ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.5.2001

BEFORE
THE HON'BLE B.K. RATHI, J.

Civil Misc. Writ Petition No. 24255 of 1998

Smt. Anjum Ara ...Petitioner
Versus
XIth Additional District Judge, Gorakhpur and others ...Opposite parties

Counsel for the petitioner:
M.A. Qadeer
Sri R.U. Ansari

Counsel for the respondents:
S.C.

Section 21 (1) (a) of U.P. Act No. 13 of 1972- In the absence of any pleading in the application under section 21 (1) (a) of U.P. Act No. XIII of 1972, it cannot be accepted that the respondents are tenants of the petitioner. The application of the petitioner was not maintainable. (held in para 6)

The entire facts regarding partition appears to have been concocted to create an artificial need to oust the respondent nos. 2 to 4. In the circumstances, the petition for release was rightly rejected by the appellate court.

(Delivered by Hon'ble B.K. Rathi, J.)

1. The petitioner moved an application under section 21 (1) (a) of U.P. Act No. XIII of 1972 (hereinafter called the Act) for the release of the premises in possession of respondent nos. 2 to 4, Annexure-1 to the petition. The application for release was allowed by the Prescribed Authority by order dated 19.11.1997, Annexure-12 to the petition. Aggrieved by that order, the respondent nos. 2 to 4 filed Rent Appeal No. 10 of 1997 under section 22 of the Act. The Rent Appeal has been allowed on 27.4.1998 by order, Annexure-13 to the petition. The petitioner, therefore, has invoked extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

2. I have heard Sri R.U. Ansari, learned counsel for the petitioner. Respondent nos. 2 to 4 did not appear and, therefore, they could not be heard.

3. The premises in dispute known as Zahur Building situated in Golghar, Gorakhpur City. Originally, Zahurul Hasan was the owner and land lord of the same. He died leaving several sons and daughters. The petitioner is his daughter. It is alleged that even after the marriage, she was living in the disputed house, that there was a private partition. The portion in which the petitioner was living was allotted to the share of Ashfaq Ahmad, that Ashfaq Ahmad brother of the petitioner permitted her to live in one room of the house as licensee till her share is vacated, that the portion of the house in the tenancy of the respondent nos. 2 to 4 came to the share of the petitioner, that the petitioner is in need of the disputed premises. It is further alleged that the balance of hardship is also in favour of the petitioner and that the respondent nos. 2 to 4 are well placed in the life and can get another house.

4. After considering the arguments, I am of the view that the Prescribed Authority allowed the application for release without properly appreciating the facts. Release application moved by the petitioner is Annexure 1 to the petition. It

is alleged that the portion in which respondent nos. 2 to 4 are tenants fell to the share of the petitioner, that a private partition took place and its memo has been filed which is Annexure-4 to the petition. This memo is on a plain paper and is not admissible in evidence. Therefore, this private partition cannot be accepted. It appears that this paper has been prepared in collusion with other co-sharers who are family members of the petitioner to create an artificial need to oust the respondents. No reason has been mentioned as to why the petitioner took the portion which is in the occupation of the tenants. Even if, for the sake of arguments it is admitted that the memo of partition, Annexure-4 to the petition is admissible in evidence, it is a collusive document to oust the respondents.

5. The most interesting fact is that the petitioner has alleged that she became the owner of the house by private partition, Annexure -4 to the petition, the respondents were old tenants of the house from the life time of the father of the petitioner. It has no where been alleged in the petition as to how after the partition she became the landlady of the respondent nos. 2 to 4. They have neither accepted 'this private partition nor recognized the petitioner as their landlady. There is no attornmant by the respondents in favour of the petitioner. They have denied that the petitioner is the landlady and they are tenants of the petitioner. In the absence of any pleading in the application under section 21 (1) (a) of U.P. Act No. XIII of 1972, it cannot be accepted that the respondents are tenants of the petitioner. The application of the petitioner was not maintainable.

6. The entire facts regarding partition appears to have been concocted to create an artificial need to oust the respondent nos. 2 to 4. In the circumstances, the petition for release was rightly rejected by the appellate court.

7. The petition is without merit and is hereby dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.5.2001

BEFORE
THE HON'BLE B.K. RATHI, J.

Criminal Misc. Application No. 2155 of 2001

M/s Eastern Road Carriers Ltd.
...Applicant
Versus
State of U.P. and another ...Opp. parties

Counsel for the Applicant:
Mr. Ashwini Kumar Awasthi
Mr. Manish Tiwary

Counsel for the respondents:
A.G.A.
Mr. S.K. Singh,

Customs Act- Section 119- it is doubtful whether the goods can be confiscated under section 119 of the customs Act- the tea is a perishable item and can perish within the time taken in confiscation proceedings causing loss to the petitioner. (held in para 18)

The petition is, therefore, fit to be allowed. It is, accordingly allowed and the tea in question shall be released in favour of the petitioner on his furnishing sufficient security to the extent of eight lacs with an undertaking that in case order for confiscation under Section 124 is passed, the petitioner shall pay price

of the goods and it may be realized from him as well as from surety. It is further made clear that the confiscation proceedings may continue and shall be decided on merits without being influenced by any observations made in the body of the judgement.

(Delivered by Hon'ble B.K. Rathi, J.)

1. The petitioner is a Transport Company. Its truck was carrying 340 bags of tea, which was loaded from Tinsukia on behalf of M/s Rossell Industries Ltd., and was to be taken to Tundla in the godown of M/s Hindustan Lever Ltd. It is contended that Kamla Singh, driver of the truck, out of sheer greed, probably loaded some contrabanned material in the truck during the journey. That the said truck was intercepted by the Customs authority on 23.10.2000 and it is alleged that 250 Kgs of NEPALI GANJA was recovered from the truck which was concealed in the tea bags. The truck alongwith the goods were therefore seized. The statement of the driver Kamla Singh was recorded under Section 107/108 of the Customs Act.

2. The petitioner being a transporter moved an application for release of 340 bags of the tea. It is contended that the above tea was being transported after obtaining gate pass and invoice for removal of excisable goods no. 116 dated 14.10.2000. That the tea is a perishable item. That truck was transporting the tea with proper papers and authority. That there is no fault of the petitioner and he 'had no knowledge that the driver loaded the NEPALI GANJA in the truck. That therefore, the tea should be released in favour of the petitioner.

3. The application for release was rejected by the Special Judge, N.D.P.S. Act, Azamgarh by order, dated 4.4.2001, annexure 6 to the petition. Therefore, the petitioner has approached this Court under Section 482 Cr.P.C.

4. I have heard Sri Manish Tiwary, learned counsel for the petitioner and Sri S.K. Singh, learned counsel for the opposite party no.2.

5. It is contended by the learned counsel for the petitioner that the petitioner is a transport company having contracts with various multi-national companies. That the goods of M/s Rossell Industries Limited were being transported to M/s Hindustan Lever Limited. Both of them are multi-national companies. It is contended that there were valid papers, gate pass and invoices for removing of excisable goods. It is further argued that statement of the driver Kamla Singh was recorded under Section 107/108 Customs Act, in which he stated that during the journey he took one passenger who put the contrabanned GANJA in the truck without his knowledge. That, therefore, according to his statement there was no fault on the part of the petitioner and it was in the truck without the knowledge and consent of the petitioner. That, therefore, the tea should be released as it is a perishable item.

6. As against this, it has been argued by Sri S.K. Singh learned counsel for the Union of India that Section 119 of the Customs Act, 1962 provide for the confiscation of the goods used for concealing of smuggled goods. It has been argued that the tea bags were used for concealment of the GANJA and, therefore, they are also liable to be

confiscated it is further contended that notice regarding confiscation under Section 124 of the Customs Act has been issued to the petitioner of which no reply have been submitted. It is further contended that Section 451 Cr.P.C. does not apply, and the court has no jurisdiction to release the goods seized by the Customs authorities.

7. I have considered the arguments. It is admitted to the petitioner that notice of confiscation under 124 of the Customs Act has been issued to the petitioner. However, admittedly this notice has been issued on 10.4.2001. The contention of the learned counsel for the petitioners that the reply is under preparation and he will suitably reply the same. It is further argued by Sri Manish Tiwari that the tea is a perishable item. That during the confiscation proceedings under Section 124 it may perish and may become useless. That it will take long time in the procedure for confiscation and in the meantime the tea shall perish. That therefore the goods should be released on furnishing proper security.

8. The argument that Section 451 Cr.P.C. does not apply to the articles seized by the Customs department does not appear to be correct. Regarding this it has been argued by Sri S.K. Singh that Section 5 Cr.P.C. protects special jurisdiction of the court under the special law. That, therefore, Section 451 does not apply. It is contended that Section 52 of the N.D.P.S. Act provide a special procedure regarding the disposal of the article seized. From perusal of Section 52 of the N.D.P.S. Act provide a special procedure regarding the disposal of the article seized. From perusal of Section 52, it does not appear that the article seized cannot be disposed of by the Magistrate under Section 451 Cr.P.C. and it does not exclude its application to the articles seized under the Customs Act or N.D.P.S. Act. On the other hand Section 36-C in the N.D.P.S. Act provide for the application of the provisions of the code of Criminal procedure save as provided in the Act.

9. Therefore, Section 451 Cr.P.C. applied and it is not correct that court has no jurisdiction to release the property.

10. Now coming to the question whether tea bags should be released in favour of the petitioner. It appear that Chapter 14 of the Customs Act deals with confiscation of the goods. Section 19 provide:

"Any goods used for concealing smuggled goods shall also be liable to be confiscation."

11. The question of confiscation is to be decided under Section 124 of the Act and that order can be challenged in appeal under Chapter 15 of the Act. However, the prima facie court should see whether the goods are liable for confiscation and whether the same can be released.

12. Prima facie it appears that Section 119 Cr.P.C. does not apply to the goods in question. It provide regarding confiscation of the goods used for concealing of the smuggled goods. The smuggled goods have not been defined in the Act. Smuggling has been defined under clause 39 of section 2 of the Customs Act which means any goods liable to be confiscated under Sections 111 and 113 of the Act. Sections 111 and

113 provide for confiscation of the goods improperly imported or attempt to be imported. The improperly imported goods are the goods on which the Customs duty is payable under the Customs Act. However, on GANJA custom duty is payable. GANJA cannot be said to be smuggled goods and section 119 Customs Act prima facie has no application.

13. The other reason is that the Customs Act deals with the goods on which the Custom duty is payable. Though the Customs authorities have also right to seize the article but it is very doubtful that Section 119 shall apply to those articles on which Customs duty is not payable, and whether they can be said to be smuggled goods. Therefore prima facie it appear that the GANJA is not smuggled goods and tea bags used for concealing it cannot be confiscated.

14. It is also necessary to refer to clause (3) of Section 60 of the N.D.P.S. Act which reads as follows:

"Section 60 (3) Any animal or conveyance used in carrying any narcotic drug or psychotropic substance, or any article liable to confiscation under sub-section (1) or sub -section (2) shall be liable to confiscation, unless the owner of the animal or conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of the animal or conveyance and that each of them had taken all reasonable precautions against such use."

15. There is identical provisions under Clause (2) of Section 115 of Customs Act.

16. The evidence collected by the Customs Authorities under Sections 107 and 108 of the Act does not show that the GANJA was being transported with the knowledge or connivance of the petitioner. The statement of the driver who was arrested at the spot recorded under section 107 and 108 of the Act also does not show that the petitioner had knowledge of GANJA in the Truck. If it is so, the above clause will apply and it is doubtful whether the goods can be confiscated under Section 119 of the Customs Act.

17. There is also no doubt that the tea is a perishable items and can perish within the time taken in confiscation proceedings casing loss to the petitioner. The petitioner is ready to furnish security to the extent of the value of the goods which according to the parties is about eight lacs.

18. The petition is, therefore, fit to be allowed. It is, accordingly allowed and the tea in question shall be released in favour of the petitioner on his furnishing sufficient security to the extent of Rs. eight lacs with an undertaking that in case order for confiscation under Section 124 is passed, the petitioner shall pay price of the goods and it may be realised from him as well as from surety. It is further made clear that the confiscation proceedings may continue and shall be decided on merits without being influenced by any observation made in the body of the judgement.

19. The petition is, accordingly, disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.5.2001

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE S. RAFAT ALAM, J.

First Appeal From Order No. 102 of 1999

United India Insurance Company Ltd. through its Manager Divisional, Kanpur Nagar ...Appellant
Versus
Smt. Vidya Yadav &others...Respondents

Counsel for the Appellant:
Shri Vineet Saran

Counsel for the Respondents:

Motor Vehicle Act, 1988, Section 149- Accident claim Tribunal awarded Rs. 12,90,000/- to the dependants of deceased- can not be challenged by the Insurance Company- unless it is proved and established by the company that the insured was guilty of infringement or violation of promise- held- the M.V. Act a social welfare legislation- enacted in protecting the interest of the dependants of the deceased- can not be defeated on technical ground that instead of insurer, the award has been made in favour of the claimant.

Held- Para 6 and 8

The Motor Vehicles Act is a social welfare legislation and has been enacted with a view to protect the interest of the dependants of the deceased who died in motor accident on account of which the dependants suffered irreparable loss and thus, the award made in favour of the dependants cannot be defeated on technical grounds and the appellate court may not interfere with the award on these minor technicalities which will defeat the very purpose and object intended to be achieved.

Section 149 of the Motor Vehicles Act, 1988, lays down the grounds on which the Insurance Company can defend itself in respect of the liability of compensation and unless the Insurance Company successfully proves and establishes that the insured was guilty of infringement or violation of the promise, it cannot repudiate its statutory liability under section 149.

Case law discussed:
1984 ACC-139
JT 2000 (4) SC-207
1987 (2) SCC-654
1996 (5) SCC-21

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This appeal arises out of the award of the Motor Accident Claims Tribunal, dated 31.10.1998 given in Motor Accident Claim Case No. 191 of 1997.

2. The short facts giving rise to the present appeal is that the deceased Santosh Kumar Yadav while going on a Tempo in the morning at 7.30 A.M. on 3.1.1997, met with an accident near St. Joseph's School, P.S. Chakeri, on account of which he sustained several injuries and ultimately died in the hospital the same evening. An F.I.R. was also lodged on the same day at about 8.30 A.M. alleging that the aforesaid tempo when reached near St. Josephs School, a tanker bearing registration no. UP 78-B/3274 coming from opposite direction, dashed into it, on account of which the deceased was badly injured. It was also alleged that the accident took place due to rash and negligent driving of the driver of the tanker. The widow, children and mother of the deceased who were dependent on him, filed claim case no. 191 of 1997 before the Motor Accident Claims

Tribunal Kanpur Nagar claiming compensation of Rs. 12,90,000/-. The appellant who was opposite party no. 1 and the owner of the vehicle, opposite party no. 2, appeared in the proceeding and filed their written statements denying the factum of accident.

3. The learned Tribunal having appreciated the evidence on record, found that the accident took place due to negligent and rash driving of the tanker's driver on account of which the deceased received fatal injuries which ultimately resulted in his death. The learned Tribunal also found that the age of the deceased was 25 years. On the question of income of the deceased it was claimed before the Tribunal that the deceased was running tempo out of which he was earning Rs. 3500/- per month. The Tribunal taking into account the necessary expenses in maintenance of the tempo and the expenses of the deceased on himself, reached to the conclusion that he must be spending Rs. 1500/- every month on his family members. The learned Tribunal accordingly assessed Rs. 18000/- per annum as income of the deceased for the purpose of calculating the compensation. Accordingly, looking to the age of the deceased and his income, the learned Tribunal applied the multiplier of eighteen and awarded a sum of Rs. 3,24,000/- to the claimant. Rs. 5000/- was awarded towards the funeral expenses and Rs. 21000/- as damages.

4. The factum of accident and findings of the learned Tribunal regarding age of the deceased and his income have not been disputed before us. Besides that it is concluded by finding of fact, which in our opinion, is based on correct appreciation of evidence.

5. The solitary point which has been urged by the learned counsel for the appellant in his lucid argument before us is that where no award is made against the owner (insured), the insurer cannot be made liable and thus, the learned Tribunal fell in error by giving award against the insurer/appellant. He placed reliance on a Division Bench judgment of this Court in the case of ***New India Assurance Company Ltd. Vs. Surjit Kaur & another***, reported in 1984 ACC 139.

6. We do not find any force in the submission. Admittedly, the tanker in question was insured for the period 2.8.1996 to 1.8.1997 and, therefore, appellant is liable to third parties on account of statutory compulsions due to the initial agreement entered between the insured (owner of the vehicle) and the appellant. Section 149 of the Motor Vehicles Act, 1988 provides that it is the duty of the insurer to satisfy the judgments and awards against the person insured in respect of third party risks. Award made in the name of insurer will not make any difference as the ultimate liability is of the insurer to pay the assured amount to the third party. The appellant Insurer has not denied the fact that the vehicle was covered under the policy of insurance and thus cannot question the validity of the award on the ground that it ought to have been passed in favour of the insured, and only then it would be binding on him. If the submission is accepted it would result in frustration of the objective sought to be achieved by the Act. The Motor Vehicles Act is a social welfare legislation and has been enacted with a view to protect the interest of the dependants of the deceased who died in motor accident on account of which the dependants suffered irreparable

loss and thus, the award made in favour of the dependants cannot be defeated on technical grounds and the appellate court may not interfere with the award on these minor technicalities which will defeat the very purpose and object intended to be achieved. Hon'ble Supreme Court in the case of ***Chinnama George & others vs. N.K. Raju & another reported in JT 2000 (4) SC 207*** has held as under:-

"We have to give effect to the real purpose to the provision of law relating to the award of compensation in respect of the accident arising out of the use of the motor vehicles and cannot permit the insurer to give him right to defend or appeal on grounds not permitted by law by a backdoor method. Any other interpretation will produce unjust results and open gates for the insurer to challenge any award. We have to adopt purposive approach which would not defeat the broad purpose of the Act. Court has to give effect to true object of the Act by adopting purposive approach."

7. In view of the exposition of law and also in view of Section 149 of the Act the insurer shall be deemed to be the judgment debtor in respect of the claim made by the heirs and legal representatives of the deceased.

Reliance placed on a judgment of this Court in the case of ***New India Assurance Company Ltd. Vs. Surjit Kaur & another*** (Supra), in our view, is of no help to the appellant for two reasons. Firstly, in that case the Tribunal had allowed the claim petition only against the insurance company and dismissed against the owner of the vehicle and, therefore, the Division Bench held that since no award was made against the owner, the insurer cannot be made liable. Whereas in the present case the Tribunal has not dismissed the claim petition against the owner rather it has been allowed against both the parties. However, since the vehicle was covered under the policy of insurance, thus it directed the insurer to pay the amount of compensation. Secondly, in that case the deceased was travelling on a truck transporting goods which was not for carrying passengers on hire or gratuitously. Therefore, in view of Section 95 (2) (a) of the Motor Vehicles Act, 1939, it was held that the insurer is not liable for the death of a passenger travelling in a goods vehicle either on hire or gratuitously. Therefore, the authority cited is not applicable to the facts and circumstances of the present case.

8. Section 149 of the Motor Vehicles Act, 1988, lays down the grounds on which the Insurance Company can defend itself in respect of the liability of compensation and unless the Insurance Company successfully proves and establishes that the insured was guilty of infringement or violation of the promise, it cannot repudiate its statutory liability under Section 149. Reference may be made to a judgment of the Hon'ble Apex Court in the case of ***Skandia Insurance Company Ltd. Vs. Kokilaben Chandrawad***, reported in 1987 (2) SCC 654 and in the case of ***Sohanlal Passi Vs. P. Sesh Reddi, & others***, 1996 (5) SCC 21. It is not the case of the appellant that there is any breach of any condition of the contract of insurance and thus the Insurance Company cannot absolve from its liability. This being the legal position, in our view, the award under appeal cannot be set aside merely on the ground that it ought to have been passed in favour of the insured and thereby depriving the

claimant from compensation under the provisions of the Motor Vehicles Act which is a beneficial legislation.

9. No other point has been urged by the learned counsel for the appellant.

10. Having appreciated the submissions and having gone through the award, we do not find any merit in the appeal and it is, accordingly, dismissed, but without cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 24.5.2001

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE S.K. JAIN, J.

First Appeal From Order No. 610 of 2001

Uttar Pradesh Financial Corporation
...Appellant
Versus
M/s Garlon Polyfeb Industries and others
...Claiment

Counsel for the Appellant:
Sri P.S. Baghel

Counsel for the Claimens:
Sri Rajesh Srivastava

State Financial Corporation Act, Section - 31- Realisation of loan- Finance Corporation is not bound to adopt only one mode at any stage it can be abandoned or withdrawn- the provision of section 29 opted held- proper order passed by Civil Judge permitting the Corporation to take recourse of section 29 of the Act can not sustain in view of section 17 of the Recovery of Debts due to the Financial Institution Act 1993- only the is the proper authority and not any other authority or the Court.

Held- Para 10 and 11

Corporation is not bound to adopt only one of the remedies provided under the Act and it can recover the amount by taking recourse to section 31 of the Act but withdraw or abandon it at any stage and take recourse to the provisions of section 29 of the Act. It is, therefore not permissible for a court to issue an injunction directing UPFC to first proceed under section 29 of the Act. Such an order is wholly against the provisions of the State Financial Corporation Act and also the Contract Act. The impugned order dated 6.1.2001 therefore cannot be sustained and has to be set aside.

The Tribunal alone has the authority and jurisdiction to entertain and decide the applications from the Financial institutions for recovery of debts due to them and such a power cannot be exercised by any other court or authority in view of section 18 of the aforesaid Act.
Case law discussed.
AIR 1992 SC 1740

(Delivered by Hon'ble G.P. Mathur, J.)

1. This appeal under Order 43 Rule 1 (r) C.P.C. has been preferred by the defendant against the order dated 6.1.2001 of Civil Judge (Senior Division), Kanpur Nagar, by which injunction application filed by the plaintiffs was allowed and the defendant- appellant has been directed to take recourse to proceedings under Section 29 of the State Financial Corporation Act (hereinafter referred to as the Act) and to recover the amount by enforcing the personal liability only if entire amount due is not recovered in the aforesaid manner.

2. The case set up by the plaintiffs-respondents is as follows. The plaintiffs no. 1 and 2 are companies registered under the provisions of Indian Companies

Act and plaintiffs applied for loan and the Uttar Pradesh Financial Corporation (for short UPFC) granted a term loan of Rs. 45.50 lacs a working capital term loan of Rs. 55 lacs and ERS loan of Rs. 81 lacs to the plaintiff no. 1 The plaintiff no. 2 was sanctioned a working capital term loan of Rs. 13 lacs. There was some dispute with the authorities of Central Excise Department, due to which working of the unit was stopped. The plaintiffs made request to the defendant for rescheduling the payment of the balance amount. The assets and properties of plaintiffs no. 1 and 2 are mortgaged with the defendant. The defendant intimated on 9.2.2000 to the plaintiffs that it had decided to issue recovery certificates against the directors of the plaintiff-companies. The defendant had not taken any step under section 29 of the Act to take over the assets of the companies and it was threatening to issue personal recovery against the plaintiffs no. 3, 4 and 5 who are the directors of the companies. The relief claimed in the suit is that a decree for permanent injunction be passed restraining the defendant from realizing any amount from the plaintiffs or their guarantors without resorting to action under section 29 of the Act i.e. disposing of assets and primary security which have been mortgaged.

3. The plaintiffs also moved an application under Order 39 Rules 1 and 2 read with section 151 C.P.C. praying that an ad interim injunction be passed in favour of the plaintiffs restraining the defendants and its official from realizing any amount from the plaintiffs or their guarantors without resorting to action under section 29 of the Act i.e. disposing of assets/primary security already mortgaged till the final disposal of the suit. The application was accompanied with an affidavit of plaintiff no. 5 wherein the same facts have been stated as in the plaint.

4. The defendant- appellant filed an objection against the injunction application filed by the plaintiffs. The case set up in the objection is that an amount of Rs. 2,24,44,177/- was due against plaintiff no. 1 and an amount of Rs. 13,67,704/- was due against plaintiff no. 2. The plaintiffs no. 1 and 2 had neither paid the principal amount nor the interest on the due dates as per the agreement. The defendant rescheduled the instalments of the loan but even after availing of the said facility, the plaintiffs did not pay the instalments as per agreed reschedulement. It was also pleaded that the directors of the plaintiff companies had stood as guarantors or sureties and they are also liable to repay the loan in their personal and individual capacity. The UPFC was entitled to take legal proceedings both against the principal borrower and also the guarantors to recover the entire amount. The liability of the guarantors was co-extensive with the liability of the borrower and therefore personal recovery certificate could be issued against the guarantors of the loan under the terms of the personal guarantee bonds executed by them. It was also asserted that the plaintiffs have neither prima facie case nor balance of convenience in their favour and the injunction application filed by the plaintiffs was misconceived and also barred under section 3 of the U.P. Public Moneys (Recovery of Dues) Act.

5. The learned Civil Judge (Senior Division) held that the plaintiffs had paid more than Rs. 1 crore towards repayment of the loan by the year 1998. No.

production was being made in the unit of the plaintiffs and in that connection they had made several representations to the defendant for re-schedulement of loan. This showed that the plaintiffs had no malafide intention not to repay the amount. It was further held that the proceedings for recovery of the loan from the personal property of the directors should be initiated only if the outstanding amount cannot be recovered from the hypothecated properties. Since the value of the hypothecated property was much more than the outstanding dues, the defendant should first proceed to recover the amount by initiating proceedings against the said property. On these findings, the injunction application was allowed and injunction in terms already mentioned above was granted.

6. We have heard learned counsel for the parties and have perused the record. It is an admitted fact that the plaintiffs no. 4 and 5 who are the directors of the companies (plaintiffs no. 1 and 2) had stood as guarantors for payment of the loan. A copy of the bond of the guarantee executed by the plaintiffs no. 4 and 5 was produced before us by the learned counsel for the appellant. This contains several conditions. The conditions no. 2, 4, 6 and 7 read as follows :

"2. That I/We waive all rights which I/We may become entitled to as surety/sureties to complete with you in obtaining payment of the money due or to become due to you in respect of your said loan as against the said company/firm.

4. That it shall not be necessary for you to sue the said company before suing me for the amounts due hereunder.

6. That till such time as this guarantee is not released by you I/We and my/our property/properties and all money that belongs to me/us shall be available to your for repayment of all moneys which shall at any time be due from the said company/firm subject to the limit aforesaid.

7. That the liability to repay the amount due to you shall arise on demand being made by you on the above address and the amount due to you may also be recovered as arrears of land revenue."

7. The terms of the guarantee executed by the plaintiffs no. 4 and 5 show that they executed the bond wherein it was agreed that the money due from the company could be recovered from them and it was not necessary for the defendant to first proceed against the company for recovery of the amount. The condition no. 7 shows that the liability of the plaintiffs no. 4 and 5 shall arise on demand being made and the amount due could be recovered as arrears of land revenue. There is no condition in the bond of the guarantee executed by plaintiffs no. 4 and 5 that the defendant UPFC shall first initiate proceedings under section 29 of the Act or shall first proceed to recover the amount from the properties which had been hypothecated in its favour and only thereafter, proceed against the plaintiffs no. 4 and 5. Under the terms of the guarantee, UPFC could straight away proceed to recover the amount from the plaintiffs no. 4 and 5 even before taking any step to recover the same from the companies (plaintiffs no. 1 and 2).

8. Section 128 of the Contract Act provides that the liability of the surety is co extensive with that of the principal

debtor unless it is otherwise provided by the contract. This provision was considered in State Bank of India versus M/s Ind Export Regd. AIR 1992 SC 1740 and it will be useful to reproduce the paragraphs 14, 15, 16, 17 and 18 of this judgment:-

"14. In Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 it is observed thus :

"Coextensive- Surety's liability is coextensive with that of the principal debtor.

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

15. In Chitty on Contracts, 24th Edition, Volume 2 at page 1031 paragraph 4831 it is stated as under :

"Conditions precedent to surety- Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."

16. In Halsbury's Laws of England Fourth Edition, Vol. 20, paragraph 159 at page 87 it has been observed that ' it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for'.

17. In Hukumchand Insurance Co. Ltd. versus Bank of Baroda a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-à-vis the principal debtor Venkatchaliah, J. (as His Lordship then was) observed:

"The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default."

9. Thus there cannot be even a slightest doubt that the UPFC is entitled to recover the amount even before taking any proceedings against the principal debtor i.e. plaintiffs no. 1 and 2.

10. Under the State Financial Corporation Act several modes have been given to recover the loan. In A.P. State Financial Corporation versus M/s Gar Re-rolling Mills 1994 (2) SCC 647 it was held that the Corporation is not bound to adopt only one of the remedies provided under the Act and it can recover the amount by taking recourse to section 31 of the Act but withdraw or abandon it at

any stage and take recourse to the provisions of section 29 of the Act. It was further held that while the Corporation cannot simultaneously pursue two remedies, it is under no disability to take recourse to the rights and remedy available to it under section 29 of the Act, even after an order under section 31 has been obtained but without executing it and withdraw from those proceedings at any stage. This authoritative pronouncement clearly shows that it is open to the UPFC to recover the amount in any manner. If the law permits several modes to recover the amount, the debtor can not dictate which mode should be adopted by the creditor. It is, therefore not permissible for a court to issue an injunction directing UPFC to first proceed under section 29 of the Act. Such an order is wholly against the provisions of the State Financial Corporation Act and also the Contract Act. The impugned order dated 6.1.2001 therefore cannot be sustained and has to be set aside.

11. Sri R.N. Singh learned senior counsel for the plaintiff-respondents has submitted that in view of the section 17 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, the tribunal alone has the authority and jurisdiction to entertain and decide the applications from the financial institutions for recovery of debts due to them and such a power cannot be exercised by any other court or authority in view of section 18 of the aforesaid Act. Learned counsel has further submitted that in view of the fact that UPFC has been notified by means of notification issued on 28.3.1995 under section 4 K of the Indian Companies Act as a financial institution. The debt due to it can only be recovered by moving an application under section 17 of the Act and provisions of U.P. Public Moneys (Recovery of Dues) Act cannot be invoked. An identical plea was repelled by a Division Bench of this Court in Civil Misc. Writ Petition no. 13738 of 2001 (M/s Unique Bubile Tube Industries versus UPFC) decided on 27.4.2001. We do not want to express any concluded opinion on this question as such a plea has not been taken in the plaint. This plea was neither raised nor considered by the learned Civil Judge (Senior Division). We have already referred to the reasons given by the learned Civil Judge for granting ad interim order and in our opinion they are totally contrary to the settled principles of law. We are therefore of the opinion that the impugned order must be set aside.

In the result, the appeal succeeds and is hereby allowed. The impugned judgment and order dated 6.1.2001 of the learned Civil Judge (Senior Division) is set aside and the injunction application no. 5 C moved by the plaintiffs is rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.5.2001

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

Civil Misc. Writ Petition No. 17753 of 2001

Janab and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Mr. Ghan Shyam Joshi

Counsel for the Respondents:
S.C.

Section 333 of U.P. Z.A. & L.R. Act- the powers conferred under section 333 of the Act is very wide- the revision will lie against an order passed by the Collector exercising the powers under section 122-C (6) of the Act. (Held in para 8)

The order passed by the Collector under Section 122-C of the Act shall be subject to the revisional jurisdiction and the writ petition to this court should not be ordinarily entertained unless it come as an exception, as so far the powers of this Court is concerned, even if there is statutory alternative remedy, there is no fetter on the extra ordinary jurisdiction of this Court while exercising jurisdiction under Article 226 of the Constitution of India.

Case law discussed:

1996 R.D.-163
1972 RD-228
1994 RD-92

(Delivered by Hon'ble S.K. Singh, J.)

1. This petition has been filed against the order passed by the Additional Collector/Additional District Magistrate (Finance & Revenue), Jyotiba Phule Nagar dated 21.3.2001 by which the allotment as was made in favour of the petitioners for housing site was cancelled and it was directed that the land will stand restored back in Gaon Sabha.

2. A preliminary objection has been raised on behalf of the Gaon Sabha by Sri Anuj Kumar who appeared on behalf of respondent no. 2 that the writ petition as has been filed by the petitioners should not be entertained as they have an alternative remedy to approach the revisional jurisdiction of the Addl. Commissioner Board of Revenue.

3. Learned counsel for the petitioners having placed reliance on the provisions as contained in Section 122 C sub-clause (7) of UPZA & LR Act (hereinafter referred to as the Act) argued that every order passed by the Assistant Collector under Sub-section (4) shall subject to the provisions of sub-section (6), shall be final and the provisions of Section 333 and Section 333-A shall not apply thereto. The provisions of Section 122-C of the Act is hereby quoted below :

122-C: Allotment of land for housing site for members of Scheduled Caste, agricultural labourers etc.

(1): The Assistant Collector in charge of the sub-division of his own Motion or on the resolution of the Land Management Committee, may earmark any of the following classes of land for the provisions of abadi sites for the members of the scheduled castes and the Scheduled Tribes and agricultural labourers and the village artisans."

(4) If the Assistant Collector in charge of the sub-division is satisfied that the Land Management Committee has failed to discharge its duties or to perform its functions under sub-section (2) or it is otherwise necessary or expedient so to do, he may himself allot such land in accordance with the provisions of sub-section (3).

……

(6) The Collector may of his own motion and shall on the application of any person aggrieved by an allotment of land under this section inquire in the manner prescribed into such allotment, and if he is satisfied that the allotment is irregular, he may cancel the allotment and thereupon the right, title and interest of the allottee and of every other person claiming

through him in the land allotted shall cease.

(7) Every order passed by the Assistant Collector under sub-section (4) shall, subject to the provisions of sub-section (6) shall be final, and the provisions of section 333 and Section 333-A shall not apply in relation thereto.

4. Learned counsel in support of that submission, place reliance on a decision reported in **1996 RD. 163 Smt. Sumratiya Vs. Commissioner** and argued that as no revision lay to the revisional authority in view of provisions of Section 122-C (7) and therefore, writ petition is to be entertained by this Court. I have considered the submissions made across the bar and have carefully examined the provisions contained in Section 122-C sub-clauses (4), (6) and (7) of the Act.

5. A bare perusal of the aforesaid provisions will make it clear that under sub-clause (4) of Section 122-C, the Assistant Collector has been entrusted with the powers which are administrative in nature and it cannot be said that he acts as a Court while exercising that power. It is this exercise, which has been referred under sub-clause (7) of Section 122-C of the Act, to be final, subject to the provisions of sub-clause (6) of Section 122-C is concerned, it relates to the cancellation of the allotment after giving opportunity to the parties to the proceedings and thus the powers being exercised in this regard, being as judicial one, it will certainly come within the forecorner of the powers as are conferred on the revisional authority under section 333 of the Act. The finality attached to the order passed by the Collector under sub-clause (4) of Section 122-C, in my opinion in no way restricts the revisional powers of the Additional commissioner/Board of Revenue under the Act. The power of the revisional court which has been given under the Act having not been specifically taken away, it cannot be said that there is intention of legislature to provide two contradictory procedures for exercising the powers by the revisional authority.

This view clearly finds support from the decision as has been reported in **1972 RD 228 Smt. K. Devi Vs. Board of Revenue** in which the Division Bench of this Court has held, while dealing with the provisions of Section 115-N (3) that the decision of the Assistant Collector shall be final and in that context, the Division Bench has held that such finality does not restrict the revisional jurisdiction conferred upon the higher courts. Besides the aforesaid decision , yet in another case decided by this Court as reported in **1994 RD-92 Smt. Bhoodevi Vs. Board of Revenue**, similar view has been taken that there is no encroachment on the powers of the revisional authority to examine the propriety, legality and otherwise in respect to any order passed by the Courts below.

6. In my view, as the powers conferred under section 333 of the Act is very wide the revision will lie against an order passed by the Collector exercising the powers under section 122-C(6) of the Act.

7. The decision as has been referred by learned counsel for the petitioner, having been examined in detail, appears to have not taken note of the decision of the Division Bench as given in Smt. K.

Devi case (supra) and the powers of the revisional authority under section 333 of the Act has not been discussed in detail and in fact, this decision appears to have been rendered in the facts of that very case as in para 12 of that decision, the Hon'ble Judge has made an observation that even if it be assumed that the revision under section 333 of the Act may lie, it will be a futile exercise and therefore, in my view the decision as has been given by this Court in Smt. Sumaratiya Vs. Commissioner (supra) appears to be distinguishable.

