uttar Pradesh Irrigation Department (Amendment) Rules 1998 by which Rule 4 of 1996 as amended reads as under:-

"(1) Any person who:-

(i) was appointed on the post of Part-Time Tube-Well Operator before June 30, 1998 and is continuing in service, as such, on the date of the commencement of the Uttar Pradesh Irrigation Department Regularisation of Part-Time Tube-Well, Operators on the post of Tub-Well Operators (First Amendment Rules, 2008."

21. From the reading of Rule 4 of the Regularization Rules, 1996 as amended for the purpose of Regularization on the post in question, the following two conditions must be satisfied:-

(a) A person should be appointed on the post of Part-Time Tube-Well Operator before 30 June, 1998.

(b) He is continuing in service, as such on the date of the commencement of Uttra Pradesh Irrigation Department Regularization of Part-Time Tube-Well

Operators on the post of Tube-Well Operators first amendment Rules, 1998.

22. It is settled position of law that recruitment/selection, by way of advertizement or any other mode as prescribed by the Rule is essential process which lead to a eventually appointment in service that is to say, the selection/recruitment process and precedes appointment.

23. Notifying the vacancies inviting applications, their scrutiny, finalisation of list of such eligible candidates, thereafter preliminary test, written and oral tests and interview are the part of selection process for appointment on post and after completing the said exercise, the selection for appointment compete when appointment order is issued.

24. Further, the appointment to a post or office postulates (a) decision by the competent authority to appoint a particular person: (b) incorporation of the said decision in an order of appointment: and (c) communication of the order of appointment to the person who is being appointed. All the three requirements must be fulfilled for an appointment to be effective.

25. Appointment is effected by the employer through a contract of employment. As in every contract, so in a contract of public employment an offer of appointment to the candidate sought to be employed and his acceptance of the offer forms the basis of appointment. Appointment is made to a vacancy and in a post. It is, therefore, made by a positive and deliberate act of engagement creating a relationship between employer and employee. Appoinment is the starting point of a career in public employment. It confers a status and ensure all the rights that are attached to public service, including confirmation, seniority, promotion, and so on tenure. (See. Besant Lal Vs. State of Punjab AIR 1969 P&H 178).

26. Hon'ble the Supreme Court in the case of **Prafulla Kr. Swain Vs. Prakash Ch. Misra, JT 1993 (1) SCC 360** held that appointment means an actual act of posting a person to a particular office and anything short of it cannot be construed as appointment.

27. In the case of Ganedra Prasad Vs. Executive Engineer and others, (Civil Misc. Writ Petition No. 34729 of 2007), this Court by judgment and order dated 02.07.2010 held as under:-

"According to the petitioner he appeared in the examination and interview for selection on the post of Part time/Assistant Tub-well Operator on 12.5.1994 whereupon vide order dated 27.5.1994 he was declared selected. On his aforesaid selection he was sent for training which he completed successfully. However, he was not permitted to join the services in view of the judgment and order of the Lucknow Bench of the Allahabad High Court dated 18.5.1994 passed in writ petition no. 3538 of 1992 Suresh Chandra Tiwari and others Vs., State of U.P; interim order in Special Leave Petition No. 16219 of 1994 of the Sate of U.P. arising therefrom; and the directions of the authorities dated 4.10.1994 not to appoint any part-time/ Assistant Tube well operators till the disposal of the Special Leave Petition.

After the dismissal of the special leave petition on 22.3.1995, the petitioner

represented for issuing appointment letter but when no action was taken, he preferred writ petition no. 7003 of 1996 seeking direction for his appointment. The said writ petition was disposed of on 22.3.1996 with the direction to the authorities concern to decide the representation of the petitioner in that regard within a time bound period. The above order was modified on 10.7.1996 and it was also provided that in deciding the representation the authorities shall also keep in mind the decision of the Supreme Court dated 22.3.1995 dismissing the Special Leave Petition. The petitioner as such again represented to the authorities and ultimately after going through the process of initiation of contempt proceedings, final order was passed on 24.9.1997 by the respondent no. 2 rejecting the petitioner's claim. When the said order was brought to the notice of the contempt Court in contempt petition no. 1503 of 1997, the Court vide order 20.4.2001 held that the aforesaid order dated 24.9.1997 can not be treated as an order passed in compliance of the order of the High Court. In such a situation, the petitioner again submitted a fresh representation for giving him appointment which was rejected vide order dated 3/4.10.2002. However, the said order was set aside by the High Court in writ petition no. 50610 of 2002 of the petitioner on 10.4.2007 and the matter was remitted to the authorities concerned to reconsider the same. It is thereafter that on the fresh representation of the petitioner, one of the impugned orders dated 27.6.2007 rejecting the claim/representation of the petitioner has been passed. A fresh order was passed by the respondent no. 1 on 29.11.2008 refusing the claim of the petitioner and other similarly situated persons for appointment as Part time/Assistant Tub-well Operator in pursuance to the selection of the year 1994 on the ground that the aforesaid posts have been declared to be a dying cadre."

28. In the said matter, it has been further held as under:-

"To conclude the claim of the petitioner for appointment as prayed for can not be accepted in short for the following reasons:-

(1)Petitioner was never finally selected for appointment as he had not undergone and qualified the practical examination as provided under Rule 14 of the Rules;

(2)There are no cadre posts of part time/Assistant Tube-well Operators under the Rules and the posts of Part time/Assistant Tube-well Operators temporarily created were declared dead and have not been revived;

(3)The petitioner has not been discriminated as he was never allowed to function in pursuance to his alleged selection and even otherwise any irregular or illegal appointment, would not permit the petitioner to take shelter of Article 14 of the Constitution and to seek appointment on the basis of parity with the alleged wrong appointment;

(4)Selection alone, if any, does not give any right for appointment; and

(5)There is no justification for giving appointment to the petitioner at such a long distance of time on the basis of selection of the year 1992.

In view of the aforesaid circumstances, I am of the considered opinion that the respondent no. 1 has committed no error of law in rejecting the petitioner's claim for appointment of Part time/ Assistant Tube-well Operator on the

basis of alleged selection of the year 1994."

29. In the instant case, although, the petitioners were selected for appointment on the post in question and their names find place in the select list published on 09.09.1994 but the order for appointment on the post in question has been issued in the year 2005-2006 after completing all the necessary formalities, so their actual date of appointment in the Department is the date on which they were appointed on the post in question (i.e. in the year 2005-2006) and not 09.09.1994, when the select list was published. Hence, the petitioners were not appointed on the post of part time Tube Well Operators before 30, June, 1998, as per the rule 4 of Regularization Rules 1996. Thus, there is no illegality or infirmity in the impugned order dated 21.04.2004 passed by Engineer in Chief and the petitioner cannot claim any benefit from the letter/order dated 17.03.2005 or on the basis of the argument advanced on their behalf in view of the judgment passed by this Court in the case of **Indra Kumar Singh (Supra)**. So, the same is not applicable in the facts and circumstance of the present case.

30. In the result, writ petition lacks merit and is dismissed as the same is not applicable in the facts and circumstances of the present case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2013

BEFORE
THE HON'BLE SHEO KUMAR SINGH, J.
THE HON'BLE BRIJESH KUMAR SRIVASTAVA-II,J.

Civil Misc. Writ Petition No. 8983 of 2012

Alongwith

W.P. No. 8983/2012; W.P. No. 7786 of 2012, W.P. No. 4749 of 2012, W.P. No.4747 of 2012, W.P. No. 4744 of 2012, W.P. No.4742 of 2012, W.P. No.2097 of 2012 , W.P. No.72929 of 2011, W.P. No. 62127 of 2011, W.P. No.47694 of 2011, W.P. No.8978 of 2012, W.P. No.40109 of 2012, W.P. No.26263 of 2010 , W.P. No.27034 of 2010, W.P. No.8982 of 2012, W.P. No.45593 of 2010, W.P. No.39835 of 2010, W.P. No. 27035 of 2010 , W.P. No.36079 of 2011, W.P. No.33230 of 2011, W.P. No.23460 of 2011, W.P. No.42419 of 2011, W.P. No. 41660 of 2011, W.P. No. 41658 of 2011, W.P. No.39114 of 2011, W.P. No. 25048 of 2012, W.P. No. 29064 of 2012, W.P. No. 29067 of 2012, W.P. No.29068 of 2012, W.P. No.29133 of 2012, W.P. No. 29339 of 2012, W.P. No.37906 of 2012, W.P. No.44259 of 2012, W.P. No.44261 of 2012, W.P. No.44264 of 2012, W.P. No. 53736 of 2012, W.P. No.53737 of 2012, W.P. No. 53741 of 2012, W.P. No.55877 of 2012, W.P. No.55880 of 2012 , W.P. No.55885 of 2012 W.P. No.55886 of 2012, W.P. No. 57828 of 2012 W.P. No. 63422 of 2012, W.P. No.63424 of 2012, W.P. No. 63425 of 2012 W.P. No. 63427 of 2012, W.P. No.67104 of 2012, W.P. No.67106 of 2012, W.P. No.67109 of 2012, W.P. No. 67110 of 2012 , W.P. No.67112 of 2012, W.P. No.10150 of 2010, W.P. No. 13847 of 2009, W.P. No.48469 of 2009 , W.P. No.32782 of 2011, W.P. No. 32787 of 2011, W.P. No.39212 of 2010, W.P. No.35429 of 2009 , W.P. No.34028 of 2009, W.P. No.38257 of 2011

Ram Singh and Ors. ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

<u>Urban Land(Ceiling and Regulation)Act 1976-Section 10(5)-</u> Possession of surplus land-symbolic possession is no possession-unless notice in writing served-notice against dead person-or change in revenue entry-without

executing possession memo-without name and address of two witness-presumption of possession of land owners shall be-state can not interfere with their possession.

Held: Para-43

In view of the aforesaid discussions and examination of various aspects in various judgments it is clear that if proceedings have started by sending notice against the dead person at any stage then that will not divest the landholder of his rights. There has to be proper service as provided under Section 10(5) of the Act. There has to be proper service under Section 10(6) of the Act. Required procedure has to be followed. Possession is to be taken by the competent authority. Possession has to be actual physical and not symbolic. Mere change in the entry is also not the enough proof of dis-possession. The effect of the Repeal of the Principal Act is so clear and loud which permits the rights with the landholders if actual physical possession has not been taken over by the State or by any person duly authorized by the State Government in its behalf after due notice and service in accordance with law.

Case Law discussed:

2010 (81)456; 2010 (81) ALR 215; 2010(81)ALR 85; 2010 (81) ALR 216; 2013 (118) RD 306; 2009 (75) ALR 873; 2012(2) AWC 2123; 2012(90)ALR 818; 2011 (5) ADJ638; 2005 (61) ALR 873; 2010(82) ALR 136; 2009 (1) ADJ 583; 2007 (4) ADJ 426; S.L.P. (Civil) No. 12960/2008/; JT 2013(4) SC 275

(Delivered by Hon'ble Sheo Kumar Singh, J.)

1. These are large number of writ petitions in which several points are there but more or less they are common and therefore, for convenience, as requested by both sides all are being taken together and are being decided by a common judgment.

2. Facts are not in much issue except formal and usual denial without any supportive material and thus the Court feels that by making cases in bunch covered by a particular point, all may be decided in one go.

3. All the writ petitioners challenges the interference by the District Administration in their rights to continue in peaceful possession on the pretext of the land having declared as surplus under The Urban Land (Ceiling and Regulation) Act, 1976.

4. We are to first notice the facts which are stated in all the petitions mainly to the same effect in different language, which can be summarised as under-

5. Petitioners are owner and in possession of the land in dispute. Although the land was declared as surplus but at no point of time actual physical possession was taken by the competent authority. In some of the cases proceedings/notice is said to have been given against the dead person and in some of the cases proceedings only upto issuance of notice under Section 10(5) of The Urban Land (Ceiling and Regulation) Act, 1976 herein after referred to as the Act remained and that too without any proper service on the land holder. In some of the cases notice is said to have been issued under Section 10(6) of the Act but it has not been served and in some of the cases for taking the actual physical possession there is no document on record. In some of the cases although Dhakhalnama is there but there is no detail of the witness i.e. father's name, address and in none of the cases competent authority is said to have taken possession. Lekhpal, Consolidation Officer and other alike authorities are not competent to take possession. In none of the cases there is any overt and positive action on the part of the respondents to display taking of the actual physical possession. Taking of possession in none of the cases being in acco-*rdance with law even if there is some entry in favour of the

respondents that cannot be indicative of taking of actual physical possession.

6. Thus on the facts and totality of the situation emphasis is that petitioners continued and are continuing in actual physical possession over the land in dispute and the actual physical possession having not taken in accordance with law by the competent authority petitioners will continue with their rights and they will be entitled to get their name/entry restored in the revenue papers if that has been expunged.

7. It is in the aforesaid premises, we are to just refer relevant provisions of the Act then the decided cases on the points of this court and the recent judgment of the Apex Court in which more or less various aspects touched by this court has been confirmed.

8. In the beginning it will be useful to quote various sub. Clauses of Section 10 of the The Urban Land (Ceiling and Regular) Act, 1976, relevant for our purposes-

"10(3) At any time after the publication of the notification under sub-section (1), the competent authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land referred to in the notification published under sub-section (1) shall, with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government and upon the publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

10(5) Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice.

10(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary.

At this stage, we are to quote Section 3 of the Urban Land (Ceiling and Regulation) Repeal Act, 1909-

3. Savings - (1) The repeal of the principal Act shall not affect-

(a) the vesting of any vacant land under sub-section (3) of section 10, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(2) Where-

(a) any land is deemed to have vested in the State Government under sub-section (3) of section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land,

then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

9. Submission is that if notice right from the start of proceedings or otherwise is against dead person then it will be nullity.

10. Submission is that if notice is issued only under Section 10(5) of the Act or otherwise it is not properly served on the land holder then it will be nullity.

11. It is then submitted that even if notice has been issued under Section 10(6) of the Act but it do not indicate the name of the witnesses and his parentage and his address then also it will be vitiated.

12. It is argued that even if possession is said to have been taken but there is no possession memo or even possession memo is there but if it do not contain complete detail of witnesses and possession taking authority then also it is vitiated.

13. Argument is that if possession is not shown to have been taken by the competent authority under the Act and in the light of Circular dated 9th February, 1977 then also it is vitiated.

14. Taking of possession is to be in accordance with law by an overt act and positive material is to be there and mere entry of possession will not be sufficient to establish taking of actual physical possession.

15. The observation as made by this court in case of **State of U.P and another Vs. Nek Singh reported in 2010 (81) 456** is quoted below-

"On examination of the facts on record, it is crystal clear that the possession allegedly taken on 23.1.1986 was unlawful for plurality of reasons which are ? Firstly, the possession allegedly taken on 23.1.1986 was pursuant to the CA's order dt. 19.12.1985 u/s 10(5) which was addressed to deceased Dhan Singh and, therefore, it was nullity and non est factum having no legal consequence and the possession taken on the basis was also void."

16. In another decision given in case of **Ram Chandra Vs. State of U.P. and others reported in 2010 (81) ALR 215** following observations were made-

"There is specific allegation in the writ petition that proceedings either under Section 10(5) or under Section 10(6) of the Act was never taken. In the counter affidavit this specific allegation has not been denied and it is stated that notice under Section 10(5) of the Act was issued. From the record it appears that the notice under Section 10(5) of the Act was issued against a dead person as the father of the petitioner had already died prior to 26th September 1996. Thus, in view of the decision of this Court rendered in the case of State of U.P. vs. Hari Ram & others [2005 (60) ALR 535], all proceedings would abate.

17. In another decision given in case of **Smt. Shanti Devi Vs. State of U.P. and others reported in 2010 (81) ALR 85** following observations were made-

"The issue can be examined from another angle. Learned Standing counsel does not dispute that there is no other provision for taking of possession under the Act except the power provided under Section 10(5) and 10(6). Admittedly, the

very first step of taking over possession was taken through a notice under Section 10(5) dated 26.6.1999 which was issued in the name of the land holder. The fact that the land holder died on 4.3.1996 has not been denied. Thus, even the notice under Section 10(5) was void and would not give any right or power to the respondents to seek or take over possession of the disputed land. "

18. In another decision given in case of **Jai Prakash Vs. State of U.P. and others reported in 2010 (81) ALR 216** following observations were made-

"It is also not denied that the original land holder died on 26.7.1998 and therefore even that notice was issued against a dead person. A Division Bench of this Court in the case of State of U.P. Vs. Hari Ram and others [2005 (60) A.L.R.535] has already held that where possession is not taken before the Repeal Act in accordance to law, all proceedings would abate and land would stand restored to the land holders. ".

It has been held in the decision given by this court in case of **Mahaveer Vs. State of U.P. and others reported in 2013(118) RD 306,** as given below-

6. A counter affidavit has been filed by the State in which it is pleaded that under Section 10 (5) of the Act a notice was issued on 12.1.1998 for taking possession. However, there is no averment in the counter affidavit as regards service of notice or that any proceedings under Section 10 (6) of the Act was undertaken. Learned standing counsel has produced the original record before us, which contains the copy of the notice dated 12.1.1998 under Section 10 (5) of the Act. However, neither there is any material to indicate that the said notice was served upon the petitioner, nor any material to indicate that the possession was handed over to the State by the petitioner, or any proceedings under Section 10 (6) of the Act were undertaken.

7.Learned counsel for the petitioner has rightly relied upon the judgment of Apex Court in Vinayak Kashinath Shilkar v. Deputy Collector and Competent Authority and others, 2012 (2) AWC 2123 (SC) and a Division Bench judgment of this Court in Chandrma v. State of U.P. and others, 2011 (5) ADJ 638 (DB). In Chandrma (supra) this Court has laid down that there being no proof of taking of physical possession of the surplus land in accordance with the procedure prescribed, the petitioner was entitled for issue of a writ of mandamus. It is useful to quote paragraphs 13 to 16 as under: -

"13. In this case as found above from the pleadings there is no assertion by the State, that the possession was actually handed over by petitioner's grand father in pursuance to the notice under Section 10 (5) of the Act, or that any proceedings were taken under Section 10 (6) of the Act for taking over possession. There are no pleadings of service of the notice under Section 10 (5) and preparation of Dakhalnama (possession memo) and the entries in Form No. C.L.C. III (Register for land of which possession has been taken under Section 10 (5) or 10 (6)), in proof of taking over physical possession of the surplus land.

14. In absence of any pleadings or assertion by the State that the possession of the land was given in response to Section 10

(5) of the Act, or that proceedings under Section 10 (6) was taken and any Dakhalnama (possession memo) was prepared and entries were made in Form No. U.L.C. III, we find that the petitioner is still in possession of the land."

20. The observation as made by this court in case of **Babu Chand Vs. State of U.P and another reported in 2009 (75) ALR 873** is quoted below-

"Possession on paper is a symbolic possession and word "possession' used in Clause (a) of sub-section (2) of Section 3 of the Act mean actual physical possession and not the symbolic possession."

21. The observation as made by the Apex court in case of **Vinayak Kashinath Shilkar Vs. Dy. Collector and Competent Authority and another reported in 2012(2) AWC 212**3 is quoted below-

"It is clear from the above provisions that where the possession of the vacant land has not been taken over by the State Government or by any person duly authorized by the State Government in this behalf or by the Competent Authority, the proceedings under the Act would not survive. Mere vesting of the vacant land with the State Government by operation of law without actual possession is not sufficient for operation of Section 3(1) (a) of the Act."

22. The observation as made by this court **Smt. Prem Kumari Agarwal Vs. State of U.P. and others reported in 2012(90) ALR 818** is quoted below- .

"There is nothing on record to show that the State Government is in actual physical possession of the surplus land except alleging that the possession has been taken. The counter affidavit is silent as to whether the possession has been taken actually on the spot or the State Government is in constructive possession. The petitioner having been in possession of the unpartitioned land in question being a co-sharer, no actual possession could possibly be taken without there being any partition. It is not the case of the respondent that there has been a mutual partition amongst the co-sharers, as also with the State Government. At the most it can be inferred that a constructive possession was taken by the State Government. "

23. The observation as made by this Court in case of **Chandrama Vs State of U.P. and others reported in 2011(5) ADJ 638** is hereby quoted-

"Learned counsel for the petitioner has relied upon judgments of the Supreme Court and the High Courts in Pt. Madan Swaroop Shrotiya Public Charitable Trust vs. State of U.P. & ors JT 2000 (3) SC 391; Kailash and another vs. State of UP and ors 2005 (61) ALR 383; State of UP vs. Devendra Nath & another Civil Misc. Writ petition No. 76070 of 2005 decided on 15.12.2005; Babu Ram and others vs. State of UP and others 2009 (75) ALR 873; Ram Chandra Pandey vs. State of UP and others 2010 (82) ALR 136 and M/s Star Paper Mills Ltd. vs. State of UP and others 2011 (1) CRC 93. In all these cases, it was held following leading judgment in Pt. Madan Swaroop Shrotiya Public Charitable Trust (supra), that unless actual physical possession was taken for which proceedings are provided under Section 10 (5) and 10 (6) of the Act, and there is proof of taking over

possession, the proceedings will abate under Section 3 of the Repeal Act, 1999.

In this case as found above from the pleadings there is no assertion by the State, that the possession was actually handed over by petitioner's grand father in pursuance to the notice under Section 10 (5) of the Act, or that any proceedings were taken under Section 10 (6) of the Act for taking over possession. There are no pleadings of service of the notice under Section 10 (5) and preparation of Dakhalnama (possession memo) and the entries in Form No. C.L.C. III (Register for land of which possession has been taken under Section 10 (5) or 10 (6)), in proof of taking over physical possession of the surplus land."

24. The observation as made by this Court in case of **Kailash Vs State of U.P. and another reported in 2005(61) ALR 873** is hereby quoted-

"In an unreported judgement when State wanted a clarification in this regard in Civil Misc. Writ Petition No. 47369 of 2000 (State of U.P. Through the Competent Authority and another Vs. Hari Ram and others) one of our Division Bench held as follows:

".....an illegal act is not recognized in law and has to be ignored unless specifically required under statute to be reckoned with. Secondly, possession of surplus land, on notice given under section 10 (5) of the Act is to be surrendered by the landowner voluntarily in pursuance to said notice. If the landowner does not surrender possession in pursuance to the aforesaid notice, 'the Act' contemplates taking possession by force and coercing the landowner under section 10 (6) of the Act. If possession is taken in an extraordinary manner (process not recognized in law) i.e. without resorting to the provisions contemplated under section 10 (5) or Section 10 (6) of the Act, then possession will be irrelevant and of no consequence so far as the applicability of the Repeal Act is concerned. The Repeal Act shall have no effect on the Principal Act if possession of surplus land was not taken as contemplated in the Principal Act. Repeal Act, clearly talks possession being taken under section 10 (5) or 10 (6) of the Act. It is a statutory obligation on the Competent Authority or State to take possession as permitted in law. It is to be appreciated that in case possession is purported to be taken under section 10 (6) of the Act, still Court is required to examine whether 'taking of such possession' is valid or invalidated on any of the considerations in law. If Court finds that one or more grounds exist which show that the process of possession, though claimed under section 10 (5) or 10 (6) of the Act is unlawful or vitiated in law, then such possession will have no recognition in law and it will have to be ignored and treated as of no legal consequence. The possession envisaged under section 3 of the Repeal Act is de facto and not de jure only."

The respondents further wanted to say that the land has been mutated in their name, therefore, the same can not be said to be land of the petitioners. We are all aware that mutation can not give the title. Therefore, mere mutation can not help the State for saying that the land is their actual physical possession. Even the Division Bench of our High Court in the earlier unreported judgement held as follows:

"Mere 'mutation' of entry in favour of State/ other persons in revenue records, is irrelevant/ inconsequential so far as the

applicability of section 3 of Repeal Act is concerned."

25. The observation as made in case of **Ram Chandra Pandey Vs. State of U.P. reported in 2010(82) ALR, 136** is hereby quoted-

"From the perusal of provisions contained under Sub section (5) and (6) of Section 10 read with Section 3 and 4 of the Repeal Act 1999 and directions with regard to the procedure for taking over the possession, it transpires that after the land is vested under Sub section (3) of Section 10 of the Principal Act, the Competent Authority is obliged to issue notice in writing, ordering any person who may be in possession of such vacant land to surrender or deliver the possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of notice and, if any, person refuses or fails to comply with an order made under sub Section (5), the Competent Authority may take possession of the vacant land or cause to be taken to the concerned State Government or to any person duly authorised by such State Government in this behalf, may for that purpose use such force as may be necessary. Under the Directions of 1983 (supra), various forms of notices have been prescribed. Form U.L.C.-II is meant for notice under section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976. Apart from the format of the notice, the Competent Authority is required to forward a copy of the same to the Collector with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenance may, kindly be taken and intimation be given to the undersigned along with copy of certificate to verify.

With regard to the taking over the possession of the surplus land, as we have already noticed, under the Act there is no specific provision or mode prescribed for taking over possession except procedure as contained under Sub Sections (5) and (6) of Section 10 of the Parent Act and direction issued in the year 1983. Therefore, we take shelter of few judicial pronouncements where this aspect of the matter has been dealt with in the cases of Land Acquisition Act as well as Urban Land Ceiling Act.

26. In Balmokand Khatri Educational and Industrial Trust v. State of Punjab,(1996) 4 SCC 212: (AIR 1996 SC 1239), it was held that:

"It is difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the punchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto the retention of possession would tantamount only to be illegal or unlawful possession.

Same view was reiterated in State of Tamil Nadu v. Mahalakshmi Ammal, (1996) 7 SCC 269; (AIR 1996 SC 866) and Tamil Nadu Housing Board v. A.Vishwam, (1996)8 SCC 259; (AIR 1996 SC 3377).

In Balwant Narain Bhagde (AIR 1975 SC 1767), possession was meant as 'possession on the spot' and not 'symbolical' one.

This view has also been taken by this Court in the case Chabi Nath Vs State of U.P., 2005 (59) ALR. 413 and Dr.(Smt. Raj Kumari Mehrotra Vs State of U.P.,2009 (1) ADJ 583.

In the background of the facts of this case and the submissions made by the learned counsel for the parties as well as on perusal of the record produced by the learned Standing Counsel, especially the document by which possession of the land is said to have been taken from the grand father of the petitioner late, Dhani Ram, we are not satisfied that actual physical possession of the plots in question was ever taken by the State Government. From the record, we find that the memo of possession prepared in the present case is nothing but a mere noting of three officials of the State Government made on 2.4.1992, which is also not on the proper format and appears to have been prepared by the State officials in their office, and as such no authenticity can be attached to the same. On such memorandum, there is no signature of the grand father of the petitioner (late Dhani Ram) or any independent person to show that actual physical possession had been delivered to the State Government. More so, the name of late Dhani Ram continued in the revenue record till his death in the year 1995 and thereafter the name of the petitioner was admittedly recorded in the Khasra and Khatauni in the year 1996, which continued so till the passing of the ex-parte order in 2004, where after also the land revenue was being accepted from the petitioner. "

27. The observation as made in case of **Dr. Raj Kumari Mehrotra Vs. State of U.P. and others reported in 2009(1) ADJ 583** is hereby quoted-

"From the records that have been produced before us, we do not find any transaction between the authority and the Allahabad Development Authority of taking possession. There is nothing on record to indicate, that after the land holder filed his objection on 30.11.1998 clearly denying taking over possession or action having taken under Section 10(6) of the Act 1976, the possession was taken by the authorities. Apart from this the fact that the physical possession had not been taken over, stood fully corroborated by the admission of the District Magistrate in the order dated 15.7.2004 Annexure 13 to the writ petition. The admission of the District Magistrate in the aforesaid letter about the possession being retained by the land holder has not been successfully denied in the counter affidavit. The only denial is that the said letter was sent by the Addl. District Magistrate and not the competent authority, Urban Ceiling Land . Such an explanation cannot deny the factum of the possession being retained by the tenure holder, inasmuch as the said letter dated 15.07.2004 admits that possession was not taken over by the competent authority in no uncertain terms. It is the trite law that admission is the best piece of evidence."

28. With regard to the taking of the possession over the surplus land, as we have already noticed, under the Act there is no specific provision or mode prescribed for taking over possession except procedure as contained under Sub Sections (5) and (6) of Section 10 of the Parent Act and direction issued in the year 1983. Therefore, we take shelter of few judicial pronouncements where this aspect of the matter has been dealt with in the cases of Land Acquisition Act as well as Urban Land Ceiling Act.

29. The observation as made in case of **Ravindra Prakash Misra and others Vs. State of U.P. and others reported in 2007(4) ADJ 426** is hereby quoted-

"it is categorically stated that the respondents never undertook any exercise at all in respect of any of the petitioners under Section 10 (6) of the Act 1976. It is alleged that the claim of possession made by the respondents is merely on paper and the petitioners, at no point of time, were ever dispossessed from the land in question. In reply thereto, the counter affidavit on behalf of the Development Authority simply states that the same did not require any specific reply but the counter affidavit filed on behalf of the State recites that a notice under Section 10 (3) followed by a notice under Section 10(5) of the Act 1976 had been issued and copies thereof have been filed along with the said counter affidavit. A perusal of the notice under Section 10(5) of the Act 1976 demonstrates that the said notice has been issued in the name of the petitioner no.1 only. The counter affidavit nowhere recites that notices were served separately on all the petitioners under Section 10(5) of the Act 1976. There is no averment in the counter affidavit as to how the said notice was served on the petitioner no.1. There is also no averment in the counter affidavit which would indicate that notices were issued to the petitioners no. 2 and 3. Apart from this, paragraph 16 of the writ petition has not been denied effectively at all. Paragraph 8 of the counter affidavit of the State simply states that there is nothing on the record of the said answering respondent in respect thereof. This leaves no room for doubt that no proceedings for taking actual physical possession were ever initiated under Section 10(6) of the Act 1976.

30. In the absence of any material to the contrary, the inescapable conclusion is that the petitioners continued to retain the actual physical uninterrupted possession which was also protected during the pendency of the writ petition under an interim order dated 14.03.2000.

