ORIGINAL JURISDICTION
CIVIL SIDE
DATED: 6.7.2000

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

Civil Misc. Writ Petition No. 27971 of 2000

Amol Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri I.N. Singh
Sri Ajay Yadav

Counsel for the Respondents:
S.C.

Article 26 of the Constitution of India- Dying in harness Rules- the very object of appointment of a dependent of the deceased employee who dies in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family- the right to appointment is not a heritable right which can pass on to the successor and await attainment of majority of such succession.

The very object of appointment of a dependent of the deceased employee who dies in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family. (Para 2)

The right to appointment is not a heritable right which can pass on the successor and await attainment of majority of such succession. (Para 3)

By the Court

1. The father of the petitioner died on 31st August, 1991. Mr. I.N. Singh, learned counsel for the petitioner contends that at that point of time the petitioner was minor and aged about 11 years. He attained majority in 1998. Upon attainment of majority, he applied for appointment under the Dying in Harness Rules. The Dying in Harness rules has been provided for saving a family of a deceased from immediate destitution. Such a position cannot be expected to continue till for 10 years. In such circumstances, the petitioner cannot claim any relief.

2. Mr. I.N. Singh relied upon the decision in the case of **Manoj Kumar Saxena v. District Magistrate, Bareilly and others** (2000(2) E.S.C. 967 (All) in which the delay of 12 years was overlooked relying on the decision cited therein. One of the decisions that was cited was that of **Pushpendra Singh v. Regional Manager, U.P.S.R.T.C., Aligarh** {2000(1) ESC 448 (All)}. But it appears that in the case of Pushpendra Singh (Supra), the Division Bench in the appeal did not entertain the claim since the claim was made after 10 years of death. However, if any application is moved, the respondent may consider the same if the family was still reeling under the financial strait. Thus the decision in the case of Pushpendra Singh (Supra) does not seem to have been correctly applied or followed in the decision of Manoj Kumar Saxena (Supra). Then again, the relief that was granted in the case of Pushpendra Singh (supra) was not a ratio decided but on a sympathetic consideration. The Division Bench had relied upon the decision in the case of **Umesh Kumar Nagpal v. State of Haryana and others** {(1994) 4SCC 138} wherein it was held that compassionate appointment cannot be granted after the

lapse of reasonable period which must be specified in the rules. The consideration of such employment is not a vested right, which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole bread winner. The compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over. The decision in the case of **Jagdish Prasad v. State of Haryana** {1996(1) SLR 7} wherein the Apex Court had observed that the very object of appointment of a dependent of the deceased employee who dies in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family. Since the death occurred way back in 1971, in which year, the appellant was four years old, it cannot be said that he is entitled to be appointed after he attained majority long thereafter. In other words, if that contention is accepted, it amount to another mode of recruitment of the dependent of a deceased Government servant which cannot be encouraged de hors the recruitment rules.

3. The reasoning of the Apex Court can be supported also by another reason namely, that the right to appointment is not a heritable right which can pass on to the successor and await attainment of majority of such succession.

4. The Rules have prescribed 5 years period as the limit within which such appointment can be asked for. In view of the Apex Court, it is not possible for me to agree with the ratio decided in the case of Manoj Kumar Saxena (Supra). Since in respect of the view I have taken are supported by the decisions of the Apex Court decisions as well as the Appeal Court, it is not possible for me to agree with the ratio decided in the case of Manoj Kumar Saxena (supra). Since in respect of the view I have taken are supported by the decisions of the Apex Court as well as that of the Division Bench as observed here-in-before, I am not inclined to interfere in the matter.

5. The writ petition therefore, fails and is, accordingly, dismissed. However, there will be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: 20.7.2000

BEFORE
THE HON'BLE J.C. GUPTA, J.
THE HON'BLE U.S. TRIPATHI, J.

Criminal Misc. Writ Petition No. 4232(M.B.) of 2000

Manoj Prabhakar ...Petitioner
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioner:
Sri Prashant Kumar

Counsel for the Respondents:
AG.A.

Article 226 of the Constitution of India- Quashing of the F.I.R.- the High Court has no jurisdiction to examine the correctness or otherwise of the allegations made in the First Information Report and it will have to proceed entirely on the basis of the allegations made in the First Information Report- there is nothing on record to show even remotely that the first informant was in any- way concerned or connected with the match fixing episode or was under

the influence of any person against whom match fixing charge has been levelled by the petitioner.

Held-para 12)

The question of examining truthfulness or otherwise of the allegations made in the First Information Report is not to be gone into by this Court in these proceedings as the same is to be determined by the Investigating Agency during investigation.

By the Court

1. Heard petitioner's counsel and the learned A.G.A.

2. This writ petition has been filed by Sri Manoj Prabhakar for quashing the First Information Report dated 9.8.1999, on the basis of which case crime no. 1444 of 1999 under Sections 420, 406 and 471 I.P.C. has been registered as P.S. Haldwani, District Nainital against the petitioner and two others.

3. The prosecution story as narrated in the First Information Report is that about 1-1/2 years ago the petitioner alongwith Sri Divya Nautiyal and Sri Umesh Chand came to the shop of the complainant and persuaded him to invest money in APACE Savings & Mutal Benefit (India) Ltd. telling him that he would get ten percent interest and after a period of fifteen months the rate of interest would be three percent per month on the deposited amount. The complaint induced by the said allurement of the petitioner and his complainant induced by the said allurement of the petitioner and his companions opened two accounts in the aforesaid Company and deposited Rs. 50 per day for 15 months. When co-accused Umesh Chand did not come to collect installments, the complainant went to the office of the Company and found that the same has been closed. Neither his money nor interest was refunded to him. It is specifically alleged that the petitioner and his co-associates have dishonestly misappropriated his money amounting to Rs.35,000/- approximately by deceitful means.

4. Learned counsel for the petitioner in support of his arguments for quashing the First Information Report submitted that the petitioner had no concern whatsoever with the affairs of the aforesaid Company, as he was holding no post therein. He was simply holding no post therein. He was simply holding the post of Managing Director of Naturence Research Labs (P) Ltd., having its registered office at A-91 Malviya Nagar, New Delhi, New Delhi. He invited applications for appointment of Marketing Agents for sales, marketing and distribution of his Company's cosmetic goods. Several applications were received and family, the Board of Directors of his Company selected the name of M/s Apace Marketing Ltd. He has never been inducted as Director of Agent of Apace Savings & Mutal Benefit (India) Ltd. According to petitioner's counsel the first information report has been lodged with totally false, fabricated and concocted allegations.

5. Learned A.G.A. on the other hand argued that since First Information Report discloses commission of cognizable offence, the petitioner has no case for getting the same quashed.

6. It is well settled that power of quashing First Information Report or criminal proceeding at its inception

should be exercised very sparingly and with circumspection and that too in rarest of rare cases, while examining the question it is not justifiable for the Court to embark upon an enquiry, as to the reliability or genuineness or otherwise of the allegations made in the First Information Report and extraordinary jurisdiction conferred on this Court under Article 226 of the Constitution of India does not permit it to act in an arbitrary or capricious manner. It is not permissible for this Court to examine those allegations meticulously. While examining the question whether the case falls within the category of 'rarest of rare' cases, the Court first has to go into the grip of the matter, whether the allegations constitute the offence. At this stage it is not for the Court to weigh the pros and cons of the prosecution case. In support of this view, we may refer to a few decisions of the Apex Court, State of Harayana vs. Bhajan Lal and others, AIR 1992 SC 604, Mustaq Ahmad vs. Mohd. Habiburrhaman, J.T. 1996 (1) 656, Roopan Deol Bajaj and another vs. Kunwar Pal Singh Gill J.T. 1995 (7) SC, 299, State of Karela vs. O.C. Kuttan and others, J.T. 1999 (1) SC 486.

7. Again in the case of Pratibha Rani vs. Suraj Kumar and others (1985) 2 SCC 370, it was held by the Supreme Court that the High Court has no jurisdiction to examine the correctness or otherwise of the allegations made in the First Information Report and it will have to proceed entirely on the basis of the allegations made in the First Information Report.

8. In the back drop of this settled legal position we have closely examined the allegations made in the present F.I.R. and we are of the view that no sufficient ground has been made out in the present case, which may warrant interference of this Court at the investigation stage and no case is made out for quashing the First Information Report.

9. It was also submitted by the petitioner's counsel that since the petitioner, a cricketer of repute has engineered the 'match fixing scam' several persons are annoyed with him and therefore at their instance he has been falsely implicated by connecting his name with M/s Apace Group of Companies. It will be suffice to state that the allegations made in the writ petition in this regard are too vague ambiguous and incomplete to be given any credence. To bring a case within the ambit of 'mala fide' the allegations should be succinctly clear, unambiguous and prima facie believable. In the present case from the allegations made in the petition it is not at all possible for us to draw any inference of malafide. Moreover, there is nothing on record to show even remotely that the first informant was in any way concerned or connected with the match fixing episode or was under the influence of any person against whom match fixing charge has been leveled by the petitioner.

10. Relying upon the decision of Apex Court in Joginder Kumar's case reported in 1994) 4 SCC 260 it was urged by the petitioner's counsel that the arrest of the petitioner should be stayed till the submission of charge sheet. This decision was considered by this Court in Full Bench decision in Criminal Misc. Writ Petition No. 5795 of 1998 decided on 17.9.1999, Satpal and others vs. state of U.P. and it was held that in appropriate cases, if the Court is convinced that the power of arrest will be exercised wrongly

or malafidely or in violation of Section 41(1) (a)j of the Code of Criminal Procedure, writ of mandamus can be issued restraining the police from misusing its legal power. However, the order staying arrest may be granted sparingly in exceptional case and with circumspection that too in rarest of rare case keeping in mind that any relief, interim or final during investigation, which has the tendency to slow down or otherwise hamper the investigation should not be granted.

11. Section 41)1) of the Code of Criminal Procedure makes a provision as to in what circumstances, a police officer may arrest an accused without the order of Magistrate or without a warrant. Clause (a) of this Sub-Section provides that any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists, of his having been so concerned, may be arrested by police without a warrant. Section 157 Cr.P.C. lays down the procedure for investigation and empowers the Investigating Officer to take measures for the arrest of the offender. The Full Bench in the case of Statpal and others (supra) observed.

"…There is no doubt that arrest is part of investigation, the police or the investigating agency has every authority to investigate a case where cognizable offence has been reportred. But while exercising power of arrest they are required to be satisfied about the genuineness or bona fides of the allegations of the complaint and about the necessity of arrest of the person concerned. In other words, there must be reasonable justification for effecting such arrest, which is necessary for the proper investigation."

12. As already pointed out above, the question of examining truthfulness or otherwise of the allegations made in the First Information Report is not to be gone into by this Court in these proceedings as the same is to be determined by the Investigating Agency during investigation. We hope and trust that the Investigating Agency while making investigation shall act honestly, fairly and independently in accordance with the above mentioned observations of the Full Bench decision.

13. For the reasons stated above, the writ petition is dismissed.

14. Learned counsel for the petitioner then made a prayer that leave to appeal to Supreme Court be granted. In our opinion it is not a fit case for grant of leave to appeal. Accordingly, the oral prayer of the learned counsel is refused.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: JULY 24, 2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE D.R. CHAUDHARY, J.

Civil Misc. Writ Petition No. 22248 of 1991

Paras Nath Tiwari ...Petitioner
Versus
Director, Indian Institute of Technology, Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri J.K. Srivastava
Sri S.K. Mehrotra
Sri Siddeshwari Prasad

Counsel for the Respondents:
Sri Pankaj Bhatia
Sri D. Kacker

Article 226 of the Constitution of India- imposition of any term contrary to the Advertisement itself is unjustified- respondents directed to consider the case of permanent appointment of the petitioner.

Held –(Para 5)

The imposition of this term, being contrary to the Advertisement itself, the Respondents could not insist for production of such a licence by the petitioner even though he had prayed for grant of some time for production of such a licence for the reason mentioned in his letters which have been brought on the record.

By the Court

1. The petitioner has come up with a prayer to quash the order dated 21.12.1990 passed by the Dean, Faculty Affairs, Indian Institute of Technology, Kanpur (Respondent no. 2) as contained in Annexure-12 in so far as it relates to his termination of services by grant of a writ, order or direction in the nature of certiorari. The impugned order reads thus :-

"Further to letter No.: Estt. 4493 (FA)/89-ITTK/4183 dated December 1, 1989, the term of probationary period of Shri P.N. Tewari, Maintenance Engineer (Aircraft), Department of Aerospace Engineering, has been extended for a period of six months w.e.f. November 4, 1990 on the same terms and conditions contained in the original appointment letter No. DF/D-1 (FA)/ITTK/88/1333 dated September 13/20, 1988 with the stipulation that no further extension will be given.

Sd/-(V.SUNDARARAAJAN)
DEAN FACULTY AFFAAAIRS

The Relevant Facts:-

2. The petitioner then serving as Sargent in Indian Air Force who had obtained a First Class in the Degree Course of A.M.I.E. (India) in Mechanical Engineering, which is equivalent of B. Tech. or B.E., and was having a certificate granted by the Indian Air Force in regard to maintenance and major repairs of HT 2, Gnat and Dakota aircraft's in terms of Advertisement No. DF-15/87 December 23, published by the Indian Institute of Technology, Kanpur applied for his appointment. He, along with others, was called for interview. He secured the highest marks at the Interview which is being denied. He was selected for the appointment. Vide appointment letter dated 13/20th September, 1988 (Annexure-3) he was appointed as Maintenance Engineer (Aircraft). Pursuant to this appointment he sought voluntary retirement to discharge from the Indian Air Force which was accorded.

2.1 In his appointment letter (as contained in Annexure-3) following terms were mentioned:-

"4.PROBATION; Subject to the provisions of the Rules and Statutes, this appointment is made on Probation for a period of one year and till the necessary certificate for maintenance of the Institute aircraft are obtained , from the date of joining. However, the appointing authority shall have the power to extend the period of probation. The appointment will be confirmed on permanent basis,

after satisfactory completion of the probationary period."

5. DURATION; On confirmation after the period of probation and subject to satisfactory service thereafter, you shall be retained in the services of the Institute on a permanent basis. The age of retirement will be governed by the provisions of the Statutes in force."

2.2. Vide his letter dated March 17, 1989 the petitioner informed his Head, Aeronautical Engineering Department that he is preparing for A.M.I.E. Examination scheduled to take place in September, 1989. He was intimated vide Aaannexure-6 that his confirmation will be subject to his obtaining A.M.E. licence within a reasonable time. The petitioner made another communication vide Annexure-7. Vide Annexure-8 the Faculty Incharge- Flight Lab. I.I.T., Kanpur sought clarifications in regard to the examination for AME licence. Vide Annexure-9 the petitioner explained his position stating that he has not been informed about the acceptance and/or rejection of his examination form. Vide Annexure-10 the Dean Faculty Affairs, I.I.T., Kanpur informed the petitioner that his probationary period has been extended for a period of one year with effect from 4th November, 1989 on same terms and conditions ass contained in his appointment letter (Annexure-3). The petitioner vide Annexure-11 made another correspondence to the Dean Faculty explaining, interalia, that since there was no Chief Engineer at the relevant time to forward his examination from thus in relation to the examination held for September, 1989 Session the Civil Aviation Department did not consider his experience at I.I.T., Kanpur and that the results of March, 1990 Session is expected. Thereafter the impugned office order as contained in Annexure-12 was passed.

The Submissions :-

3. Sri Sidheshwari Prasad, the learned Senior Counsel appearing on behalf of the petitioner, contended as follows:-

(i) Under the advertisement the only requirement for the purposes of appointment of Maintenance Engineer was to be B. Tech. in Aeronautical or Mechanical Engineering which the petitioner undisputedly possessed and thus the subsequent imposition for obtaining 'necessary certificate for maintenance of the Institute of Aircraft' was wholly arbitrary, void besides unreasonable and impermissible for I.I.T.

(ii) Even assuming that this term was validly imposed on a bare perusal of the document as contained in Annexure-1, which is the Indian Air Force Trade Proficiency Certificate, it was/is crystal clear that the petitioner had special training in regard to maintenance and major repairs of HT 2 Gnat and Dakota Aircrafts thus the petitioner was possessing the necessary certificate for maintenance of, interalia, Dakota Aircrafts which are also a civil aircraft, thus his services were illegally not made permanent.

(iii) Issuance of a direction to obtain a licence for maintenance of institute aircraft repeatedly vide Annexures-4 and 6 for the reason already stated was void as in service jurisprudence it is well settled that imposition of any fresh term contrary

to and/or variance of the terms and conditions issued in the advertisement letter is not permissible.

4. The learned counsel appearing on behalf of the Respondents, on the other hand, contended as follows:-

(i) No wrong was committed in insisting the petitioner to obtain the certificate for maintenance of the institute aircraft, which apparently meant civil aircraft and not military aircraft, coupled with the additional fact that the petitioner himself went on applying for grant of more time so that he could obtain that certificate, the submission made by Mr. Prasad are not valid.
(ii) Unless the petitioner could have possessed that certificate in regard to airworthiness of any civil aircraft.
(iii) Consequently, this writ petition has got no merit and is liable to be dismissed.

Our Findings:-

5. It is not in dispute before us that Dakota aircrafts are not civil aircrafts though at times they are being used by the Indian Air Force. The Trade Proficiency Certificate granted by the Indian Air Force proves the factum that the petitioner had specialised training in maintenance and major repairs of HT 2, Gnat and Dakota Aircrafts. The advertisement in question laid down only one requirement for appointment as Maintenance Engineer (Aircraft), namely, that the applicant should be B. Tech. In Aeronautical or Mechanical Engineering. The petitioner possessed the required degree which is undisputed before us. Admittedly, the authorities of the Indian Institute of Technology, Kanpur after interview had selected him for appointment. The question, therefore, is as to whether the Respondents were justified in imposing additional terms while appointing him on probation vide Annexure-4. Our answer is a definite no. Such a requirement was not asked for at the time of making applications for appointment to the post in question. It was only after his selection in I.I.T. the petitioner sought voluntary retirement from I.A.F. The imposition of this term, being contrary to the Advertisement itself, the Respondents could not insist for production of such a licence by the petitioner even though he had prayed for grant of some time for production of such a licence for the reasons mentioned in his letters which have been brought on the record. As a necessary counter there was no justification for the Respondents not to consider the case of permanent appointment of the petitioner vide Annexure-12 rather in the backdrop aforementioned we are of the view that the petitioner was/is entitled to for consideration of his permanent appointment to the post in question.

6. In the result, the impugned order, as contained in Annexure-12, is quashed and the Respondents are directed to consider the case of the petitioner for the purpose of permanent appointment to the post in question objectively and in the light of the observations made in the proceeding paragraph. This writ petition is allowed with costs quantified to the extent of Rs.5,000/- only.

7. The office is directed to hand over a copy of this order within one week to Sri Pankaj Bhatia, the learned counsel for the Respondents for a follow up action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: 25.7.2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE D.R. CHAUDHARY, J.

Civil Misc. Writ Petition No.26568 of 2000

Smt. Suman Sinha ...Petitioner
Versus
Chief Justice, High Court, Allahabad and others ....Respondents

Counsel for the Petitioner:
Sri Anil Kumar Srivastava

Counsel for the Respondents:
S.C.
Sri Sunil Ambwani
Sri S.N. Srivastava
Sri Sudhir Agarwal

Article 226 of the Constitution of India- the benefits of destitute widow and children of Advocates who had died- U.P. Bar Council is a statutory body- law has been framed for the benefits of destitute widows- children of the Advocate who has died- U.P. Bar Council directed to consider the claim of such persons expeditiously.

Such widows who are unable to maintain themselves, can make a demand for maintenance from her parents.
Held (Para 12)
U.P. Bar Council, is a statutory body. It is required to act as per the provisions of the Act and the Rules. There cannot be any dispute that Law has been framed for the benefits of destitute widows and children of Advocate who had died.

By the Court

Following prayers have made in this writ petition by the petitioner Smt. Suman Sinha widow of Late Girish Shanker Sinha, Advocate, whose registration number was 169 of 1981, and who had died of heart attack on 16th July, 2000, as per the Death Certificate as contained in Annexure-1 :-

I. to issue a writ, order or direction in the nature of mandamus directing Hon'ble the Chief Justice and the Registrar of this Court (arrayed as Respondent nos. 1 & 2 respectively) to consider the application (as contained in Annexure-4) filed for her appointment against any post in this court in view of the proposal placed on 22.5.2000 before Hon'ble The Chief Justice by the President of High Court Bar Association of this Court at the time of his welcome address which he had also accepted.
II. to issue a writ, order or direction in the nature of Mandamus directing the Respondents to frame rules and law in the interest of the dependants of the deceased Advocates.
III. to issue a writ, order or direction in the nature of mandamus directing Respondent no. 3, the U.P. Bar Council, to pay immediately a sum of Rs.1,00,000/- under Accidental Insurance Scheme and Rs.50,000/- for which the dependants of every Advocate are entitled.

2. Respondent no. 4 is the High Court Bar Association, Allahabad, which has been sued through its President. Respondent no. 5 is the Union of India through Speaker, New Delhi. Respondent no. 6 is also the Union of India through its Central Law Minister, New Delhi.

3. In terms of order dated 2.6.2000 the petitioner has served Respondent no. 3. It further appears that the petitioner of

her own has also served Respondent no. 4 by sending a copy of the writ petition under postal certificate on 22nd June, 2000 (the postal seal is not clearly legible).

4. The petitioner claims to be a destitute widow and having children aged about 7 years, 6 years and 3 years to add to her misery, that there is none to support them who have become homeless and income-less, that she went to her parents first to have shelter and then to her sister who not being financially well provided shelter and food for some time, that Dying-in-Harness Rules providing employment, and not those of the registered Advocates who play an important part in the society, is arbitrary and violative of Article 14 of the Constitution of India inasmuch as they are violative of principles of natural justice amounting to an un-human conduct and hence this writ petition.

The Submission:-

5. Shri Anil Kumar Srivastava, learned counsel appearing in support of the prayers, contended that in the circumstances enumerated in the writ petition the reliefs prayedj for be granted. Under the Constitutional ethics and philosophy the State being a welfare State is required to act in favour of citizens and similarly situated persons, that it were the lawyers who during freedom struggle of the country had laid their lives, and are still playing a dominant role in the present social set up. Non framing of the rules by the Government for giving employment to the destitute widows and dependants of the deceased advocates, who are also called as 'Officers of the Court", is not only contrary to the doctrine of welfare but also violative of Articles 14 and 21 of the Constitution of India and that in not giving appointment to ;the petitioner Hon'ble the Chief Justice has also not acted fairly.

6. Shri Sudhir Agarwal, the learned Special Counsel for the Court representing Respondent nos. 1 and 2, on the other hand contended as follows:- (a) It being not the case of the petitioner that any statutory function has not been discharged by Respondents no. 1 & 2, the prayer for issuance of a high prerogative writ like mandamus is wholly misconceived and not tenable. (b) He has instructions to state that no promise was ever made by the previous Hon'ble the Chief Justice to the effect that an appointment will be given to any widow or dependant children of an Advocate nor does the existing rules contemplate such an appointment. (c) Accordingly, this writ petition be dismissed.

7. No-one has appeared on behalf the Respondent No. 4 nor does we see in the peculiar circumstances any justification for issuance of a notice to the High Court Bar Association.

8. Despite service of notice on it the Respondent no. 3 the U.P. Bar Council has not appeared to contest the claim of the petitioner though on our query Shri Amrendra Nath Singh, Advocate, who is also a member of the U.P. Bar Council, tried to assist us by taking a stand that if it is a fact that petitioner has approached the U.P. Bar Council then the latter is bound to pass appropriate orders as per the rules expeditiously.

Out Findings:-

9. Learned Counsel for the Petitioner referred to several judgments of

this Court wherein some observations have been made in relation to powers of the High Court which in our view do not apply to the facts and circumstances of the present case.

10. Learned counsel for the petitioner apparently failed to show us that in not appointing the petitioner Hon'ble the Chief Justice of this Court has violated any statutory rules or Act. As rightly pointed out by Shri Sudhir Agarwal, the learned counsel appearing on behalf of Respondents no. 1 & 2, the existing rules do not contemplate any provision for appointment of a destitute widow of a deceased Advocate of this Court. He went on to emphasize that even though the petitioner, from the submission made by her counsel, appears to be possessing a Graduate Degree, but she has not applied, despite advertisement made by this Court, for her appointment against any Class-III post and consequently there was no question for affording any opportunity to her to appear in the ensuing examinations which are going to be conducted for the purposes of filling up Class-III posts in terms of notice published earlier. Consequently, we see no force in Prayer no. 1 to issue the desired mandamus to Respondents nos. 1 & 2 and dismiss this writ petition as against Respondents nos. 1 & 2.

11. Now we come to the second prayer of the petitioner. The Courts have got inherent limitation in this regard. They cannot either legislate or command the appropriate legislature to take a policy decision in regard to the cause ventilated by the petitioner not only on her behalf but also for those persons who may become widows of the Advocates in future. The Law in this regard is clear. We feel ourselves handicapped in granting such a relief. The prayer for grant of relief no. 2 is thus rejected.

12. Now we come to the last prayer. Respondent no. 3, the U.P. Bar Council, is a statutory body. It is required to act as per the provisions of the Act and the Rules. There cannot be any dispute that Law has been framed for the benefits of destitute widows and children of Advocates who had died. Unfortunately Respondent no. 3 is un-represented. We do not want to embarrass Shri Amrendra Nath Singh, who of his own has taken a very fair stand before us which we have already noted. Since keeping pending this case against respondent no. 3 will not be in the interest of the petitioner herself, we dispose of prayer no. 3 with this direction to Respondent no. 3 that it will consider the claim of the petitioner with utmost expedition and pass in interim order, as per the law within 2 weeks from the date of receipt of a copy of this order from any quarter and final orders within 2 months therefore. In the ends of justice we direct the office to serve a copy of our order forthwith on Respondent no. 3 through a special messenger.

13. Before parting, we being the Apex Court of this State cannot remain a silent spectator. The record discloses that the petitioner is having parents. On her case she has no source of livelihood. There are ample provisions (See Mulla Hindu Law 17th Edition Vol. II pages 446-467) in the Statutes under which she can make a demand for maintenance from her parents through an appropriate court. Accordingly, we give liberty to the petitioner to file an appropriate application before an appropriate Court for claiming maintenance from her

parents and we hope and trust that if such an application is made, the same shall be taken up and appropriate orders will be passed immediately.

14. This writ petition is disposed of in terms aforementioned.

15. The Office is also directed to hand over a copy of this order within 3 days to Shri Sudhir Agarwal, learned counsel for the Court for its intimation to Hon'ble The Chief Justice.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2000

BEFORE
THE HON'BLE P.K. JAIN, J.

Second Appeal No. 1138 of 1997

Ghaziabad Development Authority, Ghaziabad through its Vice Chairman
...Defendant/Appellant
Versus
Sri Lajja Ram ...Plaintiff/Respondent.

Counsel for the Appellant :
Shri A.K. Mishra

Counsel for the Respondent :
Shri Rajeev Mishra.

A U.P. Urban Planning Development Act 1973- Section 14 (1)- Development charges on Development Area- means- the development carried out should be in accordance with the Master Plan or Zonal Development plan- requirement of permission by the State Government for constructing the Building beyond 3.5 FAR- not required.
Held- Para 8
The appellant has also failed to establish any such practice adopted by the appellant. As already pointed out above, it is not disputed that around the land of the plaintiff some builders have been permitted to raise constructions in 3.5. F.A.R. It is nowhere pleaded nor any evidence is produced by the defendant-appellant to show that such practice as suggested by Sri Misra was adhered to and sanction of the State government was obtained by the authority. As a matter of fact, in my opinion no substantial question of law is involved in this regard and the provisions of the Act are very much clear.
B U.P. Urban Planning Development Act 1973 Section-35 – Development Charges- can be charged by the authority only when the actual Development by construction of road, drain sever line, electricity supply has been made Development fee can be charged prior to sanction of Development plan by permitting to construct the building- fee charged should in uniformity.

Held- Para 13

Development area by construction of road, drain, sever line, electric supply and water supply lines. In the instant case there is no evidence on record that such development has been made by the appellant. However, during arguments it is conceded by the respondent that they are ready to pay the development fee probably for the reason that they have not pleaded in the plaint that no such development was carried out by the appellant in the area in question.

By the Court

1. Though the appeals were admitted by Hon'ble R.N. Ray, J (since retired) vide order dated 10.12.97 no substantial question of law were formulated. However, Sri A.K. Mishra, learned counsel for the appellant has pressed the two appeals on following substantial questions of law formulated by him in the memos of appeal:-

"1. Whether the appellant was only authorized to sanction the site plan for the construction of 1.5. F.A.R. The respondent admitted a site plan of which can only be passed after the Board of the appellant in its meeting approves it and sends its recommendation to the State Government and the State Government grants its permission, only then site plan of 3.5 F.A.R. of multistories can be passed. No request was made nor any application was given by the plaintiff/respondent that his case be placed before the Board of the appellant but view to the contrary taken by the appellant court is wholly ilegal and erroneous?

2. Whether as per the rules and regulations of the appellant the respondents are liable to pay development charges, internal developments charges and betterment charges to the appellant as the land in dispute is situated within the regulated area and as such before permitting constructions on a free hold land development charges etc. are charged as per the rules and regulations of the appellant but view to the contrary taken by the appellant court is wholly illegal and erroneous?"

2. In Second Appeal No 1139 of 1997 one more question raised is that the trial Court decreed the suit for allotment of certain lands to the plaintiffs-respondents on payment of consideration as directed by the Courts below. The decree is in the nature of specific performance of the contract. There was no agreement. Hence the said decree is without jurisdiction.

Since in both the appeals the questions raised are identical it would be convenient to decide both the appeals by a common judgment.

3. In suit no. 417 of 1997 the plaintiff alleged that he was owner in possession of land Khasra no. 126 admeasuring 3-4-0 bigha pucca khasra no. 125 admeasuring area 1-10-6 pucca bigha situated in village Makanpur Pargana Loni, Telsil Dadri district Ghaziabad. The name of the father of the plaintiff and the name of the plaintiff were recorded in the revenue records in various years. The defendant is interfering without right or title in the possession of the plaintiff and threatened to demolish the constructions made thereon. The plaintiff applied fir sanction of plan of multistories building but the defendant did not pass any order. The relief claimed was that by a decree of permanent injunction the defendant, its officials and officers be restrained from interfering in the peaceful possession of the plaintiff over the suit land and they also be restrained from illegally demolishing the constructions in the suit land. By a subsequent amendment a further prayer added was that by a decree of mandatory injunction they be directed to sanction the construction plan of 3.5 F.A.R. multistories building.

4. In suit no 509 of 1997 was filed by the plaintiffs-respondents in respect of khasra plot no 233 area admeasuring 1-13-0 pucca bigha, khasra plot no. 232 area admeasuring 0-13-0 pucca bigha, khasra plotno. 232 area admeasuring 0-13-0 and khasra plot no. 377/2 area admeasuring 1-13-0 pucca bigha with similar allegations and for the same relief. However, by subsequent amendment in the plaint another relief added was that by passing a mandatory decree the defendant be directed to allot 1378.71 square meter

land after accepting consideration of Rs.708/- per sq. meter and betterment charges at the rate of 1% of the sale consideration. The material allegations on which the said relief was added were that the defendant is developing the land in Kaushambi scheme. According to the development plan some of the roads, drainage, sewer etc. pass through the land of the plaintiffs. The defendant requires 447.22-sq. meter land of khasra no 377/2 and the defendant shall have to allot 1549.95-sq. land to straighten the land of the plaintiff. Like – wise for constructions of road, boundary wall of sub-stations the defendant needs 277.45-sq. meter of land and the plaintiffs need 1656.16-sq. meter of land for constructions of the building. After adjustment the plaintiffs will be given 1378.71-sq. meter land. The agreement in this respect was arrived at between the parties and the defendant shall have to pay Rs.708/- plus one percent betterment charges to the plaintiffs.

5. The defendants contested both the suits on various grounds. They had also taken the plea that the disputed land does not belong to the plaintiffs. In both the suits the trial Court recorded findings of fact that the land was not acquired by the defendant-appellant and the plaintiffs were owners and were recorded tenure-holders of the suit land. On the evidence of the parties the trial Court recorded a finding of fact that the defendants agreed to allot certain lands to the plaintiffs on the terms and conditions as stated above in the plaint in suit no. 509 if 1997 in lieu of land acquired by the defendant-appellant for the purposes of development of its won land. The trial Court also held that the plaintiffs were entitled to sanction of 3.5 F.A.R. land for construction of multistories building. The trial Court therefore, decreed both the suits. The lower appellate Court affirmed the findings of fact recorded by the trial Court. Aggrieved by the judgments and decrees passed by the courts below the appellant Ghaziabad Development Authority has filed these two appeals.

Heard Sri A.K. Mishra, learned counsel for the appellant and Sri Rajiv Mishra, learned counsel for the respondents in both the appeals.

Findings on Question No.1 :

6. The case of the plaintiff-respondents was that the plaintiff intended to construct multistories building on his land and he had applied for permission to construct 3.5 F.A.R. multi-stories building. Such an application in the prescribed form and complying with all formalities was moved on 14.6.95. The plaintiff's further case is that the development authority the appellant neither refused the permission nor granted permission. On consideration of the evidence adduced by the authorities the trial court recorded a finding of fact that the plaintiff-respondent submitted application for permission to construct multi-stories building in 3.5 F.A.R. on 14.6.1995. The defendant did not grant the permission even after expiry of six months period. IT was also held that the permission was also not refused by the defendant-appellant. The defendant-appellant's case appeared to be that for grant of permission for construction of multi-storied building in 3.5 F.A.R. the sanction of Government was necessary. It is admitted that around this land in question the authority has granted permission t various builders to construct

multi-storied building in 3.5 F.A.R. No copy of sanction from the State Government in such cases has been filed. The sole question, therefore, is whether sanction of the state government for construction of a building in 3.5 F.A.R. was necessary or not and if so what was its procedure.

7. Submission of Sri A.K. Mishra is that it has been the practice of the appellant to obtain sanction from the State government where permission to construct multi-storied building in 3.5 F.A.R. is sought. On the other hand, Sri Rajiv Mishra, learned counsel for the respondent has vehemently submitted that there is no rule or bye-law framed by the authorities providing for such sanction from the State government. Despite sufficient opportunity being granted Sri A.K. Mishra, learned counsel for the appellant has not been able to refer to any provision of law or bye-law or rules framed under the U.P. Urban Planning and Development Act whereby sanction of the state government is necessary for granting permission to construct a building beyond the height of 1.5 F.A.R.

8. Section 14 (1) of the U.P. Urban Planning and Development Act, 1973, (hereinafter called the Act) provided that after the declaration of any area as development area under Section 3, no development of land shall be undertaken or carried out or continued in that area by any person or body (including a department of Government) unless permission for such development has been obtained in writing from the Vice Chairman in accordance with the provisions of this Act. The term development has been defined in Section 2 (e) of the Act which provided that 'development' with its grammatical variations, means the carrying out of building, engineering, mining or other operations in, over or under land, or the making of any material change in any building or land, and includes re-development. Therefore, the carrying out of building operations over any land within development area amounts to development, Section 14 (1) specifically provided that permission to make such development by carrying out building operations over the land shall be granted in writing by the Vice Chairman. This provision does not admit of any exception. It does not limit the powers of the Vice Chairman and does not provides as upto what height the permission development can be granted by the Vice Chairman and beyond that the sanction of the state government was necessary. There is of-course Section 10 of the Act which provided that every plan shall be submitted by the authority to the state government for approval and the State government may either approve the plan without modification or with such modifications as it may consider necessary or reject the plan with directions to the authority to prepare a fresh plan according to such directions. However, this provision applies only to master plan and the zonal development plans only and not to the plans for constructing a building in the development area. Sub Section (1) of Section 10 specifically provided that in this Section and in Sections 11,12,14 and 16 the word 'plan' means the master plan as well as the zonal development plan for a zone. Sub Section 14 does not speak of any plan; it only speaks of permission for development when such development is undertaken, carried out or continued in the development area by any person or

body of persons. This Sub-section (2) of Section 14 which speaks of plans and provided that after coming into operation of any of the plans in the development area no development shall be undertaken or carried out or continued in that area unless such development is also in accordance with such plan which means that the developments carried should be in accordance with the master plan or zonal development plan. No plan or permission for development by carrying out building activities could be permitted by the Vice Chairman if same is in contravention of the master plan or the zonal development plan. Before the lower appellate court, an argument was advanced on behalf of the appellant that the defendant appellant is not authorised to sanction the site plan 3.5 F.A.R. multi-storied building and such power vests in the Board/the Government. The lower appellate court rejected this contention and held that the plaintiff was not required to obtain any sanction from the Board or State Government. The learned counsel for the appellant has not been able to point out or show any provision of law, bye-law or regulation framed under the Act whereby the defendant-appellant was bound to refer the matter to State Government where the sanction for constructing a building beyond 1.5 F.A.R. was required. The appellant has also failed to establish any such practice adopted by the appellant. As already pointed out above, it is not disputed that around the land of the plaintiff some builders have been permitted to raise constructions in 3.5 F.A.R. It is nowhere pleaded nor any evidence is produced by the defendant-appellant to show that such practice as suggested by Sri Mishra was adhered to and sanction of the State Government was obtained by the authority. As a matter of fact, in my opinion no substantial question of law is involved in this regard and the provisions of the Act are very much clear.

Findings on question No.2:

9. In the plaint in Suit No.509 of 1997 it was pleaded by the plaintiff in para No.4 that the plaintiff has deposited the required fee with the defendant for grant of permission to construct building in 3.5 F.A.R. but the defendants are illegally demanding development charges to which they are not legally entitled since the plaintiff is himself intending to carry out development of his own land. The defendant in para No.11 of the written statement in Suit No.509 of 1997 took a plea that the construction plan cannot be sanctioned without deposit of development charges since the land in question is situated in regulated area. No such plea was taken either in the plaint or in the written statement in Suit No.417 of 1997, therefore, the question raised herein is raised only in Second Appeal No.1139 of 1997. Such question cannot be raised in Second Appeal No. 1138 of 1997 for want of pleading by the parties and if the courts below have dealt with it, while deciding suit No. 417 of 1997 it is decided beyond jurisdiction. So far as Suit No. 509 of 1997 is concerned, this question appears to have been dealt by the trial court while deciding issue no.2. The trial court has held that the attention of the court was drawn by the plaintiff towards Section 35 of the U.P. Urban Planning and Development Act, 1973, which provided for payment of betterment charges only where the development is carried out by the development authority. The court, however, observed that since the plaintiff has expressed his intention to develop his

land himself he was not bound to pay development charges; he was simply bound to pay betterment charges. This question does not appear to have been dealt with by the lower appellate court even though in ground No. 6 the appellant has specifically challenged the finding of the trial court in this regard.