8. In view of the premises aforesaid, I hold that the order passed by the Collector under Section 122-C of the Act shall be subject to the revisional jurisdiction and the writ petition to this Court should not be ordinarily entertained unless it comes as an exception, as so far the powers of this Court is concerned, even if there is statutory alternative remedy, there is no fetter on the extra ordinary jurisdiction of this Court while exercising jurisdiction under Article 226 of the Constitution of India.

9. Having considered the facts and circumstances of the case and in view of the discussions as made above, I do not find it to be a fit case for exercising the jurisdiction under Article 226 of the Constitution as the petitioners have alternative statutory remedy of filing revision against the order which has been impugned here in the instant writ petition.

10. In the result, the writ petition is dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 21.5.2001

BEFORE
THE HON'BLE B.K RATHI, J.

Civil Misc. Writ Petition No.14879 of 2001

Jitendra and another ...Petitioners
Versus
Ist Additional District Judge, Kanpur Nagar and another ...Respondents

Counsel for the Petitioner:
Sri Rajiv Joshi
Sri D.K. Sharma

Counsel for the Respondents:
Sri Ravi Kant
Sri R.K. Khanna
S.C.

U.P. Act No. XIII of 1972 Section 21 (1) (a)- mere- non disclosure of the nature of business in the application for release does not establish that the need set up by the land lord is not bonafide- every body, irrespective of the fact as to how much he is earning, has a right to augment his income- the need of the land lady appears to be genuine and bonafide. (Held in para 11)

In the present case, the nature of business intended to be started has not been disclosed by the land lady upto this stage. Therefore, I find that the need of the land lady will be satisfied by the release of the half of the disputed shop which is of very big size 28 feet x 52 feet.

Case law discussed.
AIR 1995 SC 576
1981 ARC 649
1995 (2) ARC-107
1981 ARC 229
(2000) 1 ARC-3

(Delivered by Hon'ble B.K. Rathi, J.)

1. The accommodation in dispute is commercial building situated at 38/4, Gillis Bazar, Kanpur. The respondent no. 2 who is land lady of the premises filed an application for release of the accommodation under section 21 (1) (a) of U.P. Act No. XIII of 1972 alleging that she bonafide requires the premises to settle her son Vinay Madho Khanna in the business who is without employment and is married and had one son and one daughter aged 10 years and 6 years respectively, that he is looking after the cattle market in village Ramaipur District Kanpur Nagar which is held on Monday and Thursday only, that, therefore, the land lady in order to augment her income want that her son be employed on all the days of the week in some permanent business. The petitioners contested the application for release. The application for release was rejected by the Prescribed Authority by judgment dated 14.5.1988, Annexure-8 to the petition. Against that order, the respondent no. 2 filed Rent Appeal No. 105 of 1998 under section 22 of U.P. Act No. XIII of 1972 by respondent no. 1, Annexure-9 to the petition. The premises has been released in favour of land lady- respondent no. 2. Aggrieved by it, the present petition has been preferred invoking extra-ordinary jurisdiction of this court under Article 226 of the Constitution of India.

2. I have heard Sri Rajiv Joshi, learned counsel for the petitioners and Sri Ravi Kant, Senior Advocate assisted by Sri R.K. Khanna, learned counsel for respondent no. 2.

3. It is admitted case of the parties that the land lady has only one son Vinay Madho Khanna . The land lady had a cattle market named Madhobagh in village Ramaipur and it is being managed by her son. However, this fact has not been denied that this market is being held on two days in a week only on Monday and Thursday. It is alleged that, therefore, it is necessary for the land lady to start some business for the permanent engagement of her son on all the days and to augment her income.

4. It is contended by the learned counsel for the petitioners that the land lady - respondent no. 2 has sufficient income from the cattle market, that she has large income from the rent of other tenanted accommodation and it is not necessary for her to augment the income. It is contended that no accounts book or details have been filed to show that the income is not sufficient for the family of the land lady, that the business intended to be started in the disputed premises has also not been disclosed, that therefore, there is no need of the land lady for the premises in dispute and the appellate court has erred in holding that she has a bonafide need.

5. I have considered the arguments. It is not disputed that the son of the land lady- respondent no. 2 is looking after and managing the cattle market which is held on two days only in a week. Therefore, on other five days of the week he is without work and, therefore, the need for starting a business for him is bonafide. The argument that details of the income has not been given and it has not been disclosed as to why there is necessity to augment the income and, that the income from the cattle market and from rent is not sufficient for the land lady, cannot be accepted. In my opinion, it was not

necessary to give such details. Now a days no body is satisfied with his own income and every body wants to augment his income irrespective of the fact as to what he is earning. Even if, the income from the cattle market and the rent is sufficient for the livelihood of the land lady and his son, they have right to further augment the income to raise their standard of living for which there are no limits now a days. Even if it is found that the income is sufficient for the livelihood of the land lady and her family, her son cannot be directed not be start any other business and to remain sitting at home for five days in a week. In the circumstances, the need of the land lady for the disputed premises for setting of a business appears to be bonafide.

6. In this connection, it has also been argued that the business intended to be set up by the land lady has not been disclosed. In this connection, learned counsel for the respondent has relied on the decision of the Apex Court in Ram Kumar Khetan Versus Bibi Jubaida and others, A.I.R. 1995 SC 576. The Apex Court has held in this case that mere non-disclosure of the nature of business in the application for release does not establish that the need set up by the land lord is not bonafide. In view of the above decision, it cannot be said that the need is not bonafide for the reason that the nature of the business has not been disclosed.

7. Sri Rajiv Joshi, learned counsel for the petitioners has referred to few decision in support of his arguments. The first is M/s Lalita Printers Stores Versus Ivth Addl. District Judge, Kanpur, 1981 ARC 649. In this case, it was pleaded by the land lord that he has to start the business to augment the existing income. It was observed that the accounts books are the best evidence to prove insufficiency of income from the existing business. The land lord should, therefore, have produced accounts book. In this case, it was found that the land lord was not completely unemployed and, therefore, the question of income arose. He was carrying on some other business. As such, this authority is of no help. The next case referred to is Gopal Krishna Gupta versus IV Addl. District Judge, Kanpur Nagar and others 1995 (2) ARC, 107. It was observed in this case that once it is pleaded that the income was insufficient, the insufficiency of the income assumes importance and it becomes the duty on the land lord to produce the accounts books, so that a correct finding could be recorded in this behalf. This authority is also of no help to the petitioners. In the present case, the land lady has not only alleged that she has insufficient income for the livelihood and that she want to augment her income but has also alleged the need for the engagement of her son on all the days of the week. I have already stated that every body, irrespective of the fact as to how much he is earning, has a right to augment his income. Therefore, the need of the land lady appears to be genuine and bonafide and I find no reason to interfere in the findings of the appellate court on this point.

8. Learned counsel for the petitioners has also challenged the findings on the question of comparative hardship. It is contended that the petitioners are tenant of the premises in dispute since last 70 years and are carrying on business in the same. This fact has not been denied except to the extent that at present the shop is being

used only as godown and no business is being carry on in the same, that the petitioners have another shop at the Mestan Road on which they are carrying on business. Learned counsel has referred to Clause (a) of Sub-Clause (2) of Rule 16 and argued that the petitioners are old tenants and there is lessor justification for releasing the shop.

9. However, respondent no. 1 has recorded a finding that the shop in dispute is a godown and, therefore, this clause will not apply, that, therefore, the comparative hardship is also in favour of the land lady.

10. Learned counsel for the petitioners has vehemently argued that even in case the need is held to be bonafide and the comparative hardship is in favour of the land lady, even then there is no justification for releasing the entire shop. It is undisputed that the size of the disputed shop is 28 feet x 52 feet, that it can be divided into two parts and the need of the land lady can be satisfied by the release of the half shop only. Learned counsel argued that though Rule 16 (1) (d) does not apply to the commercial buildings, even then the court has jurisdiction to consider whether the release of the part of the building will serve the purpose of requirement for the business. Learned counsel for the petitioners in support of his argument referred to the decisions in the case of Firm M/s Shankar Das Durga Prasad versus IVth Addl. District Judge, Meerut, 1981 ARC, 229 and Dwarika Prasad Versus IInd Addl. District Judge, 2000 (1) ARC, 3. In the first case, it was observed that absence of commercial premises in Rule 16 (1) (d) does not mean that the court has no jurisdiction to consider the release of the part of the business premises. In the case of Dwarika Prasad Versus IInd Addl. District Judge, it has been held by this Court that where the shop is a big one to maintain equities between the parties, the shop can be released partially.

11. In this case, the land lady has not disclosed the nature of the business intended to be started by her son. For this, the learned counsel for respondent no. 2 took shelter of the decision of the Supreme Court in the case of Ram Kumar Khetan (supra). No doubt, the land lady can take shelter of the decision for proving that she has bonafide need for the premises in dispute without disclosing the nature of the business intended to be started. However, once the question for consideration arise whether the need shall be satisfied by the release of the part of the accommodation, the question as to what business is intended to be started becomes very material. In the present case, the nature of business intended to be started has not been disclosed by the land lady upto this stage. Therefore, I find that the need of the land lady will be satisfied by the release of the half of the disputed shop which is of very big size 28 feet x 52 feet.

12. In view of the above discussion, the petition is allowed in part. The order, Annexure-9 to the petition dated 5.1.2001 is modified to the extent that half of the shop in dispute is released in favour of respondent no. 3 The respondent no. 3 will get a wall constructed in between the shop dividing it in two equal portions in such a manner that half of the front portion of the shop is available in each portion. The expenses of raising the wall shall be borne by the land lady. One

portion of the shop of the choice of the land lady shall stand released in favour of the land lady and one portion shall remain in the tenancy of the petitioners. However, the rent payable by the petitioners shall also become half from the date the possession of half shop is taken by the land lady.

13. It is also directed that the petitioners shall extend full cooperation in the raising of the wall by the land lady and for that purpose will provide vacant place by removing their goods. In case the petitioners does not cooperate in the raising of the wall and creates obstruction, the entire shop shall stand released.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.5.2001

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ Petition No. 13862 of 1993

Municipal Board, Amroha and another
...Petitioners
Versus
U.P. Public Services Tribunal No. 1, Jawahar Bhavan, Lucknow and another
...Respondents

Counsel for the Petitioners:
Sri G.N. Chandra
Sri Vinod Sinha

Counsel for the Respondents:
Sri B.N. Asthana
Sri Sandeep Mookerji, S.C.
Sri Malik Sayeed Uddin

Constitution of India-Article 226-Apart from the violation of the principles of natural justice because of non-payment of subsistence allowance, some prejudice must be shown to have been caused to the employee. Prejudice may be the inability of the employee to attend the enquiry proceedings for want of funds because of non-payment of subsistence allowance- mere non payment of subsistence allowance during the period of suspension will not ipos facto render the order of removal invalid. It must be coupled with real prejudice. (Held in para 17).

In the instant case, respondent no. 2 has not pleaded that he was prevented from attending the enquiry proceedings because of non-payment of subsistence allowance. No material has been placed by him before the Court to show that any prejudice was caused to him on account of non-payment of subsistence allowance. It is not in dispute that he attended the enquiry proceedings throughout and was afforded full opportunity. Under these circumstances, the Tribunal was not justified in allowing the review application and in setting aside the order of removal dated 27.8.1974 and the order of dismissal of appeal dated 11.5.1977. Therefore, the impugned judgement of the Tribunal is liable to be quashed.

Case law discussed:
AIR 1983 SC 803
(1999) 2 UPLBEC 1280
AIR 1973 SC 1183
Jt. 1996 (3) SC 772
AIR 1986 SC 1168
AIR 1983 SC 803
AIR 1994 SC 1558
AIR 1978 SC 597 625
AIR 1985 SC 1416 1456
AIR 1957 SC 227

(Delivered by Hon'ble D. S. Sinha, J.)

1. Heard Sri Vinod Sinha, the learned counsel appearing for the petitioners, Sri B.N. Asthana, the learned Senior Advocate, appearing for respondent no. 2, and Sri Sandeep Mookerji, the learned Standing Counsel

of the State of U.P., appearing for the respondent no. 1.

2. In this petition under Article 226 of the Constitution of India, the petitioners have prayed for issuance of a writ, order or direction in the nature of certiorari quashing the order dated 30.9.1992 passed by respondent no. 1, a copy whereof is annexure-4 to the writ petition.

3. The facts, emerging from the pleadings of the parties and the impugned judgment, are that respondent no. 2 was a confirmed meter reader in Water Works Department of Nagar Palika, Amroha. On 13.5.1974, the Executive Officer submitted a report that the work of respondent no. 2 was not satisfactory. On the said report, the respondent no. 2 was suspended on 14.5.1974 and the Water works Engineer was appointed as the Enquiry Officer. On the same day charge-sheet was served on the respondent no. 2. After completing the enquiry, the Enquiry Officer submitted his report dated 24.6.1974, a copy of which is annexure-3 to the writ petition. On 16.7.1974, a show cause notice was issued to respondent no. 2 along with the copy of the enquiry report. On 30.7.1974, the respondent no. 2 appeared and sought time to file his reply. On 8.8.1974, he submitted his reply. On 27.8.1974, the Administrator passed an order removing respondent no. 2 from the service of the Nagar Palika, a copy of which is annexure-2 to the writ petition. The respondent no. 2 filed an appeal against the aforesaid order which was dismissed by order dated 11.5.1977. Thereafter, respondent no. 2 filed a claim petition before the U.P. Public Services Tribunal which was dismissed by it by order the dated 28.12.1985. The respondent no. 2, thereafter, filed a review application before the Tribunal. The Tribunal by its impugned judgment dated 30.9.1992 has allowed the review application, set aside its judgment dated 28.12.1985 and quashed the order of removal dated 27.8.1974 and the order of dismissal of the appeal dated 11.5.1977. Aggrieved, the Municipal Board has filed the instant petition.

4. The learned counsel for the petitioners submitted that the Tribunal committed an illegality in placing reliance on the judgment of the Hon'ble Supreme Court rendered in State of Maharashtra Vs. Chandra Bhan, reported in AIR 1983 SC at page 803, as the same was not applicable to the facts of the case and that the Tribunal erred in allowing the review application. His submission was that in the backdrop of the facts and circumstances of the case mere non-payment of subsistence allowance by itself was not sufficient to invalidate the enquiry proceeding and the consequential order of punishment. In support of his contention, the learned counsel for the petitioners placed reliance on the judgments rendered in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and others, reported in (1999) 2 UPLBEC page 1280, and Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh, reported in AIR 1973 SC page 1183.

5. On the other hand, the learned counsel appearing for the respondent no. 2 contended that mere non-payment of subsistence allowance was sufficient to invalidate the order of removal. In support of his contention, the learned counsel placed reliance on the judgment rendered in State Bank of Patiala and others Vs.

S.K. Sharma, reported in J.T.1996 (3) SC 722.

6. The learned Standing Counsel appearing for the respondent no. 1 has submitted that non-payment of subsistence allowance amounts to violation of the principles of natural justice and he, accordingly, submitted that the Tribunal has rightly allowed the review application and rightly set aside the order of removal dated 27.8.1974 as well as the order of dismissal of appeal dated 11.5.1977. In support of his contention, he placed reliance on a Supreme Court judgment rendered in Fakirbhai Fulabbhai Solanki Vs. Presiding Officer and another, reported in AIR 1986 SC page 1168.

7. The Tribunal by its impugned order and judgment has allowed the review application filed by respondent no. 2 merely on the ground that no subsistence allowance was paid to him and has founded its order and judgment on the decision of the Hon'ble Supreme Court rendered in State of Maharashtra Vs. Chandra Bhan, reported in AIR 1983 SC page 803. In the said case, the question of vires of the second proviso to rule 151 (1) (ii) (b) of the Bombay Civil Services Rules, 1959, providing for payment of subsistence allowance at the rate of rupee one per month to a government servant who was convicted by competent court and sentenced to imprisonment and whose appeal against conviction and sentence was pending, was raised. The Hon'ble Supreme Court after considering various judgments held that the second proviso was unreasonable and void. Thus, the said judgment of the Hon'ble Supreme Court was not applicable to the facts of the present case and as such the reliance placed on it by the Tribunal is misplaced.

8. Now the question that arises for determination is as to whether non-payment of subsistence allowance to the respondent no. 2, during the period of suspension, *ipso facto* rendered the order of removal invalid.

9. In the case of Fakirbhai Fulabbhai Solanki Vs. Presiding Officer and another, (AIR 1986 SC page 1168) the Hon'ble Supreme Court held that non-payment of subsistence allowance to the workman during the pendency of an application under Section 33 (3) of the Industrial Disputes Act, 1947, amounted to denial of a reasonable opportunity to defend in the proceedings before the Tribunal and such denial led to violation of principles of natural justice vitiating the proceedings before the Tribunal under sub-section (3) of section 33 of the Industrial Disputes Act, 1947. Thus, according to the said judgment, the denial of payment of subsistence allowance to the workman placed under suspension during the pendency of the proceedings under Section 33(3) amounts to violation of principles of natural justice.

10. Here the question is whether mere violation of principles of natural justice is sufficient to invalidate the enquiry proceedings and the consequent order of dismissal/removal.

11. Discussion in paragraphs 20, 21, 22, 23 and 24 of the decision of the Hon'ble Supreme Court in the case of Ravi S. Naik Vs. Union of India and others, reported in AIR 1994 SC page 1558, provides complete answer to the

question. The said paragraphs are reproduced below :-

"20. Principles of natural justice have an important places in modern Administrative Law. They have been defined to mean "fair play in action". (See: Smt. Maneka Gandhi v. Union of India, (1978) 2 SCR 621 at p 676 : (AIR 1978 SC 597 at p 625), Bhagwati, J.). As laid down by this Court "they constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men" (Union of India v. Tulsi Ram, 1985 Supp (2) SCR 131 at p 225): (AIR 1985 SC 1416 at p. 1456)). An order of an authority exercising judicial or quasi judicial functions passed in violation of principles of natural justice is procedurally ultra vires and, therefore, suffers from a jurisdictional error. That is the reason why in spite of the finality imparted to the decision of the Speakers/Chairmen by paragraph 6(1) of the Tenth Schedule such a decision is subject to judicial review on the ground of non-compliance with rules of natural justice. But while applying the principles of natural justice, it must be borne in mind that "they are not immutable but flexible" and they are not cast in a rigid mould and they cannot be put in a legal strait-jacket. Whether the requirements of natural justice have been complied with or not has to be considered in the context of the facts and circumstances of a particular case."

21. The approach of the English Courts has been thus summed up by Prof. Wade :

"The judges, anxious as always to preserve some freedom of manoeuvre, emphasise that 'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject-matter. The so-called rules of natural justice are not engraved on tablets of stone. Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant there is no such thing as a merely technical infringement of natural justice."

[H.W.R. Wade: Administrative Law, 6th Edn., p. 530]"

Similarly Clive Lewis has stated:

" The fact that the applicant has suffered no prejudice as a result of the error complained of may be a reason for refusing him relief. It is necessary to keep in mind the purpose of the public law principle that has technically been violated, and ask whether that underlying purpose has in any event been achieved in the circumstances of the case. If so, the courts may decide that the breach has caused no injustice or prejudice and there is no need to grant relief.

The courts may, for example, refuse relief if there has been a breach of natural justice but where the breach has in fact not prevented the individual from having a fair hearing."

[Clive Lewis: Judicial Remedies in Public Law (1992) p. 290]

In the words of Lord Wilber Force :

" A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it

there is something of substance which has been lost by the failure. The court does not act in vain"
[Malloch v. Aberdeen Corporation (1971) 2 All ER 1278 at p. 1294]
24. The approach of the Courts in India is no different. In A.M. Allison v. B.L. Sen, 1957 SCR 359: (AIR 1957 SC. 227), it has been laid down that while exercising the jurisdiction under Article 226 of the Constitution the High court has the power to refuse the writs if it was satisfied that there has no failure of justice."
[Emphasis supplied]

12. According to the view of the Hon'ble supreme Court in the aforesaid judgment, mere violation of principles of natural justice is not enough and apart from the violation of principles of natural justice, some real prejudice has to be shown.

13. In the judgments rendered in Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh (supra) and Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and others (supra), the employees concerned could not attend the enquiry proceedings because of paucity of funds and financial stringencies on account of non-payment of subsistence allowance. In these circumstances, it was held by the Hon'ble supreme Court that the enquiry proceedings were vitiated.

14. The proposition that is culled out from the aforesaid judgments of the Hon'ble supreme Court is that apart from the violation of the principles of natural justice because of non-payment of subsistence allowance, some prejudice must be shown to have been caused to the employee. Prejudice may be the inability of the employee to attend the enquiry proceedings for want of funds because of non-payment of subsistence allowance.

15. Therefore, it is clear that mere non-payment of subsistence allowance during the period of suspension will not *ipso facto* render the order of removal invalid. It must be coupled with real prejudice.

16. In the judgment rendered in State Bank of Patiala and others vs. S. K. Sharma (supra), on which reliance has been placed by the learned counsel for the respondent no. 2, the question of non-payment of subsistence allowance was not raised and considered. The judgment, therefore, is of no help to the respondent no. 2.

17. In the instant case, respondent no. 2 has not pleaded that he was prevented from attending the enquiry proceedings because of non-payment of subsistence allowance. No material has been placed by him before the Court to show that any prejudice was caused to him on account of non-payment of subsistence allowance. It is not in dispute that he attended the enquiry proceedings throughout and was afforded full opportunity. Under these circumstances, the Tribunal was not justified in allowing the review application and in setting aside the order of removal dated 27.8.1974 and the order of dismissal of appeal dated 11.5.1977. Therefore, the impugned judgment of the Tribunal is liable to be quashed.

18. In view of the discussion made above, the petition succeeds and is allowed. The impugned judgment of the Tribunal dated 30.9.1992 is quashed.

However, in the circumstances of the case, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.5.2001

BEFORE
THE HON'BLE B.K. RATHI, J.

Civil Misc. Writ Petition No.5912 of 1992

Mahabir Prasad ...Petitioner
Versus
Sri Jai Dayal Dalmia and others ...Respondents

Counsel for the Petitioner:
Shri P.N. Saksena

Counsel for the Respondents:
Shri Rajesh Tandon
Shri C.K. Parekh
S.C.

Section 21 (1) (a) of U.P. Act No. XIII of 1972- the order of XIII A.D.J. suffers from illegality as he has not awarded the compensation as required by the proviso-to-sub-section (1) of section 21, (Held in para 17).

The petition is accordingly allowed and the order of release, annexure no.15 to the writ petition passed by the respondent no. 3 is quashed.

Case Law Discussed-
1990(1) ARC 382
1984 ARC 113
1980 ARC 479
ARC-2001 (1) 185

(Delivered by Hon'ble B.K.Rathi, J.)

1. The premises in dispute is western portion of premises no.73/15, Collectorganj, Kanpur Nagar, consisting of one godown, one gaddi attached with a kothari and a varandah and open space on the ground floor. The respondent no.1 is the landlord of the said premises and he moved an application for release of the same under section 21(1)(a) of U.P.Act No.XIII of 1972 alleging that his son, Shiv Hari Dalmia is without any employment and he want to establish the business of lubricant oil in the disputed accommodation. It was also pleaded that the locality is ideal for the said business. The application for release was opposed by the petitioner.

2. The learned Prescribed Authority, respondent no.2 rejected the application for release on 23.02.1981 by judgment, annexure no.6 to the writ petition. Aggrieved by it, the respondent no.1 filed appeal under section 22 of the Act being appeal no.22 of 1981. The said appeal has been allowed by the respondent no.3 on 27.01.1992, annexure no.15 to the writ petition and the premises in dispute has been released in favour of the respondent no.1. Aggrieved by the order of the respondent no.3, the petitioner has filed the present writ petition invoking the extra-ordinary jurisdiction of this court under Article 226 of the Constitution of India.

3. I have heard Sri P.N. Saksena, learned counsel for the petitioner, Sri Rajesh Tandon, Senior Advocate, assisted by Sri C.K Parekh, learned counsel for the respondent no.1.

4. The first question that arise for decision in this appeal is whether the finding of the appellate court that the need of the respondent no.1 of the premises in dispute is genuine and bonafide is correct and can be maintained. It has been argued by Sri P.N. Saksena, learned counsel for the petitioner that in application for

release, annexure no.1 to the writ petition, the only need alleged is to establish Shiv Hari Dalmia, the son of the respondent no.1 in lubricant oil business in premises in dispute. That it was further pleaded that for that business the respondent no.1 need one room and show room for the office and big godown for storing materials. However, the petitioner pleaded that Shiv Hari Dalmia is already engaged in the business of firm M/s Moti Lal Bhagirath Mal and therefore, there is no requirement for him. The petitioner also pleaded that the respondent no.1 got one godown released in his favour in 1969 and it was let out to M/s Banarasi Das Dwarika Das. It was also pleaded that there is gaddi in possession of the landlord for carrying on business. That Brij Mohan Dalmia and Sheo Mohan Dalmia are co-owners of the premises and the application for release is not maintainable.

5. Regarding the godown released in the year 1969 it is pleaded by the landlord that it was not let out. However, it is not fit for the business of the lubricant oil. As regards the firm M/s Moti Lal Bhagirath Mal it was pleaded in para 5 of the affidavit of Shiv Hari Dalmia, annexure no.2 to the writ petition, that it is a partnership firm and the respondent no.1, his son and two nephews are partners in the same. Regarding gaddi it was pleaded that it is being used by M/s Moti Lal Bhagirath Mal.

6. Again in another affidavit, annexure no.3 to the writ petition, the son of the landlord pleaded that in the firm M/s Motil Lal Bhagirath Mal had five partners namely, Jai Dayal Dalmia, landlord, his son, the deponent and brother Umesh Krishna Dalmia, Sheo Mohan Dalmia and Brij Mohan Dalmia. That he wants to start the separate business for himself. A new plea was also raised in the affidavit that godown which was released in favour of the landlord and the gaddi of M/s Moti Lal Bhagirath Mal can not be used by the son of the landlord for the reason that gaddi belongs to Ms/ Moti Lal Bhagirath Mal and the said godown is in the back side and is used as store-cum-godown and it is not fit either for gaddi or for show room. That in order to reach the said godown the petitioner has to go and pass through the portion of Sheo Mohan and Brij Mohan Dalmia, who are completely separate from the landlord. That from the accommodation in dispute, there can be passage to the godown and also to the stair case leading to the residential portion of the petitioner. It was further alleged that a will was executed by late Bagirath Mal, who left two sons, namely, Jai Dayal Dalmia, respondent no.1 and Gaja Nand Dalmia. The will has been acted upon and the properties have been partitioned and Shiv Mohan Dalmia and Brij Mohan Dalmia are not co-owners of the premises in dispute.

7. It has been argued by the learned counsel for the petitioner that the landlord again changed the case in affidavit, annexure no.4 to the writ petition, in which it was pleaded that the assets and liabilities of the firm, M/s Moti Lal Bhagirath Mal has exclusively come to the landlord. That half portion of the gaddi used by M/s Moti Lal Bhagirath Mal is being used by this firm and even it is not sufficient for the business of that firm. It therefore, can not be used for establishing the business by the son of the landlord, who want to start a separate business. That there was complete partition between the respondent no.1 and

sons of his brother. The petitioner is paying rent to the respondent no.1 and his tenant. Therefore has right to move an application. It was further pleaded in this affidavit that there is no staircase for going to the first floor where the respondent no.1 resides and the respondent no.1 is using the staircase of Sri Shiv Mohan Dalmia. The respondent no.1 will also construct new staircase from the portion in dispute. There is also no rasta for going to the back portion of the house and the respondent no.3 and other tenants are using the portion of Shiv Mohan Dalmia for going to the back portion. The rasta is also to be constructed through the disputed portion.

8. The allegation of the petitioner that three rooms on the ground floor are also lying vacant have also been denied in para 3 of the affidavit, annexure no.5 to the writ petition. On the basis of these allegations and affidavits, it has been argued by the learned counsel for the petitioner that the landlord has changed the case at every stage; that there is sufficient accommodation in possession of the landlord and there is no need for the premises in dispute. The finding of the comparative hardship has also been challenged.

9. It is no doubt correct that initially the landlord only alleged that he has to settle his son in the business in the disputed premises. Later on he disclosed that his son is partner in business of M/s Moti Lal Bhagirath Mal in which there are five partners. Later on it was alleged that the firm, M/s Moti Lal Bhagirath Mal came to the share of the landlord. However it has been argued on behalf of the respondent no.3 that the release application is to be decided on the basis of the affidavit. In **Manohar Lal Sharma Versus IXth Additional District Judge, 1990 (1) A.R.C., 382**. it was observed by this court that in the matter of rent control the pleadings need not be strictly construed. The Rent Control authorities are required to look into the evidence adduced by the parties. This observation was made by this court in different circumstances. It does not mean that the need is not required to be pleaded in the pleadings and the landlord can be permitted to change the need at every stage and to suppress the correct facts. Unless the landlord come to the court with clean hands the application for release can not be allowed.

10. As already discussed above in this case in the application the need to settle the son has been mentioned. Later on in affidavits the need have been changed and it was pleaded that it is required for construction of staircase and rasta for going to the back portion. This changed stand appear to have been taken feeling the weekness in his case by the landlord.

11. As regards the other business as well the different stands were taken. The release application is totally silent on this point. However, in the affidavit it has been mentioned that in the firm, Ms/ Moti Lal Bhagirath Mal there is five partners. Later on, it was pleaded that the petitioner and his son and nephew was partners. Later on it was pleaded that assets and liabilities of M/s Moti Lal Bhagirath Mal exclusively came to the petitioner. All these different facts were pleaded by the son of the landlord in his affidavits and not by the landlord.

12. As regards the accommodations available there is also different pleadings. Admittedly, a godown came in possession of the landlord in the year 1969. Nothing was mentioned regarding this godown in the application as to why it is not suitable. The petitioner has filed two photographs before the appellate court and have filed their copies in this court, which are annexure nos.13 and 14 to the writ petition, which show that a shop and godown in the back side of the premises is available to the petitioner. It is contended that there is no market in the backside. However, the petitioner alleged that there is 100ft. road in front of the said godown and the shop. This fact has not been denied. This godown and shop therefore can not be said to be unsuitable for lubricant oil business. Therefore, this is also alternative accommodation is available to the landlord to settle his son in the business of lubricant oil.

13. The learned counsel for the petitioner has referred to the decision of **N.S. Dutta and others Versus VIIth Additional District Judge, Allahabad reported in1984 A.R.C., 113**. In this case Brij Kishore Tandon filed an application for release against N.S.Datta alleging that he has to settle his son in his independent business, who is unemployed and unsettled in life for which the premises was required. It was found that the son has share in the Kashi Ornament business. It was held that the mere fact that son has share in the business does not affect the maintainability of the application for release. The son has right to establish himself in the independent business. This authority was later on followed in the number of cases wherein it has been held that the fact that the son is also carrying on the business in partnership with the other members of the family is not material as he has right to settle himself in an independent business. Reference has been made to **M/s Deep Chand Nem Chand Jain and others Versus The Prescribed authority, A.D.M.(E), Saharanpur and others, 1980 A.R.C., 479** and Pramod Kumar Verma Versus VIth Additional District Judge, Bijnor and others, A.R.C., 2001 (1), 185. It is no doubt true that every person has right to set up his independent business and the release application can not be rejected for the reason that the person for whom the need is pleaded is already a partner in some other business. However, in the present case there is alternative accommodation available for starting business of lubricant oil for the son of the petitioner. Therefore, the need of the petitioner for the accommodation in dispute is not genuine and bonafide.

14. The respondent no.1 has not properly considered the alternative accommodation. He has also not referred to the photographs, annexure nos. 13 and 14 to the writ petition, and have not considered the same.

15. I therefore, find that there is no bonafide need of the respondent no.1 for the premises in dispute. If it is so the question of balance of hardship does not arise for consideration. In my opinion, the respondent no.3 was not justified in finding that the need of the respondent no.1 is bonafide.

16. The order of the respondent no.3 also suffers from another illegality. He has not awarded the compensation as required by the proviso to sub-section (1) of section 21, which is as follows:

Provided further that if any application under clause (a) is made in respect of (any building let out exclusively for non-residential purposes), the prescribed authority while making the order of eviction shall, after considering all relevant facts of the case, award against the landlord to the tenant (an amount not exceeding two year's rent) as compensation and may, subject to rules, impose such other conditions as it thinks fit;"

17. The petition is accordingly allowed and the order of release, annexure no.15 to the writ petition passed by the respondent no.3 is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MAY 25, 2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.B. MISRA, J.

Civil Misc. Writ Petition No. 5890 of 1996

Dr. Balbhadra Pandey ...Petitioner
Versus
Vice Chancellor, Gorakhpur University and others ...Respondents

Counsel for the Petitioner:
Shri D.S.M. Tripathi
Shri V.C. Dixit

Counsel for the Respondents:
Shri Dilip Gupta
S.C.

Gorakhpur University Statute No. H. 11.12-B-Personal promotion- on the post of professor- the reader being appointed on 16.2.87- can not be considered in interview held on 28.1.96 other reader appointed on the same day have been allowed to participate but the call letter issued to the petitioner cancelled- Representation before Chancellor still pending-court directed to decide the representation with 2 months if found suitable be promoted retrospectively.

(Delivered by Hon'ble M. Katju, J.)

1. This writ petition has been filed against the order dated 24.1.1996 Annexure 12 to the writ petition and for a mandamus directing the respondents not to open the sealed envelop and recommendation of the selection committee held on 28.1.1996 in respect of respondents 5, 6 and 7 until and unless the case of the petitioner is also considered for personal promotion on the post of professor in Education in Gorakhpur University. The petitioner has also prayed for a mandamus directing the respondents 1 and 2 to call for a meeting of the selection committee for considering the petitioner for personal promotion as professor.

We have heard learned counsel for the parties.

2. The petitioner is M.A., Ph.D. and D.Lit. The petitioner was originally appointed as lecturer in Education on 12.7.1969 after approval of the Vice Chancellor of Gorakhpur University in Baba Raghav Das Degree College, Deoria affiliated to Gorakhpur University. The petitioner worked on that post from 12.7.1969 to 29.4.1981. In 1981 a substantive vacancy of lecturer in Education was advertised by Gorakhpur University. The petitioner also applied for that post and was duly selected by the selection committee and the selection was approved by the Executive Council and thereafter the petitioner was appointed on 30.4.1981 as lecturer in Education in

Gorakhpur University in permanent capacity. After probation he was confirmed as permanent lecturer.

3. Subsequently, a large number of posts of Reader were advertised by the Gorakhpur University in the Education Department. In the selection the Selection Committee selected the petitioner as well as Dr. N.K. Lal, Dr. Smt. Sheh Lata Sahi, Dr. Ram Deo Singh, Dr. R.K. Joshi and Dr. R.P. Barnwal. All these persons were issued letter of appointment appointing them as Reader on 16.2.1987. True copies of these letters including letter of appointment of the petitioner is Annexure 1 to 4 to the writ petition. Thereafter the petitioner and others joined on these posts on 16.2.1987. In paragraph 11 of the writ petition it is alleged that the petitioner and respondents 5, 6 and 7 as well as Dr. R.K. Joshi and Dr. R.P. Barnwal were selected and appointed as Reader on 16.2.1987 i.e. all of them on the same date. Dr. R.K. Joshi and Dr. Barnwal have now retired. In the seniority list of Reader the petitioner was at serial no. 2 and Dr. N.K. Lal was at serial no. 1. It is alleged in paragraph 15 of the writ petition that as per statutes of the Gorakhpur University the service rendered by the petitioner in Baba Raghav Das Degree College has to be added to the service in the University vide order dated 17.12.1991 Annexure 6 to the writ petition. In paragraph 16 to the writ petition it is alleged that according to the relevant G.O. and statute of the University the petitioner being Ph.D. and having completed 13 years of service as teacher was entitled to be given selection grade from 1982. However, the University granted it only from 1986 against which the petitioner made a representation. On this representation the then Vice Chancellor ordered for giving selection grade to the petitioner w.e.f. 12.7.1982 on the recommendation made by the Accounts Department of the University. True copy of the order dated 27.4.1987 giving selection grade to the petitioner containing recommendation of the Accounts Department are Annexures 7 and 8 to the writ petition. In paragraph 17 of the writ petition it is alleged that the petitioner has requisite qualification for being promoted as professor. A selection committee was constituted to consider promotion to the post of professor and 28.1.1996 was fixed for interview. The petitioner received the interview letter vide Annexure 9. Alongwith the petitioner the respondents 5, 6 and 7 were also called for that interview. However, it is stated in paragraph 24 of the writ petition that the petitioner was informed orally on 27.1.1996 that he was not called for interview on 28.1.1996 for considering him for personal promotion as professor. The petitioner gave a written representation in this connection vide Annexure 10 to the writ petition. He then gave a representation to the Chancellor and he also gave representation to the respondent no. 1 on 27.1.1996 vide Annexure 11 to the writ petition. On 30.1.1996 the petitioner received a letter from respondent no. 2 stating that his call letter dated 23.1.1996 has been cancelled. True copy of the said letter is Annexure 12 to the writ petition. No reason has been given in the same why the petitioner's call letter had been cancelled. The respondents 5, 6 and 7 were called for interview. In paragraph 33 of the petition it is stated that the respondent no. 1 and 2 are in collusion with the respondents 5, 6 and 7 to make then senior to the petitioner.