8.On the aforesaid factual premise, we find force in the submissions made by the learned counsel for the petitioners which is squarely supported by the two Division Benche decisions of this Court in the case of Chhabinath Vs. State of U.P. & Ors., 2005 (2) AWC 1405 followed by the decision in the case of State of U.P. & Anr. Vs. Hari Ram & Anr., 2005 ALJ 2402. The following observations in the case of State of U.P. Vs. Hari Ram (supra) are quoted below in support of our conclusions:-

30. In Section 10 (3) of the Act, the expression used by the Legislature is that land declared surplus ".....shall be deemed to have vested absolutely in the State Government....." Term 'vested' refers to de jure 'title' and 'interest' in the surplus land irrespective of actual possession.

33. In contradistinction to the above, in the case of 'surplus land' ' being vested' in the State under Section 10 (3) of the Act, the Act further provided steps for taking possession under Section 10(5) or 10 (6) of the Act.

37. From the above dictionary meanings it is clear that expression 'vest/vested' may or may not include 'transfer of possession'. It means that 'vested' includes 'physical possession or not' shall depend upon the overall reading of statutory provisions.

38. In the light of the above, the expression 'vesting' used in the Act, 1976

and the Repeal Act has to be read with reference to and in the context they are used. A perusal of Section 10 of the Principal Act (particularly Sections 10(3), 10(5) and 10(6) and Sections 3 and 4 of the Repeal Act provide that surplus land when 'deemed to have vested' does not refer to 'physical possession'. This becomes conspicuous on reading Sections 10(5) and 10(6) of the Act, which alone talk of 'actual physical possession'.

43. Section 10(1) of the Act contemplates a 'notification' in the official Gazette of the concerned State giving particulars of the vacant land held by a person in excess of ceiling limit. The words "such vacant land is to be acquired" used in the Notification shows the surplus land will be acquired later. Section 10(3) of the Act provides for another notification in the official Gazette to notify the date with effect from which 'such land shall be deemed to have been acquired and deemed to have absolutely vested' in the State Government.

44. Expression 'possession' is used for the first time in Sections 10(5) and thereafter 10(6) of the Act. Notification under Section 10 (1) and 10 (3) are not relevant so far as the question of applicability of saving clause of Section 3 of the Repeal Act is concerned.

45. Section 10(5) of the Act provides that Competent Authority may be notice in writing order any person, who may be in possession of the land declared surplus to surrender or deliver possession thereof to the State Government or to any person duly authorized in this behalf within 30 days of the service of notice. Section 10 (5) makes it clear and shows that "vesting' is something different and distinct from "possession'.

46. Section 10 (6) of the Act takes care of a stage when a person, in possession of surplus land fails to surrender/deliver possession voluntarily or receipt of notice under Section 10(5) of the Act and, in that contingency authorizes/empowers competent authority to take physical/de facto possession of such vacant lands so declared surplus land.

47. Section 3 of the Repeal Act amply reflect the purpose and intention the Legislature, namely where a land owner remains in physical possession, then irrespective of its being 'declaring surplus, and/or entry being made in favour of State in Revenue Records as a consequence of vesting and even if compensation is paid or received, in law, surplus land gets exempted and ought to remain with original landowner. The relevant criterion is whether physical possession of the land declared surplus was ever taken by the State Government. If answer is in 'negative', the landowner must not suffer and have the benefit of Repeal Act because, due to- the inaction/failure on the part of State to take physical possession before coming into force the Repeal Act, in negation of 'Aim and object' and purpose of the Act.

48. Section 3 (2) (a) and (b) of Repeal Act make clear that even receipt of compensation will not disentitle one to claim benefit of the Repeal Act if compensation is refunded, provided a person continues to be in physical of the land declared surplus.

49. The above interpretation of Section 3 of the Repeal Act; further finds support from Section 11 of the Act, which refers to 'deemed acquisition' under Section 10 (3) of the Act. It has no reference to section 10 (5) of 10 (6) of the

Act. It shows that notional compensation (as against market value) becomes payable, as and when land is 'deemed vested' in the State Government even without resumption of or taking physical possession of surplus land. For claiming compensation or taking over of 'physical possession' is not the condition precedent under the Act. Section 11 (1) of the Act affirms the above position and explains the purpose of incorporation of Section 3 (2), Clauses (a) and (b) of Repeal Act. Section 3 (2) (a) of Repeal Act- qualifies that 'surplus land' is deemed vested under Section 10 (3) of Principal Act but possession of which has not been taken. It shows that condition precedent by taking of physical possession is not the 'deemed vesting' or mutation in Revenue Records.

50. Mere 'mutation' of entry in favour of State/other persons in revenue records, is irrelevant/inconsequential so far as the applicability of Section 3 of Repeal Act is concerned.

51. Similar conclusion is irresistible if we read Section 4 of the Repeal Act that again talks of possession of which has been taken over by the State. Answer to the question - 'when possession is taken over can be found out from the entries made in due course- at relevant time in ULC Forms I, II and III.

31. It is clear that mere vesting of 'land declared surplus' under the Act, without resuming 'de facto possession', is of no consequence and the landholder shall be entitled to the benefit of Repeal Act.

32. There is no even an iota of material to show that steps were taken by the petitioners to take physical/de facto possession of the surplus land on spot.

33. Firstly, an illegal act is not recognized in law and has to be ignored unless specifically required under statute to be reckoned with. Secondly, possession of surplus land, on notice given under Section 10(5) of the Act is to be surrendered by the landowner voluntarily in pursuance to said notice. If the landowner does not surrender possession in pursuance to the aforesaid notice, "the Act' contemplates taking possession by force and coercing the landowner under Section 10(6) of the Act. If possession is taken in an extraordinary manner (process not recognized in law) i.e. without resorting to the provisions contemplated under Section 10(5) or Section 10(6) of the Act, then possession will be irrelevant and of no consequence so far as the applicability of the Repeal Act is concerned. The repeal Act shall have no effect on the Principal Act if possession of surplus land was not taken as contemplated in the Principal Act. Repeal Act, clearly talks possession being taken under Section 10(5) or 10(6) of the Act. It is a statutory obligation on the Competent Authority or State to take possession as permitted in law. It is to be appreciated that in case possession is purported to be taken under Section 10(6) of the Act, still Court is required to examine whether "taking of such possession' is valid or invalidated on any of the considerations in law. If Court finds that one or more grounds exist which show that the process of possession, though claimed under Section 10(5) or 10(6) of the Act is unlawful or vitiated in law, then such possession will have no reorganization in law and it will have to be ignored and treated as of no legal consequence. The possession envisaged under Section 3 of the Repeal Act is de facto and not de jure only."

34. Most of the aspects noted above, were subject matter of bunch of cases before the Apex Court of which the leading appeal is **Civil Appeal No. 2326 of 2013 (Arising out of S.L.P.(Civil) No. 12960/2008, State of U.P. Vs. Hari Ram** were dismissed by the Apex Court on 11.3.2013. The judgment of Apex Court is reported in **JT 2013 (4) SC 275.**

The observation of the Apex Court on main issue can be quoted here-

"2. We are, in these batch of cases, called upon to decide the question whether the deemed vesting of surplus land under Section 10(3) of the Urban Land (Ceiling and Regulation) Act, 1976 [for short "the Act'] would amount to taking de facto possession depriving the land holders of the benefit of the saving Clause under Section 3 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 [for short "the Repeal Act'].

14.We notice even after the coming into force of the Repeal Act, the competent authority under the Act 33 of 1976 vide its letter dated 10th June, 1999 informed the Bandobast Chakbandi Adhikar that the surplus land declared as per the notification issued under the Act had vested in the State Government free from all encumbrances and, therefore, in the revenue records the name of State Government be entered and name of the respondent be mutated. The competent authority vide its notice dated 19.6.1999 issued under Section 10(5) of the Act directed the respondent to handover possession of the land declared as surplus to duly authorized persons on behalf of the Collector.

15. Before examining the impact of the Repeal Act on Act 33 of 1976,particularly, Section 3 of the Repeal Act on sub-section (3) to Section 10 of the Act, let us examine whether possession could be taken following the procedure laid down in sub-section (3) to Section 10 of the Act. Section 6 casts an obligation on every person holding vacant land in excess of ceiling limit to file a statement before the competent authority and after following all the statutory procedures, the competent authority has to pass the order under Section 8(4) on the draft statement. Following that, a final statement has to be issued under Section 9 on the person concerned. Sub-section (1) to Section 10 states that after the service of statement,the competent authority has to issue a notification giving particulars of the land held by such person in excess of the ceiling limit. Notification has to be published for the information of the general public in the Official Gazette, stating that such vacant land is to be acquired and that the claims of all the persons interested in such vacant land be made by them giving particulars of the nature of their interests in such land.

16.Sub-section (2) of Section 10 states that after considering the claims of persons interested in the vacant land, the competent authority has to determine the nature and extent of such claims and pass such orders as it might deem fit. Sub-section (3) of Section 10 states that after the publication of the notification under sub-section (1), the competent authority has to declare that the excess land referred to in the Notification published under sub-section (1) of Section 10 shall, with effect from such date, as might be prescribed in the declaration, be deemed to have been acquired by the State Government. On publication of a declaration to that effect such land shall be deemed to have been

vested absolutely in the State Government, free from all encumbrances, with effect from the date so specified.

Voluntary Surrender

28. The "vesting' in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The court in Maharaj Singh v. State of UP and Others (1977) 1 SCC 155, while interpreting Section 117(1) of U.P. Zamindari Abolition and Land Reform Act, 1950 held that "vesting' is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The court in Rajendra Kumar v. Kalyan (dead) by Lrs. (2000) 8 SCC 99 held as follows:

"We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. "To vest, generally means to give a property in." (Per Brett, L.J. Coverdale v. Charlton. Stroud's Judicial Dictionary, 5th edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To "vest", cannot be termed to be an executor devise. Be it noted however, that "vested" does not necessarily and always mean "vest in possession" but includes "vest in interest" as well."

29. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.

30. Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.

Peaceful dispossession

31.Sub-section (5) of Section 10, for the first time, speaks of "possession" which says where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorized by the State Government.

32. If de facto possession has already passed on to the State Government by the

two deeming provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) to Section 10 to surrender or deliver possession. Subsection (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.

Forceful dispossession.

33. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) to Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub-section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force - as may be necessary - can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub-section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted only in a situation which falls under sub-section (6) and not under sub-section (5) to Section 10. Sub-sections (5) and (6),therefore, take care of both the situations, i.e. taking possession by giving notice that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), than "forceful dispossession" under sub-section (6) of Section 10.

34. Requirement of giving notice under sub-sections (5) and (6) of Section 10 is mandatory. Though the word "may' has been used therein, the word "may' in both the sub-sections has to be understood as "shall" because a court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from failure to implement the requirement. Effect of non-issue of notice under sub-section (5) or sub-section (6) of Section 11 is that it might result the land holder being dispossessed without notice, therefore, the word "may' has to be read as "shall'.

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39. The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 3 of the Repeal Act.

40. We, therefore, find no infirmity in the judgment of the High Court and the

appeal is, accordingly, dismissed so also the other appeals. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and hence, the respondents are entitled to get the benefit of Section 3 of the Repeal Act. However, there will be no order as to costs."

36. It is a matter of common notice and also matter of record that large number of cases which earlier came before this court and were decided and even at present also on getting the record it is clear that proceedings are either without any notice on the land holders or after the notice to the dead person or after the notice but not the proper service stating the name of the witnesses and their details and in most of the cases proceedings did not progress after the notice under Section 10(5) of the Urban Land (Ceiling and Regulation) Act 1976 and if there is notice under Section 10(6) of the Act it again do not contain proper service with the name/identity of the witnesses. For taking Dakhal document demonstrates the authority signing the paper is not competent. The emphasis on the word 'actual physical possession' has some special meaning and thus that rules out the paper possession and it is for this reason it has been said that mere entry will not reflect taking of actual physical possession.

37. We can safely assume that nobody is going to leave the possession just on mere asking by a notice under Section 10(5) of the Act. It is highly improbable to accept and believe that a notice under Section 10(5) of the Act is given and the person proceeds to surrender and deliver the possession to the State or to a person duly authorized.

38. The Law Courts has always expected the strict proof of taking possession under the Rural Ceiling also having found it to be a confiscatry law. The land owned by any person might be coming down from the time of their ancestors will be so easily and conveniently surrendered as is being stated by the State in the counter affidavit is a matter of surprise. The factum of actual possession which has a vital role on the right of Landholder certainly has to be actual physical possession and that too in accordance with law and therefore that permits a big room of inquiry in all respect and the court having not found any positive material and any overt act to show dispossession of the landholder has to lean in their favour and thus in view of the repeal of the Urban Land (Ceiling and Regulation) Act, 1976 a person having continued in possession will continue with his rights.

39. The court feels that after imposition of ceiling on agricultural land by the State Government and its success in getting the land and its distribution to the weaker class the demand for imposing of ceiling on urban properties was also felt with the growing population and for orderly development of the urban areas and also to take measures to regulate social control over the resources of urban land besides other allied purposes. After lapse of reasonable time for various kind of pressures and we do not exactly know the object but primarily for the reasons stated in the Repeal Act the Urban Land (Ceiling and Regulation) Repeal Act, 1999 came into force.

40. It is to be observed that all the decided cases on the point have interpreted the possession as 'actual physical possession' and not only paper/symbolic. There being no specific

provision for taking over possession of the surplus land direction was issued named as 'U.P. Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983. For payment of compensation and procedure for taking possession of the vacant land and its manner has been dealt in great detail in the decision given by this court in the case of **Ram Chandra Pandey (Supra)**.

41. If we read the relevant provisions of the U.P. Urban Land (Ceiling and Regulation) Act, 1976 and U.P. Urban Land (Ceiling and Regulation) Repeal Act 1999 then it will be clear that mere vesting of the land declared surplus under the Act without taking de facto possession is of no consequence and land holder shall be entitled to the benefit of Repeal Act. The effect of the Repeal Act is further clear that if the land owner remains in physical possession then irrespective of his land being declared surplus and/or entry being made in favour of the State in Revenue Records, he will not be divested of his rights. Even if compensation is received that also that will not dis-entitle him to claim the benefit if compensation is refunded, provided he is in actual physical possession. Payment of compensation has no co-relation with the taking of actual physical possession as with the vesting of land compensation becomes payable which can be paid without taking actual physical possession.

42. It is not to be emphasised again and again that irrespective of vesting of land the State or the competent authority authorizes by the State is to establish taking of actual physical possession from the landholders, after following due procedure and therefore, in all the cases there has to be a verification about continuance of actual physical possession as claimed by the landholder or its taking over as claimed by the State as provided in law and it is accordingly rights of the parties are to be governed.

43. In view of the aforesaid discussions and examination of various aspects in various judgments it is clear that if proceedings have started by sending notice against the dead person at any stage then that will not divest the landholder of his rights. There has to be proper service as provided under Section 10(5) of the Act. There has to be proper service under Section 10(6) of the Act. Required procedure has to be followed. Possession is to be taken by the competent authority. Possession has to be actual physical and not symbolic. Mere change in the entry is also not the enough proof of dis-possession. The effect of the Repeal of the Principal Act is so clear and loud which permits the rights with the landholders if actual physical possession has not been taken over by the State or by any person duly authorized by the State Government in its behalf after due notice and service in accordance with law.

44. We are just to add here for caution that facts of each and every writ petition has not been mentioned separately as that was to add the bulk. When the case was taken up learned Advocate in presence of learned Standing Counsel stated the relevant facts of their cases which primarily related to issuance of notice against dead person, non service of notice under Section 10(5) of the Act, non service of notice under Section 10(6) of the Act, non taking of possession in accordance with law by the competent

authority. The main stand of the State is of taking possession after notice under Section 10(5) of the Act and sometimes giving the same to the development authority.

45. Here we are to notice that in respect to the rights and possession over the property of others (if two sets are there) the person who may not have any right draws a skeleton and fill ups the colour and then presents the same till the last in a very powerful manner. It is then on defeat he leaves the property/possession. Here we are talking from the State side that notice under Section 10(5) of the Act to surrender and deliver the possession was given and everything went off so peacefully which no one can imagine. At various times the development authorities state about their possession. Certainly that has to flow from the State, therefore, first State has to demonstrate its lawful authority i.e. taking of actual physical possession in accordance with law and if that is not substantiated then everything has to fall. This being very basic thing in all the petitions, all the aspects were checked in presence of the State side, some from the record and some otherwise upon which a conclusion has been arrived at. As and when an individual case is to be there the tenure holder is to establish either of the situation as has been explained in series of the cases noted on the point and also the case in hand for getting the relief. If the factual premises do not support the petitioner then certainly State has to succeed.

46. In respect to the cases where after declaration of the land as surplus and deemed vesting, the landholder has transferred their land, the question of consideration of their existing rights has to be seen as on the date of transfer whether they have any right to be enforced or otherwise, and therefore, this class of cases will have to be kept separate for being dealt.

47. Accordingly, all the writ petitions are allowed. Respondents are directed not to interfere in the peaceful possession of the petitioners and also to restore entry of their name on moving appropriate application in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2013

BEFORE
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 10450 Of 2013

Aditya Kumar and others ...Petitioners
Versus
The State of U.P. and othersRespondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri O.P. Singh
Smt. Durga Tewari, Sri Chandan Sharma
Sri Basisht Narain Pandey
Sri J.K. Srivastava

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri R.A. Akhtar
Sri Kalpraj Singh, Sri Vipin Pandey

Constitution of India, Art.-14-Right of Children to Free and Compulsory Education Act 2009- Appointment of Part-time instructor- in Primary School- by G.O. dated 31.01.2013-cut off date of age limit-provided 21 to 35 yrs-unless found unreasonable-does not amount hostile discrimination-can not be interfered under writ jurisdiction.

Held: Para-10
Having heard the respective submissions, the Scheme is for appointment of a short duration of eleven months as a part-time Instructor subject to further renewal. The age limit of 35 years is a criteria that is

prescribed for engaging such Instructors. I have not been able to locate any logical reason to reject this fixation. The State has the competence to employ candidates up to a reasonable age. By making such a prescription the State does not become irrational in its approach. If the age was fixed, say upto 45 years, then those above 45 would raise the same argument. This by itself, therefore, cannot be the basis of a challenge to the criteria unless unreasonableness is writ so large, that it may appear to be absurd. The age of 35 years has not in any way been demonstrated to be a wrong or unfit age as the maximum for a part-time Instructor. Even otherwise, it does appear that the Scheme has been introduced as a human resource harnessing measure to provide employment to this middle age group of youth who may be saved from wandering aimlessly for employment. The State is making efforts with central aid to ameliorate this condition and if it has chosen the maximum age limit of 35 years, the same cannot be illogical.

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

1. The common thread of arguments in all these petitions raises a challenge to the fixation of upper age limit of 35 years for engagement as a part-time Instructor in a Scheme floated by the State Government with the financial aid of the Central Government under the Right of Children to Free and Compulsory Education Act, 2009.

2. The notification advertised on 3.10.2012 for the said purpose only prescribed a minimum age bar of 21 years with a restriction that a retired teacher above the age of 65 years would not be engaged. This Government Order was rescinded and replaced by the Government Order dated 31.1.2013 which introduces the maximum age restriction of 35 years. Clause 4 (i) of the Government Order which is under challenge is quoted herein under:-

''4(1) वर्तमान शैक्षिक सत्र 2012–13 में अभ्यर्थी की आयु 01 जुलाई 2012 को न्यूनतम 21 वर्ष तथा 35 वर्ष से अधिक नहीं होगी।''

3. I have heard Sri Ashok Khare, learned Senior Counsel, Smt. Durga Tewari, Sri Chandan Sharma, Sri Basisht Narain Pandey and Sri J.K. Srivastava, Advocates for the petitioners and Sri Kalpraj Singh, Sri Vipin Pandey and Sri Tomar, learned Standing Counsel for the respondents.

4. The thrust of the arguments of all the learned counsel is that for the appointment of a teacher in a Primary or a Junior High School on the regular side is not fettered by such maximum age and is also relaxable. Even for engagements under Schemes like that of Instructors, Shiksha Mitra, Prerak or Vocational Teachers, no such upper age limit is provided for. In the present case also the predecessor Government Order dated 3.10.2012 did not place any bar and, therefore, there is no rational basis for now introducing the maximum age of 35 years that eliminates all the petitioners from the zone of consideration.

5. It is urged that the norms fixed under the Notification dated 3.9.2001 by the NCTE prescribing minimum qualifications, no such restrictions have been imposed and, therefore, the impugned condition has no rational nexus with the object sought to be achieved. It is for this reason that the earlier Government Order dated 3.10.2012 did not place any such restriction.

6. The petitioners, some of whom hold C.P.Ed. qualifications urge that such certificates were awarded upto 1997 in the State of U.P. and have been given up in other States. Such candidates are obviously above

the age bar as they are holders of certificates that were issued long ago. They are very few in number in the entire State and, therefore, they could be possible candidates but for the age bar that has now been introduced. The argument is that the maximum age limit as prescribed is designed to eliminate these candidates and put them out of employment.

7. It is then urged that the definition of the academic session should not be treated as the year of recruitment as the advertisement itself has been issued after the Government Order dated 31.1.2013. There is, therefore, no rationality in asking for the age limit as on 1.7.2012 as the appointments will be made now in 2013.

8. Another similarity is sought to be drawn from no such age bar being fixed for appointments in girls institutions under the Kasturba Gandhi Awasiya Balika Vidyalaya Yojna.

9. Opposing the said arguments, the State contends that fixing the upper age limit is within the executive powers of the State and is in tune with such limitations in all State employment. The competence of the State to do so cannot be doubted. The petitioners have not been able to point out any irrationality in the limit so fixed. A cut-off-date has been provided which also relates to the process of selection for 11 months duration subject to further renewal and it is a rational method of short-listing applications which cannot be said to be arbitrary. The age limit is commensurate to the nature of the job of teaching which is to be performed for the students of a particular age group. Merely because some other age limit or no age limit would be better, cannot be a ground to invoke Article 14 of the Constitution to strike down the maximum age prescribed.

10. Having heard the respective submissions, the Scheme is for appointment of a short duration of eleven months as a part-time Instructor subject to further renewal. The age limit of 35 years is a criteria that is prescribed for engaging such Instructors. I have not been able to locate any logical reason to reject this fixation. The State has the competence to employ candidates up to a reasonable age. By making such a prescription the State does not become irrational in its approach. If the age was fixed, say upto 45 years, then those above 45 would raise the same argument. This by itself, therefore, cannot be the basis of a challenge to the criteria unless unreasonableness is writ so large, that it may appear to be absurd. The age of 35 years has not in any way been demonstrated to be a wrong or unfit age as the maximum for a part-time Instructor. Even otherwise, it does appear that the Scheme has been introduced as a human resource harnessing measure to provide employment to this middle age group of youth who may be saved from wandering aimlessly for employment. The State is making efforts with central aid to ameliorate this condition and if it has chosen the maximum age limit of 35 years, the same cannot be illogical.

11. Merely because other engagements in the past did not make such a provision would by itself not be sufficient to treat the fixation to be arbitrary. In the absence of any further material, the power to fix an upper age limit for engagement by the employer is not taken away. The alteration in the conditions between the Government

Orders dated 3.10.2012 and 31.1.2013, therefore, does not amount to any act of hostile discrimination so as to accept the arguments of the petitioners. The fixation can also be construed to be in the interest of students to provide energetic and suitably aged Instructors for teaching the category of Primary and Junior classes. There is no irrationality in making such a provision. A little more relaxation would be convenient or alternatively acceptable as a better option is a matter of policy which does not fall within the powers of a court to fix. Since the Scheme has been brought into existence in the 2012-13 session, the cut-off-date has a rational nexus and cannot be discarded on the ground of being implemented later on in 2013. The invitation and sorting of applications that are likely to be huge in number does consume some time and, therefore, a date in relation thereto prior to the advertisement cannot be arbitrary merely because the consequential processing is to be effected later on. The provision of not having an age bar in other schemes or in a girls institution cannot be a comparable argument to declare the upper age limit as arbitrary.

12. None of the arguments, thus, advanced by the petitioners holds water and the challenge raised lacks merit. The petitions are, accordingly, dismissed with no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.04.2013

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Application No. 10525 of 2012

Chandan ...Applicant
Versus
State of U.P. and another ...Respondents

Counsel for the Applicant:
Sri Manikant Srivastava
Sri Jai Singh Chandel

Counsel for the Respondents:
A.G.A., Sri M.C. Singh
Sri Dushyant Singh

Code of Criminal Procedure-Section 482-
Prayer for quashing proceeding under section 363, 366. the prosecutrix in statement under section 164 has admitted her age 19 yrs.-having brilliant academic record not a case of enticing away merely on elopement No offence under section 363. 366 IPC made out-proceeding quashed.

Held: Para-18
From the statement of the prosecutrix Sita it could not be said that it was an act of 'taking away or enticed away' rather it would be a case of elopement as was indicated by the Apex Court in the of Varadarajan Vs. State of Madhya Pradesh, AIR 1965 Supreme Court, 942 where the Apex Court had distinguished the case of taking or enticing away from the mere act of elopement and in that connection has pointed out that even if a lady, who had not attend the majority i.e the age of 18 years herself goes with a man of her own volition then it could not be said to be a case of either taking away or enticing away a minor women out of keeping of her lawful guardianship. It was further held that in such factual situation no offence either under sections 363, 366-A or 366 I.P.C could be said to be made out. The Apex Court in the case of Jaimala Vs. Home Secretary, Government of Jammu and Kasmir, AIR 1982 SC 1297 has held that in addition of three years is to be made to medically assess the age and thus from the medical report of the prosecutrix it is evident that she is aged about 19 years of age.

Case Law discussed:
AIR 1965 Supreme Court, 942; AIR 1982 SC 1297

(Delivered by Hon'ble Ramesh Sinha, J)

1. Heard Sri Jai Singh Chandel, learned counsel for the applicant, learned A.G.A for the State and Sri M.C. Singh, learned counsel appearing on behalf of opposite party No.2.

2. The applicant, through the present application under section 482 Cr.P.C. has invoked the inherent jurisdiction of this Court with a prayer to quash the proceeding in S.T. No. 11 of 2012, under sections 363 and 366 I.P.C, pending in the court of Addl. Sessions Judge, Anoopshahar, Bulandshahar

3. The brief facts of the case are that a First Information Report was lodged by the opposite party No.2 the father of the prosecutrix (hereinafter referred to as the complainant) against the applicant and two other persons namely Hosiyar son of Khacheru and Jagdish son of Teja alleging that on 19.5.2011 at about 4.00 P.M. in the morning his daughter aged about 15- 16 years had gone to attend call of nature in the Jungle which was near the house of the complainant and when she did not return he made a search of her daughter and came to know that her daughter was enticed away by Chandan son of Dharamveer (applicant), Hosiyar Singh son of Khacharu and Jagdish son of Teja. He made a search of her daughter from his relatives and also made a search of by three above named accused persons but they could not be traced. It is stated that several persons of the village have seen her daughter being taken by the said accused persons. The accused persons are influential and men of criminal antecedent, hence, he prayed for registration of First Information Report against them.

4. The F.I.R of the incident was lodged by the complainant on 22.5.2011 at police station Anoopshahar, District Bulandshahar which was registered as Case Crime No. 34/11, under sections 363 and 366 I.P.C.

5. The medical of the prosecutrix was done on 15.7.2011 and her statement was recorded under section 161 Cr.P.C on 12.7.2011 and the statement of the prosecutrix recorded under section 164 Cr.P.C was recorded on 16.7.2011 respectively.

6. The investigation was carried out and thereafter charge sheet was submitted against the applicant and two other co-accused persons namely Hosiyar Singh and Jagdish, under sections 363 and 366 I.P.C on 31.9.2011 and the Chief Judicial Magistrate, Bulandshahar took cognizance of the offence and registered the case as Case No. 6416 of 2011 and committed the case to the Court of Session.

7. The applicant has approached this Court for quashing of the entire proceedings of S.T. No. 11 of 2012, under sections 363 and 366 I.P.C pending in the Court of Additional Sessions Judge, Anoopshahar, District Bulandshahar by filing the present 482 Cr.P.C application.

8. It has been contended by the learned counsel for the applicant that the applicant is the nephew of co-accused HosiyarSingh with whom the prosecutrix Sita had married. She is a major girl aged about 19 years, as per the medical report which is based on ossification test which was conducted on 15.7.2011 by the order of the C.M.O. A medical certificate has been issued by the C.M.O on 15.7.2011 which has been annexed as Annexure-4 to the accompany affidavit. He further

pointed out that as per the statement of the prosecutrix Sita recorded under section 164 Cr.P.C on 16.7.2011 she has admitted that she was known to co-accused Hosiyar Singh for the last four years and she stated that she had left her house voluntarily with co-accused Hosiyar Singh who had not enticed her and they had gone to Jaipur where they lived in rented house for about 15-20 days. Thereafter had gone to Aligarh where they got themselves married in Arya Samaj Mandir then they went to Sikandarabad and lived there for about one month. Co-accused Hosiyar Singh was working in a private company. It was further stated by her that she had established sexual relationship with co-accused Hosiyar Singh on her own sweet will and she married him and she want to go with her husband. She was apprehending danger to her life from the members of her family. It was categorically stated by her that the applicant and co-accused Jagdish did not commit any rape on her and they have been falsely implicated by the member of her family. The said statement of the prosecutrix has been annexed as Annexure 5 at page 11 of the accompany affidavit.

9. In view of the said statement of the prosecutrix under section 164 Cr.P.C it was submitted that the prosecutrix was a major girl and she has left her parents' house with her own sweet will and had accompanied with co-accused Hosiyar Singh and stayed with him at several places and returned after two months of the incident when she was arrested by the police and handed over to her parents. Hence no offence under sections 363 and 366 I.P.C is made out against the applicant and his prosecution in the case is liable to be quashed by this Court.

