ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 20.05.1998

BEFORE
THE HON'BLE R.R.K. TRIVEDI, J.
THE HON'BLE R.K. SINGH, J.

1998

May, 20

Civil Misc. Writ Petition No.30542 of 1996

Dr. Shashi Kant Rai & others ...Petitioners
Versus
State of U.P. & others ...Respondents

Counsels for Petitioners : Sri Arun Tandon
: Sri S.C. Budhwar
: Sri B.D. Mandhyan
: Sri S.K. Gupta
Counsels for the Respondents : S.C.
: Sri V.M. Sahai

Constitution of India, Article 14, 16 readwith U.P. Public Services (Reservation for Schedule Castes, S.T. and other backward Classes) Act 1994—100% reservation – Advertisement providing 100% reservation while since 1988 the vacancy never advertised – held – unconstitutional. (Para 10, 11 and 13)

Case Law discussed
AIR 1993 SC-477
J.T. 1998(3) SC-223
AIR 1995 SC-1371, J.T. 1997(2) SC-467
1997 J.T.(4) SC-251, AIR 1997 SC-3505

By the Court

1. In this petition counter and rejoinder affidavits have been exchanged between the parties and learned counsel for the parties have agreed that this petition may be decided finally at this stage.

2. Two applications for impleadment have also been filed. First application is numbered as 71415 of 1997, which has been moved by Ram Swarup Ahirwar and the second application is numbered as 23563 of 1998 which has been moved by Dr.Satish Kumar and three others. Along with the second application counter affidavit has also been filed.

1998

Dr. S.K.Rai & others
Vs.
State Of U.P. & Others

R.R.K. Trivedi, J.
R.K.Singh, J.

3. The important question for determination in this writ petition is as to whether the respondents could legally initiate special recruitment drive to fill up the entire backlog of the posts of reserved quota in respect of the entire cadre of the posts of Medical Officers (Ayurvedic/Yunani) in the State of Uttar Pradesh. Respondent no.2, namely U.P. Public Service Commission, Allahabad, by advertisement no.3/95-96 invited applications for the 47 posts of Medical Officers (Ayurvedic) out of which 42 posts were reserved for Scheduled Caste and 5 posts for Scheduled Tribes. Another advertisement no.1 of 1996-97 was issued inviting applications for appointment on 433 posts of Medical Officers (Ayurvedic). Out of the aforesaid 433 posts 389 posts were reserved for Scheduled caste and 44 posts for Scheduled Tribes. All the posts mentioned in the aforesaid two advertisements are in the pay scale of Rs.2200-4000. Petitioners claimed that they were selected for bachelor degree of Ayurvedic Medicines and Surgery, in short B.A.M.S., in combined pre-medical test held by the State Government in the year 1987-88 and passed their B.A.M.S. degree course in the year 1993 except petitioner no.4 who had passed the degree course in the year 1992. It has been claimed that all the petitioners passed their B.A.M.S. degree from the State Government Ayurvedic College and they have been duly registered with the Indian Medical Council. All the petitioners belonged to general category. As under the impugned advertisement no.3 of 1995096 and no.1 of 1996-97 the candidates of general category have been excluded and 100 per cent reservation in favour of Scheduled Castes and Scheduled Tribes category has been provided, they have approached this Court for quashing the aforesaid advertisements which are Annexures 3 and 4 to the writ petition. It has also been prayed that respondents may be directed to advertise the vacancies in accordance with law and to hold selection from the open market giving equal opportunity to the candidates of the general category also.

4. Petitioners have stated that after the year 1988 no advertisement was published. The impugned advertisement no.3 of 1995-96 and no.1 of 1996-97 have been published for the first time illegally enforcing 100 per cent reservation in favour of Scheduled Castes and Scheduled Tribes category. It has been alleged that the aforesaid action in the name of special recruitment drive is wholly illegal and contrary to the judgments of Hon'ble Supreme Court.

5. A counter affidavit has been filed on behalf of the State Government, in paragraph 6 whereof it has been stated that there are

total 2470 vacant posts for Medical Officers (Ayurvedic/Yunani) ot of which 2272 posts have been filled. 198 posts are still vacant. Besides the aforesaid, about 241 super-numerary posts have also been created for accommodating part-time Medical Officers serving in hill areas. 1826 Medical Officers are serving in the department on ad-hoc basis. Out of 2272 posts already filled, there are only 87 medical officers belonging to Scheduled Castes category. Their percentage is very low, hence in order to fill up the backlog in the quota of reserved category, the Government by letter dated 24.1.1996 requested the Commission to take steps to complete the quota of the aforesaid reserved category. The request made by the Government to initiate special recruitment drive for the aforesaid purpose is in accordance with the provisions contained in the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (hereinafter referred to as the Act). There quest made by the Government does not suffer from any error of law and is in consonance with the provisions of the Constitution. In paragraphs 12, 17 and 18 of the counter affidavit, it has been averred that the special recruitment drive requisition has been sent to the Commission in accordance with the provisions of the Constitution and the Act to fill the backlog of reserved category of Scheduled Castes and Scheduled Tribes. It has not been disputed that after 1988 no other advertisement was published.

6. We have heard Shri S.C. Budhwar, learned senior advocate, assisted by Shri Arun Tandon for the petitioners, learned standing counsel and Shri V.M. Sahai for respondents and Shri B.D. Mandhyan and Shri S.K. Gupta for the applicants for impleadment.

7. Shri S.C. Budhwar, learned counsel appearing for the petitioners, has submitted that the special recruitment drive through the impugned advertisements providing 100 percent reservation could not be legally undertaken by the respondents and the action is neither is accordance with the provisions of the Act nor in consonance with the provisions contained in the Constitution. Learned counsel has submitted that the action of the respondents is wholly arbitrary and violative of Article 14 of the Constitution of India. It has been further submitted that direct recruitment for giving effect to the policy of reservation could only be against the vacancies with regard to the year of recruitment and it could not be legally initiated taking into account the entire posts belonging to the cadre.

1998

Dr. S.K.Rai & others
Vs.
State Of U.P. & Others

R.R.K. Trivedi, J.
R.K.Singh, J.

Reliance has been placed by the learned counsel for petitioners in case of Indra Sawhney versus Union of India reported in A.I.R. 1993 S.C.477 and Post Graduate Institute of Medical Education and Research, Chandigarh versus Faculty Association and others reported in J.T.1998 (3) S.C.223.

8. Shri B.D. Mandhyan, on the other hand, submitted that the special recruitment drive initiated by the State Government does not violate any constitutional provision. The representation for scheduled castes and Scheduled Tribes in the Service is only 5 per cent as there are only 87 doctors of this category out of 2272. The U.P. Act No.4 of 1994 contains provision for such special recruitment drive to remove the backlog. It has also been submitted that Indra Sawhney's case has been considered and interpreted in subsequent judgments of Hon'ble Supreme Court and the action on the part of the respondents is fully justified. Reliance has been placed in case of R.K. Sabbarwal and others versus State of Punjab and others (A.I.R.1995 S.C.1371), State of U.P. versus Dr.Dina Nath Shukla and others (J.T. 1997(2) S.C.467), Ashok Kumar Gupta and another versus State of U.P. and others (J.T.1997(4) S.C.251) and Jagdish Negi versus State of U.P. (A.I.R.1997 S.C.3505). The submission of the learned counsel for the respondents were more or less on the same line as stated above.

We have thoroughly considered the submissions made by the learned counsel for the parties. In our opinion, it has to be seen first as to whether special recruitment drive directed by respondent no.1 and initiated by respondent no.2 is in consonance with the provisions of the Act. Section 3 of the Act is very relevant for the purpose which is being reproduced below :--

"3. Reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes.—

> (1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes of citizens,--

(a) in the case of Scheduled Castes twenty-one per cent;

(b) in the case of Scheduled Tribes two per cent;

(c) in the case of Other backward Classes of citizens — twenty-seven per cent;

Provided that the reservation under clause (c) shall not apply to the category of other backward classes of citizens specified in Schedule II.

(2) If, even in respect of any year of recruitment, any vacancy reserved for any category of persons under sub-section (1) remains unfilled, special recruitment shall be made for such number of times, not exceeding three, as may be considered necessary to fill such vacancy from amongst the persons belonging to that category.

(3) If, in the third such recruitment referred to in sub-section (2), suitable candidates belonging to the Scheduled Tribes are not available to fill the vacancy reserved for them, such vacancy shall be filled by persons belonging to the Scheduled Castes.

(4) Where, due to non-availability of suitable candidates any of the vacancies reserved under sub-section (1) remains unfilled even after special recruitment referred to in sub-section (2), it may be carried over to the next year commencing from first of July, in which recruitment is to be made, subject to the condition that in that year total reservation of vacancies for all categories of persons mentioned in sub-section (1) shall not exceed fifty per cent of the total vacancies.

(5) The State Government shall, for applying the reservation under sub-section (1), by a notified order, issue a roster which shall be continuously applied till it is exhausted.

(6) If a person belonging to any of the categories mentioned in sub-section (1), gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (1).

1998

Dr. S.K.Rai & Others
Vs.
State Of U.P. & Others

R.R.K. Trivedi, J.
R.K.Singh, J.

(7) If, on the date of commencement of this Act, reservation was in force under Government orders for appointment to posts to be filled by promotion., such Government Orders shall continue to be applicable till they are modified or revoked."

9. From perusal of sub-section (2), (3) and (4) of Section 3 of the Act, it is apparent that the special recruitment can be made for such number of times not exceeding three, as may be considered necessary to fill such vacancies from amongst the persons belonging to that category, provided that in the direct recruitment contemplated under sub-section (1) of Section 3 for vacancies reserved for any category of persons remain unfilled. Thus, for initiating a special recruitment drive, it is necessary that there should have been a process of direct recruitment in respect of the different service and posts as contemplated under sub-section (1) of Section 3. The Scheme provided under sub-section (1) does not contemplate a special recruitment independantly. For such a move, the condition precedent appears to be an effort of direct recruitment under sub-section (1) in which the vacancy reserved for any category of persons mentioned therein remained unfilled. The words, "if, even in respect of any year of recruitment" used in sub-section (2) suggest that the procedure of special recruitment can be adopted both in case of direct recruitment in respect of the vacancies of any year of recruitment or otherwise. Thus, special recruitment providing 100 percent reservation in favour of a reserved category could only follow a recruitment already undertaken open for all the categories.

10. In the present case it is not disputed that after 1988 there was no advertisement for recruitment of medical officers (Ayurvedic/Yunani). After 8 years the impugned advertisements have been published providing 100 percent reservation in favour of a particular category which, in our opinion, is not in accordance with the provisions of the Act. The legislative intent appears to be that the special recruitment providing 100 percent reservation should only be initiated after the candidates of all the categories including general category had already availed the opportunity to seek appointment in their categories. The aforesaid legislative intent may be further ascertained from the provisions contained in sub-section (4) which provides that where due to non-availability of suitable candidates in all the vacancies reserved under sub-section (1) remained unfilled, even after special recruitment referred to in sub-section (2), it may be

carried over to the next year commencing from first of July in which recruitment is to be made, however, it has been made subject to the condition that in that year total reservation of vacancies for all categories of persons mentioned in sub-section (1) shall not exceed 50 percent of the total vacancies.

11. In our opinion, the impugned advertisements providing 100 percent reservation in favour of a particular category in absence of a direct recruitment as contemplated under sub-section (1) of section 3 of the Act I wholly illegal, arbitrary and in contravention of the provisions of the Act. The controversy may also be tested on the basis of the judgments of Hon'ble Supreme Court. In Indra Sawhney versus Union of India (supra) while considering question no.6 which was relating to the extent of reservation which can be made, Hon'ble B.P. Jeevan Reddy, J. who delivered the majority judgment, held in para.96 as under:

> "96. The next aspect of this question is whether a year should be taken as the unit or the total strength of the cadre, for the purpose of applying the 50% rule. Balaji (AIR 1963 SC 649) does not deal with this aspect but Devadasan (AIR 1964 SC 179) (majority opinion) does. Mudholkar, J. speaking for the majority says :
>
> "We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb undully the legitimate claims of other communities."

1998

Dr. S.K.Rai & Others
Vs.
State Of U.P. & Others

R.R.K. Trivedi, J.
R.K.Singh, J.

"On the other hand is the approach adopted by Ray, CJ, in Thomas (AIR 1976 SC 490). While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In our opinion, the approach adopted by Ray, C.J. would not be consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go i.e., in a year or two. The positioned can be better explained by taking an illustration. Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes, i.e., 270 by other backward classes, 150 by scheduled castes and 80 by scheduled tribes. At a given point of time, let us say, the number of members of O.B.Cs. in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/ cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be."

12. After the judgment in Indra Sawhney's case (supra), the State legislature enacted U.P. Act No. 4 of 1994. Section 3(2) of the Act provides for special recruitment but in order to preserve the equality clause and to provide equal opportunity to all segments of the

society, the condition has been imposed that special recruitment should follow a direct recruitment open for all categories. In other words, it may be said that the ratio in the judgment of Indra Sawhney case that at a given time there should not be reservation for more than 50% has been preserved. If the special recruitment follows direct recruitment open for all categories and the vacancy reserved for any category of persons remains unfilled, then the special recruitment could be taken and in that case persons belonging to other categories could not have any complaint as to the extent of their quota in that particular recruitment they have already availed opportunity. Learned counsel for the respondent placed strong reliance in judgment of Hon'ble Supreme Court in case of State of U.P. versus Dina Nath Shukla and others (supra) and other cases. However, recently a Constitution Bench in case of P.G. Institute of Medical Education and Research, Chandigarh (supra) has taken into consideration the judgments relied on by the learned counsel for the respondents. The controversy before Hon'ble Supreme Court was with regard to enforcing reservation where there is a single post. Hon'ble Supreme Court in para. 30 of the judgment has observed as under :

> "30. There is no difficulty in appreciating that there is need for reservation for the members of the Scheduled Castes and Scheduled Tribes and other backward classes and such reservation is not confined to the initial appointment in a cadre but also to the appointment in promotional post. It cannot however be lost signt of that in the anxiety for such reservation for the backward classes, a situation should not be brought by which the chance of appointment is completely taken away so far as the members of other segments of the society are concerned by making such single post cent percent reserved for the reserved categories to the exclusion of other members of the community even when such member is senior in service and is otherwise more meritorious. "

In para. 31 it has been further observed as under:

> "31. Articles 14, 15 and 16 including Article 16(4), 16(4A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such view has been indicated in the Constitution

1998

Dr. S.K.Rai & Others
Vs.
State Of U.P. & Others

R.R.K. Trivedi, J.
R.K.Singh, J.

Bench decisions of this court in Balaji's case, Devadasan's case and Sabharwal's case. Even in Indra Sawhney's case, the same view has been held by indication that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of citizens. The special provision under Article 15(4) must therefore strike a balance between several relevant considerations and proceed objectively. In this connection reference may be made to the decisions of this Court in the State of Andhra Pradesh and Ors. Vs. U.S.V. Balaram and C.A. Rajendran Vs. Union of India (AIR 1972 SC 1375 and AIR 1968 SC 507). It has been indicated in Indra Sawhney's case (supra) that clause (4) of Article 16 is not in the nature of an exception to Clauses (1) and (2) of Article 16 but an instance of classification permitted by clause (1). It has also been indicated in the said decision that clause (4) of Article 16 does not cover the entire field covered by clauses (1) and (2) of Article 16. In Indra Sawhney's case this court has also indicated that in the interests of the backword classes of citizens, the State can not reserve all the appointment under the State or even a majority of them. The doctrine of equality such a manner that the latter while surveying the case of backward classes shall not unreasonably encroach upon the field of equality."

In para. 33, it has been provided as under :

"33. In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public and cent percent reservation for the backward classes is not permissible within the constitutional frame work. The decisions of this court to this effect over the decades have been consistent. "

13. In our opinion, in view of the judgment of Hon'ble Supreme Court mentioned above, 100% reservation provided for backward and scheduled castes and scheduled tribes categories by the impugned advertisements is not only in contravention of the

provisions of the Act but it also offends the equality clause contained in Articles 14,15 and 16 of the Constitution and thus cannot be sustained.

14. For the reasons stated above, this writ petition is allowed. The impugned advertisements no. 3 of 1995-96 and no.1 of 1996-97, annexures 3 and 4 to the writ petition, are quashed. However, it shall be open to the respondents to re advertise the posts in accordance with the provisions of the Act and in the light of the observations made above.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD, 24.08.1998

1998

August, 24

BEFORE
THE HON'BLE S.K. PHAUJDAR, J.

Criminal Misc. Application No.2921 of 1998

Ashok Kumar Singh **...Petitioner**

Versus

Union of India & another **...Respondents**

Counsel for the Petitioner : Sri V.K. Singh
Counsel for the Respondents : Sri S.C.

Section 482 Cr.P.C.—Bare statement of a co-accused could be strong suspicion against the applicant. However the suspicion cannot take place of proof. If there is any other material other than the confirmation, trial court would proceed otherwise the trial must not be allowed to proceed and the accused must be discharged.

By the Court

Through this application under Section 482 Cr.P.C. the petitioner has prayed for quashing a complaint in Case No. 1512 of 1997 pending before the special C.J.M. (Economic Offences),

1998

A.K.Singh
Vs.
U.O.I.
& another

S.K.
Phaujdar, J.

Varanasi. The complaint in question was made by Sri A.K. Ranjan, Assistant Commissioner, Customs (P), Gorakhpur, against five persons including the present applicant. The complaint spoke of an alleged offence under Section 135 of the Customs Act (hereinafter referred to as the 'Act') committed on 29.5.1995 at Naubat Trade Tax check-post in respect of chinese silk yarn valued at Rs.38,40,000/-. In addition to the said silk yarn, metal scrap worth more than Rs. 30,000 and a truck no. WMH 4911 valued at Rs.4,00,000/- were also seized.

According to the complainant, the Assistant Commissioner of Customs, on 28.5.1995, the officers of the Directorate of Revenue Intelligence (in short, 'DRI') at Varanasi got some secret information and kept surveillance on the Grand Trunk Road at parhau, District Varanasi, awaiting arrival of the truck No. WMH 4911. It was brought to the notice of the DRI officers that the truck in question was detained on that date in the trade tax check-post at Naubatpur and the officers rushed to the check-post, contacted the trade tax authorities and took the truck in their custody along with the papers produced by the driver. The materials, as indicated above, were seized but despite chances being given the owner, driver or cleaner of the truck did not come forwarded to claim ownership of the truck or the goods so seized. It was alleged that the aforesaid Chinese silk yarn was found concealed under metal scrap in the concerned truck.

The complainant further stated that there were grounds for reasonable belief that the silk yarn were of foreign origin and were smuggled into India from Nepal in contravention of notifications under Section 11 of the Act and, as such, the materials were liable to confiscation. An enquiry/investigation was taken up by the customs officials and the involvement of the accused persons named in the complaint came to light. The truck in question stood registered in the name of Pawan Kumar Khandelwal. He appeared before the concerned officer and made a statement under Section 108 of the Act and had disclosed that in his absence the driver, Ambuj Mahto, looked to the matters relating to the truck. The said truck was loaded with metal scrap on 25.5.1995 at Raniganj in West Bengal by an employee of Deepak Transport Agency of Calcutta and this employee was addressed by his acquaintances as Pandey Ji.

Engiry further revealed that metal scrap was booked by M/s Mantri Steels, Calcutta, who were regular suppliers of iron and steel scrap to various parties and supplies were made through Deepak

1998

A.K.Singh
Vs.
U.O.I.
& another

S.K.
Phaujdar, J.

Transport Agency who had booked truck no. WMH 4911 from Sri Pawan Kumar Agarwal to load the scrap in the godown of M/S Bengal Scrap Processing Agency. According to the complaint, the present applicant is the proprietor of Deepak Transport Agency and he had deputed Sri Shambhu Nath Pandey to supervise the loading of truck at Raniganj along with Shri A. Jaiswal, proprietor of M/s. Bengal Proceesing Company. Statements were made during investigation of Shmbhu Nath Pandey and one Ajai Kumar Jaiswal about loading of truck wich scrap and about making over the documents to the owner and driver. After completion of loading Shambhu Nath had returned to Calcutta. Statement was allegedly made by the applicant also and the officials of the DRI found positive discrepancies between the statements of Pawan Kumar, Shambhu Nath and Ashok Kumar. Statement was made by one Rajneesh Agarwal as well and upon consideration of those statements and the fact of seizure, the complainant was of the view that evidence in the instant case was of a circumstanctial nature and all the links did lead to an inevitable conclusion that the accused persons were in league in commission of the offence under Section 135 of the Act.

In the present application it was urged that there was no direct evidence against the applicant showing the applicant's involvement in any offence under Section 135 of the Act. He was not present when the alleged contraband was seized and he could not be prosecuted on the basis of certain statements- exculpatory or inclupatory- made by any co-accused persons. It was stated that he was only an agent to procure a truck for transporting the materials of others and was not at all liable for carriage of any contraband in truck.

Section 135 of the Act speaks of evasion of customs duty and prescribes punishment thereof. Under this Section, if any person is, in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt of any evasion of any duty chargeable thereon, acquires possession of or is in any was concerned with carrying, removing etc. or dealing with any goods which he knows or has reason to believe are liable to confiscation, would be punishable under this section. Section 111 speaks of confiscation of improperly imported goods. In the instant case, there is no defence that the Chinese silk yarn found in the truck was not of foreign origin or were properly imported into India.

1998

A.K.Singh
Vs.
U.O.I.
& another

S.K.
Phaujdar, J.

Reference has been made in the complaint to Sections 107 and 108 of the Act. Section 108 speaks of power to summon persons to given evidence and to produce documents. The statements of different persons, as indicated in the complaint, were taken in exercised of powers under this Act. Section 107 speaks of power of an officer of the customs to require any person to produce a document and to examine any person acquainted with the facts and circumstances of the case. The Learned State counsel submitted that the statements under Sections 107 and 108 made by a co-accused are admissible pieces of evidence and are not hit by Section 25 of the Evidence Act.

Reliance was placed on a decision of an Hon'ble single judge of this High Court in the case of Rohit Agarwal Vs. State of U.P.. as reported in 1991 (28) Alld. Crl. Case at page 581. This decision was given in an application under Section 482 Cr.P.C. which was moved for quashing a proceeding under Section 135 of the Customs Act. One Rajbir Singh was arrested by a customs officer and he made a statement under Sections 107 and 108 of the Act. There was a statement of Rohit Agarwal accepting that the foreign goods seized from the tanker in question belonged to the applicant – Rohit Agarwal. An objection was taken before this Court that mere statement of Rajbir Singh who was a co-accused in the case was not admissible in evidence and as such, the proceedings in the complaint would amount to absue of the process of the court as otherwise there was no case under Section 135 of the customs Act made out against the applicant. The Hon'ble Judge of this High Court relied on several decisions of the Supreme Court is reported in AIR 1970 SC 940, AIR 1972 SC 1224 and AIR 1974 SC 120 and came to a conclusion that the statements made to a customs officer were not hit by Section 25 of the Evidence Act as the officers of the Customs department were not police officers. It was held that the customs officers enquiring into the matter about suspected smugglings were simply making enquiry and, as such, the enquiries would not affect the statement of a person under Article 20(3) of the Constitution of India. The statement under Sections 107 and 108 of the Act were not thus of a person accused in any offence and, as such, the statement of Rajbir Singh was not inadmissible in evidence and could be made the basis for the proceedings under section 135 of the Act.

It is necessary to look to the case-laws that were relied on by the Hon'ble Judge. The decision reported in AIR 1970 SC 940 covered two judgements, one each from Calcutta and Bombay High

1998

A.K.Singh
Vs.
U.O.I.
& another

S.K.
Phaujdar, J.

Courts. Certain statements were made to custom officer under Section 171A of Sea Customs Act. It was held that the officer of the customs department was not a police officer and the court also went on to say that a person against whom an enquiry is held under Section 171A of the Sea Customs Act was not a person accused of any offence. The court was of the view that the statements under Sections 107 and 108 of the Customs Act were not statements by a person accused of any offence. The court was of the view that these statements are not hit by Article 20(3) of the Constitution of India and because those were not statements by an accused of any offence and because the statements were made to an officer who was not a police officer, Section 25 of the Evidence Act would not be a bar to the admissibility of such statements. Section 25 of the Evidence Act simply states that no confession made to a police officer shall be proved against a person accused of any offence. The statements in this case were sought to be proved against the makers thereof.

The decision in AIR 1972 SC 1224 was again a case from Bombay High Court and the prosection was in respect of Foreign Exchange Regulation Act. The appellant in this case was found present on the back seat of the car from the dicky of which gold was recovered. There was evidence to the effect that the said car before the recovery of the gold was brought at an odd hour of 2 a.m. and taken on the Kutcha track towards salt pans near a bridge across a creek. The car was thereafter parked on a kutcha truck near that bridge and its engine was kept running. After the car was intercepted the customs officials inerrogated the appellant and other accused. At that stage the appellant did not take up any plea that he did not know about the presence of the gold in the dicky. The fact that mud on the gunny bags containing gold was wet, showed that the gunny bags had been places on the dicky shortly before they were examined by the customs officials. The chain of circumstances, according to the court, clearly pointed to the guilt of the appellant. Here also there were certain statements recorded by an officer of the customs and the same were held admissible and not hit by Section 25 of the Evidence Act. Such a statement was made by the appellant and that statement was sought to be proved as Ext. 17 and the aforesaid objection was taken, but was not accepted.

The third decision referred to by the Hon'ble Judge of the Allahabad High Court stands reported in AIR 1974 SC 120. Here also a question arose on the admissibility of statements under Section 107 of the Customs Act and it was held that the expression "any

1998

A.K.Singh
Vs.
U.O.I.
& another

S.K.
Phaujdar, J.

person" in Section 107 includes a person who is subsequently arraigned as an accused in the trial in respect of smuggled gold. When such a person was found in possession of smuggled gold, he being acquainted with the facts and circumstances of the case would be the best person to throw light with regard to such gold. He can, therefore, be examined under Section 107 of the Customs Act. Such statement was held admissible and the conviction of the appellant was upheld.

In the three cases the statements which were allowed to be proved were statements of the persons who were being prosecuted and who were found at the spot at the time of seizure. These statements under Section 107 were held admissible as not hit by Section 25 of the Evidence Act as the customs officials were not police officers and more so, the statements were made during enquiry and, as such, were not statements of persons accused of any offence. In the instant case at out hands however, the applicant was allegedly not present at the spot when the contraband was seized and he is being sough to be prosecuted on the basis of statement made by another person who is a co-accused. No doubt, the statement would be admissible but the question is not of mere admissibility or mere absence of bar under Section 25 of the Evidence Act, the real question relates to a proper interpretation of Section 30 of the Evidence Act. Section 30 is quoted below in toto:

> "30.Consideration of proved confession affecting person making it and others jointly under trial for the same offence-
>
> When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such person is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession.
>
> Explanation:- "Offence", as used in this section includes he abatement of or attempt to commit the offence."

It was stated that this confession of a co-accused, even if proved, cannot be the basis of a conviction and although it is evidence in the generic sense, it is not evidence in the specific sense and it could afford corroboration to other evidence and cannot be the

supporting point or the sole basis of the conviction. In this respect, reference could be made to a decision of the Supreme Court in the case of Hari Charan Vs. State, as reported in AIR 1964 SC 1184, as also to another decision of the Supreme Court reported in AIR 1957 SC 381 wherein it was held that confession of a co-accused can only be taken into consideration but it was not in itself a substantive evidence. The privy Council also held that a confession of a co-accused was obviously evidence of a very weak type and it did not come within the definition of evidence contained in Section 3, as reported in AIR 1949 PC 257.

It is necessary to have the facts behind these decisions of the Supreme Court and the privy Council. We may proceed chronologically.

The case before the privy Council was from Patna High Court in which the High Court had dismissed an appeal against a judgement and order of the Sessions Judge convicting the appellant for an offence of murder. Privy Council, however, advised His Magisty that the appeal be allowed and the judgement was recorded giving the reasons for such advice. The evidence against the appellant consisted of, (a), the evidence of Kholli Bohara who had taken part in the murder and had become an approver, (b), the confession of Trinath recorded under Section 154 Cr.P.C. which implicated both himself and the appellant in the murder, and (c) the recovery of a loin cloth identified as the one, which the deceased was wearing when he was assaulted and an instrument for cutting grass. For the purpose of the instant case, the evidence in point (b) is relevant. The Privy Council quoted Section 30 of the Evidence Act and held in paragraph 9 of the judgement (as reported) that Section 30 was introduced for the first time in the Evidence Act of 1872 and it was the departure from the common law of England. It was observed that this Section 30 applied to confessions and not to statements which do not admit the guilt of the confessing party. It was held that statement of Trinath was a confession. Their lordships further observed that Section 30 seemed to be based on the view that an admission of an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused, their lordships continued to observe, was obviously evidence of a weaker type. It did not indeed come within the definition of ‘evidence’ contained in Section 3 of the Evidence Act. Such statement was not required to be given on oath nor in the presence of the accused and it could not be

1998

A.K.Singh
Vs.
U.O.I.
& another

S.K.
Phaujdar, J.

tested by cross-examination. It was a much weaker type of evidence than the evidence of an approver which was not subject to any of those infirmities. Section 30, however, provided that the court might take into consideration the confession and thereby no doubt made it evidence on which the court could act, but the section did not say that the confession was to amount to proof. Clearly, there must be other evidence and confession was only one element in the consideration of all the facts proved in the case, which can be put into the scale and weighed with other evidence. Their lordships confirmed the view that the confession of an co-accused could be used only in support of the evidence and could not be made a foundation of a conviction.

The case before the Supreme Court, as reported in AIR 1957 SC at page 381 was also of murder. It was a case in which corpus delecti was not traceable and proof of murder solely depended on a retracted confession of an accused. The court was of the view that although corpus delecti was not found, there could be a conviction if reliable evidence, direct or circumstantial, of the commission of murder was available. However, a confession of a co-accused was not in itself a substantive evidence. This view was expressed in paragraph 10 of the judgement which was, per chance, pronounced in a case arising from the Allahabad High Court. The courts below had relied on a confession of accused Ram Chandra against a co-accused, Ram Bhrose, for holding him guilty of the offences charged against him. The Supreme Court held, "It is rightly urged that under Section 30, Evidence Act confession of a co-accused can only be taken into consideration but is not in itself substantive evidence". The Supreme Court, however, was satisfied that even excluding the confession as substantive evidence there was enough material against the appellant Ram Bharose to find him guilty of offence of criminal conspiracy to commit offences charged. To come to the ratio, we find that the view was affirmed that confession of a co-accused could only be considered but could not be relied on as substantive evidence.

The case reported in AIR 1964 SC at page 1184 was again from the Patna High Court. Here also a question arose as to the probative value of a confession of one accused against a co-accused. The Supreme Court dealt with the definition clause in Section 3 in the Evidence Act and Section 30 thereof, as also some earlier decisions of the apex court. It was observed, in paragraph 16 of the judgement, as reported, "It is true that the confession made by Ram

Surat is a detailed statement and it attributes to the two appellants a major part in the commission of the offence. It is also true that the said confession has been found to be voluntary, and true so far as the part played by Ram Surat himself is concerned, and so, it is not unlikely that the confessional statement in regard to the part played by the two appellants may also be true, and in that sense, the reading of the said confession may raise a serious suspicion against the accused. But it is precisely in such cases that the true legal approach must be adopted and suspicion, however, grave, must not be allowed to take the place of proof. As we have already indicated, it has been a recognised principle of administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence an feels the necessity o seeking for an assurance in support of its conclusion deducible from the said evidence. In criminal trial, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced agaist an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt. That is precisely what has happened in these appeals."

The question that actually arises in the instant case is not on the point of admissibility of a statement made to a customs official notwithstanding the bar of Section 25 of the Evidence Act. It is really the question of use of that confession against a co-accused and this use is permissible for a limited purpose only as per Section 30 of the Evidence Act. What is the scope of Section 30 has clearly been explained in the decisions of the privy Council and of the Supreme Court. If it is barely the statement of a co-accused against the present applicant, then there could be strong suspicion against the applicant, no doubt. But as observed by the Supreme Court, the suspicion, however great, could not take the place of proof. The lower court records are not before us. The trial court is in a position to look to every bit of material on which the complainant seeks to build up his case. The trial court would be in a better position to look to such materials to find if the present applicant is sought to be prosecuted merely on the statement of a co-accused made to a customs official or on other materials also. It is, therefore, thought proper that the trial court will look to the complaint and the materials that the

1998

A.K.Singh
Vs.
U.O.I.
& another

S.K.
Phaujdar, J.

complainant proposes to rely on and the trial court would keep in mind the decision of the courts on the point of admissibility as evidence, of a confession of a co-accused against another. If there be any material other than the confession, the trial court would proceed and if there be none others, then the complaint against the present applicant must not be allowed to proceed and he must be discharged at the threshold itself.

The present application stands disposed of with the aforesaid directions to the trial court. The above said point shall be determined before proceeding further with the case and till a decision is taken on this point, the personal attendance of the applicant before the trial court shall not be insisted upon, provided he appears through a counsel. If at all any process has been issued against the applicant, the same shall not be executed on condition that he would appear, as directed above, within 15 days from today and take up the objections that have been taken here. The trial court would give its decision on such objection within a reasonable time, preferably within 3 months after giving an opportunity of hearing to the complainant and the applicant.

Petition Disposed of

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 17.08.1998

1998

August, 17

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. Writ Petition No.3034 of 1998

Committee of Management, J.V. Inter College, Rajupur, Distt. Saharanpur & others ...Petitioners
Versus
Dy.Director of Education, Saharanpur & others ...Respondents

Counsel for the petitioners : Sri V.K. Shukla
Counsel for the respondents : S.C.
: Sri R. Rai
: Sri Malik S. Uddin
: Sri S.U. Khan

Article 226 of the Constitution of India—in absence of any provisions for appeal or review, the Deputy/Joint Director of Education has supervisory power to correct and rectify the mistake committed by the D.I.O.S. in his administrative orders—opportunity of hearing to the petitioner need not be given before passing the Administrative orders by which administrative orders passed by the D.I.O.S. were substituted.

1998

C/M, J.V. Inter College Saharanpur & Others
Vs.
D.D.E., Saharanpur & Others

O.P.Garg, J.

Cases reffered
1978 AWC P.124
1993(2) UPLBEC P.934
1984 UPLBEC P.166
1995 All C.J. P.1241
1995(2) UPLBEC P.704
1980 UPLBEC P.6
1998(1) PLBEC P.429

1. By means of this writ petition under Article 226 of the Constitution of India, it is prayed that the impugned order dated 13.1.1998, Annexure 12 to the writ petition, passed by the Deputy Director of Education, (for Short 'DDE') (Madhyamik), Saharanpur Region, Saharanpur be quashed and the respondent no.1 be commanded to appoint prabandh Sanchalak forthwith in exercise of the powers vested in him under clause 8 of the amended Scheme of Administration with a view to complete the process of elections of the members and the office bearers of the Committee of management from out of 116 members of the General Body of the Society.

2. Counter and rejoinder affidavits have been exchanged and, therefore, this writ petition is being finally disposed of, on merits.

3. Heard Sri V.K. Shukla, learned counsel for the petitioners and Sri S.U. Khan for the respondent no. 3 as well as learned Standing counsel for the respondent nos. 1 and 2.

4. The only question which arises for consideration and determination in the present writ petition is where in the absence of any provision for appeal or revision, a Regional Deputy Director (Madhyamik) is empowered and authorised to set aside the order of the District Inspector of Schools (for short 'DIOS') refusing to recognise the election of a Committee of Management or to put differently, whether the administrative action of a subordinate authority can be annulled by a higher authority, in its supervisory

1998

C/M, J.V. Inter College Saharanpur & Others
Vs.
D.D.E., Saharanpur & Others

O.P.Garg, J.

jurisdiction. This legal question has come up in the following circumstances :-

5.Sri Janta Vidya Sabha, Rajpur, District Saharanpur is a society registered under the Societies Registration Act, 1860. It has established an institution in village Rajupur in district Saharanpur. The said institution was initially a Junior High School and in course of time, it came to be upgraded to High School and than to Intermediate level. The institution is govered by the provisions contained in the Scheme of Administration which has been framed in exercise of power vested under Section 16-A of the Intermediate Education Act, 1921 (hereinafter referred to 'the act'). Undeoubtedly, the institution is on the list of grants-in-aid of the State Government and the provisions of the U.P. High School and Intermediate Colleges (payment of Salaries to the Teachers and other Employees) Act, 1971 are applicable. It is an admitted fact that Sri Saud Ahmad- petitioner no.2 was the Manager of the Committee of Management and Mohd. Kamil Hasan was its president. Originally there were 56 members of the Society. Therefore, elections for constituting the Committee of Management were held on 23.7.1997 in which, respondent no.3, of which Sri Iqbal Ahmad was the Manager, was elected. The relevant documents were submitted to the DIOS for recognising the new Committee of Management and attesting the signatures of the newly elected Manager Sri Iqbal Ahmad. By order dated 12.8.1997, which is Annexure 11 to this writ petition, the DIOS did not recognise the Committee of Management as according to him, the elections held on 23.7.1997 were not according to the provisions of the Scheme of Administration. Certain members of the newly elected Committee of Management made a representation to the DDE (Madhyamik) Saharanpur Region, Saharanpur respondent no. 1 as well as District Magistrate, Saharanpur. The matter ultimately came to be dealt with by the DDE- respondent no.1 who by the impugned order dated 13.1.1998, Annexure 12 to the writ petition, set aside the order dated 12.8.1997 passed by the DIOS and recognised the Committee of Management elected on 23.7.1997 by 56 members of the Society and in which Sri Mohd. Kamil Hasan and Sri Iqbal Ahmad were elected as the president and Manager respectively. By the same order, the enrolment of 60 more members of the society at the behest of Sri Saud Ahmad-petitioner no. 2 was held to be illegal.

6. Sri V.K. Shukla, learned counsel for the petitioners urged that the impugned order dated 13.1.1998 passed by the respondent

no.1-DDE (Madhyamik) Saharanpur Region, Saharanpur is per se illegal and without jurisdiction, inasmuch as, no-where under the provisions of the Act the DDE has been vested with the power of appellate authority and consequently, the order dated 12.8.1997 passed by the DIOS Saharanpur refusing to recognise the alleged elections of the Committee of Management held on 23.7.1997 could not be set aside. It was also urged that the DDE can exercise powers only under Section 16-A (7) of the Act on a reference having been made to him if there is a dispute raised about the election by the rival parties and that in that case too, the power of the DDE is limited to determine the fact as to which of the party is in actual control of the affairs of the institution and even this determination by the DDE under Section 16-A(7) of the Act is subject to the final adjudication by the competent court. According to Sri Shukla, learned counsel for the petitioner, the DDE concerned could not have exercised his powers under Section 16-A (7) of the Act in the present case, as there was no dispute about the rival elections and no reference under the aforesaid provision was made. It was also pointed out that the finding of the DDE that there were only 56 members of the society and the alleged addition of 60 members by the Ex Manager Sri Saud Ahmad was illegal is also not sustainable as it is against the weight of the evidence on record.

7. Sri S.U. Khan, learned counsel for the respondent no.3 repelled the various submissions raised on behalf of the petitioners and urged that a wrong order passed by the DIOS on the administrative side can always be corrected by the DDE who is superior administrative authority under its supervisory administrative jurisdiction and that this legal position has received judicial recognition in a number of cases decided by this Court.

8. To begin with, it may be mentioned that it is an admitted fact that there were only 56 members of the society. The petitioner no.2- Saud Ahmad has asserted that he enrolled 60 more members on 23.12.1996 to which act the the DIOS put the seal of approval on 26.12.1996. The case of the petitioners, therefore, is that under the provision of para 5(v) of the Scheme of administration, all the 116 members of the society should have taken part in the election of the new Committee of Management and since the elections were held by inviting only 56 old members and excluding the newly enrolled 60 members, it was not in accordance with the Scheme of Administration and was consequently not approved and recognised by the DIOS by his order dated 12.8.1997. The DDE has dealt with

1998

C/M, J.V. Inter College Saharanpur & Others
Vs.
D.D.E., Saharanpur & Others

O.P.Garg, J.

this controversy with all specificity and has come to the conclusion that the enrolment of 60 more members by Saud Ahmad petitioner no. 2 was illegal. The respondent no. 3 in his counter affidavit has alleged that the list of the alleged enrolment of 60 members was not required to be put up for approval before the DIOS and that the list of the new members was ante dated and signed by the then DIOS- Sri O.P. Saini in a back date after his retirement in collusion with Saud Ahmad- petitioner no.2 When the fact that list has been ante dated and the signatures of the then DIOS were obtained on a back date, after his retirement, was brought to the notice of the DDE, Saud Ahmad petitioner no.2 behaved in a funny manner, inasmuch as he removed the relevant list and tore it out in pieces. Kamil Hasan president pleaded his total ignorance about the enrolment of the new members. The relevant documents about the deposit of the enrolment fee and other charges were also missing. It was in these circumstances that the DDE had come to the conclustion that the enrolment of 60 members, as alleged by Saud Ahmad, was illegal. The society as a body, had 56 members only. These 56 members only could be associated in electing the new Committee of Management. According to the DDE- respondent no.1, the question of validity of the enrolment of the new 60 members by Saud Ahmad was not thoroughly scrutinised by the DIOS and that he has, in a most mechanical and perfunctory manner, refused to recognise the newly elected Committee of Management. It was in the background of above facts that the DDE set aside the order dated 12.8.1997 and by the impugned order dated 13.1.1998 reognised the Committee of Management as having been duly elected on 23.7.1997 of which Sri Iqbal Ahmad is the Manager.

9. The main thrust of Sri V.K. Shukla, learned counsel for the petitioners to assail the impugned order is that the DDE concerned had no jurisdiction, whatsoever, to set aside the order dated 12.8.1997 passed by the DIOS for one simple reason that no provision for appeal has been made and that the jurisdiction of DDE can be invoked only in one situation, i.e., under Section 16-A (7) of the Act, when dispute of the rival Committees of Management is referred to him and in which he has to record a finding as to which of the rival committees of management has been in actual control of the affairs of the institutions. Without repeating the facts all over again, suffice it to say that it is not the case of the respondents that the impugned order dated 13.1.1998 has been passed by the DDE as an appellate authority or under the provisions of Section 16-A (7) of the Act. On the other hand, Sri S. U. Khan, learned counsel for the

respondents frankly conceded that it is not a case in which powers under Section 16-A (7) of the Act could be invoked by the DDE nor it is a case in which he had exercised powers as an appellate authority. It is accepted at all hands that 'appeal' is a creature of statute and in the absence of any statutory provisions, no appeal would lie. Therefore, in the instant case, the question of preferring an appeal against the order dated 12.8.1997 passed by the DIOS to the DDE did not arise. No rival Committee of Management has been set up and, therefore, the question of making reference under Section 16-A (7) of the Act also did not arise.

10. As said above, the only moot point for determination is whether the DDE in exercise of his supervisory powers could rectify the order passed by the DIOS on administrative level.

11. It is well established that neither under the U.P. Intermediate Education Act nor under any statutory provision, the DIOS has been given the power to adjudicate upon the claims of the rival contending managing Committees but it is equally clear that under the U.P. Intermediate Education Act as also under the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971, the DIOS has to deal with the committee of Management of a recognised educational institution in respect of various affairs of the institution, i.e., granting of approval as contemplated by sub-section (3) of Section 16-C of the Act and dealing with the management of such an institution under Section 5 of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971. Not only this, the DIOS has to perform various administrative functions of statutory character in collaboration with the management of High School and Intermediate Colleges. These duties cannot be discharged by the DIOS unless he is in a position to find out on an administrative level as to who are the real office bearers of the Committee. For this limited purpose, the DIOS must, of necessity, satisfy himself as to who, according to him, are validly elected office bearers of the institution. Mere raising of a dispute about the election of the members of the Managing Committee and its office bearers would not absolve the DIOS from its duty to find out on an administrative level as to who are the real office bearers of the College in order to perform his statutory functions under the aforesaid two Acts. Viewed from the angle of administration, the DIOS is duty bound to take a decision to recognise the Committee of Management and to attest the signatures of the Manager who has

1998

C/M, J.V. Inter College Saharanpur & Others
Vs.
D.D.E., Saharanpur & Others

O.P.Garg, J.

been elected, after satisfying himself as to who according to him are validly elected office bearers of the institution. An administrative enquiry may always be necessary whenever some sort of dispute or doubt is raised about the election of the new Committee of Management and its office bearers. This aspect of the matter came to be considered in an earlier decision in the case of Committee of Management SAV Inter College Vs. District Inspector of Schools (Civil Misc. Writ No. 12725 of 1975, decided on 24.11.1997, by a Division Bench of this Court. The said decision again came to be considered by another Division Bench of this court in the case of Committee of Management and another V. District Inspector of Schools, Meerut and another (1978 AWC-124) in which the earlier view was reiterated. To the same effect is another decision of a Division Bench of this Court reported in (1993) 2 UPLBEC-934- Committee of Management, Vaidik Higher Secondary School Faizpur, Ninana and another Vs. DIOS Meerut and another.

12. In Gauri Shankar Rai and others Vs. Dr. Ram Lakhan Pandey, DIOS, Ballia and others (1984) UPLBEC-166, it was observed that the DIOS recognises a new committee of management for day to day work of the department, such as payment of salary to the teachers and staff of the college. In discharging this administrative function, it cannot be said that the DIOS decides any dispute relating to election of rival committees of management. There can, therefore, be no escape from the conclusion that the DIOS stands vested with sufficient jurisdiction for the limited purpose, as indicated above, to satisfy himself as to who according to him is validly continuing as manager or representative of the committee of management. If any party feels dissatisfied with such administrative decision, he is always at liberty to file a suit for adjudication of his rights either as an office bearer of the committee of management or member of such committee. Simply because a dispute has come to be raised in regard to the validity or a particular election, DIOS cannot shirk in his duty to recognise a particular committee and to attest the signatures of its manager. He would not be justified in waiting for the dispute to be resolved by the civil court or wash his hands off by making reference u/s. 16-A (7) of the Act. If the apathy or inaction on the part of the DIOS in discharging his administrative function is upheld it is likely to lead to disastrous results.

13. It is well embedded and established proposition of law that the DIOS has to perform certain administrative functions even though there is no statutory sanction for the performance of such

1998

C/M, J.V. Inter College Saharanpur & Others
Vs.
D.D.E., Saharanpur & Others

O.P.Garg, J.

administrative duty. The Deputy Director of Education is undoubtedly a superior and senior officer to whom the DIOS is subordinate. Sri S. U. Khan, learned counsel for the respondents urged that in the case of Shandar Hussain Vs. Dy. Director of Education XII Region Moradabad and others (1995-All.C.J.-1241) it has been held that Deputy/Joint Director, in exercise of its supervisory jurisdiction has the power to Scrutinise the order passed by the subordinate officers and to correct and rectify the wrong orders. It was urged that a superior officer cannot shut his eyes to the mistakes committed by his subordinates and the propriety demands that the senior officer should step in to correct the mistakes. Sri V. K. Shukla, learned counsel for the petitioners, urged that Shandar Hussain's case (Supra) is not a good law in view of the later decision of this court reported in (1995) 2 U.P.L.B.E.C.-704- Committee of Management, Lakhori Inter College, Moradabad Vs. DDE 12th Region Moradabad which is based on the Full Bench decision of this court in 1980 UPLBEC-6- Magan Ram Yadav Vs. DDE and others. I have thoroughly studied both these above rulings and find that they do not erlipse Shandar Hussain's case (supra) In Lakhori Inter College case (supra), there was some serious dispute about the correctness and legality of inclusion and exclusion of 122 persons as life members of the general body of the society. It was held that in the absence of any specific provision in the Act or Regulations it was absolutely clear that the DIOS had exceeded his jurisdiction in entering into the complex question about the validity of the election and also validity of 122 persons as life members of the Society. It was also observed that the Deputy Director of Education does not sit in appeal over the judgement of the DIOS to have approved election and attested the signatures of the Manager. The direction of the Deputy Director in that case appointing the Authorised Controller was found to be patently unwarranted and without jurisdiction. Reliance was placed on Magan Ram Yadav's case (Supra) for the limited purpose that the Education Code is nothing but a mere executive instruction and could not be given status of statutory rule. It is true that the provision in the Education Code do not supersede the statute and Regulations as the provisions therein are mere compilations of the administrative orders and instructions of the Department. There can, therefore, be no quarrel about the proposition of law laid down in the decision of Lakhori Inter College (Supra). As a matter of fact, Shandar Hussain's case (supra) is clearly in keeping with a number of decisions of this court, discussed above in which it has been held that the DIOS exercises certain powers at the administrative level. In Shandar's case (supra),

1998

C/M, J.V. Inter College Saharanpur & Others
Vs.
D.D.E., Saharanpur & Others

O.P.Garg, J.

it was hold that the administrative power exercised by the DIOS is subject to correction and scrutiny by the higher authorities on the administrative side. Shandar's case (supra) came to be referred and discussed before a Division Bench of this Court in (1998) 1 U.P.L.B.E.C.-429 Committee of Management, Tagore Ucchattar Madhyamik Vidhyalaya Dilawarganj, Farrukhabad Vs. DIOS, Farrukhabad and others Though Shandar's case (supra) was distinguished and found to be inapplicable to the facts of the case before the Division Bench, it was impliedly approved. In carrying on the general administrative functions of the State, executive functions are performed by hierarchy of officers who are supposed to act according to rule of law. A superior officer has the implied and implicit administrative power to perform the function which its subordinate can discharge. If a subordinate officer has omitted to perform his administrative duty or administrative function the superior officer would certainly step in to pass appropriate correct order on administrative side. If the illegal and incorrect administrative orders of the subordinates are allowed to exist and continue, the very purpose of creating the hierarchy in the civil services would be frustrated. I am, therefore, also of the view that the Deputy/Joint Director of Education has the power and authority to scrutinise and correct the order passed by the DIOS on administrative side. The decision in Shandar's case still survives and it cannot be ignored particularly when it is based on perfect rationale of administrative expediency and exigency. The submission of the learned counsel for the petitioners that the Deputy Director of Education-respondent no.1 was not legally entitled for want of jurisdiction to review or revise the order passed by the DIOS is not tenable. In the absence of any provision for appeal or review, the Deputy/Joint Director of Education concerned has supervisory power to correct and rectify the mistakes committed by the DIOS in his administrative orders.

14. A faint suggestion was also made that the respondent no.1 – Deputy Director of Education did not afford an opportunity to the petitioners before passing the impugned order. In matters where observance of principles of natural justice would have made no difference and the admitted and undisputable or irrefutable facts speaking for themselves lead to a situation where only one conclusion is possible under the law, the issuance of a writ to compel observance of principles of natural justice is not at all called for. In every case and situation, personal hearing is not necessary. In the circumstances of the present case, it was not necessary for the Joint

Director to have given an opportunity of hearing to the petitioners before passing the administrative order by which the administrative order passed by the DIOS was substituted.

15. In the result, for the reasons stated above, the present petition has no merits and is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 02.09.1998

1998

September, 2

BEFORE
THE HON'BLE S.R. SINGH, J.

Civil Misc. Writ Petition No.24382 of 1998

Smt. Shanti Devi **...Petitioner**

Versus

A.D. & S.J., Karvi & others **...Respondents**

Counsel for the petitioner : Sri S.K. Singh
: Sri V.K. Singh
Counsel for the respondents : S.C.
: Sri G.S. Dwivedi
: Sri N.C. Tripathi

(A) U.P. Punchayat Raj Act (Election of Member Pradhan and Up Pradhans) Rules 1994—rule 54—Election of Pradhan—Nirvachan Adhikari found two candidates securing highest number of votes 187—the allotment of additional one vote to the candidate on whom the lot falls—instead of lot the decision taken on the basis of "Toss"—held no noticiable difference between the two. (Para 6)

(B) Words and Phrases—"Draw of lots" and "Toss" explained—as per law Laxieon—denotes any thing used in determining a Question by chance on without men's choice or will-—while "Toss" to flip a coin into air and let it fall heads or tails as a method of letting fate decide. (Para 5)

1998

Smt. S.Devi
Vs.
A.D. & S.J. & Others

S.R.Singh, J.

By the Court

1. Petitioner, Smt. Shanti Devi and respondent, Smt. Babua alias Butuwa amongst other were horn-locked in election for the office of Pradhan of Gram Panchayat Kotilihayi, Vikas Khand Manikpur District Banda, held in the year 1995. The petitioner and the third respondent both secured 187 votes each which is the highest number of votes polled amongst the contesting candidates. In an effort to break the stalemate, the respondent no.3 moved an application before the Returning Officer, suggesting that the decision between the two candidates be taken by means of 'toss'. A copy of the application has been annexed as Annexure 1 to the petition. It would appear that the suggestion was not demurred to by the petitioner as a result of which the Returning Officer was induced to the expedient of toss and get the result accordingly. On the coin being flipped it turned the wheel in favour of the petitioner and against the respondent no.3 and the result was declared accordingly vide order dated 20.4.95. The matter, however, escalated into institution of an election petition under section 12C of the U.P. Panchayat Raj Act, 1947 before the Prescribed Authority, who allowed the petition by means of the order dated 30.3.98 on the ground that declaration of result by toss was contrary to rules. The Returning Officer was accordingly directed by the prescribed Authority to relegate himself to draw of lots for decision on the result between the petitioner and the 3rd respondent. The petitioner preferred a revision against the order of the Prescribed Authority. The revision came to be dismissed by the learned Addl. District Judge(Chatrapati Sahu Ji Maharaj Nagar) vide judgment and order dated 17.7.1998. These are the two orders which are sought to be quashed by certiorari.

2. I have heard Sri S.K. Singh, appearing for the petitioner and Sri N.C. Tripathi, appearing for the third respondent. The other respondents are mere formal parties and as such notices were not issued to them.

3. Counsel appearing for the petitioner canvassed inter-alia that the third respondent having opted for the result of the election by way of toss, was estopped arguing the toss and articulating in her own interest a self-created illegality after the result went against her.

In any case, contended the learned counsel, the result of the election in the present case was not materially affected merely because it was declared by tossing of a coin and not by draw of lot. Sri N.C. Tripathi, appearing for the contesting respondent submitted, in repudiation, that rule 54 of the U.P. Panchayat Raj (Election of Members, Pradhans and U.P. Pradhans) rules 1994, implicitly provides that if after the counting of votes is completed, it is found that any of the candidates have secured equal number of votes and addition of one vote would turn the wheel in favour of any of these candidates, the Election Officer shall forthwith decide between those candidates by draw of lot and proceed as if the candidate on whom the lot falls, had an additional vote and the Returning Officer illegally decided to toss for it; the rule of estoppel by conduct would not operate against statute; the declaration of result by flipping a coin would not meet the standard of practicability in the event of more than two candidates securing equal number of votes; and, therefore, the Prescribed Authority was justified in setting aside the election of the petitioner. The nub of the submission made by the learned counsel is that in the event of contestants securing equal number of votes, the declaration ought to have been made in the manner prescribed by rule 54 of the Rules aforestated and any declaration made in contravention of the Rules, would wear the taint of invalidity on its forehead.