10. Sri A.K. Mishra, learned counsel for the appellant has referred to Sub-Section (2-A) of Section 15 of the Act which provided as follows:

11. The authority shall be entitled to levy development fees, mutation charges, stacking fee and water fees in such manner and at such rates as may be prescribed.

Provided that the amount of stacking fees levied in respect of an area which is not being developed or has not been developed, by the authority, shall be transferred to the local authority within whose local limits such area is situated.

Proviso (3) to sub section (3) of Section 15 also further provides that before granting permission referred to in Section 14, the Vice Chairman may get the fees and charges levied under Sub section (2-A) deposited. In view of the proviso quoted herein before it is clear that before grant of permission under Section 14 (1) the Vice Chairman of the development authority is well authorized to get the fees and charges levied under Sub-section (2-A) deposited, Sri Rajiv Mishra has, however, pointed out that the plaintiff had applied for grant of permission in the year 1995 whereas provisions of Sub-section (2-A) of Section 15 and proviso (3) to Sub-Section (3) of Section 15 were introduced in the Act by U.P. Act No.3 of 1997.

12. The U.P. Urban Planning and Development Act was amended by U.P. Act 3 of 1997 by which Sub Section (2-A) of Section 15 and proviso to Sub-Section (3) as pointed out above were introduced. The amending Act received the assent of the Governor on May 1, 1997 and was published in U.P. Gazette extra ordinary on 2nd May, 1997. The amending Act does not provide for retrospective operation of the amended provision of the Act, However, admittedly the sanction has not been granted by the appellant till today. Since now there is a provision under Section 15 of the U.P. Urban Planning and Development Act with regard to the authority of the appellant to levy development charges and to compel the plaintiff-respondent to deposit the same before sanction for carrying out development by building activities is granted, the plaintiff-respondent is bound to deposit such development fee as may be imposed. It may not be out of place to point out here that in Section 2 of the Act clause (ggg) was introduced by the amending Act which defined the development fee. This clause provided that the "development fee means the fee levied upon a person or body under Section 15 for construction of road, drain sewer line, electric supply and water supply lines in the development area by the development authority."

13. In view of the above definition of development fee, the same can be levied by the appellant only when development is carried out in the development area by construction of road, drain, sewer line, electric supply and water supply lines. In the instant case

there is no evidence on record that such development has been made by the appellant. However, during arguments it is conceded by the respondent that they are ready to pay the development fee probably for the reason that they have not pleaded in the plaint that no such development was carried out by the appellant in the area in question. Sri Rajiv Mishra, has however, pointed out that the appellant is charging development fee at the of Rs. 100/- per sq. yard which fact was conceded by the appellant. In the case of Ghaziabad Shiromani Sahakari Avas Samiti Ltd. and others Vs. State of U.P. and others (1990-1) Supreme Court Cases 583. He has referred para 9 of the judgment which reads as follows:

"It has been agreed that the development charges for the sewerage, electricity, road connections and the like shall be provided by the development authority at the rate of Rs. 100/- per sq. yard and internal development shall be done by the societies themselves in raising the construction, the bye-laws and regulations of the development authority shall be strictly followed. We hope and trust that the development authority shall extend its cooperation in every manner to the societies to effectuate the directions made by us………"

It has been submitted by Sri Mishra that from a number of builders the development fee has been charged at the above rate. Sri A.K. Mishra has, however, pointed out that there is no material on record to substantiate the argument of the learned counsel for the respondent. It may be observed here that the appellant being a body of the government constituted to carry out the purpose of enacting of the Act would maintain uniformity in charging development charges from various persons/bodies carrying out development activities by constructing buildings. In case from other builders/developers of the land the development fee has been charged at the rate of Rs. 100/- per sq. yard, there is no reason why the appellant should charge higher development fee from the plaintiffs-respondent especially when the plaintiff-respondent has categorically pleaded that it intends to carry out internal development by himself.

14. In view of the discussions made above, it is held that the appellant is entitled to charge development fee before sanctioning the development plan by permitting to construct the building. However, such fee shall be charged uniformly as pointed out above.

15. The findings of the courts below that the authority is entitled only to levy betterment charges is set aside for the reason that the betterment charges are levied by the authority only when as a consequence of any development scheme executed by the authority in any development area, the value of any property in that area has increased due to the benefits of the development. In the instant case there is no evidence to the effect that the value of the land due to the activity of the development in the area has increases. Besides this, the authority under Section 15(2-A) is a entitled to levy development fee, staking charges, water fee and mutation charges only before grant of permission to carry out development activities by constructions. Further in the instant case the development charges are being claimed by the appellant, therefore, the betterment

charges cannot be directed to paid by the plaintiff-respondent.

Findings on Question NO.3 in Second Appeal No. 1139 of 1997:

16. The trial court in Suit No. 509 of 1997 recorded a finding of fact on consideration of the evidence of the parties that the defendant-appellant requires 447.22 Sq. meters in plot No. 377/2 of the plaintiff for construction of road. Similarly in Khasra Nos. 232 and 233 the defendant-appellant requires 277.45 sq. meters of land belonging to the plaintiff-respondent for purposes of construction of road and boundary wall of sub-station. On perusal of the proceedings of the authority which were produced by D.W. 1 appearing o behalf of the defendant-appellant the court also recorded a finding of fact that an agreement was arrived at between the parties to transfer the aforesaid land by the plaintiff to the defendant and in lieu thereof the defendant agreed to compensate the plaintiff by providing some land in the development area at the rate of Rs.708/- pert sq. meters. This finding of fact has been affirmed by the lower appellate court and both the courts have passed the decree in this regard. The argument of Sri A.K. Mishra, learned counsel for the appellant is that specific performance of the contract cannot be granted by the trial court in the absence of any such agreement. In the written statement, it has been pleaded that there was no legal agreement between the parties in this regard. However, it is not specifically denied that the defendant wanted part of the land from plot nos. 377/2, 232 and 233 belonging to the plaintiff. In the written statement the ownership of the plaintiff of the aforesaid plots was denied. The finding of the courts below is against the defendant-appellant, which is not challenged in this appeal, D.W.1 Ashok Kumar on the other hand, admitted during cross examination that the development authority needs 447.22 sq. meters of land of Khasra plot No. 377/2 for purposes of construction of road and similarly the defendant requires 277.45 Sq. meters of land of plot nos. 232 and 233 for purposes of construction of road and boundary wall of sub-station. Admittedly, such land has not been acquired by the development authority viz. the appellant. Considering the evidence of the defendant which was in the form of statement of D.W.1 and which is based upon the entries in the proceedings book, courts below held that there to an agreement between the parties for transfer of land. There are findings of fact and in my view no substantial question of law involved. The concurrent findings of fact arrived at by the courts below cannot be assailed in Second Appeal.

17. In view of the discussions made above, both the appeals are partly allowed and decree passed by the courts below is modified to the extent that the appellant is entitled to levy development charges before sanctioning the development plan by building activities by the plaintiff. The defendant, therefore, shall serve a notice within 15 days from today upon the plaintiff-respondent to deposit the development fee within the period provided in the notice, which the plaintiff-respondent shall deposit within the stipulated period and thereafter the defendant shall grant permission and sanction the development plan as decreed by the courts below.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: AUGUST 7, 2000

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

Civil Misc. Writ Petition No. 858 of 1995

M/s Swarup Industries and another ...Petitioners
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioners:
Sri Bharat Ji Agarwal

Counsel for the Respondents:
S.C.

Section 3-G of U.P. Trade Tax Act- the section 3-G does not expressly mention that form III D has to be issued by the Government department to the seller, but in our opinion this duty is clearly implied by section 3-G.

Section 3-G imposes a duty on the government department to issue form III-D to the seller whenever sales are made to it.

Held- para 14 and 16)

A power is often coupled with an implied duty and such duty can be enforced by a mandamus.

The writ petition is hence allowed and a mandamus is issued to the respondents 3 to 5 to issue forms III-D to the petitioner for the relevant assessment years.

By the Court

1. Heard Sri Bharatji Agarwal learned counsel for the petitioner and the learned Standing Counsel.

2. The petitioner no. 1 is a registered partnership firm of which petitioner no. 2 is one of the partners. The petitioner no. 1 is a registered under both U.P. and Central Sales Tax Act. The petitioner firm is carrying on the business of manufacture and sale of R.C.C. Spun Pipes and Collars etc. These goods are manufactured and sold by the petitioner to various government departments including the Public Works Department, Sharda Nahar Samadesh, Lucknow and also to the Chief Development Officer Bareilly/ Lakhimpur-Kheri/ Shahjahanpur/ Moradabad.

3. For the relevant assessment years 1990-91 to 1993-94 the petitioner sold the R.C.C. Spun Pipes and collars manufactured by them to various government departments. In all the invoices/bills raised by the petitioner against these government departments it is mentioned that the sales are against form III-D. Since the petitioner made sales to Government Departments it charged concessional rate of tax at the rate of 4% plus surcharge. In paragraph 7 of the petition it has been held that the petitioners have been writing regularly to all these government departments to which it made sales including the departments of respondents 3 to 5 to issue form III-D but in spite of the best efforts forms III-D were not given by the Departments of respondents 3 to 5. A summary list of sales made by the petitioner in the State of U.P. for the relevant assessment years against form III D has been annexed as Annexure1 to the writ petition. The petitioner sent several reminders to the Departments of respondents 3 to 5 but despite that form III D were not issued to the petition.

4. In this connection reference may be made to Section 3-G(1)j of the U.P. Trade Tax Act which reads as follows:

"3-G Special rate of tax on certain sales
(1) Notwithstanding anything contained in section 3-A or section 3-D or Section 3-F and subject to the provisions of sub-section (2) and such conditions and restrictions, if any, as may be specified by the State Government, by notification, tax on the turnover of sales of goods to a department of the Central Government or of a State Government or to a Corporation or undertaking established or constituted by or under a Central Act or an Uttar Pradesh Act, or to a Government Company as defined in section 617 of the Companies Act, 1956 (not being a Nagar Nigam, Nagar Palika Parishad, Zila Panchayat, Nagar Panchayat, Cantonment Board, a University or an educational institution or an institution managed for the time being by an authorised controller) shall , if the dealer furnishes to the assessing authority a certificate obtained from such department or a declaration obtained from such Corporation, Undertaking or Company in such form and manner and within such period as may be prescribed, be levied and paid at the rate for the time being specified in sub-section (1) of section 8 of the Central Sales Tax Act, 1956, or at such rate as the State Government may, by notification, specify in relation to any sales, unless the goods are taxable under any other section of this Act at a rate lower than the said rate."

5. The above provision indicates that when a person makes sale to a government department it is entitled to get form III-D.

Section 8-A (2-b) of U.P. Trade Tax Act states as follows:
"Where trade tax on sale of goods is payable on any turnover by a dealer (including a commission agent or any of the persons mentioned in the explanation to clause (c) of Section 2 registered under this Act, such a dealer may recover an amount, equivalent to the amount of trade tax on sale of goods payable, from the person to whom the goods are sold by him. Whether on his own behalf or an behalf of his principal."

6. The above provision indicates that when trade tax is payable by a dealer it can recover the amount from the person to whom goods are sold. Since sales were made to the government departments which were covered by Section3-G the petitioner can realise the tax only at the rate of 4% plus surcharge, since all such sales were made against form III-D, which were to be supplied by the departments of respondents 3j to 5 to the petitioner.

7. In paragraph 14 and 15j of the writ petition it is alleged that in view of Section 15-A (1) (qq) of U.P. Trade Tax Act the petitioner could not have realised tax from these department in excess of three times of the tax in excess of 4% other wise the petitioner would have been liable to penalty to the extent of three times of the tax in excess of 4%. In paragraph 17 of the writ petition it is alleged that the petitioner made several reminders to the departments concerned to issue form III-D to the petitioner but the same were not issued, with the result that a huge illegal liability is being created against the petitioner by the Trade Tax Officer, Sector 3, Bareilly, respondent no. 2, True copies of the

reminders are annexed as Annexures 2, 3 and 4 to the writ petition. In paragraph 19 of the writ petition it is alleged that despite these reminders neither forms III-D were supplied nor any reply sent by these Departments. In paragraph 20 of the writ petition it is alleged that in view of non-issuance of form III-D a huge illegal liability has been created against the petitioner for the assessment years 1990-91 to 1993-94. In paragraph 21 of the writ petition it is alleged that petitioner has filed appeal against the assessment order but the appellate authority is not admitting the appeal unless the tax assessed on account of non-furnishing of forms III-D is deposited by the petitioner which the respondent no. 6 is treating as the admitted tax for the purpose of filing of ;the appeals.

8. Learned counsel for the petitioner has relied on the decision of this Court in M/s Tracto Auto Industries Pvt. Ltd. vs. Union of India and others 1991(1) UPTC 241 where it has been held that there is statutory obligation cast upon the purchasing dealer to issue the declaration forms to the selling dealer where the purchases were made against form III-B. He has also relied on the decision in M/s G.G. Industries Pvt. Ltd. vs. Union of India 1994 (2) UPTC 1032 and on the decision of M/s Garg Plastics, Kanpur vs. Pradeshiya Co-operative Dairy Federation Ltd. 1995 UPTC 513 to the same effect. Copies of these judgments have been annexed as Annexure 5,6 and 7 to the writ petition. In M/s Huma Pipes vs. State of U.P., writ petition no. 857 of 1995 decided on 11.7.1997 a division bench of this Court directed that forms III-D be issued to the petitioner in respect of sales to government departments.

9. A counter affidavit has been filed and in paragraph 6 of the same it has been alleged that assessee could have charged the standard rate of tax from government departments who had not issued form III-D. In paragraph 10 of the counter affidavit it is alleged that in the absence of form III-D the tax liability as ascertained by the assessing authority is correct.

10. A rejoinder affidavit has been filed. In paragraph 3 of the rejoinder affidavit it is stated that respondent no. 4 the Chief Administrator, Sharda Nahar Samadesh Lucknow has issued forms III-D after the filing of the present writ petition when notices were served on respondent no. 4 as per the list enclosed as Annexure C.A. 1 to the counter affidavit. However, in respect of sales made by the petitioner during the assessment year 1990-91 the respondent no. 4 has not issued form III-D to the petitioner. A complete list of the bill number, date and the sales made to the respondent no. 4 during the assessment year 1990-91 is Annexure R.A. 1 to the rejoinder affidavit.

11. As regards respondents 3 and 5 it is alleged in paragraph 4 of the rejoinder affidavit that they have not issued the requisite forms III-D for the assessment year 1990-91j to 1993-94. No counter affidavit has been filed on behalf of the respondents 3 and 5, and they have not issued form III-D to the petitioner so far. The petitioner did not realise any tax in excess of 4% from respondents 3 and 5 since they were sales to government departments. A complete list of sale made by the petitioner to the respondent no. 5 giving the full details is Annexure R.A,3.

12. In our opinion, the stand taken by the respondent in the counter affidavit is wholly misconceived and not valid. When a sale is made to a Government department in our opinion form III-D has to be issued to the selling dealer in view of section 3 G. This is a statutory duty and in our opinion the ratio of the decisions in M/s Tracto Auto Industries Pvt. Ltd. (Supra), M/s G.G. Industries Pvt. Ltd. (supra) and M/s Garg Plastics (supra) and M/s R.S. Huma Pipes (supra) squarely apply to the facts of the present case also.

13. No doubt section 3-G does not expressly mention that form III-D has to be issued by the government department to the seller, but in our opinion this duty is clearly implied by section 3-G. In modern Proteins Ltd. vs. Food Corporation of India, 1983 (52) S.T.C. the Andhra Pradesh High Court held that even though there is no express provision imposing a statutory obligation upon the Food Corporation to issue form C there is an implied obligation to issue such forms. The Court held 'when the Act envisages that only a tax of 4% is leviable in the case of inter State Sales and not 10% under the A.P. General Sales Tax Act, and entitles the registered dealer to pay this concessional rate of tax and prescribes the mode by which he can claim the concessional rate, it could not have been the intention of the legislature to defeat this provision at the sweet will and pleasure of the purchaser of the goods.' We are in respectful agreement with this decision.

14. Similarly, in *Hirdey Narain vs. I.T.O.* A.I.R. 1971 S.C. 33 the Supreme Court observed; If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right- public or private- of a citizen'. The Supreme Court relied on the decision of the House of Lords in Julius vs. Bishop of oxford (1980) 5 A.C. 214 for the proposition that a power is often coupled with an implied duty, and such duty can be enforced by a mandamus. This view has also been taken by the Supreme Court in Comptroller and Auditor General of India vs. K.S. Jagannathan, AIR 1997 SC 537.

15. Hence in our opinion section 3-G imposes a duty on the government departments to issue form III-D to the seller whenever sales are made to it.

16. The writ petition is hence allowed and a mandamus is issued to the respondents 3 to 5 to issue forms III-D to the petitioner for the relevant assessment years as prayed for within one month of production of a certified copy of this order before the authority concerned.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.9.2000

BEFORE
THE HON'BLE J.C. GUPTA, J.
THE HON'BLE U.S. TRIPATHI, J.

Criminal Misc. Writ Petition No. 310 of 2000

Km. Meenakshi Agarwal and Others ...Petitioners
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri V.P.Srivastava
Sri K.D. Tiwari

Counsel for the Respondents:
AGA
Sri S.K. Kautilya
Sri Samit Gopal
Sri G.S. Chaturvedi

Article 226 of the Constitution of India- quashing of F.I.R. – where the allegations in the F.I.R. taken at the face Value and accepted in entirety do not constitute any cognizable offence the F.I.R. and the investigation thereon may be quashed. Upon consideration of relevant materials if the Court is satisfied and no offence is disclosed, it will be the duty of Court to interfere with the investigation so that alleged accused may not be unnecessarily subjected to harassment and humiliation.

The State Govt. has the power the rescind the order by which investigation may have been entrusted to the C.B.C.I.D. and such a power can be exercised at any subsequent state." Held (Para 30)
Held – (Para 30)

The police will not arrest simply because F.I.R. has been lodged against petitioners of writ petition no. 310 of 2000 and 1741 of 2000 and police will resort to the power of arrest when allegations made in the F.I.R. are found genuine or credible evidence/material is collected against petitioners regarding commission of offence.

<u>By the Court</u>

1. Common questions of law and facts are involved in above writ petitions and therefore, all the above writ petitions are taken up together for disposal for which the learned counsel for the parties have no objection.

2. Brief facts of the case giving rice to above writ petitions are as below:

Late Karmendra Narain Agarwal husband of Smt. Shashi Agarwal and father of Km. Meenakshi Agarwal and Manoj Narain Agarwal owned some property known as Prag Agricultural Farm Gokul Nagar, P.S. Kichha, District Udham Singh Nagar. D.S. Sirohi, R.K. Yadav, Hanspal and Munna Lal were employees of Late Kamrendra Narain Agarwal, who managed the property owned by him. Km. Meenakshi Agarwal also owned a theatre known as Meenakshi Theatre, Ram Ghat Road, Aligarh. On the death of Karmendra Narain Agarwal some dispute regarding property of the said Farm arose between widow on one side and son and daughter on the other side. Civil and revenue litigations were also going on between the a parties including testamentary suits, which are pending in various Courts.

3. On 4.11.1999 at about 9.30 P.M., R.K. Yadav along with 40 more persons allegedly raided the house of Km. Meenakshi Agarwal Quarrel took place and it is alleged that R.K. Yadav sustained injuries in it. Km. Meenakshi Agarwal lodged report of the said occurrence on said date at 10.30 P.M. at P.S. Kichha, district Udham Singh Nagar, which was registered at case crime no. 960 of 1999 under Sections 147, 148, 140, 452,323, 427, 506, 307 and 326 I.P.C. Manoj Narain Agarwal also lodged report of the said occurrence on 5.11.1999 at 2.10 P.M. at P.S. Kichcha against six person including Meenakshi Agarwal, D.S. Sirohi, R.K. Yadav, Hanspal and Munna Lal at P.S. Kichcha, on the basis of which a cross case at crime no. 960-A

of 1999 under Sections 147,148,149,307, 504 and 506 I.P.C. was registered. Both the cases were being investigated by the local police and the police submitted charge sheet in case crime no. 960 of 1999 against 41 persons. However, the police submitted final report on 29311.1999 in cross case crime no. 960-A of 1999, which was sent to Senior Prosecuting Officer for scrutiny.

4. In the meantime, Manoj Narain Agarwal filed writ petition no. 7230 before this court for transfer of investigation of case crime no. 960 of 1999 and 960-A of 1999 from Superintendent of Police, Udham Singh Nagar to any other agency not under his control as fair and impartial investigation was not possible by the local police. The above writ petition was finally disposed of on 1.12.1999 by a Division Bench of this Court with the observation that it would be proper if the matter is looked into by the D.I.G. (Kumaun Region), Udham Singh Nagar, Nainital, who will ensure that fair and impartial investigation of the cross cases is conducted by the agency other than named above.

5. In view of above order dated 1.12.1999 the final report submitted in case crime no. 960-A of 1999 was returned back and it was directed that the matter be investigated afresh by another officer and the matter is being investigated by another officer. Apprehending heer arrest Km. Meenakshi Agarwal, D.S. Sirohi, R.K. Yadav, Hanspal and Munna Lal filed writ petition no. 310 of 2000 for issue of a writ, order or direction in the nature of certiorati quashing the F.I.R. in case crime no. 960-A OF 1999 under Sections 147, 148, 149, 307, 504 and 506 I.P.C., P.S. Kichha, District Udham Singh Nagar with interim prayer for staying their arrest in the said case mainly on the ground that the police had submitted final report in the said case and there was no occasion for its reinvestigation. In the said writ petition no. 310 of 2000 filed by Km. Meenakshi Agarwal and others this Court, vide order dated 19.1.2000 issued notice to respondent no. 3 for filing counter-affidavit and directed the learned A.G.A. to file counter-affidavit on behalf of respondents no. 1 and 2 and in the meantime it was directed that though the investigation of the case shall go on, the arrest of the petitioners in case crime no. 960-A of 1999 shall remain stayed. Smt. Shashi Agarwal also filed writ petition no. 1741 of 2000 for issue of a writ, order or direction in the nature of certiorari quashing the First Information Report in case crime no. 960-A of 1999 lodged against her with an interim prayer for staying her arrest in the said case, which was ordered to be connected with writ petition no. 310 of 2000.

6. Thereafter, Km. Meenakshi Agarwal moved an application to the Chief Secretary, U.P. and also to Director General Police, U.P. Praying that investigation of case crime no. 960-A of 1999 be directed to be investigated by C.B.C.I.D. Since no order was passed on her above application and she was apprehending that local police and the D.I.G. (Kumaun Range) would not investigate the case fairly and properly as they were under influence of local M..L.A., she filed writ petition no. 1743 of 2000 for issue of a writ, order or direction in the nature of mandamus directing the State of U.P. to direct investigation of case crime no. 960-A of 1999 P.S. Kichha, District Udham Singh

Nagar Nainital by C.B.C.I.D. The said writ petition was also directed to be connected with writ petition. 310 of 2000.

7. On the application of Km. Meenakshi Agarwal dated 3.4.2000 praying that the matter may be directed to be investigated by C.B.C.I.D., the State Government, vide order dated 6.4.2000 directed the case crime no. 960-A of 1999,P.S. Kichha, District Udham Singh Nagar (Nainital) to be investigated by C.B.C.I.D.. Thereafter, the State Government reconsidered the order dated 6.4.2000 and vide order dated 11.5.2000 transferred the investigation from C.B.C.I.D. to local police by recalling order dated 6.4.2000 and therefore investigation was handed over from C.B.C.I.D. to local police again. In pursuance of the order dated 19.5.2000 local police took up the matter and started investigation, Smt. Shashi Agarwal filed writ petition no. 2996 of 2000 for issue of a writ, order or direction in the nature of certiorari quashing the order dated 11.5.2000 passed by the State of U.P. and a writ of mandamus directing the C.B.C.I.D., to investigate the case and submit report in case crime no. 960-A of 1999. In the said writ petition notices were issued and in the meantime, the arrest of petitioner (Smt. Shashi Agarwal) was stayed in case crime no. 960-A of 1999 till the next date of listing or until submission of charge sheet, which so ever. was earlier, vide order dated 4.7.2000. Thereafter, Manoj Narain Agarwal filed another writ petition no. 3848 of 2000 challenging the order dated 19.5.2000 for issue of a writ, order or direction in the nature of mandamus commanding the respondents of said writ petition, the State of U.P., Secretary Home Department, U.P. Lucknow and D.I.G. Police Kumaun range not to interfere in the smooth and fair investigation being conducted under the direction of this Court by order dated 1.12.1999 except in accordance with law or prior permission of the Court and directing the D.I.G. Police Kumaun range (respondent no. 4) to get the investigation concluded within stipulated period as deemed fit and proper by this Court mainly on the ground that he came to know that by order dated 5.6.2000 the Under Secretary Home has directed that the investigation be done jointly by the C.B.C.I.D. and local police and on the application of D.I.G. Kumaun range respondent no. 4 had requested State Government to form a team of C.I.D. officers to help the local police in the investigation of the two cases, case crime no. 960 of 1999 and 960-A of 1999 and Km. Meenakshi Agarwal was trying to get the investigation transferred in spite of the specific order of this Court dated 1.12.1999 by concealing the fact and during pendency of writ petition no. 1743 being filed for the same prayer

8. Counter –affidavits and rejoinder-affidavits were filed by the parties,

9. We have heard Sri G.S. Chaturvedi, Senior Advocate appearing on behalf of Manoj Narain Agarwal and Sri V.P. Srivastava, learned counsel appearing on behalf of Km. Meenakshi Agarwal and Smt. Shashi Agarwal at great length and have perused the record.

10. The first question, which crops up for determination is whether the F.I.R. lodged in case crime no. 960-A of 1999 is liable to be quashed?

11. A perusal of F.I.R. in case crime no. 960-A of a1999 under Sections 147, 148, 149, 307, 504 and 506 I.P.C. P.S. Kichha, district Udham Singh Nagar shows that it discloses commission of cognizable offence. The contention of Sri V.P. Srivastava, Advocate was that the above F.I.R. was a counter blast of case crime no. 960 of 1999 lodged by Km. Meenakshi Agarwal against Manoj Narain Agarwal and others and no such occurrence had taken place and that the above F.I.R. was malafide.

12. The scope of interference by this Court either in the exercise of extraordinary power under Article 226 of the Constitution or its inherent power under Section 482 Cr.P.C. with the investigation of a cognizable offence has been examined in a number of decisions of the Hon'ble Supreme Court as well as of different High Court and this Court in Full Bench decision in Satya Pal & others vs. State of U.P. and others, 2000 (40) ACC 75, and it was held by the Full Bench that it has been consistently held that (where the allegations in the F.I.R. taken at the face value and accepted in entirety do not constitute any cognizable offence the F.I.R. and the investigation thereon may be quashed.) It also quoted the guide lines by way of illustrations given by Apex Court in the case of State of Haryana & others vs. Chaudhary Bhajan Lal & others, 1991 (28) ACC,III (SC) and other cases of the Apex Court and concluded that on the basis of the allegations made in the F.I.R. and on a consideration of the relevant materials if the Court is satisfied that an offence is disclosed, the Court normally will not interfere with the investigation unless there is strong grounds or compelling reasons requiring interference in the interest of justice. However, (upon consideration of relevant materials if the Court is satisfied and no offence is disclosed, it will be the duty of Court to interfere with the investigation so that alleged accused may not be unnecessarily subjected to harassment and humiliation).

13. Perusal of F.I.R. of case crime no. 960-A of 1999 under Sections 147, 148, 149, 307, 504 and 506 I.P.C. (Annexure no. 3 to writ petition no. 1741 of 2000) shows that there is specific allegation that on 4.11.1999 at about 8 P.M. threats was extended to the complainant on his mobile phone and when the complainant reached near the gate of Farm on his Safari Car indiscriminate firing was made on him and he sustained pellet injury and thereafter his vehicle was dis-balanced and persons of Meenakshi Agarwal caused injuries on him. Thus, the above F.I.R. discloses commission of cognizable offences. Whether such occurrence took place or not is to be decided by the Trial Court concerned on the basis of evidence of the parties. Truthfulness of the allegations and the establishment of the guilt can only take place when the trial proceeds without any interruption. As held by the Apex Court in the case of State of Maharashtra vs. Ishwar Piraji Kalpatri and others, 1996 SCC (Crl.) 150, at the stage of quashing a first information report or complaint the High Court is not justified in embarking upon an enquiry as to the probability or reliability or genuineness of the allegations made therein. If the ingredients which establish the commission of offence or misconduct exist then, the prosecution cannot fail merely because there was an animus of the complainant or the prosecution against the accused. Allegations of mala fides

may be relevant while judging the correctness of the allegation or while examining the evidence. But the mere fact that the complainant is guilty of mala fides, would be no ground for quashing the prosecution. It was further held by the Apex Court in the case of State of Bihar vs. Rajendra Agrawalla, 1996 SCC (Cri) 628 that at the initial stage, the High Court should not sift or appreciate the evidence and come to the conclusion that no prima facie case is made out.

14. As held above the F.I.R. discloses commission of cognizable offence, we are of the view that there is no ground for quashing the F.I.R. in case crime no.960-A of 1999.

15. A prayer has also been sought in writ petition no. 310 of 2000 and 1741 of 2000 for staying arrest of the petitioner in case crime no.960-A of 1999. The question of arrest in case the Court does not find any ground for quashing the F.I.R. has also been considered in Full Bench decision of this Court in the case of Satya Pal and others vs. State of U.P. and others (supra) and it was held in paragraph 40 as below:-

16. "Therefore, in appropriate cases if this Court is convinced that the power of arrest will be exercised wrongly or malafidely or in violation of Section 41 (1) (a) of the Code, writ of mandamus can be issued restraining the police from misusing its legal power. However, the order staying arrest may be granted sparingly in exceptional cases and with circumspection, that too in the rarest of rare cases keeping in mind that any relief, interim or final during investigation which has the tendency to slow or otherwise hamper the investigation, should not be granted. Our opinion further gains support from a recent judgment of the Apex Court in the case of M/S Pepsi Foods Ltd. Vs Special Judicial Magistrate, , 1998 (36) ACC 20 CSC, wherein while dealing with the power and jurisdiction of this Court under Article 226 of the Constitution and Section 482 of the Code, it has been observed as Follows:-

17. "The power conferred on the High Court under Articles 226 and 227 of the Constitution and under Section 482 of the Code have no limits but more the power more due care and caution is to be exercised in invoking these powers."

18. Since, the F.I.R. discloses commission of cognizable offence and the matter requires investigation and F.I.R. is not liable to be quashed, the arrest being part of investigation cannot be stayed Sri V.P. Srivastava further contended that none of the requirements of Section 173 (2) Cr.P.C. require that an accused must be arrested during investigation, but we find no force in the above contention as Section 170 Cr.P.C. clearly says that if, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed. Moreover, Section 41 Cr.P.C. also

empowers any police officer to arrest without an order from a Magistrate and without a warrant, any person who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned.

19. Sri V.P. Srivastava further placed reliance on paragraph 41 of the observation of Full Bench in Satya Pal's case (supra). But we find that there is nothing on record to show that contingencies envisaged in the said paragraph are existing in this case.

20. The next point urged by Sri V.P. Srivastava, was that once the State Government had transferred the investigation of the case from local police to C.B.C.I..D. it cannot recall the said order and re transfer the investigation to local police and therefore, order dated 11.5.2000 passed by State Government is liable to be quashed. He further contended that the Division Bench case of this Court in Bhopal and others vs. State of U.P. and others, 1997 (34) ACC,371 does not appear good law in view of Apex Court decision in Munir Alam vs. Union o f India and others, 1999 (39) ACC<230. On the other hand Sri G.S. Chaturvedi contended that if the State Government has power to transfer investigation from local police to C.B.C.I.D. it has power to recall or rescind the said order in view of Section 21 of U.P. General Clauses Act and that the decision of Apex Court in Munir Alam's case (supra) is distinguishable on the facts of the case.

21. In the case of Bhopal and others vs. State of U.P. and others (supra) one Reghubir was murdered in the evening of 5.10.1994 and the F.I.R. of the incident was lodged by one Rajpal Singh alleging that the applicants had committed his murder by assaulting him with knives. A case was registered as crime no. 129/94 under Section 302 IPC at P.S. Doghat district Meerut against all three applicants. The local police investated the matter and aster investigation submitted a charge-sheet dated 25.11.1994 in the Court of C.J.M., Meerut. It appears that before the charge sheet had been submitted by the local police, the State Government had passed an order directing that the case shall be investigated by C.B.C.I.D. Subsequently, the State Govt. passed an order on 4.8.1995 by which the earlier order directing investigation by C.B.C.I.D. was rescinded and it was further provided that the local police shall investigate the case. The said order was challenged in the Writ Petition. It was contended that once the State Government passes an order transferring the investigation to C.B.C.I.D., it should not re transfer the same back to local police. The Division Bench quoting and considering the notification of the Government no. 4173/c/vi-e-e27P/94 dated 15.9.1995 held as below:-

22. "There is no such prohibition under any statute nor there is any such rule, notification or order that once the State Govt. has transferred investigation from local police to C.B.C.I.D., it cannot recall or rescind the said order and entrust the investigation back to the local police. In fact, such a power is possessed by the State Govt. in view of Section 21 of U.P. General Clauses Act which provides that where by any Uttar Pradesh Act a power to issue statutory instrument is conferred, then that power includes a power,

exercisable in the like manner and subject to the like sanction and condition (if any) to add, amend, vary or rescind any statutory instrument so issued. In view Section 4 (42-B), any notification or order would be a statutory instrument. Therefore the State Govt. has the power to rescind the order by which investigation may have been entrusted to the C.B.C.I.D. and such a power can be exercised at any subsequent state."

23. With the above observation the writ petition was dismissed.

24. In the case of Munir Alam vs. Union of India (supra) relied on by Sri V.P. Srivastava, on the night intervening on 1st and 2nd October, 1996 in the vicinity of the lodge of Vice Chancellor, Aligarh Muslim University firing took place in which Nadim Alam, the 20 year old sun of the petitioner was killed. A formal report was filed by respondent No. 3 (Proctor of the University) on 2nd October, 1996 which was incomplete and therefore, an additional report in continuation of the earlier report was also filed. The local police on investigation submitted final report in the committal Court. The petitioner in writ petition before the Apex Court challenged the submission of final report on the ground that the investigation into the incident of firing was conducted in a wholly slip-shod and a biased manner. The Petitioner therefore, interalia prayed in the petition that a fair investigation be got conducted into the incident through the C.B.I. and to punish the guilty and award exemplary damages to the family of the deceased. The Apex Court besides issuing notices to opposite parties also directed Sessions Judge Aligarh to inquire into the matter himself or to get it inquired by a competent officer, not below the rank of an Additional Sessions Judge and to submit the report of inquiry to the Court within two months from the date of communication of order, The matter was inquired by IVth Additional District and Sessions Judge, Aligarh and report was submitted. In the meantime, the Senior Superintendent of Police and District Magistrate, Aligarh appointed Chief Development Officer, Aligarh and the Superintendent of Police, Aligarh (Rural Area) as Inquiry Officers to inquire into the matter, who also submitted report, which was produced before the Apex Court. It was held by the Apex Court that since the Court was seized of the matter and had required the Additional District and sessions Judge to hold an inquiry, their Lordships fail to understand how the State Government could have, after the report of the Additional District and Sessions judge was submitted to the Court, directed an enquiry by the two Officers of the State Government. On the basis of report of IVth Additional District and Sessions Judge the Court considered it necessary with a view to arrive at the truth, that the entire matter be got investigated through the Central Bureau of Investigation (C.B.I.). Accordingly, Director, C.B.I. was directed to hold an enquiry/investigation into the incident which occurred during the intervening night of 1st and 2nd October, 1996 and into the related matters.

25. The facts of the above case are thus distinguishable from the facts of the present case. In the said case, the Apex Court was seized of the matter and had directed the Sessions Judge, Aligarh to hold enquiry and submit report. No. such contingency existed in the instant case

and facts of instant case are fully covered with the facts of Bhopal's case (supra).

26. Moreover, in the above case, the complainant himself had challenged the investigation by the local police. It has further been held in Bhopal's case that a case where a complainant or victim comes to the Court and makes a grievance that the local police is not investigating the crime fairly stands on entirely different footing. In such a case the Court may issue a direction for investigation by C.B.C.I.D. or some other impartial agency so that the crime is properly investigated and the confidence of the public at large is restored. In the instant case nothing has been shown that the case was complicated one or was of a public interest and therefore, investigation be done by C.B.C.I.D.

27. Moreover, the order of the State Government dated 11.5.2000 shows that the transfer of investigation from C.B.C.I.D. to local police was ordered in pursuance of the order of this Court dated 1.12.1999 passed in Criminal Misc. Writ Petition No. 7230 of 1999, which directed that D.I.G. (Kumaun Region) shall personally look into the matter and will ensure that fair and impartial investigation of the cross cases is conducted. The order dated 1.12.1999 of this Court passed in Criminal Misc. Writ Petition No. 7230 of 1999 shows that the Court had directed D.I.G. (Kumaun Region), Udham Singh Nagar, Nainital to ensure that fair and impartial investigation of the cross cases is conducted by the agency other than named above. This shows that the Court meant that the investigation will be looked into by the D.I.G. (Kumaun Region) i.e. the Investigating Agency under his control. The above order, therefore, cannot be interpreted that the investigation was directed to be conducted by C.B.C.I.D. as the C.B.C.I.D. is not under the control of D.I.G.

28. Thus, we find that there is no ground for interference with the order dated 11.5.2000 passed by the State Government.

29. Sri G.S. Chaturvedi, Senior Advocate lastly contended that the D.I.G. (Kumaun Region) had sent a letter to Principal Secretary Home, U.P. Government, Lucknow dated 25.5.2000 that a team of C.I.D. officers be formed to help in the investigation by the local police, which means that the C.B.C.I.D. would interfere in the investigation by local police. Having gone through the above letter, annexure-13 to the counter-affidavit filed in writ petition no. 3848 of 2000 we find that there is no force in the above contention as the local police had simply sought assistance of a team of officers of C.I.D. in the investigation and it does not mean that C.B.C.I.D. will conduct investigation.

30. In view of our above discussions and observations we are of the view that the writ petitions have no force. However, it should be made clear that the police will not arrest simply because F.I.R. has been lodged against petitioners of writ petition no. 310 of 2000 and 1741 of 2000 and police will resort to the power of arrest when allegations made in the F.I.R. are found genuine or credible evidence/material is collected against petitioners regarding commission of offence. We hope and trust that Investigation Agency shall act fairly and honestly and will take coercive steps

against the petitioners only after verifying the above allegations made against the petitioners.