10. It was further submitted that the applicant has been nominated in the present case merely because he is nephew of co-accused Hosiyar Singh. It has been pointed out that the applicant is a student of M.Sc and having good academic record. He has passed out first class in High School and Intermediate and in B.Sc IInd year by obtaining more then 80% of mark. The academic record of the applicant has been annexed as Annexure-R.A-1 at page Nos. 5 to 10.

11. Sri M.C. Singh, learned counsel for the complainant-opposite party No.2 has vehemently opposed the prayer for quashing of the proceedings against the applicant and has submitted that the charge sheet discloses cognizable offence against the applicant, hence he is liable to be tried by the Court below. He further submitted that the prosecutrix is a minor girl as stated in the First Information Report lodged by the father of the prosecutrix. He has also drawn the attention of the Court to the High School certificate of the prosecutrix which has been annexed as C.A-1 at page Nos. 13 and 14, according to which the date of birth of the prosecutrix is 9.9.1995. She is minor girl aged about 16 years on the date of the incident. He further submitted that at the time of incident she was minor, therefore her consent is immaterial.

12. Learned A.G.A also adopted the argument of the learned counsel for the complainant.

13. Considered the submission advanced by the learned counsel for the parties.

14. From the perusal of the record, it is apparent that the prosecutrix, as per

medical opinion, is aged about 19 years and in her statement recorded under section 164 Cr.P.C she has categorically stated that she has voluntarily left her parents' house on 19.5.2011 and had accompanied with co-accused Hosiyar Singh and travelled at several places and enjoyed with company and further married him at Aligarh and established sexual relationship with co-accused Hosiyar Singh and remained with him for about two months.

15. So far as the contention of the learned counsel for the opposite party No.2/complainant that the prosecutrix was a minor girl at the time of incident as per High School certificate, hence her consent was immaterial does not appears to be sustainable in the eyes of law.

16. The learned counsel for the complainant appears to have made the said argument thinking that when there was a medical report assessing the age of victim and simultaneously there was a record indicating that the date of birth of the victim as mentioned in the school record then the preference had always to be given to the school record and not to to the medical record. It is relevant point out here that there was no such law which could justify the argument of the learned counsel for the complainant that in case of present nature the assessed aged of the victim for the offence of the present nature has to be recorded in the light of the entries made in the school record. Probably the learned counsel for the complainant was having in his mind the provision of Juvenile Justice (Care and Protection) Rules 2007 which by virtue of Rule 12 had granted credence to the age of the victim of such an offence which is mentioned in the High School certificate over the medically assess the age of the victim.

17. In my opinion it is misreading of law which appears leading the learned counsel for the complainant to raise the said argument. In the present case the age of prosecutrix is 19 years and as such she was a major and she was not an accused. She was not a juvenile in conflict with law and as such she could not be subjected to wrong interpretation of law.

18. From the statement of the prosecutrix Sita it could not be said that it was an act of 'taking away or enticed away' rather it would be a case of elopement as was indicated by the Apex Court in the of **Varadarajan Vs. State of Madhya Pradesh, AIR 1965 Supreme Court, 942** where the Apex Court had distinguished the case of taking or enticing away from the mere act of elopement and in that connection has pointed out that even if a lady, who had not attend the majority i.e the age of 18 years herself goes with a man of her own volition then it could not be said to be a case of either taking away or enticing away a minor women out of keeping of her lawful guardianship. It was further held that in such factual situation no offence either under sections 363, 366-A or 366 I.P.C could be said to be made out. The Apex Court in the case of **Jaimala Vs. Home Secretary, Government of Jammu and Kasmir, AIR 1982 SC 1297** has held that in addition of three years is to be made to medically assess the age and thus from the medical report of the prosecutrix it is evident that she is aged about 19 years of age.

19. Admittedly, as per the statement of the prosecutrix no offence under sections 363 and 366 I.P.C is made out against the applicant. Moreover the academic record of the applicant also

shown that he is a brilliant student and his implication by the complainant in a mala fide manner cannot be ruled out.

20. In view of the above, the prosecution of the applicant in the aforesaid case is wholly unwarranted and is hereby quashed, accordingly.

21. The petition stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 11609 Of 2013

Danish and others ...Petitioners
Versus
Syed Shahenshah Husain ...Respondent

Counsel for the Petitioners:
Sri Bharat Pratap Singh

Counsel for the Respondent:
Sri S.P. Singh

Court Fee Act-Section 7 (IV) (c) and 7 (IV)(a)- Suit for cancellation of will decided in favor of plaintiff-objection that Court fee must be as per valuation of property-held defendant No legal right to challenge the Court fee-which is between plaintiff and the Court-no error committed by Revisional Court-petition dismissed.

Held: Para-6
I do not find any error in the view of the lower revisional court. The matter of court fees is in between the plaintiff and the State. Defendant has go no concern with it. The suit has been filed before Civil Judge (S.D.) whose upper jurisdiction is unlimited.

Case Law discussed:

AIR 2010 SC 2807; 2013(1) SCC 579; 2010 (12) SCC 112; AIR 1961 SC 1299; 2012 (117) RD 249 (SC)

(Delivered by Sibghat Ullah Khan, J.)

1. Heard learned counsel for the petitioners and Sri S.P. Singh, learned counsel for respondent, who has appeared through caveat.

2. Respondent has instituted O.S. No.1276 of 2009, Syed Shahenshah Husain Vs. Danish and others. Relief claimed in the suit is for declaration to the effect that the will claimed to have been executed on 11.01.2008 by Syed Wasi Jafar in favour of defendant No.1 be declared null and void. Relief of permanent prohibitory injunction has also been sought. Relief of mandatory injunction was also sought for delivery of possession to the plaintiff in case it was found that defendants were in possession. Defendants filed written statement and raised pleas of under valuation of the suit and insufficiency of court fees paid on the plaint. In para-15 of the plaint, Relief-(A) for declaration was valued at Rs.2 lacs and relief-(B) was also valued at Rs.2 lacs, total Rs.4 lacs. Issues were framed. Issues No.3 & 4 related to valuation and court fees. Additional Civil Judge (S.D.), Court No.1, Bulandshahar decided the said issues in favour of the plaintiff on 07.08.2012. The defendants petitioners had contended that valuation of the suit for the purposes of jurisdiction and court fees must be on the basis of market value of the property regarding which Will was executed and ad voleram court fees should have been paid. The trial court placed reliance upon **Surhid Singh Vs. Randhir Singh, AIR 2010 SC 2807** holding that if the relief is for declaration

of a deed to be void of which plaintiff is not executant/ purported to be executant, then court fees is to be paid in accordance with Section 7(IV)(C) of Court Fees Act and not Section 7(IV)(A). The issues were decided in favour of the plaintiff. Against the said order, defendants petitioners filed Civil Revision No.82 of 2012, which was dismissed on 09.11.2012, hence this writ petition.

3. The revisional court agreed with the petitioners that Surhid Singh (2010) authority of the Supreme Court was not applicable in U.P.

4. Learned counsel for the petitioners has cited an authority of the Supreme Court delivered after the decision of the revisional court judgment reported in **Shailendra Bhardwaj and others Vs. Chandra Pal and others, 2013 (1) SCC 579** (delivered on 21.11.2012) in which the Supreme Court held that its earlier authority of **Suhrid Singh @ Sardool Singh Vs. Randhir Singh others, 2010 (12) SCC 112** was confined to Punjab Court Fees Act, however as far as Court Fees Act as amended by U.P. is concerned, in a suit for declaring will and sale deed as void resulting in cancellation computation of court fees will be covered by Section 7(IV)(A) and not Article 17(II) of Court Fees Act even if no consequential relief is claimed under Section 7(IV)(A) amended by U.P. in 1938. Accordingly, the view of the lower revisional court is perfectly in accordance with law.

5. However following the judgment of the Supreme Court reported in **Sri Ratnavaramaraja v. Smt. Vimla , AIR 1961 SC 1299 and A. Nawab Jhon Vs. B.N. Subrimaniyam, 2012 (117) RD 249 (SC)** the lower revisional court held that defendants had no legal right to challenge the decision of the trial court on court fees. Accordingly, revision was dismissed.

6. I do not find any error in the view of the lower revisional court. The matter of court fees is in between the plaintiff and the State. Defendant has go no concern with it. The suit has been filed before Civil Judge (S.D.) whose upper jurisdiction is unlimited.

7. The writ petition is therefore dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 30.04.2013

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE ARVIND KUMAR TRIPATHI(II), J.

Writ Petition No. 11802(M/B) Of 2010

Rameshwari Prasad Srivastava and others ...Petitioners
Versus
Chief Manager, S.B.I. and another ...Respondents

Counsel for the Petitioners:
Sri Sushil Kumar Sinha

Counsel for the Respondents:
A.S.G., Sri Anand Kumar Singh
Sri Sudeep Seth.

<u>Indian Succession Act, 1925-</u> Section 370 and 381-Succession certificate-petitioner's wife-open an account under provident fund scheme 1968-without nominee-after her death-petitioners claimed the amount being legal heir duly supported with affidavit with no objection by other claimants-rejection on lack of succession certificate-objection that under PF scheme succession certificate not required-held-misconceived-Form G reflects the succession certificate-in absence of nomination.

Held: Para-6

Sri S.K. Sinha, learned Counsel for the petitioners submits that the demand of succession certificate for settlement of PPF account claimed by the respondent-Bank from the petitioners who are legal heirs of the deceased depositor/subscriber is manifestly unjust and illegal insofar as there is no interse dispute amongst the legal heirs of the deceased subscriber and as such, there is no occasion to demand succession certificate from them.

(Delivered by Hon'ble Rajiv Sharma, J)

1. Heard Sri S.K. Sinha, learned Counsel for the petitioners and Sri Sudeep Seth, learned Counsel for the respondent No.1 and perused the records.

2. Through the instant writ petition under Article 226 of the Constitution of India, petitioners have challenged the order/direction dated 7.4.2010 passed by the Chief Manager, State Bank of India (respondent No.1) contained in Annexure No.13 to the writ petition, whereby respondent No.1 has informed petitioners that since claim amount exceeds Rs.1 lac, therefore, claim will be made along with succession certificate/letter of Administration.

3. Shorn off unnecessary details the facts of the case are as under :

Smt. Lajja Srivastava had opened an account, namely, Public Provident Fund Scheme, 1968 [hereinafter referred to as **"PPF"**], bearing No. PPF 314, without nominating any body to receive the amount on her death in the State Bank of India Branch at Shikohabad, District Mainpuri (now Ferozabad) on 7.7.1987. On the request of Smt. Lajja Srivastava, the said PPF account was transferred on 22.5.1995 to State Bank of India, at Gomti Nagar, Lucknow, upon which, the said PPF account was registered as PPF account, bearing No. 10070430561 at State Bank of India branch, Gomti Nagar, Lucknow.

4. On 24.10.2007, Smt. Lajja Srivastava expired leaving behind her husband, who is the petitioner No.1 and her two sons, who are the petitioner Nos. 2 and 3. After the death of Smt. Lajja Srivastava, petitioner No.1 (Rameshwari Prasad Srivastava) submitted an application for payment of balances in the PPF account on 13.5.2008, to which the Chief Manager of the State Bank of India, vide letter dated 16.9.2008, informed the petitioner No.1 that for settlement of the said Public Provident Fund account in his favour, he was required to produce succession certificate. Subsequently, petitioner No. 1 again submitted all relevant documents along with a photocopy of the WILL dated 20.6.2007 executed by Smt. Lajja Srivastava (deceased subscriber of the said PPF account) vide letter dated 25.7.2009 for settlement of the PPF account claimed in his favour but again the Bank required Succession Certificate as a necessary precondition for processing the said claim as desired. Thereafter, on taking legal advise, the petitioner No.1 has again submitted a fresh application dated 18.12.2009 along with claim Form-G dated 17.12.2009 for withdrawal by legal heirs under the Public Provident Fund Scheme, 1968 and also an affidavit dated 17.12.2009 in support thereof along with four annexures i.e. a photocopy of the Death Certificate of the deceased subscriber attested by Notary Public, photocopy of disclaimer granted by the two sons of the deceased subscriber attested by the Notary Public, a photocopy of subscriber's Identity card

issued by the Election Commission of India attested by Notary Public and a photo copy of the pass book of the said Public Provident Fund Account No. 10070430561 and its relevant contents including entries attested by the Notary Public but again Chief Manager, vide letter dated 7.4.2010 advised the petitioner No.1 to produce succession certificate/letter of administration in order to settle the said PPF claim.

5. Hence the instant writ petition.

6. Sri S.K. Sinha, learned Counsel for the petitioners submits that the demand of succession certificate for settlement of PPF account claimed by the respondent-Bank from the petitioners who are legal heirs of the deceased depositor/subscriber is manifestly unjust and illegal insofar as there is no interse dispute amongst the legal heirs of the deceased subscriber and as such, there is no occasion to demand succession certificate from them.

7. Elaborating his submission, Sri Sinha submits that in Section 8 of the Act, it was not provided that claimants, other than depositor/subscriber shall invariably have to produce succession certificate. Therefore, by no stretch of imagination, it can be assumed that in compliance of Clause-10 of the Schedule to the Act, the Scheme cannot be implemented without the production of succession certificate. He submits that the production of succession certificate is virtually prohibited by Section 3 (3) of the Act. The claim under the Public Provident Fund Act and the Public Provident Fund Scheme is a statutory liability and the amount has to be paid in terms of the said scheme i.e. the Public Provident Fund Act, 1968.

8. While placing reliance upon the judgment of the Apex Court in **Bimal Chandra Banerjee V. State of Madhya Pradesh etc**.: AIR 1971 SC 517, **Chandra Kumar Sah and another V. The District Judge and others** : AIR 1976 Allahabad 328 and Narain Sarup V. Daya Shanker : AIR 1938 Allahabad 256, Sri Sinha submits that a rule making authority has no plenary power and further the Rules are to be confined to the same field of operation as that area marked out by the Act itself. Thus, the plea of the respondent-bank that under Section 370 and 381 of the Indian Succession Act, 1925, the grant of succession certificate afford full indemnity to the bank is wholly misconceived.

9. Sri Sinha has also contended that no provision of the Act, leave along the aforesaid ones afford any indemnity whatsoever to the respondent No.1-bank as the application and operation of the said Indian Succession Act, 1925 is expressly precluded by the law of the Public Provident Funds Act, 1968 vide Section 3 (3) and that also the grant of succession certificate does not establish the character of the guarantee as an heir which is a necessary precondition to be fulfilled by the claimant under the Public Provident Fund Act, 1968 before making a valid claim, which is specifically mandated under Section 8 (3) of the said Act. He submits that the succession certificate merely establishes the representative character of the guarantee and nothing more is an established and incontrovertible fact. Even in cases where the Indian Succession Act, 1925 is applicable, or operative the grant of succession is not necessarily and essentially final which can be challenged

and can be revoked under Section 383 on the ground given in sub-clause (c) amongst others. He submits that towards security as is also required from the guarantee of succession certificate, for the purpose and under circumstances, mentioned in Section 375 (1) of the Indian Succession Act, 1925, the petitioner No.1 has already furnished/provided as demanded earlier by respondent No.1-Bank i.e. two sureties adequately covering the amount in question in the said Public Provident Funds Account of the deceased subscriber sought to be release along with letter of indemnity to the full satisfaction of the respondent No.1-Bank and competent enough to indemnify it.

10. Refuting the submissions advanced by the Counsel for the petitioner, Sri Sudeep Seth, learned Counsel for the respondent-Bank submits that Smt. Lajja Srivastava, wife of petitioner No.1 and mother of petitioners Nos. 2 and 3, maintained a PPF account in State Bank of India Branch, Gomti Nagar, Lucknow. The said PPF account did not carry any nomination. On 24.10.2007, Smt. Lajja Srivastava expired without making any nomination in the said PPF account. He further submits that petitioner No.1 submitted a claim dated 13.5.2008 for payment of the amount in the PPF account of Smt. Lajja Srivastava but in paragraph 3 of the claim, the petitioner No.1 has put a cross in respect of succession certificate i.e. lodging the claim without annexing the succession certificate. Accordingly, the bank rejected the claim of the petitioner No.1 vide order dated 16.9.2008 on the premise that the succession certificate was not enclosed along with the application. Thereafter, the petitioner submitted another claim but again the succession certificate was not annexed and as such, vide letter dated 1.8.2009, the Bank apprised the petitioner No.1 that for operation of the amount, nomination or grant of succession certificate are necessary concomitant and as such, the Bank asked the petitioner No.1 to submit succession certificate for operation of the account/settlement of the claim. Thereafter, the petitioner submitted another application dated 18.12.2009 submitting his claim under Form -G for withdrawal of the amount. However, in the said claim Form-G clause relating to succession certificate has been struck down by the petitioner No.1 and he did not submit the succession certificate.

11. Sri Seth further submits that petitioner has also sought information under the Right to Information Act, 2005, whereupon it was apprised by the Bank vide covering letter dated 11.3.2010 that as per PPF Scheme, 1968 and Form-G, if the amount exceeds Rs.1 lac, Form-G envisaged production of succession certificate for payment of PPF account where there is no nomination. Thus, there is no infirmity in the order dated 7.4.2010 passed by the Bank.

12. Sri Seth further submits that petitioners have not challenged the orders dated 16.9.2008 and 1.8.2009 passed by the Bank rejecting the claim of the petitioners and as such, no effective relief can be granted to the petitioners. He further submits that under Sections 370 and 381 of the Indian Succession Act, 1925, the grant of succession certificate afford full indemnity to the Bank as regards payment made or dealings had in good faith in respect of such debts or securities to or with the person to whim the certificate is granted. Accordingly, the

succession certificate is sought by the Bank.

13. We have heard learned Counsel for the parties and perused the record.

14. It is not in dispute that Smt. Lajja Srivastava was the subscriber of PPF Account No. 10070430561. In the said PPF account, no nomination was made by the subscriber. After the death of Smt. Lajja Srivastava, petitioner No.1, who is the husband of Smt. Lajja Srivastava, moved an application claiming the amount of PPF, which was rejected by the bank by saying that until and unless succession certificate is not produced by the petitioners, amount of PPF cannot be disbursed as the claimed amount is above one lac.

15. Under Clause 12 of the Provident Fund Scheme, 1968, where there is no nomination enforce at the time of death of the subscriber, the amount standing to the credit of the deceased after making adjustment, shall be repaid by the accounts office to the legal heirs of the deceased on receipt of application in Form-G. It is also provided that the balance up to Rs.1 lac may be paid to the legal heirs on production of letter of indemnity; and affidavit; a letter of disclaimer of affidavit; and certificate of death of subscriber, on stamp paper in the forms as enclosure to Form-G.

16. On perusal of the Form G, it reflects that the succession certificate/letter of administration with attested copy of the probated Will of the deceased subscriber issued by the competent Court is required to be annexed along with the application for withdrawal. In the bottom of Form-G, it has been mentioned that succession certificate clause be struck of, if there is a valid nomination. Thus, it is clear that in the absence of nomination, the succession certificate is required.

17. Admittedly, in the said PPF account, there is no nominee and the amount of PPF is more than one lac and as such, requiring the succession certificate from the petitioners by the Bank in view of the provisions, referred to above, is logical and not illegal. Furthermore, amendment in paragraph 1 as per Notification dated 23.6.1986 has no help to the petitioner since the balance amount is more than 1 lacks insofar as the current account balance of PPF account of Late Smt. Lajja Srivastava as on 2.3.2012 is Rs.9,12,870/- as informed by the Bank.

18. Even otherwise, during the course of arguments, learned Counsel for the petitioners have raised certain objection on the clause of the Act but on perusal of the reliefs claimed by the petitioners in the instant writ petition, petitioners have not challenged any clause/section/rules of the Act. Therefore, the judgments, which have been relied upon by the Counsel for the petitioners, are not applicable in the facts and circumstances of the case.

19. For the above reasons, we are not inclined to interfere under Article 226 of the Constitution of India.

20. The writ petition is, therefore, **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2013.

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 14092 Of 2013

Ramvijai Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri A.K.Yadav
Sri R.A.Akhtar

Constitution of India, Art. 226- Appointment as Physical instructor in Basic Education Deptt.-on part time fixed honorarium of Rs. 7000/- basis appointment governed by G.O. 31.01.2013-challenged on ground -clause 11(2) requiring Candidates must be of same block or Distt.-offends Art. 14 and 16 of Constitution-held-short term employment-scheme like Shiksha Mitra-domicile restrictions survived for long time without challenge-can not be interfered under writ jurisdiction.

Held: Para-14
There is yet another reason for not interfering. These are policy matters for short-term employments. They do not deserve to be interfered with necessarily unless it is so grave that it may require a redressal under Article 226 of the Constitution. The process impedes the implementation of such programmes that are in public interest and in particular for Basic Schools where conditions have fast deteriorated. Schemes with domicile restrictions like Shiksha Mitra have survived for long, may be without such challenge.

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

1. This petition questions the parameters set out in the Government Order dated 31.1.2013 for engagement of Part-Time Instructors, particularly in the subject of Physical and Health Education, in Basic Schools run by the respondent State under the Basic Education Department on the ground that the criteria for providing benefit to Schools having a student strength of more than 100 is arbitrary and discriminatory.

2. The second ground is a challenge to Clause 11(2) of the aforesaid G.O. that provides that the candidature would stand restricted to the residents of the same district which offends Article 16 and 14 of the Constitution as no restriction in public employment can be enforced on the basis of geographical limitations or place of residence.

3. Sri Ashok Khare, learned Senior Counsel for the petitioner elaborating his submissions contends that the method to compute, allocate and identify the posts on the basis of more than 100 students in a School is an erroneous approach. Schools having less than 100 students would therefore stand discriminated and deprived of teachers in special subjects like Physical and Health Education which is compulsory in Basic Schools.

4. The said argument may not wade through as the provision made is in accordance with the student teacher ratio. If the number of students is less than 100 then there would no justification for having more teachers than required. For this one can fall upon the Government Order dated 5.4.2004 reference whereof has been made by the petitioner himself in Paras 26 and 27 of the petition and appended as Annexure 14. A perusal

thereof provides a remedy which has been described as unjustifiable by the petitioner for no valid reason. The submission therefore has to be rejected.

5. Sri Khare has laid more stress on the second argument of discrimination on the ground of residence. He has heavily relied on two apex court judgments reported in **(2002) 6 SCC Pg. 393 Harshendra Choubisa and others Vs. State of Rajasthan and others;** and **(2002) 6 SCC Pg. 562 Kailash Chand Sharma Vs. State of Rajasthan and others** coupled with the full bench decision in the case of **J.K. Soni Vs. State reported in 2010 (7) ADJ Pg. 407** to buttress his stand. He contends that restricting the candidature only to a district is denial of opportunity to apply in other districts. This according to him violates Article 16 as well. There is no rationality behind this restriction so as to achieve any objective of basic education or even employment. To give preference compulsorily is prohibitory in nature for no valid reason. He submits there was no such restriction under any scheme of part time engagement, and even if it was, the same does not appear to have been challenged. This sort of preference has the effect of eliminating candidates who are more meritorious but stand excluded from consideration altogether. He has invited the attention of the court to the other schemes including the engagement in Kasturba Gandhi Awasiya Balika Vidyalaya. The issue of restricting applications in the matter of Apprentice Teachers has also been cited as an example to contend that this court interfered with the same.

6. Refuting the submissions, Sri Ashok Kumar Yadav, learned Standing Counsel contends that the Government Order in Clause 1(6) spells out the reason as follows:-

"1(6) चूंकि अंशकालिक अनुदेशकों को नियत मानदेय रू0 7000/– प्रतिमाह पर रखा जा रहा है अतः अभ्यर्थी को उसी जनपद का निवासी होना अनिवार्य है ताकि वह शिक्षण कार्य सुगमता से कर सके।"

7. He further points out Clause 1(13) which recites as under:-

"1(13) अभ्यर्थी जिस विकासखण्ड का निवासी है यथासम्भव उसी विकासखण्ड में उसे तैनाती दी जाये प्रथम तैनाती में आवंटित विद्यालय में जिला बेसिक शिक्षा अधिकारी द्वारा कोई परिवर्तन नहीं किया जायेगा एवं चयनित अभ्यर्थी को उसी विद्यालय में कार्य करना होगा।"

8. Sri Yadav submits that this provision made appears to be in the interest of the candidates who may be able to discharge their duties conveniently as they are being only paid an honraria of Rs. 7000/-. This also according to him is in the interest of the institution as part-time teachers would be readily available nearby and may not have to cover a long distance and would therefore be able to discharge their duties efficiently. He contends that no material has been brought to contradict the said recitals nor any thing to the contrary to indicate dilution of merit. There is no data or facts pleaded that may remotely suggest the lowering of merit in selection.

9. Sri Khare in rejoinder contends that there is no reason as to why a candidate not belonging to the same district cannot discharge his duties efficiently. Covering of a distance is also not material as a handsome amount is being paid as honraria and in these hard days of employment, a candidate would

be willingly available to go to another district. He therefore submits that the argument is bereft of any rationale.

10. Having heard learned counsel and having perused the Government Order dated 31.1.2013 as well as the judgments cited at the bar, the object appears to be of providing cheap and adequate basic education within the limited sources of the State. The scheme is also aided by the Central Government. It offers engagement for only eleven months, renewable on performance. It is not a substantive or permanent employment. It gives a respite to the pressure on the teaching staff of a institution, employment to the local unemployed youth and benefit to the children. The object is therefore not to confer any vested right of public employment so as to attract the principles of service jurisprudence to the extent of constitutionality. The scheme also appears to cater to sustenance measures for locally available candidates which has a rational purpose.

11. The limiting of the candidature to the district has not been demonstrated by the petitioner to have necessarily resulted in lowering or compromising with merit. As a matter of fact no data has been disclosed to draw an objective inference as suggested. If a candidate is available locally for part-time engagement, he is in an advantageous position to discharge his duties. He also does not have to hassle for his daily needs if he lives nearby. It is for this reason that the Government Order provides for placing a candidate as far as possible in the same block of the district to which he belongs. There does not appear to be anything irrational about the same. Additionally, there is no challenge or any pleading criticising the aforesaid quoted clauses. The restriction of the candidature to a district does not amount to a complete prohibition. Rather, the opportunity is provided in the home district for convenience.

12. Coming to the two decisions of the apex court, the facts therein were that an additional bonus of marks while preparing merit was given @ 10% marks to a candidate of the same district and @ 5% marks to a candidate of the Rural Area. The justification pleaded was that it would give an impetus to candidates of rural area to stick to their areas and not rush for a placement in an urban area. The second reason pleaded was that a candidate of the same area would be able to communicate with the students more efficiently. Both reasons were rejected by the High Court and upheld by the Apex Court holding them to be irrational and the preferential weightage of marks to be violative of Article 14 and 16 as they were founded merely on the basis of residence. The same judgment however in Para 14 of Kailash Chand Sharma's case (supra) holds that such discrimination is not attracted where it is not merely related to residence but the factum of residence is taken into account in addition to other relevant factors. The said decisions were related to public employment as Gram Sewaks and Teachers on permanent basis, and was not concerned with any part-time scheme engagement as presently involved.

13. In the instant case no weightage is being extended to the merit of a candidate. There is no positive discriminatory act which may give advantage over merit. The said decisions

deprecated any State act that led to variation in merit. There is no such matter of incidence involved herein so as to draw a parallel from the said decisions. The status of employment and the purpose as pleaded were on an altogether different footing in the said cases. The same therefore are of no advantage to the petitioners. The ratio of the judgment in the case of J.K. Soni (supra) does not come close to the controversy at hand and therefore also does not apply on the facts of the present case.

14. There is yet another reason for not interfering. These are policy matters for short-term employments. They do not deserve to be interfered with necessarily unless it is so grave that it may require a redressal under Article 226 of the Constitution. The process impedes the implementation of such programmes that are in public interest and in particular for Basic Schools where conditions have fast deteriorated. Schemes with domicile restrictions like Shiksha Mitra have survived for long, may be without such challenge.

15. Accordingly, for all the reasons set out hereinabove, the petition cannot succeed and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL.SIDE
DATED: ALLAHABAD 29.04.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 14972 Of 2013

Mohammad Hanif and others..Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Hari Om Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India-Art.-226- Principle of Natural Justice-order of entails Civil Consequence-opportunity of hearing-must-impugned order-not only cryptic but-without any provision of law-held-unsustainable quashed-principal Secretary Revenue to issue circular for strict compliance of Natural Justice-enacting penal provisions against such erring officer.

Held: Para-11
In view of the above legal position and undisputed facts that the order impugned is not only cryptic but has been passed without affording an opportunity of hearing, it cannot be legally sustained.

Case Law discussed:
AIR 1978 SC 597; 1985 (3) SCC 398; 1989 (3) SCC 202; 2005 (6) SCC 321; 1996 (87) RD 66; 2005 (2) AWC 1256; (2010) 13 SCC 336; AIR 1996 SC 432

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

1. Heard Sri Hari Om Yadav, learned counsel for the petitioners and learned Standing Counsel appearing for the State respondents.

2. Through this writ petition, the petitioners have prayed for issuing a writ of certiorari quashing the order dated 25.06.2012 passed by respondent no. 2/ Tahsildar, Sadar, District Bulandshahar.

3. On 15.03.2013, this Court directed the learned Standing Counsel to seek instructions in this matter apprising the Court that under which provision of law, the impugned order has been passed on an application without there being any notice to the affected party.

4. Dr. Madhu Tandon, learned Standing Counsel appearing for the State has submitted that the entry of the petitioners' name has been expunged from the revenue record as the same was recorded without there being any valid title. Further, they have no right / title over the land in dispute and the writ petition deserves to be dismissed.

5. On the contrary, learned counsel for the petitioners submits that the impugned order has been passed on the application of the respondent no. 3 without there being any notice to the petitioners. In his submissions, it is settled law that any order which leads to civil consequences must be passed in conformity with the principles of natural justice and procedure adopted must be just, fair and reasonable.