4. I have bestowed my anxious consideration to the submissions made across the bar. Section 12-C of the U.P. Panchayat Raj Act, 1947 envisages that the election of a person as Pradhan or as a member of the Gram Panchayat etc. shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground (a) that the election has not been a free election by reason that corrupt practice of bribery or undue influence has extensively prevailed at the election, or (b) that the result of the election has been materially affected- (I) by the improper acceptance or rejection of any nomination or; (ii) by gross failure to comply with the provisions of the Act or the rules framed thereunder. Sub section (2) of Sec. 12 C of the Act defines the terms 'corrupt practice of bribery' and 'undue influence' for the purpose of the Act but these are the terms not germane to the controversy involved in this petition. In the present case, the question of improper acceptance or rejection of any nomination papers is also not involved and the only question that begs answer is whether declaration of result of the election by the expedient of toss and not by draw of lot, could be a facet involving

1998

Smt. S.Devi
Vs.
A.D. & S.J. & Others

S.R.Singh, J.

gross failure to comply with the provisions of the Act so as to warrant declaration of the result being set aside by means of an election petition u/s 12 C of the Act. Rules 53 and 54 of the U.P. Panchayat Raj (Election of Members, Pradhans and U.P. Pradhans) Rules 1994, being germane to the controversy involved in this petition, are excerpted below:

> *"53. Declaration of result- The Nirvachan Adhikari shall declare the candidates securing the highest number of votes in their respective constituencies to be duly elected.*
> *54. Equality of votes- If after the count of the votes is completed, an equality of votes is found to exist between any candidates and the addition of one vote will entitle any of those candidates to be declared elected, the Nirvachan Adhikari shall forthwith decide between those candidates by lot and proceed as if the candidate on whom the lot falls had an additional vote."*

5. Equality in votes admittedly existed between the petitioner and the third respondent and according to rule 54 of the Rules aforestated, the Returning Officer was enjoined in law to decide between the two candidates by lot and proceed as if the candidate on whom the lot falls, had an additional vote as visualised by rule 54 but the question is whether non compliance with rule 54 vitiated the declaration of the result of the election. The word 'lot' has been defined in the Law Lexicon, inter-alia, to mean "anything used in determining a question by chance; or without men's choice or well; a resort to chance for the determination of question or for arriving at a result". 'Toss' on the other hand has been defined in the new lexicon Webster's Dictionary to mean as under;

> *"to flip a coin into the air and let it fall heads or tails as a method of letting fate decide whether the course of action previously agreed on if the coin falls heads is to be put into operation or that agreed on if it falls tails, to agree with someone to let a matter be settled in this way…."*

6. It is thus deducible that there is no noticeable difference between the terms 'lot' and 'toss'. Both the terms used in the context connote determination of something by chance. Rule 54 of the rules, indubitably, envisages the result of election in the event of equality of votes, to be decided by draw of lot but upon regard being had to the fact that equality of votes in the present case was between two candidates only, it cannot be said that declaration of result by toss materially affected the result of the election so as to warrant

1998

Smt. S.Devi
Vs.
A.D. & S.J. & Others

S.R.Singh, J.

interference under sec. 12-C (1)(b)(ii) of the Act. Declaration by toss would have, no doubt, materially affected the result of the election, if there had been an equality of votes between three or more candidates but in the present case, the equality of votes was between two candidates only and therefore, decision taken by the Returning Officer by toss would not materially affect the result of election which was not liable to be called in question except on the ground inter-alia that the result of the election has been materially affected by gross failure to comply with the provisions of the Act and the rules made thereunder. Neither the Prescribed Authority nor the revisional court addressed itself to the question whether the result has been materially affected merely because the returning officer decided the fate of the petitioner and the third respondent by flipping a coin on the application moved by the third respondent herself. True, 'estoppel' cannot prevent or hinder the performance of a statutory duty or exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public' and 'it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statue has, on grounds of general public policy enacted shall be invalid' but regard being had to the element of uncertainty equally involved, both in 'toss' and 'lot' and the language employed in Sec. 12 C of the Act, I am of the considered view that the declaration of the result of election by 'toss' in the event of equality of votes between two candidates, would by itself not invalidate the declaration in that the result cannot be said to have been materially affected merely because it was declared by toss, the third respondent was herself a privy to the illegality if at all committed by the Returning Officer in not proceeding in accordance with the provisions of rule 54 of the Rules and it is still uncertain if she will win the election provided the result is declared by drawing lot as prescribed by rule 54 of the Rules. She was therefore, not entitled to get the election of the petitioner set aside under section 12 C of the Act.

7. In the result, the petition succeeds and is allowed. The impugned Order dated 30.3.98 and 17.7.98 are quashed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 18.08.1998

1998

August, 18

BEFORE
THE HON'BLE R.K. MAHAJAN, J.

Civil Misc. Writ Petition No.9323 of 1987

Distt. Cooperative Federation Ltd., Mathura...Petitioners
Versus
Dy. Registrar, Cooperative Societies U.P. ...Respondents
Agra & others

Counsel for the prtitioner : Sri R.P. Goyal
: Sri K.N. Mishra
Counsel for the Respondents : S.C.
: Sri C.M. Shukla
: Sri G.D. Srivastava
: Sri Anil Kumar

Constitution of India, Article 21—Termination—Petitioner was appointed as Manager in response to advertisement and being fully qualified without adopting fair procedure—without giving any chance to the concern employee—held illegal. (Para 5)

Case reffered
1982 UPLBEC-398

1. This is a writ petition moved by District Co-operative Federation Limited seeking direction in the nature of certiorari quashing the order dated 8.6.1984 communicated on 31.1.1987 (Annexure no.-1 to the writ petition) and the award dated 29.9.1981 passed by the respondent no. 1 (annexure no.2 to the writ petition). A prayer has been further made not to give effect to the impugned award by issuing a writ of mandamus. It may be mentioned at the out set that the respondent no. 3 who was employed as Manager in a Cold Storage under the control of the petitioner on 5.4.1978 was terminated later on as post of Manager-cum-Engineer. It may be mentioned that Shri P.N. Shukla was appointed on purely temporary basis. Later on he was terminated on the basis of resolution of Committee of Management dated 23.2.1979. It appears that the matter of termination was submitted on a reference made by Shri P.N. Shukla to the Deputy Registrar Copperative Societies U.P., Agra against the District Co-operative Federation, Mathura. It further

1998

D.C.F.Ltd.
Vs.
D.R., C & S.
U.P. & ors.

R.K.
Mahajan, J.

appears that Deputy Registrar appointed Regional Assistant Registrar, Agra as sole arbitrator and referred the dispute for adjudication. The Arbitrator gave an a ward in favour of Shri Shukla and declared the termination order void. The matter was taken up in the appeal before the competent authority and which was dismissed by the order dated 8.6.1984 (annexure no.1).

2. Feeling aggrieved the management has filed this writ petition. At the time of hearing only counsel for the petitioner appeared. Learned counsel for the respondent was not present. Counter affidavit has been filed by the wife of Shri Shukla as Shri Shukla is no more in this world. She has pleaded that Shri Shukla was appointed against the regular vacancy and it was not stated at the time of termination that the termination was done on account of new development i.e. amalgamation of post as referred above and he was not qualified to be appointed. It is alleged in the counter affidavit that Shri Shukla was pressed hard to accept the potato stock for storage beyond the storage capacity against which the Manager protested in view of this proposed storage as any mishap in the Cold Storage was the matter of his technical responsibility and also the administrative responsibility. The management was communicated as he did not accommodate storage of 28995 bags of potato. In other words the case of respondent no. 3 is that her husband Shri Shukla was terminated on account of prejudice and antagonism and amalgamation of post is just a trick to shunt him out.

I have gone through the record carefully and also the award.

3. Shri K.N. Mishra, learned counsel for the petitioner advanced legal proposition of law that termination of Shri Shukla is on business within the meaning of Section 70 of the U.P. Cooperative Societies Act, 1965 (hereinafter referred to as the Act of 1965) and the award is a nullity and without jurisdiction. He has further submitted that the remedy available to the petitioner was under Section 128 of Act of 1965 which deals with powers of Registrar to annual the resolution or cancel the order passed by an officer or cooperative society in certain cases. He has further submitted that the matter was squarely covered under Regulation 29 of U.P. Cooperative Societies Employees Service Regulations, 1975 (hereinafter referred to as the Regulations) which deals with the termination of an employee when the work is reduced and expenditure is excessive.

1998

D.C.F.Ltd.
Vs.
D.R., C & S.
U.P. & ors.

R.K.
Mahajan, J.

4. After hearing learned counsel for the petitioner and giving thoughtful consideration I refuse to interfere in the award passed by the respondent no.1 on the following reasionings :

5. Firstly, the matter relates to the case of more than two decades old. The widow, respondent no.3, is a helpless lady. There is no resources for her income, as stated in the counter affidavit. Secondly, late Shri Shukla joined as manager in response to advertisement and he was found to be qualified when his appointment as Manager was done. Later on he did not oblige to store more potatoes in the Cold Storage then he was shunted out from service. If the veil is lifted from the order it is stigmatic and entails Civil consequences. It was then thought that Engineer be given charge of manager and before termination he was not given any chance to defend his case and fair procedure was also not adopted. In fact Article 21 of the Constitution of India lays down that nobody should be terminated except following the procedure prescribed by law. A person cannot be deprived of his livlihood without fair procedure and fair hearing. Protection has been given by Constitution of India under Article 21 read with Article 14 that if the act of depriving livlihood is arbitrary the same can be struck down and I am of the view that it was arbitrary and the Arbitrator's finding cannot be assailed on this ground. The question that the matter could be referred to the Arbitrator for arbitration purely a technical as the management should not have acquiesced to the jurisdiction.

6. I would like to refer the opening language of Section 70 of Act of 1965 :

> *"Notwithstanding anything contained in any law for the time being in force, if any dispute relating to the constitution, management of the business of a co-operative society other than a dispute regarding disciplinary action taken against a paid servant of a society arises-*
>
> *(a)* . . . . . .
> *(b)* . . . . . .
> *(c)* . . . . . .
> *(d)* . . . . . .
>
> *such dispute shall be referred to the Registrar for action in accordance with the provisions of this Act*

and the rules and no court shall have jurisdiction to entertain any suit or other proceeding in respect of any such dispute."

1998

D.C.F.Ltd.
Vs.
D.R., C & S.
U.P. & ors.

R.K.
Mahajan, J.

7. It is not a case of disciplinary action against an employee but it is a matter of amalgamation of post and it falls within the purview of management of business of co-operative societies.

I may also refer sub clause (3) of Section 70 of Act of 1965 for ready reference :

"(3) If any question arises whether a dispute referred to the Registrar under this Section is a dispute relating to the constitution, management or the business of co-operative society, decision thereon of the Registrar shall be final and shall not be called in question in any court."

Mr. K.N. Mishra, learned counsel for the petitioner has relied upon 1982 U.P.L.B.E.C. 398 Parmeshwar Dayal Shukla Vs. The Deputy Registrar, Co-operative Societies, U.P., Allahabad Region, Allahabad and others. Shri Mishra has relied upon para 34 of the aforesaid judgment. The point pressed is that since it was termination and the matter should have been taken under regulations of the co-operative Societies Act and not by arbitration. The ratio of the aforesaid judgment is not applicable in the facts and circumstances of the present case.

8. For the aforesaid reasons this court is not inolined to give disoritionary relief in the facts and circumstances of this case and I hereby dismiss the writ petition.

Petition dismissed.

1998

August, 26

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 26.08.1998

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. Writ Petition No.28425 of 1997

Committee of Management Sri J.A. Vidyalay, Gurha, Kanpur Dehat and another ...Petitiomers

Versus

Dy. Registrar, Films Societies & Chits, Kanpur & others ...Respondents

Counsel for the petitioner : Sri Ashok Khare
Counsel for the respondents : S.C.
: Sri V.K. Shukla
: Sri J.N. Verma

Constitution of India, Article 226—Renewal of Registration—certification for Registration issue in the year 1990 for 5 years—after expiry of the terms fresh election taken place-- xxxx send before Deputy Registrar—objection filed by the petitioner—Rejected—the Deputy Registrar by envoking power u/s 4(i) granted renewal—held the Deputy Registrar legally exercised his power after consideration of the matterial available on record—No interference is called for. (Para 10 and 11)

Case law discussed
1981 UPLBEC-308, 1987(I) UPLBEC-333, 1988(I) UPLBEC-515,
AIR 1988 Alld-236, 1991 AWC-1311, 1993(2) UPLBEC-890,
1994 WVD (Alld) Vol.III-389 (DB),
1998(I) UPLBEC-399, 1995(3) ESC-166 (Alld.),
AIR 1994-Alld-209

By the Court

1. In this writ petition, the validity of the order dated 18.8.1997, Annexure 7 to the writ petition, passed by the Deputy Registrar, Firms Societies and Chits, Kanpur has been challenged by the petitioner- Committee of Management Janta Audyogik Vidyalaya, Sherpur Gurha, Kanpur Dehat through its Secretary/Manager, Vir Sent Yadav. Counter and rejoinder affidavits

1998

C/M, Sri Janta Audyogik Vidyalaya, Kanpur Dehat & anr.
Vs.
Dy.Registrar, Firms Societies and Chits, Kanpur And others.

O.P. Garg,J.

have been exchanged. With the consent of the learned counsel for the parties, this writ petition is finally disposed of.

2. Heard Sri Ashok Khare, learned counsel for the petitioners and Sri V.K. Shukla, learned counsel for the respondent nos. 2 and 3.

3. Sri Janta Audyogik Vidyalaya, Sherpur, Gurha, Kanpur Dehat is a society which was registered under the Societies Registration Act, 1860 on 9.1.1963. The renewal of the certificate of registration of the said society was made on 19.3.1994 for a period of 5 years commencing from 10.10.1990 on the application of Ram Swarup Yadav, the then Manager/Secretary. List of the Committee of Management and its office bearers of the year 1993-94 was filed. At that time, there were only 12 members of the general body. Shiv Lal Singh- respondent no. 3 applied for renewal of the certificate of registration for a period of 5 years and filed the necessary documents as required u/s 4 of the Societies Registration Act. The petitioners filed objections before the Deputy Registrar who by the impugned order dated 18.8.1997 came to the conclusion that the papers filed by Shiv Lal for renewal of the certificate of registration u/s. 3-A of the Societies Registration Act (hereinafter referred to as 'the Act') are acceptable and accordingly by invoking the powers u/s 4(1), list of the committee of management of the year 1997-98 was registered and renewal for 5 years w.e.f. 10.10.1995 was allowed, and the objections filed by Vir Sen Yadav were rejected.

4. Sri Ashok Khare, learned counsel for the petitioners challenged the impugned order on the ground that no opportunity of hearing was given to the petitioners and in effect, the impugned order is merely ex-parte. It was also urged that the Deputy Registrar had no jurisdiction to pass the impugned order as the only course left open to him was to have referred the dispute about the election of the rival committees of management to the Prescribed Authority u/s 25 of the Act. Sri V.K. Shukla repelled all these submissions.

5. On behalf of the petitioners, it was urged that the Registrar himself has no jurisdiction u/s 4(1) of the Act to hear and decide any doubt or dispute in respect of an election or continuance in office of an office bearer of a society, and, therefore, any decision given by him in this regard will be wholly without jurisdiction. Sri Khare maintains that the Dy. Registrar was under the law bound to refer the dispute of the nature raised before him to the Prescribed Authority.

1998

C/M, Sri Janta Audyogik Vidyalaya, Kanpur Dehat & anr.
Vs.
Dy.Registrar, Firms Societies and Chits, Kanpur And others.

O.P. Garg,J.

In support of his contention, Sri Khare placed reliance on the following decisions :-

1. 1981 UPLBEC –308 (D.B.) – Vijay Narain Singh Vs. Registrar, Firms Societies and Chits, U.P., Lucknow and others;

2. (1987)1 UPLBEC – 333 – Committee of Management and others Vs. Zila Basic Sikhsha Adhikari and others;

3. (1988)1 UPLBEC – 515 (D.B.) – Purva Bazar Educational Society, Gorakhpur Vs. Asstt. Registrar, Firms Chits and Societies, Gorakhpur.

4. A.I.R. 1988 Allahabad – 236 – All India Council and another Vs. Firms Societies and Chits.

5. 1991 AWC – 1311 – Muslim Welfare Society Machlinagar Vs. Asstt. Registrar, Firms, Societies and Chits.

6. 1993 (2) UPLBEC – 890 – Khoproha Educational Society and others Vs. Asstt. Registrar, Firms Societies and Chits.

7. 1994 HVD (Alld.) Vol.III- 389 (D.B.) – Company Management Vs. Asstt. Registrar, Firms Societies and Chits.

The gamut of all these rulings is that if there is any doubt or dispute about the election of the committee of management or the office bearers, such a dispute cannot be resolved by Deputy Registrar in exercise of his powers u/ss. 3A and 4 of the Act and he is left with no option but to refer the dispute to the Prescribed Authority for being decided under the provisions of Section 25 of the Act. Sri Shukla maintained that the impugned order passed by the Deputy Registrar is in effect, an order u/s 4 of the Act, and , therefore, no exception can be taken about it. In support of his contention, he placed reliance on two decisions of the Division Bench of this Court, namely, (I) (1995) 2 UPLBEC – 1242 – Committee of Management, Kishan Shiksha Sadan, Bankshai, District Basti and another Vs. Assistant Registrar, Chits Firms and Societies, Gorakhpur and (ii) dated

28.10.1997 in special Appeal No. 22 of 1996 – Shiksha Parishad Nagwa Ballia and another Vs. Dy. Registrar, Firms Societies and Chits and others.

1998

C/M, Sri Janta Audyogik Vidyalaya, Kanpur Dehat & anr.
Vs.
Dy.Registrar, Firms Societies and Chits, Kanpur And others.

O.P. Garg,J.

6. Before entering into the controversy whether the impugned order, in effect, is an order passed u/s 4 of the Act or amounts to usurpation of the power of the Prescribed Authority, as contemplated u/s 25 of the Act, it would be proper to make a reference to the celebrated decision of a Division Bench of this court reported in 1998 (1) UPLBEC – 399 Shiksha Prasar Samiti Allahabad and another Vs. Registrar Societies, Chits and Firms, U.P., Lucknow and others, in which it was observed that in a case in which both the sides are seeking renewal of registration of the same society, they cannot be said to be aggrieved party, if the renewal of the registration is granted by the authority concerned. The renewal is of the registration of the society and it is for the benefit of all the members and office bearers of the society. There may be a situation that two rival factions of the same society may apply for renewal separately and the renewal may be granted at the instance of one of them but the ultimate beneficiary shall be the society as a whole and not the individuals alone seeking renewal. In such a situation after renewal of the registration of the society, the dispute about renewal must be taken to have come to an end. A stranger cannot and should not be allowed to claim renewal of registration of the society. In the instant case, the renewal of the certificate of registration has been allowed at the instance of Shiv Lal Singh – respondent no. 3 who cannot be said to be stranger.

7. The scope and object of provisions of Section 4 and S. 25 of the Act are quite separate and distinct. Under Section 4, annual list of managing body is to be filed before the Registrar for record. The list of the managing body is to be counter signed by the old members and if the old office bearers do not countersign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period and is required to decide all objections received within the said period. It is a sort of administrative enquity. On the other hand, the Prescribed Authority on a reference made to it, by the Registrar or by atleast $1/4^{th}$ of the members of a society, hear and decide in a summary manner, any doubt or dispute in respect of the election or continuance in office of an office bearers of such society and may pass such orders in respect thereof, as it deem fit. The Prescribed Authority has the power to set aside the election of an office bearers

1998

C/M, Sri Janta Audyogik Vidyalaya, Kanpur Dehat & anr.
Vs.
Dy.Registrar, Firms Societies and Chits, Kanpur And others.

O.P. Garg,J.

if he is satisfied that any corrupt practice has been committed by such office bearer, that the nomination of any candidate has been improperly rejected or that the result of the election, in so far as it concerns the such office bearer, has been materially affected by the improper acceptance of any nomination or by improper rejection of any vote or the reception of any vote, which is void or by any non-compliance with the provisions of the rules of the society.

8. Section 25 of the Act contemplates different situation. It is attracted only when there is no dispute in respect of registration of society or its renewal of certificate of registration but there is dispute between two rival parties each of whom is claiming to be validly elected body. In such a situation, the dispute between the two rival parties has to be referred for adjudication under Section 25 of the Act. Section 25 of the Act is also attracted when a party challenges the legality or otherwise of the election of particular set of office bearers of society on the grounds enumerated in S. 25 of the Act. Thus, the dispute u/s 25 of the Act can be referred for adjudication only when it is found that the registration of the society or its renewal is intact.

9. In Kranti Kumar Chaturvedi and others Vs. District Inspector of Schools Kanpur and others – 1995 (3) ESC – 166 (All.) a Division Bench of this Court has clearly ruled that S. 25 of the Act would be attracted if 'there is dispute between two rival parties each of whom is claiming to be validly elected body' and that the Section 'is also attracted when a party challenges the legality or otherwise of the election of particular act of office bearer of the society on the grounds enumerated in S. 25 of the Act'. The Division Bench has further ruled that S.25 would be attracted to a dispute of the nature aforesaid, 'only when there is no dispute in respect of registration of society or its renewal of certificate of registration.' A reference may also be made to another decision of the Division Bench in Shambhu Kumar Tripathi Vs. Asstt. Registrar, Firms Societies and Chits (AIR 1994 (All.)-209 in which it was observed :-

> *"…..It is evident from S. 3-A that renewal of the certificate of registration of a society is within the exclusive jurisdiction/ domain of the Registrar which term includes Asstt. Registrar Firms, Societies and Chits. The power to renew a certificate of registration being expressly and exclusively conferred upon the Registrar, the Registrar would be deemed to possess*

1998

C/M, Sri Janta Audyogik Vidyalaya, Kanpur
Dehat & anr.
Vs.
Dy.Registrar, Firms Societies and Chits, Kanpur
And others.

O.P. Garg,J.

all incidental and ancillary powers as may be considered necessary for an effective exercise of the power under S. 3-A of the Act."

10. It is no use to refer to the plethora of decisions on the point as it would unnecessarily burden this judgment. The fact remains that so far as renewal of certificate of the society is concerned, it can be done by the Registrar and Prescribed Authority has nothing to do with it and, therefore, the order of Deputy Registrar – respondent no. 1, insofar as it allowed the proceeding for renewal of certificate of registration initiated and culminated in the order of renewal for a specified period at the instance of Shiv Lal Singh- respondent no. 3, warrant no interference as apparently, the Dy. Registrar has committed no illegality. It is not in all the cases that the Dy. Registrar is bound to refer the dispute u/s 25 to the Prescribed Authority. In the absence of a reference by the Dy. Registrar, the petitioners may also go in for a reference provided they are in a position to muster the strength of one fourth of the members of the registered society. S. 25 itself contemplates that independent of a reference by the Registrar, a reference may be made by at least one fourth of the members of the registered society.

11. The submission of Sri Ashok Khare that the impugned order is vitiated on account of non-observance of principles of natural justice is wide off the mark. As a matter of fact, the petitioners Committee filed objections before the Dy. Registrar and had the occasion and opportunity to place material in support of their objections. The petitioners availed the full opportunity of hearing. Even, otherwise, in matters, where observance of principles of natural justice would have made no difference and the admitted or undisputed or unrefutable facts speaking for themselves lead to a situation where only one conclusion is possible under the law, issuing of a writ to compel the observance of natural justice is not at all called for. In my view, firstly it is not a case in which principles of natural justice have been violated and secondly, even if it be so, a writ shall not issue for the mere asking of the petitioners as the impugned order does not suffer from any illegality and was passed after consideration of the material available on record. Consideration of the material on record itself by the concerned authority in some cases fulfils the requirement of the principles of natural justice. In this behalf, a reference may also profitably be made to a recent decision of this court in Writ Petition No. 15117 of 1998 – Committee of Management, Anujuman Moin –ut-Tulaba,

Bulandshahr Vs. Dy. Registrar, Firms Societies and Chits, Meerut and others decided on 3.8.1998, wherein a similar view has been taken by this Court.

12. In conclusion, there is no justification, whatsoever, to interfere with the impugned order dated 18.8.1997, Annexure 7 to the writ petition, passed by the Dy. Registrar, Firms, Societies and Chits, Kanpur, respondent no. 1.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 19.08.1998

1998

August, 19

BEFORE
THE HON'BLE J.C. GUPTA, J.

Civil Misc. Writ Petition No.20152 of 1989

M/s Bata India Ltd. ...Petitioner--Tenant
Versus
IInd A.D.J. II, Gorakhpur & another ...Respondents

Counsel for the petitioner : Sri H.N. Mehrotra
: Sri R.S. Saxena
: Sri S.N. Verma
Counsel for the respondents : Sri O.P. Misra
: Sri S.C.
: Sri M.A. Qadeer

U.P. Urban Building (Regulation of letting and Renting) Act 1972—S—34(6)—Affidavit sworn before Notary and not before Oath Commissioner—whether is admissible in evidence ?—held—yes—provisions of S—34(6) are enabling Provision-being Procedural in nature has to be interperated in such a way so as to advance justice-Technicalties not to be allowed to come in the way dispensation of justice. (Para 4 and 5)

Case law discussed
1982 A.L.J. 642

By the Court

This is tenant's writ petition.

1998

M/s Bata India Ltd.
Vs.
A.D.J. II, Gorakhpur & others

J.C.Gupta, J.

1. Heard petitioner's counsel Shri S.N. Verma and Shri M.A. Qadeer, counsel appearing for the contesting respondent.

2. It appears that an application for release was made by the contesting respondent landlord under section 21(1) (a) of the U.P. Act No. 13 of 1972, hereinafter referred to as the Act. The petitioner is undisputedly tenant in the disputed accommodation for the last many years and has been using the accommodation in question as its godown. The landlord in the release application based his claim on the ground that as he was in service and posted at Mokamah, his wife and children were residing in his ancestral house at Gorakhpur and because of family partition they required the disputed accommodation for their residential purpose. The claim of the landlord was contested by the petitioner on a number of grounds, one of them being that the accommodation in question is not at all suited for residential purpose, being in the shape of a tinshed godown only. The Prescribed Authority rejected the landlord's application for release accepting the plea of the petitioner. The landlord filed appeal under section 22 of the Act before the District Judge and during the pendency of the same, an application for amendment of release application was made on behalf of the landlord and the same was allowed, whereby certain additional facts were brought on record such as that the landlord has resigned and left the service and after that he has shifted to Calcutta temporarily and in the meantime his mother died and, therefore, in view of the changed circumstances he wanted to shift to Gorakhpur to settle there with his family and for that reason, the disputed accommodation was bona-fide required by him and his family. The landlord also filed evidence in support of the alleged developments. The tenant filed objections/written statement supported with an affidavit wherein the claim made by the landlord was denied and it was specifically pleaded again that the accommodation in question was not suitable for residential purpose. It was further stated that the landlord has permanently settled at Calcutta where he was also running a business and, therefore, his claim that he would come to Gorakhpur to settle there permanently was incorrect and not bona-fide.

3. The lower appellate court allowed the appeal of the landlord by the impugned order dated 7.8.89 which has been challenged in this writ petition.

1998

M/s Bata India Ltd.
Vs.
A.D.J. II, Gorakhpur & others

J.C.Gupta, J.

4. Learned counsel for the petitioner contended that the lower appellate court has misdirected itself in not taking into consideration the affidavit filed on behalf of the tenant petitioner in support of its defence solely on the ground that the said affidavits were inadmissible as they were sworn before Notary and not before the Oath Commissioner. According to the submission made by Sri Verma, counsel for the petitioner, the non-consideration of the said affidavits has resulted in great miscarriage of justice and the petitioner has been greatly prejudiced and for this reason alone the finding of fact recorded by the appellate authority is vitiated in law as the said finding has been arrived at on consideration of evidence of one side only. In support of submission reliance has been placed on the decision in the case of Kashi Nath Srivastava Vs. Mrs. G.S. Tewari and others 1982 AIJ 642. In this case the question raised was whether the affidavits sworn before the Notary are not admissible in evidence and could not be taken into consideration because of the language used in section 34(6) of the Act. Hon'ble K.N. Goyal, J. examined the matter thoroughly and answered the question saying that the provision of section 34(6) was merely an enabling provision and it could not shut out an affidavit sworn before a Notary which in any case would have been admissible even without any express provision in that behalf. Section 34(6) does not exclude consideration of affidavits sworn before the Notary. Learned counsel for the respondents on the other hand argued that where something is required to be done in certain manner it has to be done only in that manner or not at all and all other modes get necessarily excluded. He submitted that a specific procedure of swearing of affidavit has been provided in section 34(6) of the Act and therefore the swearing of the affidavits has to be done in that manner alone and not otherwise and since section 34(6) does not speak of swearing of affidavits before Notary, any affidavit sworn before such an officer cannot be read in evidence in proceeding under the Act. It would appear from the decision in Kashi Nath's case (Supra) that a similar argument was also made before the Court, but the same was rejected by the learned Judge holding that the aforesaid principle is applicable primarily in relation to exercise of statutory powers by public authorities and is more rigidly enforced in cases where power is of drastic nature but even in regard to exercise of public powers, the rule is not of universal application. No rule of public policy can be imagined for exclusion of affidavits sworn before the Notary from proceedings under the Act. The provision contained in section 34(6) of the Act being procedural in nature has to be interpreted in such a way so as to advance justice and facilitate to meet its end and court should not

take a very strict, technical and narrow view. What was required to be seen in such matters was whether there has been substantial compliance of the provisions or not. In view of the aforesaid decision and also having regard to the scheme of the Act, the affidavits sworn before the Notary cannot be excluded from consideration by the authorities acting under the provisions of the Act. The appellate authority, therefore, in the present case committed a manifest error of law in not considering the affidavits filed on behalf of the petitioner simply on a technical ground. It could not be disputed from the respondent's side that the affidavit filed on behalf of the petitioner were very material having a hearing on the issues involved in the case. It is well established law that non-consideration of material evidence which goes to the root of the matter in controversy vitiates even a finding of fact recorded by the court below and in such cases this Court has the power to interfere.

1998

M/s Bata India Ltd.
Vs.
A.D.J. II, Gorakhpur & others

J.C.Gupta, J.

5. The problem involved could be viewed from another angle. If the appellate authority was of the opinion whether rightly or wrongly, that the affidavits filed by the petitioner were defective having not been sworn before the Oath Commissioner, it should have either rejected them before the judgment or should have asked the petitioner to remove those defects. However, the lower appellate authority proceeded to reject the same only in the judgment where by the petitioner's rights were greatly prejudiced. It is well known that the rules of procedure are meant to subserve and not to govern the cause of justice. Technicalities should not be allowed to come in the way of dispensation of justice. The maxim "Jus Summun Saepa Summa Est Malitia" suggests that law strictly enforced sometimes becomes the severest injustice.

For the reasons stated above, the impugned judgment of the appellate authority cannot be sustained.

6. The writ petition is allowed. The judgment of the appellate authority dated 7.3.89 is quashed and the case is sent back to the appellate authority to decide the appeal afresh in accordance with law and in the light of the observations made above. Since the matter has been pending since 1985, the appellate authority shall make every endeavour to decide the appeal expeditiously preferably within two months from the date a certified copy of this order is produced.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 20.08.1998

1998

August, 20

BEFORE
THE HON'BLE D.K. SETH, J.

Civil Misc. Writ Petition No.25478 of 1998

Smt. Neeta Andrews ...Petitioner
Versus
B.S.A., Bulandshahr & another ...Respondents

Counsel for the petitioner : Sri Prakash Gupta
Counsel for the respondents : Sri Sudhakar Upadhyay

Constitution of India, Article 226—Scope of writ jurisdiction—Petitioner's claim as Incharge Head Mistress Partly allowed by the Tribunal subsequently affirmed by High Court—Subsequent writ petition for benefit of award—amount to execution of Tribunal order—held—writ petition not maintainable in view of provisions of section 5(7) of the Act. (Para 6 and 8)

By the Court

1. One Smt. Paliwal was appointed as Incharge Head Mistress of the School by the order dated 17th May, 75. The petitioner had challenged the said appointment on the ground that she is legally entitled to be appointed as Incharge Head Mistress as well as on account of her qualification as regular Head Mistress. The claim petition was allowed in part in the manner following :-

> "In the circumstances, the claim petition is partly allowed. The impugned order dated 17.5.1975, passed by the Basic Shiksha Adhikari appointing Smt. Paliwal, opposite party no.3 as Incharge Head Mistress, is declared in effective being without jurisdiction and is quashed. The petitioner is also declared to be the Incharge Head Mistress as of the Senior Basic Balika Vidyalaya, Devai with effect from 30.6.1972 but the opposite party no.1 is directed to hold

the selection for the post of Head Mistress expeditiously in accordance with the rules and consider the claim of the petitioner also for the post the plea of granting arrears to any of the petitioner treating her as regular Head Mistress is, however, rejected."

2. This order was challenged by Smt. Paliwal in Writ Petition No. 5029 of 1980. The said writ petition was disposed of by an order dated 17th June, 97 by dismissing the writ petition and, thereby, affirming the order of the learned public Service Tribunal. In the said order, certain observations were made, which may be quoted herein below:-

"In that view of the matter, I am not inclined to interfere with the impugned order of the Tribunal. The writ petition therefore, fails and is accordingly dismissed. There will be however no order as to costs."

However, it is observed that the question of seniority, which was not subject matter in the claim petition before the Tribunal shall remain open to be decided in accordance with law in between the parties in future.

The fact remains that a stop gap arrangement appears to continue till today. It is a matter of grant regret that the result of regular selection has not been declared. The direction contained in the order of the learned Tribunal quoted above with regard to selection should be implemented forthwith."

3. After the said order was passed, the petitioner moved an application on 9th September, 97 claiming the following reliefs :-

"Under the circumstances, it is therefore, prayed that this Hon'ble Court may be pleased to pass appropriate orders directing the respondents to treat the respondent/applicant as regular Head Mistress of Sr. Basic Girls Junior High School Devai, District Bulandshahr and pay her service emoluments

1998

Smt. Neeta Andrews
Vs.
B.S.A., Bulandshahr & another

D.K.Seth, J.

as such including the arrears w.e.f. 1.7.72 till upto now and direct the respondents not to hold further selection on the post.

An in alternative, be pleased to direct the Zila Basic Shiksha Adhikari, Bulandshahr to pay to the respondent applicant all service amoluments as Head Mistress w.e.f. 1.7.72 till upto now and continue to pay the same every month till she hold the post of Head Mistress, including annual increments, pay revision etc."

The said application was dismissed with the following observations:-

"A perusal of the aforesaid prayer indicates that such relief cannot be granted by this Court after the writ petition was disposed of by order dated 17.7.1997, on the Basic of this to recall the order dated 17.7.1997. On the other hand, same relieves, which are being claimed in this application, can be claimed in writ petition. Such relief cannot be granted in this petition as no review of the order dated 9.9.1997 is sought for.

The application fails and is accordingly dismissed."

Now a fresh writ petition has been filed by the petitioner claiming the following relieves:-

"(i) issue a writ, order or direction in the nature of mandamus commanding the respondents that the petitioner is entitled to the post of Regular Head Mistress in Senior Balika Vidyalaya, Dewai, District Bulandshahr w.e.f. 14.5.1979 or 29.5.1980 as the case may be, and also entitled to her amoluments as Head Mistress.

(ii) issue a writ, order or direction in the nature of mandamus commanding the respondents to treat the petitioner as having

1998

Smt. Neeta Andrews
Vs.
B.S.A., Bulandshahr & another

D.K.Seth, J.

been appointed regular Head Mistress of the Institution from the date on which the selection committee submitted its report.

(iii) any other suitable, writ, order or direction which this Hon'ble Court deems just and proper in the circumstances of the case.

(iv) allow the writ petition of the petitioner with cost throughout."

I have heard Mr. Prakash Gupta, learned counsel for the petitioner at length.

5. It appears that the relief which the petitioner had claimed in the claim petition before the U.P. Public Services Tribunal, was partly allowed. The said order of the Tribunal has been affirmed by this Court. The petitioner could not have claimed any relief, which she had asked for by means of her application dated 9th September, 97 in a writ petition filed by Smt. Paliwal particularly when the petitioner was not aggrieved by the order of the learned Tribunal, which was the cause of action for the earlier writ petition filed by Smt. Paliwal in this writ petition, no fresh cause of action has been pleaded. On the other hand, the very cause of action on which the claim petition had proceeded, has been sought to be achieved through this fresh writ petition. The petitioner having an order in her favour passed by the learned Tribunal, cannot ask for any further order from this Court. The court is not supposed to pass infructuous orders nor it can go on repeating its orders. If there is no scope for the petitioner being aggrieved by the order of the learned Tribunal, in that event she cannot claim to have any cause of action in maintaining such writ petition before this court.

6. Section 5 sub-section (7) of the U.P. Public Services (Tribunal) Act, 1976 provides "that the order of the Tribunal finally disposing of a reference shall be executed in the same manner in which any final order of the State Government or other authority or officer or other person comp-etent to pass such order under the relevant service rules as to redrossal of grievances in any appeal preferred or representation made by the claimant in connection with any matter relating to his employment to which the reference relates would have been executed." The Tribunal is also empowered to exercise the powers conferred on the High Court under the Contempt

1998

Smt. Neeta Andrews
Vs.
B.S.A., Bulandshahr & another

D.K.Seth, J.

of Courts''Act, 1971 by virtue of section 5A of the said Act, which provides "that the Tribunal shall and exercise, jurisdiction, powers and authority in respect of contempt of itself as the High Court has, and may exercise, in respect of contempt of itself, and for this purpose the provisions of the Contempt of Court Act, 1971 shall, mutaties mutandis, apply subject to the following modifications, contained in clauses (a), (b) and (c) thereof. Such moficications were incorporated only to enable the application of the Contempt of Courts' Act,1971 mutatis mutandis so far as the Tribunal is concerned.

Thus it appears that the Tribunal was capable of executing in award if occasions so arises.

7. Learned counsel for the petitioner Mr. Prakash Gupta though had alleged that despite the order of the Tribunal and that of this Court dated 17th July, 97 passed in the earlier writ petition, the respondents did not take steps for implementing the award of the Tribunal. Therefore, he has filed this writ petition seeking a mandamus so that the relief sought for by the petitioner can be granted.

8. It appears that the relief sought for can very well be obtained through the execution/ implementation of the award of the learned Tribunal. By no stretch of imagination, the jurisdiction under Article 226 of the Constitution could be stretched for the purpose of execution of the award of the Public Service Tribunal subordinate to the High Court. The High Court cannot be treated to be an executing court for the purpose of execution of an award passed by a subordinate Tribunal. Though it was not so submitted by Mr. Gupta but the effect of issuing a mandamuse in the present writ petition would be that of executing the award of the Tribunal. Though Mr. Gupta has coined his submission in such manner to avoid such interpretation but if one delves deep into his submission having regard to the facts and circumstances of the case that in the guise of issuing mandamus, the High Court will be in effect executing the award of the learned Tribunal. Therefore, the writ jurisdiction cannot be utilized for such an oblique purpose if there are specific remedy available and open to the petitioner in obtaining the award executed.

9. Since the Tribunal itself is capable of executing its own award, therefore, the petitioner ought to have approached the Tribunal or should have taken steps for getting the award of the

Tribunal executed in the manner provided in Section 5 sub-section (7) or such other manner as is provided under law and as the petitioner may be advised to take resort to.

1998

Smt. Neeta Andrews Vs. B.S.A., Bulandshahr & another

D.K.Seth, J.

10. Nowhere in the writ petition, it is alleged that the petitioner had taken any steps to get the award implemented in any manner whatsoever. On the other hand, it is being contended that the respondents despite the existance of the award and the order of this Court passed on 17th July,97, has not taken any steps. The momonent the award is affirmed, the award becomes executable finally since the order of the Tribunal becomes final by the affirmation of the said order and becomes capable of being executed. Therefore, it was open to the petitioner to apply for execution of such award instead of repeatedly coming to this Court and seeking to invoke writ jurisdiction on the same cause of action time and again through inappropriate process or in other words, in abuse of process.

11. In such circumstances, as observed above, the writ petition is not maintainable and is liable to be dismissed. It is, accordingly dismissed. No costs. This order, however, will not prevent the petitioner from getting the award executed in accordance with law. If the petitioner approaches the authority or the forum, as the case may be, and takes steps for execution of the award according to law, the same may be decided expeditionary.

Let a copy of this order be issued to the learned counsel for the parties on payment of usual charges within a week.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 17.08.1998

1998

August, 17

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE BHAGWAN DIN, J.

Civil Misc. Writ Petition No.18399 of 1993

Km. Manisha Dubey **...Petitioner**

Versus

State of U.P. & others **...Respondents**

Counsel for the petitioner : Sri S.P. Singh
Counsel for the respondents : S.C.
: Sri S.M.A. Kazmi
: Sri V.D. Dubey

Constitution of India, Article 226—Regularisation Part-time appointment as lecturer in Music (vocal) on fixed salary—without approval of Vice Chancellor whether such appointment is covered by the expression of "Teacher" as envaisagged under section 60-A of the U.P.State Universities ? held—"No" question of regularisation and payment of salary does not arise. (Para 7)

By the Court

1. Heard Sri S.P. Singh, learned counsel appearing for the petitioner and Sri S.G. Husnain, learned Addl. Chief Standing Counsel representing the respondents no. 1,2, 3 and 5, at length and in detail.

2. By means of this petition under Article 226 of the Constitution of India, the petitioner prays that her services on the post of lecturer in Music (Vocal) at Kamla Arya Kanya Degree College, Mirzaput be regularised. Further prayer of the petitioner is that the respondents may be commanded to pay to her salary alongwith arrears and other dues.

1998

Km. Manisha Dubey
Vs.
State of U.P. & others

D.S.Sinha, J.
Bhagwan Din, J.

3. Petitioner claims that she was appointed as lecturer by the order of the managing committee dated 23rd June,1982, a copy whereof is Annexure-2 to the writ petition.

4. A counter affidavit on behalf of respondent no.1, 2, 3 and 5 has been filed. A copy of this counter affidavit was served on the learned counsel representing the petitioner on 15th December, 1993. More than four and half years have elapsed. But, the petitioner has not filed any rejoinder affidavit rebutting the averments made in the said counter affidavit.

5. From the perusal of the uncontroverted averments made in the counter-affidavit, it transpires that one Sri O.P. Malik was lecturer in Music (Vocal) at the College. The management of the College vide its resolution dated 30th April, 1981 decided to terminate the services of Sri Malik and sought the approval of the Vice-Chancellor of the Gorakhpur University to which the College is affiliated. Vice-Chancellor did not agree with the decision of the managing committee and vide his order dated 21st April, 1982 disapproved the resolution of the managing committee terminating the services of Sri Malik. The managing committee went up in appeal before the Chancellor. The Chancellor also did not approve the proposal of the managing committee to terminate the services of Sri Malik and affirmed the order of the Vice Chancellor dated 21st April, 1982 disapproving the resolution of the managing committee proposing to terminate the services of Sri Malik. In the interregnum the petitioner was given a part time appointment on the post of lecturer Music (Vocal) on a fixed salary of Rs.500/-.

6. As a consequence of disapproval of the resolution of the managing committee proposing to terminate his services Sri Malik had to be reinstated on the post and the petitioner had to give way. From the record, it appears that the petitioner was at no point of time appointed on the post of lecturer in Music (Vocal) substantively or on adhoc basis. On the contrary, her appointment was made as a part-time lecturer on a fixed salary.

7. Clearly enough, the petitioner is not covered by the definition 'teacher' provided in Section 60-A of the U.P. State Universities Act, 1973, which is a condition precedent for her entitlement to regularisation and claim of salary. In the counter-affidavit, it is asserted that there is no other post except one which was held by Sri Malik. It also transpires that the appointment of the petitioner was never approved by the Vice Chancellor. The petitioner

being not covered by the expression 'teacher' the question of her regularisation and payment of salary does not arise. Her claim in that regard is misconceived.

8. On the facts and circumstances noticed above, the court is of the opinion that the petitioner is not entitled to any relief from this court.

In the result, the petition fails and is dismissed. The interim order dated 24th May, 1993 is vacated.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 10.08.1998

1998

August, 10

BEFORE
THE HON'BLE D.K. SETH, J.

Civil Misc. Writ Petition No.23700 of 1998

M/s Farukhi Glass Industries ...Petitioner
Versus
Regional Provident Fund Commissioner &others ...Respondents

Counsel for the petitioner : Sri S.K. Srivastava
Counsel for the respondents : S.C.
: Sri S. Chaturvedi

Constitution of India, Article 226—Alternative Remedy—order passed under section 7A(1)(b) of the Employees Provident Fund and Miscellaneous Provision Act 1952—Sub Section (4) of section 7-B of the Act specifically provides for review apart from Right of Appeal under section 7(1) of the Act—held—Writ petition can not be entertained. (Para 7 and 8)

By the Court

1. The petitioner has challenged an order passed under Section 7A of the Employees' Provident Fund and Miscellaneous

1998

M/s F.G.I.
Vs.
R.P.F.
Commissioner
Kanpur
& others

D.K.Seth, J.

Provisions Act, 1952, contained in Annexure 1 to the writ petition, being dated 2nd June,98. Learned counsel for the petitioner Mr. S.K. Srivastava contends that the said order for determination of the amount has been undertaken in view of the Circular dated 24th December, 97. From the face of the order, it appears that the said order does not conform to the said Circular dated 24th December,97, which is Annexure II to the writ petition as such the order is per-se illegal, and therefore, it should be set aside. Accordingly, he contends that while calculating the amount, the authorities have taken into account identified class of employees irrespective of the facts whether they were in service or they are in service, who have not been enrolled as Provident Fund Members due to amendment in paragraph 26 of the Employees' Provident Fund Scheme,1952. According to him, those who had left the service, their case cannot be included within the calculation by virtue of the provisions contained in the said Circular. Therefore the said order impugned, contained in Annexure, I should be quashed.

2. Mr. Satish Chaturvedi, learned counsel for the respondents on the other hand contends that the order being an order passed under Section 7A(I) of the said Act, is appelable. As such on account of alternative remedy, the petition is not maintainable. Whether persons who had left service or not or enrolled or not have been included or not, are disputed questions of fact, which cannot be gone into in writ jurisdiction. Therefore, writ petition should be dismissed.

3. I have heard learned counsel for both the parties. In my view, it appears that on account of existence of an alternative remedy, this writ petition may not be entertained by this Court. Therefore, it is not necessary to go into the merits of the case. All points taken in this writ petition, are being kept opened for being agitated before the proper forum.

4. From the scheme of the Act, it appears that the order passed is an order under Section 7A(I) (b) of the said Act, clearly determining the amount due from the employer under the provisions of the Act, and the Scheme as the case may be. Here in these orders, amount due from the employer in respect of the identified class of employees have been determined. If there is any infraction, the same is question of merit, based on facts, which can be gone into before the appropriate authority. Sub Section (4) of Section 7A of the said Act itself provides that in case of an ex-parte order, a remedy is provided for setting aside an ex-parte order on the grounds

1998

M/s F.G.I.
Vs.
R.P.F.
Commissioner
Kanpur
& others

D.K.Seth, J.

mentioned in the said sub section. Therefore, there is an existence of in-built safeguard provided in the section itself.

5. In the present case, as it appears from the order itself, the same was passed exparte, which is also one of the ground agitated by Mr. Srivastava, counsel for the petitioner. Mr. Chaturvedi, however, contends that this ground, though advanced from the Bar, has not been specifically taken in the writ petition.

6. Be that as it may, the order itself shows that this is an ex-parte order. If the petitioner is so advised, he can take this ground as well, which is kept opened for being decided by the appropriate forum, if so agitated by the petitioner.

7. Apart from sub-section (4) of Section 7A, section 7B also provides for another remedy available to the petitioner, through which, the petitioner can assail the said order on the ground that certain material facts, which could not be discovered by the petitioner at the point of time show the order was made and therefore the order can also be decided reviesed by reason of the ground provided therein.

8. Then Section 7(I) itself provides for a regular appeal against an order passed under Section 7A (1) or an order passed u/s 7B. Sri Srivastava, however, very fairly concedes that there is a remedy open by way of appeal. But according to him, the order is per-se illegal. Therefore, he cannot be thrown to the remedy available by way of appeal. This is a case fit for being entertained by this Court in writ jurisdiction, is one of his contention.

9. I am afraid that such a contention can be entertained in view of three remedies as indicated above, being opened to the petitioner. If there is a course of regular appeal opened, the same cannot be ignored and overlooked. The alternative remedy that has been provided in the Act itself, appears to be offication adequate alternative remedy. Then again in the present case, the question that falls for determination, being a disputed question of fact, as to whether identified class of employees are either enrolled or not or whether their case could be included in the calculation or not, is surely a disputed question of fact, which cannot be decided in writ jurisction.

10. For all these reasons, this writ petition is dismissed on account of alternative remedy, keeping all points opened to be agitated before the appropriate forum, as the petitioner might be advised.

The petition is, thus, dismissed on the ground of alternative remedy.

Petition Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD, 01.09.1998

1998

September, 1

BEFORE
THE HON'BLE S.K. PHAUJDAR, J.

Criminal Misc. Application No.2918 of 1998

Smt. Anand Kumari and another ...Applicants
Versus
State of U.P. & another ...Opposite parties

Counsel for the applicant : Sri P.N. Tripathi
Counsel for the Opp. parties : A.G.A.

Section 319 Cr.P.C.—the powers under section 319 Cr.P.C. should be SPARINGLY used and that too for compelling reasons. If on one point of time a particular evidence is not acted upon, it may not be proper for the court at the subsequent stage to record an order contrary to the earlier order on the basis of the verbatam the same evidence.

By the Court

The matter was heard on 6.8.1998 and orders had been reserved, which is being pronounced today. There had been a direction on 6.8.1998 that till orders were recorded, further proceedings in case Crime No. 1218 of 1996, pending before the C.J.M., Mirzapur, would remain stayed.

1998

Smt. Anand Kumari & another
Vs.
State of U.P. & another

S.K. Phaujdar, J.

By an order of the C.J.M., Mirzapur, dated 7.1.1998 the present applicants were summoned for an Offence under Section 380, I.P.C. in purported exercise of the powers of the Magistrate under Section 319, Cr.P.C. The aggrieved applicants moved a Criminal Revision No. 16 of 1998 before the Sessions Judge, Mirzapur, and the revision application was dismissed on 13.7.1998.

A complaint was filed by one Rajendra Kumar before the C.J.M., Mirzapur, for an offence under Section 379, I.P.C. on 8.4.1996 for an incident that allegedly took place on 21.3.1996. The complainant and his witnesses were examined under Sections 200 and 202, Cr.P.C. and upon those statements the Magistrate recorded an order dated 26.9.1996 under Section 203, Cr.P.C. dismissing the complaint against the present applicants, but one Om Prakash son of applicant no.1 was summoned for an offence under Section 380, I.P.C. This order was not challenged at any point of time before any forum and, accordingly, the order attained finality. The trial against Om Prakash proceeded before the court below and during the course of trial statements of the witnesses were recorded under section 244, Cr.P.C. At that stage, an application was filed under Section 319, Cr.P.C. for summoning the accused applicants on the basis of the statements made in court and the Magistrate did record the order dated 7.1.1998 in exercise of his powers under Section 319, Cr.P.C. and he summoned the present two applicants. Only thereafter the revision application, as stated above, was preferred and was dismissed on 13.7.1998.

The order of the Magistrate, as confirmed by the Sessions Judge, was challenged mainly on two grounds. It was stated that the Magistrate, after discharging the present applicants at an earlier stage, would not have taken recourse to Section 319, Cr.P.C. as that power could be exercised against a person who was not an accused, while the present applicants were very much accused persons before the court below, albeit discharged. It was also contended that the statements made by the witnesses under Section 244, Cr.P.C. were verbatim the same as were made under Sections 200 and 202, Cr.P.C. and when these very statements were once disbelieved or thought not sufficient for issuance of summons, the same would not have been acted upon at a subsequent stage.

So far the first point is concerned, the learned counsel placed reliance on a decision of the Supreme Court as reported in A.I.R. 1990 S.C. 2158 (Sohan Lal and Others Vs. State of Rajasthan). Two

1998

Smt. Anand Kumari & another
Vs.
State of U.P. & another

S.K. Phaujdar, J.

Hon'ble Judges of the Supreme Court had before them a case in course of a criminal appeal against a judgment of the Rajasthan High Court. In that matter one Shanti Lal had lodged a report before police against four persons for having pelted stones at his house causing damage and causing injuries to certain persons. Police submitted charge-sheet for offences under Sections 147/323/325/336/427, I.P.C. and the Magistrate, after taking cognizance and after hearing the arguments, discharged two persons of all the charges levelled against them and directed framing of charge under Section 427 I.P.C. only against some others. Subsequently, the Assistant Public Prosecutor submitted an application for amendment of charge under Section 216, Cr.P.C. in view of the evidence that was led in the case. The Magistrate took fresh cognizance for offences under Sections 147/427/336/323/325, I.P.C. not only against three persons standing trial, but also against the other two, who were discharged after hearing.

The Hon'ble Judges engaged themselves to the proper interpretation of Sections 216, 319 and 398, Cr.P.C. and were of the view that the discharge, as aforesaid, was not one under Section 203, Cr.P.C. The order of discharge could have been challenged in a revision and, if so challenged, it could not have been disposed of without hearing the person so discharged. It was observed that Section 319, Cr.P.C. could not have been taken recourse to circumvent the bar under Section 398, Cr.P.C.

The learned State Counsel relied on an earlier decision of the Supreme Court as reported in 1983 S.C.C. (Crl.) 115 (Municipal Corporation of Delhi v. Ram Kishan Rohtagi and others). It also dealt with the power of the High Court under Section 482, Cr.P.C. read with Section 319, Cr.P.C. and it was held that this Section 319 was really an extra-ordinary power that was conferred on the Court and was to be used sparingly and if compelling reasons existed for taking cognizance against other persons against whom action had not been taken. The Supreme Court observed that if the prosecution at any stage produced evidence which satisfied the court that the other accused or those who have not been arrayed as accused, against who proceedings had been quashed, had also committed the offence, the court could take cognizance against them and try them along with the other accused. The Supreme Court observed that the mere fact that the proceedings had been quashed under Section 482, Cr.P.C. against some of the accused persons would not prevent the court from exercising its discretion if it was fully satisfied that a case for taking

1998

Smt. Anand Kumari & another
Vs.
State of U.P. & another

S.K. Phaujdar, J.

cognizance against them had been made out on the additional evidence led before it.

The decision of the Supreme Court in the case of Municipal Corporation of Delhi (supra) was referred to in the latter judgment of the Supreme Court in the case of Sohan Lal (Supra) and was not overruled. It was submitted, however, on behalf of the applicants that if at all there be any conflict between the two decisions of the Supreme Court given by Benches of equal strength, the decision of the latter Bench would be binding. Reliance on this point was placed on a Full Bench decision of the Allahabad High Court in the case of Gopal Krishna Indlev V. V Addl. District Judge, Kanpur and others as reported in A.I.R. 1981 Allahabad 300. On the question of binding nature of precedence, it is felt that the subsequent judgment of the Supreme Court, if at all it was in conflict with the earlier judgment, would be taken to be the law of the land. Thus, the judgment in Sohan Lal's case (supra) would have a binding effect as precedent on the ratio enunciated therein. The facts of the case, however, must tilt the view of this Court in favour of the present applicants.

To recapitulate in brief, it may be indicated that after the complaint was filed by respondent no. 2, the witnesses were examined and upon those statements only the Court declined to proceed against Anand Kumari and Baby. The copies of the statements made before the court during trial and those made before the court under Section 200 and 202, Cr.P.C. have been submitted before this Court to say that they were verbatim the same. If at one point of time a particular evidence is not acted upon when the court was to look only for a prima facie material, it may not be proper for the court at a subsequent stage to record an order contrary to the earlier order on the basis of verbatim the same evidence. Even the case law relied upon by the State Counsel requires that the power under Section 319, Cr.P.C. should be sparingly used and that too for compelling reasons. Viewing from this angle and being aware of the fact that the records are not before this court and the complainant should also be heard in the matter, it is felt that the order of the Magistrate and the consequential order of the Revisional Court should be quashed and the matter should be sent down to the court below to see and compare if the two sets of statements made under Section 200 and 202, Cr.P.C. and dureing trial were same, so far the present two applicants are concerned. If so, then certainly it would not be a case of compelling reason for an action under Section 319, Cr.P.C.