31. With these observations writ petitions no. 310 of 2000, 1741 of 2000 1743 of 2000 & 2996 of 2000 and 3848 of 2000 are dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.9.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE ONKARESHWAR BHATT, J.

First Appeal No. 1024 of 1988

Harbans ...Claimant/Appellant
Versus
The State of U.P. and another ...Respondents.

Counsel for the Appellant:
Shri Ravi Kant

Counsel for the Respondents:
Shri B.D. Mandhyan

Section 25 and Proviso 2 of section 28 of Land Acquisition Act- The provision of Section 25 of the Land Acquisition Act was amended as to permit the claimant to raise the dispute before the reference Court as to the amount irrespective of the claim he had made before the Collector and even if he had not made such claim he can make it before the reference Court.

The proviso to Section 28 of the Act leaves no discretion to the Court to award interest less then 15 per annum. The appellant is therefore entitled to interest at the rate of 15 on the amount determined by the Court.

Held (Para 8)

Section 25 (1) of the un amended Act specifically provided that the Court shall not award the amount in excess so claimed but this provision has been deleted and it will not be fair to put similar restriction on the claim made by a person before the Court under reference under Section 18 of the Act. The second reason is that the proceeding before the reference Court under Section 18 of the Act is treated as an original proceeding for the purpose of determining market value afresh on the basis of the material produced before it.

By the Court

1. This appeal is directed against the Award dated 30th May 1987 passed by the Reference Court in Land Acquisition Reference Case No. 40 of 1979.

2. Briefly stand the facts are that for establishing market yard for Krishi Utpadan Mandi Samiit at Shamli, District Muzaffarnagar, the State Government issued notification under Section 4 of the Land Acquisition Act (hereinafter referred to as the Act) on 6.11.1975. The plots of the appellant unmbered as 282M, 284M, 285 and 286 total area 5 Bigha 11 Biswansis were sought to be acquired. This notification was followed by another notification under Section 6 of the Act. The State Government took possession of the land in question from the appellant on 16.1.1976. Notices under Section 9 of the Act were issued requiring the persons interested in the land forming subject matter of the declaration to submit their claims for compensation for acquisition of their land. The appellant submitted the claim petition before the Special Land Acquisition Officer and he made an Award on 18.10.1977 awarding compensation at Rs. 10,303.05 per bigha and solatium at 15% and interest at 6%.

3. The appellant, aggrieved against the award of the Special Land Acquisition Officer, sought reference under Section 18 of the Act. Various other claimants, whose lands were adjoining to the land of the appellant and were acquired by the same notification. Also sought reference. All the references were consolidated by the Court and heard together. During the pendency of the reference, the Land Acquisition (Amendment) Act, 1968 of 1984 came into force by which certain provisions were inserted and substantial changes were made. The said Act has an impact on the pending proceedings and as a consequence thereof the appellant moved an application before the Court that the compensation be awarded as envisaged by the amending provisions.

4. In the reference proceedings documentary as well as oral evidence was led by the parties. The State did not chose to file any exemplar except one relied by the Special Land Acquisition Officer pertaining to the year 1973 i.e. more than two years earlier than the notification under Sections 4 and 6 of the Act. The Court, considering the evidence, recorded a finding that the market value of the land was more than Rs.20,000/- per Bigha but since compensation was claimed at the rate of Rs.15,000/- per Bigha, it allowed the claim at the aforesaid claimed rate. The solatium was awarded at 30% and interest at 12% per annum. The appellant was not awarded the cost.

5. The appellant has filed the appeal for enhancement of the compensation. The first submission of the learned counsel for the appellant is that though the Court was recorded a finding that the market value of the land was more than Rs.20,000/- per bigha but awarded the compensation at the rate or Rs.15,000/- per bigha simply on the ground that the appellant had claimed compensation at the rate of Rs.15,000/- per bigha before the Land Acquisition Officer without considering the amended provisions of Section 25 of the Act. Section 25 of the Act before amendment read as under-:

"25. Rules as to amount of compensation –(1) When the applicant has made a claim to compensation, pursuant to any notice given under Section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under Section 11.

(2) When the applicant has refused to make such claim or has omitted without sufficient reason to be allowed by the Judge to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

(3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector.

6. Sub-section (1) of Section 25 of the Act clearly prohibited the Court from awarding compensation in excess of the amount so claimed. Secondly, this restricted the power of the Court to entertain any claim when aggrieved person has not submitted any claim before the Collector. To remove this mischief Section 17 of the amending Act (Act 68 of 1984) was introduced. Section 25 as substituted reads as under:-

"25. Amount of compensation awarded by the Court shall not be less than the amount awarded by the Collector under Section 11."

7. The embargo which was placed upon the Court limiting its right to award higher compensation than the claimed before the Collector was removed and the Court was in a position to award higher claim if the parties lead evidence and proved the marked value of the acquired property. In Sharad Chandra V. State of Gujrat and others, AIR 1987 Gujrat 55, the Court in Para 10 of the judgment considered the similar question and held that the Court can award compensation in excess of the amount claimed by the claimant before the Land Acquisition Officer. This decision was followed by the Full Bench of Karnataka High Court in The Special Land Acquisition Officer (NHW) Dharwad v. Kallangouda and others, AIR 1994 Karnataka 112, wherein the Full Bench held that after the amendment of the provisions of Section 25 of the Act, the claimant was entitled to seek higher amount than what he had claimed before the Special Land Acquisition Officer. The Court observed as Under:-

"While the law of course expects him to make good the claim made before Court by producing ample evidence, it has nonetheless thought fit to remove all barriers that may prevent or preclude him from claiming the market value of the land. Thus we find S. 25 as it now stands totally liberates the claimant from all restraints that held him in check earlier from making a claim before Court from the first time even where he had not made any claom before the Collector and even if he had made some claim the Section in its new orientation gives him full liberty to hike his claim before Court without furnishing any reasons or affording an explanation for making a lower claim before the Collector".

8. There were two reasons assigned to this conclusion. Firstly, Section 25(1) of the un amended Act specifically provided that the Court shall not award the amount in excess so claimed but this provision has been deleted and if this provision was deleted, it will not be fair to put similar restriction on the claim made by a person before the Court under reference under Section 18 of the Act. The second reason is that the proceeding before the reference Court under Section 18 of the Act is treated as an original proceeding for the purpose of determining market value afresh on the basis of the material produced before it. The Supreme Court emphasized this aspect in Chimanlal Hargovinddas v. Special Land Acquisition Officer. Poona, AIR 1988 SC 1652. The following principles were laid down:-

"(1) A reference under Section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition Officer in his Award unless the same material is produced and proved before the Court.

(2) So also the Award of the Land Acquisition Officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the court hearing the Reference. It is merely an offer made by the Land Acquisition Officer and the material utilised by him for making his valuation cannot be utilised by the Court unless produced and

proved before it. It is not the function of the court to sit in appeal against the Award, approve or disapprove its reasoning or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition Officer, as if it were an appellate Court.

(3) The court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose."

9. The principles laid down in Chiminlal Hargovinddas's case had been applied in various decisions vide Special Tehsildar, Land Acquisition, Yerraguntla v. Kamalagangi Reddy and others, AIR 1990 AP 124 and Special Land Acquisition officer (NHW) Dharwar V. Kallangouda, AIR 1994 Karnataka 112.

10. The Court while interpreting the provisions of an amending Act has to apply the principles laid down in Heydon's case (1584) 3 Co. Rep. 7a, p. 7b: 76 ER 637. Which is also known as 'Purpsive Construction' or 'Mischief rule'. The Court has to consider four matters in construing such provision: (I) What was the law before making of the Act, (ii) what was the mischief for which the law did not provide, (iii) What is the remedy that the Act has provided, and (iv) What is the reason of the remedy. The rule then directs that the courts must adopt that construction which "shall suppress the mischief and advance the remedy". The rule was explained in the Bengal immunity Co. v. State of Bihar by S.R. Das, C.J. as follows: " It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case was decided. The Heydon's case was followed in various decisions of this Court vide Dr. Waliram Waman Hiray v. Mr. Justice B. Lentin Air 1988 SC 2267, CIT Oatiala v Shahzada Nand & Sons AIR 1966 SC 1342, and M/s Goodyear India Ltd. V. State of Haryana AIR 1990 SC 781.

11. The provision of Section 25 of the Land Acquisition Act was amended as to permit the claimant to raise the dispute before the reference Court as to the amount irrespective of the claim he had made before the Collector and even if he had not made such claim he had made before the Collector and even if he had not made such claim he can make it before the reference Court.

12. The parties are free to lead evidence to prove the market rate. A claimant might have made claim before the Land Acquisition Officer on the basis of his own ass3ssment without finding out various exemplars when it receives notice under Section 9 of the Act for submitting the claim before the Land Acquisition Officer but if he finds the exemplars and other material evidence to show that the value of the land is higher than what he had claimed, the Court has to determine it on the basis of the material evidence produced before it and is not confined to the confined to the claim as made before the Collector.

13. Learned council for the respondent has relied upon the decision of the Supreme Court in Ujjain Vikas Pradhikaran (Ujjain Development Authority) v. Tarachand and another, judgement Today 1996 (7) SC 206, wherein their Lordships observed that even after the deletion of sub-section (2) of Section 22 by amending Act 68 of 1984, it would be always open to a party to claim a particular amount and having claimed at that rate, the Court should not allow compensation higher than the amount claimed by him with the following observations:-

"It would be obvious that if one party claims compensation at a particular rate, he assesses the market value of the land at that particular rate and seeks compensation on that basis. Having assessed the compensation at that particular rate, the question emerges: whether the Court could grant higher compensation than was assessed by the party? We find answer in the negative. This principle squarely applied to the facts in these cases. The party having limited the compensation to Rs.20,000/- per bigha in the memorandum of appeal filed in the High Court, it would be obvious that the respondents claimed that they were entitled to the maximum of compensation @ Rs.20,000/- per bigha."

14. In this case in the grounds of appeal submitted before the High Court the compensation was claimed at the rate of Rs.20,000/- per bigha and the High Court enhanced the amount of compensation at the rate of Rs.26,000/- per Bigha. It was not a case before the Reference Court. The appellant himself limited his claim before the High Court. It was held that the High Court was not entitled to enhance the compensation at a rate higher than claimed in the memorandum of appeal. The claimant before the Reference Court leads evidence in regard to valuation of the land acquired and when he files appeal before the High Court he is fully aware of the materials on the record in regard to valuation of the acquired land and on appeal being filed by him if he limits his claim, the High Court, in both the circumstances, would not be justified to enhance the value of the property over and above the value fixed in the memo of appeal. Here in the present case higher claim was made before the Reference Court and the parties led evidence. The Reference Court itself came to the conclusion on appraisal of evidence that the market value of the land war more than Rs.20,000/- per bigha and there is no justification on the facts and circumstances of the present case not to award the amount at the market value as assessed itself by the Reference Court. The appellant shall be entitled to get compensation at the rate of Rs20,000/- per bigha from the respondents.

15. The next submission of the learned counsel for the appellant is that he is entitled to interest at the rate of 15% in view of the amended provision of Section 28 of the Act. The Court has allowed interest at 12% per annum from the date of delivery of possession till the date of award. It is contended that according to the proviso to Section 28 of the Act where Reference Court directs excess amount to be paid and if such amount is paid after the date of expiry of a period of one year from the date on which the possession is taken, the interest at the rate of 15% per annum shall be paid from the date of expiry of the said period of one year on the amount of such excess or part thereof

which has not been paid into the Court before the date of such expiry but the appellant has not been awarded interest at the rate of 15%. The proviso to Section 28 of the Act leaves no discretion to the Court to award interest less than 15% per annum. The appellant is therefore entitled to interest at the rate of 15% on the amount determined by the Court.

16. The last submission of the learned counsel for the appellant is that the Court has not awarded cost without assigning any reason. Sub-section (2) of Section 27 of the Act provides that when the award of the Collector is not upheld the cost shall ordinarily be paid by the collector unless Court is of the opinion that the claim of the applicant was so extravagant or that he was so negligent in putting his case before the Collector that some deduction from his cost should be made or he should pay a part of collector's cost. In this case the appellant had submitted the claim before the collector at Rs.15,000/- per bigha but he was awarded at the rate of Rs.10,303.05 per bigha and it has been enhanced to Rs.15,000/- per bigha by the Court below, the Court should have awarded the cost to the appellant.

17. In view of the above the appeal is allowed. The order of the reference Court dated 30.5.1987 is modified. The amount of compensation shall be calculated by the reference Court keeping in view the observation made above and the decree shall be prepared accordingly.

18. The cost of this appeal shall however, be borne by the parties.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEPTEMBER 7,2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE S.K.JAIN, J.

Civil Misc. Writ Petition No. 24533 of 1998

Raja Ram and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel of the Petitioners:
Shri M.A. Sarwar Khan

Counsel for the Respondents:
Shri H.R. Misra
Shri Ali Hasan
Shri Praveen Kumar
S.C.

Article 21 of the Constitution of India – the Constitution safeguards protection from health hazards, it will be in the fitness of things to restrain these persons whose fundamental right under Article 19 (1) (g) must yield to the fundamental right under Article 21 of the Constitution of the locality.

Held- (Para 18)

The constitution safeguards protection from health hazards, it will be in the fitness of things to restrain these persons whose fundamental right under Article 19 (1) (g) must yield to the fundamental right under Article 21 of the Constitution of the locality.

By the Court

The petitioners have come up with following prayers:-

(i) To quash the Order dated 26.3.1998 passed by the

Adyaksha/President, Nagar Panchayat, Mariyahun refusing to shift the slaughter house to any other place on the ground of non-availability of any appropriate place and permitting Respondent Nos. 7 to 14 to slaughter Buffaloes only with certain riders.

(ii) To restrain Respondents Nos.7 to 14 from slaughtering cattle in the slaughter house in question till making of Bye-laws and shifting of the slaughter house to any other place.

(iii) To direct Respondent Nos. 7 to 14 to slaughter buffaloes as usual in their localities.

(iv) To Command Respondent Nos. 2 to 4 to fix the slaughter house near the Bone Godown where lands are available.

<u>The Facts</u>:-

2. The petitioners case is to this effect:- There is an unlawful slaughter house where the Respondent No.s 7 to 14, who are butchers, are slaughtering buffaloes and she-buffaloes in the vicinity of residential premises of various communities and nearby religious place without any licence and under bye-laws framed by the Nagar Panchayat/Zila Parishad Board, District Jaunpur. The said Respondents are spreading the remains of slaughtered cattle in closed vicinity of the residential houses and on path way resulting in foul and offensive smell, filth and infection causing damage to human life and injuries to the health or physical comfort of the people. Birds of all dinds spread the remains of the slaughtered cattle on the top of the houses and the dogs at the doors, besides on the 'Shaheed-Ki-Ma…" and the ' Kabristan'. Dure to this tense situation the petitioners and a large number of inhabitants moved vide Annexure-2 Respondent No. 4 the Up-Ziladhikari, Mariyahun for removal of the slaughter house and to fix another place away from Abadi and religious place. Respondent No. 3 the District agistrate was also moved for a quick action, who vide his letter dated 10.8.1997 (Annexure-3) asked Respondent No. 4 to look at the matter and to take necessary action for maintenance of peace. The Adhaykshya/President,Nagar Panchayat, Mariyahun also made his communication 21.8.1997 (Annexure-6) to Respondent No. 3 that it is difficult for him to take any decision in that regard as the slaughter house is very old due to which there is great filth all-around but where-ever it will be shifted filth will be there and thus appropriate action be taken at his level. After getting enquiry reports through Tehsildar and S.H.O., Kotwali as contained in Annexure-4,Respondent No.4 passed the order dated 29.8.1997 (Annexure-5) stopping slaughter of cattle in the said slaughter house after holding that Respondent Nos. 7 to 14 are illegally operating the slaughter house which has not spread filth dangerously totally effecting the normal life and endangered the Mohalla and thus it will be in the public interest to do so. He also directed the said Respondents not to kill cattle and spread filth. Respondent Nos. 7 to 14 moved Respondent No. 4 against his order dated 29.8.1997. Respondent No. 4, however, drew up a proceeding under Section 144 Cr. P.C. against him vide order dated 30.8.1997 and restrained them from slaughtering the cattle. Respondent Nos 7 to 14 then moved this Court in Criminal Revision No. 1136 of 1997 against the order dated 30.8.1997 without

impleading the petitioners. In the meantime the Deputy Chief Medical Officer, Jaunpur also submitted his report after inspection to the C.M.O. that it is better to keep the slaughter house closed, which is 20 Meters away, and to shift from abadi to prevent spreading of infectious diseases. In the Criminal Revision Respondent Nos. 7 to 14 filed undertakings and it was disposed of vide Order dated 10.9.1997 at the stage of admission holding that there is no illegality in the order but since the revisionists had under-taken to clean the area having remains of the butchered animals and that they will not spread the remains of the animals near the slaughter house or in the Mohalla, where it is situated, so as to create danger to human life the order is modified to the extent that it shall remain in operation till the remains of the butchered animals already lying at the spot are removed, and that the revisionist will not in future spread the said remains near the slaughter house so as to create nuisance and danger to human life. Pursuant to the order passed by this Court in the Criminal Revision, the UP Zila Adhikari Passed his order dated 18.9.1997 (Annexure –10) Directing Respondent Nos 7 to 14 to run the slaughter house after obtaining licence in accordance with law without endangering the health of human beings. Despite all this without obtaining licence in accordance with law Respondent No. 7 to 14 forcibly tried to run the said slaughter house which was objected to by a large number of inhabitants resulting in initiation of proceedings under Sections 107/116 & 144 Cr.P.C. by the Up Zila Adhikari stopping the slaughtering of the cattle again in the slaughter house to prevent riot between the two groups. The Petitioners moved this Court by filing writ petition bearing C.M. Writ Petition No. 32309 of 1997 as Public Interest Litigation impleading Respondent Nos. 7 to 14 as parties, which was disposed of by order dated 29.9.1997 holding that the petitioners may approach the Nagar Panchayat of making suitable regulation and bye-laws for the purposes of health, hygiene and sanitation or for prohibiting the slaughter of animals within a certain reasonable distance of a place of worship, educational institution etc. and in the event such an application is made the same will be decided in accordance with law and appropriate bye-laws will be made within a month thereafter. The Petitioners approached the Nagar Panchayat to comply with the directions issued by this Court by making bye-laws. Its President started dealing bad politics. The Petitioners moved the District Magistrate, Jaunpur for redressal of their grievances. The District Magistrate called for report from the Up Zila Adhikari and Additional District Magistrate (Finance). The Up Zila Adhikari called for a report from the authority concerned. Inspection was made by the Vetenary Medical Officer and all concerned authorities and even by the Up Zila Adhikari etc.. The District Magistrate passed an order stopping the slaughtering of the cattle till the slaughter house is not shifted to any other place and further directing Respondent Nos. 7 to 14 to slaughter the cattle in their localities. Against the aforesaid order of the District Magistrate Respondent Nos. 7 to 14 moved this Court by filing C.M.W.P. No. 41473 of 1997 by suppressing and misrepresenting facts which was disposed of by an order dated 27.2.1998 holding that the place of slaughter house shall be fixed by Nagar Panchayat after hearing the parties concerned within a month, but without

taking into consideration the order of the District Magistrate Respondent Nos. 7 to 14 are slaughtering cattle in their locality continuously for the last six months without any problem. Thereafter the impugned order was passed willfully ignoring the reports of the authorities which is manifestly erroneous, arbitrary, discriminatory, malafide, unconstitutional and without framing of the bye-laws till date. Pursuant to this order Respondent Nos. 7 to 14 are trying to slaughter on disputed place without obtaining licence and without framing of Bye-laws. Lands are available to the Nagar Panchayat and to Respondent Nos. 7 to 14 as pointed out in Paragraph 36 but a false statement has been made by Respondent No. 2 in the order impugned that it is not available, who is put to proof that the slaughter house in question in 100 years old. In the absence of any bye-law and licence running of a slaughter house adjacent to a Harijan Basti is in violation of the mandatory provisions of Section 237, 241 and 298 R of the U.P. Municipalities Act, 1961 as well as the Provisions of SC & ST ACT.

3. On 17.8.1998 the following order was passed by the Court:-

" The main thrust of the submission of Sri M. Sarwar Khan, learned counsel appearing on behalf of the 2 petitioners is that the plight of the petitioners and other residents of Mohalla Garhi, Nagar Panchayat Mariyahun, Post Office Mariyahun., District Jaunpur to have a meaningful life, which stands guaranteed under Article 21 of the Constitution of India, has been breached by Respondent No. 2, Adhakshya/President, Nagar Panchayat Mariyahun, District Jaunpur by allowing Respondent Nos. 7 to 14 to run a slaughter-house where they are slaughtering buffaloes and she-buffaloes without any licence and under any bye-laws framed by the Nagar Panchayat, Mariyahun, District Jaunpur despite orders passed by this Court earlier in Civil Misc. Writ Petition Nos. 32309/97 and 41473/97. In the second writ petition the Court especially directed Respondent No. 2 to fix the place of slaughter house but without applying his mind and formulating any bye-laws he has permitted Respondent Nos. 7 to 14 to continue the slaughter house at the old site.

Shri Ali Hasan, learned counsel appearing on behalf of Respondent Nos 7 to 14 contended that this slaughter-house is coming on its place for about last 100 years and that in a suit filed by them they have also obtained an injunction order against these petitioners which is binding on them and, accordingly, this writ petition is not maintainable.

Sri Praveen Kumar, learned counsel appearing on behalf of Respondent No. 2 contended that Respondent Nos. 7 to 14 have been allowed to continue the slaughter-house on the same spot in consonance of the bye-laws.

The learned counsel for the petitioner, in reply, contended that no bye-laws have been framed till today and that the stand of the learned counsel for Respondent No. 2 is incorrect.

Put up this matter under the same heading on 14th September, 1998.

We direct the District Magistrate, Jaunpur, Respondent No. 3, to file an affidavit before this Court after visiting the place in question as to whether it will

be desirable to shift the slaughter-house at its old locality keeping in his mind the fundamental right guaranteed to the citizens of India under Article 21 of the Constitution of India, which guarantees a decent and meaningful life to its citizens and obviously it includes environmental protection as laid down by Supreme Court in its several decisions.

The affidavit is required to be filed by 11th September, 1998. The other questions raised will also be considered on the next date when a counter affidavit if filed by Respondent No. 2 as well as Respondent No.s 7 to 14.

Respondent No. 3 is further directed to state in his affidavit as to whether Respondent No. 2 has framed bye-laws or not and whether it has been approved by the competent authority or not.

The office is directed to hand over a copy of this order to Sri H.R. Misra, learned counsel, by tomorrow for its communication to and follow up action by Respondent No. 3."

4. Pursuant to the aforementioned order the District Magistrate filed his own affidavit dated 11.9.1998 on 16.9.1998 stating, interalia, that he visited the locality on 5.9.1998 and found that slaughtering of animals is being done on Plot No. 188 which is causing nuisance and is hazardous to the residents of the locality, apart from the fact that the maintenance of the slaughter house is in a very bad condition; that Nagar Panchayat Adhikari has not framed any bye-laws; and that he had also taken statements of a large number of residents who had pointed out various difficulties on account of the slaughter housel.

5. No Counter Affidavit has been filed by Respondent No.s 7 to 14 to the writ petition.

6. Counter Affidavit, however, has been filed by Respondent No.s 2 and 6 (wrongly stating on behalf of Respondent No. 3) and 8.10.1999 asserting, interalia, that Civil Suit No. 1181 of 1997 has been filed by the father of the petitioner no. 2 for restraining the Respondents from slaughtering cattle before the Civil Judge, Jaunpur denying the existence of the slaughter house and thereby petitioners have not come with clean hands; vide his order dated 21.9.1997 licence was granted along with site plan; it has been wrongly stated that the slaughter house is in the vicinity of the residential premises, rather it is on open land and about hundred meters away from the Shaheed-Kr-Mazar and Kabristan and far away from residential premises; inspection was made by the Sub Divisional Magistrate, Mariyahun on 18.9.1997 but nothing injurious to human life and health was found the District Magistrate has been informed that the Respondents are ready to remove the slaughter house, if land is provided by the administration; slaughter house was to start its work after issuance of licence; proceedings have been initiated for framing of bye-laws; the impugned order was passed correctly; the statements made in Paragraph 36 are not correct hence denied though the bone godown is being shifted, as it is situated near the office of the Forest department, Degree College and the Intermediate College, and the place, which is being worshiped; the slaughter house is about 100 years old, which being a question of fact and can it be shifted to some other place, can only be decided by the Civil Court; and that under the facts and

circumstances the writ petition is devoid of any merit and is liable to be dismissed with cost.

7. To the aforementioned Counter Affidavit the Petitioners filed their Rejoinder on 12.5.2000 asserting, therein,. Interalia, to the effect that in order to linger the matter Suit No. 919 of 1997 was filed by Respondent No.s 7 to 14 impleading their own men as Defendant No.s 10 & 11 in which with consent of the Plaintiffs and Defendant No.s 10 & 11, who are own men of the Plaintiffs, an order was passed on 4.8.1997 by the Civil Court directing the parties not to make any new construction or destroy the existing ones till the date fixed; Suit No. 1181 of 1997 was filed by the father of Petitioner no. 2 on the basis that he is owner and in possession of the suit property and for restraining the defendants from interfering with his possession and thereby the relief sought for therein is different from the relief's sought for in this writ petition, which is for the benefit of the public and thereby maintainable; licence was not granted in accordance with law rather the Chairman in collusion with Respondent No.s 7 to 14 had only issued a receipt for running the slaughter house, without approval of the District Magistrate; it is Respondent No. 6 who has not come to this Court with clean hands, who is in collusion with Respondent No.s 7 to 14, and is earning huge money from them and for his own benefit had willfully neglected the orders passed by this Court.

The Submissions:-

8. Sri M.A. Sarwar Khan, learned counsel for the petitioners, contended as follows:- From the facts and circumstances of the case it is apparent that Respondent Nos. 2/6 had no regard to the orders passed and the directions issued by this Court in not framing Bye-laws; that numerous materials on the record including their undertaking given to this Court in the Criminal Revision speak for themselves as to what extent Respondent Nos. 7 to 14 can go, breaching the fundamental right guaranteed under Article 21 of the Constitution to the people of the locality to lead a meaningful life and environmental protection; the stand of Respondent Nos. 2 to 6 that there is a slaughter house in existence for more than 100 years and dubbing it to be a question of fact, which can be decided only by the Civil Court and not by this Court is not relevant inasmuch as there cannot be any question of waiver of Article 21 of the Constitution nor such plea has been taken either by Respondent Nos. 2 and 6 in their Counter Affidavit and consequently it is a fit case in which Respondent Nos. 7 to 14 be restrained from slaughtering cattle in the alleged slaughter house which was also directed to be closed by Respondent No. 4 vide his order dated 29.8.1997 which was not set aside.

9. Sri H.R. Misra, learned Standing Counsel appearing on behalf of Respondent Nos. 1 and 3 to 5, contended that nothing has bee (1)n brought on the record by Respondent Nos. 2 and 6 that in terms of the directions issued by this Court, Bye-laws have been framed and that the materials on the record justifies shifting of the slaughter house and passing of an order restraining Respondent Nos. 7 to 14 from slaughtering cattle from the slaughter house in question.

10. Sri Ali Hasan, learned counsel appearing on behalf of Respondent Nos. 7 to 24, contended that it was the duty of Respondent Nos. 2 and 3 to shift the slaughter house and that the said Respondents are not responsible for not shifting the slaughter house in question; that they should be allowed to continue slaughtering of the cattle in the slaughter house in question because it is their only source of livelihood, besides Article 19 (1) (g) of the Constitution of India confers fundamental rights in them to carry on their profession of slaughtering, which cannot be denied by invoking Article 21 of the Constitution of India.

Our Findings:-

11. Sections 237,241 and 298 of the U.P. Municipalities Act, 1961, which controls places for slaughter of animals for sale, and issuance of licence for sale of animals, meat or fish intended to human food subject to bye-laws, reads thus:-

"237, Places for slaughter of animals for sale,- (1) The municipality may, with the approval of the District Magistrate, fix premises, either within or without the limits of the (municipal area), for the slaughter of animals or animals of any specified description for sale, and may, with the like approval, grant and withdraw licences for the use of such premises,.

(2) When such premises have been fixed by the municipality beyond (the limits of municipal area), it shall have the same power to make bye-laws for the inspection and proper regulation of the same as if they were within those limits.

(3) When such premises have been fixed, no person shall slaughter any such animal for sale at any other place within the (municipal area).

(4) Should anyone slaughter for sale any such animals at any other place within the (municipal area), he shall be liable on conviction to a fine which may extend to twenty rupees for every animal so slaughtered."

X X X X

"241, Licensing of markets and shops for sale of certain articles –(1) The right of any person to use any place, within the limits of a (municipal area), other than a municipal market, as a market or shop for the sale of animals, meat or fish intended for human food, or as a market for the sale of fruit or vegetable, shall be subject to bye-laws (if any) made under heading F of Section 298.

(2) Provided that, where any bye-law is in force requiring a licence for the establishment or maintenance of a market or shop for the sale of any article mentioned in sub-section (1), the municipality shall not-

(a) refuse a licence for the maintenance of a market or shop lawfully established at the date of such bye-law coming into force, if application be made within six months from such date, except on the ground that the place where market or shop is established fails to comply with any conditions prescribed by, or under this Act, or

(b) Cancel, suspend or refuse to renew any licence granted under such bye-law for any cause other than the failure of the licensee to comply with the conditions of

licence or with any provision of, or made under, this Act.

"298. Power of municipality to make bye-laws.-(1) A municipality by special resolution may, and where required by the State Government shall, make bye-laws applicable to the whose or any part of the (municipal area), consistent with this Act and with any rule, for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the (municipal area) and for the furtherance of municipal administration under this Act.

LIST I
BY-LAWS FOR ANY (MUNICIPAL AREA)
F- Markets, Slaughter –house, sale of foods, etc.

(a) Prohibiting, subject to the provision of Section 241, the use of any place as a slaughter-house, or as a market or shop for the sale of animals intended for human food or of meat or of fish, or as a market for the sale of fruit or vegetables, in default of a licence granted by the municipality or otherwise than in accordance with the conditions of a licence so granted;

(b) Prescribing the conditions subject to which and the circumstances in which, and the areas or localities in respect of which, licences for such use may be granted, refused, suspended or withdrawn; and

(c) Providing for the inspection of, and regulation of the conduct of business in, a place used as aforesaid, so as to secure cleanliness therein or to minimize any injurious offensive or dangerous effect arising or Providing for the inspection of, and regulation of the conduct of business in, a place used as aforesaid, so as to secure cleanliness likely to arise there from;

(d) Providing for the establishment, and (except so far as provision may be made by bye-laws under sub-head © for the regulation and inspection of markets and slaughter houses, of lively stables, of encamping grounds of sarais, of flour mills, of bakeries, of places for the manufacture preparation or sale of specified articles of food or drink, or for keeping or exhibiting animals for sale or hire or animals of which the produce is sold, and of place of public entertainment or resort, and for the proper and cleanly conduct of business therein;

(dd) prescribing the conditions subject to which, and the circumstances in which, and the areas or locality in respect of which, licences for the purposes of sub-head (d) may be granted, refused, suspended, or withdrawn and fixing the fees payable for such licences, and prohibiting the establishment of business places mentioned in sub-head (d) in default of licence granted by the municipality or otherwise than in accordance with the conditions of licence so granted;

(e) in a (municipal area) where a reasonable number of slaughter houses have been provided or licenced by the municipality, controlling and regulating the admission within (limits of the municipal area) for purposes of sale of the flesh (other than cured or preserved meat) of any cattle, sheep, goats or swine slaughtered, at a slaughter house or place

not maintained or licenced under this Act."

11.1 Section 3 and its sub-section (ii) of the Scheduled Castes and Scheduled Tribes (Prevention of atrocities) Act, 1989 reads thus:-

"3 Punishment for offences of atrocities- (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe-

(ii) acts with intent to cause injury, insult or annoyance to any member of a Scheduled Caste or a Scheduled Tribe by dumping etc, waste matter, carcasses or any other obnoxious substances in his premises or neighborhood,"

The aforesaid provision restrains any one of non-annoyance to any member of a Scheduled Caste by dumping etc., waster matter, carcasses or any other obnoxious substances in his neighborhood.

11.2 Article 21 of the Constitution of India reads thus:-

"21 Protection of life and personal liberty:- No person shall be deprived of his life or personal liberty except according to procedure established by law."

12. Having refreshed the aforesaid provisions now let us have a look firstly of the location of the Slaughter House in question. The plaint of Suit No. 919 of 1997 filed by Respondent Nos. 7 to 10, (Annexure-II to the petitioner's rejoinder) describes it bounded as follows North & South- Fields of Jamal Akhtar, East- Mazar then Field of Hira Lal (whose Son is Petitioner No. 1 and West Kabristan. The plaint does not show that the Suit was under Order VIII Rule & C.P.C. It was filed for injunction restraining the defendants from taking possession of the Slaughter House.

In their application filed before Respondent No. 4, as contained in Annexure-2 the petitioners describe their house situated at the distance of 10 yards from the slaughter house. The District Magistrate in his communication dated 10.8.1997, as contained in Annexure-3, describes its location as situated between the Harijans and other Hindu abadi.

The S.H.O., Mariyahun reported to Respondent No. 4 (contained in Annexure –4) that it is situated at a distance of about 100 – 150 meters from the Harijan Basti, Maurya Basti and Mulsim Basti.

The Deputy C.M.O. IV, Jaunpur reported to C.M.O., Jaunpur vide Annexure-9 that it is at a distance of 20 meters away from the abadi.

The health inspector, Community Centre, Kariyahu reported to the Medical Superintendent (Vide Annexure-11) that the house of Hira Lal and others is situated towards East at a distance of about 51 meters, on its West is Kabristan, towards North house of Pyari Devi and towards South at a distance of about 60 meters, there is Carpet Weaving Factory in which about 100 people work.

As per the report dated 2.10.1997 of Respondent No. 4 submitted to Respondent No. 3 it stands on Plot No. 188 which in the Revenue Records stand recorded in the name of Mohammad Shafi son of Arman as Sankramaniya

Bhumidhar who was one of the objectors and not of Noor Mohammad and others.

13. The aforesaid reports also demonstrate the horrors of health hazard which has not been considered by Respondent No. 2

Respondent No. 2 in his communication dated 21.8.1997 (Annexure –6A) made to Respondent No. 3 had himself stated that a prayer has been made by the residents of Mohalla Garhahi that due to the slaughter house there is great filth in the entire region, but wherever the slaughter house will be there will be great filth and it is difficult for him to take a decision in regard to removal of the slaughter house and thus appropriate action be taken by Respondent No. 3.

14. However, we are not required to consider the title and ownership of the land on which the slaughter house is allegedly standing since 100 years as alleged by Respondent Nos.2 and 5 nor can it be decided conclusively in the Civil suit filed by Respondent Nos. 7 to 10 for grant of injunction.

15. The materials on the record, in the form of various reports submitted from time to time unequivocally shows that the slaughter house in question is located near the residences and place of worship. The statement of Respondent No. 6 that it is wrong to say that it is in the vicinity of residential house and that the 'Shaheed-ke Mazar' and 'Kabristan' are far away are incorrect. The fact that the dogs and birds spray the meat etc. of the slaughtered cattle, has not been denied by Respondent Nos. 7 to 14. The Respondents have also not denied the relevant facts staqted by the petitioners. They have also not produced the final injunction order passed by the civil court which in any view cannot restrain this Court to pass order 'Ex Debitio Justitiae'

16. Environmental protection and the guarantee by the State too lead a decent and meaningful life under Article 21 of the Constitution of India is of recent origin. In fact in Buffalo Traders Welfare Association Versus Maneka (1994) Supp. (3) SCC 448 this Article was invoked even for providing hygienic condition in Idgah slaughter house at Delhi. Safeguards are also available in the U.P. Municipalities Act and SC & ST Act. Under the Code of Criminal Procedure there is, however, a temporary safeguard.

17. Utter callousness and negligence has been shown by Respondent Nos. 2 and 6 in not framing the Bye-laws till today. Even their learned counsel has not appeared to contest, Thus, there was/is apparent oblique motive to help Respondent Nos. 7 to 14 in carrying out the slaughter house, On the statements made in the Counter Affidavit the alleged licence was issued to Respondent Nos. 7 to 14 only on 21.9.1997 and not earlier which the petitioners assert to be merely a Receipt. The licence has also not been produced. Allowing Respondent Nos. 7 to 14 to continue slaughtering in the alleged slaughter house is bound to cause serious infectious diseases endangering health and hygiene of the persons of the locality which is evident from various documents appended. Respondent Nos. 7 to 14 had not honoured their own undertaking given to this Court in the Criminal Revision. Thus the imposition of terms on Respondent Nos. 7 to 14 were merely an eye wash.

18. In fact, when (the Constitution safeguards protection from health hazards, it will be in the fitness of things to restrain these persons whose fundamental right under Article 19(1) (g) must yield to the fundamental right under Article 21 of the Constitution of the locality,) who had also breached their own undertaking given to this Court in the Criminal Revision. This Court cannot wait indefinitely on account of non-framing of Bye-laws by Respondent No. 2 and must act in furtherance of achieving the avowed object enshrined under Article 21 of the Constitution of India.

19. The fact asserted by the petitioners in paragraph 26 that Respondent Nos. 7 to 14 are slaughtering cattle in their locality continuously for six months without any problem has not been countered by Respondent Nos. 2 and 6. Respondent No.2 has erred in thinking in his counter that the report of the S.D.M. has stated nothing injurious whereas the materials show to the contrary, besides the impugned order does not even refer to that alleged report.

20. In the counter Respondent Nos. 2 and 6 have pointed out that the Bone Godown has already been shifted.

21. It is unbelievable that the Nagar Panchayat has no land to which the slaughter house can be shifted. At least shifting of the Bone Godown shows the availability of such a land.

22. For the reasons aforementioned, we quash the impugned order and restrain Respondent Nos. 7 to 14 from slaughtering any cattle in the slaughter house and command the District Magistrate, Jaunpur to close it at once without any hitch and murmur. If Respondent Nos. 7 to 14 so like they may continue slaughtering in their locality though subject to health safeguards of others. Respondent Nos. 2 and 3 are also directed to search out a suitable slaughter place expeditiously lates within three months where Respondent Nos. 7 to 14 may carry their trade in accordance with law.

23. This writ petition is allowed to the extent indicated as above, but in the peculiar facts and circumstance we make no order as to cost.