6. I have heard learned counsel for the parties.

7. For appreciating the controversy, it would be useful to go through the impugned order dated 25.06.2012 passed by respondent No. 2, which is reproduced herein under:-

"आर. के.
ग्राम औरंगाबाद की खतौनी खता नं0 1224 पर पारित आदेश दिनांक 15.06.2012 निरस्त हो तथा भूमि पूर्व की भाँति अभिलेख में अंकित है ।
ह0 अपठनीय 25.06.2012"

8. From the perusal of the order impugned, it is apparent on the face of it that the order is not only cryptic but the same has been passed without affording an opportunity of hearing to the petitioners and without quoting any provision of law.

9. Learned Standing Counsel appearing for the State could not show from the perusal of the order that before passing the impugned order any opportunity was offered to the petitioners. The Apex Court in the case of **Maneka Ghandhi Vs. Union of India**, AIR 1978 SC 597, **Union of India vs. Tulsi Ram Patel** 1985 (3) SCC 398, **I.J. Rao Assistant Collector of Customs vs. Bibhuti Bagh** 1989 (3) SCC 202, **Canara Bank vs. V.K. Awasthi** 2005 (6) SCC 321, **Muzeeb Vs. Deputy Director of Consolidation and others** 1996 (87) RD 66 and **Chaturgun vs. State of U.P**. 2005 (2) AWC 1256 observed that an order which leads to civil consequences must be passed in conformity with the principles of natural justice.

10. Otherwise also, it is apparent from the perusal of the impugned order that no reason has been recorded, while expunging the names of the petitioners from the revenue records. The Apex court in **Sant Lal Gupta and others vs. Modern Cooperative Group Housing Society Limited and others,** (2010) 13 SCC 336 has observed as under:

"27.....The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/ unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. [Vide: State of Orissa v. Dhaniram Luhar AIR 2004 SC 1794; State of Rajasthan v. Sohan Lal & Ors. (2004) 5 SCC 573; Vishnu Dev Sharma v.

State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. v. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. v. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal v. State of Haryana & Ors. (2009) 3 SCC 258; State of Himachal Pradesh v. Sada Ram & Anr. (2009) 4 SCC 422; and The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285)."

11. In view of the above legal position and undisputed facts that the order impugned is not only cryptic but has been passed without affording an opportunity of hearing, it cannot be legally sustained.

12. The writ petition succeeds and is allowed. The impugned order dated 25.06.2012 passed by respondent no. 2/ Tahsildar, Sadar, District Bulandshahar is hereby quashed.

13. However, allowing of this writ petition will not preclude the respondent to proceed with the matter in accordance with law.

14. Sitting in this jurisdiction, it is being constantly noticed that the revenue authorities are passing this type of orders frequently; some time on an application filed by a person and some time, in suo motu proceeding, which extinguishes / creates the right of a tenure holder, without there being any notice to the affected party and without assigning any reason for the same.

15. These types of orders not only affect the tenure holders, but the process of the courts is also availed by challenging these orders and repeatedly, this Court is quashing such types of orders. In this process, sometime counter affidavit is called for, sometime officers are summoned and it is thereafter, orders are being quashed, but this will not serve the very purpose of the common people. The Officers of the State and the subject of the State both are governed under the rule of law. No one can be permitted to take law in his own hand and no one can be permitted to proceed in an autocratic manner, as it is the welfare State and it is the government of the people. There are complete mechanism prescribed either by the Legislature by enacting Acts or by making Rule or issuing government orders for handling the problems. The authorities are expected to proceed in accordance with law. The consequence to not proceed in accordance with law, not only affects the tenure holders, but it also puts pressure on the authorities/courts and also affects the public exchequer.

16. Learned Standing Counsel always argue that there are no basis for recording the names of such persons in the revenue records and that is why entries are being expunged. It is also being noticed that these revenue entries are being permitted to continue years after years; in some cases, it is permitted to continue for more than 40 years. It is something which is beyond understanding that how these kinds of illegal entries are permitted to be continued by the revenue authorities for such a long duration; why this has not been noticed and appropriate action has been taken at the appropriate levels; and whenever the action is taken, it is always unilateral in hot haste manner without taking any action against the erring officers, who are involved in the

process of wrong recording of the names in the revenue records. Without their collusion, no one can dare to get entered their names in the revenue records without there being any valid titles. The records are always kept in the custody of the revenue authorities and if the tampering is made in their records, it can only be done either by the officers of the revenue department or with the collusion with the officials of the department with whom records are kept.

17. In view of the observation made by the Apex Court in **Anil Baipadithaya and Others Vs. State of Karnataka and Others** AIR 1996 SC 432, it is expected that action is not only to be taken against the persons, but also against those who have been found involved in this process. Assuming the entries are bogus and forged, as alleged, but the same are of long duration, the same should not be expunged without any discussion and without any notice, unless it is uncontroverted. It is very often said justice is not only to be done, but it appears to have been done.

18. Taking note of that, the Principal Secretary, Revenue, U.P. at Lucknow is directed to issue a circular in this regard requiring the revenue officers not to pass such types of cryptic orders without there being any notice and without assigning any reason. He is also directed to make a penal provision in the aforesaid circular for the erring officials, in whose connivance names of the persons who have no title are recorded and are permitted to continue for a long period. He is also directed either to file compliance report before this Court within a period of two months or give the reasons for not complying the same.

19. The Registry of this Court is directed to intimate this order to the Principal Secretary, Revenue, U.P. at Lucknow for compliance.

20. List this matter, only for having the version of the Principal Secretary, Revenue, U.P. at Lucknow, after three months.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2013

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Application No.16440 of 2013
(U/s 482 Cr. P.C.)

Deepak Goel . ..Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Satish Kumar Tyagi

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 482-Quashing of criminal proceeding-offence under Section 138 of N.I. Act. ground of challenge cheque dishonored not for want of sufficient amount in account of drawer-but payment was stopped as the cheque misplaced-hence no offence under section 138 made out-held-once liberty to pay the amount of cheque given-not availed by applicant-question of fact whether cheque lost on payment stopped-can be decided only during Trail-application rejected.

Held: Para-8
From a perusal of the record, it is apparent that the applicant has a liability to make payment to complainant for which he had issued the cheque in question in favour of complainant and he has not denied the his signature on the cheque in question. The defence set up by the applicant with respect to the lost of cheque cannot be adjudicated by this Court at this stage.
Case Law discussed:

(2009) 2 SCC (Cri) 936; (2009) 1 SCC (Cri.) 567; (2008) 3 SCC (Cri.); JT 1998 (2) SC 198

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

1. Heard Sri S.K. Tyagi, learned counsel for the applicant and learned A.G.A. for the State.

2. This 482 Cr.P.C. application has been filed with a prayer to quash the entire proceedings of Complaint Case No. 2120 of 2011 under Section 138 N.I. Act, police station Sadar Bazar Meerut, District Meerut pending in the Court of A.C.J.M., Court No.6, Meerut.

3. Brief facts of the case are that a complaint has been filed by Sanjay Agarwal-opposite party no.2 (hereinafter referred to as the complainant) against the applicant alleging that on 4.12.2004, the applicant along with his uncle, namely, Sri P.D. Agarwal had come to the shop of the complainant and purchased some items for his house such as plywood, mica etc. after making the payment of the same went away. Thereafter on 14.12.2004, the applicant along with his uncle Sri P.D. Agarwal again came to the shop of complainant and purchased some goods for his house amounting to Rs. 2,25,106/- out of which Rs. 106/- was paid by him in cash and for remaining amount, i.e., Rs. 2,25,000/- he has given Cheque No. 250468 dated 15.12.2004 of the H.D.F.C. bank Ltd. in the presence of his uncle P.D. Agarwal and one Aman Gupta and had stated that the said cheque would be encashed on the presentation before the bank. On 15.12.2004, when complainant was going to place the said cheque for its encashment, the uncle of the applicant P.D. Agarwal had asked him on phone not to place the said cheque for encashment as the applicant does not have sufficient fund in his account and further asked him to place the said cheque in March, 2005 for encashment. Thereafter the complainant produced the said cheque through its banker on 1.3.2005 for encashment but the same was dishonoured by the concerned bank and a memo dated 5.3.2005 was sent with an endorsement that payment was stopped by the drawer. When the said cheque was dishonoured, the complainant gave a notice to the applicant through his counsel on 19.3.2005 which was replied by the applicant through his counsel on 24.3.2005, hence the present complaint has been filed by complainant alleging that the applicant has no intention to pay the amount in question and has deliberately issued the cheque in question on 15.12.2004 and gave a false advertisement in the newspaper that his cheque has been lost.

4. In the present complaint, the learned Magistrate has recorded the statement of the complainant and Sri P.D. Agarwal-uncle of the applicant and one Aman Gupta under Sections 200 and 202 Cr.P.C. and after having found prima facie case against the applicant summoned him by passing the impugned order, hence the present application.

5. Learned counsel for the applicant submits that the disputed cheque bearing Cheque No. 250468 of R.D.C., 29 Rajnagar Ghaziabad Branch of HDFC Bank Ltd. bearing the signature of the applicant was lost on 29.11.2004 for which he has given an information at police station Sihanigate, District Ghaziabad on 29.11.2004 itself. He also informed the concerned Bank about the lost of the said cheque on 2.12.2004 requesting the Bank to make stop payment with respect to the said cheque. Thereafter he also got a news item published with respect to the said cheque in a

daily newspaper at district Ghaziabad on 7.12.2004. He further submits that after receiving a notice under Section 138 N.I. Act from the advocate of the complainant, the applicant sent a reply of the same through his advocate by registered post. He further submits that there was no debt or liability on the applicant of the opposite party no.2 and the lost cheque of the applicant was misused by opposite party no.2. The cheque in question was not dishonoured due to insufficient funds but it was endorsed in the memo of bank that payment was stopped by the drawer. He submits that no offence under Section 138 N.I. Act is made out against the applicant. In support of his submission, he has placed reliance on several judgments of the Apex Court, i.e., in the case of **Raj Kumar Khurana vs. State (NCT of Delhi) and another reported in (2009)2 SCC (Cri.) 936, R. Kalyani vs. Janak C. Mehta & others (2009) 1 SCC (Cri.) 567 and DCM Financial Services Limited vs. J.N. Sareen & another (2008) 3 SCC (Cri.) 401.**

6. Learned A.G.A. vehemently opposed the said prayer and has submitted that the offence in question is said have been committed in the year 2004. He submits that the applicant had purchased certain goods from the complainant in lieu of which he has issued the cheque in question in favour of complainant and he has set up a false defence that the cheque in question was lost due to which stop payment was made by the bank on his request. He submits that from a perusal of the complaint as well as the statement of the complainant and its witnesses, cognizable offence under Section 138 N.I. Act is disclosed against the applicant for which he is liable to be prosecuted.

7. Considered the submissions advanced by learned counsel for the parties and perused the record.

8. From a perusal of the record, it is apparent that the applicant has a liability to make payment to complainant for which he had issued the cheque in question in favour of complainant and he has not denied the his signature on the cheque in question. The defence set up by the applicant with respect to the lost of cheque cannot be adjudicated by this Court at this stage. The applicant has to lead his defence before the trial court. The Apex Court in the case of **M/s. Modi Cements Limited vs. Shri Kuchil Kumar Nandi reported in JT 1998 (2) SC 198** has held that once a cheque is issued and on presentation is dishonoured, penal provision is attracted. Stopping of payment will not preclude an action under Section 138 N.I. Act. It was further held that the court taking cognizance of the complaint under Section 138 N.I. Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. Once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the Bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. In this regard paras-16, 18, 19, 20 and 21 of the said judgment are relevant, hence the same are quoted hereinbelow:-

" 16. We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawer or to the Bank for stoppage of the payment it will not preclude an action

under Section 138 of the Act by the drawer or the holder of a cheque in due course. The object of Chapter XVII, which is intituled as "OF PENALTIES IN CASE OF DISHONOR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS" and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in Electronics Trade & Technology Development Corporation Ltd., Secunderabad reported in JT 1996 (1) SC 643 in paragraph 6 to the effect "Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions. Section 138 does not get attracted", does not fit in with the object and purpose for which the above chapter has been brought on the Statute Book.

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the Bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in Electronics Trade & Technology Development Corporation Ltd., Secunderabad (supra). "..... Section 138 of the Act intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly" in our opinion, do not also lay down the law correctly.

19. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the Banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability, is returned by the Bank unpaid, on the ground either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person, draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposited the amount thereafter before the cheque is out in the bank by the drawer, and the cheque is honored, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonored.

20. On careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act

draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honor the cheque issues the same and, therefore, amounts to an offence under Section 138 of the Act. For the persons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act of the limited extent as indicated above.

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold."

9. The judgment relied upon by the learned counsel for the applicant in the case of **Raj Kumar Khurana (Supra)** is totally distinguishable from the present case and cannot be made applicable to the instant case. Moreover, the other two case laws which have been cited by the learned counsel for the applicant are also completely distinguishable from the facts of the present case and they do not deal with the controversy involved in the present case, hence the same are also not applicable in the present case.

10. Thus, in view of the law laid down by the Apex Court in the case of **M/s Modi Cements Limited (Supra)**, the arguments raised by the learned counsel for the applicant is not sustainable in the eyes of law.

11. The application lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.05.2013

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Criminal Misc. Writ Appl.No. 16659 Of 2013

Gyanendra Kumar Rawat ...Petitioner
Versus
State of U.P. And Anr. ...Respondents

Counsel for the Petitioner:
Sri R.D. Singh, Sri Mayank Singh

Counsel for the Respondents:
A.G.A.

Code Of Criminal Procedure-Section 482-
After closing prosecution evidence and statements under Section 313-argument, heard on 14.06.12-thereafter on 26.07.12 application on behalf of prosecution to summon such witness-neither statement recorded under section 161 nor shown in list of witness-held-prosecution can not be allowed to fill up the lacuna after examination of all prosecution witness.

Held: Para-11
Certainly the prosecution cannot be permitted to fill up the lacunas after it has examined all its witnesses. No reason was shown in the application as to why the said witness was not examined by the Investigating Officer under Section 161 Cr.P.C. and why such application was not moved at the initial stage. The prosecution cannot be permitted to re-open its case and there was no justification to allow such application moved at the belated stage.

Case Law discussed:
CRLMC No. 2680 of 2010; Crl. Misc. Appl. (C482) No. 892 Of 2011.

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

1. Supplementary affidavit filed by learned counsel for the applicant is taken on record.

2. Heard learned counsel for the applicant, learned A.G.A. and perused the record.

3. This criminal misc. application u/s 482 Cr.P.C. has been filed with the prayer to quash the order dated 28.7.2012 passed by 7th A.C.J.M., Agra in Criminal Case No.369 of 2010 "State Vs. Gyanendra Kumar Rawat", under Sections 420, 465, 467, 468, 471 I.P.C., P.S. Lohamandi, District Agra.

4. Learned counsel for the applicant has submitted that in the present case the prosecution has adduced all his evidences and after that the arguments were also heard but after conclusion of the arguments of the prosecution, another witness Shatrughan Singh the then City Magistrate, Agra has been summoned under Section 311 Cr.P.C. It has been submitted that the prosecution cannot be permitted to fill up the lacuna of prosecution case and the court below has not considered this matter.

5. Learned A.G.A. has defended the impugned order.

6. By the supplementary affidavit, the certified copy of the order-sheet has been filed which reveals that after the prosecution evidence and statement under Section 313 Cr.P.C., the case was listed for arguments on 8.6.2012 and the arguments were heard on 14.6.2012. On 26.7.2012 the prosecution had moved an application to summon the said witness Satrughan Singh and learned trial court after hearing both the parties, has allowed the application under Section 311 Cr.P.C. and has summoned Satrughan Singh the then City Magistrate, Agra on the ground that in view of page nos.86 and 87 of the file, the City Magistrate has sent the report to District Magistrate, Agra in which it was mentioned that Digambar Singh and Jitendra Singh had cooperated with Gyanendra Kumar Rawat because the said envelop was not received by C.R.A.

7. Learned counsel for the applicant has relied upon the judgment of Orissa High Court dated 30.8.2011 passed in **CRLMC No.2680 of 2010 "Akshya Kumar Patra Vs. State of Orissa**", in which the Orissa High Court has held as under:-

"It is equally important to note herein that in the present case evidence on the side of the prosecution had been concluded, defence had also concluded their evidence, arguments from both the sides had also been concluded. It is at such a stage that the prosecution sought time to advance further arguments and it is only after three adjournments thereafter, that the present petition under Section 311 Cr.P.C. came to be filed. Clearly neither at the stage of examination of the Investigating Officer nor during the examination of any of the prosecution witnesses did the prosecution bring about any relevant evidence justifying the examination of Palu @ Ajaya Kumar Barik as a witness. As held in the case of Karam Chand Mukhi and others (supra), if it was the case of the

prosecution that there is negligence or mischief by the Investigating Officer in omitting the name of Palu @ Ajaya Kumar Barik from the list of charge-sheeted witness, then such a question should have been specifically put to the Investigating Officer by the prosecution in the shape of leading questions, if permitted by the trial court, so as to provide circumstances for consideration of the trial court in the event any such additional evidence is sought to be examined. Admittedly, in the present case nothing has been done by the prosecution and, therefore, when there is no positive circumstances available to indicate that Palu @ Ajaya Kumar Barik is a witness to the occurrence (pre or post), this Court finds that the application of the prosecution under Section 311 Cr.P.C. ought to have been rejected by the court below."

8. Reliance has further been placed on the judgment of Uttarakhand High Court dated 27.9.2011 passed in **Criminal Misc. Application (C482) No.892 of 2011 "Km. Shailja Rawat Vs. State of Uttarakhand**", in which the Uttarakhand High Court has held as under:-

"This Court agree with the learned trial court that the object of Section 311 Code of Criminal Procedure, is not to fill the lacunae in the evidence of any party."

9. Learned counsel for the applicant has further relied upon Raghuveer Prashad Sharma Vs. State of Madhya Pradesh, 2009(4) Crimes 315, in which it has been held that because the statement of Dhanno was not recorded under Section 161 Cr.P.C., therefore, there was no justification on the part of learned court below in allowing the application filed by respondent for permitting to examine Dhanno as prosecution witness.

10. In the present case the prosecution evidence was concluded on 8.6.2012 and the statement under Section 313 Cr.P.C. was also recorded on 8.6.2012 thereafter the arguments were heard on 14.6.2012 because the accused persons had not adduced any evidence in defence. After that various other dates were fixed for remaining arguments and on 26.7.2012 this application under Section 311 Cr.P.C. was moved by the prosecution. Admittedly the name of Satrughan Singh did not find place in the list of witnesses and he was not examined under Section 161 Cr.P.C. It was alleged that he has sent the report to the District Magistrate regarding collusion of Digambar Singh and Jitendra Singh with Gyanendra Kumar Rawat.

11. Certainly the prosecution cannot be permitted to fill up the lacunas after it has examined all its witnesses. No reason was shown in the application as to why the said witness was not examined by the Investigating Officer under Section 161 Cr.P.C. and why such application was not moved at the initial stage. The prosecution cannot be permitted to re-open its case and there was no justification to allow such application moved at the belated stage.

12. In these circumstances, the order dated 28.7.2012 cannot be sustained. The application is allowed and the order dated 28.7.2012 is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2013

BEFORE

THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 17727 Of 2011

St. Joseph Convent School Shivpur Varanasi ...Petitioner
Versus
The Presiding Officer Labour Court & Anr. ...Respondents

Counsel for the Petitioner:
Sri Shyam Narain, Sri Gopal Narain
Sri Sudhanshu Narain

Counsel for the Respondents:
C.S.C., Sri Kailash Prasad Yadav
Sri Vinod Kumar Srivastava

U.P. Industrial Dispute Act, 1947-Section 6 N, 2(s)- word 'Retrenchment'-explained-services of work man terminated-based upon enquiry report under disciplinary proceeding-does not come within perview of retrenchment-nor provision of Section 6 N,attracted held award by Labour Court-unsustainable-quashed.

Held: Para-9

From the aforesaid, it is clear that Section-6-N would come into play, if a workman is retrenched for any reason whatsoever except by way of disciplinary action. If disciplinary action is adopted and the services of the workman is terminated on account of a disciplinary action, then retrenchment compensation is not payable and Section 6-N is not applicable.

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

1. The workman committed an act of misconduct and was consequently chargesheeted. The management appointed an Enquiry Officer to conduct a domestic enquiry. The Enquiry Officer gave full opportunity to the workman to defend himself. The Enquriy Officer after considering the various evidence that was brought before it submitted an enquiry report holding that the charges levelled against the workman stood proved. Based on the enquiry report, the management issued a notice, and thereafter, the management after considering all aspects of the matter, passed an order terminating the services of the workman. The workman, being aggrieved by the order of termination, raised an industrial dispute, which was eventually referred to the labour court for adjudication.

2. Before the Labour Court, the workman contended that he had been in continuous service for more than 15 years and that he was not responsible for the misconduct as he was only a door checker in a bus and not a bus driver and was not responsible for the accident. The workman contended that he had worked for more than 240 days in a year and that the order of termination was in violation of the provision of 6-N of the U.P. Industrial Disputes Act.

3. On the other hand, the petitioner/ employers contended that the management took action in terminating service of the workman on account of disciplinary proceedings being initiated against him by serving a chargesheet, and thereafter, holding an enquiry against him. The petitioner contended that the charges stood proved and, on that basis, disciplinary action was taken and since the charges were grave in nature, the services of the petitioner was terminated. The petitioner in the written statement had also stated that in the event the labour court finds that the enquiry initiated and conducted by the management was violative of the principles of natural justice, in that event, an opportunity should be given to them to prove the charges before the labour court itself.

4. The labour court without considering the validity and legality of the domestic enquiry proceedings has set aside the termination of the workman on the short ground that the workman had worked for 15 years continuously without any break in service and that there has been a gross violation of Section 6-N of the U.P. Industrial Disputes Act. The labour court accordingly directed reinstatement with continuity of service and with full backwages. The petitioner, being by the said award, has filed the present writ petition.

5. Having heard the learned counsel for the parties at some length, the Court is of the opinion that the award of the labour court can not be sustained. The Court is constrained to observe that the Presiding Officer of the labour court does not know the basic labour jurisprudence. The retrenchment compensation is payable when a person is retrenched for whatever reason except by way of disciplinary proceedings. This is clearly indicated in the definition of clause 2-(s) of the U.P. Industrial Disputes Act. For facility, the said provision is extracted hereunder:

(s)' Retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include-

(i) voluntary retirement of the workmen; or

(ii)retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and workman concerned contains a stipulation in that behalf;

6. A perusal of the aforesaid provision indicates that retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action

7. Section-6-N of the U.P. Industrial Disputes Act provides certain conditions, which are required to be made by the employer before retrenching the workman. For facility, the said provision is extracted hereunder:

6-N. Conditions precedent to retrenchment of workmen- *No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-*

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice wages for the period of the notice:

Provided that no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service;

(b) the workman has been paid, at the time retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the State Government.

8. A perusal of the aforesaid provision indicates that a workmen who has been in continuous service for not less than one year could not be retrenched unless the workman has been given one month's notice in writing or one month's wages in lieu of such notice

and that compensation would be equivalent to fifteen days' average pay for every completed year of service order of service or any part thereof.

9. From the aforesaid, it is clear that Section-6-N would come into play, if a workman is retrenched for any reason whatsoever except by way of disciplinary action. If disciplinary action is adopted and the services of the workman is terminated on account of a disciplinary action, then retrenchment compensation is not payable and Section 6-N is not applicable.

10. In the light of the aforesaid, the provision of Section-6- N is not attracted till such time as the order of termination is not set aside. Consequently, the impugned award can not be sustained and is quashed.

11. The writ petition is allowed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 20087 Of 2013

Mahendra Kumar Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Kumar Pandey
Sri Bhrigu Ram Ji (Pandey)

Counsel for the Respondents:
C.S.C., Sri Mrig Raj Singh
Sri Sanjay Kumar Prajapati

Constitution Of India-Art. 226- Service Law-transfer in garb of complaints-on direction of such minister having no concern with Basic education department denotes complete surrender of power by authority concern-being malice in law-held-not sustainable-quashed.

Held: Para-6
The Minister of another department can only make a request and he cannot pass an order for the transfer of an Assistant Coordinator who is under the Basic Education Department. The Minister, therefore, transgressed his authority and the Basic Education Officer committed a manifest error by surrendering to the jurisdiction of the concerned Minister. If the head of another department is allowed to pass orders for a different department, the entire administration would go haywire and would, to an extent, violate the rules of business. The order, therefore, suffers from malice in law.

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

1. Heard Sri B.R.J. Pandey, learned counsel for the petitioner, and Sri Sanjay Kumar Prajapati, learned counsel for the respondent No.5 and Sri Mrig Raj Singh learned counsel for the Respondent No.4 and learned Standing Counsel for the Respondent Nos. 1,2 and 3 who all have assisted the Court in relation to the impugned transfer order dated 2nd April, 2013. This transfer order has been opposed reciting that it is on account of certain allegations made against the petitioner and complaints received that he is being transferred from Dharmapur to Muftiganj. Learned counsel submits that this recital is absolutely false inasmuch as neither the petitioner was made aware of any such complaint nor any such inquiry has been communicated so as to gather that there is a complaint against the petitioner while working as an Assistant Coordinator.

2. Sri Pandey submits that this entire transfer order is based on the request of the Respondent-Shashi Kant Yadav who moved an application before Dr. Paras Nath Yadav a Minister of the State Government of the Department of Minor Irrigation and Animal Husbandry.

3. It is urged that the said Minister passed an order on 30.1.2013 which is endorsed on the application filed by Sri Shashi Kant Yadav copy whereof is Annexure-6 to the Writ petition. The Minister has categorically directed the Basic Education Officer to carry out the transfer order as per the request of Shashi Kant Yadav. Sri Pandey submits that it is the request of Sri Shashi Kant Yadav which has been translated into the transfer order without there being any basis for the complaint as alleged.

4. Sri Pandey, therefore, contends that the order amounts to clear surrender of jurisdiction before the Minister of another department by the Basic Education Officer on a totally false pretext. He, therefore, submits the order suffers from malice in law and deserves to be set aside.

5. Sri Mrig Raj Singh contends that there was a complaint against the petitioner and that he is in possession of the said complaint letter which has been made the basis of the transfer.

6. Be that as it may, it remains undisputed that the transfer may have been apparently triggered on an alleged complaint but it also stands established on record that Mr. Shashi Kant Yadav was accommodated against the same post on the direction issued by the Minor Irrigation and Animal Husbandry Minister. It is, therefore, clear to the Court that the subsequent alleged complaint is nothing else but a device to give cover to the transfer order and, therefore, the order suffers from malice in law. The Minister of another department can only make a request and he cannot pass an order for the transfer of an Assistant Coordinator who is under the Basic Education Department. The Minister, therefore, transgressed his authority and the Basic Education Officer committed a manifest error by surrendering to the jurisdiction of the concerned Minister. If the head of another department is allowed to pass orders for a different department, the entire administration would go haywire and would, to an extent, violate the rules of business. The order, therefore, suffers from malice in law.

7. The impugned order dated 2.4.2013 is quashed.

8. The petitioner shall not be disturbed from the place of his posting under the impugned order.

9. So far as Sri Shashi Kant Yadav is concerned, in the event he wants a transfer on his own request, it is open to him to approach the Basic Education Oficer for the redressal of his grievance.

10. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 20172 Of 2013

Smt. Pooja and another ..Petitioners

Versus

State of U.P. and others. ..Respondents

Counsel for the Petitioners:
Sri A.K.S. Bais

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-21- Petition seeking protection from harassment-being marriageable couple-instead of approaching direction before Writ Court-should first approach to Police-if no FIR lodged against them or not wanted in any case-Police to consider the age and marriage-give proper protection from harassment-taking in to consideration that if both major-free to join the company to their choice-petition disposed of.

Held: Para-14

In view of the aforesaid facts and circumstances, the writ petition is disposed of with liberty to the petitioners to approach the concerned Superintendent of Police or Senior Superintendent of Police and to appraise him of the disturbance by outsiders in their married life and in case it is so done, the police authorities would ensure that they are not put to any threat or torture and their married life is not disturbed provided they are prima facie found to be of marriageable age and married in accordance with law and further that they are not wanted or involved in any case in connection with the above marriage or living together.

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard learned counsel for the petitioners and learned standing counsel appearing for the State of U.P.

2. This is a stereotype writ petition similar to large number of petitions coming before this Court daily wherein young girls and boys claim protection from their parents and relatives alleging threat by them with the support of police to their life contending that they are adults and have married with their own free will but against the wishes of their elders.

3. The petitioners herein are also claim that they are of marriageable age and have married with their own free will against the wishes of their parents and therefore, their married life should be protected by restraining the respondents from interferening in their married life as husband and wife.

4. The factum of the petitioners being of marriageable age or the validity or marriage cannot be adjudicated on the basis of evaluation of the affidavits alone in exercise of writ jurisdiction particularly in the absence of certificates of registration of their respective dates of birth and marriage which are compulsory in law and the proof of their authenticity. The said factual aspects are required to be decided on the basis of the evidence adduced by the parties before the appropriate forum. In such a situation, this Court is at a loss to make any conclusive comments regarding the age of the petitioners or the legality of their marriage. Nonetheless as the right to marriage has been recognized as a right to life under Article 21 of the Constitution of India vide **Lata Singh Vs. State of U.P. and another A.I.R. 2006 SC 2522** and it has further been observed that the persons of marriageable age are free to marry any one of their choice and to live an independent married life, they are entitle to be given adequate protection so that their married life, if validly entered, is not disturbed by outsiders.

5. Normally when any such disturbance is created in the life of a married couple, they are supposed to make a complaint or lodge an F.I.R. whereupon the police would take action, investigate the matter and provide protection, if necessary.

6. On the other hand where the parents of either of the parties allege that marriage is not valid for certain reasons or that the parties to the marriage are minor or that the girl has been kidnapped or there is likelihood of the marriage being used as a disguise for immoral purpose, they can also lodge a complaint or F.I.R. with the police whereupon again the matter would be investigated and offenders punished in accordance with law.