In view of above, the application stands allowed. The orders of the Magistrate and that of the Sessions Judge, dated 7.1.1998 and 13.7.1998 respectively, are quashed. The matter is sent back to the Trial Judge, who will proceed according to the directions given above and if the statements made in the course of trial made the same allegations against the present two applicants as were made during the stage of Sections 200 and 202, Cr.P.C., the Magistrate will not exercise his powers under Section 319, Cr.P.C. for summoning the present two applicants.

Application Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD, 04.09.1998

BEFORE
THE HON'BLE D.P. MOHAPATRA, C.J.
THE HON'BLE R.R.K. TRIVEDI, J.

1998

September, 4

Habeas Corpus Petition No.14673 of 1998

Moradhawaj **...Petitioner**

Versus

D.M., Kanpur Nagar and others **...Respondents**

Counsel for the petitioner : Sri Prashant Kumar Singh
Counsel for the respondents : Addl. Standing Counsel
: A.G.A.

Article 226 of the Constitution of India/Section 3(2) of the National Security Act, 1980—Inordinate and unexplained delay on the part of the Central Govt. in disposing of the representations of the petitioner has rendered his detention illegal and arbitrary representations remained pending with the Central Govt. for more than 6 months for which there was no explanation offered by the Central Government.

By the Court

In this petition, filed under Article 226 of the Constitution the petitioner Moradhwaj son of Jagmohan has prayed for issuance of a writ of certiorari quashing the detention order passed by the District

1998

Moradhawaj
Vs.
D.M.,
Kanpur
& others

D.P.
Mohapatra,CJ
R.R.K.
Trivedi, J.

Magistrate, Kanpur Nagar, respondent no.1 on 28.1.1998 (Annexure 1) under section 3(2) of the National Security Act, 1980 (hereinafter referred to as the Act) and for a writ of habeas corpus directing the respondents to release the petitioner forthwith.

The factual back drop of the case leading to the present proceeding may be shortly stated thus: On an occurrence, which took place on 30t^{h} of December, 1997 at 9.40 A.M. in the compound of the Medical College, a first information report (Annexure 5) was lodged in Swarupnagar Police Station of Kanpur Nagar same day at 10.25 A.M. by one Roop Kishore Kanaujia. On the basis of the said first information report Case Crime No. 286 of 1997 under sections 147/148/149/307/427 was registered. The petitioner was one of the culprits named in the first information report. He was arrested on 2.1.1998 by the police in the aforementioned case and detained in Kanpur Nagar Jail. While he was in jail custody he was served with the order of the respondent No. 1 (Annexure 1) directing his detention under section 3(2) of the Act. The grounds of detention (Annexure 2) were also served on the petitioner along with the detention order. The order of detention was approved by the State Government on 7.2.1998 (vide the order Annexure 4) and the said order was served on the petitioner on 13.2.98. The petitioner submitted representations (Annexure 6) against the detention order on 2.2.1998 to the State Government, the Central Government and the Advisory Board through the Superintendent Jail, Kanpur Nagar. In paragraph 9 of the petition the petitioner has alleged "That till today no communication was given to the petitioner about the orders passed by the State Government on the representation dated 2.2.1998. Hence detention order becomes illegal". In paragraph 11 of the petition, the petitioner has averred "That till today, no communication was given to the petitioner about the order, if any, passed on representation dated 2.2.1998 passed by Central Government. Hence detention order cannot be continued." The report of the Advisory Board was received by the State Government on 11.3.1998. By the order dated 23.3.1998 (Annexure 7) the State Government confirmed the order of detention.

In the grounds of detention it is averred, inter alia, that on 30.12.1997 at about 9.40 A.M. when Sri Roop Kishore Kanaujia entered the Medical College Compound through the rear gate and moved a little the petitioner and his companions, who were armed with country made pistols, bombs, revolvers reached there in a Maruti car Hero Honda Motorcycle, scooter, sorrounded the vehicle

1998

Moradhawaj
Vs.
D.M.,
Kanpur
& others

D.P.
Mohapatra,CJ
R.R.K.
Trivedi, J.

of Sri Kanaujia from all sides, attacked him with bombs and fire arms, due to which Sri Kanaujia and his companions, who were in the vehicle, were seriously injured and the car was badly damaged. Due to this incident there was panic amongst the persons present in the Medical College Compound, they ran heltor-skeltor distrubing free movement of traffic at the place and even tempo of life at the place was disturbed. It is further averred in the grounds of detention that when Inspector-in-charge of Swarup Nagar Police station visited the place of incident he experienced that there was an atmosphere of fear and terror, several empty cartridiges of different type (32 bore, 315 bore and 12 bore) were recovered from the scene of occurrence and that the Sub-Inspector along with police force was present at the place of occurrence. Further, the Ambassador car was found to be badly damaged due to bomb blast, broken glasses were lying scattered all over the place; on account of the incident both the gates of the Medical College Compound were closed and public order at the place was disturbed. In order to restore public order at the place extra police force had to be deployed.

It is also stated in the grounds of detention that after assessing the situation several local newspapers, like Dainik Jagran and Aaj, published news items relating to the incident under captions "Medical College Parisar Men Bambaji se dahshat, panch ghyal" and "Baloo Dhone Kee Ranjish Men Bam, Goliyon se Hamla Panch Ghayal". In the grounds of detention it is further stated that the aforementioned crime had been committed by the petitioner and his companions at a public place in broad day light in the Medical College Compound where there are residential houses of doctors, and patients from all over the town visit the Medical College and there is heavy traffic in the area. The even tempo of life in the locality was greatly disturbed. People ran heltor-skeltor. One and half Section of P.A.C. was constantly deployed there from 30.12.1997 to 8.1.1998. From the first information report, the reports of the police Officers, the materials found during the course of investigation, which were all placed before the District Magistrate, he felt satisfied that in order to maintain public order in the locality it was necessary to detain the petitioner under section 3 of the Act. It is specifically averred in the grounds of detention that the petitioner is at present detained in the district jail Kanpur Nagar in connection with Case Crime No. 286 of 1997 under sections 147/148/149/307/427 I.P.C. P.S. Swarup Nagar, Kanpur; that the petitioner has made an application for bail in the Court in that case and that there is every possibility of the petitioner being enlarged on

1998

Moradhawaj
Vs.
D.M.,
Kanpur
& others

D.P.
Mohapatra,CJ
R.R.K.
Trivedi, J.

bail in near future and in case he is enlarged on bail there is every possibility of his repeating such crimes, thereby disturbing public order. In the grounds of detention it was also stated that the petitioner may make a representation to the Advisory Board, the State Government, and the Central Government and state specifically if he would like to be heard personally by the Advisory Board.

Sri Prashant Kumar Singh, learned counsel for the petitioner, has assailed the order of detention on three grounds:

1. On the facts and circumstances stated in the grounds of detention and the documents annexed to it no case of disturbance of public order is made out; even accepting all the allegations only a case of disturbance of law and order can be said to have been made out.

2. No period of detention is mentioned either in the detention order or in the order of the State Government approving the same. It is only in the order of the State Government dated 23.3.1998 confirming the order of detention that the period of twelve months is mentioned. It is the submission of Sri Singh that non-mention of the period of detention, which is required under section 3(3) of the Act, vitiates the order of detention.

3. There has been inordinate delay on the part of the Central Government in disposing of the petitioner's representation; indeed Sri Singh submitted that till the date of hearing of the case the petitioner had not been communicated any order of the Central Government disposing of his representation.

The learned Additional Government Advocate controverted the contentions raised by Sri Singh. He contended that under the provisions of the Act neither the detaining authority in the order of detention nor the State Government in the approval order is required to specify the period of detention. It is only under section 12 of the Act that the statute mandates that the State Government while confirming the order of detention has to specify the period of detention. The said statutory provision having been duly complied with, the order of detention/approval order does not suffer from any infirmity. It is the further contention of the learned Additional

1998

Moradhawaj
Vs.
D.M.,
Kanpur
& others

D.P.
Mohapatra,CJ
R.R.K.
Trivedi, J.

Government Advocate that as stated in the grounds of detention the incident took place at a public place in side Medical College Compound, in broad day light when large number of people come to the Medical College for treatment, for rendering service in the College and the Hospital attached to it and also to the residential quarters of the staff of the College and Hospital. Referring to the manner in which the incident took place, the learned Additional Government Advocate submitted that it was a pre-planned attack on Sri Kanaujia and his companions who were inside Ambassador car. By attacking the vehicle with bombs and fire arms by the petitioner and his companions such an incident, it is the contention of the Additional Government Advocate, has the potentiality of disturbing public order, therefore, the contention of learned counsel for the petitioner that the incident in question may give rise to a situation of law and order should not be accepted. Regarding the delay in disposal of the representations of the petitioner the submission of learned Additional Government Advocate was that the State Government disposed of the petitioner's representation dated 2.2.1998 with due promptitude on 18.2.1998.

The learned Additional Standing Counsel appearing for the Union of India initially stated that he has no information or instruction as to whether the representation made by the petitioner to the Central Government has been disposed of or not; but subsequently in the course of hearing of the case submitted that he has information that the representation was disposed of on 12.8.1998 which was communicated to the petitioner on 14.8.1998.

Taking up the question whether the incident and events, as stated in the grounds of detention make out a case of disturbance of public order or only a case of affecting law and order, it is our considered view that in the facts and circumstances of the case, the incident and the place where it has occurred, make out a case of disturbance of public order attracting the provisions of Section 3(2) of the Act. The incident took place in the Medical College Compound, a public place where large number of persons assemble for the purpose of treatment; the time of the incident was at about 10.00 A.M. which is peak time for activities in the campus and a large number of persons are expected to have been present at the spot; attack on the injured persons in ruthless at the spot; attack on the injured persons in ruthless and dastardly manner by assailants by fire arms and bombs caused grievious injuries to five persons, the occupiers of the car. An incident of the type in a public place in

1998

Moradhawaj
Vs.
D.M.,
Kanpur
& others

D.P.
Mohapatra,CJ
R.R.K.
Trivedi, J.

broad day light is bound to create panic and fear psychosis in the people present at the spot and the local residents. Such an incident at a public place in which the culprits successfully assaulted persons causing grievious is reasonably expected to create a sense of insecurity in the people of the locality who expect that such a place like the Medical College campus is a place safe from criminal activities of the nature. The people naturally expected that a public place where major institutions like Medical College and Hospitals are situated is well protected by State agencies and the place is free from criminal activities. A major incident of the type, as in the present case, taking place in such a protected public place will disturb even tempo of life of the locality. Therefore, it cannot be said that the incident, as narrated in the grounds of detention, has no nexus to public order. We are not persuaded to accept the first contention raised by Sri Singh, learned counsel for the petitioner.

The next point that arises for consideration is whether the order of detention is rendered invalid for the reason that no period of detention has been specified either in the order of detention or in the approval order. It is also submitted in this connection that even in the order of the State Government approving the order detention no period is stated.

Reliance was placed on the decision of the Supreme Court in the case of Commissioner of Police and another V. Gurbux Anandram Bhiryani 1988 (Supp) S.C.C. 568 in which it was held that the order of preventive detention passed under section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug-offenders Act, 1981 was invalid on the ground of non-mention of the period of detention in the order. The decision in that case was considered by a Bench of three Judges in the case of Mrs. T. Devaki Vs. Government of Tamil Nadu and others (A.I.R. 1990 S.C. 1086) in which it was ruled:

> "Once the order of detention is confirmed by the State Government, maximum period for which a detenu shall be detained cannot exceed twelve months from the date of detention. The Act nowhere requires the detaining authority to specify the period for which the detenu is required to be detained. The expression 'the state Government are satisfied that it is necessary to do, they may, by order in writing direct that during such period as may be specified in the order' occurring in sub-section (2) of Section 3 relates to the period

1998

Moradhawaj
Vs.
D.M.,
Kanpur
& others

D.P.
Mohapatra,CJ
R.R.K.
Trivedi, J.

> for which the order of delegation issued by the State Government is to remain in force and it has no relevance to the period of detention.
>
> .....
>
> Since the Act does not require the detaining authority to specify the period a detenu is required to be detained, order of detention is not rendered invalid or illegal in the absence of such specification."

Considering the decision in Commissioner of Police and another V. Gurubux Anandram Bhiryani (Supra) it was observed " With great respect we do not agree with the view expressed by the learned Judges". In the circumstances, the decision relied by the learned counsel for the petitioner is of no assistance in determining the question. On a fair reading of the provisions of the National Security Act and bearing in mind the principles laid down by the apex Court in T. Devaki's case we have no hesitation to hold that the order of detention is not rendered illegal and invalid merely on the ground of non-specification of the period of detention which the detenue has to undergo. It was not disputed before us that the period of twelve months was specified in the order of the State Government confirming the order of detention. Therefore, the second submission raised by the learned counsel for the petitioner fails and is hereby rejected.

The other contention raised by learned counsel for the petitioner is regarding inordinate, unexplained delay on the part of the Central Government in disposing of the representation made by the petitioner against the order of detention. As noted earlier, the contention of the petitioner in this regard is that his representation made to the Central Government on 2.2.1998 had not been decided till date. In course of hearing of the case the learned Additional Standing Counsel appearing for the Central Government informed the Court that petitioner's representation was rejected by the Central Government on 12.8.1998 and the order was communicated to the petitioner on 14.8.1998. Thus, it is clear that the representation remained pending with the Central Government for more than six months for which there is no explanation offered by the Central Government. In the facts and circumstances of the case there is no scope for doubt that the delay in disposal of the representation made to the Central Government is inordinate and unexplained. Such inordinate and unexplained delay renders continued detention of the petitioner illegal and he is entitled to an order directing his release

1998

Moradhawaj
Vs.
D.M.,
Kanpur
& others

D.P.
Mohapatra,CJ
R.R.K.
Trivedi, J.

forthwith. In support of this view we may notice the Full Bench decision of this Court in the case of Raj Bahadur Yadav V. State of U.P. and others reported in 1997 (35) ACC 33 in which considering the question of delay on the part of the Central Government in disposing of the detenu's representation this Court held:

> "Coming to the question of delay in disposing of the detenu's representation, the position is clear that the Advisory Board, the appropriate Government and the Central Government are required to act with promptitude and reasonable dispatch in dealing with the representation of the detenue and to consider whether his further detention is legal. Inordinate and unexplained delay on the part of any of the authorities in dealing with the matter will render further detention of the detenu illegal."

Testing the facts and circumstances of the case in hand on the touch stone of the principles of law noted above, the conclusion is inescapable that the inordinate unexplained delay on the part of Central Government in disposing of the petitioner's representation has rendered his continued detention illegal and he is entitled to be released forthwith.

Accordingly, the writ petition is allowed and the respondents are directed to release the petitioner forthwith if his detention in jail is not required in any other proceeding.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 17.08.1998

BEFORE
THE HON'BLE D.K. SETH, J.

1998

August, 17

Civil Misc. Writ Petition No.27672 of 1994

Sri Shamshad Ali and others ...Petitioner
Versus
District Basic Education Officer & others ...Respondents

Counsel for the petitioner : Sri A.D. Prabhakar
Counsel for the respondents : Sri K.S. Shukla

Constitution of India, Article 226—Service Law—Selection grade—Petitioner appointment under half a million job—subsequent adjustment on 22.01.1985 as Assistant Urdu teacher in Junior High School in view of letter dated 14.12.1984—Selection grade allowed w.e.f.1.1.1986 with impression they have completed 12 years service in terms of Para 7 of G.O. dated 8.6.1989—stop of payment of selection grade w.e.f. June 1994 without giving any notice or opportunity of hearing to the petitioners-held although the petitioners were not entitled for selection grade but stopping of selection grade without any order in writing without notice to the petitioners-but stoppage of such scale is civil consequences which can not be inflicted without giving them an opportunity. (Para 8 and 9)

By the Court

1. The petitioners allege that they were appointed as Asstt. Urdu Teachers in various Junior High Schools some times around 1977. The petitioner no.1 alleges to have been appointed on last of February, 77 while the petitioner no. 2 alleges to have been appointed in 1973. Thus, it appears that the petitioners were appointed between the period 1973 and 1978. It is an admitted position that the petitioners' were given appointment under the scheme for creation of half a million job.subsequently, the Director of education , U.P. through his letter dated 14th December,84 addressed to all the district Basic Education Officers, U.P. had informed that there was a scheme, teachers like the petitioners, who are appointed in the primary teachers pay scale, were to be adjusted in the pay scale of High School Asst. Urdu Teachers from the earlier

1998

S. Ali & ors.
Vs.
D.B.E.O. M.Nagar & others

D.K.Seth, J.

pay scale of primary school teachers on which they were initially appointed. Pursuant to the said order, the petitioner were adjusted against the scale of rs.450-720/-. It appears that the petitioners were adjusted against such posts on 22nd January'85. Subsequently the petitioners were allowed selection grade scale of pay w.e.f. 1st January 86 on the ground that had completed 12 years, of service in terms of paragraph 7 of the Govt. Order dated 8th June'89. After such grant of selection Grade Scale of Pay, the petitioners were allowed to continue to draw such selection Grade of pay quite for some time. Thereafter, the respondents has stopped payment in the scale of selection Grade pay to the petitioners w.e.f.. June'1994. Mr. A.D. Prabhaker' learned counsel for the petitioners submits that there was no written order issued in this respect. The said stoppage of payment in the scale of selection Grade Scale of pay has been effected without giving any notice or without hearing the petitioners. According to him, after having guaranteed selection Grade scale of pay and having allowed to continue for such a long time, The same can neither be withdrawn nor the same can be stopped without giving any opportunity to the petitioners. On these grounds, he claims that it is admitted in the counter affidavit that there is no order in this respect, which is apparent from Annexure R.A.I to the rejoinder affidavit, by which the respondent themselves have admitted that no such order has been passed. Therefor, the petitioners should be allowed to continue in the Selection Grade Scale of pay.

2. Mr. K.S. Shukla, learned counsel for the respondents on the other hand contends that grants of selection Grade scale of pay flow from the order dated 3rd June, 89, contained in Annexure IV. The petitioners do not qualify to be eligible for such selection Grade scale of pay under the said Govt. order. The grant of selection Grade scale of pay was a mistaken grant through inadvertence. Under the law, the petitioners are not entitled to such selection Grade scale of pay on account of their bing ineligible under the said Govt. order. According to him, the petitioners can seek inforcement of legal right through writ jurisdiction. The said legal right if alleged to have been on the basis of the said Govt. Order dated 3rd June,89. If under the said Govt. Order, the petitioners are not eligible, in that event, there cannot be any legal right, which can be enforced through the writ jurisdiction. The petitioners cannot claim their right on the basis of a mistaken step taken in this regard. According to him, persons, who have been in one post for more than the stipulated period of 12 years, he is eligible for Selection Grade Scale of pay. In the present case, the petitioners were in the Scale of Rs.195 Rs.225/- when initially

appointed. The scale of Rs.450-720/- was sanctioned only by virtue of the order dated 14th December,84 after creating the posts. Therefore, according to him, though the petitioners were adjusted against the new posts and in the new scale, the same does not confer any right in them to claim a benefit in view of paragraph 7 of the said Govt. Order dated 3rd June,89. On this ground, he prays that the writ petition should be dismissed.

1998

S. Ali & ors.
Vs.
D.B.E.O.
M.Nagar
& others

D.K.Seth, J.

I have heard both the learned counsel at length.

3. Admittedly, the petitioners were appointed in the scale of Rs.195-225/- persuant to a scheme for half a million job. It is rightly contended by Mr. Shukla that these posts were Ex-Cadre-Posts. Therefore, it cannot be said that the petitioners were holding regular posts. Admittedly, the posts were created by the order dated 14th December,84 contained in Annexure-2, against which the petitioners were adjusted. Scale for the said post were sanctioned as Rs.450-720/-. Against these posts, and scale the petitioners were adjusted by the order dated 22nd January,85, contained in Annexure III. Thus the petitioners, who were not holding regular appointments or posts, were adjusted against regular posts by the said order dated 22nd January,85 against a scale of Rs.450-720/-. The order dated 14th December,84 contains several clauses for the purpose of creation of posts after containing informations from different schools and then to adjust those persons, who were appointed persuant to half a million job scheme, in the scale available to the Asstt. Teachers in the Junior High School from the scale of Primary Teachers.

4. Thus the fact remains that the petitioners were adjusted against regular post in the scale of Rs.450-720/- w.e.f. 1st January,85. Therefore, the question as to whether the petitioners had completed minimum qualifying service for grant of Selection Grade Scale of Pay, is a question to be determined. In order to come to a conclusion, it is to be decided as to whether the petitioners service under the half a million job scheme in the scale of primary teacher right from the initial appointment should be taken into account for such purpose.

5. In order to appreciate the above questions, it would be necessary to refer to the relevant clause contained in the order dated 3rd June,89, being Annexure IV to the writ petition, where from the right claimed by the petitioners are alleged to be flowing. Paragraph VII of the said Govt. Order dated 3rd June,89 is relevant. Paragraph 7 deals with grant of Selection Grade Scale of Pay to different groups

1998

S. Ali & ors.
Vs.
D.B.E.O.
M.Nagar
& others

D.K.Seth, J.

of teachers. It is provided that primary school and Junior High School teachers would be entitled to Selection Grade Scale of Pay w.e.f. 1st June,86, provided such teachers have completed 12 years of satisfactory service. The expression 'teacher' has been qualified with the expression regular 'teachers'. Regular teachers means the teachers, who have been appointed following due process or in other words, who have been regularly appointed. If the teachers, who were appointed under the said half a million job scheme were regular teachers or could be treated so, in that event it would not have been necessary to create posts by the order dated 24th December,84 or for providing a scale. Since the appointment was not a regular appointment and was made an Ex-cadre-Post persuant to the scheme for half a million job, they were adjusted against the scale of primary teachers though they were working in junior High School. Thus by no stretch of imagination, it could be said that the appointment of the petitioners as Asstt. Teachers in a junior High School with the scale of primary teacher under the said scheme, to be a regular appointment of a regular teacher. The adjustment against the posts and scale itself shows that those teachers, who were appointed under the said scheme, were regularised or became regular teachers by virtue of the order dated 14th December,84 persuant to which they were so regularized or appointed w.e.f. 1st June,85, after being adjusted against regular posts and regular scale. If the appointments under the scheme were regular, in that event, there was no necessity of any granting them the scale of Asstt. Teacher of Junior High School and allowing the scale of primary teachers and post them against Ex-Cadre-Post and, therefore, there would have been no necessity of creation of posts and their adjustment against regular posts and scale.

6. Thus by no any stretch of imagination, the petitioners could be said to be regular teachers. Unless they are regular teachers, the petitioners cannot claim any right under paragraph 7 of the said Govt. Order dated 3rd June,89 which prescribes the eligibility criteria. In as much as in order to give the benefit of paragraph 7, the primary condition is that the teacher should be a regular teacher and have completed 12 years' of Service as such regular teachers and such service must be satisfactory and the such completion should have been made on 1st January, 86 or before or thereafter, as the case may be.

7. Admittedly, the petitioners were appointed under the scheme in a scale of primary teachers. They served in junior High

School and might have completed 12 years' of service, but the petitioners not being regular teachers, they cannot derive benefit out of paragraph 7 of the said Govt. Order.

1998

S. Ali & ors.
Vs.
D.B.E.O. M.Nagar & others

D.K.Seth, J.

8. Therefore, it appears that the petitioners were not eligible under the said criteria for Selection Grade Scale of Pay. But still then such scale was granted to them and they had continued to draw the same till 1994 without any objection. There is no order by which the said scale was stopped. It is also an admitted position that before stopping such payment in the scale, no notice was given to the petitioners neither any opportunity was given to them. The stoppage of such scale has a civil consequence on the lights of the petitioners. Such civil consequence cannot be inflicted on a person without giving them an opportunity.

9. In the present case, admittedly, there is no order by which the said grant was stopped. In such circumstances, it is incumbent upon the respondents to give opportunity to the petitioners as to why the grant of Selection Grade Scale of Pay should not be dis-continued.

10. In that view of the matter, this writ petition is allowed in part to the extent that the respondents shall issue notice and give opportunity to the petitioners with regard to the decision that might be taken for discontinuance of Selection Grade Scale of Pay to the petitioners and shall pass appropriate order in respect thereof. The respondents had never asked for refund of the amount paid to the petitioners till today. Therefore, it will not be open to seek refund of the said amount herein. However, the question of continuance of Selection Grade Scale of Pay after June,94, may be considered and decided by the respondents in accordance with law, having regard to the observation made him above, after giving an opportunity to the petitioners. Such decision is to be taken as early as possible, preferably within period of 3 months from the date a copy of this order is furnished to the respondents. This order, shall, however, confine to the case of the petitioners only. It will be open to the petitioners to establish their case for eligibility and entitlement to Selection Grade Scale of Pay provided they are so eligible. It will be open to them to claim such eligibility on account of their completion of 12 years' of service after 1st June,85 alternatively. All these questions with regard thereto are kept opened.

Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD, 07.09.1998

1998

September, 7

BEFORE
THE HON'BLE S.K. PHAUJDAR, J.

Criminal Misc. Application No.3385 of 1998

Ram Pal Singh & another **...Applicants**

Versus

State of U.P. & another **...Opp. Parties**

Counsel for the applicants : Sri S.V. Goswami
Counsel for the respondents : A.G.A.

Section 482 Cr.P.C.—Section order indicated that the prosecution case as well as other material collected during investigation were considered by the sanctioning authority—the sanction order doesnot become bad simply because the defence version was not considered.

By the Court

Through the present application under Section 482 Cr.P.C. the applicants had prayed for quashing a criminal case No. 1561 of 1998, pending in the court of C.J.M. Bareilly, (State V. Rampal) under Sections 302, 307/34, I.P.C. It is stated the applicants were public servants protected under Section 197, Cr.P.C. and cognizance was taken upon a charge-sheet dated 20-12-1992 along with a sanction dated 29-12-1991 and the sanction was bad in law as the sanctioning authority did not take into consideration all the relevant papers. An objection to this effect was taken before the court below, but the same was disallowed on 6.8.1998.

The prosecution against the two applicants was launched through case Crime No. 164-A of 1995 for an incident that took place on 5.6.1995 at about 9.00 A.M. The report was lodged on the next day at about 7.10 P.M. Informant was one Lochan Singh. It was stated in the F.I.R. that on the date of occurrence while Ram Kishore and others were proceeding on a Bus towards their village home and the Bust reached Deochara crossing, the Sub-Inspector of Police, Ram Pal Singh, and his security guard Constable Gopal Singh dragged these persons out of the Bus. It was alleged further that Ram

Pal Singh used his service Revolver and Gopal used his Machinegun and opened fire on the aforesaid Ram Kishore and others, as a result of which these persons suffered serious injuries. The incident was seen by several persons, who are named in the F.I.R. In consequence of the injuries Ram Kishore died and Amar Singh was in a critical condition. A report was sought to be made at Bhamaura Police Station to which these officials were attached, but no report was accepted. Accordingly, the complaint was made to the Superintendent of Police (Rural), Bareilly, and the case was started.

It was stated on behalf of the present applicants that an F.I.R. was lodged by Ram Pal Singh at Bhamaura Police Station and three cases were instituted upon that F.I.R. Case Crime No.164 of 1995 was instituted for offences under Sections 147/148/149/307/393/224/225/332/330, I.P.C. against Ram Kishore and others, Case Crime No. 165 of 1995 was registered under Sections 4/25 of the Arms Act against Amar Singh only, and case Crime No.166 of 1995 was recorded under Section 25 of the Arms Act against Ram Kishore alone. This report was lodged on 5.6.1995 at 1.45 P.M. for an incident that had allegedly taken place in Deochara at about 9.15 A.M. In this case the Police Officers had alleged that they had received source information that certain persons were travelling in the Bus with illegal arms. Accordingly, the Bus was intercepted at Deochara crossing. When these police officials stood near the Bus, Ram Kishore, Amar Singh and others jumped off the Bus and tried to escape. On suspicion, these persons were apprehended and a search was made in presence of Ram Vir Singh, S.O., and certain others. Amar was allegedly carrying a knife, Ram Kishore was having a 315 bore Tamancha with live cartridges therein. At that point of time Heera Lal, Kanshi Ram and others assembled there and wanted that the apprehended persons should be released. When the police party was taking the arrested persons towards Police Station, Heera Lal and others stopped them and those persons assaulted the police officials and caused serious injury on the head of Ram Pal and only then he used his service Revolver in self defence. Gopal was also injured.

Ram Pal was examined by a Doctor on the same day. The paper in Annexure '2' indicates that he suffered multiple injuries on the second and third left metacarpe bone. He had injuries on the head as well and other parts of his body. The injury report of Gopal indicates contusions on the shoulder, left elbow joint and lower part of back. All were simple injuries. He was examined at about 11.30

1998

R.P.Singh & another
Vs.
State of U.P. & another

S.K. Phaujdar, J.

A.M. at the hospital. It may be mentioned that the injuries of Ram Pal also indicated as simple ones. At the time of his admission in the hospital, he was fully conscious.

It is stated that a Magisterial enquiry was conducted into the matter and the Magistrate had found that the police officials had to resort to firing in self defence.

The sanction in question was given by the Secretary Home (Police) under the orders of the Governor of U.P. on 29.11.1997/8.12.1997. A copy of the sanction order is at Annexure '5' to this application. It appears from a reading of the sanction order that the prosecution case was fully brought to the knowledge of the sanctioning authority and the materials gathered in investigation and the statements of the witnesses were also perused by the sanctioning authority. A prima facie case was made out. Accordingly, the Governor thought it proper to accord the required sanction.

As stated above, this sanction order was challenged in the court below and the copy of the order of the court below dated 6.8.1998 is at Annexure '9' to this application. The prayer for recalling the cognizance order was made on 17.7.1998 by Ram Pal Singh and Gopal Singh. It was alleged before the Magistrate that these two persons were police officials but the Government had not examined the case fully and seriously and had accorded sanction mechanically. The Magistrate opined that a perusal of the records indicate that the matter was investigated into by the C.B. C.I.D. and only thereafter charge-sheet was submitted after obtaining the sanction. The Magistrate was of the view that whether the sanction was proper or not could be determined only after taking evidence and as such it was not possible to accept the defence version at that stage.

Under Section 197(1), Cr.P.C. sanction is necessary before cognizance by a court for an offence committed by a public servant while acting or purporting to act in the discharge of his official duties. This privilege, however, may be claimed by only such public servants who are not removable from office save by or with the sanction of the Government. The Sub-Inspector of Police or a Constable are police officials, who may not enjoy this privilege under Section 197(1), Cr.P.C. as they are not public servants of that status who could be removed from office only by or with the sanction of the Government. These persons are removable by officers lower in rank. However, in view of the notification of the

State Government under Section 197(3) of the Code of Criminal Procedure the provisions of Section 197(2), Cr.P.C. have been made applicable to the police personnel in Uttar Pradesh and as such it is open for them to agitate a plea of absence of sanction as Section 197(2), Cr.P.C. also requires a previous sanction by the State Government before cognizance of any offence allegedly committed by a police personnel while acting or purporting to act in the discharge of his official duty.

1998

R.P.Singh & another
Vs.
State of U.P. & another

S.K. Phaujdar, J.

Sri S. V. Goswami appearing for the petitioners relied on a decision of the Supreme Court in the case of Jaswant Singh V. State of Punjab as reported in A.I.R. 1958 S.C. 124. It was a prosecution under the Prevention of Corruption Act, 1947 and the law required previous sanction before the prosecution. The Supreme Court observed that sanction under the Prevention of Corruption Act is not intended to be nor is an automatic formality and it is essential that the provision in regard to sanction should be observed with complete strictness. It was explained that the object of the provision for sanctions is that the authority giving the sanction should be able to consider for itself the evidence before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden. It was contended that the evidence included the materials that the defence could rely on and in the instant case the findings of the Magisterial enquiry neither placed before the sanctioning authority nor considered.

Reliance was also placed on a recent decision of the Supreme Court in the case of Suresh Kumar Bhikam Chand Jain V. Pandey Ajay Bhushan and others as reported in A.I.R. 1998 S.C. 1524. It was also a case on the question of sanction under Section 197, Cr.P.C. and it was held by the Supreme Court that the accused had a right to produce relevant material to establish necessary ingredients for invoking the provisions of Section 197, Cr.P.C.

In answer to these submissions, the learned A.G.A. placed before me the decision of the Supreme Court in the case of Bakhshish Singh Brar V. Smt. Gurmej Kaur and another as reported in A.I.R. 1988 S.C. 257. Here also a question of accord of sanction was raised in a complaint against police officers for causing death of the victim. Cognizance was taken for offences under Sections 323/149/302, I.P.C. The trial court had held that it could decide necessity of sanction only after gathering materials and evidence. That order of the trial court was challenged before the High Court of

1998

R.P.Singh & another
Vs.
State of U.P. & another

S.K. Phaujdar, J.

Punjab in a proceeding under Section 482, Cr.P.C. and the High Court refused to interfere. The Supreme Court observed that the order of the trial court was absolutely legal and the order of the High Court in refusing to interfere with a criminal proceeding was also proper. A very relevant comment was made by the Supreme Court in this regard. "It is necessary to protect the public servants in the discharge of their duties. They must be made immune from being harassed in Criminal proceedings and prosecution, that is the rational behind Section 196 and Section 197. But it is equally important to emphasise that rights of the citizens should be protected and no excesses should be permitted. Encounter death has become too common. In the facts and circumstances of each case protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit."

In the instant case there is no dispute that there was some incident at Deochara crossing within Bhamaura Police Station in which the deceased and the present two accused stood involved. One version of the incident came through the report of the Police Officer on which three separate cases were drawn up against the deceased and others. The counter version came in the counter case lodged on the second day and reasons were cited why a report was to be made to the Superintendent of Police. The matter has been investigated into. For according sanction, the sanctioning authority was to look to the materials those were collected during investigation. The sanction order indicates that not only the prosecution Case was known to the sanctioning authority but it had looked to the materials collected during investigation. If the defence version was not considered, the sanction order may not be bad on that score alone as to accept the defence version at this initial stage would be sealing the fate of the prosecution version in this case at the out set which perhaps is not the intention of law. When two versions of the same incident are coming, it is desirable that the trial court, after taking evidence, would determine which version is acceptable. The law is now clear that when a case and counter are lodged, the two cases should be tried by the same court side by side.

The facts in Bakhshish Singh Brar's case (supra) fit in with the facts of the instant case, almost in toto. Here also an alleged miscreant has been killed by a Police Officer and it is stated that it

was done in self defence. The court below had observed that it could be determined only after trial. It is, therefore, not necessary to interfere with this order of the trial court in a proceeding under section 482, Cr.P.C. as the right decision has been taken by the trial court in this regard, as was observed by the Supreme Court in the case of Bakshish Singh (supra).

In view of above, the present application stands dismissed.

Application Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 04.09.1998

BEFORE
THE HON'BLE M. KATJU, J.

1998

September, 4

Civil Misc. Writ Petition No.1665 of 1998

Bhagwan Singh Sisodia **...Petitioner**

Versus

State of U.P. & others **...Respondents**

Counsel for petitioner : Sri Ashok Khare
Counsel for respondents : S.C.

Article 226 of the Constitution of India—If the selected person join and function 5 for considerable period of time, the select list stands exhausted. However if the person does not join or resigns or dies within few days after joining, in such circumstances the list did not stand exhausted.

By the Court

This writ petition has been filed for quashing order dated 31.12.97 Annexure 14 to the petition and order dated 2.1.97 Annexure 15 as well as order 7.4.97 Annexure 5 to the writ petition and for a mandamus directing the respondents not to interfere with the functioning of the petitioner as officiating principal of the college in question.

1998

B.S.Sisodia
Vs.
State of U.P.
& others

M.Katju, J.

The dispute in this case is regarding the question as to who is entitled to officiate as the Principal of the college till a regular selection. It appears the U.P. Secondary Education Service Commission prepared a panel of three names for appointment on the post of principal of D.N. College and A.K. School, Tirwa, Kannauj vide Annexure 3 to the petition. In this panel Mohd. Naim is at Serial No. 1 and Chandresh Nath Singh Baghel is at serial no.2 and Ram Chandra is at serial no.3. This select list was prepared on 3.8.96 and accordingly Mohd. Naim was appointed as Principal on 4.8.96 and he worked till 30.6.97 when he retired. The claim of respondent no. 8 Chandresh Nath Singh Baghel is that he should be appointed as permanent principal since he is at serial no.2 in the select list. On the other hand the case of the petitioner is that the select list stood exhausted on the appointment of Mohd. Naim.

The respondents have appointed Chandresh Nath Singh Baghel as Principal on the reasoning that he was at serial no.2 in the select list and hence he had the right to be appointed. The question is whether select list dated 3.8.96 stood exhausted or not after the appointment of Mohd. Naim as Principal.

The learned counsel for the petitioner has relied on the decision of this court in Dr. Chandra Deo Pandey V. Chancellor, Allahabad University 1989 (1) UPLBEC 727 and the decision in Adam Malik Khan and others V. Aligarh Muslim University, Aligarh and others 1997(1) E.S.C. 331 (All). On the other hand learned counsel for respondent no. 8. relied on the decision in 1994(2) U.P.L.B.E.C. 1320 Kishori Raman Shiksha Samiti Mathura V. Regional Inspectress of Girls Schools, Agra 1997 (2) Allahabad Law Reports 34 Girish Dhan Dwivedi Vs. U.P.S.E.S. Commission and Dr. Uma Kant Vs. Dr. Bhika Lal Jain & others 1992 (1) SCC 105.

I have carefully gone through these decisions and have considered the arguments of learned counsels for the parties. In my opinion since Mohd. Naim had joined in August 1996 and he actually worked till 30.6.97 i.e. for about 11 months the select list stood exhausted. The position may have been different if Mohd. Naim had not joined, or after joining within a few days hereafter he had resigned or had died or had abandoned his duty. If a person does not join, or he resigned or died with in a few days after joining then ofcourse it could be argued that the list did not stand exhausted, as that would be a practical approach. But if he joins and functions for a considerable period of time the select list stands exhausted.

1998

B.S.Sisodia Vs. State of U.P. & others

M.Katju, J.

In the decision in Kishori Raman Shiksha Samiti Mathura V. RIGS, Agra (supra) relied upon by the learned counsel for respondents the person who was first in the panel died five days after joining as principal. In my opinion this decision is distinguishable because in the present case Mohd. Naim had worked for 11 months as Principal and then he retired. In my opinion in this situation a fresh selection had to be held by the Commission or Board (which now stands substituted for the Commission).

In the circumstances this writ petition is allowed. The impugned orders are quashed, and the respondents are directed not to interfere with the petitioner's functioning as officiating principal of the institution in question.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 01.09.1998

1998

September, 1

BEFORE
THE HON'BLE M. KATJU, J.

Civil Misc. Writ Petition No.24419 of 1998

Dropal Singh **...Petitioner**

Versus

Nuclear Power Corporation of India Ltd. & another **...Respondents**

Counsel for the Petitioner : Sri Mahesh Gautam
Counsel for the respondents : S.C.
: Sri S.N. Srivastava
: Sri V.R. Agrawal

Constitution of India, Article 226—Cancellation of appointment order—Petitioner appointed as stipendary trainee—Appointment order cancelled on the pertext the petitioner is over qualified—held—under qualification can be a ground for cancellation but being over-qualified the petitioner be given weightage. (Para 3)

Case law discussed
W.P.No.15696 of 98 decided on 13.8.98

By the Court

1998

Dropal Singh Vs. N.P.C.I. Ltd. & another

M.Katju, J.

1. Heard Sri Mahesh Gautam for the petitioner and Sri Piyush Agarwal holding the brief of Sri V.R. Agarwal for the respondent.

2. The petitioner had been appointed as stipendary trainee by the respondent but that appointment has been cancelled by the impugned order dated 28.4.98 annexure-1 to the writ petition on the ground that the petitioner did not disclose his higher qualification of B.Sc. Thus the ground for cancelling the appointment is that he is over qualified.

3. In similar writ petition No. 15696 of 1998 Jitendra Sharma V. Nuclear Power Corporation of India Limited and another this court quashed the impugned order by its judgment dated 13.8.98. In that case also the appointment had been cancelled on the ground that the petitioner was over qualified, and this court had held that of a person's appointment can be cancelled if he is under-qualified but not on the ground that he is over qualified, rather the respondent should have given weightage to the fact that the petitioner had got higher qualification.

4. Following the said decision, this petition is allowed. The impugned order dated 28.4.98 is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 01.09.1998

1998

September, 1

BEFORE
THE HON'BLE S.K. PHAUJDAR, J.

Criminal Misc. Application No.3471 of 1998

Raghuvansh Kumar Misra ...**Applicant**

Versus

State of U.P. ...**Respondent**

Counsel for the applicant : Sri Ravindra Rai
Counsel for the respondent : A.G.A.

Section 156(3) Cr.P.C.—the Magistrate directed the Station Officer concerned to register and investigate the case and report. The very direction for reporting the progress of investigation may not by

itself vitiate the direction for registration of the case or an investigation.

1998

R.K.Mishra Vs. State of U.P.

S.K. Phaujdar, J.

Case referred
A.C.C. 1995(32) P.253
A.C.C. 1991(28) P.111
Cr.L.J. 1998 P.463

By the Court

1. The matter was heard yesterday.

2. The present application is directed against an order dated 2.7.1998 passed by the II Addl. C.J.M., at Varanasi in Crime No.C-13/98 relating to P.S. Badagaon, Varanasi.

3. An application was filed before the Addl. C.J.M. by one Rajesh Kumar Mishra against the present applicant and others for action under Section 156(3), Cr.P.C. The Magistrate recorded an order in the following language :

"Seen contents and record.

Order

S.O. Baragaon to register and investigate the case and report."

4. It was argued that the Magistrate had no authority to call for a report and that would amount to interference in investigation. It was further argued that when it was an allegation of misuse of authority and acts of dishonesty against public servant of any status, a suitable preliminary enquiry should have been made before registering a case. It was also submitted that being aggrieved by certain orders recorded by the authorities, that the complainant moved a writ petition and the same was finally withdrawn and thereafter when the authorities proceeded according to law the present case has been initiated on false allegations.

5. Reliance was placed on certain case laws. The learned counsel placed before me the decision of the Supreme Court in the case of State of Haryana & others V. Chaudhary Bhajan Lal and others as reported in 1991 (28) Alld. Criminal Cases 111. The case law does not relate to exercise of powers under Section 156(3), Cr.P.C. but in

1998

R.K.Mishra
Vs.
State of U.P.

S.K.
Phaujdar, J.

interpreting Section 157, Cr.P.C. it was observed that when there is a complaint against a public servant for misuse of authority and acts of dishonesty, a suitable preliminary enquiry must be made before registering complaint and making full investigation therein. This very case law, however, states that at the stage of registration of a crime on the basis of information, the Police Officer cannot make an enquiry as to whether the information is reliable and genuine. The Police Officer, it was held, cannot refuse to register a case on such ground, rather he was statutorily obliged to register a case and to enter the substance in a prescribed form.

6. Reference was also made to a decision of the Allahabad High Court recorded by an Hon'ble Single Judge in the case of Raj Kumar Agarwal and others Vs. State of U.P. and others as reported in 1995 (32) Alld. Criminal Cases 253. It was in relation to exercise of powers under Section 482, Cr.P.C. in a matter pending investigation and the Court had directed that the Investigating Officer was to apply his mind to the materials received during investigation and then to decide if there was absolute necessity of arrest.

7. The third case placed before me is a decision of the Gujarat High Court in the case of Arvindbhai Ravjibhai Patel Vs. State of Gujarat and others as reported in 1998 Crl.L.J. 463. It was a case where the complaint filed before the Magistrate should have been investigated by the court itself and it was held that ""passing the buck" to the police for doing the needful was improper and amounted to abdication and dereliction of duty. It was an order whereby the Magistrare, upon receipt of the complaint, had directed an enquiry to be made by the Police and to submit a report.

8. In the present case, however, the Magistrate was informed about a cognizable offence as complaint was made of forgery of papers. The nature of allegation suggested that the details could be brought to light by an investigation only and as such it was not "passing of the buck" by the Magistrate to the Police. The Magistrate clearly directed registration of a case and investigation. While writing the order the Magistrate had also recorded "and report". These words may not be given undue importance as the Magistrate simply wanted to be aware of the developments and nothing more. It is the duty of the Police Officer to intimate the registration of an F.I.R. and to intimate the proceedings of investigation in case any accused is arrested and forwarded to court. Thus, the very direction for reporting the progress of investigation may not, by itself, vitiate

the direction for registration of a case or an investigation. This order under under Section 156(3), Cr.P.C. may not, therefore, be interferred with under Section 482, Cr.P.C. So far the other prayer for stay of arrest of the applicant in the case is concerned, it will be entering into the merits of the case and, as far the present norm followed by this High Court, the powers under Section 482, Cr.P.C. may not be exercised in any manner so as to interfere with the investigation. So far as the prayer for stay of arrest or for any other prayer of the like nature, it will be open for the petitioner to move the writ Court.

The present application stands disposed of with the above observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 18.08.1998

BEFORE
THE HON'BLE D.K. SETH, J.

1998

August, 18

Civil Misc. Writ Petition No.36916 of 1993

Rakesh Kumar **...Petitioner**

Versus

S.S.P., Saharanpur & others **...Respondents**

Counsel for the petitioner : Sri Suresh Chandra Dwivedi
Counsel for the respondents : S.C.

Article 226 of the Constitution of India—Termination of service under U.P. Temporary Govt. Employees (Termination of Service) 1975 after he had rendered 6½ years of service is bad in view of the fact that the petitioner was already confirmed by undergoing the period of Probation and as such he could not be subjected to the U.P. Temporary Government Service (Termination of Service) Rules 1975.

Cases referred
AIR 1996 SC P.2093
AIR 1988 SC P.286
AIR 1991 (18) P.610
AIR 1968 SC P.1210
SCC 1987(4)SCC P.482

1998

Rakesh Kr.
Vs.
S.S.P.
Saharanpur
& others

D.K.Seth, J.

By the Court

1. The petitioner was appointed as a Police Constable on 1.1.1987. According to him after completion of the probation period, the petitioner continued to serve in the Department untill his services were terminated by an order dated 12.7.1993 namely almost after six and a half years. The said order of termination dated 12.7.1993 indicates that service of the petitioner was terminated under the U.P. Temporary Government Employees (Termination of Service) Rules, 1975 on the ground that the petitioner's service was no more required. This order has since been challanged in this writ petition.

2. Mr. Rakesh Pandey, learned counsel for the petitioner contends that under Regulation 541, the period of probation is fixed at two years for constables other than posted directly in the Criminal Investigation Department or transferred to the Mounted Police as contained in clause (a) and (b) of clause (1) thereof. The petitioner does not fall in any of these two categories as such according to him, the petitioner should be deemed to be confirmed on the expiry of the probationery period by reason of the decisions cited by him which will be dealt with at appropriate stage. In support of his contention he submits that by reason of clause (2) of the said Regulation, the petitioner could be discharged at the end of probation provided an opinion was formed by the superintended of Police that the petitioner was unsuitable either during or at the end of the period of probation. In the present case there was no such formation of opinion and that the petitioners service was not dispensed with on the ground that he was unsuitable at the end of the probation period. Whereas he was allowed to continue for almost four and a half years after the end of the probationery period. He contends further that since the petitioner, by reason of his deeming confirmation, was nor more a temporary employee, therefore, the provisions of the U.P. Temporary Government Employees (Termination of Service Rules, 1975 hereinafter referred to as Temporary Government Employees Rules, cannot be applied. Alternatively he contends, assuming but not admitting, that the petitioner was not confirmed but still then if his service is terminated on the ground of unsuitability then it is incumbent upon the respondent to inform him about his deficiency and his service could not have been terminated under the provisions of the Temporary Government Employees Rules. According to him the provisions can be applied, only when the termination is a termination simpliciter without any stigma. The termination on the ground of unsuitability is definitely a stigma which has since been

made out in the counter affidavit. He argues the above point alternatively but ultimately stuck to his submission with regard to deemed confirmation by reason of the decisions cited by him. The petitioner having been confirmed by reason of deeming clause, there was no scope of treating him as a temporary employee and as such before termination of his service it is required that he should be given an opportunity. For all these reasons according to him, the order of termination should be quashed and the writ petitioner should be declared to be in service with all consequential benefits during this period.

1998

Rakesh Kr.
Vs.
S.S.P.
Saharanpur
& others

D.K.Seth, J.

3. Mr. V.K. Rai, learned brief holder of the State on the other hand contends that by reason of the conditions contained in clause (1) Regulation 541, the petitioner could have been confirmed only when there was a specific order of confirmation and not otherwise. In view of the existance of such clause, the question that the period of probation was fixed is immaterial. Clause (2) of Regulation 541 was related to the question of discharge at the end of probation. The existance of said clause does not take away the effect of clause (1) which requires a specific order of confirmation by the Superintendent of Police. Though a recruitee may not be discharged but still then by virtue of his continuation he does not become a confirmed employee. On the other hand according to him he continues to be a temporary employee until specific order of confirmation is issued in terms of clause (1) of the Regulation 541. Therefore, according to him, the provisions of Temporary Government Employees Rules, 1975 is very much applicable in the case of the petitioner. He next contends that under the said Rules, a person can be terminated even on the ground of unsuitability. But the ground of unsuitability does not find mention in the order of termination. Disclosing of the ground in the counter affidavit would not change the character of the order which do not impose any stigma and therefore the ground of stigma cannot be available in the present case to the petitioner. Since the petitioner had sufferred a number of minor punishment therefore on the ground of unsuitability his service can still be terminated under the said Rules. He relies on a decision in the case of State of Punjab- V – Baldeo Singh Khosla AIR 1996 SC 2093 and contends that even if the probation period is over, the same would not confer any right on the petitioner to be treated as confirmed automatically. His continuation is subject to confirmation provided he performs satisfactory work during this period. Therefore, according to him, there is no infirmity in the order imputned. The writ petition is therefore, liable to be dismissed.

1998

Rakesh Kr.
Vs.
S.S.P. Saharanpur & others

D.K.Seth, J.

4. I have heard both Mr. Rakesh Pandey and Mr. V.K. Rai, learned counsel for the respective parties at length.

5. The question that have been raised is as to whether in interpreting Regulation 541, the petitioner could be said to be still on probation/ on temporary service or confirmed. In order to appreciate the situation, it is necessary to refer to Regulation 541 of the U.P. Police Regulations which runs as follows:-

> "541. (1) A recruit will be on probation from the date he begins to officiate in clear vacancy. The period of probation will be two years except in the following cases:
>
> (a) those recruited directly in Criminal Investigation Department or District Intelligence Staff will be on probation for three years, and
> (b) those transferred to the Mounted Police will be governed by the directions in paragraph 84 of the Police Regulations.
>
> If at the end of the period of probation conduct and work have been satisfactory and the recruit has been approved by the Deputy Inspector General of Police for service in the force, the Superintendent of Police will confirm him in his appointment.
>
> (2) In any case in which either during or at the end of the period of probation, the Superintendent of Police is of opinion that a recruit is unlikely to make a good police officer he may dispense with his service. Before, however this is done the recruit must be supplied with specific complaints and grounds on which it is proposed to discharge him and then he should be called upon to show cause as to why he should not be discharged. The recruit must furnish his representation in writing and it will be duly considered by the Superintendent of Police before passing the orders of discharge.
> (3) Every order passed by a Superintendent under sub-paragraph (2) above shall, subject to the control of the Deputy Inspector General be final."

6. The very expression used in clause (1) shows that the period of probation will be two years excepting in cases contemplated in clause (a) and (b) of Clause (1). The expression used

in the said Regulation clearly indicates that the period of probation is fixed. There is nothing in the said regulation to contemplate that the said period of probation could be extended beyond two years. This conclusion finds support from the clauses included in clause (1) itself normally that at the end of the period of probation, the Superintendent of Police will confirm the recruit provided the conduct and the work of the recruit have been satisfactory and the recruit has been approved by the Deputy Inspector General of Police for service in force. The clause does not use the expression that at the end of the period of probation or after such extended period. On the other hand it only expresses' at the end of the period of probation". Clause (2) also uses similar expression that either during or at the end of the period of probation. Clause (2) also does not use the expression that at the end or such extended period of probation. On the other hand it is abundantly clear that the whole scheme of the said Regulation clearly indicates that no where it was conceived of any extension of the period of probation which is for a fixed period of two years in case of all recruits except those mentioned in sub clause (a) and (b).

7. Thus if the period of probation is fixed what would be the effect after the expiry of the period of probation ? Whether on the expiry of such period of probation the recruit would be deemed to have been confirmed automatically even though no order of confirmation is issued? Whether he will continue to be on probation? Or whether his continuance will be that of a temporary nature?

8. Mr. Rakesh Pandey vehemently argued that the effect would be an automatic confirmation even without such order. He relied on a decision in the case of Om Prakash Maurya Vs. U.P. Co-operative Sugar Factories Federation, Lucknow and others, AIR 1986 Supreme Court 1844. He also relied on the decision in the case of M.K. Agarwal Vs. Gurgaon Gramin Bank and others, AIR 1988 Supreme Court 286. He had referred to another decision of this Court in the case of Pramod Kumar Singh Vs. State of U.P. 1991 (18) A.L.R. 610 in support of his such contention.

9. So far as the decision in the case of Pramod Kumar Singh (supra) is concerned, the question involved was the interpretation of the Regulation 541 of the U.P. Police Regulations. While interpreting the said Regulation relying on the decision in the case of Om Prakash Maurya (supra) as well as in the case of State of Punjab Vs.Dharam Singh, AIR 1968 SC 1210, this Court had laid down that

1998

Rakesh Kr.
Vs.
S.S.P. Saharanpur & others

D.K.Seth, J.

on the expiry of the maximum probationary period of two years, the recruit cannot be deemed to continue on probation, instead he stood confirmed in the post by implication and that the appellant acquired the status of a confirmed employee. In the case of Dharam Singh (supra) the Apex Court had held as follows:

> "Where as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he can not be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the infrence that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

10. In the case of Om Prakash Maurya (supra), it was held that the Regulations has provided a period of probation of one year which could be extended for another period on one year. The proviso to Regulation 17 of the U.P. Co-operative Societies Employees Service Regulations (1975) had restricted the power of appointing authority in extending the period of probation beyond the period of one year. An employee appointed against a regular vacancy cannot be placed on probation for a period of more than two years and if during the period of probation the appointing authority is of opinion that the employee has not made use of opportunity afforded to him, he may discharge him from service but there was no power to extend the period of probation beyond the period of two years. Regulation 18 thereof stipulates confirmation of an employee by an express order on the completion of the probationary period. But the Regulation do not expressly lay down as to what would be the status of an employee on the expiry of a maximum period of probation when no order of confirmation is issued and the employee is allowed to continue in service. Relying on such provision, the Apex Court had held that since Regulation 17 did not permit continuation of an employee on probation for a period of more than two years the necessary result would follow that after the expiry of two years probationary period, the employee stands confirmed by implication and this is implicit in the scheme of Regulations 17 and 18.

1998

Rakesh Kr.
Vs.
S.S.P. Saharanpur & others

D.K.Seth, J.

11. Similarly relying on the decision in the case of Dharam Singh (supra) and Om Prakash Maurya (supra) the Apex Court in the case of M.K. Agarwal (supra) took similar view on the basis of Gurgaon Gramin Bank (Staff) Services Regulations 1980. In the said Regulations as the period of probation was one year which could be extended for six months more and provided that at the end of such probation period, the probationer should either be confirmed or discharged. There also nothing was laid down as to what would happen if either of these two contingencies have not come into being. In such circumstances, the Apex Court had held that such a situation renders an inference inescapable that if the probationer was not discharged at or before the expiry of maximum period of probation then there would be an implied confirmation since there was no statutory indication as to what should follow in the absence of express confirmation at the end of even the maximum permissible period of probation. In cases where, these conditions coalesce, there would be confirmation by implication.