24. The office is directed to hand over a copy of this order, if possible by tomorrow or latest within one week to Sri H.R. Misra, learned Standing Counsel, for its communication to and follow up action by the District Magistrate, Jaunpur.

25. Mr. Mishra is also directed to inform the substance of this order by Fax and /or otherwise to the District Magistrate, Jaunpur.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE SHITLA PD. SRIVASTAVA, J.

Special Appeal No. 242 of 1996

Jagbeer Singh Maan ...Appellant/ Petitioner.
Versus
Deputy Director of Education, Region, I, Meerut and others ...Respondents.

Counsel for the Appellant:
Shri A. Jaiswal
Shri Shailendra

Counsel for the Respondent:
S.C.
Shri A.K. Goyal, Shri R.P. Tiwari
Shri V.K. Shukla

U.P. Intermediate Education Act, 1921, S. 16-G readwith Regulation 59 and Indian Evidence Act, 1872, S.115 and Principles of Natural Justice- Transfer- No estoppel against statute- No violation of natural justice.
Held-
We are also of the opinion that as transfer was not in accordance with the statute and even if the order was implemented which was against the statute there cannot be any estoppel against the statute. So for as the opportunity of hearing is concerned the petitioner himself has stated in the writ petition that he made representation to the District Inspector of Schools on 2.4.1991 and on 3.4.1991 and also made representation to the Committee of Management National Public Inter College, Jalalabad, district Muzaffarnagar for salary. He again made representation on 21.4.1991 to the Deputy Director of Education, Region 1, Meerut. Nothing has been shown by the petitioner that the order transferring him from Janta Inter College Lachera to National Public Inter College, Jalalabad was in accordance with Regulation 59 of the Regulations framed under the aforesaid Act and there was any concurrence of the two colleges. The order passed by the District Inspector of Schools on 30.3.1991 cannot be said to be illegal. Therefore, neither the principle of estoppel applies in this case now any rule of natural justice has been violated. We accordingly do not find any error in the judgement of the learned Single Judge. (para 10)

By the Court

1. This special appeal has been filed by the appellant, who was the petitioner before the learned Single Judge, against the judgment and order dated 26.2.1996 passed by learned Single Judge.

2. The brief facts for the purposes of this appeal are that the petitioner filed writ petition challenging the order dated 30.3.1991 passed by the District Inspector of Schools, Muzaffarnagar and further prayed for a writ of mandamus directing the respondents of pay the arrears of salary from July 1989. The impugned order has been filed as Annexure-21 to the writ petition. This order shows that on 3.1.1991 the petitioner was adjusted in National Public Inter College Jalalabad. District Muzaffarnagar on the post of a teacher, which fell vacant. This adjustment was found irregular and has been cancelled and petitioner was reverted back to his parent school.

3. The contention of the petitioner was that he was appointed as C.T. Grade teacher in Janta Junior High School at Lachera, district Muzaffarnagar on 28.7.1981. The school was upgraded to Intermediate College. Petitioner's services were confirmed on 1.8.1982 but in the month of June 1989 the management stopped his salary and did not permit him to work further. It is stated that the petitioner informed the District Inspector of Schools ventilating his grievance, made representation and the District Inspector of Schools told the Committee of Management for the payment of salary to the petitioner but the petitioner was not allowed to work in the institution . Therefore the District of Schools vide his letter dated 9.8.1990 transferred and adjusted the petitioner in the same status in another institution namely, K.K. Jain Inter College Khatauli, district Muzaffarnagar but the management of the college refused to take work from the

petitioner. Then the District Inspector of Schools attached the petitioner with his office but he was not paid any salary. The Committee of Management Junta Inter College Lachera, district Muzaffarnagar relieved the petitioner on 24.8.1990. Then the District Inspector of Schools on 3.1.1991 after taking oral approval from the Deputy Director of Education, Region 1, Meerut directed the Committee of Management National Public Inter College, Jalalabad, district Muzaffarnagar to adjust the petitioner in C.T. Grade. The case of the petitioner is that he was adjusted in that college and he joined the college on 4.1.1991. It is stated that the petitioner has received a letter of the Manager of National Public Inter College, Jalalabad dated 31.1.1991 and also of the Principal dated 18.1.1991 demanding official papers. The petitioner made representation o 14.3.1991 to the Committee of Management National Public Inter College, Jalalabad for the payment of salary but no salary was paid. The District Inspector of Schools passed an order for single operation against the Committee of Management National Public Inter College, Jalalabad on 13.3.1991. The Committee of Management filed Writ Petition No.8389 of 1991 against this order. A stay order was passed by the High Court. It is stated that though the petitioner was working in National Public Inter College, Jalalabad but he was not paid his salary and the District Inspector of Schools on 30.301991 under the order dated 16.3.1991 passed by the Deputy Director of Education, Region I, Meerut withdrew the order dated 3.1.1991. The petitioner has challenged that order in the writ petition.

4. The first ground of attack of the petitioner was that before passing the order dated 30.3.1991 no opportunity of hearing was given to the petitioner, therefore, the order was bad in law. The second ground taken by the petitioner was that the order dated 3.1.1991 which has now been recalled has already been implemented, therefore, it cannot be withdrawn.

5. A counter affidavit was filed in this case contesting the plea of the petitioner. In the counter affidavit filed by one Ishwar Chandra Tyagi, Senior Assistant in the office of the District Inspector of Schools it is stated that the services of the petitioner in Janta Inter College Lachera, which is a recognized institution and that of National Public Inter College, Jalalabad, which is also a recognized institution are governed by the provisions of Payment of Salaries Act, 1971. It is stated that the petitioner was adjusted in other institution, as there was difference between management of Janta Inter College and the petitioner. But subsequently this order was recalled.

6. A counter affidavit has also been filed by one Chandra Vir Singh, President, Committee of Management Janta Inter College, Lachera, district Muzaffarnagar.

7. On behalf of the petitioner it was contended before the learned Single Judge that the District Inspector of Schools had no power to recall his earlier order dated 3.1.1991 and further that no opportunity of hearing was given to the petitioner. From the side of the respondent it was contended that the service of a teacher is governed by the provisions of U.P. Intermediate Education Act, 1921 and

Regulations 55 to 62 under Chapter III of the Regulations framed under the said Act. It was further contended on behalf of the Committee of Management of National Public Inter College, Jalalabad and Committee of Management of Janta Inter College Lachera, district Muzaffarnagar that the transfer order could not be effected in view of the provisions of U.P. Secondary Education Services Commission and Selection Boards Act, 1982. It was further argued on behalf of respondent no.3 that the concurrence of the institution where transfer was proposed was must and since there was no concurrence the transfer order was bad. Learned Single Judge held that there was no concurrence of the management of National Public Inter College, Jalalabad, district Muzaffarnagar for transferring the petitioner from Janta Inter College Lachera district Muzaffarnagar. He further held that even if Section 16-G of the aforesaid Act applies Regulation 59 of the Regulations framed under the aforesaid Act prohibits such transfer in the absence of the concurrence of the institution where a transfer is proposed. Therefore, the transfer was illegal. The writ petition was dismissed but the petitioner was given liberty to approach the appropriate authority. The petitioner has challenged this order of the learned Single Judge by means of the present special appeal.

8. Here the ground of attack is that the learned Single Judge has completely ignored the case of the petitioner that in compliance of the order of the District Inspector of Schools he had joined the college at Jalalabad, therefore, principle of estoppel applied in this case. His further contention is that the District Inspector of Schools has no authority to review his order on the dictate of the Deputy Director of Education as has been done in this case. Admittedly the petitioner was a teacher in C.T. Grade, therefore, provisions of U.P. Intermediate Education Act and Regulations 55 to 62 framed under the aforesaid Act will govern the services of the petitioner.

9. After hearing learned counsel for the parties at length we are of the opinion that the only point to be determined before the learned Single Judge was as to whether the transfer order passed by the District Inspector of Schools dated 3.1.1991 was legal and in accordance with law. Learned counsel for the applicant has placed reliance on Section 16-G of the U.P. Intermediate Education Act whereas learned counsel for the respondent has placed reliance on Regulation 59 of Chapter III of the Regulations framed under the said Act. Relevant portion of Section and Regulation are quoted herein below:-

"**16-G.[Conditions of services of Head of Institutions, teachers and other employees] (1)** <u>Every person employed in a recognized institution shall be governed by such conditions of service as may be prescribed by Regulations and any agreement between the management and such employee insofar as it is inconsistent with the provisions of this Act or with the Regulations shall be void.</u>

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the Regulations may provide for –

(a) the period of probation, the conditions of confirmation and the procedure and conditions for promotion

and punishment [(including suspension pending or in contemplation of inquiry or during the pendency of investigation, inquiry or trial in any criminal case for an offence involving moral turpitude)] and the emoluments for the period of suspension and termination of service with notice.

(b) The scales of pay, and payment of salaries .

(c) Transfer of service from one recognized institution to another,

(d) Grant of leave and Provident Fund and other benefits, and

(e) Maintenance of record of work and service.

"Regulation:59- The transfer of an employee will be permissible subject to the conditions that (I) the Management of the institution where the applicant is serving in willing to release him and (ii) the Management of the new institution to which the applicant has applied for transfer is willing to accept him.

Provided that the transfer application of a person against whom disciplinary enquiry is pending shall not be considered.

Provided further that an employee shall be allowed in the new institution the same salary as he was drawing in the former institution."

From a perusal of the aforesaid provisions it is apparent that the concurrence of the two institutions for the transfer is a must and the finding has been recorded by the learned Single Judge that there is nothing to show that any such concurrence of the management of National Public Inter College, Jalalabad, district Muzaffarnagar was obtained. The transfer order is bad which is prohibited by Regulation 59 of Chapter III of the Regulations framed under the aforesaid Act.

10. We agree with the view taken by the learned Single Judge. We are also of the opinion that as transfer was not in accordance with the statute and even if the order was implemented which was against the statute there cannot be any estoppel against the statute. So far as the opportunity of hearing is concerned the petitioner himself as stated in the writ petition that he made representation to the District Inspector of Schools on 2.4.1991 and on 3.4.1991 and also made representation to the Committee of Management National Public Inter College, Jalalabad. District Muzaffarnagar for salary He again made representation on 21.4.1991 to the Deputy Director of Education. Region I. Meerut. Nothing has been shown by the petitioner that the order transferring him from Janta Inter College Lachera to National Public Inter College, Jalalabad was in accordance with Regulation 59 of the Regulations framed under the aforesaid Act and there was any concurrence of the two colleges. The order passed by the District Inspector of Schools on 30.3.1991 cannot be said to be illegal. Therefore, neither the principle of estoppel applies in this case nor any rule of natural justice has been violated. We accordingly do not find any error in the judgment of the learned Single Judge.

11. The special appeal fails and is dismissed. There shall be no order as to costs.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18TH OCTOBER, 2000

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

Civil Misc. Writ Petition No. 33321 of 2000

M/s. Khurram Carpets Pvt. Ltd. And another ...Petitioners
Versus
State of U.P. through its Secretary Housing, U.P. at Lucknow and others ...Respondents

Counsel for Petitioners :
Shri V.K. Shukla

Counsel for the Respondents:
Shri U.N. Sharma
Shri S. Chaturvedi
S.C.

Constitution of India, Article 226 readwith U.P. Urban Planning and Development Act, 1973, Ss. 27,28,28-A(4) and S.41-Public authority's action found to be discriminatory, frivolous and against Policy decision of State Government-Action , held to be illegal.

Held-

The policy decision that the life of the plan sanctioned for commercial buildings or group housing shall be five years with further extensions on year to year basis has to be implemented by every Development Authority constituted by every Development Authority constituted under the Act. These directions of the Government cannot be ignored or, in any manner, frustrated. The attitude of the respondent. Authority in pestering and harassing the petitioner, in the instant case, cannot but be condemned.

The action of the public authority, therefore, must be based on some rational and relevant purpose. It must not be guided by irrational or irrelevant considerations. It is expected that a statutory public authority must exercise its powers in public interest and for public good . Misuse of power implies doing of something improper. The eseence of impropriety is replacement of public motive for a private one. Certainly the decisions which are capricious cannot be legitimate. (Para 12 and 13)

By the Court

1. In an attempt to promote and boost tourism in the holy city of Varanasi, which is already on the tourist map of the country, a number of projects have come up. The World Bank has also sanctioned substantial amount to bring Varanasi on International Tourist Map of the world. Construction of new hotels is the integral part of the promotion of tourism. The petitioner-company, i.e. M/s. Khurram Carpets Pvt. Ltd. Is having a tie with Raddison Group of Hotels and with a view to construct a five star hotel at plot Nos.4/1 and 4/2, Mauja Araji Line, Mohalla Sikraul, Near Varuna Bridge, Varanasi submitted a plan for sanction to the Varanasi Development Authority (hereinafter referred to as "the Authority") constituted under the provisions of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as "as Act"). The proposed five star hotel building is to have seven floors besides basement. The plan was sanctioned by the Authority on 9.8.1995 and an outside limit of three years was provided to complete the construction work, meaning thereby the life of the sanctioned plan was to expire on 8th August, 1998. In view of various difficulties, the constructions as per the sanctioned plan. Could not be completed within the time frame. The petitioners applied on 4.8.1998 for extension of time

by two years to complete the construction of building. The basement, ground floor and the first floor portion of the hotel building had been constructed. There were certain sharp unauthorised deviations and in view of voluntary compounding scheme the constructions which were not in conformity with the sanctioned plan were compounded after the petitioners had deposited a sum of Rs.3,94,908/- on 19.2.2000. In this manner the offending constructions on the basement, ground floor and the first floor came to be regularised. The petitioners continued the construction of the second and third floor of the building to which the Authority took an exception and served the petitioners with a notice under Section 27 and 28 of the Act and called upon them to explain under what authority further constructions are being made as the life span of the original plan had already expired on 8.8.1998. The petitioners submitted an explanation that the repeat floors are being constructed strictly in accordance with the original sanctioned plan. The Authority passed orders for stopping further construction-work. On 29th May, 2000 the Vive Chairman of the Authority directed that the building under construction be sealed in view of provisions of Section 28A(4) of the Act so that the petitioners are prevented from carrying on further construction- work on the spot, which according to Authority was an illegal activity, as the original sanctioned map has run out its life. With the police help the site of the disputed construction was sealed. On the representation of the petitioners the Commissioner of the Division who also happened to be the ex officio Chairman of the Authority passed an order that the premises be unsealed and no interference be caused in the on-going work. Ultimately this order was recalled by the Commissioner of the Division when full facts, it appears, were brought to his notice by the Authority. The application of the petitioners dated 4.8.1998 for extension of time was rejected by the Authority on 13.6.2000.

2. The petitioners preferred an appeal before the Commissioner of the Division, who by the impugned order dated 3rd July, 2000 remanded the case to the Vice-Chairman of the Authority for taking decision afresh in the matter. The direction issued by the Commissioner/appellate authority, translated into English runs as follows:

"7. In the conspectus of the above analysis the matter is remanded to the Vice-Chairman, Varanasi Development Authority with the direction that in case the appellant (petitioner) submits an application for renewal or revalidation of the originally sanctioned plan as per rules, then it shall be disposed of according to law by a speaking order within a week. The seal put on the site of the disputed construction be opened subject to the condition that if the appellant commences further construction work in that event the site shall be sealed again. Accordingly appeal no.177 of 2000 and appeal/representation no.171 of 2000 are disposed of …."

Pursuant to the above order of the appellate authority/Commissioner of the Division the petitioners have submitted a fresh plan on 6.7.2000. The Authority raised certain objections/queries on 12.7.2000 (Annexure-13 to the petition) and sought the clarification from the petitioners, who have submitted their reply, a copy of which is Annexure –14 to the petition. The site of construction still

continues to be sealed as the Authority has filed a review application before the appellate authority with regard to the direction of unsealing the same.

3. By means of this writ petition under Article 226 of the Constitution of India the petitioners have challenged the order dated 3.7.2000 passed by the appellate authority in appeal no.177 of 2000, a copy of which is Annexure-10 to the petition as well as order dated 29.5.2000, Annexure – 7 to the petition, passed by the Vice-Chairman of the Authority-respondent no.4 for sealing the site of the construction under Section 28-A(4) of the Act and the order dated 12.7.2000, Annexure-13 to the petition, whereby a number of queries/objections have been raised on the fresh plan submitted by the petitioner. It is prayed that the aforesaid orders be quashed and the respondents be prohibited from interfering, in any manner whatsoever, in the ongoing construction of the hotel building over plot Nos.4/1 and 4/2, Mauja Araji Line, Mohalla Sikraul, Near Varuna Bridge, Varanasi. It is further prayed that the respondents be commanded to open the seal put on the existing constructions at the site aforesaid.

Counter and rejoinder affidavits have been exchanged.

4. Heard Sri V.K. Shukla, learned counsel for the petitioners and Sri Satish Chaturvedi, learned counsel appearing on behalf of respondent-Authority as well as learned Standing Counsel.

5. Sri Satish Chaturvedi, learned counsel for the respondent-Authority pointed out and took a preliminary objection about the maintainability of the present petition on the ground that since the matter in respect of construction on the site in question is under consideration of the Hon'ble Supreme Court in S.L.P.No.9961-9963 of 2000 and the parties have been directed to maintain status quo with regard to the disputed construction, the petitioners cannot be permitted to undertake the work of construction and, therefore, the various relief's claimed by the petitioners in the present petition cannot be granted, Sri V.K. Shukla, learned counsel for the petitioners maintained that the matter which is pending before the Hon'ble Supreme Court has nothing to do with the disputed constructions as the special leave petition has been preferred by the respondent-Authority against the order dated 23.5.2000 passed in Civil Misc. Writ Petition No.29087 of 1998 filed by Durgesh Shanker Mathur and others and the orders dated 17.5.2000 and 23.5.2000 passed in Civil Misc. Contempt Application No.42216 of 2000 arising out of the said miscellaneous writ petition. In order to resolve this controversy and for the sake of clarity it s necessary to reproduce the contents of paragraphs 3 and 35 of the counter affidavit filed by the respondent-Authority. These paragraphs read as follows:

"3. That is reply to contents of paragraph no.1 of the writ petition it is stated that though this is the first writ petition with regard to the property subject matter of the present writ petition, however, it is stated that the property in question has already been made subject to the contempt application under Article 215 of the Constitution of India being contempt application No.42216 of 2000 arising out of Writ Petition No.20987 of

1998. It is further stated that the subject matter of the present writ petition, however, it is stated that the property in question has already been made subject to the contempt application under Article 215 of the Constitution of India being contempt application No.42216 of 2000 arising out of Writ Petition No.20987 of 1998. It is further stated that the subject matter of the present writ petition is the property being No.4/1 & 4/2 Mauja Arazi Line, Ward Sikraul, near Varuna Bridge, Varanasi and to show that the said very property was the subject matter of the contempt application No.42216 of 2000, copy of the judgment dated 17.5.2000 is being filed herewith and marked as ANNEXURE NO.CA-1 to this counter affidavit.

Thus, it is stated that since the property which is in question has already been subject matter in earlier case arising out of Writ Petition No.20987 of 1998, the present writ petition is liable to be dismissed on this ground alone."

"35. That contents of paragraph no.38 of the writ petition are denied. It is denied that there is any illegality or arbitrariness in the action of the answering-respondent. It is further stated that since the petitioners have already raised a dispute with regard to construction over site No.4/1 & 4/2 Mauja Araji Lne, near Varuna Bridge, Ward Sikraul, Varanasi in contempt petition No.42216/2000 under Article 215 of the Constitution of India arising out of Writ Petition No.20987 of 1998 as is clear from the order dated 17.5.2000, copy of which has already been filed as Annexure No.CA-1 to this counter affidavit.

It is further stated that subsequently the writ petition No.20987 of 1998 was allowed finally vide judgment date 23.5.2000. It is further submitted that against the order passed in the writ petition as well as in the contempt petition the answering-respondents have filed S.L.P. before the Hon'ble Supreme Court being S.L.P. No.9961-9963/2000, whereby the Hon'ble Court has been pleased to stay the orders passed by this Hon'ble Court. Copy of the judgment passed in S.L.P. is being filed herewith and marked as ANNEXURE NO.CA-9 to this counter affidavit.

It is further submitted that after the judgment/order passed by this Hon'ble Court, wherein the petitioner has already raised dispute with regard to the property situated over site No.4/1 & 4/2 Mauja Araji Line, near Varuna Bridge, Ward Sikraul, Varanasi which is the subject matter of the present writ petition. The petitioners have filed the present writ petition, however, till the order passed by this Hon'ble Court is in operation the present writ petition deserves no consideration.

It is further stated that in the writ petition subsequently on 14.7.2000 the petitioner has again moved an application with regard to on-going construction over site No.4/1 & 4/2 Mauja Araji Line, Ward Sikraul, near Varuna Bridge, Varanasi which is the subject matter of the present writ petition and to prove the same copy of the said contempt application (except annexures) is being filed herewith and marked as ANNEXURE NO.CA-10 to this counter affidavit.

It is further stated that since the matter is pending with the Hon'ble Court

as such the present writ petition requires no consideration and liable to be dismissed."

In Annexure CA – 10 to the counter affidavit, which is a copy of the application moved in Contempt Application No.42216 of 2000 under Article 215 of the Constitution of India, reference of the site on which the disputed constructions are going on has been made in paragraphs 7,8,9, an d10. The various orders with regard to the disputed site i.e. plot nos. 42, Mauja Araji Line, Mohalla Sikraul, Near Varuna Bridge, Varanasi, which have been challenged in the present petition have been specifically referred to in the said application and the conduct of the Vice-Chairman Sri V.S. Bhullar has been criticised, A specific prayer (iii) has been made in the contempt Application under Article 215 of the Constitution of India, which runs as follows:

"(iii) To issue a direction that the conduct of Shri Jagat Raj Tripathi, Joint Secretary Varanasi Development Authority be investigated in so far as it relates to the on going construction at site no. 4/1 and 4/2 mauja Araji Line, Near Varuna Bridge, Varanasi, as per the sanctioned Map, wherein he is not permitting the construction to proceed in spite of sanctioned Map being there, only on account of the fact that requisite amount of money demanded by him is not being paid to him;"

An interim order issuing notice was passed by a Division Bench of this Court on the said contempt application on 18.5.2000 followed by a final order dated 23.5.2000 in the contempt petition as well as in Writ Petition No. 20987 of 1998. Both the orders passed on the contempt petition as well as on writ petition have been challenged before the Apex Court by filing Special Leave to Appeal No. 9961-9963 of 2000 on which the Hon'ble Supreme Court has passed an order on 20.7.2000, the relevant portion of which is extracted below:

"…till further operation of the impugned orders passed by the High Court are stayed Mr. Mishra, the learned senior counsel appearing for respondent No.1 states that original sanctioned plan would be produced by the respondent No. 1 on the next date of hearing parties are directed to maintain status quo as of today with regard to the disputed construction. Contempt proceeding against the petitioner shall also remain stayed. Counsel for the respondent No.1 prays for and is granted two weeks time for filing counter affidavit Rejoinder affidavit, if any, may be filed within two weeks thereafter."

6. In view of the above facts, now the preliminary question for determination is whether the order passed by the apex court on 20.7.2000 directing the parties to maintain the status quo (as on the date of the order) with regard to the disputed construction would apply to the constructions which are the subject matter of the present writ petition. For the reasons which are to follow, I would hasten to conclude that the aforesaid order of the apex court dated 20.7.2000 passed in Special Leave to Appeal No. 9961-9953 of 2000 does not debar the present petitioners to maintain the petition. The earlier writ petition no. 20987 of 1998 was filed by one Drgesh Shankara Mathur with regard to the constructions made over Araji No. 313 Mauja Cantt. Sikrol district Varanasi as per approved plan

dated 16.5.1998 by the Authority. The following relief's were specifically claimed in the aforesaid writ petition:-

"(i) Issue a writ, order or direction in the nature of mandamus, commanding and restraining the respondent nos. 2 and 3 and its agents and servants from demolishing any construction raised over Araji No. 313, Mauza Cantt. Sikraul, district Varanasi as per the approved plan dated 16.5.1998 by the vice Chairman of Varanasi Development Authority, Varanasi;
(ii) issue a writ order or direction in the nature of mandamus commanding the respondent no. 2 and 3 to restore status quo ante as it existed in the afternoon of 26.6.1978in regard to the property no. 313 , Mauza Cantt. Sikraul, Varanasi by raising the boundary wall, as it existed at the said point of time:
(iii)
(iv)

The property which was involved in the earlier writ petition, filed by Durgesh Shankar Mathur is distinct separate and away from the site which compises of Arazi no. 4/s and 4/2, Mauza Arazi Civil Lines, Sikraul, near Varuna Bridge, Varanasi. The owners of the two buildings are different and they have nothing in common with them. In the earlier writ petition, the constructions had already been completed and there was a threat for their demolition and as a matter of fact a portion of the boundary wall was demolished. It was in these circumstances, that the relief's, as extracted above, came to be claimed and were ultimately granted by this court. In the present case, the constructions were commenced pursuant to the plan which was originally sanctioned on 8.8.1995. Since the constructions could not be completed within the period specified, further extension of time was sought and the dispute is with regard to the raising of the further constructions in pursuance of the original plan, life of which has expired. The present petitioners could not be and were not party to the earlier writ petition no. 20987 of 1998 and there was not even a shisper in the averments made in the earlier writ petition about plot no. 4/1 and 4/2, Mauza Arazi Civil Lines, Sikraul, district Varanasi. One cannot escape from the conclusion that whatever has been stated, considered and determined in the earlier writ petition no. 20987 of 1998 has nothing to do with the property, which is the subject matter of the instant writ petition and the persons who are the petitioners.

7. The whole confusion appears to have arisen on account of the fact in the application under Article 215 of the Constitution of India, for initiating action against the officials/officers of the respondent-Authority for the alleged flagrant violation of the order of this court, a reference was made in an incidental manner with regard to the property, which is involved in the present writ petition, to lend strength to the assertion that the officials/officers of the Authority were out to harass the builders for extraneous considerations and since the same officers were involved in harassing the present petitioners for ulterior and extraneous purposes, it was prayed that the conduct of those officers, particularly, that of Sri Jagat Raj Tripathi, Joint Secretary, Varanasi Development Authority be investigated. This court finally decided the Civil Misc. Writ No. 20987 of 1998 on 23.5.2000 granting the requisite relief's. On the application for

contempt under Article 215 of the Constitution of India, and order has been passed by the same Division Bench on 23.5.2000 (in Criminal Contempt application no. 42216 of 2000 / Criminal Contempt Petition No. 35/2000, the Varanasi Development Authority as well as the alleged contemnors have filed Special Leave to Appeal on which the order dated 20.7.2000 as quoted above, was passed by the apex court. The order that the parties shall maintain status quo as on the ate of the order with regard to the disputed construction has no bearing on, relation to, or nexus with site nos. 4/1 and 4/2, which are the properties in dispute in the petition, in hand. The order of the apex court, of necessity, has to be confined with regard to the property no. 313 Mauza Cantt. Sikraul district Varanasi which was disputed in Civil Misc. Writ No. 20987 of 1998. The submission of the learned counsel for the Varanasi Development Authority that on account of the order of the apex court dated 20.7.2000 passed in Special Leave to Appeal no. 9961-9963 on 2000, the present writ petition is not maintainable, is wide off the mark as there is nothing in common between the two writ petition in the conspectus of the facts stated above.

8. Having cleared the decks from the cobwebs spun by the learned counsel for the contesting respondents about the maintainability of the present writ petition. Now it is the time to consider the merits of the present writ petition. It is an indubitable fact that a plan to construct a five-star hotel building with seven floors besides the basement was sanctioned by the Authority on 9.8.1995. The entire building was to be completed within a period of three years, meaning thereby the sanction was to ensure up to 8.8.1998, which was the deadline. The petitioners did commence the work of construction but could reach only up to the level of the basement, ground floor and first floor and consequently before the approach of the deadline they applied on 4.8.1998 for extension of time by two years to complete the project. The various deviations which came to be made by the petitioners in the construction of the basement, ground floor and first floor portions were compounded and regularised by the respondent-Authority on deposit of Rs.3,94,908. The bogey of the unauthorised construction or deviations cannot now be raised by the respondent-Authority as it has itself condoned the deviations after accepting a substantial amount as per rules. The whole trouble started when the petitioners were prevented from raising the repeat floors on and above the first floor. The respondent-Authority, it appears laboured under the impression that since the original period of three years has expired the sanctioned plan has lapsed and, therefore, any further building activity would be in teeth of the provisions of Section 27 of the Act liable to be stopped and since the petitioners continued to raise their constructions, the drastic provisions of Section 28-A (4) of the Act were invoked. The petitioners, on the other hand, were swayed away by the idea that since their unauthorised constructions have been compounded they are entitled to continue with the building activity of the repeat floors. They, therefore, approached the Commissioner of the division/Chairman of the Authority to intervene in the matter. The stand taken by the petitioners found favour with the Chairman and he issued instructions to the Vice Chairman of the Authority to unseal the site so that the on-going building

activity may not come to a halt There was apparent resistance on the part of the officers of the Authority who, to some extent went out of the way to flout the orders of their Chairman. When the orders passed by the Chairman on the administrative side failed to evoke favorable response, the petitioners had to take the recourse to the judicial proceeding by filing a formal appeal under the provisions of sub-section (2) of Section 27 of the Act. The appeal was decided by the Chairman on 3.7.2000 and the matter was remanded to the Vice Chairman to dispose of the application for renewal or revalidation of the original sanctioned plan as per rules within a week. Accordingly, the petitioners submitted a fresh plan on 6.7.2000. Instead of revalidating or renewing the original plan, the officers of the Authority incensed as they were, had chosen to raise certain frivolous objections. They did not pass orders for renewal or revalidation of the original sanctioned plan.

9. I have given thoughtful consideration to the matter with reference to the rival contentions of the parties and the material brought on the record and find that the various contentions raised on behalf of the petitioners are not unfounded. With a view to regulate the building activity in a developmental area, it is necessary to sanction the building plans. Sanction of plans has an element of public purpose. The time limit within which the work of construction is to be completed is fix in order to encourage the building activity and to develop the area within the specified period. However, the dead line by which the constructions are required to be completed be sacrosanct and in view of the Various difficulties, imponderables and the exigencies, which may not be for seen, the life of the plan may be extended by passing an order which in the common parlance is termed as revalidation or renewal of the plan originally sanctioned. One cannot lose sight of the fact that seven storeyed (besides the basement) hotel building is a giganitic venture fraught with certain difficulties which cannot be easily visualised. The re request of the petitioners for extension of two year's time to complete the project in the circumstances appeared to be quite genuine and reasonable. After the offending constructions had been compounded, prayer for extension of time should have been, in the normal course, allowed by the Authority.

10. Sri V.K. Shukla, learned counsel for the petitioners urged that in spite of the orders passed by the Chairman in appeal, the officers of the respondent-Authority are not prepared to see to reason and have adopted an attitude of hostility against the petitioners and the matter has been allowed to pend unnecessarily to the serious detriment of the petitioners, who are in a quandary after having invested a huge money in making apart of the constructions which they are not able to complete on account of the arbitrary, uncalled for, reckless and callous attitude of the officers of the respondent-Authority as somehow they have entertained a feeling that the adverse orders in the earlier writ and contempt petitioners came into being at the behest of the present petitioners. It was also urged that the application dated 4.8.1998 moved by the petitioners for extension of time was rejected by the Authority on 13.6.2000, i.e., after about 22 months of its filing on totally insufficient, untenable and tenuous grounds with a view to defeat

the legitimate claim of the petitioners to complete the project.

11. The Vice Chairman of the Authority and other officers subordinate to him have acted in cohesion against the interest of the petitioners and were out to deliberately cause loss to them. The entire exercise was directed in a manner so as to defeat the legitimate rights of the petitioners who were at all stages prepared to obey orders and directions of the Authority. This is obvious from the fact that after the submission of the plans by the petitioners on 6.7.2000 pursuant to the orders of the appellate authority, an attitude of pinpricking and hair splitting was adopted by raising frivolous objections. The frivolity of the objections raised on behalf of the Authority may be exemplified in order to demonstrate the unfairness on the part of the officers and employees of the respondent-Authority In the letter dated 12.7.2000, addressed by the respondent-Authority to the petitioners, a copy of which is Annexure 13 to the writ petition, the first objection raised is that the petitioners have diminished and consumed the parking space in the basement by raising partition walls which act is objectionable both from technical and planning point of view. The petitioners in their reply, a copy of which is Annexure 14 to the writ petition, have clarified that the partition walls. Which are purely of temporary nature have been put up with a view to accommodate and provide space for housing the masons and labourers who are engaged in the construction of huge project and after the building work is complete and the workers are relieved of their job, the temporary partition walls are liable to be removed and eventually the entire area shall be made available for parking purposes. It is common knowledge that temporary structures are put up for accommodating the labourers at the site itself and after the completion of the building labourers quit the place and move out. The Authority has raised the objection just for the sake of objection so that the renewal or validation of the plan submitted by the petitioners in view of the direction of the appellate court may continue to remain pending. This attitude of the respondent-Authority is reprehensible and cannot but be condemned. Now when the petitioners have to make the constructions of repeat floors there hardly appears to be scope for any valid and tangible objection.

12. There is yet another aspect of the matter. With a view to relieve the public of the harassment occasioned in getting the building plans sanctioned the State Government has simplified the procedure by taking a policy decision. The original period of validity of three years of a building plan for a commercial or a group housing scheme has been extended to five years. This policy decision of the State Government is contained in Avas Neeti Karya Pariyojna circulated by Housing Department of State of U.P, Lucknow in March 1999, a copy of which is Annexure 11 to the writ petition. Sri Satish Chaturvedi, learned counsel for the respondent-Authority appears to be of the view that no government order has been issued pursuant to the policy decision and, therefore, reference to the aforesaid Avas Neeti karya Pariyojna is otiose. This submission is clearly in opposition to the provisions of Section 41 of the Act. It contemplates control by the State Government over the Development Authority, its Chairman or the Vice Chairman. Sub-section (1) of Section 41

lays down that the Authority, the Chairman or the Vice Chairman shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of the Development Authority. It is not disputed that Avas Neeti Karya Pariyojna, Annexure 11 has been issued by the State Government. Not only this, alive to the situation, the State Government has also capped the policy decision by issuing Government Order No.M/182-9 -3/97-38 Misc./97 dated 30th September, 2000 and the validity period of the plan sanctioned for a commercial building stands extended to five years. Even after the expiry of the period of five years life of the plan may be extended thrice on year to year basis. The policy decision that the life of the plan sanctioned for commercial buildings or group housing shall be five years with further extensions on year to year basis has to be implemented by every Development Authority constituted under the Act. These directions of the Government cannot be ignored or, in any manner, frustrated. The attitude of the respondent-Authority in pestering and harassing the petitioners, in the instant case, cannot but be condemned.

13. From the material brought on record, one can easily infer that the respondent-Authority has not been fair in dealing with the petitioners. The variety of reasons, which impelled the Authority to adopt hostile attitude, are not too for to seek, Sri V.K. Shukla learned counsel for the petitioners pointed out that the action of the respondent-Authority and its officers has not only been arbitrary or capricious but certainly discriminatory. He pointed out that in the case of another hotel building known as M.M. Continental Hotel, the respondent-Authority has adopted a partisan attitude, inasmuch as, in spite of the fact that the entire building has been constructed against the provisions of the plan, it has been allowed to be continued and some orders for compounding of the offending constructions appear to have been passed surreptitiously. To fortify his contention, the record of the M.M. Continental Hotel was required to be summoned. On the application of the petitioners, Sri V.B. Singh, who was earlier counsel for the respondent-Authority undertook to produce the record of the said establishment on the next date, but for the reasons best known to the Authority, the record was not produced and it was deliberately withheld obviously with olique motive. The court has been deprived of the opportunity of wading through the record of M.M. Continental Hotel. A legitimate adverse inference may, therefore, be drawn against the respondent-Authority that it has applied different yardsticks in the matter of construction of Hotel building in the developmental area of Varanasi. The respondent no.3 is a public authority and there are prethora of decisions of Hon'ble the Supreme Court as well as this court that a public body should not have unfettered discretion in dealing with the citizens. In this connection, I am reminded of the observations made by Prof. Wade in his book 'Administrative Law'. He sad :-

" The powers of public authorities are, therefore, essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish . He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the

same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest.

There are many cases in which a public authority has been held to have acted from improper motives or upon in relevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void."

The action of the public authority, therefore, must be based on some rational and relevant purpose. It must not be guided by irrational or irrelevant considerations. It is expected a statutory public authority must exercise its powers in public interest and for public good . Misuse of power implies doing of something improper. The essence of impropriety is replacement of public motive for a private one. Certainly the decisions which are capricious cannot be legitimate.

14. Without dilating over the matter any further, suffice it to say that the respondent-Authority is duty bound to pass appropriate orders for validating/revewal of the plan submitted by the petitioners in the light of the directions made by the appellate court as well as the observations made above. Already there has been a considerable delay in completing the work of construction. If the Authority had extended time in view of the policy decision taken by the State Government for extension of the validity period of the plans and had not sealed the site, hotel building by now would have reached an advanced stage. The petitioners should not be permitted to suffer any further due to the arbitrary, unjustified and callous attitude of the officers of the Authority.

15. This writ petition is finally decided with the direction that the respondent no.3-Authority shall immediately pass orders (not later than 15 days from the date of copy of this judgement is produced before it) for the revalidation/renewal of the plan filed by the petitioners and release the same pursuant to the order dated 3.7.2000 of the appellate authority as well as the State Government dated 30.9.2000 and after removing the seal from the site, it shall make it available for further constructions according to the original sanctioned plan, without any let or hindrances.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 16.10.2000

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

Civil Misc. Writ Petition No. 43878 of 2000

Meerut College Parivar Kalyan Samiti
...Petitioner.
Versus
State of U.P. through its Secretary, Higher Education, Lucknow & others
...Respondents

Counsel for the Petitioner:
Shri Pramod Jain

Counsel for the Respondent :
S.C.
Shri Shailendra

First statutes of Meerut University- statute 17.15-Benefit of academic session- Principal of an affiliated college attaining the age of superannuation on 2.7.2000- service extended upto 30.6.2001- held need no interference in view of law laid down by High Court in Udai Narain Pandey case reported in 1999 (3) U.P.L.B.E.C. 1887.

Held- para 6

It may be pointed out that statute 16.24 applies to Universities while the provisions contained in Statute 17.15 applying to affiliated colleges. The attention of the Apex Court was perhaps not invited to the relevant statute applicable to affiliated college. However, statute 16.24 referred to the judgement of the supreme Court is in pari materia with statute 17.15.

