ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD JULY7,1999

1999

July, 7

BEFORE
THE HON'BLE G.P. MATHUR, J.

Criminal Misc. Application No. 1094 of 1985

Amrish Kumar Agarwal and others ...Accused-Applicants
Versus
State of Uttar Pradesh and others ... Compalinant-Opp.party

Counsel for the Applicant : Shri Subodh Kumar
Counsel for the opposite parties: A.G.A.

Indian penal code,1860, S.498-A-Explanation read with Constitution of India, Article 20(1)-Cruelty-offence committed prior to insertion of S.498-a-Conviction under Sec.498-A-held,barred by Article 20(1) of Constitution and illegal – Held- In these circumstances, the conviction of the accused- applicants under Section 498- A will clearly violate clause (1) of Article 20 of the Constitution. Since the accused cannot be convicted under section 498-A I.P.C. their prosecution under the aforesaid section is not justified. (Para 4)

By the Court

1. This petition under section 482 Cr.P.C. has been filed for quashing the proceedings of Criminal Case No.2013 of 1984 pendingagainst the applicants in the court of IInd Additional Munsif Magistrate Kasganj.

2. The petition was admitted on 30.1.1985 and further proceedings in the trial court were stayed on the same day. However, neither any one has put in appearance on behalf of the complainant-opposite party no.3 nor any counter affidavit has been filed either on her behalf or on behalf of the State. The Court has therefore to proceed on the basis that the averments made in the petition and affidavit are correct.

3. Smt. Meera Rani Agrawal, the complainant –opposite party no.3 filed a criminal complaint on 19.12.1984 against the applicants that her marriage with Amrish Kumar Agarwal (A-1) was performed at Kasganj, district Etah on 30.2.1982 and thereafter she continued to

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perform her marital obligations. Soon after her marriage the applicant no.1 and his parents (A-2 and A-3) started making demand of a motor cycle and additional dowry. She politely told them that the economic condition of her father was bad and he was not in a position to fulfill the demands made by them. In April, 1983,the applicant no.1 assaulted the complainant due to which she received injuries. She sent a letter to her father informing him about the incident and them her brother Rajesh came to Faridpur to fetch her. She came to her parental home in Kasganj and started residing there. Since then the applicant no.1 and her in-laws(A-2 and A-3)did not bother to call her nor sent any money for her maintenance. The case of the complainant further is that at the time when she was coming along with her brother all the accused threatened her not make any complaint or to tell any one about the incident otherwise she would be killed. The learned Magistrate recorded the statement of the complainant under section 200 Cr.P.C. and thereafter passed an order on 4.1.1985 holding that a prima facie under section 498-A, I.P.C. had been made out and the accused be summoned to face trial.

4. In paragraph-15 of the complaint, it is alleged that the accused had committed an offence under section 498-A,504 and 506 I.P.C. However, the learned Magistrate has chosen to summon the accused only under section 498-A, I.P.C. A perusal of the complaint shows that the marriage of the complainant with applicant no.1 Amrish Kumar Agrawal was performed on 3.2.1982 and soon thereafter a demand of dowry was made by him and his parents. It is stated in paragraph-4 of the complaint that she was beaten by applicant no.1 in April 1983 and brother Rajesh came to fetch her. It is further stated that after she came to her parental home, the accused did not at all bother to call or to send any money for her maintenance. In paragraph-13, it is stated that the complainant had lodged a F.I.R. regarding the occurrence, which took place on 22.4.1983. According to the complainant, the demand of dowry was after 3.2.1982 till April/May 1983 and after she came to her parental home in Kasganj, district Etah , the accused did not at all bother to take care of her. They neither called her nor sent any money for her maintenance. It is, thus, obvious that the complainant was subjected to cruelty as defined in explanation to section 498-A, I.P.C. between 3.2.1982 and April/May 1983 and not thereafter Section 498-A has been inserted by criminal law (Second Amendment) Act, 1983(Act 46 of 1983) with effect from December 25, 1983. At the time when the alleged offence was committed, section 498-A, I.P.C. was not in existence and it has been incorporated in Indian Penal Code

subsequently by means of an amendment. Clause (1) of Article 20 of the Constitution lays down that no persons shall be convicted of any offence except for violation of a law in force at the time of the commission of the charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. A sovereign legislature has the power to enact prospective as well as retrospective laws but clause (1) of Article 20 imposes two limitations upon the law making power of legislative authorities in India as regards retrospective legislation. It prohibits the making of ex post facto criminal law i.e. making an act a crime for the first time and then making that law retrospective. IT also prohibits the infliction of a penalty greater than that, which might have been inflicted under the law, which was in force when the act was committed. As shown earlier, the acts which amount to an offence under section 498-A I.P.C. are alleged to have been committed by the accused prior to the date on which the aforesaid section was incorporated in the Indian Penal Code by means of criminal law (Second Amendment) Act,1983. In these circumstances, the conviction of the accused-applicants under section 498-A will clearly violate clause (1) of Article 20 of the Constitution. Since the accused cannot be convicted under section 498-A I.P.C. their prosecution under the aforesaid is not justified. The order dated 4.1.1985 passed by IIIrd Additional Chief Magistrate, Kasgang, Etah summoning the accused to face trial under section 498-A, I.P.C. is, therefore, illegal and has to be set aside.

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5. In the result, the petition is allowed and the order dated 4.1.1985 passed by IIIrd Additional Chief Judicial Magistrate, Kasganj, district Etah summoning the accused applicants under section 498-A I.P.C. is quashed. It is however made clear that it will be open to the learned Magistrate to summon and try the accused, if they have committed any other offence.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.8.99

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August, 18

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ Petition No. 37919 of 1995

M/s Krishna Rice and Dal Mills and another ... Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioners : Shri C.K. Parekh
Counsel for the Respondents: Shri B.D.Madhyan
Shri H.R. Mishra
learned Standing Counsel
Shri S. P. Gautam
Shri G.C. Bhatacharya
Shri S.K. Srivastava

Mandi Adhiniyam 1964 S-17 (iii)(A) readwith – Constitution of India Article 226- Liability to pay the market fees-agricultural produce sold by the Trader to the State Government- whether the trader or the purchaser is liable to pay the market fee?-held-the liability shifted upon the trader to pay the marked fee-if so chooses he can pass the burden upon the purchaser (Para 4)

By the Court

1. The moot question urged by Sri Parikh is as to whether when an agriculture produce is sold by the trader to the State Government, the market fee payable to the committee constituted under the Krishi Utpadan Mandi Adhiniyam, 1964 has to be paid the seller-petitioner or the purchaser State Respondent no.2.

2. Shri C.K. Parekh, learned counsel appearing in support of this writ petition with reference to a Division Bench decision of our own High Court in Shri Vijay Rice Mills Rudrapur Vs. State of U.p.1998 (33) A.L.R. 684 contended that this writ petition be disposed of in the same manner as it was done in Vijay Rice Mills (supra).

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B.K. Roy, J.
Lakshmi Bihari,J.

3. Shri B. D. Madhyan, learned counsel appearing on behalf of Respondent no.6,on the other hand, contended that the question raised by the petitioner now stands authoritatively concluded by two Division Bench judgements rendered by three Judges of the Supreme Court i. Krishi Utpadan Mandi Samiti, Hardwar Vs. Indian Food products Ltd. and others, disposed of by judgement and order dated July 19,1999, and thus accordingly following the ratio laid down therein this writ petition be dismissed.

4. In our view the question urged on behalf of the petition stands answered authortatively by the Hon'ble Supreme Court in Krishi Utpadan Mandi Samiti, Bareilly supra the relevant part of which reads thus :-

" The precise question, which we have noticed above came up for considered by a three Judge Bench of this Court in Mahalaxmi Rice Mills & Ors. Vs. State of U.P. and Ors.(1998) 6 SCC 590, wherein it was held that the Market Committee was entitled to collect the market fee from the seller and it is for the seller to pass the burden on the purchaser, if he so chooses. The Bench went on to say that the respondents cannot shirk the responsibility to pay the market fee to the Market Committee when the transaction falls within the purview of sub-clause 3 of Section 17 (iii) (b) of the Act and that it would open to them to receive the same from the purchaser – Government.

The judgement of the three Judge Bench (supra) has answered the precise question. We are not persuaded to take a different view. We may, at this stage, also point out that the judgement relied upon by the High Court in the case of India Wood Products Ltd.(supra) was considered by the three Judge Bench in Mahalaxmi Rice Mills case (supra)and not approved.

Since the matter is covered by the judgement in Mahalaxmi Rice Mills case (supra) following that judgement, we allow these appeals and set aside the impugned orders. Consequently, the writ petitions filed in the High Court shall stand dismissed."

5. Following the ratio laid down before mentioned we, too, dismiss writ petition. In the peculiar facts and circumstances, however, we make no order as to cost.

6. A copy of this order shall be handed over within one week to Shri H.R.Mishra, the learned Standing Counsel, appearing for Respondent No.2 for its communication to the authority concerned.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 23.7.99

1999

July, 22

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

Civil Misc. Writ Petition No. 3900 of 1995

Chaudhry Ram **...Petitioner**
Versus
The IIIrd Addl. District Judge,
Saharanpur & Others **...Respondents**

Counsel for the Petitioner: Shri Pushkar Mehrotra
Shri Ravi Kiran Jain
Counsel for The respondents: S.C.
Shri Rajesh Tandon

U.P. Act No. 13 of 1972- Sec.21 (1) (a)- read with Rule 16(2)- Release Application- Bonafied need to settle the business of unemployed son – Tenant's objection regarding need of land lord can be meet out by starting the business in his residential building itself held in the eye of law the land Lord can not be compelled to convert the residential accommodation in to commercial one particularly when the tenant possessing his building for business purpose.

Held-
It is well established principal that every land lord possesses a right to live comfortably in his residential house and therefore, he cannot be forced to convert any portion of his residential purpose as that would not only reduce the extent of residential accommodation but may also result in disturbance of his peaceful living in the said house and the same will be contrary to the policy underlying the provisions contained in section 21 of the Act.
Held-
U.P. Act No. 13 of 1972 – U.P. Urban Building (Regulation of letting and Rent) Control Rule –r. 16-(2))(b)- Comparative hardship- Tenant already constructed and shifted his business at new place – Land Lord's need is greater.
Held-

It is, therefore, fully borne out from the record that the tenant – Petitioner has with him an laternative accommodation at Amble Road and in fact has already shifted his business of fertilizers and Cement etc. therein. The finding of the appellate authority, therefore, on the question of compression of hardship is in line with Rule 16(2) Clause (b) of the Rules framed under the act which provides that where the tenant has available with him suitable accommodation to which he can shift his business without substantial loss there shall be greater justification for allowing the release application and since the Fertilizer business has himself there is no question of rejecting the claim of the land lord on the basis of the allegation that the tenant has earneda good – will of his business of Fertilizer in the ship in question. (Para 9)

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J.C. Gupta, J.

Case Law Discussed.
1993 (1) AIR – 77
1993 (2) ARC – 63

By the Court

This is tenant's writ petition.

1. Being aggrieved by the order dated 18.1.95 passed by the appellate authority reversing the order of the prescribed authority dated 16.2.91 and releasing the premises in question for business purpose in favour of landlord, the tenant- Petitioner has now approached this Court for redress seeking quashing of the order of the appellate authority.

2. The dispute relates to a shop situated in main bazar Sarsawa, district Saharanpur which is under occupation of the petitioner as tenant. The landlords moved application for the release of the said shop under Section 21(1) (a) of U. P. Act No.XIII of 1972, hereinafter referred to as the 'Act'. The release of the shop was sought for settling Jagmohan, the third son of respondent no.2 in business who according to the landlords' case' was unemployed and was sitting idle and since no other suitable accommodation was available with the landlord their need of the shop in question was most genuine and pressing. The claim of the landlords was contested by the tenant-petitioner on the grounds that Jagmohan was not unemployed and the need shown was not bonafide; that the landlord has available with him some other accommodations wherein he could settle his son Jagmohan if at all he was to do so set up. Parties adduced evidence on affidavits before the Prescribed Authority who recorded a finding in favour of the landlords on the question of

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bonafide need to the effect that Jagmohan was unemployed and the claim of the landlord that the said son was to be set up in business was not unjustified. However, while considering the hardships of the parties the prescribed Authority recorded a finding that since the landlords have available with them shop no.410 and the same was lying vacant, the proposed business of Jagmohan could be started in the said shop. The prescribed Authority also recorded a finding that the tenant has earned a good-will and therefore, he would suffer a great hardship in the event of his being dislodged from the business of fertilizer and of agricultural equipment's which he was carrying in the shop in dispute for the last so many years.

3. In the appeal filed by the landlords, the appellate authority reversed the judgment and order of the prescribed authority specifically touching all the findings recorded by the prescribed authority. The appellate authority has affirmed the finding of the prescribed authority so far as it related to the question of need of the landlord's son Jagmohan. Both the courts below have thus found that Jagmohan was unemployed and his need to set up business of hardware was genuine and pressing. Learned counsel for the petitioner has not been able to point out that this concurrent finding of fact recorded by the courts below is any awy erroneous and / or unjust.

4. Learned counsel for the tenant – Petitioner, Sri Ravi Kiran Jain argued that the lower appellate authority for unjustifiable reasons has reversed the finding of the prescribed Authority regarding availability of shop No.41C to the landlords. This submission of the Learned counsel must be rejected as untenable. Before the courts below, the Landlord's case with regard to shop no.410 was that the same could not be considered as available to them because of its dilapidated condition. The prescribed authority rejected the said assertion of the landlords observing that there was no evidence in support of that assertion, though in fact enough material had been brought on record by the landlords in support of their plea that the said shop was not capable of being used for any purpose. The appellate authority has pointed out that evidence and material and on appraisal thereof a clear cut finding has been recorded that shop no.410 has been rendered roofless and its walls are in a ruinous condition and the shop is beyond repairs. It has also been held by the appellate authority that the said shop in its present states is not suitable for any use and the landlords cannot be forced to re-construct the same for establishing Jagmohan in business

therein. It could not be pointed out by the learned counsel for the petitioner that the aforesaid finding of the appellate authority is perverse or is vitiated on account of any other error which may call for intervention of this court. It may also be pointed out that it has been found by the appellate authority that it is fully borne from the record that the said shop had fallen down even before proceeding under Section 21(1)(a) of the Act were initiated. It must therefore, be held that the said shop has rightly been left out from consideration by the appellate authority as an alternative accommodation available to the landlord for their bonafide need.

5. Next it was argued by the learned counsel for the petitioner that the Tenant-Petitioner has specifically pleaded that the landlords are in occupation of a big Haveli and in the ground floor thereof many rooms were available which could be conveniently utilised for the proposed business as many shops situated in the near vicinity of that Haveli wherein business of grocery, Sringar, Prasad etc. were being carried on, but while dealing with that question no specified finding has been recorded by the appellate authority that no space was available to the landlords in the said Haveli for being used for the proposed business. In reply, learned counsel for the respondent Sri Rajesh Tandon submitted that it was the definite case of the landlords before the courts below that the Haveli was being used exclusively for residential purpose and it has no shops either in the ground floor or in any part thereof. It was pointed out that the tenant-petitioner in the affidavits filed before the courts below never came with the case that the Haveli has any shop or any part thereof was being used for non-residential purpose and no such case was also pleaded in the written statement. He submitted that appellate authority has recorded a specific finding of fact that the said Haveli is used for residential purpose only. It was pointed out that in paragraph 15 of the rejoinder affidavit filed on behalf of the landlord before the court below, it was specifically stated that the residential house of the landlord was situated in a purely residential house of the landlord was situated in a purely residential locality and there was not a single vacant or surplus space in the ground floor of their residential Haveli which could suffice the bonafied need of the landlords of setting Jagmohan in the proposed business. It was submitted that when a building is used exclusively for residential purpose the landlord cannot be compelled to convert any portion of their residential house for non –residential use and thereby reduce the extent of their residential accommodation. In support of his argument learned counsel placed reliance on the decision in Prem

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Prakash Gupta and Others Vs. IInd Addl. District Judge, Allahabad and others reported in 1993(1) ARC 77, wherein a learned Single Judge of this Court held:-

6. "It may further be noticed that taking into consideration the policy and the object behind section of the U.P. Act No. 13 of 1972 which is for the benefit of the landlord, there can be no manner of doubt that the intention has been not to reduce the availability of the residential accommodation. Sub-clause(ii) of the third proviso to section 21 prohibits release of any portion of residential accommodation for business purpose. This provision re-enforces the above aspects. When an accommodation in the occupation of a tenant which is being utilised for residential purpose cannot be allowed to be used for business purpose and released on this account, there can be arise any question of compelling a landlord to convert a part of the residential building in his occupation for use of business purpose and refuse the grant of release on the ground that a part of the residential accommodation can be utilised for business purpose compelling thereby the reduction of residential accommodation contrary to the policy underlying the provisions contained in Section 21 of the Act."

7. Similarly in the case of Jagdish Prasad Vs. IXth Additional District Judge, Kanpur and others 1993(2) ARC 63, the view taken was that the landlord could not be compelled to use a portion of the residential accommodation for business purpose and thereby reduce the availability of residential accommodation.

8. It is well established principle that every landlord possesses a right to live comfortably in his residential house and therefore, he cannot be forced to convert any portion of his residential house for commercial purpose as that would not only reduce the extent of residential accommodation but may also result in disturbance of his peaceful living in the said house and the same will be contrary to the policy underlying the provisions contained in Section 21 of the Act. In the present case it has been found as a fact by the appellate authority on appraisal of evidence that the Haveli of the landlords is used exclusively for residential purpose and therefore, the landlords could not be compelled to set up Jagmohan in business in any part of the Haveli. This holding of the appellate authority is in consonance with the policy underlying the provisions contained in Section 21 of the Act and therefore, no interference is called for by this Court.

9. The lower appellate authority has recorded a finding of fact also that it is proved from the evidence on record that the tenant – petitioner has available with him shops, godown and other buildings in Sarsawa. Lower appellate authority has placed reliance on the evidence led on behalf of the landlord that the tenant-petitioner Chaudhry Ram has purchased a property in Mohalla Bazar (Ambala Road), Sarsawa through sale deed dated 12.1.1989 in the name of his sons Sarvshri Satish Kumar and Harish Kumar and the certified copy of the sale deed was brought on record. A shop has been constructed in the said property and as per the finding of the appellate authority the petitioner has shifted his old business of Fertilizers and Cement etc. in the said shop and a new business of cloth has been started in the shop in dispute. Chaudhary Ram in his affidavit filed before the appellate court admitted that he has closed the business of Fertilizer and has started cloth business in the disputed shop. It is therefore fully borne out from the record that the tenant-petitioner has with him an alternative accommodation at Ambala Road and in fact has already shifted his business of Fertilizers and Cement etc. therein. The finding of the appellate authority, therefore, on the question of comparison of hardship is in line with Rule 16(2) Clause (b) of the Rules framed under the Act which provides that where the tenant has available with him suitable accommodation to which he can shift his business without substantial loss there shall be greater justification for allowing the release application and since the Fertilizer business has already been shifted to another shop by the petitioner himself there is no question of rejecting the claim of the landlord on the basis of the allegation that the tenant has earned a good-will of his business of Fertilizer in the shop in question. The view taken by the lower appellate authority on the question of comparative hardship, therefore, does not suffer from any manifest error of law. As the entire matter has been examined objectively by the lower appellate authority which is also a fact finding authority and when this exercise has been made in a proper and legal manner, this Court will not interfere since the matter of appreciation of evidence is the domain of the fact finding authority.

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10. No other point has been pressed or urged.

For the reasons stated above, this writ petition has no merits and is accordingly dismissed. Stay order granted earlier shall stand vacated. In the circumstances, the parties shall bear their own costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.7.1999

1999

July, 27.

BEFORE
THE HON'BLE A.K.YOG,.J.

Civil Misc. Writ Petition No.30433 of 1999.

Shahzade and another ...Petitioners
Versus
IX Additional District Judge,
Bareilly and another ...Respondents

Counsel for the Petitioners : Shri Raj Kumar Khanna
Counsel for the Respondents: S.C.

Constitution of India, Article 226 and 227 read with U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, Ss. 12 and 25- Suit for eviction on ground of sub-letting and arrears of rent- concurrent findings of fact recorded by Trial Court as well as Revision Court that sub-letting by tenant to persons who were not members of his 'family' is proved- section 12 read with Sec. 25 of U.P. Act XIII of 1972 contemplates legal presumption of sub-letting of accommodation, if tenement or part thereof is allowed to be occupied by a person who is not a member of family of tenant- In instant case a finding has been recorded to the effect that persons who were not within definition of 'family' under Act XIII of 1972, were occupying and using the accommodation in question- Held, concurrent finding of fact cannot be assailed in writ proceedings, that findings are not vitiated- Hence High Court did not find any manifest error apparent on the face of record warranting interference under Articles 226/227, Constitution of India. (Para 11,12,13)

Finding of fact cannot be assailed in writ proceedings particularly when petitioner has virtually conceded that finding are not vitiated.

The Revisional Court held that under the U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972 (U.P. Act No. XIII of 1972) for short called the 'Act' Defendant nos.2,3 and 4 did not fall in the definition of 'Family' of tenant and, therefore, possession of these persons will amount to sub-letting as contemplated under U.P. Act No. XIII of 1972.

By the Court

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A.K. Yog, J.

1. Suit No.397 of 1981 (Hazi Mohd. Noor Versus Sarjaz and others) was instituted in the court of Judge Small causes Court, Bareilly, on the ground that tenancy of the Defendant-petitioner was determined by serving notice under Section 106 of Transfer of Property Act and that he had sub let the accommodation in his tenancy, he was defaulter and failed to pay arrears of rent in spite of demand notice being served The Defendant contested the suit by filing written statement (Annexure 2 to the writ petition) on the question of sub letting. It was pleaded that Defendant nos. 2,3 and 4 were his close relatives (Brother-in-law and Maternal uncle) who have been visiting in conclusion with him because of relationship. Parties led evidence. The Judge, Small Causes Court after perusing the evidence in detail recording a finding that Defendant-Petitioner had sublet the accommodation notice was legally severed and Defendant had committed default in payment of rent and hence Suit for ejectment and recovery of arrears of rent was liable to be decreed. Accordingly, Trial Court decreed the suit vide judgment and order dated February 15,1991.

2. Feeling aggrieved, Defendant-Petitioner filed Revision No.7 of 1991 under Section 25 of Provincial Small Causes Act. The revision was also dismissed by the Court below (Respondent no.1) vide judgment and order dated 28t[h] May 1999. The Defendant-Petitioner, feeling aggrieved, has filed the present petition praying for issuance of a writ of certiorari to quash the judgement and order dated 15th February, 1991(Annexure 3) passed by Judge, Small Causes Court and Judgement and order dated 28th May, 1999 (Annexure 5) passed by Respondent no.1.

3. Heard learned counsel for the petitioner.

4. Both the Courts below have passed concurrent judgements. Finding record by Trial Court on the question of service of notice and that on the question of sub letting has been affirmed by the Revisional Court
After having carefully examined the question on the basis of material on record.

5. On perusal of the judgment passed by Judge, Small Causes Court, it is noticed that the Trial Court, after perusal of relevant material and evidence on record led by parties, came to the

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A.K. Yog, J.

conclusion that Defendant nos.2,3 and 4 were living in the accommodation in question. Trial Court referred to the statement of Defendant no.1(DW1) wherein he admitted that the wife and children of Bannay, Defendant no.2 who was maternal uncle of Defendant- petitioner were living in the accommodation in question. The Trial Court also observed that alleged sub-tenants were using accommodation separately inasmuch as they had independently engaged sweeper, separately holding ration card and had their kitchen separately. From the perusal of statement of the plaintiff and Defendant as well as voter list, Trial Court recorded finding of fact that Defendant nos.2,3 and 4 were occupying accommodation in question in their own right, could not be said to be justified in arriving at the conclusion of sub letting.

6. Hon'ble Supreme Court in the case of **Smt. Krishnawati Versus Shri Hans Raj, reported in AIR 1974 SC 280** observed as follows:-

"In the determination of a question of fact no application of any principle of law is required in finding either the basic facts or arriving at the ultimate conclusion; in a mixed question of law and fact the ultimate conclusion has to be drawn by applying principles of law to basic findings………The negative answer given to it by Rent Courts is merely the factual common-sense inference, which did not call for application of any principle of law. In our view, no question of law – was involved in the Second Appeal……….."

7. In para 6 of the said judgement Hon'ble Supreme Court has also noted as follows:

"Sub-letting was, therefore, the principal ground on which eviction was sought. When eviction is sought on that ground it is now settled law that the onus to prove sub-letting is on the landlord. If the landlord prima facie shows that the occupant who was in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence…………….."

8. Hon'ble Supreme Court has, however, consistently taken the view that sub-letting cannot be established unless actual payment of rent by sub-lessee to lessee is proved but in those cases it had no occasion to consider legal position in view of the Provision of the Act, 1972, where under actual payment of rent is not required to be proved by the landlord and mere occupation by a person, other than

'family' of the tenant as defined in this Act, gives rise to the presumption of sub-letting.

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9. The Judge Small Causes Court, though did not record finding on this aspect (namely, whether rent was being paid by Defendant no.2, 3 and 4 sub-lessee to the original lessor- Defendant no.1), Revision Court has adverted to this aspect and the gap left has been filled by providing the missing link.

10. Learned counsel for the petitioner stated that some valuable consideration must pass from sub-lessee to the lessee. The submission is wholly misconceived and is not tenable. Section 12 read with Section 25 of U.P. Act No.XIII of 1972 contemplates legal presumption of sub-letting of accommodation, if tenement or part thereof is allowed to be occupied by a person who is not a member of the family of the tenant. In the instant case, a finding has been recorded to the effect that persons, who were not within the definition of family under the said Act, are occupying and using the accommodation in question.

11. Finding of fact cannot be assailed in writ proceedings, particularly when petitioner has virtually conceded that finding are not vitiated.

12. The Revision Court held that under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No.XIII of 1972) (for short called the 'Act') Defendant nos. 2,3 and 4 did not fall in the definition of 'Family' of tenant and , therefore, possession of these persons will amount to sub-letting as contemplated under U.P. Act No.XIII of 1972. Record shows that there can be no controversy as to the applicability of the said Act. Even otherwise, petitioner has not challenged the factum of applicability of U.P. Act No. XIII of 1972 and there is no ground to this effect in the writ petition.

13. In view of the above, I do not find any manifest error apparent on the face of record warranting interference under Article 226/227, Constitution of India.

14. The writ petition has no merits and it is accordingly dismissed.

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A.K. Yog, J.

15. After judgment was dictated and pronounced in open court learned counsel for the petitioner prayed for granting of time for vacating the accommodation in question and stated that his client Defendant-Petitioner shall vacate the accommodation, without objection of any kind, in case tenant-petitioner is not dispossessed for some reasonable time i.e. six months.

16. In view of the above, as well as taking into account the status of the petitioner and other attending circumstance, the tenant-petitioner be allowed to vacate the accommodation in question (subject matter of JSCC Suit No.397 of 1981 – Hazi Mohd. Noor Versus Sartaj and others) situate at Mohalla Bagh Birgitan, opposite Kumar Talkies, District Bareilly, up to 31st January, 2000 provided:-

1. The tenant-petitioner/s file/s before concerned Prescribed Authority, on or before 31st August, 1999, an application along with his affidavit giving an unconditional undertaking to comply with all the conditions mentioned hereinafter:

2. Petitioner-tenant shall not be evicted from the accommodation in his tenancy for six months i.e. up to 31st January 2000. Tenant-petitioner, his representative/assignee, etc, claiming through him or otherwise, if any, shall vacate without objection and peacefully deliver vacant possession of the accommodation in question or before 31st January, 2000 to the landlord or landlord's nominee/representative(if any, appointed and intimated by the landlord) by giving prior advance notice and notifying to the landlord by Registered A.D. post (on his last known address or as may be disclosed in advance by the landlord in writing before the concerned prescribed authority), time and date on which Landlord is to take possession from the tenant.

3. Petitioners shall on or before 31st August, 1999 deposit entire amount due towards rent etc. up to date i.e. entire arrears of the past, if any, as well as the rent for the period ending on the 31st January, 2000.

4. Petitioners and everyone claiming under him undertake not to 'change' or 'damage' or transfer/alienate/assign in any manner, the accommodation in question.

5. In case tenant-petitioner/s fail to comply with any of the conditions/or direction/s contained in this order, landlord shall be

entitled to evict the tenant-petitioners forthwith from the accommodation in question by seeking police force through concerned prescribed authority.

6. Defaulting party shall pay Rs.25000/-(Rupees Twenty five thousand only) as demages to the other party if there is violation of the undertaking or anyone or more of the conditions contained in this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.7.1999

BEFORE
THE HON'BLE S.H.A.RAJA, J.
THE HON'BLE KRISHNA KUMAR, J.

1999

July, 14

Civil Misc. Writ Petition No. 34550 of 1998.

Dr.B.N. Gupta **...Petitioner**
Vs.
The Union of India and others **...Respondents**

Counsel for the Petitioner : Shri Umesh Narain Sharma
: Shri ManMohan Das Agarwal

Counsel for the Respondents : Shri S.N. Srivastava
: Senior Standing Counsel
: Govt. of India, High Court
: Shri M.S. Negi

Indian Council of Forestry Research and Education Group 'A' Scientific Posts Recruitment Rules, 31,32,33 and 34-
Held-
The terms and condition of the advertisement in pursuance to which the petitioner was selected clearly indicates that the terms of appointment of Director General, ICFRE will normally be for a period of five years which can be extended by the Central Government on the recommendation of the Board of Governors subject to the age of superannuation on as Rules. The said rules, which indicate that the age of superannuation of the officers of IFCRE will be 60 years. In pursuance of that advertisement the petitioner had applied. He was selected and an offer was given to him to join the post of Director General. The offer clearly indicate that the term of appointment of Director General, ICFRE will be for

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Krishna Kumar,J.

a period of five years or till the date of his superannuation, as per ICFRE Rules, whichever is earlier. The offer was accepted by the petitioner on the terms and conditions mentioned in the aforesaid letter. Although the Rules do not provide any age of superannuation as far as the post of Director General is concerned, but the Rules clearly provide the age of superannuation of the officers of ICFRE including the Director as 60 years. The advertisement, offer of appointment and its acceptance by the petitioner clearly shows that the ICFRE Rules will be applicable. Now it is not open for the petitioner to resile from the same and stake a claim to continue to an end. [Para 23]

Cases referred.

AIR-1997 (I) SC 225
1992 Supp.(2) SC 186

Case distinguished.

AIR 1992 SC 1872

By the Court

1. The petitioner who belongs to Indian Forest Services, Initially was appointed on deputation as Director in the cadre of Scientist 'H' in the Indian Council of Forestry Research and Education, Dehradun, (hereinafter referred to as ICFRE). On 7.11.1994 the petitioner was absorbed in the service on his application, with effect from 1.1.1994 as per A.I.S. Rules and Rules of Indian Council of Forestry Research And Education by means of letter No. Nil dated 29th December, 1993.

2. Later on the Government of Punjab and Chandigarh have conveyed their concurrence for the acceptance of the resignation of the petitioner for his permanent absorption in ICFRE vide letter No. 13/1/94FI-1/15128 dated 18.8.1994. The Ministry of Environment and Forests vide letter No. A.19011/17/90-IFS-1 dated 23rd /26th September, 1994 have conveyed approval of the Government of India for permanent absorption of the petitioner in the Council with effect from 1.1.1994 under provisions of Rules 5-A of AIS (DCRB) Rules, 1958.

3. The said absorption letter indicate that after 1.1.1994 Dr. B.N. Gupta, Scientist 'II' Tropical Forest Research Institute, Jabalpur

will cease to be a member of the Indian Forest Service and will henceforth be governed by the Recruitment Rules for Group 'A' Scientific posts in ICFRE. On absorption with effect from 1.1.1994, his pay etc. will be protected, as per ICFRE Rules.

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4. In pursuance of an advertisement published in Hindustan times dated 17.10.1995 the post of Director General in the ICFRE was advertised. According to the terms and conditions as set out in the advertisement, which is relevant for consideration in the present case, the term of appointment of Director General, ICFRE will normally be for a period of five years which can be extendable by the Central Government on the recommendation of the Board of Governor subject to the age of superannuation as ICFRE Rules (emphasis laid).

5. The petition who was working as Scientist 'H' and Director in ICFRE was selected as Director General in ICFRE. On 9.1.1997 the Government of India, Ministry of Environment and Forest offered the appointment to the petitioner to the post of Director General, Council of Forestry Research and Education of the following terms and conditions

“(i) The pay scale of the post is Rs. 7300-100-7600.

(ii) You will be entitled to draw pay and allowance in the scale of the post.

(iii) The term of appointment of Director General, Indian Council of Forestry Research and Education will be for a period of five years or till the date of his superannuation, as per ICFRE rules, which ever is earlier (emphasis laid)."

6. The said letter also indicated that the other conditions of the service of the petitioner will be in accordance with the Rules and Regulations framed by the ICFRE, Dehradun.

7. By means of the letter dated 9.1.1997 addressed to the President, ICFRE Society, the petitioner accepted the offer of appointment for the post of Director General, Indian Council of Forestry Research and Education on the terms and conditions mentioned in the aforesaid letter (emphasis laid).

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8. After the petitioner gave this acceptance to the offer, the Chairman, Board of Governors of the ICFRE passed an order indicating the following terms and conditions:

"Terms of appointment of Director General, ICFRE will primarily be for a period of 5 years which can be extended by the Central Government on the recommendation of the Board of the Governors subject to the age of superannuation as ICFRE rules."

9. On 10.1.1997 the petitioner assumed the charge of the post of Director General of ICFRE. On 14.9.1998 the petitioner was directed to retire from service with effect from 13.12.1998 after attaining the age of 60 years.

10. Being aggrieved against the said order the petitioner invoked the jurisdiction of this Court by filling the present writ petition.

11. Although generally no interim is passed in such matter, however, while entertaining the writ petition, a Division Bench of this Court granted an interim order directing the respondents to permit the petitioner to continue in service till he will complete a period of five years from the date of his appointment.

12. The Union of India, thereafter, filed a civil appeal bearing civil Appeal No. 2476 of 1999 arising out S.L.P. (Civil) No. 4296 of 1999. A Division Bench of Hon'ble Supreme Court after hearing the matter found that balance of convenience and irreparable injury or loss was not in favour of the petitioner of this writ petition, of this writ petition, in view of the fact that in case the petitioner would succeed in the writ petition, he would very well be compensated in terms of money. The Hon'ble Supreme Court set the order passed by this Court and directed the High Court to decide the writ petition expeditiously preferably within a period of three months. Accordingly the writ petition was listed before this Court.

13. We have heard Shri Man Mohan Das Agarwal, learned counsel appearing on behalf of the petitioner as well as Shri S.N. Srivastava assistged by Shri M.S. Negi at considerable length.

14. It is well settled principle of service jurisprudence that the age of superannuation should be in accordance with service rules of the appointment under the terms and conditions of the appointment

letter has a binding effect until and unless it is arbitrary, irrational, unfair, unjust or improper. No person who has agreed to the terms and conditions can wriggle out or resile from the same.

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15. In Union of India and others Vs. Major R.N. Mathur, AIR-1997(1)SC225,the Hon'ble Supreme Court observed that if there are no statutory rules at all dealing with the age of superannuation of the respondents but for the reason the age which is fixed for the civil servants governed by the fundamental Rules cannot be brought in, In the absence of a rule to the contrary, the Central Government is fully authorised to fix the age which it has done and was accepted voluntarily by the respondents. They must now retire when they reach the age of fifty five years.

16. It was further indicated that the appointment was made fixing the age of superannuation as fifty years. In terms, thereof, the officer is required to retire at the age of fifty five years.

17. A similar question cropped up in Union of India and others Vs. Lt. Col. Komal Charan and others 1992 Supp.(2) SC 186, wherein the Hon'ble Supreme Court observed that there are no statutory rules at all dealing with the age superannuation of the respondents, but for the reason the age which is fixed for the civil servants governed by the Fundamental Rules cannot be brought in. In the absence of a rule to the contrary, the Central Government is fully authorised to fix the age which is has done and which was accepted voluntarily by the respondents. The relevant order in clear terms lays down the age of superannuation at fifty five years with a further provision of extension to the age of fifty seven years. The respondents exercised their option and were accordingly granted whole time NCC Commission, They cannot now repudiate the same and claim any additional benefit which they are not entitled to under any rule or law.

18. In the present case Shri Mohan Das Agarwal, learned counsel appearing on behalf of the petitioner convassed before the Court that the post of Director General is a ex cadre post with a fixed tenure and the selection/appointment was made by direct recruitment. The rules for Group 'A' Scientific post in the Indian Council of forestry Research and Education provides that the Age of superannuation for regular employees will be 60 years, is not applicable. He further submitted that the Board of Governors may

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grant extension in such cases in accordance with the instructions/guidelines issued by the government.

19. As far as the appointment of the Director General is concerned, Rule 31 provides that the Director General, ICFRE shall be the Chief Executive Officer of the Society. Rule 32 provides that the appointment to the post of Director General, ICFRE shall be made by the President of the Society with the concurrence of the Government of India from a panel to be drawn up by the Board of Governors from amongst eminent Scientists/Foresters with a minimum of 25 years of service having background in Forestry Research. However, the Director General, ICFRE in position at the time of the registration of the society would continue to hold the post under the new rules as per terms and conditions of his appointment made my the government of India. Rule 33 deals with the terms of the officer of the director General which provides that the terms of the Director Generally, ICFRE will normally be for a period of five years extendable by the central Government on the recommendation of the Board. Rule 34 provides that the other terms and condition of the Director General, ICFRE shall be determined by the Board of Governors in consultation with the government of India.

20. Relying upon the aforesaid rules it was vehemently contended by Shri Agarwal that the appointment of the petitioner was for a period of five years and that tenure cannot be cut short by the respondents by retiring the petitioner on his attaining the age of 60 years and in that regard relied upon a decision of Hon;ble Supreme Court in L.P. Agarwal Vs. Union of India AIR 1992 SC1872.

21. Before dealing with the observations of the Hon'ble Supreme Court, it would be proper to mention the fact involved in that case that L.P. Agarwal was appointed as Director of All India Institute of Medical Science with effect from 18th February, 1979. The order dated 6.4.1979 stated that the he was given appointment for a period of five years or till he attains the age 62 years, whichever is earlier. He was confirmed on the said post with effect. From 19.2.1980. By an order dated November 24, 1980 he was prematurely retired from service in the public interest by giving him three months pay and allowances in lieu of notice. In the light of the aforesaid facts and circumstances, the Hon'ble Supreme Court observed in paragraph 16 of the report:

"We have given our thoughtful consideration to the reasoning and the conclusions reached by the Court. We are not inclined to agree with the same. Under the Recruitment Rules the post of Director of the AIMS is a tenure post. The said rules further provide the method of direct recruitment for filling the post. These service conditions make the post of Director a tenure post and as such the question of superannuating or prematurely retiring the incumbent of said post does not arise. The age of 62 years provided under proviso to Regulation 30(2) of the Regulations only shows that no employee of the AIIMS can be given extension beyond that age. This has obviously been done for maintaining efficiency in the institute service. We do not agree simply because the appointment order of the appellant mentions that "he is appointed for a period of five years or till he attains the age of 62 years", the appointment cases to be to a tenure post. Even an outsider (not an existing employees of the AIIMS) can be selected and appointed to the post of Director. Can such person be retired prematurely curtailing his tenure of five years? Obviously not. The appointment of the appellant was on a five years, tenure, but it could be curtailed in the event of his attaining the age 62 years before completing the said tenure. The High Court failed to appreciate the simple alphabet of the service jurisprudence. The High Court's reasoning is against the clear and unambiguous language of the Recruitment Rules. The said rules provide 'tenure for five years' inclusive of one year `probation and the post is to be filled "by direct recruitment". Tenure means a term during which an office is held. It is condition of holding the office. Once a person is appointed to a tenure post, his appointment to the person is appointed to a tenure post, his appointment to the said office begins when he joins and it comes to an end on the completion of the tenure unless curtailed on justifiable grounds. Such a person does not superannuate, he only goes out of the office on completion of his tenure. The question of prematurely retiring him does not arise. The appointment order gave a clear tenure to the appellant. The High Court fell into error in reading "the concept of superannuation" in the order, concept of superannuation which is well understood in the service jurisprudence is alien to tenure appointments which have a fixed life span. The appellant could not, therefore, have been prematurely retired and that too without being put on any notice whatsoever. Under what circumstances can an appointment for a tenure be cut short is not a matter which requires our immediate consideration in this case because the order impugned before the High Court concerned itself only with premature retirement and the High Court also dealt with that aspect of the matter only. This

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Court's judgement in Dr. Bool Chand Vs. The Chancellor, Kurukshetra Univeristy, (1968) 1 SCR 434 (AIR 1968 SC 292) relied upon by the High court is not on the point involved in this case. In that case the tenure of Dr. Bool Chand was curtailed as he was found unfit to continue as Vice Chancellor having regard to his antecedents, Which were not discussed by him at the time of his appointment as Vice Chancellor. Similarly the judgement in Dr. D.C. Saxena Vs. State of Haryana, (1987) 3 SCR 146, (AIR 1987 SC 1463) has no relevance to the facts of this case."

22. A bare perusal of the observations of the Hon'ble Supreme Court would indicate that the Hon’ble Judges of the Supreme Court do not agree with the view expressed by the High Court simply because the appointment of the appellant L.P. Agarwal mentioned that he was appointed for a period of five years or till he attained the age of 62 years. The appointment cannot cease to be tenure post. Even an outsider could be selected and appointed on the post of Director General. Can such a person be asked to retire prematurely even if he did not complete either the fixed tenure of five years or till he attains the age of superannuation. The Supreme Court answered the question in negative, but observed that the appointment of the appellant was for a five years tenure, but could be curtailed in the event of his attaining the age of 62 years before completing the said tenure. This observation of Hon’ble Supreme Court does not help the petitioner rather it helps the case of the respondents. The petitioner actually belongs to the cadre of Indian Council of Forestry Research and Education and discharged his duties for a considerable period of time. At the relevant time the Rules and Regulations of the Indian Council of Forestry Research and Education were applicable to him. According to those rules the age of retirement is 60 years, only a person belonging to the cadre of Indian Council of Forestry Research and Education could be appointed as Director General of Indian Council of Forestry Research and Education, which was not in the case of DR. L.P. Agarwal (supra), because in the matter of appointment of a Director in All India Institute of Medical Sciences a person other than a cadre of All India Institute of Medical Science could be appointed.

23. The terms and conditions of the advertisement in pursuance to which the petitioner was selected clearly indicates that the terms of appointment of Director General, ICFRE will normally be for a period of five years which can be extended by the Central

Government on the recommendation of the Board of Governors subject to the age of superannuation as ICFRE Rules. The said rules, which we have mentioned earlier indicate that the age of superannuation of the officers of ICFRE will be 60 years. In pursuance of that advertisement the petitioner had applied. He was selected and an offer was given to him to join the post of Director General. The offer clearly indicate that the term of appointment of Director General, ICFRE will be for a period of five years or till the date of his superannuation , as per ICFRE Rules, whichever is earlier. The offer was accepted by the petitioner on the terms and conditions mentioned in the aforesaid letter. Although the Rules do not provide any age of superannuation as far as the post of Director General is concerned, but the Rules clearly provide the age of superannuation of the officer of ICFRE including the Director as 60 years. The advertisement, offer of appointment ad its acceptance by the petitioner clearly shows that the ICFRE Rules will be applicable. Now it is open for the petitioner to resile from the same and stake a claim to continue as Director General until and unless the tenure appointment of five years comes to an end. Actually the said appointment was for a period of five years or till the date of superannuation of the petitioner as per ICFRE Rules, whichever was earlier. According to ICFRE Rules the age of retirement, which made applicable in the case of the petitioner was 60 years, thus he can be retired at the age of 60 years.

24. We are of the view that the petitioner played his innings well during his career as a Scientist, reaching the highest ladder. Initially the petitioner was inducted in the Indian Forrest Service. Thereafter he was appointed as Director in ICFRE and then became its Director General. It was unfortunate that lust for office and power has prompted him to prolong his stay as Director General, Contrary to the terms and conditions of the appointment, which can not be permitted.

25. We are definitely of the view that the writ petition is devoid of merit. It is accordingly dismissed.

26. However, the parties are directed to bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.3.99

1999

March, 30

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

Civil Misc. Writ Petition No. 12618 of 1999

Surendra Prasad **...Petitioner**
Versus
U.P. Cooperative Sugar Factory Federation & other **...Respondents**

Counsel for the Petitioner : Shri C.L. Yadav
Counsel for the Respondent : S.C.
Shri A.K. Mishra

Constitution of India, Article 226- Writ Petition- Question of maintainability- Employee working in Kashi Sahkari Chini Mills Ltd. Aurai- Services governed by the Standing Order-held- no statutory force- the Cooperative Society having been registered under the Co-operative Societies Act- not a State. Held the condition of service is governed by the Standing Orders which has no Statutory force and the Cooperative Societies having been registered merely under the Cooperative Societies Act are not being constituted by any other statute and thus does not become a State within the meaning of Article 12 as has been held in the case of U.P. State Cooperative Land Development Bank Limited (Para 4).

Case law discussed.

AIR 1982- All 342
AIR 1979 SC- 1628
AIR 1995 SC- 1715
1999 (I) LBESR (Alld.) 384
J.T. 1998 (9) SC-81

By the Court

1. The petitioner claims employment under the Dying in Harness Rules n account of death of his father, who was employed as permanent S.B.A. in the Kashi Sahkari Chini Mills Limited Aurai. Mr. A.K. Misra, learned counsel for the respondent raised a preliminary objection to the extent that Dying in Harness Rules does not apply in the Kashi Sahkari Chini Mills Ltd. Since it was not a

State within the meaning of Article 12 of the Constitution and secondly that this writ petition is not maintainable against Kashi Sahkari Chini Mills Ltd., a Cooperative Society in view of the Full Bench decision in the case of Radha Charan Sharma Vs. U.P. Cooperative Federation & others (1982 AIR All 342).

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2. Mr. C. L. Yadav, learned counsel for the petitioner on the other hand contends that the Cooperative Society is affiliated to the federation and that the office of the federation as well as that of the Cooperative Society are Government office and the State Government can exercise control over the affairs of the society. Therefore it is amenable to the writ jurisdiction. He had relied on a decision in support of his contention, which will be dealt with at appropriate stage.

I have heard both the learned counsel at length.

Mr. Yadav relying on Section 2(a-4) of the Cooperative Societies Act contended that this Section 2 (a-4) includes U.P. Cooperative Sugar Factories Federation Ltd. As an apex society in serial no. 7. Therefore, writ is maintainable against it because it is a State within the meaning of Article 12. He relies on Section 3 and points out that the Registrar is appointed by the Government as Registrar of Cooperative Societies. He also relied on Section 122 under which the State Government is empowered to exercise control over the employees of the Cooperative Societies. On these grounds, he contends that this writ petition is maintainable.

3. In the present case, the petitioner’s father was employed in the Cooperative Society, which was affiliated to the federation. Even if the federation is held to be a State within the meaning of Article 12, still then simply by affiliation, the Society cannot become State within the meaning of Article 12. Therefore the definition in Section 2 (a-4) of the said Act does not help Mr. Yadav in order to bring the concerned Cooperative Society within the ambit of a State within the meaning of Article 12. Section 3 empowering the State Government to appoint the Registrar of the Cooperative Society has nothing to do with the concerned Cooperative Societies because the Registrar of Cooperative Societies is the Registrar of All the Cooperative Societies and he altogether functions in a different capacity unrelated to the internal management and affairs with regard to its affairs of the concerned Cooperative Societies. The jurisdiction of the Registrar is prescribed and is confined to the extent as indicated in

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D.K. Seth, J.

the various provisions of the Act and the Rules. By virtue thereof, no characteristics of State is conferred on the Society. Section 31-A requires appointment of certain Government Officers in the Society for the apex society ipso facto does not make the Society a State within the meaning of Article 12 unless all the ingredients as has been specified in the case of Raman Daya Ram Shetty Vs. The International Airport Authority of India (AIR 1979 SC 1628) is satisfied. In the present case the Cooperative Society does not satisfy those ingradiuns. Therefore, Section 31-A cannot help Mr. Yadav in his contention particularly when it has been held in the case of Radha Charan Sharma (Supra) by a Full Bench of this Court that the Cooperative Society is not a State within the meaning of Article 12 of the Constitution and as such not emenable to writ jurisdiction. Section 122 prescribed authority on the State Government to exercise control over the employees of the Cooperative Societies by virtue whereof, U.P. Cooperative Societies Employees' (Centralised Service) Regulation, 1975 has been promulgated. In this case it has not been shown that the employees of the said Society are governed by the said 1975 Regulations. On the other hand, the employees of the said Society are governed by the Standing Orders by the notification dated 4th March,1972. Cooperative Sugar Factories were also included within the ambit of 1975 Regulations but by subsequent notification, Cooperative Sugar Factories have been taken out of the application of the 1975 Regulations. Therefore, the 1975 Regulation as such does not apply. At the same time, Standing Order by which the employee is governed, has no statutory force as has been held in the case of Rajasthan State Road Transport Corporation & another Vs. Krishna Kant (AIR 1995 SC 1715). Therefore, in absence of any statutory force in the Standing Order, the condition of service in relation to the employees, the Cooperative Society does not discharge any statutory obligation in order to make it amenable to writ jurisdiction. The decision in the case of Subhash Yadav Vs. U.P. Cooperative Society & others on which Mr. Yadav had relied on, has not laid down any ratio. On the other hand, it had directed disposal of the representation in accordance with Regulation 104 of the 1975 Regulations, which does not apply in the present case. Therefore, the said decision does not help Mr. Yadav.

4. He had relied on a decision in the case of Subhash Chandra Singh Vs. Fertilizer Corporation of India Limited (1999(1) LBESR 384 (All). In the said case it was a Fertilizer Corporation of India Limited, which was involved. The Fertilizer Corporation of India Limited was Company and not a Cooperative Society as it appears

from the said judgment and, therefore, the decision thereof does not help us which is related to Cooperative Societies.

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D.K. Seth, J.

He also relies on the decision in the case of U.P. State Cooperative Land Development Bank Ltd. Vs. Chandra Bhan Dubey & others (JT 1998(9) SC 81). The said decision does not help Mr. Yadav on the face of the decision in the case of Radha Charan Sharma (Supra). Inasmuch as in the said case, the U.P. State Cooperative Land Development Bank Ltd. Was a held to be a State since the said Bank was constituted by U.P. Cooperative Land Development Bank Act,1964 and was governed by the U.P. State Cooperative Bank Rules,1971 Act 1964. Even employees' service rules were framed under the provisions of the said Act and the rules. On this ground, it was held that it was State within the meaning of Article 12 since while discharging its relation with its employees, if discharges statutory obligation conferred on it by virtue of the said Rules, which was statutory in nature having statutory force, which is completely distinguishable and distinct from the present case where (the condition of service is governed by the Standing Orders, which has no statutory force and the Cooperative Societies having been registered merely under the Cooperative Societies Act are not being constituted by any other statute and thus which does not become a State within the meaning of Article 12 as has been held in the case of U.P. State Cooperative Land Development Bank Limited (Supra).) Therefore, this judgment is also distinct and distinguishable from the Cooperative Societies on which the father of the petitioner was an employee.

For all these reasons, I am unable to agree with the contention of Mr. Yadav though argued strenuously.

The writ petition, therefore, fails and is accordingly dismissed. No cost.

Petition Dismissed.

ORIGINAL JURIDICTION
CIVIL SIDE
DATED:ALLAHABAD 13.7.1999

1999

July, 13

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

Civil Misc. Writ petition No. 28566 of 1997

Amar pal **...Petitioner**
Versus
District Inspenctor of Schools & othres **...Respondent**

Council for the Petitioner : Shri Vinod Sinha
Council for the Respondents: S.C.
Shri K.P. Shukla
Shri A.K. Yadav

Constitution of India, Article 226, Right to appointment candidate duly selected by commission DIOS directed the concern management for joining appointment resisted by the management claiming the post in question falls under 50 % promotion quota – DIOS rejected the claim of promotion quota-order became final- held selected candidate have every right to work as lecturer as per direction of DIOS.
Held.-
The petitioner was selected by the Commission, according to sub-rule(5) of Rule and was allotted to the Institution . But the said vacancy at National School having not been available by reason of an interim order passed, he was allocated another school, where also he could not be adjusted. In such circumstances the District Inspector of school had sought to accommodate and adjust him in the present school.. The District Inspector of School who has to intimate and to see that the selected provision of law cannot conceive all kinds of exigencies . The case in course of administration certain exigencies corps up, it may be handled or tacked administratively. Adjustment of a selected candidate in one school or the other. Right beyond the filling up of the post.[Para 15]

Case law discussed.
1997 (2) ESC

By the Court

1999

Amar Pal
Vs.
D.I.O.S. & others

D.K. Seth, J.

1. The petitioner was selected by U.P. Secondary Education Service Commission as a Lecturer in Civics on 5th April,1996. The petitioner was assigned to Udai Raj Hindu Inter College Kashipur, Nainital. Since in view of an interim order granted on a writ petition filed by one of the teacher in the said School claiming promotion to the post of Lecturer in Civics, the petitioner was not appointed in the said school. The Commission thereafter assigned Rastriya Vidyalaya Inter College, Khair, Aligarh. It is alleged that on account of some dispute in the said School, the petitioner could not be accommodated therein . In such cistumstances the District Inspector of Schools by his letter dated 8th October, 1996 assigned Babu Lal Jain Inter College, Aligarh in order to adjust the petitioner. Despite successive letters written by the District Inspector of Schools, the school authority did not allow the petitioner to join. On this background, the present writ petitions has been filed seeking appropriate relief.

2. The respondents District Inspector of School had filed his counter affidavit. The Committee of Management represented by Mr. K.P. Shukla had also filed a counter-affidavit as well as a supplementary counter-affidavit. Mr. Vinod Sinha , counsel for the petitioner had filed a rejoinder-affidavit to the counter –affidavit. He filed a rejoinder-affidavit to the counter –affidavit . He does not propose to file rejoinder affidavit in respect of the supplementary counter-affidavit since he intends to rely on a document signed by the Principal and the Manager of the school in order to counter the statements made in the supplementary counter-affidavit. Mr. K.R. Singh had supported the counter affidavit filed on behalf of the District Inspector of the Schools relying on the relevant records annexed therewith.