12. Applying the ratio decided in the said decisions we may look into Regulation 541 which also provides in sub clause(1) that if the conduct and work of the probationer is satisfactory and he has been approved by the Deputy Inspector General of Police for service in the force, then he will be confirmed in his appointment. Such confirmation is to come at the end of the period of probation. By virtue of clause (2) if the Superintendent of Police is of opinion that the recruit is unlikely to make a good police officer he may dispense with his service at the end of the period of probation. Such opinion is to be formed either during or at the end of the period of probation. The expression used both in clause (1) and clause (2) are “at the end of the period of probation.” The phrase “at the end” indicates a particular specific point of time. The end period cannot be extended to mean a period of four and half years. At the end should mean a period which is reasonably proximate or close to the expiry of the period immediately on the hilt of expiry of such period. It cannot extend for a period longer than as reasonable with proximity. By no stretch of imagination the period of four and half years can be said to be a period at the end of the period of probation. Regulation 541 has also not made any provision with regard to a situation where neither the service is dispensed with nor any order of confirmation has been passed. Therefore, the ratio decided in the cases cited above in all likely-hood applies in full force.

1998

Rakesh Kr.
Vs.
S.S.P. Saharanpur & others

D.K.Seth, J.

13. Mr. V.K. Rai, brief holder has however, submitted that it has been specifically provided in clause (1) that the confirmation is depended on the satisfactory conduct and work and the approval of the Deputy Inspector General of Police that the recruit is a person fit for service in the force then only Superintendent of Police will confirm in his appointment. This condition according to him points out that there must be an overt and specific act of confirmation. According to him unless there is an order of confirmation, the deeming clause cannot operate in view of the specific provisions expressed in Regulation 541, which is distinct and different in its expression and scheme from the Regulations which were dealt with in the decision in the case of Om Prakash Maurya (supra) and M.K. Agarwal (supra). Therefore, according to him the said ratio cannot be attracted in the present case and the petitioner could be treated either to be on probation or to be continuing temporarily. He relied on the decision in the case of Municipal Corporation, Raipur Vs. Ashok Kumar Mishra, (1991) 3 Supreme Court Cases 325 and State of Punjab Vs. Baldev Singh Khoshla, AIR 1996 Supreme Court 2093.

14. The decision in the case of Ashok Kumar Mishra (supra) points out that where the rule empower the authority to extend a probation beyond the prescribed period in such cases if there is no confirmation after the initial period of probation in the absence of any express provision or order of confirmation, the continuation of an employee would mean extension of probation period and in such situation termination after initial period of probation would mean termination of probationary service. The said decision has also relied on the decision in the case of Dharam Singh (supra). Om Prakash Maurya (supra) and M.K. Agarwal (supra). It had also relied on the decision in the case of State of Gujrat Vs. Akhilesh Chand Bhargava 1987 (4) S.C.C. 482. In paragraph 4 and 5 while dealing with those decisions, it was observed that the Apex Court had reiterated the same view in all these four decisions that if under the Regulations probatonary period could not be extended beyond maximum period of two years then on the expiry of maximum period of probation, the services of the incumbent stands confirmed and he could not be treated to be on probation and be reverted to a lower post. Therefore, this decision in the case of Ashok Kumar Mishra (supra) has affirmed the decisions in the case of Dharam Singh (supra), Om Prakash Maurya (supra) and M.K. Agarwal (supra). Thus the distinction that has been made in the said decision is to the extent that where there are provisions empowering the authority to extend the period of probation, in such situation, the expiry of the period of

probation would not result into confirmation by implication. In the present case there being no authority to extend the period beyond two years, the said decision cannot help Mr. Rai since the decisions in the case of Dharam Singh (supra) Om Prakash Maurya (supra). M.K. Agarwal (supra) and Akhilesh Bhargava (supra) have been followed by this Court in the case of Dharmvir Singh Rana, while interpreting the regulation 541 rendering the same to be a stare decisis.

1998

Rakesh Kr.
Vs.
S.S.P.
Saharanpur
& others

D.K.Seth, J.

15. Mr. Rai also relied on a decision in the case of Baldev Singh (supra) but the said judgment has not taken note of any of the judgments cited above. But then the facts of the said case are also different from the facts of this case. On the other hand, the said facts of the said case fits in the facts of the case of Ashok Kumar Mishra (supra) inasmuch as Rule 10 (3) of the Punjab, State Co-operative Service (Class II) Rules (1958) provided that on conclusion of the period of probation if vacancy exists, the service may be confirmed, if his work or conduct has in its opinion not been satisfactory, the authority may extend the period of probation by such period as it may think fit and thereafter pass such order as could have been passed on the expiry of his period of probation. Thus in this case, the authority was empowered to extend the period of probation, as it might think fit and the order of confirmation could be passed only after such period. Thus, the facts of this case also contemplates authority to extend the period of confirmation which is distinguishable from the decisions cited by Mr. Rakesh Pandey.

16. Thus the decision in the case of Pramod Kumar Singh (supra) stares on the face on the contention of Mr. V.I. Rai having regard to the decisions in the cases of Om Prakash Maurya (supra), Dharam Singh (supra), M.K. Agarwal (supra) and Akhilesh Bhargava (supra) I do not find any reason to differ with the view taken in the case of Pramod Kumar Singh (supra) by this Court. I am therefore, respectfully in agreement with the said decision that in the absence of any specific provision as to what would happen if either of the two procedures contemplated in Regulation 541 namely either to confirm or to dispense with services are not taken at the end of probation in that event, the recruit, stands confirmed by implication. This view finds support from the fact it was open to the authority either to dispense with the service of the incumbent or to refuse confirmation on the ground that the conduct and work of the petitioner was not satisfactory or that he was not approved by the Deputy Inspector General of Police for service in the force. If despite

1998

Rakesh Kr.
Vs.
S.S.P.
Saharanpur
& others

D.K.Seth, J.

having such power, the respondents refrain from exercising such power in that event by reason of period of probation being fixed there is no scope for treating the period of probation to have been extended by implication. On the other hand, the presumption would be adverse to that of the respondents and would be in favour of the incumbent.

17. Since by reason of my aforesaid observations, I have come to the conclusion that the petitioner has been confirmed after the expiry of period of probation. Therefore, it is not necessary to deal with the other contention and counter contention raised by Sri Rakesh Pandey and Sri V.K. Rai respectively with regard to the alleged continuation of the petitioner as a temporary employee and application of the termination of Temporary Government Servant Service Rules.

18. Thus the questions formulated at the beginning of the discussion are answered as hereinafter having regard to the facts and circumstances of this case in relation to regulation 541 aforesaid. Under regulation 541 there being no authority to extend the period of probation after the period fixed if neither the incumbent is confirmed nor discharged and no opinion is formed or the recruit is not dis-approved by the Deputy Inspector General of Police at the end of the probation within its reasonable proximity, then the incumbent will not be continuing on probation nor he would be continuing as in temporary service but he would be deemed to have been confirmed automatically by implication.

19. Once the petitioner as held above, is confirmed, he cannot be subject to the said U.P. Temporary Government Service (Termination of Service) Rules, 1975 and as such his service could not have been terminated under the said provisions.

20. In the result, the writ petition succees and is allowed. The impugned order dated 12th July,1993, terminating the service of the petitioner hereby stands quashed. Let a writ of certiorari do accordingly issue. The petitioner shall be deemed to have been in service continuously and shall be entitled to all service benefits, as would have been available to him, under the law as if he were in service, provided the petitioner satisfies the authority that he was not gainfully employed elsewhere during the said period.

21. There shall however, be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 20.08.1998

BEFORE
THE HON'BLE J.C. GUPTA, J.

1998

August, 20

Civil Misc. Writ Petition No.26533 of 1998

Manager, Lease & Rent Bata India Ltd. ...Petitioner
Versus
D.J., Allahabad & others ...Opp. Parties

Counsel for the petitioner : Sri Pankaj Bhatia
Counsel for the respondents : S.C.

Section 21(1)(a)/Section 41 read with Rule 22(1)(A) of U.P. Act No.13 of 1972—release application of the landlord was allowed exparte by the Prescribed authority and in execution thereof the petitioners were dispossessed—application for setting aside the exparte order was moved and simultaneously an appeal under section 22 of the Act was also filed-the interest of justice requires disposal of restoration application first for the simple reason that if appeal is decided prior in time, the lower court will be left with no jurisdiction to proceed with the restoration application.

By the Court

Heard petitioner's counsel.

In the peculiar circumstances of the case, this writ petition is disposed of finally.

The release application of the landlord moved under Section 21(1)(a) of the U.P. Act No.13 of 1972 was allowed exparte by the Prescribed Authority and in execution thereof the petitioners were dispossessed. They moved an application for setting aside the exparte order under the provisions of Section 41 Rule 22(1) (a) before the Prescribed Authority which is still pending decision. Simultaneously the petitioners also filed an appeal under Section 22 of the Act against the order of the Prescribed Authority, whereby the landlord's application for release had been allowed. The said appeal is also pending before the District Judge, Allahabad. Against the order of the District Judge recalling the appeal from the court of

1998

Manager
Lease & Rent
M/s Bata
India Ltd
Vs.
D.J., Alld.
& others

J.C.Gupta, J.

Addl. District Judge, the petitioners filed writ petition before this Court which was disposed of by the order dated 17.7.1998. While disposing of the said petition this Court also issued a direction to the prescribed Authority to dispose of application in misc.case no. 19 of 1997 moved by the petitioners for recalling the order passed exparte, expeditiously within two months from the date of production of the certified copy of the order. The period of two months has not yet expired. In the mean time when the appeal came up for hearing before the District Judge, Allahabad, the petitioners moved an application that since their application for setting aside the exparte order was already pending before the prescribed authority, the hearing of the appeal may be adjourned but the learned District Judge proceeded to reject the same by the impugned order.

Learned Counsel for the petitioners contended that in case the appeal is decided first, the petitioners shall be highly prejudiced because in that event the Prescribed Authority will have no jurisdiction to examine merits of restoration application which is pending before him. This contention of the learned counsel for the petitioners carries weight. It is well settled that where an application for setting aside an exparte order is moved before the trial court and an appeal is also filed against the same order, interest of justice requires disposal of restoration application first, for the simple reason that if appeal is decided prior in time, the lower court will be left with no jurisdiction to proceed with the restoration application because in such a situation the order of the lower court would merge in the order of the Appellate Court and if he decides the restoration application, the order will be ultra vires. Mere filing of appeal does not take away the jurisdiction of the trial court to proceed with the application moved before him for setting aside the exparte order. In such cases, the proper course is to get the hearing of appeal adjourned to enable the trial court to pass final orders on the restoration application first, of course, keeping in view that the hearing of restoration application is not got adjourned by the appellant himself.

In the circumstances, the District Judge is directed to postpone the hearing of the appeal in question until the restoration application moved by the petitioner before the Prescribed Authority is finally decided. However, it is further made clear that the Prescribed Authority shall make every endeavour to decide the restoration application within the time specified in earlier order of this Court dated 17.7.98.

With the above observations, this writ petition is disposed of finally.

A certified copy of this order may be made available to the parties counsel, on payment of usual charges, within two days.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 12.08.1998

1998

August, 12

BEFORE
THE HON'BLE D.K. SETH, J.

Civil Misc. Writ Petition No.25894 of 1992

Principal, Sri Jodha Singh Inter College, Harkoopur, Etawah ...Petitioner

Versus

Ist A.C.J.M., Etawah & others ...Respondents

Counsel for the petitioner : Sri K.P. Bajpayee
Counsel for the respondents : Sri U.C. Misra
: Sri Ramesh Upadhyay
: Sri G.D. Misra
: Sri R.K. Misra
: S.C.

Section 6 of U.P. Public Service Tribunal Act—Bar of filing the suit in view of the provisions contained in section 6 of U.P. Public Service Tribunal Act and chapter-III of the regulation framed under U.P. Intermediate Education Act 1921 will not be applicable in case of the petitioner as he is neither a public servant within the meaning of section 2 clause-B nor he is a teacher under sub-section 3 of U.P. Intermediate Education Act.

By The Court

1. The petitioner had filed a suit for a declaration that his termination of service is illegal and invalid and that he is entitled to continue in service as well as to the payment of salary. A preliminary issue was framed as to the maintainability of the suit. The trial court had held that the suit is not maintainable. Against the said order, Misc. Appeal No. 13 of 1989 was preferred. The said appeal was

1998

Principal, J.S.I.C., Etawah
Vs.
Ist A.C.J.M. Etawah & others

D.K.Seth, J.

allowed and it was held that the suit is maintainable as framed. Learned counsel for the petitioner Mr. K.P. Vajpayee had argued that in view of the provisions contained in section 6 of the U.P. Public Service Tribunal Act, the suit is not maintainable. He also contended that even if the suit is not barred by section 6 of the said Act by reason of Chapter III of the Regulation framed under the U.P. Intermediate Education Act,1921, the Civil Court cannot assume jurisdiction in respect of termination of service of an employee other than teachers.

2. Sri G.D. Mishra, learned counsel for the respondent no.4 on the other hand contended that the civil suit is maintainable and he had referred to several judgments on this point. According to him, the petitioner not being a public servant within the meaning of section 2, clause (b), section 6 of the U.P. Public Service Tribunal Act,19, 1976 cannot be attracted. According to him by reason of this specific provision contained in section 16G (4) of the U.P. Intermediate Education Act, the bar of suit provided therein applies in relation to the persons covered by sub-section 3 thereof. Sub-section3 coveres only the teachers and not other employees of a recognized school. The petitioner being other employee of a recognized school, such bar cannot operate against him in respect of filing of the suit.

3. After having heard both the learned counsel, it appears that the petitioner cannot be said to be a public servant as defined in section 2 (b) of the U..P. Public Service Tribunal Act, 1976 since he is neither in the service nor in the pay of State Government nor of a local authority or any other corporation owned or controlled by the State Government. The said definition does not include an employee other than teachers in a recognized school. Therefore, section 6 of the said Act cannot be attracted to bar the suit in respect of termination of service as rightly contended by Mr. G.D.Misra, learned counsel for respondent that section 16 G(4) does not bar a suit in respect of termination of service of an employee other than teacher of a recognized school. Regulation 31 of Chapter III of the said Regulation framed under the U.P. Intermediate Education Act, does not specify that a suit is barred while prescribing certain other remedies therein. When Section 16 G (4) has deliberately omitted to include other employees while creating bar of suit in respect of conditions of service, the same embargo cannot be introduced through rules, which the Act had omitted to incorporate. There cannot be any rule framed contradicting the Act itself. Therefore, the

bar provided in the U.P. Intermediate Education Act against filing of the suit, does not operate in respect of termination of service of an employee other than teacher in a recognized school.

1998

Principal, J.S.I.C., Etawah
Vs.
Ist A.C.J.M. Etawah & others

D.K.Seth, J.

4. Now such suit is subject to section 14 of the specific Relief Act in respect of the contract of employment which cannot be specifically enforced. But this provision does not preclude a person from seeking a declaration of some right arising out of his employment under section 34 of the Specific Relief Act. It was so held in the case of Ashok Kumar Srivastava Vs. National Insurance Company Limited, reported in 1998 (33) A.L.R. 386. In the said judgement, it was held as follows :-

> "Though Specific Relief Act widens the spheres of the civil court its preamble shows that the Act is not exhaustive of all kinds of specific reliefs." An act to define and amend the law relating to certain kinds of specific relief". It is well to remember that the Act is not restricted to specific performance of contracts as the statute governs powers of the court in granting specific reliefs in a variety of fields. Even so, the Act does not cover all specific relieves conceivable. Its preceding enactment (Specific Relief Act, 1877) was held by the Courts in India as not exhaustive. Vide Ramdas Khatavu v. Atlas Mills. In Hungerford Investment Trust Ltd. V. Haridas Mundhra and others, this Court observed that Specific Relief Act, 1963, is also not an exhaustive enactment and it does not consolidate the whole law on the subject. " As the preamble would indicate, it is an Act to define and amend the law relating to certain kinds of specific relief. It does not purport to lay down the law relating to specific relief in all its ramification."
>
> Chapter II, contains a fasciculus of rules relating to specific performance of contracts. Section 14 falls within that Chapter and it points to contracts which are not specifically enforceable. Powers of the court to grant declaratory reliefs are adumbrated in section 34 of the Act which falls under Chapter VI of the act. It is well to remember that even the wide language contained in Section 34, did not exhaust the powers of the court to grant declaratory reliefs. In

1998

Principal, J.S.I.C., Etawah
Vs.
Ist A.C.J.M. Etawah & others

D.K.Seth, J.

Veruareddi Ramaragahava Reddy and others. V. Konduri Seshu Reddy and others and in M/s Suprepe General Films Exchange Ltd. V. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and others, this court while interpreting the corresponding provision in the preceding enactment of 1977(Section 42) has observed that "Section 42 merely gives statutory recognition to a well-recognized type of declaratory, relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of Courts to give declarations of right in appropriate cases falling outside section 42." The position remains the same under the present Act also. Hence the mere fact a suit which is not maintainable under Section 14 of the Act is not to persist with its disability of non-admission of civil courts even outside the contours of Chapter II of the Act. Section 34 is enough to open the corridors of civil courts to admit suits filed for a variety of declaratory reliefs."

5. Thus it seems that a suit is maintainable to the limited extent under Section 34 relating to the declaratory decree declaring the right of the petitioner under Section 34 of the specific Relief Act subject to the restriction of Section 14 thereof. Therefore, the order impugned does not suffer from any infirmity, for which it can be set aside.

6. It is contended by the learned counsel for the respondent that since injunction has been prayed for in the suit, the same is not maintainable in view of the Allahabad Amendment of Order 39, Rule 2 of the Code of Civil Procedure.

7. The above contention appears to be devoid of merit inasmuch as by adding the proviso to sub-rule (2) of Rule 2 order 39 CPC by the U.P. Act No. 57 of 1976, the cases where injunctions can not been granted, has been specified. In clause (b), the operation of an order of transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of or taking charge from any employee, including any employee of the Government, cannot be stayed. The said proviso applies go the grant of injunction. Even if there is a prayer for injunction, the same may not be available to the plaintiff either by way of temporary or

mandatory or mandatory or permanent injunction by the reason of such amendment. But that will not preclude the plaintiff from seeking the relief of declaration without any injunction either permanent or mandatory, as the case may be. Therefore, the plaintiff may not claim the relief of reinstantement. But he may very well claim declaration of his rights u/s 34 of the Specific Relief Act, subject to the limitation of Section 14 thereof, read with order 39, sub- rule (2) proviso inserted by U.P. Amendment Act No. 57 of 1976 in the Code of Civil Procedure.

1998

Principal, J.S.I.C., Etawah
Vs.
Ist A.C.J.M. Etawah & others

D.K.Seth, J.

8. Therefore, as observed above, the suit is maintainable.

9. At this stage, learned counsel for the respondent submits that respondent no.4 being a workman within the meaning of Section 2(s) of the U.P. Industrial Disputes Act, his client may prefer the remedy provided in the Industrial Disputes Act. Whether he will do so or not, it is upto him. It is always open to him to choose as to which course he will adopt. Therefore, whether he will persue his remedy in the suit or he will approach the Industrial Forum, is absolutely in the discretion of respondent no. 4, who may exercise such discretion as he may be advised. It will be open to him to seek his remedy at appropriate forum as may be permissible in law.

10. With these observations, this writ petition is therefore dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 12.08.1998

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON"BLE M.C. AGARWAL, J.

1998

August, 12

Civil Misc. Writ Petition No.7744 of 1987

Ram Kumar Dwivedi **...Petitioner**

Versus

Pradeshik Cooperative Dairy Federation Ltd. and others **...Respondents**

Counsel for the petitioner : Sri I.N. Singh
: Sri Ajai Yadav
: Sri Sakha Ram Singh
Counsel for the respondents : Sri G.D. Mishra

Regulation 17 of U.P. Cooperative Socities Employees Service Regulation 1975—this provision empowers the appointing authority to terminate the service at any time before or at the end of the period of probation or extended period of probation.—No illegality in terminating the services of the petitioner before expiry of the period of probation.

By the Court

Heard Shri I.N.Singh, learned counsel appearing for the petitioner and Shri G.D.Mishra, learned counsel appearing for the respondents.

By means of this petition under Article 226 of the Constitution of India, the petitioner seeks to challenge the order dated 13th April, 1987, a copy whereof is Annexure-XV to the writ petition. By this order services of the petitioner were terminated with immediate effect.

Vide order dated 9th January, 1987, a copy whereof is Annexure-VI to the writ petition, the petitioner was appointed as Manager Grade – III, under the Pradeshik Cooperative Dairy Federation Limited, with effect from 15th November, 1986. Clause 3 of the appointment letter indicates that appointment of the petitioner was on probation for a

period of one year which could be extended for another one year, at the sole discretion of the appointing authority.

1998

R.K.Dwivedi
Vs.
P.C.D.F.Ltd.
& others

D.S.Sinha,J.
M.C.
Agarwal, J.

The period of probation of the petitioner was to expire on 14th November, 1987 but, before expiry of the period of probation the services of the petitioner were terminated by the impugned order dated 13th April, 1987.

Contention of the learned counsel for the petitioner is that the impugned order of termination is bad inasmuch as it is contrary to the provisions of Regulation-19 of the U.P. Co-operative Societies Employees' Service Regulations, 1975 (hereinafter called the Regulations) which indisputably, are applicable to the petitioner.

In the opinion of the court, the reliance upon Regulation 19 of the Regulations is mislpaced. The said Regulation deals with the termination of a temporary employee. The petitioner was a probationer, and not a temporary employee. Therefore,provisions of Regulation 19 are not attracted

Regulation 17 of the Regulation deals with matter relating to probationers. Clause (ii) of the Regulation-17 provides that if it appears at any time before or at the end of the period of probation or extended period of probation that a person has not availed the opportunity offered to him for picking up the work or has otherwise failed to give satisfaction he may, if directly recruited, be removed from the service or if promoted by selection, be reverted to the post from which he was promoted. This provision clearly empowered the relevant authority to remove or terminate the services of the petitioner during the period of probation.

Thus, the impugned order is well within the four corners of law. It does not suffer from any such infirmity which may justify interference of this court in exercise of its special and extra ordinary jurisdiction under Article 226 of the Constitution of India.

In the result, the petition fails and is hereby dismissed. The interim order/orders shall stand vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 28.08.1998

1998

August, 28

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.K. MAHAJAN, J.

Civil Misc. Writ Petition No.25903 of 1998

Bharat Jan Kalyan Samiti, Allahabad ...Petitioner
Versus
Union of India & others ...Respondents

Counsel for the petitioner : Sri S.N.S. Yadav
: Smt. Kamla Yadav
Counsel for the respondents : S.C.

Conduct of Election Rule-1961—rule 90-Maximum limit of election expenses—Rs.15 lacs for Parliamentry Constituancy and Rs.6 lacs for State legislature Constituancy challenge made as violating of Article 14 of the constitution but without any logic-taking judicial notice of the apparent price rise of all articles like Petrol/diesel cost of papers and printing etc. court declined to interfer. (Para 7)

By the Court

The petitioner, Bharat Jan Kalyan Samiti, who claims itself to be a registered society under the Societies Registration Act, has come up for quashing the amended Rule 90 of Conduct of Election Rules, 1961 as published in the Government of India Gazette (Extraordinary) Chapter II Part III (11) dated 31.12.1997 raising the maximum limit of the election expenses to Rs.15 lacs for a Parliamentary constituency and to Rs.6 lacs for a State Legislature constituency.

2. The Central Government has exercised its powers vested under Section 169 of the Representation of the Peoples Act, 1951 after consultation with the Election Commission which is apparent from a bare perusal of the Gazette notification itself.

3. The petitioner asserts that the amendment aforesaid ultra vires Article 14 of the Constitution of India but without demonstrating as to how it has offended the equality clause.

1998

B.J.K.Samiti
Vs.
U.O.I.
& others

B.K.Roy, J.
R.K.
Mahajan, J.

4. The petitioner avers, interalia, that this debars young man and woman of the State from contesting the elections as most of them are unemployed, economically weak and not in a position to spend Rs. 15 lacs ; that raising of maximum limit of election expenses by nearly about four times will prompt corruption, criminal activities and unfairness; that because of this increase the citizen of the country will be taxed; and that illegal money will be used by persons who are of criminal background, corrupt and otherwise bad elements.

5. Sri S.N.S. Yadav, learned counsel for the petitioner fails prima facie to substantiate the grounds by giving any illustration whatsoever so that we could call upon the Respondents to file their counter affidavit.

6. What has really been done is that merely the permissible extent of election expenditures have been raised and no one has been deprived to fight the election, if he chooses to do so. Thus, we do not see any discrimination between the persons who are fighting elections either for the Parliament or the State Legislatures.

7. One should take judicial notice of the apparent price rise of all things/articles/commodities. There are many fold rise in the cost of petrol/diesel, papers and printing, motor vehicles (Car/Jeeps/Tractors/Buses/Cycles and even their fares, labour and loudspeakers etc. essential for fighting election.

8. For the aforementioned reasons this writ petition is dismissed in limine.

9. Sri Chandra Prakash, learned counsel for the Union appearing on behalf of Respondent Nos. 1 and 2 and Sri H.R. Misra, learned Standing Counsel appearing on behalf of Respondent NO. 3 both pray for cost on the ground that it is thoroughly misconceived writ petition. However, cost is declined.

10. The office is directed to hand-over a copy of this order by Monday to both learned Standing Counsel for its communication to the respective Governments.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 17.08.1998

1998

August, 17

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. Writ Petition No.786 of 1998

Abhishek Srivastava ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the petitioner : Sri K.C. Sinha
: Sri Giridhar Gopal
Counsel for the respondents : Sri R.P. Tiwari
: Sri P. Padia
: S.C.

Article 226 of the Constitution of India—in the enterance test for admission to B.Ed. course the petitioner secured the highest marks ios Form/Admit Card were issued after the date of impugned notification—in such circumstances the respondents are estopped from taking the plea that the petitioner was not eligible to appear in the examination as he did not fulfil the requirement of minimum percentage of marks.

By the Court

1. The petitioner, Abhishek Srivastava, who had obtained degree of Master of Commerce had a keen desire to become a teacher, as his father, who was also a teacher, died in harness. He appeared in the Entrance Test conducted by Bundelkhand University in the year 1997 for admission to B.Ed. Course and topped the list of the successful candidates having secured 84.47% marks. The petitioner was not allowed to take up admission at Pt. J.N. College, Banda—respondent no.3 as his name did not appear in the list transmitted by the University for admission to the B.Ed. Course in the aforesaid College, obviously for the reason that the percentage of marks of the petitioner in B.A. was less than the prescribed minimum of 45 per cent as notified by the State Government amending the Uttar Pradesh State Universities (Regulation of Admission to course of instruction for Degree in Education in Affiliated, Associated and Constituent Colleges) order 1987. By the said amendment it has been

1998

A.Srivastava Vs. Stat of U.P. & others

O.P.Garg, J.

provided that for admission in the B.Ed. course the minimum qualification would be graduate degree of a University established by law with a minimum 45 per cent marks. The petitioner ran from pillar to post by making representations but no orders were passed with the result the petitioner had to file a writ petition no. 36094 of 1997 which was finally disposed of by this court on 27.10.1997 with the direction that the pending representation of the petitioner shall be decided within the period specified and that till the representation of the petitioner is decided he shall be permitted to join B.Ed. Classes in respondent no.3 College, Against this order the respondent University filed a Special Appeal No. 1046 of 1997 which was ultimately dismissed in view of the decision rejecting the representation of the petitioner on 2.12.97 (Annexure-7). After the rejection of the representation the petitioner was not allowed to attend the classes.

2. In the present writ petition under Article 226 of the Constitution of India, a prayer has been made by the petitioner that the order dated 2.12.1997, Annexure-7 to the writ petition, rejecting his representation be quashed and the respondents be commanded to permit him to pursue his stuties in B.Ed. Course in respondent-3 college and no impediments or restrictions should be placed in his taking up the ensuing examinations. A supplementary affidavit has been filed to indicate that now the examinations are to take place in the month of October, 1998.

3. In the counter affidavit filed by respondents 1 and 2 it has been averred that since the petitioner does not fulfil the minimum qualification as has been prescribed under the notification dt. 4.7.1997, Annexure-9 to the writ petition, he was not eligible to appear in entrance test. It was maintained that the petitioner being ineligible to appear in the entrance test, is not entitled to seek admission in B.Ed. course, even though he had topped the list of the successful candidates. A rejoinder affidavit has been filed.

4. Heard Sri Giridhar Gopal, learned counsel for the petitioner and Sri R.P. Tiwari, learned counsel for respondents.

5. To begin with, it may be mentioned that at the time when the application for entrance test for admission to the B.Ed. course were invited by the respondent- University, Minimum qualification was only graduate in view of the Government notification dated 5.5.1987. However the question of prescription of minimum

1998

A.Srivastava Vs. Stat of U.P. & others

O.P.Garg, J.

percentage of marks was in contemplation and consideration of the Government and this fact was mentioned in clause 17(2) of the printed application form required to be submitted by the candidates desirous of seeking admission to B.Ed. course. A firm decision in the matter was taken by the Government on 4th July,1997 on which date the notification, copy of which is annexure 9 to the writ petition, was issued prescribing minimum requirement of 45 percent marks in the degree examination and the requirement was made applicable with retrospective effect. Admittedly the petitioner secured 44.5 per cent marks in B.A. examination and did not fulfil the newly laid down criteria of the minimum qualification of having secured at least 45 percent marks. The petitioner was denied the benefit of admission in B.Ed. course only on the solitary ground that he does not possess the minimum percentage of marks as has been prescribed by the notification amending the Regulation of Admission Order of 1987, referred to above.

6. Sri Girdhar Gopal, learned counsel for the petitioner urged that the petitioner is a brilliant student who admittedly had topped the list of the candidates of successful candidates in the Entrance Test for admission to B.Ed. Course having secured 84.47 per cent marks and that since the form of the petitioner was accepted and after the date of impugned notification admit card was issued to the petitioner and he was allowed to take up the examination in which he remained successful, the respondents are now estopped from taking the plea that the petitioner was not eligible to appear in the examination as he did not fulfil the requirement of minimum percentage of marks. To fortify his contention Sri Girdhar Gopal has placed reliance on the oft-quoted celebrated decision of the Supreme Court reported in (1976) S.C.C. 311- Shri Krishnan Vs. The Kurkshetra University, Kurkshera. In that case Sri Krishnan, appellant before the Supreme Court, who was Government Servant, was pursuing the course of L.L.B. in evening classes. He failed in three subject at the part I examination but was permitted to appear in part II with option to clear those subjects in which he had failed. He was, however, refused permission for part II examination which was ultimately given on his giving an undertaking to secure his employer's permission. After the examination he demanded that his results be declared as the permission was not necessary. He was informed that since his attendance in B.A. I is short his candidature stood cancelled. The High Court dismissed the writ petition in limini. The Apex Court held that the University Ordinance empowers the authorities to withdraw the certificate regarding attendance before

1998

A.Srivastava
Vs.
Stat of U.P.
& others

O.P.Garg, J.

the examination if the candidate fails to reach the prescribed minimum. But this could not be done only before the examination . Once the appellant was allowed to take the examination, rightly or wrongly, then the statute which empowers the university to withdraw the candidature of the applicant has worked itself out and the applicant cannot be refused admission subsequently for any infirmity which should have been looked into before giving the applicant permission to appear. Though notice regarding shortage of attendance was twice put up on the notice board and the appellant was aware of it, it cannot be said that he committed a fraud by not drawing the attention of the university authorities to this fact. If neither the Head of Department nor the university authorities took care to scrutinize the admission form, then the question of the appellant committing fraud did not arise. Where a person on whom fraud is committed is in a position to discover the truth by due diligence, fraud is not proved. Hence if the university authorities acquieseed in the infirmities which the admission form contained and allowed the appellant to appear in the examination then by force of the university statute the university had no power to withdraw the candidature of the appellant.

7. The Apex Court found that somewhat similar situation arose in Premji Bhai Ganesh Bhai Kshatriya V. Vice Chancellor Ravishankar University, Raipur (A.I.R. 1967 M.P. 194) in which a Division Bench of the High Court of Madhya Pradesh observed as follows:

> "From the provisions of Ordinance Nos. 19 and 48 it is clear that the scrutiny as to the requisite attendance of the Candidates is required to be made before the admission cards are issued. Once the admission cards are issued permitting the candidates to take their examination, there is no provision in Ordinance No. 19 or Ordinance No. 48 which would enable the Vice-Chancellor to withdraw the permission. The discretion having been clearly exercised in favour of the petitioner by permitting him to appear at the examination it was not open to the Vice-Chancellor to withdraw that permission subsequently and to withhold his result."

8. The learned counsel for the petitioner further placed reliance on 1990 All. L.J.1113- Km. Savita Singh Vs. Board of High School & Intermediate Examination, U.P., Allahabad, through its Secretary; 1990 All L.J. 1090- Alok Singh Vs. Kshetriya Sachiv,

1998

A.Srivastava Vs. Stat of U.P. & others

O.P.Garg, J.

and others and (1990) 3 UPLBEC 1808-Km. Pallavi Mukherjee Vs. Board of High School in which placing reliance on Shri Krishnan's case (supra) it was held that the educational authorities were estopped from withholding or canceling the result of the petitioner on the ground that the combination offered by the student as private candidate was not permissible under the regulation. Reference was also made to the Division Bench decision of this court in Ved Pal Singh Vs. Madhyamic Shiksha Parishad (1987 U.P.L.B.E.C.-298) in which it was held that once having declared the result the Board was estopped from recalling the result and declaring the petitioner as failed almost after two years. This cannot be done and this will greatly affect the career of the petitioner who had already studied for two years by attending the classes in Intermediate. Another Division Bench of this court in Rajnath Singh Yadav Vs. Secretary Madhyamic Shiksha Parishad (1986) 2 UPLBEC-1424- quashed the order of the Board on the ground of delayed action. Similar view was taken in Pravesh Kumar Dubey Vs. Kanpur University (1990 UPLBEC-1053).

9. In the backdrop of the above law, Sri Girdhar Gopal, learned counsel for the petitioner urged that the respondents are estopped from refusing admission to the petitioner on the ground that he did not fulfil the eligibility qualification. Sri R.P. Tewari, learned counsel for the respondents repelled the above submission and urged that since in the admission form itself, it was mentioned that the State Government is seized of the matter-whether or not prescription of the minimum qualification of 45% marks in the degree course should be made, the petitioner cannot claim that he was kept in dark and, therefore, the plea of estopped against the respondents is not attracted.

10. I have given thoughtful consideration to the matter. It is true that in the instructions annexed with the application form, it is mentioned that the State Government is contemplating to prescribe eligibility qualification of having 45% minimum marks in the degree course but the said information cannot debar the petitioner from asserting his right to seek admission. It has got to be realised that plea of estoppel deals with the questions of facts and not of rights. No one can be estopped from asserting his right which he might have stated that he will not assert. The contingency mentioned in the instructions appended with the application form was inchoate and incomplete. The matter was mere in contemplation of the Government. Suppose the State Government had not taken the

1998

A.Srivastava
Vs.
Stat of U.P.
& others

O.P.Garg, J.

decision as was under its contemplation, in that event, the petitioner would have been entitled for admission. No candidate at that stage could be made ineligible to appear in the admission test merely on the ground that on some future date, the State Government is likely to prescribe the requirement of minimum marks of 45%. It was a contingency which was likely to fructify in the near future or it may not have been translated into action at all. Therefore, the information conveyed to the students through the instructions appended to the admission form was of no consequence. Ignoring the said information, we have to judge whether the petitioner has a case for being admitted in the B.Ed. course or not. There is yet another aspect of the matter. The provision with regard to the prescription of minimum qualification could not be made retrospective to the serious detriment of the candidates who on the relevant date, when the applications were invited, were eligible to appear in the Combined Entrance Test. The candidates who were eligible on a particular date to appear in the admission test could not have been made ineligible by a subsequent Government notification which could very well be made operative from the next session.

11. In the instant case, the petitioner submitted the application form on 10.6.1997 thought the last date for submission of the form was 25.6.1997. Till the last date of the submission of the application forms, there was no prescription that the candidates should have secured minimum 45% marks in the degree course. As a matter of fact, in view of the Government notification dated 5.5.1987 any candidate who was a Graduate, irrespective of the percentage of his marks, was entitled to appear in the admission test for B.Ed. course. The petitioner having passed M.Com. examination, was eligible and entitled to appear in the Combined Entrance Test. Even otherwise, the plea of estopped and acquiscence would be attracted in the present case for one simple reason that inspite of the Government notification dated 4.7.1997, prescribed the minimum 45% marks in the degree course, admit card was issued to the petitioner on 16.7.1997. He was allowed to undertake the Entrance Test on 20.7.1997 and on 20.9.1997 result of the Entrance Test was declared in which, as said above, the petitioner topped the list of the successful candidates, securing 84.47% of marks. It was the duty of the respondents to have disallowed all those candidates who had not fulfilled the requirement of minimum percentage of marks in the degree course after the date of the Govt. notification i.e., 4.7.1997. The doctrine of equitable estoppel applies to a case where a person is given an unequivocal assurance and on the faith thereof he acted

1998

A.Srivastava
Vs.
Stat of U.P.
& others

O.P.Garg, J.

detrimental to his interest and he suffered an irretrievable injury in that pursuit. In such an event, having made such a promise, the maker thereof is precluded to resile therefrom and pass an order detrimental to the interest of the person who believed the promise, placed reliance thereon acted on that basis to his detriment and he cannot be adequately compensated. The concept of promisory estoppel involves a representation by a person that something will be done in future and on such representation being made, the party alters his position relying on such promise.

12. Now the question is whether the present case comes within the fold of the above principle? As said above, on the date on which the petitioner applied for Entrance Test, he was undoubtedly eligible and qualified to appear in the test. His form was accepted without any demur or objection. Not only this, even after the crucial date of the Government notification, an admit card was issued to the petitioner and he was allowed to appear in the Entrance Test and ultimately, his result was declared on 20.9.97. All this exercise went on with any objection from the side of the respondents. The petitioner, therefore, cannot be penalised for the fault committed by the respondents. In the educations sphere the apex court has been quite liberal in extending the principal of promisory estoppel and acquiscence against educational authorities if they have, after giving an assurance, have acted to the detriment of a student. The other High Courts have also taken a liberal attitude in interpreting and applying the principle of estoppel, vis-à-vis, students in the matters` of their admission, cancellation of results and other allied matters. A reference may be made to the decision of M. Hussain and others Vs. Bharathiyar University Coimbatore and others 1991 (3) A.I.E.C.-730 (Mad.) and the decision of this court in Atul Mathur and others Vs. Allahabad Agricultural Institute, Naini and others (1993) 1 E.S.C.-244 (Alld.) and Km. Pratima Srivastava Vs. Purvanchal University Jaunpur (1994) 1 E.S.C.-74 (Alld.). Km. Pratima Srivastava's case (supra) also related to Entrance Examination for the B.Ed. course. It was held that the respondents in that case, after declaring the petitioner successful in Entrance Examination for B.Ed. and also after directing her to get herself admitted in the particular college, could not go back and refuse her admission on the ground that she did not possess degree of Graduation upto a particular date. In Sri Krishnan's case (supra), the apex court has clearly laid down that once the candidate is allowed to take the examination, rightly or wrongly, then the statute which empowers the University to withdraw the candidature of the applicant has worked itself out' and

1998

A.Srivastava Vs. Stat of U.P. & others

O.P.Garg, J.

the candidate cannot be refused admission subsequently for any infirmiry, which should have been looked into before giving the candidate permission to appear. In view of the authoritative pronouncement of the apex court as well as this court, the plea of estoppel is clearly attracted in the present case and now the respondents are debarred from asserting that the petitioner was not eligible to seek admission, as he did not fulfil the minimum requirement of percentage of marks in the degree examination.

13. This court had directed the respondents to take a decision on the representation of the petitioner. It is sad and bad that neither the University nor the State Government took any decision in the matter in spite of the fact that the principal of the College, who had passed the impugned order dated 2.12.1997, had contacted the Registrar of the respondent no. 2- University and sought his guidance. If the University had applied its mind to the case of the petitioner on his representation, perhaps it would have come to the conclusion that it was an eminently suited case in which relaxation from the minimum requirement of qualification was necessary. We are dealing with an ambitious candidate who has obtained a Master's degree. He had topped the list of the selected candidates and the percentage of marks secured by him being 84.47, was commendable. But for the Government notification dated 4.7.97 the petitioner would have been admitted in the B.Ed. course. The respondent no. 2- Bundelkhand University instead of taking up the matter with the Government, left the matter to be decided by the Principal, who had no option but to reject the representation of the petitioner merely on the ground that since the name of the petitioner did not appear in the list of the candidates transmitted by the University, he was not rightly given admission. In the representation, the very question which was to be decided was whether in the circumstances of the case, the petitioner should be allowed to take up the B.Ed. course even though he did not fulfil the requirement of minimum percentage of marks, which was prescribed by a subsequent Govt. notification. Be that as it may, the fact remains that the respondents are estopped from asserting that the petitioner was ineligible to appear in the Entrance Test to the B.Ed. course and is not entitled to pursue the studies.

14. The petitioner has pursued the B.Ed. course in pursuance of the orders of this court and now the examinations are to take place in the month of October, 1998. The apex court has permitted the students who were found ineligible but were able to pursue the

1998

A.Srivastava Vs. Stat of U.P. & others

O.P.Garg, J.

studies in pursuance of the orders of the court to complete the course on considerations of justice and equity. Dr. Km. Nilofer Insar Vs. State of M.P. and others (1991) 4 SCC- 279 is an instance in which consideration of justice and equity have outweighed the legal considerations. Km. Nilofer Insar was permitted to complete the M.D. course, which she was pursuing under the interim orders, though legally she was not entitled to the course in preference to the rival candidate, Dr. Jain. The court observed that even if her (Km. Nilofer's) admission is cancelled, Dr. Jain cannot now be admitted to the M.D. course of 1989, though in view of the apex court, Dr. Jain has been the victim partly of a lapse and failure on the part of the Medical College authorities in properly applyig the rules governing the transfer, and partly of court's delay in disposing of the writ petition. In my view, the present is a case in which the consideration of equity and justice should take precedence over the legal considerations and technical formulae.

15. In the result, for the reasons stated above, the writ petition succeeds and is allowed. The impugned order dated 2.12.1997 passed by respondent no. 3 on the representation of the petitioner is hereby quashed. The petitioner shall be deemed to have been validly admitted in the B.Ed. course in respondent no. 3 collegein pursuance of the Entrance test conducted by Bundelkhand University—respondent no. 2 in the year 1997. None of the respondents shall put any impediment in the way of the petitioner to pursue his studies and to appear in the ensuing B.Ed. examination and for all practical purposes, he shall be treated as a bona fide student of B.Ed. course.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 09.09.1998

BEFORE
THE HON'BLE S.H.A. RAZA, J.
THE HON'BLE BHAGWAN DIN, J.

1998

September, 9

Civil Misc. Writ Petition No.14885 of 1996

Atma Ram Srivastava ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the petitioner : Sri Tej Pratap Singh
: Sri A. Krishna
Counsel for the respondents : S.C.

Article 14, 226 of the Constitution of India—Order deducting 5% per month from the pension of the petitioner was passed by the disciplinary authority not commensurate with the gravity of misconduct alleged as the inquiry officer had held that the petitioner had not committed such an Act of misconduct or negligence which would amount such a draftic action-the impugned order is hit by Article 14 of the Constitution of India.

Cases relied on
AIR 1990 SC P.1923

By the Court

(Delivered by Hon'ble S.H.A. Raza, J.)

1. The petitioner, who has retired from service on 28.2.1993 while holding the post of Additional Secretary, Regional Office, U.P. Board, Allahabad, by means of the present writ petition has prayed that the impugned order dated 31.5.1995 passed by the State Government, which was served upon the petitioner on 27.10.1995 by means of which the Governor of U.P. exercising his powers under Section 351-A of Civil Service Regulations, directed the reduction of 5% of pension with permanent effect, be quashed. The petitioner has also prayed for the issuance of a writ in the nature of mandamus commanding the respondents to forthwith disburse the deducted amount to the petitioner along with interest at the rate of 14 per annum from the date of retirement till the date of actual deduction.

1998

Atma Ram Srivastava
Vs.
State of U.P. & others

S.H.A.Raza, J.
Bhagwan Din, J.

2. Before dealing with the question as to whether the order of the State Government, which has been impugned in this writ petition, considering the facts and circumstances of the case, was legal or not, the facts in brief which warranted such an action deserves to be elucidated.

3. On 10.11.1991, by a public notice, which was published in the news-papers, the petitioner invited tenders for the sale of unused answer books of the high school and intermediate examinations and other materials. Condition of the tenders published was that the tenderers had to deposit 10% of the costs as security money. On 25.11.1991, the tenders were opened before the Tender Committee, which consisted of the petitioner, the Deputy Collector as a nominee of the District Magistrate, the Assistant Director, Government Press, Allahabad as a nominee of the Director, Government Press, Allahabad and two Deputy Secretaries of the U.P. Board of High School and Intermediate Examination and one Shri R.B. Tewari, Assistant Secretary of U.P. Board of High School and Intermediate Examination, regional office, Allahabad.

4. M/S Shiva Associates submitted tenders regarding the first four items, out of total seven items and also submitted a bank draft amounting to Rs. 2.30 lakhs as 10% of the total value of the first four items. As the tender submitted by M/s Shiva Associates for item No. 4, i.e., the unused answer books, was highest, i.e. Rs. 1313 per quintal, the tender of M/S Shiva Associates was approved by the Tender Committee. Although the quantity and value of the answer books was higher and the tenderer M/s Shiva Associates deposited less amount as 10% security, but the Tender Committee approved the tendar of M/s Shiva Associates and the Bank draft submitted by M/s Shiva Shiva Associates was perused and accepted by the Tender Committee.

5. On 27.1.1992 M/s Shiva Associated requested that the costs of the unused answer books, lifted by it, should be adjusted from the security deposit of Rs. 2.30 lakhs, deposited by it. The request was conceded and M/s Shiva Associates removed 120.43 quintals of unused answer books, the costs of which in accordance with the rate of Rs. 1313 per quintals as approved by the Tender Committee, come to Rs. 1,58,151/-. On 20.3.1992, M/s Shiva Associates deposited with the Board of High School and Intermediate Examination a bank draft of Rs.1,58,151/-. On

22.7.1992, Allahabad Bank, Main Branch, Allahabad, sent an information that the bank draft submitted by M/s Shiva Associates was not a genuine document and no such draft was ever issued by the State Bank of India, Main Branch, Satna. On 30.7.1992 the petitioner lodged an FIR against Shir R.N. Tiwari, proprietor of M/s Shiva Associates. As soon as the FIR was lodged, Shri R.N. Tiwari, the proprietor of M/s Shiva Associates deposited the entire sale amount of Rs.1,58,151/- as well as Rs.11,865 towards the sale tax.

1998

Atma Ram Srivastava
Vs.
State of U.P. & others

S.H.A.Raza, J.
Bhagwan Din, J.

6. As stated in the foregoing paragraph that the petitioner was to retire on 23.2.1993, which was Sunday, but on 27.2.1993, which was the last day in service of the petitioner, at about 4.40 P.M., the petitioner was served with a charge sheet containing certain charges pertaining to the sale of unused answer books of the High school and intermediate examinations, which was sold in the year 1991 by the Regional Office of the Board of High School and Intermediate Examinations, Allahabad.

7. The petitioner submitted an explanation to the said charge sheet. Thereafter an enquiry officer was appointed and a departmental enquiry was held.

8. The petitioner submitted an explanation to the said charge sheet. Thereafter an enquiry officer was appointed and a departmental enquiry was held.

9. As far as the first charge regarding the defect in accepting the tender of M/s Shiva Associates and less deposit of security money is concerned, the Enquiry Officer gave a finding that the tender was accepted by the entire Tender Committee, hence only the Additional Secretary, Sri Atma Ram Srivastava cannot be held guilty, but the Enquiry Officer in his report remarked that in spite of that facts, it was obligatory for Mr. Atma Ram, being a member of the Tender Committee, to have placed the correct facts before the Tender Committee, hence the charge no. 1 is partially proved against him.

10. The second charge pertains to the allegation that after the approval of the tender, in accordance with the direction of the Board, it was incumbent that after the deposit of security money on 21.12.1991, the agreement ought to have been executed. The firm never applied for the extension of the time for executing the agreement. In view of the aforesaid position, due to non-execution of

1998

Atma Ram Srivastava
Vs.
State of U.P. & others

S.H.A.Raza, J.
Bhagwan Din, J.

the agreement by 21.12.1991, the security money ought to have been forfeited, but the firm was allowed to execute that agreement on 30.1.1992.

11. The defence of the petitioner against the said charge was that according to him, amount of security deposit should have been 1,31,500/-. It was not clear that as to how the Board directed to deposit a sum of Rs. 1,30,000/- as security deposit. If the Board would have desired that Rs.1,30,000/-ought to have been deposited, it should have amended the letter dated 11.12.1991. According to the direction of the Board, the security money had to be deposited on 21.12.1991 in the Saving Bank Account of the Board, without getting the amount deposited in the said Account, it was not possible to get the agreement executed. As far as the delay in the execution of agreement was concerned, M/s Shiva Associate sought a direction from the Board. On that letter no officer had put his signature, no meeting in that regard was ever held that the security money should be reduced and the date of agreement be extended. Neither it was possible to send the reply before 21.12.1991 nor it was possible to get the agreement executed by 21.12.1991.

12. The Enquiry Officer concluded that in the light of the explanation given by Sri Atma Ram Srivastava, Shri Atma Ram Srivastava could be exonerated –partially of the said charge, but he further remarked that the charge stood partially proved.

13. According to the third charge, as per agreement dated 3.1.1992,Rs. 13,200/- ought to have been deposited in the name of the Additional Secretary, High School and Intermediate Examinations in the Post Office Saving Bank Account.

14. The defence of the petitioner against the said charge was that M/s Shiva Associates has submitted the tender for four items of the waste papers and accordingly it had to deposit Rs. 2,29,898/- as security money. The firm on that four items deposited a sum of Rs.2,30,000/-, but as only for item regarding unused answer books, the tender of M/s Shiva Associates was accepted by the Tender Committee, hence, at the rate of Rs.1313/- per quintal, it had to deposit Rs.1,30,000/- as security money, but as the tenderer at the time of submitting tender had already deposited Rs. 2,30,000/- including Rs. 13,200/- hence no loss was caused, particularly when the tenderer had deposited the entire money alongwith the sales tax.

Hence the evaluation of the correctness of the security deposit at the later stage became redundant.

1998

Atma Ram Srivastava
Vs.
State of U.P. & others

S.H.A.Raza, J.
Bhagwan Din, J.

15. However, the Enquiry Officer concluded that as in the agreement it was indicated that the tenderers had to deposit Rs.13,200/- in the office of the Additional Secretary, Board of High School and Intermediate Examinations, it was obligatory on the part of the petitioner to get the said amount deposited in the Post Office Saving Bank Account before the agreement and only thereafter the agreement should have been executed, which shows his carelessness and raises a question mark upon his membership of the Tender Committee. If he would have got deposited Rs. 13,200/- in the Saving Bank Account of the Board, then the deposit of Rs.2,30,000/- on the basis of fictitious bank draft would have come to light. The Enquiry Officer also concluded that one of the Secretaries of the agreement put his signature on 6.1.1992, which raises a suspicion about the validity of the agreement. The agreement was filed alongwith the letter dated 3.2.1992 in the office of the Board without getting the amount of Rs. 13,200/- deposited in the Saving Bank Account of the Board. The execution of agreement on 3.1.1992 was not proper and against the condition, hence that charge stood proved.

16. The fourth charge pertains to allowing M/s Shiva Associates to lift the unused answer books without the deposit of the security money. According to the Enquiry Officer this charge also stood proved.

17. The fifth charge also pertains to lifting of the unused answer books. The tenderer in its letter dated 28.1.1992 had written that it had deposited the entire amount of Rs.2,30,000/- and the valuation of the answer books be adjusted in the account.Although, there was no order for lifting of unused answer books, the petitioner allowed the lifting of unused answer books to the tune of Rs.1,53,150.85 ps.

18. The Enquiry Officer concluded that the said charge stood proved.

19. The sixth charge pertains to non-deposit of the sales tax by M/s Shiva Associates and it was alleged that without getting that amount deposited, permission was granted to lift the stock.

1998

Atma Ram Srivastava
Vs.
State of U.P. & others

S.H.A.Raza, J.
Bhagwan Din, J.

20. The Enquiry Officer concluded that as the sales tax was deposited later on, that charge was not proved against the petitioner as the administration did not suffer any loss.

21. The seventh charge pertains to non-verification of the bank draft of Rs.2,30,000/-, which was deposited by M/s Shiva Associates and non-deposit of 10% security money for the unused answer books. It was alleged that if Rs.1,30,000/- would have been deposited as security money, then it would have come to the light that the deposit of Rs.2,30,000/- as security by the said firm for all the items was fictitious.

22. On that charge the Enquiry Officer concluded that the charge was not proved against Sri Atma Ram Srivastava as his bad intention is not proved.

23. The Enquiry Officer further concluded that charges no. 1 and 2 are partially proved, while other charges were fully proved. Although the firm later on had deposited the entire amount including the sales tax, ;hence the administration did not suffer any loss. TheEnquiry Officer recommended that considering the fact that as the petitioner had already retired, his case should be considered sympathetically.

24. From the perusal of the entire enquiry report it transpires that on charge no.1, the Enquiry Officer clearly stated that the entire process of acceptance of tender was completed unanimously by the Tender Committee, hence it would not be proper to hold the petitioner guilty of the charge. As far as charge no.2 is concerned, the Enquiry Officer concluded that in the light of the explanation of the petitioner, he could be partially exonerated from the said charge, but later on stated that charge was partially proved against the petitioner. As far as sixth charge is concerned, it is the clear cut finding of the Enquiry Officer that as the sales tax amount was deposited, the administration did not suffer any financial loss. The Enquiry Officer also recorded a finding over charge No. 7 that it had to be accepted that Shri Atma Ram Srivastava has proceeded in the matter in accordance with the established practice and no bad intention can be attributed to him as the firm had deposited the entire amount of the unused answer books including the sales tax, hence his case deserves to be considered sympathetically, particularly when he has been retired from service.

25. After the submission of the report the disciplinary authority issued a show cause notice to the petitioner. The petitioner submitted an explanation against the show cause notice. Thereafter, the impugned order, deducting 5% per month from the pension of the petitioner, was passed by the disciplinary authority i.e. the State Government.

26. The question as to whether the petitioner was guilty of such an act of mis-conduct or negligence in discharge of his duties while in office, which warranted such a drastic action of deprivation of 5% from pension results into grave consequences as far as pensioner is concerned. It has also to be examined as to whether the deprivation is corelative to or commensurate with the gravity of such an act.

27. More or less a similar question cropped up in the case of D.V. Kapoor Vs. Union of India and others, AIR 1990 SC 1923. In that case the matter pertained to Rule 8(5)(2) and Rule 9 of Civil Services Pension Rules, 1972, by means of which a power has been vested with the President to withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum.