4. The statute 11.12-B of the University statute states that a Reader

who has put in ten years full time continuous service shall be considered for personal promotion as professor. It is alleged that the petitioner should have been considered for promotion in the interview held on 28.1.1996 particularly since respondents 5, 6 and 7 were appointed as Readers on 16.2.1987 i.e. on the same date as the petitioner. Hence the petitioner has filed this petition.

5. Counter and supplementary counter affidavits and their replies have been filed and we have perused the same. In paragraph 4 and 5 of the supplementary counter affidavit it is stated that in November 2000 the petitioner was considered for promotion as professor but was not found suitable by the selection committee vide Annexure S.C.A. 2. The recommendation of the selection committee was approved by the Executive Council vide Annexure S.C.A. 3. Against that the petitioner submitted a representation to the Chancellor vide Annexure S.C.A. 4 and 5. The University submitted comments on the petitioner's representation vide Annexure S.C.A. 6. The petitioner's representation before the Chancellor is still pending. In paragraph 13 of the supplementary counter affidavit it is stated that the selection committee for personal promotion met on 23.1.1987. On the date of introduction of statute 11.12 B respondent no. 5 who was a non Ph.D. had put in 16 years of service while respondents 6 and 7 who were Ph.D. had put in 13 years of service but they completed five years service in the University only on 11.2.1985. Thus it is alleged that on 25.2.1985 the respondents 5, 6 and 7 were eligible for being considered for promotion as Reader. However, the selection committee met on 23.1.1987. It is alleged that the promotion of the respondents 5, 6 and 7 as Reader should be taken w.e.f. 25.2.1985 and as such they had put in ten years service when the selection committee met on 28.1.1996 for the post of professor. On the other hand, the petitioner had completed five years service only on 30.4.1986 and as such he became eligible for being considered for promotion only on 29.4.1996. Hence the petitioner was not called for interview before the selection committee for the post of professor.

6. We do not accept this submission of the learned counsel for the respondent. Statute 11.12 B has an Explanation which states that a Reader shall mean a teacher who has worked as Reader in a University. Hence the averment in paragraph 13 of the supplementary counter affidavit that the respondents 5, 6 and 7 should be considered as promoted as Reader from 25.2.1985 is not acceptable. They can be considered for promotion to the post of Professor only 10 years from the date when they were actually promoted as Reader that is from 16.2.1987, and that is the date on which the petitioner too was appointed as Reader. Hence the petitioner should have been called for interview for the post of professor in the interview held on 28.1.1996. Since that was not done there was discrimination against the petitioner.

7. However, the difficulty in the petitioner's case is that he was considered in November 2000 for promotion as Professor but was found unsuitable by the Selection Committee, and the matter is now pending before the Chancellor. Unless the petitioner is found suitable by the University authorities or the

Chancellor this Court cannot grant him promotion as Professor.

8. In the facts and circumstances of the case we dispose off this petition with a direction to the Chancellor to dispose off the petitioner's representation, copies of which are Annexures S.C.A. 4 and S.C.A. 5 preferably within two months of production of a copy of this order before the Chancellor. If the Chancellor holds the petitioner suitable for promotion as Professor he will be promoted retrospectively from the date respondents 5, 6 and 7 were promoted and shall get arrears within three months.

Petition is disposed off with these observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25 MAY, 2001

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

Civil Misc. writ Petition No. 19341 of 2001

Ram Bhajan ...Petitioner
Versus
Chief Revenue Officer/Prescribed Authority, Mirzapur and others ...Respondents

Counsel for the Petitioner:
Sri V. Singh

Counsel for the Respondents:
Sri S.N. Singh
Sri Anuj Kumar
S.C.

U.P. Imposition of Ceiling on Land Holding Act- Section 10 (2)- the allottee cannot acquire any better right than the right as exists with the State and thus the State itself having no right to the land as the same did not remain as surplus the claim of the allottee will fall short as the giver himself is not possessed to part anything to the petitioner. (held in para 19)

Equity also lies in favour of the tenure holder/respondent as by process of law ultimately he succeed in getting the land discharged from the ceiling proceedings and therefore, he is entitled to get his name restored in the revenue papers in preference to the petitioner as the State /Collector from whom the petitioner has derived right has lost its control and domain over the land in dispute and thus the petitioner will not be entitled to get any relief in preference to the claim of the respondent tenure holder.

Case law discussed.
1986 A.L.J. 1232
1989 A.L.J. 644

(Delivered by Hon'ble S.K. Singh, J.)

1. By means of this writ petition the petitioner has sought quashing of the order passed by the respondent no. 2 dated 7.3.2001 and the orders passed by respondent no. 1 dated 22.5.86 and 20.11.87.

2. The facts in brief are that a notice was issued under Section 10 (2) of the U.P. Imposition of Ceiling of Land Holding Act, hereby referred to as the Act by which an area of 20-0-4 was proposed as surplus. The said notice was confirmed by the judgement of the Prescribed Authority dated 15.12.76 and the area 20-0-4 was declared as surplus. Against that judgment the tenure holders filed restoration and thereafter appeal, but both were dismissed. Ultimately by the judgment of this Court dated 23.11.84 the matter was remanded back for reconsideration.

3. It appears that in the meantime on 12.3.1979 the land as was declared surplus was allotted to the petitioner who claims to have come in possession over that land.

4. After remand of the matter when it was taken up by the respondent no. 1/Prescribed Authority after consideration of entire facts, evidence and after giving full opportunity to the tenure holders and the State who were parties in the proceedings before the respondent no. 1, a decision was taken that at the time of issuance of notice under Section 10 (2) of the Act the tenure holder was not possessed with any surplus land and thus respondent no. 1/Prescribed Authority vide its judgment dated 22.5.86 discharge the notice dated 8.11.76 as was issued under Section 10(2) of the Act to the tenure holders and it was held that there is no surplus land.

5. As a consequence of that decision, respondent no. 1/Prescribed Authority by that very order dated 22.5.86 directed that the name of the allottee i.e. petitioner be expunged and the land was directed to be recorded in the revenue records in the name of the tenure holder. By the order dated 22.5.86 it has been further observed by the respondent no. 1/Prescribed Authority that in the event the land is found to be irrigated at any point of time fresh notice can be issued to the tenure holders. The order dated 22.5.86 further directs, issuance of Parwana Amaldaramad for making necessary correction in the revenue records. It appears that the allottees filed appeal against the order dated 22.5.86 passed by the respondent no. 1/Prescribed Authority that was dismissed as not maintainable. It is thereafter, the Prescribed Authority by its order dated 20.11.87 gave necessary direction for issuance of revised Parwana Amaldaramad as a consequence to the order dated 22.5.86. It is against this judgment of the Prescribed authority dated 22.5.86 a revision was filed by the petitioner which was recommended by the Additional Commissioner vide its judgment dated 14.11.1990 to the Board of Revenue for being allowed. The recommendation of the Additional Commissioner for allowing the revision is solely on the ground that the allottee was not heard before passing the order by the Prescribed Authority and therefore, for giving an opportunity of hearing remand is required.

6. When the matter was taken up by the Board of Revenue, the revision was dismissed holding the same to be not maintainable and thus the petitioner has challenged the order of the Board of Revenue dated 7.3.2001 and that of the Prescribed Authority dated 22.5.1986 and 20.11.87.

7. I have heard learned counsel for the petitioner Sri V. Singh who has submitted his argument in support of the writ petition and Sri S.N. Singh who appeared on behalf of the respondent no. 6.

8. It has been argued by the learned counsel for the petitioner that the judgement of the two authorities below are erroneous. It has been argued that no proceeding have been initiated by the tenure holder for getting the allotment in favour of the petitioner cancelled under Section 27(4) of the Act and as a specific procedure has been prescribed for cancellation of the lease, without having

taken recourse thereof the lease in favour of the petitioner cannot be treated to be cancelled. It has been further argued that admittedly no notice and opportunity has been given to the petitioner and therefore, the orders of the courts below which have an adverse effect on the petitioner's right being in violation of Principles of Natural Justice is legally vitiated.

9. In support of the aforesaid contentions learned counsel for the petitioner has placed reliance on the decision as has been reported in 1986 ALJ, page 1232 (Satyapal and others Vs. State of U.P. and others) and 1989, ALJ page 644 (Chauthi and others Vs. State of U.P. and others).

10. In response to the arguments as has been advanced by the learned counsel for the petitioner, it has been submitted by Sri S.N. Singh, learned counsel for the respondent that as no land of the tenure holder remained as surplus in view of the judgment of the Prescribed Authority dated 22.5.1986 allotment in the petitioner's favour will automatically fall and therefore, giving of opportunity to the allottee/petitioner will be just a futile exercise and therefore, Principle of Natural justice will have no application as the petitioner may have nothing to say in the matter.

11. It has been further argued by the learned counsel that as the allotment was made during the pendency of the proceedings which was being perused by the tenure holders and in any view of the matter the land having not remained as surplus the said allotment becomes void abinitio and no proceedings for cancellation was separately required and the Prescribed Authority was fully competent to take decision in respect to the status of the parties, which has been rightly restored by the judgement dated 22.5.86.

12. In view of the submissions as have been advanced across the Bar, the facts became admitted that in view of the decision of the Prescribed Authority dated 22.5.86 no land of the tenure holder remained as surplus and the judgment of the Prescribed Authority dated 22.5.86 has been admittedly not challenged by the State till date as no material in this respect has either been brought by the petitioner before this court and no submission has been advanced in this respect and thus in view of the judgment of the Prescribed Authority dated 22.5.86, there remains no surplus land which could remain subject matter of any allotment.

13. It is well settled that the matter of declaration of the land as surplus is between the State and the tenure holder and nobody comes in between and thus once the State has chosen not to take up the mater to the higher forum, challenging the judgment of the Prescribed Authority by which notice for declaration of the land as surplus itself was withdrawn, no argument can be advanced by the petitioner raising any finger on this aspect that the tenure holder might have surplus land if the matter is examined in further details in the light of the facts as are being pleaded by him.

14. It is also settled that the allottee cannot acquire any better right than the right as exists with the State and thus the State itself having no right to the land as the same did not remain as surplus the claim of the allottee will fall short as the

giver himself is not possessed to part anything to the petitioner.

15. The decision as has been cited by the learned counsel for the petitioner although lays down that the allottee has to be given opportunity of hearing before cancellation of the allotment, but in my opinion those decisions have no application to the facts of the present case. Those decisions can only apply when there is proceedings for cancellation of the allotment and some impropriety and illegality in the allotment proceedings are alleged, which can be subject matter of enquiry and scrutiny in that cancellation proceedings for which certainly the allottee will have to be given opportunity of hearing so that he can demonstrate the completion of all the formalities and validity of the allotment. But so far the present case is concerned neither the tenure holder has taken any ground nor have challenged the validity of the allotment on any ground which may be available for cancellation of the allotment. Here by virtue of the fact that by the judgment of the Prescribed Authority no land remained as surplus and thus as a consequence thereof the Prescribed Authority has directed to restore the correct position of the revenue records and therefore, the decision as has been cited by the learned counsel for the petitioner will not fit-in in the facts of the present case.

16. In fact the land having been given to the allottee by the Collector, the allottee cannot get any better title than the Collector was possessed, as the petitioner has stepped into the shoes of the Collector. In view of the judgment of the Prescribed Authority dated 22.5.86 the restoration of the Correct entry in the revenue record and even restitution of the possession will be an automatic follow-up to which the petitioner can have no say in the matter as he has no locus standi to intervene in the matter of declaration of the land as surplus.

17. In view of the aforesaid discussion it is clear that by the judgment of the Prescribed Authority dated 22.5.86, no land of the tenure holder remained surplus and therefore, the Prescribed Authority appears to be justified in giving further direction that the revenue records in the name of the tenure holders be corrected after deleting the name of the allottee and necessary Parwana be issued accordingly.

18. In view of my reasoning that allottees have no better right than the State/Collector and further the allottees have no right to come in between in the proceedings of declaration of land as surplus, in view of the facts so exists on record as no land of the tenure holder remained surplus, the petitioner appears to have no triable case which in the event of affording opportunity he can canvass before the court below and therefore, grant of opportunity as being claimed by the petitioner will be futile exercise, causing further delay in restoration of revenue records in pursuance of the judgment of the Prescribed Authority dated 22.5.1986.

19. Equity also lies in favour of the tenure holder/respondent as by process of law ultimately he succeed in getting the land discharged from the ceiling proceedings and therefore, he is entitled to get his name restored in the revenue papers in preference to the petitioner as the State/Collector from whom the

petitioner has derived right has lost its control and domain over the land in dispute and thus the petitioner will not be entitled to get any relief in preference to the claim of the respondent tenure holder.

20. For the reasons given aforesaid I do not find any infirmity in the direction given by the Prescribed Authority for entering the names of the tenure holder after deletion of the name of the petitioner in the record and for issuance of the revised Parwana Amaldaramad, after his decision that there is no surplus land and notice issued to the tenure holder is being withdrawn. The revisional Court has rightly dismissed the petitioner's revision.

21. Accordingly the writ is dismissed without their being any order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2001

BEFORE
THE HON'BLE B.K. RATHI, J.

Civil Misc. Writ Petition No.19983 of 2001

Mahendra Nath Verma ...Petitioner
Versus
The District Judge, Varanasi and others ...Respondents

Counsel for the petitioner:
Shri Vijay Kumar Rai
Shri Vinod Kumar Rai
Shri Sankatha Rai

Counsel for the Respondents:
S.C.
Shri Anil Bhushan

Code of Civil Procedure- under order 21 Rule 97- the application for delivery of possession with the help of police force be treated as an application under order 21 rule 97 C.P.C.- the petitioner being outsider, his objections can not be entertained and were rightly rejected. (Held in para 10).

It may also be observed that the objections of the petitioner appear to be totally frivolous. The defendant in the suit Baijnath also filed writ petition in this court, in which the petitioner filed an affidavit alleging himself to be pairokar of Baijnath- defendant in the suit. In that affidavit he did not allege that he is the tenant of the first floor portion. On the other hand he claimed himself to be pairokar. Therefore, it is apparent that the petitioner is claiming through Baijnath, judgement debtor and not an independent right. By the frivolous objections the petitioner did not permit the decree holder to take possession since 1986.

Case law discussed:
AIR 1997 S.C. 856

(Delivered by Hon'ble B.K. Rathi, J.)

1. The Parshuram Joshi deceased, the father of respondent nos. 3 to 6 filed a suit for eviction and for recovery of arrears of rent being S.C.C. suit no.253 of 1972 against Baijnath, father of respondent nos. 7 to 9 in the court of J.S.C.C., Varanasi. It was alleged in the plaint that Baijnath was tenant of the ground floor as well as first floor of the house in dispute. The suit was decreed on 31.03.1979. The plaintiff, Parshuram Joshi filed an application for execution no.17 of 1979 against Baijnath. During the pendency of the execution Parshuram Joshi died and respondent nos.3 to 6 were impleaded in his place. Baijnath also died and respondent nos. 7 to 9 were impleaded in his place.

2. The petitioner claims that he is tenant of the first floor of the said house since long and the suit and the decree between Parshuram Joshi and Baijnath were collusive. Therefore, on 22.03.1986 he filed objections under Order 21 Rule 97 C.P.C., (However in the objections Order 22 Rule 35 C.P.C. has been wrongly written), with a prayer that he be not dispossessed from the first floor of the house. His objections were registered as Misc. case no.29 of 1986. The possession of the ground floor portion has already been taken by respondent nos.3 to 6 from respondent nos. 7 to 9 under a compromise.

3. The objections of the petitioner were rejected by J.S.C.C., Varanasi on 03.03.2001 by order annexure no.2 to the writ petition. Against that order, the petitioner has filed the revision no.72 of 2001 before the District Judge, Varanasi. The same has also been dismissed by order dated 28.03.2001, annexure no.1 to the writ petition.

4. Therefore, the petitioner has invoked the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India with a request that both the orders annexure nos.1 and 2 to the writ petition be quashed.

5. I have heard Sri Sankatha Rai and Sri V.K. Rai, learned counsel for the petitioner, Sri Anil Bhushan, learned counsel for the respondent nos.3 to 6 and the learned Standing Counsel.

6. It is contended that both the courts below have rejected the objections on the ground that they are not maintainable. That the question whether the petitioner is tenant since long and is in possession of the disputed portion as tenant in his own independent right has not been investigated by court below. It has been argued that the finding of both the courts below that the objections are not maintainable are not correct.

7. Learned counsel for the petitioner in support of the argument has referred to **Brahmdeo Chaudhary Versus Rishikesh Prasad Jaiswal and another, A.I.R., 1997 S.C., 856**. In this case, the decree was for delivery of possession. The bailiff went to the spot to execute the decree and to deliver the possession. He was resisted by the petitioner before the Hon'ble Supreme Court and his brothers. Therefore, he returned the writ of delivery of possession with the report that it is not possible to execute it. Thereafter an application was moved by the decree holder for delivery of possession with the help of the police force. Thereafter the petitioner of the case filed an application to stay the operation of the said warrant and to decide his objections. In these circumstances, the Apex Court has held that the objections are maintainable. It was observed by the Apex Court that:

"It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99 C.P.C. Order XXI, Rule 97 C.P.C. deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the

decree-holder. While Order XXI, Rule 99 C.P.C. on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it even if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. Provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only Order XXI, Rule 97 sub-rule (1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under order XXI, Rule 35 C.P.C. with the help of police force, as that course would amount to by-passing and circumventing the procedure laid down under Order XXI, Rule 97 C.P.C. in connection with removal of obstruction of purported strangers to the decree. Once such a obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99 C.P.C. and pray for restoration of possession."

8. Therefore, this authority is of no help in the present case. In the present case the Amin never went to the spot to deliver the possession of the disputed portion nor he was resisted by the petitioner. Therefore, the objection of the petitioner under Order 21 Rule 97 C.P.C. were not maintainable, which reads as follows:

"Resistance or obstruction to possession of immovable property - (1)

Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction."

9. The perusal of this provision show that it envisage an application by the decree-holder and not by the outsider. In the cited case the outsider put resistance and the request was for delivery of possession with the help of police force of the person, who put resistance. Therefore, it was observed by the Apex Court that the application for delivery of possession with the help of police force be treated as an application under Order 21 Rule 97 C.P.C.. However, in the present case the petitioner being outsider his objections can not be entertained and were rightly rejected. The petition is, therefore, without merit.

10. Before parting with this case, it may also be observed that the objections of the petitioner appear to be totally frivolous. The defendant in the suit Baijnath also filed writ petition in this court, in which the petitioner filed an affidavit alleging himself to be pairokar of Baijnath-defendant in the suit. In that affidavit he did not alleged that he is the tenant of the first floor portion. On the other hand he claimed himself to be pairokar. Therefore, it is apparent that the petitioner is claiming through Baijnath, judgment-debtor and not an independent right. By the frivolous objections the petitioner did not permit the decree holder to take possession since 1986.

11. In the circumstances the petition is dismissed with Rs.10,000/- as special cost to respondent nos. 3 to 6.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.5.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 18215 of 2001

Sihasan Rai ...Petitioner
Versus
Ram Narain alias Ramayan Rai and others ...Respondents

Counsel for the Petitioner:
Sri Siddhartha Varma

Counsel for the Respondents:
S.C.

Held

Article 226 of the Constitution of India- A defendant can be transposed as the plaintiff if the interest of the plaintiff as against the contesting defendant is common but where the plaintiff enters into a compromise with the contesting defendants, the cause of action against the contesting defendants ceases as regards the plaintiff who has filed the suit. If the proforma defendant has any cause of action independently, it is always open to him to file suit against such defendants. Who were impleaded in the suit.

The plaintiff having entered into compromise with the contesting defendants, the courts below rightly rejected the application of the petitioner. (para 6 and 7).

Case law discussed:
AIR 1931 Privy Council 162

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

1. This writ petition is directed against the order dated 16.1.1997 passed by the trial court rejecting the application of the petitioner for transposition as plaintiff and the order of the revisional court dated 24.1.2001 dismissing the revision against the said order.

2. Briefly, stated the facts, are that Ram Narain, respondent No.1 filed suit No. 258 of 1981 for permanent injunction restraining the defendants Ist set for mandatory injunction to remove certain constructions and restraining them from interfering in possession of the plaintiff. In the suit he had impleaded Sheo Sagar and Dev Sagar as defendants Ist set and the defendant Nos. 3 to 12 as defendants 2nd set. The petitioner was impleaded as defendant No.6 in the suit. The plaintiff did not claim any relief as against the defendants 2nd set. The plaintiff entered into a compromise with the defendants Ist set and the suit was decreed on 9.9.1982 on the basis of the said compromise.

3. The petitioner filed an application to set aside the judgment and decree on

the ground that he was not served with the notice in the suit. The trial court rejected the application on 3.9.1983. The petitioner preferred an appeal and the appeal has been allowed on 16.11.1984 but it was made clear that it is set aside as against him but the compromise decree as against defendant Nos.1 and 2 was not set aside. The appellate court permitted that the trial shall proceed against the petitioner.

4. The petitioner filed an application for his transposition as plaintiff on the ground that the interest of the plaintiff and the defendant-petitioner was common but the plaintiff colluded with the defendants Ist set and obtained a decree collusively which, in fact, affects his rights. The trial court rejected the application by order dated 16.1.1997. The petitioner preferred a revision, which has been, dismissed by the impugned order dated 24.1.2001.

5. I have heard Sri Siddhartha Varma, learned counsel for the petitioner who submitted that the defendants are entitled to be transposed as plaintiffs even though the plaintiff has not claimed any relief in the suit against him. He has placed reliance upon the decision **Bhupendra Narayan Sinha Bahadur Vs. Rajeswar Prasad Bhakat and others AIR 1931 Privy Council 162** wherein it has been held that the course of adding pro forma defendants as co-plaintiffs should always be adopted where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings.

6. A defendant can be transposed as the plaintiff if the interest of the plaintiff as against the contesting defendant is common but where the plaintiff enters into a compromise with the contesting defendants, the cause of action against the contesting defendants ceases as regards the plaintiff who has filed the suit. If the proforma defendant has any cause of action independently, it is always open to him to file suit against such defendants, who were impleaded in the suit but the matter was compromised between the plaintiffs and such defendants. A suit, which has already been decided between the plaintiff and the defendant, cannot be reopened by permitting the proforma defendant to be impleaded as the plaintiff in the suit.

7. As noted above, the plaintiff having entered into compromise with the contesting defendants, the courts below rightly rejected the application of the petitioner.

8. In view of the above, I do not find any merit in the writ petition and it is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.5.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 20134 of 2001

Rahmat Khan ...Petitioner
Versus
The District Judge, Bareilly and others ...Respondents

Counsel for the Petitioner:
Shri Krishna Gopal Srivastava

Counsel for the Respondents:
Sri S.P. Shukla
Sri R.P. Shukla
S.C.

U.P. Punchaya Raj Act, 1947- Section 12-C(1)-Interlocutory order- Language used in Section 397 (2) Cr.P.C. are quite different than the Punchayat Raj Act-order passed beyond the scope of 12-C-Revision held not maintainable.

Held- Para 8

The language used in sub-section (2) of Section 397, Cr.P.C. is different and the interpretation of the word 'interlocutory order' cannot be made applicable while interpreting the power of the revisional court conferred under sub-section (6) of Section 12-C of the Act for the reasons given above.

Case law discussed:
1985 AWC-94
AIR 1977 SC-2185

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

1. This writ petition is directed against the order dated 5.2.2001 passed by the Prescribed Authority rejecting the objection of the petitioner in regard to the validity of filing the election petition and the order of the revisional court dated 11.5.2001 dismissing the revision against the said order.

2. The election of Pradhan of Gram Panchayat Boomchi, tehsil Meerganj, Bareilly was held in June, 2000. The petitioner was elected as Pradhan of the said Gram Panchayat. Respondent No.3 filed election petition under Section 12-C of the U.P. Panchayat Raj Act, 1947 (in short the Act) challenging the election of the petitioner on various grounds. In the said election petition the petitioner filed an application before the Prescribed Authority for rejecting the election petition with the allegations that the election petition was not properly presented before the appropriate authority and without required amount being deposited before presenting the election petition.

3. The Prescribed Authority rejected the application vide order dated 5.2.2001 holding that the election petition was properly presented before the Prescribed Authority concerned and the respondent No.3 had deposited the required amount before presentation of the election petition. The petitioner preferred a revision against this order and it was dismissed by respondent No. 1 on 11.5.2001 on the ground that it was against the interlocutory order. These orders have been challenged in the present writ petition.

4. I have heard Sri Krishna Gopal Srivastava, learned counsel for the petitioner and S/Sri S.P. Shukla and R.P. Shukla, learned counsel for the contesting respondents.

5. Learned counsel for the petitioner submitted that when an order that adjudicates the rights of the parties, it should not be treated as interlocutory order and revision against such order is maintainable.

6. The maintainability of the revision has to be examined in the context of the provision of sub-section (6) of Section 12-C of the Act. Section 12-C (1) of the Act which provides that the election of a person as Pradhan including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground specified therein (emphasis

supplied). Sub-section (6) of Section 12-C of the Act reads as under:-

" Any party aggrieved by an order of the prescribed authority upon an application under sub-section (1) may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more of the following grounds, namely:-

(a) that the prescribed authority has exercised a jurisdiction not vested in it by law;
(b) that the prescribed authority has failed to exercise a jurisdiction so vested;
(c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity."

7. Sub-section (1) refers to an application and sub-section (6) of Section 12-C of the Act also refers an order of the Prescribed Authority upon an application under sub-section (1) of the Act. A revision is maintainable only when the application is decided filed under sub-section (1) of Section 12-C of the Act challenging the election of Pradhan of Gram Panchayat etc. The revisional court is not empowered to entertain any revision on any other application filed during the pendency of the election petition. It may be that during the election petition, an application may be filed by one of the parties in that election petition and decision on such application by the Prescribed Authority may determine certain questions relating to the election petition but decision on such application will not be covered by sub-section (6) of Section 12-C of the Act. This question was considered in ***Kedar Singh Vs. The District Judge, Agra and others, 1983 AWC 622*** wherein the order of the Sub-Divisional Officer allowing the application for inspection of ballot papers was challenged. The Court held that such an order having been not passed on an application as contemplated under Section 12-C (1) of the Act, the revision was not maintainable. Similar view was expressed in ***Bhagwat Prasad Misra Vs. Sub-Divisional Officer and others, 1985 AWC 94.***

8. Learned counsel for the petitioner has placed reliance upon the decision ***Amar Nath and others Vs. State of Haryana and others, AIR 1977 SC 2185,*** wherein the Hon'ble Supreme Court interpreting the words " interlocutory order" used under Section 397(2), Cr.P.C. held that any orders which affect or adjudicate the rights of the accused or decides certain rights of the parties cannot be said to be interlocutory order so as to take it outside the purview of the revisional jurisdiction of the High Court under Section 397(2), Cr.P.C. The Court was interpreting the meaning of 'interlocutory order' as used under Section 397(2), Cr.P.C. The language used in sub-section (2) of Section 397, Cr.P.C. is different and the interpretation of the word "interlocutory order" cannot be made applicable while interpreting the power of the revisional court conferred under sub-section (6) of Section 12-C of the Act for the reasons given above.

9. Even on merits, I do not find any illegality in the order passed by the Prescribed Authority. He has recorded a finding that the election petition was filed before the appropriate authority and the respondent No.3 had deposited the

required amount before filing the election petition.

In view of the above, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.7.2001

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE S. RAFAT ALAM, J.

Special Appeal No. 804 of 1997

Bal Chand Singh Yadav ...Appellant
Versus
State of U.P. and another ...Opp. Parties

Counsel for the Appellant:
Sri Surendra Pratap Singh

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- a temporary Government Servant has no right to the post and his services can be terminated by giving him one month's notice without assigning any reason under the terms of the contract for providing such termination and under the relevant statutory rules regulating the terms and conditions of temporary government servant. (Held in para 11)

We do not find any merit in this appeal. It is accordingly, dismissed but without costs.

Case law discussed.
1991 (1) SLR pg. 606, 1964 (5) SCR 190, 1961 (1) SCR 606, AIR 1964 SC 449, 1975 (1) SCR 814, 1968 (3) SCR 234, (1994) 4 SCC 189, AIR 1958 SC pg. 36, AIR 1979 SC 684, AIR 1992 SC pg. 496, AIR 1964 SC 449

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This special appeal is preferred against the order of the learned Single Judge dated 11.3.1997 in writ petition No. 1644 of 1994 dismissing the writ petition against the order of termination dated 24.12.1993.

2. It appears that Sri S.N. Singh, the then Deputy Director (Fisheries), Varanasi at the verge of his retirement advertised few posts of Class -IV for appointment through advertisement dated 22nd April, 1993 in a local Hindi Newspaper 'Jan Mukh' a copy whereof has been annexed as Annexure-1 to the writ petition. The advertisement mentions that the candidates desirous for appointment appear before the Deputy Director (Fisheries), Varanasi on 13.5.1993 alongwith the application for interview. After interview the petitioner along with Sri Lal Bihari was selected and was appointed as Fisherman on purely temporary basis through office order dated 15.5.1993 issued by Sri S.N. Singh, the then Deputy Director (Fisheries). The letter of appointment further provides that the appointment is purely temporary and can be terminated on one month's notice. He consequently submitted his joining on 18.5.1993. However, by the impugned order dated 24.12.1993 his services were terminated on the ground that his services are no more required to the Department and therefore, in terms of the letter of appointment one month's salary in lieu of notice is to be paid to the petitioner. Aggrieved the petitioner-appellant approached this Court by filing Writ Petition No. 1644 of 1994 which has been dismissed by the learned Single Judge vide order dated 11.3.1997 against which this special appeal has been filed.

3. Learned counsel for the appellant vehemently contended that the services of the petitioner-appellant has been terminated without assigning any reason and without there being any valid ground for such termination. It is also contended that on similar facts and circumstances Writ Petition No. 1638 of 1994 filed by one Sri Shesh Mani Vind has been allowed by another learned Single Judge vide order dated 12.3.1997 wherein the learned Single Judge was of the view that the order of termination dated 24.12.1993 is illegal and liable to be quashed.

4. On the other hand, learned Standing Counsel submitted that the order of termination has been passed in terms of the letter of appointment, as the service of the petitioner was no more required. In the counter affidavit the respondents have stated that the appointment was temporary in nature and as such it confers no legal right to continue further as the order of termination is passed in accordance with the provisions of the said Rules. It has also been contended by the learned Standing Counsel that Sri S.N. Singh, the then Deputy Director (Fisheries) who was due to retire on 31stMay, 1993 sought permission to make appointment which was refused by the Director in spite of that he proceeded with the appointment and appointed the petitioner on 15.5.1993 only two weeks prior to his retirement. It has also been stated that a disciplinary proceeding was initiated against Sri S.N. Singh, the then Deputy Director (Fisheries) for committing several irregularities and one of the charge in the said proceeding is of making appointment of four persons in May, 1993 on the eve of his retirement.

5. From the perusal of the letter of appointment dated 15.5.1993 it is evident that the petitioner-appellant was appointed on purely temporary basis. The order of appointment postulated his services to be terminable at any time by giving one month's notice. In terms of the order of appointment the respondents by the impugned order terminated his services on the ground that it is no more required to the department. The impugned order is termination simpliciter and is neither punitive nor stigmatic and is passed in terms of the appointment order and under the provisions of the U.P. Temporary Government Servant (Termination of Service) Rules, 1975 (for short the Rules). In that view of the matter, we are of the view that the impugned order does not suffer from any illegality and as such the learned Single Judge has rightly held that there is no infirmity in the order terminating the services of the petitioner.

6. It is well settled legal position that a temporary government servant has no right to hold the post and his services can be terminated by giving one month's notice without assigning any reason either under the terms of contract providing for such termination or under the relevant statutory rules regulating terms and conditions of temporary government servant. However, if such termination or dismissal from service is made by way of punishment in that event the appointing authority is required to hold a formal enquiry by framing charges and only after giving due opportunity to such a government servant, may pass appropriate order.

7. The Hon'ble Supreme Court in the case of ***State of U.P. and another versus***

Kaushal Kishore Shukla reported in 1991 (1) SLR page 606 in para -7 of the judgment held as under :

"A temporary Govt. Servant has no right to hold the post, his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary Govt. Servants. A temporary Govt. servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his service in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary Government servant. If it decides to take punitive action it may hold a formal enquiry by framing charges and giving opportunity to the Government servant in accordance with the provisions of Article 311 of the Constitution. Since a temporary Govt. servant is also entitled to the protection of Article 311 (2) in the same manner as a permanent Govt. servant, very often the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well settled that the form of the order is not conclusive and it is open to the Court to determine the true nature of the order. In Parshotam Lal Dhingra v. Union of India, 1958 SCR 828, a Constitution Bench of this Court held that the mere use of expressions like 'terminate' or 'discharge' is not conclusive and in spite of the use of such expressions, the court may determine the true nature of the order to ascertain whether the action taken against the Govt. Servant is punitive in nature. The Court further held that in determining the true nature of the order the Court should apply two tests namely, (1) whether the temporary Govt. servant had a right to the post or the rank or (2) whether he has been visited with evil consequences, and if either of the tests is satisfied, it must be held that the order of termination of temporary Govt. servant is by way of punishment. It must be borne in mind that a temporary Govt. servant has no right to hold the post and termination of such Govt. servant does not visit him with any evil consequence. The evil consequences as held in Parshotam Lal Dhingra's case (supra) do not include the termination of services of a temporary Govt. servant in accordance with the terms and conditions of service. The view taken by the Constitution Bench in Dhingra's case has been reiterated and affirmed by the Constitution Bench decisions of this Court in the State of Orissa and anar. V. Ram Narayan Das 1961 (1) SCR 606, R.C. Lacy v. The State of Bihar and anr. C.A. No. 590/62 decided on 23.10.1963, Champaklal Chimanlal Shah v. The Union of India, 1964 (5) SCR 190, Jagdish Mitter v. The Union of India, 1964 AIR SC 449, A.G. Benjamin V. Union of India, C.A. No. 1341/66 decided on 13.12.1996, Shamsher Singh & anr.V. State of Punjab, 1975 (1) SCR 814. These decisions have been discussed and followed by a three Judge Bench in State of Punjab & anr. V. Shri Sukh Raj Bahadur, 1968 (3) SCR 234."

8. The Hon'ble Supreme Court again reiterated the similar view in the case of ***State of U.P. and another Versus Prem Lata Misra (Km.) and others*** reported in (1994) 4 Supreme Court Cases 189 and held as under :

" It is settled law that the court can lift the veil of the innocuous order to find whether it is the foundation or motive to pass the offending order. If misconduct is the foundation to pass the order then an enquiry into misconduct should be conducted and an action according to law should follow. But if it is motive, it is not incumbent upon the competent officer to have the enquiry conducted and the service of a temporary employee could be terminated, in terms of the order of appointment or rules giving one month's notice or pay/salary in lieu thereof. Even if an enquiry was initiated it could be dropped midway and action could be taken in terms of the rules or order of appointment. The same principle applies to the facts in this case. It is seen that the respondent was appointed by direct recruitment by selection committee constituted by the Government in this behalf and on finding about the suitability to the post an as Asstt. Project Officer, the respondent was appointed and was posted to the place where she had joined. Thereafter, her work was supervised by the higher officers and two officers have submitted their reports concerning the performance of the duties by the respondent. She was regularly irregular in her duties, insubordinate and left the office during office hours without permission etc. On consideration thereof, the competent authority found that the respondent is not fit to be continued in service as her work and conduct were unsatisfactory. Under these circumstances, the termination is for her unsuitability or unfitness but not by way of punishment as a punitive measure and one in terms of the order of appointment and also the Rules. Accordingly, the High Court has gone against settled law in allowing the writ petition."