By the Court

1. Heard Sri Pramod Jain appearing for the petitioner, Standing Counsel representing the state, Sri Vivek Chaudhary for Vice Chancellor and Sri Shailendra representing the respondent no. 4 Dr. V.B. Chauhan. Since we are not interfering with the impugned order it is not necessary to issued notice to Committee of Management and the Director, Anti Corruption Branch, C.B.I. arrayed herein as respondent nos. 3 and 5 respectively.

The writ petition is directed against the office memo dated 17.6.2000 by which the service of the fourth respondent has been extended upto 30.6.2001. it is not disputed that the fourth respondent was born on 2.7.1940 and as such he attained the age of superannuation on 2.7.2000. the services of the petitioner, however, stood extended up to 30.6.2001. under Statute 17.15 of the First Statutes of the University of Meerut. The College in question is affiliated to the said university Statute 17.15 being relevant to the controversy is quoted hereunder:

" 17.15 No extension in service beyond the age of superannuation shall be granted to any teacher after the date of commencement of these Statutes. Provided that a teacher-

(i) whose date of superannuation does not fall on June 30. Or

(ii) whose date of birth is July 1 and who having been employed from before the commencement of these Statutes continues to be in service as such on the date of commencement of the Meerut University (Twenty second Amendment) First Statutes, 1985: shall continue in service till the end of the academic session, that is, June 30 following, and will be treated as on re-employment from the date immediately following his superannuation till June 30 following.

2. The question is whether the benefit of Statute 17.15 could be given to the Principal of an affiliated college. Section 2 (18) of the Universities Act. 1973 defines " teacher ' to mean, "a person employed (for imparting instructions or guiding or conducting research in the University or in an institute or in a constituent, affiliated or associated college) and includes a Principal or a Director " By this reckoning Principal of an affiliated college would be deemed to be a 'teacher' and therefore, he was entitled to get the benefit of Statute 17.15 and accordingly, to continue in service till the end of academic session i.e. to say till 30th June following the date of his superannuation.

No resolution of Committee of Management is required to be passed in this regard inasmuch as the extension in service and re-employment takes place by operation of law and the petitioner will be treated as " reemployment from the date immediately following his superannuation till June 30 following"

3. Sri Pramod Jain, learned counsel has placed reliance on a decision of Supreme Court in S.K. Rathi Vs. Prem Hari Sharma and others. The said decision, in our opinion, is not applicable to the facts of the present case. It would appear from the facts of that case that a teacher was acting as on officiating principal and the question arose as to whether on extension of his service as a teacher he was entitled to continue as officiating principal of the college the management did not allow him to work as officiating principal. He filed Civil Misc. Writ Petition No. 54640 of 1990 Dr. Prem Hari Sharma Vs. Dr. B.R. Ambedakar. University of Agra and others, in which a Division Bench of this court passed the following order:

"Sri Pankaj Mittal has appeared for respondent no. 1 and learned counsel for Central Govt. for respondent nos. 2.3 and 4. They may file C.A. within a month.

List in the week commencing 14th Feb. 2000. In view of the Division Bench decision in Udai Narain Pandey Vs. Director of Education 1999 (3) U.P.L.B.E.C. 1887, we direct that petitioner shall continue to function as principal of the institution in question till. 30.9.2000.

Sd/-M.Katju. J.
Sd/-S.K. Agarwal. J.
5.1.2000'

4. Against the interim order dated 5.1.2000 Special Leave Petition was filed by Sri. S.K. Rathi which has been decided by the Supreme and is reported in Jt. 2000 (8) SC 267. It would appear that the provisions contained in Section 2 (18) of the of the State Universities Act. 1973 were not brought to the notice of their Lordships the Supreme Court and therefore, it was held that is as result of extension, the teacher concerned would be entitled to continue as a teacher in his substantive appointment but not as a principal. The post of a principal is a direct recruitment post and is not a post to be filled by promotion. But since a teacher in that case was given officiating appointment as principal and the Apex court proceeded as if the post of principal was to be filled up b promotion as would appear from the observation:" It is a teacher on promotion who is appointed as a Principal and there is no decision of the government giving extension beyond the age of 60 years to a principal." This observation was perhaps, made because the relevant provisions were not brought to the notice of the Hon'ble Supreme Court

5. In **Uddi Narain pandey Vs. Director of Education (Higher Education) Allahabad and others** the question involved herein was considered by a Division Bench of this Court wherein it was held that a person appointed as principal holding the said post till the date of superannuation is entitled to reemployment in the service as per the Statute. The Special leave to Appeal (Civil) No. 3895 of 1999 was preferred against the judgement. Upon hearing the counsel the Hon'ble Supreme Court was pleased to pass the following order:

"We are in agreement with the High Court that in view of the provisions of Statute 16.24 read with Section 2 (18) of the U.P. State Universities Act, 1973, the Principal who was in office could be re-employed till 30th June following his age of superannuation. In this view of the matter, the continuation of respondent no. 5 till 30th June, 1999 is in accordance with law.

The special leave petition is dismissed."

6. It may be pointed out that Statute 16.24 applies to Universities while the provisions contained in Statute 17.15 applying to affiliated colleges. The attention of the apex Court was perhaps not invited to the relevant Statute applicable to affiliated college. However, statute 16.24 referred to the judgment of the Supreme Court is in pari materia with Statute 17.15

Accordingly, we find no merits in this case. The writ petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE SHITLA PD. SRIVASTAVA,J.

Special Appeal No. 471 of 1998

Dinesh Chand Sharma ...Petitioner-Appellant
Versus
District Inspector of Schools Meerut and others ...Respondents

Counsel for the Appellant:
Shri Ashok Khare

Counsel for the Respondents:
S.C.

Intermediate Education Act, 1921 Regulations 101 to 107, as amended- Natural Justice- Compassionate appointment. –No second appointment on compassionate ground.

Held- para 6

We are of the view that when the father of the petitioner died, petitioner was legally entitled to get and appointment on compassionate ground and he was rightly appointed as an assistant clerk as he was qualified for that post only having qualification of intermediate only. The law on compassionate ground is very clear. It is for the purpose of giving financial assistance to the dependants and the family members of the deceased who was a bread earner and died during the course of his employment. It is apparent from the order passed by the District Inspector of Schools, Meerut dated 24.4.1998 that the officer concerned considered the relevant rules and law reported in 1994 (6) SCC, page 657 wherein it has been clearly held that no person is entitled to claim the benefit under dying in harness rules more that once. Therefore, it cannot be said that the petitioner was entitled to claim the benefit under dying in harness rules more than once. Therefore, it cannot be said that the petitioner was entitled to get benefit of dying in harness rules for second time when he became qualified for the post of assistant teacher. We are of the view that the case of the petitioner is fully covered by the decision quoted above and the judgement of the learned Single Judge does not require any interference in special appeal.

Cases referred

By the Court

1. This special appeal has been filed by the appellant (petitioner) against the

judgement and order dated 18.5.1998 passed by learned Single Judge dismissing the writ petition of the appellant.

2. The brief facts giving rise to the writ petition has been mentioned in the affidavit filed by one Mahesh Chandra Sharma. Who is brother of the appellant. Along with affidavit documents beginning from the date of the appointment of the appellant till the cancellation of his appointment as assistant teacher in Ashok Higher Secondary School Sarawan, District Meerut have been filed. It is stated in the affidavit that petitioners father Mam Chandra Sharma was serving as permanent lecturer in Chemistry in Janta Inter College Saroorpur, district Meerut He died on 26.11.1987 while he was in service. The petitioner applied for appointment on compassionate ground. He was appointed as assistant clerk by the Committee of Management of the institution on 24.9.1992 and he joined his service as assistant clerk in the institution. At that time the petitioner had passed only intermediate examination and subsequently he passed his B.A. examination in the year 1993 and B. Ed. examination in the year 1994.

3. After appointment of the petitioner as assistant clerk a dispute arose regarding the post on which the petitioner was appointed, as one Rohtas Singh and Satyavir Singh were also appointed on the said post . The challenged the order of appointment of the petitioner by filing writ petitions before this Court. The District Inspector of Schools by orders dated 15.9.1994 and 4.3.1995 declared the petitioner to be surplus. The order of confirmation of the appointment of the petitioner to the post of assistant clerk was cancelled by the Manger of the institution vide order dated 16.1.1995. It appears that when the petitioner became qualified for the post of assistant teacher he submitted as application on 2.2.1995 that he should be appointed as an assistant teacher on the post which had fallen vacant in L.T. grade. This application was filed on the basis of certain amendments made in Regulations 101 to 107 introduced in Chapter III of the Regulations framed under the U.P. Intermediate education Act by means of notification dated 30.7.1992. The application of the petitioner was forwarded by the Manager of Janta Inter College where the father of the petitioner has served before his retirement as a teacher as well as by the Manager of Kisan Inter College. Meerut. When no action was taken by the District Inspector of Schools on the representation of the petitioner he preferred Civil Misc. Writ Petition No. 18292 of 1995 in which this Court directed the District Inspector of Schools to decide the representation of the petitioner. On 18.7.1995 petitioner made a fresh representation. The District Inspector of Schools on 30.1.1997 passed an order that the petitioner shall be appointed as an assistant teacher in Nav Bharat Vidya Peeth Inter College. Partapur. District Meerut. It appears that on 14.6.1997 the Manager, Committee of Management of Ashok Higher Secondary School, Saranwa, district Meerut made a request to the District Inspector of Schools that the petitioner be accorded replacement in his institution on the vacancy which was going to occur due to the retirement of Sri Richha Pal Singh on 30.6.1997. the District Inspector of Schools on 30.6.1997 passed an order directing the replacement of the petitioner at Ashok Higher Secondary School

Saranwa. District Meerut as assistant teacher. The petitioner joined on 1.7.1997. But subsequently on the salary bill of August 1997 an endorsement was made on 22.8.1997. by the District Inspector of Schools that the bill should not be passed. The petitioner filed Civil Misc. Writ Petition No. 29649 of 1997.This Court on 12.9.1997 passed an order that as the petitioner started discharging his duty in compliance of the order dated 30.6.1997 passed by the District Inspector of Schools. Meerut the respondents are directed to pay salary to the petitioner month in accordance with law. But this order will not prevent the respondents from making any enquiry or taking any action in terms of the decision, in such an enquiry in respect of the petitioners appointment. It appears that the District Inspector of Schools on 24.4.1998 passed an order and cancelled the order dated 30.6.1997 by which the petitioner was appointed as assistant teacher. The petitioner has challenged this order by means of Civil Misc. Writ Petition No. 16614 of 1998, which was dismissed on 18.5.1998 by the learned Single Judge against which this special appeal has filed.

4. Learned Single Judge held that the petitioner was appointed as assistant clerk on compassionate ground on 24.9.1992 and on that date he was simply an intermediate and now he cannot be given again benefit on compassionate ground for appointment on the post of assistant teacher simply because he had passed B.A. and B. Ed. examination during the period of his service. Learned Single Judge has observed that in State of Rajasthan Versus Umrao Singh 1994 (6) SCC, Page 657, it has been held that once the appointment has been made on compassionate ground the claimant is not entitled to get another appointment on different post simply because he is qualified for other post subsequently.

5. We have heard learned counsel for the parties at length Learned counsel for the petitioner has vehemently urged that learned Single Judge has not appreciated the point that on account of the order passed by the District Inspector of Schools in favour of Rohtas Singh and Satyavir Singh the appellant continued as assistant clerk only against a supernumerary post of assistant clerk and while he was working on the aforesaid post notification dated 2.2.1995. came into existence and creation of supernumerary post of assistant clerk was prohibited and a provision was made for making appointment on compassionate ground also on the post of assistant teacher in L.T. grade to the dependent of the person dying in harness after 1.1.1981 and as the father of the petitioner died in the year 1987 the petitioner was qualified to be appointed as assistant teacher on the post which fell vacant and when the petitioner was actually appointed vide order dated 30.6.1997as assistant teacher a right accrued to him and that right could not be snatched from the petitioner by the order dated 24.4.1998 without giving any opportunity of hearing to the petitioner. His further contention is that apart from violation of rules of natural justice discrimination has also been made as other persons similarly placed were given benefit, therefore, the order is violative under Article 14 of the Constitution of India. His further submission is that the case of the petitioner was covered by amended Regulations 101 to 107 as introduced under Chapter III of Regulations framed under the

Intermediate Education Act by means of notification dated 30.7.1992. His further submission is that the appointment on compassionate ground has to be made against a substantive vacancy in a permanent capacity and as the petitioner was working as temporary appointee against the supernumerary post of assistant clerk, in view of Regulation 101 to 107 he was to be adjusted against the substantive vacancy as soon as the vacancy comes into existence which was rightly done on 30.6.1997.

6. After hearing learned counsel for the petitioner at length and going through the entire documents filed along with the affidavit we are of the view that when the father of the petitioner died, petitioner was legally entitled to get an appointment on compassionate ground and he was rightly appointed as an assistant clerk as he was qualified for that post only having qualification of intermediate only. The law on compassionate ground is very clear. It is for the purpose of giving financial assistance to the dependants and the family members of the deceased who was a bread earner and died during the course of his employment. It is apparent from the order passed by the District Inspector of Schools, Meerut dated 24.4.1998 that the officer concerned considered the relevant rules and law reported in 1994 (6) SCC, page 657 wherein it has been clearly held that no person is entitled to claim the benefit under dying in harness rules more than once. Therefore, it cannot be said that the petitioner was entitled to get benefit of dying in harness rules for second time when he became qualified for the post of assistant teacher. We are of the view that the case of the petitioner is fully covered by the decision quoted above and the judgement of the learned Single Judge does not require any interference in special appeal.

The special appeal is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.9.2000

BEFORE
THE HON'BLE SHYMAL KUMAR SEN, C.J.
THE HON'BLE G.P. MATHUR, J.

Civil Misc. writ Petition No. 31877 of 2000

Mudi ...Petitioner
Versus
State Election Commission, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Shri Amit Krishan
Shri Ravi Kant

Counsel for the Respondents:
S.C.
Shri B.D. Mandhyan

U.P. Punchayat Raj Act 1947 – Section 9- readwith U.P. Punchayat Raj (Electors Registration) Rules 1994-Rule 19-finaity of voter list-whether it can be altered after publication- held it is to be treated sacrosanct- can not be challenged either in writ petition or by election petition under Section 12-c of the Act.

Held-

We are, therefore, clearly of the opinion that after the publication of final electoral roll and commencement of the election process, no challenge to its correctness can be entertained by means of a writ petition under Article 226 of the constitution. The electoral roll is sacrosanct and its correctness cannot be challenged in an election petition filed

under Section-12-c of the U.P. panchayat Raj Act as well.

Case Law discussed

AIR 1994 SC –2271
AIR1995 SC – 1512
JT. 1994 (8) SC 733
(1985) 4 SCC 689
(1985) 4 SCC –722
AIR 1957 SC-304

By the Court

1. The petitioner contested election for the office of Pradhan of village Bhura, Tehsil Kairana, District Muzaffarnagar Which was held on June 23.2.2000. In the said election 4902 were cast out of which 308 votes were rejected as invalid. Petitioner secured 1957 votes while Rishipal, respondent no secured 1752 votes and was accordingly declared to have been elected as pradhan. The present writ petition under Article of the constitution has been filed praying for several relief including a writ of quo warranto asking respondent no. 4 to show his authority to hold the office of pradhan, a writ of mandamus for restraining respondent no. 4 from functioning pradhan of the village, writ of mandamus commanding state Election Commission and District Returning officer to hold fresh election of the office of pradhan of village Bhura in accordance with the revised electoral rolls after deleting names of those who were wrongly included in the electoral of the gaon sabha. Further relief has been sought praying to writ of mandamus be issued commanding the State Election Commission and the District Returning officer to delete the names of all those persons whose names have been mentioned in annexures- 2 to 4 of the writ petition. Though the relief claimed in the writ petition has not been couched in such a language but in effect the petitioner wants that the election of respondent no. 4 as pradhan be set aside and a fresh election held.

2. Sri Ravi Kant, learned counsel for the petitioner, he submitted that electoral roll of the gaon sabha, on the basis of which the election was held, was defective and fraudulent inasmuch as it contained names of large number of such persons who were either dead or were minors or were otherwise not eligible to vote in the election and, consequently, the result of the election had been materially affected and therefore, the election of respondent no.4 is liable to be aside and a fresh election should be held after correcting the electorate roll.

3. In order to examine the contention raised, it is necessary to notice the provisions of the U.P. Panchayat Raj Act 1947 (hereinafter referred to as the Act) and the Rules made there under. Section 9 of the Act which deals with electoral for each territorial constituency was drastically amended by U.P. Act No. 9 of 1994. The relevant sub-sections of Section of the Act which have a bearing on the controversy in hand as being reproduced below:

"9. Electoral roll for each territorial constituency. – (1) for each territorial constituency of a Gram Panchayat, an electoral roll shall be prepared, in accordance with the provisions of this Act and the rules made there under, under the superintendence, direction and control of the State Election commission.

(I-A) Subject to the superintendence, direction and control of the State Election commission, the Mukhya Nirvachan Adhikari (Panchyat) shall supervise, and perform all functions relating to the

preparation revision and correction of the electoral rolls in the State in accordance with this Act and the rules made there under:

(1-B) ……………………….

(2) The electoral roll referred to in sub-section (1) shall be published in the prescribed manner and upon its publication it shall, subject to any alteration, addition or modification made in accordance with this Act and the rules made there under, be the electoral roll for that territorial constituency prepared in accordance with the provisions of this Act.

(3) Subject to the provisions of sub-sections (4) (5), (6) and (7) every person who has attained the age 18 years on the first day of January of the year in which the electoral roll, is prepared or revised and who is ordinarily resident in the territorial constituency of a Gram Panchayat shall be entitled to be registered in the electoral roll for that territorial constituency.

Explanation………………………..

(4)

(5)

(6)

(7)

(8) Where the State Election Commission is satisfied after making such enquiry as it may deem fit, whether on an application made to it or on its own motion that any entry in the electoral roll should be corrected or deleted or that the name of any person entitled to be registered should be added in the electoral roll, it shall, subject to the provisions of this Act and rules and orders made there under, delete or add the entry, as the case may be:

Provided that no such correction, deletion or addition shall be made after the last date for making nominations for an election in the Gram Panchayat and before the completion of that election;

Provided further that no deletion or correction of any entry in respect of any person affecting his interest adversely shall be made without giving him reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him.

(9) The State Election Commission may, if it thinks it necessary so to do for the purposes of a general or bye-election, direct a special revision of the electoral roll for any territorial constituency of a Gram Panchayat in such manner as it may think fit.

Provided that subject to the other provisions of this Act, the electoral roll for the territorial constituency, as in force at the time of issue of any such direction, shall continue to be in force until the completion of the special revision so directed."

4. Sub-section (10) of Section 9 confers powers on the State Election Commission to make provision in respect of certain matters viz. The date on which the electoral roll shall come into force and its period of operation; the correction of any existing entry in electoral roll; the correction and inclusion of name of any person in the electoral roll in so far as the provision is no made in this regard by the Act or the Rules. Section 9-A provides that except as other wise provided by or under the Act, every person whose name is for the time being included in the electoral roll for a territorial constituency

of a gram panchayat shall be entitled to vote at any election made and be eligible for election, nomination or appointment to any office in that gram panchayat or the concerned nyaya panchayat.

5. In exercise of power conferred by sub-section (2) of Section 9 and Section110 of the U.P. Panchyat Raj Act, the State Government made the U.P. Panchyat Raj (Registration of Electiors) Rules 1994, which were published on August 20, 1994 (hereinafter referred to as the Rules) Sub-rule (c) of rule 2 defines " roll" and it means an electoral roll for a territorial constituency of a gram panchayat. Rule 3 provides that in every district each roll should be prepared and revised by an Electoral Registration Officer, who shall be such officer of the State Government as the State Election Commission may in consultation with the State Government designate or nominate in this behalf. Rule 5 provides that the first roll should be prepared in accordance with the provisions of the Rules, Rule8 requires that as soon as the roll for all the territorial constituencies of a gram panchayat are ready, they shall be published by making a copy there of available for the inspection and displaying a notice in form 1 at the office of the Block Development Officer. The Electoral Registration Officer shall by beat of drum or by amplifier or any other convenient mode give publicity in the panchayat area to the fact that the rool has been published. Rule 9 enables any person whose name is not included or whose name has been wrongly included in the roll of some other territorial constituency of the gram panchayat or whose name is struck off the rolls by reason of any disqualification, to apply in form 2 to the Assistant Electoral Registration officer for inclusion of his name in the roll. Rule 10 permits objection to be made against any entry in the electoral roll either at the instance of the person concerned on the instance of a third person. Rule 11 gives a limitation of 7 days for making application or objection under rule 9 or rule 10 from the date of publication of the draft roll as provided under rule 8 Rule 15 enjoins that a notice shall be served in from at upon every applicant under rule 9 or rule 10 specifying the place and time when the application shall be heard , directing him to be present with such evidence, if any, as he may wish to adduce. Rule 16 is material and it provides that an Assistant Electoral Registration officer shall hold a summary enquiry into every application in respect of which notice has been given under rule 15 and shall record a decision thereon. At the hearing the person to whom such notice was issued, shall be entitled to be present and to be heard. The Assistant Electoral Registration Officer may in his discretion require any person to whom such notice has been issued to be present and may also require that the evidence tendered by any person shall be given on oath and may administer oath for the purpose. Rule 18 casts a duty on the Assistant Electoral Registration officer to take remedial action if name of a dead person or of persons who cease to be, or are not, ordinarily resident in the area of the territorial constituency, have been included in the roll. He is also required to prepare a list of the names and other details or such persons and exhibit a notice on the notice board in his office with a copy of the list together with the notice as to the time and place at which the question of deletion of such names from the roll shall be considered and further after considering any verbal or

written objections that may be preferred, decide whether all or any of the names be deleted from the rolls. Rule 19 relates to final publication of the roll and sub-rule (1) and (2) are being reproduced below:

"19. Final publication of roll. – (1) The Electoral Registration officer shall thereafter publish the roll together with the list of amendments under rules 15,16,17 and 18, by making a complete copy thereof available for inspection and displaying a notice in form 7 at his office.
(2) On such publication the roll together with the list of amendments shall be electoral roll for the territorial constituency.
(3)………………….."

Rule 21-A provides for appeal and sub-rule (1) the re of lays down that an appeal shall lie from any decision of the Assistant Electoral Registration officer under rules 16,18 or 21 to the District Magistrate. Sub-rule 4 of this rule provides that every decision of the appellate officer shall be final, but if it reverses or modifies a decision of the Assistant Electoral Registration officer, it shall take effect only from the date of decision of the appeal.

6. The provisions of the U.P. Panchayat Raj (Registration of Electors) Rules, 1994, show that the draft electoral roll has to be published and the Electoral Roll Registration officer shall by beat of drum or by amplifier or any other convenient mode shall give publicity in the panchayat area to the fact that roll has been published and that a copy thereof can be inspected free of charge at the office of the Block Development officer. Any person whose name is entered in the roll and has objection of the inclusion of name of any other person in the roll or has objection to any particular entry, can file an application for correction of the particulars or exclusion of the names under rule 10 within a period of 7 days from the date of publication of the roll. The application is to be heard by the Assistant Electoral Registration officer under rule 16 and he can dilate the name of a dead person or of persons who have ceased to be, or are not, ordinarily residents of the area of the territorial constituency. Against the decision of the Assistant Electoral Registration officer, an appeal is provided to the District Magistrate under rule 21-A. Rule 19 provides that the Electoral Roll Registration officer shall publish the roll together with the list of amendments and on such publication the same shall be the electoral roll for the territorial constituency. The Rules, therefore, provide a complete machinery for correction of electoral roll. They also provide that on publication of the final electoral roll, the same shall be treated to be the electoral roll for the territorial constituency. Similar provision is contained in Section 9 and sub-section (2) thereof provides that the electoral roll prepared in accordance with the provisions of the Act and the Rules shall be the electoral roll of for the territorial constituency of the gram panchayat. The first proviso to sub-section (8) of Section 9 lays down that no correction, deletion or addition shall be made to an electoral roll after the last date for making nominations for an election in the gram panchayat and before the completion of that election, Sub-section (12) of Section 9 of the Act lays down in clear terms that no civil court shall have jurisdiction to entertain or adjudicate upon the question whether any person is or is not entitled to be registered

in an electoral roll or to question the legality of any action taken by or under the authority of the State Election commission or of any decision given by any authority or officer appointed in this behalf in respect of preparation and publication of the electoral rolls. Thus, the provisions of the Act attach finality to an electoral roll which has been prepared in accordance with rule 19 and the first proviso to Section 8 of the Act puts an embargo on the power of the State Election Commission or any other officer or authority to made any correction, deletion or addition in the electoral roll after the last date for making of nomination for an election in the gram panchayat and before the completion of that election. This clearly shows that for the purpose of holding an election the final electoral roll as published under Rule 19 is to be treated as sacrosanct. The civil court is also debarred from examining the correctness or other wise of the electoral roll.

7. In view of the aforesaid provision a challenge to the correctness of electoral roll cannot be permitted to be raised after the publication of the final electoral roll. If a person feels that name of a dead person or a person who is not eligible to be included in the electoral roll has been included in the electoral roll, his remedy lies in filing an application at the opportune time for correction of the entry. Similarly, if the name of someone has not been included in the electoral roll though he is eligible for the said purpose, he ought to make an application in that regard within the prescribed period. The decision of the Assistant Electoral Registration officer in these matters is subject to an appeal and sub-rule (4) of rule 21-A attaches finality to the order passed in appeal. The provisions of the Act and the rules thus provide a complete safeguard against any wrong inclusion or wrong omission of name in the electoral roll. After publication of the final roll the same is immune from any challenge at a subsequent stage. Once the process of election has begun, they can neither be challenged by means of a writ petition under Article 226 of the Constitution nor in an election petition filed under Section 12-C of the U.P. Panchayat Raj Act which gives the procedure for challenging the election of a person as pradhan.

8. Ours is the biggest democracy and the second most popular country in the world and, consequently, the electoral rolls are also big containing large number of names. The authorities entrusted with the duty of preparation of electoral roll can possibly have no personal knowledge about the correctness of every entry. If the people of the area do not take appropriate steps for deletion of the name of a dead person or the name of a person who is not qualified to be entered in the electoral roll of a panchayat, the same may continue to find place till the time of the election and voting. It is practically impossible to have an absolutely accurate electoral roll. The State machinery has to spend considerable time and energy in holding an election and it also involves huge public expenditure. If the ground of error or mistake in the electoral roll is entertained, every election will be under a peril of being set a side although the authorities have conducted the election in a most fair and impartial manner following the rules and the candidates have also conducted them selves fairly without committing even the slightest breach of the law. This will lead to great uncertainly and will not be conducive to the growth of a healthy

and vibrant democracy. Therefore, after the notification for election has been issued no writ petition should be entertained challenging the correctness of the electoral roll. The election of the returned candidate can also not be challenged on the said ground either by filing a writ petition or by means of an election petition as provided in the statute. However, if some gross procedural error has been committed in the preparation of the electoral roll, like not publishing the draft electoral roll or not giving opportunity for making an application for either delection or addition of names, the action of the authorities in such cases will not be immune from challenge under Article 226 of the constitution provided the same is made promptly and before the notification for holding the election is issued.

9. In Baidyanath Panjila Vs. Sita Ram Mahto, AIR 1970 SC 314, it was held that reference under Section 62 (1) of Representation of People Act, 1950, to the electoral roll shall mean electoral roll in force on the last day for making nominations for the election and votes of persons added after last day for making the nominations in contravention of Section23 (3) of the said Act shall be deemed to be void and, as such, covered by Section1 00(1) (d) of the Act. In Subhash Desai Vs. Sharad J. Rao AIR 1994 SC 2277. The appellant's election to the legislative assemble had been set aside by the High Court on several grounds and one of the grounds was that names of certain persons had been included in the electoral roll though the final publication had been made before making of the nominations. The High Court after declaring election of the appellant to be void, issued a direction to verify as to whether final publication of the electoral roll on 15.1.1990 with inclusion of names of electors was in accordance with law and if the said inclusion was not in accordance with the procedure prescribed by the Representation of People Act, 1950, then to exclude their votes after opening the ballot boxes and to recount the valid votes for the purpose of fresh declaration. The Apex Court set a side the said direction on the ground that the final publication of the electoral roll had been made before making of the nominations.

10. Some decisions regarding delimitation of the constituencies may be profitable noticed at this stage. In Meghraj Kothari Vs. Delimitation Commission, AIR 1967 SC 669, a notification of the Delimitation Commission, whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes, was challenged on the ground that right of candidate for election to the Parliament from the said constituency had been taken away. If was held that the impugned notification was a law relating to delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution and that an examination of Sections 8 and 9 of the Delimitation Commission Act showed that the matters dealt with therein were not subject to the scrutiny of any court of law. In State of U.P. Vs. Pradhan Sangh Kshetra Samiti AIR 1995 SC 1512, which is a case governed by the provisions of the U.P. panchayat Raj the apex Court after referring to the law laid down in Meghraj Kothari (supra) observed as follows in paragraph 11;

"….. If we read Articles 243-C, 243-K and 243-Q in place of Article 327 and

Section 2 (kk) , of the Delimitation Act, 1950 if will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged or the Court could have entertained such a challenge except on the ground that before the delimitation, no objections were invited and no hearing was given, Even this challenge could not have been entertained after the notification for holding the elections was issued…."

11. A similar controversy was examined in Anugrah Narain Singh Vs. State of U.P. Jt., 1996 (8) SC 733, wherein the elections scheduled to be held with regard to municipal corporations governed by the U.P. Municipal Corporations Adhiniyam, 1959, were challenged. With regard to the delimitation of the constituency, it was held as follows in paragraph 25 of the reports:

"….. The U.P. Act of 1959, however, merely provides that the draft order of delimitation of municipal areas shall be published in the official Gazette for objections for a period of not less than seven days. The draft order may be altered or modified after hearing the objections filed, if any. Thereupon, it shall become final. It does not lay down that such an order upon reaching finality will have the force of law and shall not be questioned in any court of law. For this reason, if may not be possible to say that such order made under Section 32 of the U.P. Act has the force of law and is beyond challenge by virtue of Article 243-ZG. But any such challenge should be made soon after the final order is published. The validity of a final order published under Section 33 of the U.P. Act is beyond the ken of Election Court constituted under Section 61 of the said Act."

12. With regard to the electoral rolls, the Court observed as follows in paragraphs 26 and 28 of the reports, which are as under:

"Similarly, the electoral rolls have to be prepared and published under Section 39 of the U.P. Act. If there is any mistake, objections can be filed within the specified period and corrected on the basis of the objections filed, if any. A remedy by way of appeal has been provided to a person aggrieved by the inclusion, deletion or correction of the name in the electoral roll. There is no provision in the U.P. Act giving force of law to the electoral roll after its finalisation. However, Section 49 of the U.P. Act contains a bar on the jurisdiction of a civil court to entertain or adjudicate upon a question whether a person is or is not entitled to be registered in an electoral roll for a ward or to question the legality of any action taken by or under the authority of the State Election Commission in respect of preparation and publication of electoral roll or to question the legality of any action taken or of any decision taken by the Returning officer or by any other persons appointed under this Act in Connection with an election.

"28. Therefore, so far as preparation of the electoral roll is concerned, there are sufficient safeguards in the Act against any abuse or misuse of power. In view of these provisions and particularly, in view of sub-section (6) of Section 39 which provides for appeals in regard to inclusion, deletion or correction of names,

there is hardly any scope for a Court to intervene and correct the electoral rolls under Article 226 of the Constitution. In fact , if this is allowed to be done, every election will be indefinitely delayed and it will not be possible to comply with the mandate of the Constitution that every Municipality shall have a life-span of five years, or less, if dissolved earlier, and thereafter fresh elections will have to be held within the time specified in clause (3) of Article 243-U. Having regard to the provisions for filing objections and also the right of appeal against inclusion, deletion and correction of names and also to the constitutional authority of the Election Commission to give directions in all matters pertaining to elections, the Court should not have intervened at all on the basis of allegations as to preparation of electoral rolls."

13. The principle laid down in the case of Anugrah Narain Singh (Supra) is fully applicable to the present case as well . We are therefore, clearly of the opinion that after the publication of final electoral roll and commencement of the election process, no challenge to its correctness can be entertained by means of a writ petition under Article 226 of the Constitution. The electoral roll is sacrosanct and its correctness cannot be challenged in an election petition filed under Section 12-C of the U.P. Panchayat Raj Act as well.

14. Sri Ravikant has submitted that preparation and publication of electoral rolls is not a part of the process of the election and can, therefore, be challenged in a writ petition filed under Article 226 of the Constitution. In support of his submission he has placed reliance on Lakshmi Charan Sen and others Vs. A.K.M. Hassan Uzzzaman and others, (1985) 4 SCC 689, (paragraphs 26 and 28) and Indrajit Barua and others Vs. Election Commission of India and others, (1985) 4 SCC 722. In our opinion, the principle laid down in the aforesaid cases do not have any application to the controversy in hand. In Lakshmi Charan Sen (supra), which was a case governed by Representation of People Act, it was observed that notwithstanding the fact that the roll contains errors and they have remained to be corrected, or that the appeals in respect thereof are still pending, the Returning officer is under an obligation to publish the roll by virtue of rule 22. It was further held that the fact that certain claims and objections are not fully disposed of, even assuming that they are filed in accordance with law, cannot arrest the process of election to the Legislature and the election is to be held on the basis of the electoral roll which is in force on the last day for making nominations. In Indrajit Barua (supra) it was observed that even unrevised electoral roll continues to be effective for election to the parliament and other legislatures. In paragraph 12 of the Reports, it was observed:

"Preparation of electoral rolls is not a process of election. In a suitable case challenge to the electoral roll for not complying with the requirements of the law may be entertained subject to the rule indicated in Punnuswami case. But the election of a candidate is not open to challenge on the score of the electoral roll being defective."

15. The aforesaid observations do not at all support the case of the petitioner. On the contrary, they support the view which as been taken by us. The learned counsel for the petitioner has also referred to another decision of the Apex

Court in Chief Commissioner of Ajmer Vs. Radhey shyam Dani, AIR 1957 SC 304. This cases relates to election to Ajmer Muncipal Committee which was governed by Ajmer Merwara Muncipalities Regulation 1925, which has not been produced before us. The facts of the case show that the writ petition had been filed challenging the order of the Electoral Registration officer by which an application for rectification of the mistake in parliamentary electoral roll had been rejected. In a writ petition challenging the said order the Judicial Commissioner, Ajmer, restrained the District Magistrate from holding the elections and poll to the Ajmer Municipality Committee. The question of election being challenged on the ground of some error or mistake in the electoral roll, therefore, did not arise for consideration in the said case. We fail to see as to how this decision can be of any assistance to the petitioner.

16. For the reasons mentioned above, we find no merit in the writ petition which s hereby dismissed summarily at the admission stage.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2000

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

Civil Misc. Writ Petition No. 778 of 2000

J.N. Chaturvedi, Advocate High Court, Allahabad R/O 14B, Elgin Road, Civil Lines, Allahabad ...Petitioner
Versus
Commissioner, Allahabad/ District Magistrate, Allahabad and Others ...Respondents.

Counsel for the Petitioner:
Shri Rahul Chaturvedi

Counsel for the Respondents:
Shri V.N. Srivastava
S.C.

Constitution of India, Article 226-Need of proper rain age system essential part of life line of city- only the bureaucrats alone cannot solve these problems the citizen must also involved-High level Committee constituted advocates being respectable section of people nominated chairman and the members of the Society.

Held-

In our opinion, the time has come in this county when the problems have become so big that bureaucrats alone cannot solve them. Hence, the citizens must also be involved in solving their own problems. In a democracy the people are supreme, and hence all authorities are accountable to the citizens. We had in this petition earlier set up committee by our order dated 4.9.2000 under the chairmanship of Dr. R.S. Dwivedi Senior a Advocate of this Court and this Committee Shall be known as the Allahabad Citizens Committee. The

members of the Committee, Which we appointed are advocate because Lawyers are the most representative section of the people. However, We have permitted the Chairman of the Committee to co-opt other persons also at his discretion, so that this problem of water logging and supply of water can be permanently Solved. No doubt, that Committee did hard work. (Para 4.)

By the Court

1. A drainage system is an essential part of the lifeline of a City. Without a proper drainage system in a City there are bound to be epidemics, diseases water logging and other kinds of big problems.

2. Due to the rains Which started from the evening of 30th August 2000 and continued for two or three days atleast one third, if not one half, of Allahabad City went under water, causing huge loss of property and other problems in the City. The City became like Venice, with boats plying on the streets. Lacs of citizens lost their household goods and suffered various kinds of damage and hardships. Thousands of house were several feel under water many citizens had to abandon their houses or to go on the first floor, if there was one. The miseries of the people of Allahabad were unimaginable.

3. Not only the City of Allahabad is facing such a problem but also a large member of other Cities in India were also facing the same. For instance the newspapers reported that many parts of Calcutta City were several feet under water and people were seen swimming on the streets there. Similarly in Ahmedabad city many colonies including the Gujrat High court Judges Colony were several feet under water. This is a ridiculous state of affairs. We read in our history books that 5000 to 6000 years ago in Harappa and Mohanjodaro Civillization there was a proper drainage System, water supply system and town planning. It seems that instead of progressing after 5000 to 6000 years we are going backward. This state of affairs will no longer be tolerated by this Court as it directly affects Article 21 of the Constitution of India that guarantees a dignified and civilized life to all citizens of India.

4. In our opinion, the time has come in this country when the problems have become so big that bureaucrats alone cannot solve them. Hence, the citizens must also be involved in solving their own problems. In a democracy the people are supreme, and hence, all authorities are accountable to the citizens. We had in this petition earlier set up a Committee by our order dated 4.9.2000 under the Chairmanship of Dr. R.S. Dwivedi a Senior Advocate of this Court and this Committee Shall be known as the Allahabad Citizens Committee. The members of the Committee, Which we appointed, are Advocates, because Lawyers are the most representative section of the people. However we have permitted the chairman of the committee to co-opt other persons also at his discretion, so that this problem of water logging and supply of water can be permanently solved. No doubt, the Committee did hard work, interviewed a large number of citizens in the affected areas, discussed the problems with the officials and personally visited the affected areas. However, we are still not satisfied with the work done by the committee.

5. We are informed that much of the problem of water logging was caused due to encroachment on the drains, and many people have built their constructions on the drains. We fail to understand how the Allahabad Development Authority permitted this and if it was done without its permission then why did the Allahabad Development Authority not take steps for removing these encroachments. If these illegal encroachments on drains are not removed immediately then the officials will be severely punished, and they better take beed to this the monsoons will come every year and hence. If a proper drainage system is not erected the whole of Allahabad will go several feet under water every year. We are more concerned about the future so that this situation may not arise again.