7. The petition is silent regarding any complaint or F.I.R. being lodged by either of the parties.

8. In **Devendra Kumar and others Vs. State of U.P. and others 2011 (6) ADJ 208**, a division bench of this Court held that where there is no complaint or F.I.R. against the married couple, the police cannot take any coercive action against them.

9. Another division bench of the Allahabad High Court in **Smt. Nandani and another Vs. State of U.P. and others 2013(1) ADJ 591** held that where parties to the marriage are adults and have chosen to live together as husband and wife, police is required to give protection.

10. Similar is the view expressed by the recent division bench in Civil Misc. Writ Petition No.7305 of 2013 Smt. Raj Kumari and another vs. State of U.P. and others decided on 8.2.2013 wherein it is held that "once the boy and girl are found to be adults, it is the duty of the police as well as the civil society to ensure that they are not put to fear of their lives or liberty."

11. In view of above, if the married party complaints of harassment, police has to ensure that no harm is caused to them merely for the reason that they have married against the wishes of their parents or against the tenets of the society provided they are found to be marriageable age and legally weded.

12. In this settled legal scenario, there is in fact no occasion for the petitioners to invoke the writ jurisdiction of this court as their grievance can be satisfied by making a complaint or lodging F.I.R. with the local police or by approaching the Superintendent of Police or Senior Superintendent of Police concerned who is supposed to take steps as per the law laid down above.

13. The practice of straight away approaching this Court without raising their grievance in writing before the authorities below is not appricable rather deprecated.

14. In view of the aforesaid facts and circumstances, the writ petition is disposed of with liberty to the petitioners to approach the concerned Superintendent of Police or Senior Superintendent of Police and to appraise him of the disturbance by outsiders in their married life and in case it is so done, the police authorities would ensure that they are not put to any threat or torture and their married life is not disturbed provided they are prima facie found to be of marriageable age and married in

accordance with law and further that they are not wanted or involved in any case in connection with the above marriage or living together.

15. This order would not be treated by any authority as a certificate of marriage between the parties.

16. The writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 20797 Of 2013

Salik and others ...Petitioners
Versus
Regional Provident Fund Commissioner and Anr. ...Respondents

Counsel for the Petitioners:
Sri Bhupendra Nath Singh

Counsel for the Respondents:
Sri Sacchindra Upadhyay
Sri Ashok Mehta
Ms. Suman Sirohi

Constitution of India, Art. 226- Payment of Court fee-where more than one person-filed joint writ petition-claiming similar relief-for enforcement of individual Rights-Separate Court fee payable.

Held: Para-19
The Court is of the opinion that in the instant case, a joint writ petition filed by the petitioners is for the enforcement of its individual rights, and consequently, joinder of more than one person though permissible, but where the cause of action is similar and not the same, separate court fees is payable.

Case Law discussed:
AIR 1984 (All) 46; 1994 (2) UPLBEC 1228; AIR 2005 (All) 77; 1981 AIR (SC) 484; 1968 All LJ 210; AIR 1981 SC 484; 1991 AIR (All) 362; 2006 (4) SCC 484; 1994 (2) UPLBEC 1228

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

1. Sri Salik and 137 other ex-employees of the erstwhile U.P. State Cement Corporation Ltd. Churk Sonebhadra have filed the present writ petition collectively praying for a writ of mandamus commanding the Regional Provident Commissioner-II, Varanasi and Official Liquidator to update their Provident Fund Accounts and pay the entire Provident Fund dues including pension. The facts leading to the filing of the writ petition is, that the petitioners contend that they are members of the Employees Provident Fund Trust created by the then management of the U.P. State Cement Corporation Ltd. under the Employees Provident Fund and Misc. Provisions Act, 1952, which trust was approved by the Provident Fund Department. In this trust, the provident fund contribution was regularly being deducted from the salary of the petitioners. The Churk Unit of the U.P. State Cement Corporation Ltd. was wound up by an order of the Company Judge dated 08.12.1999, and the Official Liquidator was appointed as the liquidator of the Company. From time to time, the Company Judge has been passing various orders directing the Official Liquidator to provide the correct status of the Provident Fund Trust. The accounts of this trust are also being audited through an Auditor recommended by the Regional Provident

Fund Commissioner. It has been stated that accounts of this trust has now been transferred to the Regional Provident Fund Commissioner, Varanasi by the Secretary of the erstwhile Trust, and after the receipt of the audited accounts, some of the employees were paid their dues, but now the Provident Fund dues are not been released. It has been alleged that more than five years have passed and the provident fund accounts have not been updated nor the dues of the petitioners have been released. It has also been stated that the petitioners are entitled for pension under the provision of Employees Pension Scheme 1995 and, in this regard, representations have been made to the Official Liquidator, which has remained pending. It is contended that neither the representation has been decided nor the pension is being released. Consequently, the present writ petition was filed by the 137 ex employees of the erstwhile U.P. State Cement Corporation Ltd. for a writ of mandamus against the respondents.

2. At the time of the presentation of the writ petition, the stamp reporter made an endorsement that there is a deficiency of court fee by Rs. 14,280/-. The petitioners made an objection below the report of the stamp reporter objecting to the levy of the court fee contending that the petitioners are the members of the Employees Provident Fund Trust and have a jural relationship and that the relief claimed by them in the writ petition is one and the same for all the petitioners, and consequently, a single writ petition for their joint cause of action was maintainable and one set of Court fee was payable in view of the law laid down by the Full Bench of this Court in **Umesh Chand Vinod Kumar Vs. Krishi Utpadan Mandi Samiti AIR 1984 (All) 46** as well as the decision of the Division Bench of this Court in **Saroja Nand Jha and others Vs. M/s. Hari Fertilizers, Varanasi and others, 1994 (2) UPLBEC 1228** as well the decision of the learned Single Judge in **Track Parts of India Mazdoor Sabha Vs. State of U.P. And others AIR 2005 (All) 77.**

3. The objection placed by the petitioner was duly considered by the Taxing Officer who by its order dated 09th April, 2013 rejected the contention of the petitioner and upheld the deficiency of court fee as reported by the stamp reporter. The Taxing Officer held that each of the petitioner has an independent and separate cause of action and in view of the decision of the Supreme Court in **Mota Singh Vs. State of Haryana, 1981 AIR (SC) 484** all the petitioners are liable to pay separate court fee, and consequently, directed the petitioners to make good the deficiency of court fee. The petitioner, being aggrieved by the order of the Taxing Officer, has preferred a separate application dated 11.04.2013 in the present writ petition objecting to the order of the Taxing Officer and praying that the order the Taxing Officer and the report of the stamp reporter be set aside and the writ petition be held to be maintainable on payment of one set of Court fee.

4. The Court found that the State Government was not a party in the writ petition, and accordingly, the Court directed the petitioner to serve a copy of the writ petition to the State Government, which was duly done.

5. The Court has heard Sri Bhupendra Nath Singh, the learned counsel for the petitioners, Sri Suman

Sirohi, the learned Standing counsel for the State Government, Sri Ashok Mehta, the learned counsel for the Official Liquidator and Sri Sacchindra Upadhyay, the learned counsel for the Provident Fund Authorities, respondent no. 1.

6. The issue is, whether a joint writ petition by 137 persons is maintainable and whether one set of Court fee is payable or not?

7. Various issues were considered by the Full Bench of this Court in **Umesh Chand Vinod Kumar (Supra)**. The Full Bench answered the first question of law holding that an association of persons registered or unregistered could file a writ petition under Article 226 of the Constitution of India for the enforcement of the right of its members. On the second question of law, the Full Bench answered that a single writ petition was maintainable on behalf of more than one petitioner, not connected with each other as partners or those who have no other legal subsisting jural relationship, where the questions of law and fact are common. With regard to the third question, the Full Bench answered that, where an association of persons registered or unregistered could file a writ petition for the enforcement of the right of its members, only one set of court fees would be payable otherwise separate court fees became payable. With regard to question no. 4, the Full Bench held that where an association of persons filed a writ petition not for the enforcement of rights of its members, but for the enforcement of its own rights, in which case, a common writ petition seeking enforcement of their individual rights was a misjoinder of parties and that the technical defect could be cured. The Full Court held that since there was an independent cause of action and that the cause of action was not joint, the writ petition would not be maintainable as a joint petition, but the defect of misjoinder of parties was curable upon payment of separate court fee.

8. The Full Bench made a categorical distinction while considering question no. 1 and question no. 2. The Full Court held that question no. 1 related to locus standi of the petitioners and question no. 2 related to the maintainability of the writ petition on account of joinder or misjoinder of parties. In that regard, the Full Court considered the case of another Full Bench decision of this Court in **Mall Singh and Others Vs. Smt. Laksha Kumari Khaitan and Others 1968 All LJ 210** and held :

"The joinder of more than one person under Article 226 can be permitted only where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transaction the petitioners are jointly interest in the cause or causes of action."

9. The Full Bench also relied upon a decision of the Supreme Court in **Mota Singh's case AIR 1981 SC 484** in which, it was held that several truck operators, who have filed a single writ petition challenging their liabilities to pay tax by each of the petitioners were liable to pay separate court fee. The Supreme Court held

"Having regard to the nature of these cases where every owner of a truck plying

his truck for transport of goods has a liability to pay tax impugned in the petition, each one has his own independent cause of action. A firm as understood under the Partnership Act or a Company as understood under the Indian Companies Act, if it is entitled in a law to commence action either in the firm name or in the Company's name can do so by filing a petition for the benefit of the Company or the partnership and in such a case court-fee would be payable depending upon the legal status of the petitioner. But it is too much to expect that different truck owners having no relation with each other either as partners or any other legally subsisting jural relationship of association of persons would be liable to pay only one set of court-fee simply because they have joined as petitioners in one petition. Each one has his own cause of action arising out of the liability to pay tax individually and the petition of each one would be a separate and independent petition and each such person would be liable to pay legally payable court-fee on his petition. It would be a travesty of law if one were to hold that as each one uses high way, he was common cause of action with the rest of truck pliers."

10. The Full Bench held that a single writ petition was maintainable on behalf of more than one petitioners, where the cause of action was the same, but such joinder was not permissible, where the cause of action was similar. The Full Bench distinguished the "same cause of action" from "similar cause of action" and, in that light, held that a single writ petition was maintainable, where the right to the relief arose from the same act or transaction in which case one writ petition was maintainable on one set of court fee, but whether the right of claim did not arise from the same act or transaction and where the petitioners were jointly interested in the similar cause of action, and even though, the writ petition filed by more than one person was maintainable, nonetheless, the cause of action not being joint and there being an independent cause of action of each of the petitioners, such petitioners would be liable to pay separate court fee.

11. In **Mohammad Azaz Vs. Madhyamik Shiksha Parishad, U.P. Allahabad, 1991 AIR (All) 362** another Full Bench of this Court considered the case of mass copying by the students using unfair means who filed a joint writ petition in relation to the charge against them of using unfair means. The Full Bench held that there was an absence of jural relationship and that a joint petition was not maintainable.

12. In **Prabhakaran & Ors. Vs. M. Azhagiri Pillai (Dead) by LRs. & Ors 2006 (4) SCC 484**, the Supreme Court held that jural relationship between the parties means legal relationship between the parties with reference to their rights and obligations.

13. In **Saroja Nand's case 1994 (2) UPLBEC 1228**, the facts were that separate notices were issued by the authorities to the petitioners to vacate the official quarters allotted to them. Since they failed to vacate the official quarters, the management filed separate complaints before the Chief Judicial Magistrate. A joint writ petition was filed by all the allottees before the Writ Court and the stamp reporter gave a report about the deficiency of court fee. The Division Bench held that each of the petitioner had

a separate cause of action and were jointly interested, and consequently, their case comes under the category of question no. 2 framed by the Full Court in **Umesh Chand's Case (Supra)**. The Division Bench held that since the relief was joint and common and since one writ petition was maintainable, consequently, one set of court fee was payable.

14. In **Track Parts of India AIR 2005 (All) 77, (Supra)** the facts in that case was that a trade union filed a writ petition for the quashing of the order passed by the Deputy Labour Commissioner under Section 3 of the U.P. Industrial Peace (Timely Payment of Wages) Act, 1978 and for a writ of mandamus commanding the authority to issue a recovery certificate and pay the money that was due and payable to the workers, namely, the members of its union. The Taxing Officer held that separate court fee was required to be paid by each member of the trade union.

15. The learned Single Judge relied upon the answer given by the Full Bench in **Umesh Chand Case (Supra)** to question no. 1 and held that the writ petition of the petitioner who was a trade union, was maintainable, since the application was filed by the union before the Prescribed Authority under the U.P. Industrial Peace (Timely Payment of Wages) Act, 1978 and that the Trade Union had also questioned the validity of the order rejecting the said application in the writ petition. The learned Single Judge held that not only the writ petition was maintainable, but one set of court fee was payable.

16. In the light of the aforesaid decision, the learned counsel for the petitioner pressed that a joint writ petition was maintainable wherein the petitioners have a common goal and the relief claimed by each of the petitioners was the same, namely, for the release of their provident fund dues and for payment of pension. Consequently, not only a joint writ petition was maintainable, but only one set of court fee was payable. In this regard, the learned counsel has strongly relied upon the decision of the Division Bench in **Saroja Nand's Case.**

17. On the other hand, the learned Standing counsel submitted that the decision of the Full Court in **Umesh Chand's case (Supra)** as well as the decision of the Supreme Court in **Mota Singh's case (Supra)** makes it apparently clear that a joint writ petition, having a separate cause of action was not maintainable, and since there exist no common order, a single writ petition was not maintainable. It was urged that assuming without admitting that a single writ petition was maintainable, even then, each of the petitioners had a separate cause of action and consequently were liable to pay separate court fees. Similar arguments was raised by Sri Ashok Mehta, the learned counsel for the Official Liquidator.

18. Having heard the learned counsel for the parties, the Court finds that the Full Bench in **Umesh Chand's case (Supra)** has clearly held that a joint writ petition would be validly maintainable if there is a legal subsisting jural relationship of association of persons where they have the same cause of action. Assuming that the petitioners have a jural relationship amongst them with reference to their rights and obligations, and consequently, a joint writ petition

becomes maintainable, but in the instant case, the Court finds that the petitioners do not have the same cause of action. In fact, each of the petitioners have an independent cause of action. Each of the petitioners have filed the petition for the enforcement of their individual rights, namely, for release of their provident fund dues and for payment of pension. There is no common order nor a common act or transaction.

19. The Court is of the opinion that in the instant case, a joint writ petition filed by the petitioners is for the enforcement of its individual rights, and consequently, joinder of more than one person though permissible, but where the cause of action is similar and not the same, separate court fees is payable.

20. In the light of the aforesaid, the Court in all humility is of the view that the Division Bench in **Saroja Nand case (Supra)** did not consider paragraphs 36,37,38,39,40 and 41 of the decision of the Full Bench in **Umesh Chand's Case (Supra)**

21. This Court is of the view that in the light of the decision of the Full Bench in **Umesh Chand (Supra),** each of the petitioners, having a separate cause of action, and having filed a joint writ petition for enforcement of their individual rights are liable to pay separate court fee. The order of the Taxing Officer is affirmed. The application of the petitioners dated 11.04.2013 is rejected. The petitioners are consequently directed to cure the defect and pay the court fee as reported by the stamp reporter within a week.

22. Put up this matter on Monday i.e. 06.05.2013 for admission.

23. The Registrar General is directed to circulate this order to the Stamp Reporter as well as to the Taxing Officer within two weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 21853 Of 2013

Smt. Nasreen and Anr. ...Petitioners
Versus
U.P.S.R.T.C and Anr. ...Respondents

Counsel for the Petitioners:
Sri Aashish Srivastava

Counsel for the Respondents:

U.P. Motor Vehicle Amendment Rules 2011-Rule 220 B- Release of amount of Compensation-invested in fixed deposit-premature release application-on ground to repay the amount of loan-rejection by Tribunal-held not proper purpose for repay of loan-itself to improve the financial condition of claimant-who are major direction to release amount of fixed deposit given.

Held: Para-12
In the instant case, the claimants have made a categorical statement that the amount was required to be encashed prematurely in order to repay the loans, which they had taken. Obviously, if the loan is repaid, their economic condition would improve, which would ultimately lead to improving their income. Such ground is a relevant ground coupled with the fact that the claimants are major and minor children are not involved which would require the compensation amount to be kept in a fixed deposit for their upkeep. Further, if the amount is invested for a period of time, the claimants will not be able to enjoy the compensation.

Case Law discussed:
1994 (1) TAC 323; 2007 (2) TAC 755; 2005(2) TAC 378

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

1. Heard Sri Aashish Srivastava, the learned counsel for the petitioner.

2. The petitioner No.1 is the widow and the petitioner No.2 is the mother of the deceased who died in an accident and a claim application was filed under the provisions of the Motor Vehicles Act. The Motor Accident Claims Tribunal gave an award dated 10.5.2012 awarding a compensation of Rs.2,83,480/- out of which the widow was to be given a sum of Rs.23,480/- in cash and the balance amount of Rs.1,20,000/- to the widow, and to the parents, a total sum of Rs.1,30,000/- was to be paid, but, this amount was to be kept in a fixed deposit for a period of five years. Pursuant to the award, the U.P.S.R.T.C., against whom the claim was filed, accepted the award and deposited the amount before the Accident Claims Tribunal. Based on the direction of the Tribunal, the amount was invested and a sum of Rs.23,480/- was released in favour of the petitioner No.1.

3. The widow, petitioner No.1 and the mother, petitioner No.2, thereafter filed an undated application praying for the release of the amount on the ground that they have taken loans from various persons and that the amount was required in order to clear the debts. This application has been rejected by the Tribunal by an order dated 22.2.2013 again which the present writ petition has been filed.

4. The Tribunal has rejected the claim of the petitioner on the ground that in view of Rule 220 -B of the Motor Vehicle Rules as inserted by the U.P. Motor Vehicles 11th Amendment Rules, 2011, which came into force w.e.f. 26.9.2011, the amount of compensation was rightly directed to be kept in a Fixed Deposit and that the amount could not be prematurely released in favour of the claimant. The Tribunal accordingly rejected the application. The petitioner, being aggrieved by the said order, has filed the present writ petition.

5. Having heard the learned counsel for the petitioner, the Court is of the opinion, that the writ petition can be disposed of at the admission stage itself without calling for a counter affidavit since the respondents have already deposited the amount and are no longer concerned with the end result.

6. The Supreme Court in the case of **General Manager, Kerala State Road Transport Corporation Vs. Sushamma Thomas & Ors., 1994 (1) TAC 323**, issued certain guidelines for the Claims Tribunal while awarding compensation. The said guidelines are extracted hereunder:-

(i).The claims Tribunal should, in the case of minors, invariably order amount of compensation awarded to the minor invested in long term fixed deposited at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may however, be allowed to be withdrawn.

(ii). In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property such as agricultural implements, rickshaw, etc. to earn a living the Tribunal may consider such a request

after making sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money.

(iii). In the case of semi-literate persons the Tribunal should ordinarily resort to the procedure set out in (i) above unless it is satisfied for reasons to be stated in writing, that the whole or part of the amount is required for expending any existing business or for purchasing some property as mentioned in (ii) above for earning his livelihood in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid.

(iv). In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above subject to the realization set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to so order.

(v). In the case of widows the claims Tribunal should invariably follow the procedure set out in (i) above.

(vi). In personal injury cases, if further treatment is necessary the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment.

(vii). In all cases in which investment in long term fixed deposits is made it should be an condition that the bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be.

(viii). In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency if the amount awarded is substantial the Claims Tribunal may invest it in more than one fixed deposit so that if need be one such F.D.R. can be liquidated."

7. These guidelines have now been incorporated by the Legislature and Rule 220-B of the Uttar Pradesh Motor Vehicle Rules,1998 have been inserted in the Rules.

8. Where an amount of compensation is directed to be kept for a fixed period, the said amount can be withdrawn or encashed prematurely provided a bonfide application is made for early withdrawal of the compensation and reasons are provided. In **Shaheen Bano vs. Motor Accidents Claims Tribunal and others, 2007(2)TAC 755**, the Court held, that if a bonafide purpose is made for early withdrawal of the compensation, the Tribunal should consider the bonafide purpose and should not deny the claimant on the sole ground that premature encashment cannot be done.

9. In **Yogendra Singh vs. Motor Accident Claims Tribunal and others**, 2005(2)TAC 378, the Court held that neither the Tribunal nor the Insurance Company had any right to object to the encashment of the money.

10. In the instant case, the claimants are major and as per the guidelines of the Supreme Court, in **Sushamma Thomas** case (supra), which has now been incorporated in Rule 220 of the Rules, the underlying purpose of securing the interest of the claimant by putting the amount of compensation in a fixed deposit is to protect

their interest in given circumstances, such as, where the claimants are minors and their upkeep was required to be protected or where the claimants are suffering from personal injury and the amount was required for further treatment or where the Tribunal thinks that the claimants are illiterate and, therefore, the amount was required to be invested so that the claim amount was not wasted and such other circumstances, which are required to be contemplated by the Tribunal while keeping the amount of compensation in a fixed deposit. Other than that, the Tribunal should release the amount to the claimants so that they can reap the benefits of the compensation.

11. Rule 220-B further provides that the amount so invested can be withdrawn, if a case is made out that the amount is required to purchase any moveable or immovable property for improving the income of the claimant or the amount is required for expansion of the business or considering the age, fiscal background and strata of the society to which the claimants belong or such larger interest that could be taken into consideration by the Tribunal.

12. In the instant case, the claimants have made a categorical statement that the amount was required to be encashed prematurely in order to repay the loans, which they had taken. Obviously, if the loan is repaid, their economic condition would improve, which would ultimately lead to improving their income. Such ground is a relevant ground coupled with the fact that the claimants are major and minor children are not involved which would require the compensation amount to be kept in a fixed deposit for their upkeep. Further, if the amount is invested for a period of time, the claimants will not be able to enjoy the compensation.

13. In the light of the aforesaid, the Court is of the opinion, that the Tribunal committed a manifest error in rejecting the application of the petitioner's mechanically without considering the relevant criteria given in Rule 220-B of the Rules.

14. Consequently, the impugned order cannot be sustained and is quashed. The writ petition is allowed and a writ of mandamus is issued to the Tribunal to release the amount in favour of the petitioners by encashing the F.D.Rs. prematurely.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2013.

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 22308 Of 2013

Devo Mahesha College of Engg. and Tech. ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Anurag Khanna

Counsel for the Respondents:
C.S.C., Sri Neeraj Tiwari

Constitution of India Art. 226- "Natural Justice"-rejection of application for establishing Engineering College-passed by member Secretary-placing reliance upon report submitted by standing appeal committee-without affording opportunity to narrate correct factual position entails civil consequences-opportunity of hearing held-must-order not sustainable.

Held: Para-9 &10

9.Serious civil consequences follow because of rejection of the application for recognition of institutions, as they

made huge investments, the minimum required is that they are informed of the specific reason for such rejection. The SAC must examine the contention raised on behalf of the institutions while deciding the appeal and must record reasons while rejecting the appeal.

10.It is the case of the petitioner that the report submitted by the Expert Committee after their visit on 22nd March, 2013 was factually incorrect. This Court finds that the report of the Expert Committee dated 22nd March, 2013 has been relied upon without affording opportunity of hearing to the petitioner to meet the deficiencies noticed therein. The order impugned dated 5th April, 2013 therefore, cannot be legally sustained. It is hereby quashed.

Case Law discussed:
2008 (4) ALJ,226(Pr. 7 & 8); (2003) 11 SCC 519

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

1. Heard Sri Anurag Khanna, learned counsel for the petitioner, Sri Neeraj Tiwari, learned counsel for respondent nos. 2 to 4 and learned Standing Counsel for the State-respondents.

2. Application made by the petitioner institution, namely, Devo Mahesha College of Engineering & Technology, Sukrit, Robartsganj, Sonbhadra for establishing a college of engineering and technology was rejected by the Member Secretary, All India Council for Technical Education (hereinafter referred to as the 'AICTE') under order dated 6th March, 2013. The only reason assigned in the order is that there are deficiencies as per the reports, (a) Scrutiny report, (b) Re-scrutiny report, (c) Expert Committee visit report, (d) Regional Committee report, and (e) Rejection in the EC. As per the rules applicable, the matter stood referred to the Standing Appeal Committee (hereinafter referred to as the 'SAC'). The petitioner was informed vide letter of the same date i.e. 6th March, 2013 to appear before the Appeal Committee on 12th March, 2013 at its New Delhi office. Petitioner was permitted to produce all original records in support of his defence.

3. It is the case of the petitioner that in response to the aforesaid order, he did appear before the SAC on the date and time fixed. However, SAC referred the petitioner to the Regional Office and directed the petitioner to make available all relevant records on 14th March, 2013 before the Regional Office. Petitioner complied with the aforesaid direction and thereafter the petitioner was informed that a team of expert shall visit the petitioner institution on 22nd March, 2013. Actual inspection did take place on 22nd March, 2013 by the team of experts of AICTE. Suddenly on 5th April, 2013, petitioner has been served with an order signed by the Member Secretary stating therein that his application for establishing the engineering and technology institution has been rejected on the basis of the reports, as referred earlier with the addition of SAC report.

4. Learned counsel for the petitioner points out that the Appellate Committee did not afford any opportunity of hearing before taking such decision. The scrutiny report in fact is based on incorrect statement of facts. Deficiencies pointed out in the scrutiny reports are non-existent. If opportunity of hearing had been afforded by SAC he would have demonstrated that the deficiencies do not exist.

5. Faced with the aforesaid contention, Sri Neeraj Tiwari, learned counsel for the respondents contended that it is not necessary

for the SAC to afford fresh opportunity of hearing to the petitioner, inasmuch as his claim has been considered earlier and records were examined. The Scrutiny Committee Report is only for verification of the case pleaded by the institution got inspection done by the Expert Committee, no further opportunity of hearing was required to be afforded.

6. I have considered the submissions made by the learned counsel for the parties and have examined the records of the present writ petition.

7. At the very outset, this Court may record that the manner of rejection of the applications of the institutions as in practice with the AICTE by merely referring to the deficiencies as noticed in various reports is highly unsatisfactory. The case of the institutions seeking such recognition qua that deficiencies having been removed, are non-existent, must be considered under an order supported by reasons for not accepting their case.

8. The Apex Court in its judgment in the case of **State of Uttranchal vs. Sunil Kumar Negi** reported in 2008 (4) ALJ, 226 (Pr. 7 and 8) as well as in the case of **Raj Kishor Jha vs. State of Bihar & Ors.** (2003) 11 SCC 519 has held that reasons are heart beat of any conclusion and without the same it is lifeless. reported in

9. Serious civil consequences follow because of rejection of the application for recognition of institutions, as they made huge investments, the minimum required is that they are informed of the specific reason for such rejection. The SAC must examine the contention raised on behalf of the institutions while deciding the appeal and must record reasons while rejecting the appeal.

10. It is the case of the petitioner that the report submitted by the Expert Committee after their visit on 22nd March, 2013 was factually incorrect. This Court finds that the report of the Expert Committee dated 22nd March, 2013 has been relied upon without affording opportunity of hearing to the petitioner to meet the deficiencies noticed therein. The order impugned dated 5th April, 2013 therefore, cannot be legally sustained. It is hereby quashed.

11. Let the SAC decide the appeal of the petitioner by means of a reasoned speaking order, after affording opportunity of hearing to the petitioner preferably within two weeks from the date a certified copy of this order is filed before the authority concerned.

12. The present writ petition is allowed subject to the observations made above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2013

BEFORE
THE HON'BLE PRADEEP KANT SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 22916 Of 2013

Padam Kumar Agarwal ...Petitioner
Versus
The Inspector General(Registration) and Anr. ...Respondents

Counsel for the Petitioner:
Sri V.K. Srivastava, Sri K.M. Mishra
Sri V.K. Agarwal, Sri Vijendra Singh

Counsel for the Respondents:
C.S.C.

Constitution Of India, Art. 226- Termination of compassionate appointment-without

opportunity of hearing-on ground his elder brother already got appointed on compassionate ground-stand falsified from RTI information-who was appointed on independent capacity and not on compassionate ground-other ground of termination-petition was dismissed in default-for negligence of counsel-ligent should not put to suffer-even then petition already restored-termination order being in utter violation of principle of Natural Justice-unsustainable quashed-direction to decide as fresh after giving opportunity of hearing to petitioner-stay to continue after 15 days from the date of decision.

Held: Para-14

Bearing in the mind the aforesaid law, in my view petitioner shall not be made to suffer on account of dismissal of his writ petition for non prosecution. If, petitioner makes representation for payment of salary for the period when he actually worked, the respondent no.2 shall pass a separate order in respect of the said representation having regard to the fact that if the petitioner has worked during the said period his salary shall be paid to him.

Case Law discussed:

AIR 1955 SC 425; (1967) 2 SCR 625; AIR 1968 SC 292; (1970) SCC 405; (1978) 1 SCC 248; (1980) 4 SCC 379; (2011) 8 SCC 380; (1981) 2 SCC 788

(Delivered by Hon'ble Pradeep Kant Singh Baghel, J.)

1. The petitioner is working as a Clerk in the office of the District Registrar, Firozabad. He is aggrieved by the order of his termination dated 16.4.1992 passed by the Inspector General of Registration, U.P.Allahabad, which has been communicated to him on 23.4.1992. He is seeking writ of certiorari to quash the aforesaid orders.