9. Therefore, in view of the settled legal position, there is no reason to interfere with the innocuous order of termination and the learned Single Judge has rightly dismissed the writ petition.

10. The submissions that on identical facts Writ Petition No. 1638 of 1994 filed by one Sri Shesh Mani Bind has been allowed by another learned Single Judge vide order dated 12.3.1997 is also of no help to the petitioner for the simple reason that it is per incurium as it did not notice the aforesaid two judgment and several other reported judgments of the Hon'ble Supreme Court on the subject such as, AIR 1958 SC page 36 (P.L. Dhingra vs. Union of India). AIR 1979 SC page 684 (State of U.P. versus Bhoop Singh) and AIR 1992 SC page 496 (Triveni Shanker Saxena versus State of U.P.) wherein the Hon'ble Supreme Court has consistently held that a temporary Government servant has no right to the post and his services can be terminated by giving him one month's notice without assigning any reason under the terms of the contract for providing such termination and under the relevant statutory rules regulating the terms and conditions of temporary government servant. That apart as has been stated by the learned Standing Counsel and has also been averred in para 9 of the counter affidavit in reply to para 13 of the affidavit filed alongwith this appeal that a review application has been filed by the

State in Writ Petition No. 1638 of 1994 which is pending for disposal.

11. In view of the discussions made above. We do not find any merit in this appeal. It is accordingly, dismissed but without costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2001

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No.7341 of 1997

Anand Kumar Tiwari ...Petitioner
Versus
The Superintendent of Police, Jaunpur and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Verma
Sri Siddhartha Varma

Counsel for the Respondents:
S.C.

Constitution of India, Article 226, Resignation- after resignation employee proceeded on leave expiry of 9 days beyond leave period- appointing authority send the order of acceptance through Regd. Post at the residence of the concerned employee- held resignation became effective when the authority tendered the acceptance through Regd. Post Tribunal rightly rejected the claim petition.

Held- Para 21

The act of resignation is complete on its acceptance, non communication does not change the situation More so the letter of acceptance was put into communication to the petitioner at his village through S.P. Bhojpur. Letter of acceptance once having gone out of command of the employer it had become effective.

Case law discussed:
AIR 1966 SC-1313
AIR 1969 SC- 180
1996 L cases 1228
1995 (3) SLJ-65
1989 SLR 100- Distinguished
1989(5) SLR 165
1969 ALJ 38
AIR 1940 Cal 227
1995 Supp (2) SCC 582
1987-(5) SLR 165

(Delivered by Hon'ble Ashok Bhushan, J.)

1. This is a writ petition filed by Anand Kumar Tiwari praying for quashing the order of the State Public Services Tribunal Lucknow dated 17.12.1996. Petitioner has further prayed for a writ of mandamus directing the respondents to treat the petitioner in service as Constable in the U.P Police. Facts of the case as emerge from the pleadings of the parties are:

2. Petitioner was recruited as a Constable in 1974 and was lastly posted at Jaunpur. Petitioner's elder brother died at his village on 11.9.84. The death of elder brother of the petitioner had a serious effect on his mind. Petitioner claimed in the writ petition that he prayed for leave and when the authorities did not grant him leave he submitted his resignation on 27.10.1984. Petitioner thereafter on 2.11.1984 submitted an application for grant of leave for period of one month. The said application has been annexed as annexure-1 to the writ petition. In the leave application petitioner stated that the acceptance of resignation of the petitioner will take sometime and petitioner has to go to his home for sowing his crops hence he should be granted one month leave.

Petitioner has further stated in writ petition that he sent another application on 21.11.1984 praying that no action be taken on his resignation dated 27.10.84. The said application is annexed as annexure-2 to the writ petition, which was claimed to have been sent under certificate of posting. A copy of certificate of posting is annexed as Annexure-3 to the writ petition. Petitioner stated that he continued to remain under treatment of a Doctor till 27.4.1989 and could report at Jaunpur on 28.4.1989 but he was not allowed to join on the ground that he is no more in service. Petitioner thereafter filed a claim petition no.179/V/HM3/89 in the U.P State Public Services Tribunal, Lucknow. In the claim petition the petitioner reiterated that after submitting his resignation on 27.10.1984 he wrote to the Superintendent of Police a letter dated 21.11.1984 withdrawing his resignation. Petitioner in the claim petition took the ground that resignation until accepted by the concerned authority, is nullity and petitioner can withdrew before communication of the orders thereon; hence he is entitled to join his duties and be treated to be in continuous service. A written statement supported by an affidavit was filed by Superintendent of Police, Jaunpur before the U.P Public Services Tribunal. In the written statement it was stated that the petitioner has submitted his resignation voluntarily. Petitioner's resignation was accepted nine days after expiry of his one month's leave vide order no.R-389/84 dated 11.12.1984. It was further stated that the aforesaid order dated 11.12.1984 was communicated in two copies to the Superintendent of Police, Bhojpur, Bihar with the request to get it served on the petitioner. It was further stated that Superintendent of Police, Bhojpur sent a report that person of the name of petitioner does not live in the village but he lives outside, his father also lives outside. The letter was returned with the aforesaid report regarding service on the petitioner. In his written statement Superintendent of Police has categorically stated that the letter dated 21.11.1984 was never received in the office of Superintendent of Police, Jaunpur. It was stated that after sending his resignation on 27.10.1984 the petitioner again sent a letter reiterating his request of resignation. Petitioner filed a rejoinder affidavit to the written statement in which there is no specific reply of paragraph-3 of the written statement in which it was stated that resignation was accepted vide order dated 11.12.1984. Paragraph-10 of the written statement contains the allegation that letter of acceptance of resignation sent on 11.12.1984 was returned back with the report of Superintendent of Police, Bhojpur that petitioner is not residing in the village, has also not been specifically denied. Public Service Tribunal after considering the evidence of both the parties recorded following findings:

(i) Petitioner has not shown any receipt of the office of opposite parties or signatures of any official in token of the letter of withdrawal having been received which is being denied categorically by the opposite party. The certificate of posting dated 21.11.1984 filed by the petitioner, does not conclusively prove that it was only the letter of withdrawal of resignation which has been sent through it.

(ii) Alleged application submitted by wife of the petitioner have been denied by

the opposite parties. The petitioner has not shown any receipt of they having been received in the office of opposite parties. In view of there being no evidence on behalf of the petitioner and denial by opposite parties, the case of the petitioner cannot be accepted.

(iii) The Superintendent of Police did not accept the resignation during the leave period of the petitioner and did so only when he did not turn up for nine days after the expiry of leave. These facts also establish that the Superintendent of Police and other officers had sympathy with the petitioner and were not biased against him. That being the position if the petitioner would have withdrawn his resignation during his leave period he would have certainly been allowed to do so.

3. Counsel for the petitioner Shri S.K. Verma, Senior Advocate assisted by Shri Sidharth Verma submitted in support of the writ petition that petitioner was never communicated the acceptance of his resignation, hence the resignation never became effective and he had every right to withdraw the same and resume his duties. Counsel for the petitioner further submitted that Tribunal did not record finding that acceptance of resignation was ever communicated to the petitioner, rather the pleading of respondent in the written statement proves that letter of acceptance was never received by the petitioner. In the above circumstances petitioner's services never came to an end and he had right to resume his duties and the Tribunal having ignored to give the findings on vital issues the order is vitiated.

Counsel for the petitioner cited the decisions of Apex Court and other High Courts contending that unless the acceptance of resignation is communicated, the resignation does not become effective. Shri S.K Verma relied on following decisions:

(a) AIR 1966 Supreme Court 1313; State of Punjab Versus Amar Singh Harika

(b) AIR 1969 Supreme Court Page 180; Raj Kumar Versus Union of India

(c) 1996 Labour and Industrial Cases 1228; K.Sudha Nagraj Versus the Chief Manager Andhra Bank and another.

(d) 1995 Volume 3 Service Law General 65; Ravindra Singh State of MP & Others.

(e) 1989 SLR 100; S.K.Jain versus Preceding Officer Labour Court.

(f) 1989 5 SLR 165; Satya Veer Singh Versus State of Rajasthan.

4. Petitioner's cited two more decisions i.e (i) 1969 Allahabad Law General 38, Sher Singh Versus Joint Director of Consolidation for the preposition that court acts in exercise of its jurisdiction with the substantial irregularities in omitting to give its finding on vital questions. (ii) AIR 1940 Calcutta 227 for the preposition that where a certificate of posting is put in evidence the presumption is that the letter was posted and that it reached its destination unless something is shown to the contrary.

5. After having heard the counsel for the petitioner and the learned standing

counsel following points arise for consideration:

(i) Whether acceptance of resignation has to be served on the employee before it can be held to be effective?

(ii) Whether on facts pleaded before the Tribunal, it is proved that petitioner withdrew the resignation before its acceptance?

(iii) Whether Tribunal omitted to record necessary findings while deciding the case?

6. Resignation is the voluntary relinquishment of the employment. Resignation is a bilateral concept and offer of resignation is to initiate from the employee which require its acceptance by the competent authority. The act of resignation is complete as soon as the same is accepted by the competent authority.

7. The contention of the petitioner that the acceptance is meaningless unless its communication is received by the petitioner is not correct. Petitioner 's counsel cited decision of the Apex Court AIR 1966 Supreme Court 1313 State of Punjab Versus Amar Singh Harika for the preposition that the order of dismissal could not be said to have taken effect until the respondents came to know about it. In the aforesaid judgement Apex Court held in paragraph-11.

"It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to modify its order. It may be that in some cases, the authority may feel that the ends of justice would be met by demoting the officer concerned rather than dismissing him. An order of dismissal passed by the appropriate authority and kept with itself, cannot be said to take effect unless the officer concerned knows about the said order and it is otherwise communicated to all the parties concerned. If it is held that mere passing of the order of dismissal has the effect of terminating the services of the officer concerned, various complications may arise. If before receiving the order of dismissal, the officer has exercised his power and jurisdiction to take decisions or do acts within his authority and power, would those acts and decisions be rendered invalid after it is known that an order of dismissal had already been passed against him? Would the officer concerned be entitled to his salary for the period between the date when the order was passed and the date when it was communicated to him? These and other complications would inevitably arise if it is held that the order of dismissal takes effect as soon as it is passed, though it may be communicated to the officer concerned several days thereafter. It is true that in the present case, the respondent had been suspended during the material period, but that does not change the position that if the officer concerned is not suspended during the period of enquiry, complications of the kind already indicated would definitely arise. We are, therefore, reluctant to hold that an order of dismissal passed by an appropriate authority and kept on its file without

communicating it to the officer concerned or otherwise publishing it will take effect as from the date on which the order is actually written out by the said authority such an order can only be effective after it is communicated to the officer concerned or is otherwise published."

8. The aforesaid case of the Apex Court was dealing with dismissal of an employee. Present case is not a case of dismissal and the principles governing dismissal from service are not the same with regard to communication of acceptance of resignation. The Apex Court itself had occasion to consider the question regarding communication of a dismissal order and that of acceptance of resignation. The Apex Court held that where a Public Servant has invited by his letter of resignation, determination of his employment, his services normally stand terminated from the date on which the letter of resignation is accepted by the appropriate authority. The Apex Court itself has distinguished the preposition laid down in the case of State of Punjab versus Amar Singh Harika AIR 1966 Supreme Court, 1313. Apex Court in Raj Kumar Vs Union of India; AIR 1969 S.C 180; has laid down following prepositions:

"4. The letters written by the appellant on August 21, 1964, and August 30, 1964, did not indicate that the resignation was not to become effective until acceptance thereof was intimated to the appellant. The appellant informed the authorities of the State of Rajasthan that his resignation may be forwarded for early acceptance. On the plain terms of the letters, the resignation was to be come effective as soon as it was accepted by the appointing authority. No rule has been framed under Art. 309 of the Constitution which enacts that for an order accepting the resignation to be effective, it must be communicated to the person submitting his resignation.

5. Our attention was invited to a judgement of this Court in State of Punjab v. Amar Singh Harika, AIR 1966 SC 1313 in which it was held that an order of dismissal passed by an authority and kept on its file without communicating it to the officer concerned or otherwise publishing it did not take effect as from the date on which the order was actually written out by the said authority: such an order could only effective after it was communicated to the officer concerned or was otherwise published. The principle of that case has no application here. Termination of employment by order passed by the Government does not become effective until the order is intimated to the employee. But where a public servant has invited by his letter of resignation determination of his employment, his services normally stand terminated from the date on which the letter of resignation is accepted by the appropriate authority and in the absence of any law or rule governing the conditions of his service to the contrary, it will not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority. Till the resignation is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has locus paenitentiae but not thereafter. Undue delay in intimating to the public servant concerned the action taken on the letter of resignation may justify an inference that resignation has not been accepted. In the present case the resignation was accepted within a short

time after it was received by the Government of India. Apparently the State of Rajasthan did not immediately implement the order, and relieve the appellant of his duties, but the appellant cannot profit by the delay in intimating acceptance or in relieving him of his duties."

9. In view of the preposition laid down by the Apex Court in Raj Kumar's case, the contention of the petitioner that acceptance of resignation is necessary to be communicated before it becomes effective cannot be accepted. In the present case it is further to be noted that acceptance of resignation was communicated to the petitioner by the Superintendent of Police, Jaunpur through Superintendent of Police, Bhojpur in which a report was sent by Superintendent of Police, Bhojpur that petitioner and his father do not live in Village. The acceptance of resignation was not thus kept in the file of the department but went out of it when the said letter was transmitted for communication to the petitioner. Thus I am not persuaded to accept the contention of the petitioner that resignation did not become effective since petitioner was not served with the copy of acceptance letter. Resignation became effective after its acceptance.

10. The conduct of the parties and course of events which followed submission of letter of resignation also indicate that petitioner treated himself to have severed his status as Constable since there is a complete silence on the part of petitioner from November 1984 till 28.4.1989. It was after more than 4 about 5 years that petitioner claimed to have gone to Jaunpur for resuming duty. Not a single letter is even claimed after November' 84 till April '89 stating that he continues in service since acceptance of resignation has not been received by him. With regard to acceptance of resignation Apex Court has laid down that the conduct of party is relevant. Apex Court in 1995 Supp (2) Supreme Court Cases 582 State of UP and others versus Ved Prakash Sharma held as follows:

"Till 1987, i.e for over four years he remained quiet and thereafter it suddenly occurred to him that he could take advantage of the fact that there was no formal acceptance of his resignation. He, therefore, dashed off a letter dated December 10, 1987 with a view to withdrawing his resignation letter of March 14, 1983. Even thereafter he did nothing and went on making periodical representations, the last of which was rejected on June 13, 1990. Treating that as a cause of action he filed the writ petition in question. We think that in the circumstances it is absolutely clear that he had the animus to terminate his relationship by the letter of March 14, 1983. There was, therefore, no question of his being taken back in service after such a long lapse merely because of want of a formal communication accepting the resignation. The conduct of the parties has also relevance and the conduct of the respondent in particular shows his intention to terminate the contract. Counsel, however, relied on the decision of this Court in Union of India v. Gopal Chandra Misra and referred to paragraph 33 thereof, but we find that the said decision has no application to the facts of this case. That was a case which turned on the interpretation of Article 217 proviso (a) and not a case of the present type where under the terms of the

contract, the respondent had a right to sever relationship by one month's notice.

We are, therefore, of the opinion that the High Court ought not to have interfered in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution after a lapse of several years. The High Court should have realised that the respondent alone was responsible for the situation and must thank himself for the same. The management would have filled in the vacancy and cannot be expected to create a supernumerary post for no fault of its own. We, therefore, cannot allow the order to stand. We allow the appeal and set aside the impugned order and consequently the writ petition filed in the High Court by the respondent will stand dismissed with no order as to costs."

11. The petitioner's complete silence from November' 84 to April' 89 proves that petitioner has accepted the fact that he is no more in service and claim of joining after more than 4 years was an afterthought.

12. Petitioner has much relied on the following observations by the Apex Court in Raj Kumar's case (Supra) "undue delay in intimating to the Public Servant concerned the action taken on the letter of resignation may justify an inference that resignation has not been accepted. In the present case the resignation was accepted within a short time after it was received by the Government of India. Apparently the State of Rajasthan did not immediately implement the order, and relieve the appellant of his duties but the appellant cannot profit by the delay in intimating acceptance or in relieving him of his duties."

13. The above observations do not help the petitioner since in the present case resignation was accepted on 11.12.1984 and was immediately communicated to the petitioner through S.P. Bhojpur.

14. The counsel for the petitioner has relied on single judge judgement of Andhra Pradesh High Court reported in 1996 Labour and Industrial Cases 1228 K. Sudha Nagraj Versus Chief Manager Andhra Bank and Another. Aforesaid case laid down that it is always open to the employee to withdraw his resignation before the expiry of the effective date even in case where no effective date is stipulated, the resignation can be withdrawn before the acceptance of the resignation is communicated. There is no dispute with the preposition that the resignation can be withdrawn before it is accepted. Andhra Pradesh High Court has referred to Raj Kumar's case (Supra) and two other judgement of the Apex Court but in none of the Judgement relied by Andhra Pradesh High Court, it was held that resignation can be withdrawn before receiving communication of the acceptance by the employee. The judgement of Andhra Pradesh High Court does not correctly reiterate the ratio laid down in Raj Kumar's case and other Apex Court Judgement.

15. I am unable to persuade myself to follow the above judgement of Andhra Pradesh High Court. The petitioner's counsel further relied on 1995 (3) SLJ 65 Ravindra Singh Vs State of MP which was a case in which the resignation was withdrawn before its acceptance. In that case resignation was accepted on the same day on which he withdrew the same. Thus in the facts of the above case the

Apex Court ordered the appellant to continue in service.

16. Another judgement and 1989 SLR page 100 S.K. Jain vs. Presiding Officer Labour Court is clearly distinguishable. In the above case there was no acceptance of resignation before the workmen withdrew his resignation vide letter dated 26.6.1984. The court held that it was necessary that resignation be accepted to make it effective. Punjab High Court did not lay down any preposition in the aforesaid case that for resignation being effective its communication and service of the acceptance on the workmen is necessary. In Rajasthan case 1987(5) SLR; 165 Satya Veer Singh Vs. State of Rajasthan, the resignation although accepted had not become effective since the employee was asked to submit no due certificate which was not submitted in the above case. After acceptance of resignation necessary follow up action with a view to relieve the petitioner was not taken and the petitioner was not relieved of his duty. The aforesaid case considered Rule 22 of Rajasthan Service Rules 1951 which provided that resignation becomes effective only when it is accepted and the **Government Servant is Relieved of his duties.** The petitioner in that case was not relieved from his duties hence it was held that resignation had not become effective and he was permitted to withdraw. The aforesaid case was based on interpretation of particular service rules and facts of that case do not help the petitioner in the present case.

17. From the above discussion it is clear that for becoming resignation effective, it is not necessary that the employee should receive the communication of acceptance. The acceptance of resignation brings an end to the relationship of an employee and employer. The resignation being a bilateral act it becomes complete when the offer of resignation is accepted. In the present case there is material on record to prove that even acceptance of resignation was communicated to the petitioner although petitioner did not receive the communication. In the present case acceptance of resignation having been proved and it being also communicated to the petitioner the act of resignation was complete and petitioner is not entitled to claim joining on the ground that he never received communication of acceptance.

18. The next submission of counsel for the petitioner that Tribunal did not record material findings also does not help the petitioner. Tribunal after considering the evidence did not accept the case of the petitioner that he sent withdrawal of his resignation vide letter dated 21.11.1984. Paragraph 8 of the judgement of the Tribunal clearly demonstrate that Tribunal applies its mind and disbelieved the case of the petitioner of having sent withdrawal. Paragraph 8 of the judgement is extracted below:

"I have given due consideration to the arguments advanced by the counsel and have looked into the documentary evidence filed. The petitioner after submitting the resignation had applied for one month's earned leave on the ground that acceptance of resignation will take time and as he has to plough his fields etc. in the village, he may be granted one month's leave and the leave applied for was sanctioned to him the same day, so that he may be able to do his personal work at the village, and be also able to

think over the matter of his resignation again during his leave period. It has been contended by the O-ps. in para 3 of the C/A that the petitioner during his leave period had again sent a resignation from the village. Even after this, the S.P did not accept the resignation during the leave period of the petitioner and did so only when he did not turn up for 9 days after the expiry of leave. In these circumstances it was but natural for the S.P to presume that the petitioner does not in fact want to continue in service. These facts also establish that the S.P and other officers had a sympathy with the petitioner and were not biased against him. That being the position if the petitioner would have withdrawn his resignation during his leave period, he would have certainly been allowed to do so. The O.ps have contended that the petitioner had in fact never with drawn the resignation already submitted by him. There is no doubt that resignation can always be withdrawn before its acceptance. The petitioner has not shown any receipt of the office of the O.P or signatures of any official in token of the letter of withdrawal having been received which is being denied categorically by the o.ps. It is also a little surprising that the petitioner did not sent such an important letter of withdrawal of his resignation even by regd. post and chose to send it only under the certificate of posting for which the postal authorities take no responsibility of delivery to the addresses. Even this certificate of posting dated. 21.11.1984 (Annexure no. II) filed by the petitioner does not conclusively prove that it was only the letter of with drawl of resignation which had been sent through it. It could be his request to accept the resignation already submitted by him as is alleged by the O.ps. in para of the CA/WS."

19. The Tribunal having not accepted the case of the petitioner of submitting withdrawal of resignation, the petitioner's case that he withdrew resignation and continue in service cannot be accepted.

20. The counsel for the petitioner contended that there is no finding that resignation was accepted and communicated to the petitioner. The Tribunal in paragraph-8 of the judgement has clearly found that Superintendent of Police accepted the resignation after 9 days of expiry of the leave. Thus the Tribunal has recorded the finding that resignation was accepted. The case of respondents themselves in the written statement was that acceptance of resignation was not served on the petitioner. Thus it being accepted position before the Tribunal that acceptance was not received by the petitioner hence in not recording of any finding in that respect is non consequential.

21. The act of resignation is complete on its acceptance, non communication does not change the situation. Moreso the letter of acceptance was put into communication to the petitioner at his village through S.P, Bhojpur. Letter of acceptance once having gone out of command of the employer it had become effective. The Division Bench Judgement of our High Court in 1969 ALJ page 38 Sher Singh Versus Joint Director of Consolidation is not applicable, since Tribunal has recorded necessary findings to sustain the judgement of the Tribunal. Last decision

in AIR 1940 Calcutta 227 also need to be considered. The Tribunal in its finding has stated that it is not proved that under certificate of posting which was filed by the petitioner, the letter of withdrawal was sent. The Tribunal did not draw any contrary presumption as laid down in Calcutta's case. The finding of the Tribunal was based on facts of the case and course of event which took place in the present case. The judgement of Calcutta High Court was thus not applicable.

22. In view of what has been said above the judgement of the Tribunal is based on correct appreciation of evidence on record and it did not err in dismissing the claim petition of the petitioner.

I find no merits in the writ petition. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23 MAY, 2001

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

Civil Misc. Writ Petition No. 25172 of 1997

Dharam Pal ...Petitioner
Versus
The District Judge, Hamirpur
...Respondent

Counsel for the Petitioner:
Sri S.N. Srivastava

Counsel for the Respondent:
Sri Sudhir Agarwal
Sri K.R. Sirohi
S.C.

Article 226 of the Constitution- Foundation of termination was misconduct of the petitioner amounting to stigma- no opportunity to defend was afforded to him- Termination order was held to be illegal and arbitrary- quashed. (Held in para 2)

The order, ex-facie, is based on misconduct and being stigmatic and thus punitive in nature can not be sustained in the eyes of law as no enquiry was held nor the petitioner was afforded any opportunity of hearing.

Case law discussed:
(2000), 2 UPLBEC 960
1988 UPLBEC 213
(1975) 1 SCR 814

(Delivered by Hon'ble D.R. Chaudhary, J.)

1. The petitioner who was on approved list of selected candidates was appointed as Class IV employee in judgeship Hamirpur district Hamirpur by means of appointment letter dated 9.7.97 (Annexure-2 to the writ petition). One of the terms of the appointment was that the appointment being temporary would be liable to be terminated at any time without any prior notice. Petitioner's services were terminated by an order dated 17.5.97 which reads as under:-

"He is on probation. He is not sincere, terminated with immediate effect."

Sd/-
(M.S. Premi)
17.5.97
District Judge, Hamirpur.

2. The order aforestated is under challenge in the present writ petition. The contention of the petitioner is that the order, ex-facie, is based on misconduct and being stigmatic and thus punitive in nature can not be sustained in the eyes of law as no enquiry was held nor the

petitioner was afforded any opportunity of hearing.

3. Sri K.R. Sirohi, learned counsel appearing for the Respondents, on the other hand, argued that as per terms of appointment the services of the petitioner could be terminated at any time without any notice, he can not claim any right on post on which he was appointed on purely temporary basis; the Central Nazir submitted his report dated 15.7.97 that the petitioner was not sincere to his duties, hence the impugned order has rightly been passed.

4. A similar controversy came up before the Apex Court in **V.P. Ahuja Vs. State of Punjab and others (2000) 2 UPLBEC 960,** where in the appellant was appointed as Chief Executive in establishment of Punjab Co-operative Cotton Marketing & Spinning Mills Federation Ltd. on probation of two years which could be extended on the discretion of Management who would be having right to terminate his services without notice; his work and conduct was all along under scrutiny and since his work was not satisfactory his services were terminated in terms set out in the appointment letter. The Apex court held as under:-

"A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrary, nor can those services be terminated in a punitive manner without complying with the principles of nature justice."

5. While recording the finding as above, the apex Court rejected the plea raised in support of the termination order.

6. In case of **Har Pal Singh Vs. State of U.P. 1988 UPLBEC 213**, the order of termination was passed after the adverse entries were made against the petitioner who was not confirmed and was still a temporary employee. Although the order was one of termination simpliciter without stigma against the petitioner and was passed without affording opportunity of hearing, the Supreme Court after having considered the facts of that case, came to the conclusion that order of termination was grounded on misconduct and as such after having followed the law in **Samsher Singh Vs. State of Punjab (1975) 1 SCR 814** the apex Court held that '*if an innocuous order is grounded upon feathers which cast stigma against the affected officer, he was entitled to defend himself in the proceeding provided under the rules applicable to him'*. The law is settled by catena of decisions of the apex court on the subject.

7. In the present case the Respondent has filed counter affidavit. In para 8 of the counter-affidavit it is averred that "on 17.5.1997 a report was submitted by the Assistant Nazir about the work and conduct of the petitioner consequently the services of the petitioner were terminated on the same day…". The averments aforestated and a perusal of the report dated 17.5.97 which contained the order of termination also, make it abundantly clear amounting to stigma for which' concededly, no opportunity to defend was afforded to him. The contention of Sri K.R. Sirohi that the petitioner being a temporary employee, is not entitled for opportunity to defend himself, is not acceptable being contrary to law laid down by Hon'ble Supreme Court as referred to above and also in its catena of decisions and by various High Courts in

bed roll of cases which are not being referred to herein for brevity.

8. In view of the above the writ petition succeeds and is allowed, the termination order dated 17.5.97 passed by the respondent is quashed but without any order as to cost in view of the facts and circumstances of this case.

9. The petitioner shall be entitled to the consequential benefits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 18, 2001

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 22713 of 2001

Kshitij Singh ...Petitioner
Versus
Joint Secretary, Central Board of Secondary Education, Allahabad and others ...Respondents

Counsel for the Petitioner:
Shri Ashok Nath Tripathi

Counsel for the Respondents:
Shir H.N. Pandey

Constitution of India- Article 226- the petitioner has right to claim revaluation of his answer books-there was no prejudice caused to the petitioner nor on that basis any ground for revaluation can be made (Held in para 14)

It is clear that the petitioner has not made out any case for grant of relief as prayed in the writ petition. The writ petition is accordingly dismissed.

Case law discussed:
AIR 1986 Alld. 281
AIR 1998 Alld. 218

(Delivered by Hon'ble Ashok Bhushan, J.)

1. The petitioner who appeared in Senior School Certificate Examination, 2001, filed the present writ petition praying for issue of a writ of mandamus commanding the respondents to revaluate the answer sheets of the petitioner of four subjects (Physics, Mathematics, English and Computer). Counter affidavit and supplementary counter affidavit have been filed by the respondents.

2. I have heard Sri Ashok Nath Tripathi counsel for the petitioner and Sri H. N. Pandey appearing for the respondents.

3. Petitioner's case as set out in the writ petition, is that the petitioner has been a very brilliant student through out his career. Petitioner in the writ petition has given the marks achieved by him from Class I to Class X. Annexure-18 to the writ petition is detailed chart showing the name of the Institution and the percentage of marks received by the petitioner. Petitioner's case is that in Secondary Education Examination, 1998, the petitioner was awarded 95% marks. Petitioner has stated in the writ petition that after passing his Secondary Education Examination the petitioner was selected for further studies for two years pre University course on the Scholarship given by Singapore Air Lines. Petitioner took admission at Singapore from where he passed Class XI examination. Petitioner has further stated while in Class XII the petitioner got seriously ill in Singapore and was brought to India. Petitioner appeared in Board's Examination, 2000 and has been declared pass with 84.6% marks. Petitioner in the writ petition has stated that the petitioner

was expecting that he would secure 95% marks or more but he was surprised when he secured only 84.6% marks in the Central Board of Secondary Education Examination. Petitioner's case in the writ petition is that he approached respondent no. l at Allahabad and made representation to him for revaluation of his answer sheets but the respondent no. l refused the request made by the petitioner saying that there is no such provision in C.B.S.E Board Examination Bye laws. Petitioner further stated that if instant evaluation is made petitioner would not get less than 95% marks. On the basis of the aforesaid facts the petitioner has prayed for a writ of mandamus.

4. Respondents in the counter affidavit has stated that Central Board Secondary Education Examination, New Delhi is a society which has framed bylaws for conduct of examination. Bye law 6l has been quoted in the counter affidavit which pertains to verification of marks obtained by a candidate in a subject. Bye law 6l (i) provides that no revaluation of the answer book or supplementary answer book shall be done. Respondent's case is that there is no provision of revaluation of the answer books of a candidate. It has been stated that the Board is conducting the examination throughout the country within the prescribed schedule. Result of the examination has to be declared every year at the prescribed time. Lakhs of candidates are appearing every year in the Board's examination and their results are to be declared after evaluation of the answer sheets. The results of the Board must come to a finality at some point of time and in case revaluation is permitted then the result of the Board will never come to a finality. Every candidate will apply for revaluation of the answer books and it would not be possible for the Board to conduct the next examination. As a policy matter revaluation of the answer books is not prescribed in the examination bye laws of the Board. It has further been submitted that the petitioner has no legal right to claim for revaluation of his answer book and no mandamus can be issued directing for revaluation of the answer books.

5. Central Board of Secondary Education has framed bye laws namely, Examination Bye Laws of the Central Board of Secondary Education. The aforesaid bye laws have been made effective with effect from 31.1.1995. The counsel for respondent has submitted a copy of bye-laws. The bye laws provide detailed procedure pertaining to examination conducted by the Board. Chapter VII pertains to Scheme of Examinations and Pass Criteria; Chapter VIII under the heading ' Confidential Work' deals with qualifications for appointment of Paper Setter/Moderator. Rule 51 of this Chapter provides for evaluation; rule 52 provides for marking scheme; rule 55 provides for Examiners, their qualifications; and rule 61 which deals with verification of marks obtained by a candidate in a subject, is relevant for the controversy and is quoted below:-

"61. **Verification of marks obtained by a Candidate in a subject** :-

(i) A candidate who has appeared at an examination conducted by the Board may apply to the concerned Regional Officer of the Board for verification of marks in any particular subject. The verification will be restricted to checking whether all the answers have

been evaluated and that there has been no mistake in the totalling of marks for each question in that subject and that the marks have been transferred correctly on the title page of the answer book and to the award list and whether the supplementary answer book(s) attached with the answer book mentioned by the candidate are in tact. **No revaluation of the answer book or supplementary answer book(s) shall be done**.

(ii) Such an application must be made by the candidate within one month from the date of the declaration of results.

(iii) All such applications must be accompanied by payment of fee as prescribed by the Board from time to time.

(iv) No candidate shall claim, or be entitled to, revaluation of his/her answers or disclosure or inspection of the answer book(s) or other documents.

(v) A candidate shall not be entitled to refund of fee unless as a result of the verification his/her marks are changed.

(vi) In no case the verification of marks shall be done in the presence of the candidate or any one else or his/her behalf, nor will the answer books be shown to him/her or his/her representative.

(vii) Verification of marks obtained by a candidate will be done by the officials appointed by or with the approval of the Chairman.

(viii) The marks, on verification will be revised upward or downward, as per the actual marks obtained by the candidate in his/her answer book.

(ix) The communication regarding the revision of the marks, if any, shall be sent to the candidate within a reasonable period of time.

(x) The Board will not be responsible for any loss or damage or any inconvenience caused to the candidate, consequent on the revision of marks or delay in communications for reasons beyond control.

(xi) The Board shall revise the marks statement in respect of such candidates after the previous marks statement is returned by the candidate.

(xii) The decision of the Chairman on the result of the verification of marks shall be final."

6. Rule 61 provides that a candidate who has appeared in an examination of the Board may apply to the concerned Regional Officer of the Board for verification of marks in any particular subject. The verification will be restricted to checking whether all the answer books have been evaluated and there is no mistake in total of marks of each question and the marks have been transferred correctly on the title page of the answer book.

7. Rule 6l further contains a provision that no revaluation of the answer book or supplementary answer book shall be done. The examination of

the Central Board Secondary Education is thus conducted under the bye laws which in detail prescribe the procedure of examination, evaluation and all other connected matters. The bye laws only permit verification of marks and specifically contain a provision of prohibiting revaluation of the answer book of every student who appears in the Board Examination. There is uniform procedure of examination and its evaluation conducted by the Board. The petitioner appeared in the examination conducted by the Board in accordance with the bye laws and subject to procedure and rules prescribed therein. Rule 61 provides only for verification of marks obtained by a candidate in a subject hence the petitioner can avail only that benefit which is provided under the bye laws. When the bye laws specifically prohibit the revaluation, the petitioner cannot ask this Court to issue direction to the Board to act to the contrary to the bye laws. In the writ petition there is no challenge of bye law 61 which itself provide that there will be no revaluation of the answer book.

8. Before the apex Court a similar provision pertaining to Maharashtra Secondary and Higher Secondary Education Board Regulation arose in the case of **Maharashtra State Board of Secondary and Higher Secondary Education and another** vs. **Pritosh Bhupesh Kurmarsheth etc. etc**. reported in A.I.R. 1984 Supreme Court, 1543. In the aforesaid case regulation 104 was under consideration. Regulation 104 was almost similar in nature as bye law 61 quoted above. Regulation 104 is extracted below: -

"104. **VERIFICATION OF MARKS OBTAINED BY A CANDIDATE IN A SUBJECT.**

(1) Any candidate who has appeared at the Higher Secondary Certificate examination may apply to the Divisional Secretary for verification of marks in any particular subject. The verification will be restricted to checking whether all the answers have been examined and that there has been no mistake in the totalling of marks for each question in that subject and transferring marks correctly on the first cover page of the answer-book and whether the supplements attached to the answer book mentioned by the candidate are intact. No revaluation of the answer book or supplements shall be done.

(2) Such an application must be made by the candidate through the head of the junior college which presented him for the examination, within two weeks of the declaration of the examination results and must be accompanied by a fee of Rs.10/- for each subject.

(3) No candidate shall claim, or be entitled to revaluation of the answers or disclosure or inspection of the answer books or other documents as these are treated by the Divisional Board as most confidential."

9. Before the apex Court regulation 104 (3) which provided that no candidate shall be entitled to revaluation was under challenge. The High Court had declared the regulation 104(3) ultra vires. Apex Court while considering regulation 104(3) held as under:-

"24. This takes us to the question concerning the validity of the provision contained in clauses (l) and (3) of Regulation 104, which provides that no revaluation of the answer books or supplements shall be done and that no candidate shall claim or be entitled to claim a revaluation of his answer books. This aspect has been dealt with in the separate judgment of the Division Bench delivered by Mohta. J. On perusal of the judgment it will be seen that the entire reasoning therein is based on the conclusion recorded in the judgment of Deshpande, J. delivered in the first group of cases, that the provision contained in clauses (l) and (3) of Regulation 104 prohibiting the disclosure and inspection of answer book is liable to be struck down on the ground of unreasonableness as well as on the ground of its being ultra vires the scope of the rule making power conferred by Section 36(1) of the Act. Making this as the starting point of his reasoning Mohta J. has proceeded to observe that the " logical end of permitting inspection and disclosure of answer books and other documents is to permit revaluation" and that "no useful purpose will be served by having inspection and disclosure in case further right of revaluation is denied". Based on such an approach, the learned Judge has proceeded to state that there was no justification whatsoever to restrict the obligation of correcting of mistake only to verification and exclude revaluation from the operation of Regulation 102". Accordingly, it was held that clauses (l) and (3) of Regulation 104 in so far as they prohibit revaluation, are also void on the ground of unreasonableness."