6. The Committee is directed to take all steps and measures of ensure proper set up of water supply and drainage system in the City of Allahabad, and for this purpose the Committee is empowered of to take all necessary steps and issue all necessary directions to the official. We have already directed the State Government to give all financial aid for this purpose. We direct the Secretary Urban Development Department U.P. Government as well as principal Secretary, Finance, U.P. Government to appear before us on the next date fixed and they should also appear before the committee to discuss these matters on a date intimated by the Chairman of the Committee, Which should be prior to the next date fixed by this Court.

7. The Committee shall not only monitor the problems of water logging and water supply but also the other problems of Allahabad city e.g. roads, electricity, hospitals and other civic amenities.

8. We direct that the Committee shall meet at least once a fortnight as long as this writ petition is pending. The Committee must submit its progress report to this Court on each date fixed by this Court. The authorities shall render accounts to the Committee is empowered to investigate whether the account is correct or not will introduce accountability amongst all officials.

9. The authorities concerned shall prepare a blue for the well coordinated and laid out drainage and water system within two months and submit the same to the aforesaid Committee. The Committee Shall then examine the same with the aid of experts.

The Mayor of Allahabad Dr. Rita Joshi, appeared personally before us and stated that funds were sanctioned by the government for setting up a second water works in Allahabad at Karelabagh, but nothing has been done. The authorities will explain to the Committee why that has happened, and what steps have been taken in this connection.

Dr. R.S. Dwivedi the Chairman of the Committee informs us that he has co-opted Sri A.K. Jain, Vice Chairman, Eastern U.P. Chamber of Commerce and Industry in the Committee. He can co-opt another members also.

List before us on 11th December 2000, on which date the authorities as well as the Finance and Urban Development Secretaries will be present before us.

Let Copy of this order be issued to the Chairman of the Committee free of charge by tomorrow.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEPTEMBER 28, 2000

BEFORE
THE HON'BLE R.H. ZAIDI, J.

Civil Misc. Writ Petition No. 7808 of 1998

Heera Lal Agarwal & another .Petitioners
Versus
II Additional District Judge, Farrukhabad & Others ...Respondents.

Counsels for the Petitioners:
Shri Atul Dayal
Shri K.M. Dayal

Counsels for the Respondents:
S.C.
Shri G.R. Jain

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, Ss.21 (1) (a), 22 and S. 34 (7)- Release application Rejection by prescribed Authority Appeal allowed without meeting reasons and findings recorded by prescribed authority appellate order seta side- Appeal- Scope.

Held-(Para 14 and 20)

In the present case, the Appellate Authority, after stating the facts and some of the findings recorded by the prescribed Authority while examining the questions of bonafide and genuine need, recorded its own findings, it also referred to certain decisions of this court and abruptly reached the conclusion that the prescribed Authority Committed mistake in analyzing the facts and Law and that the appeal had force and was liable to be allowed without critically examining the findings and without meeting reasons recorded by the prescribed Authority.

It may also be noticed that the prescribed Authority has recorded a clear and categorical finding on the question of comparative hardship in favour of the petitioner. The Appellate Authority did not reverse the said finding in accordance with law, legally, without reversing the said finding, the judgement and order passed by the prescribed authority could not be reversed, therefore, the judgement and order passed by the Appellate Authority is bad in law judging from the said angle.

Cases Law discussed

1996(2) ARC 479
1982 (1) ARC 246
1982 (2) ARC 527
1985 (1) ARC 368
1996 (2) ARC 617
AIR 1988 SC 1841
1978 ARC 17
1978 UPRCC 446
1986 (1) ARC 34

By the Court

1. By means of this filed under Article 226 of the Constitution of India, petitioner prays for issuance of a writ, order or direction in the nature of certiorari quashing the judgment and order dated 25.11.1997 passed by the Appellate Authority allowing the appeal and setting aside the judgement and order dated 25.11.1997 passed by the appellate Authority allowing the appeal and setting aside the judgement and order dated 30.08.1996 passed by the prescribed Authority in the proceeding under section 21 (1) (a) of the U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act 1972 (U.P. Act No. XIII of 1972), for short the Act.

2. The dispute relates to shops no. 5/23, 5/24, Nehru Nagar, Farrukhabad (hereinafter referred to as shop in dispute). The petitioner is a tenant of the shop in dispute and used to carry on "Sarrafa" business in the said shop for last more than 40 years in the name and style of Firm Sundar Lal Ram Bharose & Company. The respondents no.2 and 3 (herein after referred to as contesting respondents) applied for release of the shop in dispute as according to them the said shop was needed for setting Prabhat Kumar son of Rajendra Prasad (respondent no.2) in the business of sale of furniture and gift articles. It was stated that Prabhat Kumar completed his education in 1992 but since then he was jobless and for that reason he was also not being married. It was pleaded that the petitioner no.1 had an alternative accommodation in his possession at Lohai Road, Farrukhabad and could also acquire other shop, that need of the contesting respondents was bona fide and genuine. It was also pleaded that the contesting respondents were also willing to have shop at Lohai Road, Farrukhabad owned by respondent no.1 at the same rent at which the shop in dispute was let out to him if the same was offered to them by petitioner after getting it repaired. It was stated that the contesting resp0ndents asked the petitioner to vacate the shop in dispute to which he did not agree. Plea of comparatively more hardship, in case the release application was rejected was also taken. The petitioner no.1 filed his written statement/ objection on receipt of notice from the court of prescribed Authority admitting relationship of landlord and tenant between the parties, but controverting and denying the rest of the allegations made in the release application. It was pleaded that actually the shops in dispute, were two shops on the spot. One was let out at the rent of Rs.30/- per month and other at the rent of Rs.93.75/- per month, total Rs.123.75/- per month. Praphat Kumar son of respondent no.2 actually had no need for the shop in dispute as he was already engaged in the family business. It was also pleaded that alternative place for setting him in business was available to the landlords at Lohai Road as they had two shops on the said road. Sarrafa Bazar was the centre of sarrafa business and the shop in dispute was not fit for starting proposed business of furniture and Gift articles. The said shop was also not big enough to start the said business, the petitioner had been carrying on Sarrafa business in the shop in dispute for last 40 years. He with the consent of landlord's made a show room to make the shop more attractive after spending sufficient amount of money. The said business was the only source of his livelihood. He has earned Goodwill in the said business. His two sons also sit in the said shop and if he was uprooted from the said shop, he shall be ruined. It was also pleased that Probhat Kumar son of respondent no.2 was carrying independently the business of general merchant in the named and style of Firm Sunder Lal Ram Bharose & Company which was situated on the first floor of their general store at Nehtru Road. Even at Lohi road the land lords used to carry on the business of brassware. They actually wanted to enhance the rent of the shop in dispute. In view of these facts there was absolutely no question of any hardship what to say for comparatively greater hardship to the landlord's if their application was rejected. The release application was, therefore, liable to be dismissed.

3. In support of their cases the parties have produced evidence, oral and documentary, The prescribed Authority after perusing the material on record recorded clear and categorical findings against the contesting respondents on the relevant questions involved in the case. It was held that the need of the landlords was neither bona fide nor genuine. They had two storied shop at Nehru Road and were engaged in family business of general merchandise. Pawan Kumar, the other son of respondent no. 2 also used to work at that shop. It was held that even at Lohai Road they had two ancestral shops in which they were also carrying on Business. The shop in dispute was not fit for establishment of business of furniture and Gift articles, as the said business of furniture and Gift articles, as the said business requires a big and spacious shop, with show room and place to manufacture and repair furniture, The shop in question was smaller in size which was situated in sarrafa market and was fit for sarrafa business only in which petitioner no.1 use to carry on business for last 40 years. It was also held that the landlords have owned three brick kilns and members of their family used to do and look after the said business. The prescribed Authority also recorded clear and categorical finding that Prabhat Kumar also used to do business in the name and style of M/s Sundar Lal Ganga Saran & Company. The Prescribed Authority also held that with a view to make out a case for release of the shop in dispute, during the pendency of the case, the landlords appear to have entered into a partition and also pretended to claim that one brick kiln was closed. Even on the question of comparative hardship, it was held that the landlords shall suffer absolutely no hardship if their application was rejected. On the other hand, if the petitioner no. 1 was uprooted from the shop in dispute, he shall be totally ruined as he had no alternative suitable place to shift his business. The shop situated at Lohai Road was also not found fit to shift the proposed business as there was no Sarrafa Shops at that place. After recording said findings by judgment and order dated 30.8.1996 the release application was rejected by the Prescribed Authority.

4. Aggrieved by the said judgment and order passed by the prescribed authority the contesting respondents filed as appeal before the Appellate Authority. Before the Appellate Authority it was urged that judgement and order passed by the prescribed Authority was illegal and contrary to evidence on record, therefore, the same was liable to be set aside. The Appellate Authority agreeing with the submissions made by the learned counsel for the respondents set aside the judgment and order passed by the prescribed Authority and allowed the appeal by its judgement and order dated 25.11.199, hence the present writ petition,

5. Learned counsel appearing for the petitioners vehemently urged that the Appellate Authority has acted illegally in setting aside the judgment and order passed by the prescribed authority without critically examining properly setting aside the findings on which said judgment was based. It was urged that the Appellate Authority has acted illegally in not reversing the findings on the question of comparative hardship in accordance with law and in allowing the appeal. It was urged that under the facts and circumstances of the case no reasonable person could arrive at a finding that the

need of the landlords for the shop in dispute was genuine or bona fide or that they were to suffer any hardship in case their application was rejected. The judgement and order passed by the appellate Authority was, therefore, liable to be set aside. Learned counsel for the petitioner also submitted that the petitioners were willing to offer one shop to the contesting respondents at Lohai Road after getting the same repaired and renovated and after making it fit for their requirement, if they were willing to accept the same.

6. Learned counsels for the contesting respondents submitted that before the Authority below, their offer was not accepted by the petitioners. Therefore, at this stage, for him, there is no occasion to accept the offer, It was also urged that the judgment and order passed by the appellate authority was quite valid and legal.

7. I have considered the rival submissions made by the learned counsel for the parties and also carefully perused the record.

8. The main thrust of the argument of learned counsel for the petitioners is that the Appellate Authority has, without critically examining the judgment and order passed by the Prescribed Authority, without meeting the reasons given by the said authority and without reversing the findings recorded by it, recorded its own findings on the question of bone fide need. The Appellate Authority, thus, acted as if it was the original authority. It recorded its own findings and substituted the same in place of the findings recorded by the prescribed Authority, therefore, the judgement and order passed by the Appellate Authority was bad in law and was liable to be set aside. The judgment of the Appellate Authority is the judgment of reversal, therefore, it should be adequate and satisfactory it is well settled in law that the judgement of reversal must contain definite findings on the questions involved and must give reasons for reversing the decisions of the prescribed Authority. The appeal was filed against the order passed by the prescribed Authority dismissing the release application filed under Section 22 of the Act, which reads as under:-

"22, Appeal- Any person aggrieved by an order under Section 21 or Section 24 may within thirty days from the date of the order prefer an appeal against it to the District Judge, and in other respects, the provisions of Section 10 shall mutatis mutandis apply in relation to such appeal."

9. Section 22 of the Act provides that the provisions of Section 10 of the Act shall mutatis mutandis apply in relation to an appeal filed under Section 22 of the Act. Section 10 of the Act reads as under :-

"10. Appeal against order under Sections 8,9 and 9-A – (1) Any person aggrieved by an order of the District Magistrate under Section 8 or Section 9 or Section 9-A may, within thirty days from the date of the order, prefer an appeal against it to the District Judge, and the District Judge may either dispose it of him self or assign it for disposal to an Additional District Judge under his administrative control, and may recall it from any such officer, or transfer it to any other such officer.

(2) The appellate authority may confirm, vary or rescind the order, or remand the case to the District Magistrate for rehearing, and may also take any additional evidence, and pending its decision, stay the operation of the order appeal on such terms, if any, as it thinks fit.

(3) No further appeal or revision shall lie against any order passed by the appellate authority under this section, and its order shall be final."

10. The Scope of appellate powers came to be considered by this Court in Gyan Chand Vs. Additional District Judge, Badaun and another, 1996 (2) A.R.C. 479 wherein, in was hold as under:-

" 8. A reading of Section 22 with Section 10 of the Act clearly shows that the Appellate Authority has got the power of confirming, varying or rescinding the order under appeal. It has also got power to remand the case to the authority below and to grant interim order on such terms as it thinks fit. The order passed by the Appellate Authority has been made final under sub- section (3) of section 10 of the Act. The Appellate Authority while confirming varying or rescinding the order, will have to act judicially and in accordance with law. The Appellate Authority will have to record the reasons for passing the said order particularly while passing an order of reversal.

11. After considering the decisions in the cases of Ram Niwas Pandey Vs. VII Additional District Judge, Kanpur and another, 1982 (1) ARC 246, Mohd, Nanhey Main Vs. IV Additional District Judge, Aligarh and others, 1982 (2) ARC 527, Mahavir Jain Vs I Additional District Judge, Jhansi and others, 1985 (I) ARC 368, it was ruled as under:-

" In the aforesaid decisions, in the similar circumstances, the orders passed by the Appellate Authority have been quashed by this court on the ground that they did not examine the findings recorded by the prescribed Authority critically and the material, which was relied upon by the Prescribed Authorities and reasons recorded by them for the conclusion arrived at, remained untouched."

Similar view was taken by this Court in Ramesh Chandra Vs. II Additional District Judge, Allahabad.1996 (2) A.R.C. 617.

12. From the reading of the afore said Sections of the Act and decisions, it is evident that the Appellate Authority/ District Judge may confirm, vary or rescind the order of remand the case to the Prescribed Authority for re-hearing besides conferring other powers. In the present case, the Appellate Authority has rescinded (reversed) the judgement and order passed by the prescribed Authority, therefore, the judgement of the Appellate Authority must satisfy the basic requirements of the judgement of reversal, which have been stated above. In the Act and the Rules prescribed the render, no detailed procedure for deciding an appeal has been provided but sub-section (7) of Section 34 of the Act provides as under:-

"34. Powers of various authorities and procedure to be followed by them—
(1)………………………..

(7) The District Magistrate, the prescribed authority or the appellate or

re-visional authority shall record reasons for every order made under this Act."

13. In view of the aforesaid provision, the judgement of the Appellate Authority must contain reasons, This Court has consistently ruled that the Appellate Authority should examine the judgement of the Prescribed Authority critically if it wanted to reverse the findings recorded by the prescribed Authority. It must meet the reasons recorded to after referring to the evidence which was referred and relied upon by the Prescribed Authority, including such other evidence which for med part of the record and there after, it could reverse the findings and record its own findings on the questions involved in the appeal.

14. In the present case, the Appellate Authority, after stating the facts and some of the findings recorded by the prescribed Authority while examining the questions of bona fide and genuine need, recorded its own findings, it also referred to certain decisions of this court and abruptly reached the conclusion that the prescribed Authority committed mistake in analyzing the facts and law and that the appeal had force and was liable to be allowed without critically examining the findings and without meeting reasons recorded by the Prescribed Authority.

15. It is evident form the judgment and order passed by the Appellate Authority that what has weighed with it to allow the appeal was the fact of availability of alternative accommodation at Lohai Road. The Prescribed Authority, while dealing with the question of availability of alternative accommodation, rejected the contention of the contesting respondents on the ground that the petitioner has been carrying on Sarrafa business in the shop in dispute for about 40 years. He with the consent of the landlord, made show-room attractive after investing sufficient amount, earned goodwill in the said business. The said business was the only source of his livelihood and his two major sons also used to sit with him on the shop in dispute, and that Prabhat Kumar, Son of the petitioner no.2 was already engaged in the business in the name and style of Sunder Lal Ram Bharose and Company, and also used to assist his father in the ancestral business. He was carrying on the business of brick kiln and that at Lohai Road, there was no Sarrafa business carried by any other person. It was not a fit and proper place for sarrafa business. In Dr. M.K. Salpekar Vs. Sunil Kumar Shyam Sunder Chaudhary and others, A.I.R. 1988 S.C. 1841, the Apex Court of the country, while considering the question of alternative accommodation was pleased to rule as under:-

"When a Court is called upon to decide whether another building available to the tenant can be treated as alternative accommodation, it has to consider whether the other building is capable of reasonably meeting the requirements of the tenant on his vacating the disputed premises."

In Pritamber Lal Gupta Vs. Bankey Lal and others, 1978 A.R.C. 17, this Court ruled as under:-

" The alternative premises must be such where the business could be carried on by the petitioner. The State Government again appears in favour of the respondents nos. 1 and 2 and without discussing the

evidence on the said question, held that the premises no.27/33, Katre, Allahabad, Could be used by the petitioner for carrying on his business. The State Government ought to have considered the evidence of the petitioner which was to the effect that the same was not suitable for the purposes of doing the business."

Similar view was taken by this Court in Ram Swarup Gupta Vs. III Additional District Judge and others, 1978 U.P.R.C.C. 446, wherein it was held as under:-

"Mere availability of an accommodation is not enough. Whether it is adequate for the nature and the requirement of the business to be carried on as also the location of that accommodation are important circumstances. The floor space area available in the alternative accommodation may also from an important consideration depending on the nature of business carried on."

16. According to the version of the petitioners, at Lohai Road no shop is available, but even if it is available, it does not satisfy the requirements of an alternative accommodation as held in the above noted decisions. The view taken and the finding recorded by the Appellate Authority, to the contrary, to the effect that there existed an alternative accommodation was not correct. The Appellate Authority has not applied its mind to the fact that all the four shops or any one of them situated at Lohai Road was vacant and available to the petitioner and that it satisfied the requirement of an alternative accommodation.

17. There is another aspect of the matter, as in paragraph 6-A of the release application, it was stated as under:-

6अ- यह कि प्रार्थीगण विपक्षीगण की लोहाई रोड फर्रूखाबाद स्थित सम्मपत्ति /उतने ही किराये पर लेने को तैयार है जितनी कि किराया प्रश्नगत सम्पत्ति का विपक्षीगण द्वारा प्रार्थीगण को दिया जा रहा है। यदि विपक्षीगण लबे (सडक लोहाई रोड)तत्काल निर्माण करवाकर उपरोक्त सम्पत्ति न्यायालय द्वारा निर्धारित समय के अन्दर प्रार्थीगण को किराये पर देने को सहमत हो जाते हैं।

18. From the above noted paragraph it is evident that the dispute could be resolved if one shop as Lohai Road was offered by the petitioner and the same is accepted by the contesting respondents no. 2 and 3 with this view in consideration, I asked the learned counsel for the petitioner as to whether the petitioner was willing to accept the offer and provide one shop suitable for the purpose of Prabhat Kumar, Learned Counsel for the petitioner after consultation with his client made statement at the Bar that he was willing to offer a shop suitable for the purpose of Prabhat Kumar on the same terms and on the same conditions the shop in dispute had been let out to the petitioner. It was also stated that the shop shall be repaired and renovated according to the wishes of the contesting respondents within such reasonable time as may be prescribed by this court. The learned counsel appearing for the contesting respondents also consulted his client after the aforesaid offer was made, but according to him, the contesting respondents declined to accepted the officer, legally, the contesting respondents are bound by their statements of fact made in paragraph no. 6-A of the release

application as the same so far has not been withdrawn specifically or otherwise.

19. In support of their pleas regarding partition of property and closure of brick kiln business, the contesting respondents filed supplementary counter affidavit along with which as many as 15 documents have been filed as Annexures. Learned counsel for the respondents wanted to rely on the said documents. In the affidavit, it has not been stated as to whether these documents were filed before the authorities below or they are being produced before this Court for the first time. In any view of the matter, this Court, in exercise of its power under Article 226 of the constitution of India, cannot appraise or re-apprise the evidence and cannot record its own findings on the questions of fact involved in the case.

20. It may also be noticed that the Prescribed Authority has recorded a clear and categorical finding on the question of comparative hardship in favour of the petitioner, the Appellate Authority did not reverse the said finding in accordance with law, Legally, without reversing the said finding, the judgement and order passed by the Prescribed Authority could not be reversed, therefore, the judgement and order passed by the Appellate Authority is bad in law judging from the said angle. A reference in this regard may be made to a decision in Shyam Lal Vs. VII Additional District Judge, Meerut and others, 1986 (1) A.R.C. 34.

21. In view of the aforesaid discussions, the judgement and order passed by the Appellate Authority dated 25.11.1997 is liable to be set aside and the case is liable to be remanded to the Appellate Authority for decision in the light of the observations made above.

22. The writ petition succeeds and is allowed. The judgement and order dated 25.11.1997 passed by the respondent no.1 is hereby quashed. The case is remanded to the Appellate Authority for decision afresh in the light of the observation made above. The Appellate Authority shall also take into consideration the offer made by the petitioner to provide a suitable shop to the contesting respondents at Lohai Road while deciding the appeal. It is further observed that the appeal shall be decided expeditiously.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD OCTOBER 12' 2000

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

Civil Misc. Writ Petition No. 33560 of 1993

Kamla Palace ...Petitioner
Versus
State of Uttar Pradesh through Secretary (Institutional Finance) Secretariat (U.P.) Lucknow, and others ...Respondent

Counsel for the Petitioner:
Shri V.B. Singh
Shri D.K. Singh

Counsel for the Respondent:
Shri C.S. Singh
Shri Chandra Shekhar Singh

U.P. Cinematograph Rules, 1951,R. 333- Promissory Estoppel- State Government announcing incentives of 100% Grant in aid for first two years and 75% in third year to new Cinema Halls in areas having

less than one lac population vide G.O. dated 18.07.1984- Petitioner acting on said promise obtained licence and constructed a Cinema Hall- Subsequent withdrawal of incentives by State Government by G.O. dated 14.7.1992, held, applicable only to persons constructing Cinema halls on or after 14.7.1992.

Held- Para 14

Thus, the respondents are bound by the incentives announced by the State Government in the Government Order dated 18.7.1989. The changed rates of the grant in aid as per G.O. dated 14.7.1992 would be applicable only where a person decides to construct the new cinema building on or after 14.7.1992 and applies for grant of permission under Rule 3 of the Rules on or after that date.

Cases discussed

JT 1994 (5) SC 64
JT 1994 (7) SC 362
JT 1995 (6) SC 185
AIR 1979 S C 621
(1997) 7 SCC 251

By the Court

1. The petitioner, Kamla Palace, village, Dunda Hera, district Ghaziabad, through its proprietor Sri Arvind Mohan Sharma, has filed the present petition under Article 226/227 of the Constitution of India, seeking writ of certiorari quashing the orders dated 14.5.1992, 16.7.1993, 22.7.1993, 13.9.1993 and 22.9.1993, contained in annexures 14, 9, 12, 13 respectively, in addition to writ of Mandamus directing the respondents not to compel the petitioner to pay any amount towards the entertainment tax for the first two years of functioning of petitioner cinema Hall.

2. The facts of the case in brief are that according to the petitioner, acting on the basis of grant in aid facility provided by the State Government vide Government Order dated 18th July 1989, he decided to construct a cinema hall in village Dunda Hera of district Ghaziabad which had a population of less than 5000. The petitioner had made an application under Rule 3 of the U.P. Cinematograph Rules, 1951 (hereinafter referred to as the Rules), on 18.11.1989, seeking approval of the site plan and permission for construction of permanent cinema hall building. The District Magistrate, who is the licensing, granted permission under Rule 3(3) of the Rules, to the petitioner on 20.2.1992. Thereafter, the petitioner started the construction of the cinema hall. The petitioner had applied for grant of licence on 20.2.1993. The petitioner was granted licence on 9.5.1993 and it started exhibiting the cinematograph films from 10.5.1993.

3. It may be mentioned here that the State Government had provided certain incentives for construction of new cinema halls vide order dated 18.7.1989. The said order applied to those cases where the application for approved of the site plan for construction of permanent cinema building had been filed after 1.4.1989 but before 31.3.1994 coupled with the conditions that application for grant of licence should be made between 1.4.1990 to 31.3.1995. The grant in aid admissible to such new cinema halls was 100% of the entertainment tax, during first 2 years and 75% of the entertainment tax during the third year. The petitioner also applied for giving of grant in aid in terms of Government Order dated 18.7.1989. However vide order dated 16.7.1993 passed by the District

Magistrate Ghaziabad, respondent no. 4, the petitioner was informed that it would be entitled to grant in aid to the extent of 75% of the entertainment tax only as the cinema hall was running with effect from 10.5.1993. The petitioner also received an order dated 22.7.1993 passed by the Incharge, Assistant Commissioner, Entertainment Tax, Ghaziabad, respondent no. 3 calling upon it to deposit a sum of Rs.42,603.77 being 25% amount of entertainment tax recoverable from the petitioner from 10.5.1993 to 14.7.1993. The petitioner made a representation before the Secretary (Institutional Finance) Government of U.P. Lucknow, on 4.8.1993 stating inter alia that it had constructed the cinema hall on the basis of grant in aid as provided in Government Order dated 18.7.1989 which was effective from 1.4.1989. The petitioner further stated that since it had complied with all the conditions of the Government Order dated 18.7.1989, it was entitled for grant in aid to the extent of 100% entertainment tax for the first 2 years. The petitioner prayed for quashing the order dated 16.7.1993 and issuance of direction for not depositing any money towards any entertainment tax. The Joint Secretary (Institutional Finance) respondent no 2, vide order dated 13.7.1993 informed the petitioner that the Government Order dated 18.7.1989 had been amended vide order dated14.5.1992 and therefore, the order dated 16.7.1993 passed by the respondent no.3 was valid and legal. After the Joint Secretary (Institutional Finance) respondent no.2 had communicated the decision upholding the legality of the order dated 18.7.1993, the respondent no.4 had passed another order on 22.9.1993 directing the petitioner to deposit a sum of Rs.71,563.33 being 25% of the entertainment tax for the period 10.5.1993 to 7.9.1993. The orders dated 14.5.1992, 16.7.1993, 22.7.1993, 13.9.1993, 22.9.1993 are under challenge in the present petition.

4. We have heard Shri V.B. Singh, learned counsel for the petitioner and Shri Chandra Sehkhar Singh learned Standing Counsel for the respondents.

5. The learned counsel for the petitioner submitted that the Government order dated 14.7.1992 wherein grant in aid for first two years had been amended from 100% to 75% of the entertainment tax would not to be applicable in the case of the petitioner in as much as acting on the basis of terms/incentives as contained in the Government Order dated 18.7.1989, the petitioner had taken steps to construct a new permanent cinema hall for which necessary permission was also grated by the respondent no. 4 vide order dated 20.3.1992. The petitioner having altered his position by acting on the promise as held out by the State Government and contained in the Government order dated 18.7.1989, can not be denied the benefit of grant in aid to the extent of 100% of the entertainment tax for the first two years and the Government Order dated 14.7.1992 if at all, will apply prospectively i.e. in respect of those persons who decided to construct new cinema hall on or after 14.7.1992 and had taken steps for the same thereafter. He submitted that consequently the other orders dated 16.7.1993, 22.7.1993, 13.9.1993 and 22.9.1993 are also illegal and can not be allowed to stand. In support of aforesaid plea, the learned counsel for the petitioner has relied upon the decisions of the Hon'ble Supreme Court in the case of M/s Motilal Padampat Sugar Mills Co. Ltd. The State of U.P. and others reported in AIR 1979

S.C. 621 and Pawan Aalloys & Casting Pvt. Ltd., Meerut Vs U.P. State Electricity Board and others reported in (1977) 7 S.S.C. 251, and submitted that the State is bound by the promise it had made and on the ground of the principle of promissory estoppel, the State of U.P. is estopped from demanding 25.% of the amount of entertainment tax from the petitioner in respect of the first 2 years.

6. Shri C.S. Singh learned standing counsel, on the other hand submitted that even though, the petitioner had been granted permission by the District Magistrate, respondent no.4, under rule 3(3) of the Rules for construction of the cinema building on 20.2.1992, yet in view of the fact that the petitioner had completed the construction of the cinema building only on 20.2. 1993 and had been granted licence to exhibit the cinematograph films thereafter when the Government order dated 14.7.1992 had already come into existence, the petitioner is not entitled for grant in aid to the extent of 100% entertainment tax for the first 2 years as the same had been modified substituted to 75% vide G.O. dated 14.7.1992. He further submitted that in the facts and circumstances of the present case, it can not be said that the petitioner had taken effective steps for construction of the new cinema building within a short span of three months and has not altered its position. He submitted that the plea of promissory estoppel is not applicable in the present case and law applicable at the time of grant of licence is to be taken into consideration. He submitted that when the petitioner was granted licence to run exhibit the cinematograph films in May 1993, the Government Order dated 14.7.1992 had already come into force and, therefore, the petitioner was entitled for grant in aid of 75% of the entertainment tax for the first 2 years and not 100% of the entertainment tax.

7. He further submitted that there is no prohibition in law to review the policy regarding grant in aid. If the State Government has reduced the amount of grant in aid from 100% to 75% vide order dated 14.7.1992 no exception can be taken to it, In support of this plea, he relied upon the decisions of the Hon'ble Supreme Court in the Case of M/s Pankaj Jain Agencies Vs. Union of India & Ors, reported in JT 1994(5) S.C. 64, Kasinka Trading & Anr. Etc. vs Union of India and Anr. Reported in JT 1994(7) S.C. 362, and State of Himanchal Pradesh & Ors. Etc. vs. Ganesh Wood Products & Etc. reported in JT 1995(6) S.C. 485.

8. Having heard the learned counsel for the parties, we find that admittedly in the present case, the petitioner had applied for grant of permission for the construction of a new cinema building on 18.11.1989 after purchasing the land on 15.11.1989 as per annexure 2 to the writ petition. The licensing authority, respondent no. 4, had granted permission to the petitioner approving the site plan and for construction of cinema building under Rule 3 (3) of the Rules on 20.2.1992. The petitioner had started construction thereafter, which had been completed on 20.2.1993. At the time when the petitioner had applied for permission under Rule 3 of the Rules i.e. on 18.11.1989 and when the permission under Rule 3(3) was given on 20.2.1992, the Government order dated 18.7.1989 was already in force which provided for grant in aid to the extent of 100% of the amount of entertainment tax to the new cinema halls for the period of first 2

years. Thus, the petitioner had acted on the promise/incentives announced by the State Government as contained in the order dated 18.7.1989 and has altered its position by investing money in the purchase of land and construction of the cinema hall. The scheme of grant in aid as given in the Government order dated 18.7.1989, was applicable to those persons who applied for approval of the site plan during the period 1.4.1989 to 31.3.1994 and also applied for grant of licence between 1.4.1990 to 31.3.1995. In the present case, both the conditions have been fulfilled by the petitioner as he had applied for the grant of permission to construct cinema building and approval of site plan before 31.3.1994 and also for grant of licence sometimes in February 1993 which licence was granted on 9.5.1993.

9. The only question remains as to whether the petitioner is entitled for grant in aid to the extent of 100% of the amount of entertainment tax for the first 2 years as provided in the Government order dated 18.7.1989 or to the extent of 75% as provided in the Government Order dated 14.7.1992. It may be mentioned that by the Government Order dated 14.7.1992, clause 2 of earlier G.O. dated 18.7.1989 has been substituted by a new clause which provides uniform grant in aid of 75% of the amount of entertainment tax for all the three years in place of 100% for the first two years and 75% for the third year.

10. Answer to the aforesaid question would depend on the applicability of the principles of promissory estoppel. If we come to the conclusion that the doctrine of promissory estoppel is attracted in the present case then the petitioner shall be entitled to grant in aid under the amended G.O. dated 18.7.1989, otherwise not. The Hon'ble Supreme Court in the case of Pawan Alloys & Casting Pvt. Ltd. (supra) after examining the various decision on the issue of promissory estoppel, has held as follows.

"10, It is now well settled by series of decisions of this Court that the State authorities as well as its limbs like the Board covered by the sweep of Article 12 of the constitution of India being treated as "State" within the meaning of the said article, can be made subject to the equitable doctrine of promissory estoppel in case where because of their representation the party claims estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promise does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise."

11. Thus, the State is bound by the promise which it had made in the event any person acting on such promise has changed its position. From a perusal of the Government Order dated 18th July 1989, we find that with a view to encourage establishing new permanent cinema hall in areas where the population according to 1981 census was not more than 1,00,000 the State Government had announced incentives in the form of grant in aid which was equivalent to 100% of the amount of entertainment tax for the first 2 years and 75% of the entertainment tax for the third year. The net resell of the aforesaid G.O. was that persons constructing new cinema halls who fall within the purview of the G.O. would not

be liable to pay entertainment tax at all in the first 2 years and shall pay only 25% of entertainment tax in the third year as they were entitled to retain it as grant in aid. The State Government was competent to announce the incentives in the form of grant in aid to attract persons to construct new cinema halls in areas having population of 1,00,000 or less. The petitioner had also acted on the promise made by the State Government as contained in the said G.O. by purchasing the land for constructing a new cinema hall and had invested huge sum of money, in the hope and belief that it will also get the grant in aid to the extent of 100% of the amount of entertainment tax in the first years.

12. The respondents have not placed any material before the Court to show that the withdrawal of the incentives grant in aid to the extent of 75% was grant in the public interest. Therefore, the equity which had arisen in favour of the petitioner remained untouched / undisturbed by any overwhelming and superior equity in favour of the respondents entitling them to withdraw in pre-mature manner leaving the petitioner high and dry before the requisite period of two years. The Hon'ble Supreme court in the case of Pawan Alloys & Casting Pvt. Ltd. (supra) has held that where there is no such overriding public interest, it may be still be open the promissory State or its delegate to resile from the promise on giving reasonable notice which need not be a formal notice giving the promisee a reasonable opportunity of resuming his position provided it is possible for the promise to restore the status quo ante. In paras 36 and 37 of the decision rendered in the aforesaid case the Hon'ble Supreme Court has held as under:

"36. As observed by this Court in Shrijee Sales Corpn. even where there is no such overriding public interest it might still be open to the promisor-State or its delegate to resile from the promise on giving reasonable notice which need not be a formal notice giving the promisee a reasonable opportunity of resuming his position, provided its is possible for the promisee to restore the status quo ante. Even on this aspect the respondent-Board has no case. It has not given any reasonable opportunity to the appellants to resume their earlier position. Nor is it shown by the Board that it is possible for the appellate promisee to restore the status quo ante. The reason is obvious. Once the new industries were lured into establishing their factories in the region catered to by the Board on being assured three-year guaranteed incentive of development rebate of 10% on their total bills of electricity charges and acting on the same once they had established their industries and spent large amounts for constructing the infrastructure and for employing necessary labour and for purchasing raw materials etc. It would be almost impossible for them to restore the status quo ante and to walk out midstream if the development rebate incentive was withdrawn for the un expired period out of the three years' guaranteed period of currency of development rebate incentive. In fairness even it was not suggested by learned Senior counsel for the respondents that on such withdrawal of development rebate the appellant would be able to restore the status quo ante and walk out. He simply relied upon the ratio of the decision of this Court in the case of Shrijee Sales Corporation for contending that it is the power of the Board to grant the rebate and it is equally the power of

the Board to withdraw the same in its own discretion.

37. Consequently it must be held that the twin aspects highlighted by this Court in Shrijee Sales Corpn. on the basis of which the authority promising a particular course of conduct on its part to the prospective promisee can resile from the promise even prematurely are not found established on the facts of these cases. Consequently the ratio of the said decision can not be of any avail to the respondent-Board"

13. Applying the principles laid down by the Hon'ble Supreme Court, in the aforesaid case, we find that the respondents have not placed any material on record before the Court nor have shown that by reducing the amount of grant in aid from 100% of the entertainment tax to 75% of the entertainment tax for the first 2 years, it is possible for the petitioner to restore the status quo ante.

14. Thus, the respondents are bound by the incentives announced by the State Government in the Government Order dated 18.7.1989. The changed rates of the grant in aid as per G.O. dated 14.7.1992 would be applicable only where a person decides to construct new cinema building on or after 14.7.1992 and applies for grant of permission under Rules 3 of the Rules on or after that date. The decisions relied upon by the learned Standing Counsel, have all been considered by the Hon'ble Supreme Court in the case of Pawan Aoooys & Casting Pvt. Ltd. (supra)and after considering the same the Hon'ble Supreme Court had laid down the above principles.

15. It may be mentioned that the decision in the case of M/s Pankaj Jain Agencies (supra) relied upon by the learned Standing Counsel is not at all concerned with the issue of promissory estoppel and has no bearing to the issues involved in the present petition.

16. In view of the foregoing discussions, the writ petition succeeds and is allowed. It is held that the Government Order dated 14.7.1992 would not be applicable to the petitioner. The condition mentioned in the order dated 16.7.1993 (filed as annexure 9 to the petition) in so far as it grants the benefit of grant in aid to the extent of 75% of the entertainment tax in the first 2 years is quashed and we hold that the petitioner is entitled for grant in aid of 100% of the amount of entertainment tax in the first 2 years. The various which are impugned, namely 22.7.1993, and cannot be sustained and are hereby quashed.

17. However, there shall be no order as to cost.

Petition Allowed.

APPELLATE JURISDICTION
DATED: 29.9.2000

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

Special Appeal No. 576 of 2000

Chandra Prakash Gupta ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Applicant:
Sri Krishna Murati
Sri Ashok Khare

Counsel for the Respondent:
S.C.

Constitution of India, Article 226- Suspension- Interim stay-Discretion- Exercise of.

Held-

There is a very serious allegation of misappropriation of a huge amount against the appellant. The suspension order has been passed by the Governor and as such, it cannot be urged that the authority, passing the order, had no jurisdiction to do so. The allegation is that fictitious records were prepared and a big amount was misappropriated. The Officer to hold enquiry has already been appointed. The learned Single Judge has also directed that the enquiry be completed within six months. In these circumstances we do not at all consider it a fit case in which discretion may be exercised in favour of the appellant under Article 226 of the Constitution of India. (Para 5)

Cases referred.

AIR 1986 SC 662 (Pr.58)
2000 (I) UPLBEC 515
1993 (2) JT 550
1994 (4) JT 51

By the Court

1. The appellant belongs the U.P. Palika Centralised Service and was working as Sanitary & Food Inspector in City Board, Hapur, District Ghaziabad in the year 1992. He was placed under suspension by the State Government on May 11, 2000. The order recites that the applicant had been prima facie found to be guilty of having committed forgery in the records and illegal and un-authorised withdrawal of Rs.17,49,000/- in the name of 583 fictitious beneficiaries from Jawahar Rojgar Yojana funds. A disciplinary enquiry was ordered to be held against him and Additional Commissioner (Administration) Meerut was appointed as Enquiry Officer. This order was challenged by the appellant by filing a writ petition which was summarily dismissed by a learned Single Judge on 4.8.2000. However, the learned Single Judge directed that the disciplinary enquiry may be completed within six months. Feeling aggrieved by the said order, the appellant has preferred the present special appeal.