3. Mr. Vinod Sinha, learned counsel for the petitioner contended that since the petitioner has been selected by the Commissioner and he could not be adjusted against the school allocated on two earlier occasions by the Commission , the District Inspector of Schools is empowered by virtue of circular dated 1st June, 1997 issued by the Government to adjust the petitioner against any vacancy in a school within the district. Therefore, the assignment of the petitioner to Babu Lal Jain Inter College cannot be questioned. The committee of management has no locus standie to oppose such adjustment. Therefore, according to him, the writ petition should be allowed .

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4. Mr. K.P. Shukla, learned counsel for Committee of Management on the other hand contends that the post sought to be filled up by adjustment of the petitioner is against 50% promotional quota and as such the said post cannot be filled up by direct recruitment. He next contends that the Commission has no jurisdiction to select a candidate for the petitioner's school since no requisition was sent as yet for filling up the vacancy by direct recruitment. He next contends that the Commission cannot assume jurisdiction to select a candidate for the vacancy in the school in the absence of any advertisement published in respect of the said vacancy by the Commission before making the selection. He next contends that if no selection is made in respect of a particular vacancy then the Commission cannot have any jurisdiction to assign the petitioner or any selected candidate to such school. He next contends that in the present case the assignment of the petitioner to the respondent's school was not made by the Commission. On the other hand, it is made by the District Inspector of Schools. According to him, the District Inspector of Schools in not authorised to assign or allocate school to selected candidates. Therefore, the petitioner is not entitled to join the school. He next contends that since the post is to be filled no by promotion, therefore, there is no scope for filling up the post by direct recruitment and the post should be filled up by promotion from among the eligible candidates working in the school. He had relied on Rules 10,11,12 and 13 of the U.P. Secondary Education Service Commission Rules, 1995 contending that the school had already sent requisition for filling up the vacancy by promotion, which ought to have been allowed. He also relies on the decision in the case of committee of Management, Tarun Inter College, Kunda, District Mau. Vs. District Inspector of Schools , Mau & others (1997(2)ESC 1350(All) in support of his contention.

5. I have heard both the learned counsel at length.

6. It appears that there was a vacancy in the school in respect of which a requisition was forwarded by the Committee of Management to the District Inspector of Schools on 27th July,1995 together with the particulars of the eligible teacher in the Form No.6 as required under Rule 11 of the 1995 Rules. The District Inspector of Schools by his letter dated 2nd july,1996 informed the school authority that the vacancy was to be filled up by direct recruitment since there are already 4 posts of Lectures filled up by promotion out of 6 sanctioned strength. Therefore, vacancy could not be filled up

by promotion and, therefore, appropriate requisition be sent. There in nothing on record to show that the school authority had ever sent any requisition with regard to show that the school authority had ever sent any requisition with regard thereto. The particulars of the teachers forwarded along with the requisition by the school was sent by the Manager as well as the principal. A perusal of the same, which is Annexure C.A. 1 to the counter affidavit filed by the District Inspector of Schools, shows that the teachers from serial nos. 1 to 5 who were holding posts of Lecturers were all appointed between 1961 and 1969. The Lecturers in serial no. 1 to 4 are shown to have been holding the post of Lecturers by promotion. Thus out of 5 posts shown in the said list 4 were filled up by promotion while the 5th post was filled up by transfer. It is not disputed that there are six posts of Lecturers. According to Rule 10, 50% of the posts are to be filled up by promotion. Admittedly 50 per cent of posts are 3. But the fact remains that four of the posts of the Lectures were filled up by promotion. Therefore, one post, which could be filled up by direct recruitment has since been filled up by promotion. Thus there is no scope for filling up the vacancy by promotion.

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7. Then again the said claim or requisition of the school authority for filling up the vacancy by promotion was refused by the District Inspector of Schools on 2nd July, 1996. This order has since not been challenged by the Committee of Management. So long as the said order remains, the Committee of Management cannot come out with a case for claiming the posts to be filled up by promotion. The school authority having not asaailed the same, they appears to have admitted the position. Mr. Shukla has not shown any thing to this court that this order was ever challenged by the Committee of Management. He has also not disputed the veracity and correctness of Annexures C.A.1.The Annexure C.A. appears to be zerox copy of the original which bears the signature of the Manager and the principal, which is apparent from the Zerox copy of the said document were the signatures also figures in the zerox copy. Mr. Shukla submits that he is not disputing the signatures but he is submitting that the copy has not been given to him. Therefore, the court had supplied the copy to Mr. Shukla for inspection. Mr. Shukla had inspected the same. After inspecting, Mr. Shukla did not dispute the said signature. Then again in the counter affidavit, it has not been p-leaded that the requisition for filling up the vacancy by promotion sent on 27th July, 1995 is still pending. It is not the case of the school authority that instead of deciding the same the vacancy is being sought to be filled up. It is also not contended that no communication

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has been received by the school authority with regard to the requisition .

8. Be that as it may. The Committee of Management was well aware of the situation as to how the posts of Lecturers were to be filled up. That apart, a statement has come from the District Inspector of Schools on the basis of the records available in his office, which is corroborated by the particulars of the teachers of the said school contained in Annexure C.A.1 There being no discrepancy in between the said statement particulars of teachers and the letter dated 2nd July, 1996, there is no scope for disputing the same. Thus the school authority knew it well that the said post was not to be filled up by promotion since the promotional quota was already full in excess by one post.

9. Thus the ground taken to oppose the appointment on the ground that the post is from the promotional quota appears to be a mis-statement made by the Committee of Management knowing full well and having reason the same to be incorrect and untrue which statement has also been made through supplementary counter-affidavit affirmed by Mr. Santosh Kumar Jain, The Manager. It has been stated that the post is to be filled up by promotion within the 50% quota which is true to his knowledge. He has also stated that the vacancy was not intimated to the Service Commission according to Rule 11 of the 1995 Rules. The fact remains that this vacancy was intimated by the committee of management by its letter dated 27th July,1995, according to Rule 11 of the 1995 Rules. Though claiming it to be a vacancy to be filled up from promotional quota but still he has made a statement that the committee of management has not intimated the vacancy to the Service Commission, in paragraph 2 of the supplementary counter-affidavit. According to Rule 11 of the 1995 Rules, such intimation to the Commission in so be forwarded through the District Inspector of Schools. Thus it appears that the statement made in paragraph 2 is incorrect on the face of the record. Similar statement made in paragraph 5 of the supplementary counter-affidavit with regard to the statement that the vacancy was within 50% quota, appears to be incorrect having regard to the Annexures C.A.1. Thus he has made incorrect statement in paragraph 2 as well. In such circumstance there are reasons to believe that the said Manager Sri Santosh Kumar Jain has purported to use some materials on oath before the court of law knowing or believing or having reason to believe the same to be incorrect.

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10. Thus it is apparent on the face of the record that the post against which the petitioner is being sought to be adjusted is not a promotional post.

11. Admittedly, the persons who could have been eligible for promotion have not raised any grievance against such adjustment. Neither of them came forward to challenge such appointment. On the face of the record, the Committee of Management could not have acquired any locus standie to challenge the adjustment or appointment of the petitioner even if the posts were to be filled up by promotion unless there were eligible candidates available and such candidates are agreeable or intend to be promoted. If such candidates themselves are not eager to be promoted or do not come forward to claim promotion, in that event it is not open to the Committee of Management to claim locus standie to challenge such appointment through direct recruitment by the Commission. Though the vacancy was to be notified according to Rule 11 of the 1995 Rules according to time stipulated therein, which , admittedly, took place some times in 1995, yet the committee of Management has mis-led the District Inspector of Schools by sending requisition for filling up the vacancy by promotion and did not send proper requisition for filling up the said post. thus the committee of Management had created the situation by manupulating the whole process. There cannot be any earthly reason to believe such a step was taken by the management with bonafide intention. On the other hand, from the facts, the conduct of the Committee of Management seems to be contrary.

12. In Paragraph 2 of the supplementary counter affidavit , it is stated that no requisition was sent by the Committee of Management when the Committee of Management when the Committee of Management was bound to said requisition according to Rule 11 of the 1995 Rules. In such cases, according to sub-rule (4) of Rule 11 of the 1995 Rules, if vacancies are not notified by the management, in that event it is open to the Inspector to notify such vacancy to the Commission. Thus the committee of Management having not discharged its own duty in accordance with Rule 11, there having been no teacher claiming the promotion to the post of Lecturer and none having come forward to challenge the said appointment, the Committee of Management cannot assume locus standi to challenge the adjustment or appointment of the petitioner in this school.

13. It is not open to the Committee of Management to challenge the selection by the Commission on the ground that there

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was no advertisement with regard to the vacancy of the concerned school. In any event, the Committee of Management cannot assume jurisdiction to challenge the selection by Commission or the allocation of the Institution by the Commission. If such a proposition is accepted, in that event, it will completely render the whole system un-workable. In that event all appointment should be challenged by the Committee of Management. That apart, the test of locus standi is to be determined on the basis as to the interest of the school authority is to see that the education is properly administered by the school and that there are teachers in the school and there is no vacancy continuing. Whether such vacancy is filled up by promotion or by recruitment or whether such vacancy be filled by one teacher or the other, is no concern of the Committee of Management though it may question the qualification of the candidate selected.

14. In the present case the qualification of the petitioner is not under challenge. Whether the said vacancy is filled up by the petitioner or any other teacher is no concern of the Committee of Management, since the Committee of Management will not suffer any thing. On the other hand if the vacancy is filled p, the Committee of Management would be benefited. Thus the Committee of Management cannot claim locus standi to oppose or challenge the selection.

15. The petitioner was selected by the Commission, according to sub-rule (5) of Rule 12 of the 1995 Rules and was allocated to the Institution. But the said vacancy at Nainital School having not been available by reason of an interim order passed, he was allocated another school, where also he could not be adjusted. In such circumstance the District Inspector of School had sought to accommodate and adjust him in the present school. The second allocation was made in a school at Khair, Aligarh. The adjustment was sought to be made in the concerned school, which is also situated at Aligarh. Mr. Vinod Sinha had drawn my attention to a communication made on 21st November, 1996 contained in Annexure 5 to the writ petition. In the said communication, the District Inspector of Schools had communicated the Committee of Management that the requisition for filling up a vacancy by promotion was declined by the District Inspector of Schools through his letter dated 2nd July, 1996 and that in terms of Circular dated 1st June, 1996 the District Inspector of Schools had adjusted the petitioner against the said school. The circular dated 1st June, 1996 is

Annexure 1 to the supplementary affidavit, where from it appears that when there is any difficulties in giving appointment in a school

Allocated to a candidate by the Commission, in such cases such candidates may be adjusted against existing vacancy within the district by the District Inspector of schools. Thus by reason of such Circular, the District Inspector of Schools is empowered to allocate or adjust the petitioner against the vacancy of the concerned school. Mr. Shukla had contended that the said Circular cannot over-ride Rule 11 of the 1965 Rules, or the relevant provisions of law, Since it is only an administrative instruction the question of allocation of a school is in fact administrative action. In case of administrative exigencies whole system or procedure has to be adjusted. The power of the Commission is to allocate a school. Every time whenever there is difficulty, if it has to revert to the Commission, in that event the Commission would be burdened with the un-necessary exercise in terms of Rule 13. It is the District Inspector of Schools who has to intimate and to see that the selected candidates are accommodated and adjusted in the school. A provision of law cannot conceive all kinds of exigencies. In case in course of administration certain exigencies crops up, it may be handled or tackled administratively. It is only a question of adjustment of a selected candidate in one school or the other. It is not fundamental to the question of selection . It does not deny any right of the committee of Management or anyone else. The extent that the candidate has been selected by the Commission is not fit to join the school. But such a stand cannot be taken unless it is shown that he lacks the requisite qualification for being so selected. Unless some amount of maneuverability is provided, it is not possible to run the administration. There must be some scope or space for movement for the administration to suit a particular situation. 'When one such allocation is made to a particular candidate to a particular school, such candidate cannot be adjusted in any other vacancy. If such an interpretation is accepted the net result would be to disturb the whole system jeopardising the interest of institution keeping the posts vacant be adjusted in any other vacancy. If such an interpretation is accepted the ner result would be to disturb the whole system jeopardising the interest of institution keeping the posts vacant for an indefinite period while affecting the rights of such selected candidates. It is not a question of fundamental or legal right of the Committee of Management attempted to be put forth through the question raised. The Committee may be interested n the filling up of the vacancy. It does not gain personally if it is filled up by promotion or transfer or recruitment. It

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cannot claim legal right beyond the filling up of the post. It is the interest of the education, which is paramount. A post cannot be left vacant for an indefinite period though a candidate by the Commission is available. Then again the Circular dated 1st June, 1996 is still holding the field and has not been challenged by anyone else. Neither the School authority had challenged the same. Unless the same is challenged by the respondents, in a writ petition filed by the petitioner claiming the relief under the said Circular, it is not open for this Court to enter into such question unless it is shown that the same is wholly without jurisdiction or that there is no existence of such Circular.

16. As observed earlier, I do not find any reason to hold that their said Circular is issued without any jurisdiction. In as much as the State Government in its administration of education is empowered to issue directions from time to time. Having regard to the hardship and difficulties faced, It is open to the State Government to issue such direction in order to ameliorate the situation in the best interest of education. Thus I find that there is no illegality or irregularity in the issuance of the Circular dated 1st June , 1996.

17. Thus there is no infirmity in the adjustment of ht petitioner in the concerned school by the District Inspector of Schools in the facts and circumstances of the case.

18. The decision in the case of Committee of Management, Tarun Inter College, Kunda (Supra) does not apply in the present case since the same had dealt with the question of appointment of un-qualifies teacher. It was not a case of duly qualified candidates selected by the service Commission. In the said case the teachers sought to be appointed were not qualifies for the post, which is not a case in the present writ petition. Therefore no reliance can be placed on the said decision for the purpose of the contention raised by Mr. Shukla in the present case.

19. In the result the writ petition succeeds and is allowed accordingly. The Committee Of Management , including the Manager and the Principal/Head Master of the School is, hereby, directed to allow the petitioner to join the school as soon as he reports for duty, which he should do on or before 31st July, 1999.

20. Let a writ of mandamus do issue accordingly. The respondent District Inspector of School shall ensure compliance of

this order and take appropriate steps. In case the petitioner is still refused joining by the school authority, in the event it would be open to the District Inspector of School for initiating proceedings for superannuation of the Committee of Management or for appointment of authorised controller Drawing and Disbursing officer, as the case may be, if so thinks fit.

21. Since I cannot but observe that the School authority had taken unreasonable stand and attempted to mislead the court even by affirming the affidavits with incorrect statements having reason to believe that the statements were incorrect or untrue, therefore the following direction is being issued in order to send a correct signal that the proceedings of a court should not be taken lightly and the sanctity of the court is not violated or flouted with immunity.

22. In view of such mis-statements, the learned Registrar is, hereby, directed to issue a notice upon Sri Santosh Kumar Jain to explain or show cause as to why a proceeding under Section 340 the Code of Criminal Procedure should not be initiated against him before the appropriate court. Such notice has to be issued within four weeks from the date of receipt of the record. The record be placed before the learned Registrar within two weeks from date. The Registrar shall give six weeks to Sri Santosh Kumar Jain to submit his explanation. After the explanation is submitted, the Registrar shall place the record before this Court within two weeks from the date of receipt of the said explanation intimating Mr. Jain the date on which the matter will be listed before this Court.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.7.99

1999

July, 30

BEFORE
THE HON'BLE D..S.SINHA, J.
THE HON'BLE ONKARESHWAR BHATT, J,

Civil Misc. Writ Petition No.41064 of 1992

Union of India another ...Petitioner
Versus
M/s B. M. Electric press and another ...Respondents

Counsel for the Petitioners Shri Lalji Sinha
Counsel for the Respondents

Railway claim tribunal act 1987, sec.2 (b) section 15 jurisdictional bar appointed day' means the date 8.11.89 when the tribunal was established the court or the authorities are not entitled to exercise any jurisdiction or power regarding the claim of compensation for loss destruction, damage, deterircation, non delivery of goods or animal entrusted to railway administration complaint filed under section 12 of the consumer protection act held barred by section 15 of the tribunal Act. (para12)

Thus, in November 1991 , when the respondent no.1 had filed the complaint under section 12 of the consumer protection act, the district consumer redressal forum, Aligarh ,the respondent no.2 had no jurisdiction to entertain the said complaint. Likewise, on 8th June 1992 the forum did not have jurisdiction to pass the impugned order. Entire proceedings before the respondent no.2 were to tally without jurisdiction, rendering the impugned order void.

By the Court

1. Head Shri Lal Ji Sinha, learned counsel appearing for the petitioners. Despite being duly served, the respondents have not put in appearance to contest the petition

2. The order dated 8th June, 1992 passed by the District Consumer Redressal Forum, Aligarh, the respondent No.2, established under the Consumer Protection Act, 1986, hereinafter called the Consumer Protection Act, purporting to allow the Claim Petition No.323 of 1991 M/s B.M. Electric Press, Aligarh Vs. Union

of India and another, is under challenge in this petition under Article 226 of the Constitution of India

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Onkareshwar Bhatt, J.

3. Learned counsel of the petitioners contends that the impugned order is totally without jurisdiction in view of the provisions of Section 15 of the Railway Claims Tribunal Act, 1987, hereafter called the Railway Claims Tribunal Act.

4. On 30th May, 1989, M/s Hindustan paper Board Corporation Ltd. booked with Northern Railway 383 bundles of papers from Panchgram Railway Station to Aligarh in favour of the respondent no.1 During the course of delivery of the goods it was discovered that that one bundle of papers was short and 20 bundles were damaged. This let the respondent no.1 file before the respondent no.2 the Claim Petition No.323 of 1991, under section 12 of the Consumer Protection Act, 1986 hereinafter to as the Consumer Protection Act, in November, 1991, for loss and damages of the goods in question.

5. Upholding the claim of the respondent no.1. the respondent no.2 passed the impugned order dated 8th June 1992 directing the petitioners to pay a sum of Rs.7,849.50 Paise together with 12% interest with effect from June 1989,and Rs.100/ by way of costs.

6. Section 15 of the Railway claims Tribunal Act, provides that on and from the appointed day, no court or other authority shall have, or be entitled to, exercise any jurisdiction, powers or authority in relation to the matters referred to in sub section (1) and (1-A) of section 13 of the Act.

7. The matters referred to in sub section (1) of section 13 of the Act, inter alia cover the compensation for loss, destruction, damage, deterioration or non delivery of animals or goods entrusted to a railway administration for carriage by railway.

8. Thus, on and form the appointed day, no Court or other authority had or is entitled to exercise any jurisdiction, powers or authority in relation to the claim for compensation for loss destruction, damage, deterioration non delivery of animals or goods entrusted to a railway administration for carriage by railway.

9. The 'appointed day' has been defined in sub section (b)of section 2 of the Railway Claims Tribunal Act to mean the date with

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effect from which the Claims Tribunal is established under Section 3 of the Act which ordains that the Central Government shall by notification, establish a Claims Tribunal to be know as the Railway Claims Tribunal to exercise the jurisdiction powers, and authority conferred on it by or under the Act.

10. In exercise of powers conferred under section 3 of the Railway Claims Tribunal Act, the Central Government issued a notification dated 5th October 1989, published in Gazette of India Extra part II section 3 (ii), dated 5th October 1989, P.2, purporting to establish Railway Claims Tribunal with effect form the 8th day of November 1989and declaring the said to be a 'appointed day' within the meaning of Clause (b) of section 2 of the Railway Claims Tribunal Act.

11. In view of the establishment of the Railway Claims Tribunal with effect from 8th November 1989, and declaration of that date to be the 'appointed day, for the purpose of section 15 of the Railway Claims Tribunal Act 8th November, 1989 is the 'appointed day', and from that date jurisdiction of every court or other authority in relation to the matters covered in sub section (1) and (1-A)of section 13 of the Act stands clearly excluded.

12. Thus, in November 1991, when the respondent no.1 had filed the complaint under section 12 of the consumer protection Act, the District Consumer Redressal Forum, Aligarh the respondent No 2 had no jurisdiction to entertain the said complaint likewise, on 8th June, 1992, the Forum did not have jurisdiction to pass the impugned order. Entire proceedings before the respondent no.2 were totally without jurisdiction, rendering the impugned order void.

13. In the result, the petition succeeds and is allowed. The impugned order dated 8th June 1992 , a photocopy whereof is Anexxure 2 to the petition is quashed. There is no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 23.7.99

BEFORE
THE HON'BLE V.M.SAHAI,J.

1999

July, 23

Civil Misc. Writ Petition No.14172 of 1989

Sohan Lal Umrawo ...Petitioner
Versus
Sachiv / Mahaprabandhak Fatehpur District Cooperative Bank Ltd. and another ...Respondents

Counsel for the petitioners: Shri B.P.Srivastava
Shri Raj Kumar

Counsel for the Respondents Sri H.R.Mishra
Sri A.Kumar

Constitution of India , Article 226 **Legal presumption show cause notice send though Registered post deniol by the delenquent employee High Court declined to interfere as there shall be every presumption of service, unless otherwise Is proved.**

1998 Sec. (EJS) 1837
1997 (30)Sec 72
The Contention of the petitioner that show cause notice was not served upon him is not acceptable, in view of he fact that the show cause notice was sent by the registered post to the petitioner. Moreover, no foundation has been laid in the writ petition that the show cause notice not served upon him. A letter sent by registered post is presumed to be served unless rebutted. Since the petitioner has not been able to rebut it there is no infirmity or illegality in the impugned order of removal. The order passed by respondents is liable to be maintained. [Para 4]

By the Court

1. The petitioner was appointed as Gurad in 1963 in District Co-operative Bank Ltd., Chandpur district Fatehpur. He worked for some time as cashier/clerk. While working as cashier he was issued a charge sheet for embezzlement of funds. In the departmental disciplinary proceedings he was found guilty of the charges framed against him. The punishing authority issued show cause notice to the petitioner by registered post on 18/21-5-87 as to why the petitioner

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V.M. Sahai, J.

be not removed from the services. Therefore, by an order dated 29.4.89 (Annexure-3 to the writ petition) the petitioner was removed from the service, with the concurrence of the Institutional Service Board. The removal order has been challenged in the instant writ petition.

I have heard Shri B.P. Srivastava learned counsel for the petitioner and Shri H.R. Mishra learned counsel appearing for the respondents.

2. Counsel for the petitioner argued that no show cause notice was served on the petitioner dated 18/21-5-87 and unless the respondents proved that it was actually served upon the petitioner, till then it cannot be presumed to have been served upon the petitioner and the dismissal order was violative of principles of natural justice. He placed reliance on the judgement of Apex Court in Union of India Vs. Deenanath Shantaram Karekar and others 1998 SCC (L&S) 1837. Relying on paragraph 10 of the aforesaid of the judgment the counsel for the petitioner urged that since the show cause notice was not actually served upon him the removal order passed against him is vitiated and is liable to be set aside.

3. On the other hand, the Shri H.R. Mishra learned counsel for the respondent urged that in the writ petition it was not stated that the show cause notice 18/21-5-87 was not served upon the petitioner. Therefore, the respondents did not have any opportunity to meet the contention of the counsel for the petitioner. He further points out that in paragraph 19 of the counter affidavit it has been stated that the show cause notice was sent by registered post and was served upon the petitioner.

4. It is well settled by apex court in the case of Indian Oil Corporation and another Vs. Ashok Kumar Arora 1997 (3) SCC 72 that this court under Article 226 of the Constitution of India does not exercise the power of appellate court authority. The scope of interference of the court is very limited and it can therefore with the departmental disciplinary proceedings on the ground of non observance of principle of natural justice. Therefore, unless the case of the petitioner is covered by the exceptions as mentioned by the apex court in Indian Oil Corporation (supra) the petitioner cannot succeed. The contention of the petitioner that show cause notice was not served upon him is not acceptable, in view of the fact that the show cause notice was sent by the registered post to the petitioner.

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V.M. Sahai, J.

Moreover, no foundation has been laid in the writ petition that the show cause notice was not served upon him. A letter sent by registered post is presumed to be served unless rebutted. Since the petitioner has not been able to rebut it there is no infirmity or illegality in the impugned order of removal. The order passed by respondents is liable to be maintained.

In the result the writ petition fails and is accordingly dismissed.

There shall be no order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 6.5.1999

1999

May, 6

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

Civil Misc. Writ Petition No. 18782 of 1999.

Manohar **....Petitioner**
Versus
Executive Engineer, Electric Distribution Khand (1st) and another **...Respondents**

Counsel for the Petitioner : Dr. Ambar Nath Rai
Counsel for the Respondents : S.C.
Shri S.P.Mehrotra

<u>Dying in harness Rules 1974, rule 5 and 7 constitution of India, Article 226</u> appointment on compassionate ground-eldest son living separately - the younger son was given appointment after due verification made under rule 7 of the Act- the eldest son is living separately or not -held- disputed question of fact cannot be decided by this Court.

Dying in Harness Rules were incorporated to enable the bereaved family to save itself from destitution. The interest of the widow and the other members are required to be secured. If there is a dispute particularly between the widow and one of the son, in that event, in view of Rule 5 , it is the claim of the widow, whose welfare is to be given preference. At the same time, the welfare of the maximum number of the members of the family, particularly those

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D.K. Seth, J.

who are dependent of the widow, are to be taken care of. Both Rules 5 & 7 are to be read together. The materials produced before this Court indicates that such consideration has been made and that the widow and the second son is not supporting the petitioner as apparent from the fact that Ramesh Kumar has been added as respondent no. 4 and the widow did not join the petitioner as petitioner, which is sufficient indication that there is a rift between the petitioner and the widow and the other members of the family.[Para 3]

By the Court

1. The father of the petitioner died in harness in 19th August, 1996. The petitioner applied for employment on compassionate ground on 9th October, 19996. Under the Dying in Harness Rules, 1974. It is alleged that the petitioner is the eldest son of his mother and has two brothers. Since the appointment was not given, the petitioner moved a writ petition being writ petition no. 21275 of 1998, which was disposed of on 7th July, 1998 by directing the respondents to consider the petitioner's representation in accordance with law. The said representation was accordingly decided by an order dated 22nd March, 1986, which is Annexure 4 to the writ petition. This order has since been challenged by the petitioner on the ground that instead of giving appointment to the petitioner, the appointment has been proposed to be given to his younger brother Ramesh Kumar. According to him, Rule 5 of the Dying in Harness Rules provides that such employment would be available only to the person who has applied for the same. Therefore, by reason of Rule 5, the petitioner's brother Ramesh Kumar, who never applied for employment, could not be given employment superseding the claim of the petitioner who had applied for the same. Therefore, the impugned order should be quashed and the respondents should be directed to give appointment to the petitioner under the Dying in Harness Rules.

2. Mr. S.P.Mehrotra counsel for the respondents opposed the above contention raised by Dr. Ambar Nath Rai, counsel for the petitioner relying on Rule 7 of the said Rules, wherein it has been provided that while granting appointment , it is incumbent on the employer to ascertain the suitability of the candidate having regard to the welfare of the maximum number of the family members as well as the widow. Relying on Annexure 3 to the writ petition, Mr. Mehrotra points out that both the petitioner as well as Ramesh

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Kumar were claiming the employment, which is indicated in paragraph 1 of the said document. Where as in paragraph 2, it has mentioned that the petitioner is the eldest son but the widow had disagreed with the proposal for giving appointment to the petitioner on the ground that the petitioner is married and is living separately and he his no connection with the family and she was eager for the appointment of Ramesh Kumar. Therefore, the decision to give appointment to Ramesh kumar, is in commensurate with Rule 7 of the said Rules,. Thus, according to him, there is no infirmity in the order. According to him. Rule 5 cannot be read in isolation irrespective of Rule 6. Rule 5 has to be read along with Rule 7. A provision or principle of law cannot be interpreted bereft of the context and in isolation. It has to be given full meaning having regard to the contest and object and purpose as apparent from the provision of law itself. On these grounds, Mr. Mehrotra contends that the writ petition should be dismissed.

I have heard both the learned counsel at length.

3. Admittedly, the petitioner is the eldest son. There is no indication that the petitioner's brother Ramesh Kumar had ever applied on the pleadings. But from Annexure 3, it appears that Ramesh Kumar is also one of the claiments. Therefore in absence of sufficient material, it is not possible to hold that Ramesh had never applied for the post. At the same time, the widow had claimed that the eldest son is living separately with his family and has no connection with her family. It is a question of fact which this Court cannot enter into. Then again Rule 7 requires the employer to ascertain the suitability as well as to look at the welfare of the family to ensure welfare to the maximum number of the members of the family, particular the widow. As rightly contended by Mr. Mehrotra, a statute has to be read as a whole. A provision cannot be interpreted out of context or in isolation. It has to be interpreted having regard to the entire scheme so that it farthens the object and purpose. The Dying in Harness Rules were incorporated to enable the bereaved family to save itself from destitution. The interest of the widow and the other members are required to be secured. If there is a dispute particularly between the widow and one of the son, in that event, in view of Rule 5, it is the claim of the widow, whose welfare of the maximum number of the members of the family, particularly those who are dependent of the widow, are to be taken care of. Both Rules 5 & 7 are to be read together. Rule 5 is enabling provision by which the obligation is created to give appointment to one of the member of

the family. But what should be the consideration for giving any such appointment and what consideration should weigh with the employer to give such appointment, are specified in Rule 7. Therefore, it is open to the respondents to consider the case of such person, who would best serve the purpose of the said Rules in terms of Rule 7. The materials produced before this Court indicates that such consideration has been made and that the widow and the second son is not supporting the petitioner as apparent from the fact that Ramesh Kumar has been added as respondent no. 4 and the widow did not join the petitioner as petitioner, which is sufficient indication that there is a rift between the petitioner and the widow and the other members of the family.

4. Be that as it may, these are only presumptive. This Court sitting in writ jurisdiction cannot go into the disputed question of fact on the face of the record. The question being disputed and the same having settled by respondents having regard to Rule 7of the said Rules, I do not see any reason to interfere with the same.

The writ petition fails and is accordingly dismissed. No cost.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.7.99

1999

July, 21

BEFORE
THE HON'BLE V.M. SAHAI, J.

Civil Misc. Writ Petition No. 11508 of 1992

Banshi Lal Singh **...Petitioner**
Versus
Uttar Pradesh Secondary Education Services and others **...Respondents**

Counsel for the Petitioner : Shri T.N. Tiwari
: Shri Ashok Khare
: Shri P.P. Srivastava

Counsel for the Respondents : Shri A.K. Singh
: Shri Satya Poot Mehrotra

: Shri S.N. Srivastava
: Shri Irshad Ali
: Shri Rajiv Kumar Singh
: S.C.

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U.P. Secondary Education Services & others

V.M. Sahai, J.

<u>Constitution of India, Article 226</u>-Scope of Judicial Review Two different punishments awarded by the different authorities for same and common misconduct in identical facts and circumstances held-system of justice founded on rule of law-petitioner be awarded same punishment as awarded to other C.T. grade Teachers.
HELD-
Normally this court should not substitute its own conclusion on the penalty and Impose some other penalty. However, this court is not precluded from interfering in exceptional circumstances. Our system of justice is founded on rule of law. Fair play is one of its important pillars, if the court finds any disturbance to it can always restore the balance. In this case due to two different orders by two different authorities on identical facts and similar situation has resulted in serious injustice. The C.T. grade teachers are working since 1992 whereas the petitioner is out of service not because his conduct was in any manner worse than others but because his approving authority was different. But the effect is so severe that it shocks the conscience of the Court as laid down in B.C. Chaturvedi (Supra). It would be fair and just that the petitioner be awarded some punishment as was awarded to C.T. Grade teachers. [Para 11]

<u>Case law discussed</u>.
AIR 1996 SC-1561
1997 (3) Sec. 72
AIR 1996 SC 484
1998 (2) SEC 407

<u>By the Court</u>

1. The short question that arises for consideration in this petitions whether where four teachers are charge sheeted for the same misconduct and punishment or removal from service is proposed by the committee of management which is modified with regard to three teachers by District Inspector of Schools to stopping of one increment for one year, whether the punishment of removed from service awarded to the petitioner, on parity, can be modified on the ground that the co-delinquents on identical charges have been awarded minor punishment.

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2. The short matrix of the case is that the petitioner was a confirmed Assistant Teacher in L.T. Grade working since 1.7.70 in Rajarsh Purshottam Das Tandon Uchchatar Madhymaic Vidyalay, Naini, Mahewa, District Allahabad (in brief institution). He and three teachers working in C.T. Grade namely, Laxmi Kant Bhatt, Ram Krishna Singh and Shiv (in brief C.T. Grade teachers) were issued charge sheet for misconduct on the same and identical charges. The charges were that in the annual internal examination of the institution of 1983 the teachers refused to sign and accept the notice dated 13.4.83 wherein detailed information and programme of examination was circulated ; though in the first meeting of the examination from 7.15. a.m. to 9.45 a.m. the teachers participated but in the second meeting of the examination from 10.00 a.m. to 12.00 noon they remained absent; in the examinations held on 2.3.4 and 5 May 1983 they did not record as to how many students were absent. The charges were replied by all the four teachers. The enquiry officer submitted his report and found the petitioner and other C.T. Grade teachers guilty of indiscipline, insubordination and dereliction of duty. The management of the institution resolved to remove the teachers from service. The management sent the proposal for removal from service with regard to C.T. Grade teachers to District Inspector of Schools as prior approval for removal is required by law. Since the petitioner was Assistant Teacher L.T. Grade hence the management sent the proposal for obtaining prior approval of U.P. Secondary Educational Service Commission (in brief Commission).

3. The District Inspector of Schools by his order dated 11.2.92 modified the proposal sent by the management for removal from service to stoppage of one increment for one year as the punishment was harsh and disproportionate to the charges. So far as the petitioner was concerned the commission granted its approval in its meeting dated 10.1.92. It was communicated by its letter dated 15.1.92 to District Inspector of Schools and the management of the institution. The management by its resolution dated 28.1.92 to removed the petitioner from the service and the order was communicated to the petitioner by letter dated 29.1.92. the petitioner has challenged the orders dated 28.1.92/29.1.92 Annexure 27 to the petitioner as well as the order of the commission dated 10.1.92 communicated by letter dated 15.1.92 Annexure-26 to the writ petition by means of the present writ petition.

4. I have heard Shri Ashok Khare learned counsel for the petitioner, A.K. Singh learned counsel for the respondent no. 1, Shri Satya Poot Mehrotra learned counsel appearing for respondent no. 2, Shri S.N. Srivastava learned standing counsel appearing for respondent no. 3, Shri Irshad Ali and Shri Rajiv Kumar Singh learned counsel appearing for respondent no. 4.

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5. The learned counsel for the petitioner argued that the enquiry officer has not recorded the reasons on the basis of which he has found the charges to be proved against the petitioner which was required to be done by enquiry officer as per chapter III of regulation 36 (1) of the regulations framed under U.P. Intermediate Education Act (in brief regulation). He further argued that the charges against the petitioner related to the annual internal examination of the institution of 1983, and the charges were not such which warranted removal of the petitioner from service. He further urged that the charges mentioned in the charge sheet could not be held to be proved against the petitioner. He finally urged that the punishment of removal awarded to the petitioner was too harsh and disproportionate to the charges leveled against him. And since on the same charges three other C.T. Grade teachers who were also found guilty of the identical charges but their punishment from removal from service was found to be not commensurate to the charges by the District Inspector of Schools and only minor punishment was awarded. The petitioner too was entitled for similar treatment on the principles of parity specially when there was nothing on record to show any other misconduct of the petitioner from 1984 till 1992.

6. On the other hand, Shri S.P. Mehrotra learned counsel appearing for respondent no. 2 has supported the orders of respondent on the ground that the act of the petitioner amounted to misconduct as per chapter III of regulation 32 (1) of the regulations. The learned counsel urged that the enquiry officer, management and the commission found the petitioner guilty of the charges, after giving full opportunity of hearing at all the stages, therefore, the removal order is justified and in any case it does cast any stigma nor it bars the petitioner from seeking employment else where. He further argued that this court cannot go into question of adequary of punishment. The petitioner cannot get any benefit of the order dated 11.2.92 passed by District Inspector of Schools nor the petitioner can claim its benefit as in the petitioners case the approval for removal from service was granted prior to the order dated 11.2.92

passed by District Inspector of Schools. Moreover since the order dated 11.2.1992 passed by District Inspector of Schools has been challenged by the respondent no. 2 in appeal before the Joint Director of Education the petitioner is not entitled for parity.

7. In cases where domestic enquiry has been held and the punishing authority has agreed with the report of the enquiry officer the law is well settled by the apex court that the scope of interference under Article 226 of the Constitution is very limited. The Court does not act as an appellate court. The apex court in State of U.P. and others versus. Nand Kishore Shukla and another A.I.R. 1996 S.C. 1561 held as under:

"It is settled law that the court is not a court is not a court of appeal to go into the question of imposition of the punishment. It is for the disciplinary authority to consider what would be the nature of the punishment to be imposed on a government servant based upon the proved misconduct against the government servant. Its proportionality also cannot be gone into by the court. The only question is whether the disciplinary authority would have passed such an order. It is settled law that even one of the charges, if held proved and sufficient for imposition of penalty by the disciplinary authority or by the appellate authority, the court would be loath to interfere with that part of the order. The order of removal does not cast stigma on the respondent to disable him from seeking any appointment elsewhere. Under these circumstance, we thing that the High Court was wholly wrong in setting aside the order."

In another judgement in Indian Oil Corporation and another Vs. Ashok Kumar Arora 1997 (3) SCC 72 the law laid by the apex court is extracted below:

"At the outset, it needs to be mentioned that the High Court in such cases of departmental enquiries and the findings recorded therein does not exercise the powers of appellate court/authority. The jurisdiction of the High Court in such cases is very limited for instance where it is found that the domestic enquiry is vitiated because of non-observance of principles of natural justice, denial of reasonable opportunity; findings are based on no evidence, and/or the punishment is totally disproportionate to the proved misconduct of an employee."

8. The proposition is well settled that this court does not act as a court of appeal and would be reluctant to interfere in the matters where the report of the enquiry officer has been affirmed by the punishing authority. But the question still remains to be decided is as to whether the petitioner is entitled to parity with the other co-delinquents. The charges as mentioned earlier against all the teachers were identical . They arose out of the same incident and dereliction of duty was common. Under law the teachers could not be removed from service except with prior approval of the authorities mentioned in the act. The difference in the nature of punishment has arisen not because of any difference in nature of charge or the finding of guilt recorded by the enquiry officer but because the authorities empowered to grant approval were different. The approval of the petitioner was earlier in point of time, therefore, the question arises whether this court in exercise of its extra-ordinary jurisdiction can act in a manner to ensure justice to the petitioner.

9. The apex court in B.C. Chaturvedi versus Union of India and others in AIR 1996 SC 484 in paragraph 18 laid down as under:

" A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing and disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

In paragraph 25 in B.C. Chaturvedi (supra) it further laid down:

"No doubt, while exercising power under Article 226 of the Constitution, the High Courts have to bear in mind the restraints inherent in exercising power of judicial review. It is because of this that substitution of High Court's view regarding appropriate

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punishment is not permissible. But for this constraint, I would have though that the law makers do desire application of judicial mind to the question of even proportionality of punishment/penalty . I have said so because the industrial Disputes Act, 1947 was amended to insert section 11A in it to confer this power even on a Labour Corut/Industrial Tribunal . It may be that this power was conferred on these adjudicating authorities because of the prevalence of unfair labour practice or victimisation by the management Even so, the power under Section 11A is available to be exercised, even it there be no victimisation or taking recourse to unfair labour practice. In this background, I do not think if we would be justified in giving much weight to the decision of the employer on the question of appropriate punishment in service matters relating to Government employees or employees of the public corporations. I have said so because if need for maintenance of office discipline be the reason of our adopting a strict attitude qua the public servants, discipline has to be maintained in the industrial sector also. The availability of appeal etc. to public servants does not make a real difference , as the appellate/ revisional authority is know to have taken a different view on the question of sentence only rarely. I would , therefore , think that but for the self-imposed limitation while exercising power under Article 226 of the Constitution, there is no inherent reasons to disallow application of judicial mind to the question of proportionately of punishment/penalty. But then, while seized with this question as a writ court interference is permissible only when the punishment/penalty is shockingly disproportionate."

10. The apex in Director General of Police and othere versus G. Dasayan 1998 (2) SCC 407 while considering the case of a police constable, where the other constable was compulsorily retired on the identical charge, modified the order of dismissal to compulsory retirement . The relevant part of the case is extracted below:

."……………………………………………………………………
……………………………………………………………………
……………………………………The third ground that the co-delinquents except the Head Constable were let off though the charges were identical, it is stated by the learned counsel for the appellants that the Disciplinary Authority did not agree with the findings of the Enquiry Officer so far as those two delinquents were concerned. However, the Head Constable, who was also charged along with the respondent, was compulsorily retired by the DisciplinaryAuthority

………………………………………………………………………
……………………………………………We find merit in the arguments of the learned counsel for the appellants. At the same time, we are of the view that as pointed out by the learned counsel for the respondent that a punishment of compulsory retirement in the case of the facts and circumstances of this case. Accordingly, we set aside the order of the Tribunal and in the place of order of dismissal passed by the Disciplinary Authority, the order of compulsory retirement is substituted……………..''

11. Normally this court should not substitute its own conclusion on the penalty and impose some other penalty. However, this court is not precluded from interfering in exceptional circumstances. Our system of justice is founded on rule of law. Fair play is one of its important pillars. If the court finds any disturbance to it can always restore the balance. In this case due to tow different orders by tow different authorities on identical facts and similar situation has resulted in serious injustice. The C.T. Grade teachers are working since 1992 whereas the petitioner is out of service not because his conduct was in any manner worse than others but because his approving authority was different. But the effect is so severe that it shocks the conscience of the court as laid down in B.C. Chaturvedi (supra). It would be fair and just that the petitioner be awarded some punishment as was awarded to C.T. Grade teachers.

12. Shri Mehrotra has vehemently argued that appeal against the order of awarding punishment of stoppage of increment to C.T. Grade teachers is pending, therefore, the petitioner is not entitled to any relief. Seven years have elapsed since the appeal was filed. Moreover, this court is only removing the disparity as it is existing today.

13. The learned counsel for respondent no. 4 argued that his client having been selected by the commission and appointed in 1997, he shall seriously be prejudiced if this petition is allowed. The argument is devoid of any substance. This petition was filed in 1992. It was known to the management. If the appointment was made in vacancy of the petitioner it was obviously subject to decision of the writ petition. In any case, it is open to the commission to adjust the respondent no. 4 either in the same institution or some other institution without affecting the petitioner.

14. In view of what I have stated above it is not necessary for me to consider various other submissions raised by the learned counsel for the parties.

15. In the result the writ petition succeeds and is allowed. The order dated 10.1.92 and its communication on 15.1.1992 of the commission granting approval to the removal of the petitioner from service Annexure-26 to the writ petition and the resolution of the respondent no. 2 dated 28.1.92 and order of removal dated 29.1.92 Annexure-27 to the writ petition shall stand modified in the light of this judgement and shall stand substituted by stopping of petitioner's one increment for one year as was awarded to three C.T. Grade teachers. The petitioner shall be reinstated in service with all consequential benefits of service. The aforesaid direction of this court shall be complied with by the respondents within a period of two months from the date of production of a certified copy of this order before them.

There shall be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.7.99

BEFORE
THE HON'BLE V.M. SAHAI, J.

1999

July, 16

Civil Misc. Writ Petition No. 10632 of 1992

Satya Ram Yadav ... Petitioner
Versus
Deputy Managing Director, U.P.
State and others ...Respondents.

Counsel for the Petitioner : Shri Anil Kumar Sharma
Counsel for the Respondents: Shri O.P. Singh

<u>Constitution of India, Article 226</u> Alternative Remedy Petitioner being confirmed on the post of clerk remained abset w.e.f. 14.7.90 to 23.3.91 to 7.8.91 without of leave-show cause notice-replied by the petitioner-dismissal order passed-subsequently leave sanctioned-whether the writ petition is liable to be rejected on the ground of alternative remedy of appeal? Held- "No"

<u>**Case law discussed**</u>.
1988 (sec.) I

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S. R. Yaday
Vs.
Dy. M.anaging Director U.P. State & others

V.M. Sahai, J.

The last argument of the learned counsel for the respondents that the petitioner has an adequate alternative remedy of appeal or before the State Public Tribunal is also liable to be rejected. The dismissal order has been found to be violative of principle of natural justice. The apex court in Whirlpool Corporation versus Registrar of Trade Mark 1988 (SCC) 1 has held that if an order is violative of principle of natural justice in that case even if there is statutory alternative remedy available to the petitioner the High Court can interfere without relegating the petitioner to persue the alternative remedy.

<u>By the Court</u>

1. The petitioner was appointed on adhoc basis as clerk on 21.11.79. He joined his duties on 24.11.79. the petitioner has been dismissed from service by the respondents by order dated 13.12.91 w.e.f. 19.8.91 on the ground that he absented from the duty. The petitioner claims that he applied for leave which was subsequently sanctioned after his dismissal by the respondents. The order of dismissal is under challenge in the instant writ petition.

2. The respondents in their counter affidavit stated that the petitioner has got an adequate statuary alternative remedy of filing an appeal under regulations framed by the corporation, therefore, this petition is liable to be dismissed on the availability of alternative remedy. He further argued that since the petitioner was absent from duty unauthorisedly as his leave was not sanctioned, therefore, the respondents issued a show cause notice on 8.10.91 by registered post as to why he be not dismissed from service under the regulations. It was stated in the notice that the petitioner had been absent from duty from 19.8.91 after joining at Rath on 8.8.91. It was also mentioned that the petitioner was absent earlier also from 14.7.90 to 23.3.91, 30.3.91 to 7.8.91 and no application has been given by the petitioner for the period 14.7.90 to 25.3.91. It was further stated that the petitioner is continuously absent from duty which is in violation of the regulations. Charge sheet and show cause notice has been given to the petitioner but the petitioner has shown no improvement. In case the petitioner within 15 days did not reply to the notice then it will be presumed that he was is not interested in the service of the corporation. Since no reply was given by the petitioner to the show cause notice , therefore, the order dated 13.12.91 was passed by the

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respondent no. 1 dismissing the petitioner from service w.e.f. 19.8.91.

3. I have heard Shri Anil Kumar Sharma learned counsel for the petitioner and Shri O.P. Singh , learned counsel appearing for the respondents.

4. Learned counsel for the petitioner urged that the dismissal order is violative of principle of natural justice as the petitioner was a confirmed clerk and he could not be dismissed from service by the respondents arbitrarily without holding any departmental disciplinary proceedings and without giving proper opportunity of hearing to him. He further urged that the petitioner remained absent from duty due to illness of his wife and family members. He applied for leave, however, since respondents themselves have sanctioned the leave of the petitioner after passing of the dismissal order by their order dated 4.4.94, this itself demonstrates that the respondents illegally and arbitrarily earlier did not sanction the leave of the petitioner, therefore, the dismissal order is liable to be set aside.

5. Shri O.P. Singh the learned counsel for the respondents argued that the petitioner has got an adequate statutory alternative remedy of filing an appeal under regulations, therefore, this petition is liable to be dismissed on the availability of alternative remedy. The other argument was that the petitioner had been dismissed after issuing show cause notice and charge sheet in accordance with the principles of natural justice. He further argued that the petitioner was a temporary employee and he was absent from duty without any leave, therefore, he has rightly been dismissed from service.

6. The petitioner in paragraph 2 of the writ petition clearly stated that he was confirmed on the post of clerk. This fact has not been denied by the respondents in paragraph 4 of their counter affidavit. Therefore, the assertion of the petitioner that he was confirmed employee has to be accepted. It is settled law that such an employee cannot be dismissed from service without holding departmental disciplinary proceeding and without giving him proper opportunity to defend himself. The petitioner was absent from duty from 19.8.1991 after joining at Rath on 8.8.91. He was also absent from 14.7.90 to 23.3.91, 30.3.91 to 7.8.91 and 14.7.90 to 25.3.91. With regard to his absence from duty on the above mentioned dates the petitioner has explained in the writ petition that he could not join his duty due to illness of his wife, brother and himself. His brother

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subsequently died. In paragraph 8 of the writ petition he has clearly stated that no charge sheet dated 15.5.91 was served upon the petitioner, only a show cause notice was served upon him to which he submitted a reply and thereafter, joined his duty on 8.8.91 after availing medical leave from 26.3.91. Paragraph 8 of the writ petition has been replied by the respondents in paragraph 9 of the counter affidavit, wherein it has been asserted that charge sheet was served on the petitioner along with letter dated 15.5.91, but copy of the charge sheet has not been filed along with the counter affidavit,. This leads to the presumption that charge sheet was not served on the petitioner. No enquiry officer was appointed no material has been brought on record by the respondents to establish that any departmental disciplinary proceedings was held by the respondents. The service of show cause notice dated 8.10.91 has been denied by the petitioner in paragraph 12 of the petition which has been replied by respondents in paragraph 12 of the counter affidavit wherein self contradictory reply about the service of notice has been given. The notice was sent to the petitioner by registered post/ It has not been stated on what date the show cause notice was sent by registered post . it has not been stated on what date the show cause notice was sent by registered. No registry receipt has been filed by the respondents. The dismissal order dated 13.12.91 also does not mention that the show cause notice dated 8.10.91 was served upon the petitioner. From the facts stated above the it is clear that the notice dated 8.10.91 was not served on the petitioner. The order dated 13.12.91 dismissing the petitioner from service w.e.f. 19.8.91 was in violation of the principles of natural justice and cannot be upheld.

7. The other argument of the learned for the respondents that the petitioner was a temporary employee and his dismissal from service without any enquiry cannot be interfered by this court is devoid of any merit. As earlier held in this judgement it was not disputed by the respondents that the petitioner was a confirmed employee. If the contention of the learned for the respondents is accepted that the petitioner was a temporary employee even in that case the dismissal order passed cannot be upheld. The dismissal order states that the petitioner is being dismissed on the ground of unauthorised absence from the duty. This casts stigma upon the petitioner. The dismissal order was punitive and the petitioner was entitled for a proper opportunity of hearing in accordance with the principles of natural justice which was not given to him.

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V.M. Sahai, J.

8. The last argument of the learned counsel for the respondents that the petitioner has an adequate alternative remedy of appeal or before the State Public Tribunal is also liable to be rejected. The dismissal order has been found to be violative of principle of natural justice. The apex court in Whirlpool Corporation versus Registrar of Trade Mark 1998 (SCC)1 has held that if an order is violative of principle of natural justice in that case even if there is statutory alternative remedy available to the petitioner the High Court can interfere without relegating the petitioner to
peruse the alternative remedy.

For the reasons given above the order of dismissal passed with retrospective effect by the respondents deserves to be set aside.

9. The respondents has sanctioned leave of the petitioner for the period during which he remained absent. A copy of the order dated 4.4.94 has been placed on the record as Annexure-VI to the counter affidavit. The petitioner shall be entitled for computation of arrears of salary after deducting salary of the petitioner as per order dated. 4.4.94 passed by the respondents.

10. The writ petition succeeds and is allowed. The impugned order of dismissed dated. 13.1291 passed by respondent no. 1 dismissing the petitioner with effect from 19.8.91 Annexure-VI to the writ petition is quashed. The respondents are directed to reinstate the petitioner in service and pay his entire arrears of salary after deducting salary of the petitioner as per order dated 4.4.94 passed by the respondents within a period of three months from the date of production of a certified copy of this order before the respondent no. 1

There shall be no orders as to costs.

Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAHABAD : 8.4.1999

BEFORE
THE HON'BLE N.K. MITRA , C. J.
THE HON'BLE S. R. SINGH, J.

1999

April, 8

Special Appeal No. 899 of 1998

Smt.Zaitoon Fatima ...Appellant/Petitioner.
Versus
The director of Education U.P.
and others ...Respondents.

Counsels for the Appellant : Mr. P.C. Srivastava
Mr. Khalil Ahmad Ansari
Counsels for the Respondents :Mr. Ashok Khare & S.C.

Intermediate Education Act 1921 S-16-E (10)-supplanted by U.P. Act No. 26 of 1975-section 14-Power of Director to cancel the appointment-must be exercised within reasonable time
HELD--

We therefore find no substance in the submissions made by the learned counsel for the appellant that the Director of Education is not clothed with the power to cancel on appointment, made prior to U.P. Act 26 of 1975. We, however, hasten to add that the power must be exercised within a reasonable time or not at all as discussed here in below.[Para 4]

Intermediate Education Act 1921, S-16-E 10 Reference made by the Regional/Inspectress of Girls Schools for cancellation of initial appointment, after a laps of 23 years-whether proper held-'No' The appointment of the appellant herein to C.T. grade and later, to L.T. grade by promotion having been in fact acted upon, it would not be just and proper to re-open the question of validity of her appointment by promotion to C.T. grade and later to L.T. Grade after a lapse of about 23 years. In our opinion, the order of the Regional Inspectress of Girls Schools referring the matter to the Director of Education under section 16-E (10) is thus liable to be quashed.[Para 6]

By the Court

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The Director of Education, U.P. & others

N.K. Mitra, C J.
S.R. Singh, J.

1. Present Special Appeal arises out of the judgement and order dated 25.9.1998 by which the learned single judge has dismissed the civil misc. writ petition no. 24348 of 1995, preferred by the petitioner-appellant against the order contained in the letter dated 6.5.1994 of the Regional Inspectress of Girls Schools in which a reference was made to the Addl. Director of Education, Secondary U.P. Allahabad for appropriate action under section 16E(10) of the U.P. Intermediate Education Act 1921 (In short the 'Act') in respect of initial appointment by promotion of the appellant herein in C.T. Grade as well as her subsequent promotion in L.T. Grade and till then, the approval to the appellant's promotion to the post of Lecturer(Urdu) has been put on hold by the Regional Inspectress of Girls Schools by the self same order.

2. We have heard Sri P.C. Srivastava, for the appellant, Standing counsel for respondents 1 to 3 and Sri Ashok Khare for respondents no.5.