10. The apex Court further held in paragraphs 25 and 26 as reproduced below :-

"25…The validity of the prohibition against disclosure and inspection having been thus upheld by us, the entirety of the reasoning contained in the judgment of Mohta, J. in support of his conclusion invalidating prohibition against revaluation contained in cls.(l) and (3) of Regn.104 loses its foundation. The view expressed by the learned Judge that Regn. 102 (2) which confers on the Board a suo moto power of amending the results where it is found that such a result has been affected by any error, malpractice, fraud improper conduct etc. will be rendered nugatory and ineffective by the prohibition on revaluation is fallacious and unsound. While discussing the scope of the said regulation, we have pointed out that its purpose and effect is only to confer a suo moto power on the Board to correct errors. In cases where irregularities like mal practices, misconduct, fraud, etc are found out and it does not confer any right on the examinees to demand any correction of the result. In the scheme of the regulations after the publication of the results, the only right which the examinees have in relation to this matter is to ask for a verification of the results under Clause. (1) of Regulation 104 and the scope of such verification is subject to the limitations imposed in the said clause as well as in Clause (3) of the very same regulation".

"26…Viewed against this background, we do not find it possible to agree with the views expressed by the High Court that the denial of the right to demand a revaluation constitutes a denial of fair

play and is unreasonable. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in the Regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when we find that all safeguards against errors and mal-practices have been provided for, there cannot be said to be any denial of fair play to the examinees by reason of the prohibition against asking for revaluation."

11. In view of the law laid down by the apex Court in the aforesaid judgment, the petitioner has no right to claim revaluation of his answer books. Counsel for the respondents have also relied on the judgment of this Court reported in 2000 (Vol. I) Education Service Cases page 460 **Subhash Chandra and others** vs. **State of U.P. and others**. The learned single Judge of this Court relying on apex Court's judgment held in paragraph 5 as under :-

"5. The question is whether in absence of any statutory rule this Court can direct rechecking or revaluation of the answer books of the petitioners. The petitioners appeared in B.T.C. entrance examination 1998-99 and were declared unsuccessful. Answer books could be revalued or rechecked if the rules provide for it. In absence of any statutory rule the answer books cannot be rechecked or revalued by the respondents nor such a relief can be granted by this Court. The petitioners may be good students but that cannot entitle them to make self assessment and claim that they should have been awarded 90% marks. If self assessment is adopted as the basis of evaluating answer books in an examination and this Court is asked to interfere on this ground then the entire system of competitive examination shall come to a standstill and this Court shall stand converted into an evaluating body of answer books."

12. Counsel for the petitioner has placed reliance on single Judge judgment of this Court reported in A.I.R. 1986 Allahabad 281 **Dr. Ramkesh Kumar Singh and others** v. **Banaras Hindu University, Varanasi and others**. The case of Rakesh Kumar Singh was a case in which the petitioners have challenged the decision of the Controller of the Examination by which the result of the entrance examination of the petitioners in M.D./M.S.(Ayurved) Post Graduate Course was cancelled. The court took the view that it was obligatory on the respondents to afford opportunity to the petitioners before passing the order for cancelling the examination. The Court in the aforesaid case took the view that there is no ground for cancelling the examination. The aforesaid judgement does not help the petitioner nor help his submission that revaluation of answer book can be directed even if there is no provision in bye laws. Another judgment cited by the counsel for the petitioner is AIR 1998 Allahabad 218 **Vivek Kumar Singh** v. **The Banaras Hindu University and others**. In the aforesaid case the petitioner has claimed that question booklet supplied to the petitioner missed one sheet containing questions 29 to 50 and questions 146 to 165 in spite of the petitioner's bringing into notice to the invigilator the question booklet was not replaced. The University took the stand that the aforesaid defect was pointed out

after one hour of the commencement of the examination whereas the instruction No. 11.6 of the Information booklet provided that the candidate within ten minutes of the issue of the question booklet had to check and ensure that all the pages are there. In the aforesaid circumstances the Court held in following words:-

"The University cannot make a candidate to suffer by default nor can it project its own fault on the candidate of supplying incorrect question booklet. The petitioner, in my opinion, is entitled to be recompensated by proportionate evaluation vis-à-vis the missing questions delineated in the body of this judgment. In other words the petitioner shall be deemed to have answered correctly the missing questions in the same proportion in which he has answered correctly the question contained in the answer sheet supplied to him and his merit vis-à-vis other students who appeared in PMT/PAT-1996 shall be determined on the basis of the marks obtained by him as a result of the evaluation of his answer sheet in the aforesaid manner and in case the petitioner is found to have secured marks equal to or more than the marks secured by the last candidate in the merit list he shall be admitted to First Year MBBS course or to B. Pharmacy Part I as the case may be, along with students of 1997 batch. In case, the petitioner does not qualify, he may be intimated accordingly."

13. The above judgment of the learned single Judge also does not support the contention of the petitioner nor that judgment is an authority on the issue raised in the writ petition. The aforesaid judgement is not applicable on the facts of the present case. With regard to grievance raised by the petitioner in the supplementary affidavit dated 18.6.2001 that question No.2 (c) was wrongly set. In supplementary counter affidavit the respondents have stated in paragraph 3 that the question No. 2 (c) was detected to be incorrect and instructions were issued to the authorities and examiners to treat the said question to be cancelled and to award four marks to each candidate. The petitioner has been awarded 4 marks (full marks) with respect to question no. 2 (c) while evaluating the answer books of Computer Science subject. In view of the above, there was no prejudice caused to the petitioner nor on that basis any ground for revaluation can be made.

14. From the above discussion, it is clear that the petitioner has not made out any case for grant of relief as prayed in the writ petition. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 23, 2001

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

Civil Misc. Writ Petition No. 24097 of 2001

Lallan Prasad Singh ...Petitioner
Versus
State of U.P. and others ...Respondents.

Counsel for the Petitioner:
Sri Umesh Narain Sharma
Sri Arun Kumar

Counsel for the Respondents:
S.C.
Sri J.N. Sharma

U.P. Government Servants (Discipline and Appeal) Rules 1999 Rule 4 (1)- Negligence in discharge of duty- whether amount to misconduct- government servants can be subjected to disciplinary action for ommission which reflects the good faith and devotion to duty- Petitioner being posted as Assistant Engineer- engrossed in getting unauthorised construction- suspension held justified.

Held- Para 4

A Government Servant, therefore, can be subjected to disciplinary action for his act or ommission which reflects his good faith and devotion to duty or which shows recklessness in discharge of his duty. Rule 3 (1) of the U.P. Government Servants Conduct Rules 1956 envisages that every Government servant shall maintain at all times 'absolute integrity and devotion to duty'. In the charge sheet being Annexure 2 to the writ petition there is a specific allegation that the petitioner was in fact 'engrossed' (Lipt) in getting a large scale is that he was himself instrumental in encouraging a large scale of unauthorised constructions. In the circumstances, therefore, it cannot be said that recourse to suspension was unjustified.

Case law discussed:
(1866) 17- QBD-536
JT 1993 (1) SC 236

(Delivered by Hon'ble S.R. Singh, J.)

1. The petitioner, an Assistant Engineer presently posted at Kanpur Development Authority, Kanpur, seeks issuance of writ of certiorari quashing the order dated 14.6.2001 being Annexure 1 to the writ petition whereby he has been placed under suspension on a charge which relates to his duties while he was posted at Allahabad Development Authority, Allahabad.

2. It has been submitted by Shri U.N. Sharma, learned counsel appearing for the petitioner that the charge against the petitioner is that he failed to take effective steps in arresting unauthorised constructions in residential scheme of Allahabad Development Authority in Jhusi and was remiss in discharge of his duty but mere failure on the part of the petitioner to take effective steps in preventing the unauthorised constructions and mere carelessness in discharge of duties do not constitute 'misconduct' warranting disciplinary action. Shri Sharma has placed reliance on a decision of the Supreme Court in Union of India Vs. J. Ahmad, AIR 1979 SC 1022. Learned Standing Counsel representing the State and Shri J.N. Sharma, learned counsel appearing for Allahabad Development Authority, Allahabad (party respondent no.2), on the other hand, submitted that the charge levelled against the petitioner are such as may warrant major penalty in the event of the same being established at the enquiry and therefore, recourse to suspension cannot be said to be unjustified.

3. We have given anxious consideration to the submission made across the Bar. The proviso to Rule 4(1) of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 visualizes that recourse to suspension would not be taken unless the charge is such as may warrant major penalty in the event of same being established at the enquiry. Therefore, the question is whether charges as levelled against the petitioner are such as may warrant imposition of major penalty in the event of the same being established at the enquiry. The charges against the petitioner as stated in the impugned order

are two fold; first, that he failed to take any effective steps in preventing the unauthorised constructions in the residential scheme launched by the Allahabad Development Authority, Allahabad in Jhusi Kshetra, and second, that he was remiss in discharging his duties. In Union of India and others Vs. J. Ahmad (supra) it has been held that mere negligence and lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not be construed 'misconduct' unless consequences are directly attributable to negligence which would be such as to be irreparable or the resultant damage would be very high. The respondent J. Ahmad in that case had initially joined service in Assam State but later on came to be promoted to the Indian Administrative Services cadre and soon thereafter he was posted as Deputy Commissioner and District Magistrate, Navgaon and while he was posted on aforementioned post there was a large scale of linguistic disturbance in the Navgaon which led to his suspension from service. The charges framed against him affirmatively showed failure on his part to take any effective preventive measures. Such a charge, in the context, was construed as an error in judgment in evaluating developing situation and since the allegations on various charges did not specify any act or omission in dereliction of duty or contrary to conduct rule or any general rule prescribed within the 'duty', it was held that the charges at the most only indicate the shortcomings in the personal capacity or the degree of efficiency of the respondent but such deficiency in personal character and personal ability would not be construed as 'misconduct' for the purpose of 'disciplinary proceeding'. The Apex Court, however, held that gross or habitual negligence in performance of duty may constitute misconduct for disciplinary proceeding.

4. A perusal of the charge sheet dated 14.6.2001 simultaneously issued in the instant case would indicate that it is not a case of mere negligence in discharge of duty but some thing more. The petitioner, according to charge No. 2, was 'engrossed' (Lipt) in getting the unauthorised constructions raised (Aap Avaidh Nirman Karane mein Sanlipt Hain). It has been held in numerous cases that 'if an act or omission of a Government servant reflects his devotion to duty as 'a public servant', such an act or omission may be the subject matter of disciplinary action as misconduct. Lopes L .J. in Pearce Vs. Fasters (1866) 17 QBD 536 has observed: "If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal"). Decision aforestated has been quoted with approval in Union of India and others Vs. K.K. Dhavan, JT 1993 (1) SC 236 as well as in J. Ahmad (supra). A Government Servant, therefore, can be subjected to disciplinary action for his act or omission which reflects his 'good faith' and 'devotion to duty' or which shows 'recklessness' in discharge of his duty. Rule 3(1) of the U.P. Government Servants Conduct Rules, 1956 envisages that every Government servant shall maintain at all times 'absolute integrity and devotion to duty'. In the charge-sheet being Annexure 2 to the writ petition there is a specific allegation that the petitioner was in fact 'engrossed' (Lipt) in getting a large scale of unauthorised constructions raised. In other words, the charge is that he was

himself instrumental in encouraging a large scale of unauthorised constructions. In the circumstances, therefore, it cannot be said that recourse to suspension was unjustified.

5. It was next contended by Shri U. N. Sharma that the charge that the petitioner failed to take effective steps in preventing unauthorised constructions as also the charge of being remiss in discharge of duty are quite vague and therefore, the petitioner who is no longer posted in the Allahabad Development Authority, Allahabad, ought not to have been suspended. It is true that the charges as mentioned in the impugned suspension order are vague and indefinite but the charge-sheet (Annexure 2 to the writ petition) simultaneously served to the petitioner is quite precise and the charges mentioned therein do not suffer from the vice of vagueness. The defect stands removed. Therefore neither the suspension order nor the charge sheet is liable to be quashed.

6. However, in view of the allegation that the petitioner was assigned the construction zone III Sub Zone 12, Jhusi Kshetra only for a short period of 8-9 months and that the Nayay Avas Yojna had been developed by a registered housing society known as Sarvahit Sahkari Awas Samiti the members whereof had started raising construction in 1988 and the Government itself initiated Self Compounding Scheme, 1999 with a view to regularising the unauthorised constructions pursuant whereof 135 owners of the Nayay Nagar Colony applied for compounding of their construction on payment of the prescribed fee and the Allahabad Development Authority Board considered the matter of regularisation of the colony in its 71st meeting held on 29.9.2000 vide Item No. 1161 and a regularisation plan of the colony has been prepared and approved by the Vice-Chairman, it is provided that in case the petitioner files his explanation to the charge-sheet, the enquiry shall be completed within two months from the date of submission of the reply failing which the petitioner shall be reinstated without prejudice to the enquiry provided that failure to complete the enquiry within the period aforesaid is not attributable to the petitioner.

The writ petition is disposed of in terms of the above directions.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD: 19.7.2001

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

Criminal Revision No. 1834 of 2001

Uma Nath and another ...Revisionists
Versus
State of U.P. and others ...Opp. Parties

Counsel for the Revisionists:
Sri Ali Hasan

Counsel for the Respondents:
G.A.

Code of Criminal Procedure- Section 397 (2)- Interlocutory order Test- upholding the objection if proceeding not comes to an end- explained.

Held-Para 5, 13

The expression 'interlocutory orders' has been used in Section 397 (2) Cr.P.C. in a restricted sense only. To lay down that all orders than 'Final orders disposing of

proceedings will fall within the sweep of the expression 'interlocutory orders' will fall within the sweep of the expression' interlocutory orders' as envisaged in Section 397 (2) denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties and any order which substantially affects the rights of the parties even, if made, during the pendency of lis is not an interlocutory order.

Case law discussed.

(1997) 4 SCC-137
(1977)4 SCC-451
AIR 1980 SC-962
2000 (41) ACC-353

(Delivered by Hon'ble J.C. Gupta, J.)

1. Heard Sri Ali Hasan, learned counsel for the applicants in revision.

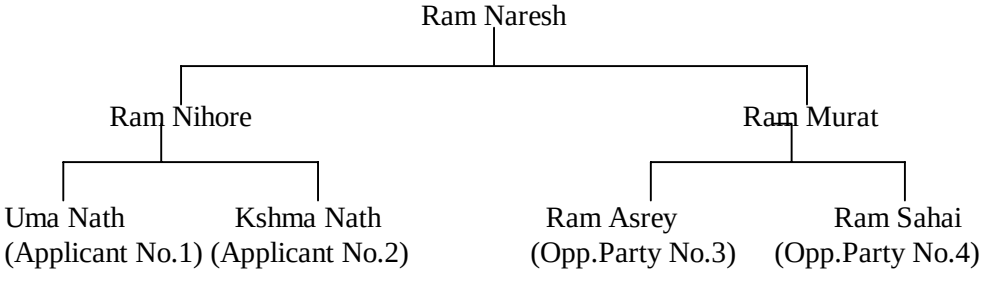
This revision is directed against the order dated 15.5.2001 passed by revisional court setting aside the order dated 5.10.2001 made under Section 145 (1) Cr.P.C. and the order dated 17.2.2001 made under Section 146 (1) Cr.P.C. attaching the property in dispute.

The dispute relates to a few agricultural plots whose details are given in the police challani report dated 25.8.2000.

Parties to the proceedings are inter related as per the following pedigree -

2. Ram Naresh was undisputedly the recorded tenure-holder of the disputed plots. After his death, dispute arose between the parties with regard to the holding left by Ram Naresh so much so that the dispute led to some murders and other criminal incidents. On 25.8.2000 police submitted a report before Sub-divisional Magistrate, Jaunpur stating that there was a dispute between the parties in relation to the plots in question. After the first party (applicants in revision) succeeded in getting the ex-parte order of mutation set aside, which was in favour of opposite parties, a few incidents including murders have occurred. The first party i.e. applicants are history sheeters and hardened criminals and they could commit any serious crime. Therefore, a prayer was made that proceedings under Section 145 Cr.P.C. be drawn and property attached and given in custody of an independent person.

On 5.10.2000, the Magistrate passed preliminary order under Section 145 (1) Cr.P.C. and thereafter on 17.2.2001 passed order of attachment under Section 146(1) Cr.P.C. The validity of these orders was challenged by opposite parties in criminal revision No. 182 of 2001 before Sessions Judge on the ground of their being without jurisdiction, null and void. The learned Sessions Judge by the impugned order has set aside both the orders of the Magistrate and quashed the proceedings.



3. Learned counsel for the applicants in revision in a very emphatic manner submitted before this court that the revision filed before the Sessions Judge was not maintainable on account of the statutory bar contained in Section 397(2) Cr.P.C. as both the orders of the Magistrate made under Sections 145(1) and 146(1) Cr.P.C. were interlocutory orders, therefore, the order of the Sessions Judge allowing the revision is liable to be set aside.

4. It is now well-neigh settled that in deciding the question whether an order is interlocutory or not, the sole test is not whether such order passed during the interim stage of proceeding but the feasible test is whether by upholding the objection raised by a party would it result in culminating the proceeding. If it has the effect of bringing the proceedings to an end such an order would not be interlocutory in nature as envisaged in Section 397 (2) Cr.P.C. (Vide Amarnath Vs. State of Harayana (1977)4 SCC 137, Madhu Limaye Vs. State of Maharasta (1977) 4 SCC 451, V.C. Shukla Vs. State A.I.R. 1090 SC 962 and K.K. Patel Vs. State of Gujrat 2000(41) A.C.C. 353).

5. Where an order is wholly without jurisdiction, it is a nullity and non-est with the result that any proceeding drawn subsequent thereto will become void ab initio and if such order is set aside it has the effect of wiping out the whole proceedings. In relation to such an order, bar of Section 397 (2) Cr.P.C. can not be applied merely on the ground that the said order was passed at the initial or intermediate stage of the proceedings. It will not be correct to say that bar of Section 397(2) will apply to all orders excepting the final orders by which proceedings are culminated. The expression 'interlocutory orders' has been used in Section 397(2) Cr.P.C. in a restricted sense only. To lay down that all orders other than 'Final orders disposing of proceedings will fall within the sweep of the expression 'interlocutory orders ' will not be a correct proposition. 'Interlocutory order' as envisaged in Section 397(2) denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties and any order which substantially affects the rights of the parties even, if made, during the pendency of lis is not an interlocutory order.

6. Therefore, where it is shown that on admitted facts the Magistrate could not assume jurisdiction to initiate proceedings under Section 145 Cr.P.C. the bar of Section 397 (2) can not be pressed into service, as in such a situation orders made under Sections 145(1) and 146 Cr.P.C. will be null and void having no sanctity in law and if they are set aside they have the effect of culminating the proceedings as void ab initio.

7. In the present case, the contention of the opposite parties before the lower revisional court was that even as per the own case of the applicants in revision, the Magistrate did not possess jurisdiction to initiate proceedings under Section 145 Cr.P.C. The case of applicants in revision was that after the death of original tenure holder Ram Naresh, they have acquired one half share in the disputed plot under law of succession, yet the opposite parties have taken actual possession of the entire property and were not allowing the applicants to make use of their half share. It is also pertinent to note that even before

this court in the affidavit filed alongwith memo of revision, applicant no. 2 Kshama Nath in paragraph 7 thereof has stated in clear words ' It is made clear that the entire land of Ram Naresh (deceased) is in possession of opposite parties no. 2 to 4 and for obtaining the half share many a times incidents took place between the parties ….."

8. Again in paragraph 11 of the affidavit it has been stated 'That, the entire property in dispute belongs to one Ram Naresh, grand father of revisionists as well as father of opposite party no. 2 and grand father of opposite parties no. 3 to 4 and both the parties have half-half share in the property of Ram Naresh. It is further made clear that the entire property is in possession of opposite parties no. 2 to 4 …..".

9. It is, thus, obvious that even as per their own case, the applicants, have acquired half share in the plots in question after the death of Ram Naresh, but they are out of possession as the entire land is in actual possession of opposite parties no. 2 to 4 who are not allowing them to take possession of the land to the extent of their half share. It was no where alleged that at any point of time they had come in exclusive possession of any part of the disputed plots. The police challani report dated 25.8.2000 also stated that after the ex-parte mutation order made at favour of opposite parties had been set aside, the applicants in revision started laying their claim in the disputed property with the use of force, which has given rise to a dispute between the parties, as such there is imminent danger of breach of peace.

10. The moot question for consideration is whether on these facts and as per the own showing the applicants could the Magistrate exercise jurisdiction for initiating Section 145 Cr.P.C. proceedings in relation to the plots in question.

11. For initiating proceedings under Section 145 Cr.P.C., the Magistrate gets jurisdiction only where there is a dispute between the parties in relation to possession of immovable property and not merely to their rights or title. So long as one person claims to be in actual possession to the exclusion of others and alleges that some other person by force seeks to interfere with his possession or alleges that he has been forcibly and wrongfully dispossessed within two months next before the date of preliminary order and on account of the said dispute there is apprehension of breach of peace, then only the occasion for exercising powers under Section 145 Cr.P.C. can arise or in other words, proceedings under Section 145 Cr.P.C. can be restored to only when both the conditions laid down therein are shown to co-exist i.e. that there is a dispute between the parties in relation to actual possession of some immovable property and that the said dispute is likely to lead to a breach of the peace. If there is merely a dispute with regard to possession without there being any likelihood of the breach of the peace, the Magistrate is not competent to take recourse to Section 145 Cr.P.C. and the dispute is to be resolved by a court of competent jurisdiction. Similarly if there is only an apprehension of breach of peace without there being any dispute relating to actual possession and the dispute is only in relation to right or title of immovable property, then also Magistrate will have no power or jurisdiction to proceed under Section 145

Cr.P.C. and in such a situation the proper course for him is to proceed under Section 107/116 Cr.P.C.

12. "Possession" contemplated under Section 145 Cr.P.C. is actual physical possession of the subject of dispute i.e. possession in fact as distinguished from possession implied by law which is commonly known as constructive possession. The Magistrate in a proceeding under Section 145 Cr.P.C. is concerned only with the question of actual possession and he has to address himself on this issue alone irrespective of any right or title to possession. He cannot proceed to decide rights or title of the parties without there being any dispute relating to actual physical possession of the property in question. It is not open to him to enable a party to by pass civil or revenue proceedings. Sub-section (4) of Section 145 Cr.P.C. clearly states that inquiry as to possession is to be made without reference to merits or the claims of any of the parties to possess the subject of dispute. He does not possess jurisdiction to decide whether on the basis of his title or right a party could be put in actual possession of the disputed property. Proceedings under Section 145 Cr.P.C. do not contemplate case of joint property or joint holding or joint possession. In relation to joint property, proceedings under Section 145 Cr.P.C. can not be drawn on the basis of constructive joint possession, unless a co-owner claims his actual physical possession over a specified portion of joint property on account of some settlement or long user, etc.

13. In the present case, even according to the own case of the applicants, the entire disputed land is in actual possession of the opposite parties and they merely claimed half share therein being descendants of Ram Naresh. Their further admitted case is that though they are having half -share in the property in question, yet the opposite parties are not allowing them to take possession to the extent of their share. It is not their case that they were in actual possession of any specified portion of the joint-holding at any point of time and they were dispossessed there from. On these admitted facts, no proceedings under Section 145 Cr.P.C. could be legally initiated. The Magistrate thus lacked inherent jurisdiction in passing orders under Sections 145 (1) Cr.P.C. and 146 (1) Cr.P.C. These orders were certainly without jurisdiction and thus could not be characterized as 'interlocutory orders'. The learned Sessions Judge was, therefore, fully justified in allowing the revision of the opposite parties and in quashing the proceedings initiated under Section 145 Cr.P.C.

For the reasons stated above, this revision is dismissed. However, it is made clear that dismissal of this revision will not prevent the learned magistrate from taking action under Section 107/116 Cr.P.C., if he deems such an action necessary.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.7.2001

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

Criminal Revision No. 1568 of 2000

Dharm Vir ...Revisionist
Versus
Smt. Nemwati and another ...Opposite Parties

Counsel for the Revisionist:
Sri Jitendra Pal Singh

Counsel for the Opposite Parties:
Sri Ravi Prakash Srivastava
A.G.A.

Code of Criminal Procedure- Sub Section 4 of Section 401- Since the complainant could have filed an appeal against the order of acquittal recorded by the learned Magistrate, under sub-section (4) of section 378- revision filed before the Sessions Judge by the complainant was clearly not maintainable in view of the bar created by Sub-section (4) of Section 401 Cr.P.C. (Held in para 6)

Once revision itself was not legally maintainable, the impugned order setting aside the order of the learned Magistrate acquitting the applicant cannot be sustained.

(Delivered by Hon'ble J.C. Gupta, J.)

1. Heard.

2. This revision is directed against the order dated 2.6.2000 passed by Sri Dhani Ram, Special Judge, SC/ST Act. Pilibhit allowing the revision filed by opposite party no. 1 against the order of the Magistrate dated 10.11.97 whereby accused/applicant was acquitted of the offences punishable under Section 406 I.P.C. and under Section 3/4 of the Dowry Prohibition Act.

3. Undisputedly the case before the learned Magistrate proceeded on a complaint filed by opposite party no.1 which ultimately resulted into acquittal of the applicant. Against this order of acquittal opposite party no.1 filed revision before the Session Judge which has been allowed by the impugned order and the case has been sent back to the trial court for a fresh decision in the light of observations made in the body of order.

4. It is submitted that learned Special Judge has committed gross illegality in allowing the revision totally over looking the fact that revision itself was not legally maintainable in view of the bar created under Sub-section (4) of Section 401 of the Cr.P.C. which provides that where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. By virtue of Section 399(1) Cr.P.C. Sessions Judge is empowered to exercise all or any of the powers which may be exercised by the High Court under Sub-section (1) of Section 401. Since the powers of the High Court in revision are restricted under sub section (4) Section 401 Cr.P.C. the same restriction would also apply in relation to the powers of Sessions Judge as well. As already stated above Sub-section (4) of Section 401 in clear words lays down that when appeal under this Code lies at the instance of the party who could have appealed and if no such appeal is brought, revision is not maintainable.

5. The question that now arises for consideration is whether any appeal lies against an order of acquittal in a case instituted upon complaint. In this connection, we may refer to sub-section (4) of Section 378 Cr.P.C. which runs as under :

"(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court".

6. Since the complainant could have filed an appeal against the order of acquittal recorded by the learned Magistrate, under Sub-section (4) of Section 378, revision filed before the Session Judge by the complainant was clearly not maintainable in view of the bar created by Sub-section (4) of Section 401 Cr.P.C.. Once revision itself was not legally maintainable, the impugned order setting aside the order of the learned Magistrate acquitting the applicant cannot be sustained.

7. For the reasons stated above, revision is allowed. The impugned order dated 2.6.2000 is set aside.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: THE ALLAHABAD 18.7.2001

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

Criminal Revision No. 1817 of 2001

Prithvi Singh and others ...Revisionists
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionists:
Sri D.K. Dewan

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

Indian Evidence Act- Section 54- in a criminal proceedings, evidence of bad character of the accused cannot be adduced unless the accused leads the evidence of good character. (Held - para 6)

Unless the accused has given evidence that he has a good character, it is not competent for the prosecution to adduce evidence tending to show that the accused is a person of bad character. This prohibition of course will not apply in a case where bad character of any person is itself in issue.

(Delivered by Hon'ble J.C. Gupta, J.)

1. Heard Sri D.K. Dewan, learned counsel for the applicant in revision and the learned A.G.A.

2. In the facts and circumstances of the case, this revision is disposed of finally.

3. The revision is directed against the order dated 6.7.2001 passed by the Additional Sessions Judge (court no. 4) Mathura in S.T. No. 437/1987, State vs.

Prithvi Singh and others under Section 302 I.P.C., P.S. Daldeo allowing permission to the prosecution to bring on record certain papers for showing that the accused-revisionists were having bad and shady character, at the stage when prosecution had already closed its evidence.

4. A perusal of the impugned order indicates that on behalf of prosecution an application was moved stating that accused Prithvi Singh, Fateh Singh and Shree Chand have long criminal history and, therefore, the prosecution may be allowed to file papers showing that accused persons were of bad character. This application was opposed on behalf of the accused applicants on the ground that prosecution can not be permitted to lead such kind of evidence. The learned Sessions Judge, however, allowed the application of the prosecution and permitted it to bring on record papers in order to show that accused persons were of bad character. Learned counsel for the applicants submitted before the court that such a piece of evidence can not be permitted to be brought on record being irrelevant and inadmissible. He invited the attention of the Court to Sections 53 and 54 of the Indian Evidence Act, which are reproduced below :-

" Section 53- In criminal proceedings the fact that the person accused is of a good character is relevant.

Section 54- In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanatuion-1. This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation-2 A previous conviction is relevant as evidence of bad character.

5. It is not disputed before the court that the bad character of the accused persons is not a fact in issue in the trial in question wherein it has to be decided whether the accused persons could be held guilty for committing the murder of the deceased. Section 54 clearly lays down that in a criminal proceedings, evidence of bad character of the accused can not be adduced unless the accused leads the evidence of good character.

6. It is thus, clear that unless the accused has given evidence that he has a good character, it is not competent for the prosecution to adduce evidence tending to show that the accused is a person of bad character. This prohibition of course will not apply in a case where bad character of any person is itself in issue.

7. In view of what has been stated above, the impugned order of the trial court can not be sustained and is set aside.

8. Revision is accordingly allowed. However, having regard to the fact that the trial is pending since long, it is directed that it shall be now concluded as expeditiously as possible and in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.7.2001

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

Civil Misc. Writ Petition No. 26684 of 2001

Kushum Devi ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar Shukla

Counsel for the Respondents:
S.C.

Rule 2 (c) of U.P. Recruitment of Dependents of Government Servant (Dying in Harness) Rules 1974-A divorced daughter, if dependent upon her father cannot be excluded and has to be included within the meaning of the word 'family' since such a 'Divorced Daughter', if dependent upon her father, has to be treated at par with an unmarried daughter or widow daughter as all of them continue to be liability of their father as member of the family of their 'father' (held in para 13).

The impugned order is set aside. The concerned authority namely General Manager (respondent no. 2) is directed to decide the claim of the petitioner for compassionate appointment in accordance with law and subject to the observations made above i.e., in case the petitioner happens to be the dependent upon her deceased father at the time of death and continues to be so for the reason that she has neither re-married nor other wise employed elsewhere as 'unmarried daughter', subject however to the condition that she shall give an undertaking to support her widow mother in case she is offered appointment under the aforesaid Rules, 1974.

Case law discussed:
1999 (83) FLR 523 (DB)

(Delivered by Hon'ble A.K. Yog, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel representing respondents no. 1 and 2.

2. This writ petition is being heard finally decided under the Rules of the Court as also agreed by the counsels for the parties.

3. Photo- copies of the certified copies of the papers relating to Original Suit No. 89 of 2000 (Smt. Kushum Devi Vs. Arun Kumar Sen) under section 13 of Hindu Marriage Act, show that the Petitioner, who is daughter of late Bhagawat Prasad, was married to one Arun Kumar Sen and the said marriage has been dissolved by a decree of divorce dated 17.12.2000 under Section 13 of Hindu Marriage Act. There is nothing on record to show that petitioner has re-married.

4. Father of the petitioner Bhagawat Prasad, employed in the respondent's office at Jhansi, died on 11.11.1999 leaving behind his widow who submitted an application on 18.1.2001 for giving compassionate appointed to her daughter, the present petitioner (annexure-1 to the writ petition) to the Commissioner and Director, U.P. Industry Department Kanpur, who forwarded the same to the General Manager for consideration under relevant 'Dying in Harness' rules for appointment. In the said application, wife of the deceased employee, late Bhagawat Prasad aforementioned, requested for giving appointment to her daughter (namely, the petitioner). The petitioner in

a representation dated 16.4.2001 submitted that there was no other family member of Bhagawat Prasad except her mother, who was of old age and not able to take up the job, copy of the application is filed annexure-4 to the writ petition.

5. General Manager, vide impugned order dated 9.5.2001 (annexure 5 to the writ petition), rejected the petitioner's claim for compassionate appointment under 'The U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 (for short called 'the Rules') and held that under the said definition of the word 'family' under the Rules only 'wife or husband', 'sons' or 'unmarried daughters'/widowed daughters' are covered and since the petitioner was divorced daughter, her claim under the aforesaid Rules was not maintainable.

6. Rule 2, shows that the definition of word 'family' is inclusive and not exclusive.

Rule 2 (c) of the Rules, 1974 is quoted below :

"'(c)' "family" shall include the following relations of the deceased Government servant :

(i) Wife or husband,

(ii) Sons,

(iii) Unmarried and widowed daughters,"

7. Petitioner's counsel placed reliance upon the decision in the case of State of U.P. and others V. Rajendra Kumar and others 1999 (83) FLR 523 (DB), wherein this Court referring to various decisions held that the word 'family' used in Rules 2 (c)- is not exhaustive and a 'grandson' who is dependent upon a deceased employee will be covered under aforesaid 'Rule ' which is a piece of beneficial legislation and have to be liberally construed.

8. Para 5, 11 and 12 of the said judgment in the case of State of U.P. (supra) are quoted for ready reference -

"5. The learned single judge agreed with this submission and we also agree with the same. The word 'include' connotes that the persons mentioned in Rule 2 (c) are not exhaustive of the meaning of the word family but are only inclusive. This implies that the word 'family' is not limited to the persons mentioned in Rule 2 (c), but more persons can be included in the definition of the word 'family' in certain respects.

11. It may also be mentioned that the modern method of interpretation, as pointed out by Lord Denning in his Book. 'The discipline of law', is purposive and not literal. The literal method of interpretation as pointed out by Lord Denning is out of vogue everywhere in the world and now the courts see the intention and not the literal meaning. This view has also been accepted by our Supreme Court in several decisions, e.g. in Hindustan Lever Ltd. vs. Ashok Vishnu Kate and others. In Administrator, Municipal Corporation V. Dattatray, the Supreme Court observed 'The mechanical approach to construction, is altogether out of step with the modern positive approach. The modern positive approach is to have a purposeful construction that is to effectuate the object and purpose of the Act.

12. In the present case the respondent was the dependent of his grandfather who died in harness. In our opinion, therefore, the

learned single Judge has rightly held that the respondent is entitled to the benefit of the Dying in Harness Rules. The said Rules are a piece of beneficial legislation and have to be liberally construed."

9. Rule 2 (c) of the Rules is only descriptive so as to include 'unmarried and widowed daughters' who may be eligible for seeking compassionate appointment provided they are dependants of the deceased employee.

10. A divorced daughter, if dependent upon her father cannot be excluded and has to be included within the meaning of the word 'family' since such a 'Divorced daughter', if dependent upon her father, has to be treated at par with an unmarried daughter or widowed daughter as all of them continue to be liability of their father as member of the family of their father.

11. It is to be noted that a widowed daughter, normally continues to receive support and other benefits from the family of her husband. Her relationship with the family of her husband does not automatically comes to an end. In contrast, a divorced daughter snaps all her relationship with her husband and his family and looses status of a married woman. There is no logic to exclude a divorced daughter dependent upon her father from the definition of the word 'family' under the Rules.

The above view is fortified from the provision contained in Rule 6 of Order XXXIIA. Code of Civil Procedure, wherein expression ' family' is as follows:-

6. 'Family'- Meaning of - For the purposes of this Order, each of the following shall be treated as constituting a family, namely:-

(a)(i) ……
(ii) ……
(iii) ……

(b) ……

(c) a woman not having a husband or not living together with her husband and child or children being issue of hers, and any child or children being maintained by her;
(emphasis supplied by Court).