2. A brief reference to the factual aspect would suffice.

3. The petitioner's father Suresh Chandra Gupta was a Registration Clerk in the office of the respondent no.2. He unfortunately died in the year 1982. The petitioner, at the time of death of his father, was minor. After attaining the age of majority he moved an application for appointment on compassionate ground. The respondent no.1 Inspector General of Registration, U.P. Allahabad appointed him on the post of clerk on compassionate ground on 18.6.1990. A copy of the appointment order is Annexure -1 to the writ petition. It is stated that the petitioner joined his services and he was working, his salary was also paid upto March, 1991, but his salary was stopped without disclosing any reason. He made representation for his payment of salary and to his utter shock he was served a copy of termination dated 23.4.1992. From the communication dated 23.4.1992 it is evident that the said order was passed in compliance of the order dated 16.4.1992 which is on the record as Annexure-1 to the counter affidavit. In the termination order dated 16.4.1992 it is mentioned that petitioner has obtained his appointment by fraud as his elder brother Pawan Kumar Agarwal has already been appointed on the compassionate ground and for the said reasons his appointment was cancelled.

4. A counter affidavit has been filed on behalf of the respondents. The stand taken in the counter affidavit is the same which has been mentioned in the impugned order dated 16.4.1992 viz the petitioner's elder brother was appointed on compassionate ground after the death of the petitioner's father and concealing this fact the petitioner has secured appointment and for the said reasons his appointment is cancelled.

5. I have heard Sri K.M.Mishra learned counsel for the petitioner and learned Standing Counsel.

6. Learned counsel for the petitioner submits that the order of termination has been passed in utter disregard to principles of natural justice and no opportunity or notice was given to the petitioner and on this ground alone the order is vitiated. He further urged that the allegations in the impugned order that the petitioner secured appointment by misrepresentation is incorrect as the petitioner's brother was not appointed on compassionate ground. Learned counsel for the petitioner has drawn the attention of the Court to the document which he has brought on the record as Annexure-SA-1 to the Supplementary Affidavit. The said document has been obtained by him under the provisions of the Right to Information Act. The said document issued from the office of the District Magistrate, Etah reveals that the appointment of the petitioner's brother was not made on compassionate ground rather it was a regular appointment.

7. Learned counsel for the petitioner further submitted that the writ petition was dismissed for non prosecution on 8.7.2008. It is contended that there was no fault on the part of the petitioner as writ petition was dismissed on account of inadvertent mistake of the office of the counsel and this Court having satisfied by the cause shown by the learned counsel for the petitioner recalled its order on 24.1.2011. He further submits that salary of the petitioner has been stopped from September, 2010 on account of dismissal of the writ petition although he worked during this period.

8. Learned Standing Counsel submits that the appointment of the petitioner was obtained by fraud and as such no opportunity was necessary. He further submits that the brother of the petitioner was appointed on compassionate ground.

9. I have considered the respective submissions of the learned counsel for the parties and perused the record.

10. Indisputably, the petitioner's father died in the year 1982 and at that point of time the petitioner was minor. As soon as he has attained majority he moved application for appointment on compassionate ground and the respondent no.1 herein appointed him. Petitioner's appointment has been cancelled on 16.4.1992 alleging therein that the appointment of the petitioner has been obtained by fraud. From the perusal of the impugned order it is evident that serious allegations of fraud has been alleged against the petitioner. In paragraph 12 of the writ petition the petitioner has stated that no notice or opportunity was afforded to the petitioner before passing the said order. In the counter affidavit the said averment has been replied in paragraph 10 wherein it is mentioned that since the petitioner has played fraud hence no opportunity was necessary. From the reply of the counter affidavit it is established that the petitioner was not offered any opportunity in case the petitioner was guilty of any fraud then it was incumbent for the authorities to give opportunity to the petitioner to explain his stand. Simply by a stroke of pen that there is allegation of fraud, his services has been terminated.

11. The horizon of Natural Justice has been expanded in last three decades by Judge made law. In India Kraipak case (A.K.Karaipak v. Union of India: AIR 1970 SC 150) marks watershed in the

administrative law. Procedural fairness is hallmark of civilized society. One of its facets is "essence of justice". If a person's right are prejudicially affected by any order of judicial/administrative/quasi judicial authority, the person must be heard. The pre decisional hearing is preferred to post decisional hearing.

12. The Supreme Court in a series of decisions have expanded its limit. Reference may be made to some of the decisions Sangram Singh v. Election Tribunal : AIR 1955 SC 425; State of Orissa v. Binapani Dei and others : (1967) 2 SCR 625; Bool Chand (Dr.) v. Chancellor, Kurukshetra University: AIR 1968 SC 292; Mohindar Singh Gill v. Chief Election Commission (1970) SCC 405; Maneka Gandhi v. Union of India (1978) 1 SCC 248; S.L.Kapoor v. Jagmohan (1980) 4 SCC 379 and recent judgement in P.D. Dinakaran (1) Judges Enquiry Committee (2011) 8 SCC 380.

13. As regards, second submission of learned counsel for the petitioner that dismissal of writ petition for non prosecution may not cause prejudice to petitioner's interest, it is trite law that for the fault of Advocate party should not suffer. In the High Court personal presence of a party is not required unlike civil court. After engaging a counsel the party becomes confident that his interest is safe in the hands of his learned counsel. He poses complete faith in him. The Supreme Court in the case of **Rafiq and another v. Munshi Lal and another (1981) 2 SCC 788** observed as under**:**

"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer , the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the letter appears in the matter when it is listed. It is no part of his job. Mr. A.K.Sanghi stated that a practice has grown up in the High court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe, we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done every thing in his power expected of him would suffer because of the default of his advocate. If we reject this appeal , as Mr. A.K.Sanghai invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest be represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer

obviously is in the negative. Maybe that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200 should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr.A.K.Sanghi."

14. Bearing in the mind the aforesaid law, in my view petitioner shall not be made to suffer on account of dismissal of his writ petition for non prosecution. If, petitioner makes representation for payment of salary for the period when he actually worked, the respondent no.2 shall pass a separate order in respect of the said representation having regard to the fact that if the petitioner has worked during the said period his salary shall be paid to him.

15. After careful consideration of the facts, in my view the impugned order dated 16.4.1992 for aforestated reasons needs to be set aside, it is accordingly set aside.

16. The respondents shall give opportunity to the petitioner and pass a fresh order. While passing the order, the respondent no. 1, shall have the regard to the fact that the petitioner is working in compliance of the interim order dated 18.6.1992, passed by this Court and in the counter affidavit there is no averment that the work and conduct of the petitioner was unsatisfactory.

17. Having regard to the facts and circumstances of the case a direction is issued upon the respondent no.1,Inspector General of Registration, U.P. Allahabad to give opportunity to the petitioner and pass order in the light of the observations made above within three months from the date of communication of this order. The interim protection granted by this Court to the petitioner shall continue after fifteen days of the decision taken by the respondent no.1.

18. With the aforesaid observations the writ petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2013

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 25133 Of 1992

Bhanu Pratap Singh Shishodia & Anr. ...Petitioners
Versus
D.I.O.S. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinod Sinha, Sri A.P. Singh Raghav
Sri Akhilesh Tripathi, Sri Anil Yadav
Sri S.P. Singh, Sri Jitendra Rana
Sri S.P.S. Chauhan

Counsel for the Respondents:
S.C.

U.P. Secondary Education(Service and Selection Board)Act 1982 Section 33-c(2)A-Regularization of Ad-hoc lecturer-working either on short term or substantive capacity-petitioner working pursuance of interim order-Regional Committee to consider regularization within 3 months.

Held: Para-10
This Court in Yash Karan Singh (supra) has considered the judgement of Supreme Court in Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur and another v. Sree Kumar Tiwari and Another reported 1997 (2) UPLBEC 1133 and Full Bench decision of this Court in Smt. Pramila Misra v. Deputy Director of Education, Jhansi Division, Jhansi reported in 1997(2) ESC 1284; Raj Kumar Verma and Another v. D.I.O.S. Saharanpur and others, 1999 (3) ESC 1950 and Smt. Shashi Saxena and others v. Deputy Director of Education and others reported in 2000 (3) ESC 1990, this Court issued direction to Selection Committee to consider the cause of the teachers therein for regularisation under section 33 B of Act No. 5 of 1982. In Yesh Karan Singh v. DIOS and Another (supra) also teacher was working on the strength of interim order for a quite long time.

Case Law discussed:
1997(2)UPLBEC1133; 1997(2) ESC 1284; 1999(3) ESC 1950; 2000(3) ESC 1990; Special Appeal No. 1591 of 2006; Special Appeal No. 2627 of 1990

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

1. The petitioners preferred this writ petition for a direction upon the respondents to pay the salary of the petitioners as Teacher in Lecturer Grade and to accord approval for regular promotion of the petitioners.

2. Brief reference to the factual aspects would suffice.

3. Rana Sangram Singh Inter College, Bishara, district Ghaziabad is a recognised institution, wherein education is imparted upto the level of Intermediate. It receives aid out of State Fund. the provisions of the U.P. Intermediate Education Act, 1921, the Regulations framed thereunder, the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 (U.P.Act No. 5 of 1982), and the U.P.High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 are applicable to the institution. The institution is administered by the respondent no.2, i.e. Committee of Management.

4. It is stated that petitioner no. 1 unfortunately died during the pendency of the writ petition. Learned counsel for the petitioner submits that he is pressing the relief on behalf of petitioner no.2 only.

5. The petitioner no.2 was initially appointed on 9.7.1973 (wrongly mentioned in the writ petition as 16.12.1998). It is stated that three posts of lecturer fell vacant in the College on account of retirement of teachers working in lecturer grade in English, Sanskrit and History subjects. There are total ten sanctioned post of lecturer. The petitioner no.2 did his M.A. in Sanskrit and he is B.Ed. also. The petitioner no.2 moved an application for his regular promotion in lecturer grade under 50% promotion quota. Application of the petitioner no.2 was considered by the Committee of Management and passed a resolution recommending the name of the petitioner no.2 for promotion in lecturer grade. All relevant papers were furnished to the office of the District Inspector of Schools and the petitioner was promoted on ad hoc basis on 31.10.1991. It is stated that papers for regular promotion were also sent to the Commission on 4.11.1991. When no

steps were taken for regular promotion of the petitioner in lecturer's grade, he preferred writ petition before this Court. This Court passed the following interim order :-

"Heard learned counsel for the petitioner.

So far as relief regarding issuance of a writ of mandamus directing the respondents to pay salary to the petitioners is concerned, the same is inter-tuined with the decision in the referred writ petition No. of 1992 filed on behalf of Smt. Durgesh Kumari, inasmuch as the Adhoc appointments of the petitioners were made after the embargo put on the appointments. As regards the relief regarding issuance of a direction to the commission for according the approval to the proposal for regular promotion under Rule 9 of the U.P. Secondary Education Services Commission Rules, 1983 is concerned, the same may be examined and considered if and when the Secondary Education Services Commission resumes its functioning inasmuch as the learned counsel for the parties are not sure whether the Act passed by the State legislature abolishing the Secondary Education Services Commission and substituting it by the Regional Selection Board has been accorded assent to by the President of India.

Accordingly list this petition for admission after three months. It is made clear that in case the petitioners are working as lecturers on ad hoc basis in the concerned institution, they would not be disturbed until further order of this Court. "

6. It is stated that on the strength of interim order, uninterruptedly, the petitioner continued to work in the institution and salary paid.

7. During the course of the proceedings the State Government has amended the Act and certain provisions have been made for regularization of ad hoc teachers appointed under Section 18 of the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 read with Difficulties of Removal Orders. Section 33 A was inserted by U.P.Act No. 19 of 1985 (w.e.f. 28.12.1994) Section 33 B was brought on Statute Book by U.P.Act No. 1 of 1993 (w.e.f. 7.8.1993), Section 33 C and Section 33 D were inserted by U.P. Act No. 25 of 1998 (w.e.f. 20.4.1998) and 33 F was inserted by U.P.Act No. 5 of 2001 (w.e.f. 30.12.2000).

8. The objects of these amendments were to regularize ad hoc teachers appointed from time to time against substantive vacancies and short term vacancies, as the case may be. It is common knowledge that Commission/Board takes considerable long time to complete the process of recruitment. It is impossible to fill huge vacancies that goes on increasing by passing years.

9. Having regard to said object and intention of the legislature I am of the view that if two views are possible while considering regularization of teachers, the authorities concern may take a view which favour the teacher. Having said so, I hasten to add that statutory provisions cannot be bypassed. The Selection Committees constituted are invested with Statutory power to examine the cases of regularization in terms of conditions mentioned in the above sections.

10. This Court in Yash Karan Singh (supra) has considered the judgement of Supreme Court in Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur and another v. Sree Kumar Tiwari and Another reported 1997 (2) UPLBEC 1133 and Full Bench decision of this Court in Smt. Pramila Misra v. Deputy Director of Education, Jhansi Division, Jhansi reported in 1997(2) ESC 1284; Raj Kumar Verma and Another v. D.I.O.S. Saharanpur and others, 1999 (3) ESC 1950 and Smt. Shashi Saxena and others v. Deputy Director of Education and others reported in 2000 (3) ESC 1990, this Court issued direction to Selection Committee to consider the cause of the teachers therein for regularisation under section 33 B of Act No. 5 of 1982. In Yesh Karan Singh v. DIOS and Another (supra) also teacher was working on the strength of interim order for a quite long time.

11. Relevant would it be, to mention that similar orders in same set of facts have been passed by different Division Benches and by learned Single Hon'ble Judges. Reference may be made to some of the cases: Smt. Indu Gautam v. DIOS Aligarh (Special Appeal No. 643 of 2012) ; Smt. Sadhna Sharma v. State of U.P. (Special Appeal No. 1591 of 2006; Writ Petition No. 2627 of 1990 Smt. Madhu Bala Gupta and another v. State of U.P. ; Writ Petition No. 24383 of 1989 V .K.Sharma v. State of U.P. and Writ Petition No. 11797 of 1994 Shashi Prakash Dubey and Another v. DIOS and others.

12. As a result, I am of the view that end of justice would be met if a direction is issued upon the Regional Committee headed by the Joint Director of Education under section 33 -C (2 a) of the Act, to consider the cause of the petitioner for regularization of the petitioner in accordance with law. The said exercise shall be completed by the Regional Committee as expeditiously as possible preferably within three months from the date of communication of this order.

13. The writ petition is disposed of.

14. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 25619 Of 2011

Umesh Chandra ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri H.W. Khan, Sri J.H. Khan
Sri Abhitab Kumar Tiwari

Counsel for the Respondents:
C.S.C.

U.P. Industrial Dispute Act 1947-Section 6-N- Termination of Tube Well Operator-challenged before Writ Court pursuance of stay working-regularization petition-dismissed as after expiry of 3 years-no-extension-and during this the tube-well failed-on this ground termination order passed-which remained unchallenge-consequently regularization denied-petitioner raised Industrial disputed-rejection on ground in absence of reference order regarding provisions of Section 6-P and 6 Q-adjudication not possible-held illegal-working more than 240 days not denied-consequent to failure of tub-well other juniors allowed allowed to work and regularized subsequently-petitioner entitled for reinstatement-considering delay of 11 years-in perusing litigation before Writ Court-relief for back wages denied-order passed by Labour Court set a side.

Held: Para-20

In view of the aforesaid, the Court is of the opinion that since similarly situated persons were reinstated in the service by various orders of the writ Court for different reasons, the petitioner is also entitled to be reinstated in service. The Court has held that the order of termination was in violation of the provision Section 6-N of the Act. The Court, accordingly, holds that the award of the labour court declining to grant relief was wholly erroneous. The award is accordingly quashed. The petitioner would be reinstated in service.

Case Law discussed:

Suresh Chandra Tewari and others Vs. State of U.P. and other; 2008 (26) LCD 280

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

1. Heard Sri W.H. Khan, the learned Senior counsel assisted by Sri J.H. Khan, the learned counsel for the petitioner and the learned Standing counsel for the respondents.

2. The admitted facts as culled out from the pleadings before the labour court is, that the petitioner, who is a workman was appointed as a part time Tubewell Operator by an order dated 11th March, 1987 for a period of three years to work on Tubewell No. 1 NBG. The appointment letter clearly indicated that his services would come to an end on 14th March, 1990. When the term was coming to an end, the petitioner filed a writ petition no. 2725 of 1990 and obtained an interim order dated 21st March, 1990, whereby the Court allowed the petitioner to continue to work provided the Tubewells and the post were available. It is not known as to whether, the petitioner was permitted to work in terms of the interim order as the Court does not find any pleadings to that effect. On 20th March, 1992, the State Government issued a Government Order indicating that the nomenclature of the post of part time Tubewell Operator would be changed to Assistant Tubewell Operator and that these Tubewell Operators would work for a period of three hours in a day and that the remaining time could be utilized by them for other work. It was also indicated that, in the event, the tubewell failed or there was no requirement of work, the services of these Assistant Tubewell Operators would be dispensed with in terms of the State Government Order.

3. The petitioner was given an appointment letter on 14th May, 1992 for a period of three years. In this appointment letter, it was clearly indicated that his services was limited to three years as an Assistant Tubewell Operator and that he would be allowed to work only for three hours, and thereafter, it was open to the petitioner to do whatever kind of work. It was also indicated that, in the event, the tubewell failed or his services were no longer required, in which case, his services would be dispensed with.

4. It transpires that Tubewell No. 1, where the petitioner was working, failed and accordingly, the Executive Engineer issued a notice dated 23rd March, 1995 indicating that the services of the petitioner was no longer required as the Tubewell had failed, and therefore, his services would come to an end after 31st March, 1995.

5. Curiously, the petitioner did not challenge the order of termination, but chose to file a writ petition before the Lucknow Bench, being writ petition no. 3611 (ss) of 1995, for regularization of his services. This petition was eventually dismissed by a judgement dated 13th December, 2005 on

the ground that the services of the petitioner could not be regularized under Article 226 of the Constitution of India, coupled with the fact that his services had already been terminated by a notice dated 23rd March, 1995, and even, if there was a violation of the provision of 6-N of the U.P. Industrial Disputes Act, the remedy against the order of termination lay under the Industrial Disputes Act. Pursuant to the dismissal of the writ petition , the petitioner raised an industrial dispute in the year 2006, which was ultimately referred by the State Government by an order dated 28th December, 2006.

6. Before the labour court, the workman contended that he had been working continuously in service since 1987 without any break and that he had completed 240 days in a calender year and that the termination of his services by the notice dated 23rd March, 1995 was in a gross violation of the provision of Section 6-N of the U.P. Industrial Disputes Act. It was also contended that many Tubewell Operators were still working, where the Tubewell had failed and that the petitioner had been discriminated. It was also contended that the juniors to the petitioner were allowed to continue in violation of the provisions of Section 6-P and Section 6-Q of the Industrial Disputes Act. The workman, subsequently, prayed that the order of termination should be set aside and that he should be reinstated with continuity of service and with full backwages.

7. The employers contended that the petitioner was appointed initially as a part time Tubewell Operator for a fixed period, and thereafter was issued a fresh appointment letter again for a fixed period of three years on certain terms and conditions. The appointment letter clearly indicated that, in the event, the tubewell failed, his services would be dispensed with. These terms and conditions were duly accepted by the workman, and therefore, it was no longer open to the workman to contend that such conditions imposed in the appointment letter was onerous. The employers also contended that the Irrigation Department was not an industry as specified under Section 2-(k) of the U.P. Industrial Disputes Act. It was also contended that the services of the workman was terminated on 31st March, 1995, whereas the dispute was raised in the year 2006 after a gap of more than 10 years and on account of undue delay no relief can be granted to the workman.

8. The Labour Court after, considering the material evidence that was brought on record, held that the Irrigation Department is an industry and that the petitioner is a workman as defined under Section 2 (z) of the Act. The labour court held that there has been delay in raising the reference, but such delay cannot defeat the claim of the workman. The labour court further held that the provision of Section 6-P and Section 6-Q cannot be considered in the present case as the same was not referred by the State Government in the reference order. The labour court further found that the termination of the services of the workman was based on the terms and conditions on the appointment letter, which was accepted by the petitioner while taking up the job and that such termination based on the terms and conditions of the appointment letter did not amount to the retrenchment as defined under Section 2(s) of the U.P. Industrial Disputes Act. The labour court, accordingly, declined to grant any relief to the workman and rejected his claim application. The petitioner, being

aggrieved by the said award, has filed the present writ petition.

9. Before this Court, the workman raised new pleas, namely, that by an order of 16th June, 1994, the petitioner was transferred to work in Tubewell No. 4 NBG. This fact has been stated in paragraph 7 of the writ petition, which has been categorically denied by the respondent in their counter affidavit. Such grounds which are not a part of the record of the labour court cannot be taken into consideration in a writ jurisdiction.

10. The learned counsel also relied upon a decision of the Lucknow Bench in the case of **Suresh Chandra Tewari and others Vs. State of U.P. And others**, decided on 18th May, 1994, in which the Government Order dated 20th February, 1992 was quashed and part-time Tubewell Operators were allow to continue. It was contended that the case of the petitioner stood on the same footing, and consequently, the petitioner should also be given the same relief. The learned counsel also relied upon a decision in the case of **Indra Kumar Singh. Vs. State of U.P. And others 2008 (26) LCD 280**, in which, the order of termination, which was based on the conditions given in the Government Order dated 20th Feb, 1992 was quashed in a writ jurisdiction. The learned counsel submitted that in view of this decision, which was fully applicable, the petitioner was entitled to be given the same relief.

11. The learned senior counsel contended that various Tubewell Operators filed various writ petitions, where tubewells had failed, and all those writ petitions were allowed and these Tubewell Operators were reinstated in service. It was contended that the conditions mentioned in the appointment letter was based on the conditions given in the Government Order dated 20th February, 1992 which has been quashed in the case of **Suresh Chandra (Supra)**, and consequently, such conditions, being onerous, could not be a factor for dispensing the services of the workman. It was therefore, contended that the petitioner should also be granted the same relief of reinstatement in service.

12. Having heard the learned counsel for the petitioner, the Court is of the view that the decision in the case of S**uresh Chandra** and in the case of **Indra Kumar Singh** are based on its own facts. No doubt, the Government Order dated 20th February, 1992 was quashed in the case of **Suresh Chandra (Supra)** on the ground that the nomenclature of part time Tubewell Operator cannot be changed to the Assistant part time Tubewell Operator. The conditions mentioned in the impugned order was not considered by the Court in Suresh Chandra's case. In Indra Kumar Singh's case, the Court found that the appointment of the petitioner did not contained such conditions as mentioned in the Government Order dated 20th February, 1992, and accordingly, quashed the order of the termination, which was based on the conditions mentioned in the Government Order dated 20th February, 1992. This decision is distinguishable.

13. The terms and conditions in the appointment letter, namely, that if the tube-well failed and that the services are no longer required, in which case, the services of the Tubewell Operator would be dispensed with has to be tested on the anvil of reasonableness. In the opinion of the Court, such conditions are neither onerous nor discriminatory. tubewells

have a limited period of life and when a tubewell dries up, it becomes non-operational and, at that stage, it is for the authority to see as to whether the services of a Tubewell Operator is required or not ? If their services are required, it would be open to the authority to extend their services, failing which, their services would be dispensed with.

14. In the case of **Suresh Chandra (Supra)**, the evidence that was led proved that part time Tubewell Operators were not working for a limited period of time, but were working beyond the stipulated period and were working at odd hours of the day. It came on record that on account of erratic electric supply, the Tubewell operator was required to operate Tubewell whenever the electricity was available. On account of these findings, the court was of the view that the condition that the petitioners were working for a limited period was incorrect. In the instant case, no such evidence has been brought by the petitioner before the labour court to indicate that he was working full time or beyond the stipulated hours of working nor there is any such pleadings to this effect.

15. In the light of the aforesaid, the services of the workman was dispensed with in accordance with the terms and conditions of the appointment letter and would not attract the provisions of Section 6-P and Section 6-Q of the Industrial Disputes Act. The labour court, however, committed an error in holding that since the reference order did not mention about Section 6-P and Section 6-Q, the labour court could not deal with such questions. In the opinion of the Court, the labour court committed an error. In order to test the validity and legality of the order of the termination, it would always be open to the labour court to deal with incidental questions attached to the main reference order and consider the violation of Section 6-P and Section 6-Q, and the consequential relief to be given, in the event, the labour court found that the order of termination was illegal. The Court finds that the labour court committed an error in holding that the provision of retrenchment as embodied in Section 2(s) was not applicable as the services of the workman was terminated in terms of the appointment letter.

16. The Court is of the opinion that the labour court committed an error. The termination of the services of the workman for any reason whatsoever amounts to retrenchment unless the termination falls in the exceptional clause. Even if, the services of the workman has been terminated in terms of the appointment letter, the same does not fall in the exceptional clause. Admittedly, the workman had worked for more than 240 days in a calender year and had more or less completed three years of service. If his services was no longer required on account of the tubewell having failed, his services could be dispensed with after complying with the provisions of Section 6-N of the Act. This has not been do so. Consequently, the order of termination of the services of the workman was violative of provision of Section 6-N of the Industrial Disputes Act. The order of termination cannot be sustained.

17. Similar notice was given to **Indra Kumar Singh**, who challenged the notice in a writ jurisdiction without going through the process of the labour court. His writ petition was allowed on a different ground and he was reinstated in service. Similarly, a large number of part time Tubewell had filed writ petitions who were also reinstated in service.

18. In the case of Suresh Chandra (Supra), the Government Order of 1992 was quashed and the services of the workman remained untouched. Subsequently Regularization Rules was introduced in 1998, and based on those Rules, many of the services of the part time Tubewell Operators have been regularized.

19. The petitioner in the instant case had also filed a writ petition for regularization of his services in the year 1995, but did not challenge the order of termination on account of which, his writ petition was dismissed. The petitioner, thereafter, raised an industrial dispute.

20. In view of the aforesaid, the Court is of the opinion that since similarly situated persons were reinstated in the service by various orders of the writ Court for different reasons, the petitioner is also entitled to be reinstated in service. The Court has held that the order of termination was in violation of the provision Section 6-N of the Act. The Court, accordingly, holds that the award of the labour court declining to grant relief was wholly erroneous. The award is accordingly quashed. The petitioner would be reinstated in service.

21. The reference was made in the year 2006 after a gap of almost 11 years on account of the fact that the petitioner was pursuing his remedy for regularization of his services before a Writ Court. For this delay, the liability of backwages cannot be fastened upon the employers. The Court is, therefore, of the opinion that in order to mould the relief, the petitioner is only entitled for reinstatement with continuity of service, but will not be entitled for any backwages.

22. In view of the aforesaid, the award of the labour court is quashed. The writ petition is allowed to the extent stated aforesaid.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2013

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 25969 of 2013
M/S Agarwal Trading Agency...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri R.K. Tripathi

Counsel for the Respondents:
C.S.C.

U.P. Kerosene Oil control Order 1962- Rule 11 Proviso-II- Suspension of licence-pending enquiry-before passing order opportunity is must-moreover after expiry of 2 weeks-suspension automatically ceased with operation-suspension order lost its existence accordingly-given liberty to pass final order.

Held: Para-11

A perusal of the aforesaid provision indicates that the 1st proviso of Rule 11 of the Order, 1962 contemplates that the licencee shall be given a reasonable opportunity of submitting his explanation before license is suspended except when suspension is pending inquiry. With regard to suspension pending inquiry an outer limit of two weeks have been provided for. The object of the said rule is that normally suspension of kerosene oil licensee should be ordered after giving due opportunity and in case it is made suspension pending inquiry it has outer limit of two weeks. A perusal of the suspension order dated 30/4/2013, clearly indicates that suspension order was pending inquiry, hence the said suspension shall come to an end after expiry of two weeks. However, the mere fact that suspension order which was passed pending inquiry has come to an

end after two weeks does not preclude the authorities from passing a final order under the 1st proviso of Rule 11 of the Order, 1962.

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

1. Supplementary affidavit filed today is taken on record.

2. Heard Shri Ashok Khare, learned Senior Advocate assisted by Shri R.K Tripathi, for the petitioner and the learned Standing Counsel.

3. By this petition, the petitioner has prayed for quashing the order dated 30/4/2013 passed by the District Supply Officer suspending the license of the petitioner's Kerosene Oil. By the said order the District Supply Officer also directed the petitioner to submit his reply along with evidence within one week.

4. Learned counsel for the petitioner submitted that the suspension of the petitioner's license of kerosene oil was suspension pending inquiry and in accordance with 2nd proviso of Clause 11 of the U.P. Kerosene Control Order, 1962 (hereinafter called the "Order 1962") the said suspension order has come to an end. He further submits that according to first proviso to Rule 11 of the Order 1962, before suspending the license, an opportunity of submitting an explanation is required and it is by an exception that suspension can be ordered pending inquiry. He submits that since the petitioner's suspension of kerosene oil was ordered pending inquiry hence the same has come to an end after expiry of two weeks.

5. Learned Standing Counsel appearing for the respondents submits that the petitioner did not submit any reply and further it was on account of the petitioner's non submission of his reply that the order could not be passed.

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

Clause 11 of the Order, 1962 is as follows:

"[11. Forfeiture of security, suspension and cancellation of and refusal to renew licence.- The Licensing Authority may, for reasons to be recorded in writing, forfeit the security either in whole or in part, suspend or cancel any licence or refuse to renew a licence if it is satisfied that the licensee has contravened any provisions of this Order or the conditions of the licence or any direction issued thereunder:

8. Provided that the licensee shall be given a reasonable opportunity of submitting his explanation before forfeiture of security either in whole or in part or before a licence is cancelled or its renewal is refused or its suspended otherwise than by way of suspension pending inquiry:

9. Provided further that no order of suspension pending inquiry shall extend beyond a period of two weeks:

10. Provided also that it shall not be necessary to give an opportunity in respect of an alleged contravention which has led to the conviction of the licensee.]"

11. A perusal of the aforesaid provision indicates that the 1st proviso of Rule 11 of the Order, 1962 contemplates that the licencee shall be given a reasonable opportunity of submitting his explanation before license is suspended except when suspension is pending inquiry. With regard to suspension pending

inquiry an outer limit of two weeks have been provided for. The object of the said rule is that normally suspension of kerosene oil licensee should be ordered after giving due opportunity and in case it is made suspension pending inquiry it has outer limit of two weeks. A perusal of the suspension order dated 30/4/2013, clearly indicates that suspension order was pending inquiry, hence the said suspension shall come to an end after expiry of two weeks. However, the mere fact that suspension order which was passed pending inquiry has come to an end after two weeks does not preclude the authorities from passing a final order under the 1st proviso of Rule 11 of the Order, 1962.