3. The facts shorn of unnecessary details are that the appellant was appointed Asstt. Teacher in the L.T.C. grade in Abdul Salam Girls Inter College Moradabad sometime in the year 1970. In the course of time she was promoted to the C. T. grade and later, to the L.T. grade in the year 1976. A vacancy in the post of lecturer (Urdu) was occasioned by the retirement of the Incumbent – Begum Jahan on 30.2.1993. The appellant who, according to the seniority-list, already published being the senior-most teacher in the L.T. grade, was promoted to the post of lecturer in Urdu and the relevant papers were sent to the Regional Inspectress of Girls School on 24.11.93 for approval qua the requirements of regulation 6(5) of Chapter 2 of the Regulations made under the Act. The 5th respondent who also happens to be the Asstt. Teacher in L.T. grade, preferred a representation staking her claim for promotion inter-alia on the premises that she happened to be the senior most teacher in L.T. grade and that the initial appointment by promotion of the appellant in C.T. grade and later, in the L.T. grade was invalid and she was not qualified for being promoted to the post of lecturer. The Regional Inspectress of Girls School, it seems issued notice to the parties to appear before her. On behalf of the college, service books, salary register, papers regarding pay fixation and other papers, were produced before the Regional Inspectress of Girls Schools, but the authorised controller did not produce any material regarding

appellant's pay-fixation for the period between 1.8.73 and 1.11.73 nor was any document produced showing approval to the appellant's promotion from J.T.C. to C.T. grade. The Regional Inspectress of Girls Schools came to the conclusion that there was no material vouching for pay fixation of the appellant in L.T. grade nor was there any material to be eloquent of the fact that the promotion of the appellant from J.T.C. to C.T. grade was approved by the then Regional Inspectress of Girls Schools Bareilly nor was there anything to manifest that her pay was fixed in C.T. grade with effect from 1.7.1970. The Regional Inspectress of Girls Schools being of the opinion that the services of the appellant in C.T. grade were not lent approval and that she had not passed L.T. or B.Ed and therefore, she was not qualified for the post of Asstt. Teacher in L.T. grade. Upon a consideration therefore, the Regional Inspectress of Girls Schools referred the matter to the Addl. Director of Education under section 16-E (10) of the Act. The reference was sought to be quashed in the writ petition. Sri P.C. Srivastava, learned counsel for the appellant canvassed that the appellant was appointed to C.T. grade before Sec. 16(E) was supplanted by Sec. 14 of the U.P. Act 26 of 1975 and the Amending Act was not made to have retroactive effect and therefore, proceeded the submission, the proceedings under section 16 (E) (10) could not be invoked in aid to emasculate the appointment already made. The submission made by the learned counsel has no cutting edge. Section 16 –E (10) empowers the Director in the case of appointment of teacher in an Institution to rescind such appointment and pass such consequential orders as may be necessary, on being satisfied that the appointment has been made in antagonism of the provisions of the Act. The provision being germane to the controversy is excerpted below.

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"(10) Where the State Government, in cases of the appointment of Head of Institution, and the Director in the case of appointment of teacher in an institution, is satisfied that any person has appointment as Head of Institution or teacher, as the case may be, in contravention of the provisions of this Act, the State Government or, as the case may be, the Director may, after affording an opportunity of being heard to such person, cancel such appointment and pass such consequential order as may be necessary."

4. In our considered view, section 16 –E (10) being an enabling and remedial provision, can be invoked to call in question even the appointments made before insertion of the section and in that sense, it has retroactive effect. To rephrase it, the operation of section 16-E

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(10) is not confined to appointments made after the said provision was inserted by substituting the old Sec. 16 E vide Sec. 14 of the Amending Act. This follows from the expressions "has been appointed" used in sub-section (10) of Sec. 16 –E of the Act. As a matter of fact, the provision is in its direct operation prospective, for it relates to future cancellation of appointments already made and in this way it will not be appropriated to be called a retrospective stature merely *"because a part of the requisites for its action is drawn from time antecedent to its passing*." We therefore find no substance in the submissions made by the learned counsel for the appellant that the Director of Education is not clothed with the power to cancel an appointment, made prior to U.P. Act 26 of 1975. We, however, hasten to add that the power must be exercised within a reasonable time or not at all as discussed here in below.

5. The next question that begs consideration is whether the Regional Inspectress of Girls Schools was justified in making reference under section 16 E (10) of the Act to the Director of Education for cancellation of the initial appointment of the appellant by promotion to C.T. grade and later, to L.T. grade after a lapse of about 23 years. The counsel for the appellant propounded with vehemence that if would be unjust to allow the appointment to be cancelled after a lapse of nearly 23 years of the appointment of the appellant to L.T. grade. The submission made by the learned counsel is loaded with substance. In Smt. S.K. Chaudhary Vs. Manager, Committee of Management Vidyawati Darbari Girls Inter College, Lookerganj, Allahabad and others (1991) 1 UPLBEC 250, the validity of appointment of a teacher was sought to be challenged after lapse of 17 years. The Full Bench held as under:

"One fails to understand that after a lapse of nearly17 years the Regional Inspectress of Girls Schools referred the matter to the Director of Education for adjudicating the appointments were valid or not. The exercise of power by the Regional Inspectress of Girls Schools on the facts and circumstances of the case is wholly arbitrary as that poser could not be exercised after lapse of 17 years……. In any view of the matter, the appointments which were existing for the last 17 years could not be set aside after a lapse of such a longer period …….. It is true that there is power under section 16-E (10) of the Act to cancel the appointments but that power has to be exercised within a reasonable tune. The appointments had been made in the year 1973 and by no stretch of imagination it can be said that the exercise of that power after the lapse of 17 years by the Director of Education

under section 16 –E) (10), on the facts and circumstances of the case, can be said to be exercise of a power within a reasonable tune."

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6. The court is no-doubt conscious of the maxim "*Quod Abinitio Non Valet In Tractu Temporis Non Convalescit,"* Which implies that which was originally vold, does not by lapse of time became valid but rule contained in the said maxim is subject to certain exceptions and one such exception is illustrated by the maxim, *quod fieri non debet factum valet* which means the fact cannot be altered though it should not have been done. R.V. Lord Newborough, 4 Q.B.585 will illustrate the doctrine of *factum valet.* There, the question was as to the payment of salary to certain special constables whose appointments had not been made in accordance with the requirements of the Special Constable Act, 1831 nor was there any valid order for payment of their salaries. Relying upon the doctrine of *quod fieri non debet factum valet,* Lush J, who decided that, as the order for payment had been acted upon, the account allowed, and the money paid, the proceedings should not be re-opened. (The appointment of the appellant herein to C.T. grade and later, to L.T. grade by promotion having been in fact acted upon, It would not be just and proper to re-open the question of validity of her appointment by promotion to C.T. grade and later, to L.T. grade after a lapse of about 23 years. In our opinion, the order of the Regional Inspectress of Girls Schools referring the matter to the Director of Education under section 16-E (10) is thus liable to be quashed.)

As regards the appellant's promotion in lecturer grade, Sri P.C. Srivastava, submitted that the promotion of the appellant to the post of lecturer (Urdu) would, in the fact-situation of the case, be deemed to have been approved by virtue of regulation 6(6) Chapter II of the Regulations which reads as under:

" (6) Within three weeks from the date of receipt of the proposal under clause (5), the Inspectors shall communicate his decision therein to the Manager failing which the Inspectors shall be deemed to have given his concurrence to the resolution passed by the committee of Management."

Under regulation 6(5) of the Regulations, the management of the Institution is required to forward the proposal for appointment by promotion of any teacher to the Inspector within a week from the date of resolution passed by the Committee of Management in regard

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to such appointment. In case of Girls Colleges, the resolution was required to be sent to the Regional Inspectress of Girls Schools who was competent to accord approval. The resolution along-with other relevant paper was forwarded to the Regional Inspectress of Girls Schools on 24.11.93 Concededly, Regional Inspectress of Girls Schools failed to communicate her decision on the resolution to the management of the institution within three weeks of the date of receipt of the proposal and therefore, as stipulated in clause (6) of the regulation 6 of Chapter II of the Regulations made under the Act, the Regional Inspectress of Girls School would be deemed to have given her concurrence to the resolution passed by the Committee of Management in respect of appointment of the appellant by promotion to the post of Lecturer (Urdu).

However, regard being had to the fact that since the promotion of the appellant was not expressly approved by the Regional Inspectress of Girls Schools in writing, the Management promoted the 5th respondent who has been working as lecturer (Urdu) and the same has been approved by the Regional Inspectress of Girls Schools as also the fact that the petitioner-appellant is due to retire on 30th June 1999 as stated across the bar by the counsel appearing for the parties as well as the fact that she has not actually worked as Lecturer after the 5th respondent was promoted to the post and the fact that her deemed promotion to the post of lecturer, can still be rescinded in case the Director converges to the view that she is not equipped with the requisite qualification for the post, we are inclined to dispose of the appeal with the direction that although the appellant herein shall be deemed to have been promoted to the post of lecturer (Urdu) which fell vacant on the retirement of permanent incumbent-Begum Jahan on 30.2.93 and she shall be given all retiral benefits admissible to the post of lecturer and for that purpose she shall be deemed to have been in continuous service as lecturer (Urdu), but at the same time, would not be entitled to the salary with effect from the date the promotion of the 5th respondent was approved by the Regional Inspectress of Girls Schools.

The appeal therefore succeeds and is allowed In terms of the above directions and the judgment under challenge accordingly is set aside and the order impugned in the writ petition is quashed. The parties shall bear their respective costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 9.8.1999

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

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August, 9

Civil Misc Writ Petition No. 20219 of 1996

Abdul Bari ...**Petitioner**
Versus
State of u.p. and others ...**Respondents**

Counsel for the Petitioner : Shri Rajeshwari Sahai
: Shri Anant Vijai
Counsel for the Respondents : Shri K.R.Singh
: Standing Counsel

U.P. Home Guard Adhiniyam 1963, s-10,12-Termination order-Petitioner working as volunteer enaged a Home guard without permission of higher authorities-finding of guilt recorded during the deciplinary proceeding of other Home guard in which petitioner had appeared as witness-held without charge sheet without affording any opportunity to meet the charges- termination order held illegal.

HELD-There was no charge sheet issued to the petitioner and there was no enquiry held against him. Even if the charges mentioned in the report are leveled against the petitioner, in that event the petitioner had every right to be afforded an opportunity to meet the charges by himself of issuing a charge sheet and holding an enquiry against him giving proper opportunity.[Para 4]

Constitution of India article 311-civil post a volunteer not receiving any remuneration, whether entitled for protection of Article 11 of the Constitution? held- Yes.
HELD-
Admittedly, the materials disclosed in the counter affidavit inflicts a stigma on the petitioner. Therefore, his service could not be dispensed with without holding an enquiry. The fact that the petitioner was a volunteer and that he did not receive any remuneration, would not change the petition in view of the decision in the case of Suraj Prasad Tewari (Supra) which had dealt with all other points as has been raisedas well as the decision in the case of Jawed Ahmad and others (Supra) [Para 8]

Case law discussed
1998 (20 U.P.L.BEC- 1484

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1999 (1) U.P.LBEC - 655
W.P.No. 29824-92 decided on 23.9.92
W.P.No. 9028-99decided on 28.10.91
1986 (2) U.P.LBEC. 1130
1997 (1) Awc. 376

By the Court

1. The petitioner was a Platoon Commander in the Home Guard. His service was terminated by an order dated 7th March, 1996. This order is subject matter of challenge in this writ petition. Mr. Rajeshwri Sahai learned counsel for the petitioner contends that the petitioner was holding a civil post as has been held in the decision in the case of Suraj Prasad Tewari. Vs. Zila Commandar, Hamirpur (1998 (2) UPLBEC 1484). Therefore his service could not be terminated without giving an opportunity as has been held in the case of Jawed Ahmad. Vs. State of U.P. & others (1999(1) UPLBEC 655). On these grounds he prays that the writ petition be allowed and the impugned order be quashed.

2. Mr. K.R. Singh, learned Standing Counsel on the other hand contends that Section 12 of the U.P> Home Guard Adhiniyam, 1963 empowers an authority to terminate the petitioners service. He also contends that the petitioner did not hold the civil post in view of Section 10 of the said Act. He further contended that for the purpose of discharge or resignation of the petitioner, who was a volunteer and holding the post without any remuneration would not be equated with the same status which was involved in the decision in the case of Suraj Prasad Tewari (supra) and Jawed Ahmad and others (supra) . He further contends that the Petitioner's service was terminated after holding an enquiry in which he had participated and as such sufficient opportunity was given to him. He further contends that the petitioner was a person who could not be retained in the force which is a disciplined one. On these grounds he contends that this writ petition should be dismissed.

I have heard both the learned counsel at length

3. Section 10 of the U.P. Home Guards Adhiniyam, 1963 prescribes that the Home Guard would be deemed to be a public servant but not civil servant. He would be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. The Explanation to Section 10 provides that a Home Guard would

not be deemed to be a holder of civil post merely by reason of his enrolment as Home Guard. This question came to be interpreted in the decision in the case of Gulam Mohammad and others. Vs. State of U.P. nos. 29824 of 1992 and 27675 of 1992 disposed of on 23rd September, 1992 by a Division Bench comprising of the Hon'ble B.M.Lal and V.Bahuguna , JJ as their lordships then were. Relying on a Single Judge decision in the case of Abdul Hamid and another. Vs. State of U.P. in Civil Misc. Writ Petition no. 9028 of 1999 disposed of on 28th October, 1991 by Hon'ble S.C.Mathur, J as his lordship then was it was held that a Home Guard cannot compel the State Government or its officer to continue him on duty. The payment of honorarium to a Home Guard would not change the situation and cannot compel the State Government to continue him on duty. This very question was also dealt with in the decision in the case of Bibhuti Narain Singh. Vs. State of U.P. and another (1986 (2) UPLBEC 1130) But this judgment had taken a contrary view as has been taken in the case of Abdul Hamid (Supra) and Gulam Mohammad (supra) The decision in the case of Bibhuti Narain Singh was followed in the case of Dashrath Singh Parihar Vs.State of U.P.(1997 (1) AWC 376). In the case of Bibhuti Narain Singh(Supra) and Dasrath Singh Parihar (Supra), this Court had taken the view that the post of Company Commandar is a civil post .

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4. In the case of Suraj Prasad Tewari (supra), the petitioner was a Company Commandar. The learned Single Judge in the case of Suraj Prasad Tewari (supra) had proposed to examine the various provisions in the light of the decisions in the case of Bibhuti Narain Singh (supra) and Dashrath Singh Parihar (Supra) with the observation that since the decision in the case of Gulam Mohammad (supra) as well as Abdul Hamid (Supra) did not notice the decision in the case of Bibhuti Narain Singh (supra) which was earlier point of time, therefore, it would not prevent the learned Single Judge from examining the issue. After deliberating on various issues and relying on various decisions cited in the said judgment, the learned Single Judge had found the decision in the case of Bibhuti Narain Singh (Supra) more acceptable and had followed the same holding that the post of a Company Commandar in the Home Guard is a civil post attracting Article 311 of the Constitution of India.

5. In the present case the post is that of a Platoon Commandar and not of a Company Commandar. But that would not make a difference with regard to the situation or position. Thus I do not find any reason to disagree with the decision in the case of Suraj Prasad

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Tewari (Supra). Therefore, if it is found that the service of the petitioner was dispensed with without affording him an opportunity, in that event the order or termination cannot be sustained and that service of the petitioner could only be terminated after giving him an opportunity or holding an enquiry as against him if there is any stigma attached to the reason for terminating the service of the petitioner.

6. The impugned order does not disclose that The service of the petitioner was being terminated with any stigma. But in the counter affidavit, it has been pointed out that the petitioner was not a person fit to be retained in service on account of finding of guilt in an enquiry in which he had participate. Therefore, according to Mr. K.R. Singh sufficient opportunity has been given and the principle enunciated in Article 311 has since been, in fact and in principle, observed before terminating the service of the petitioner.

But the fact remains that the enquiry to which my attention was drawn related to an enquiry against the Company Commandar Hari shankar Singh, District Commandant on the basis of a complaint made by the petitioner. The report of the enquiry officer is a part of Annexure C. A. 3 to the counter affidavit. A persual of the said report shows that on the basis of the complaint made by the petitioner, the enquiry was undertaken against Sri Hari Shankar Singh in which the petitioner had submitted his statement, both written and oral. In the said enquiry it was found that Sri Hari Shankar Singh was not guilty of the allegations made against him. On the other hand, it was the petitioner who is guilty for the alleged violation. It has been pointed out in the said report that the petitioner had engaged Home Guards on duty between 17th November, 1992 and 5th December, 1992 and 22nd May, 1991 till 30th May 1991 without obtaining any direction from the higher authorities, according to his own wihms and was responsible for not sending the muster roll though he was asked to do so. If was also alleged that he was an indisciplined person and that he had a meeting with the Secretary of the Chief Minister. Therefore, he was a person unfit to be retained in the force. On the basis of this report, another letter dated 14th February, 1996 was issued, by which an appropriate order for terminating the petitioner's service was asked for.

7. From the above facts, it appears that the enquiry was initiated against Hari Shankar Singh on the Complaint of the petitioner. There was no enquiry in respect of any charges levelled against the

petitioner nor any was ever held. It is preposterous to conceive that a witness could be held guilty of his own complaint against some one else. There was no charge sheet issued to the petitioner and there was no enquiry held against him. Even if the charges mentioned in the report are levelled against the petitioner, in that event the petitioner had every right to be afforded an opportunity to meet the charges by issuing a charge sheet and holding an enquiry against him giving proper opportunity.

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8. Admittedly, the materials disclosed in the counter affidavit inflicts a stigma on the petitioner. Therefore, his service could not be dispensed with without holding an enquiry. The fact that the petitioner was a volunteer and that he did not receive any remuneration, would not change the position in view of the decision in the case of Suraj Prasad Tewari (Supra), which had dealt with all other points as has been raised as well as the decision in the case of Jawed Ahmad and others (supra).

Sections 10 and 12 has been considered in the said decision and having relied on the various decision cited in the case of Suraj Prasad Tewari (Supra) it was held that the post of Home Guard is a civil post attracting application of Article 311.

In that view of the matter, the impugned order dated 7th March, 1996 is liable to be quashed and is hereby quashed accordingly.

Let a writ of certiorari do issue accordingly.

Since the petitioner is a volunteer and had been serving without any remuneration, therefore, there is not question of payment of back wages. However, it will be open to the respondents to pass appropriate order after holding an enquiry and giving an opportunity to the petitioner, if it is so advised.

The writ petition is thus allowed and disposed of. No cost

Let a copy of this order be issued to the learned counsel on payment of usual charges at the earliest.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD APRIL 5, 1999

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April, 5

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

Civil Misc. Writ No. 8076 of 1999

State Bank of India-through its Deputy General Manager, Zonal Office Gorakhpur ...Petitioner
Versus
Sri Ram Chandra Dubey and others ...Respondents

Counsel for the petitioner : Sri Navin Sinha
Sri S.N.Verma
Senior Advocate
Counsel for the Respondent: Sri H.N. Singh

<u>Constitution of India, Article 226</u>- Simplicitor Reivstatement what constitute- whether the reinstatement of a workman without specific order for payment of back wages would necessarily mean rejection of such claim for such wages ? Held-if the order of termination is void contrary to the provisions of law-must be deemed the employee have continued in service without break and is entitled to salary through-out without being prejudice with fact whether the reivistatement is simplicition or with back wages. (Para 13)

It is the normal rule in Labour Jurisprudence. If the order of termination is void being contrary to the provisions of the constitution of India or mandatory provisions of law, in such case, the employee must be deemed to have continued in service without break and is entitled to salary throughout. It would not made any difference if an order for the payment of back wages has not specifically been passed. On the reinstatement, even though simplicitor, the normal rule of payment of back wages has to be applied unless it is proved that the workman has engaged himself in some gainful employment or there existed any other circumstance. In the absence of any circumstances to neutralize the normal rule that reinstatement is coupled with the relief of back wages, the respondent nos. 1 to 23 are entitled to back wages.(Para 13)

<u>Case law discussed</u>
1998 LABIC 629
special Appeal no: 40 of 1995 decided on 13.11.98
1993 FLR 055

(1) LIJ. 138.
(1) L.L.J. 145
(2) A.P.L.J. 374
lab IC.-513
AIR 1979 SC 75
1905 (50) FLR 81
AIR 1988 SC 344
AIR 1984 SC 500
1998 (78) FLR -453

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O.P. Garg, J.

By the Court

1. An interesting and important question of law, that has been canvassed in the present writ petition under Article 226 of the Constitution of India, is whether the reinstatement of workmen without a specific order for the payment of back wages would necessarily mean rejection of the claim for such wages. To understand the background in which the controversy has come to be raised it is necessary to narrate certain facts.

2. Twenty six workmen, including the respondent nos.1 to 23 were employed by the petitioner-bank between 4th May, 1961 and November 1962. The services of all the 26 employees were terminated on 16.08.69 An industrial dispute was raised and the Central Government by its notification dated 21.06.1985 referred the following dispute for adjudication to the Central Government Industrial Tribunal-cum-labour Court, Kanpur.

"WHETHER the action of State Bank of India in relation to their Gorakhpur Branch in terminating the services of Sri Ram Chandra Dubey and 25 others employees of the Bank, (as mentioned in Annexure) is justified ? if not, to what relief are the work ment concerned entitled?"

3. A reference came to be registered as Industrial Dispute no. 255 of 1985 Both the parties canvassed their point of view before the tribunal. An award dated 4.2.1987 , a copy of which is Annexure 1 to the writ petition was made After elaborate discussion of the fa----- the rival contentions of the parties, it was concluded:-

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"19 That in any view of the matter the services of the workment could not have been terminated, Consequently I hold that the action of the management of State Bank Of India relation to their Gorakhpur Branch in Terminating the services of Sri Ram Chandra Dubey and 25 other employees of the Bank as mentioned in the Annexure is not justified.

20. The result is that all the workmen mentioned in the Annexure to the reference order are entitled to be reinstated in service w.e.f. 16.08 .69"

4. The petitioner challenged the validity of the award before this court by filing a writ petition being Civil Misc. Writ No. 9901 of 1987 An interim order staying the operation of the award was passed subject to the condition that all the workmen are reinstated. The in whose favour the award was made were reinstated on 04.02.1987 By order dated 9.1.1987 a copy of which is Annexure 2 to the writ petition, Civil Misc. Writ No. 9901 of 1987 was dismissed by this court as it was found that the award in question does not suffer from any error of law. A passing reference was made to the question, which is the subject matter of challenge in the present petition that the workmen who have been reinstated in service, are not entitled to past wages as the award on the point is absolutely silent this question was not gone into in the said writ petition primarily on the ground that there was no challenge against the award on the said ground. Out of 26 workmen, who were reinstated, respondent nos. 1 to 23 moved three separate applications u/s 33-c (2) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') for computation --- the amount of back wages on the basis of the award. All these three applications (LCA Nos. 335, 336 and 340 of 1997 have been decided by the impugned order dated 11.9.1998, a copy of which is Annexure 7 to the writ petition Back wages for the period 16.8.1969 as per details given in the Annexures appended to the order, were computed.

5. The petitioner Bank has challenged the impugned order dated 19.11.1998 mainly on the ground that in the absence of any direction in the award regarding payment of back wages the question of that claim being entertained u/s 33-c (2) of the Act did not arise and, therefore, the applications moved by the respondent-workmen were not maintainable in law; that though the workmen have been reinstated w.e.f.16.8.1969 impliedly granting continuity in service, workmen do not, as a matter of right, become automatically entitled

to back wages in full or in part; that in the absence of the specific order, back wages could not be awarded to the respondent workmen and in any case, the amount as calculated by the respondent no. 24-Central Government Industrial Tribunal-cum Labour Court, Kanpur Nagar (hereinafter referred to as the Tribunal) without taking into consideration the evidence of the petitioner-Bank is wrong and excessive. On the above grounds, it is prayed that the impugned order dated 19.11.1998, Annexure 7 to the writ petition be quashed.

6. Sri H.N. Singh appearing on behalf of respondent nos. 1 to 23 stated ---- since the impugned order is challenged purely on legal matrix, he would not file any counter affidavit and the writ petition be decided finally at this stage.

7. Heard Sri S.N. Varma, learned Senior Advocate, assisted by Sri Navin Sinha, learned counsel for the petitioner-Bank and Sri H.N. Singh, on behalf of the respondent workmen.

8. It is an indubitable fact that the award dated 4.2.1987 is totally silent with regard to the payment or non-payment of the back wages though the respondent workmen have been directed to be reinstated w.e.f.16.8.1969 on which date, their services were terminated. When a workman is reinstated then on some occasions, some difference of opinion arises regarding the past facilities, wages, leave, Bonus etc, which are not specifically decreed or awarded by the order by which the workman is reinstated. In the absence of a specific direction one way or the other, a vex question to make payment of the back wages arises whether a workman is entitled to such wages would depend on the meaning and consequence of the order of reinstatement. In the case of wrongful dismissal/termination, reinstatement is the normal relief, which should be granted to the aggrieved workman and this can only be departed from in extra ordinary case because the establishment is closed, or the post is abolished or there is bitterness or back of confidence between the parties or the worker is on the verge of retirement or is old or infirm so as to incapable of discharging his duties. Taking into consideration the material on record, the Tribunal came to the conclusion that reinstatement of the respondent-workmen was the appropriate relief which could be allowed to them. Accordingly an award for reinstatement was made and the order of reinstatement has further been affirmed by this court in Civil Misc. Writ No. 9901 of 1987. The order of reinstatement passed in favour of the respondent workmen, therefore is beyond the pale of challenge.

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9. Sri S.N. Verma, learned Senior Advocate, appearing on behalf of the petitioner-Bank urged that in the absence of specific direction for the payment of back wages, the respondent-workmen were not at all entitled to claim such wages. In support of his contention that a mere order of reinstatement would not necessarily mean reinstatement with back wages, reliance was placed on the decision of the Bombay High Court in the case of *Maneck Gopal Divekar Vs. M/s Phoenis Mills Ltd. and another* (1988 LAB I.C.-629) in which it was observed that an order of reinstatement cannot be construed as an order of reinstatement with back wages. The term reinstatement' has to be read with the necessary limitations by which it is governed, such as the reinstatement with or without back wages or reasonable compensation in lieu thereof. It was further observed in the said case that normally when a relief of reinstatement is granted, it is coupled with the order of back wages whether full half or otherwise, unless there are compelling circumstances in the case for not granting back wages. But the order has to specifically mention granting of back wages when reinstatement is granted otherwise it would necessarily mean reinstatement without back wages. In the opinion of learned Single Judge of Bombay High Court it would not be correct to say that an order of reinstatement without back wages does not exist. If an order of reinstatement is to be construed as an order of reinstatement with full back wages there was no necessity for the legislature to make provisions of four alternatives in granting the relief to a dismissed or discharged workman With reference to the provision of Section 30 (1) (b) of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, which provided for four alternative relief's, namely, (I) payment of reasonable compensation or (ii) reinstatement (iii) reinstatement with or without back wages, or (iv) payment of reasonable compensation in lieu of back wages, in the case of dismissal discharge or termination of services, it was observed that when the relief of 'reinstatement Simplicitor' is granted it means relief of reinstatement and nothing more and certainly not the back wages along with it. The view taken in the aforesaid case proceeded on the reasoning that if there are four alternatives available to the industrial Tribunal or the Labour Court in granting the relief to the complainant and when any one of them is granted, it would necessarily mean rejection of the other three. In view of the specific four alternatives provided in the Maharashtra Act, the various observations made in Maneck Gopal's case (supra) are to be confined to the facts of that case only. The observations made therein are not of universal application so

that they may be transplanted in all the given situations which may arise beyond the purview of the provisions of Maharashtra Act.

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10. On behalf of the petitioner, reference was also made to a decision dated 13.11.1995 of learned Single Judge of this court in Second Appeal No. 40 of 1995 Gorakhpur Kshetriya Gramin Bank Mohaddipur, Gorakhpur vs. Ram Kripal Nag Banshi In that case, the order granting the full back wages by the Civil Court was challenged. It was urged that where the suit was merely for reinstatement and not for recovery of arrears of salary, the arrears of salary could not be granted without recording a finding that the employee was not gainfully employed. Relying upon the decision in State of U.P. and others vs.Atal Behari Shastri (1993)66 F.I.R. -855 and Depot Manager Andhra Pradesh State Road Transport Corporation, Hanumakonda vs. Venkateshwarulu and another (A.I.R.1995 Sc-258.) it was observed that where an employee who was suspended pending departmental enquiry for a criminal charge and an order of reinstatement is passed, he is not automatically entitled to full salary. The order passed by the 1st appellate court was modified in the Second Appeal with the clarification that the plaintiff-employee shall state restored to his position as it existed immediately before the order of removal from service was passed, meaning thereby, he was entitled to the subsistence allowance which he was getting during the period of suspension prior to the order of removal. The decision in the Second Appeal, refereed to above, which has been heavily relied upon by the learned counsel for the petitioner-Bank is of no help and assistance in the present case for one simple reason that the respondent-workmen no.1 to 23 were immediately before their termination on 16.8.1969 working and getting the salary of the post which they were manning.

11. It is true that the payment of back wages depends on various imponderables and variable factors. Back wages may not be granted depending upon the finding on the question of gainful employment or otherwise during the period of enforced idleness. It has been held in a catena of decisions that it is for the employer to establish that the workman was gainfully employed during the period he remained out of job or that there existed certain circumstances which debarred the workman from claiming payment of back wages. Nothing of the kind has been shown in the case of present 23 respondent-workmen.

12. Law is clear on the point that normally reinstatement should carry a direction for payment of back wages. Ordinarily

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reinstatement contemplates back wages. In a case where reinstatement simplicitor has been ordered without a specific order for the payment of back wages, the question is as to whether such an order of reinstatement implies direction for payment of back wages also. To answer this question, one has to consider the meaning of the expression 'reinstatement' Reinstatement' results in replacing a person in a position from which he resigned or was dismissed; it means restoration of the status quo ante the resignation or dismissal. The case may be . The word 're' when used as a prefix normally means 'again' or 'back' Reinstatement ordinarily means restoration of ex-employee to his original post and putting him into the position he would have been if he would have continued in service all along and he is therefore, entitled to all back pay, allowances and other privileges. The word 'reinstatement' means that the employee is put back in the same position as if he has not been dismissed. The above meaning of the word instatement has been explained by Venkatramaiya in "Law Lexicon and Legal Maxims" as well as in Words and Phrases Vol. IV pages 524-525 (Rowland Borrows) This expression was also considered and given the same meaning in Deshbandhu Cinema V I.T. (1969 (1) LIJ-138 (Patna High Court) and Vihar Talkies Vs. I.T. (1969) 1 LLJ-145 (Patna High Court) The effect of reinstatement, therefore, is that it effaces the order of dismissal or termination for all practical purposes and if the order of dismissal/termination is set aside, the employee is restored back to the position and status which he was occupying and enjoying just before the order of dismissal or termination was passed. The order of reinstatement wipes off the stigmatic order of dismissal or termination. Reinstatement implies as if the order of dismissal /termination was never passed. When an order of reinstatement is made, two distinct consequences follow (1) the worker is reinstated and the contract of service is restored and (2) from the date he is entitled to wages as he was entitled to prior to the date of dismissal/termination and the employee continues to be in service uninterrupted by the offending order. Though in the case of S.V.Mittoo Vs. L.T. (1973) 2 A.P.L.J.-374 it was held that on reinstatement a worker is not automatically entitled to get wages for the entire period in another case of Andhra Scientific Co. Vs. L.C. (1971 LAB IC. 513) it was observed that the effect of an award of reinstatement is to restore the employee to his former position and status "It implies that on reinstatement, he should get his full back wages reduced to the extent of the income earned by him elsewhere. Even though the workman has not been in actual service from the date of his termination till the order of termination was set aside, he

must be deemed to have remained in service once the order of termination is set aside. This point came to be considered with all specificity by the apex court in M/s.Hindustan Tin Works (p) Ltd. Vs. Employees of M/s Hindustan Tin Works (p) Ltd. (A.I.R1979 sc-75) .The relevant observations which are of far reaching consequence and have a direct bearing on the controversy in hand may be extracted as below.

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"The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted, More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. This is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz to resist the workman's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances, reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect"

In S.M.Sanjad Vs. Baroda Municipal Corporation (1985 (50) FLR - 81) the workmen were held entitled to the full back wages unless the same could be denied on some relevant grounds. In Union of India

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Vs. Sri Babu Ram Lalla (AIR 1988 SC-344) the apex court took the view that since the order of termination of the workman was rightly held to be a nullity, he was entitled to be paid salary on the footing that he had always continued in service and the void order was never in existence in the eye of law. Not only this, in the case of Gammon India Ltd. Vs. Niranjan Dass (AIR 1984 SC-500) where the illegally terminated workmen had reached the age of superannuation and therefore, physical reinstatement in service was not possible, the apex court declared that the workmen shall be deemed to have continued to be in service uninterruptedly form the date of attempted termination of service till the date of superannuation and that he would be entitled to all back wages including the benefit of revised wages or salary, if during the period there is revision of pay scales with yearly increments, revised Dearness Allowance or variable Dearness Allowance and all terminal benefits if he has reached the age of superannuation such as, Provident Fund, Gratuity, etc. It was directed that back wages should be calculated as if the workman continued in service uninterrupted. He was also held entitled to leave to leave encashment and bonus, if other workmen in the same category were paid the same. It would not be out of place to made a reference to a decision of the Gujarat High Court in the case of Vasantika R.Dalia Vs. Baroda Municipal Corporation (1998) (78) FLR-453). In that case, by an award, the relief of reinstatement was granted but the relief of back wages had been denied specifically and the relief of continuity of service had not been denied in any terms except that along with the relief of reinstatement the word 'continuity' had not been mentioned. It was held that once the relief of reinstatement is granted, the continuity of service is the direct on sequence rather inherent in the relief of this nature. When the relief of reinstatement is granted and the continuity of service is not specifically denied the party has to be relegated to the same position as was held by it at the time of termination. It was further observed that when the order of termination has been found to be void, the workman holds the relief of reinstatement with no mention of specific denial of continuity of service, the concerned workman has to be relegated to the position which was obtained at the time of termination of his/her services and there is no question of denying the continuity of service for the period for which the service have been interrupted on account of an unlawful and void order. As regards the question of back wages, it was observed that it is dependent on variable factor of gainful employment during the period of idleness and , therefore, in a given case the relief of back wages cannot be granted depending upon the question of gainful

employment or otherwise during the period the party remained out of employment .

13. From the analysis of various decisions, particularly the decision of the apex court in the case of M/s Hindustan Tin Works (P) Ltd. (Supra) it can easily be spelt out that the claim for back wages is implicit, integral part, and necessary inseparable concomitant of the order of reinstatement. The thrust of all the decisions is that ordinarily a workman, whose services have been illegally terminated, would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. It is the normal rule in Labour jurisprudence. If the order of termination is void being contrary to the provisions of the Constitution of India or mandatory provisions of law, in such case the employee must be deemed to have continued in service without break and is entitled to salary throughout. It would not make any difference if an order for the payment of back wages has not specifically been passed. On the reinstatement, even though simplicitor, the normal rule of payment of back wages has to be applied unless it is proved that the workman has engaged himself in some gainful employment or there existed any other circumstance to deprive him of the said benefit. The normal rule can be departed from only when the employer objecting to the payment of back wages establishes the circumstances necessitating the departure from the well embedded normal rule, which has, in course of time, ripened into law. In the instant case, there is not attempt, or even a faint suggestion on the part of the petitioner-bank to reflect the circumstances to neutralize the normal rule. Undoubtedly the continuity of service of respondent nos. 1 to 23 has been maintained by making the order of reinstatement w.e.f. 16.8.1969.In the absence of any circumstance to neutralize the normal rule that reinstatement is coupled with the relief of back wages, the respondent nos. 1 to 23 are entitled to back wages, i.e., for the period 16.8.1969 to 3.2.1987. The impugned order dated 19th November, 1998, therefore, foes not suffer from any illegality or irregularity insofar as it reaches the conclusion that the respondent workmen are entitled to back wages.

14. New it is time to consider the legal question whether an order for the payment of back wages in the circumstances could be passed by the respondent no.24 on applications u/s 33-c(2) of the Act. Sri S.N. Varma learned Senior Advocate and counsel for the petitioner Bank urged that it is settled law that the proceeding u/s 33-c (2) of the Act is in the nature of execution proceedings by which an

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existing right in favour of an employee under a settlement or award or under the statute can be executed and since no such right of full back wages had accrued in favour of the respondent workmen, in terms of the award which is silent on the question of payment of back wages, the applications u/s 33-c (2) of the Act were not maintainable. This submission is nothing but a subterfuge and an attempt to hair-split the controversy. A firm finding has been recorded by the respondent no.4 which has also found approval of this court that the award cannot be interpreted to mean that the back wages were not implied in the relief of reinstatement It has been held that the award dated 4.2.1987 by which the reinstatement was ordered, embraced within its ambit the claim for full back wages even though it was silent on the point. Applications u/s 33-c (2) of the Act moved by the workmen before the respondent no.24 were essentially for the purpose of computation of back wages. The respondent no. 24 has not determined any new right in favour of the workmen. It has simply computed the back wages on the basis of the award of reinstatement which conferred a right for claim of back wages on the respondent-workmen.

15. Sri Varma, learned counsel for the petitioner-Bank also urged that the mathematical calculation of the back wages arrived at by the respondent no.24 has suffered certain inaccuracies and on a proper calculation and proof of certain facts. There would arise a wide gap in the amount, which is actually payable to the respondent-workmen and which has been awarded by the respondent no.24 . A pointed reference was made to the observation of the respondent no.24 in the impugned order that the evidence of Vinod Kumar Agarwal, Deputy. Manager M.W.-1, was not taken into consideration and the version of the management was not found to be worth consideration as the claim of the respondent-workmen was not specifically denied in the written statement Sri H.N. Singh, learned counsel for the respondent-workmen has no objection if in view of the alleged yawning discrepancy, recalculation of the back wages is made. It is not possible for this court to undertake this exercise in the writ jurisdiction.

16. On legal matrix, the writ petition fails and is accordingly dismissed. The respondent no.24 however, is directed to give a fresh look to the calculation of the back wages payable to the respondent nos. 1 to 23 and recalculate them in the light of the material, which may be placed before it by the petitioner-Bank as well as the respondent-workmen. This exercise shall be concluded by the

respondent no. 24 within a period of one month from the date a certified copy of this judgement and order is produced by either of the parties. If there are any mistakes in the calculations, they shall be rectified and intimated to the parties. The parties shall bear their own costs. Let certified copy of this judgement and order be supplied to the learned counsel for the parties on payment of usual charges within 72 hours.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 17.8.1999

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

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August, 17

Civil Misc. Writ Petition No. 10833 of 1995

Nand Kishore Goaseen and others ...Petitioners
Versus
State of U.P. through Secretary,
Food and Civil supplies department,
Lucknow & others ...Respondents

Counsel for the Petitioners : Sri W.H. Khan

Counsel for the Respondents : S.C.

U.P. Urban Buildings (Regulation of letting, Rent and eviction Act 1972 as iserted by U.P. Ammending Act No. 5 of 1995- section 2 (bb)- Provisions of exemption to certain building from operation of the Act- validity challenged- whether such provisions are discriminatory ? Held- 'No'- if the tenant is sought to be ejected can raise objection by leading evidence.

Case law discussed.
1985 (I) SCC 290
1970 MPLJ-973

The Supreme Court approved the decision of the case State of M.P. Vs. Kanhaya Lal, 1970 M.P.L.J. 973, wherein the State Government grantedexemption by issuing notification under section 3(2) of M.P. Accommodation Control Act, One of the grounds of challenge was that the notification was discriminatory as the grant of exemption was not germane to the policy of the Act. The High Court upheld the validity of section 3(2) of the Act on the ground

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that the policy to exempt religious public trust was valid but struck down the notification considering the facts of that case. (Para 8)

The object underlying clause (bb) of sub-section (1) of section 2 of the Act clearly indicates that the classification of two distinct kinds of buildings has a reasonable nexus to the object sought to be achieved and, therefore, this provision is not discriminatory and hit by Article 14 of the Constitution. (Para 9)

By the Court

1. The petitioners have challenged the validity of Section 2(bb) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 (In short the Act) which was inserted by U.P. Amending Act No. 5 of 1995

2. The petitioners are tenants of Shri Krishna Janam Asthan Sewa Sansthan, respondent no.2 ,registered under the Societies Registration Act 1860. It filed 14 suits in the year 1988 for ejectment of the petitioners after terminating their tenancy, During the pendency of the suit the Uttar Pradesh Buildings (Regulation of Letting , Rent and Eviction) Amendment) Ordinance 1994 was promulgated whereby clause (bb) was added under sub-section (i0 of Section 2 of the Act. Section 2 of the Act grants exemption to certain buildings from operation of the Act. In view of insertion of clause (bb) , the buildings belonging to or vested in a public charitable or public religious institutions shall also be excluded. Respondent. No. 2 filed applications shall also be excluded. Respondent no. 2 filed application for amendment of the plaint claiming the benefit of the exemption in view of the addition of clause (bb) in Section 2 of the Act. The petitioners have challenged the validity of this provision on the ground that the provision is violative of Article 14 of the Constitution.

3. Clauses (bb) and (bbb) were added in clause (a) of sub-section (1) of Section 2 of the Act by the Uttar Pradesh (Regulation of Letting, Rent and Eviction) Amendment Ordinance 1994 which read as under :-

“2. Exemptions from operatin of Act.-(1) Nothing in this Act shall apply to (the following,namely):-

(bb) any building belonging to or vested in public charitable or public religious institution;

(bbb) any building belonging to or vested in a waqf including a waqf-alal-aulad;

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Sub-section (3) of Section 2 was deleted. This Ordinance was replaced by the Uttar Pradesh (Amendment)Act No.5 of 1995.

4. The contention of learned counsel for the petitioners is that the petitioners are being treated unequally as regards other tenants. A tenant under the provisions of the Act is entitled to protection from eviction by the landlord on termination of tenancy and secondly the fixation of rent is controlled by the provisions of the Act but the petitioners are being deprived of such benefit merely because the building belongs either to public charitable institution or public religious institution.

5. The distinction between public charitable or public religious institutions or other class of landlords forms separate categories. The money which is realised as rent is to be utilised by the landlord either for public charitable purpose or for public religious institutions, while in case of other landlords, it may be utilised for their personal purpose. Section 3® defines charitable institutions and Section 3(s) defines religious institutions as follows:-

3. In this Act, unless the context otherwise requires-
…………………………………………………….
® "charitable institution" means any establishment, undertaking organisation or associabtion rormed for a charitable purpose and includes a specific endowment;

Explanation:- For the purposes of this clause the words"charitable purpose" includes relief of poverty, education, medical relief and advancement of any other object of utility or welfare to the general public or any section thereof, not being an object of an exclusively religious nature;

(s) "religious institution" means a tempole, math,mosque, church, gurudwara or any other place of public worship;
……………………………………."

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6. The legislation has further made it clear that such exemption is applicable only to the institution which is of a public character either charitable institution or religious institution.

7. It is settled principle of law that a classification can be made but it should have reasonabel nexus with the object sought to be achieved. The distinction between two categories of persons namely, the personal property of individuals and those belonging to public religious or charitable institutions was considered in S. Kandaswamy Chattiar Vs. State of Tamil Nadu and another, 1985(1) Supreme Court Cases 290. The facts of this case were that section 29 of Tamil Nadu Buildings (Lease and Rent Control) Act 1960, conferred the power on the government to exempt a building or class of building from all or any of the provisions of the Act. The State Government in pursuance of this provision issued notificatin whereby it exted all buildings owned by the Hindu, Christian and Muslim religious public trust and public charitable trust from all the provisions of the said. Act. The tenants challenged the aforesaid notification on two grounds firstly, that the and secondly, it was discriminatory and offending against the equal protection of Article 14 of the Constitution. The Supreme Court repelled both the contention. The Court observed:-

"It cannot be disputed that public religious and charitable endowments or tursts constitute a well recognised distinct group inasmuch as they not onoly serve public purposes but the disbursement of their income is governed by the objects with which they are created and buildings belonging to such public religious and charitable endowmetns or trusts clearly fall into a distinct class different from buildings owned by private landlords and as such their classification into one group done by the State Government while issuing the impugned notification must be regarded as having been based on an intelligible differentia."

8. The Supreme Court approved the decision of the case. State of M.P. Vs. Kanhaiya Lal, 1970 M.P.L.J. 973, wherein the State Government granted exemption by issuing notification under Section 3(2) of M.P. Accommodation Control Act. One of the grounds of challenge was that the notification was discriminatory as th4e grant of exemption was not germane to the policy of the Act, The High Court upheld the validity of Section 3(3) of the Act on the ground

that the policy to exempt religious public trust was valid but stuck down the notification considering the facts of that case.

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9. The object underlying clause(bb) of sub-section (1) of Section 2 of the Act clearly indicates that the classification of two distinct kinds of buildings has a reasonable nexus to the object sought to be achieved and, therefore, this provision is not discriminatory and hit by Article 14 of the Constitution.

10. The next submission of learned counsel for the petitioner is that sub-rule (5) of Rule 3 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules 1972 provides that before an order of exemption under Section 2(3) is passed, the sitting tenant, if any, shall be given an opportunity of making representation against the proposed order but not the property is being exempted without giving an opportunity of hearing. Thus submission no longer subsists after deletion of sub-section (3) of Section 2 of the Act by U.P. Act No. 5 of 1995. Sub-section(3) of section 2 of the Act conferred power on the State Government to exempt from all or any of the provisions of the Act any building which was owned by a public charitable or public religious institution by a notice. Rule 3 was framed laying down the procedure to be followed while exercising the power by the State Government for exemption under this provision . As this provision has been deleted, Rule 3 of the Rules 1972 has become redundant. The tenant can if he is sought to be evicted in any suit or proceeding wherein the landlord claims the exemption from the operation of the Act under clause (bb) of Sub-section (1) of Section 2 of the Act, he can raise an objection that the building does not belong or vest in public religious institution and to prove this version he can also lead the evidence. The tenant has not been deprived of any opportunity of hearing in that respect.

In view of the above discussion there is no merit in this writ petition. It is accordingly dismissed.

Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 24.03.1999

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March, 24

BEFORE
THE HON'BLE N.K. MITRA, C.J.
THE HON'BLE S.R. SINGH, J.

Special Appeal No. 661 of 1993

Mohammad Idris and another ...Petitioners/Appellants
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant : Shri Man Mohan Das Agrawal
Counsel for the Respondents : Shri R.N.Singh
: Shri A.K.Saxena

U.P. Intermediate Education Act 1921 –S-16-E(10) – Head of the Institution – selection duly approved – cancellation sought on the ground when the Principal was appearing in Intermediate Exam was debarred for subsequent examination for using unfairmeans – held offending conduct was not after the selection to the post of Principal hence the question of cancellation not arises.

On merits we find that the selection of the fifth respondent was approved by the authorities under the U.P. Intermediate Education Act, 1921 UP Intermediate Education Act 1921 and challenge to the appointment was made by the petitioners four years after his selection and appointment. The Challenge, it may be observed, was based on the ground that the fifth respondent was found using unfair means of the Intermediate Examination and he was debarred from appearing in the subsequent examination. In the instant case the offending conduct of the fifth respondent was not after he was selected for the post Principal. Therefore the decision aforesaid is of no avail to the appellants. (Para 5)

Case law discussed :
AIR 1993 SC 1769
1986 ALJ 1485
AIR 1987 SC 1489

By the Court

1. Heard Shri M.M.D. Agarwal for the appellants and Shir R.N. Singh for the respondents.

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2. The appointment of the fifth respondent Mohd. Tariq, as Principal H.M.S. Inter College, Etawah was sought to be cancelled under Section 16-E-(10) of the U.P. Intermediate Education Act, 1921. The State Government rejected the representation preferred by the petitioners and maintained the appointment of the fifth respondent. Aggrieved the petitioners filed the writ petition which came to be dismissed by the learned Single Judge vide judgment under challenge in this appeal holding , inter alia, that the selection committee had considered the academic qualification experience certificates and other relevant materials in respect of all the candidates and then recommended the name of the fifth respondent for appointment.

3. Sri R.N. Singh raised a preliminary objection that the writ petiton itself was not maintainable at the behest of the petitioner in that name of the non selectees chose to challenge the selection and appointment of the fifth respondent. The learned counsel placed reliance on a decision of the Supreme Court in R.K. Jain versus Union of India and others AIR 1993 SC 1769 in which it was held as under:

"In service jurisprudence it is settled law that it is for the aggrieved person u.i. non appointee to assail the ugality of the offending action. Third party has no locus standi to canvas the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public spirited person."

4. It is true that non selectees did not assail the selection and appointment of the fifth respondent but the remedy under Article 226 of the Constitution being a public law remedy could be avail of the petitioners one of whom claims to be a member of the General Body of the Institution and the other a public spirited person being a freedom fighter . The learned Single Judge has dismissed the writ petition on merits and not as not maintainable. I Amit Chand Tripathi and others versus university of Allahabad and others, 1986 all .L.J. 1485 a Division Bench of this Court held that "even if the petitioners are not personally aggrieved and the interest of the public is involved a citizen can maintain the writ petition". It cannot be gain said that in the appointment to the post of Principal, there is always involved an element of public interest . In the circumstances of the case, therefore, the submission made by Shri R.N. Singh about

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maintainability of writ petition at the behest of the petitioners cannot be sustained.

5. On merits we find that the selection of the fifth respondent was approved by the authorities under the U.P. Intermediate Education Act, 1921 U.P. Intermediate Education Act, 1921 U.P. Intermediate Education Act,1921 and challenge to the appointment was made by the petitioner four years after his selection and appointment. The Challenge, it may be observed, was based on the ground that the fifth respondent was found using unfair means at the intermediate examination and he was debarred from appearing in the subsequent examination. The learned counsel submitted that the said conduct of the fifth respondent would show that the he was undesirable and unsuitable for the post of principal which is a post of pivotal importance in the life of an institution. Reliance has been placed on a decision of Supreme Court in Daya Shanker Pandey versus The High Court of Allahabad and others, AIR 1987 SC 1469. In our considered view the decision therein has no application to the facts of the present case. The appellant therein was appointed as a judicial officer and thereafter, with the permission of the court, he appeared in L.L.M. Examination at Aligarh University where he was found using unfair means. This conduct of the judicial officer led to his removal from service. In the instant case the offending conduct of the fifth respondent was not after he was selected for the post of principal. Therefore, the decision aforesaid is of no avail to the appellants.

In the result, therefore, the appeal is dismissed. The parties shall bear their own cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 29.07.99

1999

July, 29

BEFORE
THE HON'BLE PALOK BASU, J.
THE HON'BLE R.K. AGARWAL, J.

Civil Misc. Writ Petition No. 29604 of 1999

Harshvardhan Mittal **...Petitioners**
Versus
U.P. State Electricity Board through its Chairman, Lucknow and others **...Respondent**

Counsel for the Petitioners : Sri P.K. Jain
: Sri Ravi Kiran jain
Counsel for the Respondents : Sri Sudhir Agrawal

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Palok Basu, J.
R. K. Agarwal, J.

<u>U.P. Government Electrical Undertaking (Dues Recovery) Act 1958</u> liability pay the dues petitioner's name recorded in consumer column in agreement deed subsequent withdrawal from Director of the Firm whether the new director of the firm or the petitioners shall be liable to pay the dues ? held recovery proceeding intitiated against the petitioner has full sanction of law.

<u>Case Law Discussed</u>.
1998 (5) SCC.170
HELD-
It has thus been provided in para 18 that the terms and conditions of the agreement between the consumer and the supplier will prevail over certain other convenants. Therefore, the petitioner Harshvardhan is bound by the terms of the agreement. In this view of the matter the recovery proceedings initiated against the petitioner Harshvardhan Mittal has full sanction of law and no illegality could be found therein. The decision of the Hon. Supreme Court in S.K. Bhargava(Supra0 was not against a 'Consumer' and in this case since the petitioner Harshvardhan Mittal is the consumer, the ruling is not applicable at all on the facts of the case and the respective provisions are totally different (Para 11 & 14)

<u>By the Court</u>

1. Those who are under liability to pay lacs and lacs of rupees as dues, may be electricity dues or otherwise, try to find out some way to thwart the recovery proceedings. Provisions of law and agreement, therefore, have to be pointedly looked into find out whether the objections are genuine or only an effort to by-pass the lawful dues.

2. Harshvardhan Mittal, Shiv Kumar ,Bramh Singh and Som Pal Singh are the four petitioners challenging the recovery certificates dated 4.3.99 and 1.4.99 for Rs. 14,12,778/- and Rs. 32,04,144 respectively, Annexures- 7 and 8 to the writ petition) . At the outset it may be stated that two recovery certificates have not named the petitioners Shiv Kumar Singh, Bramh Singh and Som Pal Singh but it indicates the recovery proceedings only as against the petitioner, no. 1, Harshvardhan Mittal, the objection of the learned counsel for the respondent that the impleadment of petitioner nos. 2,3, and 4 may be only a legal step to thwart some future proceedings may not be

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out of place. However, no final verdict on this issue is necessary for determining the point raised on behalf of Harshvardhan Mittal.

3. Sri Ravi Kiran Jain, Senior Advocate for the petitioners assisted by Sri Pramod Kumar Jain has been heard in this matter at substantial length and the entire writ petition has been thoroughly scrutinised. Sri Jain placed reliance on certain provisions contained in the Indian Electricity Act, 1910, U.P. Government Electrical undertakings (Dues Recovery) Act, 1958 and also on a decision of Hon'ble Supreme Court in S.K. Bhargava Vs. Collector, Chandigarh and others, reported in 1998(5) SCC., 170.