12. In view of the above, the reason given in the impugned order dated 9.5.2001 cannot be allowed to stand.

13. The impugned order is set aside. The concerned authority namely General Manager (respondent no. 2) is directed to decide the claim of the petitioner for compassionate appointment in accordance with law and subject to the observations made above i.e., in case the petitioner happens to be the dependent upon her deceased father at the time of death and continues to be so for the reason that she has neither re-married nor other wise employed elsewhere, and family is in distress, her claim have to be considered as ' unmarried daughter' subject however to the condition that she shall give an undertaking to support her widowed mother in case she is offered appointment under the aforesaid Rules, 1974.

14. Subject to the above observations, the petition stands allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.7.2001

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

Civil Misc. Writ Petition No. 810 of 1999

M/s Moti Lal and Brothers ...Petitioner
Versus
Customs, Excise & Gold (Control) Appellate Tribunal, Mumbai and others ...Respondents

Counsel for the Petitioner:
Sri A.P. Mathur

Counsel for the Respondent:
Sri S.P. Kesarwani
Sri S.N. Srivastava

Constitution of India- Article 226- no cause of action has arisen within the territorial jurisdiction of this Court the adjudication proceedings took place before the authorities at Mumbai- Appeal was also considered at Mumbai- this Court cannot pass any order interfering with the order of the Tribunal located at Mumbai. (Held in para 14).

We accordingly hold that this Court has no jurisdiction to entertain the writ petition. The Mumbai High Court has the exclusive jurisdiction for the purpose. The writ petition therefore is dismissed.

Case law discussed:
2000 (2) UJ 1502 (SC)

(Delivered by Hon'ble S.K. Sen, C.J.)

1. Heard Sri A.P. Mathur learned Counsel for the petitioner and Sri S.P. Kesarwani learned Standing Counsel for respondents.

2. In the instant writ petition the petitioner has prayed for the following relief's:

(i) issue a writ of certiorari quashing the order dated 27.7.99 served on 6.8.99 read with order dated Nil March 1997 passed on the modification application of stay and stay cum waiver application by the Hon'ble Customs, Excise & Gold (Control) Appellate Tribunal,

(ii) issue any other writ, order or direction in the nature of Mandamus directing the Hon'ble Tribunal Mumbai to decide the Appeal No. C/2/R/97 Bom filed by the petitioners without insisting on any predeposit within a stipulated period and further to say the recovery proceedings till the disposal of the appeal,

(iii) issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case,

(iv) and to award the cost of this petition to the petitioners.

3. It appears from the relief claimed in the writ petition that the petitioner seeks to challenge the order passed on the application for modification of stay and stay cum waiver application by the Customs. Excise & Gold (Control) Appellate Tribunal, Mumbai. A further prayer has been made by the writ petitioner for a direction upon the Tribunal which is situated at Mumbai to decide the Appeal No. 642-1997 filed by the petitioner without insisting on any predeposit within a stipulated period and further to stay recovery proceedings till the disposal of the appeal.

4. The short facts involved in the writ petition inter-alia are that the petitioner is engaged in the manufacture of carpet at Ghosia, District Sant Ravi Das Nagar (Bhadohi) and is possessed with an import-export pass book duty free licence under which the petitioner was importing duty free dyes and chemicals for using them in the manufacture of carpets which were to be exported outside India. It is stated that some consignments of dyes and chemicals pending clearance at Bombay docks were seized. After investigation being made, about the actual use of the imported goods by the petitioner, a show cause notice was issued on 28th August 1991 by the Assistant Collector of Customs (Preventive) Mumbai. On 11.5.1992 the case was adjudicated by the Additional Collector of Customs (Preventive) Mumbai. The Collector of Customs (Appeals) vide order dated 11.10.1993 set aside the order of Additional Collector on the ground of the jurisdiction of the authority in issuing the show cause notice. Therefore on 3rd June 1994, the Collector of Customs (Preventive) Mumbai issued a fresh show cause notice. On 11th September 1996 Commissioner of Customs (Preventive) Mumbai adjudicated the case and decided the same against the writ petitioner. In December 1996 writ petitioner filed appeal and stay cum waiver application before the Customs Excise & Gold (Control) Appellate Tribunal at Mumbai. On 19th March 1997, the Tribunal had partly allowed the stay cum waiver application and observed as follows:

"On a careful consideration of the submissions, we find that the issues are contentious and in such circumstances we are of the view that for the purpose of hearing the appeal on merits in this case the applicant should predeposit rupees 40 lakhs on or before 30.4.1997 subject to which the predeposit of the balance amount of duty and penalty will be dispensed with and its recovery stayed."

5. On 15th May 1997 application for modification of the aforesaid order was filed by the writ petitioner on which following order was passed by the Tribunal on 18th November 1997:

"On careful consideration of submissions, since this is very central to the modification application of the stay order we would direct the Department to verify the actual position since it will have a clear nexus to the very basis of demanding duty under Section 28 A of the Customs Act in this case on the material in question. Copy of this order to be given to both the parties."

6. It appears that thereafter the Department filed an application before the Tribunal for hearing the appeal out of turn on which on 29th June 1999 an order was passed by the Tribunal to the following effect:

"Failure on the part of the importer to comply with the stay order of the Tribunal will itself result in dismissal of the appeal of the importer and therefore no ground for early hearing and the application for early hearing by the department is therefore dismissed."

7. Subsequently the modification application filed by the petitioner on 15th May 1997 came up for consideration before the Tribunal and vide order passed on 27th July 1999 the Tribunal held that they do not see any reason to modify the earlier order and further observed that if

the amount is not deposited within a month from the receipt of the order, the appeal is liable to be dismissed."

8. The writ petitioner has challenged the order dated 27.7.98 read with the order dated 19.3.97 passed by Customs Excise & Gold (Control) Appellate Tribunal Mumbai in the present writ petition.

9. Mr. S.P. Kesarwani learned Standing Counsel appearing for the respondents has raised a preliminary objection about the maintainability of this writ petition on the ground that the orders impugned in the writ petition have all been passed by the Tribunal situate at Mumbai and no cause of action has arisen within the territorial jurisdiction of this Court so as to entertain the writ petition and exercise jurisdiction under Article 226 of the Constitution of India. According to him the adjudication proceedings took place before the authorities at Mumbai. Appeal was also considered at Mumbai, modification application was also considered at Mumbai. Therefore this Court can not pass any order interfering with the order of the Tribunal located at Mumbai.

10. He further submitted that at no stage of the proceedings either before the adjudicating authority or before the Tribunal any objection regarding jurisdiction of the said authority on the ground of lack of territorial jurisdiction was ever raised by the petitioner and only it was urged on behalf of the petitioner before the Tribunal that the Commissioner of Customs Mumbai alone is the competent authority to adjudicate the proceedings. That apart in the ground of appeal before the Tribunal the petitioners specifically took the point with regard to the jurisdiction to the effect that the adjudication proceeding should have been conducted by the Commissioner of Customs Mumbai and not by the Commissioner of Customs (Preventive) Mumbai. It therefore appears that the case of the petitioners all along was that the Commissioner of Customs at Mumbai has exclusive jurisdiction to adjudicate upon the matter.

11. In the writ petition except stating that the petitioner is engaged in the manufacture of carpets at Ghosia District Sant Ravi Das Nagar (Bhadohi) and some verification was to be done in the factory of the petitioner by way of passing reference, the petitioner has not shown that any cause of action for challenging the impugned order of the Tribunal at Mumbai has arisen within the jurisdiction of this Court. The relieves claimed by the writ petitioner has already been reproduced hereinbefore. All the relief's have been claimed against the action/ orders passed by the Tribunal at Mumbai.

12. Be that as it may the matter being proceeded with by Customs Excise & Gold (Control) Appellate Tribunal Mumbai which had passed the impugned order as already stated hereinbefore there is no scope for challenging the orders of the Tribunal at Mumbai before this Court as no cause of action has arisen within the jurisdiction of this Court.

13. The decision of Hon'ble Supreme Court in the case of Navin Chandra N Majithia Vs. State of Maharashtra & others (reported in 2000(2) UJ 1502 (SC) relied upon by the learned counsel for the petitioners would not be applicable to the facts of the

present case in as much as it related to a case where entire transaction took place at Mumbai but the First Information Report was lodged at Shillong. The writ petition was filed at Mumbai High Court praying for mandamus to be issued to Meghalaya Government to transfer the investigation to Mumbai Police. No such situation exists in the present case. As already mentioned hereinbefore the impugned orders have been passed by the Tribunal at Mumbai and there is no averment in the writ petition on the basis of which it can be held that any cause of action had arisen within the jurisdiction of this Court.

14. We accordingly hold that this Court has no jurisdiction to entertain the writ petition. The Mumbai High Court has the exclusive jurisdiction for the purpose. The writ petition therefore is dismissed. The interim order passed by this Court stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.7.2001

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

Civil Misc. Writ Petition No. 25929 of 2001

Santosh Kumar ...Petitioner
Versus
State of U. P. and others ...Respondents

Counsel for the Petitioner:
Sri R.J. Mishra

Counsel for the Respondents:
S.C.

Fertiliser (Control) order, 1985- sub-clause (3) of Clause 31- it is mandatory to record the reasons for cancellation of the licence which means that if the licensor submits explanation to the charges given in the notice, the authorities are required to consider explanation and give reasons for not accepting the explanation given by him. (Held in para 4).

The impugned order dated 20.6.2001 (Annexure 6 to the writ petition) is hereby quashed.

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

1. The petitioner has sought to quash the order dated 20.6.2001 (Annexure '6' to the writ petition) cancelling his licence for fertilizers.

2. The petitioner is a retail dealer of fertilizers. He obtained a licence for selling fertilizers under the provisions of Fertiliser (Control) Order, 1985 (in short the 'Order'). On 9.1.2001 the Fertilizer Inspector, Kerakat, district Jaunpur took a sample of DAP fertilizers from the shop of the petitioner. On 24.3.2001 the District Agriculture Officer, respondent No.2 issued a show cause notice to the petitioner that report of the analyst indicates that the fertilizer, which was being sold by the petitioner from his shop, is deficient in certain ingredients and is not up to the mark. The petitioner submitted reply to the show cause notice. In his reply, a copy of which has been annexed as Annexure '5' to the writ petition, it was stated that the quantity of phosphorus and other ingredients was less hardly by 1-2 per cent. He was purchasing it from the Company that is Hind Lever Chemical, Rajpura. The company supplied fertilizer to the petitioner. The mixture of various chemicals was done by the company and as a retailer, he is not responsible for it.

3. One of the objections raised was that the sample obtained by the Inspector should have been sent for analysis within seven days by him from the date of taking sample and the report of the Analyst should be sent within 60 days from the date of receipt of sample but the sample was taken on 9.1.2001 and it was received in the Laboratory on 12.1.2001 and analysis was done on 5.3.2001. The report of the Analyst was beyond 60 days from the date of receipt of sample and the report of the Analyst cannot be taken as correct. Respondent No.2, without recording any finding in regard to explanation of the petitioner and the objection raised by him, cancelled the licence of the petitioner without assigning any reason. Sub-clause (3) of Clause 31 of the Order provides that wherever a certificate is suspended or cancelled under this Clause, the registering authority or, as the case may be, the Controller *shall record a brief statement of the reasons* for such suspension or, as the case may be, cancellation and furnish a copy thereof to the person whose certificate has been suspended or cancelled. It reads as under:-

"(3) Wherever a certificate is suspended or cancelled under this clause, the registering authority or, as the case may be, the Controller shall record a brief statement of the reasons for such suspension or, as the case may be, cancellation and furnish a copy thereof to the person whose certificate has been suspended or cancelled."

4. It is mandatory to record the reasons for cancellation of the licence which means that if the licensor submits explanation to the charges given in the notice the authorities are required to consider explanation and give reasons for not accepting the explanation given by him.

5. As noted above we find that respondent no.2 did not consider the explanation given by the petitioner and the reason for not accepting the explanation. The impugned order has been passed by respondent no.2 without assigning any reason.

6. In view of the above the writ petition is allowed. The impugned order dated 20.6.2001 (Annexure-6 to the writ petition) is hereby quashed. Respondent no.2 is directed to pass order afresh in accordance with law within a month from the date of production of a certified copy of this order keeping in view of the observation made above.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 7.8. 2001

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

Criminal Revision No. 2035 of 2001

Jai Pal Singh ...Revisionist
Versus
State of U.P. and others
...Opposite Parties

Counsel for the Revisionist:
Shri R.P. Singh Yadav

Counsel for the Respondents:
A.G.A.

Criminal Procedure Code-section 240- in cases of trials of warrant cases by Magistrates, if the cases are instituted upon police report the trial shall be treated to have commenced when charges are framed under section 240 of

the Code of Criminal Procedure, 1973. (Held in para 4).

In the case in hand undisputedly 17.2.1997 was fixed for framing of charges as such in view of the subsequent decision of Common Cause Society trial could not be deemed to have commenced and accordingly the period of two years limited in the earlier decision of Common Cause could not be deemed to have expired. Thus the revisional court has committed no error in setting aside the order of learned Magistrate whereby the applicant in revision was discharged.

Case law discussed:
AIR 1996 SC 1619
ACC 1997 (34) 342

(Delivered by Hon'ble J.C. Gupta, J.)

1. Heard Shri R.P. Singh Yadav for the applicant in revision and the learned A.G.A. for the State.

2. It appears that on the basis of first information report dated 1.6.1994 case was investigated and charge sheet against the applicant and three others was submitted in the court of the Magistrate on 4.7.1994. The Magistrate took cognizance and sent the record to copying section for preparation of copies. The record was then received back in the court of the Magistrate on 16.7.1994. The accused persons appeared in the court on 18.8.1994. The case remained pending in the court of Magistrate and 17.2.1997 was fixed for framing of charges. On this date an application was moved on behalf of the accused persons to discharge them on the basis of guide lines framed by the Apex Court in the case of ***'Common Cause' a Registered Society through its Director Vs. Union of India and others A.I.R. 1996 S.C. 1619.*** The learned Magistrate allowed the said application on the ground that since the offence under Section 323 I.P.C. is punishable up to a period of one year and offence under Section 324 I.P.C. upto a maximum period of three years the trial as per the above guide lines should have been concluded within a period of two years and if the same was not so concluded the accused is entitled to acquittal or discharge, as the case may be. The complainant challenged the said order of the learned Magistrate in revision before the Sessions Judge in Criminal Revision No. 318 of 1999 and by the impugned order said revision has been allowed. The learned Sessions Judge referred to the decision of ***Common Cause Society Vs. Union of India reported in A.C.C. 1997 (34) 342*** and has held that since the case was fixed for 17.2.1997 for framing charges in law it would be deemed that trial had not yet commenced and, therefore, limitation of two years period had not yet commenced. In the subsequent judgment of Common Cause Society, the Apex Court clarified and modified the previous judgment and in paragraph II it was observed.

II. The phrase "pendency of trials" as employed in paras1(a) to 1(c) and the phrase "non-commencement of trial" as employed in paras 2(b) to 2(f) shall be construed as under:

(i) ……

(ii) In cases of trials of warrant cases by Magistrates if the cases are instituted upon police reports the trials shall be treated to have commenced when charges are framed under Section 240 of the Code of Criminal Procedure, 1973 while in trials of warrant cases by Magistrates when cases are instituted otherwise than on police report such trials shall be treated to have commenced when charges are

framed against the accused concerned under Section 246 of the Code of Criminal Procedure, 1973"

3. Undisputedly the case in hand was a trial of warrant case instituted upon police report and as per the above guide lines in such cases trial shall be treated to have commenced when charges are framed under Section 240 of the Code of Criminal Procedure. In the earlier decision of Common Cause case, in paragraph 2 (f) it was laid down that where the cases pending in criminal courts under I.P.C. or any other law for the time being in force are punishable with imprisonment up to three years, with or without fine, and if such pendency is for more than two years and if in such cases trial have still not commenced, the criminal court shall discharge or acquit the accused, as the case may be, and close such cases. By the subsequent decision the phrase 'pendency of trial' and the phrase 'non-commencement of trial' as employed in the aforesaid paragraph was explained and it was observed that in cases of trials of warrant cases by Magistrates if the cases are instituted upon police report the trial shall be treated to have commenced when charges are framed under Section 240 of the Code of Criminal Procedure, 1973.

4. In the case in hand undisputedly 17.2.1997 was fixed for framing of charges as such in view of the subsequent decision of Common Cause Society trial could not be deemed to have commenced and accordingly the period of two years limited in the earlier decision of Common Cause could not be deemed to have expired. Thus the revisional court has committed no error in setting aside the order of learned Magistrate whereby the applicant in revision was discharged.

5. For the above reasons this revision is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.8.2001

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

Civil Misc. Writ Petition No. 28351 of 2001

Dugdh Utpadak Sahakari Samiti Ltd. and another ...Petitioner

Versus

The Ayukt, Uttar Pradesh, Lucknow and others ...Respondents

Counsel for the Petitioners:
Sri Sudhakar Pandey

Counsel for the Respondents:
Sri G.D. Mishra

Cooperative Societies Act 1965 S. 14- Power of Registrar-amendment in Bye-laws 65 of the society with retrospective effect- whether valid?

Held- No.- unamended provision of Bye laws provides the eligibility of members for votes who had supplied the milk for 180 days in proceeding Cooperative year- by proposed amendment further added about eligibility of such member who had provided minimum 500 liters of milk- Held- Para 6

The Registrar has not been given any power to make any amendment in the bye laws giving effect to such bye laws retrospectively. The bye law no. 5 referred to above also does not provide that it shall be given retrospective effect.

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

1. The petitioners have sought to quash the amendment made in bye-laws of the society known as Dugdh Utpadak Sahkari Samiti Ltd., petitioner no.1 (in short the society), by an order passed by the Registrar, Milk Co-operative Society, U.P., Lucknow on 19.4.2001.

2. The society is a registered society under the provisions of U.P. Co-operative Societies Act and Rules framed thereunder. It has its own bye-laws. The office bearers of the managing committee of the society are to be elected in accordance with the bye-laws of the society. The last election of the office bearers of the society was held in the year 1998 and the term is expiring on 10.8.2001. The Commissioner/Registrar, Dugdh Sahkari Samitiyan Dugdhshala Vikas Uttar Pradesh, Lucknow, respondent no.1, has issued notification dated 19.4.2001 by which amendments have been made in the bye-laws of the society. He has approved the impugned bye-law 65 of the society whereby a member of the society shall have no right to vote if he has not supplied milk for 180 days in the preceding co-operative year and minimum 500 litres of milk. The unamended bye law provided that a member shall have no right to vote if he has not supplied milk for 180 days in the preceding co-operative year but the amended bye-law added further condition that such member must have supplied minimum 500 litres of milk.

3. We have heard Sri Sudhakar Pandey, learned counsel for the petitioners, and Sri G.D. Mishra, learned counsel for the respondents.

4. The core question is whether the amendment can be made with retrospective effect. The members are to participate in the election after expiry of term of the present committee of management. The unamended bye-law no.65 did not provide that a member should have supplied 500 litres of milk in a co-operative year. The only condition was that such member should have supplied milk for 180 days. If the amendment is given retrospective effect it will deprive the members to cast their votes in the ensuing election of the members and office bearers of the committee of management.

5. The settled principle of law is that amendment should not be taken as retrospective unless the statute, affecting substantive rights, provides that it is to be given effect retrospectively. Secondly, a delegated legislation cannot be made retrospectively unless the statute itself confers power on the authority framing delegated legislation. Section 14 of the U.P. Co-operative Societies Act, 1965 confers power to make amendment in the bye-law which reads as under :-

"14. Power to direct amendments in bye-laws – (1) When the Registrar is of the opinion, whether on the representation of a member of a Co-operative Society, or otherwise, that an amendment in the bye-laws of a co-operative society is necessary or desirable in the interests of such society or in public interest, he may, under such circumstances as may be prescribed, by order in writing issued to the society by registered post, require the society to make the amendment within such time as he may specify in the order.

(2) If the society fails to make the amendment within the time specified, the Registrar may, after giving the society an opportunity of being heard, register such amendment and issue to the society by registered post a copy of the amendment certified by him as a copy and such copy shall be conclusive evidence that the amendment has been duly made and such copy registered."

6. The Registrar has not been given any power to make any amendment in the bye-laws giving effect to such bye-laws retrospectively. The bye-law no.65 referred to above also does not provide that it shall be given retrospective effect.

7. In view of the above the writ petition is allowed and disposed of with the clarification that the amendments of the bye-laws made by respondent no.1 by notification dated 19..4.2001 is not retrospective.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.7.2001

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

Civil Misc. Writ Petition No. 26942 of 2001

Gyan Singh ...Petitioner
Versus
The Regional Transport Authority, Aligarh and another ...Respondents

Counsel for the Petitioner:
Shri A.R. Dube

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- mandamus will be issued to enforce the duty laid on a particular officer under law but if no duty is cast under any statute or law, the Court will not issue a mandamus to decide the matter in quasi judicial manner treating the objection as a lis between the two parties. (Held in para 7).

If the authority is going to take decision, it may consider various aspects including the objection of any person but unless the authority is bound under law to decide objections of an objector after providing the opportunity of hearing to the objector and pass the order by speaking order, the High Court is not bound to issue any mandamus in exercise of its power to issue a writ of mandamus under Article 226 of the Constitution to decide such objection.

Case law discussed:
AIR 1992 SC 443
1997(3) ALR 542
AIR 1969 SC 1306

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

1. The petitioner seeks a writ of mandamus commanding the respondents to decide his objection in respect of grant of temporary or permanent stage carriage permit on the route Sikandara Rau-Jalesar-Hathras Junction (in short the 'route').

2. The petitioner is an existing operator on the route in question. His version is that 40 stage carriages are being plied on the aforesaid route on the basis of permanent permits granted to him and other operators by the authority concerned. The respondents are also going to extend the route in question, which will overlap 15 Kms. route of the petitioner out of 25 Kms., the total length of the route. Certain other persons have applied for grant of permit on the route in

question. The petitioner is alleged to have filed objection before the Regional Transport Authority, Aligarh, respondent No.1 against the grant of any further permit. His grievance is that if other permit is granted to other persons on the route in question, the petitioner and other operators will not be able to meet out the expenses of vehicles, which they are running along with the taxes, which they are liable to pay. The question is whether the petitioner has a right to seek mandamus commanding the respondents to consider his objection by a speaking order and thereby to function as a quasi judicial authority taking into consideration the interest of the petitioner and the persons to whom permit is to be granted.

3. In this respect we have to trace out the history of Legislation. Section 46 of the Motor Vehicles Act, 1939 (in short the 'Act') provided for submission of the application for grant of stage carriage permit. Section 47 of the said Act provided the procedure in considering application for stage carriage permit by the Regional Transport Authority. Sub-section (1) of Section 47 provided for various guidelines, which were to be, considered by the Regional Transport Authority while considering an application for stage carriage permit. Clause (*f*) of sub-section (1) of Section 47 of the Act reads as under:-

"47. **Procedure of Regional Transport Authority in considering application for stage carriage permit**- (1)…..

(a)….

(b)….

(c)….

(d)….

(e)….

(f) the condition of the roads included in the proposed route or area;

and shall also take into consideration any representations made by persons already providing passenger transport facilities by any means along or near the proposed route or area, or by any association representing persons interested in the provision of road transport facilities recognised in this behalf by the State Government, or by any local authority or police authority within whose jurisdiction any part of the proposed route or area lies: (emphasis supplied)

4. Provided that other conditions being equal, an application for a stage carriage permit from a co-operative society registered or deemed to have been reregistered under any enactment in force for the time being (and an application for a stage carriage permit from a person who has a valid licence for driving transport vehicles shall, as far as maybe, be given preference over applications from individual owners)."

5. The Act was repealed by Section 217 of the Motor Vehicles Act, 1988 (in short '1988 Act'). Section 70 of 1988 Act laid down the conditions for grant of permit. Section 71 lays down the procedure of Regional Transport Authority in considering the application for stage carriage permit. It does not contain any provision for considering any representation of any person who is already providing passenger transport facilities. The Legislation deliberately deleted this provision with the result that an existing operator cannot claim any right of entertaining his objection and give him opportunity of hearing. This question was considered by the apex

Court in ***Mithilesh Garg, etc. etc., Vs. Union of India and others etc. etc. AIR 1992 SC 443*** where the existing operators challenged the liberalization of private sectors operations in the Road Transport field. It was held that Article 19(1)(g) of the Constitution of India guarantees to all citizens the right to practice any profession, or to carry on any occupation, trade or business subject to reasonable restrictions imposed by the State under Article 19(6) of the Constitution of India. And in that context the State can grant permit to private operators and the existing operators have no right to challenge the authority of the State Government to grant such permits. In regard to the filing of objections by the existing operators, the Supreme Court took note of the amendments and held that the right to file objection has been taken away under the new Act. It was observed as under:-

"The Parliament in its wisdom has completely effaced the above features. The scheme envisaged under Sections 47 and 57 of the old Act has been completely done away with by the Act. The right of existing-operators to file objections and the provision to impose limit on the number of permits have been taken away. There is no similar provision to that of Section 47 and Section 57 under the Act. The Statement of Objects and Reasons of the Act shows that the purpose of bringing in the Act was to liberalise the grant of permits. Section 71 (1) of the Act provides that while considering an application for a stage carriage permit the Regional Transport Authority shall have regard to the objects of the Act. Section 80 (2), which is the harbinger of Liberalisation, provides that a Regional Transport Authority shall not ordinarily refuse to grant an application for permit of any kind made at any time under the Act. There is no provision under the Act like that of Section 47 (3) of the Old Act and as such no limit for the grant of permits can be fixed under the Act. There is, however, a provision under Section 71(3) (a) of the Act under which a limit can be fixed for the grant of permits in respect of the routes which are within a town having population of more than five lakhs."

6. Learned counsel for the petitioner has placed reliance upon the decision of this Court in ***Subhash Chandra Sharma and The Regional Transport Authority, Aligarh Region, Aligarh 1997(3) ALR 542***. In this case the petitioner had filed a writ of mandamus commanding the Regional Transport Authority, Aligarh not to grant any permit on the route prayed for therein. The Court disposed of the writ petition with the observations that the petitioner can raise the objection before the Regional Transport Authority. In this case the Court was not considering whether a mandamus can be issued to the Regional Transport Authority to decide an objection. It had also not taken note of the decision of the Supreme Court in ***Mithilesh Garg*** (supra).

7. It is also well settled that mandamus will be issued to enforce the duty laid on a particular officer under law but if no duty is cast under any statute or law, the Court will not issue a mandamus to decide the matter in quasi judicial manner treating the objection as a *lis* between the two parties vide ***Praga Tools Corporation Vs. C.V. Imanual and others AIR 1969 SC 1306***. If the authority is going to take decision, it may consider various aspects including the objection of

any person but unless the authority is bound under law to decide objections of an objector after providing the opportunity of hearing to the objector and pass the order by speaking order, the High Court is not bound to issue any mandamus in exercise of its power to issue a writ of mandamus under Article 226 of the Constitution to decide such objection.

8. In view of the above, the writ petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.8.2001

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

Special Appeal No. 508 of 2000

Manoj Singh ...Petitioner-Appellant
Versus
The Public Service Commission, U.P. Allahabad and others ...Respondents

Counsel for the Petitioner:
Shri Indra Kumar
Shri A.P. Sahi

Counsel for the Respondents:
Shri S.K. Singh
Shri B.N. Singh

U.P. Motor Vehicle Rules- Rule-213 (4) Service- candidature for the post of Regional Inspectors (Technical) – Rejected on the ground- the petitioner not possess the practical experience of working in large automobile workshop of the Government held- not proper- experience of working in largest automobile work shop either approved by the Government or by Private Sector makes no difference- according necessary direction issued to the commission for further action.

(Held para 4)

It has, however, neither been mentioned in the advertisement nor prescribed in Rule 213 (4) of the Rules framed under the U.P. Motor Vehicle Act. It will be quite unreasonable to construe the "large automobile workshop" as that work shop which was approved by the State Government because many automobile workshop, which are very big and cannot be excluded for the purpose. More ever, the decision of the Commission cannot override the statutory rule. That apart, the advertisement does not also mention that the large automobile workshop only relates to the workshop approved by the State Government. This aspect of the matter, in our view, appears to have been overlooked by the learned Single Judge. Accordingly, we are of the view that the U.P. Public Service Commission should reconsider the case of the appellant for appointment afresh and take into account if the appellant has worked in a large automobile workshop meaning thereby the large automobile workshop either approved by the State Government or in the private sector.

(Delivered by Hon'ble S.K. Sen, C.J.)

1. We have heard Sri A.P. Sahi, learned counsel for the petitioner-appellant and Sri B.N. Singh, learned counsel appearing for respondents.

2. In this special appeal the appellant has challenged the order dated 17.8.2000 passed by the learned Single Judge dismissing the writ petition filed by him.

3. The appellant has applied for recruitment to the post of Regional Inspector (Technical) and Assistant Regional Inspector (Technical) pursuant

to Advertisement No.A-4/E-1/1999 in U.P. Transport Department. The recruitment was to be made on the basis of the said advertisement, which prescribes educational qualifications and other qualifications enumerated against item no. 5 of the advertisement. It was specifically provided in the advertisement that for the post of Regional Inspector (Technical) the candidates must possess five years' experience and for Assistant Regional Inspector (Technical) the candidates must possess three years practical experience of repairs, overhauling and inspection of motor vehicles in a 'large automobile workshop.' The candidature of the petitioner has been rejected on the ground that he did not possess the essential qualification inasmuch as the experience certificate produced by the petitioner was issued by a workshop different from the one prescribed for a 'large automobile workshop'. The said decision of the Commission was challenged in the writ petition. The learned Single Judge, however, dismissed the writ petition since according to him the petitioner did not possess the requisite qualification of having experience of working in a 'large automobile works'. Coming to his conclusion the learned Single Judge relied, upon the decision of the Commission dated May 12, 2000 taken on the basis of the recommendation made by the Transport Department which defines large scale automobile workshop'.

4. The contention of the Mr. B.N. Singh, learned counsel for the Commission before us is that the candidate must possess practical experience in a 'large automobile workshop' approved by the State Government. It has, however, neither been mentioned in the advertisement nor prescribed in Rule 213 (4) of the Rules framed under the U.P. Motor Vehicle Act. It will be quite unreasonable to construe the 'large automobile workshop' as that workshop which was approved by the State Government because many automobile workshops which are very big and cannot be excluded for the purposes. Moreover, the decision of the Commission cannot override the statutory rule. That apart, the advertisement does not also mention that the large automobile workshop only relates to the workshop approved by the State Government. This aspect of the matter, in our view, appears to have been overlooked by the learned Single Judge. Accordingly, we are of the view that the U.P. Public Service Commission should reconsider the case of the appellant for appointment afresh and take into account if the appellant has worked in a large automobile workshop meaning thereby the large automobile workshop either approved by the State Government or in the private sector. The Commission shall scrutinize the document and evidence that has been produced by the appellant and in the event the Commission holds that the appellant has no such qualification of work in a large automobile workshop, which is essential pursuant to the advertisement it shall record reasons for the same and in case the Commission finds that the appellant has requisite experience of working in a large automobile workshop it shall declare result accordingly and recommend the case of the appellant for appointment. The Commission shall take decision in the matter expeditiously.

5. Accordingly, the order passed by the Single Judge is set aside and the

special appeal is allowed to the extent indicated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.7.2001

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

Civil Misc. Writ Petition No. 27885 of 2001

Arvind Kumar Agrawal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri Shashi Nandan

Counsel for the Respondents:
S.C.

Constitution of India-Article 226- The State Government by issuing Government Order dated 12.6.2001 has given relaxation in regard of construction of cinema halls within the radius of 5 Kms.- The Government has framed policy keeping in view the interest of the public of the area and other factors- There is no illegality in the said Government Order. (Held in para 8).

Every citizen has a fundamental right to carry on any occupation, trade or business guaranteed to him by Article 19(1) (g) of the Constitution. Under Clause (6) of the said article the State can, by law, impose reasonable restrictions on the exercise of such a right. Restriction can be imposed by 'Law' which means legislative enactment and the subordinate legislation. But a restriction cannot be imposed by executive orders unsupported by the law.

Case law discussed:
1995 (2) EFR 169

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

1. The petitioner has challenged clauses 7 and 8 of the Government Order dated 12.6.2001 whereby certain relaxation in regard to the constructions of cinema halls has been given to the persons raising constructions on complying with certain conditions.

2. The petitioner is running the business of Basant cinema since 1969 and is also running Ganga cinema since the year 1987. Both the aforesaid cinema halls are situated at Thana Bhawan, district Muzaffarnagar.

3. Respondent No.3 applied to the District Magistrate/Licensing Authority for construction of cinema halls. He has granted permission to him to construct cinema halls. The grievance of the petitioner is that the site of the cinema hall which is to be constructed by respondent No.3 is hardly at a distance of 3 kms. from Basant cinema and 3.5 kms. from Ganga cinema and it will affect the business of the petitioner for two reasons, firstly it is near to the cinema hall of the petitioner and secondly the cinema halls, which are to be constructed, will get tax exemption.

4. The State Government has issued various Government Orders framing the policy when the Licensing Authority is to grant permission for raising construction of cinema halls. The State Government issued a Government Order dated 11.8.2000 for laying down its policy to encourage the construction of new cinema halls throughout the State of U.P. Clause (3) of the aforesaid Government Order provides that in case the cinema hall is constructed in an area having population

of one lac then proprietor shall be entitled to the benefit of exemption of entertainment tax to the extent of 100% while in respect of cinema halls constructed at a place having population in excess of one lac then the aforesaid exemption would be available for a period of three years and thereafter for a period of another two years at the rate of 50%. The State Government issued another Government Order dated 9.1.2001 amending the clauses 7 and 8 of the Government Order dated 11.8.2000. It provided that in case of Nagar Panchayat the cinema hall should not be situated within 5 Kms. from the existing cinema hall while in case of Nagar Nigam and Nagar Palika Parishad, the aforesaid restriction of distance was fixed at 5 kms. from an existing cinema hall.

5. The State Government issued another Government Order dated 12.6.2001 whereby Clauses 7 and 8 of the previous Government Orders were further modified to the extent that power was given to the Licensing Authority to give relaxation in regard to the distance to be maintained between the existing cinema halls and the halls which are to be constructed with a view to encourage the construction of new cinema halls.

6. The grievance of the petitioner is in regard to the power conferred on the Licensing Authority to give relaxation in regard to the distance to be maintained between the existing cinema halls and the cinema halls, which are to be constructed.

7. The petitioner cannot claim that the other cinema halls should not be constructed so as to give him monopoly in running the cinema hall within a certain area. Every citizen has a right to carry on business at any place.

8. In ***Daulat Ram Gupta Vs. State of U.P. and others 1995(2) EFR 169*** where the Government issued an order that the Collector shall not appoint any Diesel dealer within 5 Kms. radius of a regular Diesel retail out let of the Company, was held violative of Article 19(1)(g) of the Constitution. It was observed that every citizen has a fundamental right to carry on any occupation, trade or business guaranteed to him by Article 19(1)(g) of the Constitution. Under Clause (6) of the said article the State can, by law, impose reasonable restrictions on the exercise of such a right. Restriction can be imposed by "law" which means legislative enactment and the subordinate legislation. But a restriction cannot be imposed by executive orders unsupported by the law.

9. The State Government by issuing Government Order dated 12.6.2001 has given relaxation in regard of construction of cinema halls within the radius of 5 Kms. The Government has framed policy keeping in view the interest of the public of the area and other factors. There is no illegality in the said Government Order.

10. In view of the above, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 17, 2001

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 30411 of 1990

Krishnavatar Shukla ...Petitioner
Versus
The State of Uttar Pradesh and others ...Respondents

Counsels for the Petitioners:
Sri D.S. Srivastava
Sri R.K. Pande
Sri S.K. Shukla
Sri B.N. Tiwari

Counsel for the Respondents:
Sri S.S. Sharma
S.C.

Constitution of Article 226- Regularisation of daily wage employees can be made only when posts are created-abolishing the engagement of daily wage worker is within the power of employer and the said decision is not available to be interfered by the Court unless it is held to be vitiated by malafide or arbitrary (Held in para 12).

It is held that the order dated 16th August, 1990 impugned in the writ petition does not suffer from any error. However, it is provided that petitioner will be considered for any future vacancy in the department by waiving age bar as and when any engagement is made by the department on daily wage basis or regular vacancy.

Case law discussed:
1994 (3) UPLBEC 1460
2001 (2) UPLBEC 1249
1996 (7) SCC-34

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard Sri D.S. Srivastava, counsel for the petitioner and Sri S.S. Sharma, Standing Counsel appearing for the respondents.