28. D.V. Kapoor was working as an Assistant Grade IV of the Indian Foreign Service, Branch 'B' in Indian High Commission at London. On Novermber 8, 1978 he was transferred to the Ministry of External Affairs, New Delhi, but he did not join duty as ordered, resulting in initiation of disciplinary proceedings against him on August 23, 1979. Pending the proceedings, on February 26, 1980 D.V. Kapoor sought voluntary retirement from service and by proceedings dated October 24, 1980 he was allowed to retire but was put on notice that the disciplinary proceedings initiated against him would be continued under Rule 9 of Civil Services Pensions Rules, 1972. His main defence in the explanation was that his wife was ailing at London and, therefore, he sought for leave for six days in the first instance and 30 days later, which was granted, but as she did not recover from the ailment, he could not undertake travel. So he sought for more leave, but when it was rejected, he was constrained to opt for voluntary retirement. After conducting the enquiry the Inquiry Officer submitted his report dated May 19,1981.

1998

Atma Ram Srivastava
Vs.
State of U.P. & others

S.H.A.Raza, J.
Bhagwan Din, J.

29. The charge against D.V. Kapoor were that he absented himself from duty from December 15, 1978 without any authorisation and despite his being asked to join the duty he remained absent from duty which is wilful contravention of Rule 3(i)(ii) and 3(i) (iii) of the Civil Services Conduct Rules, 1964. The Inquiry Officer found that it is, however, difficult to say whether his absenting himself from duty was entirely wilful. In the concluding portion he concluded that both the articles of charges have been established, the circumstances in which D.V. Kapoor violated the rules require a sympathetic consideration while deciding the case under Rule 9 of the Rules. The President, on consideration of the report, agreed with the findings of the Inquiry Officer and in consultation with the Union Public Service Commission decided that the entire gratuity and pension otherwise admissible to D.V. Kapoor was with held on permanent basis as a measure of punishment through the proceedings dated November 24, 1981. Being aggrieved against the said order D.V. Kapoor filed a writ petition before the High Court, which was dismissed. Thereafter, he invoked the jurisdiction of Hon'ble Supreme Court.

30. In the light of the aforesaid facts and circumstances, Hon'ble Mr. Justice K. Ramaswamy (as he then was) speaking on behalf of the Bench referred to the decision of the Government as compiled by Swamy's Pension Compilation, 1987 Edition, where it was indicated:

> "Pensions are not in the nature of reward but there is a binding obligation on Government which can be claimed as right. Their forfeiture is only on resignation, removal or dismissal from service. After a pension is sanctioned, its continuance depends on future good conduct, but it cannot be stopped or reduced for other reasons."

Thereafter, the Bench observed:

> "Rule 9 of the rules empowers the President only to withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right. The measure of deprivation therefore, must be correclative to or commensurate with the gravity of the grare misconduct or irregularity as it offends the right to assistance at the evening

1998

Atma Ram Srivastava
Vs.
State of U.P. & others

S.H.A.Raza, J.
Bhagwan Din, J.

of his life as assured under Article 41 of the Constitution …… .. The exercise of the power by the President is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs. 60/-."

The Bench, therefore, concluded:

"In the instant case there was no finding that the appellant did commit grave misconduct as charged for, therefore, the exercise of power by the President."

31. The provision of Rule 9 of Civil Services Pensions Rules, 1972 is paramateria with Civil Services Regulation No. 351-A.

32. We have discussed in details the report of the Enquiry Officer, from which it transpires that the petitioner had not committed such an act of misconduct or negligence in discharge of his duty while in office which would warrant such a drastic action. The punishment awarded does not commensurate with the gravity of the charge of misconduct or is not correlative with the gravity of the misconduct or irregularity. At the most it can be said that the petitioner has committed mistake or an error in not getting the security money deposited at a particular time and getting the agreement executed after some time, but the administration did not suffer any loss. The Enquiry Officer himself did not attribute dishonest intention or motive on the part of the petitioner and in the concluding part of his report the Enquiry Officer recommended for sympathetic consideration of the case by the State Government. It seems that the concluding part of the report of the Enquiry Officer was not considered by the State Government in its right perspective.

33. We are of the view that the petitioner has not committed such an act of grave misconduct or irregularity which warranted such a drastic action at the evening of his career. Only certain lapses mistake or error which are technical in nature can be attributed to the

1998

Atma Ram Srivastava
Vs.
State of U.P. & others

S.H.A.Raza, J.
Bhagwan Din, J.

petitioner. There was no bad intention on the part of the petitioner to cause wrongful loss to the State Government and wrongful gain to himself or any other person. The action does not commensurate with the gravity of the alleged charges of misconduct or irregularity.

34. The impugned order suffers from arbitrariness inasmuch as no prudent man would have arrived at the conclusion, which has been arrived at by the State Government. Article 14 of the Constitution of India is the sworn enemy of arbitrariness, hence the impugned order is hit by Article 14 of the Constitution of India.

35. In view of what has been indicated herein above, the writ petition succeeds and is allowed. The impugned order dated 31.5.1995 is hereby quashed. A writ in the nature of mandamus is issued commanding the respondents to return the amount of the pension which has been deducted from the pension of the petitioner within three months from the date of receipt of a certified copy of this order. A writ in the nature of mandamus is also issued commanding the respondents to pay the petitioner his gratuity, if the same has not yet been paid within the aforesaid period with interest at the rate of 12% per annum from the date of retirement till the payment of gratuity.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 25.09.1998

1998

September, 25

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No.38240 of 1997

Doomer Singh ...Petitioner
Versus
U.P. Secondary Education Service Commission, Allahabad and others ...Respondents

Counsel for the petitioner : Sri Ashok Khare
Counsel for the respondents : S.C.
: Sri B.K. Srivastava

U.P. Secondary Education Service Commission 1982 Act No.5 of 1982—Section-21 readwith U.P. Intermediate Eduacation Act 1921,

S-16-G(3)(a)—Termination during probation period—candidate appointed through Commission as L.T. Grade Teacher—C/M passed termination order before completion of probation period of one year without prior approval of the authority concern—held termination order illegal—direction issued to take work till the termination order is approved. (Para 5)

1998

D.Singh
Vs.
U.P.S.E.S.C.
Alld.& others

Sudhir
Narain, J.

Case law discussed
1974 ALJ 465
1990(2) UPLBEC 983
1983 UPLBEC-622
1980 UPLBEC-119

By The Court

1. The petitioner seeks writ of certiorari quashing the resolution dated 20.10.1997 passed by the Committee of Management Sri Ganesh Inter College, Kasganj, Etah, resolving to terminate the services of the petitioner and the letter of the Manager dated 23.10.1997, whereby he was informed that his services have been terminated and a writ of mandamus commanding the Committee of Management to comply with the order of the District Inspector of Schools, Etah, dated 28.10.1997, whereby he held that the said resolution was inoperative without its approval by the competent authority.

2. The facts in brief are that in Sri Ganesh Inter College, Kasganj, Etah (hereinafter referred to as the Institution) there existed a substantive vacancy of Assistant Teacher in L.T. Grade for teaching Hindi subject. The Committee of Management sent the resolution pertaining to the said vacancy to the U.P. Secondary Education Services Commission, Allahabad (In short the Commission). The Commission issued the advertisement in the year 1996, whereby applications were invited for various posts of Assistant Teacher in L.T. grade including the post in question. The petitioner applied for the said post. He appeared before the Commission for interview. He was selected and was recommended by the Commission for appointment in the Institution. The Committee of Management issued appointment letter to the petitioner on 24.10.1996 appointing him as Assistant Teacher in L.T. grade for the period of one year on probation. The petitioner, in pursuance of the said letter, joined the institution on 25.10.1996. The Committee of Management, before expiry of the period of one year, passed a resolution on 20.10.1997 dispensing with the services of the

1998

D.Singh
Vs.
U.P.S.E.S.C.
Alld.& others

Sudhir
Narain, J.

petitioner with immediate effect purporting to exercise the powers under Regulation 25 of Chapter-III of the Regulations framed under the U.P. Intermediate Education Act. The Manager of the Institution sent a letter to the petitioner on 25.10.1997 informing him that his services have been terminated. The petitioner submitted representation before the District Inspector of Schools, Etah on which he issued a direction to the Committee of Management for permitting the petitioner to join the Institution and permit him to discharge his duties as no order of termination could be passed without prior approval of the District Inspector of Schools as provided under Section 16-G(3) of the U.P. Intermediate Education Act. The petitioner was , however, not permitted to function by the Committee of Management and he has filed this petition for the reliefs mentioned above.

3. The controversy is as to whether the Committee of Management is entitled to terminate the services of a teacher appointed on probation without obtaining any prior approval of the Commission as provided under Section 21 of Uttar Pradesh Secondary Education Services Commission and Selection Board's Act 1982. Sub-section (1) of Section 21 of the Act provides that no teacher specified in the Schedule shall be dismissed or removed from service or reduced in rank and neither his emoluments may be reduced nor he may be given a notice of removal from service by the Management unless prior approval of the Commission has been obtained. Sub-section (3) provides that every order of dismissal, removal or reduction in rank or removal from service or reduction in emoluments of a teacher in contravention of the provisions of sub-section (1) or sub-section (2) shall be void. The contention of learned counsel for the respondent is that the Committee of Management passed order simplicitor discharging the petitioner from service within the period of probation. He was appointed on probation for one year and the Committee of Management was entitled to consider his performance during the period of one year and it was for the Management to terminate the services or to extend the period of his probation.

4. Regulation 10 of Chapter III of the Regulations framed under the U.P. Intermediate Education Act 1921 provides that a person placed on probation shall be confirmed if he fulfils the requirements of Regulation 9 and has worked with diligence and otherwise proved himself fit for the post for which he was recruited and his integrity is certified. Regulation 11 further lays down that

1998

D.Singh
Vs.
U.P.S.E.S.C.
Alld.& others

Sudhir
Narain, J.

unless before the expiry of the period of probation, the service of a Head Master, Principal or teacher is terminated or action is taken to dismiss, discharge or remove him or reduce him in rank or in the case of Head Master or Principal the period of probation is extended under Regulation 10 following, he shall be confirmed on the post and in the grade at the end of his probation. Regulation 25 provides that the service of a temporary employee other than a probationer or of probationer during the term of his probation, can be terminated at any time by giving him one month's notice or one month's pay in lieu thereof. This provision was considered by the Division Bench of this Court in Managing Committee Sohan Lal Higher Secondary School, Rajendra Nagar, Lucknow Vs. Sheo Datt Gupta and another, 1974 A.L.J. 465 and it was held that prior approval of the District Inspector of Schools was required under Section 16-G(3)(a) of the U.P. Intermediate Education Act even in the case of a probationer, in as much as the provisions of Section 16-G(3)(a) does not make any distinction between a teacher appointed on probation or he is confirmed. It was observed:

> "To sum up, Sec. 16-G(3)(a) of the Act having been worded generally will apply to every case of termination of service where prior to the termination some notice has to be given. It, therefore, applies to a probationer also, and therefore the services of a probationer cannot be terminated unless notice of termination is served after obtaining the approval of the Inspector."

5. In Om Prakash Vs. U.P. Secondary Education Services Commission Allenganj, Allahabad and others, (1990) 2 U.P. L.B.E.C. 983, the similar controversy as raised in the present writ petition was involved. It was contended before the Court that Section 21 of Act 5 of 1982 does not provide for approval in respect of a teacher appointed on probation. The Court held that Section 32 of 1982 Act preserves the protection given to the teachers under the provisions of Section 16-G(3) of Act No. 2 of 1921 and the Regulations framed thereunder in the matters of dismissal, removal, termination or reduction in rank provided the provisions are not inconsistent with the provisions of the Act. The provisions of Section 21 of 1982 Act are silent with respect to the discharge of a probationer. The provisions of Section 16-G(3)(a) would not be inconsistent so far as the discharge of a probationer is concerned. The Division Bench held that the word 'removal' used in Section 21 and Section 32 of 1982 Act was used in comprehensive sense to

1998

D.Singh
Vs.
U.P.S.E.S.C.
Alld.& others

Sudhir
Narain, J.

include the discharge of a probationer from service. It was held that protection of Section 21 of the Act is available to the probationer who is being discharged from service.

6. Learned counsel for the respondents contended that if a probationer is discharged from service, the order is not passed by way of punishment and the termination does not cast a stigma on the petitioner. He has placed reliance on Janta Vidyalaya Society Deoria and another Vs. Deputy Director of Education, VII Region, Gorakhpur and others, 1983 U.P. L.B.E.C. 622, wherein the Committee of Management having passed resolution terminating the services of a teacher asked the District Inspector of Schools for sanction whereupon the District Inspector of Schools accorded sanction to the proposal of the Committee of Management for termination of the service. The teacher filed appeal against the order of the District Inspector of Schools which was allowed by the Deputy Director of Education. The High Court quashed that order holding that the District Inspector of Schools was not required to assign any reason before grant of the approval.

7. In P.C. Bagla (Post Graduate College Hathras) U.P. Vs. Vice Chancellor, Agra University, 1980 U.P. L.B.E.C. 119, it was held that a probationer is not entitled to any opportunity of hearing prior to termination of the service as he has no right to hold the post. None of these cases hold that the prior approval of the authority concerned was not required even in the case of the probationer before serving the notice of termination of service. The consideration for grant of the approval by the authority concerned is different in case of probationer where the order of termination is passed on the basis of the assessment of the work of the teacher during the period of probation and also examining his integrity. It is for the Committee of Management to assess his work, competency, integrity and other relevant factors before terminating his service. The order of termination is not passed by way of punishment. In a case where the order is passed by way of punishment, different considerations may arise, namely, the nature of charges levelled against the teacher, the evidence to prove such charges and whether the proper procedure was followed as provided under the Act and the Rules framed therein before imposing punishment on him but in either of the case, approval of the authority concerned is required.

8. As the petitioner was appointed on the recommendation of the Commission, it was necessary for the Committee of Management

to have obtained prior approval of the order of termination of the service of the petitioner. The Committee of Management has already taken a decision to terminate the service of the petitioner within the period of probation. It can submit the necessary papers before the Commission under Section 21 of Act No. 5 of 1982. In case the Committee of Management submits the necessary papers with a request to accord the approval of the termination of the service of the petitioner, the Commission or such authority, who is empowered to accord the approval, will pass an order expeditiously possibly within a period of three months from the date of submission of a certified copy of this order before such authority.

9. The writ petition is accordingly allowed and the petitioner be permitted to function till the order of termination is served after obtaining the approval of the authority concerned under Section 21 of Act No. 5 of 1982 Act.

The parties shall, however, bear their own costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD, 15.09.1998

BEFORE
THE HON'BLE S. K. PHAUJDAR, J.

1998

September,15

Criminal Misc. Application No.3838 of 1998

Smt. Rahmat Jahan **...Applicant**

Versus

State of U.P. **...Opp. Party**

Counsel for the applicant : Sri V.K. Chaturvedi
Counsel for the Opp. Party : A.G. A.

Section 482 Cr.P.C.—Application for taking the applicant in Judicial custody while she was actually lying in the Hospital, would amount to surrender would no doubt means appearing physically but where a person is unable to appear before the Court for medical reasons and desires that her surrender be accepted and she may be taken in Judicial custody.

By the Court

1998

Smt. Rahmat Jahan
Vs.
State of U.P.

S.K. Phaujdar, J.

1. The matter was heard yesterday in presence of Sri V.K. Chaturvedi for the applicant, Sri Tej Pal for the respondent/complainant, and Sri Surendra Singh, learned A.G.A. for the State.

2. Through this application under Section 482, Cr.P.C. the applicant has made a prayer for taking her in judicial custody in case Crime No.185 of 1997 corresponding to case No. 1405 of 1997 relating to P.S. Loha Mandi, District Agra, for offences under Sections 498-A/304-B/201, I.P.C.

3. The applicant, who is a woman, is said to be confined in S.N. Hospital at Agra at present. She had made a prayer before the Chief Judicial Magistrate, Agra, on 29.8.1998 making a prayer for taking her into judicial custody in terms of an order of the Supreme Court dated 27.8.1998. The applicant indicated that being a heart patient and suffering from a heart attack she had admitted herself in S.N. Hospital on 21.8.1998 and was unable to move about due to her physical conditions and as such her being in the hospital and her filing the surrender application be accepted as her surrender in judicial custody. The C.J.M., Agra, by his order dated 29.8.1998 observed that it was not a surrender at all and there was no prayer for deputation of a Magistrate. Accordingly, the C.J.M. observed that it was open for the applicant to appear in person before the court and then make a surrender, otherwise the surrender application could not be considered. The Supreme Court was approached in a Special Leave petition by the complainant, Mohd. Isahaq, in which the accused persons including the present applicant were arrayed as respondents. The Apex Court directed that before considering the facts and circumstances of the case the accused-respondents were to surrender before the court concerned within four and file proof of such surrender within two weeks thereafter. This order was passed by the Supreme Court on 27.7.1998 in S.L.P.(Crl.) No.1764 of 1998. Subsequently, the Supreme Court was informed on 3.9.1998 that one of the accused, viz. Smt. Rahmat Jahan (the present applicant) could not surrender due to her hospitalisation. The Supreme Court was also informed that a prayer was made on her behalf for treating her admission in the hospital as a surrender in court and that the court had rejected such prayer. The Supreme Court observed “If she is aggrieved thereby she may, if so advised, approach the High Court against rejection of her prayer and if approached the High Court will

consider the same in accordance with law without being influenced by our earlier orders." Only after this, the present application has been filed.

1998

Smt. Rahmat Jahan
Vs.
State of U.P.

S.K. Phaujdar, J.

4. The only question that arises for consideration is whether the application for taking the applicant in judicial custody while she was actually lying in the hospital would amount to surrender or not. The learned counsel for the complainant submitted that the applicant was quite hale and hearty and was not at all admitted in the hospital and the whole thing was a plea set up to defraud the court. The learned A.G.A. submitted that once this court gives a ruling that surrender may be made even without have a far-fetched effect on the criminal proceedings and it would go against the provisions of Section 437, Cr.P.C. The learned counsel for the complainant relied on a decision of the Supreme Court in the case reported in 1998 Crl.L.J. 2527. The Supreme Court had before it a question concerning true interpretation of Section 167(5), Cr.P.C. (as amended in West Bengal). There was non- completion of an investigation for two years and a plea for discharge was raised. The Court was confronted with the clause 'made his appearance' as appearing in sub-section (5) to Section 167 and it opined that it means physical appearance and not appearance by counsel. It was observed that the word 'appearance' in Section 167(5) cannot be understood different from the same word used in Sections 436 and 437 of the Code. In the concerned case, the respondent had not made his physical appearance before the Special Judge at any time before the charge-sheet was laid and hence there was no question of invoking the bar contemplated under section 167(5) on the facts of that case.

5. The question that has been posed in this case requires a thorough understatnding of the situation in the back-ground. Under the direction of the Supreme Court certain person is required to surrender before the court below. In common parlance surrender would, nodoubt, mean appearing physically under the jurisdiction of the court awaiting further orders of the court. In the instant case, however, it is the plea of the applicant that she is bed-ridden in a hospital due to some heart ailment. She makes a prayer in writing before the court that her being in the hospital, be treated as her surrender and she may be taken in judicial custody. This prayer was rejected by the court because of absence of her personal appearance in the court room. 'Surrender', according to the dictionary meaning means 'to yield onself up'. In legal parlance it should mean

1998

Smt. Rahmat Jahan
Vs.
State of U.P.

S.K. Phaujdar, J.

'succumbing to the physical jurisdiction of the court for action regarding the person who surrenders. Here is a person, who, for medical reasons, is unable to appear before the court in person, but she desires that her surrender be accepted and she may be taken in judicial custody. It is open for the court to ask the police officers, under a judicial order, to go to the hospital and to take charge of the person. It will be open for the court to see if really the ailment was of such a nature wich would require her stay in the hospital or not, but that could be done only after accepting the fact of surrender. The person surrendering, although was not physically present before the court, has kept herself completely at the mercy of the court awaiting any judicial order for her further custody. We could envisage a case where in an encounter an accused is arrested in a seriously injured condition, in such a case he would be sent to the hospital first rather than to the court and a report to the court would be made explaining the situation and the court would in that case accept the forwarding of the accused to the court. It is certainly an exceptional case, but may not be an absolutely impossible one. Similarly, if a person is critically ill, he or she should have the liberty to be in the hospital for treatment and then indicate to the court that she or he is succumbing to the jurisdiction of the court and further to indicate that she or he had kept herself or himself under the complete mercy of the court for further orders regarding her or his custody.

6. In my view, under the circumstances of the case, the court below should have accepted the surrender and should have issued nesessary directions to the police officers to formally take the applicant in custody and keep her in watch at the hospital. After such surrender is accepted, it will be open for the court below to consider the reality of the plea of critical disease and to record an order accordingly. The C.J.M. is, therefore, directed to act in terms of the above observation.

7. The application stands disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD, 14.09.1998

BEFORE
THE HON'BLE S. K. PHAUJDAR, J.

1998

September, 14

Criminal Misc. Application No.3602 of 1998

M.K. Vinyl (P) Ltd. ...Petitioner

Versus

State of U.P. & others ...Respondents

Counsel for the petitioner : Sri Amit Saxena
Counsel for the respondents : A.G.A.

Section 482 Cr.P.C.—the powers under section 482 Cr.P.C. could not be exercised to quash the First Information Report in view of the judgement of the Allahabad High Court in Ram Lal Yadav's case—proper remedy is to file a writ petition.

1. Through this application under Section 482, Cr.P.C. the applican has prayed for quashing an F.I.R. dated 25.8.1998 lodged at P.S. Dalanwala, District Dehradun under Section 420, I.P.C. in case Crime No. 338 of 1998.

2. When asked if the powers under Section 482, Cr.P.C. could be exercised to quash an F.I.R. in view of the judgment of this Cour in Ram Lal Yadav's case and A.S. Bindra's case the learned counsel submitted that the cases may be distinguished as the F.I.R. was against a corporate authority and no Criminal action lies against a corporate authority as no individual was named as an accused. Reliance was placed on a decision of the Supreme Court as reported in JT 1997 (10) S.C. 165 as also on an unreported decision of this High Court dated 8.5.1998 in Criminal Misc. Application No. 9353 of 1986.

3. The facts of the case may be stated in brief before the law point could be taken up. The F.I.R. now under challenge is at Annexure '14' to the present application which was lodged on the basis of a report from the Superintending Engineer, U.P. Jal Nigam at Dehradun, which is at Annexure '13' to the present application. The report was made to the Officer-in-Charge of the concerned Police Station stating that M/s M.K. Vinyl (P) Ltd. Had supplied to

1998

M.K.Vinyl P. Ltd.
Vs.
State of U.P. & others

S.K. Phaujdar, J.

the Jal Nigam, between February and July,1997, certain quantity of pipe of certain specifications under an indent from the Department. Payment was made by the Department to the Firm, but on actul use the pipes were found broken and suffering from excessive leakage. The pipes were inspected by the experts from the Roorkee University as also from Shri Ram Institute for Industrial & Research and the same were found not in conformity with the standard given by the Indian Standard Institute and as such the Department was cheated.

4. An F.I.R. is to be drawn up under Section 154, Cr.P.C. when an information relating to commission of a cognizable offence is given to Officer-in-Charge of a Police Station. If it is given orally, it is to be reduced into writing and is to be readover to the informant. Every such information of commission of cognizable offence is to be signed by the person giving the information and the substance thereof is to be entered in a book to be kept by the officer in such form as the State Government may prescribe in this behalf. This is popularly known as the F.I.R. (First Information Report). Loding of an F.I.R. nodoubt requires information relating to commission of a cognizable offence but it no where requires that any particular person be named as perpetrator of the offence. It may not, therefore, be proper to describe an F.I.R. to be untenable in law simply because it neames a corporate person as an accused.

5. The case law, that has been relied upon, does not cover the instant point. Here was a case before the Supreme Court in which in a prosection under Section 138 of the Negotiable Instruments Act the accused was acquitted by the Magistrate on the ground of absence of the complainant. The complaint was, however, filed by a company and was not a corporal person capable of making physical presence in the court. The Supreme Court observed that where the complainant is a body corporate it is dejure complainant and it must associate a human being as defecto complainant to represent the company. In case of absence of a corporal representative, the company could seek permission of the court to send another person to represent it. The Supreme Court set aside the order of acquittal on the ground of absence of the company as the complainant and other witnesses had already been examined by the court. The Supreme Court in explaining the term ‘complainant’ had referred to the word ‘person’ as defined in Section 11 of the Indian Penal Code which States that the word ‘person’ includes any company or association or body of persons, whether incorporated or not. An offence of cheating is defined under Section 415, I.P.C. and it is made punishable under

1998

M.K.Vinyl P. Ltd.
Vs.
State of U.P. & others

S.K. Phaujdar, J.

Section 420, I.P.C. and Section 420, I.P.C. begins with the words 'whoever cheats'. An offence of cheating could be committed on proof of certain components like deception, fradulent or dishonest inducement to deliver any property and damage or harm to the person deceived in respect of his property. This deception, prima facie, was made by the Firm and only investigation could reveal as to who were the persons actually involved in the act of deception and inducement which resulted in damage or harm to the property of the complainant.

6. The records of the unreported case were not available from the office nor did the learned counsel place a copy of the orders before me. The position of law is, however, clear. If there be a prima facie allegation of commission of a cognizable offence, an F.I.R. can be drawn up and investigation can be taken up. There is no necessity of mention of the name of the accused and as such naming a corporate person as an accused may not be a legal bar against entertainment of an F.I.R. once this point fails, we are back to the general question whether an F.I.R. could be quashed in exercise of powers under Section 482, Cr.P.C. The decision in the case of A.S. Bindra was referred to by the learned counsel to say that it was open to distinction because of the above ground. When that ground has failed, there is no reason to distinguish the decision in A.S.Bindra's case. That case has been relied on even recently by this Court on 11.9.1998 in Criminal Misc. Application No. 3517 of 1998 (Mrinal Kanti Mallich & others V. State of U.P. and another). The applicants in that case were also directed to seek relief in a proper writ petition.

7. The present application, accordingly, stands disposed of with a direction that the applicant may choose to file a writ petition for proper relief as the relief prayed for may not be granted under Section 482, Cr.P.C.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 10.09.1998

1998

September,10

BEFORE
THE HON'BLE J.C. GUPTA, J.

Civil Misc. Writ Petition No.29322 of 1998

Yaseen **...Petitioner**

Versus

VIth A.D.J., Bulandshahr and others **...Respondents**

Counsel for the petitioner : Sri Rajesh Tandon
Counsel for the respondents : Km. Anu Jaiswal
: Manju Chauhan
: S.C.

Section 25 of the Provincial Small Causes Court—the revisional court acted beyond its powers in reversing the findings of the trial court and in substituting its own finding of fact for the one recorded by the trial court—the appropriate course is to send the case back to the trial court for a fresh decision in the light of guide-lines indicated by the revisional court in its judgment.

By the Court

1. Heard Sri Rajesh Tandon appearing for the petitioner and Km. Anu Jaiswal appearing for the respondent no. 2 Km. Anu jaiswal gives a statement that she does not intend to file any counter affidavit and this writ petition may be heard and disposed of finally. With the consent of parties' counsel and in the circumstances of the case, this writ petition is disposed of finally.

2. Respondents no. 3 and 4 filed suit for rent and ejectment against the petitioner on the ground of default of payment of rent alleging therein that the defendant-petitioner was in arrears of rent from 1.10.87 which remain unpaid despite service of notice of demand on 6.9.1993. The petitioner contested the suit alleging that no amount of rent was due as he had paid entire rent to the plaintiffs but no receipt was issued therefor. The trial court did not accept this assertion of the tenant about the payment of rent to the landlords and recorded a finding that the defendaant-petitioner was a defaulter, The trial court

1998

Yaseen
Vs.
VI A.D.J. Bulandshahr & others

J.C.Gupta, J.

however, decreed suit for arrears of rent only and dismissed the same for ejectment on the ground that notice of demand and termination was not proved to have been duly served upon the petitioner. Against the judgment of the trial court, the landlords preferred revision which has been allowed by the impugned order and the plaintiff's suit has been decreed in toto.

3. Learned counsel for the tenant-petitioner argued before me that the revision court has acted beyond its powers in making interference in the finding of fact recorded by the trial court regarding service of notice, which was based upon appraisal of evidence. He argued that it was found by the trial court that it was not fully established that the notice of demand and termination was tendered to the tenant and the same was refused by him. This finding of the trial court has been reversed by the revision court on the ground that the evidence was not properly assessed and appreciated by the trial court.

4. The position with regard to the scope of powers of the court hearing revisions under Section 25 of the Provincial Small Causes Court is well settled. Such powers are only supervisory and the revision court has not been invested with the powers which are possessed by Appellate Court as far as the matter of appreciation of evidence is concerned, The revision court has a limited jurisdiction to examine the legality of the decree passed by the trial court. It has no power to examine the evidence of the case in order to decide whether or not the finding of fact recorded by the trial court is justified or net nor the revisional court can substitute its own finding of fact for the one recorded by the trial court, If certain piece of evidence and material has been not taken into consideration by the trial court which in the opinion of the revision court was necessary, the appropriate course in such a situation is to send the case back to the trial court for a fresh decision in the light of guidelines which may be indicated by the revisional court in its judgment, In this connection a reference may be made to the Division Bench case of this Court in Laxmi Kishore and another Vs. Har Prasad Shukla and others, 1981 ARC 545, Durga Prasad and others Vs. VIIth Addl. District judge, Kanpur Nagar and others 1998(2) AWC 1161, Jaidev Mishra Vs. District Judge, Faizabad and others 1998(1) ARC 354 and the decision in writ petition No. 6505 of 1980 Kailash Chandra & another Vs.IIIrd Addl. Judge, Jalaun, Orai and others decided on 25.8.1998.

1998

Yaseen
Vs.
VI A.D.J.
Bulandshahr
& others

J.C.Gupta, J.

5. In the instant case, it appears that the revisional court was not satisfied with the manner in which the evidence on record was assessed by the trial court in not taking into consideration various important aspect of the matter. In such circumstances, the revisional court should have remanded the case to the trial court for a fresh decision instead of reappraising the evidence itself and substituting its own finding of fact. Learned counsel for the respondents however, argued that in the written statement the defendant has not specifically denied the averment made in the plaint that a notice was duly served upon the defendant and none of the courts below have taken into account this important factor while answering the question of service of notice. What is the effect of the pleadings of the parties in the present case, in the light of evidence on record has not been considered by either of the courts below and this court in its writ jurisdiction does not decide a disputed question of fact. In the present case on one hand the revisional court has acted beyond its powers in substituting its own finding of fact for the one recorded by the trial court after reappraisal of evidence but at the same time it is also clear that the trial court did not appreciate the evidence adduced by the parties on the question of service of notice in its right perspective ant it also lost sight of the fact that the observations made in another suit with respect to the statement of the postman who was produced as a witness in that case were neither relevant nor could be read in evidence in the present case. If a witness is disbelieved in one case it does not mean necessarily that he is a lier forever or that his evidence is to be discarded on that ground alone. It appears that on account of this wrong approach and legal misconception, the mind of the trial judge was to a great extent influenced by this irrelevant factor while making assessment of the evidence on record. The finding of the trial court, therefore, on the question of service of notice also gets vitiated.

6. From the above discussion, it follows that the findings recorded by the trial court as well as by the revisional court on the question of service of notice cannot be sustained and for this reason the order of the revisional court as well as the decree of the trial court are set aside and the case is sent back to the trial court for a fresh decision on the question of service of notice only. The other findings recorded on the question of default etc. are maintained and they shall not be touched again while deciding the case afresh. The trial court is directed to decide the case in accordance with law for a fresh decision in the light of observations made above, expeditiously,

preferably within a period of three months from the date of production of certified copy of this order.

7. For the reasons stated above, this writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 23.09.1998

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.K. MAHAJAN, J.

1998

September,23

Civil Misc. Writ Petition No.17723 of 1988

U.P. State Sugar Corporation, Unit Munderwa, Basti **...Petitioner**

Versus

Ram Nain Singh & others **...Respondents**

Counsel for the petitioner : Sri G.P. Mathur
: Sri H.S. Nigam
Counsel for the respondents : S.C.

Article 14, 226 of the Constitution of india—Notification dated 15-7-1992 issued by the State Government under section 3 of U.P. Industrial Dispute Act 1947 challenged—not violative of Article 14 of the Constitution of India as the restriction is reasonable and it has been imposed with the consent of the parties just to secure the payment of the gratuity in time.

By the Court

1. The petitioner has moved the present writ petition seeking following reliefs :-

" (i) issue a writ of mandamus commanding the respondents not to enforce or given effect to the notification dated 15.7.1982 issued by the state Government.

(ii) Issue a writ of mandamus commanding the respondent no. 2 not to proceed with or decide the application moved by respondent no.1 which has been made on the basis of the notification dated 15.7.1982.

1998

U.P.S.S.Corp
Vs.
R.N.Singh
& others

B.K.Roy, J.
R.K.
Mahajan, J.

2. It appears that the petition is a sugar Mills known as Madho Mahesh Sugar Company Limited at Munderwa Bazar in district Basti. It was acquired by the State of U.P. under the provision of U.P. sugar undertakings (Acquisition) Act, 1971 and stood transferred and vested with the U.P. state sugar Corporation Limited free from any incumbrances on 28.10.1984. The respondent no. 1 after attaining the age of superannuation from service retired on 1.8.1984. It may be mentioned at this stage that the U.P. Government on 15.7.1982 under Section 3 of U.P. Industrial Disputes Act, 1947 issued a notification. The notification aforesaid is quoted below for ready reference:-

" English translation of Shram Anubhag-2 Notification No. 3157 (H.I)/XXXVI-2-201(ii)(HI)-79 dated July 15, 1982 published in U.P. Gazette Extra, dated 15th July,1982 pp 2-3.

Whereas in view of the sick and uneconmic condition of the sugar Industry, the Bipartite Committees constituted for evaluation of the present situation of the said industry and suggesting ways and means for its amelioration inter alia, in its meeting held on Feb. 12, 1982 in the Uttar Pradesh Sachivalaya, Lucknow, the question of payment of gratuity to the workmen employed in the said Industry :

And, whereas, members of both the parties present in the said meeting of the Committee, reached an unanimous decision regarding payment of gratuity to the workmen employed in the said industry :

And whereas, in order to enforce the said unanimous decision taken by the said Bipartite Committee the state Government exercising power under clause (b) of section 3 of the U.P. Industrial disputes Act, 1947 (U.P. Act XXVIII of 1947) issued order vide Notification No. 1867 (HI)/XXXVI-2-201 (HI)-79 dated May 4, 1982.

And whereas, the said Bipartite Committee in its meeting held on May 4, 1982, further considered the question of payment of gratuity to the workmen employed in the said Industry and unanimously decided to modify its earlier decision :

And whereas, in the opinion of the state Government it is necessary to enforce the said unanimous decision, taken by the said Bipartite Committee for securing public safety and convenience and

maitenance of public order and supplies and services essential to the life of the community and for maintaining employment also :

1998

U.P.S.S.Corp Vs. R.N.Singh & others

B.K.Roy, J.
R.K. Mahajan, J.

Now, therefore, in exercise of the powers under clause (b) of section 3 of the U.P. Industrial Disputes Act, 1947 (U.P.) Act No. (XXVIII of 1947) read with Section 21 of the Uttar Pradesh feneral clauses Act, 1904 (U.P. Act No. 1 of 1904) and in supersession of Notification No. 1867 (HI)/XXXVI-2-101-(ii) (HI)-79 dated May 4, 1982, the Government is pleased to make the following order and to direct with reference to Section 19 of the said Act that notice of this Order shall be given publication in the Gazettee.

O R D E R

1. The management shall pay the amount of gratuity to a retiring workman as may be found due to him by the management on receipt of a clearance slip from the workman in respect of articles of stores, advance etc. The workman shall simultaneously vacate his quarter and hand over its possession to the management.

2. The retiring workman shall be deemed to be in service and shall be entitled to full wages and all fringe benefits as long as the employer does not tender the due amount of gratuity to him.

3. Receipt of payment of the amount of gratuity found due by the employer shall not prejudice the right of the workman to raise a dispute about it, if he considers the amount disputable even on vacation of the quarter and exit from the service.

4. This order shall apply to all workman covered by the wage board for the sugar Industry and shall remain in force till December 31, 1963.

3. Petitioners grievance is that the notification aforesaid is illegal and without jurisdiction as the State Government has no jurisdiction to issue notification. It is further submitted that the state government can only exercise power under section 3(2) (b) of U.P. Industrial Disputes Act, 1947 (hereinafter referred to a U.P. Act) for the temporary measure and it is still in force i.e. till the filing of the writ petition which was filed in the year 1988. In other words, it was in force till July, 1987. The petitioner further alleges that this notification is bad as it is repugnant to section 7 of Payment of Gratuity Act, 1972(hereinafter referred to as Act of 1972) and the

1998

U.P.S.S.Corp
Vs.
R.N.Singh
& others

B.K.Roy, J.
R.K.
Mahajan, J.

Rules framed thereunder. It is further alleged that there is complete machinery for recovery of gratuity under section 8 of Act of 1972 and there is penal provision under section 9 of Act of 1972 in case gratuity is not paid. The petitioner's grievance is that respondent no. 1 never reported for duty after 1.8.1984 and he cannot be treated in service after 1.8.1984 and is not entitle to wages and other benefits unless gratuity is paid. So in nut shell the grievance of the petitioner is that the deeming clause of notification in case the gratuity is not paid the worker shall be entitled to full wages and so long the gratuity of the employee is against the spirit of Article 14 of the Constitution of India and it may be mentioned that this was a Bipartite Committee agreement to device ways and means to meet the present situation arising out of the industry. Both the parties were present in the said meeting. It may be mentioned that the parties reached at a unanimous decision regarding payment of gratuity and decided to implement and modify the earlier decision. The Government was satisfied in the public interest for securing public safety and convenience and also to maintain supply and service of essential goods to the life of the community and thought it essential to enforce this decision. Admittedly, this decision was to cover all the workman governed by wage Board for the sugar Industry. It may be mentioned that the workman-respondent no. 1 had filed and application under section 33-C(2) of U.P. Act for payment of wages and gratuity in the Labour Court which was also stayed by the order dated 12.9.1988 by this Court.

4. Shri H.S. Nigam, counsel for the petitioner has submitted on the above lines and his only thrust of argument is that on superannuation of the workman he is ceases to be an employee of the sugar factory as defined in section 2(2) of the U.P. Act. He further submits that the notification cannot enhance the age of retirement beyond 60 years which is mentioned in the standing Orders. He further submits that the notification cannot override the provision of Act of 1972).

5. After hearing Shri Nigam we are of the view that Shri Nigam's submissions lack force on the following reasonings

Firstly, it is now well established principle of labour laws jurisprudence that settlements are sacred and they are not ignored. Their terms and conditions are binding upon the parties unless they have been procured. As a result fraud, misrepresentation etc. and challenged in proper forum.

1998

U.P.S.S.Corp
Vs.
R.N.Singh
& others

B.K.Roy, J.
R.K.
Mahajan, J.

6. Sanctity to settlement has been given under section 18 of the Industrial Disputes Act, 1947 (hereinafter referred to as Central Act.) However, this power of issuing notification imposing conditions which was agreed by the parties was issued by the Government after specifying that it was a usual decision. We would like to quote Section 4(5) of Act of 1972 with an advantage :

"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 with the employer."

We would also like to quote section 3(b) of U.P. Act with an advantage:

"3(b) for requiring employers, workman or both to observe for such period, as may be specified in the order, such terms and conditions of employment as may be determined in accordance with the order."

7. We are of the view that the deeming clause of service was inserted by the Government at the time of notification with the consent of the parties and there is nothing bad or illegal if such term was inserted to as deterent measure to avoid to knock at the door of different forums under Act of 1972 and U.P., Act, as the case may be. The workman was not given gratuity in time and as per terms of Bipartite agreement and he proceeded to avail his remedy under section 33-2(c) of central Act , which is quoted for ready reference:-

"33-C(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money an if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within a period not exceeding three months

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period by such further period as he may think fit."

1998

U.P.S.S.Corp Vs. R.N.Singh & others

B.K.Roy, J.
R.K. Mahajan, J.

8. Legislature has used the word any money is due to workman under settlement of award and Chapter VIII section 33© (2) mentions that it can be recovered by him. In fact this section is for the enforcement of existing rights. It is just like an executing proceedings and petition can be filed to claim the amount due under gratuity and also under the settlement.

9. We are also of the view that there is no violation of Article 14 of constitution of India as the restriction is reasonable and it has been imposed with the consent of the parties just to secure the payment of the gratuity in time. The Payment of Gratuity Act is a social legislation to protect the weaker section of society and the Hon'ble supreme court has held valid this piece of legislation in case of Bakshish Singh Vs. Darshan Engineering works (1994) 1 S.C.C.9. In this case it was observed that it must be paid irrespective of financial capacity otherwise establishment has no right to exist.

10. We, therefore, for the reasons recorded above dismiss the writ petition finding no force in the arguments of learned counsel for the petitioner. The stay order is vacated. We direct the Labour Court to decide application pending before it within three months from the date of receipt of a copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 21.09.1998

1998

September,21

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE S.R. ALAM, J.

Civil Misc. Writ Petition No.28679 of 1990

M/s Raj Ashok Oil Company ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the petitioner : Sri M.K. Gupta
Counsel for the respondents : Sri U.K. Pandey
: Sri Sabhajeet Yadav

Article 226 of the Constitution of India—the enforcement of the G.O. dated 19-5-1990 would not result inviolation of the Petrolium

Act 1934 and the rules made there-under. Paragraph 3,7 of the G.O. provides that a block distributor would be required to have a licence under Form IX of the Petrolium rules and he would be governed by all the provisions of the Petrolium Act and rules made thereunder.

1998

M/s R.A.Oil Company
Vs.
State of U.P. & others

G.P.Mathur, J.
S.R.Alam, J.

By the Court

The controversy raised in these petitions is identical and therefore, they are being disposed of by a common order. Writ petition No. 28679 of 1979 shall be treated as leading petition. The petitioners seek quashing of the government order dated 19.5.1990 (annexure-1 to the writ petition) in so far it directs the petitioners to make supplies of Kerosene from the Oil Depot to the business premises of the Distributors and they have made a further prayer that a writ of mandamus be issued restraining the respondents from enforcing Clause-4 of the aforesaid government order.

For making easy availability of the Kerosene in the rural areas under the public distribution system, the State Govt. issued a government order on 19.5.1990. This provides that in order to facilitate the job of lifting of Kerosene by the retailers a Block Distributor or Wholesaler shall be appointed in each block. This arrangment will be done under the U.P. Kerosene Control Order, 1962 (hereinafter referred to as the Control Order) except where a wholesaler of the oil companies is already functioning in a block. The government order lays down the order of preference for appointment of Block Distributors and first preference is to be given to the wholesalers/agents working in the district. An effort is to be made that the wholesalers/agents working in the district should work as Block Distributors so that there may not be any problem of co-ordination. Para-4 of the government order provides that F.O.R. delivery of Kerosene shall be made to the Block Distributors for which necessary instructions shall be given to the wholesaler by the District Magistrate. The government order is a detailed one and contains instructions regarding the procedure which is to be adopted for attaching the retailers to a Block Distributor, fixation of price of Kerosene and fixation of transport charges etc.

(3) Shri M.K.Gupta, learned counsel for the petitioner has contended that the enforcement of the government order dated 19.5.1990 would result in violation of the Petroleum Act, 1934 and the Rules made thereunder and therfore, the government order

1998

M/s R.A.Oil Company
Vs.
State of U.P. & others

G.P.Mathur, J.
S.R.Alam, J.

deserves to be quashed or it should not be enforced against the petitioners.

(4) In order to appreciate the arguments raised by learned counsel, it is necessary to note few provisions of U.P. Kerosene Control Order, 1962. Clause 2(a) (aa), (d) and (f) of the Control Order read as follows:

2(a): "agent" means an agent appointed by an oil Company for distribution ofKerosene to distributor or to retail dealers and holding licence in Form III;

(aa): "Distributor" means a person holding a licence in Form III-A to take Kerosene delivery from an agent for distribution thereof to retail dealers, and to such other persons as directed by the Licensing Authority:

(d) "licensee" means an agent or a distributor or a retail dealer;

(f) "retail Dealer" means a person holding a licence in Form IV.

(5) The petitioners are "agent" and they have been appointed so by an oil Company for distribution of Kerosene to distributors or to retail dealers and hold licence in Form-III. As the definition shows "distributor" means a person holding a licence in Form III-A to take delivery of Kerosene from an agent for distribution thereof to retail dealers and to such other persons as directed by the Licensing Authority. In exercise of powers conferred by Section 4 of the Petroleum Act, the Central Government has made the Petroleum Rules, 1976. Rule 76 provides that no person shall load or unload a tank vehicle with any class of Petroleum except at a place which is situated within premises licensed under these rules and is approved in writing, for loading or unloading of such class of petroleum, by the Chief Controller.

(6) Learned counsel has submitted that under the impugned government order the petitioners, who are agent would be required to unload Kerosene at the business premises of a block distributor and it is likely that such block distributor may not hold or possed any licence as required by the Petroleum Rules. In such an event the agent would be liable to be punished for the same. In our opinion, the contention raised has no substance. Para-3,7 of the government order provides that a block distributor would be required to have a licence

1998

M/s R.A.Oil Company
Vs.
State of U.P. & others

G.P.Mathur, J.
S.R.Alam, J.

under Form IX of the Petroleum Rules and he would be governed by all the provisions of the petroleum Act and Rules made thereunder. This shows that the State Govt. was fully conscious of the legal position and the government order itself contemplates compliance of Rule 76 of the petroleum Rules. A person cannot be appointed as Block Distributor unless he holds a licence in Form XI of the Petroleum Rules and has complied with all the requirements of the Petroleum Act and the Rules framed thereunder. Even otherwise, no government order can make such a provision the enforcement whereof may result in breach or violation of any statute or the rules. Therefore, the apprehension expressed by the petitioners that the enforcement of the government order may result in violation of the Petroleum Act or the Rules is wholly baseless.

(7) Shri Gupta has next contended that the enforcement of the government order may result in financial loss to the petitioners as they will have to bear additional costs in transporting Kerosene from the Oil Depot to the place of storage of a Block Distributor. The government order contains several annexures and Clause 4.1 of Annexure-2 thereof provides that while attaching a Block Distributor to a wholesaler or ""“agent” care should be taken that it should be done in such a manner that the transport charges are reduced to a minimum. Annexure-10 to the government order deals with fixation of price. Here a specific provision had been made for transport charges. They have to be calculated by taking into consideration the distance of the storage point of the wholesaler from the oil Depot multiplied by the cartage charges per kilolitre per kilometre. There is specific clause in this annexure regarding the price which an agent can charge from a Block Distributor and here it is provided that while calculating the transport charges, the District Magistrate shall take into consideration the distance of the oil Depot from the storage point of the Block Distributor. Therefore, the government order has taken care of the fact that an agent or wholesaler will have to incur additional expenditure in transporting the Kerosene oil to the storage point of a Block Distributor and the price which is to be paid by a Block Distributor is to be fixed after taking into consideration the transport chartges. Thus the contention that the enforcement of the government order may result in financial loss to an agent is wholly unfounded.

8. Lastly, it was contended that the government order may result in breach of the conditions of the licence which has been issued to an agent under Form III. It is urged that thecondition no.2(I) of

1998

M/s R.A.Oil Company
Vs.
State of U.P. & others

G.P.Mathur, J.
S.R.Alam, J.

theconditions of licence provides that licensee shall not carry on business or store Kerosene except in the premises specified in his licence but now he will berequired to supply Kerosene at the storatge point of a Block Distributor. The U.P. Kerosene Control Order has been issued by the U.P. Government in exercise of powers conferred by Section 3 read with Section 5 of Essential Commodities Act. The government order dated 19.5.1990 does not in any manner contravenes the provisions of Control Order. In fact, the conditions of licence is given in Form III, which is applicable to an agent, have been amended by a Notification issued on 10.5.1990. The second proviso to condition no.2, after its amendment, reads as follows:

> "Provided further that any specified stock of Kerosene may be delivered by the agent at the premises of the distributors or retail dealers with the permission of the Licensing Authority."

9. In view of this amendment, the supply of Kerosene by an agent to a Block Distributor would not amount to breach of conditions of Licence as the State Govt. had taken care to amend the licence itself before issuing the government order. Shri Gupta has also urged that the condition No.3 of the licence requires an agent to maintain stock register in which the opening stock, quantities of Kerosene received from Oil Company and the quantities sold or delivered or otherwise disposed of each day has to be shown correctly. According to learned counsel if an agent delivers stock of Kerosene directly to a Block Distributor from the Depot of an Oil Company, there may be difficulties in maintaining the stock register. The apprehension expressed by the petitioners in this regard is wholly baseless. Clause 13 of the conditions of the licence reads as follows:

> "The Licensee shall comply with any general or special directions issued by the Licensing Authority, from time to time, in regard to the disposal of any stocks of Kerosene held by him or in regard to the maintenance of any other records of returns, as required by the Licensing Authority."

10. The agent can bring to the notice of licensing authority any problem or difficulty which may arise in maintenance of record and the Licensing Authority is empowered to issued special directions in that regard. The problem contemplated by the petitioners for maintenance of the record is more imaginary than real and it can easily be solved by concerned licensing authority.

1998

M/s R.A.Oil Company
Vs.
State of U.P. & others

G.P.Mathur, J.
S.R.Alam, J.

It may be pointed out that the government order has been issued in order to facilitate delivery of Kerosene to retail distributors and fair price shop keepers in the rural area so that the people living in remote areas may get this essential commodity conveniently under the public distribution system. In absence of a Block Distributor the petty retailers have to collect their quota of kerosene from the storage point of agents and wholesalers which are situate at a great distances. The supply of Kerosene by the agents or wholesalers to Block Distributors will reduce the distance which a retailer will have to cover in order to get his quota of Kerosene as his place of business is not likely to be at a great distance from the Block Headquarter. The government order having been issued for the convenience of people living in the rural areas cannot be struck down on these technical grounds at the instance of agents and wholesalers who make easy money without much effort as the Kerosene is supplied to them by the government owned Oild Companies.

11. No other point has been urged.

12. For the reason mentioned above, the writ petitions have no merit and are hereby dismissed. Stay order is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 27.10.1998

1998

October, 27

BEFORE
THE HON'BLE D.K. SETH, J.

Civil Misc. Writ Petition No.24375 of 1993

Constable J.N. Rai **...Petitioner**

Versus

S.S.P., Allahabad & others **...Respondents**

Counsel for the petitioner : Smt. Poonam Srivastava
Counsel for the respondents : S.C.
: Mr. K.R. Singh

U.P. Police Officers of Subordinate Ranks—Punishment and Appeal Rules 1991—Section 17(i)(a)(b)—Suspension Order—Passed without application of mind—No departmental enquiry contemplated—the only reason disclosed that the criminal

1998

Constable J.N.Rai
Vs.
S.S.P., Alld. & others

D.K.Seth, J.

proceeding pending and the charges have been framed and revocation of suspension would effect the Criminal Trail—held the order can not sustained—the departmental proceeding and the criminal proceedings are altogether an independent action and has nothing to do with each other. (Para 6)

Case law discussed
1993(22) Alld. Law Reports-141
AIR 1988 SC-2118

1. By an order dated 20.04.1993 the petitioner was put under suspension on the ground that disciplinary proceeding was contemplated against him. From the said order, it apperas that the order of suspension was issued in exercise of the powers under rule 17 (1) (a) (b) of the U.P.Police Officers of Subordinate Ranks Punishment and Appeal Rules 1991. Execpt mentioning about lodging of a first information report under section 147, 148,323,304 IPC, no further details have been mentioned. In the said order of suspension it was directed that a preliminary enquiry be compled. Subsequently preliminary enquiry was held, in which it was found that at the relevant point of time the petitioner was on duty and therefore, the question of keeping him under suspension should be reconsidered and the suspension be revoked. But the said suggestion was disagreed to by one R.S. Lal, A.S.I. (m), on the basis thereof, another report was submitted by A.P.O. on 25th May 1993 suggesting that the order of suspension should not be recalled since it might have an impact or affect on the pending enquiry. This suggestion was accepted by the Superintendent of Police on 26th May, 1993. In this background the order of suspension has since been challenged in this writ petition.

2. Smt. Poonam Srivastava, learned counsel for the petitioner contends that rule 17 (1) (a) prescribes suspension in contemplation of enquiry but till date no departmental disciplinary proceedings have yet been initiated against the petitioner, and as such the order of suspension appears to have been passed wholly without application of mind. In as much as the power under rule 17 (1) (a) can be exercised only when a departmental enquiry is contemplated. Since no departmental enquiry has been initiated , it cannot be said that there was any departmental enquity in contemplation, and therefore there cannot be any suspension under clause (a). The order of suspension having been passed under clause (a), is wholly without application of mind. She next contends that the alleged investigation

1998

Constable J.N.Rai
Vs.
S.S.P., Alld. & others

D.K.Seth, J.

in respect of the case mentioned in the order of suspension, was allegedly initiated on the complaint of a private person. Unless there is specific indication in the order or there are sufficient material to indicate that it satisfies the test of clause (b) of rule 17 (1), no order under clause (b) could be passed. She points out the nothing has been indicated as to how the alleged lodging of first information report in respect of the alleged offence, had involved the petitioner in his official capacity and as to how it would embarrass in discharge of his duty. Then again, she points out that till date neither the petitioner had ever been called on to appear in any investigation or in trial nor he has been summoned to appear in any proceedings though it is alleged in the counter-affidavit that chargesheet has been submitted, therefore, there was no justification for continuing the order of suspension. At the same time, there is no material which could satisfy the test laid down in clause (b) of rule 17 (1). She also relies on two decisions of the Apex Court in support of her contention. On these grounds, she prays that the order of suspension should be quashed, having regard to the facts and circumstances of the case.

3. Mr. K.R. Singh, learned Standing Counsel, on the other hand contends that it is not necessary that there must be sufficient material for passing an order of suspension. The order of suspension is passed at the discretion of the disciplinary authority. If there is discretion vested in an officer, unless it is shown that the same has been exercised malafide, there is no scope for this court to interfere with such exercise of discretion. Nothing has been brought to the notice of the Court to indicate that the discretion has been exercised malafide. Any report or suggestion by a sub ordinate officer is not binding on the disciplinary authority. It is always open to the disciplinary authority to exercise his discretion dispite such report when he is of the view that the order of suspension should continue. Such view is reflected in the order passed by the disciplinary authority on 26th may 1993 as it appears from annexure-4 to the writ petition. The question as to whether there was application of mind or not, has to be decided on the basis of the order of suspension. Further materials cannot be looked into for this purpose. On these ground, he submits that the writ petition is liable to be dismissed.

4. I have heard both the learned counsels at length. The fact remains that no departmental enquiry has yet been initiated against the petitioner. There is nothing indicated in the order of suspension as to on which ground the disciplinary/departmental proceeding is contemplated. No further material has been disclosed to substantiate

1998

Constable
J.N.Rai
Vs.
S.S.P., Alld.
& others

D.K.Seth, J.

formation of the opinion that disciplinary proceeding is contemplated. The absence of any further material in this regard goes to show that there was no disciplinary proceeding contemplated against the petitioner. The power under clause (a) of rule 17 (1) of the aforesaid rules appears to have been exercised without any application of mind. If any disciplinary/departmental proceeding was in contemplation against the petitioner, in the event, since 1993 after lapse of five years, the same ought to have been concluded or chargesheet could have been isssued initiating departmental proceeding against the petitioner. Since no where it has been contended in the Counter –affidavit that a disciplinary proceeding has been initiated against him or any chargesheet has been issued, the contention of Smt. Poonam Srivastava seems to be of substance that the order of suspension passed under clause (a) of rule 17 (1) appears to have been passed without any application of mind and as such cannot be sustained.