Sri Sudhir Agrawal has appeared on behalf of the U.P. State Electricity Board and Sri S.C. Rai, Addl. Chief Standing Counsel appearing for the opposite parties No.s 3 and 4, i.e. Tehsil and Collector, Muzaffargangar who are the recovering revenue officials have been heard. It may be pointed out that the admitted position as emerging from the writ petition indicates that there was an agreement dated 23rd December, 95 a copy of which has been filed by the petitioners as Annexure-2 to the writ petition . The first page of the Annexure indicates that the parties to the agreement are classified into two parts. The first part describes the "Supplier" which has been noted therein as U.P. State Electricity Board and the other part describes the "Consumer".In this column of consumer the name of Sri Harshvardhan Mittal, son of Sri S.S. Mittal, permanent resident of E.45 and E.50 Jashodharpur has been mentioned followed by the name, M/s Vaibhay Steel Pvt. Ltd. Mjashodharpur described as a company registered under the Companies Act through its Director Harshvardhan, S/o Sri S.S. Mittal, permanent resident of E.45 and E.50 Jsashodharpur (Kotdwar). The words partnership concern/ Partnership concern have not been cut out but since copy as filed indicates the name of the petitioner as Director, the other two description shall be deemed to have been irrelevant for the purposes of this agreement which has been acted upon by the parties.

4. There are several provisions in the agreement detailed in paragraphs 1 to 20. In the end where the execution column is printed, the signature of the petitioner Harshvardhan Mittal exists showing as Director, for and on behalf of the consumer M/s. Vaibhav steel Pvt. Ltd. It has been further mentioned in the writ petition that the petitioner Harshvardhan Mittal has resigned from the Directorship on 1.3.97 (vide agreement in para-12 of the writ petition). It has been mentioned therein that intimation to all concerned departments have

been given and the name of U.P. State Electricity Board is mentioned. In para-13 it is written that copy of the letter of information addressed to the U.P. State Electricity Board was filed as Annexure-3 to the writ petition. It may be pointed out that the letter Annexure-3 does not bear any date nor the annexure indicates as to whom it is addressed to. However, assuming that it was sent to the U.P. State Electricity Board and that it was conveyed that all the four petitioners have resigned on different dates i.e. Shiv Kumar Singh and Bramh Singh on 23.11.96 and Sompal Singh and the petitioner Harshvardhan on 1.3.97 . Neither the existing agreement was cancelled, nor new connection was taken.

5. On the strength of the material noted above reliance was placed on the definitions of "consumer" in the aforesaid two Acts and Sri Jain argued that the petitioners cannot be taken to be personally liable for the electricity charges payable for the factory/company. The definitions are quoted below for ready reference:

"In the Indian Electricity Act.1910:

Definition:
"Consumer" means any person who is supplied with energy by a licensee or the Government or by any other person engaged in the business of supplying energy to the public under this Act or any other law for the time being in force, and includes any person whose premises are for the time being connected for the purpose of receiving energy with the works of a licensee, the Government or such other person, as the case may be.

In the U.P. Government Electrical Undertakings(Dues Recovery) Act,1958:-

"Consumer:" means any person who is supplied with the energy by a Government electrical undertaking, whether for his own consumption or in connection with his business of supplying energy or otherwise."

6. Simultaneously Sri Jain canvassed strongly that the decision of the Apex Court in S.K. Bhargava (Supra) had gone into the question of applicability of principles of natural justice at the time of recovery process under the Haryana Public Moneys(Recovery of

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Dues)Act, 1979 and held that since the petitioner in that case namely, S.K. Bhargava should have been afforded an opportunity, the petitioner Harshvardhan Mittal or for that matter the other petitioners should have been heard by the officials concerned who directed issuance of the two recovery for Rs. 14,12,778/= and Rs.32,09,144 respectively, certificates and their representation should have been decided because no notice of demand was served upon the petitioners.

7. In reply it was contended that in the representation which was said to have been made by the petitioners, copy of which has been filed as Annexure-9 to the writ petition, there is not even a whisper that no notice has or had been served on them. It was argued that in fact, it virtually admits the service of notice because only thereupon they could make the representation. Such being the position, the very factual basis of the argument of Sri Jain is totally obliterated. The petitioners obviously had notice of the demand against them where after recovery certificates have been issued.

8. As to the contention that all the petitioners having resigned from the office of "Director", no individual liability could flow from the agreement and thus the recovery certificates were wrongly issued, it may be mentioned that recovery proceedings have been started only against petitioner Harshvardhan Mittal, therefore, this contention has to be examined only so far as he is concerned and no other.

9. Coming to the question whether the petitioner Harshvardhan against whom the recovery proceedings have been initiated can be proceeded against or not, the argument of Sri Jain suffers from two fallacies. Firstly, the agreement itself says that the petitioner Harshvardhan Mittal, with his parentage and address, is a consumer, Once this is so, the petitioner is the consumer. Secondly , the provisions contained in the Act, and the actual description of the "Consumer" in the statutory agreement will have to be adhered to not only for supplying electricity but also for realising the bills amounts and arrears for consuming the electricity.

10. Therefore, showing the name Vaibhav Steels Pvt. Ltd. , through Sri Harshvardhan, Mittal, as Director of the Company, in the column of the 'Consumer' does not in any way absolve him from being the "Consumer" within the meaning of the said agreement. If the "Company through its director" alone was to be the consumer,

that alone should have been written at the relevant column The name of the petitioner Harshvardhan Mittal has been specifically shown as an individual, in his individual capacity, as has been noted above. Thus there is no escape for Harshvardhan Mittal from this statutory agreement and liability arising therefore.

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It may further be pointed out that Sri Sudhir Agarwal has placed reliance on paras-13 and 18 of the agreement in order to reply to the argument of Sri Jain that petitioner Harshvardhan Mittal would not be covered by the definition of the word 'consumer' as given in the Recovery Act(Quoted above). Paras-13 and 18 read as under:-

(13) Any notice by the supplier to the consumer shall be deemed to be duly given and served, delivered by had act, or sent by registered post to the address specified in the consumer's application or as subsequently notified to the supplier.

(18) That the consumer hereby further agrees to abide by the terms and conditions as stipulated in the Electricity Supply (Consumers) Regulations, 1984 formed under Section 79 of the Electricity (Supply) Act, 1948 and this agreement shall be subject to the provisions of the same. Provided that in case of any inconsistency between the terms of this covenant shall prevail."

11. It has thus been provided in Para-18 that the term and conditions of the agreement between the consumer and the supplier will prevail over certain other covenants. Therefore, the petitioner Harshvardhan is bound by the terms of the state agreement.

12. Sri Jain has also argued that since the new Directors have been inducted in the meantime, the Company can be proceeded with and the recovery proceedings if necessary can be taken against the company and its property and also the newly inducted Director.

13. Sri Sudhir Agarwal on the other hand rightly argued that the petitioner Harshvardhan is a consumer and his liability emanates from the agreement itself and it has not been disputed that arrears of the electricity charges can be realized as arrears of land revenue vide Section-5 of the Recovery Act of 1958. He further rightly argued that the petitioner's representation after having been served with the notice of demand did not lie and the Board could proceed lawfully even after the resignation of the petitioner Harshvardhan Mittal was submitted.

14. In this view of the matter the recovery proceedings initiated against the petitioner Harshvardhan Mittal has full sanction of law and no illegality could be found therein. The decision of the Hon'ble Supreme Court in S.K. Bhargava(Supra) was not against a "consumer" and in this case since the petitioner Harshvardhan Mittal is the consumer, the ruling is not applicable at all on the facts of the case and the restrictive provision are totally different

The writ petition fails and is hereby summarily dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD: 12.7.99

1999

July, 12

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

Civil Misc. Writ Petition No. 1268 of 1992

Vishnu Deo Tiwari ...Petitioner
Versus
U.P. Secondary Education Service Commission, Allahabad & others ...Respondents

Counsel for the Petitioner : Mr. S.N.Shukla
Counsel for the Respondents : Mr.S.K.Singh & Mr. A.N.Singh

Intermediate Education Act – Chapter III- Regulation 35- chargesheet against Head of the institution-issued by the manager and not by the sub-committee for enquiry-order approving the decision of management- held – commission cannot approve the same .

A reading of the decision in the case of Committee of Management Shahganj Public Inter College (Supra) clearly indicates that the chargesheet against the Principal or Headmaster, unless issued by the Sub-committee for enquiry would vitiate the enquiry proceeding and the Commissioner cannot approve the same. Here in this case, the chargesheet has been issued by the Manager and not by the sub-committee. The Commission could not have approved the order of punishment in view of the ratio decided in the case of Committee of Management, S.B.Inter College, Lahua Kalan (Supra) since relied upon in the decision in the case of Committee of Management, Shahganj Public Inter College (Supra).(Para 7)

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Cases law discussed;

1995(3), U.P.L.B.E.C. 1593.
W.P. No. 9962 of 88 decided on 10.10.88
1988 U.P.L.B.E.C. 552.
1982 U.P.L.B.E.C. 234.

By the Court

1. In this writ petition the order dated 13th September,1991, passed by the U.P. Secondary Education Services Commission being annexure-50 to the writ petition granting approval to the order of dismissal of the petitioner from the post of Principal of Sri Krishna Inter College, Ashram Barhaj, Deoria, is under challenge.

2. Mr. S.N. Shukla, learned counsel for the petitioner has taken a simple but interesting point to the extent that the charge sheet was issued by the Manager and not by the Enquiry Committee appointed under Regulation 35 Chapter III of the Regulation framed under U.P. Intermediate Education Act and as such in view of the ratio decided in the decision in the case of Committee of Management, Shahganj Public Inter College, Shahganj and another Vs. U.P. Secondary Education Service Commission, Allahabad and another [(1995)3 UPLBEC 1593] interpreting Regulation 35 and 36 of the said Regulation, Admittedly, the chargesheet was issued by the Manger. There is nothing to show that the chargesheet was forwarded by the Manager having been framed by the Enquiry Committee nor there is anything to show that the chargesheet was approved by the Committee of Management and the Manager was authorised to forward the same. There is also nothing to indicate that the Enquiry Committee had ever authorised the Manager to issue the chargesheet framed by it. In such circumstances, Mr. Shukla contends that the whole enquiry is vitiated and no approval could be granted by the Service Commission to the proposed punishment pursuant to the enquiry. Though he had taken various other points, it is not necessary to go into those questions until a decision on the point raised by Mr. Shukla is arrived at.

3. Mr. A.N.Singh, learned counsel for the respondent, the Committee of Management on the other hand contends that the Committee of Management had approved the chargesheet as is apparent from the resolution dated 10th January,1988. The Manager

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hadforwarded the chargesheet on behalf of the Committee of Management and as a Manager he is authorised to do so. Secondly, he contends that Regulation 35 and 36 of the said Regulation does not prescribed that the chargesheet had to be issued by the Enquiry Committee and a chargesheet issued by the Manager would be invalid.

I have heard both the counsel at length.

4. It appears that Regulation 35 has not specified that the chargesheet has to be issued by the Enquiry Committee. Regulation 35 prescribes if the complaint or the adverse report of charges appears to be serious then the Committee of Management shall appoint the Principal or the Manager as an Enquiry Officer in respect of all other employees or the Manager himself may hold the enquiry if in the scheme of administration any such authority is conferred on the Manager. In case of enquiry against the principal or the Headmaster, a small Sub-committee is to be constituted which should be directed to submit its report early. Thus Regulation 35 does not prescribed that the chargesheet is to be issued in the case of a Principal by the Committee of Enquiry. On the other hand it prescribes that for enquiry against the Principal or Headmaster, a Sub-committee is to be constituted.

5. Regulation 36 is construed on indirect note. Regulation 36 has not prescribed as to by whom such chargesheet is to be issued. It does not also prescribe that such charges are to be approved either by the Committee of Management or by the Enquiry Committee in the case of Headmaster or Principal. It also does not say that such chargesheet cannot by framed by the Manager.

6. Be that as it may, despite in absence of any such specific provision in Regulation 35 and 36, the learned Single Judge in the decision in the case of Committee of Management, Shahganj Public Inter College (Supra) had held while interpreting Regulation 35 & 36 that in the case of Headmaster or Principal, the chargesheet has to be issued by the Sub-committee of Enquiry. In case such chargesheet is issued by the Manager in respect of Headmaster or Principal in that event, the same would be incompetent. The said decision had relied upon a Division Bench judgement in the case of Committee of Management, S.B.Inter College, Lahua Kalan, Dist. Azamgarh Vs. U.P. Secondary Education Service Commission, Allahabad & others in Civil Misc. Writ petition No. 9962 of 1988 decided on 10th

October,1988. In the said decision, the Division bench had upheld the order of the Commission which disapproved the proposal for termination of services of the Principal of the College on the ground that the chargesheet was served by the Manager of the Institution and not by the Enquiry Sub-Committee. The Division Bench had held that it was thus clear that the chargesheet was not given by the sub-committee. This was enough to sustain the impugned order disapproving the order of termination. The decision in the case of Committee of Management, Shahganj Public Inter College (Supra) had also confirmed the order of the Commission which refused to approve the order of punishment only on the ground that the chargesheet was issued by the Manager on the Headmaster/Principal and not by the Sub-committee.

Even if, I may have reservation and unless I am able to distinguish the decision, as a Single Judge, I am bound by the decision of the Division Bench.

7. A reading of the decision in the case of Committee of management Shahganj Public Inter College (Supra), clearly indicates that the chargesheet against the Principal or Headmaster, unless issued by the Sub-committee for enquiry would vitiate the enquiry proceeding and the Commission cannot approve the same. Here in this case, the chargesheet has been issued by the Manager and not by the Sub-Committee. The Commission could not have approved the order of punishment in view of the ratio decided in the case of Committee of Management, S.B.Inter College, Lahua Kalan (Supra) since relied upon in the decision in the case of Committee of Management, Shahganj Public Inter College (Supra).

8. This ground is sufficient for setting aside or quashing the order of approval granted by the Commission contained in annexure-50 to the writ petition.

9. Mr. A.N.Singh, learned counsel for the respondent had, however, contended that this point was not taken before the Commission by the petitioner. The question is a question of the jurisdiction of initiation of the proceeding. An enquiry proceeding is initiated by issue of chargesheet. In the present case, the chargesheet appears to have been issued on 23rd January, 1988 while the Sub-Committee for enquiry was constituted on 10th January, 1988. Thus the enquiry having been initiated on the basis of the chargesheet issued against the Principal by the Manager having been found

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contrary to the ratio laid down in the case of Committee of Management, Shahganj Public Inter College (Supra) relying upon a decision in the case of S.B.Inter College (Supra) the same cannot be basis of foundation for granting approval to the order of punishment by the Commission. As such, the said order cannot be sustained.

10. Mr. Shukla had also relied upon the decision in the case of Mangla Prasad Upadhya Vs. State of U.P. & others [1988 UPLBEC 552]. In the said judgement, the learned Single Judge had held that in law, the chargesheet has to be framed by the Enquiry Committee and the service must be of the chargesheet framed by the Committee and not by the Institution. In the present case as rightly contended by Mr. Shukla, there is nothing to show that the sub-committee has framed the chargesheet and served it.

11. Mr. AS.N.Singh has not been able to draw my attention to any material from where it can be shown that the chargesheet was framed by the sub-committee and the Manager was only a forwarding agent. Mr. Singh has relied upon the decision in the case of Keshaw Prasad Mishra Vs. Managing Committee, Gayatri Vidya Mandir, Dist. Hamirpur and others [1982 UPLBEC 234]. He contended relying on the said decision that if the chargres are formulated by the sub-committee and it is so forwarded by the Manager in that event, it will not be an infirmity and it cannot be said that the chargesheet was not served by the Sub-committee. In the present case, according to him, preliminary enquiry has been made by the Sub-committee whereby the chargesheet was formulated and served by the Manager.

12. In the said case, Enquiry Sub-committee had held a preliminary enquiry and had formulated the charges which was served by the Manager. Therefore, the Court had held that if the Sub-committee had formulated the charges, the mere service thereof by the Manager would not violate Regulation 35. But in the present case, there is nothing to show that the charges were formulated by the Sub-committee. Admittedly, the preliminary investigation was carried on by a Committee consisting of persons different than those consisted of the Enquiry Sub-committee. This decision is not in conflict with the other Division Bench judgement to the extent that the chargesheet is to be formulated and framed by the Enquiry Sub-committee. In case the charges are formulated or framed by the Sub-committee then the service thereof by the Manager in respect of an enquiry against the Principal or Headmaster would not vitiate the enquiry. This judgement in the case of keshaw prasad Misra (Supra)

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on the other is in line with the ratio decided in the case of Committee of Management, S.B.Inter College (Supra). There has been no conflict between two Division Bench judgment in relation to the ratio involved. It is not possible for me to differ from the said judgement with regard to the particular question of law as advanced by Mr. Shukla. Since in the facts of the case, there is nothing to show that the chargesheet was formulated by the Enquiry Sub-committee or that the same Members of the Enquiry Sub-committee and the Preliminary Enquiry Committee were same.

13. The preliminary enquiry is in effect a fact finding enquiry to obtain materials for forming an opinion as to the graveness of the charges and necessity to hold the enquiry. Therefore, the Sub-committee holding preliminary enquiry is a Sub-committee completely distinguished and different from the Enquiry Sub-committee. Then again, the Committee of Management in its resolution dated 10th January,1988had pointed out that the chargesheet be served while constitution the Sub-committed for enquiry thereafter. Thus the chargesheet if there by any, was not a chargesheet formulated by the Sub-Committee. Though, however, nothing has been shown that any such chargesheet was approved by the Committee of Management or that it was ever approved by the Sub-Committee and only on its direction the Manager had served it as its forwarding agent. In the circumstances, the said decision does not help the contention of Mr. Singh.

14. According, the order dated 13th September, 1991 contained in annexure-50 is liable to be quashed and is, accordingly, quashed. Let a writ of certiorari do accordingly issue.

15. Mr. Shukla submits that the petitioner had attained the age of superannuation on 30th June, 1996 and had already retired. In such circumstances, there is no scope for reinstatement of the petitioner. Therefore it is hereby declared that the petitioner is entitled to all service benefits as if he had continued as Principal/Headmaster of the said school till superannuation and accordingly all such service benefits is to be made available to the petitioner as well as consequential retirement benefits as admissible in law may also be made available to the petitioner. All such does of the petitioner may be paid to the petitioner as early as possible preferably within a period of six months from the date of communication of this order to the concerned respondent. Let a writ of mandamus do accordingly issue.

In the result the writ petition succeeds and is allowed as above. However, there will be no order as to costs.

Let a certified copy of this order be given to the counsel for the petitioner on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: JULY 22, 1999

1999

July, 22

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ Petition No. 25594 of 1995

G.N. Verma ... Petitioner
Versus
General Manager, Jal Sansthan, Khushroo Bagh, Allahabad & another ...Respondents.

Counsel for the Petitioner : Sri Bhupeshwar Dayal
Sri S.P.Gupta
Sri A.N. Verma

Counsel for the Respondents: Sri R.N. Saggi
Sri Vivek Verma
S.C.

U.P. Water Supply and Severage Act, 1975 – Section-30- Dispute between consumer and Jal Sansthan – order passed by the Nigam shall be final – till the dispute is finally adjudicated water charge shall not be levied. (Para 6)

In view of the stand taken by Respondent No. 1 before us, we are of the view that the Jal Sansthan, Allahabad is not entitled to levy any water charge from the date it disconnected water supply to the premises of the petitioner.

By the Court

The prayer of the petitioner is to command Respondent No. 1 to withdraw its water connection forthwith and to submit past bills for adjudication to some Tribunals as required under the law.

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2. Shortly put his case is that since the date of his purchase of the premises No. 17/5 (New) 5 (Old), Auckland Road, Allahabad he has been continuously paying house tax and water taxes respectively in regard thereto; he received a bill of Rs.2483.54P. (appending its copy as Annexure-1) in respect of excess water charge on the ground that the meter is defective, on receipt of which he sent a reply dated 19.11.1984 (appending its copy as Annexure-2) which was received in the officer of Respondent No. 1 on 29.11.1984 stating, inter alia, that the meter is not working and no charges for excess water was ever made since 1971, the year from which he has been living and pray that the dispute be referred under Section 30 of the Uttar Pradesh Water Supply and Sewerage Act, 1975 to the Nigam (Tribunal) of the Jal Sansthan but no action has been taken, he has also given some more illustrations in regard to subsequent bills and his reply thereto.

3. Yesterday, we had passed the following order:-

" Heard Sri Bhupeshwar Dayal, learned counsel for the Petitioner.

As prayed for by Sri R.M. Saggi, learned counsel appearing for the Jal Sansthan, Allahabad put up tomorrow to enable him to explain as to what was the basis of preparation of the document appended as Annexure-1 to the writ petition which has been described as "Jal mulya ka bill-cum-notice", Allahabad Jal Sansthan, Khushru Bagh, Allahabad inasmuch as without stating as to whether the figure 5306400 mentioned in the caption 'khapat' litre/gallon is with reference to litter or gallon reminding Jal Sansthan that one of the words therein has not been struck off and there is a lot of difference between a litre and a gallon. It is a well settled law that doctrine of void and vagueness comes into play in all administrative action and whether for this vagueness the bill-cum-notice is fit to be ignored by the petitioner or not ?

Sd/- Binod Kumar Roy,J.

Sd/- Lakshmi Bihari,J".

4. Mr. R.N. Saggi, learned counsel appearing on behalf of the Sansthan (Respondent No.1) informs us that the Jal Sansthan, Allahabad has already disconnected water supply to the petitioner on 18.9.1995 and from that date onwards it is not going to charge any water charges and it does not intend to reconnect the water supply unless the petitioner desires besides it is going to refer the dispute to the Nigam (Tribunal) as suggested by the petitioner.

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B.K. Roy, J.
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5. Section 30 of the Act reads thus:-
" **30. Disputes with consumers**-Subject to the provisions of this Act, any dispute arising between the Jal Sansthan and the consumer shall be referred to the Nigam whose decision shall be final."

A perusal of the aforementioned provision leaves no manner of doubt that in terms of the dispute raised by the petitioner it was required to be referred to the Nigam whose decision has been made final by the Statute save and except its challenge before this Court through a writ application.

6. In view of the stand taken by Respondent No. 1 before us, we are of the view that the Jal Sansthan, Allahabad is not entitled to levy any water charge from the date it disconnected water supply to the premises of the petitioner.

7. We also put on record the stand of Respondent No.1 that the Jal Sansthan, Allahabad is going to refer the dispute to the Nigam (Tribunal) under Section 30 of the Act.

8. In the aforementioned view of the matter this writ petition is disposed of with following directions:- (I) The respondents are restrained from levying any water charges from the petitioner from 18.9.1995.(ii) Respondent no.1 is directed to refer the dispute raised by the petitioner, through his various representations, to the Nigam for disposal, if it intends to act against the petitioner.

9. In the peculiar facts and circumstances, however, we make no order as to cost.

10. The office is directed to hand over a copy of this order within one week to Sri R.N. Saggi, learned counsel for Respondent no.1 for a follow up action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:THE ALLAHABAD: 8.7.99

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

1999

July, 8

Civil Misc. Writ Petition No. 25059 of 1992.

Sarita Singh **...Petitioner**
Versus
State of U.P. & others **...Respondents**

Counsel for the Petitioner : Shri Rajeev Mishra
Counsel for the Respondents : Shri R.K. Saxena S.C.

Constitution of India, Article 226 – Regulation – Time bound appointment – extended from time to time- daily wager have no right to claim regularisation pursuant to interim order passed by the Court. Held-

But the fact remains that an interim order was issued on 21st July, 1992 in the present writ petition by virtue whereof the petitioner was reinstated on 15th January,1993. Such reinstatement was subject to the result of the writ petition. The interim order does not confer any right. The interim order is an order interim during the pendency of the writ petition. It depends on the result of the writ petition. Since the petitioner had no right which could be asserted on the date when the writ petition was moved for a period beyond three months from the date 29th May, 1992. She cannot claim to continue beyond the same. If she had continued or reinstated by virtue of the interim order, the same does not confer any right on her since I have already held that she did not have any right to continue in the post.

Case law discussed.
1991(1) SLR 321
1997(76) FLR 237
1991(1) SCC 691
AIR 1992 SC-2070
AIR 1992 SC 2130

By the Court

1. The petitioner was initially appointed in the post of clerk on daily wage basis for a period of three months on 17th April, 1991 as is evident from annexure-1 to the writ petition. The services were

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thereafter extended by an order dated 18th July,1991 contained in anneuxre-2 to the writ petition for another period of three months. Thereafter, it was further extended for a period of three months by an order dated 3rd December,1991 the services were extended for another period of three months as is evident from anneuxre-4. Again by an order dated 29th May,1992, the services of the petitioner were extended for a period of three months as is apparent from annexure-5. Thereafter, by an order dated 18th June,1992, there was a general order for dispensing with services of all such daily wage employees since there was no provision for appointment of such daily wage employee under the ?Rules and that employment has been brought within the purview of the U.P. Sub-ordinate service Selection Commission. Pursuant to the said order, by an order dated 19th June, 1992, the petitioner's services was dispensed with. These are annexure-6 & 7 respectively.

2. By means of this Rules, Mr. Rajeev Mishra, learned counsel for the petitioner had assailed the said order contained in annexure-6 & 7 respectively. Relying on the decision in the case of Rama Shanker Yadav Vs. State of U.P. & others writ petition No. 24413 of 1992 disposed of on 11th February, 1998, Mr. Mishra points out that the impugned order contained in annexure-6 has since been quashed by this Court on 11th February, 1998. Therefore, the basis of issuing the order contained in annexure-7 having been non est, the order of termination cannot be sustained. He further contends that since the petitioner had continued for quite sometime, his services cannot be terminated in this manner without giving any opportunity to the petitioner and without following necessary procedure for dispensing with service since there is no allegation as against the petitioner. He further points out from the amendment application filed on 22nd April, 1998 that pursuant to the interim order granted in this writ petition, the petitioner was reinstated in service on 15th January, 1993. But subsequently, the petitioner was not paid salary since April,1996 till 12th February,1998. On the other hand, on 12th February,1998 by an order dated 9th February, 1998 contained in annexure-2 to the Amendment Application, the petitioner's services were against terminated. Therefore, the petitioner has filed the present application for amendment in order to bring on record the subsequent events that had taken place during the pendency of the writ petition.

3. After hearing Mr. Rajeev Mishra, learned counsel for the petitioner and Mr. R.K.Saxena, learned Standing Counsel, the

application for amendment is allowed. The application for amendment is to be treated as part of the writ petition.

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4. After the amendment is allowed by consent of the parties, the writ petition is taken up for hearing. Mr. Rajeev Mishra had addressed the Court on the merits of the case on the basis of the amended pleadings in the writ petition. Mr. Saxena had also made his submission.
I have heard both the counsel at length.

5. The appointment letter contained in annexure-1 specifies that the appointment was on daily wage basis and purely temporary for a period of three months from the date of joining. The order dated 18th July, 1991 contained in annexure-2 also mentions that the service is being extended for a period of three months from 18th July,1991. The order dated 3rd December,1991 contained in annexure-3 again extended the services of the petitioner. Similarly, services were extended for three months from 20th January,1992 by virtue of the order dated 16th January,1992 contained in annexure-4. While annexure-5 dated 29th May, 1992 extended the services for another three months. But there was no subsequent extension. By reason of the order dated 18th June,1992, the services of the petitioner was dispensed with by an order dated 19th June,1992 contained in annexure-7. Relying on the decision in the case of Rama Shanker Yadav (Supra), Mr. Rajeev Mishra, contends that the order dated 18th June,1992 having been quashed, the basis of termination of services of the petitioner by the order dated 19th June,1992 had become non-existent. Therefore, the order dated 19th June,1992 contained in annexure-7 dispensing with petitioner's service on the basis of the order dated 18th June, 1992 contained in annexure-6 looses its force. Thus as soon the order dated 19th June,1992 becomes inoperative, the order extending the petitioner's service by order dated 29th May,1992 contained in annexure-5 revives.

6. In the decision in the case of Rama Shanker Yadav (Supra), the order dated 18th June,1992 was not quashed as a whole. It was quashed so far as the petitioner in that case was concerned. The consideration of the order dated 18th June,1992 was confirmed to the case of the petitioner in that case alone, as is apparent from the reading of the said decision. There is nothing in the said decision to indicate that the order was challenged as a whole. Whatever might be the position the Court had confirmed itself to the case of the petitioner only while deciding the said case. In as much as in the said

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case the Court had observed that the Court had carefully considered the case of the petitioner and found that the order of termination was illegal and arbitrary since the petitioner was initially appointed by the Director and that there was no illegality and irregularity in the said appointment. This observation clearly indicates that the case was confirmed to the petitioner Rama Shanker Yadav alone. The said decision has not recorded any reason or basis of its satisfaction. It may be on the basis of the materials placed before the Court in the said case on the facts and circumstances of the said case. It has not laid down any ratio decidendi which could be followed as precedent in the present case. The contention of Mr. Rajeev Mishra therefore, cannot be acceded to on account of the distinguishing feature as discussed above in relation to the case of Rama Shanker Yadav (Supra) and hat of this case.

7. Then again by virtue of the said order dated 29th May, 1992 the petitioner was entitled to continue for a period of three months from 29th May, 1992. Thus the services being limited by time and there having been no further extension, the petitioner cannot claim any right to continue after the expiry of the said period of three months from 29th May, 1992 and the services of the petitioner would automatically come to an end. In such a situation, the petitioner cannot claim any legal right in continuing in service and there cannot be existence of any legal right which can be asserted through writ jurisdiction to continue in service by virtue of the said appointment on daily wage basis on the post of a clerk.

8. In the relevant rules being the U.P. Ayurvedic & Unani Clerical Services Rules,1991, there is no provision for appointment of clerk on daily wage basis. Then again by virtue of 1991 Rules, the appointment in the post of clerk had become subject to selection by the U.P.Sub-ordinate Service Selection Board. There cannot be any appointment de hors the rules that too by an authority other than the Service Commission. Therefore, the petitioner cannot claim any right to continue on the post.

9. But the fact remains that an interim order was issued on 21st July,1992 in the present writ petition by virtue whereof the petitioner was reinstated on 15th January,1993. Such reinstatement was subject to the result of the writ petition. The interim order does not confer any right. The interim order is an order interim during the pendency of the writ petition. If depends on the result of the writ petition. Since the petitioner had no right which could be asserted on the date when

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the writ petition was moved for a period beyond three months from the date 29th May,1992. She cannot claim to continue beyond the same. If she had continued or reinstated by virtue of the interim order, the same does not confer any right on her since I have already held that she did not have any right to continue in the post.

10. Be that as it may, second order of termination contained in annexure-2 to the amendment application shows the reason on which the services of the petitioner were terminated. It had pointed out that the petitioner was not posted against any sanctioned post and the appointment was not a regular appointment. Thus even if it is assumed that the petitioner had been continuing by virtue of the interim order then she had a right to continue but that right is subject to a determination by the authority to retain her services and the second order appears to have been passed on the basis of a decision in writ petition No. 1366(SS) of 1997 and the connected writ petition decided on 7th/8th August,1997 whereby permission was given to dispense with all illegal appointments. Having found that the petitioner was not appointed on a post in a regular manner and that there having been on post to accommodate the petitioner, she was removed from the services.

11. Independent of the interim order, let us examine the validity of the order dated 9th February,1998 contained in annexure-2 to the amendment application. As observed earlier, since there is no provision for appointment on daily wage basis after the 1991 Rules were framed and the question of appointment in the post of clerk having been subjected to the Service Commission and the petitioner having not been appointed against a regular post through a regular selection, the petitioner could not claim any legal right to assert through writ jurisdiction. The Court cannot support the entry in service through back door. The judicial process cannot be utilised to support a mode of recruitment de hors the rules as has been held in the case of State of Himanchal Pradesh Vs. Suresh Kumar Verma [1991(1)SLR 321]. Then again in the case of Himangsu Kumar Vidyarthi Vs., State of Bihar & others [1997(76)FLR 237], the Apex Court had held that daily wage employee has no right to the post. Concept of retrenchment cannot be extended to them. Their disengagement is not arbitrary. In the present case, the petitioner was also not engaged against a post. Therefore, the principle enunciated in the said decision applies in full force in the present case. In the case of Sate of U.P. Vs. Kaushal Kumar Shukla [1991(1) SCC 691] as well as in the case of Director, Institute of Management 7

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Development Vs. Smt,. Puspa Srivastava [AIR 1992 SC 2070], the Apex Court had held that a person appointed for a limited time cannot claim any right to continue after the expiry of the time limit. In the case of State of Haryana Vs. Pyara Singh [AIR 1992 SC 2130] the Apex Court had depricated the entry into service through back door.

12. Mr. Mishra had also relied on two circulars contained in annexure-3 & 4 to the amendment application whereby there has been a proposal of regularisation of the employees. Relying on those circulars Mr. Mishra contends that by reason of continuation in service pursuant to the interim order, the petitioner has also acquired a right to be considered for regularisation on the basis of her seniority as provided in annexure-3 & 4 respectively. In fact, the said two annexures shows that those were issued to regularise the persons who were working pursuant to the interim order granted by this Court though there was no post. Therefore, such persons working against no post pursuant to the interim order being considered on the basis of seniority for being absorbed or adjusted against any vacancy in the Class-IV post. But the said circular has one provision which clearly cases out the petitioner. Because the said circular was meant for Class-IV employees. Since it is specifically mentioned that those Class-IV employees who are working though there is no post available by reason of the order of the High Court, they are to be adjusted against the new vacancies or that might be resulted or created in future. Both these circulars deal with Class-IV employees. However, no such order could be issued in respect of a person employed in Class-III post since such employment is subject to 1991 Rules and its selection conducted by the Service Commission. Therefore, no relief can be claimed by the petitioner by reason of the said two circulars contained in annexure-3 & 4 to the amendment application.

13. Mr. Mishra had also relied on the U.P. Regularisation of Daily Wages Appointment on Group-C Posts (Outside the purview of U.P. Public Service Commission) Rules 1998 since been promulgated on 9th July, 1998 and contends that by reason of Rule 4(1)(I), the petitioner could have been become eligible for regularisation unless the order dated 9th February, 1998 was passed. In fact, by virtue of the said 1998 Rules, had the petitioner's service not been terminated by order dated 9th February, 1998 she could have been within the zone of consideration for regularisation. But admittedly, the petitioner was not in service on 9th July,1998. Unless the order dated

9th February, 1998 is held to be invalid and the petitioner is deemed to be continued, it cannot be said that she could come within the zone of consideration within 1998 Rules. Since I have already held that there is no infirmity in the order dated 9th February, 1998 therefore, the petitioner cannot claim to continue in service on 9th July, 1998 in order to claim the benefit of the 1998 Rules.

In the result the writ petition fails and is, accordingly, dismissed. However, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.8.99

BEFORE
THE HON'BLE A.K.YOG, J.

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August, 6

Civil Misc. Writ Petition No.19160 of 1985

Kedar Nath Agarwal and another ...Petitioners
Versus
District Judge, Ballia and others ...Respondents

Counsel for the Petitioners: Sri R.R.Shivhare
Counsel for the Respondents: Mr.R.N.Singh
Mr.A.N.Ray
Mr.S.N.Singh

Constitution of India, Article 226-Practice and Procedure-Proceeding u/s 21(1) (a) of U.P. Act XIII of 1972 finally decided-During pendency of writ petition- Land Lord expired- whether the subsequent circumstances occurred during pendency of writ petition can be taken into account ?
Held-'No'

Case law discussed.
1999 (I) ARC 188
1997 (1) ARC 627 (SC)
1975 ALJ 669 Para-4

By the Court

Smt. Dhanraji Debi and Jagdeo Shah Respondent no. 4 and 4 since dead represented by legal representatives) filed release application under Section 21 (1) (a), U.P. Urban Buildings (Regulation of letting , Rent and Eviction) Act, 1972 (U.P. Act No.

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XIII of 1972), for short called 'the Act' contending inter alia amongst others, that they required the shop described in the release application situate in Qasba Rasra (district Ballia) wherein Petitioners were tenants at the rate of Rs.43.75 paise per month on the ground that Jagdeo Shah had to quit Calcutta because of anti-Bengali movements and riots and that he required the shop in question for carrying on his own business along with his wife Smt. Dhanraji, Land Lord also filed an application (Annexure 2 to the petition) praying that an Amin be appointed by the Court for preparing site plan. Amin submitted a report dated 30th September 1983 (page 28 of the Writ Paper Book) alongwith site plan (page 32 of the writ paper book).

Tenants filed written statement and denied the case of the land lord as disclosed in the written statement.

The tenant filed evidence in support of their case. Out of said evidence, only following documents have been filed with the writ petition :-

1. Affidavit of Kedar Nath dated Nil (Annexure IV)
2. Affidavit of Mahadev dated 21.12.1983 (Annexure –V)
3. Copy of the application dated 21.12.1983 praying for appointment of Advocate Commissioner (Annexure-VI)
4. Affidavit of Ram Ashish Pathak dated Nil (Annexure-VI).
5. Affidavit of Mohan Das Agarwal dated 16.2.1984 (Annexure VIII)

The Prescribed Authority allowed the release application vide judgement and order dated 22nd February 1984 (Annexure –IX) on the ground that the need of the land lords was 'bonafide' and that land lord was to suffer more hardship as compared to the tenant. Judgement of the Prescribed Authority shows that tenant has been throghout pleading that one of the land lords (Jagdeo Shah) was old and he was not in a position to conduct business. It has also come in the order that the land lords had a minor daughter who was dependent on ;the income of her parents (Respondent nos. 3 and 4) and that land lord had hosiery licence and in a position to run the proposed business in the accommodation, in question. The Prescribed Authority also recorded a finding of fact that there is no shop as such on the southern side of the disputed shop as alleged by the tenant nor the said accommodation, could be used as show room proposed by the land lord. Tenant was using shop in question and

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engaged in business in the name of M/s Kedar Nath Machinery Stores. It was also found that tenants had one shop wherein 'gold and silver business' in the name and style off –M/s Kedar Nath Sarraf was being done and another business of cloth was being carried on in the name and style of M/s Mahadeo Ranchhjordas' in another shop.

The tenant had relied upon the Amin's report and the map prepared by him for pleading that case of the land lord was not to be accepted. The Prescribed Authority also referred to the affidavit of Mahadeo(son of the tenant) and also to the Amin's report with reference to the allegations contained in the said affidavit but did not find favour with ;the allegation made by the tenant. Consequently, Prescribed Authority allowed the release application of the land lord.

Feeling aggrieved tenant filed Rent Control Appeal No.4 of 1984 under section 22 of the Act. The Appellate Authority vide judgement and order dated 25th November 1985 (Annexure-X) dismissed the appeal.

In these circumstances, the tenant-Petitioners filed the present writ petition to challenge the concurrent judgements passed by Respondent nos. 1 and 2 (Annexure IX and X).

The original land lords (Respondent Nos. 3 and 4) died during the pendency of the petition. Initially steps were not taken by the Petitioners to substitute legal representatives promptly. Applications for substituting legal representatives promptly. Applications for substituting legal representative along with application under section 5, Limitation Act were filed only when one of the legal representatives of the deceased land lord filed an application for abating the writ petition. Needless to mention, these procedural hastles led to pendency of the writ petition since 1983, completely frustrating the object of provisions of release in the Act.

Kamla Devi, one of the legal representatives of the deceased land lord Respondent nos. 3 and 4 filed a counter affidavit., The petitioners also filed a Rejoinder Affidavit mainly contending that there is dispute amongst daughters of the deceased legal representatives and also referred to subsequent developments, which had taken place during the pendency of the writ petition.

Heard learned counsels for the parties.

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On the behalf of the Petitioners, it is urged that both the land lords (Respondent Nos.3 and 4) having died., leaving behind three married daughters this Court may take into account the said circumstances which came into existence after passing of the impugned orders. The learned counsel for the petitioners submitted that the application under section 21 of the Act should be rejected as having abated since the cause of action for seeking release of the shop in question has become non-existent. Alternatively, it is submitted that writ petition should be allowed. The learned counsel for the petitioners has referred to Section 21 (1) (a) of the Act to show that law contemplates that when release of an accommodation is required by land lord or any member of his family, the same must continue. According to him, both the land lords having died during the writ proceedings, leaving married daughters (who are not members of the land lord's family),the application under section 21 (1) (a) of the Act filed for release stands abated.

The petitioners submits that High Court should and ought to take into account subsequent events which have emerged during the pendency of the writ petition and places reliance on the following decisions reported in :-

1. AIR 1981 SC 1711 (Paragraph 14 and 28)
2. AIR 1985 SC 207 (Paragraph 15 and 16)
3. AIR 1991 SC 1760 (Paragraph 20 to 23)
4. 1996 (1) ARC 572 (Paragraph 9)
5. 1989 (1) ARC 475
6. 1997 (1) ARC 627
7. 1986 (1) ARC 416 (Paragraph 8) and
8. 1993 (2) ARC 401 (Paragraph 7)

The learned counsel for the petitioner has also fairly placed before this Court the following decisions wherein, according to him, a contrary view has been taken:-

1. 1999 ARC 188 (Paragraphs 17 and 19)
2. 1998 (2) ARC 445
3. 1997 (I) ARC 627 (Paragraph 3) Followed in 1998 (2) ARC 445

The learned counsel for the petitioner thereafter, carrying his arguments further on the above aspect submitted that this Court should refer the matter to a larger bench. In this context, he has referred to the following decisions reported in;-

1. AIR 1974 SC 1596
2. AIR 1976 SC (Paragraph 22)
3. 1990 (1) AWC 308 and
4. 1991 (1) AWC 213

On the other hand, contesting respondents have placed reliance on the decision reported in AAAIR 1976 SC 79. In the said decision it is held that Court is required to determine the rights of the parties as existed on ;the date of institution of the suit. His submission is that ‘ Subsequent events’ which have come into existence during pendency of writ petition, are to be ignored.

One has to bear in mind, while considering respective decisions on ;the question, that vital and decisive factor is as to whether the proceedings had come to an end under the Act. The matter having become final in appeal or revision and thus having and came to an end, ;the matter stood finally decided. Filing of writ petition by invoking supervisory jurisdiction under the Constitution cannot be said to be continuation of the proceedings under the Act. It is well settled in law that writ is not continuation of the suit, aappeal or revision. For this purpose reference may be made to :-

1. AIR 1963 SC 946 (State of U.P. versus Vijay Anand Maharaj)

2. AIR 1966 SC 1445 (Paragraphs 15 and 16) Ramesh &another versus Genda Lal Motilal Patni & others)

3. 1974 RD 107-AIR 1974 All.202 (FB) (Udai Bhan Singh versus Board of Revenue)

4. AIR 1972 SC 1598 (The Ahmedabad Manfg.& Colico Printing Coy.Ltd. versus Rantahal Remanand & others)

Perusal of all the decisions relied upon by the learned counsel for the petitioner, (particularly AIR 1991 SC 1760 Paragraph 25 which has taken note of other decisions reported in AIR 1981 SC 1711 and AIR SC 207), clearly shows that Supreme Court was considering the question whether a case where matter was pending in appeal, it was permissible under law to take into account subsequent events before appeal was finally decided. Paragraph 25 of the said decision shows that in that case application for additional evidence was filed in appeal to bring on record subsequent developments.

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Case was not finally decided under the contemplated forum channel. Supreme Court held, in ;the facts of; the case that subsequent events emerging during appeal should be taken into account. N decision has been placed wherein Hon'ble Supreme Court held that even if the proceedings are finally determined under normal channel, still subsequent developments which take place when writ petition is pending should be taken into account.

There are decisions of the apex court wherein it has been held that once matter is finally decided in appeal then subsequent circumstances, which occur during pendency of writ proceedings, cannot be taken into account. Reference may be made to the following decisions, which held that 'Subsequent Events' after appellate stage (when matter is finally concluded) are not relevant:-

(1) 1999 (1) ARC 188 (Paragraphs 17 and 19)
(2) 1997 (1) ARC 627 (SC)
(3) 1975 Allahabad Law journal 669 (Paragraph 4)

I find no contrary decision of this Court or that of the apex court on the said issue. The contingency of making reference hence does not arise.

The release application does not abate nor writ petition, for the said reason, can be simplicitor allowed. Had the land lord got possession on the basis of the impugned orders and had the writ petition not been pending for no fault of the land lords or their legal representatives, the land lords would have certainly reaped the fruits. A party cannot be penalized for the delay in Court.

The learned Counsel for the petitioner then submitted that the Prescribed Authority has erred in law in taking into account the ex parte report of the Amin, which was obtained behind the back of the petitioners and also that tenants were not allowed to cross-examine the said Amin. Reference is made to certain provisions of the Act wherein Prescribed Authority has power to allow cross-examination.

Memorandum of Appeal under Section 22 of the Act has not been annexed with ;the Writ Petition. A copy of the same was placed for perusal before the Court by the learned counsel for the Petitioners. A perusal of the same shows that in Ground No. 10 (Memorandum of Appeal) tenant- appellants did express grievance on this aspect. Perusal of the appellate judgement, however, does not

sow any discussion on this aspect. It is clear that said ground was not raised and pressed before Appellate Authority (District Judge). The said averments are, however, sworn on the basis of ;the legal advice. No reliance can be placed on such averments made on legal advice on the point n question accepted and, therefore, rejected. Obviously, such an allegation is an after thought made on the basis jof the advice tendered by the counsel. There is nothing on record to show that the counsel before the Appellate Court had, as a fact, pressed' Ground No. 10" , in the Writ Petition. There is anything to show that any grievance was made before Appellate Authority by filing an application, before him-pointing out alleged omission. This court cannot allow this point to be pressed now. Averments on this point made in Paragraph 16 of the writ petition cannot be accepted. There is no affidavit of the counsel before Appellate Court or this Court as held in 1978 (UP) RCC 503. No one can be allowed to take advantage of lapse on his own part. See AIR 287, AIR 1988 SC 71.

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The other grievance, that Amin was not cross-examined, it may be stated that it was not a mandatory obligation upon the Courts below while exercising jurisdiction under the Act. Petitioner has miserably failed to demonstrate as to how he has been prejudiced.

Learned counsel for the petitioner then submitted that the Prescribed Authority has made a perverse observation while it observed that no affidavit was filed by Kedar Nath. It is sad for the petitioners to note that such an objection is not taken before the Appellate Court. Paragraph 7 of the Appellate judgement (particular page 77 of the writ paper book) shows the Appellant's main contention was that land lord had daccommodation on the south of the shop in question. The lower Appellate Court found it was neither sufficient nor suitable . Petitioners cannot be allowed to find fault with Appellate Court's judgement on this score now. Perusal of the affidavits filed alongwith ;the writ petition shows that tenant did refer and relied upon the Amin's report.

Petitioners have also filed copy of application praying for appointment of Advocate Commissioner. There is nothing in the memorandum of appeal on this aspect. Petitioners not having pressed the said application cannot be permitted now at this stage to challenge the judgement of the Courts below on this score. There is no categorical pleading that the petitioners had pressed and argued before the appellate authority that their application for appointment of Commissioner has not been considered by the Prescribed

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Authority in spite of tenants pressing for it. Otherwise also, if ;the appellate authority has not taken into account certain application or plea raised before it, the party concerned should have approached that very court promptly and expeditiously as the Court alone would have been in the best position to ascertain and determine the said fact.

The learned counsel for the Petitioners thereafter referred to the appellate judgement and pointed out that in the said judgement there is no mention of the affidavit of the tenant. It will suffice to mention that the Prescribed Authority had considered the matter and recorded findings of fact. The appellate authority was writing judgement of concurrence. Apart from it, perusal of the appellate judgement shows that the tenant-petitioners, who were appellants before the appellate authority, mainly pressed their argument regarding the fact that there was a room on the southern side in the accommodation in question, which could be used as show room. The said argument has been repelled by the appellate authority by giving reasons in its judgement. The appellate authority further observed that Amin-Commissioner had found that appellant had sufficient accommodation in his possession. The said statement of fact in the appellate judgement has not been specifically denied as a fact in the writ petition.

It is possible that the two Courts below could have delivered better judgements. This Court is, however, not expected to appraise evidence on its own and then find fault with the findings recorded by the Courts below. This Court cannot be, while exercising jurisdiction under Article 226, Constitution of India, asked to act as trial/Appellate Court.

The learned counsel for the petitioners further urged that the Courts below have not taken into account Section 21 of the Act, which requires granting of two years of rent as compensation. There is no pleading in writ petition that such a plea was raised and pressed before the concerned courts. It may be pointed out that the relevant provision in this aspect requires ground of compensation only when the Court feels that circumstances warrant granting of compensation and not as of course in all the cases-without having regard to the facts of a case.

In the instant case Courts below were not required to consider this aspect. I have, however, examined the record and after taking

into account the social status of the tenant, I do not think it is a fit case that compensation should be awarded.

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The learned counsel for the Petitioners, at this stage submitted that since accommodation in question is being used as shop, ;it is a fit case where this Court should protect possession of his clients for some time. Considering the request made at the Bar on behalf of the Petitioners I direct that petitioners shall not be dispossessed from the accommodation in question on the basis of the impugned orders provided they give an undertaking in writing containing the conditions as mentioned herein.

1. The tenant-petitioners shall file before concerned Prescribed Authority, on or before 31st August, 1999, an application alongwith an affidavit giving an unconditional undertaking to comply with all the conditions mentioned hereinafter.

2. Petitioner-tenants shall not be evicted from the accommodation in their tenancy for six months i.e. up to 31st January 2000. Tenant-petitioners, their representative assignee, etc. claiming through them or otherwise, if any, shall vacate without objection and peacefully deliver vacant possession of the accommodation in question on or before 31st January, 2000 to the land lord or landlord's nominee/representative (if any, appointed and intimated by the land lord) by giving prior advance notice and notifying to the land lord by Registered A. D. post (on his last known address or as may be disclosed in advance by the land lord in writing before the concerned prescribed authority), time and date on which land lord is to take possession from the tenants.

3. Petitioners shall on or before 31st August, 1999 deposit entire amount due towards rent etc. up to date i.e. entire arrears of the past, if any, as well as the rent for the period ending on the 31st January, 2000`.

4. Petitioners and everyone claiming under them undertake not to 'change' or damage' or transfer/alienate /assign in any manner, the accommodation in question.

5. In case tenant-petitioners fail to comply with any of the conditions/or directions contained in this order, land lord shall be entitled to evict the tenant-petitioners forthwith from the

accommodation in question byt seeking police force through concerned Prescribed Authority.

6. Defaulting party shall pay Rs. 25,000/- (Rupees Twenty five thousand only) as damages to the other party if there is violation of the undertaking or anyone or more of ;the conditions contained in this order

The writ petition is dismissed subject to the observations and conditions mentioned above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 24.5.1999

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May, 24

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

Civil Misc. Writ Petition No. 21462 of 1999

Mahaveer Prasad Sharma **...Petitioner.**
Versus
Cane Commissioner, U.P., Lucknow & others **...Respondents**

Counsel for the Petitioner : Shri N.L. Pandey
Counsel for the Respondent : S.C.
Mr. Manish Umrao
Mr. P.M.N. Singh

U.P. Sugar Cane (Regulation of supplies and purchase) Act 1953- S.2(n) read with U.P. Cane Cooperative Service Regulation,1975- Regulation 27- Disciplinary Proceeding-against seasonal employee intitiated on 9th October 1998 where the employee retired in June 98 itself- crushing season 1998 ended on 15.7.98- held- disciplinary proceeding automatically dropped on 15th July 98- Petition allowed. (Para 9)

There is no scope for the court to accept the contention of Mr. Manish Umrao, holding brief of Mr. P.M.N. Singh, Learned counsel for the respondents that the next crushing season had begun on 1st October, 1997, therefore the order passed on 9th October, 1998 nine days exceeding one year, would not attract the mischief of Regulation 27. Inasmuch as even if the crushing season had started on 1st October,1998 but the same comes to an end on 15th July, 1998 and then from 1st October,1998, the crushing season 1998-99 begins, which is altogether another crushing season. The

one year cannot be imported to interpret the same. For all these reason's it appears that the impugned order contained in Annexure 6 to the writ petition, is wholly incompetent, and void since the disciplinary proceedings stood automatically dropped on the expiry of 15th July, 1998 in terms of Regulation 27.

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D.K. Seth, J.

By the Court

1. A charge sheet was issued to the petitioner on 8th July, 1997 pursuant to which an enquiry was proposed. By an order dated 9th October,1998, the petitioner was punished by the Committee of Management. This order is contained in Annexure 6 to the writ petition. Mr. N.L. Pandey, learned counsel for the petitioner contends that the petitioner had retired on 30th June,1998. The crushing season 1997-98 ended on 15th July, 1997. In view of Regulation 27 of the U.P. Cane Cooperative Service Regulation,1975, the disciplinary proceedings should be deemed to have been automatically dropped, if it is not completed within the same crushing season expiring on 15th July,1997. Therefore, the impugned order is in-competent and is liable to be quashed.

2. Mr. Manish Umrao, holding brief of Mr. P.M.N. Singh, learned counsel for the respondents contends that since the charge sheet was issued on 8th July,1997, namely seven days before the end of the crushing season i.e. 15th July,1997, therefore, it cannot be said to have been automatically dropped after 15th July,1997. According to him, the season 1997-98 may be taken to be the crushing season for the purpose of Regulation 27 of the said Regulation in this case. Therefore, the order is competent and has been rightly passed.

I have heard both the counsel at length.

Crushing season has been defined in the said Regulation in Regulation 2(n) in the following manner:-

"Crushing Season" means the period as defined in U.P. Sugarcane (Regulation of Supplies and Purchases) Act, 1953 (U.P. Act No.-XXIV of 1953)."

3. U.P. Sugarcane (Regulation of Supplies and Purchases) Act, 1953 from where the definition of crushing season has been borrowed in Regulation 27 provides in Section 2(I) as follows:-

"Crushing Season" means the period beginning on the 1st October in any year and ending on the 15th July next following;"

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4. Thus it appears that the crushing season is the period between 1st October in any year and ending on the 15the July next following. Thus in the present case the crushing season 1996-97 ended on 15th July,1997 whereas the charge sheet was issued on 9th July,1997, namely seven days before the end of the crushing season 1996-97. The said period cannot be taken to be a period within the meaning of Regulation 27 in view of physical impossibility. In such circumstances, it is to be looked into in a different manner.

5. In order to appreciate the situation, it is necessary to refer to Regulation 27, which prescribes as follows:-

"27. Disciplinary Proceedings:- In the event of a complaint against any member of the season staff the Secretary of the Union shall make a preliminary enquiry and if he is satisfied that a prima facie case is established against the person concerned, he shall intimate the same to him in the form of charges and call for his explanation to be submitted within a specified time. The Secretary of the Union shall examine the explanation, documents and connected records and submit his final report along with definite recommendations to the Committee of Management of the Union for passing final order in the case. In case the explanation is not received within the specified time, the Secritary shall submit his final report to the Committee of Management on the basis of material already on the file. These proceedings shall be of a summary nature and the Secretary should not take more than a month to complete the same. The Committee of Management should also arrange to dispose of the case within one month of the final report from the Secretary, in case of default on the part of Secretary of Cane Union or the Committee of Management in not completing the disciplinary proceeding against a seasonal staff by the end of crushing season, the same shall be deemed to have been automatically dropped."