2. Counter and rejoinder affidavits have been exchanged and with the consent of the parties the writ petition is being finally decided.

3. This writ petition has been filed by the petitioner praying for issue of a writ, order or direction in the nature of certiorari quashing the order dated 16th August, 1990 passed by the Executive Engineer, Rural Engineering Services, Banda Division, Banda. The aforesaid decision was taken in pursuance of the direction issued by the Chief Engineer that in the office no work charge employees or daily wage employees be allowed to continue.

4. The petitioner's case is that he was appointed in the department of Rural Engineering as work charge Chowkidar in the year 1988 at the rate of Rs.300/- per month. The petitioner worked from 6th April, 1988 to 3.1.1989. Petitioner's case is that the Chief Engineer passed an order in his favour on 15th June, 1989 that petitioner may be regularised if any post exists and till such time he may be paid Rs. 20/- per day. Petitioner further refers to order dated 3.7.1989 passed by the Executive Engineer by which petitioner was engaged at the rate of Rs. 20/- per day on the post of Clerk in work charge establishment. Petitioner states that he has been continuously working from 15th June, 1989 till the order of termination was passed on 16th August, 1990. Petitioner's case is that he was continuing

from April, 1988 except breaks of 2 or 3 days. Petitioner has stated that he has completed 240 days during his regular appointment. Petitioner has further stated that inspite of order dated 15th June, 1989 passed by the Chief Engineer his services were not regularised.

5. The respondents have filed a counter affidavit in which it has been stated that petitioner was appointed as daily wager on fixed rate and his working period was for fixed periods on the basis of sanction. It has further been stated that there is no post of Clerk-cum-Chowkidar sanctioned in the work charge establishment. Petitioner was engaged on the basis of sanction by Chief Engineer. Petitioner is not working since April, 1990.

6. The petitioner has filed a rejoinder affidavit and has again reiterated that he has been working from April, 1988 and has completed 240 days prior to 16th August, 1990. Petitioner has alleged that his services have been terminated without complying the provisions of Section 6N of the Industrial Disputes Act, 1947. The petitioner has further placed reliance on judgment of this Court in Writ Petition No. 8148 of 1990 (H.M. Rizvi and others Vs. Rural Engineering Service, U.P. and others).

7. The counsel for the petitioner in support of his submissions has stated that termination of the services of the petitioner was illegal being in violation of Section 6 N. The petitioner has further stated that he is also entitled to the benefit of judgment given by this Court in H.M. Rizvi's case (Supra). The petitioner has placed reliance on another judgment of this Court in Writ Petition No. 31498 of 1990 (Kailash Kumar Verma Vs. State of U.P. and other). In the aforesaid judgment of Kailash Kumar Verma (supra), this Court has followed the order of Lucknow Bench of this Court passed in H.M. Rizvi's case (supra).

8. Learned Standing Counsel has refuted the submissions made by counsel for the petitioner. Learned Standing Counsel has stated that the petitioner was engaged only on daily wage basis and department has every jurisdiction to terminate daily wage engagements and no error was committed by the department in dispensing with daily wage and work charge employees. With regard to violation of Section 6 N of the Industrial Disputes Act, 1947 learned Standing Counsel submitted that for that petitioner ought to have raised industrial dispute. Learned Standing Counsel has also relied on a judgment of this Court **1994 (3) U.P.L.B.E.C. 1460, Babu Ram and another Vs. Town Area Committee, Hasayan, district Aligarh and others** and judgment of the Apex Court **2001(2) U.P.L.B.E.C. 1249, Notified Area Council, Pipili and another Vs. Gahar Mohammad and another.**

9. After having heard counsel for the petitioner and learned Standing Counsel and perusing the record, it is clear that petitioner's period of working is only from April, 1988 to 16th August, 1990. On the basis of the aforesaid period, petitioner does not become entitle for regularisation in service. Regularisation in service on the post falling outside the purview of the Public Service Commission can be claimed only in accordance with provisions of U.P. Regularisation of Ad-hoc Appointments (on posts outside the purview of Public

Service Commission) Rules, 1979. In the aforesaid Rules the cut of date for regularisation Original is 1.10.1986. The decision which has been impugned in the writ petition is a general decision taken by the department for dispensing with daily wage employees and work charge employees. The judgment of learned Single Judge in H.M. Rizvi's case (supra) do support the contention of the petitioner but after the aforesaid decision of learned Single Judge there are several pronouncements of Apex Court which hold that disengagement of daily wage employees does not give any right to him. In **1996 (7) S.C.C. 34, State of U.P. and others Vs. U.P. Madhyamik Shiksha Parishad Sharamik Sangh and others**, the Apex Court held that the regularisation of daily wage employees can be made only when post are created. The recent decision of Apex Court in Notified Area Council's case (supra), it has clearly been laid down that abolishing the engagement of daily wage worker is within the power of employer and the said decision is not available to be interfered by the Court unless it is held to be vitiated by malafide or arbitrary. In paragraph 4 of the said judgment the Apex Court has laid down as under:

"4. From the discussions in the judgment, it is manifest that the High Court "has not appreciated" the resolution of the N.A.C. abolishing the engagement of daily wage workers and has also taken exception to the Executive Officer terminating the appointments of the respondents who were appointed by resolution passed by the Council. From the materials available on record, it is clear that on both the counts the High Court fell into error. The position is fairly well settled that continuance or abolition of posts is within the power of the employer and any decision in that regard is not available to be interfered with by the Courts unless it is held to be vitiated by mala fide or arbitrary. From the discussions in the judgment under appeal, we do not find that the High Court took into consideration any material on record to come to the conclusion that the resolution passed by the NAC, dispensing with the engagement of daily wage workers, was vitiated on any count. If the employees could not continue as daily wage workers, then the question of their regularisation in the post did not arise. It is relevant to note here that the regular appointments purportedly made by the letter dated 22nd March, 1995 had been cancelled within a week, by the letter dated 29th March, 1995. Therefore, when the matter was being considered by the High Court, the case of the respondents could only be considered as daily wage workers and not as regular employees."

10. There is no allegation in the writ petition that decision of respondents to discontinue the petitioner's engagement was mala fide or was arbitrary.

11. In view of the clear pronouncement of the Apex Court on the subject I am not persuaded to follow the judgment of this Court in H.M. Rizvi's case (supra). With regard to contention of the petitioner's counsel that petitioner's services have been terminated in violation of Section 6 N of the Industrial Dispute Act, learned Standing Counsel is right in his submission that for the aforesaid it was open to the petitioner to raise an industrial dispute. The petitioner, however, having worked on daily wage basis in the department is entitled to be considered for any future vacancy as daily

rated worker or regular employee according to law by waiving age bar if any. The aforesaid directions were also issued by the Apex Court in the case of Notified Area Council (supra).

12. In view of the above, it is held that the order dated 16th August, 1990 impugned in the writ petition does not suffer from any error. However, it is provided that petitioner will be considered for any future vacancy in the department by waiving age bar as and when any engagement is made by the department on daily wage basis or regular vacancy.

13. With the aforesaid observations, the writ petition is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.8.2001

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

Civil Misc. Writ Petition No. 30315 of 2001

Uttar Pradesh Lekhpal Sangh Allahabad ...Petitioner

Versus

State of U.P. through the Collector/District Magistrate, Allahabad ...Respondents

Counsel for the Petitioner:
Shri Gulab Chandra

Counsel for the Respondents:
S.C.

Constitution of India-Article 226- High Court while considering a petition in exercise of jurisdiction under Article 226, Constitution of India can entertain objection of the petitioner, in a given case, against order of Taxing Officer and adjudicate the question of the sufficiency of Court-fee, maintainability of the writ petition and its being in order. (Held in para 11).

The instant writ petition is by a single entity (i.e. 'Sangh') and single set of Court fee paid by it is sufficient.
Case law discussed:
(1997) 3 SCC 261

(Delivered by Hon'ble A.K. Yog, J.)

Re: Civil Misc. Application No. Nil of 2001 dated Nil August 2001

1. This in an application with the prayer that Court may be pleased to set aside and quash the report of the Stamp Reporter dated 18th July 2001 along with its affirming order dated 10th August 2001 passed by the Taxing Officer scribed on the back of pages 2 and 3 of the writ paper book.

2. Aforementioned report dated 18th July 2001 and order of the Taxing Officer dated 10th August, 2001 have obviously proceeded on information being given by the learned counsel (by giving names of the members of the Petitioner's Sangh) on the objection of the Stamp Reporter as follows- 'Report regarding sufficiency of Court fee will be made after names of the Lekhpal's are given." Learned counsel for the Petitioner, in a queer manner, supplied list of members by showing as if they are Petitioners- by putting title of Writ Petition and part of Writ Petition (marking the pages as 1A, 1B, 1C, 1D and 1E), apparently, obtaining 'stamp' and initials' (without details of the deponent, date of swearing of verification clause). These pages (numbers 1A to 1E) cannot be treated as part of the affidavit of the accompanying Writ Petition. Such a list is not admissible and liable to be ignored as waste paper apart from calling for an

explanation of the Oath Commissioner Rai Anandi Prasad, for which Registrar General may take appropriate action.

3. The learned counsel for the Petitioner in his aforesaid Civil Misc. Application No. Nil of 2001 dated Nil, August 2001 prayed that petition be treated as 'PIL' and otherwise in the individual capacity of Krishna Mohan Srivastava (who represents 'Uttar Pradesh Lekhpal Sangh, Allahabad as its District Secretary).

4. The Petitioner claims writ of mandamus to ensure that Respondents should allot GPF Account Numbers and to prepare and maintain other relevant records, interest awarded on GPF amount so far credited in their respective accounts and to command the Respondents to decide the representation of Petitioner's Sand dated 09th July 2001/Annexure- 5 to the petition (which has been made in the name and on behalf of the Sangh).

5. Averments in Para 2 of the petition show that Petitioner Sangh represented by its District Secretary through Krishna Mohan Srivastava, having its principla office at Sadar Tehsil at Allahabad is a duly recognized Sangh vide State Government B.O. No. 75/4-11-A-359 dated 14.11.1962. District Secretary is competent to look after the interest of its Lekhpals- members of the Sangh and to seek appropriate remedy through Courts.

6. It may be noted at the outset that, petition cannot be treated as public interest litigation as it is to espouse the matter relating to the services of the members of the Sangh.

7. Petition has been filed in the name of Sangh, which is a recognized Sangh. It is single entity and has its own existence. Present petition, in its existing form is maintainable and the judgment rendered in the petition shall be binding on its members. There is only one Petitioner and this single set of Court fee, paid by the Petitioner is sufficient.

8. Stamp Reporter/Taxing Officer relying upon a Division Bench judgment dated September 22, 1997 passed by this Court in Special Appeal No. 255 of 1993 Shyam Sunder and others Versus Meerut Mandal Vikas Nigam and others and contends that the report of Taxing Officer is final and cannot be subjected to scrutiny any more.

9. This Special Appeal was against the judgment of learned single Judge in a Writ Petition filed by several persons affirming decision of Taxing Officer to pay separate Court-fee. Special Appeal Bench held that order of Taxing Officer, under Section 5 of Court Fees Act was final and could not be challenged and no Appeal/Revision was provided under the said Act. The Bench further held that it was for Taxing Officer to refer the matter to the Chief Justice of the High Court or to such Judge of the High Court as the Chief Justice may have appointed either generally or specially in this behalf. The Bench held that under Section 5 of the Act, decision of Taxing Officer on the question of sufficiency of Court- fee, has been conferred finality by the Act. While rendering the said judgment the Division Bench referred to certain judgments considering the question of maintainability of a statutory appeal under legislative enactment Act on the question of payment of Court-fee. The Division

Bench did not advert or refer to the question of competence of the High Court (whether a single or Division Bench) exercising its extraordinary constitutional powers under Article 226, Constitution of India. Constitution is the fountainhead of all the enactments. No legislative Act can override the Constitution and abridge its powers under Article 226, Constitution of India, See (1997) 3 SCC 261 (Pr 78-82)- L. Chandra Kumar V. Union of India.

10. The contention of the Stamp Reporter as affirmed by the Taxing Officer, relying upon aforementioned Division Bench in Special Appeal of Shyam Sunder and others (supra), in my considered opinion, cannot be sustained. High Court while considering a Petition in exercise of jurisdiction under Article 226, Constitution of India can entertain objection of the Petitioner, in a given case, against order of Taxing Officer and adjudicate the question of the sufficiency of Court-fee, maintainability of the Writ Petition and its being in order.

11. The instant Writ Petition is by a single entity (i.e. 'Sangh') and single set of Court fee paid by it is sufficient.

12. Taxing Officer's report is overruled. Relief's claimed in the above Miscellaneous Application are misconceived and hence application stands rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 31.8.2001

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

Civil Misc. Writ Petition No. 34689 of 1997

Vijendra Pal Singh ...Petitioner
Versus
State of Uttar Pradesh and another ...Respondents

Counsels for the Petitioner:
Sri Gopal Krushna
Sri S.U. Khan
Sri Prem Babu Verma
Sri Dharmendra Suri

Counsels for the Respondents:
Sri S.M.A. Qazmi
Sri Sudhir Agrawal

Constitution of India - Article 226- definite finding by the Inquiry Judge that the petitioner was not guilty of accepting any bribe or illegal gratification- Any error of judgement which may be unintentional cannot be considered to be an act of misconduct.(held in para 16)

We find that the petitioner is not guilty of the misconduct and the order of his removal from service dated 11.7.1997. Annexure no. 9 to the writ petition is liable to be quashed and is accordingly quashed.

Case law discussed.
AIR 1992 SC 1233
AIR 1993 SC 1478
AIR 1999 SC 2881
1988 Supp.(1) SCR 396
JT 1996 (3) SC pg. 722

(Delivered by Hon'ble Onkareshwar Bhatt, J.)

1. By means of this writ petition under Article 226 of the Constitution of

India the petitioner has prayed for quashing of the order of removal dated 11.7.1997, Annexure 9 to the writ petition. The petitioner has also prayed for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to take the petitioner in service without any interruption or break and further to pay all the benefits as admissible under rules.

2. Affidavits have been exchanged and we have heard Sri S.U. Khan, learned counsel for the petitioner and Sri Sudhir Agarwal, learned counsel for the respondents.

3. The petitioner is a direct recruit to Higher Judicial Service and he joined the service on 7.12.1986. From June, 1991 till May 31, 1994 the petitioner was working as Additional District & Sessions Judge at Budaun. At Budaun he performed the duties of Incharge District Judge from September, 1992 till June 1, 1993. The District Magistrate and the Superintendent of Police, Budaun made complaint against the petitioner. The District Judge called for comments of the petitioner which was submitted by him. The District Judge reported his observations on the complaint. The then Inspecting Judge recommended that regular disciplinary enquiry be instituted against the petitioner on 2.6.1995. The petitioner was placed under suspension by order dated 4.11.1995. The chargesheet was issued against the petitioner on 10.4.1996 and six charges were leveled against him. The petitioner submitted his reply to the chargesheet. The Inquiry Judge submitted her report on 8.10.1996 and held the petitioner guilty of the charges no. 2,3,4 and 5. He was exonerated from the charges no. 1 and 6. The Inquiry Judge's recommendations were placed before the Administrative Committee and before the Full Court which recommended for punishment of removal of the petitioner from service. The respondent no. 1 accepted the recommendations and passed the order of removal on 11.7.1997, which is impugned in this writ petition.

4. The charges no. 2,3,4 and 5 pertain to grant of bail in four cases. The finding of the Inquiry Judge regarding grant of bail on charge no. 2 is that the reasons recorded in the bail order are not at all convincing and that bail order is not a judicious order and, therefore, it is improper. It has further been held that so far as the motive for granting this improper bail is concerned, the District Judge in his report has opined that there is no evidence against this order regarding illegal gratification and bribe etc. The Inquiry Judge has further found that bail has been granted improperly to all the three accused in this case. If it is not for illegal gratification, it could be for favouring the said accused. It cannot, therefore, be said that the charge against the petitioner is without any basis. On the third charge the finding is that 'there is no doubt that delinquent officer has granted bail most improperly…… the order is wholly perverse'. On charge no. 4 the Inquiry Judge has found that ……. there was absolutely no justification for grant of bail in the facts and circumstances of this case. Regarding the motive behind the grant of bail, it is not possible to allege illegal gratification in the absence of any positive proof. However, the conclusion that bail was granted to bestow favour on the accused is inescapable.' On charge no. 5 the Inquiry Judge has found that ' to allow the third application was, in fact, unwarranted. The profit and motive

theory taken into consideration at this stage shows total lack of understanding of criminal law. Some kind of extraneous consideration for granting bail in this manner cannot be ruled out. The grant of bail to above accused is, therefore, most improper.

5. The Inquiry Judge in her report has mentioned that on the question of allegations and consequent charge of illegal gratification and bribe etc. the District Judge was directed to hold enquiry and as per his report the allegations of illegal gratification and bribe etc. were not found substantiated as there was no proof forthcoming that the bails were granted though improperly, but for estraneous consideration or bribe etc. ' The Inquiry Judge accepted this report and held ' the officer not guilty of accepting any bribe or illegal gratification.' The Inquiry Judge held that 'so far as the charge of misconduct is concerned, by granting bails improperly the petitioner has committed impropriety and violated the settled principles of grant of pre-trial bail. The Inquiry Judge further held that 'the manner in which the officer has granted bail in four cases, have been granted recklessly completely ignoring the settled norms of granting bails. He is, therefore, guilty of misconduct to this extent'.

6. The findings of the Inquiry Judge goes to show that the petitioner has committed impropriety and violated the settled principles of grant of pre-trial bail and the bail has been granted in four cases recklessly. To the above extent, the petitioner has been found guilty of misconduct.

7. On behalf of the petitioner it has been contended that the orders of grant of bail passed by him were in exercise of judicial powers and at the most the orders could be wrong and erroneous and that the charges do not disclose any misconduct. It is also contended that copy of the note dated 2.6.1995 prepared by the Inspecting Judge was not provided to him which has vitiated the enquiry, that in any case punishment awarded to the petitioner is wholly disproportionate.

8. For initiating disciplinary proceedings against the officer performing judicial or quashi-judicial functions, guide lines have been laid by the Apex Court in the case of 'Union of India and others Vs. A.N. Saxena' reported in AIR 1992 Supreme Court page 1233. It has been laid down that :

" It is true that when an officer is performing judicial or quashi-judicial functions disciplinary proceedings regarding any of his actions in the course of such proceedings should be taken only after great caution and a close scrutiny of his actions and only if the circumstances so warrant. The initiation of such proceedings, it is true, is likely to shake the confidence of the public in the officer concerned and also if lightly taken likely to undermine his independence. Hence, the need for extreme care and caution before initiation of disciplinary proceedings against an officer performing judicial or quashi-judicial functions in respect of his actions in the discharge or purported to discharge his functions. But it is not as if such action cannot be taken at all. Where the actions of such an officer indicate culpability, namely, a desire to oblige himself or unduly favour one of the parties or an improper motive there is no

reason why disciplinary action should not be taken."

9. Again in the case of 'Union of India Vs. K.K. Dhawan' reported in AIR 1993 Supreme Court page 1478, it has been observed that :

"Thus we conclude that the disciplinary action can be taken in the following cases:

(i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty ,
(ii) If there is prima facie material to show recklessness or misconduct in the discharge of his duty,
(iii) If he has acted in a manner which is unbecoming of a government servant,
(iv) If he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers,
(v) If he had acted in order to unduly favour a party,
(vi) If he had been actuated by corrupt motive however, small the bribe may be because Lord Coke said long ago ' though the bribe may be small, yet the fault is great.'

10. Again in the case of 'Zunjarrao Bhikaji Nagarkar Vs. Union of India and others' reported in AIR 1999 Supreme Court page 2881 it has been held that :

"To maintain any charge sheet against a quashi judicial authority something more has to be alleged than a mere mistake of law, e.g. in the nature of some extraneous consideration influencing the quashi judicial order. If every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quashi judicial officers like the appellant. The entire system of administrative adjudication whereunder quashi judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings. When we talk of negligence in a quashi judicial adjudication, it is not negligence perceived as carelessness, inadvertence or omission but as culpable negligence. A wrong interpretation of law cannot be a ground for misconduct."

11. In a very recent judgement delivered in Civil Appeal no. 5182 of 2001 arising out of SLP (Civil) No. 5132 of 2001 P.C. Joshi Vs. State of U.P. and others' decided on 8.8.2001 the Supreme Court has observed that:

"That there was possibility on a given set of facts to arrive at a different conclusion is no ground to indict a judicial officer for taking one view and that too for alleged misconduct for that reason alone …

If in every case where an order of a subordinate court is found to be faultya disciplinary action were to be initiated, the confidence of

the subordinate judiciary will be shaken and the officers will be inconstant fear of writing a judgement so as not to face any disciplinary enquiry and thus judicial officers cannot act independently or fearlessly.
…….merely because the order is wrong or the action taken could have been different does not warrant initiation of

disciplinary proceedings against the judicial officer.'

12. We have mentioned the findings of the Inquiry Judge on the four charges earlier. The findings show that bail order was not judicious order and, therefore, it was improper, the order is wholly perverse and there was absolutely no justification for grant of bail in the facts and circumstances of the case. The Inquiry Judge has held in connection with the grant of bail relating to charge no. 2 that if it is not for illegal gratification, it could be for favouring the said accused. Similar is the observation regarding bail order in respect of charge no. 5 the Inquiry Judge has held that extraneous consideration for granting bail in this manner cannot be ruled out. So far as the finding regarding charge no. 5 is concerned, the same is contradicted by later finding of the Inquiry Judge, who has held that the officer is not guilty of accepting any bribe or illegal gratification. The concluding portion of the finding of the Inquiry Judge shows the order granting bail in four cases have been granted recklessly, completely ignoring the norms of granting bails and the petitioner was found guilty of misconduct to that extent. The report of the Inquiry Judge shows that the Inquiry Judge has examined the bail orders to arrive at a conclusion whether bail should have been granted in each one of those cases or not. The examination of each one of the charges in relation to grant of bail the Inquiry Judge proceeded to consider the case on merits. There can be no doubt that the orders passed on bail applications were passed in judicial proceedings by the petitioner. We have examined the findings of the Inquiry Judge and it is clear that inferences have been drawn on merits of the cases. No specific material was brought on record to show or prove that there was any mala fide or extraneous reasons on the part of the petitioner in passing the orders. There is categorical finding that the officer is not guilty of accepting any bribe or illegal gratification.

13. The petitioner was a direct recruit, who joined judicial service in December, 1986. He was Incharge District Judge from September 1992 to July 1993, by which time he had put in about 6 1/2 years was not sufficient to find that he was an experienced officer from whom sufficient knowledge of criminal law was expected, as has been found by the Inquiry Judge. There is definite finding by the Inquiry Judge that the petitioner was not guilty of accepting any bribe or illegal gratification. Any error of judgment which may be unintentional cannot be considered to be an act of misconduct. Suspicion cannot be substituted for a proof. Presumption or assumption cannot lead to a conclusion that the petitioner has committed an act of misconduct with oblique motive for extraneous consideration. The bail orders which have been passed by the petitioner have been passed in exercise of judicial functions in judicial proceedings. The orders granting bail by the petitioner was passed after taking one view in the matter. The possibility that a different conclusion is possible, is no ground to indict a judicial officer for having taken that view. Nothing has been brought on record to show that the order of grant of bail has been upset. The finding of the Inquiry Judge that the bail order was granted to bestow favour on the accused is based on conjecture and surmises in view of the positive finding that the petitioner is not

guilty of accepting any bribe or illegal gratification.

14. The Apex Court in the case of P.C. Joshi vs. State of U.P. and others (supra) has mentioned its observations in the case of '**Ishwar Chand Jain vs. High Court of Punjab and Haryana and another**' 1988 Supp. (1) SCR 396 as follows :

"……While exercising control over the subordinate judiciary under the Constitution, the High Court is under a constitutional obligation to guide and protect judicial officers. An honest, strict judicial officer is likely to have adversaries. If complaints are entertained on trifling matters relating to judicial officers, which may have been upheld by the High Court on the judicial side, and if the judicial officers are under constant threat of complaints and enquiry on trifling matter, and if the High Court encourages anonymous complaints, no judicial officer would feel secure, and it would be difficult for him to discharge his duties in an honest and independent manner. An independent and honest judiciary is a sine qua non for the Rule of law. It is imperative that the High Court should take steps to protect its honest judicial officers by ignoring ill-conceived or motivated complaints made by unscrupulous lawyers and litigants' (p.409)".

15. The next contention of the petitioner is that copy of note dated 2.6.1995 prepared by the Inspecting Judge was not supplied to him. In the case of '**State Bank of Patiala & others Vs. S.K. Sharma**' reported in Judgements Today 1996 (3) SC page 722 it has been held that non furnishing of copies of statements of the witnesses has not vitiated the enquiry. The Supreme Court has held that test of prejudice has to be applied. The petitioner has failed to show that how non-supply of the note of the Inspecting Judge has prejudiced him. We have gone through the enquiry report. The Inquiry Judge has considered the materials and has arrived at a finding independently and no reliance was placed on the note of the Inspecting Judge dated 2.6.1995. The note dated 2.6.1995 was only referred by the Inquiry Judge to fortify the conclusion which was arrived at independently by her. Therefore, by non supply of the note dated 2.6.1995 the enquiry is not vitiated.

16. In view of the aforesaid discussions, we find that the petitioner is not guilty of the misconduct and the order of his removal from service dated 11.7.1997. Annexure no. 9 to the writ petition is liable to be quashed and is accordingly quashed. The petition is allowed. The respondents are commanded to reinstate the petitioner in service immediately with continuity of service and all consequential benefits, such as payment of arrears of salary and other benefits, as admissible under the rules.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.8.2001

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

Criminal Revision No. 1210 of 2000

Harkesh and others ...Revisionists
Versus
State of U.P. and another ...Opp. Parties

Counsel for the Revisionists:
L.V. Singh

Counsel for the Respondents:
Sri G. K. Singh
A.G.A.

Code of Criminal Procedure- Section 190(1)(b)- learned Magistrate while taking cognizance under section 190 (1)(b) of the Code has taken into consideration the affidavits of complainant and other witnesses filed alongwith Protest petition which was not permissible in law (Held in para 22)

The revision is accordingly allowed. The order of the learned Magistrate dated 20.4.2000 passed in Case No. 911/2000 arising out of Crime No. 242/90 under sections 323/324/504/506 IPC and 3 (1)(X) of SC/ST. Act is set aside and the learned Magistrate is directed to pass appropriate orders afresh on the Protest Petition filed by opposite party no. 2 against the final report submitted by police in accordance with law and in the light of observations made above in the body of this order.

Case law discussed:
(1984) 2 SCC-500
AIR 1968 SC-117
AIR 1980 SC 1883
AIR 1977 SC 2401
AIR 1989 SC-890
JT 2001(2) SC-81

(Delivered by Hon'ble J.C. Gupta, J.)

1. The order dated 20.4.2000 passed by IIIrd Additional Chief Judicial Magistrate, Bijnor directing issue of process against the applicants is under challenge in this revision.

2. Facts relevant for the purpose of this revision in brief are that on a complaint filed by Om Prakash, father of opposite party no. 2 and others regarding an incident of 29.3.99 the police on the basis of an order made under Section 156(3) Cr.P.C. investigated the case and submitted final report. Ten days thereafter another complaint with the nomenclature "Application under Section 156(3) Cr.P.C." was filed by opposite party no.2 alleging therein that on 12.4.99 the applicants assaulted him and Ram Chandra and caused them injuries. The Magistrate concerned directed the police to register First Information Report and investigate the same. Consequently, case was registered and police came into action. The Investigating Officer recorded statement of witnesses and concluded that case was false and concocted. With these conclusions he submitted 'final report' which was forwarded to the court concerned by the Officer-in-charge of concerned police station. Feeling aggrieved, opposite party no.2 filed objections against acceptance of final report in the form of a "Protest Petition" alleging therein that the investigating officer neither interrogated the witnesses nor recorded their statements and submitted final report in collusion with the accused persons. In support of the protest petition he also filed his own affidavit and affidavits of witnesses Ram Chandra, Banshi, Mohd. Ali, Abdul Aziz and Shamsher. The learned Magistrate then passed the impugned order observing that perusal of case diary revealed that the investigating officer did not record the statements of witnesses Ram Chandra, Mohd. Ali and Shamsher on the ground that they did not come forward before him despite requisition sent to them. He further observed that the complainant in his statement has supported the allegations made in the First Information Report. It appears that the Magistrate on the basis of material placed before him

which also included the complainant's affidavit and affidavits of witnesses, concluded that the final report was liable to be rejected. Accordingly final report dated 1.6.99 was rejected and impugned summoning order was passed.

3. The court has heard learned counsel for the parties.

4. Learned counsel for the applicants contended that where police submits final report, though it is open to the Magistrate to take cognizance under Section 190(1)(b) Cr.P.C. on the basis of investigation records but in that event he cannot take any external aid of any other piece of evidence or material which does not form part of police papers. If he decides to take into account any material or evidence other than police papers prepared during investigation, he is bound to comply with the requirement of Sections 200 and 202 of the Code. It was argued that since in the present case the learned Magistrate has taken into consideration the affidavits of the complainant and other witnesses filed alongwith the protest petition, he was bound to follow procedure laid down for complaint cases. It was also contended that if the Magistrate felt that the investigating officer failed in his duty in collecting relevant material, he should have directed further investigation instead of issuing process against the applicants on the basis of material brought on record in the form of affidavits.

5. Chapter XIV of the Code of Criminal Procedure deals with the conditions requisite for initiation of proceedings. For the purpose of this case, we are concerned with Section 190(1) alone which is reproduced below:

"**190. Cognizance of offences by Magistrates:-** (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

"(a) upon receiving a complaint of facts which constitute such offence;
(b) upon a police report of such facts;
(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

6. There are four methods of taking cognizance of offences by the courts competent to try the same. The court called upon to take cognizance of the offence must apply its mind to the facts placed before it either upon a police report or upon a complaint or in some other manner the court came to know about it and in the case of Court of Session upon commitment of the case by the Magistrate. (vide A.R. Antulay Vs. R.S. Nayak (1984) 2 S.C.C. 500).

7. When a Magistrate receives a complaint, which may be either oral or in writing as defined under Clause (d) of Section 2 of the Code, he has two courses open before him. He may take cognizance under Section 190(1)(a) by applying his mind to the facts of the case and thereafter proceed in the manner provided in Sections 200 and 202 Cr.P.C.. By virtue of Section 200 he is required to examine the complainant and the witnesses present, if any. If the Magistrate finds that there is sufficient ground for proceeding, he may issue process under Section 204. But if the Magistrate does not feel satisfied, he may either dismiss the

complaint under Section 203 Cr.P.C. or postpone the issue of process and take recourse to Section 202 which provides that he may inquire into the case himself or may direct an investigation to be made by a police officer or such other person as he thinks fit, for the purpose of deciding whether or not there are sufficient grounds to proceed. If he finds grounds to be sufficient he may issue process or otherwise he may dismiss the complaint under Section 203 Cr.P.C. after briefly recording his reasons for so doing.

8. The other course open to the Magistrate is that instead of taking cognizance he may send the complaint for police investigation under Section 156(3) Cr.P.C.. If this course is adopted, the police will have to investigate the matter as per the procedure laid down in Section 157 onwards. If upon investigation it appears to the Officer-in-charge of the police station that there is no sufficient evidence or any reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, he may submit a report to the Magistrate for dropping the proceedings Such a report is commonly known as "Final Report."

9. Section 170 Cr.P.C. lays down that if, upon an investigation, it appears to the officer in-charge of the police station that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused, 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 today before such Magistrate until otherwise directed. The report of completion of investigation shall be forwarded to the Magistrate in the prescribed form as provided under Section 173(2) Cr.P.C..

10. Upon receiving final report the following four courses are open to the Magistrate and he may adopt any one of them as the facts and circumstances of the case may require:

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant;

(II) He may take cognizance under Section 190(1) (b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed;

(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

11. This position of law is now well settled by various pronouncements of the Apex Court, such as (1) Abhinandan Jha Vs. Dinesh Misra A.I.R. 1968 S.C. 117 (2) H.S. Bains Vs. State A.I.R. 1980 S.C. 1883 (3) Tularam Vs. Kishan Singh A.I.R. 1977 S.C. 2401 and (4) M/s India Carat Pvt. Ltd. Vs. State of Karnataka A.I.R.1989 S.C. 890.

12. In Abhinandan Jha Vs. Dinesh Misra (Supra) the question arose whether a Magistrate to whom report under Section 173 (2) had been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge sheet, on his disagreeing with the report submitted by the police. The Apex Court held that the Magistrate has no jurisdiction to direct the police to submit a charge sheet but it is open to the Magistrate to agree or disagree with the police report. If he agrees with the report that there is no case made out for issuing process to the accused, he may accept report and close the proceedings. But if he comes to the conclusion that further investigation is necessary, he may make an order to that effect under Section 156(3) and if ultimately the Magistrate is of the opinion that the facts set out in the police report constitute an offence, he can take cognizance of the offence, notwithstanding the contrary opinion of the police expressed in the report. However in the said decision a typing error occurred in as much as the reference to Section 190(1)(c) was a mistake for Section 190(1)(b) which was later on pointed out in H.S. Bains case (supra).

{Emphasis supplied}

13. In the case of H.S. Bains (supra) it was held that the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses expressed in the police report submitted to the Magistrate under Section 173(2) Cr.P.C. The Magistrate may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police. It would, thus, be a cognizance under Section 190(1) (b) of the Code. The Apex Court repelled the contention that if the Magistrate was not satisfied with the police report only two courses were open to him viz. either to order a further investigation of the case by the police or to take cognizance of the case himself as if upon a complaint and record the statements of the complainant and his witnesses under Section 200 of the Code and then issue process if he was satisfied that the case should be proceeded with.

14. In the case of M/s India Carat Pvt. Ltd Vs. State of Karnataka (supra) it was held by the Apex Court in paragraph 16 of the report "The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a

Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusions arrived at by the investigation officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him."

15. Similarly in the case of Tula Ram (supra) it was held that if the police, after making an investigation, sent a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of the case under Section 190(1)(b) and issue process or in the alternative he could take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he was of opinion that the case should be proceeded with.

16. In a recent decision in Suresh Chand Jain Vs. State of Madhya Pradesh and another J.T. 2001(2) S.C. 81, the Apex Court pointed out that the investigation envisaged in Section 202 is different from the investigation contemplated under Section 156(3) of the Code as the former is ordered after taking cognizance of the offence whereas the later at a pre-cognizance stage. The investigation referred to Section 202(1) is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

17. The moot question that stares at our face in the present case is whether the Magistrate deciding to take cognizance under Section 190(1)(b) on the receipt of final report could take aid of external material or evidence in addition to the materials or facts collected during investigation or he could act upon only on the investigation records?

18. The observations made in the decision in M/s India Carat Pvt. Ltd., which have been reproduced above in this order, leave no room for doubt that the Magistrate is not bound with the conclusions arrived at by the investigating agency and it is open for him to apply his mind independently to the facts emerging from the investigation and take cognizance of the case if he deems fit, in exercise of his powers under Section 190(1)(b). The Magistrate in such a situation is not bound to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance under Section 190(1) (a), though

alternatively it is open to him to act under Section 200 or Section 202 also.

19. The position is thus clear that when Magistrate receives police report under Section 173(2), he is entitled to take cognizance of an offence even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during investigation and other material collected during investigation and form his own opinion independently without being bound by the conclusions arrived at by the investigating agency and take cognizance under Section 190(1) (b) of the Code and direct the issue of process to the accused. However the Magistrate cannot make use of any material or evidence other than the investigation records while acting under Section 190(1)(b) of the Code. If he chooses to make use of any materials other than the investigation records, he will have to follow the procedure laid down in relation to complaint cases, on the basis of original complaint or application moved under Section 156(3) Cr.P.C. which otherwise tantamount to complaint or the Protest petition filed against acceptance of final report treating the same as complaint. This proposition would be in consonance with the provision of Section 207 which inter-alia provides for supply of copy of statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses and any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173.