12. In view of the facts of the present case, no useful purpose will be served in keeping the writ petition pending and calling for a counter affidavit. We are of the view that the suspension order dated 30/4/2013, which was pending inquiry shall cease to operate after two weeks. However, it shall be open for the authorities to pass a final order under the first proviso of Rule 11 of the Order, 1962 in accordance with law.

13. With the aforesaid observation, writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.26118 Of 2011
along with
No. 18968 / 2010
with
No. 19004 / 2010
with
No.19007 / 2010
with
No. 19009 / 2010
with
No. 19011 / 2010
with
No. 19013 / 2010
with
No. 19015 / 2010

U.P. Power Transmission Corporation Ltd. ...Petitioner
Versus
Jagdish Narain Rawat and Ors Respondents

Counsel for the Petitioner:
Sri Arvind Kumar

Counsel for the Respondents:
Ms. Bushra Maryam

U.P. Retirement Benifits Rules 1961 readwith New Family Pension Scheme1965- whether the employees of U.P.E.B. who opted pension Rule 1961 can be debarred from benefit of gratuity Act?-held-'No'

Held: Para-14 and 15

14.In the light of the aforesaid, the option exercised by the workers was an exercise in futility and it did not bind them for not receiving better benefits payable under the Act.

15.Nothing stopped the workman from receiving the benefits under the Payment of Gratuity Act, 1972 in view of sub-clause (5) of Section 4 of the Act, which clearly indicates that the right of the employee to receive better terms of gratuity under any award or agreement would not be affected by Section 4 of the Act to receive payment under the said Act.

Case Law discussed:
1999 (81) FLR 867; 2010 (124) FLR 192; 2001 (90) FLR 770

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

1. The erstwhile U.P. State Electricity Board vide its boards meeting dated 26th December, 1963 passed a resolution for adopting the U.P. Government Rules and Regulation regarding Classification and Control Rules, Government Servant Conduct Rules, T.A. Rules, Medical Attendance Rules and Pensionary Rules as amended from time to time. Pursuant to the said resolution, the U.P. State Electricity Board adopted the U.P. Retirement Benefits Rules, 1961 read with U.P. New Family Pension Scheme, 1965. Under the Pension Rules, a composite scheme was provided for payment of GPF, gratuity and pension, which according to the petitioner gave better benefits than the Central Provident Fund Scheme and gratuity payable under different gratuity schemes. In 1972, the Payment of Gratuity Act came into existence, and under the said Act, it became obligatory on the employers to pay gratuity. Accordingly, an office memorandum dated 3rd April, 1976 and 5th May, 1976 was issued directing its employees to either opt for the pension Rules under the U.P. Retirement Benefit Rules, 1961 or for payment of gratuity under the Act of 1972. It was clarified that if the employee opts for the benefit under the Payment of Gratuity Act, 1972, he would not be entitled to pensionary benefits as provided under the U.P. Retirement Benefit Rules, 1961. Based on the aforesaid office memorandum, a further office memorandum was issued on 17th February, 1982 and 21st June, 1983 directing the employees to give the option either to opt for the U.P. Retirement Benefits Rules, 1961 read with U.P. New Family Pension Scheme, 1965 or opt for the benefits of gratuity payable under the Payment of Gratuity Act. Subsequently, an office memorandum dated 19th September, 1984 was issued clarifying its earlier office memorandums indicating therein that employees of the U.P. State Electricity Board, were no longer required to submit their option for being allowed benefits admissible under the U.P. Retirement Benefit Rules, 1961 and the New Family Pension Scheme, 1965.

2. It transpires that pursuant to the office memorandum dated 17th February, 1982, the workman in question, gave an option to take the benefits under the U.P. Retirement Benefit Rules, 1961. The workman retired on 30th September, 1994 and received GPF and gratuity amounting to Rs.5,91,121/-, which he received without any protest and also started receiving pension under the said Rules.

3. After 9 long years, the workman filed an application under the Payment of Gratuity Act before the Controlling Authority praying that he is entitled for gratuity under the said Act. The petitioner's objected saying that since a composite scheme had been framed by the Government of Uttar Pradesh, which had been adopted by the U.P. State Electricity Board, which the workmen had opted, it was no longer permissible for the workmen to claim gratuity under the Act. The Controlling Authority, after considering the matter, passed an order dated 7th August, 2010 directing the petitioner to pay the difference of the gratuity amount along with interest at the rate of 6% per annum. The petitioner, being aggrieved, filed an appeal, which also met the same fate. The petitioner has now filed the present writ petition.

4. Heard Sri Arvind Kumar, the learned counsel for the petitioner and Ms. Bushra Maryam, the learned counsel for the respondent.

5. The admitted facts which emerges is, that a composite scheme has been given under the U.P. Retirement Benefit Rules, 1961 and New Family Pension Scheme, 1965, which has been adopted by the U.P. State Electricity Board. It is alleged that this composite scheme provides for payment of gratuity, GPF and pension, which is more beneficial to the workers than other schemes. The workman has also opted to receive the benefits under the Rules of 1961 and the Family Pension Scheme of 1965.

6. The question which is required to be answered is, whether the option given by the workman is binding on him and whether he is entitled to claim the balance gratuity amount under the Payment of Gratuity Act.

7. In order to appreciate the submissions of the learned counsel for the parties, it would be appropriate to refer to a few provisions of the Act. Section 4 of the Payment of Gratuity Act, 1972 provides that gratuity would be payable to an employee on termination of his employment after he has rendered continuous service for not less than 5 years on his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease. Sub-clause (5) of Section 4 provides as under:-

4(5). Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract of the employer.

8. A perusal of the aforesaid indicates that nothing would affect a right of the employee to receive better terms of gratuity from the employer.

9. Section 5 provides power to exempt the provisions of the Act by the appropriate Government, if in the opinion of the appropriate government, it is found that the employees are in receipt of gratuity or pensionary benefits, which are more favourable than the benefits conferred under the Act. Section 5 is extracted hereunder:-

"5. Power to exempt.-- [(1)] The appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

[(2)] The appropriate Government may, by notification and subject to such conditions as may be specified in the notification, exempt any employee or class of employees employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, if, in the opinion of the appropriate Government, such employee or class of employees are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.]

[(3)] A notification issued under sub-section (1) or sub- section (2) may be issued retrospectively a date not earlier

than the date of commencement of this Act, but no such notification shall be issued so as to prejudicially affect the interests of any person.]"

Section 14 of the Act reads as under:

*"**14. Act to override other enactments, etc**.-- The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."*

10. A perusal of the aforesaid indicates that the provisions of Payment of Gratuity Act will have effect notwithstanding anything inconsistent therewith contained in any other enactment.

11. From the aforesaid, it is clear that gratuity is payable to an employee under Section 4, if the employee meets the conditions mentioned therein. This payment is mandatory. If a scheme is floated by the employers, which is more beneficial than the benefit granted under the Payment of Gratuity Act then the provisions of the Act can be exempted by the appropriate government under Section 5 upon an application filed by the employers in such purposes failing which, the provision of Section 14 will override any other enactment made, which is inconsistent with the Payment of Gratuity Act.

12. In the instant case, the respondents are giving the benefits as per the U.P. Retirement Rules, 1961 read with New Family Pension Scheme, 1965. The question is, whether the workman was still liable to be paid the gratuity under the Act of 1972. The learned counsel for the petitioner contended that once the workers gave their option and had exercised their right to receive the benefit under the Rules of 1961 read with the New Family Pension Scheme, 1965, it was no longer permissible for them to receive gratuity under the Act of 1972.

13. The submission of the learned counsel for the petitioner cannot be accepted. The Court finds that the office memorandum of 1982 was subsequently clarified by another office memorandum dated 19th September, 1984, in which it was clarified that the employees were no longer required to submit their option for receiving the benefits under the U.P. Retirement Benefit Rules, 1961 read with New New Family Pension Scheme, 1965.

14. In the light of the aforesaid, the option exercised by the workers was an exercise in futility and it did not bind them for not receiving better benefits payable under the Act.

15. Nothing stopped the workman from receiving the benefits under the Payment of Gratuity Act, 1972 in view of sub-clause (5) of Section 4 of the Act, which clearly indicates that the right of the employee to receive better terms of gratuity under any award or agreement would not be affected by Section 4 of the Act to receive payment under the said Act.

16. In **Municipal Corporation of Delhi Vs. Dharam Prakash Sharma of Delhi, 1999 (81) FLR 867** the Supreme Court held that since no steps were taken by the employer to seek exemption under Section 5 of the Payment of Gratuity Act and in view of the overriding provision of

Section 14 of the said Act, the provisions of gratuity payable to the employees under the pension Rules would have no effect and that the employees would be entitled to payment of gratuity under the Payment of Gratuity Act. The said decision is squarely applicable in the instant case.

17. Similarly, in **Allahabad Bank and another Vs. All India Allahabad Bank Retired Employees Association, 2010 (124) FLR 192**, the Supreme Court held that gratuity payable under the Payment of Gratuity Act is a statutory right and the same cannot be taken away except in accordance with the provisions of the Act.

18. In the instant case, it was open to the employers to seek exemption under Section 5 of the Payment of Gratuity Act, which has not been done and so long as the exemption is not granted by the appropriate government, the provisions of the Gratuity Act will remain applicable upon the petitioner.

19. The learned counsel for the petitioner has relied upon the decision of the Supreme Court in **DTC Retired Employees Association and others Vs. Delhi Transport Corporation, 2001 (90) FLR 770** wherein the Supreme Court held that the appellants, who were the retired employees and had opted for the pension scheme, which was introduced by the employer corporation through which they were paid gratuity could not avail the benefit of both the pension and gratuity and that it was not open to the Court to interfere with the pension scheme that was implemented by the employers. The said decision is squarely distinguishable and is not applicable in the instant case, inasmuch as the provision of Sections 5 and 14 of the Payment of Gratuity Act was not considered nor noticed.

20. In the light of the aforesaid, the Court is of the opinion that the order of the Prescribed Authority directing the petitioners' to pay the difference of the gratuity was justified. However, the Court finds that the order of payment of interest was not justified. The workman did not stir in the matter for 9 long years and, thereafter, filed the claim application. The Court is of the opinion that on account of the fault of the workman, the payment of the interest liability cannot be fastened upon the employers.

21. In the light of the aforesaid, the writ petition is partly allowed. The order of the Controlling Authority is modified to the extent that the employers, namely, the petitioners are only liable to pay the difference of the gratuity amount under the Payment of Gratuity Act and that no interest would be payable. Since the entire amount has been deposited, the Controlling Authority would disburse the payment of the gratuity amount to the workers and the interest component would be refunded to the petitioners.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2013

BEFORE
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 28553 of 2013

Girish Chandra ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Ramesh Narain Pandey

U.P. Intermediate Education Act, 1921-Chapter III-Regulation 35 to 37-Dismissal of petitioner-working as Teacher in minority institution-without charge sheet-without supply of document, without issuing show cause notice-prior to inflict major penalty-held-order based upon malafide consideration-inn utter disregard of principle of Natural Justice-not sustainable-quashed with liberty to proceed in accordance with law.

Held: Para-11
I have perused the impugned order and the opening part thereof clearly recites the manner in which the Management has proceeded to consider the non-cooperation of the petitioner as one of the grounds for proceeding to pass the termination order. Regulation 37 of Chapter III categorically requires that after the inquiry is concluded, the report of the Enquiry Officer shall be considered by the Committee of Management and then the Committee shall offer an opportunity to the delinquent employee to give his explanation and hear him before passing the order of termination. There is no material discussed by the District Inspector of Schools to enable this Court to infer tht the Committeee had ever complied with the said provision. The order impugned dated 15.4.2013 is clearly deficient on this aspect. Learned counsel for the respondent - Committee of Management, therefore, could not support the order on this ground. The impugned order, therefore, being in violation of Regulation 37 of Chapter-III of 1921 Act cannot be sustained.

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

1. Heard Sri Ashok Khare, leanred Senior Counsel for the petitioner, Sri Ramesh Narain Pandey for the respondent Nos. 4 and 5 and learned Standing Counsel for the respondent Nos. 1 to 3.

2. There is hardly any role for the Respondent Nos. 1 to 3 to play in the present dispute at this stage and, therefore, this Court does not find it necessary to grant any time to the said respondents to file any counter-affidavit.

3. Sri Pandey, learned counsel for the respondent Nos. 4 and 5, submits that he does not propose to file any counter-affidavit at this stage and the matter can be disposed of on the basis of the facts that are already on record.

4. In view of the consent of all the learned counsel for the parties, the matter is being disposed of finally at this stage.

5. The petitioner is a Teacher of Shri Digamber Jain Inter College, Agra, which is a minority institution protected under Article 30 of the Constitution of India.

6. Disciplinary proceedings were initiated against the petitioner and he has been terminated from his services by the impugned order dated 15.4.2013, which is under challenge before this Court. The ground for termination is that the petitioner was guilty of the charges referred to in the chargesheet dated 28.2.2013 and since the petitioner failed to cooperate in the inquiry and failed to respond to the show cause notice in accordance with law, the petitioner was removed from service.

7. The reply submitted by the petitioner to the show cause notice was also not found satisfactory.

8. Sri Ashok Khare contends that the impugned order is violative of the procedure prescribed under Regulations 35 to 37 of Chapter III of the U.P.

Intermediate Education Act, 1921 and not only this, the charges are absolutely frivolous and the inquiry has proceeded without giving notice to the petitioner. He further contends that none of the documents were provided which was demanded by him. On the contrary a reply was given by the Committee that the documents were not required as they were not necessary for the purpose of the reply. He, therefore, submits that the respondent - Committee of Management has proceeded to terminate the services of the petitioner without complying with the principles of natural justice and in clear violation of the provisions aforesaid. He has relied upon on three decisions of this Court in the case of Hardev Singh Vs. Committee of Management, D.B. Santokh Singh Khalsa Inter College, Agra, and another, 2004 (2) LBESR 1138, the decision in the case of Tariq Ayyub Vs. State of U.P. and others, decided on 21.10.2010 and the third decision in the case of Abha Saxena Vs. State of U.P. and others, 2012 (10) ADJ 484, to urge that even in minority institutions where regulations have been violated, this Court can exercise its discretion under Article 226 of the Constitution of India and interfere with the order of termination.

9. Replying to the aforesaid submissions, Sri Pandey for the Management, submits that this is a case where the charges are serious enough that warrant the dismissal of the petitioner. The charges were inquired into in accordance with the procedure prescribed but the petitioner failed to cooperate with the inquiry and, therefore, the impugned order is justified. He submits that the reply, which was given by the petitioner, was absolutely unsatisfactory and not only this, his conduct in the institution is such that it is not desirable to continue him further in service. Sri Pandey, therefore, submits that the impugned order does not require any interference and the findings of fact recorded cannot be a subject matter of appeal before this Court under Article 226 of the Constitution of India.

10. Having heard learned counsel for the parties and having considered the decisions that have been cited at the bar, the interference in service matters relating to employees of minority institutions is limited to the extent of violation of procedure prescribed under the Regulations, provided they are regulatory in nature, and do not impinge upon the fundamental rights guaranteed under Article 30 of the Constitution of India. The judgments, which have been relied upon by the learned counsel for the petitioner, permits such interference and in the instant case the stand taken by the petitioner is that the inquiry is vitiated for non-compliance of Regulations 35 to 37 of Chapter III of the 1921 Act.

11. I have perused the impugned order and the opening part thereof clearly recites the manner in which the Management has proceeded to consider the non-cooperation of the petitioner as one of the grounds for proceeding to pass the termination order. Regulation 37 of Chapter III categorically requires that after the inquiry is concluded, the report of the Enquiry Officer shall be considered by the Committee of Management and then the Committee shall offer an opportunity to the delinquent employee to give his explanation and hear him before passing the order of termination. There is no material discussed by the District Inspector of Schools to enable this Court to infer tht the Committeee had ever complied with the said provision. The order impugned dated 15.4.2013 is clearly deficient on this

aspect. Learned counsel for the respondent - Committee of Management, therefore, could not support the order on this ground. The impugned order, therefore, being in violation of Regulation 37 of Chapter-III of 1921 Act cannot be sustained.

12. The writ petition is allowed. The order impugned is hereby set aside. It shall be open to the Committee of Management to proceed to take action against the petitioner in accordance with the regulations aforesaid and in the light of the judgments referred to herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 29171 Of 2013

Radhey Shyam and Ors. ...Petitioners
Versus
State of U.P. and Ors. ..Respondents

Counsel for the Petitioner:
Sri Babu Lal Ram
Sri S.K. Chaudhary

Counsel for the Respondents:
C.S.C., Sri Mahendra Pratap
Sri P.R. Maurya, Sri Anurag Yadav
Sri Sunil Kumar Maurya

U.P. Land Revenue Act 1901-Section 219(i)- Revision against order passed by Thsildar under section 34-dismissed with direction to file appeal-held-order by revision Court-illegal-revision maintainable but not filed-revisional court wrongly failed to exercise its power-order quashed.

Held: Para-17
In view of the law laid down by the Apex Court no room is left for doubt that in case the revisional court has failed to exercise its jurisdiction vested in it, such order passed, even in mutation proceedings cannot be sustained in the eye of law and writ petition would be maintainable against such order.

Case Law discussed:
1984 R.R. 333 (E); 1987 RD 109; 2007 (103) RD; AIR 1977 S.C. 1718; AIR 1975 SC 1409; AIR 1999 SC 1124; 2002 (48) ALR 319(SC); 2009 (106) RD 98

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

1. Heard Sri Babu Lal Ram along with S.K.Chaudhary, learned counsel for the petitioners, learned standing counsel for the State-respondents, Sri Mahendra Pratap andSri P.R.Maurya along with Sri Anurag Yadav, and Sri Sunil Kumar Maurya,learned counsel for respondent no.4.

2. With the consent of the learned counsel for the partiesthe writ petition is beingdecided on its own merits without exchange of affidavits.

3. Through this writ petitionthe petitioners have prayed issuing a writ of certiorari quashing the order dated 25.3.2013 passed by the Tehsildar (Judicial), Sadar, Jaunpur, respondent no.3 in Case No. 248 (Hari Cold Storage and General Mills Private Limited vs. Radhey Shyam and others) and the order dated 10.5.2013 passed by Additional District Magistrate (Finance and Revenue), Jaunpur, respondent no.2.Vide order dated 25.3.2013 the application of respondent no.4 filed under section 34 of the U.P. Land Revenue Act, 1901 (for short the Act) has been allowed. However, by the subsequent order the revision filed by the petitioner has been dismissed with the direction to the petitioner to file an appeal against the order impugned in the revision.

4. It is contended by the learned counsel for the petitioners that the revisional court has erred in relegating the petitioners to avail remedy of appeal against the order impugned dated 25.3.2013 passed by the Tehsildar, respondent no.3 instead of deciding the revision himself.On the other hand, learned counsel for the respondent no.4 contended that the issue involved in the revision canonly be decided by the appellate court as the jurisdiction of the revisional court is very limited and the appellate court can investigate the fact also. Therefore, no infirmity can be attached with the impugned order and the revisional court has rightly directed the petitioners to file an appeal against the order impugned.

5. I have heard the learned counsel for the parties and perused the record.It is not in dispute that the application of respondent no.4 filed under section 34 of the Act was allowed by the Tehsildar, respondent no.3. It is also not in dispute that in the aforesaid proceeding the petitioner was a party and the order dated 25.3.2013 was passed after hearing both the parties.

6. Under theAct there are two sections, i.e. Section 210/211, which confers right to the tenure holder to file an appeal against various ordersunderthe Act andsection 219which confers the remedy of revision. For appreciating the controversy it would be useful to go through the section 219(1), the 'Revision' which isreproduced herein under:

"219 Revision (1) The Board or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officer may call forthe record of any case decided or proceeding held by any revenue Court subordinate to him in which no appeal lies or where an appeal lies but has not been preferred, for the purpose of satisfying himself as the legality or propriety of the order passed or proceeding held and if such subordinate revenue Court appears to have-

(a) exercised a jurisdiction not vested in it by law, or

(b) failed to exercise a jurisdiction so vested, or

(c) acted in the exercise of jurisdiction illegally or with material irregularity, the Board or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officer, as the case may be, pass such order in the case as he thinks fit."

8. From the bare reading of sub-section (1) of section 219 it would transpire that the remedy of revision can be availed against an order where order can be appealed but the remedy of appeal has not been availed or where against the order impugned no appeal lies.

9. Here it isnot in dispute that the order impugned in the revision was appealable but in view of the language used in sub-section (1) of section 219 of the Act the revision could be maintained against an order where appeal liesbut has not been preferred and the same has been filed directly under section 219 of the Act before the Additional District Magistrate (Finance and Revenue), Jaunpur.

10..The other side has taken objection that the revision can not be filed directly without availing the remedy of appeal.Another argument was raised that

appreciation of facts and perusal of evidence etc.can notbe done under the revisional jurisdiction and that comes in the domain of the appellate court.

11. The Additional District Magistrate (F & R) after going through the record and hearing the parties came to the conclusion that since in the case in hand the perusal of facts and evidence etc. would be required, thereforethe remedy of appeal under section 210 of the Act would be the appropriate remedy and he dismissed the revision with the direction to the petitioner to file appeal.

12. The revision was fiisled under section 219 of the Act. Sub-section 1 of section 219 of the Act confers a remedy of revision to a tenure holder before the Board of Revenue or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officer and the court concerned, on such approach or otherwise, may call for the record of any case decided or proceeding held by any revenue courts subordinate to him in which no appeal lies or where an appeal lies but has not been preferred, for the purpose of satisfying himselfthe legality or propriety of the order passed or proceeding held and if such subordinate revenue court appears to have exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction so vested, or acted in the exercise of jurisdiction illegally or with material irregularity,as the case may be, may pass such order in the case as he thinks fit.

13. From the bare reading ofsection 219 of the Act it transpires that while conferring the power of revision against an order where an appeal lies but has not been filed the intention of the legislature is very much clear. The revisional court has been conferred power to exercise the power of the appellate court as well as the revisional court both particularly in the circumstances where remedy of appeal is provided but has not been availed and the revision has been filed directly. Otherwise also the power is not restricted as from the entire reading of the section219 of the Act it would be clearthat a very vide power has been conferred upon therevisional court over its subordinate courts and this power canbe exercised even suo motu without there being any approach of any of the parties.

14. Learned counsel for the respondents, after placingreliance uponthe decisions of this Court in **Smt. Lakhmati and another vs. The Board of Revenue U.P. at Allahabad and another** (1984 R.R.333 (E)), **Smt. Kalindri Devi vs. Board of Revenue** (1987 RD 109) and **Ram Pratap Tiwari and another vs. Board of Revenue and others** [2007 (103) RD 569] wherein it has been held that mutation proceeding is fiscal in nature and it does not decide the right and title of the parties and only for the purpose of payment of land revenue namesare recorded on the basis of the possession etc., submitted thatthe writ petition would not be maintainable against an order passed in mutation proceeding.

15. The legal position on the facts involved in those writ petitions cannot be disputedon which basis of the decision has been rendered but the facts of this case are distinguishable for the reason that here the revisional court by directing the petitioner to approach the appellate court against the order passed in mutation

proceeding has failed to exercise the jurisdiction vested in it. The revisional court has been conferred power under section 219 of the Act to ensure that its subordinate courts may notfail in exercising the jurisdiction vested in them by law and exercise the jurisdictionnot vested in them orcommit any material irregularity or illegality while exercising such jurisdiction.While examining the judgment of the subordinate courts if the revisional court has been given power to alter the orders in the eventuality of failure ofexercise of jurisdiction, wrong exercise of jurisdiction or committingmaterial irregularity or illegalitywhile deciding the cases why not it be applicable to the revisional courts too.The language used under section 219 of the Act is unambiguous and clear. Sub-section (1) of Section 219 of the Act provides that a revision would lie before the Board of Revenue or the Commissioner or the Additional Commissioner or the Collector or the Record Officer, or the Settlement Officeragainst an order passed by the revenue courts or proceeding held by the revenue courts where no appeal lies or where appeal lies but has not been preferred, since in this section very vide power has been conferred upon the revisional court and the revisional court has failed to exercise its jurisdiction by directing the petitioner to avail the remedy of appeal, therefore, this order cannot be sustained in the eye of law.

16. The view taken by me finds support from the decision of theApex Court in the **State of M.P. v. Babu Lal** (AIR 1977 S. C. 1718)where while examining such issue following observation has been made:

"4. The State contended before the High Court that a Writ of Certiorari should be issued to quash the judgment which was illegal and in clear violation of law. The High Court said that the State could file a suit for declaration that the decree is null and void.

5. One of the principles on which Certiorari is issued is where the Court acts illegally and there is error on the face of record. If the Court usurps the jurisdiction, the record is corrected by Certiorari. This cases is a glaring instance of such violation of law. The High Court was in error in not issuing Writ of Certiorari."

17. In view of the law laid down by the Apex Court no room is left for doubt that in case the revisional court has failed to exercise its jurisdiction vested in it, such order passed, even in mutation proceedings cannot be sustained in the eye of law and writ petition would be maintainable against such order.

18. The matter may be examined from another angle also. The insistence of the Apex Court has always been that in case material is available before the court concerned the case should be decided by the said court on merit without remanding the matter. Although here this is not a case of remand but impliedlythis case would fall in the same category.Therefore also the same principle would be applicable and the Revisional court has erred indirecting the petitioner to file an appeal under section 210 of the Act.Reference may be given in P. Venkateswarlu Vs. Motor and General Traders, AIR 1975 SC 1409; Ashwinkumar K. Patel Vs. Upendra J. Patel and others, AIR 1999 SC 1124; P. Purushottam Reddy and another Vs. Pratap Steels Ltd., 2002 (48) ALR 319 (SC);learned Single Judge of this Courton

the same principle in Raj Narain and others Vs. Deputy Director of Consolidation, 2009(106) RD 98 has held that if the entire material was available before the Deputy Director of Consolidation, instead of remanding the matter, he should himself have considered the matter on merit and decided the same. The order of remand was held to be unsustainable.

19. Althoughit is settled that mutation proceeding is fiscal in nature and the orders passedtherein do not decide the right and title of the parties, therefore, the orders passed therein being summary in nature, writ petition would not be maintainable but here in this case since there is jurisdictional error, therefore, the writ petition would lie against such orders where the revisional court has failed to exercise the jurisdiction vested in it.It may also be noticed that although the orders deciding the mutation case do not decide the right and title of the parties. The judgments rendered therein arenot binding upon the courts deciding the title of the matter but it may be kept in mind thatthe person whosename is recorded in the revenue record can transfer the land through registered sale deed, gift deed etc.In case the sale deed is executed only because of recording of name without there being any valid title,the remedy, for the aggrieved person, would be to file a suitbut for cancellation of sale deed, not for declaration of right which would consume a very long time and in the meantime even the nature of the land may be changed. Further the possession wouldbe enjoyed by the persons in whose favour an order of mutation has been passedor the transferee without there being any validtitle and the person having validtitlewill becomea looser for the years together and in some cases if the land has gone in the hands of mafia or musclemen, the rightful owner may not be able to get the fruit of litigation during his life time.These contingencies and situations of the cases, although,maynot have legal weight butthe factual matrix and the reality of the same cannot bebrushed aside while entertaining writ petitions against the orders passed in mutation cases.

20. So far as this case is concerned, as I have held that the revisional court has failed to exercise the jurisdiction vested in it, therefore, the impugned order dated 10.5.2013cannot be sustained in the eye of law.The writ petition succeeds and is allowed. The order dated 10.5.2013 passed by the Additional District Magistrate (Finance and Revenue), Jaunpur in Revision No. 31 of 2012-13 (Radhey Shyam and others vs. Hari Cold Storage Pvt. Ltd., Jaunpur) is hereby quashed.The revisional court is directedto decide the revision after hearing both the sides expeditiously in accordance with law without granting any unnecessaryadjournment to the learned counsel for the parties.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2013

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE ANJANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 32023 Of 2013

Dr. Gauri Shankar Gupta & Ors...Petitioners
Versus
The State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri Vijay Prakash
Counsel for the Respondents:
C.S.C., A.S.G.I., Sri J.K. Tiwari

Sri Praveen Shukla

Constitution of India, Art. -226- Prayer for transgression from Ayurvedic to allopathic Branch-denied by chief medical officer-held-proper-petitioner to continue their practice in their branch having decree of B.A.M.S. organic compound of human body-neither taught nor practiced-can not be allowed-petition dismissed.

Held: Para-12
It is difficult for us to believe that the petitioners, who obtained degrees in Ayurveda medicine in the years 1982-1983,have acquiredknowledge of Allopathic Medicine. It will be extremely dangerous to allow them to prescribe and to treat human beings with Allopathic medicines. They have a right to practice in their own branch of medicine. The transgression into other branches of medicine proposed by petitioners is not permissible to them, in law.

Case Law discussed:
WA No. 1260 of 2006(A); AIR 1999 SC 468; (2000) 5 SCC 80; 2004(2) ESC (All) (DB) 976; 2004 ESC (5)1; 2001 (2) JIC 744 (All); (1996) 4 SSC 332; (2013) 4 SCC 252

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

1. We have heard Shri Vijay Prakash, learned counsel appearing for the petitioners. Shri J.K. Tiwari, Standing Counsel appears for the State respondents. Shri Praveen Shukla has accepted notice on behalf of Union of India-respondent no.6.

2. By this writ petition, the petitioners have prayed for following reliefs:-

"i) issue a writ, order or direction in the nature of certiorari quashing the impugned Government Order dated 8.6.2012 in pursuance whereof Chief Medical Officer, Amroha has issued the order dated 10.5.2013 as contained in Annexure No.1 to this writ petition.

ii) issue a writ, order or direction in the nature of mandamus commanding the opposite parties not to interfere in the practicing of the petitioners as medical practitioners in modern medicine (Allopathic Medicine including the surgery) in any manner whatsoever and further the opposite parties may be restrained from taking any coercive steps against the petitioners in pursuance to the Government Order dated 8.6.2012 or for any other reason whatsoever may be.