6. Regulation 27 thus shows that the inquiry so initiated has to be completed within one month by the Secretary. Then after the report of the Secretary, the Committee of Management has to take a decision within one month. But this one month is not mandatory but directory. At the same time this one month indicates that it has to be expeditiously dealt with. This one month may be the inner limit. But

outer limit has been specifically provided in Regulation 27 itself, where it has been provided that in case of default on the part of the Secretary or on the Committee of Management in not completing the disciplinary proceeding against a seasonal staff by the end of the crushing season, in that event, the disciplinary proceeding should be deemed to have been dropped automatically. The expression used “automatically dropped” clearly incidates when read along with phrase “deemed to have been” that no other order is necessary and it is dropped automatically at the end of the crushing season.

7. The contention of Mr. Pandey to the extent that the inquiry ought to have been concluded within 15th July,1997 though technically seems to be sound but the same is practically impossible. If it is so taken when even the inner limit of one month by the Secretary and another one month by the Committee of Management would not fit in . Thus though the enquiry was initiated by the issue of the charge sheet on 8th July, 1997 and if we take the inner limit of one month by the Secretary and one month by the Committee of Management, then it would overlap the following crushing season. Thus when this inner limit overlaps, the crushing season following has to be taken to be the as an outer limit. Rules of interpretation cannot be technically interpreted so as to frustrate the purpose and object. An interpretation which farthers the purpose and object of the provision is to be preferred to within the technically prepounded interpretation. Thus, in this case, the season 1997-98 has to be taken as to the crushing season purpose of Regulation 27 as an the outer limit for dropping of the proceedings.

8. In the present case, admittedly, even the following crushing season, namely, 1997-98 ended on 15th July,1998 within which the petitioner had retired on 30th June,1998. Thus there were two eventualities- one that the petitioner had retired on 30th June,1998 and the crushing season had also ended on 15th July,1998, where as the order was passed on 9th October,1998. Thus the order having been passed after the expiry of the crushing season squarely attracts the mischief condition as provided in Regulation 27.

9. Regulation 27 as observed earlier, is not mandatory with regard to the inner limit of one month and one month so far as Secretary and Committee of Management respectively are concerned. But from the scheme of the said provision, it cannot be said that the outer limited is directory. The language used, as observered earlier, clearly indicates that it was with the object of

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D.K. Seth, J.

making it mandatory such a provision was incorporated, when the Legislature clearly prescribes that if on account of any default the proceedings could not completed by the end of the crushing season, in that event such proceedings shall be deemed to have been dropped automatically, A plain reading of the said provision clearly indicates that there is no scope of ambiguation and it cannot be interpreted in any other manner. The expression used by the Legislature has to be interpreted on the simple meaning attached to it. The High Court in exercise of writ jurisdiction can interpret a Legislative. But it cannot encroach upon the domain of the Legislature, namely to legislate. If any other interpretation is given, in that event, the same would contrary to the purpose and object and, there by, making out a different purpose from the provision provided in Regulation 27, which has a statutory force since framed in exercise of Section 122 of the U.P. Cooperative Societies Act, 1965 by Cane Commissioner, the authority constituted under the Government through Notification dated 12th January, 1970. Thus the above provision cannot be interpreted in the manner except as I propose to. There is no scope for the court to accept the contention of Mr. Manish Umrao, holding brief of Mr. P.M.N. Singh, learned counsel for the respondents that the next crushing season had begin on 1st October,1997, therefore, the order passed on 9th October,1998 nine days exceeding one year, would not attract the mischief of Regulation 27. Inasmuch as even if the crushing season had started on 1st October,1998 but the same comes to an end on 15th July,1998 and then from 1st October,1998 the crushing season 1998-99 begins, which is altogether another crushing season. The one year cannot be imported to interpret the same. For all these reasons, it appears that the impugned order contained in Annexure 6 to the writ petition, is wholly incompetent and void since the disciplinary proceeding stood automatically dropped on the expiry of 15th July,1998 in terms of Regulation 27.

10. In the result, the writ petition succeeds and is hereby, allowed. A writ of certiorari do issue accordingly quashing the order contained in Annexure 6 to the extent it inflicts punishment pursuant to the disciplinary proceedings without affecting the petitioner's superannuation on 30th June,1998.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 7.7.1999

1999

July, 7

BEFORE
THE HON'BLE G.P. MATHUR, J.

Criminal Misc. Application No. 8422 of 1984

Jagdish Prasad **...Applicant.**
Versus
State of U.P. and Others **...Opposite party.**

Counsel for the Applicant : Shri A.K. Gupta
M.K. Gupta
Counsel for the Respondents: A.G.A.

Constitution of India, Article 20 (2)- Double jeopardy-Doctrine of Applicability. (Para 4)
Held-

Article 20 (2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. The bar created by the clause (2) of Article 20 would apply only where the accused has been both prosecuted and punished for the same offence previously. The facts mentioned above would show that the police after investigation submitted final report which was accepted by the learned C.J.M. and the accused were not even summoned to face trial. Therefore the contention raised on the basis of clause (2) of Article 20 has no substance as the stage for prosecution of the applicant had not even arisen on account of acceptance of the final report.

Indian Evidence Act- Bar of Principles of issue estoppel Applicability. (Para 6)
Held-
In the present case, the accused applicant has not been tried on any former occasion and as such no finding has been recorded in his favour. In absence of a finding having been recorded in favour of the accused, the question of precluding the reception of evidence to disturb the aforesaid finding of fact in the present trial does not arise at all. Therefore the trial of the applicant on the basis of the complaint instituted against him is not at all barred on the principle of issue estoppel.

Cases referred:
AIR 1965 SC 87
AIR 1969 SC 961

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Jagdish Prasad
Vs.
State U.P. & others

G.P. Mathur, J.

AIR 1956 SC 415
AIR 1985 SC 1285

By the Court

1. This petition under section 482 Cr.P.C. has been filed for quashing the proceedings of criminal case no. 1485 of 1981 pending before the C.J.M., Aligarh.

2. A criminal complaint was filed by the Sales Tax Department, Aligarh through Sri K.D. Joshi, Sales Tax Officer against the applicant Jagdish, Basudeo and some others on 22.5.81 in the Court of C.J.M. Aligarh. The case set up in the complaint is as follows. The officers of the Sales Tax Department conducted a survey of the business premises of firm M/s Ram Charan Kasera, Kanwariganj on 7.9.79. The survey commenced at about 12 a.m. and continued till 6 p.m. and some incriminating documents were seized which were kept in a leather bag and the same was handed over to Sri Kishan peon of the department. While the officers of the Sales Tax Department were busy in the survey work, the accused called more than 100 persons to his shop. When the officers of the department were proceeding to leave the business premises of the firm, the accused along with their companions forcibly snatched the leather bag from Sri Kishan peon. They also made an attempt to forcibly snatch the bags which were being carried by Sri Indra Deo Ram and Sri K.N. Singh, Sales Tax Officers. In the scuffle which ensued a diary of Sri K.N. Singh was torned. The accused also forcibly obtained signature of Sri I.D. Ram on a letter which was written by them. They also assaulted Devendra Kumar Sharma, an employee of the department and prevented the officers from leaving the place by surrounding the Jeep of the department. However they could manage to come out on account of timely arrival of police patrol vehicle. A F.I.R. of the incident was lodged by Sri I.D. Ram at P.S. Kotwali on the same day, on the basis of which a case was registered as crime no.578 of 1979 under section 395 I.P.C. On 14.10.79 the accused along with some police personnel came to the house of Sri Kishan and took him along with them in a car. They obtained his signature on an affidavit after giving him threat of life. It was thus alleged that the accused had committed offence under sections 395,353,332,384,426 I.P.C.

3. Sri M.K. Gupta, learned counsel for the applicant, has submitted that the prosecution of the applicant on the basis of the

complaint instituted by Sales Tax Department is violative of Article 20(2) of the Constitution and is also barred by the principles of issue estoppel. In order to appreciate the contention raised by the learned counsel for the applicant, it is necessary to mention certain facts. As mentioned in the complaint, F.I.R. of the incident was lodged on 7.9.79 against Jagdish, Basudeo and others under section 395 I.P.C. at P.S. Kotwali which was registered as crime no. 578 of 1979. The police after investigation submitted final report dt. 18.10.80. The final report was accepted by the C.J.M. Aligarh on 21.10.80. Subsequently a protest petition was filed on behalf of the Sales Tax Department through Sri K.D. Joshi, Sales Tax Officer on 17.2.81 wherein a prayer was made that the order accepting the final report be reconsidered and the accused be summond. This application was rejected by the learned C.J.M. on 12.3.81. The Sales Tax Department preferred a revision against the aforesaid order which was dismissed at the admission stage by the learned Sessions Judge on 19.5.81. The complaint giving rise to the present petition was thereafter filed on 22.5.81.

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4. Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. The bar created by the clause (2) of Article 20 would apply only where the accused has been both prosecuted and punished for the same offence previously. The facts mentioned above would show that the police after investigation submitted final report which was accepted by the learned C.J.M. and the accused were not even summoned to face trial. Therefore the contention raised on the basis of clause (2) of Article 20 has no substance as the stage for prosecution of the applicant had not even arisen on account of acceptance of the final report.

5. Regarding the second contention that the trial of the applicant is barred by the principles of issue estoppel it may be noticed that neither there has been any previous trial of the applicant nor any finding has been recorded in his favour at any earlier stage. The principles of issue estoppel was explained in the following words by the Supreme Court in Manipur Administration Versus Bira Singh AIR 1965 SC 87 :

“The rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution,

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not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of section 403(2)."

6. Similar view was taken in Piara Singh Versus State of Punjab AIR 1969 SC 961 and Pritam Singh Versus State of Punjab AIR 1956 SC 415. In the present case, the accused applicant has not been tried on any former occasion and as such no finding has been recorded in his favour. In absence of a finding having been recorded in favour of the accused, the question of precluding the reception of evidence to disturb the aforesaid finding of fact in the present trial does not arise at all. Therefore the trial of the applicant on the basis of the complaint instituted against him is not at all barred on the principle of issue estoppel.

7. There is another aspect of the case which deserves notice. The police submitted final report dt. 18.10.80 in favour of the accused and the said report was accepted by the learned C.J.M. on 21.10.80. It is obvious that the final report was accepted without issuing any notice to the first informant namely Sri I.D. Ram, Sales Tax Officer, Aligarh. This fact has been specifically stated in para 11 of the protest petition and is also born out from the sequence of events namely that the final report was accepted within three days of its submission by the police. In Bhagwant Singh Versus Police Commissioner AIR 1985 SC 1285 it has been held that in a case where the magistrate to whom a report is forwarded under sub-section (2) of section 173 Cr.P.C. decides not to take cognizance of the offence and to drop the proceedings or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the F.I.R. he must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. In view of this authoritative pronouncement by the Apex Court, the order accepting the final report passed by the C.J.M. on 21.10.80 was clearly illegal. After the officers of the Sales Tax Department came to know about the acceptance of the final report, a protest petition was filed along with some affidavits of the eye witnesses on 17.2.81 praying that the order accepting the final report be reconsidered and the accused be summoned. This application was rejected by the learned C.J.M. on 12.3.81. The order passed by him is being reproduced below:

"Sri K.D. Joshi have moved this application to reconsider the order accepting the final report in this case and summon the accused. I have heard the counsel for the applicant and the P.O. The F.R. was accepted by me on 21.10.80 after perusing the case diary and my order runs as follows:

'Police janch ke nateja ko sahi mante huve F.R. swikar ki jaati hai.'

I do not think it just and proper to revise the order only on the basis of affidavit filed. The applicant may resort to another course open to him under the law to proceed against the accused. The application is rejected"

8. The observation made in the last part of the order to the effect that the applicant (complainant) may resort to another course open to him under the law clearly postulates that a complaint could be filed against the accused. The law is well settled that even if a final report is submitted and the same is accepted, it is open to the first informant to file a complaint for prosecution of the accused.

In view of the discussion made above, there is no merit in this petition which is hereby dismissed. Stay order is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.99

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE LAKSHMI BIHARI, J.

1999

August, 23

Civil Misc. Writ Petition No. 3842 of 1992

Modi Spinning and Weaving Mills Company ...Petitioner
Versus
The Nagar Palika Modinagar, Through its Administrator and other ...Respondents.

Counsel for the petitioner : Miss Bharti Sapru
Shri K. Gulati
Shri Rakesh Sawhney
Shri Sudhir Chandra

Counsel for the Respondents : Shri P. Mittal

1999

Modi Spinning & Weaving Mills Company
Vs.
The N.P. Modi Nagar, through its Administrator & others

B.K. Roy, J.
Lakshmi Bihari, J.

Sick Industrial Companies (Special provisions) Act 1985, Section 22 (3)- Applicability. (Para 5)
Held-
Having given our anxious consideration we agree with the view taken by the Bombay High Court which stands approved by the Supreme Court holding non-applicability of clause (3) of Section 22 of the Act.

Cases referred:
A.I.R. 1990. S.C. 1017.
A.I.R. 1990 Bom. 27

By the Court

The prayer of the petitioner is to quash the order 15th February, 1992 passed by the Executive Officer, Nagarpalika, Modi Nagar contained in his letter dated 15th June, 1992 (appended as Annexure-5) to deposit the amount mentioned therein as House Tax. A further prayer has been made to prohibit the Respondents from taking any steps or proceedings in any manner in the nature of execution, distress or the like against its properties for recovery of the amount due under the aforementioned impugned order without the prior consent of the BIFR under Section 22 (1) of the sick Industrial Companies (Special Provisions) Act, 1985.

2. Heard Miss Bharti Sapru, learned counsel appearing on behalf of the petitioner and Mr. Pankaj Mithal, learned counsel appearing on behalf of Respondent no. 1 and 2.

3. The main thrust of the submission of Miss. Bharti Sapru was that the urged on behalf of the petitioner stands answered in its favour by the pronouncement of the Supreme Court in Gram Panchayat v. Sri Vallabh Glass works Ltd. & others AIR 1990 SC 1017 in as much as against the decision of the Bombay High Court in Sri Vallabh Glass Works Ltd. V. state of Maharashtra & others AIR 1990 Bombay 27 which also repelled the similar contention raised by Mr. Mittal in regard to applicability of Section 22 (3) of the Act and thus this writ petition is fit to be allowed.

4. The contention of Mr. Mittal, on the other hand, was that true it is that Section 22(3) of the Act which according to him applies and no relief can be claimed beyond seven years, was considered by the Bombay High Court and similar argument made before the Bombay High Court was rejected but there being no pronouncement in this

regard by the Supreme Court in the aforementioned case the contention of Miss Bharti Sapru is not fit to be allowed and accordingly this writ petition be dismissed.

5. In our opinion the view taken by the Bombay High Court in regard to non-applicability of Section 22 (3) of the Act stands approved by the Supreme court when it made following observations in gram panchayat Supra :-

"In our opinion the High Court was justified in quashing the recovery proceeding which was against the property of the Company…………"

6. Having given our anxious consideration we agree with the view taken by the Bombay High Court which stands approved by the Supreme Court holding non-applicability of clause (3) of Section 22 of the Act.

7. In the result, we allow this writ petition and quash the order impugned but in the peculiar facts and circumstances making and order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLHABAD 18.08.1999

BEFORE
THE HON'BLE A.K. YOG , J.

1999

August, 18

Civil Misc. Writ Petition No. 34514 of 1999

Km. Sweta Agarwal **...Petitioner**
Versus
Additional Secretary, Board of High school & intermediate Education U.P. At Allahabad and another **...Respondents**

Counsel for the Petitioner : Shri V.D. Ojha
Counsel for the Respondents : SC

Constitution of India, Article 226 read with Articles 14 and 16- Exercise of power under Article 226- Equal treatment-No discrimination-Benefit granted to all similarly circumstanced persons viz. Scrutiny applicants. (Paras 3 &4)

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Km. Sweta Agarwal
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Addl. Secretary, Board of High School & Intermediate at Alld. & others
------
A.K. Yog , J.

Held -
It is to be appreciated that parties who failed to approach the Court cannot be ignored. So all the parties, whether they have knocked the door of the Court or not, to be granted relief. It cannot be said that benefit be given to only those who are before Court. Similarly circumstanced persons who have not approached the Court and may be waiting in the wings would also be entitled to be given similar relief against the State which is under statutory obligation to accord equal treatment as otherwise it may be guitly of discriminatory or arbitrary treatment which cannot be countenanced under Article 14 and 16, Constitution of India. In view of the above, I issue writ of mandamus containing a general command to the concerned authorities (Respondents) with respect to all the similar cases pending on date before them to finalize on or before October 31, 1999.

Cases referred:
(1997) 2 S.C.C.1 (Pr. 18)
AIR 1979 SC 765 (766)
1982 UPLBEC 480.

By the Court

1. It is yet another case where Petitioner in seeking relief for expending matter of scrutiny pending with the Respondents.

2. This Court takes judicial notice of the fact that large number of students have submitted their application forms praying for scrutiny as contemplated under relevant regulations framed by the Board of High School & Intermediate Education, U.P., Allhabad (for short called Board). Instead of applying its mind to individual cases, this court feels that matters pertaining to scrutiny should be decided at the earliest possible and Board should be decided at the earliest possible and Board should not, by delay at its end, compel students and guardians to run to High Court.

3. It is to be appreciated that parties who failed to approach the Court cannot be ignored. So all the parties, whether they have knocked the door of the Court or not, to be granted relief. It cannot be said that benefit be given to only those who are before Court. Similarly circumstanced persons and who have not approached the Court may be waiting in the wings would also be entitled to be given similar relief against the State which is under statutory obligation to accord equal treatment as otherwise it may be guilty of discriminatory or arbitrary treatment which cannot be countenanced

under Articles 14 and 16, Constitution of India as held in (1997) 2SCC1 (Paragraph 18) (**Ashwani Kumar versus State of Bihar**), AIR 1979 SC 765 (766) (Paragraphs 40 to 45) (**State of Kerala Versus Kumari T.P. Roshana**) and 1982 U.P. Local Bodies and Educational Cases 480, (Paragraph 5 and 7) **Sneh Deep Versus State of U.P. and others**).

4. In view of the above, I issue writ of mandamus containing a general command to the concerned authorities (Respondents) with respect to all the similar cases pending on date before them to finalize on or before October 31, 1999.

5. Fate of respective scrutiny application shall be communicated to the concerned applicant simultaneously while deciding the applications in normal course as per prevailing practice existing on date. The concerned authorities shall also ensure to declare scrutiny result be publishing the same in two Daily Newspapers of Hindi and two Daily Newspapers of English, namely, **Dainik Jagran, Rashtriya Sahara, Hindustan times** and **times of india** respectively. If there are various editions, the publication shall be given in all the deitions of the aforesaid newspaper so as to cover circulation in the entire State of U.P.. The said publication may be done immediately after 31st October 1999, but in any case before 21st November 1999.

The writ petition is allowed subject to the observations made above. It also made clear that Respondent authorities may seek adequate additional resources, if required, from the State Government and it shall be extended to them within two weeks of the request being made.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 18.08.1999

1999

August, 18

BEFORE
THE HON'BLE A.K. YOG , J.

Civil Misc. Writ Petition No. 9815 of 1999

Committee of Management and another ...Petitioners
Versus
District Inspector of Schools
Basti and others ...Respondents

1999

C/M & another
Vs.
D.I.O.S., Basti & others

A.K. Yog , J.

Counsel for the Petitioners : Sri A. Kumar
Sri K.P. Shukla
Counsel for the Respondents : SC
Sri K. Sahai

Constitution of India , Article 226-Ambit and scope.
Held -

Apart from the above this Court is seized of the matter in exercise of its jurisdiction under Article 226, Constitution of India is fully entitled to take notice of the illegality committed by the Government Officer in the case. It cannot be ignored on technicalities. (Para 9)

By the Court

1. There is a recognised minority Inter College by the name of Khair Industrial Higher Secondary School, Basti, (for short called the institution). One Syed Alauddin claiming to be President /Secretary of the said institution filed present petition in the name of Comm. Of Management of the institution and also in his personal capacity and sought to challenge order dated 26.02.1999 passed by D.I.O.S., Respondent no. 1 (Annexure-6 to the Writ Petition).

2. The said impugned order is said to have been passed on the basis of opinion obtained from SC; true copy of the said opinion dated 12.02.1999 has been annexed as Annexure no. 7 to the petition. It is sad to note that SC appointed by the State Government at the High Court gave opinion against record. The SC ought to have desisted from giving such opinion, which was apparently aimed to help a litigant out of way. The D.I.O.S. should have also applied his own mind and relied upon his wisdom. It is high time, that court must take notice of the fact that opinions are obtained from SC and concerned D.G.C.(Civil) for extraneous consideration which are, peruse record, given for strengthening hands of one or the other unscrupulous litigant. Authorities and officials who are involved in such racket cannot be said to be above board. Their on integrity comes under shadwo of doubt. In the facts of this case, it is appropriate that a copy of this judgement shall be sent to the chief Secretary, U.P. Government for initiating enquiry and suitable action against concerned DIOS and to ensure to check on such practices in future.

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C/M & another Vs. D.I.O.S., Basti & others

A.K. Yog , J.

3. One Sri Dwarika Prasad, the then DIOS vide his order dated 17.10.1998 held that none of the three rival contending parties could be recognized as legally constituted Committee of Management.

4. The District Inspector of Schools, sent a letter dated 05.02.1999 addressed to Sri S.C. Srivastava, SC for U.P. At High Court, and Allahabad. One fails to find reason why said letter was addressed to particular SC. Reasons may not be too far to find. After having managed a tailor made legal opinion,, the then DIOS got fortified to pass and order, which he was not otherwise in a position to issue (in view of his order dated 17.10.1998) and oblige a particular party of his choice.

5. In the impugned order dated 26.02.1999 the District Inspector of Schools, referred to the opinion of the SC and went ahead boldly to perpetuate gross misuse of his official position and power. He passed impugned order and recognised one Sri Hamidullah Khan as President/Manager/Treasurer.

6. This Court regrets to record a note that District Inspector of Schools (belonging to educational department) Became instrumental in paving way to circumvent his own order dated 17.10.1998 and for it he willingly went out of his way,. It has lead to more fierce litigation.

7. Ultimately, Court is a mute sufferer, as it has to deal with litigation fomented by Government Officers of the State Government. The entire situation requires serious consideration and positive action at the higher level. DIOS had found that said Hamidullah Khan was not entitled to be recognized vide order dated 17.10.1998 Nothing having intervened in between the said DIOS had no business, to recognise any person as the manager.

8. It is argued before this Court that Syed Alauddin has no locus Standi to file present petition as he was not a party when DIOS passed order dated 17.10.1998. The other contesting respondent submitted that said Syed Alauddin had subsequently replaced Abdul Wahid Siddiqui(whom he had represented before DIOS). This Court need not go into the merit and demerit of the said issue, in as much as there is no allegation that Committee of management represented by Abdul Wahid Siddiqui did not authorise said Syed Alauddin to file the present petition.

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C/M & another
Vs.
D.I.O.S., Basti & others

A.K. Yog , J.

9. Apart from the above this Court is seized of the matter in exercise of its jurisdiction under Article 226, Constitution of India is fully entitled to take notice of the illegality committed by the Government Officer in the case. It cannot be ignored on technicalities.

10. The impugned order dated 26.02.1999 (Annexure-6 to the Writ Petition) passed by DIOS, Basti is set aside. Respondents are directed to restore the position which existed immediately on the day of passing of the order dated 17.10.1998.

11. Writ petition stands allowed. There will be no order as to costs.
12. Registry is directed to send a certified copy of this judgment to the Advocate General for information.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.1999

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

1999

July, 5

Civil Misc. Writ Petition No. 19322 of 1990

Attar Singh **...Petitioner**
Versus
Executive Officer, Municipal Board, Kosi Kalan, District Mathur and another **...Respondents**

Counsel for the Petitioner : Shri Ram Jee Saxena
Shri A.R. Dube
Counsel for the Respondents : Sri P.K. Singhal

Financial Hand Book, Volume II, Part II, R. 56- Powers under- Exercise of –Nature- Mandatory.
Held-
The Government order has been issued within the power conferred on the Government in respect of persons employed in non-centralised service under the Municipal Authorities. If such an order is issued within the jurisdiction, scope and ambit of the power conferred on the executive in respect of a particular purpose with particular object providing a safeguard alongwith the procedure to be followed, in that event, it cannot be said that it is only directory. When it has provided that a Screeing Committee has to be formed with the persons mentioned in the said order and a

particular procedure is prescribed in that event, it has to be followed as it has been provided. The non obtaining of approval cannot be said to be a mere formality or a technical process. In fact the intention behind the procedure prescribed in paragraph 3 of the said Government order was to provide a safeguard or safety valve.

This question of approval is not an embargo but is a control exercised by the Government. This is only for the purpose of providing checks and balance for proper exercise of the power conferred by Rule 56 which is otherwise an extra ordinary power exercised in an extra ordinary situation for which an extra ordinary safeguard is provided. (Para 4)

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By the Court

1. The petitioner's service was dispensed with in exercise of Rule 56 of Financial hand Book Vol.-II Part-II by an order dated 20th July, 1990 containing in Annexure-I to the writ petition. Mr. A.R. Dubey, learned counsel for the petitioner has assailed the said order on the ground that by reason of the Govt. order dated 21st December, 1989, such dispensation of service could be made under the said rule only in accordance with the procedure laid down therein. According to him, it could be done only after obtaining prior approval of the Commissioner. In the present case, according to him no such approval has been obtained.

2. Mr. P.K. Singhal appearing with Mr. Murlidhar learned counsel for the respondents oppose Mr. Dubey. According to Mr. Murlidhar, there is nothing on record to show that the prior approval of the Commissioner was obtained. But however, according to him, the Government Order is not mandatory and therefore, no observance thereof cannot vitiate the impugned order. He further contends that because of the time limit of 25 days for completion of the process and absence of approval of the Commissioner within the stipulated time period shall be deemed to be the grant of the approval. He further contends that consideration is dependent on the subjective satisfaction of the appointing authority and to the suitability of the employee to be retained in service. Here the appointing authority having found it fit to dispense with the service, the Court should not interfere in exercise of writ jurisdiction since the petitioner has not alleged malafide against the appointing authority. Therefore, this writ petition should be dismissed.

3. I have heard both the counsel at length.

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4. The Government Order dated 21st December, 1989 was issued by the Government in respect of scrutinising of persons for dispensing with service after attainment of 58 years but before attainment of superannuation in terms of Rule 56 of the Financial Hand Book. It provides that in respect of persons outside the centralised service of the Municipal Authorities may be processed in the manner prescribed therein. Admittedly, no such process as prescribed in the Government dated 21st December, 1989 relating to obtaining of approval of the Commissioner or any other Higher Authority is provided in respect of the application of Rule 56 of the Financial Hand Book relating to a government servant. Such process has been prescribed specifically for the Municipal Authorities. There is , admittedly, a difference in the characteristic and status of the appointing authority between the appointing authority of a Government Servant whereas the appointing authority in a Municipal office is normally the Chairman who is an elected representative of the people and not a government servant. There is a difference of the characteristics in the matter of accountability in between a government servant and the elected representative heading the Municipal Authority. Therefore , the Government thought it fit that there should be some safeguard or safety valve in respect of exercise of Rule 56 of the Financial Hand Book in relation to the service in the Municipal Office of the persons who are outside the purview of the centralised service. While Rule 56 is being attracted to such persons, the Government in its wisdom thought it fit to provide a safety valve and therefore, it was provided that such action can be taken against a municipal servant outside the purview of centralised service only after obtaining approval of the Commissioner. It has been provided that there should be a Screening Committee headed by the appointing authority being the Chairman and two of the members who had been empowered to recommend the necessity of despensing of service after scrutinising the service record. It is only an authority given for recommendation. The final order can be passed by the Chairman/Appointing Authority only after obtaining the approval of the Commissioner. It is not contended by Mr. Murlidhar that the Government Order does not have any legal force. But he contends that it is only an administrative instruction in the from of executive advice and as such, it is not mandatory and binding. But the said contention does not find any support from the text of the Government Order which clearly indicates the purpose, object and intention for issuing such Government Order. The Government order has been issued within the power conferred on the

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Government in respect of persons employed in non-centralised service under the Municipal Authorities. If such an order is issued within the jurisdiction, scope and ambit of the power conferred on the executive in respect of a particular purpose with particular object providing a safeguard alongwith the procedure to be followed in that event it cannot be said that is only directory. When it has provided that a Screening Committee has to be formed with the persons mentioned in the said order and a particular procedure is prescribed in that event, it has to be followed as it has been provided. The non obtaining of approval cannot be said to be a formality or a technical process. In fact the intention behind the procedure prescribed in paragraph 3 of the said Government Order was to provide a safeguard or safety valve. When in specifically provides that dispensation of service under this rule could be done only after obtaining approval from the Commissioner on the recommendation of the screening committee in that event it cannot be interpreted to mean anything otherwise and non-observance thereof said to be a technical fault to the extent of irregularity. In fact is is the jurisdiction that is conferred on the Chairman to dispense with the service without following other procedure even before superannuation only in an exceptional circumstances. Such action is a discretionary one and as such a safeguard was felt necessary so that the discretion may not be absolute one and is scrutinised. This question of approval is not an embargo but is a control exercised by the Government. This is only for the purpose of providing checks and balance or proper exercise of the power conferred by Rule 56 which is otherwise an extra ordinary power to be exercised in an extra ordinary situation for which an extra ordinary safeguard is provided. In such circumstances, it is not possible for me to agree with the contention of Mr. Murlidhar.

5. Thus in the absence of approval of the Commissioner, the dispensation of service of the petitioner by the impugned order contained in Annexure-I to the writ petitioner cannot be sustained and is liable to be quashed and is accordingly, quashed ltd. A writ certiorari do accordingly issue.

6. Admittedly, the petitioner was 53 years old when the order was passed. The petitioner must have attained the age of superannuation. Mr. Murlidhar therefore, submits that in such circumstance, the petitioner would be entitled only to back wages or arrears of salary as the case may be. He contends that the petitioner did not work therefore, the Court should consider the question of

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payment of salary to the extent of 50% since the amount would be paid to the petitioner in a lumpsum.

7. Mr. A.R. Dubey on the other contends that the petitioner has suffered the agony of dispensing with service and has suffered enormously in respect of financial stringency on account of non payment of salary continuously for a long period and the social humiliation on account of such dispensation of service for which he claims compensation for the injury suffered by the petitioner alongwith interest payable on the salary due.

8. On this question both of them argued at length. After hearing both the counsel and balancing the situation, it seem that justice would be served if the petitioner is awarded full back wages for the period till the date of superannuation alongwith all other service benefits without any compensation or interest as the case may be.

9. In the circumstances, it is hereby declared that the petitioner shall be deemed to be in service and shall retire on attainment of superannuation with all service benefits. The respondents shall ensure payment of back wages as well as retirement benefits as admissible in law to the petitioner as early as possible preferably within a period of six months from the date of receipt of a certified copy of this order. Let writ of mandamus do accordingly issue.

10. The writ petitioner is, therefore, disposed of. However, there will be no order as to costs.

11. Let a certified copy of this order be given to the learned counsel for the petitioner on payment of usual charges.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD JULY 7, 1999

1999

July, 7

BEFORE
THE HON'BLE G.P. MATHUR, J.

Criminal Misc. Application No. 1934 of 1990

Udai Narain **...Applicant.**
Versus
State of U.P. & others **...Respondents.**

1999

Udai Narain
Vs.
State of U.P. & others

G.P. Mathur , J.

Counsel for the Applicant : Sri prakbahkar Singh
Counsel for the opposite parties : A.G.A.

Code of Criminal Procedure, 1973, Ss. 353 and 354- Judgement in appeal by a Criminal Court of original Jurisdiction or Session Judge – Oral pronouncement of operative part before proceeding to write the same, held, illegal.
Held –

A combined reading of sections 353 and 354 Cr.P.C. shows that a Criminal Court of original jurisdiction or a learned Session Judge while delivering judgement in an appeal cannot first pronounce the operative part of the order and thereafter proceed to write the judgement. Either the whole of judgement has to be delivered in court by writing or dictating the judgement or a previously written judgement can be pronounced by reading out the whole judgement or reading out the operative part of the judgement and thereafter signing every page of the judgement and giving date of pronouncement thereof. The judgement must contain the point or points for determination, the decision thereon and the reasons for the decision.

What the learned Sessions Judge seems to have done in the present case was to first pronounce the operative part of the judgement and thereafter proceeded to dictate the judgement to his stenographer. This was clearly contrary to the mandate of sections 353 and 354 Cr. P.C. and, as such, the procedure followed by him was illegal.(Para 9 & 10)

Case referred :
A.I.R. 1954 S.C. 194.

By the Court

1. This petition under section 482 Cr. P.C. has been filed by the complainant praying that further proceedings in S.T. No. 388 of 1987 be stayed and the learned VI Additional Sessions Judge, Varanasi be restrained from delivering the judgement in the aforesaid case.

2. Udai Narain, the complainant applicant filed a criminal complaint against the accused respondents no. 2 to 5 under sections 395, 397 I.P.C. The learned Magistrate took cognizance of the offence and summoned the accused. In due course, the case was committed to the court of Sessions where the statement of complainant and some other witnesses was recorded. It appears that the record of case was burnt in a fire, which broke out in the office

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and an order, was passed on 5.8.1989 to reconstruct the record. On 10.8.1989, the prosecution as well as the defence filed certain papers which were taken on record and 16.8.1989 was fixed for recording statement of accused under section 313 Cr.P.C. Thereafter, on 4.10.1989 the statement of some of the accused was recorded under section 313 Cr.P.C. The order sheet of 11.12.1989 read as follows:-

"I have heard the complainant`s private counsel and have thoroughly examined the record. Judgement of acquittal orally pronounced in open court at about 3.25 p.m."

3. There is another order sheet of the same date i.e. 11.12.1989 which has been written in Hindi wherein it is mentioned that subsequent to the pronouncement of order of acquittal, an application was moved by the complainant at about 4.00 p.m. for transferring the case to some other court. It is also mentioned in the order sheet that a part of the judgement had been dictated by the learned Sessions judge but on account of filing of transfer application by the complainant , he refrained from giving any further dictation in order to complete the judgement. Thereafter several dates were fixed for giving opportunity to the complainant to file stay order,. On 14.3.1900, the record of the trail court was summoned by this Court and consequently no further proceeding took place before the learned IV Additional Sessions Judge.

4. I have heard Shri Prabhakar Singh for the complainant-applicant, learned A.G.A. for the State and Shri V.Singh for the accused opposite parties.

5. The order sheet dated 11.12.1989 shows that the learned VI Additional Sessions Judge first orally pronounced the order acquitting the accused opposite parties and thereafter proceeded to dictate the judgement which was also not completed on account of filing of the transfer application by the complainant. The record of the trial court does not contain even that part of the judgement, which is said to have been orally dictated in court by the learned Sessions Judge.

6. The code of Criminal Procedure contains a complete chapter on judgement and that is Chapter XXVII. Section 354 deals with language and contents of judgement and section 353 Cr.P.C. lays down the procedure for pronouncing a judgement. Sub-section (1)

of section 354 and sub-section (1) to (3) of section 353 read as under:-

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"354. Language and contents of judgement.- (1) Except as otherwise expressly provided by this Code, every judgment referred to in Section 353,-

(a) shall be written in the language of the Court:
(b) shall contain the point or points for determination, the decision thereon and the reasons for the decision;
© shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced;
(d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set a liberty.

353. Judgment:- The judgment in every trial in any Criminal a Court of original jurisdiction shall be pronounced in open court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleladers,-

(a) by delivering the whole of the judgment; or
(b) by reading out the whole of the judgment; or
© by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

7. A perusal of section 354 would show that the judgement in every trial in any criminal Court of Original Jurisdiction shall contain the point or points for determination, the decision thereon and the reasons for the decision. In case of conviction the judgment shall specify the offence or section of the I.P.C. or other law under which the accused is convicted and the punishment to which he is sentenced. In case of acquittal the judgment shall state the offence of which the accused is acquitted. Section 384 gives power to the Appellate court to dismiss an appeal summarily. However sub-section (3) of this section provides that where the Appellate Court dismissing an appeal under this section is a Court of Sessions or the

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Chief Judicial Magistrate, it shall record its reasons for doing so. Section 387 provides that the rules contained in Chapter XXVII as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment in appeal of a Court of Session or Chief Judicial Magistrate. Therefore, a judgment in an appeal given by a court of Session must contain point or points for determination, the decision thereon and the reasons for the decision. That apart, the pronouncement of judgement by the court of Sessions in an appeal has to be done in a manner laid down under section 353 Cr.P.C.

8. The word "judgment" is not defined in the Code. It is a word of general import and normally it means judicial determination or decision of a court. What is the precise meaning of the word judgement as used in the Code came up for consideration in Surendra Singh and others Versus State of Uttar Pradesh, AIR 1954 SC 194 and it was explained in following words:-

"A judgment is the final decision of the Court intimated to the parties and to the world at large by formal "pronouncement" or "deliverly" in open court. It is a judicial act which must be performed in a judicial way,. The decision which is so pronounced or intimated must be a declaration of the mind of the Court as it is at the time of pronouncement. This is the first judicial act touching the judgment which the Court performs after the hearing. Everything else up till then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the Court. The is what constitutes the " judgment"."

9. A combined reading of sections 353 and 354 Cr.P.C. shows that a Criminal Court of original jurisdiction or a learned Session Judge while delivering judgment in an appeal cannot first pronounce the operative part of the order and thereafter proceed to write the judgment. Either the whole of judgment has to be delivdered in court by writing or dictating the judgment or a previously written judgment can be pronounced by reading out the whole judgmebnt or reading out the operative part of the judgment and thereafter signing every page of the judgment and giving date of pronouncement thereof. The judgment must contain the point or points for determination, the decision thereon and the reasons for the decision.

10. What the learned Sessions Judge seems to have done in the present case was to first pronounce the operative part of the judgment and thereafter proceeded to dictate the judgment to his stenographer. This was clearly contrary to the mandate of sections 353 and 354 Cr.P.C. and, as such, the procedure followed by him was illegal. As mentioned earlier, the record of the case does not contain the judgment or even a part thereof, reference of which is mentioned in the order sheet dated 11.12.1989. In absence of any judgment on record the final decision in the case has snot been rendered and the case has not yet concluded. In order to conclude the case, the judgment has to be pronounced in accordance with section 353 Cr.P.C.

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11. In the result the petition succeeds and is hereby allowed. The oral pronouncement of judgment of acquittal as recorded in the order sheet dated 11.12.1989 is set aside. The learned Sessions Judge is directed to conclude the session's trial jby pronouncing judgment in accordance with lalw after hearing counsel for the parties. It will be open to the learned Sessions Judge, Varanasi, either to hear the case himself or to asign it to some other Additional Sessions Judge in his Sessions division.

12. Office is directed to send back the record of the trial court as early as possible.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 06.07.1999

BEFORE
THE HON'BLE YATINDRA SINGH, J.

1999

July, 6

Civil Misc. Writ Petition No. 11679 of 1983

Masuryadin and others **...Petitioner**
Versus
Special Judge (Economic Offences),
Allahabad and others **...Opposite Parties**

Counsel for the Petitioner : Sri D.C. Saxena
Counsel for the Respondents : S.C.

1999

Masuryadin and others
Vs.
Special Judge (Economic Offences), Alld.. & others

Yatindra Singh , J.

Transfer of Property Act, 1882; S. 58 (c)Proviso (Added by Amend Act of 1929) Sale visa vis Mortagage by conditional sale – sale deed executed – Reconveyance deed executed separately – Effect.
Held: The effect of the amending Act is that such transaction now cannot be a mortgage unless the condition to re- convey is incorporated in the sale deed.

The very object of the proviso to section 58 (c) is to shut out an enquiry whether a sale with a stipulation to reconvey is a mortgage where the stipulation is not embodied in the same document. Hence, if the sale and agreement to repurchase are embodied in separate documents , then the transaction can not amount to mortgage , whether or not the documents are executed contemporaneously .

The present transaction in 1972 can not be treated to be a mortgage . It is, an outright sale in favour of Saligram – Radheshyam with a separate agreement of re-conveyance in favour of the petitioners.(Para 7 & 8)

Cases referred.
AIR 1988 S.C. 1074 .
1955 (1) S.C.R. 174: (1954) ASC. 345: 1954. SCJ 469:(1954) SCA 611
(1960)2 SCR117:(1960)ASC 301:SCJ 327 (1960)2SCA 189
(1983) ASC 1182 1972 A Raj 250.
AIR 1992 MP 22,26,27,
(1953) Mad 1196: (1953) AM 830.
(1980) A. Karn. 154
(1974) A. Bom. 136

By the Court

1. This writ petition raises a question about the status of a tenant (of a person a house) of a person 'a', during the period when he (the person 'a') had transferred the entire house to the third party b, and he himself (the person 'a') became the tenant of his transferee b, sill the tenant continue to be the tenant of that person a. or become the tenant of is transferee b what will happen if the transferee b re-transfers the house to the person a does it mean that the person a continued to be the landlord of the tenant during the period he had transferred the house to the third party b these questions arise in the following background.

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Facts

2. Petitioners are the owners of the house no . 636; Bahadurganj Allahabad (hereinafter referred to as the house) there is a shop in this house which was let out to one Nafis Ahmad (respondent no. 3) at rate of Rs. 90/- per month in 1967 . Nafis Ahmad has died during the pendency of the writ petition and is substituted by his heirs. All of them are referred to as respondent no.3. In 1969 some of the petitioners executed a sale deed in favour of one Ramashankar for Rs. 3000/- in respect of the house . the details of the petitioners who have executed these deeds are not relevant. They are referred to as the petitioners Rama Shankar also executed an agreement of re-conveyance in favour of the petitioners on the same day. A rent deed was also executed on the same day by which petitioners became the tenants of Rama Shankar at the rate of Rs. 60/- per month. In 1972; three deeds were executed on the same day between the three parties. (1) Rama Shankar to whom the house was earlier sold. (2) some of the petitioners (the petitioners for short as the details are not relevant) and (3) Saligram and Radheshyam Saligrah – Radheshyam for short they executed three deeds on the same day. These deeds were (1) a sale deed in favour of Saligram – Radheshyam for Rs. 10;000/-(the money was shared by the petitioners and Ramshankar; (2) a deed of re- conveyance in favour of the petitioners by Saligram – Radheshyam ; and a rent deed by which the petitioners became the tenant of the house at the rate of Rs. 150/- per month the effect of these three deeds (in 1972) was that Rama Shankar went out the picture and a new relationship between petitioners and Saligram – Radheshyam came into existence. In the deeds of 1969 or 1972; there is no any reference about the shop or respondent no.3. or about his status. They are silent on this question.

3. Saligram – Radheshyam were undoubtedly the landlord of the petitioners . They filed a JSCC suit no. 39/1976 for ejectment and for arrears of rent against the petitioners . some of the petitioners (petitioners for short as the details not relevant) filed a suit no. 19 of 1977 for cancellation of the transfer deed etc (executed in 1972) in favour of Saligram – Radheshyam. These two suits were consolidated and decided by a common judgement dated 12.08.1980 by the IIIrd addl. District Judge . Allahabad. The suit filed by Saligram –Radheshyma was decreed for the recovery of arrears of rent against by the petitioners but was dismissed for their ejectment. The other suit n. 19/1977 filed by the petitioners for the cancellation of the sale deed was dismissed petitioners filed an appeal and a

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revision against the judgement in these suits. During pendency of these proceedings. Two more suits were filed by the petitioners one against Saligram-Radheshyma alleging that the transaction evidenced by the three deeds in 1972 was in fact mortgage and for its redemption . and the other against respondent no. 3 for his ejectment.

4. The petitioners filed the suit no. 440/1990 against Saligram – Radheshyam on the allegation that transaction evidenced by the three deeds in 1972 was in fact a mortgage and it be redeemed . This suit was compromised between the petitioners and Saligram – Radheshyam in 1994 a compromise decree was also passed in the same year. In substance the compromise was that the petitioners have paid the entire amount due to Saligram – Radheshyam and Saligram – Radheshyam were to re-convey the house to the petitioners this they did in the same year and the petitioners again became owners of the house. This disposed off this suit as well as the appeal and the revision between the petitioners and Saligram – Radheshyma against the judgement dated 12.08.1080.in o.s. no. 19. Of 1977 and JSCC suit no. 3 of 1076 this has happened during the pendency of the present writ petition. Petitioners have filed a supplementary affidavit bringing these facts on the record. Respondent no. 3 has admitted it but has denied that has rendered the impugned orders illegal.

5. The present writ petition. Arises out of the proceedings in the JSCC suit no. 240/1981 filed by the petitioners against the respondent no. 3 for his ejectment from the shop on the ground of non payment of rent for the period 1.6.75 to31.12.1976 Rs. 1710/- and from 1.1.1981 Rs. 270/- these arrears are for the period when the petitioners were not the owners of the shop they had transferred the house which included the shop to Saligram – Radheshyam the suit was contested by respondent no. 3 the courts below have dismissed the suit on the ground that petitioners were neither owner. Nor the landlord for the relevant period and the suit was incompetent . It is against these orders that the present writ petition has been filed .

Points for Determination

6. I have heard Sri K.B. Mathur counsel for the petitioner and Sri Raj Kumar Jain counsel for the respondents. Following points arise for determination.

1. What was the nature of the transaction between petitioners and Saligram – Radheshyam evidenced by the three deeds in 1972. Was

it a mortgage . what is the effect of the supreme court decision in Indra Kumar vs Sheo Lal ?[1]

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2. What was the status of respondent no. 3. During the period of the sale deed in favour of Saligram –Radheshyam was respondent no. 3.

A tenant Saligram – Radheshyam or a tenant of the petitioners and thus a sub – tenant of Saligram – Radheshyam .

1st Points for Determination

7. Three separate deeds were executed on the same day in 1972 one was a sale deed of the house by the petitioners in favour of Saligram – Radheshyam the second was a deed of deed of re- conveyance in favour of the petitioners the third was a rent deed . showing that the petitioners had become tenants of Saligram - Radheshyam in respect of the house . At some point of time such transaction by separate deeds was treated to be a mortgage . but them the transfer of property act (the act for short) has been amended in 1929. A proviso has been added in section 58 (c) [2]. The effect of the amending act is that such transaction now can not be a mortgage unless the condition to re-convey is incorporated in the sale deed. Mulla on the transfer of property act 8th Ed. Has succinctly stated the law as the effect of the proviso to clause (c) added by the amending act of 1929 is that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale the transaction will not be regarded as a mortgage . This has now been settled by several decisions of the

1. AIR 1988 SC 1874
2. 58(c); Where a mortgagor ostensibly sells the mortgaged property—On condition that on default of payment of the mortgaged-money on a certain date the sale shall become absolute, or

On condition that on such payment being made the sale shall become void, or

On condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgage a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

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Supreme Court[3] and this was also the opinion expressed by the high courts in many cases. The effect of the proviso is that a transaction in which the stipulation for re-conveyance is contained in a separate document cannot be a mortgage of any kind both because of the language of the proviso and because it could not fall in any other category of mortgage[4] . If a document purports to be an absolute sale and there is no stipulation for treating the sale as mortgage a Separate document of re- conveyance cannot convert it into a mortgage [5]. The very object of the proviso to section 58 (c) is to shut out an enquiry whether a sale with a stipulation to re-convey is a mortgage where the stipulation is not embodied in the same document. Hence; if the sale and agreement to repurchase are embodied in separate documents; then the transaction can not amount to mortgage; whether or not the documents are executed contemporaneously .[6]

Indra Kaur vs Sheo Lal Kapoor

8. Sri K.B. Mathur counsel for the petitioners has cited a decision reported in Indra Kaur vs Sheo Lal Kapoor to the effect that such transaction would be a mortgage . It is true that in this case the supreme court did frame a question if such a transaction will be a mortgage or out right sale and did make certain observations. But the supreme court ultimately did not decide this question. It was left to

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3. Pandit Chunchaun Jha Vs Sjeikhbada Ali, (1955)1 S.C.R. 174, (1954) A.S.C. 345, (1954) S.C.J. 469, (1954) S.C.A. 611; Bhaskar Waman Joshi vs Narayan Rambilas Agarwal, (1960) 2 SCR 117, (1960) A.S.C. 301, (1960) S.C.J. 327, (1060) 2 S.C.A. 189; Simrathmull vs. Nanja Linglah, (1963) A.S.C. 1182 and See Bahadur vs. Motiram, (1972) A. Raj 250, Ramjen Kahan & Ors Vs. Baba Raghunath Dass & AIR 1992 M.P. 22,26,27.

4. Suryaparkasa vs. Venkataraju, (1953) Mad. 1196, (1953) A.M. 830

5. Amir Bee vs. The Sub Divisional Magistrate, Sakaleshpur, (1980) A.Karn. 154

6. Hasam Narani Mal vs. Mohan Singh, (1974) A.Bom. 136.

be decided at appropriate time[7]. This case is neither an authority that such transactions are mortgage nor (The present transaction in 1972 can not be treated to be a mortgage . It is in fact an outright sale in favour of Saligram –Radheshyam with a separate agreement of re-conveyance in favour of the petitioners .)

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Special Judge (Economic Offences), Alld.. & others

Yatindra Singh , J.

2nd Point- Status of Respondent no. 3

9. The shop let out to the Respondent no. 3 is a part of the house. Respondent no. 3 was the tenant of the petitioners . Ultimately by different deeds the house including the shop was sold to Saligram – Radheshyam .They were its owners from 1972 to 1994. This includes the period for which rent is claimed from respondent no. 3 Section 109 of the Act[8] clarifies the right of the transferees. It says,

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7. The relevant part of para-5 of Indra Kaur vs. Sheo Lal Kapoor is as follows: 'As the plaint stands, and as the plaintiff himself has preferred to enforce the agreement for specific performance, it is not necessary to examine the question as towhether or not the real nature of the transaction was mortgage though it was given an appearance of a transaction of a sale. For the same reason we need not examine the question as to whether or not S. 58(c) of the Transfer of Property Act would have disabled the plaintiff from claiming the relief of redemption on the basis that the real intention of the parties was to create a mortgage and not an absolute sale coupled with an agreement for reconveyance. This question will have to be dealt with at an approperiate time having regard to the fact that there is an increasing tendency in recent years to enter into such transactions in order to deprive the debtor of his right of redemption within the prescribed period of limitation. In fact very often the mortgagee in place of getting a mortgage deed executed in lieu of a loan obtains an agreement to sell in his favour from the mortgagor so as to bring pressure on the mortgagor by seeking to enforce specific performance to enable the mortgagee to obtain possession of the property for an amount smaller than the real value of the property. We need not however probe the matter any further for the purpose of disposing of the present appeal for the reasons stated earlier.'

8. Section 109 of Transfer of Property Act: If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to besubject to any of the liabilities imposed upon him by the lease, unless the leesee elects to treat the transferee as the person liable to him:

Provided that the transferee is notentitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

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transferee in the absence of a contract to the contrary shall possess all the rights' there was no mention about the shop or respondent no.3 in any of the deeds . They are silent. There was no contract to the contrary. The deeds never stipulated that:

- Saligram – Radheshyam will not be the landlord of the shop or
- they are not entitled to receive of the rent of the shop. or
- the petitioners will continue to be the landlord of the shop and Respondent no 3 will be a sub tenant of the transferee Saligram – Radheshyam .

Respondent no. 3 is the tenant of Saligram – Radheyshyam during the period there was sale deed in their favour and not their sub-tenant. It is also doubtful if without consent of the tenant namely respondent no. 3 another tenant can be superimposed. [9]

10 . Saligarm – Radheshyam became the owner as well as the landlord of respondent no. 3 in respect of the shop. They also became owner and the landlord of the petitioners of the remaining house in the possession of the petitioners. As there is nothing to the contrary in any of the deeds. The fact that in the earlier litigation between the petitioners and Saligram – Radheshyam they had taken different pleas is immaterial . respondent no. 3 is also not bound by any observation made in the judgement between them. He was not a party there. The fact that by the compromise decree all litigation between the petitioners and Saligram – Radheshyam have been compromised and the house has been again re-transferred to the petitioners in 1994 does not mean that Saligram – Radheshyam were not entitled to the rent from Respondent no. 3 for the period the sale stood in their favour. Saligram – Radheshyam are entitled to the arrears of rent, if thee is any for that period. The petitioners are not entitled to the arrears of rent for that period unless it was also transferred to them in 1994 This is clear from proviso to the section 109 of the Act. There is nothing on the record to show that respondent no.3 was in arrears of rent so far as Saligram – Radheshyam are concerned or Saligram – Radheshyam have transferred the arrears of rent to the petitioners. Apart from it the present suit was filed in 1981 and on that date petitioners were not

9. I have not held the respondent no. 3 to be the tenant of Saligram-Radheshyam on this proposition but on the basis of the law as stated in section 109 of the Act.

entitled for the arrears of rent the. Suit was rightly dismissed as not maintainable .

Conclusion

11. The writ petition has no merits. It is dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 13.7.99

BEFORE
THE HON'BLE M.KATJU, .J.

1999

July, 13

Civil Misc. Writ Petition No. 27937 of 1999.

Smt. Shobha Sharma ...Petitioner
Versus
State of U.P. through Chief Secretary,
and others ...Respondents

Counsel for the Petitioner : Shri Dinesh Dwivedi
Shri S.D. Kautilya
Counsel for the Respondents : Advocate General

Constitution of India, Articles 309, 243 (G) and 213 (2) read with U.P. Panchayat Raj (Amendment) Act, 1999 (Ord.14 of 1999) - Validity-Transfer of petitioner, a government servant to Gram evam Panchayat on permanent basis without her consent under the aforesaid ordinance-Held, valid.

HELD-
Article 309 itself contemplates that the service conditions of a government employee can be changed by an Act of the legislature. An Act of the Legislature, to which an ordinance is equivalent vide Article 213 (2) , does not require the consent of the persons to whom it is to be applicable, in order to come into force. The impugned ordinance also does not require the consent of the individuals before their transfer . Moreover it is settled law that contract can be superseded by Statute.