5. So far as the order of suspension under clause (b) of rule 17 (1) is concerned, it appears that the order of suspension was issued on the basis of lodging of a first information report in *respect of the alleged offence.* No doubt, it has been pointed out in the counter affidavit that a chargesheet has been submitted in connection with the said case, but at the same time nothing has been disclosed therein as to how initiation of the said criminal proceeding against the petitioner involves any kind of his moral turpitude or it is likely to embarrass him in discharge of his duties or how it is connected with the petitioner's position as a police officer. No material is forthcoming before thisCourt to substantiate any of these conditions as contemplated in clause (b) of rule 17 (1) of the aforesaid rules. Admitedly, the disciplinary authority has discretion to place a person under suspension under clause (b) provided either of these three conditions are satisfied, namely:

(i) The charges are connected with the person in his position as a ploice officer, or

(ii) It is likely to embarrass him indischarge of his duties, or

6. When any of these conditions are satisfied, then certainly such discretion is to be exercised by the disciplinary authority provided there are justifiable reasons to suspend if such complaints are initiated by private person. Admittedly, the complaint was lodged by

1998

Constable J.N.Rai Vs. S.S.P., Alld. & others

D.K.Seth, J.

a private person. Nothing has been disclosed to show that the disciplinary authority had applied its mind to justify the suspenstion since the complaint was intitiated on the accusations of a private person. Unless there is sufficient material to show that the disciplinary authority had applied its mind and had justifiabale reasons to suspend a person, the order of suspension cannot be sustained. In the present case nothing has been disclosed to show as to how the suspension of the petitioner is justified. Only reason that has been disclosed in the note or endorsement dated 26th May, 1993 is that is might effect the criminal case. The suspension or reinstatement can never affect proceedings of a criminal case. Success of a criminal case depends on the materials on record brought in evidence and not on the conduct of the disciplinary authority in putting a person under suspension or initiatting departmental proceeding or enquiry against him. An order of suspension is issued in course of a disciplinary proceeding departmentally. It is altogether an independent action and the same has nothing to do with the criminal prosecution. Crininal prosecution in no way is concerned with the departmental disciplinary proceeding. Therefore, the justification that has been sought to be advance seems to be unfounded. For the aforesaid reasons the order of suspension cannot be sustained.

7. Smt. Poonam Srivastava had relied on the decision in the case of P.J. Sundarrajan Vs. Unit Trust of India (1993 (22) Alld. Law Reports-141). The said decision is a very shsort one, the text whereof is quoted below:

" Heard parties. We have perused the records. We are of the view that the departmental enquiry should be stayed till the trial which is stated to be pending in the court of the Chief Metropolitan Magistrate, Madras is completed. The enquiry shall accordingly stand stayed. However, it will be open to the respondents to proceed with the enquiry, if they so choose after the trial court has rendered its judgment, whether or not any appeal is taken from that judgment to a higher court. We are told that the trial has been pending since May 1989 and many witnesses have already been examined. Accordingly, we expect the trial court to complte the trial within three months from the date of receipt of a copy of this judgment. In the circumstances, the appeal is disposed of with no order as to costs."

1998

Constable J.N.Rai
Vs.
S.S.P., Alld. & others

D.K.Seth, J.

8. This judgment has no relevance so far as the present point is concerned. In the said case, a view was expressed that departmental enquiry should remain stayed then criminal trial is pending. It does not deal with the question of suspension or with rule 17 (1) (a) or 17 (1) (b) of the rules. Thus, reliance on this judgment is wholly misplaced.

9. Another decision relied on by the learned counsel for the petitioner is the decision in the case of Kusheshwar Dubey Vs. Bharat Coking Coal Ltd and others (A.I.R. 1988 S.C.-2118), in which the Apex Court had laid down as Follows:

"6.The view expressed in the three cases of this Court seem to support the position that while there could be no legal bar for simultaneous proceedings being taken, yet there may be cases where it would be appropriate to defer disciplinary proceeding awaiting disposal of the criminal case. In the latter class of cases it would be open to the delinquent employee to seek such an order of stay or injunction from the Court. Whether in the facts and circumstances of a particular case there should or should not be such simultaneity of the proceedings would then receive judicial consideration and the Court will decide in the given circumstance of a particular case as to whether the disciplinary proceedings should be interdicted, pending criminal trial. As we have already stated that is is neither possible nor advisable to evolve a hard and fast, straight-jacket formula valid for all cases and of general application without regard to the particularities of the individual situation. For the dispossal of the present case, we do not think it necessary to say anything more, particularly when we do not intend to lay down any general guideline.
7. In the instant case, the criminal action and the disciplinary proceedings are grounded upon the same set of facts. We are of the view that the disciplinary proceedings should have been stayed and the High Court was not right in interfering with the trial court's order of injunction which had been affirmed in appeal."

10. A reading of the above decision shows that this case also has no relevance so far as the present question is concerned. In the said case, it was held that where criminal case is pending, it would be appropriate to defer the disciplinary proceeding awaiting disposal of the criminal case, and in such cases it would be open to the delinquent employee to seek an order of stay or injunction from the court. Whether in the facts and circumstances of a particular case

there should or should not be such simulteneous proceedings would then receive judicial consideration and the court will decide in the given circumstances of a particular case as to whether the disciplinary proceedings should have been stayed. Thus, reliance on this decision also does not held thus learned counsel for the petitioner.

11. In the facts and circumstances of the case as indicated before, this writ petition succeeds and is hereby allowed. The impugned order of suspension dated 20.04.1993 contained in annexure-1 to the writ petition is quashed. However, this order will not prohbit the respondents to pass appropriate order, if circumstances so warrant, provided there are sufficient reasons and justifiction therefor and it is so permitted in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 17.11.1998

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.K. SINGH, J.

1998

November,17

Civil Misc. Writ Petition No.12872 of 1990

Tehsil Bar Association, Deoria & another ...Petitioner
Versus
I.G. Registration, Allahabad and others ...Respondents

Counsel for the petitioner : Sri J.P. Gupta
Counsel for the respondents : S.C.

U.P. Documents Writers licensing Rules, 1977—Rule 6(2)-G.O. dated 20.4.1990, bearing No.SR 758/Eleven-90 is valid. (Para 5)

By the Court

The prayer of the petitioner is to quash G.O.dated 20.4.1990 issued by the State Government in its Institutional Finance (Stamp and Registration) Deparment,Lucknow bearing No.SR-758 /Eleven-90 sent by the Joint Secretary to the Inspector General Registraion.

1998

Tahsil Bar Association
Vs.
I.G. Registration Alld, & ors.

B.K.Roy, J.
R.K.Singh, J.

2.Rule 6(2) of the U.P.Documents Writers Licensing Rules,1977,reads thus:-

"(2)Nothing in sub-rule (1) shall apply where the writer of such document is one of the parties thereto or is a legal practitioner engaged by the parties for drawing up the document."(Emphasis supplied).

3.The impugned G.O.clarifies that under rule 6(2) of the U.P.Document Wriers Licensing Rules 1977 lawyers have right to prepare deeds only on behalf of their clients.

4.Having heard Sri J.P.Gupta, learned counsel for the petitioner and Sri .S.K.Jaiswal,learned Standing counsel for the petitioner Standing counsel appearing on behalf of the State, we do not find any infirmity in this clarification of the Govt.

5.It goes without saying that if any counsel prepares a document after having a written authority from his client, in that event Rule 6(2) of the Rules aforementioned permits preparation of such a document and the Government never intended to curb any restriction on such a professional right of the counsel throughout the State.

6.Accordingly,it cannot be held that there is any real cause of action for the Petitioner Association to agitate by filing this writ petition.

7.This writ is dismissed with aforementioned observation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 18.11.1998

1998

November,18

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.K. SINGH, J.

Civil Misc. Writ Petition No.22052 of 1990

Krishna Pati Nath Shukla **...Petitioner**

Versus

State of U.P. & others **...Respondents**

Counsel for the petitioner : Sri S.P. Singh
: Sri Satya Prakash Tewari
Counsel for the respondents : S.C.

Article 226 of the Constitution—Govt. orders abolishing the seeds store purchase centre in rural areas of plain only and not in the hill region and Bundelkhand region challenged on the ground of being discriminatory—Held it is not violative of Article 14, 39(a), 40 and 48 of the constitution as both regions are not geographically, socially, culturally or even agriculturewise similarly situated.

By the Court

The petitioner who is Gram Pradhan of Gaon Sabha Padari Khund, District Maharajganj, has come up with a prayer to quash the various orders passed by the Government as contained in Annexures-3 to 6 of the writ petition abolishing the Seed Store and Purchase Centres in rural areas.

A perusal of the various orders passed by the Government shows that the Government had given various reasons for adopting such a policy decision though in some cases it has not altogether abolished those centres.

Sri S.P.Singh, learned counsel appearing in support of this writ petition, contended that the policy decision of the Government is discriminatory in as much as such centres have been allowed to remain in Hill areas and Bundelkhand Region and thus it is violative of Articles 14, 39 (a),40 and 48 of the Constitution of India.

1998

K.P.N. Shukla
Vs.
State of U.P. & others

B.K.Roy, J.
R.K.Singh, J.

Mr.Singh also contended that since no counter has been filed, the relief claimed for, be granted.

Sri P.K.Bisaria, learned standing counsel,appearing on behalf of the respodents on the either hand, contended that the policy of the Government is not discriminatory while allowing continuances of such centres in the Hill region and the Bundelkhand region which is as well known to be a hilly region. In fact the petitioner has no where come up with a claim that the Hill areas and Bundelkhand region where such centres have been allowed to continue, and other places where such they have been abolished, are all geographically, socially, culturally or even agriculturewise similarly situated. Accordingly, there is no force in the contention of Mr.Singh. It has also not been stated precisely as to how the various reasons given by the Government giving up its earlier policy decision is vitiated on account of applicability of Articles 14, 39(a), 40 and 48 of the Constitution of India. He also demonstrated that the ceiling area under the Law Reforms Laws are on the higher side in these areas than that of other area.

Having gone through the writ petition and heard learned counsel for the parties we find substance in the contentions of Mr. Bisaria and accept them.

We all know that our State Legislature has decided to create a separate State of Uttrakhand in regard to all Hill areas. We also all know that the Legislature while enacting Land Reforms Laws for the Bulendkhand Region, has prescribed a higher ceiling limit, i.e. to say of 45.00 acres per person/individual whereas in other areas the ceiling areas is undisputedly lesser between 18.00 to 27.00 Acres. These apparent aspects could not be shown to be incorrect during his submissions by Mr.Singh. We are not impressed by the bald argument of Mr. Singh that the Policy decision is violative of Articles 14, 39(a), 40 and 48 of the Constitution.

We, accordingly, are of the view that there is no merit in this wit petition. It is accordingly dismissed, but without there being any order as to cost.

The office is directed to hand over a copy of this order without one week to Sri Bisaria, the learned Standing Counsel for its communication to the Government.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 02.11.1998

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

1998

November, 2

Civil Misc. Writ Petition No.23207 of 1998

Harindra Singh ...Petitioner

Versus

Rent Control & Eviction Officer, Dehradun and another ...Respondents

Counsel for the petitioner : Sri Anil Sharma
Counsel for the respondents : S.C.
: Sri Ranjit Saxena

U.P. urban Building (Regulation of Letting, Rent and Eviction) Act 1972—Section 2—Expemtions from operation of Act –Proviso to (2)(1)—Building constructed after taking loan from Oil and Natutral Gas Commission a Government of India undertaking—Not covered by the aforesaid proviso.

Under the proviso there is no general word following the particular and specific words and in absence of any such general words the principles of ejusdam generis can not be applied as to any authority advancing loan to the land lord. (Para 7)

Case relied upon
AIR 1972 SC 1863
AIR 1952 SC 262

By the Court

1. This writ petition is directed against the order dated 15.5.1998 passed by the Rent Control and Eviction Officer, Dehradun, whereby he declared the accommodation in question as vacant under the provisions of Section 12 of U.P.Act No. 13 of 1972.

2. Respondent no. 2 is landlady of the accommodation in question. It was let out to the petitioner by her in the year 1984. Respondent no.2 moved an application under Section 12 of the Act for declaring the disputed accommodation as vacant alleging that the petitioner was a tenant of the accommodation in question on monthly rent of

1998

H.Singh
Vs.
R.C. & E.O.
Dehradun
& another

Sudhir
Narain, J.

Rs.1500/-. He was transferred to Hindola district Tehri and on transfer he has taken a residence at Chaukuwala but he has ot the disputed house locked. It was stated that the accommmodation in question be declared as vacant and be released in her favour as she needed it bonafide for residential purpose. The petitioner filed objection. It was stated that the house in question was constructed in the year 1982 and it was assessed for the first time by the Municipal Board in the year 1982. He denied that he has removed his belongings from the said premises. He, however, did not deny that he was transferred to Hindola, district Tehri Garhwal. The Rent Control Inspector submitted the report stating that petitioner has been transferred but he has kept the house locked. The Rent Control and Eviction Officer by the impugned order dated 15th May 1998 found that the petitioner has been transferred to Hindola, district Tehri Garwal, he has kept the house locked. It was further found that the petitioner was in occupation of the premises in question without any allotment order and his possession was unauthorised. He declared the accommodation in question as vacant. The petitioner has challenged this order in the present writ petition.

3. I Have heard Sri Anil Sharma, learned counsel for the petitioner and Sri K.K.Arora , learned counsel for the respondent.

4. Learned counsel for the petitioner contended that the landlady-respondent no.2 had obtained the loan for constructing the house in question in the year 1982. After taking the loan from Oil and Natural Gas Commissioner, a Government of India Undertaking , the entire amount of the loan was not paid up till date of allotment to the petitioner. On the allotment the provisions of U.P.Act no.13 of 1972 were not applicable and in that circumstances, it was not incumbent upon the petitioner to obtain any allotment order under Section 16(1)(a) of the Act . He has placed reliance upon the first proviso to sub-section (1) of Section 2 of the Act which reads as under:

"2.Exemptions from operation of Act –(1) Nothing in this Act shall apply to (the following, namely) (a) any building of which the government or a local authority or a public sector corporation (or Cantonment Board) is the landlord;or
……
……
(h)……
……

1998

H.Singh
Vs.
R.C. & E.O.
Dehradun
& another

Sudhir
Narain, J.

(Except as provided in sub-section (5) of Section 12, sub- section (1-A) of Section 21, sub-section (2) of Section 24, Section 24-A, 24-B, 24-C or sub- section (3) of section 29, nothing in this Act shall apply to a period of ten years from the date on which its construction is completed) :

(Provided that where any building is constructed substantially out of funds obtained by way of loan or advance from the State Government or the Life Insurance Corporation of India or a bank or a co-operative society or the Uttar Pradash Avas Evam Vikas Parishad, and the period of repayment of such loan or advance exceeds the aforesaidperiod of ten years then the reference in this sub-section to the period of ten years shall be deemed to be reference to the period of fifteen years or the period ending with the date of actual of such loan or advance (including interest), whichever is shorter.)

…… …..."

5. The proviso referred to above indicates that if the building is constructed substantially out of the funds obtained by way of loan or advance from the State Government or Life Insurance Corporation of India or a bank or a co-operative society or the Uttar Pradesh Avas Evam Vikas Parishad, and the period of repayment of such loan or advance exceeds the aforesaid period of ten years then the reference in this sub-section to the period of fifteen years or the period ending with the date of actual repayment of such loan or advance (including interest), whichever is shorter. This proviso does not include any loan taken from any other authority be it private corporation or such authority in which the Government has invested the amount.

6. The learned counsel for the petitioner submitted that the Oil and Natural Gas Commission is a Government of India Undertaking and ,therefore, such authority should also be taken to have been included under this proviso on the principle of ejusdem generis. This principle of interpretation is applicable when particular words pertaining to a class, category or genus are followed by general words and such general words are construed as limited to things of the same kind as those specified. In Amar Chand Chaudhary vs. The Collector of Excise, Government of Tripura, Agartala and others, A.I.R. 1972 S.C. 1863, the Supreme Court laid down that the doctrine of ejusdem generis applies when (i) the Statute contains an enumeration of specific words; (ii) the subject of the enumeration

1998

H.Singh
Vs.
R.C. & E.O.
Dehradun
& another

Sudhir
Narain, J.

constitutes a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) there is no indication of a different legislative intent.

7. Under the proviso referred to above there is no general word following the particular and specific words and in absence of any such general word the principle of ejusdem cannot be applied as to any authority advancing loan to the landlord for raising the construction which is occupied by a tenant after its construction. The words have been specified only in respect of the loan advanced by the State Government or the Life Insurance Corporationof India or a bank or a Co-operative Society or Uttar Pradash Avas Evam Vikas Parishad and if the loan is taken by a person from any other authority for raising construction, such authority shall not be deemed to have been included under the proviso.

8. Learned counsel for the petitioner then submitted that it is a mistake by the legislature by omitting the word " other authority " but the object of the provision is that whenever from any authority the loan is taken in which the Government has any interest, such authority should also be deemed to have been included. The doctrine of casus omissus contemplates that a matter which should have been, but has not been provided for in a statute cannot be supplied by courts, as to do so will be the legislation and not construction. In Hira Devi and others vs.District Board Shahjahanpur, A.I.R. 1952 Supreme Court 262, the Supreme Court observed – " no doubt it is the duty of the court to try and harmonise the various provisions of the Act passed by the legislature. But it is certainly not the duty of the court to stretch the words used by the legislature to fill in gaps or omissions in the provisions of the ACT." The Court held that where the Statute provided the power to suspend an employee on a certain condition, the Court will not add any other ground in the Statute to create a power of suspension. In P.K. Unni vs. Nirmala Industries and others, A.I.R. 1990 S.C. 933, it was observed that though the period for making an application under Order 21, Rule 89 of the Code of Civil Procedure has been exended by the Amending Act 104 of 1976 but the legislature omitted to extend the period to make deposit under Rule 92 (2) of Order 21, the Court cannot by application of Rule 89 extend the period of limitation for making the deposit under Rule 92 (2) of Order 21 of C.P.C. The Court could not assume that legislature made a mistake in this respect or made an omission in accomplishing what it had set out to achieve.

9. In view of the above principle the submission made on behalf of the petitioner that Court should read "all other authority" who had advanced the loan for raising the construction under the first proviso to sub-section (2) of Section 2 of the Act No.13 of 1972, cannot be accepted.

10. The petitioner had occupied the disputed accommodation without any allotment order in the year 1994. The occupation of the accommodation without any allotment order is in violation of Section 13 of the Act which provides that where a landlord or tenant ceases to occupy a building or part thereof, no person shall occupy it in any capacity on his behalf or otherwise than under an order of allotment or release under Section 16 and if a person so purports to occupy it, he shall, without prejudice to the provisions of Section 31, be deemed to be an unauthorised occupant of such building or part. In Nutan Kumar vs. Additional District Judge and others, 1993 A.R.C. 204, the Full Bench of this Court has held that even if the building is let out by the landlord and a person is in occupation of it, his possession shall be deemed to be unauthorised under law. The view taken by the Rent Control and Eviction Officer was that the petitioner was in unauthorised occupation. The accommodation in dispute shall be treated as vacant under law and he can take the proceedings for release/allotment under Section 16 of the Act.

In view of the above the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 05.11.1998

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.K. SINGH, J.

1998

November, 5

Civil Misc. Writ Petition No.23359 of 1992

Sita Ram Yadav **...Petitioner**

Versus

State of U.P. & others **...Respondents**

Counsel for the petitioner : Sri Krishan Ji Khare
Counsel for the respondents : S.C.
: Sri Sudhir Jaiswal

1998

S.R.Yadav
Vs.
State of U.P.
& another

B.K.Roy, J.
R.K.Singh, J.

Article 226 of the Constitution—recommendations of the District Judges and the District Magistrate is not biding on the "STATE" while considering the extention of the service of the Addl. Distt. Govt. Counsel (Civil)—a counsel cannot be thrusted on a litigent to become his counsel.

By The Court

According to Sri Krishna Ji Khare learned counsel for the petitioner, the real prayer of the petitioner is to quash the communication made by the Joint Secretary and Joint Legal Remembrancer, Government of Uttar Pradesh to the District Magistrate, Ghazipur informing him that he has been directed to communicate that in regard to his recommendation made under clause 7.08 of the Legal Remembrancer's Manual it has been decided after through thinking that the services of Sri Sita Ram Yadav (the petitioner) as Assistant District Government Counsel (Civil) will not be extended and, thus, Sri Yadav be relivered immediately (as contained in Annexure-5 to this writ petitioner).

2. Sri Khare, with reference to the decision of the Apex Court in Kumari Shrilekha Vidyarthi versus State of U.P. and others (1990) 2 U.P.L.B.E.C. 1174, contended that the order impugned is arbitrary inasmuch as the recommendations made by the District Magistrate and the District Judge concerned were based on performance of the petitioner which were binding on the State.

3. We regret in not finding any substance in the contention. It is always open for the State as a litigant to engage a councel of his choice. Merely because the District Magistrate or District Judge has made recommendations for continuance of the held that that recommendation is binding on the state. Mr. Khare could not locate his fingers to such a ratio decidendi in Kumari Shrilekha Vidyarthi's case supra to support his submissions. We are of the definite view that a councel cannot thrust on a litigant to his freedom of speech and there is no question of violation of any fundamental right of the petitioner of his freedom of speech and expression. We do not find that earlier any interim releif was also granted to the petitioner.

4. We, accordingly, not finding any merit in this writ petitioner, dismiss it but without cost.

5. The Office is directed to hand over a copy of this order within 1 week to Sri Sudhir Jaiswal , Learned Standing Councel, for its communication to the Government.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD, 06.11.1998

BEFORE
THE HON'BLE O.P. JAIN, J.

1998

November, 6

Criminal Misc. Petition No.4510 of 1998

Parma Pandey & others **...Petitioners**

Versus

State of U.P. & another **...Respondents**

Counsel for the petitioner : Sri Manish Tewari
: Sri Ashwani Kumar Awasthi
: Sri V.C. Tiwari
Counsel for the respondents : A.G.A.

Section 195(i)(b)(ii) of Cr.P.C. Bar under this section is not applicable to a case where forgery of the document was committed before the document was produced in the court—Bar created by section 195(i)(b)(ii) of Cr.P.C. would be applicable where the document was forged while it was custodia legis.

By the Court

1. This writ petitioner is directed against the revisional judgment dated 29th September, 1998 by District and Sessions Judge, Mau who has dismissed the filed by the petitioners.

2. The relevant facts of the case are the respondent no.2 Vijai Bahadur Pandey filed a criminal complaint against the present petitioner under Sections 463,464,467,468,420 and 379 I.P.C. It was alleged in the complaint that on 27th April,1981 the accused persons obtained the thumb impression of one Sheo Pujan Pandey on a piece of paper and a forged will was febricated by the accused persons. This forged will, it is alleged, was produced by the accused persons in mutation proceedings and later on in a civil suit instituted in the

1998

P.Pandey
& others
Vs.
State of U.P.
& another

O.P.Jain, J.

year 1996. It was also alleged in the complaint that the will was stolen from the record of Revenue Court by the accused persons. The complaint was filed in the court on 11th august,1997.

3. The Learned Magistrate summoned the accused by his order dated 4th December, 1997. An application was filled on behalf of the accused persons for recall of the order. By order dated 2nd April,1998 the Magistrate deleted Section 379 I.P.C. and the rest of the order was confirmed. Being aggrieved against order dated 2nd April,1998 the present petitioners filed a revision before the court of sessions inter alia on the ground that the prosecution for the offences under the above Sections is barred by the provisions of section 195 (1) (b) (ii) Cr.P.C. by the impunged order dated 29th September,1998 the learned Sessions Judge repelled this contention and dismissed the revision. Hence this writ petition.

4. I have heard Sri V.C. Tiwari learned Senior Councel assisted by Sri Manish Tiwari appearing for the petitioners and Sri. J.S.Sengar learned Advocate appearing on behalf of respondent no.2. learned A.G.A. has also been heard.

5. In this Court the same contention has been repeated on behalf of the petitioner under Sections 463, 464, 467 etc. is barred under Section 195 (1) (b) (ii) Cr.P.C. In support of his contention learned councel for the petitioners has placed reliance on the decisions of this court in the case of Smt. Lakhpati Vs. Ram Khelawan and others Vs. state of U.P. & others 1998 JIC 358 (All).

6. On behalf of respondent no.2 reliance has been placed on the decision of the Supreme Court in the case of Sacchidanand Singh Vs. State of Bihar and others 1998 (3) ACC 466 (SC). The case of Sacchidanand Singh is also reported in 1998 (1) Judgement Today 370.

7. I have gone through the Judgement cited at the bar and the case in hand is fully covered by the decision of the Apex Court in the case of Sacchidanand Singh and another Vs. State of I Bihar (Supra). The Apex Court has taken the view that the bar under Section 195 (1) (b) (ii) Cr.P.C. does not apply to initiation of prosecution

proceedings simply on the ground that the document concerned was produced in a court though the act of forgery was perpetrated prior to its production in the court. In paragraph 8 of the Apex Court has pointed out the unsavoury consequences which will ensue if a liberal construction is adopted. The observations in para 8 are as under :"That apart it is difficult to interpret Section 195 (2) (b) (ii) as containing a bar against initiation of prosecution proceedings merely because the document concerned was produced in a court albeit the acts of forgery was perpetrated prior to its production in he court. Any such construction is likely to ensue unsavoury consequences. For instance, if rank forgery of a valuable document is detected and the forgerer is sure that he would imminently be embroiled in prosecution proceedings he can simply get that document produced in any long drawn litigation which was either instituted by himself or some body alse who can be influnced by him and thereby pre-empt the prosecution for the entire long period of pendency of that litigation."

7- In Para 12 of the judgement following abservations have been made :

"It would be a strained thinking that any offence involving forgery of a document if committed for outside the precincts of the Court and long before its production in the Court, could also be treated as one affecting administration of justice merely because that document later reached the Court records."

8. The Apex Court has clearly held that the bar contained in Section 195 (1) (b) (ii) of the Cr.P.C. is not applicable to a case where forgery of the document was committed before the document was produced is said to have been prepared in the year 1981 i.e. long before its production in mutation proceedings and in the civil suit. The bar created by Section 195 (1) (b) (ii) Cr.P.C. is applicable only to those cases where the document was forged while it was in custodia legis.

9. In view of the above discussion, this writ petition has no force and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 10.11.1998

1998

November,10

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.L. SARAF, J.

Civil Misc. Writ Petition No.24240 of 1998

Samsa Parween **...Petitioner**

Versus

State of U.P. & others **...Respondents**

Counsel for the petitioner : Sri Suresh Chandra Dwivedi
: Sri R.N. Singh
Counsel for the respondents : S.C.
: Sri R.N. Singh
: Sri Abay Bahnot
: Sri S.N. Srivastava

Section 87A-2 of the U.P. Municipalities Act—Motion of No confidence could not have been said to have been carried out by 2/3rd majority if 9 out of 14 members voted against the petitioner.

By the Court

Heard Sri A.P.Sahi learned counsel for the petitioner and Sri S.N.Srivastava learned counsel for the respondents.

The Petitioner has challenged the motion of no confidence against her. Petitioner was elected as a Chairman of Nagar Panchayat Maghar,Sant Kabir Nagar. There are 15 members of Nagar Panchayat and it is alleged that in the meeting of no confidence motion only 9 members attended the meeting and all 9 members voted against the petitioner. Hence it is contended by the learned councel for the petitioner that 2/3rd did not cast vote against her and the motion of no confidence could not have been said to have been carried out by the 2/3rd majority in accordance with the section 87 a(12) of the U.P. municipalities Act. However, Sri S.N. Srivastava learned counsel for the respondent has pointed out that one of the member Ram Asrey Paswan is Minister in the U.P. Government hence he was dis-qualified under section 13D(f) of the U.P. Municipalities Act stated that a person shall be dis-qualified if he is

in the service of the State or the central Government or any local authority.

1998

S. Parween
Vs.
State of U.P.
& others

M.Katju, J.
S.L.Saraf, J.

Learned councel for the petitioner alleged that in view of section 9 of the aforesaid Act person who is a M.L.A. has right to be a member that is no doubt correct but once a person becomes Minister he is in Government service under Article 164 of the Constitution of India and he is entitiled to a salary as a Minister. Hence Ram Asrey Paswan was dis-qualified the Total number of the members of the Gram panchayat in our opinion was only 14. However, 9 out 14 is 0.64, whereas 2/3rd is 0.66. Hence assuming that members of Gram Panchayat did not vote against the petitioner in the no confidence was passed against the petitioner.

As a result this petition is allowed.

The impugned motion of no confidence dated 25.7.98 is quashed shall be continue functioning as the chairman of Nagar Panchayat, Maghar, sant Kabir Nagar.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 10.11.1998

1998

November,10

BEFORE
THE HON'BLE ALOKE CHAKRABARTI, J.

Writ Petition No.1769 of 1995

M/s B.H.E.L., Haridwar ...Petitioner
Versus
Presiding Officer, Labour Court, Meerut and another ...Respondents

Counsel for the petitioner : Sri Bharat Ji Agarwal
: Sri Tarun Agrawal
Counsel for the respondents : S.C.
: Mr. Suman Sirohi
: Miss. Mohini Mauriya
: Sri Ravi Kiran Jain
: Sri Shamshul Hasan

1998

M/s B.H.E.L. Haridwar
Vs.
P.O.,Labour Court,Meerut & another

Aloke Chakrabarti, J.

Article 226 of the Constitution of India—the question of loss of confidence was not considered at all by the labour court—The Labour Court failed to discharge its function by not considering the question of loss of confidence—the impugned award is quashed and the matter is remanded back to the Labour Court for deciding afresh.

By The Court

The award dated 5.11.1994 is the subject matter of challenging here at the instance of employer. A charger sheet had been issued against the respondent no.2 workman relating to claim of leave travel concession and upon completion of disciplinary proceeding by order dated 26.12.1975, the Respondent no.2 workman had been dismissed. The dispute having been referred to, the Labour court decided the same by the impunged award.

Learned Counsel for the Petitioner employer contended that in the impugned award there is no finding as to whether the enquiry was fair and proper although an issue to the said effect had been raised as additional issue no.3.

Further contention of the learned councel for the petitioner was that the award had been given in favour of the workman solely on the ground that the charges levelled did not come within the provision of clause c of paragraph 20 of the standing Orders and therefore the order of dismissal had been quashed with consequential direction.

Learned counsel for the petitioner further contended that in view of the charges levelled, the question of loss of confidence of the employer was there and an additional issue no.4 was therfore raised. But the labour Court did notdecide the said charge and reinstatement had been granted without even deciding the same. In this connection it was further contended on behalf of the petitioner that even if the question of compensation comes up instead of reinstatement the aggregate of the amounts paid for a long period by the petitioner employer to the respondent workman month by month in terms of the interim order granted is sufficient amount towards compensation and the workman concerned remains entitled to no further amount towards compensation.

Learned councel for the workman contended that even if enquiry is fair and proper, the labour Court can interfere with the quantum of punishment and in support of such contention reference was made to

1998

M/s B.H.E.L. Haridwar
Vs.
P.O.,Labour Court,Meerut & another

Aloke Chakrabarti, J.

the case of workman of M/s Fire Stone Tyre Rubber Company of India Private Limited Vs. management and other reported in AIR 1973 SC 1227 and the case of Scooter India Limited Vs. labour Court reported in AIR 1989 SC 149.

With regard to the contention relating to charge levelled and the provision of paragraph 20 © of standing Orders it has been contended on behalf of workman that as the charge levelled was governed by the said provision of Standing Counsel Order, the said award cannot be interferred with. It has been further contended that submission of claim for travel concessiondid not touch the business of employer as it did not relate to any transaction of the employer with its customer or any third party and therfore the said provision of paragraphno.20© of the Standing order did not apply. The law decided in the case of Co-operative Central Bank Limited Vs. Additional Industrial Tribunal reported in Air 1970 SC 245 was referred to.

With regard to the question of applicability of paragraph 20 (c) if the Standing Order, the said provision of paragraph 20 (c) requires to be considered first and the same runs as follows :

"20-Act and omission of the types mentioned below shall be treated as misconduct;

** ** **

(c) Theft, fraud, dishonesty in connection with the business or property of the project

** ** **

The charge levelled against the petitioner was as follows:

"That in your leave travel concession bill dated 7.8.1975 you have claim an amount of Rs. 2500/- towards the reimbursement of expenses in respect of journey from Haridwar to Bombay and back by Taxi No. DLY 82 and attached a receipt No.136 dated 22.7.75 signed by Sri Darshan Singh on the letter head pad of Darshan Tourist Taxi Service Hardwar in support of your claim. It has been found that the aforesaid receipt and your aforesaid claim are false."

1998

M/s B.H.E.L. Haridwar
Vs.
P.O.,Labour Court,Meerut & another

Aloke Chakrabarti, J.

In view of aforesaid language of the charge, now it is to be considered whether the same amounts to fraud or dishonesty in connection with the business of employer.

The definition of word "business" has been shown on behalf of the petitioner referring to the Black's Law Dictionery. The same is as follows:

"Business-Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit advantage or livelihood. Union League Club V. Higbsib, 18 Cal.2d275, 108 p.2d487,490. Enterprise in which person engaged shows willingness to invest time and capital on future outcome. Coggett V. Burnet 62 App. D.C.102,65 F.2d 191,194. That which habitually busies or occupies or engages the time, attention, labor, and effort of persons as a principal serious concern or interest of for livelihood or profit."

Taking into consideration the aforesaid definition and the provision of the Standing Orders, I am of the opinion that the offence alleged need not touch the transaction of the employer with its customers or any third party and fraud or dishonesty, if is in connection with the employment and it is by the employee and is with regard to property of the employer, such fraud or dishonesty is in connection with the business of the employer and therefore the offence alleged comes within the provision of the paragraph 20 (c) of the Standing Orders.

With regard to question of loss of confidence, I find that an issue had been raised relation to the said aspect before the labour court but in the said award the labour court while considering the said issue has stated that the said issue, being issue no.5, had been considered alongwith other issues and award had been passed there upon. But, upon a consideration of the said award, it does not appear that the question of loss of confidence had at all been considered. The aforesaid aspect having not been considered, it appears that the labour court failed to discharge its function in respect of the said issue.

In view of the aforesaid findings both with regard to applicability of paragraph 20© of standing Orders and with regard to decision on loss of confidence, the impugned award is liable to be quashed and the matter requires to be decided afresh by the concerned labour court. Therefore, this writ petition is allowed. The impugned award

dated 5.11.1984 at annexure no.7 to the writ petition is quashed . The labour Court concerned is directed to decide the matter afresh in accordence with law following the observation made in the present judgement. As the matter is a very old one, the labour court is directed to decided the matter within a period of four months from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 16.11.1998

1998

November, 16

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE D.K. SETH, J.

Writ Petition No.30086 of 1998

Sohil Society for Welfare **...Petitioner**

Versus

Union of India & another **...Respondents**

Counsel for the petitioner : Sri Rajendra Dhobhal
Counsel for the respondents : S.C.
: Sri S.N. Srivastava
: Sri Bal Mukund
: Sri Sri Ashok Mehta (L.C.S.C.)

Article 226 of the Constitution—it is mandatory for Union of India to follow its own as well as World Health Organisation guidelines, for manufacture and procurement of OPV and to adhere to the internationally accepted standards and norms for polio eradication.

By the Court

Heard Sri A.D.Giri Learned Senior Advocate and Sri Rajendra Dobhal for the petitioner Sri bal Mukund for the Central Government and Sri Haider Hussain for the State Government

This petition has been filed as a public interest litigation for directing the respondent no.1 Union of India , to strictly follow its own guidelines as well as the guidelines of World Health Organisation for manufacture and procurement of Oral Polio Vaccine (O.P.V.)

1998

Sahil Society for Welfare
Vs.
U.O.I.
& another

M.Katju, J.
D.K.Seth, J.

On 24.9.1998 this court granted three weeks time to the learned counsel for the respondent to file counter affidavit has been filed. Hence we are treating the allegations in the Writ petition to be correct. The petition is a society registration Act. Annexure-1 is the certificate of registration. It has been stated in paragraph 2 of the petition that world over, the OPV used in Polio eradication is manufactured from bulk concentrate produced as per World Health Organisation Rules. This done to ensure that the bulk concentrate itself is of a quality than does not lessen or completely reduce the potency of the OPV manufactured from it. If this policy is act followed the OPV manufactured from the bulk concentrate would be of suspect potency such that the children to whom it is administered would not be free from the threat of being afflicted by polio. It is also alleged in paragraph 2 of the petition that 600 lacs of doses of OPV manufactured by halffkine institute and lying in its old stock and about to be lifted by the Union of India has not been manufactured from bulk concentrate produced as per World Health Organisation rules . Consequently, if the same is administered to children for immunization or reimmunization against polio, grave damage is likely to be caused to the life and Health of the children. It is alleged in paragraph 3 of the petition that World over the OPV administered for Polio eradication is equiped with V.V. M.s to ensure that the health workers administared the vaccine can detaermine whether the O.P.V/. is patent or not , but the 600 lac doses of O.P.V/. manufactured by haffkine Institute and lying in its old stock and about to be lifted by repondent no. 1 does not have on it. In paragraph 4 it is alleged that the shelf life has also been ignored.
In consumer Education & Research Centre V Union Of India 1995(3) SCC 42 and State of Punjab V Chawla 1997(2)SCC83, it has been held by the Supreme Court that the right to health is a part of the right to life guaranteed by Article 21 of the Constitution.

After hearing learned counsel for the parties , we dispose with the direction to the respondent no.1 to strictly follow its own as well as the World Health Organisation guidelines for manufactured and procurement off OPV and to adhere to the internationally accepted standards and norms for polio eradication.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 19.11.1998

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.L. SARAF, J.

1998

November, 19

Writ Petition No.31219 of 1997

Rajesh Kumar & others **...Petitioners**

Versus

District Consumer Protection Forum, Sonebhadra U.P. & another **...Respondents**

Counsel for the petitioners : Sri A.N. Mulia
: Sri Janardan Sahai
Counsel for the respondents : S.C.
: Sri V.K. Uniyal

Consumer Protection Act, 1986 S-11 readwith S-2(c), 2(e), 2(o)—jurisdiction of Consumer Forum—order passed relating to service matter—held totally without jurisdiction—order passed by the forum quashed.

By the Court

Heard Sri Janardan Sahai learned councel for the petitioner and Sri U.K.Uniyal appearing for respondent no.2

The petitioner have alleged that respondent no.2 was working in the project of the petitioner and after the project came to an end the dues of respondent no. 2 were paid and after the project came to an end the dues of respondent no.2 were paid. Annxure 6 is the copy of receipt by respondent no.2 regarding full and final payment. Thereafter it appears that respondent no.2 approached the district Consumer Forum, Sonebhadra, which has passed the impugned order against which this petition has been filed.

In our opinion , the impugned order is wholly without Jurisdiction. The jurisdiction of the District Consumer is limited to the matters prescribed under Section 11 of the Consumer Proctection , Act,1986 read with section 2(c),2(e) and 2(o) of the Act. The dispute in the present case is regarding services condition of respondent no.2 in

1998

Rajesh Kumar
Vs.
D.C.P.F., Sonebhadra & another

M. Katju, J.
S.L.Saraf, J.

Annexure-1 to the petition which is a copy of the plaint the prayer is that respondent no.2 should be gratuity and appears of salary. In our opinion, this does not come within the score of consumer Protection Act. As regards gratuity, respondent no.2 should have approached the authority concerned under the payment of Gratuity Act and as regards his Salary, he should approach the appropriate forum. However, we are of the clear opinion that the District Consumer Forum has no jurisdiction in service matters. Hence , we quash the impugned order.

The Writ petition is, accordingly, allowed and the impunged order dated 9th April,1997 is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 18.11.1998

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.L. SARAF, J.

1998

November, 18

Writ Petition No.24820 of 1998

M/s Ajay Iron & Steel Works & another ...Petitioners
Versus
Union of India & others ...Respondents

Counsel for the petitioners : Sri V.K. Shukla
: Sri Atul Kumar Pandey
Counsel for the respondents : Sri Mohd. Isha Khan
: Sri S.N. Srivastava
: Sri Chandra Prakash
: S.C.

Indian Telegraph Rules—Rule 443—consumer having more than one telephone connection—default committed in payment of Bill in respect of one connection—other connections also must be disconnected. (Para 5)

By the Court

1998

M/s Ajay Iron & Steel works & another
Vs.
U.O.I & others

M. Katju, J.
S.L.Saraf, J.

Heard Sri V.K.Shukla for the petitioners and Sri Mohd. Isha Khan for the respondents.

The Petitioner have prayed for quashing of the notice dated 2nd June 1998 and for a mandamus directing the respondents not to disconnect four of his telephones. Learned counsel for the petitioners has stated that those telephone connections.

It appears that petitioner No.2 Vijay Kumar Gupta was a partner in the firm Lala Sukhdev Ram Rolling Mills and there was a telephone connection no. 348597 in the name of that firm Obviously, since the petitioner no.2 was a partner in the said firm, he is liable to pay the telephone bills of the firm since under Section 25 of the PartnerShip Act each partner is individually and severly liable.

Learned councel for the petitioner urged that the other telephone connection bearing no. 370077,342619,340440 and 371440 are in the name of petitioner and hence they could not have been disconnected for the dues against the firm Lala Sukhdev Ram Rolling Mills. We are not in agreement with this submission Rule 443 of the Indian Telegraph Rules States as follws. :

"443 Default of payment:- if on or before the due date the rent or other charges in respect of the Telephone service provided are not paid by the Subscriber in accordence with these rules , or bills for charges in respect of calls (Local and Trunks) or phonograms or other dues from the subscriber are not duly paid by him , any Telephone or Telephones or any Telex service rented by him may be disconnected without notice. The Telephone or Telephones or the Telex so disconnected may, if the Telegraph Authority thinks fit, be restored, if the defaulting subscriber pays the outstanding dues and reconnection fee together with the rental for such portion of the itervening period (during which the telephone or Telex) remains disconnected) as may be prescribed by the Telegraph Authority from time to time. The subscriber shall pay all the above charges within such period as may be prescribed by the Telegraph Authority from time to time.

The language of Rule 443 is very clear. If a person is in default in payment of telephones dues of one telephone and if he has any other telephone connection(s) also, the other telephone connection can also

be disconnected in view of rule 443. Since the petitioner was liable to pay the dues in respect of telephone no. 348597. Hence the other four telephone connections could also be disconnected. If however, the petitioner pays the telephone bill in respect of telephone no. 348597, the other telephone connection will be reconnected forthwith provided he has paid the bills for those telephones connection also

With the above observation, the petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 27.10.1998

1998

October, 27

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.L. SARAF, J.

Writ Petition No.24347 of 1998

Ramesh Chandra Chanchal ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the petitioner : Sri Ashok Bhushan
Counsel for the respondents : S.C.

Section 48(2) of U.P. Municipalities Act—the charges against the petitioner were found to be false fravelous and motivated—if the elected Functionaries are removed because of stricks, it will be very easy to instigate a strike and get the elected Functionaries removed—the impugned orders quashed.

By the Court

This writ petition has been filed against the impunged order of the state Government dated 24.6.1998 Annexure 5 to the writ petition passed under Section 48(2) of the U.P. Municipalities Act.

We have heard learned counsel for the parties. The facts of this case are that the petitioner was elected as President of Nagar palika Parisad, Firozabad and took oath of his office on 2.12.1995. It is alleged in the petition that the respondent no. 3 is an MLA from

1998

R.C.Chanchal
Vs.
State of U.P.
& others

M. Katju, J.
S.L.Saraf, J.

district Firozabad and is at present Forest Minister, U.P. Government and is also State President of Samta Party which is allied to the B.J.P. It is alleged that respondent no. 3 has been criticising the petitioner and making false allegations against him. He also fielded a candidate against the petitioner for the post of President of Nagar Palika Parishad Firozabad who lost. It is alleged in parragraph 5 the the respondent no. 3 has always wanted to somehow throw out the petitioner from his office.

In paragraph 12 it is alleged that on 7.2.1998 a notice was issued by the State Government to the petitioner in which two charges were levelled against him and he was asked to show cause why he should not be removed from his office. True copy of the notice dated 7.2.1998 is Annexure 2 to the petition. The petitioner submitted his reply on 2.3.1998 vide Annexure 3 to the peittion. In this reply the petitioner stated that the notice was sent at the instance of the respondent no. 3 who wanted to throw out the peitioner from his office and he also gave reply on the mertis of the charges. The petitioner submitted another reply on 28.3.1998 vide Annexure 4 to the petition. Thereafter the State Government passed the impugned order dated 24.6.1998 Annexure 5 to writ petition.

Several grounds have been taken in this petition. The petitioner has alleged that the main report the District Magistrate date 8.5.1998. which has been relied upon by the State Government is passing the impugned order has not been supplied to the petitioner and hence the petitioner could not give a reply to the said report. It is also stated in paragraph 31 that the State Government has not considered the explanation given by the petitioner in reply to charge no. 1 In paragraph 32 it is stated that the State Government has not given any reason as to how charge no. 2 is proved against the petitioner but it has only relied on the report of the District Magistrate, copy of which has not been supplied to the petitioner.

In paragraph 34 of the peition it is stated that the impugned order dated 24.6.1998 refers to another allegation against the petitioner of making 26 irregular appointments, but in the show cause notice dated 27.2.98 there was no such against the petitioner . In paragraph 37 of the petiton it is stated that copy of the enquiry report dated 26.3.1998 of the District
Magistrate was not supplied to the petitioner through it was relied upon by the State Government. It is stated that the respondent no. 3 by his influence got the impugned order passed. It is stated the

1998

R.C.Chanchal
Vs.
State of U.P.
& others

M. Katju, J.
S.L.Saraf, J.

pertitioner is an elected President and enjoyed the mejority in the Nagar Palika Parishad but he has been illegally removed .

A counter affidavit has been filed on behalf of the respondents 1and 2 and we have perused the same .

In our opinion both the charges against the petitioner are frivolous and base less . The charge no. 1 as mentioned in the notice dated 7.2.1998. relates to the strike by The Safai Karmcharis . In our opinion this is not a ground of removal of an elected President of Nagar Palika Parishad.

In paragraph 19 of the petition it is stated that the strike notice was given by one Sampat Ram Madhur , a close associate of respondent no. 3 and the respondentNo.3 himself was instrumental in starting the strike. At any event, in our opinion this is no good ground for removing an elected functionary. In this connection we are in respectful agreement with the Division Bench decision of this Cort in writ petition no. 26554 of 1991 Muncipal Board Firozabad and others vs. State of U.P. and of others decided on 7.2.1992, true copy of which is Annexure 6 to the writ petition . It has been held therein that wilful default does not mean mere carelessness or negligence. In our opinion if the elected functionaries are removed because of strike then it will be very easy to remove any elelcted functionary because it is well known that it is very easy to instigate a strike in our country on some pretext or the other. In our opinion, elected functionaries should not be easily removable because in a democracy the verdict of the people must be respected. Hence in our opinion the first charge against the petitioner is wholly frivolous.

As regards the second charge, in our opinion, this charge is also frivolous. It is alleged in this charge that the petitioner ordered for disbursement of a sum of Rs. 61250/- to the contractor without investigating whether the work of cleaning of nala has been done or not. The petitioner has alleged that the recommendation and report of part payment of the amount in this connection was made by the Nagar Swasthya Adhikari the report of which was forwarded by the executive officer and it was on this basis that the petitioner passed the order of payment of the amount. The petitioner has stated that the President of the Nagar Palika Parishad acts on the report of the officer of the Nagar Palika, and unless there is something on record or other information there is no reason for desbelieving any such report of the officers of the Nagar Palika Parishad.

1998

R.C.Chanchal
Vs.
State of U.P.
& others

M. Katju, J.
S.L.Saraf, J.

In paragraph 21 of the petition it is further stated that on 9.10.1997 when the petitioner came to know that the work regarding cleaning of the nala had not been done he himself made an inspection and issued an order to the executive officer on 9.10.1997 for subnitting his report within three days. The Executive Officer thereupon issued orders for an enquiry and got the total amount of Rs. 61250/- deposited back with the Nagar Palika fund on 15.10.1991 ;the guilty Nagar Palika employees were suspended by the petitioner and an F.I.R. was lodged against them and further payment of the bill was stopped towards this work. In paragraph 22 of the petition it is stated that the complaint regarding the payment of Rs. 61250/- was made by one Sri Vishnu Verma a close associate of respondent no. 3 on 2.12.1997 while much prior to this date all necessary action were taken by the petitioner in the month of October 1997 itself and the amount was got deposited back on 15.10.1997 . All these facts are mentioned in the petitioner's reply dated 28.3.1998 vide Annexure 4 to the writ petition.

As regards the allegation of making irregular appointments, there is no such charge against the petitioner. Hence in our opinion this could not be basis for passing against the petitioner are false frivolous and motivated. It appears that some persons wanted to throw out the petitioner from his office and have got the impugned order passed illegally and arbitrarily. Hence we quash the impugned order dated 24.6.1998.

The petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 24.10.1998

1998

October, 24

BEFORE
THE HON'BLE J.C. GUPTA, J.

Civil Misc. Writ Petition No.8855 of 1997

Bhairon Prasad Sharma **...Petitioner**

Versus

Rent Control & Eviction Officer, Kanpur & others **...Respondents**

Counsel for the petitioner : Sri Ajit Kumar
Counsel for the respondents : S.C.
: Sri Manish Goyal

Article 226 of the Constitution—Principle of natural justice—An order without reasoning is no order in the eye of law and is nonest to obligation to give reasons introduces clarity and excludes or minimises the chance of arbitrainess.

By the Court

Heard Sri Ajit Kumar counsel for the petitioner and Sri Manish Goyal counsel for the respondents-land lord.

Since counter affidavit and rejoinder affidavit have been exchanged, with the consent of the parties counsel this writ petition is disposed of finally.

As the writ petition can conveniently be disposed of on a short point, it is not necessary to ;narrate the entire facts in detail ;and it is suffice to mention here that on an application moved by respondent no. 3, the Rent Control and Eviction Officer initiated proceedings. He got the premises in question inspected by 'the Rent Control Inspector. Petitioner claiming himself to be lawful tenant of the premises in question filed objections against the report of the Rent Control Inspector, and by the order dated 28.11.96 the R.C. and E.O. dropped the proceedings after holding that there did not exist any vacancy. It appears that the land lord respondent then moved an

1998

B.P.Sharma
Vs.
R.C.E.O.
& others

J.C.Gupta, J.

application on 29.11.96 for recalling the order dated 28.11.96 on the ground that the said order was passed without giving him any opportunity of hearing. The R.C. and E.O. by the following order dated 16.12.96 recalled the order dated 28.11.96 whereby proceedings were dropped :

> " Heard counsel. The order dated 28.11.96 is set aside. The application be registered and notices be sent to all party 10.1.97."

Thereafter, the petitioner made an application stating that the order dated 16.12.96 has been passed in his absence and therefore the same be recalled. The R.C. and E.O. by the order dated 10.1.97 rejected the said application. There is no justification for recalling the order dated 16.12.96. The objector-tenant may file his objections against the application for allotment by 31.1.97."

Learned counsel for the petitioner contended that both the orders dated 16.12.96 ;and 10.1.97 passed by the R.C. & E.O. are wholly illegal, null and v oid. It is further argued that the effect of the order dated 10.1.97 is that the R.C. & E.O. assumed vacancy in respect of the property in question whereas by the order dated 28.11.96 he had already dropped the proceedings and if the said order was to be recalled it was necessary for him to have given an opportunity of hearing to the petitioner. In any view of the matter both the aforesaid orders do not contain any reason and are not speaking orders. After giving my thoughtful consideration to the submission made by the learned counsel for the petitioner, I find much force in them. It is well established law that an order without reasoning is no order in the eye of law and is non est. The apex Court in the case of M\S ;HindustanTimes Limitedk Vs. Union of India & others JT 1998 (1) S.C. 18 has held that obligation to give reasons introduces clarity and excludes or at any rate minimises the chances of arbitrariness and the higher forum can test the correctness of those reasons. Justice Asprey of Australia in Pettit. Vs,Dankley (1971 (1) NSWLR 376 (CA) said that the failure of a Court to give reasons is an encroachment upon the right of appeal given to a litigant. In the case of Smt.M.Bhatnagar Vs. Dy.Director Education 1983 (1) L.C.D. 146 it was held that the order must be a speaking one. Reasons are the vehicle or bridge between the material on record and the conclusion arrivred at.

In the present case when the order dated 28.11.96 dropping the proceedings regarding declaration of vacancy had been made on

1998

B.P.Sharma
Vs.
R.C.E.O.
& others

J.C.Gupta, J.

merits in favour of the petitioner, it was incumbent upon the R.C. & E.O. to have given an opportunity ;of hearing to the petitioner before recalling the said order on the application moved by land lord-respondent. In any view of the matter, he should have also recorded reasons as to why he thought it necessary to recall the order dated 28.11.96. The order dated 16.12.96 recalling the earlier order dated 28.11.96. is not a speakaing order as it does not indicate that the Rent Control and Eviction Officer had applied his mind to; the facts of the case. The land lord had moved application for recalling the order dated 28.11.96 on the ground that he had not been afforded any opportunity of hearing, as such it was necessary for the R.C. & E.O. to have first recorded a clear cut finding whether or not the; above assertion of the land lord was correct and whether there was any necessity or justification for recalling the order dated 28.11.96.After when the order dated 16.12.96 was passed, the petitioner moved an application for recalling the said order on the ground that the same was passed behind his back. Again the R.C.& E.O. rejected the said application simply by one line order without recording any reason or finding as to whether or not petitioner had been given opportunity of hearing before the order dated16.12.96 was passed. It is well established law that if an order has 'been made in favour of a party, the same can only be set aside after giving him an opportunity of hearing which is based on the cardinal principle of natural justice.

It is true that the landlord's assertion that he had not been served with any notice and had no knowledge of the proceedings and that the order dated 28.11.96 was passed behind his back, if found to be correct , the R,.C. & E.O. has the power to recall the said order but before doing so it is necessary for him to give to the petitioner ;an opportunity to oppose the said assertion of the landlord. In the circumstances, both the orders impugned will have to be set aside. The R.C. & E.O. shall call upon the petitioner to file objections if any in opposition to the application of the land lord dated 29,.11.96 for recalling the order dated 28,.11.96 and if any objection is filed by the petitioner, he shall duly consider the same and 'thereafter shall ;pass a reasoned order.

For the reasons stated above, both the orders dated 16.12.96 and 10.1.97 passed by R.C. & E.O. are set aside. The R.C. &n E.O. is directed to decide afresh the application of the land lord dated 29.11.96 for recalling the order dated 28.11.96 in accordance with law. Since the matter has become old, he is directed to decide the

matter expeditiously, preferably within a period of six weeks from the date a certified copy of this order is produced.

The writ petition is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 12.11.1998

BEFORE
THE HON'BLE D.K.SETH, J.

1998

November, 12

Writ Petition No.27840 of 1992

Ram Ratan **...Petitioner**
Versus
District Basic Shiksha Adhikari & others **...Respondents**

Counsel for the petitioner : Sri R.K. Kakkar
Counsel for the respondents : S.C.

Constitution of India, Article 226—Date of Birth—enterned in service record at the time of joining the service-continued about 24 years—claim for alteration of Date of birth recorded in service—held can not be accepted at the fag end of service carrier. (Para 8 and 11)

Case law discussed
J.T. 1995(4) S.C. 23
AIR 1980 S.C.-1251

By the Court

1. The petitioner was appointed in service on 15.1.1960 when his date of birth was recorded in the service record as 5.2.1932. Sometimes in 1984, the petitioner alleged that he learnt that his date of birth was wrongly recorded in his service record. The District Basic Shiksha Adhikari by his letter dated 4.4.1984 sent the concerned application of the petitioner to the Chief Medical Officer, Hamirpur. The Chief Medical Officer, Hamirpur examined the petitioner on 30th August,1984 and issued a certificate that the petitioner was found to be aged about 45 years on the date. The date

1998

Ram Ratan
Vs.
D.B.S.A., Hamirpur & others

D.K.Seth, J.

of birth of the petitioner as recorded in service record was struck off at the time of audit. He also contends that pursuant to the order of the District Basic Education Officer relying upon the certificate of the Chief Medical Officer, the date of birth was correctly recorded as on 30 the August, 1939 by some officer. In such circumstances the order dated 12th May, 1992 contained in Annexure-7 to the writ petition seeking to retire the petitioner on 29.2.1992 has since been challenged by the petition in this writ petition.