(iii) issue a writ, order or direction in the nature mandamus commanding the opposite parties particularly opposite party No.7 to enter the name of the petitioners in the State Medical Register maintained by the opposite party No. 7 as defined under Section 2 (k) of the Act No.102 of 1956.

(iv) issue any other writ, order or direction, which this Hon'ble Court may deem think fit and proper under the facts and circumstances of the case.

(v) cost of the writ petition may be awarded in favour of the petitioners.

3. The petitioners claim to be qualified practitioners in Indian Medicine and have obtained B.A.M.S. degrees, which authorise them to practice Ayurveda, a branch ofIndian Medicine. They are enrolled with the Indian Medicine Council, U.P. which authorises them to practice Indian Medicine in the State of UP. Their right to practice Indian medicines is recognised by the Indian Medicine Central Council Act, 1970.

4. The petitioners have relied upon the syllabus of the BAMS examination compiled

by Central Council of Indian Medicine to authorise them to treat patients and prescribe Indian medicine including modern medicine in accordance with the advances made by the Indian medicines and to perform surgical operations. It is stated that the petitioners have studied the advances made in the modern medicine, which also includes the Allopathic Medicine and that having acquired the knowledge in its use and thus they are entitled to practice and prescribe Allopathic Medicines as well.

5. The petitioners are aggrieved by the orders passed by the Principal Secretary, Government of UP dated 8.6.2012 in which while issuing directions to take action against unqualified and unauthorised medical practitioners the State Government has also directed that where the medical practitioners in Ayurveda, Homeopathy, Unani, Siddha and Tibbi are found prescribing Allopathic and Modern Medicines, a first information report should be lodged against them. They should also be restrained from running any diagnostic centres, which are connected with tests for sex determination.

6. The petitioners are also aggrieved by the orders passed by the Chief Medical Officer, Amroha dated 10.5.2013 by which the petitioners have been prohibited to prescribe Allopathic Medicines in compliance with the Government Orders dated 8.6.2012.

7. Learned counsel for the petitioners submits that the petitioners have acquired the knowledge by studying the modern medicine in their discipline, on the strength of which they are entitled to prescribe the Allopathic Medicines. They have relied upon the notification issued by the Indian Medicine Central Councildated 8.4.2002, by which they have been authorised to prescribe modern medicine on the advances made in their branch of medicine.

8. The petitioners have studied Ayurveda which is a special branch of medicine, practiced in India for ages. They have been awarded degrees in Ayurveda branch of Indian Medicine (BAMS) which authorises them to practice Ayurveda. Their syllabus did not include Allopathic medicines nor they have studied the Pharmacology, which is the science of Allopathic Medicines. The medicinesmade out of organic substancesand inorganic chemicals used in Allopathy require special knowledge both in preparation and administering such medicines as well as their reactions on the human body, in its use for treatment. The composition of the organic compounds of Allopathic Medicines and its effect on human body is neither taught nor practiced in any branch of Indian medicine.

9. The question of inter-disciplinary interference between different branches of medicines has been subject matter ofconsideration of Supreme Court and of this Court. The judicial pronouncements have repeatedly prohibited and discouraged the practice of prescribing medicines by persons, who have not acquired the knowledge and skills in preparation and prescription of such medicines and its affects on human body.

10. In **National Integrated Medical Association and another vs. State of Kerala WA No.1260 of 2006 (A)** decided on 12.12.2006 the High Court of Kerela at Ernakulam held that the modern advances

mentioned in Section 2 (e) of the Act of 1970 can only be advanced in Ayurveda, Siddha and Unani and not Alopathic medicine. By virtue of Section 15 (2) (b) of the Indian Medical Council Act, 1956 the persons having the prescribed qualifications included in the schedules alone are eligible to practice modern medicine. The words "modern medicine" would be referable to the modern advances made in the respective fields of Ayurveda, Siddha and Unani. The Kerela High Court followed Mukhtar Chand v. State of Punjab AIR 1999 SC 468. In support of the observations made by it and reiterated that modern advances mentioned in Section 2 (3) of the Act of 1970 cannot be interpreted to mean Allopathic Medicines.

11. In **D.K. Joshi vs. State of UP and others (2000) 5 SCC 80; Dr. Ravindra Kumar Goel and others vs. State of UP and others 2004 (2) ESC (All) (DB) 976; Provincial Medical Services Association, UP and others vs. State of UP and others 2004 ESC (5)1; Dr. Behboob Alam vs. State of UP and others 2001 (2) JIC 744 (All); Poonam Verma vs. Ashwin Patel and others (1996) 4 SSC 332 and in Bhanwar Kanwar vs. R.K. Gupta and another (2013) 4 SCC 252** the Supreme court and High Courts including this Court have held that the doctors enrolled in their branch of medicines should not be allowed to practice in any other branch. Such practice would amount to quackery and for which they can be prosecuted and their registration is liable to be cancelled. A doctor qualified in one branch of medicine cannot be allowed to practice the other branch of medicine of which he has not acquired knowledge.

12. It is difficult for us to believe that the petitioners, who obtained degrees in Ayurveda medicine in the years 1982-1983,have acquiredknowledge of Allopathic Medicine. It will be extremely dangerous to allow them to prescribe and to treat human beings with Allopathic medicines. They have a right to practice in their own branch of medicine. The transgression into other branches of medicine proposed by petitioners is not permissible to them, in law.

13. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.06.2013

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Civil Misc. Writ Petition No. 32249 Of 2013
with
Civil Misc. Writ Petition No. 32113 of 2013
with
Civil Misc. Writ. Petition No. 32262 of 2013

Nitesh Kumar Srivastava ...Petitioner
Versus
High Court of Judicature at Allahabad and Ors. ...Respondents

Counsel for the Petitioner:
Sri Nitesh Kumar Srivastava
Sri Manvendra Nath Singh

Counsel for the Respondents:
C.S.C., Sri V.P. Mathur
Sri Yashwant Varma, Sri Manish Goyal
Sri A.K. Sinha

Constitution of India-Art. 226- Upper age limit-appointment of Civil Judge junior division-petitioner claimed parity of U.P. Recruitment to service (Age limit) (10th Amendment Rules 2012)-by which upper age limit extended from 35 to 40 Years-held-Rule 10 of Rule 2001 framed with

discussion of High Court-providing upper age limit as 35 years-argument of petitioner misconceived-petition dismissed.

Held: Para-23

The contentions raised on behalf of the petitioners, that once the Rules of 2001 have been framed in consultation with the High Court it is not necessary to have any further consultation with the High Court while making amendments therein, is also wholly misconceived. The procedure to be followed in the matter of framing of the original rules will have to be adopted while making any amendments in the same rules.

Case Law discussed:

AIR 1967 SC 1581; AIR 1992 SC 81; (2000) 4 SCC 640

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

1. These three writ petitions have been filed by 79 petitioners. All these petitions raise common questions of fact and law. Therefore, they have been clubbed together and are being decided by means of this common judgment.

2. The petitioners before this Court are advocates. They are aggrieved by the advertisement published by the Public Service Commission, U.P., being Advertisement No. A-2/E-1/2013 dated 23.05.2013 for recruitment to the Judicial Service, Civil Judge (Junior Division) in the State of Uttar Pradesh. Petitioners in particular seek quashing of the conditions mentioned in the advertisement which prescribed the outer age limit for making of the application as 35 years as on 1st day of July next following the year of advertisement i.e. 01st July, 2014.

3. All the petitioners before this Court would be more than 35 years on 01st July, 2014. Therefore, they are ineligible to apply in response to the advertisement published by the Public Service Commission. The advertisement itself records that the U.P. Recruitment to Service (Age Limit) (Tenth Amendment) Rules, 2012 issued by the State of Uttar Pradesh with regard to increase in the upper age limit from 35 years to 40 years have not been adopted by the High Court.

4. According to the petitioners (a) The Rules framed by the State Government, known as U.P. Recruitment to Service (Age Limit) (Tenth Amendment) Rules, 2012 (hereinafter referred to as Rules, 2012) apply automatically in the matter of recruitment to Judicial Service in the State of Uttar Pradesh on simple reading of the same. These Rules, 2012 have been framed under Article 309 of the Constitution of India. (b) The High Court has not acted fairly in not adopting the said Rules, 2012 and thereby creating a different class of Government Service for Judicial Officers. (c) Under clause 10 of The Uttar Pradesh Judicial Service Rules, 2001 (hereinafter referred to as Rules, 2001) there is no mention of any further consultation with the High Court in the matter of fixation of outer age limit, while in other clauses such consultation has been provided. Therefore, while increasing maximum age limit as per the Rules, 2012 no consultation with the High Court was required. The Rules, 2012 have over ridding effect to rules 4 and 6 of Rules 2001 and (d) Rules, 2012 are special law they prevail over the general rules framed by the High Court. Judicial Service is also a State Service. The special law which has been framed for the State Service shall also apply to the Judicial Service.

5. Broadly speaking according to the petitioners when the outer age limit has

been extended in respect of other services of the State of U.P., there is little or no justification for the High Court to not to agree to extend the upper age limit in respect of the applicants to be considered for appointment as Civil Judge (Junior Division).

6. Counsel for the petitioners has placed reliance upon the judgments of the Apex Court in the case of **Northern India Caterers (Private) Ltd. and another v. State of Punjab and another**; AIR 1967 SC 1581 and **R.S. Raghunath v. State of Karnataka and another**; AIR 1992 SC 81.

7. The contentions raised on behalf of the petitioners are wholly misconceived.

8. This Court may record that the power to frame rules in the matter of recruitment of judicial officers within the State Judiciary is conferred under Article 234 of the Constitution of India. Article 234 reads as follows:

"234. Recruitment of persons other than District Judges to judicial service.- *Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State."*

9. From a simple reading of the Article 234 it would be seen that recruitment is to be made in accordance with the rules framed by the Governor in consultation with the State Public Service Commission and the High Court only. Meaning thereby that no rules in respect of recruitment of judicial officers can take effect unless they are framed in consultation with the High Court.

10. From the records of the present writ petitions it is apparently clear that the Governor has notified rules under Article 234 of the Constitution of India for the purposes of recruitment to the judicial services of the State of U.P., known as Rules, 2001. Rule 10 (as amended in the year 2003) provides that a candidate for direct recruitment to the service must have attained the age of 22 years and must not have attained the age of more than 35 years on the first day of January next following the year in which the notification for holding the examination by the Commission inviting applications, is published. It is not in dispute that Rule 10, as amended under notification dated 19th March, 2003, was framed in consultation with the High Court.

11. So far as Rules, 2012 are concerned, suffice is to record that the same has been notified by the Governor in exercise of powers under Article 309 proviso of the Constitution of India. A copy of the amended Rules 2012 is enclosed as Annexure-1 to the present petition. Article 309 confers a power upon the Governor to frame rules in respect of the State Services. Article 309 reads as follows:

"309. Recruitment and conditions of service of persons serving the Union or a State.-*Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:*

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

12. So far as the rules framed by the State Government under Article 309 of the Constitution of India for recruitment to State services known as Rules, 2012 are concerned, they do not ipso facto become applicable to the judicial service of the State of U.P. nor stand incorporated in the Rules, 2001 framed in consultation with the High Court.

13. The Constitution Bench of the Apex Court in the case of **State of Bihar and another vs. Bal Mukund Sah and others**; (2000) 4 SCC 640, after considering the entire constitutional scheme and the law laid down on the subject under various judgments of the Apex Court, in paragraph 20 has held as follows:

"20. .....

It becomes, therefore, obvious that the framers of the Constitution separately dealt with "Judicial Services" of the State and made exclusive provisions regarding recruitment to the posts of District Judges and other civil judicial posts inferior to the posts of the District Judge. Thus these provisions found entirely in a different part of the Constitution stand on their own and quite independent of Part XIV dealing with services in general under the "State". Therefore, Article 309, which, on its express terms, is made subject to other provisions of the Constitution, does get circumscribed to the extent to which from its general field of operation is carved out a separate and exclusive field for operation by the relevant provisions of articles dealing with the Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution to which we will make further reference at an appropriate stage in the latter part of this judgment."

14. In paragraph 36 the Constitution Bench went out to hold as follows:

"36. It becomes, therefore, obvious that no recruitment to the post of a District Judge can be made by the Governor without recommendation from the High Court. Similarly, appointments to the Subordinate Judiciary at grass-root level also cannot be made by the Governor save and except according to the rules framed by him min consultation with the High Court and the Public Service Commission. Any statutory provision bypassing consultation with the High Court and laying down a statutory fiat as it tried to be done by enactment of Section 4 by the Bihar Legislature has got to be held to be in direct conflict with the complete code regarding recruitment and appointment to the posts of the District Judiciary and the Subordinate Judiciary as permitted and envisaged by Articles 233 and and 234 of the Constitution. The impugned Section 4, therefore, cannot operate in the clearly earmarked and forbidden field for the State Legislature so far as the topic of recruitment to the District Judiciary and the Subordinate Judiciary is concerned. That field is carved

out and taken out from the operation of the general sweep of Article 309."

15. Thereafter, in paragraph 51 the Constitution Bench has held as follows:

"51. As seen earlier, consultation with the High Court as envisaged by Article 234 is for fructifying the constitutional mandate of preserving the independence of the Judiciary, which is its basic structure. The Public Service Commissioner has no such constitutional imperative to be fulfilled. The scope of the examining body's consultation can never be equated with that of consultation with the appointing body whose agent is the former. It is also pertinent to note that the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice which in turn depends on sufficient information and time being given to the party concerned to enable it to tender useful advice. It is difficult to appreciate how the Governor while consulting the Public Service Commission before promulgating the rules of recruitment under Article 234 has to solicit similar type of advice as he would solicit from the High Court on due consultation. The advice which in the process of consultation can be tendered by the Public Service Commission will confine itself to the constitutional requirements of Article 320. They are entirely different from the nature of consultation and advice to be solicited from the High Court which is having full control over the Subordinate Judiciary under Article 235 of the Constitution and is directly concerned with the drafting of efficient judicial appointments so that appropriate material will be available to it thorough the process of section both at the grass-root level and at the apex level of the District Judiciary. Consultation, keeping in view the role of the High Court under Article 234 read with Article 235, stands on an entirely different footing as compared to the consultation with the Public Service Commission which has to discharge its functions of an entirely different type as envisaged by Article 320 of the Constitution."

16. In paragraph 58 of the Constitution Bench judgment it was held as follows:

"58. .....

.....Any independent outside inroad on this exercise by legislative enactment by the State Legislature which would not require consultation with an expert agency like the High Court would necessarily fall foul on the touchstone of the Constitutional scheme envisaging insulation of judicial appointments from interference by outside agencies, bypassing the High Court, whether being the Governor or for that matter Council of Ministers advising him or the Legislature. For judicial appointments the real and efficacious advice contemplated to be given to the Governor while framing rules under Article 234 or for making appointments on the recommendations of the High Court under Article 233 emanates only from the High Court which forms the bed- rock and very soul of these exercises. It is axiomatic that the High Court, which is the real expert body in the field in which vests the control over Subordinate Judiciary, has a pivotal role to play in the recruitments of judicial officers whose working has to be thereafter controlled by it under Article 235 once they join the Judicial Service after undergoing filtering process at the

relevant entry points. .....This completely insulated scheme as envisaged by the founders of the Constitution cannot be tinkered with by any outside agency dehors the permissible exercise envisaged by the twin Articles 233 and 234. ....."

17. It is, therefore, no more res integra that any rules framed by the Governor in exercise of power under Section 309 without consultation to the High Court in the matter of recruitment to the Judicial Service qua which rules are to be framed mandatorily in consultation with the High Court would be contrary to the Constitutional scheme.

18. The Apex Court in the case of **State of Bihar** (supra), while faced with the similar situation in the matter of reservation being applied under Legislative Act of State of Bihar, which on a simple reading of statutory provision had covered the post and method of recruitment to Judicial services, has held that the statutory provisions framed without consultation with the High Court have to be read down by holding that the provisions shall not apply for regulating the recruitment and appointment to the cadre of District Judge as well as to the cadre of Judiciary subordinate to the District Judge. Such appointment shall be strictly governed by the rules framed under Article 234 of the Constitution of India in consultation with the High Court. Reference- paragraph 62.

19. In the facts of the case, on a simple reading of the Rules, 2012 it will be seen that the rules have been framed in the widest possible term and would include the subordinate Judicial services also. However, since the Rules, 2012 have not been framed in consultation with the High Court and further since the High Court on the administrative side in its meeting held on 07th May, 2013 had resolved not to adopt/accept the enhancement in the outer age. It has to be held that these Rules of 2012 would have no application so far as recruitment to subordinate judicial services under the advertisement in question are concerned, any application of the Rules of 2012 to Judicial Services would be in violation of the Constitutional scheme, as has been explained by the Constitution Bench of the Apex Court in the case of State of Bihar (supra).

20. Having reached the aforesaid conclusion, it will be seen that all other issues raised on behalf of the petitioners stand answered by the law laid down by the Constitution Bench in the case of State of Bihar (supra). It is needless to emphasis that the Hoh'ble Supreme Court itself has clarified that the Judicial services form a class separate from the other services under the State, covered by Article 309 of the Constitution of India. Judicial appointments have been taken out from the field of operation of general sweep of the services covered by Article 309.

21. Therefore, the plea of discrimination, as raised by the petitioners, has no substance as the Judicial services cannot be clubbed with other services under the State, they form two different classes.

22. It may be recorded that it was within the discretion of the High Court on the administrative side to have accepted the enhancement of outer age limit in the matter or recruitment to Judicial service. The High Court has taken a conscious decision not to extend the maximum age

from 35 to 40 years. It cannot be said that the High Court has acted arbitrarily or has created a different class of Services for the Subordinate Judicial Officers.

23. The contentions raised on behalf of the petitioners, that once the Rules of 2001 have been framed in consultation with the High Court it is not necessary to have any further consultation with the High Court while making amendments therein, is also wholly misconceived. The procedure to be followed in the matter of framing of the original rules will have to be adopted while making any amendments in the same rules.

24. The contention that the Rules of 2012 have the overriding effect is also based on complete misreading of the law as has been explained by the Constitution Bench of this Court in the case of **State of Bihar** (supra).

25. Now turning to the judgements relied upon by the counsel for the petitioners.

26. In the case of Northern India Caterers (Private) Ltd. and another v. State of Punjab and another it has been laid down that repeal by implication is not generally favoured by the Court. The well established Rule of construction is that when the later enactment is worded in affirmative terms without any negative it does not impliedly repeal the earlier.

27. In our opinion the judgment has no application on the legal issues involved in the facts of the case.

28. In the case of **R.S. Raghunath (supra)** the Apex Court has laid down that in absence of any express repeal of special rule, repeal by implication cannot be inferred. There can be no dispute with regard to the legal proposition so laid down but the principle has no application in the facts of the case. The Judicial service as covered by the recruitment rules framed under Article 234 of the Constitution of India stand outside the field of operation of the State Services covered by Article 309. The judgment has therefore no application in the facts of the case.

29. For the reasons recorded above, this Court finds no substance in the present writ petitions. All three petitions are accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2013

BEFORE
THE HON'BLE ARVIND KUMAR TRIPATHI, J.

Civil Misc. Writ Petition No. 32962 Of 2000

Smt. Rekha Chaturvedi & Anr .Petitioners
Versus
Chief Controlling Revenue Authority And Anr. ...Respondents

Counsel for the Petitioners:
Sri R.K. Porwal

Counsel for the Respondents:
C.S.C.

U.P. Stamp (Valuation of property) Rules 1997- Sale deed executed on 16.02.1993-rule came into force on 15.07.1997-having no applicability with retrospective effect-when land purchased-agricultural land-without declaration under Section 143 of U.P.Z.A.L.R Act-can not be treated as Commercial or residential plot-future potentiality can not be taken into considered for stamp duty purpose.

Held:Para-9

The question of future potential cannot be a factor for determining the market value of such land for the purpose of stamp duty payable under the stamp act. The vendee pays the price of the land that satisfies the venders according to the utility of the land as on the date of transfer by the vendor. If the land was an agricultural land, it has to be treated as such and the valuation has to be done accordingly. The future potential cannot be a factor for determing market value for payment of stamp duty under the stamp act. In future if purchaser changes the utility and character of land is immaterial for the purpose of determining of stamp duty.

Case Law discussed:
2011 (3) awc 3093; 2000(3) (AWC) 2587; 2012(2) AWC 1836 (SC); 2005 (98) RD 511: 2005(2) AWC 1087

(Delivered by Hon'ble Arvind Kumar Tripathi, J.)

1. Mr. R. K.Porwal, Advocate, appeared for the petitioner and learned Standing Counsel on behalf of respondent.

2. Heard learned counsel for the parties and perused the record. Judgement was reserved on 8.3.2013.

3. The present writ petition has been filed with the prayer to issue writ of certiorari quashing the impugned order dated 21.3.1998 and 14.2.2000 passed by respondent no.2 and 1 respectively (annexure nos.1 and 2 respectively to this petition).

4. Learned counsel for the petitioner submitted that the land in question was jointly purchased by the petitioners, who are real sisters, measuring 22 decimal, out of plot no.201 (A) having total area of 3.66 decimal from one Attar Singh for a sum of Rs.42,000/-. The land was an agricultural land and according to circle rate, of the land, stamp duty was paid. There was no deficiency of stamp duty. The sale deed was executed and registered on 16.2.1993. Subsequently on the ground that there was deficiency the sale deed was impounded and notice was issued. The application was moved on behalf of petitioner seeking time to file written objection with regard to the queries mentioned in the notice. However, without giving any opportunity of hearing to the petitioners and without allowing time to file objection order was passed by the Additional District Collector (Stamp), Etawah on 21.3.1998 declaring that there was deficiency for a sum of Rs.38, 164/- and equal to the deficiency amount penalty was imposed and as such the petitioner was asked to deposit total a sum of Rs.76,328/-. Against that revision was preferred by the petitioners, which was partly allowed by the respondent no.1, Chief Controller, Revenue Authority, U.P./Board of Revenue, Allahabad and penalty was set aside. However, order regarding deficiency of stamp was affirmed on the ground that since only 20 decimal land was purchased by two different persons (petitioners) hence in the share of each of the petitioner there was ten decimal land. According to valuation list of the area on 1.1.1992 the plot upto the area of 10 decimal would be considered as a residential plot and further there was no evidence of cultivation and farming over the land in question. He further submitted that both the authorities failed to consider that the land was purchased jointly by two real sisters and the circle rate, which was issued by the District Magistrate, Etawa was with regard to the plot, which were only ten decimal hence it was deemed to be not for

the agricultural purposes. The receipt regarding the irrigation was also produced before the authorities. When the land was purchased it was agricultural land and merely on the presumption that in future it might be converted into residential, the valuation cannot be determined because the valuation has to be determined on the basis of the nature and valuation of the land on the date of execution of the deed. There was no material and merely on the basis of presumption it was observed that after the plot was divided by the petitioners, area of each plot would be ten decimal, though in fact there was no partition over the land in question, which was jointly purchased by real sisters. Hence the observation was hypothetical and based on presumption. He also submitted that there was no declaration and order under section 143 of the U.P. Z.A. & L. R. Act for change of user and nature of the land into Abadi or residential from the agricultural land. Hence the order passed by both the authorities are illegal, arbitrarily, without jurisdiction and against the principle of natural justice and as such the same are liable to be set aside. He also relied the judgment of this Court reported in **2011 (3) AWC 3093 Sunti Bunti Automobiles (P.) Ltd. Vs. State of U.P. and others** in which it was held that the circle rate for the residential cannot be applied for determining the market value of the agricultural land, if there was no declaration under section 143 of U.P.Z.A & L.R. Act relying the earlier judgment of this Court in **2000 (3) (AWC) 2587 Aniruddha Kumar and Ashwini Kumar V. Chief Controlling Revenue Authority, U.P., Allahabad and another.** He also relied other judgements of this Court in which aforesaid judgments were followed. He further cited the judgment of the Apex Court **2012(2) AWC 1836 (SC) State of U.P. and others Vs. Ambrish Tandon and another**. Hence in view of the law and aforesaid judgments he submitted that both the orders are liable to be set aside.

5. Learned Standing Counsel vehemently opposed aforesaid prayer and submitted that earlier the plots might have been agricultural plot but the village Jugramau is adjacent to Kasba/city Etawah, which is a developed place and according to valuation list dated 1.1.1992 issued by the District Collector if any plot was purchased upto 10 decimal that would be treated as residential plot and in the present case admittedly 20 decimal land was purchased by two petitioners though by a joint sale deed just for evasion of the stamp duty to show that the area of the plot was 20 decimal, which was double to the maximum area provided in the valuation list. There was no evidence to show that it was purchased for agricultural purposes and farming was being done there. He also contended that the lower revisional court, respondent no.1, has already taken lenient view and the penalty imposed by the Additional Collector was set aside, however, the order regarding deficiency of stamp duty was affirmed and as such no interference is required.

6. Considered the submission of learned counsel for the parties. There is no dispute that the land, which was purchased from one Attar Singh was part of the plot no.201 (A) having area of 3.66 decimal out of that 20 decimal land was purchased by the petitioners, who were claiming to be real sisters. As far as the determination of the market value of the land regarding which the sale deed was

executed is concerned, the valuation of the land on the date of registration of the deed is relevant and not the future potentiality and change of user of the land. Admittedly there is no declaration under section 143 U.P.Z.A.& L.R. Act regarding change of the user and nature of land, which was recorded as agricultural land when the sale deed was executed and there is also no dispute or any evidence that when Attar Singh transferred the land by executing registered sale deed he was not cultivating for sowing crops rather receipt regarding irrigation was produced on behalf of the petitioners with regard to the land in question. In the present case, the sale deed was executed on 16.2.1993 and the U.P. Stamp (Valuation of Property) Rules, 1997 was published in the U.P. gazette dated 15.7.1997. Before that the rule was not in existence and after that rule the valuation has to be considered under rule 4, 5, 6 and 7. The various factors are necessary to be considered for determining the market value of the property on the date of sale and execution of the deed. The circle rate, potentiality and utility of the land on the date of transfer of the land and surrounding lands and exemplar are the factors which ought to be considered for determining the market value for the purpose of stamp duty payable under the stamp act. As far as exemplar of any deed is concerned, adjacent or near the plot in question is important factor for determining the market value. On the basis of future potentiality and utility of the land, the market value cannot be determined for payment of stamp duty because the vendee is required to pay stamp duty for purchase of the property in question on the basis of its value on the date of purchase and execution of the deed. However, in the present case, there was grievance of the petitioner that no opportunity was given to file the reply with regard to the queries made in the show cause notice. Even there was no information and notice for spot inspection. Even any building was not found adjacent or near the plot in question. Merely on the ground that village Jugramau, where the land in question is situated was adjacent to kasba/city Etawa, the valuation was determined. While determing the valuation of the property in question for payment of stamp duty it is the potentiality and utility of the land on the date when the same was purchased and sale deed was got registered, is a relevant factors. In the present case neither any part of the area of particular village, which is adjacent to the kasba nor any exemplar has been considered and examined to show that even an agricultural plot was transferred and purchased as a residential plot or any residential or commercial plot was situated adjacent or near the plot. In case of Sunti Bunti Automobiles (P.) Ltd. (supra) the land was initially recorded as an agricultural land and there was no declaration under section 143 of U.P.Z.A. & L.R. Act though an application was moved but that remain pending so there was no declaration. It was held that in absence of exemplar sale deed or any other positive evidence to establish higher market value of the land in dispute than disclosed in the instrument, the impugned orders cannot be sustained under law.

7. In case of **Ram Khelawan V. State of U.P. and another, 2005 (98) RD 511 : 2005(2) AWC 1087** it was held that " the circle rates notified under the Indian Stamp Act are merely guidelines for determining the market value that too till

the time of registration of the document and the said rates would not be a conclusive proof of the market value which on registration has to be determined by applying general principles, which are applicable in determining the compensation under the Land Acquisition Act. It was also held that the exemplar sale method is the best method for determining the market value."

8. In case of State of U.P. and others Vs. Ambrish Tandon and another (supra) it was held by the Apex Court that "merely because the property is being used for commercial purpose at the later point of time may not be a relevant criterion for assessing the value for purpose of stamp duty. The nature of user is relatable to the date of purchase and it is relevant for the purpose of calculation of stamp duty" and the judgement and order of the High Court was upheld by the Apex Court.

9. In case of Aniruddha Kumar and Ashwini Kumar (supra) the argument that for purpose of determination of compensation under the Land Acquisition Act future potential of the land is also to be taken into account but the same principle cannot be a consideration for determination of market value of stamp duty under the Stamp Act. It was held by the Court that the submission appeared to be a sound proposition of law. In that case also the land was agricultural land and there was no declaration under section 143 U.P.Z.A. & L. R. Act and it was held that the market value has to be determined on the basis of value that would satisfy the vendor. The question of future potential cannot be a factor for determining the market value of such land for the purpose of stamp duty payable under the stamp act. The vendee pays the price of the land that satisfies the venders according to the utility of the land as on the date of transfer by the vendor. If the land was an agricultural land, it has to be treated as such and the valuation has to be done accordingly. The future potential cannot be a factor for determing market value for payment of stamp duty under the stamp act. In future if purchaser changes the utility and character of land is immaterial for the purpose of determining of stamp duty.

10. In view of the aforesaid discussion, the order declaring the deficiency of stamp duty is illegal and without jurisdiction. As such the impugned orders cannot sustain hence the impugned orders dated 21.3.1998 and 14.2.2000 passed by respondent no.2 and 1 respectively are hereby quashed.

11. Accordingly, present writ petition is allowed. No order as to costs. The amount if any deposited towards deficiency of stamp duty in pursuance of the interim order dated 2.8.2000 shall be refunded to the petitioner within reasonable period, preferably, within six weeks after furnishing certified copy of this order.