The impugned ordinance appears to be made under Article 243 (G) and also under Article 309 of the Constitution. Hence under both these Constitutional provisions the impugned ordinance to my mind is valid and constitutional. (Para 6,7 & 9)

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Smt. S. Sharma
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& others

M. Katju , J.

Cases distinguished
AIR 1989 S C 1577
1979 (3) SLR 805
1977 (2) SLR 551
Held- (Paras 6,7,9)

By the Court

1. Heard Shri Dinesh Dwivedi learned counsel for the petitioner and learned Advocate General for respondents.

2. The petitioner challenging Ordinance No. 14 of 1999 known as U.P. Panchayat Raj (Amendment) Act 1999, copy of which is Annexure-1 to the writ petition. The petitioner claims to be a government servant and she has alleged that by the impugned ordinance she has been transferred on permanent basis to the Gram Panchayat .

3. Shri Dinesh Dwivedi learned counsel for petitioner has submitted that the petitioner is a government servant and hence without her consent she cannot be transferred and placed under the Gram Panchayat. He has relied on the decision of Supreme Court in Jawhar Lal University Versus Dr. K.S. Jawatkar , AIR 1989 SC 1577 and he has placed emphasis on para 7 of the aforesaid decision. In my opinion this decision does not apply to the facts of the present case for two reasons. Firstly that was a case of a transfer of an employee from the Jawahar Lal Nehru University to Manipur University and it was not a case of a government servant. Article 309 of the Constitution states;

"Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State."

4. Thus Article 309 itself makes it clear that the service rules of the government employees can be changed by an enactment of the appropriate legislature. Secondly the aforesaid decision of the Supreme Court is also distinguishable because in that case the very service of the respondent had been transferred from Jawahar Lal Nehru to Manipur University whereas in the present case the petitioner continues to remain a government servant but she has been placed under the supervision and control of the Gram Panchayat.

Hence for both these reasons the aforesaid decision of the Supreme Court is distinguishable.

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& others

M. Katju , J.

5. Shri Dwivedi then relied upon the decision of Gujrat High Court in Bhagwati Prasad Vs. State of Gujrat 1973 (3) SLR 805 . In my opinion this decision is also distinguishable because this was not a case where the person had been transferred by an Act of the legislature. Shri Dwivedi further relied upon the decision Bhagwati Prasad Versus State of Gujarat and other 1977 (2) SLR 551. In my opinion this decision is also distinguishable as it was not case of sending a person on deputation by an enactment.

6. In my opinion had the petitioner been sent on deputation by a simple government order it possibly could have been argued that this could not be legally done without her consent but where the transfer has not been done by a government order but by an Act of the legislature then the position becomes different, because an Act stands on a higher footing than a mere government order. As already mentioned above, Article 309 itself contemplates that the service conditions of a Government employee can be changed by an Act of the Legislature. Sri Dinesh Dwivedi urged that the petitioner cannot be transferred without her consent. I do not agree. An Act of the Legislature, to which an Ordinance is equivalent vide Article 213 (2) does not require the consent of the persons to whom it is to be applicable, in order to come into force. The impugned Ordinance also does not require the consent of the individuals before their transfer.

7. Moreover it is settled that contract can be superseded by Statute

8. Learned Advocate General has invited my attention towards Article 243 (G) which states as under:

> "243 (G) Powers, authority and responsibilities of Panchayats- Subject to the provisions of the Constitution, the Legislature of the State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level subject to such conditions as may be specified therein with respect to-

(a) the preparation of plans for economic development and social justice,
(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in Eleventh Schedule."

9. The impugned Ordinance appears to be made under Art. 243 (G) and also under Article 309 of the Constitution. Hence under both these Constitutional provisions the impugned Ordinance to my mind is valid and constitutional Learned counsel for the petitioner has not been able to show that the impugned ordinance violates any constitutional provision .

10. I may also mention that the impugned Ordinance appears to be a commendable step Learned Advocate General has placed before me the 'Swaraj Scheme' prepared in 1923 by the great Lawyer and freedom fighter Deshbandhu Chittaranjan Das who advocated self-government as the basis of Swaraj. The impugned Ordinance is in consonance with this Scheme (Photocopy of the Scheme shall be kept on the record)

11. Hence there is no force in this petition and it is dismissed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 03.08.1999

1999

August, 3

BEFORE
THE HON'BLE V.M. SAHAI, J.

Civil Misc. Writ Petition No. 46039 of 1992

Faggun Jamadar **...Petitioner**
Versus
District Inspector of Schools Fatehpur and another **...Respondents**

Counsel for the Petitioner : Sri N.K. Shukla
Sri Anurag Dubey
Sri S.K. Pal
Sri R.K. Srivastava
Counsel for the Respondents : Sri S.N. Srivastava

Standing Counsel
Sri Prem Prakash Tewari

1999

Faggun Jamadar Vs. D.I.O.S., Fatehpur & others

V.M. Sahai , J.

Natural Justice-Principles of -Non compliance of- Enquiry made behind the back of the petitioner- No opportunity of hearing afforded to petitioner-Held, Impugned order is vitiated.
Held-
The petitioner has filed copy of manager's return filed in 1973. He is shown as employee in it. He has also filed his service book . In counter affidavit filed on behalf of the management it is stated that petitioner is employee since 1973. In the order and in paragraph 6 of the counter affidavit filed by the District Inspector of Schools it is stated that entry of 1973 was fictitious. In law fictitious has a technical meaning. It has to be proved. The District Inspector of Schools on the other hand, as stated by him in his order, has drawn this inference on his own without hearing the petitioner or even the management. Inquiry if any made by the District Inspector of Schools behind the back of the petitioner could not furnish the basis for passing the impugned order. Similarly, the finding that petitioner was appointed in 1981 and he was in continuous service from 1990 being based on material of which petitioner was not apprised and the management does not support it becomes erroneous at the face of it. It was contrary to rules and principles of natural justice. (Para 4)

By the Court

1. The petitioner was appointed as sweeper in the institution on 1.7.1973. His services were regularised by an order dated 22.4.1992 passed by the District Inspector of Schools. He was also given salary from April, 1991 to January. 1992 for ten months. Thereafter another District Inspector of Schools by his order dated 6.10.1992 refused salary to the petitioner on the ground that when the petitioner became continuous appointed in 1990, his age was 51 years 4 months, therefore, he become overage for regularisation. The petitioner has challenged the order of the District Inspector of Schools dated 6.10.1992 by means of the instant writ petition.

2. Heard Sri S.K. Pal learned counsel for the petitioner and Sri S.N. Srivastava, learned Standing Counsel appearing for respondent no.1 and Sri Prem Prakash Tewari, learned counsel appearing for respondent no.2

3. The District Inspector of Schools in his order dated 22.4.1992 found that the petitioner was appointed from 1.7.1973 and was entitled for salary. The subsequent District Inspector of Schools by

1999

Faggun Jamadar Vs. D.I.O.S., Fatehpur & others

V.M. Sahai , J.

his order dated 6.10.92 refused to pay salary as he was of the opinion that continuous service of the petitioner started from 2.7.90 therefore, he could not be regularised on 22.4.92 as he had become overage. For coming to finding that the petitioner's service started on 2.7.90 he has mentioned various dates and examined the record and found that the petitioner was appointed in 1981 and he was not regular. In paragraph 7 of the counter affidavit it is admitted that no opportunity of hearing to the petitioner was considered necessary by the District Inspector of Schools as he had examined the records of the institution . The District Inspector of Schools also held that the appointment of the petitioner in 1973 was fictitious.

5. The petitioner has filed copy of manager's return filed in 1973. He is shown as employee in it. He has also filed his service book In counter affidavit filed on behalf of the management it is stated that petitioner is employee since 1973. In the order and in paragraph 6 of the counter affidavit filed by the District Inspector of Schools it is stated that entry of 1973 was fictitious. In law fictitious has a technical meaning. It has to be proved. The District Inspector of Schools on the other hand as stated by him in his order has drawn this inference on his own without hearing the petitioner or even the management Inquiry if any made by the District Inspector of Schools behind the back of the petitioner could not furnish the basis for passing the impugned order. Similarly, the finding that petitioner was appointed in 1981 and he was in continuous service from 1990 being based on material of which petitioner was not apprised and the management does not support it becomes erroneous at the face of it. It was contrary to rules and principles of natural justice. The District Inspector of Schools was not entitled to reopen the order passed by his predecessor except in accordance with law. He could not set aside earlier order, on inquiry if any. Held behind the back of petitioner and without issuing notice to him. It may not be out of place that he passed similar order against other teachers and employees which was latter recalled. There was no material on record on the basis of which the District Inspector of School held that the petitioner came into service from 1981. Therefore, the order passed by the District Inspector of schools cannot be maintained.

5. In the result, the writ petition succeeds and is allowed. The impugned order dated 6.10.1992 passed by respondent no.1 Annexure-4 to the writ petition so far as it relates to the petitioner is quashed. The respondents are directed to reinstate the petitioner in

service and pay his entire arrears of salary within two months from the date a certified copy of this order is produced before them.

6. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.7.1999

1999

July, 14

BEFORE
THE HON'BLE M.KATJU ,J.

Civil Misc. writ Petition No. 27945 of 1999

Pushkar Singh Verma ...Petitioner
Versus
The District Inspector of Schools ,
Meerut and another ...Respondents

Counsel for the Petitioner : Shri A.P. Singh Raghava

Counsel for the Respondents: S.C.

Constitution of India Article 226- The officiating Principal is entitled to the salary of principal for the period he has officiated on the post of Principal. If retired, he will be entitled to the benefits of Principal as the same is paid on the basis of the salary last drawn at the time of retirement. Held-

The petitioner is entitled to the salary of Principal for the period for which he officiated on the post of Principal and the arrears of balance salary will be paid to him within two months of production of a certified copy of this order before the authority concerned. As regards the pension, since the same is paid on the basis of the salary last drawn at the time of retirement. I hold that the petitioner is entitled to the pension of Principal, if he retired on the post of officiating Principal. (Para 2)

By the Court

1. The petitioner was working as ad hoc Principal of the Institution in question when he retired. He has claimed salary and pension of Principal. This Court in Narbdeshwar Misra vs. D.I.O.S. Deoria 1982 UPLBEC 171 has held that the officiating Principal is entitled to the salary of Principal for which period he has officiated on the post of Principal.

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Pushkar Singh Verma
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M. Katju , J.

2. Following these decision this petition is allowed. It is held that the petitioner is entitled to salary of Principal for the period for which he officiated on the post of Principal and the arrears of balance salary will be paid to him within two months of production of a certified copy of this order before the authority concerned. As regards the pension since the same is paid on the basis of the salary last drawn at the time of retirement I hold that the petitioner is entitled to the pension of Principal, if he retired on the post of officiating Principal.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26TH JULY,1999

BEFORE
THE HON'BLE S.H.A. RAZA, J.
THE HON'BLE KRISHNA KUMAR, J.

1999

July, 26

Civil Misc. Writ Petition No.29243 of 1996

Ex. No. 14294238 Signalman
Jagdamba Prasad Dubey ...Petitioner.
Versus
The Union of India and others ...Respondents.

Counsel for the Petitioner : Shri G.D. Mukerji
Shri Satyajit Mukerji

Counsel for the Respondents: S.C.
Shri D.S. Shukla

Article 226 of the Constitution of India- the grant of disability pension- the authorities ought to have interpreted and applied the provisions of pension Regulations of the Army 1961 in a broad frame work to dispense with justice, instead they were applied in a narrow campass bereft from feeling of sympathy, compassion and in a most arbitrary manner- Held -

The case of the petitioner is remitted for reconsideration by the Ministry of Defence for the grant of disability pension, for passing afresh appropriate order in the light of the observations made herein above. While reconsidering the case of the petitioner, Regulations in accordance with the respondents will also be guided with a human approach so that message may not go from the

corridor of the Defence Ministry that the Government is not alive and sensitive to the problems of soldiers who are discharged from service, on account of disability during the course of Military Service. (Para 12)

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Ex.No. 14294238 Signalman J.P. Dubey
Vs.
The U.O.I., & others

S.H.A. Raza , J.
Krishna Kumar,J.

By the Court

1. Heard learned counsel for the petitioner and learned Additional Standing Counsel for the Union of India.

2. After the success of operation Vijay, the entire country has showered tribute and homage to the departed soldiers who lost their lives, and also saluted the bravery of the soldiers who in difficult mountain terrain where the temperature was below the freezing point successfully repelled the onslaught of the intruders.

3. Now the time has come when the attitude and behavior of the Army Officers and the Defence Ministry towards soldiers should change. No doubt discipline and sterness is the hall mark of Military service but it does not mean that the soldiers who are separated from their families to guard the border states, thousand of miles away from their homes and are often subjected to mental stress and strain be allowed to be abandoned, if they are discharged from military service on account of any disability which is attributable to the Military service. Their cases for grant of disability pension deserve sympathatic and compassionate consideration. Undoubtedly, the rules and orders, in that regard Pharsh, which require review, in view of the respect they command, so young men instilled with sense of patriotism, may join the military service without a feeling of insecurity in future.

4. The petitioner was initially recruited in the Army on 3rd of June 1975 after being posted at various places at the relevant time was performing his duties in Jammu.

5. At the time when he was recruited he was not suffering from any ailment. The Medical Board, which examined him, declared him fit to perform the arduous duty as a soldier. But while he was posted at Patni Top in the district of Udhampur (J & K), the petitioner suffered from neurosis, may be due to stress and strain to which a soldier is bound to be effected due to separation from his family.

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6. As soon as his illness was detected he was transferred to Chandigarh but his condition aggravated. Thereafter he was shifted to Command Hospital at Lucknow. He was discharged from Military Service due to disability in category EEE which according to the petitioner was permanent one.

7. In the counter affidavit it was not denied that while performing the difficult and hard duties at Jammu he was posted at Patni Top in the district of Udhampur but it was contended that it was not on high altitude. It seems that the authorities that have passed the orders have no knowledge about the topography that it was not on high altitude. It seems that the authorities that have passed the orders have no knowledge about the topography of Udhampur district or Patni Top in Jammu & Kashmir which is at a high altitude. If it is assumed that he was not posted on a high altitude, even then owing to aloofness from the home and the family, a soldier may be subjected to such illness which is evident from the averments made in paragraph 15 of the counter affidavit where it has been stated that the petitioner was enrolled in the Army Corps of Signals on 3rd of June, 1975 by Recruiting Officer, Bareilly. After having rendered seven years and twenty six days' service in the Army, the petitioner was discharged from service on 29th June, 1962(A.N.) under Army Rule 13 (3) III (iii) having been invalidated and boarded out from service by the Invaliding Medical Board due to disability "NEUROSIS DEPRESSIVE REACTION (300), in low medical category 'EEE'. Degree of disablement was assessed at 30% for two years by the properly constituted invaliding medical board.

8. The petitioner staked a claim in respect of grant of disability pension. His application was forwarded by the Officer Incharge, Signal Records, Jabalpur to Controller of Defence Accounts (Pension) rejected the claim regarding pension in respect of the petitioner by means of his order dated 21st September, 1982. The petitioner thereafter approached the Officer-in-Charge, Signal Records, Jabalpur by making a representation/ Appeal with the request that the case be forwarded to Government of India, Ministry of Defence. The Controller of Defence Accounts (Pension) referred the appeal of the petitioner to the Secretary, Ministry of Defence (Pension & Appeals) Government of India who rejected the appeal on 31st July, 1986.

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The U.O.I., & others

S.H.A. Raza , J. Krishna Kumar,J.

Thereafter, the petitioner having no other alternative option available invoked the jurisdiction of this court under Article 226 of the Constitution of India by filing a writ petition bearing No.22139 of 1990. An Hon'ble Single Judge of this court on 26th of September, 1995 allowed the writ petition by issuing a direction to the Secretary, Ministry of Defense, New Delhi respondent no. 1 to take into consideration all the relevant provisions of Regulation 173 of the Army Pension Regulations 1961 and in particular, Appendix-II contained in paragraph 7(b) of the aforesaid Regulation. He was further directed to arrive at a necessary conclusion as to whether the disease of neurosis (Depressive reaction) has occurred to the petitioner during the period of initial service and whether the petitioner has incurred 30 percent disability, and thereafter will take steps for granting disabling pension in accordance with Appendix-II contained in paragraph 7 (b) of the aforesaid Regulations. The court further directed that such consideration has to be made as quickly as possible preferably within a period of three months from the date of production of a certified copy of this order before the Secretary, Ministry of Defense. It was further directed that in case, the Secretary was not in a position to accede to the prayer for grant of disabling pension benefit to the petitioner, he will indicate sufficient reasons. The Secretary was further directed to set up a Medical Board for further examination of the petitioner's disease in arriving at a necessary conclusion.

9. While considering the case of the petitioner this court took notice of the fact that the Officer-in-Charge, Signal Records, Jabalpur recommended the case of the petitioner for grant of his pension but he rejected the claim regarding pension by his order dated 21.9.1982. By placing credence on the decision in **Gurnam Singh Vs. Union of India and others (1992) Labour and Industrial Cases 1594,** the court relied upon the following observations which reads as under:

"That grant of disability pension is covered by the provision of Regulation 173 of the Pension Regulations for the Army, 1961, which provides that unless otherwise specifically provided a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable at or aggravated by military service and is assessed at 20 percent or over. The question whether a disability is attributed to or aggravated by military service shall be determined under the Rules in Appendix-II. The question as to whether or not the disability is attributable to the

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military service has to be determined in accordance with the provisions of Appendix-II. The relevant entry in Appendix-II is contained in paragraph 7 (b) which reads as under :-

A disease which has led to an individuals discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of individual's acceptance for military service. However, if medical opinion holds, for reasons to be started that the disease could not have been detected on medical examination prior to acceptance for service the disease will not be deemed to have arisen during service.

A perusal of paragraph 7 (b) as stated above would show that a disease which leads to an individual's discharge is deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for military service."

10. Neither in the counter-affidavit filed in the earlier writ petition nor in the present writ petition any material has been placed before this court that the petitioner has not acquired disability because of his posting at Jammu & Kashmir at the relevant point of time nor any expert opinion of the Medical Board has been annexed with the counter affidavit which illustrates that the disability has not occurred because of the postings of the petitioner at high altitude area of Jammu & Kashmir. Beside the above there is nothing on the record to indicate that the disease could not have been detected on medical examination prior to acceptance of service. No mention was made anywhere that the disease could not have been detected at the time of petitioner" joining the Military Service.

11. A perusal of the counter affidavit filed in the writ petition will indicate that the direction of this court to the Secretary, Ministry of Defense to set up a Medical Board for examination of the petitioner's disease in arriving at a necessary conclusion was complied with. In paragraph 26 of the counter affidavit, a vain effort has been made to deny the petitioner the grant of disability pension by indicating that the Ministry of Defense only consulted the Medical authorities in compliance of the court's order. The Medical Board did not examine the petitioner and submitted his report to the government that the disease was not attributable to the Military Service. It was not indicated by the Medical Board as to what was the percentage of the disability. In the circumstances, we are of the view that the case of the petitioner was not dealt with by the Ministry of Defense in accordance with the directions of this court. It appears

that the judgement of this court was read in a most general and sweeping manner and the direction of this court was not followed and adhered to. Regulation regarding the grant of disability pension were interpreted and applied in a most mechanical and casual manner by the Ministry of Defense . The authorities ought to have interpreted and applied the Regulations in a broad frame work to dispense with justice, instead it were quoted and applied in a narrow compass, bereft from a feeling of sympathy, compassion and humanitarianism, in a most arbitrary ad irrational manner.

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S.H.A. Raza , J.
Krishna Kumar,J.

12. In view of the reasons indicated herein above, this writ petition succeeds and is allowed. A writ in the nature of certiorari quashing the letter dated 31st July, 1986 contained in Annexure-IV and letter dated 20th December, 1995 contained in Annexure-VIII passed by Ministry of Defense, Government of India is issued. The case of the petitioner is remitted for reconsideration by the Ministry of Defense for the grant of disability pension, for passing afresh appropriate order in the light of the observations made hereinabove. While reconsidering the case of the petitioner, Regulations in accordance with the respondents will also be guided with a human approach so that message may not go from the corridor of the Defense Ministry that the Government is not alive and sensitive to the problems of soldiers who are discharged from service, on account of disability during the course of Military Service. The Ministry of Defense Government of India is further directed to dispose of the appeal within a period of three months from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.5.1999

BEFORE
THE HON'BLE M. KATJU, J.

1999

May, 21

Civil Misc. Writ No. 3763 of 1999

Smt. Saroj Devi **...Petitioner**
Versus
State of U.P. through The Secretary, Department of Irrigation, Government of U.P., Lucknow & other **...Respondents.**

Counsel for the Petitioner : Shri Bhoopendra Nath Singh

Counsel for the Respondent: S.C.

1999

Smt. Saroj Devi
Vs.
State of U.P. through The Secretary, Deptt. Of Irrigation, U.P. Lucknow & others
------
M. Katju,J.

Dying in Harness Rules-2(3) U.P. Recruitment of Dependents of Govt. Servant - Appointment- Petitioner's husband died in harness on 4.5.98- 11 years continuous service on temporary basis on substantive post- held- entitled for appointment.
Case Law discussed.
J.T. 1996 (6) Page 646 distinguished.

Held- Moreover in the U.P. Recruitment of Dependents of Government servant. Dying and Harness Rules it has been mentioned in rule 2 (3) that the benefit of the Dying and Harness Rules may be given to the dependent where the deceased had worked for at least three years. Since the petitioner's husband worked for over 11 years the petitioner is entitled to the benefit of the Dying and Harness Rules. (Para 3)

By the Court

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

The petitioner is a widow with four small children. The petitioner's husband died in harness on 4.5.1998 and she has claimed appointment under Dying in and Harness Rules.

2. Learned Standing Counsel has submitted that no appointment under Dying and Harness Rules can be given to the petitioner in view of the decision of the Supreme Court in State of Haryana Vs. Rani Devi J.T. 1996 (6) page 646. He has invited our attention to paragraph 8 of the said judgment in which it has been held that a casual or ad hoc appointee cannot be given benefit of the G.O. dated 31.10.1985, I have carefully perused the aforesaid decision and in my opinion, it is distinguishable. The petitioner's husband was not a purely casual or ad hoc employee. He was a temporary appointee who had worked against a substantive vacancy from 18.4.1987 and had worked for more that 11 years. The decision of the Supreme Court applied to a case of a casual or ad hoc appointee e.g. a person appointed for a period of one month who died after 20 days of appointment. In case of such a casual appointee obviously the benefit of Dying and Harness Rules cannot be given. Hence the ratio of the decision of the Supreme Court cannot be

applied in this case as the petitioner's husband worked for over 11 years.

3. More ever in the U.P. Recruitment of Dependents of Government Servant, Dying and Harness Rules it has been mentioned in rule 2(3) that the benefit of the Dying and Harness Rules may be given to the dependent where the deceased had worked for at least three years. Since the petitioner" husband worked for over 11 years the petitioner is entitled to the benefit of the Dying and Harness Rules.

4. In the circumstances the petition is allowed. The respondents are directed to give appointment to the petitioner commensurate to her qualifications within one month of production of a certified copy of this order in accordance with law.

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Smt. Saroj Devi
Vs.
State of U.P. through The Secretary, Deptt. Of Irrigation, U.P. Lucknow & others
------
M. Katju,J.

RIVISIONAL JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD JULY 5, 1999

BEFORE
THE HON'BLE B.K. SHARMA, J.

1999

July, 5

Criminal Revision No. 280 of 1985

Kundanlal **...Accused- Revisionist**
Versus
State of U.P **...Opposite party**

Connected with
Criminal Revision No.306 of 1985

Ram Prakash **...Accused-Revisionist**
Versus
State of U.P. and another **...Opposite parties**

Criminal revision against the judgment and order dated 30.11.1984 of the Sessions Judge in Criminal Appeal No. 84 of 1982.
Kundal Lal son of Bhagwan Dass resident of No. 6 Qadir Road, Dehradun **...Applicant**
Versus
State of U.P **...Opposite Party**

Counsel for the Revisionist : Shir V.S. Jauhari
Counsel for the Opposite Parites : AGA

1999

Kundan Lal
Vs.
State of U.P.

B.K. Sharma,J.

Cr. P.C Section 397/401 - The order of the learned Additional Sessions Judge- directing the retrial was challenged-Held-the Courts have always recognised that economic offences and the offences related to the public officers and food adulteration are such in which the quashing of charge and retrial, may not be in the interest of justice-since this case also relates to economic offence, it is not proper to quash the remand order (para 4)

Case referred.

AIR 1986 Supreme Court 289
1998 SCC(Cr.) 1692
1996 SCC(Cr.) 589

By the Court

1. The facts leading to the aforementioned revisions are that in Original Case No. 329 of 1981, Food Inspector Vs. Ram Prakash and M/s Shanker Salt works through Kundal lal the Addl. Chief Judicial Magistrate, Dehradun by the order dated 31.08.1982 convicted both the accused for the offence under Section 16(1)(a)(I) of the Prevention of Food Adulteration Act, 1954 and sentenced each one of them to suffer R.I. for a period of six months and to paya fine of Rs. 1000/- each and in default of payment of fine, to suffer R.I. for a period of one month each.

2. Accused Kundan Lal challenged his conviction by preferring Criminal Appeal No. 84 of 1982 while accused Ram Prakash challenged his conviction by preferring Criminal Appeal No. 86 of 1982 before the Sessions Judge, Deharadun. Both the appeals were heard together by Sri Sardar Bahadur Balveer the then Addl. Sessions Judge, Dehradun. He found that the court, which tried the case against the two accused-appellants, had no jurisdiction and consequently sat aside their conviction and sentence by his judgment and order dated 30.11.1984 and remanded the case to the C.J.M. Dehradun to get the case tried by the competent court in the light of the observations made in the body of judgment afresh. He also directed the parties to appear before the court concerned on 01.12.1984.

3. Being aggrieved by the aforesaid common order of remand in both the appeals, accused Kundan Lal preferred Criminal Revision No. 280 of 1985 and similarly, accused Ram Prakash preferred Criminal Revision No. 306 of 1985 in this Court. The accused-revisionist Kundal Lal prayed that the operation of the impugned order passed by the Addl. Sessions Judge dated 30.11.1984 in

Criminal Revision No. 84 of 1982 relating to him be stayed and acting upon that prayer, the High Court vide it order dated 15.02.1985 stayed further proceedings as prayed. Accused-revisionist Ram Prakash made similar prayer in Criminal Revision no. 306 of 1985 and therein also this Court acting upon the prayer stayed the proceedings by its order dated 19.02.1985 and as a consequence thereof, the proceedings in Criminal Case No. 329 of 1981 are lying stayed till now.

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B.K. Sharma,J.

4. I have heard the learned counsel for the parties. The only contention raised before me behalf of the two accused-revisionists is that the order of the learned Addl. Sessions judge directing the retrial was untenable and should be set aside. Reliance has been placed by the learned counsel for the accused-revisionists on the authority S. Guin and others Vs. Grindlays Bank Ltd., AIR 1986 Supreme Court 289. In my view this authority is of no help to the accused-revisionists. In that case, a complaint has been filed before the Chief Metropolitan Magistrate, Calcutta for the offences under Section 341 I.P.C. and Section 36 AD of the Banking Regulation Act committed in October, 1977. After trial, the Magistrate acquitted all the accused. Against the said judgment of acquittal, an appeal was filed by the Bank before the High Court and after nearly six years, the High Court found that the trial Court had missed the essence of the offences and so there was failure of justice and consequently set aside the judgment of acquittal and remanded the case for retrail for the offence and under these circumstances, the Apex Court observed that having regard tot he nature of the acts alleged to have been committed, the High Court should have directed the dropping of the proceedings in exercise of its inherent powers under Section 482, Criminal procedure Code even if for some reason it came to the conclusion that the acquittal was wrong and that fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuses of judicial process. The Apex Court further said:

"…………the High Court should have dismissed the appeal before it even if it disagreed with the view taken by the trial Court with regard to the gist of the offence punishable under section 341 Indian Penal Code, having regard tot he inordinate delay of nearly six years that had ensued after the judgment of acquittal, the nature and magnitude of the offences allege to have been committed by the appellants and the difficulties that may have to be encountered in securing the presence of witnesses in a case of this nature nearly 7 years after the incident. The termination of the criminal proceedings in that way

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B.K. Sharma,J.

would secure the ends of justice as it would bring about reconciliation between the management and the employees and also put an end to a state criminal proceeding in which the public had no longer sufficient interest."

The Apex Court consequently restored the order of acquittal in these circumstances. In the present case, the facts are totally different. In this case, the occurrence related to year 1979. The trial court made the conviction on 31.08.1982 and the appellate court passed the remand order on 30.11.1984 which cannot be said to be long-after and if the two accused-revisionists had abided with the remand order, retrial of the case might have been finished in the year 1985 itself. It cannot be said that in the year 1984 when the learned Additional Sessions Judge deciding the two appeals passed the remand order, there was anything illegal in his order. There was no undue delay in the trial and also there was no undue delay in the disposal of the appeals. Actually, the appellate court had no option than to direct the retrial particularly in this case which related to the prevention of Food Adulteration Act. The courts have always recognised that the economic offence, and the officers related to the public officers and food adulteration are such in which the quashing of charge or trial may not be in the interest of justice. The case of Rajdeo Sharma vs. state of Bihar reported in 1998 Supreme Court Cases (Cr.), 1692 is a case under the prevention of Corruption Act in which the F.I.R. was lodged 16 long years ago; charge sheet was submitted three years later and till 1995, the prosecution had examined only three out of forty witness, the Apex Court declined to quash the prosecution pointing out that the accused was never in carcerased as his bail application was allowed on the day he had appeared before the court. In the present case, there was no delay in the trial and there was no delay in the disposal of appeals preferred against the conviction and when the appellate court found that the trial had been made by a court having no jurisdiction and, therefore, directed the retrial and if due to the own act of the accused-revisionists, the retrial was delayed, then they have to thank themselves and in no way, the prosecution is a guilty of any delay in bringing the accused to retrial in pursuance of the remand order. The accused revisionist are countering on bail all through. Under these circumstances, it is immaterial that inpersuance of the remand order, the retrial would take-place now after the disposal of these two criminal revisions. The spirit of "common Cause" case ("Common Cause" a registered Society through its Director Vs. Union of India and others reported in 1996 Supreme Court Cases (Cri 589) goes against the accused-

revisionists . in that case while making the direction in favour of the accused-person for release on bail, discharge or acquittal of the accused in cases suffering from delay in trial, the Apex Court expressly stated in Paragraph 4 that the directions shall not apply to the Cases involving corruption, N.D.P.S. Act, Essential Commodities Act, Food Adulteration Act and Acts dealing with environment or any other economic of offence etc. In this authority it was said that the criminal courts shall try the offence mentioned in para aforesaid on priority basis. The present also is a case relating the economic offence being under the prevention of Food Adulteration Act and for that reason it was all the more improper to quash the remand order for retrial.

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5. Both the above revisions are consequently dismissed. The remand order passed by the learned Addl. Sessions Judge, Dehradun is upheld. The stay orders dated 15.02.1985 and 19.02.1985 passed by this court in Criminal Revisions Nos. 280 of 1985 and 306 of 1985 respectively are vacated. It is directed that the court to which the case is entrusted for retrial, shall act with utmost expedition in making the trial and deciding the case according to law.

6. Let the record of the trial court which has been received in Criminal Revision No. 280 of 1985 be returned to the C.J.M. concerned along with a copy of this order forthwith by special messenger/courier.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.1999

BEFORE
THE HON'BLE BHAGWAN DIN, J.

1999

July, 27

Criminal Revision No. 753 of 1983

Criminal revision against the order and judgment dated 18.04.1983 passed by Sri S.M. Goel, IV Addl. Sessions Judge, Bijnor, in Criminal Appeal No. 39/1982.

Nazar **...Applicant**
Versus
State of U.P. and another **...Respondents**

Counsel for the Applicant : Shri G.C. Saxena
Counsel for the Respondents: A.G.A.

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Nazar
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State of U.P.
& another

Bhagwan Din, J..

Section 397/401 of Code of Criminal Procedure and section 9 of the prevention of Food Adultration Act- The local area within which Food Inspector is authorised to act may be assigned by the Central Government or state government This power has not been delegated to C.M.O. since the food inspector had no jurisdiction to take sample of the Milk within the Municipal Area of Kiratpur, the entire proceedings and the trial stood vitiated. Held-(Para 10)

The local area within which Food Inspector is authorised to act may be assigned by the Central Government or State Government. The power of the Central Government or state Government has not been delegated to the C.M.O. Bijnor to change the area or assign additional jurisdiction of the area to a Food Inspector for which he was not appointed as a Food Inspector.

By the Court

(1) On being convicted by the judicial Magistrate 1st Class, Bijnor under Section –7/16 of the prevention of Food Adulteration Act (hereinafter called 'Act') and sentenced to 6 month's R.I. and to a fine of Rs. 1000/-, the present revisionist, Nazar preferred an appeal before the Sessions Judge, Bijnor which was ultimately heard and disposed of by IV Addl. Sessions Judge, Bijnor. The appellate court dismissed the appeal by order dated 18.04.1983 confirming the order of conviction and sentence passed by the trial court. Hence, the present revision, challenging the legality and propriety of the order of conviction passed by the trial court and also the order made by the appellate court dismissing the appeal.

(2) For appreciation of the submissions of Sri R.B. Saxena, holding brief of Sri G.C. Saxena, learned counsel appearing for the revisionist and of the learned AGA and also to arrive at the correct decision, the relevant facts are given hereunder.

(3) Sri Somendra Kumar was Sanitary Inspector At P.H.C. Kiratpur. By a notification issued under Section-9 of the Act, he was appointed Food Insepctor for an area of P.H.C. Kiratupr. On 11.07.1980 at about 6.30 A.M. he intercepted the revisionist, Nazar near Tonga Stand within the municipal limit of Kiratpur. After disclosing his identity, he served a notice in form-6 exhibiting his intention to take sample of requisite quantity of milk, divided the same in 3 equal parts, kept in 3 clean and dry bottles and sealed on spot. He also prepared a memo of the proceeding of taking the sample from the revisionist, Nazar. Then he handed over one of the

sealed bottles to the revisionist and deposited the other two sealed bottles in the office of C.M.O. Bijnor for further transmission to the Public Analyst for analysis and report. On receipt of the Analyst's report, the C.M.O. authorised him to institute prosecution against the present revisionist.

(4) The Food Inspector instituted a complaint against the revisionist. In order to prove the guilt of the revisionist, he testified himself as P.W. 1. Before the trial court among other points, it was contended that the area of operation by the Food Inspector, Somendra Kumar was limited within the P.H.C. Kiratpur. He took the sample within the municipal area of Kiratpur beyong the area for which he was appointed as Food Inspector. Therefore, the entire proceeding of taking sample and prosecution stands vitiated. The trial court observed that though Somendra Kumar was appointed as a Food Inspector for an area under P.H.C. Kiratpur, but the C.M.O. Bijnor has ordered him to look after the work of the Food adulteration under the Act within the Municipal Board area, Kiratpur in addition to his own usual duties till the trained Food Inspector is posted in Municipal Board, Kiratpur. Thus , he was authorised to take sample within the municipal area of Kiratpur and there is no illegality or embarkment of jurisdictional area of the Food Inspector.

(5) In the appeal, the same argument was advanced before the appellate court. The appellate court also was of the view that since the work of Sri Somendra Kumar as Food Inspector within the municipal area of Kiratpur has been authenticated by the C.M.O. Bijnor, there is no fallacy or illegality in taking the sample within the municipal area of Kiratpur. The appellate court on the above view, turned down the submission of the counsel for the appellant on this court.

(6) In the present revision, the same question of law has been raised on the force of the observation made by this Court in Ram Dulare vs. State (1979) (1) Prevention of Food Adulteration Cases, 269).

(7) I have had the opportunity to go through the decision of the above case. In that case the food Inspector had taken the sample of milk in an area for which he was not appointed as Food Inspector. He, therefore, stated before the court that he had been orally instructed by the Nagar Swasthya Adhikari to act as Food Inspector

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over the entire Corporation area. The court held that Nagar Swasthya Adhikari had no power vested in him to authorise such insepction.

(8) Section-9 of the Act contemplates an appointment by the Provincial Govt. of the Food Inspector together with the specification of the local area over which he is authorised to exercise jurisdiction. This section makes no provision whereby such power limiting the area of operation by the State Government can be delegated to, or exercised by the Health Officer, with respect to the Sanitary Inspectors who are conferred with the power of Food Inspector under notification issued in this behalf.

(9) This court in this case (supra) held that "even assuming that oral instructions were given by the Health Officer, but Sri Gera had no jurisdiction to act outside the area of Harbans Mohal and take sample of Food in Juhi Kalan for which he never was Sanitary Inspector. Therefore, Sri Gera had no jurisdiction to take sample. As such, the entire proceedings are vitiated in law."

(10) By notification issued by the State Government, Sri Somendra Kumar, who was working as Sanitary Inspector, conferred with the power to exercised and act as Food Inspector in an area of which he was the Sanitary Inspector. Section-9 of the Act lays donw that the Central Government or the State Government may, be notification in the official gazette, appoint such persons as it thinks fit having the prescribed qualifications to be Food Inspector for such local areas as may be asigned by the Central Government or the State Government, as the case may be. Thus the local area within shich Food Inspector is authorised to act may be assigned by the Central Government or State Government. The power of the Central Government or State Government has not been delegated to the C.M.O. Bijnor to change the area or assign additional jurisdiction of the area to a Food Inspector for which he was not appointed as a Food Inspector.

(11) Having regard to the legal proposition contemplated in section-9 of the Act and also the view taken by this Court on this Court, I am of the opinion that Sri Somendra Kumar had no jurisdiction to take sample of the milk within the municipal area of Kiratpur and, therefore, the entire proceedings and the trial as well stood vitiated.

(12) The revision is, therefore, allowed. The order of the trial court convicting and sentencing the revisionist is set aside. So also the order of the appellate court dismissing the appeal and confirming the conviction and sentence awarded by the trial court is set aside. The revisionist is on bail, need not to surrender. The bail bonds are cancelled. The sureties are discharged. The amount of fine whatsoever deposited by the revisionist in the court shall be refunded forthwith.

Revision Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD. 09.07.1999

BEFORE
THE HON'BLE N.K. MITRA, C.J.
THE HON'BLE S.R. SINGH, J.

1999

July, 9

Civil Misc. Writ Petition No. 659 of 1999

M/s Mehra international ...Petitioner.
Versus
Commissioner of Income Tax, Kanpur and another ...Respondents.

Counsel for the Petitioner : Mr. Vikram Gulati
Counsel for the Respondents : S.C.

Sub Section 2-A of section 80 HHC of Income Tax Act-1961-The power of extention of period conferred by sub section 2 (a) of Section 80 HHC can be exercised on an application whether moved within six months from the end of the previous year or moved within a reasonable period beyond the period of six months- Held (para2)

The power of extension of period conferred by sub section 2 (a) of section 80 HHC can be exercised on an application whether moved within six months from the end of the previous year or moved within a reasonable period beyond the period of six months.

By the Court

1. Petition on hand is directed against order dated 30th Nov 1998 passed by income Tax Officer (Tech) on behalf of the Commissioner Income Tax Kanpur thereby refusing to grant extension of time sought for under sec 80 HHC (2) (a) of the income Tax Act, 1961 on

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N.K. Mitra,C.J.
S.R. Singh, J.

the ground that your petition dated 30th Sept 97 filed before me is not in time and no reasonable cause has been shown by you for non-realization of export sale proceeds in convertible foreign exchange within statutory time limit.

2. Having heard the learned counsel for the petitioner and the standing counsel appearing for the income Tax Department and upon regard being had to the reasons disclosed in the application seeking extension of time, we are of the considered view that the impugned order suffers from patent infirmity as discussed hereinafter (The power of extension of period conferred by sub-sec (2) (a) of Sec 80 HHC can be exercised on an application whether moved within six months from the end of the previous year or moved within a reasonable period beyond the period of six months) The period prescribed by the statute is for bringing the sale proceeds in India in convertible foreign exchange within six months it does not prescribe a time limit within which the assessee is to seek extension of period. All that the sub-sec as it stood before its amendment by the Finance Act, 1999 with effect from 1.6.1999 required is that the Chief Commissioner or Commissioner is satisfied (for reasons to be recorded in writing) that the assessee is for reasons beyond his control, unable to do so within the said period of six months It cannot be gainsaid that the proceeds of goods or merchandise exported out of India may be received in or brought into India by the assessee upto the statutory period of six months. Extension of period may be sought for by means of an application moved either before or after expiration of the said period of six months. We, however, hasten to add that if the sale proceeds of such goods or merchandise are not received in, or brought into, India within six months and the application for seeking extension is not filed within that period, it must be filed within a reasonable period after expiration of the six months period. The view taken by the Competent authority that the application was liable to be rejected as it was not filed in time, is not borne out on proper construction of sub-sec (2) (a) of Sec 80 HHC of the Income Tax Act.

3. The reasons given in the impugned order that the petition seeking extension was not filed in time, is no ground to reject the application. The said view appears to be based on misconstruction of the provisions contained in Sec 80 HHC (2) (a) which in our opinion visualizes that the period can be extended even if petition is filed beyond the statutory period of six months. The expression within such further period as the Chief Commissioner or Commissioner

,may allow in this behalf is significant Such further period may be granted on an application moved after expiration of the period of six months within which period the sale proceeds are supposed to be brought within India in convertible foreign exchange.

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S.R. Singh, J.

4. The second reason on which the application seeking extension of time has been rejected as assigned by the Competent Authority that no reasonable cause has been shown too does not commend itself to be sustained inasmuch as it does not assign any reason as to why the cause shown in the application was not found reasonable it is well settled that an order fraught with the civil consequences must be a reasoned order. The petitioner herein has articulated certain reasons in his application seeding extension of time which reasons were not adverted to and the petition seeking extension has been rejected by a laconic order stating therein that no reasonable cause has been shown It need hardly be said that reasons are the links between the conclusions drawn and the materials placed on the record. It may be worthwhile to observe as also stated at the bar that the sale proceeds were subsequently received in convertible foreign exchange in India on 16.6.1998 i.e. before the order impugned herein was passed in the conspectus of the facts and circumstances we are persuaded to the view that the matter needs to be reconsidered by the Commissioner Income Tax Kanpur or for matter of that the Income Tax officer (Tech) Kanpur.

5. In the result, the petition succeeds and is allowed. The impugned order is quashed. The matter is relegated to the Commissioner Income Tax Kanpur for disposing of the application seeking extension in accordance with law and in the light of the observations made in the body of this Judgment within a fortnight from the date of receipt of a certified copy of this order until disposal of the application seeding extension of time proceeding pending before the Authority concerned shall remain stayed.
6. Let a copy of this order be supplied to the counsel for the parties within a week on payment of usual charges.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED. ALLAHABAD JULY 30. 1999

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July, 30

BEFORE
THE HON' BLE R.R.K. TRIVEDI, J.
THE HON' BLE M. C. JAIN, J.

Habeas Corpus Writ Petition No. 26889 of 1999

Prem Chandra Sharma , Advocate **...Petitioner (In Jail)**

Versus

Superintendent, District Jail , Moradabad and others **...Respondent**

Counsel for the Peitioner : Shri D.S. Mishra
Shri Rajendra Kumar Pandey
Counsel for the Respondents : Shri Mahendra Pratap
A.G.A.

Section 3 (2) of National Security Act. 1980- delay in disposal of representation by the union – no counter affidavit was filed by the Union of India inspite of sufficient opportunity – the delay in disposal of the representation required explanation from central Government but it has not been furnished . Unexplained delay in disposal of the representation has rendered the continued detention of the petitioner be illegal .
Held- (para 36)
Delay involved required explanation from the central Government but it has not been furnished. Held that continued detention of the petitioner has been rendered illegal and he is entitled to be released.

By the Court

1. Petitioner Prem Chandra , Sharma an advocate practicing at Dehradun, has filed this habeas corpus petition challenging the order dated 24.06.1999, passed by respondent no 2, District Magistrate Dehradin under Section3(2)of national Security Act, 1980 (hereinafter referred to as the Act) directing his detention under the act.

2. Along with the order of detention petitioner was also served the grounds of detention on the basis of which the detaining authority formed his subjective satisfaction for putting the petioner under

preventive detention. From,perusal of the grounds itappears that on 23..6.1999, at about 2.05 P.M. when the collector Dehradun was holding monthly meeting of the officers of the district a crowd of 50-60 advocates led by petitioner came before the meeting hall and broke open the iron bars and entered inside the meeting hall. Persuation of the collectorate employees police and P.A. C.employees that the collector is holding an important meeting could not be any effect.Prem Chandra Sharma and his companions raised filthy and insulting slogans against the collector. They also threatened the collector that his face shall be blackened and also threatened him for life. They pushed their way inside the meeting hall by pushing away the employees and forcibly made entrance in the office of the District Magistrate in order to get their demands accepted by force. Petitioner had broken the telephone and glasses of windows and doors. He also destroyed the chairs and broke the glass affixed on the table and this way caused loss of the property of thousands of rupees. Other advocates gave full support to Prem Chandra Sharma in this violent activity. This incident was witnessed by other persons, namely Surya Mohan Nautiyal, Tahsildar ,Tahsil Dehradun Nikhil Chandra Additional Collector (Finance) Shri Ravindra Godbole, Dy. Collector (Sadar) and other officers and employees present there. Surya Mohan Nautiyal lodged First Information Report regarding the aforesaid occurrence on the same day, st 3.45 P.M., at police Station Kotwali , Dehradun , which was registered as case Crime no. 421 of 1999 under Sections 147/342/353/504/506 I.P.C., read with Section 3 (2) (e) of prevention of Damage (public property) Act , 1984 and Section 7 of Criminal Law Amendment Act. The case is under investigation.

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3. In grounds nos. 2 to 6 it has been further stated that on account of this daring criminal activity committed in day light inside the collectorate premises, Dehradun , the officers who were attending the monthly meeting were taken under a grip of fear and commotion and the officers and employees present there there ran helter- skelter for their safety. It is further stated that on account of this daring criminal activity the public in general present there also fell in the grip of fear and terror shich affected the public adversely.

4. It is further stated that on account of the aforesaid incident, fear and commotion prevailed in the locality and the market adjoining /to the collectorate was closed. People ran away leaving their vehicles, small shop keepers also ran away leaving their shops open, people in general and family members living in the vicinity

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R.R.K Trivedi, J.
M.C. Jain, J.

also fell in grip of great fear and terror, people ran away from the place of occurrence, Government employees also left for their security leaving their offices open. This activity of the petitioner was highly prejudicial to the maintenance of the public order.

5. In ground no. 7, it is stated that on knowing about the aforesaid incident, the officer- in –charge, Police Station Kotwali, Dehradun, along with orher police personnel. Reached the site of occurrence and found that there was absolute silence on roads upto long distance, people were under fear and were not coming out of their houses, Shop –Keepers had closed their Shops and ran away. Even on persuation of the officer-in –charge that full security shall be provided to them , they could not muster courage to open their shops. Residents of the area and the employees felt highly annoyed, a strong contingent of police and P.A.C. was posted there to maintain public order. All this has been mentioned in detail in General Diary no. 32.06.1999.

6. In ground no. 8 it has been mentioned that on 23.06.1999. itself, at about 7.00 P. M. sub-inspector Kripal Singh of Police Station Kotwali, District ct Dehradun , got a report recorded that petitioner has further threatened to put the Government vehicle provided to the collector on fire and to destroy the collectorate building. An announcement to this effect was made openly amongst / his companions. This activity was highly prejudicial to the maintenance of the public order. The detaining authority there after has stated that on the basis of the aforesaid, he felt satisfied that with a view to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order it is necessary to make an order directing that petitioner Prem Chandra Sharma be detained under the Act.

7. Petitioner was also informed that he has a right to make a representation against the order of detention before the State Government and such representation may be made to the Home Secretary of the State of Uttar pradesh through the Superintendent, District Jail. Dehradun . petitioner was further informed that he is also entitled to make a representation before the Advisory Board under Section 10 of the Act as the case of the petitioner shall be referred within three weeks to the advisory Board, and if representation is submitted late it shall not be considered. Petitioner was further informed that he may be heard personally by the advisory Board under Section 11 (1) of the Act and if he is

desirous of personal hearing it should be specifically mentioned in the representation which may be submitted through the Superintendent of Jail. Petitioner was Also informed that he may make a representation to the Genral Government against his detention which shall be addressed to the Secretary, Government of India , Ministry of Home (Internal Security) , North Bloch, New Delhi. It may also be submitted through the Superintendent of district Jail.

8. The detaining authority , same day, forwarded the order of detention along with other material to the state Government and the state Government approved it on 30.06.1999, under Section 3 (4) of the Act The approval was communicated to the petitioner by letter dated 02.07.1999. same day papers which were received from the detaining authority were forwarded to the Central Government under Section 3 (5) of the Act which were received by the central Government on 04.07.1999.

9. Petitioner filed a representation on 28.06.1999 which was forwarded by the District Magistrate with his comments on 03.07.1999, which was received by the State Government on 04.07.1999. The representation was considered by the under Secretary and joint Secretary (Home) on 05.07.1999 . and by Special Secretary and Secretary Home on 06.07.1999. The representation was finally rejected by the state Government on 07.07.1999 which was communicated to the petitioner on 08.07.1999 .The case of the petitioner was referred to the advisory Board on 02.07.1999 and the representation of petitioner was also sent to the advisory Board on 05.07.1999. The representation of the petitioner was sent to the Central Government on 05.07.1999.

10. In this case counter affidavit and supplementary counter affidevits have been filed by Shri Tej Pal Singhdetaining authority, District Magistrate, Dehradun as respondent no. 2 Shri R.S.Agarwal , Joint Secretary, Home department State of Uttar pradesh has filed counter affidavit on behalf of respondent no. 3/ and Shri D. Ram , Superintendent, District Jail , Dehradun, has filed counter affidavit as respondent no. 1. No counter affidavit has been filed by the union of India, respondent no.4, though sufficient opportunity was given for the same .

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11. We have heard Shri Daya Shankar Mishra, learned counsel for petitioner Shri Mahendra Pratap , learned A.G.A. for respondents nos. 1 to 3 and Shri K.N. pandey for respondent no. 4

12. Learned counsel for the petitioner has submitted that counter affidavit filed by the detaining authority is defective and it connot be read in evidence. The submission is that the consequence is that the averments made in the writ petition remained uncontroverted and they may be accepted and petitioner is entitled to the relief on this ground alone .

13. Learned A.G.A. on the other hand submitted that the affidavit filed is quite in order and does not suffer from any illegality . It has also been submitted that in order to avoid any complication another counter affidavit of the detaining authority with same contens and duly sworn in by the deponent and verified by oath Commissioner at Mussorie had been filed. The contention raised on behalf of the petitioner cannot be acceped, Learned counsel for the petitioner has placed reliance on the case of Aslam Khan versus Superintendent, District Jail, Moradabad.[1] In this connection learned counsel for petitioner has pointed out that the affidavit filed by Shri Tej Pal singh was sworn on 12.07.1999, at 4.35 P.M. whereas from the seal put by the oath Commissioner it appears that it was signed, sworn and verified before him by the detaining authority on 14.07.1999.

14. We have considered the defect pointed out by the Learned counsel for the petitioner.However , we do not find that the defect pointed out is such that the affidavit should not be read in evidence. From a close scrutiny it appears that the affidavit was prepared and it was intended to be sworn on 12.07.1999, but somehow it could not be done. At page 9, swearing clause was typed on which figures 12 and 4.35 P.M. were mentioned by hand but it could not be sworn and verified before the oath Commissioner on the date and time mentioned above. It could be placed before the Oath Commissioner, Rishikesh (dehradun) on 14.07.1999. The Oath Commissioner has affixed his seal and after filling up the columns, signed the same It clearly means that the affidavit was sworn, signed and verified by shri Tej Pal Singh. The earlier typed portion of the swearing affirmation has not been signed by the Oath Commissioner. In fact, it

1. 1983 (20) ACC p.202 (DB)

should have been scored off but as it was not signed by any Oath Commissioner it does not affect the legality of the affidavit

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15. The second challenge in this connection is that the affidavit sworn and verified by the Oath Commissioner at Rishikesh cannot be filed and used in this Court. 1. 1983 (20) ACC p. 202 (db)Chapter IV of part I of the Rules of the Court contains provisions for affidavits and Oath Commissioners. Rule I provides for appointment of oath Commissioners by Hon. The Chief Justice for such period or periods for which they have been so appointed.

16. Rule 2 provides fee to be charged for verification of affidavits which may be prescribed time to time by order of the Chief Justice.
Rule 3 provides for maintaining register by the oath Commissioner. Rule 4 is very material for the controversy raised which is being reproduced below:

> "4 Affidavit to bear serial number , etc. – Each affidavit shall have recorded on it the number and the year of the register in which it is entered and the serial number and the date of the entry. It shall also have the coupon, as supplied by the Court , affixed to it by the oath Commissioner .
>
> Provided that the affidavit verified by the oath Commissioners of other states by an Officer of Jail in the state of Uttar Pradesh, by the Superintendent – cum- Accountant of the Office of Official Liquidator , High Court, Allahabad and by the police Sub – Inspector (M) in the Office of the Inspector General of Police at Luchnow on whom powers of oath Commissioner have been conferred can be presented before the Court without such coupons."

17. Rule 5 further provides that an Oath Commissioner shall not allow an affidavit to be sworn before him unless it complies with the provisions of this Chapter. Admittedly , both on the counter affidavit filed by Tej Pal Singh , coupons have been affixed which, on conjoint reading of Rule 4 and 5 appears to be a necessary condition. Only certain affidavits have been exempted from affication of coupons which are sworn in before the officers specified in the proviso. The Oath Commissioners appointed by district Judge are not included in the proviso.

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18. For the aforesaid reason, in our opinion, the counter affidavits and supplementary counter affidavit filed by Tej Pal Singh are Illegal and could not have been presented before the Court without affixing coupons nor have been sworn before the Oath Commissioner and in absence of coupons, the affidavits cannot be said to be legal affidavits and are liable to be ignored. The objection raised by the learned counsel for the petitioner is accepted.