2. Mr. R.K.Kakkar, learned counsel for the petitioner submits that since the petitioner did not read.in any school and was not in possession of any school leaving certificate, therefore, his date of birth should be decided on the basis of a certificate from the Civil Surgeon of the district ,therefore, correction of the date of birth in the service record has rightly been done. He next contends that since the respondents themselves had referred the matter to the Chief Medical Officer and had corrected the date of birth in the service record, it is no more open to the respondents to retire the petitioner on; the basis of the date of birth recorded at the time of his entry into the service since been struck off. Therefore, the petitioner could not be retired on the basis of his date of birth as on 5th February, 1932.

3. Mr. Ajay Bhanot, learned Brief Holder for the State of U.P. on the other hand contends that the date of birth is to be recorded on first entry into service pursuant to the rules governing the determination of date of birth, as contained in the paragraph 14 of the old Rules replaced by paragraph 14 which is quoted in the said Government Order dated 23rd August, 1965, a copy of which is Annexure-8 to the writ petition. According to him it is not a case of recording of the date of birth. On the other hand it is an alteration of the date of birth recorded in the service record after paragraph 14 had come into effect, therefore, it would be governed by paragraph 14 (4) of the said Rules. The service record does not show that the date of birth was corrected by the District Basic Education Officer. On the other hand in ;the writ petition itself, the petitioner has contended that the same was corrected at the time of audit. In ;the counter affidavit, it has been pointed out that the same was struck off in1990 at the time of audit. The fact that it was so recorded in 1984 has not been admitted. Thus the said fact remains a disputed question of fact. A perusal of the service record annexed in the writ petition does not take away the question from the ambit of disputed question of fact. Therefore, this Court cannot enter into such fact. He also contends

that at the fag end of the career, the question cannot be raised as has been sought to be raised in the present writ petition.

1998

Ram Ratan
Vs.
D.B.S.A., Hamirpur & others

D.K.Seth, J.

4. I have heard both the learned counsel at length.

The fact remains that the petitioner joined service on 15.1.1960 when his date of birth was recorded as on 5.2.1932. This fact is not dispurted that for the first time in 1984, the petitioner objected to the recording of; the said date of birth. It is about after 24 years, the objection has been raised. The date of birth was allowed to continue in service record for a number of years namely, 24 years. The service record shows that the same bears the signature of the petitioner, where the date of birth was recorded in Hindi. The signature was also in Hindi. It is not pleaded that the petitioner is unable to read Hindi. The signature was also in Hindi. It is not pleaded that the petitioner is unable to read Hindi. The signature in Hindi pre-supposes that the petitioner did not have;knowledge that his date of birth was recorded wrongly in his service record.

5. On; the basis of his application, the petitionrer was sent to the Chief Medical Officer. The Chief Medical Officer had issued a certificate to the extent that he had round to the petitioner to be 45 years of age. He was not medically examined by any medical board. It does not appear that there was any scientific test carried on for determining the age either by the ocification test or such other scientific test. The certificate appears to be an assessment based on the opinion of the Chief Medical Officer.

6. Then again the endorsement in the service record appears to be made in a column, which is not meant for making such endorsement in between the lines of different items mentioned in the said column. The seal appended there- to is illegible. But the text of the endorsement says that pursuant to a particular letter containing the order of the District Basic Education Officer, the date of birth was corrected. This is not free from suspicion. However, even it the same is admitted to be correct still then in the counter affidavit the same has been disputed . Sitting in writ jurisdiction, this court cannot enter into determination of the disputed question of fact as to whether the endorsement was genuine or the petitioner was really 45 years of age on 30th August 1984 or not.

7. However, the Government order dated 23rd August, 1965 as was in force when the date of birth was sought to be altered in the service

1998

Ram Ratan
Vs.
D.B.S.A., Hamirpur & others

D.K.Seth, J.

record. Mr. Kakkar had relied on sub paragraph (2) of paragra;ph 14 quoted in ;the Government order dated 23rd August, 1965 to support his contention that the date of birth of ;the petitioner should be decided in the manner provided therein. In order to appreciate the said contention, it may be useful to quote the provisions of paragraph 14 hereafter:

"14. (1) Record of age- It is important that age of a candidate for direct recruitment should be correctly recorded. This can be done at the time of appointment and appointing authorities shall, when making first appointment, obtain for permanent record evidence regarding the correct of the candidate. The date of birth or age recorded in the High School examination certificate or any other examination recognised as equivalent thereto should ordinarily be accepted. Where the minimum educational qualification for recruitment to a service or ;post is a qualification lower than; the High School examination the date of birth, if any recorded in the certificate of that examination should be accepted as the date of birth of the candidate.

(2) If there is any reasons to doubt the accuracy of the date of birth or age as recorded in the aforesaid certificates, or where none of the aforesaid certificates, or where none of the aforesaid certificate is available, or if the date of birth or age is not indicated in any such certificate, the date of birth or age should be determined with reference to the additional evidence in the following order of preference.

(a) copy of the scholar's record (School leaving certificate) showing the date of birth at the time of first admission to a school; or

(b) Certificate from the Civil Surgeon of the district.

Provided that where the certificate or other evidence referred to in; the foregoing sub paragraphs does not indicate a person's date of birth but gives only his age, his date of birth should be determined in accordance with the method prescribed in para 127-A of the Financial Hand Book, Volume V, Part I.

3. The date of birth of candidates other than those already in government service, applying for posts\services under the Government shall also be determined in accordance with sub-paras 1 and 2 above. The date of birth of candidates already in government service will; be the date as recorded in their service books.

4. Alteration of date of birth-when the date of birth recorded in service book which has ;been attested and has been stood unchallenged for a number of years, it should not be altered except in very exceptional circumstances."

1998

Ram Ratan
Vs.
D.B.S.A., Hamirpur & others

D.K.Seth, J.

A perusal of the said provisions indicate that sub –paragraph (2) is to be resorted to in the context of sub paragraph (1) for determining the age at the time of appointment It is not a provision independent of sub-paragraph (1) , therefore, it cannot be resorted to for the purpose of alteration in ;the date of birth recorded in ;the service record. The provision for alteration of the age as provided in paragraph 9(4) lays down that it can be done only in a very exceptional circumstances. The circumstances, has been qualified with two adjectives namely: 'very' and 'exceptional'. The circumstances has to be exceptional . Exceptional circumstances is an exception to normal rules. The exceptional circumstances has also been qualified to the extent to be very exceptional . This very expression indicates that such alteration could be resorted to sparingly when there are admittedely glaring discrepancies either in ;the certificate or something else which might lead to a conclusion to be a circumstance, which is exceptional to a degree of being very exceptional i.e. something others than ordinary or in other words extra –ordinary.

Whether in the facts and circumstances, the ;petitioner's case could be brought within the ambit of Sub-paragraph 9(4) and said to be a very exceptional circumstances, is required to be examined. As observed earlier since there are reasons for suspicion and that the petitioner had allowed the date of birth recorded as on 5.2.1932 was struck off only in 1990 that too at the time of audit and on ;the basis of a certificate of the Chief Medical Officer who had assessed or opined about the age of the petitioner without any scientific test, could not be said to be an exceptional circumstances in the nature of being very exceptional. It does not seem that the facts emerging from the present case cannot be termed as a very exceptional circumstances.

(10)) Then Mr. Kakkar had relied on a decision in the case of Jiwan Kishore Vs. Delhi Transport Corporation and another, AIR 1980 Supreme Court 1251 in support of his contention, wherein it was observed that there being wide discrepancy in the date of birth and the petitioner was examined by a Medical Board which through scientific test determined the age of petitioner at 51 years. The court

1998

Ram Ratan
Vs.
D.B.S.A., Hamirpur & others

D.K.Seth, J.

had expressed that there was no reason to ignore the scientific fixation of the age when ;the records were flagrantly conflicting and therefore, the age was fixed on the basis of the scientific test by the medical board by the Apex court.

11. The said decision does not appear to lay down any ratio with regard to the determination of the age in ;such circumstances, since the said decision was obtained by; the agreement of the parties. Inasmuch as in the said decision it was recorded that "We are not impressed with the suggestion that we could pre-fix the age …… …… We are not going into its vires in this case as both sides agree that if the court fixes the age as per the Medical Board's determination, they will accept and abide by it. On this footing we dispose of the appeal in partial allowance and set aside the order of retirement and further direct that the appellant be continued in service with all the consequential benefits as a regular employee until 12.6.1982". The said decision being a decision invited by agreement of parties and having not laid down any ratio expressely indicating the same in the order, the said decision does not help Mr. Kakkar in his contention as has been sought to be made out.

12. On the other hand in the case of Burn Standard Company Ltd. & ors. Vs. Shri Dinabandhu Majumdar & anr. , JT 1995 (4) S.C. 23, the Apex Court had depricated the correction of date of birth through writ petition at the fag end of ;the service career and had held that such a writ petition cannot be entertained. In ;the present case, the writ petition has been filed only after the impugned order seeking to retire the petitioner on 29.2.1992 was issued namely the writ petition was presented on 23rd July, 1992 not only at the fag end of his career but also after the orders of retirement had taken effect.

13. In view of the above observations, it is not necessary to go into the other questions raised by the respective counsel.

14. In the result, the writ petition fails and is accordingly dismissed. However,; there shall be no order as to costs.

15. Mr. Kakkar at this stage submitted that the retiral benefits have not been paid to 'the petitioner. The respondents may be directed to pay the retiral benefits of the petitioner at the earliest. Mr. Ajay Bhanot, learned Brief Holder for the State in his usual fairness does not object to the said prayer in view of the Ivth prayer (iv) contained

in the writ petition. Therefore, the respondents are hereby expected to make available all retiral benefits as are admissible in law to the petitioner including arrears and current pension, if payable together with all other service retirement benefits as early as possible preferably within a ;period of six months from the date a copy of this order is communicated to the respondents.

'Let a certified copy of this order be issued to the learned counsel for the petitioner on paymnent of usual charges in the ordinary course.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 16.11.1998

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

1998

November, 16

Writ Petition No.38184 of 1998

Ayodhya Nath Dubey **...Petitioner**

Versus

XIIIth A.D.J., Kanpur Nagar and others **...Respondents**

Counsel for the petitioner : Sri K.K. Tripathi
Counsel for the respondents : S.C.

U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972—Section 30(1)—Meaning of words "notice in writing" explained.

Restricted meaning can not be given to "Notice in writing". It does not mean a separate notice by the land lord. The notice may be a given by submitting an objection in that proceeding or in any other manner by which the tenant comes to know that the land lord has expressed his willingness to accept the rent. (Para 6)

Cases reffered
AIR 1972 Alld. 441 relied upon.
1996 J.R.J. 471 distinguished.

By the Court

1998

A.N.Dubey
Vs.
XIIIth A.D.
& S.J., Kanpur
& others

Sudhir
Narain, J.

(1) This writ petition is directed against the judgement of the Judge Small Causes Court dated 27.3.1998 whereby the suit for ejectment against the petitioner was decreed and the order of the revisional court dated 3.11.1998 dismissing the revision against the aforesaid judgement.

(2) The land lord-respondents no. 3 and 4 filed suit no./ 380 of 1983, Smt.Shanti Devi and others Vs. Ayodhya Nath Dubey and another, against the petitioner and one Vishwanath for recovery of arrears of rent , ejectment ;and damages on the allegation that the petitioner was their tenant. He was in arrears of rent for the period 25.8.1977 to 24.2.1983 . The plaintiff-respondents sent com;posite notice on 3.3.1983 to the defendant-petitioner demanding arrears of rent and terminating his tenancy. The notice was served by refusal on 10.3.1983, The petitioner did not pay arrears of rent as demanded by the plaintiffs. It was further stated that the petitioner had sub-let the accommodation in question to Anil Kumar, defendant no. 2.

(3) The petitioner filed written statement. He alleged that the landlords have refused to accept the rent and thereafter he made deposits under section 30 of U.P.Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the Act). He denied that he sub-let the disputed accommodation to the defendant no. 2 . He also denied that he received any notice sent by the plaintiff-respondents. The trial court recorded a finding that the petitioner was served with a notice but he failed pay; the arrears of rent as demanded by the plaintiffs. The deposits made by himj under section 30 of the Act was invalid. The suit was decreed on these findings. The main thrust of the submission of; the learned counsel for the petitioner is; that the petitioner had deposited the rent under section 30 of the Act and such deposit was illegally held as invalid.

(4) Admittedly the petitioner deposited the rent under section 30 of the Act on 14.9.1977 for ;the period 25.11.1975 to 24.8.1977 amounting to Rs. 131.25. He thereafter deposited the rent for the period 25.8.1977 to 24.3.1978 on 4.3.1988. On the deposit being made a notice was issued to the plaintiff-respondents. They filed objection on 24.2.1978 stating that they had never refused to accept the rent from the petitioner and secondly they are always prepared to accept the rent. The Munsif City passed an order that the applicant (petitioner) is allowed to continue to deposit the rent at his own risk.

1998

A.N.Dubey
Vs.
XIIIth A.D.
& S.J., Kanpur
& others

Sudhir
Narain, J.

The petitioner thereafter continued to deposit the rent under section 30(1) of the Act. Learned counsel for the petitioner contended that once the petitioner had deposited the amount under section 30(1) of the Act and was permitted to continue to deposit the rent, such deposit should be treated as valid unless the land lord in the meantime signifies by notice in writing to the tenant his willingness to accept it. Section 30(1) of the Act reads as under :-

"If any person claiming to be a tenant of a building tenders any amount as rent in respect of the building to its alleged land lord and the alleged land lord refuses to accept the same then the former may deposit such amount in the prescribed manner and continue to deposit any rent which he alleges to be due for any subsequent period in respect of such building until the land lord in the meantime signifiesby notice in writing to the tenant his willingness to accept it,."

5. This section coantemplates that the tenant can make deposit under section 30(1) of the Act when the land lord refuses to accept the rent and if he hasa refused to accept the rent the tenant will be justified in depositing the rent in court unless the land lord signifies his willingness in writing for accepting the rent. The petitioner was bound to prove that the land lords had refused to accept the rent which caused him to deposit ;kthe ;amount under sec tion 30(1) of the Act. The petitioner failed to prove this fact. Secondly, when the petitioner made deposit under section 30(1) of the Act and on a notice issued to the land lord-respondents, they submitted an objection categorically stating that they never refused to accept rent and further they were always prepared to accept it. The willingness was clearly indicated in the objection filed by athe land lords. It was not necessary for the land lords to give a separate notice in writing to the tenant-petitioner.

(6) The notice to the tenant of willingness of land lord to accept the rent in a proceeding under section 30 of; the Act may be in any form. The words "notice in wrriting" under section 30(1) of the Act cannot be given a restricted meaning as to give a separate notice by the land lord. The notice may be given by submitting an objection in that proceeding or in any other manner by which the tenant comes to know that the land lord has expressed his willingness to accept the ;rent. The deposit under section 30 contemplates that the land lord has refused to accept the rent but once the land lord has expressed his

1998

A.N.Dubey
Vs.
XIIIth A.D. & S.J., Kanpur & others

Sudhir Narain, J.

willingness to accept the rent,; there is no justification for the tenant thereafter to deposit the rent under section 30 of the Act.

(7) In Mohammadoo Khan Vs. Ghulam Rasool, AIR 1972 Alld. 441, the Court held that that where the land lord gives notice demanding arrears of rent and after service of such notice if the tenant continues to deposit the rent under Section 30 of the Act that deposit is invalid as the land lord, by demanding the rent, has expressed his willingness to accept the rent.

(8) Learned counsel for the petitioner has placed reliane upon the decision Sobran Singh Vs. Prakash Chandra Gupta, 1996 JRJ 471, wherein the Court remanded the case to find out as to whether the land lord had signified the willingness to accept the rent. This case has no application to the facts of the present case. The tenant must first prove that at any point of time the land-lord has refused to accept the rent and if it is found that the land-lord has refused to accept the rent he is entitled to deposit the rent under section 30(1) of the Act until the land lord in the meantime signifies by notice in writing to the tenant his willingness to accept it.

(9) As found above the land lord never refused to accept the rent and; further on deposit being made by the petitioner they made it clear by filing objection that they prepared to accept the rent, the question of further notice being given by them did not arise and the deposit made by the petitioner under section 30 of the Act was invalid.

(10) In view of the above there is no merit in the writ petition. It is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 04.12.1998

BEFORE
THE HON'BLE D.P. MOHAPATRA, CJ.
THE HON'BLE PALOK BASU, J.
THE HON'BLE G.P. MATHUR, J.

1998

December, 4

Writ Petition No.35573 of 1994

V.K. Banerjee **...Petitioner**

Versus

State of U.P. & others **...Respondents**

Counsel for the petitioner : Sri Amit Bose
Counsel for the respondents : S.C.
: Sri R.P. Goel
: Sri Ashok Mehta

U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and otherback ward classes Act, 1994—Section 3—G.O. dated 10.10.1994—Increasing reservation quota in provision in favour of Scheduled Castes candidates from 18% to 21% is valid. (Para 14)

(1997) 5 SCC 201 relied upon.

By The Court

1. A Division Bench consisting of one of us looking to the importance of the question raised, has on 10.11.1994 opined that a larger bench be constituted and this is how under the orders of the Hon'ble the Chief Justice, this bench is seized with the matter.

2. The question formulated in the interim order passed by the Division Bench may have been more relevant on that date but the subsequent decisions of the Hon'ble the Supreme Court on the issues arising do not leave much scope for the petitioner to argue because Hon'ble Supreme Court's decision which has come in the meantime in Ashok Kumar Gupta and another versus State of U.P. and others

1998

V.K.Banerjee Vs. State of U.P. & others

D.P. Mohapatra,CJ. Palok Basu,J. G.P.Mathur,J.

1997 (5) Supreme Court Cases page 201, practically concludes the matter so far as this Court is concerned .

3. The petitioner has prayed for quashing of the government order dated 10.10.1994, restraining the respondents from enforcing the U.P. Government Servants (Criterion for Recruitment by promotion) Rules, 1994 vide notification dated 10.10.1994 and to command the respondents to make promotions on the basis of Rule 8 of U.P. Service of Engineers (Public Works Department) (Higher) Rules, 1990 by preparing one list of eligible candidate under Rule 4(1) of the U.P. Promotion by Selection (On posts outside purview of the Public Service Commission) Eligibility List Rules, 1986.

4. The short facts are that the petitioner, V.K. Banerjee, having been appointed as Assistant Engineer in U.P. Public Works Department was duly promoted as Executive Engineer. He was expecting promotion as Superintending Engineer but because of change in the eligibility rules and also by applying enhanced percentage of reservation in promotional posts, the petitioner's chances were marred in as much as the action of the respondents in bringing about the said changes in ultra-vires Articles 14 and 16 of the Constitution of India and, therefore, the aforesaid reliefs have been claimed through this writ petition filed under Article 226 of the Constitution. It has been contended that the State Government is bent upon giving undue benefits to the members of the reserved categories and, therefore, the persons who are far junior to the petitioner may be about to get advantage of promotion which is otherwise due to the petitioner or the like.

5. The only question up for consideration before this Full Bench in this writ petition is as to whether the order issued by the State of Uttar Pradesh on 10.10.1994 increasing reservation quota in promotion in favour of Scheduled Castes candidates from 18 percent to 21 percent under section 3 of The Uttar Pradesh Public Services (Reservation For Scheduled Castes , Scheduled Tribes and other Backward Classes) Act, 1994 is valid or not?

6. In Ashok Kumar Gupta and another Vs. State of U.P. and others (Supra) a bench of three Hon'ble Judges of the Apex Court has held that :

> " It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to

1998

V.K.Banerjee Vs. State of U.P. & others

D.P. Mohapatra,CJ. Palok Basu,J. G.P.Mathur,J.

promotion to a post or a class of posts depends upon the operation of the conditions of service. Article 16(4-A) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as fundamental right where they do not have adequate representation consistently with the efficiency in administration……..Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right. In adjusting the competing rights of the Dalits and Tribes on the one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian protective discrimination in favour of the Dalits and Tribes to give effect to the constitutional goals, policy and objectives referred to herein before."

7. It may be pointed out that the Hon'ble Apex Court made the aforesaid observations after taking due note of the cases on the topic, i.e. Indra Sawhney Vs. Union of India (1992 supp.(3) Supreme Court 36), R.K. Sabharwal Vs. State of Punjab (1995 (2) Supreme Court Cases 745 and State of Karnataka Vs. Appa Balu Ingale (1995 Supp. (4) Sureme Court Cases 469).

8. Coming back to the facts of the case, when the writ petition was admitted on 10.11.1994 calling affidavit in reply, an interim order was passed, relevant portion of which is quoted below :

"……..it is hereby directed that no promotion would be made to the posts of Superintending Engineers in the existing vacancies beyond 18% of the vacancies from Scheduled caste category. If any promotion has already been made in excess of the aforesaid 18% of the vacancies, these officers will not be allowed to function subject to the final decision to be passed in the writ petition."

9. It is on 17.6.1995 that the Parliament has passed Seventy-Seventh Amendment Act inserting Articles 16(4-A) in the Constitution, which reads as under :

"4-A : Nothing in this Article shall prevent the State from making any provision for reservation in the matters of promotion to any class or classes of posts in the services under the

1998

V.K.Banerjee
Vs.
State of U.P.
& others

D.P.
Mohapatra,CJ.
Palok Basu,J.
G.P.Mathur,J.

State in favour of scheduled Castes and Scheduled Tribes which, in the opinion of the State are not adequately represented in the services under the State."

10. The other relevant fact to be mentioned here is that by government order dated 10.10.1994 the state Government increased reservation for Scheduled Castes from 18% to 21% on the same date it issued a notification promulgating the U.P. Government Servants (Criterion for Recruitment by Promotion) Rules, 1994, which provided that the post of Head of the Department, one rank below the Head of the Department, one rank below the Head of the Department and a post carrying a pay scale of Rs. 6700/- and above would be filled up by promotion on the basis of merit and the rest of the posts would be filled up by promotion on the basis of the criteria of seniority subject to rejection of unfit. On 23.2.1996 the State Government has promulgated the U.P. Government servants Criterion for Recruitment by Promotion (First Amendment) Rules, 1996 which amends Rule 4 of the said Rules quoted above. This amendment provides that the posts carrying the maximum of pay-scale of Rs. 5700/- and above were to be filled up by promotion on the basis of the criteria of merit. It is not disputed that in view of this Amendment the posts of Superintending Engineers would be affected as it carries a maximum pay scale of Rs. 5700/-. It follows that after 23.2.1996 only the posts of Assistant Engineer an Executive Engineer were to be filled up by promotion on the basis of seniority subject to rejection of unfits and other posts such as Superintending Engineer, Chief Engineer Level-II, Chief Engineer Level-I and Engineer-in-Chief were to be filled up by promotion on merit. It may be mentioned here that Rule 5 of the U.P. Promotion by Selection (on Posts outside the Purview of the Public Service Commission) Eligibility List Rules, 1986 has made a provision that where the criterion for promotion is seniority subject to the rejection of unfit the appointing authority shall prepare three lists to be called the eligibility of the senior most eligible candidates from each of the category namely, General, Scheduled Caste and Scheduled Tribes, separately in the light of vacancies available for each of the said category in proportion of 1 to 5 vacancies –two times the number of vacancies subject to a minimum of 10. Reference has already been made to the change brought about by the Promotion Rules of 1994 which again stands amended by the First Amendment Rules of 1996 referred to above.

1998

V.K.Banerjee
Vs.
State of U.P.
& others

D.P.
Mohapatra,CJ.
Palok Basu,J.
G.P.Mathur,J.

11.Sri Amit Bose, learned counsel for the petitioner, has argued the matter with ability and lucidity. Likewise, Sri R.P. Goel, learned Advocate General, has replied to the said arguments elaborately, who has been ably assisted by Sri Ashok Mehta, Chief Standing Counsel for the State of Uttar Pradesh.

12. In view of the obserbations in Indra Sawhney (supra) and the latter case laws flowing from the Hon'ble Apex Court Sri Amit Bose diverte his arguments in the following manner. Sri Bose argued that saving of reservation in promotional rules through the aforesaid judgment in Indra Sawhney case for a period of five years has expired on 15.11.1997 and even though Article 16(4-A) was introduced in the Constitution of India with effect from 17.6.1995 the State of Uttar Pradesh cannot continue with the policy of reservation in promotion after 15.11.1997. It was contended by Sri Bose that it was essential for the State Government to collect material to ascertain whether the members of Schedule Castes and Scheduled Tribes were adequately represented in the higher posts or not and there being no material to indicate such analysis by the State Government , the judicial scrutiny should be applied and since there is no material the impugned order should be quashed.

13. In this very connection it was argued that the Eligibility Rules of 1996 have permitted – different levels of evaluation and have permitted the three lists to be drawn, one for General, second for Scheduled Casts and third for Scheduled Tribes candidates and therefore, he strongly contended that because that there is no provision for interse comparison of merit or suitability amongst the three categories, the levels of evaluation in favour of scheduled castes and scheduled tribes have been lowered and, therefore, the said lowering of level of evaluation is not permissible under Article 16(4) of the Constitution. Therefore, the State Government's steps in changing the criterion of promotion from merit to seniority subject to rejection of unfit should itself be hit by Article 16(4) of the Constitution.

14. The aforesaid decision of the Apex Court in Ashok Kumar Gupta and another (supra) arose out of an order passed by Lucknow Bench of this Court on 4.8.1993. It has been noticed in paragraph 5 of the judgment that increase of percentage of promotional posts for reservation has been made with effect from 11.12.1993 and further that in then existing 1973 Rules Dalits and Tribes candidates were to be treated on the same standard of suitability as general candidates.

1998

V.K.Banerjee Vs. State of U.P. & others

D.P. Mohapatra,CJ. Palok Basu,J. G.P.Mathur,J.

The litigation related to promotion of several scheduled castes and scheduled tribes candidates in the same department in which the petitioner in the instant case is employed. It may be mentioned here that apart from the matter which went to the Apex Court through Special Leave Petition against the judgment of Lucknow Bench, a writ petition was also filed before the Hon'ble Supreme Court under Article 32 of the Constitution of India challenging the action of the state of Uttar Pradesh in extending the enhanced reservation to scheduled Castes and scheduled tribes candidates in promotional posts. In para 64 of the judgement the Apex Court has dismissed the appeal as well as the writ petition. The relevant point which deals with the controversy attempted to be raised by the petitioner through this writ petition does not surviva .

15. Before concluding it may be added that State's opting to three eligibility lists which was so severely attacked by Sri Bose on behalf of the petitioner would not leave the matter for the petitioner any more to challenge for, it is admitted fact that the petitioner has already been promoted and in none of the paragraphs it is contended that the said promotion has in any way affected his seniority or any other benefits. It was, therefore , rightly pointed out by the learned Advocate General that for practical point of view the petitioner has no cause of action to maintain this writ petition. This objection is sustainable on the facts of the case. In so far as legal questions argued by Sri Amit Bose are concerned, their probing by this Court is no more permissible in view of the decision of the Hon'ble the Supreme Court in Ashok Kumar Gupta and another (supra)

16. In view of the aforesaid discussions, the writ petition fails and is dismissed. The stay order dated 10.11.1994 is hereby vacated. The parties will bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 1.12.1998

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.L. SARAF, J.

1998

December, 1

Writ Petition No.40817 of 1998

L.M.L. Ltd. & another **...Petitioners**

Versus

Union of India & others **...Respondents**

Counsel for the petitioners : Sri Yogesh Agarwal
Counsel for the respondents : S.C.
: Sri Piyush Agrawal
: Sri Bharat Ji Agarwal

Arbitration and conciliation Act 1996—Section 9—Interim Order-forum-Civil Court has power to grant interim relief. (Para 10)

Arbitration and conciliation Act, 1996—Section 45—constitutional validity—Interpretation—The purpose of section 9 is to give interim protection during arbitration proceedings. (Para 6)

Constitution of India—Article 226—Declatory writ can not be issued. (Paras 13 & 14)

Cases relied upon
(1) AIR 1966 Cal. 601
(2) AIR 1953 Alld. 477
(3) AIR 1951 S.C. 41

By the Court

1. Although we have passed separate orders in this writ petition, yet we are agreed that section 9 of the Arbitration and Conciliation Act 1996 applies also to the proceedings under part ii of the Act and hence interim relief can be granted by the civil court pending the arbitration proceedings.

2. However, the Forum for filing an application under section 9 of the Act is not the High Court but the Civil court.

3. The petition is disposed of.

1998

L.M.L.Ltd.
& another
Vs.
U.O.I.
& others

M.Katju, J.
S.L.Saraf, J.

4. Heard learned counsel for the petitioner Sri Rajesh Kumar learned counsel for the respondent no.3 and 4 as well as Sri Mohd. Isa Khan learned counsel for the respondent no.1

5. Without going into the merits of the case we are of the opinion that Section 9 of the Arbitration and Conciliation Act 1996 which provides for interim measures during arbitral proceedings applies also to provision under Part II of the Act No. doubt Section 2(2) of the Act states that Part I applies where the place of arbitration is in India and section 9 is in Part I of the Act, but it is a settled principle of interpretation that in construing statutes we must see the scheme of the Act, the context, the object etc.

6. A challenge has been made to Section 45 of the Act, but we are of the opinion that ther court should endeavor to uphold the constitutionality of a provision even if for that purpose we have to give a strained interpretation, rather thanputting an interpretation which makes the statute unconsitutional by taking its plain meaning. In our opinion if Section 9 is treated as inapplicable to Part II it will make Section 45 too harsh. The purpose of Section 9 is to given interim protection during arbitration proceedings. In our view interim protection under section 9 can be given by the court lin all kinds of arbitration proceedings, even those under Part II, otherwise irreparable loss may be caused.

7. In the circumstances we dispose off this petition with the liberty to the petitioner to move an application under section 9 of the Act to the court concerned which will decide the same in accordance with law and in the light of the observations made above.

8. Heard learned counsel for the parties.

9. The present petition relates to a matter which is essentially a civil dispute between Petitioner No. 1 and a foreign collaborator. The petitioners had entered into an agreement with respondent no.2, inter alia for transfer of technology in respect of certain two wheeler vehicles. The dispute between the parties as per the terms of agreement has now been referred to the arbitration of International Chamber of Commerce and the same is to proceed or is proceeding in accordance with the Rules of the said Chamber.

Rule 23(2) of the International Chamber of Commerce Rules (for short I.C.C. Rules) reads as follows:

1998

L.M.L.Ltd. & another
Vs.
U.O.I. & others

M.Katju, J.
S.L.Saraf, J.

"23.2 Before the file is transmitted to ther Arbitral Tribunal and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any such measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

Similar provision is made under Section 9 of the Arbitration and Conciliation Act, 1996, which reads as under:

"9.Interim measures etc. by Court: A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:-
(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings, or

(ii) for an interim measure of protection in respect of any of the following matters namely:-

(a) the preservation interim custody or sale of any goods which are the subject matter of the arbitration agreement.

(b) Securing the amount in dispute in the arbitration;

(c) The detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence:

(d) Interim injunction or the appointment of a receiver;

1998

L.M.L.Ltd.
& another
Vs.
U.O.I.
& others

M.Katju, J.
S.L.Saraf, J.

(e) such other interim measure of protection as may appear to the Court to be just and convenient;

and the Court shall have the same power for making orders as it has for the purposes of and in relation to, any proceedings before it."

Section 45 of the Arbitration and Conciliation Act 1996 reads as follows:

"Power of Judicial authority to refer parties to arbitration – Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of any action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

10. A reading of the above provisions makes it abundantly clear that Section 9 of the 1996 Act read with Rule 23.2 of the I.C.C.Rules empowers the Civil Court to pass orders for interim relief. Non obstante clause of Section 45 does not exclude the powers of Civil Court to grant interim relief. Non-obstante clause is not an impedient but is an enabling provision authorising the judicial authority to refer the parties to arbitration without restricting the powers of Civil Court to grant interim relief under Section 9 of the Act. Rules 23.2 of the I.C.C.Rules specifically lays down that before the file is transmitted to the Arbitral Tribunal in appropriate circumstances , even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The substantial and ultimate relief can only be resolved by the arbitration of International Chamber of Commerce. However, it is made clear that the above observations are purely obiter and the Court is expressing no opinion as to the applicability, validity or the scope of the aforesaid provisions.

11. Peculiarly enough, without resorting to the above mentioned procedure the petitioners have filed writ petition praying for a declaration that Section 45 of the Arbitration and Conciliation Act, 1996 be declared ultra vires, unconstitutional and bad in law. No other relief was sought for in the writ petition. At the behest of the Court a consequential relief was sought for and allowed to be added as follows:

"issue a writ of mandamus commanding opposite party no.2 not to act in violation of the agreement which is the subject matter of agreement between the parties.

1998

L.M.L.Ltd.
& another
Vs.
U.O.I.
& others

M.Katju, J.
S.L.Saraf, J.

12. Obviously, the added relief sought for is the relief against the private party asking for a direction from this Court against respondent no.2 not to act in violation of the agreement. Such a relief is purely a civil matter arising out of the arbitration proceedings between the private parties and the same cannot be granted by the Court exercising power under Article 226 of the Constitution of India.

13. The main relief sought for in the writ petition is purely a declaratory relief. It is well settled that Article 226 should not be used and was not intended to be used as a medium or means for declaratory orders or declaratory reliefs declaring Acts and orders invalid even though no relief could be granted to the petitioner. The Court should not issue writs of consolation or writs propounding theories. That is not the function, scope and purpose of Article 226. Nor should it be utilised for subsequent claims in future legal proceedings. (See AIR 1966 Calcutta, 601 at page 603).

14. The Allahabad High Court has observed in a decision reported in AIR 1953, Allahabad, 477 at page 479 that this Court has consistently taken the view that the powers of issuing writs, orders or directions should not be utilized for giving what is in essence a declaratory relief.

15. Further, the Supreme Court in AIR 1951 SC 41 it has been held that advisory opinion or declaratory judgment on the constitutionality of legislation cannot be given under Article 226 of the Constitution of India.

Summing up the above discussion, we hold that :

(a) the present petition is totally misconceived and no order can be passed on this petition

(b) the dispute in the present writ petition is purely private dispute between Petitioner No.1 and foreign collaborator, referable to the arbitration of International Chamber of Commerce and no writ of mandamus against a private party arbitrating before the International

Chamber of Commerce, can be issued by this Court exercising powers under Article 226 of the Constitution of India and

(c) Article 226 is not intended nor is the forum for passing declaratory orders or declaratory reliefs.

In view of above, the present writ petition stands dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 11.12.1998

1998

December, 11

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.K. SINGH, J.

Writ Petition No.1101 of 1996

Krishna Kumar ...**Petitioner**

Versus

State of U.P. & another ...**Respondents**

Counsel for the petitioner : Sri V.M. Sahai
Counsel for the respondents : Sri P.K. Bisaria
: S.C.

(1) Payment of Gratuity Act—Section 4—Termination of employment—includes termination by superannuation. (Para 6.3)

(2) Civil Service Regulation—Regulation 351-A—Deduction of 10% from pension—Petitioner was served a charge sheat dated 30.1.1991 before retirement. In the departmental proceedings charges were found proved—Thus deduction of 10% from pension justified. (Para 7.1)

By The Court

Through this writ petition the petitioner Kirshna Kumar who retired as Deputy Excise Commissioner, has challenged the order dated 03.11.1995, (as contained in annexure no.6 to the writ petition) deducting Rs. 1,66,580/- from his gratuity amount and deducting 10% of the pension admissible to him and as prayed for issuance of

direction restoring all benefits of service to him and for releasing his gratuity amount forthwith

1998

Krishna Kr.
Vs.
State of U.P. & another

B.K.Roy, J.
R.K.Singh, J.

2. The Petitioner was served with a charge-sheet on 30.05.1991 alleging that due to his negligence and misconduct the Government suffered a loss of Rs. 40780/- in the financial year 1983-84 while he was posted at Deoria and further loss of Rs. 1,25,800/- while he was posted at Allahabad. The Joint Excise Commissioner who was appointed enquiry officer to enquire into the charges, conducted enquiry and submitted his report on 30.12.1991, as contained in annexure no.5 to the writ petition, suggesting to be discharged of the allegations. The controlling Officer examined the enquiry report. The Government did not agree with the recommendations of the enquiry officer and passed the impugned order as contained in the annexure no.6 to the writ petition deducting Rs.1,66,580/- from the total gratuity amount of the petitioner and further in deducting 10% of the pension admissible to him.

3. The petitioner has challenged the aforesaid order of the Government on the ground that deduction from gratuity is permissible under section 4(6) of the Payment of Gratuity Act, 1972 only in the case of termination of an employee whereas his services were not terminated by the Government rather he retired from service on 31.05.1991 and thus the deduction in gratuity was not permissible and since he was not given any opportunity of hearing before passing of the order of deduction of pension therefore principles of natural justice has been violated. His further case is that the enquiry officer had recommended for discharging him from the allegations and in this back drop since the Government disagreed with the report of the enquiry officer he should have been given an opportunity of hearing but the same was not given and, therefore, the punishment is bad in the eye of law and fit to be quashed by the Court.

4. We have heard Sri V.M. Sahai, learned counsel representing the petitioner and Sri. P.K. Bisaria, learned Standing Counsel representing the Respondents, perused the writ petition, Counter and Rejoinder Affidavits. Also perued the original file maintained in the Secretariat concerning the petitioner which was directed to be produced and which was made available by Sri Bisaria. The petitioner's file shows that the charge-sheet was served on him on 30.04.1991; that the enquiry officer had found the charges alleging loss caused to the Government during the service tenure of this petitioner at Deoria and at Allahabad proved but did not recommend

1998

Krishna Kr.
Vs.
State of U.P.
& another

B.K.Roy, J.
R.K.Singh, J.

for any punishment rather observed that since the petitioner has retired from service he should be discharged from the allegations levelled in the enquiry officer and the Hon'ble Chief Minister awarded the punishment of recovery of the amount of loss caused to the Government from the gratuity of the petitioner and for 10% deduction in his pension; that the report of the enquiry officer alongwith opinion /order of the Government was communicated to the petitioner by registered post on 19.09.1992 directing him to furnish his representation; that the petitioner, however did not submit any representation; and that after waiting for 40 days the Government referred the matter for approval of the Public Service Commission and on obtaining the concurence of the Public Service Commission the impugned punishment.

5. Accordingly, we do not find any merit in the allegation of the petitioner that he was not given any resonable opportunity.

6. In regard to the attack of Mr. Sahai sagainst the order of deduction of the amount of Rs. 1.66 lacs and odd from the gratuity of the petitioner the learned Standing Counsel argued that the words 'termination of his employment' includes within its ambit 'termination on superannuation' or 'termination by retirement/resignation/death disablement due to any accident or dsease.'

6.(1) For convenience the Provisions of Section 4 of the Payment of Gratuity Act, 1972 are quoted below :

"4. Payment of Gratuity-(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less that five years-
(a) On his superannuation, or
(b) On his reitrement or resignation, or
(c) On his death or disablement due to accident or disease

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

(Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is an minor, the share of such minor, shall be deposited with the

1998

Krishna Kr.
Vs.
State of U.P.
& another

B.K.Roy, J.
R.K.Singh, J.

controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution as may be prescribed, until such minor attain majority, if no nomination has been made, to his heirs.]

Explanation.- For the purpose of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three month immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of [an employee who is employed in a season establishment and who is not so employed throughout the year], the employer shall pay the gratuity at the rate of seven days' wages for each season.

[Explanation.- In the case of a monthly-rated employee, the fifteen days wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.]

(3) The amount of gratuity payable to an employee shall not exceed [One Lakh]

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

1998

Krishna Kr.
Vs.
State of U.P.
& another

B.K.Roy, J.
R.K.Singh, J.

(5)Nothing in this section shall affect the right of an employees to receive better terms of gratuity under any award or agreement or contract with the employer.
(6) Notwithstanding anything contained in sub-section(1),-

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to or destruction of property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may be wholly or partially forfeited]—

(i) if the services of such employee have been terminated for his riotous disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment." (Emphasis supplied)

6.2 Section 4(6) of the Act clearly empowers the Government to forfeit to the extent of the damages or loss caused by the employee to the Government the amount of gratuity due to his wilful omission or negligence causing any damage or loss.

6.3 The word "terminated" has been defined under Sub-Section 1 of Section 4 It includes termination by superannuation. Thus, we do not find any force in the contention of Sri Sahai, the learned counsel of the petitioner, on this score and accordingly reject the same.

7. The services of the petitioner are controlled by provisions of the Civil Service Regulation, Regulation 351 (A) of which reads as follows:

351-A The Governor reserves to himself the right of withholding or withdrawing a persion or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pe4cuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence,

during this service, including service rendered on reemployment after retirement."

1998

Krishna Kr.
Vs.
State of U.P.
& another

B.K.Roy, J.
R.K.Singh, J.

Provided that-

(a) such departmental proceedings, if no instituted while the officer was on duty either before retirement or during re-employment-

(i) Shall not be instituted save with the sanction of the Governor.

(ii) Shall be in respect of an event which took place not more than four years before the institution of such proceedings; and

(iii) Shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) The Public Service Commission, U.P. shall be consulted before final order are passed.

[Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar pradesh Disciplinary Proceedings, (Administrative Tribunal) Rules, 1947, it shall not be necessary do consult Public Service Commission]

Explanation-For the purposes of this article-

(a) departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension form an earlier date, on such date; and

(b) Judicial proceedings shall be deemed to have been instituted:

(i) In the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal court; and

1998

Krishna Kr.
Vs.
State of U.P.
& another

B.K.Roy, J.
R.K.Singh, J.

(ii) In the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to a Civil Court." (Emphasis Supplied)

7.1 The petitioner was served with a chargesheet dated 30.1.1991 before his retirement on 31.05.1991 in the departmental proceedings the charges were found proved. Thus the provisions of Regulation 351-A are clearly applicable in his case under which the deduction from pension is permissible. Thus we do not find any illegality or impropriety in the order deducting 10% from pension of the petitioner.

8. In view of our findings, we do not find any merit in this writ petition.

9. In the result this writ petition is dismissed but without cost.

10. The office is directed to hand over a copy of this order within one week to Sri Besaria for its communication to the Government.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 2.12.1998

1998

December, 2

BEFORE
THE HON'BLE J.C.GUPTA, J.

Writ Petition No.39986 of 1998

Smt. Anita Arya & others **...Petitioners**
Versus
XIth A.D.J., Allahabad & others **...Respondents**

Counsel for the petitioner : Sri K.M. Asthana
Counsel for the respondents : S.C.
: Sri Atul Dayal

U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 Section 20(2)(C)—No findings by the courts below that the constructions have in fact diminished the utility of the building or have disfigured the same—Matter remanded back. (Para 8)

1998

Smt. A.Arya & others
Vs.
A.D.J. XI, Alld. & others

J.C.Gupta, J.

By The Court

1. Heard Sri Ravi Kiran Jain assisted by Sri. K.M Asthana, advocate for the petitioners and Sri. K.M.Dayal for the landlord-respondent no.3.

2. Sri. K.M Dayal states that he dose not propose to file any counter affidavit.

3. With the consent of parties counsel and in the circumstances of the case, this writ petition is disposed of finally at the admission stage itself.

4. This is tenant's writ petition challenging the order dated 23.1.98 passed by respondent no.2 and the order dated 16.11.98 passed by respondent no.1 whereby the landlord's suit for eviction of the petitioners has been decreed. The dispute relates to a portion of House No. 1/9-E Hastings Road, Allahabad which is admittedly under the tenancy of the petitioners and of which respondent no.3 is the landlord. The landlord filed suit for eviction of the petitioners from the aforesaid premises on the ground that the petitioners have raised illegal and unauthorized constructions in the tenanted premises without the permission of the landlord and thereby made themselves liable for eviction under Clause © of Section 20(2) of U.P. Act No. XIII of 1972., as the Constructions so raised have diminished the value of the tenanted accommodation and have also dis-figured the same. According to the landlord's case the constructions were raised in the open land existing towards North West of the tenanted house. The tenancy of the petitioners was terminated by means of notice served upon the petitioners under the provision of Section 106 of the Transfer of Property Act.

5. The suit was contested by the petitioners inter alia on the grounds that the petitioners have not raised any new constructions in the tenanted accommodation and they have been in occupation as tenant in five rooms, Store, two Varandah, Shed, Latrine, Bathroom, Kitchen, Court-yard and open space and all the constructions were old and were in existence since the inception of the tenancy. According to them the plaintiff-landlord in collusion with the officers of the Allahabad Development Authority got demolished a portion of the house under tenancy of the petitioners. With regard to raising of boundry-wall the case of the petitioners was that it was so done with the permission of the landlord. The petitioners also denied

1998

Smt. A.Arya & others
Vs.
A.D.J. XI, Alld. & others

J.C.Gupta, J.

that the tenanted accommodation in any way has been dis-figured or its utility has been diminished.

6. Parties adduced evidence before the Judge, Small cause Court. The trial court decreed the petitioner's suit holding that some new construction were raised and part of which were demolished by the Allahabad Development Authority. The trial court repelled the petitioner's contention that no construction has been raised in the tenanted premises. While upholding the said finding of the trial court, revisional Court further held that suit in question was not barred under the provision of Order 2 rule 2 C.P.C.. It also rejected the petitioner's contention that no cause of action for bringing the suit for eviction survived as the so called constructions had already been demolished by the Development Authority prior to the date of service of notice. Affirming the decree of the trial court, the revision filed by the petitioners has been dismissed by the impugned order.

7. Learned counsel for the petitioners vehemently argued that in order to attract Clause (c) of Sub-Section (2) of Section 20 of the Act, it is necessary for the landlord to prove the following facts :-

(1) That the tenant has without permission in writing of the landlord made or permitted to be made any construction or structural alteration in the building under tenancy, and

(2) That the construction of structural alteration so made was of such a nature as was likely to diminish the value of the tenanted building or its utility or to dis-figure it.

It is well settled law that in order to attract the provision of clause (c) of Section 20(2) of the Act it is not necessary that all the three contingencies namely diminition in value or utility of disfiguration of the tenanted building must co-exist together. The requirement of Section 20(2) (c) of the Act will be fulfilled if the case is brought under any of three categories mentioned above.

8. In the present case the landlord came with the case that the constructions raised by the tenant without his permission have diminished the utility of the tenanted premises and have also disfigured it. However, as rightly pointed our by the learned counsel for the petitioner, neither the trial Court nor the revisional court have recorded any categorical finding that the constructions alleged to have been raised by the tenant have in fact diminished the utility of

1998

Smt. A.Arya & others
Vs.
A.D.J. XI, Alld. & others

J.C.Gupta, J.

the tenanted building or have dis-figured the same. This revisional Court very conveniently avoided to answer this question by observing that the merely because the trial court has not used the specific words as are contained in clause (c), the finding does not stand vitiate, but it failed to notice that whether in a particular case the constructions raised by the tenanted building or disfigured the same is a mixed question of law and fact. There may be some constructions which may not fall under any of the categories mentioned in clause (c), and this vital and crucial question can be answered only after assessment of the evidence in then light of nature and kind of the construction. No finding has been recorded as to what particular constructions have been raised by the tenant in the present case and what was their kind and nature and for what purpose they were raise and in what way they have affected the utility of the tenanted building and/or how far and in what manner they have changed, defaced or changed the figure or appearance of the building. There are all questions of fact to be answered on appraisal of evidence. In the absence of specific finding clause (c) could not be applied to in a mechanical manner. The impugned orders on this ground alone are not sustainable.

9. There is yet another difficulty in upholding the impugned judgments. The defence of the petitioners was that no constructions had ever been raised in any portion of the tenanted premises. This defence plea has been rejected by both the courts below merely on the ground that the tenant himself in his written statement has admitted that open space formed part of the tenanted accommodation. Both the courts below have however totally over-looked to take into consideration the evidence of the plaintiff. The learned counsel for the petitioners invited the attention of the Court to a portion of statement of the plaintiff wherein he stated that illegal constructions were raised in the open space of kitchen garden which was not part and parcel of the tenanted premise. Sri Dayal, however, argued that some of the illegal constructions were raised in the kitchen garden while others in the open space of the tenanted premises and therefore the aforesaid statement of the plaintiff has to be read in the light of this situation. So that as it may, the fact remains that both the Courts below proceeded to decide the relevant issue simply on the basic of the admission of the defendant made in the pleadings without noticing that the said admission was only in respect of the open space and not kitchen garden and it was the specific case of the tenant that no construction of any kind whatsoever had been raised in the said open space. What type of

1998

Smt. A.Arya & others
Vs.
A.D.J. XI, Alld. & others

J.C.Gupta, J.

construction, if any, were in fact made in that open space and whether the constructions which were demolished by the Development is this regard is to round to have been recorded by the courts below. There can be no dispute that the word 'building' as used in Sub-clause (c) also includes land if it is also part of the tenancy but before applying the clause it was incumbent upon the courts below to have thoroughly and critically examined the evidence and material placed on record and recorded a categorical finding about the nature and kind of constructions which the tenant had in fact raised in the open space which formed part of the tenancy. What would be the effect of the above noted statement of the plaintiff could be examined only on appraisal of the evidence on record, which was the function of the trial court and not of this Court. This Court, therefore, finds that the impugned orders are vitiated law as manifestly erroneous.

10. Learned counsel for the petitioners also argued that the suit was barred under the provisions of order 2 Rule 2 C.P.C. on account of pendency of Civil Suit on regular side filed by the petitioners for a decree of eviction restraining the tenant accommodation over the site on which the constructions had been demolished by the Development Authority. Sri. K.M. Dayal invited the attention of the Court to order 2 Rule 4 C.P.C. and argued that no two cause of action can be joined in a suit for the recovery of immovable property and further argued that the cause of action for suit for injunction was separate and distinct from the cause of action for the suit for eviction under the provisions of U.P Act No. XIII of 1972. Since the case is being remanded for a fresh decision the above controversy is left open to be decided by the courts below .

11. For the foregoing reasons and discussions, this writ petition is allowed and the impugned judgments dated 231,98 and 16.1198 are set aside and the case is sent back to the trial court for a fresh decision in accordance with law and in the light of observations made above. Since the matter has become old the trial court shall make every endeavour to decide the suit expeditiously, preferably within a period of two months from the date of production of certified copy of this order. After when the suit is decided, revision filed if any shall also be decided on pricrity basic.

12. In the circumstances, parties are directed to bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 24.11.1998

BEFORE
THE HON'BLE S.K. PHAUJDAR, J.
THE HON'BLE J.C.MISRA, J.

1998

November, 24

Special Appeal No.829 of 1995

Umesh Chandra Saxena & others ...Appellant
Versus
A.G.U.P., Allahabad ...Respondents

Counsel for the Appellant : Sri B.B. Paul
Counsels for the Respondents : Sri Ajeet Kumar
: Sri R.Y. Pandey
: Sri Manu Saxena
: Sri Yasharth
: S.C.

Civil Procedure Code 1908—Order 23 Rule (1) (3)—withdrawal of suit—"Formal Defect—Notice u/s 80 C.P.C. not given—Defect is of formal nature. (Para 29)

Case discussed
AIR 1940 Bom. 121 SC AIR 1965 SC 11

By The Court

1. All these maters were heard together as the same were connected through a common link of administration of a religious-cum-philanthropic society, named Shri Ram Chandra Mission. It was established by late Shri Ram Chandra Ji Maharaj and on his death, unfortunately, disputes have arisen regarding his spiritual heirship to control the affairs of the Mission. The disputes, gave rise to several litigations and the above four are the result if such disputes between the parties.

2. Special Appeal No 829 of 1995 has been filed under the provisions of Chapter VIII Rule 5 of the Allahabad High Court Rules and in this appeals the judgment and order dated 16.10.19995, passed by Hon. A.K Banerji, J. of this High Court has been impugned. The

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

Hon'ble single Judge had allowed application No. A-415 filed before him and had rejected the plaint of Testamentary Suit No. 1 of 1994 under Section 7 Rule 11(a) C.P.C. The said testamentary suit was filed by Umesh Chandra Saxena and others and the Administrator General, U.P., and others were arrayed as defendants. The suit was filed by Umesh Chandra Saxena and others for a letter of administration to Umesh Chandra Saxena in respect of the properties of Shri Ram Chandra Mission and for a declation that petitioner no. 1 (Umesh Chandra Saxena) was the President of the Mission, Shahjahanpur and petitioner no. 2 was the Secretary thereof. There has been a further prayed that pending final adjudicaction interim grant may be made in favour of Umesh Chandra Saxena for the properties in question situation at Shahjahanpur with its Branches inIndia and abroad, or, in the alternative, to appoint a receiver in respect of entire estate of the deceased Shri Ram Chandra Ji Maharaj as also of the Mission, Application No a-415 was filed before the Hon'ble single Judge to say that altghough a suit was filed to obtain a declartion, the plaint did not disclose a cause of action at all and the reliefs had been camouflaged for the reasons that the relief of declaration, as claimed by plaintiff no. 1, was barred by limitation. A device was adopted to obtain an order which could not have been achieved by a direct application. It was contended that Ram Chandra Mission was a society registered under the Societies Registration Act and a Cuse of action never existed for the petitioner to make a prayer for letters of administration. The Hon'ble Single Judge considered the averments of the parties and the case laws relied upon by them and had opined that the reliefs claimed in the suit cannot be granted to the plaintiffs in a testamentary proceeding and the plaint was accordingly rejected under Order 7 Rule 11, C.P.C. by an order dated 16.10.1995.

3. Special Appeal No. 561 of 1996 again proposes to be an appeal under chapter VIII Rule 5 of the Allahabad High Court Rules. It is directed against the judgment and order dfated 24.5.1996 passed by Hon. A.K.Banerji, J. whereby he hadrejected an amendment application of the plaintiff-appellants in O.S.No.200 of 1983. The suit was between Uma Shanker and others (plaintiffs) and P.Raja-gopalachari and other (defendants). The order in question in Original Suit No. 200 of 1983 indicates that through application No. A-28 the plaintiffs No. 1,2 and 3 sopught some amendments in the plaint of O.S No. 200 of 1983 under the provisions of Order 6 Rule 17, C.P.C. read with Order 10 Rule 10 and Section 151,C.P.C. The suit was instituted in the year 1983 claiming, inter alia, that

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

defendant no.1 (P. Rajagopalachari) be restrained from acting as the President of Shri Ram Chandra Mission or from declaring himself as the President of The Mission and from interfering in the affair of the Mission. The suit was filed in a representative capacity after taking permission from the court and the suit was contested by the defendants, who had filed written statement. The suit had been pending at the evidence stage when the application for amendment, as No.a25, was filed by only two of the plaintifrs No. 1. And 3. They desired that Ram Chandra Mission, Deewan Jograj, Shahjahanpur, through Umesh chandra Saxena, in his personal capacity, be added as defendant no. 5 Certain averments were also proposed to be added in the body of the plaint and in the relief clause. The court was of the view that the plaintiffs had not sought any relief against the persons proposed parties and their presence before the court was not necessary for effectual and complete adjudication of the question involved in the suit. He was further of the view that the real purpose of the amendment application was to join Umesh Chandra Saxena as a party so that he coul;d prosecute his own case and get a declaration that he was the President of The Mission. He accepted the defence version that under the cover of seeking amendment it was not open to any part to substitute a new cause of action or to change the nature of the suit or to substitute the subject matter of the suit. Accordingly, and for other reasons stated in the order, the Hon'ble single Judge refused to accepta the amendment prayer and rejected it by his order dated 24.5.1996.