2. Sri Ashok Khare, learned Senior counsel appearing for the appellant has contended that two other employees of City Board, Hapur, namely, Khursheed Ahmad Faridi, who was working as Executive Office clerk and Sudhir Kumarn Sharma, who was working as Water Works Engineer, had also been placed under suspension for the same charge on the same date and they preferred Writ Petition No. 821 (SB) of 2000 before the Lucknow Bench where the operation of the suspension order passed against them on 11.5.2000 was stayed on 21.7.2000. The learned counsel has submitted that since the identical suspension order has been stayed by a Division Bench at Lucknow, therefore, the learned Single Judge was in error in dismissing the writ petition. We have given our careful consideration to the submission made by the learned counsel for the appellant. The order passed in writ petition no. 781(SB) of 2000 (Khursheed Ahmad Faridi vs. State) by Lucknow Bench reads as follows:

"Time was granted to learned Standing Counsel to seek instructions but he has not been able to obtain instructions. Six weeks" time is granted to

learned Standing Counsel to seek instructions. List thereafter.

In the mean-time, further operation of suspension order dated 11.5.2000 as contained in annexure no. 1 to the writ petition shall remain stayed. The enquiry shall, however, be concluded expeditiously.

Sd/- Pradeep Kant, J.
Sd/- M.A. Khan, J.
21.7.2000

Exactly similar order was passed in writ petition no. 821 (SB) of 2000 on the same date.

3. With profound respects we are unable to agree with the view taken by the Division Bench in the aforesaid order. The mere fact that the Standing Counsel was not able to obtain instructions, can not be the only ground for passing a stay order. The stay order does not give any reason as to why the suspension order passed by the State Government was liable to be stayed by the Court. It has been held by the Apex Court in Empire Industries Limited Vs. Union of India AIR 1986 SC 662 (Para-58) that every Bench hearing matter on facts and circumstances of each case should have a the right to grant interim order on such terms as it considers fit and proper and if it had granted interim order at one stage it should have the right to vary or alter such interim order. No principle of law has been enunciated in the interim order dated 21.7.2000 nor there is anything to indicate that any case has been made out for staying the operation of the suspension order. We are, therefore, not inclined to pass a similar order as has been passed in writ petition no. 781 (SB) of 2000.

4. The learned counsel has next contended that the alleged mis-appropriation of funds took place in the year 1992 and the impugned suspension order has been passed after more than 8 years in May, 2000. It has been thus alleged that the matter had become stale and, therefore, placing appellant under suspension was wholly unjustified. In support of this submission, learned counsel has placed reliance on Lal Bahadur Singh Vs. Engineer-in-Chief 2000(1) UPLBEC 515. In our opinion the mere fact that the suspension order has been passed after 8 years, cannot be sole ground for quashing or setting aside the said order. In a matter of financial irregularity or misappropriation of funds, it is quite likely that it may not be discovered or brought to light forthwith. Whenever the misappropriation of funds is revealed or brought to the notice of the higher authorities they may choose to take action in accordance with law. The delay in taking action cannot, in every case, vitiate the order for holding enquiry or placing the employee under suspension.

5. The principle on which this Court can interfere with an order of suspension has been laid down by the Apex Court in U.P. Rajya Krishi Utpadan Mandi Parishad vs. Vimal Kumar Mohanti 1994 (4) JT 51. It has been held in these cases that suspension is not a punishment but is only one of forbidding or disabling an employee to discharge the duties of his office or the post held by him. It has been further held that the Court should not interfere with an order of suspension unless they are passed malafide without there being even a prima facie evidence on record connecting the employee with misconduct in question. There is a very serious allegation of misappropriation of a

huge amount against the appellant. The suspension order has been passed by the Governor and as such, it cannot be urged that the authority, passing the order, had no jurisdiction to do so. The allegation is that fictitious records were prepared and a big amount was misappropriated. The Officer to hold enquiry has already been appointed. The learned Single Judge has also directed that the enquiry be completed within six months. In these circumstances, we do not at all consider it a fit case in which discretion may be exercised in favour of the appellant under Article 226 of the Constitution of India.

6. The appeal lacks merit and is dismissed at the admission stage.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: 28.9.2000

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

Special Appeal No. 81 (Defective) of 2000

Kanpur Jal Sansthan through its General Manager ...Appellant
Versus
Dilawar Ali and others ...Respondents

Counsel for the Appellant:
Sri Arun Tandon
Sri R.M. Saggi

Counsel for the Respondents:
S.C.
Sri Faujdar Rai

Constitution of India, Article 226- In the garb of Interim order, final order can not be passed- Direction for Regularisation of service even without prayer- held unwarranted- order passed by Single Judge set aside with direction to consider the case for admission by appropriate Bench.

Held-

In the writ petition, the petitioners have not averred that they were continuously working ever since the date of their first appointment nor they have averred that there has been no break in their service. Similarly no averment has been made with regard to their qualification. There are the necessary factors which have to be taken into consideration while taking a decision for payment of same salary to the petitioners which is being paid to a regular employee. In our opinion, the view taken by the Apex Court in the aforesaid case is also applicable here.

For the reasons mentioned, we are of the opinion that the impugned order of the learned Single Judge can not be sustained and has to be set aside. (Para 4 and 8)

<u>**Case law discussed.**</u>
1993 UPLBEC
JT 1992 (I) SC 571
1993 (2) UPLBEC 1263

<u>By the Court</u>

1. This special appeal has been preferred against the order dated 2.12.1999 of a learned Single Judge passed in writ petition no. 5497 of 1997 (Dilawar Ali and 23 others versus State of UP and others).

2. Sri Arun Tandon learned counsel for the appellant has contended that though the impugned order is an interim order but it has not only granted a relief which could be given only at the stage of final hearing but has also granted such relief which was not even claimed in the writ petition. Sri Fauzdar Rai learned counsel for the contending respondents has supported the order and has submitted

that on the facts and circumstances of the case the order is fully justified.

3. In order to appreciate the contentions raised at the bar, it is necessary to reproduce the impugned order which reads as under:

"Heard learned counsel for the petitioner. None appears for the respondents.

Since the petitioners are working since 1983 to 1985, therefore, the respondents are directed to consider the case of the petitioners for regularisation. During the pendency of regularisation, the petitioners shall be paid minimum of the pay scale against the post they are working."

In the writ petition, the following relief's haved been claimed by the petitioners:

(i) to issue a writ of mandamus, order or direction in the nature of mandamus commanding the respondents to pay the petitioners salary which is being paid to the regular employee in the similar situation since the same became due and continue to pay with admissible benefits till the petitioners are in service.

(ii) to issue any such other writ, order or direction as this Hon'ble Court may deem fit and proper under the circumstances of the case.

(iii) to award the costs of the petition to the petitioners.

The petitioners have not claimed any relief for their regularisation in service in the writs petition filed by them. However by the impugned order dated 2.12.1999 a direction has been issued at an interim stage commanding the respondents to consider the case of the petitioners for regularisation. In our opinion, no such direction could have been issued in view of the nature and scope of the writ petition and that too by an interim order.

4. Sri Arun Tandon learned counsel for the appellant has next submitted that a post can be created in Jal Sansthan with the prior approval of the State Government under section 27 of the U.P. Water Supply and Sewerage Act, 1975 and the Jal Sansthan cannot by itself create any post. He has further submitted that the petitioners have not disclosed in the writ petition whether they were continuously working ever since their initial appointment and whether the petitioners have the prescribed minimum qualification for the post of which they were claiming salary. We find substance in the submission made by the learned counsel for the appellant. In view of the provision of the Act, the Jal Sansthan cannot create any post save with the approval of the State Government. In the writ petition, the petitioners have not averred that they were continuously working ever since the date of their first appointment nor they have averred that there has been no break in their service. Similarly no averment has been made with regard to their qualification. These are the necessary factors which have to be taken into consideration while taking a decision for payment of same salary to the petitioners which is being paid to a regular employee.

5. There is another aspect of the matter which deserves consideration. The

impugned order virtually grants a relief which may be granted to the writ petitioners at the disposal of the writ petition if their claim is found to be sustainable. In State of U.P. Versus Kumari Renu Tiwari 1993 UPLBEC 1325 a division bench of our court, after considering several decisions of Apex Court, held as follows:

" An interim order is generally passed to preserve the state of affairs obtaining on the date of institution of the proceedings. It is seldom passed to alter that position. Thus an interim order may be passed to restrain the respondent from interfering in the possession of the petitioner over an immovable property, or to stay the operation of an order of termination of service which has not taken effect or to stay the alteration in the scale of pay. Moreover, the learned Single Judge has granted to the respondent the relief which may be granted to him at the disposal of the writ petition if his claim is found to be sustainable. There is no indication in the judgement as to how the appellants will be restored to the original position, if the writ petition ultimately fails. Accordingly, for all practical purposes, the relief granted to the respondent through the judgement under appeal is final. Such an order/judgement given at the interim stage can not be sustained."

6. Similar view was taken in U.P. Junior Doctors Action Committee Vs. B. Sheetal Nandwani JT 1992(1)SC 571 and Committee of Management Vs. Sushil Kumar Sharma 1993 (2) UPLBEC 1263. Recently in Special Appeal no. 1230 of 1999 (Indian Telephone Industries Ltd. Vs. The Director (DOT) decided on 3.3.2000 a similar order passed by a learned Single Judge directing the employer to continue the writ petitioner in service and pay him salary was set aside on this ground.

7. About eight hundred employees of the forest department had filed large number of writ petitions in this court claiming regularisation in service. A division bench while allowing the writ petitions, issued direction to constitute a committee to consider the case of regularisation and further directed that the employees shall be paid regular wages till their matter is finally disposed of . Against the said order, the State of U.P. preferred civil special appeal no. 3634 of 1998 (State of U.P. Vs. Putti Lal and others) in the Supreme Court which by its order dated 27.9.99 set aside the direction for payment of regular salary with the following order:

"As a result of the orders of this Court, the question of paying the regular wages to the daily rated workers cannot be allowed. The persons working will be paid only the amount payable to daily wagers."

8. In our opinion, the view taken by the Apex Court in the aforesaid case is also applicable here.

For the reasons mentioned, we are of the opinion that the impugned order of the learned Single Judge can not be sustained and has to be set aside.

9. The special appeal is, accordingly, allowed and the impugned order dated 2.12.99 of the learned Single Judge is set aside. The record shows that the writ petition has not been heard for admission though it was filed in February, 1997. We accordingly direct that the writ petition shall be listed for admission before the

appropriate bench on 18.10.,2000. It is made clear that any observation made in this order is only for the purpose of deciding the special appeal and shall not be construed as an expression of opinion regarding the merits of the claim made by the parties.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: 29.9.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE ONKARESHWAR BHATT, J.

First Appeal No. 447 of 1997

Smt. Tejendra Kaur ...Appellants
Versus
Jogendra Singh ...Respondent

Counsel for the Appellant: ...
Sri Faujdar Rai
Sri Chandra Kumar Rai
Sri R.C.Srivastava

Counsel for the Respondent:
Sri Prakash Krishna

Hindu Marriage Act 1956- Section 13- Divorce passed by misreading the contents of written statement about asking for alimony in case decree for divorce passed- parties appeared before the Court- wife's willingness to join the company of Husband but refusal by the Husband- can not be said that the wife had treated the husband with cruelty.

Held-

The appellant had asked for alimony that in case decree for divorce is passed, she may be given maintenance but it does not mean that she had admitted the version as put forward by the respondent in his divorce petition.

We had asked the parties to appear in person in this Court for the purpose of reconciliation. The respondent made a categorical statement that he is not prepared to take his wife while the appellant made a categorical statement that she is prepared to go and live with her husband.

On considering the entire evidence, we do not find there is any material evidence to come to the conclusion that the wife had treated the husband with cruelty. (paras 12, 14, 15)

Case law discussed.
AIR 2000 Alld. 148
1995 (25) ALR 277
AIR 2000 Delhi 304

By the Court

1. This appeal is directed against the judgement of the Family Court, Moradabad whereby the suit under section 13 of the Hindu Marriage Act filed by the plaintiff-respondent for divorce has been decreed.

2. The allegation of the husband plaintiff was that he married the appellant on 8.12.1994. She lived with him for about two months, and thereafter she left the matrimonial house and went to live with her parents. He doubted that his wife had relationship with some other persons. She did not permit him to have the sexual relationship. She gave birth to a son in July 1996 who was not born out of their wedlock. The relations became strained but the relative of both the parties got compromise written on 2.12.1995 wherein it was agreed that the appellant will come and reside with him. The wife after the compromise came to reside with him but after some time she left and started living with her parents.

3. The appellant contested the suit and she denied the allegations of desertion, adultery and cruelty. The Family court found that the respondent failed to prove by cogent evidence that his wife had any unfair relationship with any other person and was not guilty of adultery. The suit was however decreed on the ground of cruelty.

We have heard Sri Faujdar Rai, learned counsel for the appellant and Sri Prakash Krishna learned counsel for the respondent.

4. The core question for consideration before us is as to whether under the facts and circumstances, the plaintiff-respondent has been able to prove the cruelty against him by the appellant.

5. The basic allegation of the plaintiff-respondent against the appellant was that she left her matrimonial house at her own will without his consent and without any reasonable cause and she avoided having any sexual relationship with him. The husband also appeared as a witness in support of his allegations. He did not adduce any other evidence in support of his version.

6. In **Smt. Deepila alias Baby Vs. Naresh Chandra Singhania** (AIR 2000 Alld 148) the allegation of the husband was that the wife had treated him with cruelty but the Court did not rely upon his solitary testimony in absence of testimony of his parents, brother, sister, friends and relatives and held that they were material witnesses to prove the allegations made by the husband in his pleadings. In Smt. Beena Vs. Suresh Vir Tomer (1995(25) ALR 277) similar view was taken that accusation by the husband against wife should be proved by producing other members of the family. In the present case the appellant in her statement before the family court denied the allegations made by the respondent. There was no other congent evidence except the oral statement made by the parties before the Family Court.

7. It is admitted to the appellant that the matter was settled between the parties and they had entered into a compromise duly signed by the parties and 'their relatives and friends on 2.12.1995. In the compromise it was accepted by the respondent that the appellant shall reside with the respondent. If there was any wrong by any of the parties, that shall be deemed to have been condoned.

8. The version of the respondent is that the appellant came to reside with him after 2.12.1995 but she left the house without any intimation to him on 20,3,1996. It was further stated that after two days the parties agreed that they shall seek divorce by consent but later on she resiled from such an agreement.

9. The appellant appeared as a witness and made a statement before the Court that in fact on 20.3.1996 the respondent beat her and forced her to leave his house. Admittedly, the appellant started residing with the respondent after they entered into compromise on 2.12.1995 and it is also admitted to both the parties that the appellant left her matrimonial house on 20.3.1996. The question is whether she left the matrimonial house voluntarily or respondent forced her to leave the house. There does not seem to be any reason why the appellant, who was residing with the

respondent, would leave the matrimonial house. The appellant has given the reason that the respondent again talked about dowry. As her parents did not satisfy his demands, he forced her to leave his house. The version of the appellant appears to be correct. There was no other reason that the appellant would leave the matrimonial house of her husband.

10. The Family Court has taken a view that the appellant had filed an application claiming maintenance against the respondent under section 125 Cr.P.C. during the pendency of the suit, that discloses her intention not to reside with the respondent husband and that would amount to cruelty. The appellant was entitled for the maintenance in case her husband had forced her to leave the matrimonial house and there was nothing wrong in claiming such maintenance. The respondent had filed the suit for divorce in July 1996. He was not paying any amount of maintenance to the appellant and in these circumstances, she was justified in claiming the amount of maintenance.

11. The next reason given by the Family court is that the respondent had given a notice to the appellant on 23.3.1996 asking her to live with him but the appellant did not give any reply to the said notice, that shows that she was not inclined to live with the husband. The respondent appeared as witness before the Family Court but he did not prove the alleged notice dated 23/3.1996. On the other hand, in para 10 of the plaint, the respondent had stated that both the parties had entered into the agreement that they would seek divorce by consent. If according to the respondent the agreement had taken place to seek divorce by consent, then there was no question of having sent any notice to the appellant by the respondent to live with him.

12. The third reason given by the Family Court is that in para 36 of the written statement filed by the appellant she had stated that in case divorce decree is passed, she may be granted alimony, and such claim shows her intention was that the decree for divorce may be passed. This view of the Family Court is manifestly illegal. The appellant had asked for alimony that in case decree for divorce is passed, she may be given maintenance but it does not mean that she had admitted the version as put forward by the respondent in his divorce petition.

13. The version of the respondent was that the appellant had given birth to a son who was not born out of their wedlock but this fact was not proved by any cogent evidence by him. The marriage had admittedly taken place between the parties on 8.12.1994. The son was born, as alleged by respondent, in July 1996. The respondent did not lead any evidence to prove that his wife had no access with him and there was no other cogent evidence to prove either adultery or she gave birth to an illegitimate child. Secondly the parties had entered into compromise with the respondent on 2.12.1995 and if there were any difference or wrong done by any of the parties that shall be deemed to have been condoned.

14. We had asked the parties to appear in person in this Court for the purpose of reconciliation. The respondent made a categorical statement that he is not prepared to take his wife while the appellant made a categorical statement

that she is prepared to go and live with her husband.

15. On considering the entire evidence, we do not find there is any material evidence to come to the conclusion that the wife had treated the husband with cruelty.

16. Learned counsel for the respondent has placed reliance on the decision in the case of **Parag Mittal Vs. Smt. Vikita Mittal** (AIR 2000 Delhi 304) wherein the court has held that when the wife remained absent in the proceedings before trial court and signed petition for divorce by mutual consent, the allegation of husband of cruelty by wife against him should be accepted. In the case of **Angalla Padmalatha Vs. A. Sudershan Rao** (AIR Andhra Pradesh 353) it was found that when the parties lived together for short time and thereafter the wife left her matrimonial house of her own without his consent and the husband made efforts to bring her back but she did not return, and more so wife filed petition under section 498-A IPC and Section 125 Cr.P.C., indicated that the wife had decided to abandon matrimonial house permanently. These cases have no application to the facts of the present case as discussed above, in the present case the appellant has not left the matrimonial house voluntarily. She was forced to leave the house by her husband and she always expressed her willingness to reside with her husband.

17. In view of above discussion, the appeal is allowed with cost and the decree of the Family Court dated 27.10.1997 passed in O.S. No. 410 of 1996/Family Court Case No. 621 of 1997 is set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: SEPTEMBER22ND, 2000

BEFORE
THE HON'BLE S.R. ALAM, J.
THE HON'BLE R.K. AGARWAL, J.

Civil Misc. Writ Petition No. 373 of 1982

M/s Hira Lal Ayodhya Prasad ...Petitioner
Versus
The State of Uttar Pradesh and another ...Opposite parties

Counsel for the Petitioner:
Sri K.M.L. Hajela

Counsel for the Opposite parties:
Sri Haidar Hussain

U.P. Trade Tax Act, Ss. 15-A (1) (gg), 29-A- Petitioners deposited excess amount as Tax as State Government had reduced rate of tax on duty paid Khandsari Sugar from 4% to 2% retrospectively w.e.f. 1.1.79- Petitioner applied for adjustment- Excess amount forfeited by respondent no. 2 as said amount had been realised by the petitioners from customers- Writ petition against forfeiture dismissed- Circular dated 6.8.1979 issued by Commissioner of Sales Tax making refund/adjustment obligatory for respondent no. 2, held, not applicable.

Held-

The learned counsel for the petitioner did not dispute that its earlier writ petition no. 269 (Tax) of 1981 in which the order dated 31.12.1980 imposing penalty under Section 15-A(1) (qq) of the Act had been challenged had been dismissed by this Court vide judgement and order dated 8.5.1996. Thus till such time the order dated 31.12.1980 forfeiting the amount of excess tax is not set aside there is no question of any

adjustment/refund of the excess amount of tax. So far as the circular dated 6.8.1979 issued by the Commissioner of Sales Tax is concerned, we find that the said circular does not specifically direct for the refund/adjustment of the tax realaized by the dealer from its customers. There may be a case where a dealer may have deposited the tax from its own pocket without realizing the same from its customers. The circular covers such a case and not where the dealer has realized the tax from its customers. Thus the petitioner cannot get the benefit of the circular. (Para 10)

Case law discussed.

(1974) 3SCC 121, (1999) 8 SCC 137, AIR 1964 SCC 922 , (1970) 1 SCC.354
(1977)4 SCC. 98, (1986) 4 SCC.704, (1995) UPTC 403, 2000 UPTC 554

By the Court

1. The petitioner, M/s Hira Lal Ayodhya Prasad, through its partner Sri Satya Narain, has filed the present petition under Article 226/227 of the Constitution of India, seeking a writ of certiorari quashing the notice of demand dated 30.3.1982 issued by the Sales Tax Officer, Saharanpur, respondent no. 2 contained in annexure 6 to the writ petition and the assessment order dated 30.3.1982 passed by the respondent no. 2 contained in annexure 5 to the writ petition. The petitioner has also sought a writ of mandamus commanding the opposite parties not to realize a sum of Rs.39,272.62 and interest @ 2% per month on the said amount from May, 1979.

2. The facts giving rise to the present petition are that the petitioner is a partnership firm and is a registered dealer under the provision of the U.P. Trade Tax Act (hereinafter referred to as the Act). It acts as commission agent and deals in Khandsari Sugar. It may be mentioned here that Khandsari Sugar on which the excise duty and additional excise duty has not been paid is liable to tax at the point of first purchase. For the assessment year 1978-79, the petitioner had filed its return showing the taxable purchase on non-duty paid Khandsari Sugar at Rs.12,41,473/- during the period 1.4.1978 to 31.12.1978. The petitioner had admitted and deposited the tax @ 4% at turnover of such Khandsari Sugar. However, for the period 1.1.1979 to 31.3.1979, the petitioner had filed its return showing the turnover of non-duty paid Khandsari at on Rs.19,63,603.66. The petitioner realized and deposited tax @ 4% on the said turnover. The sales Tax Officer, respondent no. 2 passed the assessment order for the assessment year 1978-79, the respondent no. 2 found that the petitioner had deposited a sum of Rs.42,485.30 as tax in excess during the period 1.1.1979 to 31.3.1979 on the disclosed turnover as rate of tax on non duty paid Khandsari Sugar was only 2% and not 4%. The excess amount was forfeited by invoking Section 15-A(1)(qq) of the Act.

3. It appears that the State Government had reduced the rate of tax on non duty paid Khandsari Sugar from 4% to 2% retrospectively with effect from 1.1.1979 vide Notification No. 51-II-3846/X-6(1)-79 dated 30.6.1979. Consequent upon retrospective reduction of tax on non-duty paid Khandsari the Commissioner of Sales Tax U.P. had issued a circular on 6.8.1979., copy whereof has been filed as annexure 2 to the writ petition, wherein all the Sales Tax Officers of the State had been directed that if any dealer makes an application claiming adjustment of the excess amount of purchase tax deposited by him on the

turnover of purchases of Khandsari Sugar towards the tax due for the future period or makes such claim of refund/adjustment in the quarterly return then such claim of adjustment should be allowed. The petitioner accordingly made an application for adjustment of the excess amount of Rs.39,405.29 deposited by it as purchase tax for the assessment year 1978-79 towards the payment of purchase tax due for the second and third quarter of the assessment year 1979-80. According to the petitioner, instead of adjusting the said amount, the respondent no. 2 had issued notice under section 15-A(1) (qq) of the Act for forfeiting the excess amount of Rs.39,272.62 as the said amount had been realized by the petitioner from its customers. Thereafter, the respondent no. 2 vide order dated 31.12.1980 had forfeited the excess amount of Rs.39,272.62 under section 15-A (1) (qq) of the Act. It may be mentioned here that the petitioner had challenged the order dated 31.12.1980 passed under Section 15-A (1) (qq) of the Act in Civil Misc. Writ Petition No. 269 (Tax) of 1981 which had been dismissed by this Court vide judgement and order dated 8.5.1996.

4. According to the petitioner, the respondent no. 2, while passing the assessment order for the assessment year 1979-80 had accepted its books of accounts. However, he did not accept the claim of adjustment of Rs.39,272.62 towards the tax due for the assessment year 1979-80. Thus the demand of Rs.39,272.62 was raised and vide order dated 30.3.1982 the notice of demand was also issued to the petitioner calling upon it to pay the said amount alongwith interest @2% per annum w.e.f. 1.7.1979 which have been impugned in the present writ petition.

5. We have heard Sri K.M.L. Hajela, learned counsel for the petitioner, and Sri Haidar Hussain, learned Standing Counsel for the respondents.

6. The learned counsel for the petitioner submitted that the provisions of section 29-A of the Act having been declared ultravires and unconstitutional by Hon. Supreme Court in the case of State of U.P. and another vs. M/s Annupurna Biscuits Manufacturing Company (1974)3 SCC 121, the amount of tax realized by the petitioner which was found to be in excess of tax due could not have been forfeited and, therefore, the petitioner was entitled for its adjustment.

7. The submission of the learned counsel for the petitioner is not correct. The Hon. Supreme Court in the case of Asstt. Commissioner (Judicial) Sales Tax and others vs. Kheriya Brothers and another reported in (1999) 8 SCC 137, had held as follows, the case of Annpurna Biscuits (Supra) was based on earlier decision of this Court in R. Abdul Quader and Company Vs. Sales Tax Officer (AIR 1964 SC 922) and Ashok Marketing Ltd. vs. State of Bihar (1970)1 SCC 354).

8. While so, in R.S. Joshi Vs. Ajit Mills Ltd. (1977) 4 SCC 98) a seven Judge Bench of this Court overruled Ashok Marketing Ltd. case. The consequent result of such overruling was that Annpurana Biscuit Mgf Co decision got protanto overuled. Later in Kasturi Lal Hari Lal Vs. State of U.P. 1986 4 (SCC 704) the overruling of Ashok Marketing case has specifically been noticed but some how there is no

advertence to Annapurna Biscuit Mfg. Co case. This incidence by itself can by no means by allowed to gather the impression that Annapurna Biscuit Mfg. Co case is still surviving" (Citations of the case law referred supplied by us). Thus the decision in the case of Annpurna Biscuit Mfg. Co has been held to be overruled and no advantage can be derived by the petitioner there from.

9. The learned counsel for the petitioner then submitted that no penalty under Section 15-A(1)(qq) of the Act could have been imposed upon the petitioner as it had realized the tax @4% from its customers and had deposited the same also with the assessing authority alongwith its return. He relied upon the decision of this Court rendered in the case of Kalu Ram Ragunath Das Vs. Commissioner of Sales Tax reported in 1995 UPTC 403 wherein this Court had held that a direct and unequivocal realization of sales tax is not prohibited by Section 8-A(2) and where having realized the tax which was paid to the Government, the provisions of section 15-A(1)(qq) would not justify the levy of penalty. It is not necessary to go into the question as to whether the penalty under section 15-A(1)(qq) of the act has been validly imposed or not in as much as the petitioner had specifically challenged the order imposing the penalty under aforesaid section in civil misc. writ petition no. 269(Tax) of 1981 which had been dismissed by this Court on 8.5.1996. Thus, the issue of levy of penalty cannot be reagitated or reopened in the present proceedings.

10. The learned counsel for the petitioner then submitted that in view of the circular dated 6.8.1979 issued by the Commissioner of Sales Tax, it was obligatory on the part of the respondent no. 2 to grant refund adjustment of the excess tax of Rs.39,272.62 towards the tax due for the second the third quarters of the assessment year 1979-80. He further submitted that the circular issued by the Commissioner of Sales Tax is binding upon all the authorities as has been held by this Court in the case of Raghunath Laxmi Narain Spices Pvt. Ltd. Varanasi vs. State of U.P. and others reported in 2000 UPTC 554. This Court in the aforesaid case has held that the circular issued by the Commissioner, even if it is held to be binding on the authorities does not direct the authorities to grant refund/adjustment of excess tax where the tax has been realized by the dealer from its customers. Further, so long as the order dated 31.12.1980 imposing the penalty under section 15A(1)(qq) of the Act wherein the excess amount of tax realized by the petitioner during the period 1.1.1979 to 31.3.1979 had been forfeited stands there is no question of granting any adjustment or refund to the petitioner. The learned counsel for the petitioner did not dispute that its earlier writ petition no. 269 (Tax) of 1981 in which the order dated 31.12.1980 forfeiting the amount of excess tax is not set aside there is no question of any adjustment/refund of the excess amount of tax. So far as the circular dated 6.8.1979 issued by the Commissioner of Sales Tax is concerned, we find that the said circular does not specifically direct for the refund/adjustment of the tax realized by the dealer from its customers. There may be a case where a dealer may have deposited the tax from its own pocket without realizing the same from its customers. The circular covers such a case and not where the dealer has realized

the tax from its customers. Thus the petitioner cannot get the benefit of the circular.

11. No other point has been pressed. In view of the aforesaid discussions, we find no merit in the submissions made by the learned counsel for the petitioner and the writ petition is dismissed. However, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.9.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE KRISHNA KUMAR, J.

Civil Misc. Writ Petition No. 36099 of 2000

Dr. Prabhu Narain Saxena ...Petitioner
Versus
V.C. Dr. Bheem Rao Ambedkar University formerly known as Agra University Agra and others ...Respondents

Counsel for the Petitioner:
Shri G.K. Singh
Shri V.K. Singh

Counsel for the Respondents:
Shri B. Dayal
Shri R.C. Padia,
S.C.

U.P. State Universities Act, 1973- Section 13 and 31 (6)- Adhoc Appointment on the post of professor—Vice Chancellor has no power only the Executive Council or the Management of the affiliated college can make appointment under Section 13 of the Act.

Held—

The power of appointment is conferred on the Executive Council or Management of the affiliated or associated College under Section 31 of the Act. It does not confer any power on the vice Chancellor to make any appointment to make any appointment. There is no other provision under the Act or Statute which confers power on the Vice Chancellor to make appointment to the post of teacher.(Para 5)

Constitution of India, Article 226- Alternative Remedy order Passed by the Vice Chancellor found without jurisdiction writ petition held maintainable plea of alternative remedy under Section 68 of the Act can not be taken.

Held—

As discussed above, we have found that the Vice Chancellor has no power to make any appointment under Section 13 of the State Universities Act. The petitioner can challenge that order in this petition and it cannot be rejected simply on the ground that the petitioner should approach the chancellor under section 68 of the Act. (para 13)

Case law discussed.

AIR 1977 SC 615, AIR 1987 SC 2186, 1985 UPLBEC 634, J.T. 1996 (8) SC 387

By the Court

1. The petitioner seeks writ of certiorari quashing the order dated 9.8.2000 passed by the Vice Chancellor appointing Dr. Sunil Jain, respondent no4, as Professor in Zoology department of Dr. Bheem Rao Ambedkar University, Agra (hereinafter referred to as the University) and further a writ of mandamus restraining the respondents from interfering with his functioning as Head of the Zoology Department.

2. The claim of the petitioner is based on the fact that he was appointed as Reader in the University on 21.09.1987. He was confirmed on the said post on

29.10.1988. One Dr. S.P. Jain Challenged the selection of the petitioner by making representation to the Chancellor. His representation was allowed by the Chancellor on 28.11.1988 holding that the selection of the petitioner was not in accordance with law. The petitioner filed Writ Petition No.23263 of 1988 challenging the said order. This Court granted interim stay order against the order of the Chancellor and he continued to function as Reader in Zoology Department. The petitioner was appointed as Head of the Zoology Department with effect from 30.6.1994 on the ground that he was the senior most teacher in the Department.

3. The post of professor was vacant in the Zoology Department of the University. The petitioner made a representation to the University that he may be considered for promotion to the post of Professor under the Personal Promotion Scheme. As the matter remained pending with the University, the petitioner filed Writ Petition No.5005 of 2000, Prabhu Narain Saxena Vs. Vice Chancellor and others, Seeking Writ of mandamus directing the respondents to consider his claim for promotion as Professor under the Personal Promotion Scheme. The Writ petition was disposed of by this Court on 31.1.2000 with the direction that the Executive Council to take appropriate action in the matter for considering the case of the petitioner for promotion as Professor preferably within six weeks from the date of production of certified copy of the order passed by the Court. The Executive Council, in its meeting held on 16.5.2000, passed a resolution that as the matter pertaining to his appointment as Reader is subjudice in this Court in Writ Petition No. 23363 of 1988, he could not be considered for promotion to the post of Professor. The petitioner again approached this Court against the said resolution by filing Writ Petition No. 14514 of 2000 which is still pending. In the meanwhile Writ Petition No. 23263 of 1988, filed by the petitioner, was allowed on 27.7.2000 and the order of the Chancellor dated 28.11.1988 was quashed on the finding that the selection of the petitioner as Reader in the University was in accordance with law. The Executive Council, after the decision of the writ petition on 27.7.2000, was to consider the claim of the petitioner for promotion under the Personal Promotion Scheme but in the meantime the Vice Chancellor of the University, respondent no.4 for the post of Professor in the Zoology Department of the University, respondent no.1, passed an order on 9th August, 2000, appointing on a contract basis for the period of one year or till the regular appointment is made whichever is earlier. This order has been challenged by the petitioner in the present writ petition.

4. The core question is, whether the Vice Chancellor has power to make ad-hoc or short term appointment on the post of Professor in the Department of the University under the provisions of U.P. State Universities Act, 1973 (herein after referred to as ' the Act') or under any other law. The power of the Vice Chancellor has been enumerated under Section 13 of the Act. The relevant provisions in this respect are Section 13 (1) (a), Section 13 (6) and 13 (8) of the Act.

5. The power of appointment is conferred on the executive Council or management of the affiliated or associated college under Section 31 of the Act. It

does not confer any power on the Vice Chancellor to make any appointment. There is no other provision under the Act or Statute which confers power on the Vice Chancellor to make appointment to the post of teacher.

Dr. R.G. Padia, learned counsel for the respondent no.4, submitted that the Vice Chancellor in exercise of general supervision and control over the affairs of the University has power to make adhoc appointment to the post of any teacher including the post of Professor in the University. In this context sub-section (6) of Section 13 is relevant which confers the power on the Vice Chancellor to make appointment when the matter is of urgent nature requiring immediate action and the same could not be immediately dealt with by any officer or the authority or other body of the University empowered under the Act. It specifically excludes the power to appoint a teacher in the University. The relevant provision of subsection (6) of Section 13 reads as under:-

"(6) Where any matter(other than the appointment of teacher of University) is of urgent nature requiring immediate action and the same could not be immediately dealt with by any officer or the authority or other body of the University empowered by or under this Act to deal with it, the Vice Chancellor may take such action as he may deem fit and shall forth with report the action taken by him to the Chancellor and also to the officer, authority, or other body who or which in the ordinary course would have dealt with the matter:

(emphasis supplied)
………………."

6. It may be noted that sub section (6) of Section 13 of the Act, before its amendment by U.P. Act.No.1 of 1992, provided that when any matter is of urgent nature requiring immediate action and the same could not be immediately dealt with by any officer or authority or other body of the University empowered by or under the Act to deal with it, the Vice Chancellor may take such action as he deems fit. Sub-section (8) of Section 13 provided that where the exercise of power by the Vice Chancellor under Sub section (6) involves the appointment of an officer or a teacher of the University, such appointment shall terminate on appointment being made in the prescribed manner or on the expiration of period of six months from the date of the order of the Vice Chancellor, whichever is earlier. Sub-section (6) read with sub-section (8) of Section 13 of the Act prior to the amending Act of 1992 conferred power on the Vice- Chancellor to make ad-hoc appointment of a teacher in case of an urgency but the Amending Act has taken away this power by excluding the power of Vice Chancellor to make appointment of a teacher. Sub section (6) has added the words "other than appointment of teacher of the University "and similarly under Sub section (8) the words " or a teacher of the University has been deleted. The legislative intent is clear that the Vice Chancellor should not be given any power to make ad hoc appointment of teacher of the University.

7. Secondly, in the facts and circumstances of the case there was nothing to show that appointment to the post of Professor was extremely urgent. The power under Section 13 can be exercised by the Vice Chancellor only

when the matter is too urgent and requires immediate action. The question of promotion of the petitioner to the post of professor was to be considered by the Executive Council and before the decision could be taken by the Executive Council the Vice Chancellor has passed the order making appointment of respondent no.4 to the post of professor in zoology Department of the University. The Court has to examine objectively the condition precedent for the exercise of powers by an authority as held in V.S. Vishwavidyalya Vs. Raj Kishore Tripathi, AIR 1977 SC 615.

8. It is urged that the Vice Chancellor can make appointment of a teacher in exercise of his power of supervision and control of the affairs of the University under clause (a) of sub-section (1) of Section 13 of the Act.

9. The general power which is conferred under clause (a) of sub-section (1) of Section 13 of the Act will not be attracted when there is a specific bar created under sub-section (6) of Section 13 of the Act in respect of appointment of a teacher of the University by the Vice Chancellor. Secondly, clause (a) of sub-section (1) of Section 13 confers power on the Vice Chancellor to exercise general supervision and control over the affairs of the University including the constituent colleges and the Institutions maintained by the University and its affiliated and associated colleges. The power of supervision and control of the affairs of the University or any Institution does not confer the power to act it self for another authority who is empowered under the Act to make appointments. He can only supervise and control the affairs of the University e.g. if any order is passed or any action is taken by a subordinate Authority, he can pass a suitable order in respect of such action or orders.

10. The learned counsel for the respondent submitted that sub-section (1) of Section 31 of the Act provides that Executive Council shall make appointment subject to the provisions of the Act and as the words are "subject to the provisions of this Act", it is contended that it should be read as "subject to Section 13 (1) (a) " Which confers the power on the Vice Chancellor to exercise general power of supervision and control over the affairs of the University and such power by virtue of the words used in sub-section (1), namely , " subject to the provisions of this Act" will invest the power in the Vice Chancellor to make appointment. This submission cannot be accepted. The phrase " subject to the provisions of this Act" under sub-section (1) of Section 31 must relate to such other provisions of Act which relates to the appointment of a teacher in the University or in the Committee of Management of an affiliated or associated College.

11. Section 31 of the Act confers power on the Executive Council to make appointment of a teacher in the University. The Executive Council has a right to make appointment on substantive vacancy by a regular selection but it has also power to make officiating appointment in a vacancy caused by the grant of leave to an incumbent for a period not exceeding ten months without reference to the Selection Committee under Section 31 (3) (a) of the Act. If there is a permanent vacancy, there is no reason that the Executive Council should not take decision for appointment to the post on the recommendation of the

Selection Committee or if a person is entitled for promotion, not to take steps to fill up the vacancy by promotion. The Executive Council has been empowered to make appointment on a leave vacancy for a period up to ten months but if it exceeds ten months again it has to appoint a teacher after obtaining recommendation of the Selection Committee under Section 31(3) (a) of the Act. It is clear that substantive appointment as well as officiating appointment has to be made by the Executive Council and not by any of the Authority under the Act. Section 31, It appears to us, does not take into account a situation where the Executive Council can take a decision for filling up substantive post by making ad-hoc appointment. The legislative intent appears to be that if substantive vacancy is existing, the Executive Council should fill up the vacancy expeditiously in accordance with the provisions of the Act and not to make ad-hoc appointment.