19. The second challenge against the impugned order by the learned counsel for the petitioner was that the impugned order is vitiated as it was malafide, arbitrary and suffered from bias and was void- ab – initio. Learned counsel has submitted that the detaining authority illegally directed that petitioner shall be detained in district Jail , Moradabad which is 200 kms. Away from Dehradun , without any rhyme or reason, He also directed that the petitioner can be detained as ordinary prisoner the effect being that he shall be kept with the convicts and under – trials involved in criminal cases. It is submitted that the order was punitive in nature. The purpose was to cause maximum harassment to the petitioner and to keep him away from his family members, friends and colleagues. It is further submitted that under section 5 of the ACT, the place of detention and other conditions of detention namely class etc. could only be provided by the state Government which power has not been delegated to the District Magistrate. The order thus suffered from serious illegality and stood vitiated. As the order was void- ab initio it could not be injected life by the order of approval passed by the state Government on 30.06.1999. For this submission learned counsel has placed reliance on the cases of A.K..Roy vs. Union of India[2] , Aslam khan vs. Superintendent District Jail[3] and Makhan Singh Tarsikka vs. State of Punjab. [4]

20. Learned A.G.A., on the other hand , submitted that the power contemplated under Section 5 for providing place and other conditions of detention are only incidental and regulatory, breach of which will not affect the legality of the order of detention if the grounds were sufficient for passing an order of detention. It has also been submitted that Section 6 of the Act provides protection to the order of detention and the detaining authority while passing the order of detention could also provide for the place of detention and the

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2. AIR 1982 S.C. 710
3. 1983 (20) ACC 202 (DB)
4. AIR 1952 S.C. 27.

class in which the detenu shall be kept in the Jail. In this connection state Government issued notification no. 2736../xxo-12G-80,dated 04.11.1980 in exercise of powers in clause (a) of section 5 of the Act and made the order known as Uttar Pradesh national Security prisoner (Conditions of Detention) order , 1980 (Hereinafter referred to as the order of 1980) and by this general order provided for the conditions . Learned counsel has submitted that under clause 4 of the aforesaid order a national security prisoner shall ordinarily be placed in ordinary class, unless otherwise classified in accordance with the provisions pertaining to the classification of convicts as contained in the Jail Manual , into the superior class by the detaining authority or District Magistrate of the district where he is for the time being detained. A.G.A. in support of his submissions, has placed reliance on the following cases, Birendra K. Rai vs. Union of India[5], Birendra K.Rai vs. Union of India [6], Ram Pravesh Singh vs. D.M. Deoria and others[7] , and Jokhu Lal vs. Superintendent, Central Jail, Naini Allahabad and others.[8]

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21. Before we proceed with the discussion on the aforesaid legal question it may be mentioned here that by our order dated 07.07.1999, we directed that petitioner Prem Chandra Sharma shall immediately be from Moradabad Jail to Dehradun Jail and he shall be provided superior class inside Jail during the period of detention for which he may be entitled according to Jail Manual. However , the order was passed on the basis of a prima facie satisfaction but the legal question involved could not be examined in detail. As this question may arise in other cases of detention , in our opinion, it is desirable that we should decide this question in the light of the submissions made by the learned counsel for the parties. It is not disputed that power of detention by an order provided under Sub – section (2) of section 3 of the Act can be delegated to the District Magistrate under sub-section (3) of section 3 of the Act which reads as under :-

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5. 1993 (30) ACC 375 (FB)
6. A.I.R. 1993 SC 962
7. 1985 (22) ACC (SOC) 28 DB
8. 1997 (35) ACC 469 FB

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"(3) If, having regard to the circumstancas prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of police, the state Government is satisfied that it is necessary so to do, it may by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of police may also , if satisfied as provided in sub-section (2) exercise the powers conferred by the said sub-section :

Provided that the period specified in an order made by the state Government under this sub-section shall not, in the first instance, exceed three months. But the state Government may. If satisfied as aforesaid that it is necessary so to do amend such order to extena such period from time to time by any period not exceeding three months at any one time ."

22. Sections 5 and 6 of the Act are also relevant for deciding the question which for convenience, are being reproduced below:

"5. Power to regulate place and conditions of detention. – Every person in respect of whom a detention order has been made shall be liable –

(a) to be detained in such place and under such conditions, including conditions as to maintenance. Discipline and punishment for breaches of discipline as the appropriate Government may by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention , whether within the same state or in another state, by order of the appropriate Government:

Provided that no order shall be made by a state Government under clause (b) for the removal of a person from one state to another state except with the consent of the Government of that other state."

"6. Detention orders not be invalid or inoperative on certain grounds. –no detention order shall be in valid or inoperative merely by reason-

(a) that the person to be detained thereunder is outside the limits of the territorial juris-diction of the Government or officer making the order or

(b)that the place of detention of such person is out side the said limits."

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23. In our opinion, for determining the question in hand it is necessary to examine as to whether while passing the order of detention , the direction regarding place and other conditions of detention are merely regulatory and ancillary and their breach will not vitiate the order of detention. A Constitution bench of Hon, ble Suprreme court while examining the vires of the Act in case of A.K. Roy (supra) also considered the apprensions expressed and objections raised against the provisions of section 5 of the Act . The relevant portion of paragraphs 75 is being reproduced below:

"74…………………………………………………The objection of the petitioners to these provisions on the ground of their unreasonableness is not wholly without substance. Laws of preventive detention cannot. By the back door , introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered. But to no greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor Just that that a detenu should have to suffer detention in " such place " as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. If a person ordinarily resides in delhi. To keep him in detention in a far off place like Madras or Calcutta is a punitive measure by it self which. In matters of preventive detention at any rate. Is not to be encouraged. Besides. Keeping a person in detention in a place other than the one where he habitually resides makes it impossible for his friends and relatives to meet him or the detenu to claim the advantage of facilities like having his own food. The requirements of administrative convenience, safety and security may justify in a given place the transfer of a detenu to a place other then that where he ordinarily resides but that can only be by way of an exception and not as a matter of general rule. Even when a detenu is required to be kept in or transferred to a place which is other then his usual place of residence, he

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ought not to be sent to any far off place which by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. What ever smacks of punishment must be scrupulously avoided in matters of preventive detention."

"75. Since Section 5 of the Act provides for , as shown by its marginal note, the power to regulate the place and conditions of detentions . of detention., there is one more observation which we would like to make and which we consider as of great importance in matters of preventive detention. In order that the procedure attendant upon detentions should conform to the mandate of Art. 21 in the matter of fairness. Justness and reasonableness, we consider it imperative that immediately after a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of the fact that the detenu has been taken in custody. Intimation must also be given as to the place of detention , including the place where the detenu in transferred from time to time. This Court stated time and again that the person who is taken in custody does not forfeit, by reason of his arrest, all and every one of his fundamental rights. It is , therefore , necessary to treat the detenu consistently with human dignity and civilized norms of behaviour."

24. From the aforesaid observations of Hon'ble Supreme Court it is apparent that provisions contained in Section 5 of the Act are only procedural and regulatory in nature. Hon'ble Supreme Court has only cautioned that procedural measures provided in section 5 regarding place and other conditions of detention shall not be so enforced that they become punitive. A Full bench of this court in case of Birendra Kumar Rai (supra) examined in detail the nature of the provisions contained in section 5 of prevention of Illicit Traffic in Narcotic Drugs and psychotrophic subs-tance Act, 1988 which is pari- materia to section 5 of the Act. The Full Bench after a detailed consideration concluded as under :-

13…………………………………………

" These provisions express the concern of the legislature so that such person does not escape detention only on the grounds of technical violations of anything short of Constitutional violation. Violation of principle of natural

justice. Or undue delay in disposal of detenu's representation, inaction of the authorities concerned. Thus, keeping in mind the scheme of the Act, object sought to be achieved by it. The law which was before 1988 Act, the mischief which could not be covered under the said Law, the remedy the present law in trying to make, the inescapable conclusions in our considered opinion , in the alternative is that even if it could be said that for fixing the place of detention of a detenu while passing detention order under sec. 3 an order has to be passed under section 5 by the appropriate Government , then such a provision to the extent it affects detention order would only be directory and not mandatory. The object of detention as we have said before is – is only to prevent such person from his prejudicial activity affecting society and thus the place where he is to be detained could only be ancilliary which may be changed from time to time. The challenge to detention order is founded is founded primarily on the curtailment of his liberty enshrined in Art. 19 and violation of Art. 21 of the Constitution of India. Once detention order could be upheld not violative of Arts. 19 and 21 then it would not fall only because he has not been kept at such a place so long his detention is legal, of course the court has to examine whether custody of a detenu is legal or not at a particular time at place where he is lodged. So long a detenu could be said to be in legal custody may be on account of order then challenged or in legal custody by virtue of any order though the detenu still not place at the place of destination where he has to be lodged, he cannot be set at liberty only on account of laters irregularity. Thus any violation of the place specified and condition laid down under order passed under Sec. 5 may give rise to a detenu right for a direction to the authority concerned to comply the same but that cannot invalidate the detention order itself."

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25. Thus, Hon' ble Supreme Court as well as a full bench of this court have found that nature of the provisions contained in section 5 are only procedural and regulatory. They are only directory and any breach with regard to place of detention and other conditions of detention will not entitle the detenu to be released from detention. However if the place of detention and other conditions of detention are punitive in nature, they may be rectified by order of the court or by the detaining authority or the state Government. In the present case as the grievance of the petitioner regarding detention at a distant

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place and in an inferior class has already been set right, in our opinion, he is not entitled for any further relief on this basis. Submission of the learned counsel that the order of detention was void-ab-initio, cannot be accepted in view of the legal position explained by Hon' ble Supreme Court and full Bench of this court.

26. The next submission of the learned counsel for the petitioner was that the impugned order of detention is not Justified on the basis of the single incident dated 23.06.1999. in which petitioner is alleged to be involved. In this connection learned counsel has submitted that the members of the bar Association had gone to meet the District Magistrate in connection with their demand that S.D.O. Rishikesh may be directed to hold his court at Dehradun also at least once in a week. The petitioner was only a member of this delegation. Even if the alleged incident is accepted to be true, it could only be a law and order problem and could not have potential and reach to disturb the public order and even tempo of the community in that area . For the aforesaid submission learned counsel for the petitioner has placed reliance on the cases of Debu Mahto versus stateof west Bengal [9], Mrs. T. Devki versus Govt. of Tamilandu & others[10] and Surya Prakash Sharma versus State of U.P. and others[11] . In this connection learned counsel also submitted that the solitary act mentioned in the grounds of detention has not been done by an organized gang of criminals. There was no further resolution by the bar association which could be justification of the fact that petitioner shall indulge himself in similar activity. Learned counsel has placed reliance on the case of Harish Kasana versus State of U.P. and others. [12]

27. Learned A.G.A. , on the other hand submitted that petitioner led the group of 50-50 advocates who ransacked the office of the District Magistrate, used abusive and insulting language for the District Magistrate. The incident took place when the entire administrative machinery of the district was busy in monthly meeting chaired by the District Magistrate in the meeting hall. The impact of the incident was that all the officers and employees assembled there ware taken in a grip of fear and terror persons of general public present in the Collectorate premises also felt terrorised. The manner in which the public order was disturbed has been mentioned in detail

9. A. I. R. 1974 SC 816
10.A.I.R. 1990 SC 1086
11. 1994 SCC (CRl.) 1691
12. 1998 U.P. Criminal Rulings 769 (DB)

in the grounds served on the petitioner . Such an incident affecting the backbone of the administration hand sufficient potential and reach to disturb the public order and even tempo of the life in the premises. Learned counsel has placed reliance on the cases of Shafiq Ahmad vs. State of U.P. and others[13] Kamla Bai versus Commissioner of Police[14] and veeramani versus State of Tamilnadu.[15]

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28. We have carefully considered that submissions of the learned counsel for the parties and have also gone through the cases relied on by them in support of their respective Submissions. Hon' ble Supreme Court in case of Arun Chosh versus State of West Bengal[16] pointed out the difference between the maintenance of law and order and ists disturbance and maintenance of public order and its sturbance. Relevant portion from para. 3 of the Judgment is being reproduced below.

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" Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order . Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo however , much one may dislike the act. Take another case of a town where there is communal tension. A man Stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to mame further breaches of the law and order and to

subvert the public order. An act by it self is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of

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13. A.I.R. 1990 SC 220
14. 1993 SCC (CRL.) 913
15. 1994 SCC (CRL) 482
16. A.I.R. 1970 SC 1228

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assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being way-laid and assaultea. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the pubic tranquillity there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of b the criminal prosecution agencies. It means therefore that the question

whether a man has only committed a breach of law and order or has acted in a manner likely to case a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society...............They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask : Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."

29. The case of Arun Ghosh (supra) has been generally followed by Hon'ble Supreme court in subsequent cases. Now the facts of the present case are required to be considered in the light of the observations made by Hon'ble Supreme Court in the case of Arun Gosh. The incident of 23.6.1999 as detailed in the grounds of detention , is that at about 2.05 P.M., When the Collector, Dehradun

was holding monthly meeting of the officers of the district, a crowd of 50-60 advocates led by petitioner came before the meeting has and broke open the iron bars and entered inside the meeting hall. Persuation of the collectorate employees, police and P.A.C. employees that the collector is holding an imortant meeting could not be of any effect. Petitioner and his companions raised filth and insulting slogans against the Collector . They also threatened the collector that his face shall be blackened and also threatened his for life. They pushed away the employees and forcibly made entrance in the office of the District Magistrate in order to get their demands accepted by force. Petitioner had broken the telephone and glasses of windows and doors. He also destroyed the chairs and broke the glass affixed on the table and this way caused loss of the property of thousands of rupees. Other advocates gave full support to the petitioner in this violent activity. It should not be forgotten that petitioner is a practishing advocate and he was accompanied by 50-60 other advocates. They are all law knowing persons. Advocates are supposed to be protectors of law of the lanc. The entire machinery responsible for the maintenance of law and order whether it is Court or administrative officers or the police force relies on the assistance from this class. Such activities, a few years back, could not be even imagined from the persons of this class. However, unfortunately members of bar associations have stated adopting aggressive attitude and the incidents are not unknown that quite often they even resort to physical assaults on the officers presiding a court or administrative officers. Such incidents are taking place frequently. This background and unfortunate development in the attitude of the members of the bar is a relevant and valid consideration while considering the facts of the present case. If a similar activity if done by a common and lay man out of anger or annoyance against an officer or group of officers, people may not like it and may also feel disturbed but the tempo of life will remain unaffected. However , in the present case as the author of the criminal activity was a law knowing person leading a group of persons of same class ,the activity would have altogether a different impact on the community in general. At the time the incident took place the collector was not alone in the office but he was holding monthly meeting which is generally attended by all the officers of the district. The activity complained of must have left impact of fear and terror on al the officers and employees present there. In our opinion, the activity complained of had sufficient potential to disturb the public order.

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30. In such matters what has to be seen by the Court is whether there was credible material before the detaining authority for forming subjective satisfaction for passing an order of preventive detention. It is well settled that Court is not required to look into whether the material was sufficient or not. We have perused all the grounds served on the petitioner and, in our opinion, there was credible material on which basis the detaining authority could be satisfied for passing the impugned order.

31. Learned counsel also submitted that there was no subsequent resolution of the bar association on which basis the petitioner could indulge in similar activity in future and it was not necessary to prevent him by a preventive order. We are not impressed by this submission also. It is clearly mentioned in ground no.8 that sub-inspector Kripal Singh lodged a report that petitioner has threatened to put the Government vehicle provided to the Collector on fire and to destroy the collectorate building . This announcement he made openly amongst his companions. Thus there was material for the detaining authority to have apprehension that petitioner may indulge himself in similar activity and to prevent him from acting in any manner prejudicial to the maintenance of public order, it was necessary to make an order detaining him under the Act. In our considered opinion, the criminal activity had strong potential and reach to disturb the public order and the impugned order was justified in the facts and circumstances of the case;.

32. The next submission of the learned counsel for petitioner challenging the order of detention was that bail application and the order granting bail to the petitioner by the learned C.J.M. was not placed before the detaining authority and he passed the order in a machenical manner without application of mind. For this submission reliance has been placed on the case of Anant Sakharam Raut Vs. state of Maharashtra[17] and Rakeshpal Singh Versus Superintendent, District Jail[18].

33. Learned A.G.A , on the other hand, submitted that the petitioner surrendered in court of C.J.M. on 24.6.1999 it self and the bail application was posted for orders at 2.30 P.M. Bail was granted same day. The sponsoring authority had already made proposal on 23.6.1999 and the impugned order of detention was passed on

17. 1986 SCC(Crl.) 535
18. 1985 (1) Crimes 175 (Alld)

24.6.1999 . In these facts and circumstances there was no question of consideration of the bail application and the bail order by the detaining authority. All the cogent and relevant materials have been taken into consideration by the detaining authority and no prejudice has been caused to the petitioner.

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34. We have considered the submissions of the learned counsel for the parties. A Full Bench of this Court in case of Chandresh Paswan versus State of U.P.[19] considered this question. In para. 63 of the judgment, the court held as under:

> "63 in the present case also the petitioner was arrested only after service of the impugned order of detention. Thus, as observed by Hon'ble Supreme court, the challenge cannot be accepted. There is no quarrel with the legal position that all the relevant facts and circumstances should be taken into account by the detaining authority which may have bearing in forming the subjective satisfaction but in the peculiar facts and circumstances of the present case we are of the view that as the respondents were not possessed of the documents, there was no question for consideration by the detaining authority. On record there was sufficient material for forming subjective satisfaction for passing an order of preventive detention against the petitioner and non-consideration of the writ petition could not vitiate the order. It has to be seen in the facts of each case whether non-consideration of the alleged facts could vitiate the order or not. In our considered view and particularly after perusal of the record of writ petition No. 2807 of 1997, the order does not suffer from any illegality on the alleged ground.

35. In view of the aforesaid legal position, in our view, the submission of the learned counsel has no merit and the impugned order does not suffer from any illegality for non-consideration of the bail application and the bail order.

36. The last submission of the learned counsel for the petitioner was that the continued detention of petitioner has been rendered illegal for non-consideration of his representation by the Central Government. Reliance has been placed on the case of Rajammal versus State of Tamilandu and others[20]. From the counter affidavit

19. 1999 A.L.J.1967
20. J.T.1998 (8) SC 598

filed by Shri R.S. Agarwal, Joint Secretary, Home Department, U.P. Government, It is clear that the representation against the impugned order of detention was submitted by the petitioner on 28.6.1999, which was forwarded by the District Magistrate, Dehradun with his comments on 3.7.1999, which was received by the state Government on 5..7.1999. In ordinary course it must have been received by the Central Government and ought to have been decided expeditiously. Sufficient opportunity was given to the learned counsel for Union of India but no Counter affidavit has been filed till date indicating as to whether the representation of the petitioner has been decided or not. In our opinion , the delay involved required explanation from the central Government but it has not been furnished. In the circumstances, we have no option but to hold that continued detention of the petitioner has been rendered illegal and he is entitled to be released.

37. For the reasons stated above , this petition is allowed. Though the impugned order of detention has been upheld, but as continued detention of the petitioner has been found illegal, respondents are directed to set the petitioner at liberty forthwith if his detention is not required in any other case.

Petition Allowed.

ORIGINAL JURISDITION
CRIMINAL SIDE
DATED ALLAHABAD : 13.07.1999

BEFORE
HON'BLE BHAGWAN DIN, J.

1999

July, 13

Crmininal Misc. Application No. 1316 Of 1998

Ved Prakash Sanghi ... Applicant.
Versis
State of U.P. and another ... Opp. Parties.

Counsel for the Applicant : Mr. Sarvesh
Counsel for the Respondents : Mr. V.K. Birla, A.G.A.

Section 482 Code of Criminal Procedure-In case the Magistrate treats the protest application as a complaint, he has to clearly

mention that protest application is being treated as a complaint and once he mentions so then he has to adopt a procedure mentioned in Chapter XV of the Code of Criminal Procedure, namely examining the complaint under section-200 Cr. P.C. and the witnesses under section 202 Cr.P.C. and so on so forth.-Held_(Para 13)

In the case in hand, the Magistrate has not treated the protest petition as a complaint, therefore having regard to the settled legal proposition, the order of the revisional court is erroneous and bad in law and deserves to be quashed.

By the Court

1. By means of this application under section-482 Cr. P.C., the applicant, Ved Prakash Sanghi seeks for quashing the order dated 13.05.1997, passed by XII Addl. Sessions Judge, Kanpur Nagar in Criminal Revision No. 210 of 1997, allowing the revision and setting aside the summoning order made by the Magistrate under section 190(1) (b) Criminal Procedure Code (hereinafter called 'Code' for convenience).

2. The complainant lodged a report at the police station, Gwal Toli, Kanpur Nagar against the opposite party no. 2 , Anand Maheshwari and two others, namely, Anil Maheshwari and Santosh Kumar under sections-406/420 IPC with the allegations that he showed his inclination to his acquaintance santosh Kumar Gupta to sell 500 SBI Magnum shares and purchase 100 shares of each of Tata Iron & Steel, Reliance Capital and Jai Prakash Industries. The accused, Santosh Kumar Gupta introduced broker, Anand Maheshwari and Anil Maheshwari. On the pretest that the SBI Magnum shares could not be disposed of any they had purchased the shares from the above three companies, the complainant has to pay them Rs. 90000. It is further alleged that the complainant paid the said amount in three instalments but the accused persons did not hand over the shares and thereby committed breach of trust and also mis-appropriated 500 SBI Magnum shares of the complainant.

3. The local police, after completing investigation, submitted final report before the Magistrate. On being summoned by the Magistrate, the complainant filed protest petition and prayed for action against the accused persons. The Magistrate perused the assertions made in the protest petition, case diary and the documents appended tot he case diary. He was of the view that the allegations made by the

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complainant in the report prima facie make out a case for summoning the accused persons for trial under sections-406/420 IPC.

4. The accused persons in response to the service of summons, appeared in the court and filed objection against the summoning order. The magistrate after hearing the counsel for the parties, rejected the objection by order dated 16.10.1996 on the view that he was competent and empowered to take cognizance against the accused persons even on the basis of the report submitted by the police. Against that order, the accused persons filed criminal revision no. 210 of 1997 before the Sessions judge, Kanpur Nagar. The Criminal revision ultimately came to be decided by XII Addl. Sessions Judge who by the impugned order dated 13.05.1997 allowed the revision, on the view, that the Magistrate has not recorded the statements of the complainant and the witnesses, before passing the summoning order, and that an enquiry into the offence by the court of Magistrate under Section-202 Cr.P.C. in necessary before making the impugned order, therefore, the order dated 16.10.1996 passed by the Magistrate is bad in law.

5. Aggrieved by this order, the complainant approached this Court under Section 482 Cr.P.C. The opposite party no. 2 filed a counter affidavit contesting the assertions made by the applicant in his application.

6. Heard Sri Sarvesh, learned counsel for the applicant and Sri V.K. Birla, learned counsel for the opposite party no. 2. I also heard the learned AGA appearing for the opposite party no. 1 and perused the material available on record.

7. The contention of the learned counsel appearing for the applicant is that the Magistrate may take cognizance against the accused under Section-190(1) (b) of the Code on the basis of the report submitted by the police. He may do so on the basis of the statements of the witnesses recorded by the Investigating Officer and the documents collected by him in the course of investigation, without being bound in any manner by the conclusion arrived at by the police in its report. He urged that the view of the revisional court, that in the cases, final report has been submitted by the police the Magistrate has no power to take cognizance without observing the procedure contemplated in Chapter-XV of the Code i.e. without recording the statements of the complainant and the witnesses is not legal and, therefore, deserves to

be quashed. On the other hand, the learned counsel appearing for the opposite party no. 2 contended that the Magistrate could not take cognizance under section-190 (1) (b) in the cases where final report has been submitted by the police.

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8. In order to appreciate the contentions urged before me, it is necessary to notice the provisions of Section-190 of the Code which sets out different ways in which a Magistrate can take cognizance of an offence i.e. to say take notice of an allegation disclosing the commission of a crime with a view to setting the law in motion to bring the offender to book. Under these provisions the cognizance can be taken, in three ways enumerated in clauses (a), (b) and (c) of the offence alleged to have been committed. The object is to ensure the safety of citizen against the vagaries of the police by giving him the right to approach the Magistrate directly, if the police does not take action or he has reason to believe that no such action will be taken by the police. Section-190 (1) empowers the Magistrate to take cognizance upon receiving a complaint of facts which constitute such offence, upon a police report of such facts or upon information received from any person other that a police officer, or upon his own knowledge, that such offence has been committed.

9. The Hon'ble Supreme Court in H.S. Bains, Director, Small Saving –Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh) (1981 SCC(Cri) 93 held that " in case police files final report, the Magistrate can defer from the police view and can take cognizance straightway under section-190 (1) (b) of the Code. In all cases of final report where there is no formal complaint, the essential basis for the Magistrate taking cognizance is the first information report and the material contained in the case diary, the reason for cognizance being that the Magistrate defers from the conclusion arrived at by the police. The protest petition was not treated as a complaint by the Magistrate and, therefore, it was not necessary for him to record the statement under section-200 Cr.P.C. and the evidence under section-202 Cr.P.C."

10. In the case of Ram Singh Vs. U.P. State (1982 ACJ 255) this court has held that " It is, therefore, clear that the Supreme Court in no uncertain term expressed the view that although a final report is submitted, the Magistrate could on the basis of documents submitted to him under Section 169 Cr.P.C., come to a different conclusion and take cognizance of the offence under Section 190(1) (b) of the code

in spite of the contrary opinion of the police expressed in the final report."

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11. This Court again in Pratap and others Vs. State of U.P. and another (ACC 1991 (28) 422) following the view taken in M/S India Caret Pvt. Ltd. V. State of Karnataka (1989 Cr. L.J. 963) was of the view that " upon receipt of a police report under section 173 (2) Cr. P.C. Magistrate if entitled to take cognizance of an offence under section-190 (1) (b) of the Code even if the police report is to the effect that no case is made out against the accused."

12. In the cases of Raj Bahadur singh Vs. State of U.P. (ACC 1995 (32) 129 and Chetram Gangwar vs. State of U.P. (ACC 1995 (32) 241 this court has made it very clear that " in a police case where the police submits a final report, it is open to the Magistrate to accept the final report or to ask the police to make further investigation Under Section 156 (3) Cr. P.C. or to disagree with the police report and on the basis of record which is in the shape of case diary, which is invariably sent when a final report is submitted, to come to a different conclusion and issue process summoning the accused. It is also not necessary for the Magistrate to pas a detailed order going through the merit of the case, when he summons the accused." It is further held that (in case the Magistrate treats the protest application as a complaint he has to clearly mention that protest application is being treated as a complaint and once he mentions so that he has to adopt a procedure mentioned in Chapter XV of the Code of Criminal Procedure, namely, examining the complainant under section-202 Cr.P.C. and the witnesses under Section –202 Cr. P.C. and so on so forth.)

13. In the case in hand, the Magistrate has not treated the protest petition as a complaint, therefore, having regard to the settled legal propositions, as discussed above, I am of the view that the order of the revisional court is erroneous and bad in law and deserves to be quashed.

14. The application is allowed. The impugned order dated 13.05.1997 passed by XII Addl. Sessions Judge, Kanpur Nagar is hereby quashed and the order dated 16.10.1996 passed by the Magistrate summoning the accused persons o be tried under sections-406/420 IPC is upheld.

Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.1998

1998

November, 11

BEFORE
THE HON'BLE B. DIKSHIT , J.
THE HON'BLE ALOKE CHAKRABARTI, J.

Civil Misc. Writ Petition No. 34564 of 1998

Smt. Prabha Bhatnagar, ... Petitioner
Versus
State of U.P. through Secretary education Department U.P. Lucknow and others ... Respondents

Counsel for the petitioners : Shri S.D. Kautilya
: Shri Dinesh Dwivedi
Counsel for the respondents : SC
: Sri B.K. Saxena

U.P. Educational teaching (Subordinate Gazetted) Rules 1993 Rule 5 (4) – Benefit of academic session- Member lecturer Service transferred as Professor at Government Central pedagogical Institute by the Director of Education without consent of the concerned teacher-cannot be treated the member of subordinate guzetted rules-held entitled to the Session benefit. (Para 12)

Uttar Pradesh Educational Teaching (Subordinate Gazetted) Service Rules, 1993 continues to be the member of the service from which he or she is transferred and does not become member of service constituted under U.P. Educational Teaching subordinate Gazetted Service rules. We further hold that every member of lecturer cadre constituted under Lectures Service Rules shall be entitled for the academic sessions benefit and it is not left on Principal of the instituted to retire a lecturer by assigning non-teaching work.

Case Law discussed.
W.P. No. 8962 of 1997 decided on 14.03.1997

(B) U.P. Educational Teaching (subordinate guzetted) service Rules 1993- Rules5- teacher posted by transfer to a post mentioned under rule 5- not assigned the teaching work by the Principal whether entitled for benefit of G.O. No. 1239/19-93-31 (14)/95 dated 20.04.1995 Held ?-'Yes' (Para 10)

It is also relevant in this respect that no guidelines as to how a person is to be selected and posted have been placed before us

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despite our asking and therefore if by such transfer a change of cadre is accepted then it will be unreasonable as well as against the Subordinate Gazetted Service Rules in considering such a person to member of that service whom rules do not contemplate. This will also bring in accrual of benefit of academic session at the sweet will of Principal of institute. It means that if Principal entrusts teaching work to a teacher then the teacher will continue and it he does not assign such a work then the teacher will stand deprived of such benefit. Such a situation cannot be allowed, especially when there is no indication for any such thing in the rules.

By the Court

1. The question which arise for determination in this petition is as to whether a Professor at Government Central Pedagogical Institute, Allahabad (in short 'Institute') belonging to Women's Branch and appointed under Rule 5 (4) of U.P. Educational Teaching (Subordinate Gazetted) Rues, 1993 (in short 'Subordinate Gazeted Service Rules') is entitled for the benefit so that her service may come to an end at the end of academic session on 30th June in view of Government Order No. 7022/15(1)83-31(16)/77 dated 21.03.1984 read with Government Order No. 1239/19-93-31[14]/95 dated 20.04.1995? The question has arisen as petitioner attained the age of supernnuation in the month of October 1998 when a notice dated 13.10.1998 was served on her by Principal of Institute to hand over charge on 31.10.1998 to another Professor on attaining the age of supernnuation.

2. The facts, in brief, relevant for determining present controversy are that petitioner was working as an Asstt. Teacher (Music) L.T. Grade at Rajkiya Kanya Vidyalaya Handia, Distt. Allahabad in the year 1987 when she was transferred to institute as Asstt. Teacher L.T. Grade (music). During her continuance at Institute, she was promoted as Lecturer (Music). When U.P. Subordinate Educational (Lecturer's Cadre) Service Rule, 1992 in short Lecturer's Cadre Service Rules) were enforced, she became member of that cadre and her service conditions stood governed by said rules. Subsequently, she was promoted as Professor in Women's Branch during her continuance at institute. The present controversy has arisen as Principal of institute served a notice dated 13.10.1998 on petitioner directing her to hand over charge of the post to another Professor on 31.10.1998. The reason given in said letter for such a direction is that the petitioner was completing age of 58 years i.e. the

age of supernnuation. The petitioner being aggrieved by said direction has filed this petition. According to petitioner, she could not be directed to hand over charge in view of Government Order No.1239/19-93-31[14]/95 dated 20.04.1995. The said Government Order provides that teacher of government institutions shall continue, under certain conditions, till end of the academic session on attaining age of supernnuation, which means till 30th June next after attaining the age of supernnuation. The petitioner's case is that as she fulfils the condition mentioned in Government Order, she is entitled to continue till end of academic session 1998-99, which is till 30th June 1999.

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3. The condition which is attracted, which entitles her to continue till end of academic and known as session's benefit, according to petitioner is that teachers who were actually teaching some subject regularly are entitled to continue till end of academic session. The petitioner's case is that as she is holding a teaching post of professor and is teaching psychology to students of L.T. Course, therefore, she is entitled to such a benefit. The principal of institute has disputed petitioner's claim that she is regularly teaching. According to Principal, petitioner is a Research Professor and is not associated with the teaching work and is not entitled for the benefit claimed. The Principal in counter affidavit has claimed that the institute is a department of State Council for Educational Research and Training, Lucknow and its main function is to conduct research on various educational subjects, conduct surveys on educational problems and arrange workshop on these topics. Besides aforesaid functions it has also to look after development of curriculum of secondary and primary education as well as preparation of textbooks for them. As according to Principal, the petitioner is associated with research work therefore she is not entitled for session's benefit. Counter-affidavit and rejoinder-affidavit have been exchanged and as the counsel for petitioner and SC agreed that the writ petition be heard and disposed of finally at this stage of admission, therefore, the writ petition has been heard and is being finally disposed of in accordance with rules of the court.

4. The learned counsel for petitioner argued that the petitioner being member of Lecturers cadre under Lecturer's Service Rules, she is entitled to continue till end of academic session, which has been opposed by learned Standing Counsel. The learned SC contended that the service condition of petitioner are to be governed by U.P. Educational Teaching (Subordinate Gazetted) Service Rules,

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1993(in short 'Subordinate Gazetted service rules'). The learned counsel for petitioner also argued that as petitioner was not doing teaching work, therefore, she is not entitled to continue till end of academic session.

5. It is admitted case of parties that petitioner's conditions of service are governed by Lecturers Service Rules after their enforcement in the year 1994. It is also not disputed that before her becoming Professor also, the Lecturer's Service Rules were applicable to her, The appointment of petitioner as Professor has been under rule 15 of Subordinate Gzaetted Service Rules. Rule 5 of Subordinate Gazetted Service Rules is as under:

> "5 Source of recruitment-Recruitment to the various categories of posts in the service shall be made from the following sources.

Men's Branch

(1) Head Master, Government Higher Secondary School; Head Master, Government Normal School; Head Master, Government Junior Training College; Head Master, Government Extension Teachers Training Centre, Vice-principal, Government Inter College; Vice-Principal Government Junior Basic Training College; Research Professor/Professor/Project Officer, State Hindi Institute, Varanasi; Asstt. Officer, Text Books Office; Deputy Registrar, Depart-mental Examination; Assistant Secretary; Assistant Takniki Board of High School and Intermediate Education, U.P. Allahabad and its Regional Offices.

By promotion through the Selection Committee in the ratio of 34 percent and 55 percent respectively from amongst substantively appointed men's branch (I) Lecturers who have completed three years service as such on the first day of the year of recruitment;
And

(ii) Assistant Masters (L.T. Grade) who have completed twelve years service as such on the first day of the year of recruitment.

(2) Professor, Government Central Pedagogical Institute, Allahabad; Assistant Professor Engligh Language Teaching Institute, Allahabad; Lecturer, State Institute of Science Education, Allahabad; Production Officer, Text Book Officer, Lucknow, and

Superintendent Agriculture, Directorate of Education. U.P. Allahabad.

By Transfer from amongst officers mentioned at serial who possess the qualifications mentioned against each post in Appendix II.

Women's Branch

(3) Head Mistress, Govt. Girls Higher Secondary School; Head Mistress Govt. Girls Normal School; Vice-Principal, Govt. Girls Intermediate College; Vice Principal, Govt. Girls C.T. Training College, Lucknow; Professor, Government L.T. Training College For Women, Allahabad and Sanyukt Adhikshia, Bal Bhawan Lucknow.

(4) Vice-Principal, Govt. Girls Home Science Training College, Allahabad; Research Lecturer, Govt. Girls Home Science Training College, Allahabad; Vice-Principal, Govt. Girls Physical Training College, Allahabad; Vice-Principal, Govt. Nursery Training College, Allahabad; Professor Govt. Central Pedagogical Institute, Allahabad; Assistant Professor, English Language Teaching Institute, Allahabad; and Lecturer, State Institute of Science Education, Allahabad;

By promotion through the Selection Committee in the ratio of 45 percent and 55 percent respectively from amongst substantively appointed.

Lecturers who have completed three years service as such on the first day of the year of recruitment, and
Asstt. Mistress (L.R. Grade), who have completed twelve years service as such on the first day of year of recruitment.

By transfer from amongst officers mentioned at serial Number (3), who possess the qualification mentioned against each post in Appendix II.

Provided that is sufficient number of suitable eligible persons are not available for promotion to the posts mentioned at serial numbers (1) and (3) above the filed of eligibility may be extended by the Government giving relation in the length of service."

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6. The above rule lays down that posts mentioned at serial numbers (1) and (3) of Rule 5 are to be filled up by promotion while those at serial numbers (2) and (4) by transfer. The difference of filling up of post by promotion and transfer is well known under service jurisprudence. The rule making authority was well aware about the distinction of the two and therefore it has used word 'promotion' in respect of posts at serial numbers (1) and (3) whereas those under serial numbers (2) and (4) have been left to be filled by transfer. The post in question is mentioned under serial number (4) of rule 5 to be filled up by transfer by transferring either a lecturer who has completed three years as lecturer or an Assistant Mistress (L.T. Grade) who has completed twelve years service as such. As by transferring an employee from one post to another does not effect the status of an employee, so far his membership of cadre to which he or she belongs, the lecturer neither ceases to be member of Lecturer's Service Cadre nor she becomes member of Uttar Pradesh Educational Teaching (Subordinate Gazetted) Service. A transfer normally involves transfer to a post of cadre and not outside it. There is nothing in the rule to indicate that on transfer to a post mentioned under rule 5 at serial number (4), the cadre of the lecturer serving under Lecturer's Service Rule will change. Thus, by being posted as Professor on a post created under Lecturer's Grade Service Rules and her condition of service continued to be governed by said rule.

7. There is another reason due to which we consider that the petitioner did not cease to be member of Lecturers Cadre. The power to transfer an employee embeds in it power to transfer a person from time to time. There is nothing in the rule to indicate that once the Director of Education(Secondary) Uttar Pradesh (in short 'Director of Education') exercised his power then it stood exhausted. If petitioner is accepted as member of Subordinate Gazetted Service by transfer then on transfer it is to be concluded that power of Director of Education stands exhausted. No such intention of rule making authority has been shown by learned standing counsel and therefore if the Director of Education in exercise of power posted petitioner, who is a lecturer on a post mentioned in rule 5 at serial number (4), then that lecturer can be posted back on the post from which she was transferred. It is surprising that petitioner is being dealt with as member of Subordinate Gazette Service. Therefore we are of opinion that petitioner's services being governed by Lectur Service Rules, the posting of petitioner as Professor at Central Pedagogical Institute did not have the effect of making her member of Subordinate Gazetted Service Rules.

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8. Even under Subordinate Gazetted Service Rules petitioner did not become its Member. This is apparent from perusal of said rules. Rule 3(f) defined “Member of Service” a person substantively appointed under rules or orders in force prior to commencement of Subordinate Gazetted Service Rules, to a post in the cadre of the service. According to Rule 3(g) “service” means Uttar Pradesh Educational Teaching (Subordinate Gazetted) Service. Under Rule 3(h) “substantive appointment” means an appointment not being an adhoc appointment on a post in the cadre of the service, made after selection in accordance with the procedure prescribed for the time being or by executive instructions issued by the Government. Part IV, of the subordinate Gazetted Service Rules provides for recritment. Rule 8 deals with recruitment by promotion through a selection committee. It lays down procedure for preparing select list Part V of said Rules provides for appointment, probation, confirmation and seniority. Under Rule 9 appointing authority has to make appointment by taking the name of the candidates in order in which they stand in list. Rule 10 provides for probation for a period of three years, which can be extended upto two years. Rule 11 provides for confirmation of probationer after expiry of period of promotion if work and conduct is reported satisfactory and integrity is certified. Rule12 provides that persons substantively appointed in any category of posts in the service shall be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules 1991 as amended from time to time. These rules speak about selection, probation and confirmation of service in cases of promotions only and not those who are transferred. They also lay down that only those persons are members of Uttar Pradesh Educational Teachers (Subordinate Gazetted) Service who are promoted after selection. The rules provide for only such persons to be member of cadre. As those who are transferred are not selected and substantively appointed, therefore, they continue in the cadre from which they are transferred. Therefore, the petitioner being a transferee continued as member of lecturers cadre.

9. The question then arise for consideration is if petitioner can continue till end of academic session in view of Government order No.7022/15(I)/83-31(16)/77 dated 21.3.1984. The petitioner case is to be considered keeping in view the position mentioned earlier. The petitioner is seeking session’s benefit in this case in view of Government Order No. 7022/15(I)83-31(16)/77 dated 21.3.1984. One of the condition for granting benefit of said Government Order

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is that the teacher must be teaching one of the subject regularly at the time of attaining age of supernnuation during mid-academic session. There is dispute between parties about work, which was being done by petitioner. The petitioner claims that she was teaching on the date when she attained the age of supernnuation while according to Principal she was looking after research work and was not teaching. This Court while considering case of a professor working at Central Pedagogical Institute held in Civil Miscellaneous. Writ Petition No.29756 of 1998: Rajput Pandey Vs. State of U.P. and others, decided on 2.5.1997 that the Professor, who was doing teaching work at institute, is entitled for benefit under Government Order. As to whether petitioner is actually teaching a subject regularly or not is a question of fact for which parties have filed documentary evidence to support their contention but the disputed question of fact cannot be determined by this Court in a writ petition. Faced with such a situation the learned counsel for parties confined themselves to legal aspect on admitted facts. The learned counsel for petitioner, keeping in view that this court cannot determine factual dispute, contended that the claims of petitioner be examined assuming that the petitioner was assigned some research work. We proceeded to hear arguments on that basis.

10. It is not in dispute that petitioner was doing teaching work till she became professor at institute in August 1997, a post which is to be filled up by transferring a Lecturer or Assistant Mistress of L.T. Grade. There is no provision for obtaining consent of the members of Lecturer's Service for being posted on a post of Professor at institute. The learned Standing Counsel could not point out anything of the kind by which a lecturer could refuse the appointment. This indicates that Director of Education is free to post any lecturer who is member of Lecturers Service on the Post just by passing a transfer order. In case change of cadre by transfer is accepted in such circumstances, without the consent of affected teacher, merely by unilateral act of Director of Education, then it will be most unreasonable. The service of an employee from the cadre he is working cannot be allowed to be transferred to another cadre without his consent. It is also relevant in this respect that no guidelines as to how a person is to be selected and posted have been placed before us despite our asking and therefore if by such transfer a change of cadre is accepted then it will be unreasonable as well as against the Subordinate Gazetted Service Rules in considering such a person to member of that service whom rules do not contemplate. This will also bring in accrual of benefit of academic session at the sweet will of Principal of institute. It means

that if Principal entrusts teaching work to a teacher then the teacher will continue and if he does not assign such a work then the teacher will stand deprived of such benefit. Such a situation cannot be allowed, especially when there is no indication for any such thing in the rules.

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11. The learned Standing Counsel cited a Division Bench Judgement of this Court dated 14.3.1997 passed in Civil Miscellaneous Writ Petition No.8962 of 1997 Sarju Prasad Yadav Versus State of Uttar Pradesh and others. The Division Bench while considering the case proceeded on the basis that the institute does not have any academic session. It appears that the finding that institute did not had any session was recorded on the basis of order passed on representation, which finding the petitioner of that case did not dispute. The case is distinguishable as in present case the petitioner disputed the finding that institute is having academic session. She claimed that the institute has been assigned teaching work also, the academic session of which begins on 1st July every year and ends on 30th June of next year. Although the averments made in writ petition that institute has academic session has been disputed by Principal of the institute, a folio in respect of introduction of institute (annexure CA-1 to counter affidavit) provides that the work at institute is of two kind, one being that of research while the other relates to teaching for LT. Training classes. It has also not been disputed that petitioner was initially transferred in the year 1987 as L.T. Grade Teacher (Music) and continued taking classes as Lecturer (Music) of students of L.T. Course. In such circumstances, as the own document filed by opposite-party establishes that teaching work also goes on at institute, which has academic session, the case cited is distinguishable under aforesaid circumstances and it is held that the institute is engaged in teaching beside research work.

12. Keeping in view the aspect that cadre of a member of Lecturer's Service cannot get changed without the consent of concerned employee as well as considering that allowing such transfer will be unreasonable as the conditions of service by unilateral act of Director of Education will stand changed, we hold that a teacher posted by Transfer to a post mentioned under rule 5 at serial number (4) of Uttar Pradesh Educational Teaching (Subordinate Gazetted) Service Rules, 1993 continues to be the member of the service from which he or she is transferred and does not become member of service constituted under Uttar Pradesh Educational Teaching Subordinate Gazetted Service rules. We further hold that every member of

lecturer cadre constituted under Lecturers Service Rules shall be entitled for the academic sessions benefit and it is not left on Principal of the instituted to retire a lecturer by assigning non-teaching work.

13. Examining the petitioner's case in the light of aforesaid aspects it is to be held that petitioner continues as a member of service constituted under Lecturers Service Rules during her continuance on the post of Professor under Women's Branch constituted under rule 5 serial number (4) of Uttar Pradesh Education Teaching Service Rules, 1993 and is entitled to the sessions benefit.

For aforesaid reason the writ petition is allowed, the order dated 13.10.1998 passed by Principal, Central Pedagogical Institute, Allahabad (annexure 8 to writ petition) is quashed and the Principal of Central Pedagogical Institute is directed to re instate the petitioner with full benefits of the academic session by continuing her till 30th June, 1999.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.7.1999

1999

July, 21

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

Civil Misc. Writ Petition No. 14162 of 1996

Jagdish Narain Chopra ... Petitioner
Versus
Allahabad District cooperative Band Ltd. and another ... Respondents

Counsel for the Petitioner : Shri A.K. Goyal
Counsel for the Respondents : Sri T.P. Singh

Article 226 of the Constitution of India - the denial of payment of post retirement benefits on the ground of pendency of audit objection-held-An audit objection cannot be kept pending for an indefinite period. After a person has put in this youth and the prime of life in the service of the bank, he is entitled to receive his retirement benefits which is not a charity shown to him but is a

deferred payment which he had earned by reason of his service rendered. Held-

The respondent shall pay the balance retrial benefits payable to the petitioner as early as possible preferably, within a period of six months The amount due shall carry interest @ 12% simple during the period it became due and till it is paid.(Para 4)

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D. K. Seth, J.

By the Court

1. The petitioner after his retirement had been paid the amount of his provident fund due to him. But the Gratuity and other terminal benefits were not paid to him on the ground as disclosed in the Counter Affidavit that there was an audit objection in respect of certain accounts when the petitioner was posted in Hewett Road Branch. Such statements were made in paragraph 2 of the Counter Affidavit In Rejoinder Affidavit, the petitioner has clarified that he was posted in Hewett Road Branch sometimes in between 1980 and 1984. The audit objection was in respect of the provident fund amount of Nagar Mahapalik, Allahabad in respect of their employees that were transferred to the sundry Creditors account in the Bank Nagar Mahapalika was asked to furnish the details of the individual account number of the employees so that the provident fund amount received by the bank could be credited in the respective individual account of the employees. The Nagar Mahapalika had furnished the details some of its employees without furnishing the details of the others. Therefore, part of the amount was transferred to the individual accounts. After such transfer, a sum of Rs. 1,50,000/- still remained in the Sundry creditors Account and could not be credited in the individual accounts till the petitioner was in Hewett Road Branch. It is alleged that on this ground, the audit objection was raised. In paragraph 4 and 5, the above statement has been made in the Rejoinder Affidavit. Whereas in paragraph 6, the petitioner has contended that he was never informed about the audit objection until it was disclosed in the Counter Affidavit. Neither any notice to show cause was ever issued on the petitioner nor there was any finding that the petitioner was responsible nor there was any material to show that the bank had ever suffered any loss.

2. If there was an audit objection in respect of an account in 1984, in that event, it was open to the bank to take steps so long the petitioner was in employment. The petitioner had retired sometimes in 1995 and this ground of audit objection is being raised only when the retirement benefits became due that too, by a letter dated 13th July,

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1996. Nothing has been disclosed that the alleged audit objection was ever communicated to the petitioner during his tenure in service.

3. In such circumstances, after hearing Mr. A.K. Goyal learned counsel for the petitioner and Mr. T.P. Singh learned counsel for the respondent, it appears that the audit objection against withholding the disbursement of the retiral benefits does not seem to be bonafide and appears to have been lapsed by reason of an inordinate delay and laches and negligence on the part of the respondents. Bank having not come out with cases that the bank had ever suffered any loss on account of such audit objection due to inaction on the part of the petitioner, it would not be justify delay in or denial of payment of retiral benefits. Even if, there was any audit objection, the same ought to have been clarified and resolved in the meantime. An audit objection cannot be kept pending for an indefinite period. After a person has put in his youth and the prime of life in the service of the bank, he is entitled to receive his retirement benefits which is not a charity shown to him but is a deferred payment which he had earned by reason of his service rendered.

4. Therefore, the respondent shall pay the balance retiral benefits payable to the petitioner as early as possible preferably, within a period of six months from the date of copy of this order is communicated to the concerned respondent. The amount due shall carry interest @ 12% simple during the period it became due and till it is paid.

5. In the result. The writ petition succeeds and is allowed. Let a writ of mandamus do accordingly issue.

However, there will be no order as to costs.

Let a certified copy of this order be given to the counsel for the petitioner on payment of usual charges.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 21.5.1999

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

1999

May, 21

Civil Misc. Writ Petition No. 21152 of 1999

Kishore Singh son of Late Sri Shatrughan Singh ...Petitioner
Versus
State Bank of India through chief General and another ...Respondents

Counsel for the Petitioner : Shri M.C. Dwivedi
: Shri Jitendra Pandey
Counsel for the Respondents : Sri Narin Sinha
: S.C.

Article 226 of the Constitution of India-Appointment under the dying in Harness Rules-Held-that the provision for grant of appointment under the dying in Harness rules does not create a right to appointment but a right to be considered on the background of the question of destitution of the family on account of such death- Held-

There is no infirmity in the decision refusing employment to the petitioner though however, the same does not disclose any reason. (Para 3)

By the Court

1. Similar question was involved in the case of Mukesh Kumar Sharma Vs. Senior Divisional Manager, Life Insurance corporation of India and another in Civil Misc. Writ Petition No. 33231 of 1992 disposed of by this Court on 5th May, 1999 In the said case, it was held that the provision for grant of appointment under the Dying in Harness Rules does not create a right to appointment but a right to be considered on the background of the question of destitution of the family on account of such death. The Apex Court in the case of Life Insurance Corporation of India Vs. Asha Ramchhandra Ambekar (Mrs) and another reported in (1994 2 SCC 718) supports the above view. In the said case, it was further held that marriage of a son does not exclude him from the membership of the family. In the present case also the question is governed by the scheme for appointment of dependent on deceased employee on compassionate ground as

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contained in chapter 2 of the hand Book on Staff Matters Vol. Ii The dependent has been defined to include widow, son including adopted son, daughter who is fully dependent and is incapable of maintaining himself. It also prescribes certain eligibility criteria. The son has not been qualified as such it cannot be said that the married son is to be excluded. It is contended by Mr. M.C. Dwivedi, learned counsel for the petitioner that the other brothers who are married and living separately and are not looking after the petitioner and there is no one else on which the petitioner can depend. He was completely dependent on his father and therefore, he is eligible for such appointment. The said scheme further contains certain other conditions where it is prescribed that each case is to be decided on the basis of each individual circumstances having regard to the income of the member of the family already employed, the size of the family, assets and liability of the family and other relevant considerations. Thus the scheme has not provided for an absolute right of appointment. On the other hand, it had given certain discretion to the Management in case of such appointment . It does not provide that such appointment is to be given as of right and as a matter of course. The employer has been given certain discretions in the matter having regard to the guidelines laid down in the said scheme.

2. In the present case, the bank had considered all those aspects as is apparent from the statement contained in annexure-4 to the writ petition where the particulars have been given in detail. It shows that the deceased had two sons who were married and are in service. It is only the petitioner who is unemployed. The other two daughters of the deceased are already married and that the mother of the petitioner died during the life time of the deceased father. If it is accepted that the brothers are living separately, in that event, everyone will come with the story that the brothers are living separately in order to secure a job. However, such questions are question of facts which cannot be gone into sitting in writ jurisdiction. It is for the employer to decide such question.

3. Be that as it may, in the present case, it shows from the statement of assets and liabilities that the deceased had been paid terminal benefits to the extent of Rs. 1,16,372/- on account of Provident Fund, Rs. 65,760.18 on account of Gratuity, Rs. 40,908/- on account of Leave encashment. The total is shown Rs. 2,23,040.18. It is also shown that there was a movable properties of Rs. 60,000/- In such circumstances, it is pointed out by the counsel for the respondents

and after considering this question, it is decided to the petitioner is not eligible for appointment. Having regard to the decision in the case of Mukesh Kumar Sharma Vs. Life Insurance Corporation of India (Supra0 and the facts disclosed above, it does not say that there is no infirmity in the decision refusing employment to the petitioner though however, the same does not disclose any reason.

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4. For all these reasons, the Writ Petition fails and is, accordingly, dismissed. However, there will be no order as to costs.

5. Let a certified copy of this order be given to the counsel for the petitioner on payment of usual charges.

Petition Dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.07.1999

BEFORE
THE HON'BLE M.C. JAIN, J.

1999

July, 30

Criminal Revision No. 670 of 1988

Criminal revision against the order and judgment dated 6.5.1988 passed by Sri Umesh Chandra Misra Additional Sessions Judge, Ballia in Crl. Revision No. 193 of 1986 Satyadeo Singh Versus State of U.P. and another.

Sachidanand Singh S/o Nepal Singh R/o Bairia
P.S. Bairiya district Ballia ...Applicant.
Versus
State of U.P. & another ...Opp. Party.

Counsel for the Revisionist/Applicant : Sri B.N. Tiwari
Counsel for the Respondents : A.G.A.
: Sri Rajeshji Verma

Section 145 Cr.P.C.- learned Sessions Judge travelled beyond his scope by reappraising evidence adduced before the learned Magistrate by the Parties of the question of possession. The judgement passed by him suffers from patent impropriety.- Held-

Learned Additional Sessions Judge was swayed by extraneous factors in addition of the fact that he travelled beyond his scope by

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reappraising the evidence adduced before the learned Magistrate by the parties on the question of possession. He could not have done so in setting aside the finding recorded by the learned Magistrate in favour of the first party Sachchidanand Singh on the question of possession over the disputed land.[Para 11]

By the Court

1. This criminal revision arises out of the judgment and order dated 6.5.1988 passed by Sri Umesh Chandra Misra, learned Additional Sessions Judge, Ballia in Criminal Revision No.193 of 1986 which had been filed by the present respondent no. 2 against the judgment and order dated 17.5.1985 passed by S.D.M. Ballia in proceedings under Section 145 Cr.P.C. in case no. 47 of 1984.