4. Special Appeal No. 580 of 1997 was preferred by Umesh Chandra Saxena in his personal capacity as the President of Shri Ram Chandra Mission as also on behalf the judgment and order dated 10.7.1997 passed by Hon. A.K.Banerji, J. whereby the Hon'ble single Judge had dismissed Civil Misc. Writ petitions were decided by a s single order one was Civil Misc. Writ Petitions No. 37023 of 1994 between these parties. Two writ petitions were decided by a single order, one was Civil Misc. writ petition No. 22657 of 1994 Ram Chandra Mission & others and State of U.P., and the other was Civil Misc. Writ Petition No. 22657 of 1991 between Ram Chandra Mission & others and State of U.P. & others. The first mentioned writ petition was filed by Ram Chandra Mission, Shahjahanpur, through its Secretary, R.D.Mahajan under Article 226 of the constitution of India challenging the validity and legality of action of the Registrar of Firms, Societies and Chits of U.P at Lucknow and the Assistant Registrar there of of at Bareilly, who had refused to recognise the working committee of

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

Shri Ram Chandra Mission headed by Dr. S.P.Srivastava as President and R.D.Mahajan as Secretary, A writ of mandamus was sought in this writ petition upon the aforesaid Registrar and the Assistant Registrar to recognise the working committee of Ram Chandra Mission as per order passed under Section 25 of the Societies Registration Act by the Prescribed Authority and Further to grant a fresh certificate of renewal for registration to the petitioner.

5. The second writ petition covered by the order was Writ Petition No. 37023 of 1994 which also was filed on behalf of Shri Ram Chandra Mission by its President, Umesh Chandra Saxena together with others which included B.D.Mahajan also. In this application the aforesaid Registrar and the Assistant Registrar were made parties and P. Rajgopalachari and others were also arrayed as respondents. A writ of certiorari was sought for the purpose of quasing an orde dated 29.9.1994 passed by the Assistant RegistrarBareilly, and a writ of mandamus was also sought for the purpose of a declaration that Umesh Chandra Saxena was the successor President of Shri Ram Chandra Mission. A further declaration was sought that the deed dated 16.4.1982, which was relied upon by Umesh Chandra Saxena, was a valid one and the nomination deed dated 23.3.1974 carrected vide courts order dated 2.12.98 sd. S.K. Phaujdar relied upon by respondent no 4. Was forged and in alid. These two writ petition wre taken connected with Testamentary suit No.1 of 1994 and were aforesaid testamentary suit. After the decision in testamentary suit. No. 1 of 1994 there was a direction that the two writ petitions be listed along with O.S. no. 200 of 1983 and O.S. no. 127 of 1994 and these suits had also been decided separately. At the time of argument of these two writ petitions it was accepted by Sri B.B.Paul ,appearing for the petitioners in Writ Petition No 22657 of 1991 that the said writ petition was not being pressed and the same be dismissed as with drawn. The remaining writ petition alone was decided through the order impugnes in this appeal and the writ petition was dismissed giving rise to the present appeal.

6. Special Appeal No. 594 of 1997 was filed by Umesh Chandra Saxena ands other against the judgment dated 10.7.1997 recorded by Hon. A.K Banerji, J. upon an application No a-12 in O.S No. 127 of 1994. This order was recorded in a suit in which Shri Ram Chandra Mission figured as plaintiff no. 1 through its President, Dri P.rajgopalachari and Umesh Chandra Saxena and others were arrayed as defendants. The Plaintifis made a prayer through application No. A-12 to permit them to with draw suit no. 127 of

1994 with permission to Hon'ble single Judge has recorded his order dated 10.7.1997 and permitted with drawal of the suit with liberty to file a fresh suit subject to payment of Rs. 2000/- as costs to be paid to defendant no 1 within a period of one month.

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

7. From the aforesaid brief statements of the original proceedings and the orders impugnes in the instant appeals it appears that the real dispute between the parties is for administration of the properties of the Mission, names Shri Ram Chandra Mission, with its Headouarters at Shahjahanpur, U.P., and Branches in Inida and abroad. It is felt necessary that some relevant facts concerning the Mission, as per pleasdings of the partries, be indicated at this stage.

8. Shri Ram Chandra Mission, Shahjahanpur, (for short called as 'the Mission') is a society registered under the societies Registration Act, the first registration having been done in 1945. This society has branches and centres through out the globe. It has its own memorandum of association, a consititution, and a set of bye-laws of internal governance. The Mission was established by Shri Ram Chandra Ji Maharaj, a wealthy person. Out of his own properties and he was the founder President of the Mission till his life time. It was claimed by Sri U.C. Saxena and others that he had the right to nominate his successor and in the absence of any nomination by his spiritual representative in the direct line of succession. Sri U.C Saxena and Sri S.C Saxena the two petitioners in the application for letters, a respondent therein are sons of Shri Ram Chandra, also Known as Mahatma Ram Chandra Ji and Babu Ji Maharaj, while Smt. Maya Indira and Smt. Chhaya Saxena, both respondents in the above application are daughters of Shri Ram Chandra. The respondent in that petition, Sri P Rajgopalaxhar, is a disciple of Shri Ram Chandra. It was the case of Sri U.C.Saxena that in the year 1974 Sri P Rajgopalacharj jja been the secretary of the Missiobn. It was alleged that taking advantage of his position as the secretary and of a serour illness of Sri Ram Chandra, Sri P. Rajgopalachari got certain blank papers signed by shro Ram Chandra an the plea of amooth functioning of the Mission. Subsequently, after his recovery, Shri Ram Chandra Ji removed Sri P.Rajgopalachari from the office of the Secretary and appointed Sri S.A Sarnad (another respondent in that application) as the Scretary. It was claimed by Sri U.C.Saxena that on 30.12.1976 Shri Ram Chandra executed a registered will for one of his properties in favour of him. It was claimed that Sri U.C Saxena, Sri S.C Saxena and Sri P.C Saxena were the spiritual representative of Sri Ram Chandra in the direct line of success on. It

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

was further asserted that Shri Ram Chandra had repeatedly nominated Sri U.C. Saxena as the successor president of the Mission during the prriod from 29.3.1982 to 18.4.1983. The other members of the society accepted this nomination. However, according to Sri U.C.Saxena, Sri P.Rajgopalachari started alleging that he was the President of the Mission on the Basec of a nomination dated 23.3.1973, although no such nomination was actually made by Shri Ram Chandra. It was stated that even on the words of that nomination paper Sri P Rajgopalachari was nominated as the president of sahajmarg only. It was indicated in that petition that after the death of Shri Ram Chandra the founder President of the Mission, there were three sets of claimants. Sri U.C. Saxena claimed the office as the son of the founder President and as his spiritual representative in the direct line of succession. Sri S.P.Srivastava and R.D.Mahajan claimed as Chairman/President and Secretary of the working committee of the Mission while Sri. P. Rajgopalachari claimed the officer on the basis of the alleged nomination dated 23.3.1974 It a was admitted that litigations had been pending between several groups in various courts in India. It was claimed that the controuversy, however, came to an end in view of certain orders passed by the Prescribed Authority/S.D.M Shahjahanpur, who had held that the working committee of the Mission headed by Dr. S.P.Srivastava and sri R.D.Mahajan was valid and the claim of Sri P.Rajgopalaxhari and others was not acceptable. It was stated in the application for letters of administration that a large number of members of the Mission had decided that Sri U.C.Saxena was to work as the President of the Mission but Sri P. Rajgopalachari and persons in his group were not ready to accept him as the President, although duly nominated by Shri Ram Chandra.

9. The case of the respondents in the letters of administration application was made our in the counter affidavit sworn by R.J Memani, respondent no.12 in the petition. It appears from this affidavit that the founder President, Shri Ram Chandra, was considered an incurvartion of the almighty by his disciples and followers. There is no denial that the Mission was established by him and he was the President of the Mission. There is further no denial that the Mission is a Society registered under the societies Registration Act.The Presidents, following the founder, were to come by way of nomination only and in no other way, neither through election nor otherwisw.It was asserted that the Master (meaning thereby the founder President) had nominated Sri P. Rajgopalachari as his spiritual respresentative and as the President of

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

the Mission after the Mahasamadhi of the Master and thish nomination was made on 23.31974. It was asserted that Sri Rajgopalachari had been functioning as the President since the departure of the Master. It was asserted further that in addition to the properties with which the Mission was started, Shri Ram Chandra had other personal properties also. Sri Umesh Chandra, sa-rvesh Chandra and Prakash Chandra are the sons of Shri Ram Chandra Ji and the will spoken of by Sri U.C.Saxena was in respect of the personal properties of Sri Ram Chandra Ji and had no jural relationship with the property of the Mission. The will could not be connected with the functioning of the Mission or with the office of the President. Under the constitution of the Mission, The Property owned by the Mission vests in the Mission only and the constitution also spoke of the procedure for appointment of working committee. The sons of the Master, however, were allegedly interested in mundane properties rather than the spiritual attainment of their father and as per the counter affidavit this had pained the Master to a great extent. They were successor to the Master so far as his personal properties in a physical world were concerned, but for the properties of the Mission, Which was a subject matter if his spiritual son in the direct line of succession. When the Master departed from the physical world, his sons started asserting succession to the office of the President of the mission and the working committee found the claims basless. It was asserted that the three sons of the Master got a civil Suit No. 200 of 1983 filed I the court of civil judge, shahjahanpur. It was a suit for a declaration that Sri. P. Rajgopalachari was not the President of the Mission and for enjoining hom from asserting himself as the President.

10. The petitioners for letter of administration brought on record the rules and constitution of Sri Ram Chandra Mission under the clause Organisation. It is indicated that the Mission under shall work under the sole guidance and control of the founder or is spiritual representative in the direct line of succession and he shall be the President of the Mission. It is further indicated under the head Constitution & Working that the President shall select a working committee from amongst the members of the Mission to assist him in all matters pertaining to the control and organisation of the Mission and the President shall appoint, from amongst the members of the working committee, the following office bearers, viz. The Secretary, Joint Secretary, Treasurer and Auditor. It is also mentioned in the constitution that the President shall nominate from amongst his

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

spiritual succors any person as his represenative, who, as such, will enjoy all the powers and authority vested in the President.

11. The petitioners in the application for letters of administration also annexed a printed copy of 'Constitution and Bye-Laws ' of the Mission. This was a print of 1978. Under the head Organisation at Article no. 3 in subclaused (b) , it is indicated that the Mission shall work under the sole guidance and control of the founder or his spiritual representative in the direct line of succession and be shall be the President of the Mission. Under the head Constitution & Weorking in Artilcle 4 herein at sub-clause (b) the same words have been reitereated as were found in the earlier mentioned Rules & Constitution, but thereafter a claused, as follows, has been added in the Constitution printed in 1978 wherein it has been stated that "The President, at his discration or as the situation demands, may appoint any office bearers other than the above, who may or may not be members of the Working Committee of the Mission and he may entrust any dutites, as he deems fit, to such office bearers. " This was followed by sub-clause (c) which is a reproduction of the earlier sub-clause (c) and found in the Rules Constitution.

12. A printed copy of bye Laws was also annexed and under the head Possession of the Mission – Management & Control of . It is indicated that lands, buildings, furniture & fittings, accessories and appurtences there to , printing press, books, periodicals, jounals and other publications and the copy – right thereof and all the movable and immovable property acquired by or belonging to the Mission, or to any of its Branches, training centres or any other affiliated institution, shall be owned, held, and possessed by Shri Ram Chandra Mission, Shahjahanpur, U.P. and shall be managed and controlled by the Working Committee in consultation with the President.

13. The respondents also relied on a copy of the Rules and Constitution of the Mission and the Preamble therein indicates that the Mission was founded not after the name of the founder President, Shri Ram Chandra Ji but to commomorate the name of samarth Garu Maharaj of Fatehpur, a spiritual Master by his successor and representative Sri Ram Chandra JI of Shahjahanpur, "at the earnest request of some of the disciples and associates of the Samarth Guru" in order to fulfil the sacred Mission of the Master and to serve humaninty in an organised way. This preamble, however differs from the preamble of the rules and constitution of the Mission annexed to the application for letters of administration. In Article 3 of the

Constitution at sub-clause (b) it is indicated here also that the Mission shall work under the sole guidance and control of the founder or his spiritual representative in the direct line of succession and he shall be the President of the Mission and it is further indicated in Article 4 od that the President shall select a Working Committee and appoint the Secretary, Jint Secretary, Teasrer and Auditor from amongst themembers of the Working Committee. This copy also contains a clause after sub-clause (b) which was not there in the copy of the constitution filed along with the application. A copy of the bye-laws was also attached to the counter affidavit and it also covers in Article 4 the manageent and control of the possession of the Mission.

14. The counter affidavit was annexed with the nomination of Sri. P. Rajgopalcjari as the representative of the Master to work as the President of the Mission in the Sahaj Marg. This is singned by shri Ram Chandr, the President of the Mission, and it bears the date of 23.3.1974.

15. For the averments and counter averments certain thigs come out very clearly-(1) the Mission was established by Shri Ram Chandra Ji of shahjahanpur and initially Shri Ram Chandra Ji gave away his properties tot he Mission, but he had other personal properties also, (2) the Mission is a Society basically for spiritual attainment and is registered under the Scoieties Registration Act and it has its own constitution and bye-laws for running the day to day affairs of the society, (3) the founder President was to control the affairs of the Mission and was empowered by the rules, constitution and bye-laws to nominate a working committee, (4) the working committee was to manage the day to day business of the society under the guidance of the President. The Constitution provided that the Founder President will continue and thereafter his spiritual representative in the Direct line of succession will become the President. It also empowered the President to nominate from amongst his spiritual disciples any person as is representative, who, as such, would enjoy all the powers and authorities vested in the President.

16. With this background of the facts concerning the Mission we would now take up the indivual appeals with their individual problems.

17. For the shake of convenience we are first taking up Special Appeal No. 504 of 197. The order impugned in this case was

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

recorded on 10.07.1997 in O.S.N. 127 of 1994. This original suit was allowed to be withdrawn in terms of Application No. A-12 filed therein with permission to file a fresh suit. The impugned order was passed on 10.07.1997. The suit was basically for a permanent injunction with prayers to restrain the defendants from holding any function in the name of the President or other office bearers of Shri Ram Chandra Mission, Shahjahanpur, and for restraiing defendant no. 1 Umesh Chandra Saxena, from holding the brithday function fo babu Ji Raharaj from 29.4.1994 to 1.5.94 under the banner of Shri Ram Chandra Mission under the alleged Presidentship of Umesh Chandra Saxena. There was further prayer for restraining him from collecting money in anus manner for any purpose whatsoever in the name of Shri Ram Chandra Mission and from opending or operating any bank account in the namr of Shri Ram Chandra Mission, Shahjahanpur.

18. The application marked A-12 was filed on 14.3.96 with a prayer to permit withdrawl of the suit with permission to file it afresh, if occasion arose. It was indicated in the application that during pendency of the suit certain developments has taken place by way of conversion of Testamentary Case No. 8 of 1993 to a Testamentary Suit No. 1 of 1994 and a decision therein filing of a further suit No. 697 of 1995 by Mumesh Chandra Saxena before the District Court, Allahabad. It was further indicated that orders were passed in favour of Ram Chandra Mission by the Registrar of Societies, Bareilly. The plaintiff in the suit also submitted through this application on that the purpose of the suit related to a function that was to be held at Shahjahanpur from 29.4.1994 to 1.5.1994 and the period had already expired. It was, therefore, through necessary that for many reasons the plaint was to be amended to keep these further developments on recore and t ask for appropriate reliefs. It was also indicated that for certain defendants no subsisting cause of action Continued so far this suit was concerned . A point was further taken that a notice under Section 80, C.P.C. was necessary to be givne to defendant no. 9 (the Assistant Registrar of Societies of Bareilly) and so far that defendant was concerned it was a formal and technical which was to be removed. Under the totality of these circumstances, the prayer for withdrawal with the liberty to file a suit afresh was filed.

19. This application in O.S.N. 127 of 1994 was opposed by the defendants and counter affidavit was filed by Umesh Chandra Saxena., which was sworn on 10.3.1997. An objection was taken

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

that all the plaintiffs had not joined in filing the withdrawal application nor did P. Rajgopalachari had indicated in the affidavit that the withdrawal application was filed on behalf of all the palintiffs. It was stated further that O.S.No. 697, filed by Umesh Chandra Saxena in the Civil Court at Allahabad, was still subdice and P. Rajgopalachari and others had not filedl their written statement till the date of swearing of this affidavit. As regards the orders of the Registrar of Societies it was indicated that the said orders were challenged in tow writ petitions. It was contended that no notice under Section 80, C.P.C. was needed with reference to defendant no. 1 and in fact that State of U.P. was not at all a party in O.S.No. 127 of 1994. According to the defendants, there was no cause/sufficient cause to permit the plaintiff is to withdrawl the aforesaid suit with liberty to file a fresh suit.

20. A perusal of the order of the Hon'ble Single Judge dated 10.7.1997 shows that his Lordship had indicated the brief statements of fact on which the suit was based and the prayers made. Issues were framed in the suit after filing of written statement but recording of evidence had not commenced. At that stage only the application for withdrawal was filed. The Hon'ble Single Judge had also indicated what were the grounds taken by the plaintiff and what were the objections. The Court had taken pains to quote the relevant provisions of the law concerning withdrawal of suit as per Order 23, C.P.C. and had referred to certain decisions as well and thereafter recorded the order. The Court was aware of the passage of time between the date of filing and the date of withdrawal and had recorded an oreer for payment of costs as well.

21. In the grounds of appeal it was urged that the Hon'ble Single Judge had manifestly committed errors of law and had acted arbitrarily. It was stated that the application itself was not maintainable under the provisions of Order 23 Rule 1, C.P.C. and the Hon'ble Court had omitted to take note of the fact of pendency of civil revision bearing no. 162 of 1994 against an order recorded by the Civil Judge, ShahJanapur in another original suit. In the affidavit apposing the application before the court this point, however, was not urged. It was further stated in the grounds of appeal that the Hon'ble Judge had omitted to note the submission of the appellants that O.S. No. 127 of 1994 was bad for want of notice under Section 80, C.P.C. This plea goes counter to this objection taken before the court of trial where it was urged that no notice under Section 80, C.P.C. was necessary. It was further stated that Sri Arun

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

Dave, who had filed O.S. No. 127 of 1994, on behalf of P. Rajgopalachari, had no locus standi to file the suit. Another Ground was taken in this appeal to say that the cause of action in O.S. No. 127 of 1994 had 'disappeared/vanished'. It was contended in the grounds of appeal that the application for withdrawal and the objection thereto were heard on 7.4.1994 and the orders were passed only on 10.7.1997 , i.e. after more that three months and that cause failure of justice.

22. In the course of arguments Sri B.B. Paul appearing for the appellants, pressed these very points which were raised in his grounds of appeal and reliance was placed on several decisions including the ones reported in A.I.R. 1965 S.C. 11 and A.I.R. 1940 Bombay 121. It was also urged what an suit No. 142 of 1986 was also withdrawn on 1.1. 1994.

23. It was argued on behalf of the respondents by Sri A. Kumar that there were papers on recore the show that several litigations were started by different persons, all claiming to be spiritual heirs of Ram Chandra Ji Maharaj at different stages and in view there of it was necessary to make a consolidated prayer against all such persons in a single suit and withdrawal of the suit was necessary with permission to file it afresh, if need be. Sri Kumar also placed reliance of a series of decisions in support of his contentions.

24. Order 23 covers withdrawal and adjustment of suits. Rule 1 therein permits withdrawal andsub-rule (3) is important for our purposes and is quoted below:

"(3) Where the Court is satisfied,-

.

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim."

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

25. One of the grounds under which withdrawal be permitted with liberty to sue afresh is that a suit must fail be reasons or some formal defect. It was the plea of the plaintiffs that Section 80, C.P.C. notice was not served upon defendant no. 9 and for this formal defect the suit would have failed. Although, this contention was not accepted before the court below, in the grounds of appal the appellants accepted in unambiguous terms that the suit itself was not maintainable for want of notice under Section 80, C.P.C. Thus, it must be stated that the suit was such that it would have failed by reason of the formal defect of absence of notice under Section 80, C.P.C.

26. As to what is 'formal defect' was explained by the Supreme Court in the case reported in A.I.R. 1965 s.c. 11 as also by the Bombay High Court in the case reported in A.I.R. 1940 Bombay 121, which have been relied upon by the appellants' counsel.

27. Before the Bombay High Court, in the case under reference, there was a prayer for withdrawal at the appellate state in order to file another suit claiming title to the site and the suit was one for injunction. The Court explained what was 'formal defect', and observed that the expression "formal defect" was to be given wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not, " Formal defect" includes, according to the Bombay High Court as per this decision, misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject-matter of the suit. However, in the facts of the particular case, the Court was of the view that where the plaintiff had prayed for an injunction on the basis of his being the owner of the site which he claimed to be an accretion to his land as an alluvion and suit was dismissed for want of proof, the plaintiff could not have withdrawn the suit at the appellate stage to file another claiming title to the site in suit on the ground of adverse possesion as there was no defect of form in the suit but a defect of substance.

28. Before the Supreme Court the question of validity of a notice under Section 80, C.P.C. was raised in the case under reference. It was observed that " the object of the notice under Section 80, C.P.C. is to give the Government or the public servant concerned an opportunity to reconsider its or his legal pos ion and if that course is justified to make amends or settle the claim out of court. The

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

section is imperative and must be strictly construed. Failure to serve a notice complying with the requirements of the statute will entail dismissal of the suit "In the peculiar facts of the case before the Supreme Court, however, it was held that the notice served was proper. But the explanation of the object of the notice clearly indicates that failure to serve a notice would entailed dismissal of the suit. Thus, defect of notice, although formal one, may prove fatal to the suit and this defect is fully covered by Order 23 Rule 1 (3) (9a), C.P.C.

29. The Hon'ble Single Judge was alive of the situation, as observed above in this judgment. It is now an undisputed fact in terms of the grounds of appeal that the suit was bad for absence of notice under Section 80, C.P.C. if not for other reasons, for this reason alone the exercise of powers under order 23 Rule 1(3), was a proper one whereby the court had allowed withdrawal of the suit with liberty to file it afresh. The question of necessity of notice to proforme defendant no. 9 may not further be discussed in view of the admitted position of law in terms of the grounds of appeal.

30. The suit was filed basically for an injunction to avoid a certain contingency , but together with it certain claim of Umesh Chandra Saxena wasalso sought to be resisted. The aforesaid contingency had passed over but the claim of Umesh Chandra Saxena was a persisting one as was evident through the filing of different suits and applications before different authorities. It was also argued by Sri Ajit Kumar that at different points of time different persons claimed spiritual heirship to the founder of the Mission. If the plaintiff thought it proper to consolidate all the claims to bring them under one suit to avoid multiplicity of litigation that would also be a sufficient ground as contemplated under order 23 Rule 1 (23) (b), C.P.C. to allow withdrawal of the suit with liberty to file it afresh on the same cause of action or on some other cause or action.

31. In the light of these discussions, it must be held that the order dated 10.7.1997 recorded by the Hon'ble Single Judge in O.S.No. 127 of 1997 needs no interference in appeal. This appeal must, therefore, stand dismissed.

32. The next matter that we propose to take up is Special Appeal No. 561 of 1996 directed against an order refusing amendment in Suit No. 200 of 1983. It is undisputed that this suit has since been withdrawn after the filing of the instant appeal. An order was

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

recorded on 21.8.1998 by us in the course of hearing of the consolidated arguments in all these appeals and a portion of the order dated 21.8.1998, so far it relates to the instant appeal, is quoted below:

"This appeal is directed against refusal of al prayer for amendments ofa plaint in O.S.No. 200 of 1983 and it is not disputed that the suit itself has been withdrawn. There remains nothing for amendment any more and as such the present appeal is also infructuous. There is no further necessity or proceeding with this Appeal No. 561 of 1996."

At the time of recording this order, a submission was made to us on behalf of the learned counsel for the appellants that he was really eager for a direction that any observation made at the time of rejection of the application under Order 6 Rule 17, C.P.C. may not prejudice the cases of the parties in the other connected dispute, we had then observed that "This cubmission will be considered if at all any reference to these observations is made in any of the matters pending between the parties. " In view of the order recorded on 21.8.1998 Special Appeal No. 561 of 1996 is infructuous and is liable to be dismissed on that score without even going to the merits of the matter. We affirm our observation made on 21.8.1998 that if at all any reference is made in any of the other connected appeals to any comments of theHon'ble Single Judge whilerejecting the prayer under Order 6 Rule 17, C.P.C. this Court will not be over-weighed by such observation unless the facts and circumstances of the individual appeals lead us to the same conclusion.

33. We may now take up Special Appeal No. 580 of 1997 filed on behalf of Shri Ram Chandra Mission through Sri Umesh Chandra Saxena as also by Sri Saxena and others in their alleged capecity of office bearers of the Mission. The order impugned in this appeal was again one recorded by the Hon'ble Single Judge on 10.7.1997 of this High Court in dismissing Civil Misc. writ Petition No. 37023 of 1994. The aforesaid writ petition together with civil Misc. Writ Petition No. 22657 of 1991 were taken up together and were disposed of by a single order which is now in question. It appears that there is no grievance of the present appellants so far civil Misc. Writ Petition No. 22657 of 1991 is concerned. Writ Petition No. 22657 of 1991 was moved under Article 226 of the Constitution impugning certain action of the Registrar of Firms, Societies & Chits, U.P. and the Assistant Registrar refusing to recognise the

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

working committee of the Mission allegedly headed by Dr. S.P. Srivastava as the President and Sri B.D. Mahajan as the Secretary. A writ of mandamus was sought for so that the respondents-Registrars be directed to recognise this working committee in terms of the order under Section 25 of the Societies Registration Act by the Prescribed Authority. The The connected writ petition No. 37023 of 1994 was filed on behalf of the Mission through Its President, Sri Umesh Chandra Saxena, and others including the aforesaid Sri B.D. Mahajan against many respondents including the State and the aforesaid Registrar and the Assistant Registrar, as also the aforesaid Sri P. Rajgoplacharai and others. A writ of certiorari was prayed therein for quashing an order dated 29.9.1994 passed by the Assistant Registrar of Societies at Bareilly and for a writ of mandamus for a declartion that Sri Umesh Chandra Saxena was the successor president of the Mission. A prayer was there for a declaration that the deed dated 16.4.1982 relied upon by Sri Umesh Chandra Saxena was valid and the nomination deed dated 23.3.19974 relied upon by Sri p. Rajgopalachari was forged an invalid. The order impugned in this appeal makes it clear and the situation is also not disputed in this appeal that writ petition No. 22657 of 1991 was not pressed and was to be dismissed as withdrawn as due to certain intervening developments the said writ petition had become infructuous. This prayer of the petition being dismissed as withdrawn was opposed to by the respondents before the court of first instance. It was submitted on their behalf that the tow writ petitions covered contradictory allegations an averments and the aforesaid writ petition was being withdrawn only to avoid embarassment of the writ petitioners. The court was of the view that when the petitioners themselves wanted to withdraw the writ petition the court could not stand on the way and to compel them continue to press the writ petition. The court, therefore , observed that "It could not be proper for this court not to permit the petitioner to withdraw his writ petition as not pressed." But the court allowed the respondents to refer to the contradictions between the averments made in these to writ petition. It appears that the respondents did not come up in appeal against the order permeeting withdrawl of writ petition no.22657 of 1991.

34. The order dated 29.9.1994 that was challenged in other Writ Petition No. 37023 of 1994 was annexed as Annexure '25' to the writ petition. This order (in Hindi) was recorded by Sri Satyendra Singh Gangwar, Assistant Registrar of Societies, Bareilly. The Assistant Registrar was approached by a big group of members of the Mission for an action under Secion 25 (2) of the Societies

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

Registration Act (hereinafter referred to as the 'Act" for the purpose of convening a meeting of the general body of the Society to elect the president and other office bearers. Three signatories to this application were made respondents no. 11, 12, and 13 to the writ petition. The prayer made in this application was reiterated on 1.10.1993 by three members only, i.e. respondents no. 11,12 and 13 to the writ petition. These persons had again moved an application to the same effect on 6.10.93 It appears further that due to alleged inaction on the part of the Registrar and the Assistant Registrar of the Societies, these persons had moved Writ Petition No. 40897 of 1993 and Umesh Chandra Saxena, P. Rajgoplachari and S.P. Srivastava were arrayed as respondents in the last mentioned writ petition, However, the High Court did not issue any notice upon that writ petition and disposed of the same with a direction upon the Registrar and the Assistant Registrar of the Societies to redress the grievance of the aforesaid three persons in accordance with law and in terms of the Act. Only thereafter the order now impugned was recorded. It is noteworthy that in writ petition No. 40807 of 1993 the Court had observed that "It is not a fit ase for interference under Article 226 of the Constitution of India. However, if any application has been filed by the petitioners before respondents 2 and 3, respondents 2 and 3 may consider and dispose of that matter in accordance with law and the societies Registration Act at a very early d sc. " This order was recorded by Hon. S.R. Misra, J. On 3.9.1993. The Assistant Registrar before recording the final order had issued several interim directions as well. By his letter to S.A. Sarnad, Secretary of the Mission, dated 16.2.1994 the Assistant Registrar indicated that till the matter was decided no action taken by Mr. Sarnad could be taken as valid. A further letter was issued to the same gentleman on 12.4.1994 making certain queties and again on 7.7. 1994 it was indicated that if S.A. Sarnad and Kashi Ram Agarwal, who were noticed, failed to produce their evidence, the matter would be taken up ex parte. A similar notice was issued on 5.8.1994 as well. Sushil Kumar (respondent no 13 in the writ petition) also intimated the Registrar and the Assistant Registrar about further developments in the Society and of the litigations already initiated. With this background the order impugned in the writ petition was aoved.

35. It appears that the Assistant Registrar was approached for exercising his powers under Section 25(2) of the Act as applicable to the State of U.P. Section 25 of the Act covers disputes regardings election of office-bearers. It empowers the prescribed authority, on a

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

reference made to it by the Registrar or by at least one-fourth of the members of a society registered in U.P. to hear and decide in a summary manner any doubt or dispute in respect of the election or continuance if office of an office-bearer of such society, and the prescribed authority under the above circumstances might pass such order in respect thereof as it deemed fit. A prpviso to this section empowers setting aside of an election be the prescribed authority on his satisfaction of corrupt practice/improper rejection o9f nomination etc. Sub-section (2) of Section 25 of the Act reads as follows:

"(2) where by an order made under sub-section (1) and election is set aside or an office-bearers is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office-bearers is satisfied that any election of office-bearers of a society has not been held within the time specified in the rules of that society, he may call meeting of the general
body of such society for electing such office bearer or office-bearers, and such meeting shall be prescribed over and be conducted by the Registrar or by any officer authorised by him in this behalf, and the provisions in the rules of the society relating to meetings and elections shall apply to such meeting and elections with necessary modifications."

Further sub-section provides that "Where a meeting is called by the Registrar under sub-section (2), no other meeting shall be called for the purpose of election by any other authority or by any person claiming to be an office-bearer of the society." An explanation shows that for the purpose of this section, the prescribed authority would mean an officer or court authorised in this behalf by the State Government by notification published in the official Gazette.

36. A reading of the above proviso indicate that exercise of the powers under sub-section (1)
Of Section 25 lies with the prescribed authority, as indicated in the explanation, who is to be authorised by notification of the Government published in the Official GAZETTE. If the prescribed authority sets aside the election or if an office-bearer is held no longer entitled to continue in office under sub-section (1) or if the Registrar is satisfied that the election of the office-bearers of a society had not been held in the times specified in the rules then and then only the Registrar may call a meeting of the general body of such society for electing such office-bearers and the meeting is to be presided over by the Registrar. The scope of Section 25 (2) to

invoke the powers of the Registrar directly, without an order subsection (1) of Section 25, is very limited. The Registrar Must be satisfied before acting under this sub-section that any election of office-bearers of a society had not been held within the time specified in the rules of that society.

(37) With the aforesaid facts and law in the background, we may now examine the order impugned in the writ petition. This order dated 29.9.1994 was passed on the applications of three persons, who were arrayed as respondents no.11, 12 and 13 to the writ petition. After setting the facts that were brought to his notice the Assistant Registrar had formulated the following points.

(1) Whether the proceedings could be referred to the the Pargana Adhikari under Section 25(2) of the Societies Registration Act ?

(2) Whether the election of the President of the Society could be directed or not ?

(3) Whether an unregistered will could be taken note of when the matter was sub-judice before the High Court ? &

(4) Whether the membership of the society could be determined ?

The Assistant Registrar found that according to the registered rules there was no provision for determining the number of members and there was no membership fee prescribed. Both the parties had made allegations before the Assistant Registrar for misappropriation of fund of the Society. Both the parties made allegations against each other of making forgery regarding nomination and will.. The Assistant Registrar observed that the registered rules provided for nomination of the future President by the present incumbent. He found that the party, the followers of Umesh Chandra Saxena, could not have insisted for action under Section 25(2) of the Act.. The follers of Umesh Chandra Saxena were, according to the Assistant Registrar, less than one-fourth of the members shown in the list. The Assistant Registrar, accordingly, observed that there could not have been any reference to the Pargana Adhikari. He was further of the view that according to Rule 3(2) of the Society, a President could not be elected, while the dispute relate only to the post of the President, which was to be made by nominations only. The Society had no formal membership fee. Any person having faith in spirituality was entitiled to join the Mission. The number of such

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

members was shown to be 1635 by the followers of Umesh Chandra Saxena, while the followers of P. Rajagopalachari placed the numbers at more than 4000. The Assistant Registrar was of the view that when the unregistered will was pending for a decision before the High Court, till such decision is taken Sri Rajagopalachari would continue to work as the President of the Society.

(38) In the writ petition all those disputes, claims and counter-claims were brought on record which were, perhaps, beyond the scope of decision in the writ petition as the writ Court was not called upon to give any decision on a disputed fact. The scope of the writ petition was very limited. It was only to be seen if the powers of the Registrar/Assistant Registrar were duly invoked and, if so, whether there was a failure on the part of such authority to exercise such power. The matter of nomination through will or nomination deed was not at all a matter to be considered in the writ petition and more so when the same was in consideration in the suit for letters of administration, unfortunately, in every litigation the same set of facts were placed and it was insisted that a decision be given on those disputed facts.

(39) Before the Hon'ble Singh Judge the petition was moved by Umesh Chandra Saxena claiming himself as President of the Mission and it was mainly contended before him that while passing the impugned order dated 29.9.1994 the Assistant Registrar of Societies did not give any notice to Umesh Chandra Saxena, although he was the President of the Mission and as such a party interested. The failure on the part of the Assistant Registrar to give Sri Saxena an Opportunity of hearing, was high-lighted as a measure which alone, according the writ petitioner, was sufficient to vitiate the proceedings on the ground of violation of principlle of natural justice. It was further contgended before the Hon'ble Single Judge that the material facts and evidence had not been considered nor were Rules 3(b) and 4 (h) of the Soceity were properly looked into and analysed. The writ petiton was opposed before the Hon'ble Single Judge On the ground that it was a mala fide application filed with an ulterior motive and was an abuse of the process sof the court. It was contended by way of reply to the writ petition, that successive writ petitions were being filed by different persons and successive other litigation were also initiatged, Initially some persons were shown as the President but subsequently the stand was changed. Two contradictory stands were taken in the two writ petitions which

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

were heard together and this was the reason for withdrawing the other writ petition. The Hon'ble Single Judge had held that the Registrar was approached by Sushil Kumar and others canvassing the case of Umesh Chandra Saxena for recognising him as the President and, thus the petitioners before the Registrar were given full opportunity to produce their evidence and individual notice to Umesh Chandra Saxena was not necessary. Moreover, he did not, by himself, make any effort to file any application for renewal of registration of the Society showing himself to be the President, although S.P. Srivastava and B.D. Mahajan had done so at earlier points of time. The Hon'ble Single Judge was aware of the situation that there had been an interim order dated 31.7.1984 passed in F.A.F.O. No.439 of 1984 whereby the High Court had directed that Sri P. Rajagopalachari was to act as the President, subject to certain conditions regarding disposal of property and that order was confirmed by the Supreme Court despite contest. Accordingly, the Hon'ble Single Judge upheld the order of the Registrar whereby the Registrar had directed that till the dispute regarding nomination was decided by the High Court, P. Rajagopalachari was to continue to be the p[resident.

(40) According to the Rules of the Society, the post of the President was not an electrive one, nor were the members of the working committee to be elected. The Rules required the President to nominate the members of the working committee. The Act requires that a Society is to be formed by a memorandum of association and registration by at least seven persons associated with the society. The memorandum of association is to contain the name of the society, the objects of the society, and the names, addresses & occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society the management of its affairs is entrusted. A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, is to be filed with the memorandum of association. When such memorandum and certified copy of the rules with the required particulars are presented by the Secretary of the Society before the Registrar, he shall certify under his hand that the society is registered under this Act. A registration fee is to be paid for this purpose. Section 3-A of this Act speaks of renewal of certificate of registration. Once a society is registered and a certificate of registration is issued, it would remain in force for a period of five years from the date of issue. If any question arises whether any society is entitled to get itself registered in acordance

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

with Section 3 or to get the certificate of registration renewed, the matter shall be referred to the State Government, as provided in Section 3-B of the Act. Section 4 of the Act requires that once in every year, on or before the fourteenth day succeeding the day which, according to the rules of the society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar giving the names, adresses and occupations of the governors' council, directors, committee, or other governing body then entrusted with the managing committee is elected, when the signatures of the old elected members shall be obtained in the list. As observed, the rules of the society do not speak of an elected President or an elected working committee. Section 25 of the Act covers disputes regarding election of office-bearers and the Registrar's intervention is possible on his satisfaction that any election of office-bearers of a society has not been held within the time specified in the rules. If there be no election provided in the rules, naturally Section 25(1) or ( ) of the Act would not come into play. The application before the Registrar, however, proposed an interference under Section 25(2) of the Act and the Registrar refused to interefere not on the ground that no election was necessary but on another ground that the matter was sub-judice before the High Court. It is true that the Registrar in this application had no authority to direct any body to continue in office, but that is to be read not as a direction but as a reiteration of an interim order given by the High Court. Looking from this angle the very application before the Assistant Registrar for action under section 25(2) of the Act was untenable and so was the writ petition against the order of the Registrar. When the Registrar had no authority to take action under Section 25(2), of the Act, a writ could not have been issued for performance of any duty under that section. Although this approach to the subject and the reasoning for this order are different from the approach and reasining of the Hon'ble Single Judge, we are of the view that the writ petition was rightly dissmised as not tenable.

41. The only remaining matter in Special Appeal No. 829 of 1995 is to be taken up next. A brief narration of the facts behind this appeal has been given in pages 1 and 2 of this judgement as also in pages 7 to 13. To recapitulate, it may be stated that Shri U.C. Saxena and others had filed an application for issuance of letters of administration for the properties of the Ram Chandra Mission and upon contest the application was registered as Testamentary Suit No.1 of 1994. Sri Saxena and others had made the prayer on the

basis of certain document whereby Sri Saxena was nominated as the success or to the founder President, Shri Ram Chandra Ji. Reliance was placed on the rules of the society and its bye-laws and the claim was hotly contested by Sri P.Rajagopalachari and others, according to whom, Sri P. Rajagopalachari alone was the spiritual successor to Shri Ram Chandra Ji Maharaj for the affairs of the Mission, on the basis of a document said to have been written by the founder President. At an advanced stage of the proceeding of the suit and application No.A-415 was filed before the Hon'ble Single Judge dealing with the testamentory suit to say that the suit was one for obtaining certaqin declaration, but the plaint did not disclose a cause of action at all and in fact the reliefs had been been camouflaged as the plaintiffs did know that the relief for declaration, as claimed therein, was barred by limitation. This objection was heard and decided by the order dated 16.10.1995 and the plaint was rejected under Order 7 Rule 11, C.P.C.

(42) The order of the Hon'ble Single Judge dated 26.10.1995 indicates that the Court was aware of the reliefs sought for and he had categorised the reliefs under five heads, which are as under:

(1) Grant of letters of administration in favour of Sri U.C.Saxena in respect of the properties of Sri Ram Chandra Mission through out India and abroad.

(2) Declaration that Sri Umesh Chandra Saxena was the President of the Mission and the second petitioner was the Secretary thereof.

(3) An interim grant during pendency of the application.

(4) In the alternative appointment of a receiver in respect of the entire estate of deceased Sri Ram Chandra and of Ram Chandra Mission, and

(5) Any other relief.

The main trust of the applicants before the Hon'ble Single Judge was on a registered will dated 30.12.1976 executed by Sri Ram Chandra Ji for one of his personal properties in favour of Sri Umesh Chandra Saxena and another. It was further urged on behalf of the petitioner-appellants before the Hon'ble Single Judge that taking advantage of his proximity to Sri Ram Chandra Ji, Sri p. Rajagopalachari and manufactured a deed of nomination, said to have been signed by Sri

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

Ram Chandra Ji Maharaj, by utilising some signed blank papers and thereby claiming to be the President of the Mission. Sri Umesh Chandra Saxena and others had indicated before the Hon'ble Single Judge that some of the properties, which were mentioned in the registered will, as aforesaid, stood recorded in the names of the sons and daughters of Sri Ram Chandra Ji Maharaj, but for his remaining movables and immovables as also of the estate of the Mission, only Sri Umesh Chandra Saxena and his brothers and sisters were the joint legal successors.

(43) The case of Sri P. Rajagopalachari and others, as was placed before the Hon'ble Single Judge, was that the matter having become contention, the application for letters of administration was liable to be converted to a suit and it was done and issues were framed, but the suit was bad and should have been dismissed or the plaint should have been rejected.

The application No.A-415, that was moved before the court below, made the following relevant averments:

(a) The Ram Chandra Missions was a society registered under the Societies Registration Act and the Will dated 30.12.1976 did not cover any property of the Mission. It was solely for certain personal properties of the Mission. It was solely for certain personal properties of Sri Ram Chandra Ji.

(b) The properties of the society vested in the society itself under Section 5 of the Societies Registration Act and couold never have vested in any individual.

(c) Section 5-A of the Societies Registration Act imposed a restriction on the transfer of property of a registered society without previous approval of the principle court of original civil jurisdiction.

(d) The petitioners had never been authorised by the society to file the instant application and no cause of action ever arose to them.

(e) There could not have been any will for the properties of the society as the socieity being juristic person could never execute any will.

(f) Chapter XXX Rule 6 of the Allahabad High Court Rules permitted an application for letters of administration when there is a

will made under the Indian Succession Act. In the absence of any will by the Ssociety, which is an impossibility under the law, there could not have been any application for letters of administration.

(g) The theory of nomination dated 16.04.1982 was introduced subsequent to the institution of the testamentery case and even conceding the making this nomination it could not be read as a will as it does not conform to the requirements of a valid will.

(h) The plaint did not disclose any cause of action so far respondents no. 8 to 12 were concerned. Petitioner no. 3 was neither the executor nor the beneficiary in the allebged will dated 30.12.76 and as such a no application for letter of administration would have been filed at his instance.

(i) The prayers made in this application No. A_415 were for dismissal of the suit in its on irely, or in the alternative against respondents no. 8 to 12 and for pronoucement of judgment at one. Order 7 rule
11 of the Code of Civil Procedure deals with rejection of plain and it reads as under:

"11. Rejection of Plaint. The plaint shall be rejected to the following cases:

(a) Where it does not disclose a casue of action;

(b) Where the relief claimed is undervalued. And the plainfiff on being required by the Court to correct the valution within a time to be fixed by the Court, fails to do so;

(c) Where the relief claim is properly valued, but the plain is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamppaer within a time to be fixed by the Court, fails to do so;

(d) Where the suit appears from the statement in the plaint to barred by any law:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requistic stamp-paper shall not be extended unless the Court for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

from correcting the valuation or supplying the requesting stamppaper, as the case may be within the time fixed by the Court and that refusal to exted such time would cause grave injustice to the plaintiff."

It. Casts a duty upon the court itself to reject a plain when the conditions indicated in Rule 11 (a) to (10) are found existing.

(44) The Hon'ble Single Judge was confronted not only with the prayer for rejection of the palint as per application No. A-415 but also with a preliminary objection on behalf of the petitioner that when written statement wass filed and issues were framed therein, a prayer for rejection of plaint could not be entertained as the said provisions would only be invoked prior to the filing of the written statement. Without going to the merits of the application for rejection of plaint, it may be stated at this stage itself that the preliminary objection was rightly rejected by the Hon''le Single Judge. Order 7 Rule 11, C.P.C. as already observed, casts a duty upon the court to reject a plaint if the circumstances indicated therein were existing. It can not be the law that this power of the court had proceeded to some length, without application of mind on this point. The rule itself does not indicate anywhere that the power is to be exercised upon an application, or if such an application is filed it should be at any particular stage. We must and do agree that the opinion of the Hon'ble Single Judge that the preliminary objection regarding the state of moving an application under Order 7 Rule 11, C.P.C. was not acceptable. We would only add that an action under Order 7 Rule 11, C.P.C. does not await an application by any party. It is the duty of the court to reject a plaint if the reasons therefore are found existing from a reading of the plaint itself and not from a reading of the defence or other documents.

(45) It appears that a second preliminary objection was also raised before the Hon'ble Single Judge, concerning the application under Order 7 Rule 11, C.P.C. It was contended before him that in a proceeding or letters of administration all the provisions of the Code of Civil Procedure were not to be applied and as such the powers under Order 7 Rule 11, C.P.C. could not be invoked. The hon'ble Single Judge disagreed with this objection also making a reference to Section 141 C.P.C. which provides that the procedure provided in the Code of Civil Procedure in regard to suits would be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. He was of the view that the proceeding for grant of

letters, of administration was one in which the court exercised its civil jurisdiction and as such all rigours of the Code of Civil Procedure would be applicable. The Hon'ble Judge further relied on Rule 39 of Chapter XXX of the Allahabad High Court Rules to say that when the matter become contentions the application for letters of administration would be treated and registered as a suit and the written statement, and, as such the testamentary suit was a suit for all purposes under the Code of Civil Procedure and no exception could be taken to invocation of Order 7 Rule 11, C.P.C. We find no reason to disagree with this aspect of the finding of the Hon'ble Single Judge.

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

(46) During this appeal , another objection was taken, of a preliminary nature, on the ground that the Allahabad High Court Rules in Chapter XXX indicate as to what would be the proforma for an application for letters of administration and the instant application was one following that proforma in toto and when by a deeming provision only the application was to be regarded as a suit an objection may not be entertained to say that the application was bad for non-disclosure of cause of action. This point would be taken up along with the merits of the case as it would be necessary to see with the merits of the case as it would be necessary to see what is a cause of action, even for an application letters of administration.

47. After rejecting the two preliminary objections, the Hon'ble Single Judge has proceeded to discuss the merits of the application. It was urged before the Trial Judge on behalf of the defendant-respondents that the suit was really meant ot seed a declaration from the court that petitioner no. 1 was the Precident of the society and for the purpose of that declaration no cause of action had ever been indicated. This non-disclosure, according to the defendants, was a deliberate act as the plaintiffs knew that the claim in that regard was barred by law . Only for that purpose a device was sorted out to claim a relief of letters of administration,based on that declaration which was barred under the law. In the course of arguments in this appeal, Shri Ajit Kumar, appearing for the respondents, further submitted that in fact no cause of action for issuance of letters of administration had ever arisen as the property of the Mission was being administered, in fact, by Sri P.Rajgopalachari as itsPresident on nomination from the founder President and dispute, if any, regarding his right to claim as President could be deciedd in a properly framed regular suit and not in proceeding for grant of letters of administration.

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

48. It is necessary to go through the provisions of the Indian Succession Act regarding letters of administration. The Indian Success on Act,1925 in its preamble states that it is an Act to consolidate the law applicable to intestate and testamentary succession. The use of the terms 'intestate' and 'testamentary' and 'succession' suggests that the provisions of the Act are to apply in the matter of 'succession' to person either according to his will or otherwise when there is no will executed by such person. The definitions section (Section 2) says that in this Act, unless there is anything repugnat in the subject or context. 'Administratior' means a person appointed by competent authority to administer the estate of a deceased person when there is no executor. The law defines what is 'probate' and what is a 'will',but there is no definition of the term ' letters of administration. An 'executor' has been defined to mean a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. The provisions on ' letters of administration' and 'administation of assets of deceased' are covered in Part IX of the Act. Section 217 the reunder speaks that in case of intestate succession administration of the assets of the deceased shall be made or carried out in accordnnce with the provisions of this part. This also suggests that the law for letters of administration would be applicable in respect of the assets of a deceased person only Reference may also be made to the earlier part VIII, Precisely to Section 212, which provides that no right to any part of the property of a person who has died intestate can be established inany Court of Justice, unless letters of administdration have first been granted by a Court of competent jurisdiction. This again sugests that it is only in respect of properties of a deceased person, in case of dying without a will, that a letter of administration to intestate property could be claimed. Section 218 (1) also gives the same suggestion and the text reads as follows

"218. To whom administration may be granted, where deceased in a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person. – (1) If the deceased has died intestate, and was a Hindu' Muhammadan,Buddhist, Sikh or Jaina or ax exempted person, administraiton of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, 's estate." With this background of the law, we may now look to the averments in the plaint where by the present appellants had made a prayer for some declaration and for the letters of administration.

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

49. The averments have already been indicated in the earlier paragraphs of this judgment, After describing that the Mission was established by Shri Ram Chandra Ji Maharaj it was stated that the Mission/Society was established of the Mission till his life time with a right to nominate his successor. In the absence of any such nomination the office was to be inheritede by his spiritual representative in the direct line of succession. The plaint also made averments about a registered will executed by Shri Ram Chandra Ji Maharaj on 30.12.1976 for one of his properties in favour of Sri U.C.Saxena and Sri Sarvesh Chandra Saxena. The averments were made that Ram Chandra Ji Maharaj laft petitioners no.1 and 2 and respondents no.5, 6 and 7 as sons and daughters and amongst them petitioners no. 1 and 2 together with respondent no.5 were the spiritual representatives of Sri Ram Chandra JI in the direct line of succession. It was further averred that he had repeatedly nominated Sri U.C.Saxena as the successor president ot himself.. Allegations were there that the respondent, Sri P.Rajgopalachari, had allegedly forged a paper in his favour and on the basis of that was claiming to to be the nominee of the last president. It was asserted that after the death of Sri Ram Chandra Ji there were three sets of claiments; (1) the petitioner, Sri U.C.Saxena, as the son and spiritual representative in the direct line, (2) Sri S.P.Srivastava and Sri B.D.Mahajan as Chairman/president and Secretary of the working committee of the Mission, and (3) Sri P.Rajgopalachari on the basis of alleged nomination deed dated 28-3-1974. Reference ware made to different proceedings including the proceedings before the prescribned authority under the Societies Registration Act. Paragraph 27 of the plaint indicated the list of some movable and immovable properties of the said society/Mission possessed , controlled and administered by Sri Ram Chandra Ji Maharaj. Pragraph 28 of the plaint also indicated various other movable and immovable properties of Ram Chandra Ji including that of the Mission of which he was the fouder president. According to pragraph 30 the se properties of Sri Ram Chandra Mission were fully described in Annexure ‘16’ to the petition. It was asserted that Sri Ram Chandra Ji Maharaj died intestate. The prayers ware specific. Letters of administration were sought to be granted to the petitioners, in praticular to petitioner no.1, in respect of the properties in question having effect through aut India and abroad. There has been a further prayer for a declaration that petitioner no.1 was the president of Ram Chandra Mission and petitioner no.2 was the secretary thereof. There was an interim prayer to the effect that pending final adjudication there may be an interim grant in favour of petitioner no.1 in respect of the

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

properties in question including that of Ram Chandra Mission, Shahjahanpur centre and branches thereof in India and abroad and for appointment of a receiver in the alternative for the entire estate of deceased Sri Ram Chandra Ji and that of Ram Chandra Mission.

50. The plaint is silent as to which property belong personally to Sri Ram Chandra Ji Maharaj and which one was the property of the Mission. The law is clear that if it is a property personal to Sri Ram Chandra Ji Maharaj and if he died intestate, such properties would be inherited by his heirs according to his personal law and there could be a prayer for grant of letters of administration for such property. The law is also clear in terms of the provisions of the Societies Registration Act that if the properties were of the mission, may be on donation from Sri Ram Chandra Ji Maharaj or by any other grant, the same may not be claimed as personal property invoking the personal law of succession. Moreover, the Mission being juritic person , tehre could be no question of its death or leaving any property "intestate" whenever we meet the term 'intestate' it must be read in opposition to the term "testament", i.e. will and a will, according to Section 59 of the Succession Act may be made by every person of sound mind, who is not a minor. Thus , a society or a Mission could not be capable of creating a will and in this light also the question of intestate succession of the properties of a society upon intestate death of any office bearer, however high be may be on spritual leval, could never arise

51. In the plaint itself, as already indicated, there is no indication which property belonged to Sri Ram Chandra Ji and which others belonged to the Mission. The very suggestion in the prayer portion that the petitioner No.1 be declared as the president of the Mission and interim grant for the properties be made in his favour indicate that these were the properties of the Mission for which the letters of administration have been prayed for. For the reasons stated avove it can only be observed that there was neither a disclosure fo a cause of action for the letters of administration for the properties of the Mission nor was there any such cause of action ever accruing to any person. On the question of prayer for declaration also there was no indication as to when the right to claim such declaration had accrued to the petitioners. Moreover, if at all it was merely for such declaration then the testamentary jurisdiction of the High Court couldnot have been invoked. At this juncture, we may take up another objection that was raised by Sri B.B.Paul to defeat the application No.A-415. It was stated that the application was filed

1998

U.C.Saxena
Vs.
A.G.U.P.
Allahabad
& others

S.K.
Phaujdar, J.
J.C.Misra, J.

absolutely within the proforma required by Chapter XXX of the Allahabad High Court Rules and as there was no coloumn for mentioning a cause of action, the non-disclosure thereof could not be made a ground for regection of the plaint. The proforma related to intestate succession and we have already explained why any relief touching intestate succession could not be claimed for the properties of a Mission or Society. Thus, mere complaiance with the proforma may not give any benefit to the present appellants to support the plaint. It was not merely an application for letters of administration, there was a prayer for declaration too. For that declaration the petitioners/appellants were obliged to indicate the cause of action which was not done and notwith standing the question whether the High Court in the testamentary jurisdiction would entertain a suit for such declaration, the plaint for that prayer was certainly liable to be rejected for non-disclosure of the cause of action. From the background of the dispute between the parties, from the number of litigaitons they are engaged in and from the nature of averments in the petition/plaint it appears that the earlier will referred dated 30-12-1976 was referred to only as a spring-board for a leap into the depth of a matter before a court having no jurisdiction to give the reliefs prayed for and that too without disclosure as to how any cause of had ever accrued to the petitioners for the reliefs. The Hon'ble Single Judge has given his own views to arrive at the conclusion that the plaint was liable to be rejected. We have approached the matter form another angle and we also reach the same conclusion that the present plaint firstly for a declaration made in the testamentary jurisdiction of the High Court and secondly for latters of administration in respect of the society which is not 'dead' was without disclosure of any cause of action and was a frivolous one and entertainment of such plaint would only entail in unnecessary litigations. The plaint, in our view was rightly rejected under Order 7 Rule 11,C.P.C.

52. In the result, all the present four appeals No.829 of 1995, 561 of 1996, 580 of 1997 and 594 of 1997 stand dismissed with costs inconformity with the observation of the Hon'ble Single Judge . We do also direct that our observations concerning any particular fact shall not affect the merits of the cases of the parties in litigation between them in any other forum.

Appeals Dismissed.