12. The learned counsel for the respondent urged that the petitioner has an alternative remedy to make representation to the chancellor under Section 68 of the Act and therefore the petitioner be directed to seek alternative remedy. The question as to when a petitioner should be directed to make representation to the Chancellor under Section 68 of the Act was considered in **Dr. Smt. Kantesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur and others, AIR 1987 SC 2186**, wherein their Lordships held that if the Vice Chancellor passes an order without any power under law such order could be challenged before the High Curt by a petition under Article 226 of the Constitution of India and the High Court would not be justified in dismissing the writ petition on the ground that an alternative remedy was available to the petitioner under Section 68 of the Act. In this case the Vice Chancellor had disapproved the order of dismissal of the teacher from service but subsequently he reviewed that order and it was held that as he had no power to review the order, it was a nullity and the High Court could have entertained the writ petition under Article 226 of the Constitution and it should not have been dismissed on the ground that an alternative remedy was available to the petitioner under section 68 of the U.P. State Universities Act.

13. In **Pramod Pathak Vs. The Vice Chancellor, Banaras Hindu University, Varanasi and others, 1985 UPLBEC 634**, it was held that though an aggrieved person can make representation to the Visitor under Section 5 (7) of Banaras Hindu University Act, 1915 but where the Executive Council has taken a decision, itself without jurisdiction the High Court can exercise jurisdiction under Article 226 of the Constitution of India. As discussed above, we have found that the Vice Chancellor has no power to make any appointment under Section 13 of the State Universities Act. The petitioner can challenge that order in this petition and it cannot be rejected simply on the ground that the petitioner should approach the chancellor under Section 68 of the Act.

14. The next contention of the learned counsel for the respondent is that the Vice Chancellor had appointed the wife of the petitioner also in the Zoology Department as a Lecturer but the petitioner then did not challenge this order. It is settled law that there cannot be

parity in illegality. In **The Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain etc., JT 1996(8) S.C. 387**, it was observed that Article 14 of the Constitution has no application or justification to legitimise an illegal and illegitimate action. If an appointment has been made by the Vice Chancellor illegally at earlier time, he cannot be permitted to make such illegal order again and again.

15. Another contention of the respondent is that the petitioner has no right to challenge the order of appointment of respondent no.4 as that does not affect his right to function as Reader in Zoology Department in University. The grievance of the petitioner is that he is entitled for promotion to the post of Professor but without considering his case by the Executive Council, respondent no.4 has been appointed as Professor by the Vice Chancellor and that affects his rights. It is not denied that the petitioner had made representation to the Executive Council to consider his claim for promotion to the post of professor. The Executive Council did not consider his case in regard to his promotion to the post of Professor on the ground that Writ Petition No.23263 of 1988 filed by him was pending. The said writ petition has been decided on 27.7.2000. After the decision of the said writ petition it was for the Executive Council to consider his claim for promotion to the post of Professor. The Vice Chancellor has passed the order of appointment of respondent no.4 as Professor on 9th August 2000. On the facts and circumstances it cannot be urged that the petitioner is not affected by the appointment of respondent no.4 on the post of Professor in Zoology department.

16. The last contention of the learned counsel for the respondent is that a Division Bench of the High Court referred a question of law to be determined by a larger Bench in Civil Misc. Writ Petition No.3116 of 1999 and in that order an observation was made that pending further orders the University can make ad-hoc appointment on the post involved in that writ petition. Firstly, this order was passed in a matter of Allahabad University. The respondents were not parties in that writ petition. Secondly, the observation was made that the University can make ad-hoc appointment but there was no observation that the Vice Chancellor can make ad-hoc appointment. The observation made in that referring order has no relevance in the present case.

17. For the reasons given above, We allow the writ petition. The order dated 9.8.2000 passed by the Vice-Chancellor(Annexure-13 to the Writ Petition) is hereby quashed. The parties, in the facts and circumstances of the case, shall bear their own costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.10.2000

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

Habeas Corpus Writ Petition No.19910 of 2000.

Jai Prakash Shastri ...Petitioner.
Versus
Adhikshak, Janpad Karagar, Muzaffarnagar and others ..Respondents.

Counsel for the Petitioner:
Shri Daya Shanker Mishra
Shri G.P. Dixit

Counsel for the Respondents:
Shri Kamlesh Narain
Shri Mahendra Pratap
Shri S.N.Srivastava
A.G.A

Constitution of India, Article 226 readwith National Security Act, S.3(2)- Detention under-Authorities failing to inform detenue that he had a right to make representation against the detention order to the detaining authority-Detention Order, held, illegal.

Held-

In the affidavit filed by the District Magistrate it has not been stated that the said authority communicated to the detenue that he has a right to make representation against the detention order to the detaining authority (District Magistrate). Hence we hold that the detaining authority did not communicate to the detenue that he has a right to make representation to the detaining authority. Hence this petition is allowed. The impugned detention order dated 24.2.2000 is quashed. (Paras 3 and 7)

Case law discussed

JT 2000(8)SC 374, 1995 SCC (Crl.) 643, (1994) 2 SCC 355, (1994) 2 SCC 337 (Pr 17), Habeas Corpus Petition No.27252 of 2000, decided on 29.9.2000 (DB).

By the Court

1. Sri Kamlesh Narain appears for Union of India and Sri Mahendra Pratap for the State.

Heard learned counsel for the parties.

2. The petitioner is challenging the impugned detention order dated 24.2.2000 passed under Section 3(2) of the National Security Act.

A large number of points have been taken in this petition but in our opinion this petition deserves to be allowed on the very first point, namely, that the detaining authority did not communicate to the detenue that he has a right to make a representation to the detaining authority as is required by the Hon'ble Supreme Court in State of Maharashtra and others Vs. Santosh Shankar Acharya, JT 2000 (8) SC 374.

3. No doubt this point was not expressly taken in the pleadings at the petition but on 28.9.2000 we had passed an order directing the learned Government Advocate to file a supplementary affidavit stating whether the detaining authority intimated to the detenue that he has a right to make a representation against his detention to the detaining authority. In the affidavit filed by the District Magistrate it has not been stated that the said authority communicated to the detenue that he has a right to make representation against the detention order to the detaining authority (District Magistrate). Hence we hold that the detaining authority did not communicate to the detenue that he has a right to make representation to the detaining authority.

4. Learned Government Counsel has relied on the decision of Hon'ble Supreme Court in Kamlesh Kumar Ishwardas Patel Vs. Union of India and others, 1995 SCC (Crl) 643. That decision has been considered by the Hon'ble Supreme Court in State of Maharashtra's case (supra.). Hence it cannot be said that the decision in State of Maharashtra Vs. Santosh Shankar Acharya's case (supra) was delivered in ignorance of the earlier decision of the Hon'ble Supreme Court in

Kamlesh Kumar Ishwardas Patel's case (supra). It is not open to this Court to say that the Hon'ble Supreme Court in State of Maharashtra Vs. Santosh Shankar Acharya's case (supra) misinterpreted the earlier decision of the Constitution Bench of the Hon'ble Supreme Court in Kamlesh Kumar Ishwardas Patel's case (supra).

5. Learned Government counsel has also relied on the decision of Hon'ble Supreme Court in Amin Mohammed Qureshi Vs. Commissioner of Police, Greater Bombay, (1994)2 SCC 355. This decision, no doubt, is of a two Judge Bench of Hon'ble Supreme Court but it was subsequently followed by the five Judge Bench in Kamlesh Kumar Ishwardas Patel's case (supra). Learned Government counsel also relied on 1994(2) SCC 337 (para-17).

6. However, in view of the latest decision of the Hon'ble Supreme Court in State of Maharashtra Vs. Santosh Shankar Acharya's case (supra), we are bound to follow the latest decision of the Hon'ble Supreme Court. In fact this decision has been followed by a Division Bench of this Court in Nawab Dulha Vs. Union of India in Habeas Corpus Writ Petition No.27252 of 2000 delivered on 20.9.2000.

7. Following the said decision, this petition is allowed. The impugned detention order dated 24.2.2000 is quashed. The petitioner shall be released forthwith unless he is not wanted in some other criminal or preventive detention case.

8. Learned Government counsel prayed for leave to appeal to the Supreme Court. In our opinion since the point involved is covered by the Supreme Court decision in State of Maharashtra and others Vs. Santosh Shanker Acharya's case leave is refused.. A copy of this Judgment shall be supplied by tomorrow to learned counsels for the parties on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.11.2000

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

Civil Misc. Writ Petition No. 48897 of 2000

Manoj Kumar Garg ...Petitioner.
Versus
State of U.P. and another ...Respondents.

Counsel for the Petitioner:
Shri Awadh Narain Rai

Counsel for the Respondent:
S.C.

Uttar Pradesh Recruitment of Dependents of Government Servant Dying in Harness (5th Amendment) Rules 1999-Rule 5- Compassionate Appointment-Petitioner's father working as Assistant Teacher in aided Junior High School died in harness on 19.11.89 when the Petitioners was 14 years old. He passed High School in the year 1991, Intermediate examination in the year 1995-applied for appointment on 31.5.2000-amended provisions of Rule 5 providing five year period to claim appointment – quite reasonable – not entitled for any relief.

Held –

The State Government considered it and amended rule 5 of the rules in 1999. Rule 5 (1) (iii) fixed a period of five years from the date of death of the government servant within which an application has to be made by the person

who claims appointment. In my opinion, this is a reasonable period during which appointment could be claimed. (Para 10)

Case law discussed.

2000 (2) ESC-967
2000 (1) ESC-692
(1994) 4 SCC-138
2000 (1) ESC-448
(1996)1 SCC-301 (1996) (1) SLR 7
2000 (87) FLR 132

By the Court

1. Petitioner was born 2.1.1975. His father was working since 1.7.1974 as Assistant Teacher in aided institution Dayanand Vedic Vidyalaya Junior High School, Shamli, District Muzaffarnagar. He was a permanent assistant teacher. He died in harness on 19.11.1989. At the time of his father's death petitioner was a minor of about 14 years. No one in the family was qualified to claim appointment in 1989. The petitioner passed his high school and intermediate examinations in 1991 and 1995. He after attaining the age of majority and qualification for the post of clerk claimed appointment under the Dying in Harness Rules and applied on 31.5.2000. His claim has been rejected by District Basic Education Officer (in brief BSA) by order dated 7.6.2000. It is this order dated 7.6.2000 which has been challenged in this writ petition.

2. Sri Awadh Narain Rai, learned counsel for the petitioner has urged that father of the petitioner died when the petitioner was a minor aged 14 years. He applied for appointment after becoming major. The BSA committed an error in rejecting the claim of the petitioner. He placed reliance on a decision of this court in Manoj Kumar Saxena Vs. District Magistrate, Bareilly and others 2000 (2) ESC 967.

3. On the other hand learned Standing Counsel has urged that the petitioner is claiming appointment under Dying in Harness Rules after more than ten years of his father's death which is not permissible. The petitioner cannot be appointed. He further urged that order passed by BSA is not liable to be interfered with.

4. The first question that arises for consideration is whether under the Dying in Harness Rules, a person who was a minor at the time of his father's death, could claim appointment subsequently after becoming major. Appointment under the Dying in Harness is provided for granting relief to the family whose sole breadwinner had died for meeting the immediate exigency in family of the deceased. Mere death of an employee in harness does not entitle a family to employment as of right, irrespective of financial condition of the family of the deceased. Nor a right is created in the dependent of the deceased to claim appointment at any point of time. A division bench of this court in Mohd. Danish Siddqui v. State of U.P. and others 2000 (1) ESC 692 after considering decisions of the apex court and this court has held that appointment under the Dying in Harness Rules cannot be given unless there is material on record that the family of the deceased was facing any undue hardship. In the affidavit filed by the mother, brother and sister of petitioner before the BSA, it has been stated that they have no objection if the petitioner is appointed. In paragraph 9 of the writ petition it has been stated that the petitioner's family is very poor and after the death of father entire family has been suffering and is in crisis economically. Apart from pension received by the

mother, there is no other income. No material has been furnished in support of these allegations. The apex court in Umesh Kumar Nagpal v. State of Haryana and others (1994) 4 SCC 138 has laid down as under:-

"…compassionate appointment, cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such an employment is not a vested right, which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of death of the sole bread winner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

5. If the family of the deceased had been in financial crisis, petitioner's mother could have claimed appointment on a class-IV post to meet the immediate exigency in the family. She could have claimed relaxation in qualification or age. But she did not claim appointment as provided by government order dated 23.9.1981. The family of the deceased survived for more than ten years. For ten years there was no financial exigency in the family. Petitioner passed high School examination in 1991. He became major on 2.1.1993. But he did not claim appointment. He passed intermediate examination in 1995. He again did not claim appointment. In his application dated 31.5.2000, he has stated, that he claimed appointment with the respondents several times but no material has been filed to support this assertion. Therefore, it is reasonable to assume that the petitioner claimed appointment under the Dying in Harness Rules on 31.5.2000, more than seven years after becoming major. The application of the petitioner has been rejected on 7.6.2000.

6. The question that arises is whether the petitioner could claim appointment after he attained majority. The decision Pushpendra Singh v. Regional Manager U.P.S.R.T.C. Aligarh and others 2000 (1) ESC 448 was the basis on which decisions in Manoj Kumar Saxena (supra) and Sanjay Kashyap v. Chief Medical Officer, Mahrajganj and others Special Appeal No.28 of 2000 decided on 17.1.2000 were given. In these decisions direction were issued for considering the application for compassionate appointment. In Jagdish Prasad v. State of Bihar and another (1996) 1 SCC 301 [1996 (1) SLR 7] the apex court laid down:-

" It is contended for the appellant that since the appellant was minor; when his father died in harness, the compassionate circumstances continue to subsist even till date and that, therefore, the court is required to examine whether the appointment should be made on compassionate grounds. We are afraid, we cannot accede to the contention. The very object of appointment of a dependent of the deceased employee who die in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family. Since the death occurred way back in 1971, in which year, the applicant was four years old, it cannot be said that he is entitled to be appointed after he attained majority long thereafter. In other words, if that contention is accepted, it amounts to another mode of recruitment of the dependent of the deceased Government servant which

cannot be encouraged, de hors the recruitment rules."

7. The apex court in Sanjay Kumar v. State of Bihar 2000 (87) FLR 132 considered the case of a minor who was ten years old when his mother, an excise constable died on 10.12.1988. Soon after his mother's death during minority he applied for compassionate appointment. His application was rejected on 10.12.1996 as time barred. On 26.12.1996 he moved a fresh application which was also rejected on 21.4.1997 as time barred. The court held that on the date first application was made he was a minor and was not eligible for appointment. The court held:-

"There cannot be reservation of a vacancy till such time, as the petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

8. The law is clear that in absence of any specific provisions the minor who becomes major after a number of years cannot claim appointment. Father of petitioner died in 1989. Petitioner became major in 1993. He did not claim appointment for about seven years after becoming major. The plea of compassionate appointment is not to enable the family to tide over the sudden crises or distress that took place in 1989. The family had pulled on for nearly ten years without any difficulty. Poverty is one thing and immediate financial crises is another. No rule has been pointed out which provides for the minor to claim appointment after he becomes major. The vacancy of the deceased could not be treated to be reserved for his dependant beyond a reasonable period.

9. The learned counsel for the petitioner urged that the application for appointment under the Dying in Harness Rules is liable to be considered as the petitioner's family is poor and in financial crises. He relied on proviso to rule 5 of the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules 1974. This rule was amended on 13.10.1993 Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness (Third Amendment) Rules, 1993 by which Rule 5 was substituted. Another amendment has been made by Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness (Fifth Amendment) Rules, 1999 on 20.1.1999 by which Rule 5 had been substituted (in brief rules). Rule 5 is extracted below :-

" *5.Recruitment of a member of the family of the deceased*-In case a government servant dies in harness after the commencement of these rules and the spouse of the deceased government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation

of the normal recruitment rules if such person.
(i) fulfils the educational qualifications prescribed for the post.
(ii) Is otherwise qualified for government service, and
(iii) Makes the application for employment within five years from the date of the death of the government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.
(2) As for as possible, such an employment should be given in the same department in which the deceased government servant was employed prior to his death."

10. Appointments in public service should be made by an open invitation on merit, from the open market. An exception to this rule has been provided in Dying in Harness Rules to provide immediate relief to the family of government employee who dies during service on humanitarian considerations. Compassionate appointment is intended to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner who had left the family in penury and without any means of livelihood. The apex court has held that appointment on compassionate ground could be claimed within a reasonable period. What should be a reasonable period within which compassionate appointment could be claimed? The State Government considered it and amended rule 5 of the rules in 1999. Rule 5 (1) (iii) fixed a period of five years from the date of death of the government servant within which an application has to be made by the person who claims appointment. In my opinion, this is a reasonable period during which appointment could be claimed.

11. Learned counsel for the petitioner vehemently argued that in view of proviso to rule 5 (1) an application could be made and the State Government could relax the requirements of the rule. Rule 5 (1) (iii) provides that a person has to make the application for employment within five years from the date of death of the government servant. I have given my anxious consideration to proviso to rule 5 (1). It gives power to the state government to grant relaxation if it is satisfied that the time limit fixed for making application causes undue hardship in any particular case Admittedly, the petitioner did not approach the state government. The question, therefore whether he was entitled for relaxation is academic. The learned counsel for the petitioner lastly urged on the basis of observation made in Pushpendra Singh (supra) that the respondents be directed to consider petitioner's claim for temporary appointment. The observation is extracted below :

"As a result of foregoing discussion the appeal is bereft of merits. However, by reason of reliance upon the said observation as also upon the Rule which envisages consideration of an application for compassionate appointment made even after five years of the death of the employee if the circumstances so warrant, the appeal is disposed of post-fixed with the observation that in case an application

is moved, the respondents may reckon with the feasibility of a temporary appointment if the family is still reeling under financial straits."

12. The division bench in Mohd. Danish Siddqui (supra) has held that this court in Pushpendra Singh (supra) did not issue any direction to state government to consider the claim of the petitioner. The learned counsel for the petitioner could not point out any such direction in Pushpendra Singh (supra). The District Basic Education Officer, therefore, did not commit any error is rejecting the application of the petitioner for appointment under the Dying in Harness Rules.

For the aforesaid reasons this writ petition fails and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD; NOVEMBER 28, 2000

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

Civil Misc. Writ Petition No. 31168 of 2000

Union of India, through General Manager, Northern Railway, Barauda House, New Delhi and another
...Petitioners.
Versus
Vinod Kumar Mani Tripathi and others
...Applicant/ Respondents.

Counsel for the Petitioner:
Shri Vinod Kumar Mani Tripathi
Shri A.K. Gaur

Counsel for the Respondents:
Shri J.J. Munir
Shri J.N. Sharma
Shri T.P. Singh
Shri U.N. Sharma
S.C.

Constitution of India, Article 226 – Scope of Interference-by Court of law- Chairman Railway Board came to conclusion that due to corruption, favoritism and nepotism- the answer book of topmost four candidates are thicker yellowish and different from the batch- signature of invigilators on these Answer sheet appears to cancelled the whole examination interference by the Tribunal- held uncalled for – without jurisdiction.

Held –

As stated earlier, he verified and scrutinized the answer sheets of four top candidates and for the reason indicated in the preceding paragraph came to hold that the examination was not fair and proper. In that view of the matter, the Tribunal ought not to have interfered with and reviewed the decision of the chairman as if it was exercising the power to appellate authority. (para 15)

Case law discussed.
J.T. (1993) 2 SC – 688
1968 AC – 240
(1948) 1 KB 223
AIR 1991 SC – 1153
AIR 1996 SC – 11

By the Court

1. These two writ petitions arise out of a common judgement and order passed by Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Applications No. 180 of 1998 and 750 of 1999. Since, common questions of law and fact are involved in both these writ petitions, they were heard analogously and are disposed of by this judgement.

2. Railway Recruitment Board (for short " the Board) Northern Railway, Allahabad issued advertisement vide employment notice no. 3/96-97 inviting applications from eligible candidates for selection of different categories of posts numbering 18 of which category no. 4 relates to Section Engineer (P. Way). There were in total seven posts of which three relate to general category, three to O.B.C. and one to Schedule caste. Respondents no. 1 to 5 being Engineers applied to the said posts and appeared in the written test conducted by the Board. After merit list of 23 candidates was prepared notice was published in the news-paper informing successful candidates to appear for viva voce test. The roll number of respondent no. 1 Viand Kumar Mani Tripathi being not there in the select list, he moved the Central Administrative Tribunal, Allahabad, respondent no. 6 challenging the whole process of selection by filing original application no. 180 of 1998. His case in nut shell was that he had secured 106 marks out of full mark 120 but surprisingly he was not declared to have been selected whereas candidates having secured 103 & 105 marks were selected and called for viva voce test. To the application, he attached a statement indicating the roll number of the candidates and the marks secured by them in the written test. He made serious allegations against the Board and its officials in conducting the selection alleging that there were a lot of bungling done at the behest of Sri S.P. Saroj, Ex-Chairman of the Board and one Nipendra Singh (respondents no. 2 and 3 in the Original Application) for their personal gain. According to him, they changed the original copies of the answer sheets and got the marks awarded in order to show favour to those candidates of their choice. It was further alleged that Sri S.P. Saroj and Nipendra Singh were very close to each other and the latter parted with his Maruti Car to Sri Saroj as long as he was holding the office of the Chairman, Money power played a vital role in the entire selection process and those who could grease their hands become successful to get their names included in the merit list, but as he did not succumb to such illegal demand his name was omitted though he had secured good marks. It was specifically alleged that with the money earned Sri Nipendra Singh constructed a house fitted with four A.Cs in Judges Colony, Stanely Road, Allahabad, besides he purchased property at Nagpur City on payment of Rs.15 lakhs. Since the whole selection process was vitiated, inasmuch as, the selection was made on 'give and take' basis by S.P. Saroj and Nipendra Singh, in order to weed out corruption in the highest level a roving enquiry should be conducted by the C.B.I. While making all these allegations he prayed that the Board and its functionaries be directed to permit him to appear in the viva – voce for the post of Selection Engineer as he had secured marks more than those whose names were published in the select-list and in the event he was found successful further direction be given to appoint him on the said post.

3. Having entertained the Original Application of Vinod Kumar Mani Tripthi, the Tribunal passed the interim order that the viva voce test may be held, but the result shall not be declared till the next date. Pursuant to the said order, the candidates whose names found place in the merit list appeared in the viva-voce test but the result was not declared.

Subsequently, the aforesaid interim order was modified to the extent that the result of the interview be declared and till disposal of the case one post be kept reserved so that in case the application was allowed the vacant post would be made available to Sri Tripathi, Even thereafter when the Chairman of the Board did not declare the result, four successful candidates (respondents no. 2 to 5) applied for being impleaded as parties and prayed for a direction to the Chairman to declare the result. Initially Chairman, took the stand that selection process was fair and applied to the Tribunal, to allow him to declare the result of the interview. But after Sri P.K. Gupta joined as Chairman the matter took altogether a different turn. He moved the Tribunal for permission to cancel the selection since such a decision was taken by the authorities of the Railway Board. This led the respondents no. 2 to 5 to file a separate Original Application No.750 of 1999. They asserted that their being no acceptable material that there were serious lapses or illegalities committed by the Recruiting Agency in the process of selection, the entire select list should not be cancelled and therefore, the decision taken by the authorities, to cancel the selection was illegal and unsustainable in law. If at all the authorities were of the opinion that the secrecy could not be maintained, in other words, the marks secured by the candidates in the written test could be made known to the public blame must go to the Board but for that successful candidates should not suffer. They also challenged the decision of Chairman for holding fresh interview pursuant to the direction of Government of India, Ministry of Railways. The Board through its Chairman Gurnam Singh Rekhi filed return urging that in the matter of selection it is the usual procedure to scrutinise the application forms of the candidates at two stages one, before the written examination and the other before the viva-voce, so that any discrepancy/ deficiency may not go unnoticed. In the case on hand, the application forms of Sri Vinod Kumar Mani Tripathi and some others were cancelled at the second stage of scrutiny since the same were not properly filled – in terms and conditions specified in the employment notice. Therefore, no bias or will could be imputed to the Board or its functionaries for taking such a decision. He asserted that with due fairness interview was conducted by a panel of seven members and there was no ground warranting interference in the matter of selection by the Tribunal. He, however, urged that in view of leakage of the answer sheets, direction should be issued for necessary investigation as to how the copies of confidential report pertaining to evaluation of answer sheets could reach the hand of Sri Tripathi. Sri Vinod Kumar Mani Tripathi in his rejoinder affidavit asserted that once his application was accepted and he was allowed to sit in the written test, his candidature should not have been rejected when he was found to have qualified having secured 106 marks out of full mark of 120. He reiterated the stand taken in his Original Application that fraud and perjury was committed by the Board in the process of selection, therefore, the documents pertaining to the recruitment in question should be made public so that its manner of functioning in the matter of selection could be judged. Sri P.K. Gupta, who subsequently joined as Chairman of the Board suspected the fairness in the process of written examination for the reason that no secrecy was maintained in the matter of awarding

marks and copy of the mark-sheet could reach the hand of one of the candidates. So, he made sample investigation of the answer papers of top four candidates of the merit-list and to his utter surprise found that signatures of the invigilator were forged when compared to remaining answer sheet. That apart, those four answer sheets were thicker, yellowish and the stamp placed on the back-side thereon had different colour of ink, font and style as compared to the batch. Moreover, question no. 120 which was a descriptive type and was required to be written in four or five lines was not attempted at all by those four candidates presumably being apprehensive that their handwriting may be detected. Taking all these circumstances into account, the whole process of selection of twelve categories of posts were cancelled.

In view of the pleadings of parties the following issues came up before the Tribunal for consideration.

(1) Whether cancellation of candidature of Sri Vinod Kumar Mani Tripathi was legal and proper?

(2) Whether cancellation of the process of selection of category no. 4 in question on the basis of the enquiry/investigation by Sri P.K. Gupta was justified?

4. As regards issue no. 1, admittedly Sri Tripathi was one of the candidates and he appeared in the written examination conducted by the Board. He was, however, not called to appear viva-voce test since according to the Board, during second stage of scrutiny his application form was found to have not been properly filled in, inasmuch as, employment notice number and the nature of post as well as the category thereof were not indicated in the application form. This being the only ground of rejection of his application, the Tribunal held that in view of the fact that other information's furnished in the application being sufficient to identify his candidature, it was wrong on the part of the Board to reject the application on technical grounds. The Tribunal further held that such technicality should not have weighed with the mind of the Board once admit card was issued and permission was accorded to sit in the examination. So instead of rejecting the application proper course would have been to ask Sri Tripathi to supply the omission appearing thereon. These findings of the Tribunal, in our interference of this court in exercise of writ jurisdiction.

5. Sri Tripathi while challenging the rejection of his application by the Board made serious allegation questioning the fairness of selection alleging that corruption and favouritism played vital role in the procession of selection. This created suspicion in the mind of the Chairman Sri Gupta who succeeded Sri Rekhi that there may be some truth in the allegation since copy of the mark-sheet which was a part of the confidential record reached the hands of Sri Tripathi. So, in order to ascertain whether the selection process was fair and proper Sri Gupta made an enquiry, in course of which he picked up the answer sheets of top four candidates of the merit list and to his utter surprise found the signatures of the invigilator to be forged as compared to the remaining answer-sheet. He noticed the signature to be 'unsure' and on hesitant line not in flowing manner. Besides, the answer – sheets were thicker, yellowish and different from the batch

and stamps appearing on the back of the booklets were also found to be different in colors ink and style. Over and above, on going through the answer papers, he found that descriptive question no. 20 was not attended to by those four candidates for fear of their hand-writing being identified at the time of evaluation. On these findings Sri Gupta was prima facie satisfied that the examination was not fair and the candidates resorted to evil-practice for being selected. This led him to take a decision to cancel the examination and consequent selection. But since the matter was sub judice in the Tribunal permission was sought before giving effect to the decision. With regard to the decision of the Chairman to cancel the examination for the reasons as aforesaid the Tribunal in paragraph 15 of the judgement held that before taking such extreme steps he should have tried to bring on record the direct evidence, inasmuch as, he should have summoned and examined the invigilator to ascertain whether the signatures appearing on the answer-sheets are real or forged. Besides, he should have also ascertained from the invigilator and obtained an explanation regarding change of texture and colour of the answer-sheets and the stamps appearing on the back thereof. So, without holding any such fact finding enquiry he should not have cancelled the examination on the basis of personal observation and opinion. Having held thus, the Tribunal directed the Board to allow Sri Tripathi to appear in the viva-voce test and to declare the final result of the selection for the posts of Section Engineer (P.Way).

6. Sri A.K. Gaur learned counsel appearing for the petitioner Board though challenged the findings of the Tribunal recorded on both the issues, he however, led stress on the correctness of the findings and ultimate conclusion arrived at on the issue no.2. He emphatically urged that no malice or illwill can be attributed to the Chairman of the Board for taking a decision to cancel the examination in question. His decision being administrative one, correctness thereof cannot be judged with same rigour as applied to judicial decision when challenged in the higher court. He submitted that the findings of the Chairman are based on sound reasoning and unless and until those are shown to have suffered from unreasonableness and lack of good faith judicial interference is uncalled for and in that view of the matter the decision of the Tribunal upsetting those findings is unsustainable in law.

7. Per contra, learned counsel appearing for respondents no. 2 to 5 submitted that the then Chairman Sri G.S. Rekhi having admitted in the Application No.1413 of 1998 filed before the Tribunal that the selection process held by the Board was fair and impartial his successor Sri Gupta could not have gone back to such admission and held otherwise saying that irregularities were committed in the selection process. Referring to the judgement of the Supreme Court in the case of Asha Kaul V. Jammu & Kashmir JT (1993) 2 S.C. 688, it was contended that in view of the settled proposition of law that selection cannot be cancelled arbitrarily and on flimsy ground, in other words, decision to cancel can be taken only after due enquiry, and in the present case there being no enquiry whatsoever, the findings of the learned Tribunal in not giving approval to the decision of the Chairman of the Board cancelling the examination cannot be faulted with.

Elaborating the submission it was urged that there was no tangible evidence that the candidates who came out successful in the written test had adopted any unfair and illegal means and merely because one of the successful candidates obtained the copy of the mark-sheet, the same cannot be sic a ground to cancel the examination. It was lastly, contended that the respondents are Engineering Graduates and being hopeful to get into public employment appeared in the interview and for no fault of theirs and without giving them any opportunity of hearing the Board took an ex-parte decision to cancel the examination and if this decision is approved their future would be marred since they being over-aged cannot appear in any examination for entering into public employment.

Counsel appearing for respondent no. 2 supported the arguments advanced by other respondents.

Before adverting to the contentions raised at the Bar, at the outset it is necessary to have a glimpse on the law with regard to scope and ambit of judicial review of the administrative decision of the executive. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is entirely different from an ordinary appeal. There is a note of caution for exercise of power of judicial review by Lord Scarman in Nottinghamshire Country Council v. Secretary of State for the Environment, 1986 A.C. 240, in the following words:

"Judicial review is a great weapon in the Hands of the Judges; but the Judges must observe the constitutional limits set by our Parliamentary system upon the exercise of this beneficent power."

The grounds on which an administrative action can be brought within the purview of judicial review are classified as under:

(i) Illegality,

(ii) Irrationality, namely Wednesbury Unreasonableness,

(iii) Procedural impropriety.

By "irrational means Wednesbury unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at. (See Associated Provincial Picture Houses Ltd. V. Wednesbury Corpn. (1948) I KB 223). Therefore, Judicial review is permissible where the court finds that no authority acting reasonably could have reached such administrative decision. Sir William Wade in his book Administrative Law (Seventh Edition at page 339) sapiantly observed that:

"the doctrine that the powers must be exercised reasonably has to be reconciled with no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must, therefore, resist the temptation to draw the bounds too tightly, merely, according to its own opinion if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits."

9. The concept of reasonableness in administrative action has been elaborately dealt with by the Supreme Court in the case of G.B. Mahajan v.Jalgaon Municipal Council, AIR 1991 S.C. 1153.

10. In the celebrated judgement in the case of Tata cellular v. U.O.I. AIR 1996 SC p. 11, the Hon'ble Supreme Court having made reference to a catena of judicial pronouncements on the question of judicial interference in the administrative decision observed that since the court does not sit in appeal over such decision but merely reviews the manner in which it was made, the court must exercise utmost restraint while exercising the power of review, else it would be guilty of usurping power. Therefore, if the authority takes a decision on the basis of some materials which a reasonable person could have taken in that case judicial review is not permissible. On the other hand, if the decision is based on no legitimate reasons and is actuated by bad faith then judicial interference would be the proper remedy to undo the wrong.

Keeping the aforesaid legal principles in mind it is now to be judged whether the ultimate conclusion of Sri Gupta, Chairman of the Board to cancel the examination suffers from unreasonableness and whether the decision taken by the Tribunal in not putting its seal of approval thereon requires interference of this court in exercise of writ jurisdiction under Article 226 of the Constitution. We are conscious of legal position about the jurisdiction of High Court in the matter of interference in the orders of the Tribunal. It needs no emphasis that jurisdiction is supervisory and not a appellate. Article 226 is not intended to enable the High Court to convert itself into the court of appeal and examine the correctness of the decision of Tribunal. But on a perusal of the order of the Tribunal if the High Court comes to a conclusion that the Tribunal has committed a manifest error or that on the available material it is not possible for a reasonable man to come to a conclusion arrived at by the Tribunal or that the Tribunal has ignored to take into consideration certain relevant materials or has taken into consideration such materials which is not admissible then the High Court would be justified in interfering with the findings of the Tribunal.

11. To repeat with, in the present case Sri Gupta, Chairman of the Board in order to ascertain whether selection process was fair and proper picked up answer-sheets of top four candidates and on enquiry found…….

(i) That the signatures of invigilator appearing in those answer-sheets to be forged as compared to the remaining answer – sheets since the same were 'unsure' and on hesitant lines not in flowing manner.

(ii) That the answer-sheets were thicker, yellowish and different from the batch,

(iii) That the stamps appearing on the back of those booklet (answer-sheets) were found to be different in colour, ink and style; and

(iv) That the descriptive question no. 20 was not attended to by those four candidates for fear of the handwriting being identified at the time of evaluation of the answer-sheets.

12. Tested with the principles of 'reasonableness' it cannot be said that the ultimate decision of the Chairman

cancelling the examination on the basis of the findings as aforesaid was unreasonable and no prudent man could have arrived at such decision.

13. To necked eye, he found that the four answer sheets were quite dissimilar to others in size, colour and the stamp/seal appearing on the back thereof had a different colour of ink, font and style. Besides the signature of the Invigilator also appeared to be forged as compared to others. From all these what appears. Is that the written examination conducted by the Board was an eye-wash. The officials entrusted with the duty of conducting the examination betrayed the trust reposed in them. They in order to help the candidates for whom they were interested for obvious reason substituted the answer sheets in place of originals by forging the signature of the Invigilator. In our considered opinion examination was not fair and above – board. This observation of ours gains support from the other attending circumstance, inasmuch, as, no secrecy was maintained in the matter of awarding marks to the candidates in the written examination. It was expected of the board and its officials to keep the mark sheet of the candidates of the written examination in sealsed cover so long as viva voce was not concluded. No sensible man can appreciate the manner the records of the written examination were handled by the officials. Sri Tripathi, respondent No. 1 being one of the candidates could be able to get a copy of the mark-sheet of the written test and place the same on record before the Tribunal. It cannot, therefore, be denied that the officials having control over the confidential record parted with the copy of the mark sheet to Sri Tripathi. In such circumstances, court cannot be a mute spectator and approve corruption, nepotism and favourism that prevailed in the selection and permit the candidates having come out successful in such selection to enter into public service. It need not be emphasized, competitive examinations are required to be conducted by the authorities concerned in strict manner to get the best brain. Public interest involved in such service requires no compromise. Therefore, any violation of it should be dealt with strong hand.

14. Corruption, favouritism and nepotism have become order of the day. It has affected the whole society like AIDS. Corrupt people have taken place of pride in the society. These people supported by the hypocrites shamelessly commit crime in broad day light, as a result, the whole society is affected. In crime graph corruption has reached such a high proportion that unless right minded people come forward to check it, it may lead to social disorder. The court has vital role to play when such matter comes to its notice.

15. The argument advanced by the learned counsel appearing for respondent Nos. 2 to 5 that in view of the law laid down in Asha Kaul (Supra) that a detail enquiry ought to have been conducted by the Board before canceling the examination merits no consideration. The decision of the Supreme Court in the aforesaid case was rendered in altogether different fact situation and therefore, the same has no application to the case in hand. In that case, some of the candidates whose names were there in the select list for appointment as Munsifs approached the High Court of Jammu and Kashmir since the Government did not approve and publish the list. The learned Single Judge

allowed the petition directing the State Government to approve the list, but on appeal by the State, the Division Bench disagreed with the learned Single Judge. It held that the Government was not bound to fill up the existing vacancies and mere inclusion of names in the select list did not confer upon the candidates any indefeasible right to appointment. The matter was then carried to Supreme Court. It was contended that Government had not disclosed the reason for not approving the remaining names while approving the list of 13 candidates and so its action was arbitrary, capricious and vitiated by admissible and extraneous consideration. On behalf of the State, the main contention was that a large number of complaints were received by the Government against the selection and many of them were found to be not without substance. This being the submission of the State, their Lordships' observed that if the Government was satisfied after due enquiry that selection had vitiated either on account of violation of fundamental procedural requirement or was vitiated by consideration of corruption and favouritism, it can refuse to approve the select list. But while doing so, it was bound to record the reasons for its action and produce the same before the court if and when summoned. This observation of their Lordships should not be read in isolation. It should be read and interpreted in the context and circumstances it was rendered. In the present case, it cannot be said that no enquiry whatsoever was made by the Chairman of the Board. As stated earlier, he verified and scrutinised the answer sheets of four top candidates and for the reasons indicated in the preceding paragraph came to hold that the examination was not fair and proper In that view of the matter, the Tribunal ought not to have interfered with and reviewed the decision of the Chairman as if it was exercising the power of appellate authority.

16. In the result, both the writ petitions are allowed. The impugned orders passed by the Learned Tribunal in the aforesaid two cases sitting over the decision of the Chairman and directing the Board to allow Sri Tripathi to appear in viva-voce test and finally to declare the result of the examination are quashed. There shall be no order as to costs.