2. The dispute related to a piece of land situated in the east of the house of two other witnesses Raghunandan Kunwar and Jai Narain Singh were examined who supported his claim of possession. present respondent no. 2. Both of them claimed their possession thereon. Apprehension of breach of peace was reported about the possession in the present revisionist Sachchidanand Singh and to the south of the respect of the said piece of land by the police and the learned Magistrate drew preliminary order under Section 145(1) Cr.P.C. on 14.5.1982. Both the parties adduced evidence in respect of their respective claim regarding possession after filing their written statements. The revisionist before this Court was first party before the learned Magistrate. He contended that the disputed land was the part of his old house. As his house had got damaged, he constructed a new portion in the western side and the disputed land was still in his possession . He claimed that the debris of the old house was still lying on the disputed land. Besides examining himself

3. The present respondent no.2 Satya Deo Singh figured as second party before the magistrate and contended that the disputed land lying towards south of his house was part of his house and the debris thereon was of his old house. He also claimed that there existed an opening of his house towards the disputed land. He examined himself and two other witnesses Laxman Singh and Satya Narain in support of his alleged possession. On weighing the respective evidence of the parties, the learned Magistrate decided the question of possession in favour of the first party Sachidanand Singh. Second Party, namely, Satya Deo Singh was restrained from interfering with

the lawful possession of the first party unless the revisionist was evicted therefrom in due course of law.

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4. The second party Satya Deo Singh preferred revision before the Sessions Judge, Ballia which came to be decided by the impugned judgment and order dated 6.5.1988 passed by the learned Additional Sessions Judge, Ballia.

5. The learned Additional Sessions Judge reappraised the evidence and set aside the finding of possession recorded by the Magistrate in favour of the first party Sachchidanand. He remanded the matter to the Magistrate for decision afresh in the light of the observations made in the body of the judgment. It was also directed that in case of necessity, the Magistrate could himself inspect the spot. Feeling aggrieved, the revisionist has preferred the instant revision before this Court against the judgment and order of the learned Additional Sessions judge.

6. I have heard learned counsel for revisionist, learned A.G.A. for O.P.No. 1 and leaned counsel for O.P.No. 2 who was second party in proceedings before the learned Magistrate. It has been argued by learned counsel for the revisionist that the learned Additional Sessions Judge exceeded his jurisdiction by entering into reappraisal of the evidence to upset the finding of possession recorded by the learned Magistrate. It is pertinent to observe that proceedings of Section 145 Cr.P.C. are of summary nature meant to prevent the breaking of heads on the question of possession of certain property between rival parties till their rights are decided in relation thereto by a competent Court. It is the established position by a catena of decisions of this Court that finding about possession in proceedings under Section 145 Cr.P.C. recorded by the Magistrate is a finding of fact and the High Court in revision cannot interfere with the decision of the trial Court on the fact of possession so long as there is evidence in support of the finding. There are very few contingencies in which the High Court interferes, such as where the Magistrate's finding of fact regarding possession is perverse and contrary to a mass of un-rebutted evidence. The Revisional Court should not interfere only on the ground that a different view is possible. Ordinarily, the revisional court ought not to reappraise the evidence and substitute its own finding in place of those of trial Court out of proceedings under Section 145 Cr.P.C. The reasons are that the aggrieved party can obtain full and adequate relief in the Civil Court of competent jurisdiction. Moreover, an order under Section 145 (4)

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Cr.P.C. is just an interim arrangement to avoid breach of peace till rival parties get their rights, title and interest determined by a Civil Court. That apart, the proceedings under Section 145 Cr.P.C. relate to dispute where there is likelihood of breach of peace. The proceedings have positive nexus with public tranquillity; Reference may be made to the case of ***Ata Mohammad v. Tulli and others 1986 All. L J. 357* and *Fateh Mohd. And another v. State of U.P. and another, 1986 All. L.J.1519.***

7. The Apex Court has also laid down in the case of Banshi Lal and others vs. Laxman Singh 1986 SCC(Cri) 342 that unless the view of the trial Court is illegal or perverse, High Court cannot interfere with that view merely because it prefers a different view. The revisional power of the High Court is much more restricted in its scope. It was again reiterated by the apex Court in the case of pathumuna and another vs. muhammad, 1986 Cri,L.J. 1070(S.C.) that the High Court is not justified in substituting its own view for that of the Magistrate on the question of fact.

8. Needless to say the revisional power exercised by the Sessions Judge under Section 397 Cr.P.C. are akin to those of High Court under Section 401 Cr.P.C. Therefore what has been ruled about the revisional powers of the High Court in the authorities referred to above, would be applicable to the revisional powers of the Sessions Judge with equal force.

9. In the present case, it is found that the learned Additional Sessions Judge went beyond the scope of his revisional powers by making reappraisal of the evidence adduced by the parties before the learned Magistrate on the question of possession over the disputed land and substituting his own view to set aside the order of the learned Magistrate. It was admitted by the witnesses of the second party in their cross-examination that the house of the first party Sachchidanand Singh was there to the east of his existing house and that there was a lane to the south of the new house of th second party Satya Deo Singh. The lane being intervening between the new house of Satya Deo Singh and the disputed land the inference drawn by the learned Magistrate that the disputed land could not be the part of the old house of the second party could not be termed as perverse. The Second Party Satya Deo Singh himself admitted in his cross-examination that the old house of the first party Sachidanand Singh existed to the east of his existing house and to the west of the house of Kumar kurmi. As such the admission was indicative of the

disputed land being the land of the old house of the first party Sachchidanand Singh. Laxman Singh examined as a witness by the second party Satya Deo Singh also admitted that to the east of the new house of the first party Sachchidanand Singh existed some portion of land belonging to him. His another witness Satya Narain also admitted in his cross-examination that the land to the east of new house of Sachchidanand belonged to him and was the part of his old house. The point of the matter is that the conclusion drawn by the learned magistrate with regard to possession over the disputed land in favour of the first party Sachchidanand could not be termed to be contrary to the weight of evidence on record. Learned Additional Session Judge could not have interfered simply because he preferred a different view.

10. It is also noted that the learned Additional Sessions Judge based his judgment on certain other factors which are not at all borne out from the record. He observed that there had been interpolation or forgery in respect of the testimony of second parties witness Satya Narain recorded before the learned magistrate. The first party Sachchidanand Singh (present revisionist) has categorically averred in the revision petition that no such ground was even taken in the memorandum of revision before the learned Sessions Judge that had been preferred by the second party Satya Deo Singh Learned Additional Sessions Judge has also remarked that the learned M<agistrate had inspected the site but there was no spot inspection report on the record. The revisionist has averred this also in the revision petition that the application for local inspection made by Satya Deo Singh was rejected by the trial Court. That apart, learned Additional Sessions Judge sought to draw conclusion on the basis of the boundaries described in a sale deed executed by a neighbor Kumar Kurmi on 14.10.1974 in favour of a lady without affording an opportunity to the first party to rebut it.

11. It is obvious that the learned Additional Sessions was swayed by extraneous factors in addition of the fact that he travelled beyond his scope by reappraising the evidence adduced before the learned Magistrate by the parties on the question of possession. He could not have done so in setting aside the finding recorded by the learned Magistrate in favour of the first party Sachchidanand Singh on the question of possession over the disputed land. The judgment passed by him suffers from this patent impropriety.

12. The revision is, therefore, allowed. The judgment and order dated 6.5.1988 passed by the learned Additional Sessions Judge Ballia are set aside and the order of the Magistrate dated 17.5.1985 are hereby restored which shall be given effect to, Interim stay order dated 19.5.1988 stands vacated.

Revision Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 17.8.1999

1999

August, 17

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE KRISHNA KUMAR, J.

Civil Misc. writ Petition No. 38590 of 1996.

J.S.P. Singh ... Petitioner
Vs.
The High Court of Judicature at Allahabad through its Registrar and others ... Respondents.

Counsels for the Petitioner : Sri Sudhir Agarwal
Sri Ravi Kant

Counsel for the Respondents : Mr. Sunil Ambwani

Article 226 of the Constitution on of India – on judicial side the Hon. High Court could quash the entry given by the Court on its administrative side-adverse entry should not be given without anything specific against judicial officer- held- only in extreme cases where there is total lack of integrity or there is some other serious allegation which is found true that the Court should given an adverse entry.[Para 9]

By the Court

1. This writ petition has been filed against the impugned order dated 5.9.95, Annexure 3 to the petition communicating the adverse entry to the petitioner for the year 1994-95 and also to quash the D.O. dated 30.8.95. The petitioner has further prayed for quashing the orders dated 29.1.1996 and 8.10.96 by which the petitioner's representations have been rejected.

2. Heard learned counsel for the parties.

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3. The petitioner was appointed in U.P. Judicial Service in 1972. He was promoted as Chief Judicial Magistrate in 1981 and as Additional District Judge in July,1985. It is alleged in para 2 of the writ petition that the petitioner discharge his duties with utmost sense of responsibility, integrity and honesty and at no point of time the petitioner was communicated any adverse entry. In the year 1993 when the petitioner was posted as Addl. Distt. Judge, Faizabad one advocate O.P.Dwivedi criminally assulted Sri R.L.Ojha the Addl. District Judge III, Faizabad who lodged a complaint in the police station kotwali district Faizabad on the said date itself. A true copy of the complaint is Annexure 1 to the petition. It is alleged in para 4 of the petition that the bail application of the said accused Advocate O.P.Dwivedi came up for consideration before the District Judge,Faizabad who transferred the said case to the court of the petitioner who rejected the bail application. A copy of the said order is Annexure 2 to the petition. It appears that subsequently an adverse entry was communicated to the petitioner by communication dated 5.9.95 Annexure 3 to the petition. The said adverse entry reads as follows.

> "His disposal is 174. 50% which is above the prescribed standard. However, his judgments were not found to have been properly written. Most of the cases were remanded on substantial grounds. Members of the bar did speak high of him. There was rumour of doubtful integrity. His integrity needs supervision and as such it is not certified."

4. In our opinion the entry is very vague and consists of sweeping generalizations. The first allegation is that petitioner's judgments were not found to have been properly written. No detail of any case has been mentioned, and hence such a vague remark should not have been made. The next allegation is that most of the cases were remanded on substantial grounds. This allegation is also vague as no details are given. The further allegation that members of the bar did not speak high of the petitioner and there was rumour of doubtful integrity is very vague. Merely because the members of the bar did not speak highly about the petitioner is no ground to give an adverse entry to the petitioner. There are many judges who are very strict and do not succumb to the pressures of some members of the bar and this become unpopular but for this reason no adverse entry can be given

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to them. The observation that there was rumour of doubtful integrity is also vague since no details have been given therein. Moreover, no adverse entry can be given an more rumours otherwise no Judge will be safe.

5. The petitioner's disposal is 174. 50% which shows his good performance. In our opinion an adverse entry should not be given van function freely. In Shaileshwar Nath Singh vs. The High Court writ petition no. 43758 of 1997 decided on 11.8.99 this Court held that an adverse entry cannot be given to a Judicial Officer became his relating with the bar is not good.

6. In Sheo Prakash Misra Versus High Court of Judicature 1999 A.C.J. 927, we have quashed a similar adverse entry given by the Inspecting judge of the High Court which had been upheld by the Administrative Committee. In that decision a division bench of this Court held that adverse entries given too readily cause demoralization in the judicial officers.

7. In this connection, we would like to point out the difficulties and adverse circumstances in which the Judges of the subordinate judiciary in this State are functioning. Against the norm of 300 cases which each Judge is supposed to have in fact most Judges have about 3000 to 5000 cases pending in their Courts. Against the norm of 75 sessions trial, about 600 to 700 or even more sessions trial are pending in most sessions courts. Apart from this, Judges of the subordinate judiciary are not provided with sufficient and proper facilities for discharging their duties. If proper and sufficient facilities are provided to the subordinate judiciary we may expect high quality judgments from them but the truth is that the members of the subordinate judiciary are not provided with proper facilities and they have to carry a load 10 to 15 times grater than the normal load. Often the judges of the subordinate judiciary have to sit in dark and dingy Courtrooms, some times without electricity while sweating profusely in almost inhuman conditions. A large number of courts are lying vacant and the other courts have to carry this extra load. The number of the Judges has to be greatly increased if high quality justice is required from time.

8. In our opinion, if certain orders of the petitioner were not as good as they should have been, the District Judge could have been told to instruct the officer orally to be more careful but it is not proper in our opinion to give an adverse entry in such a case, which

will adversely affect the career of the petitioner. If adverse entry is given in such cases, in our opinion, the Judges shall not be able to decide cases, in our opinion, the Judges shall not be able to decide case freely.

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9. In our opinion the adverse entry should not have been given against the petitioner. This Court should not be too harsh to Judges of the subordinate judiciary and should take into account the tremendous difficulties and pressures under which they are working and only in extreme cases where there is total lack of integrity or there is same other serious allegation which is found true that the Court should given an adverse entry, because adverse entry given too readily spoils the career of a Judge and causes demoralisation in the subordinate judiciary.

10. In this connection reference may be made to the Supreme Court's decision in K.P. Tiwari Versus State of M.P. A.I.R. 1994 SC 1031 where in some what similar circumstances the Supreme Court observed:

> "We are however, impelled to remind the Judge of the High Court that however anguished he might have been over the unmerited bail granted to the accuse, he should not have allowed himself the latitude or ignoring judicial precaution and properly even momentarily. The higher courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. That is one of the function of the superior courts. Our legal system acknowledges the fallibility of the Judges and hence provides for appeals/revisions. A Judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err. It is well said that a Judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Some times, the difference in view of the higher and lower courts is purely a result of a difference in approach and perception. On such occasions the lower courts are not necessarily wrong and the higher courts always right. It has a also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks more correctly up their nostrils. They do not have the benefit of a detached atmosphere of the higher courts

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to think cool and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive. It is possible that a particular judicial officer may be consistently passing orders creating suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher court to adopt is to make not eof his conduct in the confidential record of his work and to use it on proper occasion. The Judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all confined. The suspect is not enhanced when judges at the lower level are criticised intemperately and castigated publicly. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary when Judges of the higher courts express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed, stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them. That is the surest way to make the judiciary go downhill."

11. Similarly in Kashi Nath Roy Vs. State of Bihar A.I.R. 1996 S.C. 3240 the Supreme Court observed:

> " It cannot be forgotten that in our system, like elsewhere, appellate and revisional Courts have been set up on the pre-supposition that lower Courts would in some measure of cases go wrong in decision making, both on facts as also on law, and they have been knit up to correct those orders. The human element in justicing being an important element, computer-like functioning cannot be expected of the Court, however, hard they may try and keep the selves precedent trodden in the scope of discretion's and in the manner of judging. Whenever any such intolerable error is detected by or pointed out to a superior Court, it is functionally required to correct that error that may, here and there, in any appropriate case, and in a manner befitting, maintaining the dignity of the Court and independence of judiciary, convey its message in its judgment

to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellow but clear and result orienting, but rarely as a rebuke. Sharp reacting of the kind exhibited in the a fore-extraction is not in keeping with institutional functioning. The premise that a Judge committed a mistake or an error beyond the limits of tolerance, is no ground to inflict condemnation on the Judge Subordinate, unless there existed something else and for exceptional grounds. We should, therefore, think, without much ado, that the High Court was unkind to the appellant and, therefore, the a fore paragraph deserves to be and is hereby pulled out from the orders of the High Court dated 28.1.1993 passed in criminal Miscellaneous No.12034 of 1991 titled Lala Pandey Vs. State of Bihar and 3 others decided by the High Court of Patna, as well as all other references in the said order which tell upon the functioning of appellant."

12 A similar view was taken by the Supreme Court in Braj Kishore Thakur Vs. Union of India,J.T.1997 (3) S.C. 26. In that case the High Court had passed strictures against a Judge of the subordinate judiciary for granting bail in a case. The Supreme Court held that if an order of a subordinate court Judge is wrong it can be corrected in appeal/revision by the higher court, but passing strictures is not justified. Similarly a division bench of this Court in writ petition No.21324 of 1997. Sarnam Singh Vs. High Court decided on 16.7.1998. (per R..R.K. Trivedi and R.K. Mahajan, JJ) quashed the adverse entry given to a judicial officer for granting bail in some cases. The division bench observed " The system of writing annual remarks is defective. In this system the officers who are very good and work with utmost sincerely and devotion cannot get good entries. On the other hand, those officers who are expert in flattering and other activities get excellent entries. Sometimes pressures and other factors also work. The honesty, dedication and integrity have been given a go bye in most cases."

The division bench also considered the question whether on the judicial side this Court could quash an entry given by the Court on its administrative side, and held that it could. The division bench relied on wade's administrative Law and the Wednesday principle of reasonableness for reaching to its conclusion.

14. In the circumstances, this writ petition is allowed. The adverse entry contained in Annexure 3 to the petition and the orders of the

Administrative Committee of the High Court rejecting the petitioner's representations are quashed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 23.8.1999

1999

August, 23

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

Civil Misc. Writ Petition No. 35597 of 1999

Shiv Poojan Rai ... Petitioner
Versus
Kamla Rai and others ... Respondents

Counsel for the Retitioner : Mr. Murlidhar & Mr. O.P. Rai.
Counsel for the Respondents : Dr. R.G.Padia

Code of Civil Procedure, Section 151 vis-à-vis o.39 r.1 Ambit and scope of- Held (Para 5 & 7)

The order dated 29th July, 1999 though passed on an application under section 151 of the code, is in effect an order of injunction that was passed directing the plaintiff to remove the earth clogging the drain within the ambit and scope of order 39, Rule 1 of the Code.

Therefore, this order is very much an order of injunction.

At the same time as it appears though the application was inscribed as an application under section 151 of the code, but in effect and substance and for all practical purposes, it was an application for injunction and the order that was passed was also on an order of injunction. The title or inscription of the application will not decide the characteristies of the application itself. In order to decide the character of the order and the application it is to be looked into in substance and relief claimed. Thus the order appears to be an order under order 39, Rule1 of the Code, which is appealable under order section 43 rule1 (r) of the Code before the learned District Judge.

By the Court

1. Leave granted to convert the petition into one under Article 227 of the Constitution of India.

2. By an order dated 29th July, 1999 passed by the learned Civil Judge (Junior Division), Azamgarh in original Suit No.211 of 1998 an order of injunction was passed in favour of the defendant on the basis of an application under Section 151 of the Code of Civil Procedure to the extent that the plaintiff is directed to remove the earth clogging the drain at the sough of the wall. This order was challenged by the plaintiff in civil Revision No. 158 of 1999 since been allowed, reversing the order dated 29th July, 1999 by an order dated 9th August, 1999 passed by the learned District Judge, Azamgarh. These orders have since been challenged in this petition.

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D. K. Seth, J.

3. Mr. Murli Dhar, learned counsel for the petitioner contends that the order that has been passed cannot be treated to be mandatory injunction. It was only maintenance of the exiting drain as was found in the Second Commissioner's report. Therefore, it was not hit by the order of injunction granted by the appellate court on an earlier occasion restraining the defendants from constructing a new drain. He also contends that unless that clogging of the drain is removed, the water through the drain could not be discharged, which used to be discharged so long. He further contends that the earth that had clogged the drain are fresh earth, which requires to be removed.

4. Dr. R.G. Padia, learned counsel for the plaintiff opposite parties on the other hand contends that since there was a direction to the plaintiff to remove the earth alleged to be clogging in the drain, therefore, it was very much an injunction, mandatory, in nature. According to him, such a relief cannot be obtained by means of an application under Section 151 of the Code. Inasmuch as when the matter squarely comes within the scope and ambit of order 39, Rule 1 of the Code, Section 151 of the code could not be maintained. According to him, Section 151 of the Code could be maintained only when there is no provision available in the Code itself as has been held consistently be different High Courts and the apex court. According to him, in the present case, the facts have been properly gone into by the trial court while passing the impugned order.

5. After having heard Mr. Murli Dhar Learned counsel for the petitioner and Dr. Padia, learned counsel for the respondents it seems that the order dated 29th July, 19999 though passed on an application under Section 151 of the Code, is in effect an order of injunction that was passed directing the plaintiff to remove the earth clogging the

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drain within the ambit and scope of order 39, Rule 1 of the Code. Therefore, this order is very much an order of injunction.

6. The ground on which the revision was allowed, namely, that the defendant did not pay court fee and that no mandatory injunction could be passed in favour of the defendant since he had not sought for any relief in the suit appears to be wholly misconceived. Thus it appears that the foundation on which the revision was allowed, cannot be sustained. Therefore, this matter should be sent back for afresh decision by the court below .

7. At the same as it appears though the application was inscribed as an application under Section 151of the code, but in effect and substance and for all practical purposes, it was an application for injunction and the order that was passed was also on an order of injunction. The title or inscription of the application will to decide the character of the application itself. In order to decide the character of the order and the application, it is to be looked into in substance and the relief claimed. Thus the order appears to be an order under order 39, Rule 1 of the Code, which is appealable under order 43/ ® rule 1 of the Code before the learned district Judge.

8. In such circumstances, this petition is allowed. The impugned order dated 9th August, 1999 passed by the learned District Judge in Civil Revision No. 158 of 1998 is, hereby, set aside. The matter is remanded back to the learned District Judge for a fresh decision in accordance with law. Since I have held that the order is one under order 39, Rule 1 of the Code, therefore, it would be open to the opposite parties to apply for conversion of the revision into one in appeal and if such a prayer is made, the said revision should be converted into appeal and shall be decided as a Misc. Appeal under order 43 rule 1 ® of the Code. Such step shall be taken within a period of two weeks from the date and the learned District Judge concerned shall decide the appeal, since both the parties are appearing, within a period of two weeks thereafter.

9. With these directions, the writ petition is disposed of accordingly. No cost.

10. Let a copy of this order be issued to the learned counsel on payment of usual charges within three days.

Petition Dispose of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.7.1999

1999

July, 30

BEFORE
THE HON'BLE V.M. SAHAI, J.

Civil Misc. writ Petition No. 9904 of 1994

Sanjay Kumar Giri ... Petitioner
Versus
District Inspector o f Schools and others. ... Respondents.

Counsel for the Petitioner : Shri K.Ajit
Counsel for the Respondents : Shri S.N. Srivastava
Standing Counsel

U.P. Recruitment of Dependent of Government servants dying in Harness rules 1974-Petitioner once accepted the appointment on class 4th post on compassionate ground-whether it is permissible to claim promotional post of Class III employee ? held-No (Para5)

Case law discussed

1994 (1) UPLBEC-4 20
1998 (2) UPLBEC- 1310
Once he accepted appointment on a class iv post and joined, his claim under the rules came to an end. The family of the employee who died in harness was provided with source of livelihood. The rules do not provide for any subsequent change. In any case the respondent in refusing to appoint petitioner against class III post once he accepted class iv post did not commit any error of law nor they acted against the rules.

By the Court

1. Petitioner's father a lecture in Physics in Rashtriya Inter College. Bali Nichlol. Maharanjganj died in harness on 4.7.88. The petitioner became major in 1990. He was appointed on 1.7.92 by the respondents under the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules 1974 (in brief rules) Financial approval was accorded on 31.8.1992 w.e.f. 1.7.92. After joining as a Class-iv employee he claimed that he should be given class-III post as per his qualification and made representation to the respondents but nothing was done. He filed the instant writ petition claiming promotion/appointment on a class II post.

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D.I.O.S. & others

V. M. Sahai, J.

Heard Shri K. Ajit learned counsel for the petitioner and Shri S.N. Srivastava learned standing counsel for the respondents.

2. learned counsel for the petitioner urged that the petitioner accepted appointment on a class-IV post on the oral assurance of the respondents that his claim to class III post will not be treated to have been waived. Though vacancies occurred and the he was qualified and eligible but he was not appointed on a Class III post. In support of his argument the learned counsel relied on a division bench judgement of this court in Hiraman vs. State of U.P. and others 1994 (1) UPLBEC 4210. Standing counsel argued that once the petitioner accepted appointment on a class-IV post he cannot claim subsequently class-III post.

3.The entire claim of the petitioner is based on his allegation that the respondents verbally assured him that if he accepts class-IV post it will not be treated to be wavier of his right to claim subsequently a class-III post. In Hiraman (supra) the court was considering a case where the employee had earlier been given a class-IV post under the dying in harness rules but was latter given class-III post according to his qualification. Hiraman challenged the appointment on the ground that class-III post was required to be filled by promotion. In writ petition his claim was not accepted and the appointment order was upheld. While affirming the view taken in writ petition the division bench in special appeal observed that appointment on class-IV was accepted under protest, therefore, there was no illegality in the order of the learned single judge. However this case was rendered on the facts and circumstances of that case.

4. The apex court in Direct of Education (Secondary) and another Versus Pushpendra Kumar and others 1998 (2) UPLBEC 1310 considered the rules and Chapter III, Regulations 101,103,104,105-a,106 and 107 of the Regulation framed under the U.P. Intermediate Education Act 1921 and held as under:

.. . . .the regulations governing appointment of dependents of teaching/non-teaching staff in non-Government recognised aided institution dying in harness would result in all the vacancies in class III posts non-government recognised aided institutions which are required to be filled by direct recruitment being made available to the dependent of persons employed on the teaching/non-teaching staff of such institution who die in harness and

the right of other persons who are eligible for appointment to seek employment on those posts by direct. Recruitment would be completely excluded. On such a construction the said provision in the Regulations would be open to challenge on the ground of being violative of the right to equality in the matter of employment in as much as other persons who are eligible for appointment and who may be more meritorious than the dependents of the deceased employee would be deprived of their right of being considered for such appointment under the rules. A construction which leads to such a result has to be avoided. Having regard to the fact that there are large number of posts falling in class IV and appointment on these posts is made by direct recruitment the object underlying the provision for giving employment to the dependent of a person employed in a teaching/non-teaching staff who dies in harness would be achieved. If the said provision in the Regulations is construed to mean that in the matter of appointment of a dependent of a teaching/non-teaching staff in a non-Government recognised aided institution dying in harness if a post in class II is not available in the institution in which the deceased employee was employed or in any other institution in the district, the dependent would be appointed on a class IV post in the institution in which the deceased employee was employed and for that purpose a supernumerary post in class-IV may be created. If the Regulations are thus construed the respondents-applicants could only be appointed on a class IV post and they could bot seek a direction for being appointed on a class III post and for creation of supernumerary post in class III for that purpose.

5. The object of compassionate appointment is to enable the penurious family of the deceased employee to tide over the sudden financial crises resulting due to death of the bread earner. The petitioner was appointed under the rules on a class-IV post after he attained the age of majority. Once he accepted appointment on a class-IV post and joined, his claim under the rules came to an end. The family of the employee who died in harness was provided with source of livelihood. The rules do not provide for any subsequent change. The learned counsel for the petitioner could not point out any rule under which a person given the benefit of rule once could claim a different or higher post . In any case the respondent in refusing to appoint petitioner against class III post once he accepted class IV post did not commit any error of law nor they acted against the rules.

For the aforesaid reasons, I do not find any merits in this writ petition. It fails and is accordingly dismissed.

There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.1999

BEFORE
THE HON'BLE A. K. YOG, J.

1999

August, 20

Civil Misc. Writ Petition No. 2101 of 1999

Aasif Shahdab ... Petitioner
Versus
Secretary Madhyamik Shiksha Parishad U.P. Allahabad and others ... Respondents.

Counsel for the Petitioner : Sri S.K. Dubey
Counsel for the Respondents : S.C.
Sri Irshad Ali

Article 226of the constitution of India- similarity of answers cannot be a ground for punishing a student on the ground of using unfair means. Ground for suspicion of using unfair means is not enough. Held- similarity of answers cannot be a ground for punishing a student on the ground of using unfair means. Ground for suspicion of using unfair means is not enough. (Para 4)

By the Court

1. Aasif Shahdab, Petitioner appeared in the High School examination, 1998 with Roll no.1774849 conducted by the Madhyamik Shiksha Parishad, U.P. Allahabad.

2. Petitioner was issued a provisional mark-sheet indicating that his case was under consideration in the category 'W.B.' i.e. case of suspicion of using unfair means reported by the Examiner.

3. On 18th January 1999 a learned single judge directed the respondent's counsel to produce original Answer Books' of the petitioner. On the request of learned standing Counsel in the

presence of learned counsel for the petitioner I also perused the copies and find that on comparison a person of normal prudence cannot with certainty came to the conclusion that student involved in the case has resorted to using unfair means merely similarity of certain aspects can lead to an irresistible conclusion that student /petitioner in question has resorted to using unfair means.

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Aasif Shahdab Vs. Secretary, Madhyamik Shiksha Parishad, U.P. & others
------
A.K. Yog, J.

4. This Court time and again held that similarity of answers cannot be a ground for punishing a student on the ground of using unfair means. Ground for suspicion of using unfair means is not enough. In this context reference may be made to the following decisions:-

See
1. AIR 1977 All 132,
2. AIR 1998 SC 5,
3. 1997 (6) SCC 674,
4. AIR 1979 All 209 (Para 11) (FB),
5. AIR 1996 All 206,
6. 1996 (1) UPLBEC 76,
7. 1985 UBLBEC 829 (DB) and
8. 1982 Education Cases 117 (DB),

5. In view of the above, I have no hesitation to conclude that there is no material to support the conclusion of Respondent No. 1.

6. The Writ Petition succeeds with direction to Respondent- Board to release result of the Petitioner - student forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11-8-1999

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE KRISHNA KUMAR, J.

1999

August, 11

Civil Misc. Writ Petition No. 17416 of 1997.

Ram Chandra Shukla ...**Petitioner**
Versus
State of U.P. and others ...**Respondents.**

Counsel for the Petitioner : Shri Radhey Shyam
Shri C.P. Gupta

1999

R.C. Shukla
Vs.
State U.P. & others

M. Katju, J.
Krishna Kumar, J.

Counsel for the Respondent : Shri V.B. Upadhyay S.C.
Shri Vinod Mishra
Shri Sunil Ambwani

Article 226 of the Constitution of India- Once the High Court rejects bail the subordinate court has no business to grant bail. It is gross indicipline and the entire judicial system will be subverted if this is done. Additional District & Sessions Judge has committed gross insubordination by granting bail once the bail had been rejected by the High Court. – Held

The petitioner as Additional District and Sessions Judge has committed gross insubordination by granting bail once the bail had been rejected by the High Court. (Para-2)

By the Court

Heard learned counsel for the petitioner and learned Standing Counsel.

1. The petitioner has challenged the order of his dismissal from service dated 17.4.1997 Annexure 7 to the petition. The petitioner was Addl. District and Sessions Judge and was placed under suspention by order dated 29.11.1995 and after enquiry he was dismissed from service. The charges against the petitioner were that after the High Court rejected bail in two cases the petitioner as A.D.G. granted bail. Learned counsel for the petitioner has urged that so far as the first charge is concerned the High Court rejected the bail as not pressed. In fact in this case earlier the District and Session Judge, Sri N.S. Gahlot had rejected the bail on merits and thereafter the bail application had been moved before the High Court and this application was dismissed as not pressed. As, regards charge no. 2 the bail application had been rejected by the High Court on merits after it had earlier been rejected by the District and Sessions Judge. Thereafter the petitioner as Addl. District and Sessions Judge granted bail.

2. In our opinion, once the High Court rejects bail the subordinate court has no business to grant bail. It is gross indiscipline and the entire judicial system will be subverted if this is done. All the judicial officers of the subordinate judiciary should realise that the High Court is superior to the subordinate judiciary. Once the High Court has rejected bail no District and Sessions Judge

or Addl. District Sessions Judge can grant bail. Thus the petitioner as (Addl. District and Sessions Judge has committed gross insubordination by granting bail once the bail had been rejected by the High Court.

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Krishna Kumar, J.

3. Learned counsel for the petitioner has placed before us a judgment of a learned Single Judge of this Court in Mohan Lal Vs. State of U.P. and others 1995 J.I.C. 105 Crl. Misc. Bail Application No.2087 of 1993 decided on 14.11.1994 where the learned Single Judge Hon'ble S.K. Verma, J. has held that after the High Court rejects bail on merits the Sessions Judge can entertain the bail application and can grant it. We do not at all agree with this view. Such a view will be totally subversive of judicial discipline. After the High Court rejects bail on merits the Sessions Judge cannot grant bail. Hence we over-rule the view of Hon'ble S.K. Verma, J.

4. The petitioner has been found guilty in the enquiry report of Hon'ble A.N. Gupta, J. and the finding of guilt is a finding of fact and this court cannot interfere with findings of fact. The petition is hence dismissed.

5. Let a copy of this judgment be circulated by the Registrar of this Court to the all District and Sessions Judges and Addl. District and Sessions Judge of the State so that they may know the law on this point that once the High Court rejects bail the subordinate judiciary cannot grant bail and it will be treated as a serious misconduct if they do so.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATE: ALLAHABAD 21.8.99

BEFORE
THE HON'BLE A. K. YOG, J.

1999

August, 21

Civil Misc. Writ Petition No.35811 of 1999

Lalit Kumar Garg ... Petitioner
Versus
The U.P. Board of High School and Intermediate Allahabad Through its Secretary and others ...Respondents.

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Lalit Kumar Garg
Vs.
U.P. Board of High School & Intermediate, Alld. & others

A. K. Yog,, J.

Counsel for the Petitioner : Shri Nalin Kumar Sharma
Counsel for the Respondents : S.C.

Constitution of India, Article 226 unfairmeans- General Mandamus issued to the Board to decide all cases of unfairmean within the period of three month and to communicate the result by Post to all the concerned students- apart from that the result shall be published in two well popular news papers. (Held- (Para 8) A writ of mandamus commanding generally concerned officers to decide all the cases of using unfair means pending before them till date within a reasonable time, which in the opinion of the Court should not be more than three months. All the cases shall be communicated to the concerned candidates by post as per practice. Apart from intimating the result to the concerned candidate as indicated above, the concerned authorities are commanded to publish the result in two Hindi and two English Daily newspapers having wide circulation in the entire State of U.P. for information of concerned persons.

By the Court

1. Petitioner was a regular student and appeared in the Intermediate Examination, 1999 with Roll No.1153692 held by the U.P. Board of high School and Intermediate, Allahabad.(for short called 'Board') from the Centre Rashtriya Inter College, Shahpur (Muzaffarnagar).

2. It is submitted that on 27th March 1999 while Petitioner was attending to his Chemistry II Paper a 'Flying Squad' came for inspection and a member of 'Flying Squad' found one small chit near the Petitioner's seat in the Examination Hall and said chit was got tagged with his Answer Sheet. Petitioner was made to sign blank form. Petitioner has filed reports given by Invigilators in the concerned Examination Room (Annexure-6-7 to the Writ Petition)

3. It appears that a notice dated 28th April 1999 (Annexure-4 to the Writ Petition) was given to the Regional Secretary of the Secondary Education Board through an Advocate.

4. In reply to the said notice dated 28th April 1999 (Annexure-4 to the Writ Petition) Regional Secretary of the Board informed that such matters of using unfair means are being placed before Unfair Means Committee constituted by the Board and the Unfair Means Committee decides the cases after carefully examining the case and thereafter result is being communicated to the concerned person. In

the said reply it is mentioned that decision is taken by the Unfair Means Committee in accordance with rules and relevant procedure.

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A. K. Yog,, J.

5. In paragraph 15 of the Writ Petition, Petitioner alleges that delay in disposal of the matter by the Respondents is causing an irreparable loss and his entire academic career is going to be ruined. However, this Court finds that in Paragraph 16 Petitioner out of his zeal or on legal advice made incorrect statement about his academic career. Learned Counsel for the petitioner has produced a photo state copy of the mark-sheet of the High School which shows that Petitioner is only a second divisioner.

6. Learned counsel for the petitioner admitted before this Court that averment in Paragraph 16 of the Writ Petition do not depict true picture about the academic excellence of the Petitioner.

7. Taking into account the fact that the Petitioner's result of Intermediate Examination, 1999 has been withheld and in case decision is not taken ink his case, he will one academic session.

8. In view of the above, I find that it is fit case where this Court should issue a writ of mandamus commanding generally concerned officers to decide all the cases of using unfair means pending before them till date within a reasonable time, which in the opinion of the Court should not be more than three months from today, i.e. November 30, 1999. Result of all the cases shall be communicated to the concerned candidates by post as per practice. A part from intimating the result to the concerned candidate as indicated above, the concerned authorities are commanded to publish the result in two Hindi and two English Daily newspapers having wide circulation in the entire State of U.P. for information of concerned persons.

9. In case Board find difficulty in achieving the object sought, contained in the judgment of this Court, it shall approach concerned authorities in the State Government for providing additional resources and the same shall be provided by the State Government forthwith.

With the above observation/direction, Writ Petition stands allowed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 18.08.1999

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE KRISHNA KUMAR, J.

1999

August, 18

Civil Misc. Writ Petition No. 23543 of 1997.

Ajaypal Singh ... Petitioner.
Versus
High Court of Judicature at Allahabad,
Through its Registrar and others ... Respondents.

Counsel for the Petitioner : Dr. R.G.Padia
: Mr. Prakash Padia
Counsel for the Respondents : S.C.
: Mr. S.M.A.Kazmi
: Mr. Sunil Ambwani
: Mr. Sudhir Agarwal

Article 226 of the Constitution of India – only in extreme Cases where there is total lack of integrity or where there is some other serious allegation which is found true that the Court should give an adverse entry, because adverse entry given too readily spails the career of a Judge and Causes demoralis action in the subordinate judiciary. The disposal of the petitioner was 128% and his integrity has been certified in the annual remarks – the adverse entry / warning was found uncalled for and unjustified and as such quashed.
Held – (Para 4)
This Court should not be too harsh to judges of the subordinate judiciary and should take into account the tremendous difficulties and pressures under which they were working.

By The Court

1. This writ petition has been filed for quashing the part of the annual remark against the petitioner for the year 1995-96 as communicated by the High Court through his letter dated 27.3.97, Annexure 8 to the writ petition and for quashing the order dated 21.5.96 Annexure 5 to the writ petition.

2. The petitioner was selected in P.C.S.(Judicial) Examination 1972 and at the relevant time he was functioning as the Additional District Judge, Saharanpur. It appears that in 1995 two Misc. Appeals filed by one Navin Kumar Jain and others were pending in the court of the petitioner. These appeals were withdrawn from the petitioner's court by the respondent no.3 who was at that time Incharge District Judge, Saharanpur. It appears that in connection with one of these appeals being Misc. Appeal No.77 of 1992 the petitioner wrote a letter to the Incharge District Judge, Saharanpur dated 1.1.95 Annexure 3 to the petition. In this letter he described Navin Kumar Jain as a cunning and litigious person who makes false allegations for his self interest. It may be mentioned that this was a confidential letter and one cannot understand how this was leaked out to others. In the report of the District Judge Saharanpur dated 25.3.96 to the High Court, copy of which Annexure 4 to the writ petition, it has been mentioned that the complainant wants to exercise undue influence over other judicial officers and hence got the cases transferred by making false and frivolous allegations. The District Judge also mentioned that he made oral enquiry from the counsels who told the District Judge that the complainant is a regular visitor in court and conducts cases personally. He is also involved in a Criminal case under section No. 420/467/468 I.P.C. The District Judge also mentioned that the words used by the petitioner unhappily crept into the letter, and these word were not intended for publication. The complainant only wanted to put undue influence over other judicial officers before whom various cases are pending. The District Judge observed that the complaint is false and frivolous. However, thereafter an order was passed on 21.5.96 administering the warning to the petitioner copy of which is Annexure 5 to the petition. True copy of adverse remarks is Annexure 6 to the petition.

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M. Katju,, J.
Krishna Kumar, J.

3. A counter affidavit has been filed on behalf of the High Court and we have perused the same. In our opinion the adverse remark/warning should not have been given to the petitioner. The District Judge in his report dated 25.3.96 Annexure 4 to the petition had already observed that the complaint against the petitioner is false and frivolous and the complainant only wanted to exercise undue influence on the Judicial officers of the district Judgeship. It was also observed therein that the petitioner's letter was not meant for publication. We are fully in agreement with the aforesaid report of the letter of the District Judge. The disposal of the petitioner was 128% and his integrity has been certified in the annual remarks.

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Ajaypal Singh g
Vs.
High Court of Judicature at Alld. Through its Registrar & others
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M. Katju,, J.
Krishna Kumar, J.

Hence in our opinion the adverse/warning was uncalled for the unjustified.

4. In S.P.Misra vs. High Court of Judicature at Allahabad 1999 ACJ 927 this Court has held that the adverse entry should not have been given against the petitioner. [This Court should not be too harsh to judges of the subordinate judiciary and should take into account the tremendous difficulties and pressures under which they were working] and (only in extreme cases where there is total lack of integrity or where there is some other serious allegation which is found true that the Court should give an adverse entry, because adverse entry given too readily spoils the career of a Judge and causes demoralisation in the subordinate Judiciary.) This Court relied on the decisions of the Supreme Court in K.P.Tewari Vs. State of M.P., AIR 1994 S.C. 1031 and Kashi Nath Roy Vs. State of Bihar, AIR 1996 S.C. 3240. A division bench of this Court in Shaileshwar Nath Singh Vs. took a similar view. The High Court, writ petition No. 43748 of 1997 decided on 11.8.1999. A similar view was also taken by this Court in J.S.P.Singh Vs. The High Court, writ petition no. 38599 of 1996 decided on 17.8.1999. In Sarnam Singh Vs. The High Court, writ petition no.21324 of 1997 decided on 16.7.98 a division bench of this court considered the question whether on the judicial side this court could quash an entry given by the Court on the administrative side, and held that it could. The division bench relied on Wade's Administrative Law, and the Wednesday principle of reasonableness for reaching to its conclusion.

5. In the circumstances this writ petition is allowed. The impugned order dated 27.3.97 so far as it contains remarks against petitioner and the order dated 21.5.96 are quashed. No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 28.7.99

1999

July, 28

BEFORE
THE HON'BLE V.M.SAHAI, J.

Civil Misc. Writ Petition No. 27556 of 1993

Achutyanand Dubey ... Petitioner.
Versus
District Basic Education Officer, Sonebhadra & another ... Respondents.

Counsel for the Petitioner : Shri Ram Yash Pandey
Counsel for the Respondents : Shri S.N. Srivastava
: S.C.

Constitution of India, Article 226 read with Dying in Harness Rules – Petitioner appointed as peon under the Dying in Harness Rules – Subsequently he obtained appointment as teacher in untrained grade concealing fact of his earlier appointment as peon. Held – (Para 3)

Since the petitioner concealed the fact of his earlier appointment and obtained appointment as untrained teacher again under the dying in harness rules, this Court is of the view that the petitioner does not deserve any sympathy. The petitioner is out of service. If a person conceals facts of his earlier appointment and obtains another appointment, it is a case of fraud. Wherever there is fraud, it vitiates everything.

By The Court

1. Heard counsel for the petitioner Shri R.Y.Pandey and Shri S.N.Srivastava learned standing counsel for the respondents.

2. The father of the petitioner died on 10.4.74. The petitioner claimed appointment under the Dying in Harness Rules. The petitioner was appointed as Peon. Subsequently, concealing this fact he obtained appointment in another institution as teacher in untrained grade. The appointment of the petitioner has been cancelled by the respondents on 16.2.87 on the ground that the petitioner has concealed the fact that he has been appointed as Peon cashier under the dying in harness rules.

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V.M. Sahai, J.

3. The counsel for the petitioner urged that recommendation was made in his favour by the authorities that a sympathetic view should be taken in favour of the petitioner. On the other hand the learned standing counsel had supported the order of respondents. Since the petitioner concealed the fact of his earlier appointment and obtained appointment as untrained teacher again under the dying in harness rules, This Court is of the view that the petitioner does not deserve any sympathy. The petitioner is out of service. If a person conceals facts of his earlier appointment and obtains another appointment it is a case of fraud. Wherever there is fraud it vitiates everything. Since the petitioner obtained the second appointment by fraud he is not entitled for any discretion of this Court. I do not find any illegality in the impugned order passed by respondents, canceling petitioner's appointment.

4. The writ petition fails and is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 23.8.99

1999

August, 23

BEFORE
THE HON'BLE V.M.SAHAI

Civil Misc. Writ Petition No. 39548 of 1998.

Hiyat Khan ... **Petitioner**

Versus

Union of India and others ... **Respondents**

Counsel for the petitioner : Sri Hiyat Khan in person
Counsel for the Respondent : S.C.
Sri Dinesh Kakkar

Constitution of India, Article 226 – Termination – Petitioner was selected for training apprentice-ship for two years course-candidature cancelled after completion of one year training it is contended by the institute that despite repeated warning the conduct of petitioner remained unchanged hence relaying upon the terms of agreement order passed – held – It was incumbent upon the authorities to discuss the evidence and give reasons in support of the charge-termination order quashed – Rs.5000/- awarded as cost. (Paras 10 and 11)

The apex court has settled it in series of decisions including the one mentioned in earlier order that it was incumbent on the authorities passing the termination order to discuss the evidence and give reasons in support of it. Once the charges were framed against the petitioner and he denied it than the impugned order could not have been passed without recording finding on every charge and holding that it was proved. The Legal requirement of discussing evidence and recording finding on every charge did not come to an end only because the petitioner was granted personal hearing. A perusal of Annexure-9 to the petition shows that the respondents only observed the formality of hearing, without complying with law or following the principles of natural justice. The impugned order thus being in violation of the earlier order passed by this court and being otherwise bad cannot be maintained.

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Petitioner has completed one year of training, There is no justification to deny him training of one more year as none of the charges have been found to have been proved. Since the respondents despite the order of this Court continued to act arbitrarily the petitioner is entitled to costs which is assessed to Rs.5000/-

Case law discussed
AIR. 1986 – SC – 1571.
AIR. 1991 – SC - 101

By the Court

1. Heard Sri Hiyat Khan, the petitioner in person and Sri Dinesh Kakkar learned counsel appearing for respondent no.2. the Petitioner sates that he does not press his claim against respondents 3 and 4 and respondent no.1 is a formal party. In view of this statement this writ petition is taken up for final disposal.

2. The Petitioner was a trained Machinist and he joined two year's training with respondent no.2. He completed one year's training and thereafter his training was terminated by the respondents. The petitioner filed Writ Petition No.39148 of 1987 wherein this court set aside the termination order dated 19.9.1997 and permitted the respondents to pass a fresh order after affording opportunity of hearing to the petitioner. The petitioner has completed one year's training and if he is permitted by respondents then he shall undergo one year's further training excluding the period from 19.5.1997 till the date of passing of fresh order. The judgement of this court dated 21.5.1998 is quoted below ;

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"The petitioner seeks writ of writ of certiorari quashing the order dated 19th September,1997 whereby the director of Indian Institute of Technology, Kanpur, respondent no.1. informed him that his training has been terminated.

The facts, in brief, are that respondent no.1 invited the applications for two year's course in mechanic. The petitioner applied for such training course. The Indian Institute of Technology, Kanpur (hereinafter referred to as the Institute conducted the practical test and interview. The petitioner was selected for the training course. He was issued a letter dated 19th September,1996 intimating him that he has been enrolled as trainee mechanic and he is permitted to join the training course on the conditions mentioned therein. He was also required to execute an agreement. Some of the relevant conditions mentioned in the letter are as follows:-

> 1. STIPEND: Rs.800/ p.m. in the first year. Enhancement in the stipendary amount to Rs.950/- p.m. could be considered on satisfactory completion of first year of training. You will not be entitled to any other allowances or facility.
>
> 2. DURATION: The training period will be for a period of two years with effect from the date of your joining.
>
> The training can be terminated at any time without any notice and without assigning any reason. You will be required to work day and/or night as per directions of the authorities of the Institute.
>
> Please note that the above is not a job position. You are being enrolled only as a trainee.
>
> If the Above terms and conditions are acceptable to you, you should report for training immediately alongwith the original certificates about your date of birth, educational/Technical qualifications and experience etc. and a Photostat copy each thereof for verification by the Institute Authority, latest by 7th

October,1996 failing which the offer so made will stand cancelled automatically."

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3. The petitioner executed an agreement on 7th October 1996, a copy of which has been annexed as Annexure-C.A.4 to the counter affidavit. The training period has been terminated by respondent no.1 vide impugned order dated 19th September 1997. This order has been challenged on the ground that his training has been terminated without assigning any reason and justification.

I have heard the petitioner in person and Sri Dinesh Kakkar, learned counsel for the respondents.

4. It is not denied that the petitioner was not afforded any opportunity by respondent no.1 before terminating his training in the Institute. Sri Dinesh Kakkar, learned counsel for the respondents, contended that the conditions of training itself provided that the training can be terminated any time. He has also referred to the similar condition mentioned in the agreement executed by the petitioner which reads as under :-

"The training of the party of the first part may be terminated at any time without assigning any reason and without any previous notice."

In the Counter affidavit it has been stated that the conduct of the petitioner was not proper as he remained absent without any sanctioned leave. He has further given warning on different occasions He has referred to a letter dated 3.9.1997 wherein it was stated that the petitioner is not entitled for absorption in service. He has disobeyed the orders of the supervisor. The office in-charge again wrote letters on 6.2.1997 and 8.7.1997 whereby similar warnings were given.

5 The question as to whether an agreement is arbitrary can be examined by the court. In Central Inland Water Transport Corporation Ltd., and another Vs Brojo Nath Ganguly and another, AIR 1986 SC 1571, Rule 9(i) of the Central Inland water Transport Corporation Ltd. Service discipline and Appeal Rules 1979 was examined by the Apex Court which provided that employment of a permanent employee can be terminated on three months notice on either side, it was held that such rule giving opportunity to the employee. Similar view was taken in Delhi Transport Corporation

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Vs. D.T.C. Mazdoor Congress and others, AIR 1991 SC 101 where the majority view was that Regulation 9 (b) of the Regulation framed Under Section 53 of Delhi Road Transport Act, 1950 which provided for Termination of services of the permanent employees on giving simple one month's notice or pay in lieu thereof without recording any reason therefor in order of termination was held arbitrary, illegal and discriminatory and violative of audi alteram Partem' rule. The term of the agreement that training of a party may be terminated any time without assigning any reason and without giving any opportunity to such party is arbitrary.

6. The petitioner was agitating the matter that he should be absorbed in service his contention was not accepted. The petitioner was given a warning in respect of his conduct. The petitioner, under these circumstances, could have explained his position before the decision was taken that the training should be terminated. The petitioner was taken training on 7.10.96 and he has completed almost one year in training.

7. Considering the facts and circumstances the petitioner could have been given a notice before his training was terminated . It is true that the conditions of training and also the terms of the agreement provided that the training of the petitioner can be terminated at any time without assigning any reason but the if the termination is on certain allegation, the petitioner should have been given an opportunity.

8. Considering the facts and circumstances of the case the writ petition is allowed. The impugned order dated 19.9.1997 is hereby quashed. It is , however, made clear that the respondents can take appropriate action and pass a fresh order after affording opportunity to the petitioner. The petitioner has already completed almost one year of training and he shall be allowed for further period of one year to make it two year's training course excluding the period between 19.9.1997 to this date unless any fresh order is passed after affording opportunity to the petitioner.

In the facts and circumstances of the case, the parties shall bear their own costs".

9. The respondents in pursuance of the order passed by this court gave a show cause notice framing as many as five charges. In reply the petitioner denied every charge and the allegation made against

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him. He was personally heard. The proceedings were recorded in shape of question and answers. The petitioner was no doubt asked what he wanted to say but no inquiry was made from him in respect of the charges framed against him nor any clarification was sought. By order dated 12.10.1998 the services of petitioner have again been terminated. The impugned order does not say that the petitioner was guilty of any of the charges. The only reason assigned in the order is that the respondents have come to the conclusion that the petitioner is not a fit person to be appointed or retained as trainee in the institute, therefore, the training of the petitioner in the institute be terminated with immediate effect. In the impugned order no reason has been assigned by the respondents as to what was the fault of the petitioner due to which the training was cancelled. There is no finding in the impugned order that the charges were proved.

This court while quashing earlier order had held that the term of the agreement which permitted termination without assigning any reason and without giving any opportunity was arbitrary. The court had referred to the decision in Delhi Transport Corporation and held that the termination order without giving reasons cannot be maintained. The impugned order instead of complying with the order of this court has paid lip service to it by issuing a show cause notice and granting personal hearing. And it has been vehemently defended both in the counter affidavit and the argument advanced by the learned counsel for the respondent as sufficient compliance of the order passed by this court. The apex court has settled it in series of decisions including the one mentioned in earlier order that it was incumbent on the authority passing the termination order to discuss the evidence and give reasons in support of it. Once the charges were framed against the petitioner and he denied it then the impugned order could not have been passed without recording finding on every charge and holding that it was proved. The court has time out of numbers said that, it was not enough to state that the evidence on record proved that the employee was guilty of the charges framed against him. The legal requirement of discussing evidence and recording finding on every charge did not come to an end only because the petitioner was granted personal hearing. A perusal of Annexure-9 to the petition shows that the respondents only observed the formality of hearing, without complying with law or following the principles of natural justice. The impugned order thus being in violation of the earlier order passed by this court and being otherwise bad cannot be maintained.

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11. The petitioner has been harassed by the respondents from 1997 till date and he has been running from pillar to post for getting his grievances redressed but the respondents in clear disregard of the order passed by this court passed the order arbitrarily. The petitioner has completed one year of training. There is no justification to deny him training of one more year as none of the charges have been found to have been proved. Since the respondents despite the order of this court continued to act arbitrarily the petitioner is entitle to costs which is assessed to Rs.5,000/-.

12. This writ petition succeeds and is allowed. The order dated 12.10.98 passed by respondents no.2 Annexure-10 to the writ petition, is quashed. The respondents are directed to permit the petitioner to continue and completed his remaining training of one year to make its two year's training course excluding the period between 19.9.1997 till this date. The petitioner shall be entitled to its cost of Rs.5,000/-. The aforesaid directions shall be compiled with by the respondents within one month from today.

A certified copy of this order shall be issued to the petitioner who has appeared in person and learned counsel for the respondents on payment of usual charges within 48 hours.

Petition Allowed.