20. In the present case the learned Magistrate while taking cognizance under Section 190(1)(b) of the Code has taken into consideration the affidavits of complainant and other witnesses filed alongwith Protest Petition which was not permissible in law. He could take cognizance on the basis of the Protest Petition or the original complaint but in that event he was bound to follow procedure laid down for complaint cases. The distinction between two types of cognizance is apparent in as much as cognizance under Section 190(1)(b) is taken only on the basis of papers forwarded by police under Section 173(2) Cr.P.C. but when the Magistrate makes up his mind to take into consideration other material or evidence it would be a case of taking cognizance under Section 190(1)(a) of the Code and for that matter procedure prescribed for complaint cases under Sections 200 and 202 Cr.P.C. has to be followed. If the Magistrate was of the opinion that the investigating officer had failed to record statements of material witnesses, it was open for the learned Magistrate to have sent back the case to police for a further investigation.

21. For the above reasons, the impugned order of the learned Magistrate cannot be sustained.

22. The revision is accordingly allowed. The order of the learned Magistrate dated 20.4.2000 passed in Case No.411/2000 arising out of Crime No. 242/90 under Sections 323/324/504/506 I.P.C. and 3 (1) (X) of S.C./S.T. Act is set aside and the learned Magistrate is directed to pass appropriate orders afresh on the Protest Petition filed by opposite party no.2 against the final report submitted by police in accordance

with law and in the light of observations made above in the body of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.10.2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 32743 of 2001

Committee of Management, S.D.P.G. College, Muzaffar Nagar, and others ...Petitioners.

Versus

Vice Chancellor, Chaudhary Charan Singh University, Meerut and others ...Respondents.

Counsel for the Petitioners:
Sri Man Mohan Mittal
Sri B.S. Bedi (In person)

Counsel for the Respondents:

U.P. State University Act, 1973- Section 69 Statutory bar -Civil suit relating to election of Committee of management- rivel claim- not maintainable- hence Injunction order passed by the Civil Judge- without jurisdiction- writ petition challenging the validity of Injunction order-held- maintainable.

Held- Para 13

In view of the facts and circumstances stated above and in the interest of justice, it is held that suit no. 475 of 2001 filed by the respondents is a suit, which is not maintainable in view of the Bar under Section 69 of the U.P. State Universities Act, 1973. The Civil Judge (Jr.Div.) Muzaffarnagar before passing of the aforesaid injunction order should have taken care to look into the statutory bar, which he completely overlooked and therefore his order dated 14 August, 2001 is amenable to writ jurisdiction of this Court under Article 226/227 of the Constitution of India.

1988 ALJ 709
1999(II) ALR-216
1981 UPLBEC-214
1997 (3) AWC-1902

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

1. By means of this writ petition, the committee of management Sanatan Dharm Post Graduate College, Muzaffar Nagar has challenged the order dated 14th August, 2001 (Annexure-17 to the writ petition), passed by Civil Judge (Jr. Div.), Muzaffar Nagar entertaining the suit filed on behalf of the respondents and granting ex-parte injunction order under Order 39 Rule 2 Code of Civil Procedure. This order is challenged by the petitioners inter alia on the grounds that according to the relief claimed in the writ petition after the order dated 1st August, 2001 was passed by the Vice Chancellor, Chaudhary Charan Singh University, Meerut directing that the election of the committee of management scheduled to take place, which by the order of the Vice Chancellor dated 28th July, 2001 was postponed and inspite of the aforesaid order passed by the Vice Chancellor staying the election, despite the order of Vice-Chancellor elections are said to have been held as a consequence thereof an enquiry committee consisting of three Principals was set up, which is directed to conduct the enquiry and submit its report to the Vice Chancellor. The Vice Chancellor further passed order that till the recommendation of the committee is received, the old committee, which is at present in the effective control of the affairs of the college of the management, will continue to conduct the management of the institution. After this order was passed by the Vice Chancellor, two writ

petitions were filed before this Court. One being writ petition No. 30551 of 2001 was filed by the contesting respondents of the present writ petition and plaintiffs of Suit No. 475 of 2001 with the following prayers:-

"(i) issue a writ, order or direction in the nature of certiorari calling upon the respondents to produce records for quashing of the impugned order dated 1.8.2001 passed by the respondent no.2 (Annexure no. 10 to the writ petition).

(ii) issue a writ, order or direction in the nature or mandamus directing the respondents not to interfere in the functioning of the petitioner in the affairs of the SD (PG) College, Muzaffarnagar.

(iii) issue any other writ, order of direction which this Hon'ble court may deem it fit and proper in the circumstances of the case.

(iv) Award the cost of the petition to the petitioner."

2. The aforesaid writ petition was dismissed as not pressed by this Court on 16th August, 2001. The order dated 16th August, 2001 passed by this Court is quoted below:-

"Learned counsel for the petitioner Sri R. B. Singhal stated that this writ petition may be dismissed as not pressed. It is, accordingly, dismissed as not pressed."

The second writ petition that was filed by the present petitioners i.e. writ petition no. 32021 of 2001, has been dismissed as with drawn with liberty to file a fresh writ petition by this Court on 03.9.2001. The prayer made in writ petition no. 32021 of 2001 is reproduced below:-

"(i) issue a writ, order or direction in the nature of mandamus restraining the respondents from interfering in the affairs of the institution/petitioners in their different capacity.

(ii) issue a writ, order or direction in the nature of mandamus directing respondents to follow direction of Vice-Chancellor dated 28.7.2001, regarding management election and not to interfering in the working of petitioners till the matter is finally decided.

(iii) issue any suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iv) award the cost to the petitioner."

3. The order dated 03.9.2001, by which the aforesaid writ petition was directed to be dismissed as with drawn is reproduced below:-

"Learned counsel appearing on behalf of the petitioners made a statement that he wants to withdraw the present writ petition because of the technical objections were raised by Sri R. B. Singhal, learned counsel for the respondent no. 4 (Caveator). The writ petition is accordingly dismissed as withdrawn with liberty to file a fresh writ petition."

4. Inspite these two writ petitions filed before this Court the petitioners of writ petition no. 30551 of 2001 {respondents in the instant petition} filed

a suit no. 475 of 2001, out of which the impugned order in the present writ petition was passed. The reliefs sought for in the suit clearly show from the perusal of plaint, which is annexed as Annexure-15 to the writ petition, that it is in effect of the order dated 1st August, 2001, Annexure-13 to the writ petition, by which the plaintiffs of the said suit no. 475 of 2001 challenged the arrangement that is made vide order dated 1st August, 2001.

5. That the Vice Chancellor is also one of the authority/officer of the University. Section 68 of the U.P. Universities Act, 1973 {hereinafter shall be referred to as the 'Act'} is relevant to be reproduced here, which inter alia provides that:

"68. If any question arises whether any person has been duly elected or appointed as, or is entitled to be, a member of any authority or other body of the University, or whether any decision of any authority or officer of the University (including any question as to the validity of a Statute, Ordinance or Regulation not being a Statute or Ordinance or approved by the State Government or by the Chancellor) is in conformity with this Act or the Statutes or the Ordinances made thereunder, the matter shall be referred to the Chancellor and the decision of the Chancellor thereon shall be final

Provided that no reference under this section shall be made:-

(a) more than three months after the date when the question could have been raised for the first time;

(b) by any person other than an authority or officer of the University or a person aggrieved:

Provided further that the Chancellor may in exceptional circumstances-----

(a) act suo motu or entertain a reference after the expiry of the period mentioned in the preceding proviso;

(b) where the matter referred relates to a dispute about the election, and the eligibility of the person so elected is in doubt, pass such orders of stay, as he thinks just and expedient;"

6. Section 69 of the Act is also relevant, which is reproduced below:

"69. No suit or other legal proceedings shall lie against the state government or the Director of Education (Higher Education) or the Deputy Director (as defined in section 60-A) or the Authorised Controller or the University or any Officer, authority or body thereof in respect of anything done or purported or intended to be done in pursuance of the Act or the Rules or the Statutes or the Ordinances made thereunder."

7. Sri Man Mohan Mittal, President of the committee of management of the petitioners appearing in person submitted the following points for consideration; that the suit no. 475 of 2001 was not maintainable in view of the provisions of Section 69 of the Act; that in any view of the matter, in view of the provisions of Order 39 Rule 2, proviso clause (h) as applicable in state of U.P., no injunction much less any ex-parte injunction could have been granted by the learned civil

Court and thus the order is without jurisdiction; that in view of the order dated 1st August, 2001 the grievance, if any, of the plaintiffs of suit no. 475 of 2001 was not by way of filing a suit but by way of reference under Section 68 of the Act. According to the Statutes applicable to the University, the question as to who has a right to manage the institution is pending enquiry before the Vice Chancellor and the Vice Chancellor by way of an interim arrangement has directed that the old committee of management, which is in fact controlled the affairs of the management of the committee, should continue till final order was passed by the Vice Chancellor in the matter of management, does not require any interference much less the interference by means of an injunction which in terms amounts to allowing the plaintiffs to take over the management even without adjudication upon the suit. The question as to who has a right to manage the management is still pending before the Vice Chancellor and it has been stated and admitted by both the parties, namely, petitioners as well as respondents who contested this writ petition that the Vice Chancellor has invited both the parties to appear before him with regard to their respective claims or rights to manage through election or otherwise and Vice Chancellor is likely to take a decision particularly that the power exercised by the Vice Chancellor as conferred on the Vice Chancellor by means of provisions of Section 2 (13) read with Statute 13.05 of the University.

8. It is thus contended that apart from the suit being not maintainable in view of the provisions of the Specific Relief Act, no injunction could have been granted, particularly in view of the Statutory bar as contained under Section 69 of the Act. The respondents replied to the aforesaid argument that if the suit was not validly instituted, the petitioners should not have rushed up to this Court but in case they feel aggrieved, they should have gone before the Civil Court, either for the recall of the order of injunction impugned in the present writ petition, or may approach the appellate Court. It is contended by the petitioners that admittedly the petitioners were not party to the said suit and the suit has not been filed even with the prior notice as contemplated under Order 39, Rule 3 of the Code of Civil Procedure. The petitioners have relied upon the Division Bench decision of this Court reported in **1988 All. L.J. 709 – Committee of Management of Ambika Pratap Narain Degree College, Basti and another Vs. Gorakhpur University, Gorakhpur and another.** Paragraph 2 of the aforesaid judgement is reproduced below:-

"2. We do not consider it necessary to enter into the question whether the election claimed by the petitioners were held in accordance with the bye-laws of the institution or whether on merits the petitioners had a right to be recognised as the duly constituted Committee of Management of Ambika Pratap Narain Degree College as, in our opinion the impugned order can be challenged by the petitioners by way of representation before the Chancellor under Section 68 of the U.P. State Universities Act."

9. That the petitioners further relied upon another Division Bench decision reported in **1999 (Vol. 2) ALR, 216 – Dr. Bhumitra Deo and others Vs. IInd Addl. C.J., Gorakhpur and others,** wherein the Division Bench of this Court

after citing the provisions of Section 69 of the Act has observed as under:-

"From a bare perusal of the aforementioned Section 69 of the Universities Act, it is crystal clear that no suit can be instituted in respect of anything done or purported or intended to be done pursuant to the Act or the Rules of the Statutes or the Ordinance made thereunder."

10. The other decision relied upon by the petitioners is reported in **1981 U.P.L.B.E.C., 214** – **Rajendra Vs. The Civil Judge, Bulandshahar and others.** Paragraph 20 of the aforesaid judgement is quoted below:-

"By enacting Section 69 of the Act, the legislature intended to impose a bar on the jurisdiction of the Civil Courts to entertain a suit against the authorities designated therein as well as against any act or order of any authority, officer or body constituted under the Act. In view of this provisions no suit is maintainable before a Civil Court challenging the recommendations made by the Selection Committee or an order passed by a Vice/Chancellor or a Chancellor. The Selection Committee is an authority as declared by Section 19 of the Act. Similarly, the Vice-Chancellor and the Chancellor, both are officers of the University as provided by Sec. 9 of the Act. These orders cannot be challenged before any Civil Court in view of Sections 68 and 69 of the Act."

11. The petitioners further relied upon a decision reported in **1997 (3) A.W.C., 1902** – **Committee of Management, Dev Nagri Post Graduate College, Meerut Vs. Vice-Chancellor, Choudhary Charan Singh University, Meerut and others.** Paragraph 3 of the aforesaid judgement, which is relevant for the purposes of present controversy, is reproduced below:-

"Clause (a) of sub-section (1) of Section 13 of the Act provides that the Vice-Chancellor shall be the principal executive and academic officer of the University and shall supervise and control over the affairs of the University, including the constituent colleges and the Institutes maintained by the University and its affiliated and associated colleges. This provisions vests in the Vice Chancellor to exercise the general supervisory power and control all the affairs of the college. In exercise of such power, the Vice Chancellor has power to make enquiry in the affairs of a college himself or to appoint a committee to make an enquiry and such committee is to submit a report to the Vice Chancellor. It is not necessary that an opportunity of hearing is to be given by the Vice Chancellor before constituting an enquiry committee."

12. The respondents have also relied upon certain decisions of this Court as well as the apex Court, but all relate to general provisions of the suit and none deals with the provisions like that of Section 69 of the U.P. State Universities Act, 1973. In view of the law laid down with regard to the State Universities Act, the general law will not be helpful to the respondents. Apart from above, so far as the respondents' arguments regarding the petitioners' availing the remedy of either filing an application for vacation of the injunction or of availing the remedy of an appeal before the learned Civil Court, suffice it to said that in view of the fact

and circumstances that the Advocates of the western districts of U.P. being on strike, it has not been controverted by the either side that civil Courts in the district of Muzaffar Nagar are not functioning. This coupled with the fact that in view of the law, referred to above, that suit itself is being barred by virtue of the provisions of Section 69 of the Act, there is no bar to this Court entertaining this writ petition and the writ petition is therefore entertained and the objections of the respondents are rejected. Further the fact in support of the petitioners' arguments that Vice-Chancellor has already invited both the petitioners as well as the respondents to appear before them pursuance of the order dated 1st August, 2001 and to adjudicate the matter in case the enquiry report is submitted. In this view of the matter also this writ petition deserves to be entertained.

13. In view of the facts and circumstances stated above and in the interest of justice, it is held that suit No. 475 of 2001 filed by the respondents is a suit, which is not maintainable in view of the bar under Section 69 of the U.P. State Universities Act, 1973. The Civil Judge (Jr. Div.), Muzaffarnagar before passing of the aforesaid injunction order should have taken care to look into the statutory bar, which he completely overlooked and therefore his order dated 14th August, 2001 is amenable to writ jurisdiction of this Court under Article 226/227 of the Constitution of India. Apart from the above, since the Vice Chancellor is seized of the matter regarding the adjudication of the dispute, it is not in the interest of justice that this Court should express any opinion on the merits of the case. This writ petition is therefore finally disposed of with the following observations:-

{1} The suit No. 475 of 2001 filed on behalf of the respondents is not maintainable. The order of injunction dated 14.8.2001 passed in Civil Suit No.475 of 2001 is hereby quashed.

{2} The Vice Chancellor Choudhary Charan Singh University, Meerut is directed to complete the enquiry, which has commenced pursuance to his order dated 1st August, 2001 preferably within a period of three months' from the date of presentation of a certified copy of this order before him and decide the matter in terms of law particularly Statute 13.05 of the University concerned.

{3} Till the Vice Chancellor decides the matter as directed above, the status-quo with regard to the management shall be maintained in accordance with the order dated 1st August, 2001.

14. With the aforesaid observations, the writ petition is finally disposed of. There will be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: 28.9. 2001

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE S. RAFAT ALAM, J.

Special Appeal No.711 of 1996

Shiv Dularey Gupta ...Appellant
Versus
Director of Local Bodies, U.P., Lucknow and others ...Respondents

Counsel for the Appellant:
Sri Ashok Khare

Counsel for the Respondents:
S.C.

U.P. Palikas Centralised Service Rules 1966- Rule 30 (ii)- Dismissal Order- Petition/Appellant working as map clerk- Suspended- despite of Receiving the charge sheed-despite of several opportunity- No reployer given- which resulted, dismissal- employee neither complained about non payment of subsistence allowance either before deciplinary authority in reply to show cause notice- nor any where pleaded in writ petition or in rejoinder affidavit of his own fault- law laid down in Capt. M. Paul Authony's case- held not applicable.

Held- Para 12

In the case in hand, the petitioner was put under suspension vide order dated 19.5.1988 and the departmental proceeding was initiated shortly thereafter and the enquiry proceeding was concluded and the report was submitted on 1.9.1989. Admittedly, the subsistence allowance was paid upto May, 1989. Therefore, it is difficult to hold that on account of non-payment of subsistence allowance from June 1989 he was prevented from attending the proceeding.

Even before the disciplinary authority in the show cause has not asserted that he was prevented from participating in the proceeding because of the non-payment of subsistence allowance nor such specific plea was taken in the writ petition before the learned Single Judge. In this view of the matter, we are of the view that the aforesaid authorities cited by the learned counsel for the appellant-petitioner is of no help to the petitioner and do not apply to the facts and circumstances of the present case.

Case law discussed

1999(3) SCC- 679
AIR 1973 SC-1183

(Delivered by Hon'ble S.R. Alam, J.)

1. Instant Special Appeal arises out of the judgment and order of the learned Single Judge dated 31st July, 1996 in Writ Petition No. 24401 of 1989 dismissing the writ petition.

2. The short fact of the case is that the petitioner-appellant was working as a Clerk since September, 1971 in Nagar Palika Bindki, District Fatehpur. He was, however, suspended on 19.5.1988 and a departmental proceeding was initiated against him. Accordingly, charge sheet dated 23.9.1988 containing two charges viz.(i) that at several places in the town unauthorised constructions are being made without getting the approval of the plan and he has not taken any effective steps in the matter on account of which constructions are being made on nazul land without obtaining any approval (ii) that certain queries were made in respect of the construction of "Paushala" which he did not comply on account of which the construction of the said "Paushala" is delayed was served upon him, copy of which is enclosed as Annexure-1 to the writ petition. He accordingly submitted his reply to the charges on 24.9.1988 a copy whereof is Annexure-2 to the writ petition. However, during the pendency of the proceeding additional charge dated 3.5.1989 (Annexure-3 to the writ petition) was served on him on 9.5.1989 alleging several other charges of in-discipline and irregularities causing financial loss to the Municipal Board and he was called upon to give his written defence against the charges on or before 18.5.1989. He did not submit his reply within the time but on 24.5.1989 sought 15 days further time to submit his reply which was granted, even then he did not submit his reply. He however, sent an application on 6.6.1989 through post stating that he is hospitalized in the Government Hospital for treatment and will submit his reply after getting

cured, which was received on 9.6.89. The Enquiry Officer after waiting for about three months submitted his report on 1.9.1989 holding him guilty of the charges. He however, after submission of the report, submitted his reply on 14.9.1989 but in the meanwhile, he was served with the show cause notice dated 11.9.1989 proposing as to why his services be not terminated. He accordingly submitted his reply to the show cause notice on 30th September, 1989, a copy of which is enclosed as Annexure-6 to the writ petition. The disciplinary authority having considered the reply of the petitioner-appellant by the impugned order terminated his services vide order dated 8.11.1989, a copy of which is Annexure-7 to the writ petition. Aggrieved the petitioner-appellant preferred Writ Petition No.24401 of 1989 which was heard and dismissed by the order under appeal dated 31.7.1996.

3. Shri Ashok Khare, learned counsel appearing for the appellant made two submissions in support of the appeal. Firstly, that during the period of suspension the respondents did not pay any subsistence allowance, which amounts to violation of the principles of natural justice and on account of its non-payment, the whole proceeding stood vitiated and deserves to be quashed. In support of this contention he placed reliance on a judgment of the Apex Court in the case of **Capt. M. Paul Anthony versus Bharat Gold Mines Limited and another** reported in 1999 (3) SCC 679, and in the case of **Ghanshsyam Dass Srivastava Versus State of Madhya Pradesh** reported in AIR 1973 S.C. 1183 wherein it has been held that the proceeding before the Enquiry Officer would be vitiated and the final order of the appointing authority can not sustain if on account of non payment of subsistence allowance the delinquent employee could not appear in the enquiry proceeding. The second submission is that in the departmental proceeding no opportunity was afforded to the petitioner to defend the charges in the proceeding and the Enquiry Officer proceeded exparte. It is contended that the learned Single Judge did not appreciate the aspect of the non-payment of the subsistence allowance and without taking into account the fact that the enquiry proceeding against the appellant admittedly was held exparte, dismissed the writ petition. The main thrust of his submission is that on account of non-payment of subsistence allowance, the petitioner-appellant could not participate in the proceeding and, therefore, he has been punished in total violation of principles of natural justice.

4. On the other hand learned counsel for the respondents opposed the appeal and submitted that the appellant is guilty of serious lapses and on account of his connivance several unauthorized constructions have been made without obtaining approval or sanction of the plan. It is submitted that the petitioner being Map Clerk, it was his duty to submit report about unauthorized constructions but he deliberately did not bring the matter to the notice of the authorities for taking steps to stop such illegal constructions being made within the area of the Municipality. It is further argued that sufficient opportunity was afforded to the appellant-petitioner but he did not participate in the proceeding and, therefore, the Enquiry Officer had no option but to proceed exparte.

5. In the writ petition there is no averment to the effect that on account of non-payment of subsistence allowance the petitioner could not participate in the proceeding. The statement regarding non-payment of subsistence allowance is made in para 9 of the writ petition which is as under:

"That the respondent No. 1 without applying its mind to the facts of the case, illegally issued a Show Cause Notice dated 11.9.89 proposing as to why the petitioner's services, be not terminated. A true copy of the 'Show Cause Notice' along with the finding of Enquiry Officer is attached herewith and marked, as ANNEXURE-5 to this writ petition. It is very pertinent to mention here, that the petitioner has not been paid his T.A. and D.A, since during the period of 1987 and 1988 and suspension allowance, during the suspension period that is 19.5.88 to 8.11.1989. "

6. Reply to the aforesaid statement has been given in para-12 of the counter-affidavit, which is as under:

"That the contents of paragraph-9 of the writ petition are wrong and denied. In reply it is stated that the Show Cause Notice was issued to the petitioner after waiting for a considerable time for reply of the charge-sheet, though originally the time expired on 6.6.89. It has wrongly been stated in the paragraph under reply that the petitioner has not been paid the T.A., D.A and suspension allowance during the suspension period, in fact, under the rules the petitioner did not give any certificate that he is not employed anywhere. "

In reply to the statement made in para-12 of the counter-affidavit the petitioner-appellant in the Rejoinder affidavit reiterated the statement made in para-9 of the writ petition which is as under:

"That the contents of paragraph no 12 of the counter-affidavit are not admitted and denied as such. It is submitted that the time has been expired on 8.6.89, for the T.A. and D.A. It is further submitted that the contents of paragraph no. 9 of the original writ petition are reaffirmed and reiterated here again. The certificate was needed as alleged in the paragraph under reply. However, it is further submitted that the petitioner has never joined and accepted any other job the requirement of certificate is arbitrary and not in accordance with law. The petitioner is fully entitled for T.A., D.A and suspension allowance under the rules."

7. The petitioner was Clerk in the Nagar Palika and, therefore, his service condition is governed under the provisions of U.P. Palikas Centralized Service Rules, 1966. Rule 30 (ii) of the aforesaid Rules provides as under:

"(ii) Grant of pay, including officiating pay and additional pay, special pay, honorarium compensatory allowance, subsistence allowance and the acceptance of fees shall be regulated on the same terms and conditions as are applicable to the Government servants of the same status under the U.P. Fundamental and Subsidiary Rules contained in the U.P. Financial Handbook, Vol. II, Parts II-IV."

8. The above rule provides that the payment of subsistence allowance shall be regulated on the same terms and conditions as are applicable to the Government servants of the same status under the U.P. Fundamental and Subsidiary Rules contained in the Financial Handbook, Vol. II, parts II-IV. Chapter VIII of the Financial Handbook, Vol. II, Parts II-IV provides about dismissal, removal and suspension of a Government servant. Sub-rule (1) of Rule 53 of Chapter VIII provides about the payment of subsistence allowance to a Government servant placed under suspension. Sub-Rule (2) of Rule 53 provides about the certificate to be furnished by the Government servant under suspension for the payment of subsistence allowance under sub-rule (1) of Rule 53. Sub-rule (2) of Rule 53 reads as under:

"No payment under sub-rule (1) shall be made unless the Government servant furnishes a certificate that he is not engaged in any other employment, business, profession or vocation."

9. Admittedly, the appellant-petitioner did not furnish such certificate as required under sub-rule (2) of Rule 53. Therefore, the payment of subsistence allowance from June 1989 till his dismissal, i.e. 8.11.1989, was not paid to him. It further appears from the statement of the petitioner made in para 26 of his show cause dated 30.9.1989 (Annexure-6) submitted pursuant to the show cause notice of the proposed punishment dated 11.9.1989 that he has been paid subsistence allowance till May 1989 and thereafter it was stopped as he did not furnish the certificate as required under sub-rule (2) of Rule 53. It has been stated in the counter affidavit and also in the impugned order that since June 1989 the subsistence allowance has not been paid because of non-submission of certificate as required under the law. In this view of the matter, there is no refusal or denial of payment of subsistence allowance by the employer rather the same could not be paid due to non-submission of the certificate by the petitioner and, therefore, now he cannot take advantage of his own folly and lapses. Besides that in the writ petition no plea has been taken that the petitioner has been prejudiced on account of non-payment of subsistence allowance and due to penury he did not appear in the proceeding rather it appears that he deliberately kept himself away from the proceeding against him.

10. In the case of **Capt. M. Paul Anthony (Supra)** the delinquent employee was living in his hometown in the State of Kerala whereas the departmental proceeding was being held at Kolar Gold Fields in Karnataka and a specific plea was taken before the High Court and before the Hon'ble Apex Court that on account of his penury occasioned by non-payment of subsistence allowance he could not undertake a journey to attend the departmental proceedings. In that view of the matter, the Hon'ble Apex Court in para 33 of the judgment held as under:

"Since in the instant case the appellant was not provided any subsistence allowance during the period of suspension and the adjournment prayed for by him on account of his illness, duly supported by medical certificates, was refused resulting in exparte proceedings against him, we are of the opinion that the appellant has been punished in total

violation of the principles of natural justice and he was literally not afforded any opportunity of hearing. Moreover as pleaded by the appellant before the High Court as also before us that on account of his penury occasioned by non-payment of subsistence allowance, he could not undertake a journey to attend the disciplinary proceedings, the findings recorded by the enquiry officer at such proceedings, which were held exparte, stand vitiated."

11. The ratio decedendi of the aforesaid case is that where a delinquent employee failed to appear in the departmental proceeding due to his penury caused by non-payment of subsistence allowance, in that event such exparte proceeding stands vitiated.

12. Similarly in the case of **Ghanshyam Das Srivastava Vs. State of Madhya Pradesh** (Supra), the delinquent employee was residing at Rewa and the enquiry was being held at Jabalpur which is 500 Kms. away from Rewa and the delinquent employee wrote a letter on 5.12.1964 to the Enquiry Officer informing him that unless he was paid subsistence allowance, he would not be able to face the enquiry proceeding due to acute shortage of funds. In that view of the matter, the Hon'ble Apex Court held that the order of dismissal from service cannot sustain as the appellant did not receive reasonable opportunity of defending himself in the enquiry proceeding due to non-payment of subsistence allowance. In both the aforesaid cases, i.e. **Capt. M. Paul Anthony** (Supra) and **Ghanshyam Das Srivastava** (Supra), a specific plea was taken that the delinquent employee was not in a position to participate in the proceeding on account of non-payment of subsistence allowance. An application to that effect was also filed before the Enquiry Officer. In the case in hand, the petitioner was put under suspension vide order dated 19.5.1988 and the departmental proceeding was initiated shortly thereafter and the enquiry proceeding was concluded and the report was submitted on 1.9.1989. Admittedly, the subsistence allowance was paid upto May 1989. Therefore, it is difficult to hold that on account of non-payment of subsistence allowance from June 1989 he was prevented from attending the proceeding. It appears that the petitioner was residing at Bindki in the district of Fatehpur and admittedly the enquiry was also held at Bindki. He further did not make any application before the Enquiry Officer or before the disciplinary authority that due to non-payment of subsistence allowance he is not in a position to attend the proceeding rather he filed the reply to the first charge sheet within the time and for the second charge sheet he sought further time which was initially allowed but inspite of that he did not give reply within the time allowed to him and, therefore, the Enquiry Officer proceeded ex-parte and submitted his report. Even before the disciplinary authority in the show cause against the proposed punishment, the appellant-petitioner has not asserted that he was prevented from participating in the proceeding because of the non-payment of subsistence allowance nor such specific plea was taken in the writ petition before the learned Single Judge. In this view of the matter, we are of the view that the aforesaid authorities cited by the learned counsel for the appellant-petitioner is of no help to the petitioner and do not apply

to the facts and circumstances of the present case.

13. Therefore, in the facts and circumstances of the case, it appears that the petitioner deliberately kept himself away from the proceeding and on account of non-payment of subsistence allowance w.e.f. June, 1989 he has not been prejudiced at all and, therefore, the learned Single Judge has rightly found that no case has been made out by the petitioner to the effect that he could not participate in the proceeding by reason of non-payment of subsistence allowance. The allegation in para 16 of the writ petition that at no stage the petitioner was given any opportunity of hearing or to produce evidence or cross-examine the witnesses of prosecution, has been denied in para 19 of the counter affidavit wherein it has been averred that the petitioner was given ample opportunity of being heard. It further appears from the order of respondent no. 2 dated 8.11.1989 which has been impugned in the writ petition that the appellant-petitioner was given sufficient time to submit his written statement of defence to the charge sheet dated 3.5.1989 as required under Rule 6(2)(b) of the U.P. Municipal Boards Servants (Inquiry, Punishment & Termination of Service) Rules, which provides that the charged servant's written statement of defence should ordinarily be required to be submitted within a fortnight and in no case a period of more than a month should be allowed for the purpose. In the instant case the appellant was initially given fifteen days' time to submit his written statement of defence. However, on his request made vide application dated 6.6.1989, one month's time was again allowed to him for the purpose but inspite of that he did not submit his written statement of defence or show cause within the said period. Thus, sufficient and reasonable opportunity was given to the appellant-petitioner, which he did not avail and, therefore, the allegation of violation of the principles of natural justice is without merit and does not sustain.

No other point has been urged.

14. In view of the discussions made above, in our view, there is no merit in this appeal. We accordingly uphold the order of the learned Single Judge.

15. The Special Appeal accordingly fails and is hereby dismissed but without cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 6TH OCTOBER, 2001

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

Special Appeal No. 596 of 1998

Pradeep Kumar Singh ...Appellant
Versus
U.P. State Super Corporation and others ...Respondents

Counsel for the Appellant:
Sri R.K. Ojha

Counsel for the Respondent:
Sri S.S. Nigam

Constitution of India, Article 226- Alternative Remedy- held no bar- this rule is a rule of Policy, convenience and disretion- not a rule of law- where the writ petition is for enforcement of fundamental rights- Principle of Natural justice violated- order or proceedings

without jurisdiction or vires of the Act challenged- held- alternative remedy is no bar.

Held - para 22

While exercising its writ jurisdiction under Article 226 of the Constitution of India, the High Court may decline to grant relief until such statutory remedy is exhausted. However, this rule is a rule of policy, convenience and discretion and not a rule of law nor it bars the jurisdiction of the High Court under Article 226 of the Constitution in granting relief in appropriate case and exceptional circumstances. (ii) Alternative remedy is not a bar where a writ petition has been filed for enforcement of any fundamental rights, or where there is violation of principles of natural justice, or where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged.

Constitution of India- Article 226- Practice and Procedure - writ petition admitted- remain pending for 5 years counter and rejoinder affidavit filed- factual controversy not envolve writ petition not to be dismissed on ground of alternative remedy.

Held- para 30

Thus, in view of the principles laid down by the Hon. supreme Court in the case of L. Harday Narain (supra) and B.K. Agarwal (supra), we are of the view that since the writ petition was filed in the year 1993 and was also admitted by this Court and remained pending for more than 5 years the learned Single Judge was not justified in dismissing the writ petition on the ground of alternative remedy of raising an industrial dispute.
(C) Constitution of India, Article 12- State' State Sugar Corporation Ltd. is State within the meaning of Article 12 of the Constitution even standing order have no statutory force- order being arbitrary and violative of Act 14- can be challenged in writ jurisdiction.

Held para 29

Corporation is a State as defined under Article 12 of the Constitution of India and, therefore, even if the Standing orders are not statutory, any order which has been passed in violation of principles of natural justice would be arbitrary and violative of Article 14 of the Constitution and can be challenged under Article 226 of the Constitution of India.

(Delivered by Hon'ble R.K. Agrawal, J.)

1. The present appeal has been filed against the judgement and order dated 21.7.1998 passed by the learned Single Judge in Civil Misc. Writ Petition No. 8483 of 1993, whereby the writ petition has been dismissed on the ground of alternative remedy in view of the Full Bench 's decision in the case of Chandrma Singh vs. Managing Director, U.P. Cooperative Union reported in 1991 (2) U.P.L.B.E.C. 898.

2. Briefly stated facts giving rise to the present Appeal are that the appellant/writ petitioner was appointed as Legal Assistant on 4.12.1988 in Nawabganj Sugar Mill Company Limited, district Gonda, a unit wholly owned and controlled by the U.P. State Sugar Corporation Limited (hereinafter referred to as the Corporation). Subsequently vide order dated 6.7.1989 he was transferred to Shahganj Sugar Mills i.e. another unit owned by the Corporation. His services were confirmed by the Corporation vide order dated 5.7.1990. It appears that the appellant-writ petitioner absented himself from duty since 23.9.1992. According to him, he was ill and had sent medical certificate alongwith an application by

registered post for grant of necessary leave on 23.9.1992 itself. He also sent a telegram to that effect on the same date. As he could not recover from his illness, he intimated the authorities concerned accordingly. However, the Chief Manager, of the Corporation's Shahganj Sugar Mills vide letter dated 30.9.1992 asked the appellant writ petitioner to join the duties immediately, whereupon the appellant-writ petitioner again sent his medical certificate alongwith letter dated 30.9.1992. Subsequently, the appellant-writ petitioner had sent an application alongwith medical certificate as per the averment made in the writ petition but the same was not received by the respondent no. 2 having been returned undelivered. The respondent no. 2 vide letter/notice dated 22.0.1992 directed the appellant-writ petitioner to join his duties within three days otherwise his services shall be terminated. In response to the said notice the appellant-writ petitioner again sent an application on 13.11.1992 alongwith medical certificate by registered post for extension of his leave, which letter was returned undelivered as according to the appellant-writ petitioner, the respondent no. 2 had refused to receive the said letter. The respondent no. 2 vide order dated 17,.12.1992, terminated his services. The order dated 17.12.1992 had been challenged by the appellant-writ petitioner before this Court by means of filing writ petition under Article 226 of the Constitution of India. While entertaining the writ petition, this Court had directed the respondents to file a counter affidavit. After exchange of the affidavits, the writ petition was admitted on 8.5.1996 and interim order was also passed on the same day in favour of the writ petitioner. But in Special Appeal No. 494 of 1996 preferred by the respondents-herein, this Court had stayed the operation of the interim order dated 8.5.1996. The aforesaid special Appeal was decided on 23.4.1998 with the direction for deciding the writ petition expeditiously and the interim order was also vacated. The said writ petition came up for hearing before the learned Single Judge, which has been dismissed on the ground of alternative remedy in view of the Full Bench judgement of this Court in the case of Chandrama Singh (supra).

3. We have heard Sri R.K. Ojha learned counsel for the appellant writ petitioner and Sri S.S. Nigam learned counsel for the respondents.

4. The learned counsel for the appellant-writ petitioner has submitted that the Corporation falls within the meaning of the word State as provided under Article 12 of the Constitution of India, and therefore, any arbitrary action or order passed by the Corporation can be challenged by invoking writ jurisdiction under Article 226 of the Constitution of India. He further submitted that the writ petition having been admitted and remained pending before this Court for than 5 years, it could not have been dismissed on the ground of alternative remedy. In support of this plea, he relied upon the following decisions:

(1) Hridya Naraian Vs. Income Tax Officer Bareilly reported in A.I.R. 1971 S.C. 33

(2) Dr. Bal Krishna Agarwal Vs. State of U.P. and others (1995 All.L.J. 454).

5. The learned counsel for the appellant-writ petitioner has further contended that he was a confirmed employee of the Corporation and under

clause M (4) of the Standing Orders applicable to all the sugar Mills of the Corporation, no order of dismissal could have been passed unless the employee was informed about the alleged misconduct and given an opportunity to explain the circumstances alleged against him and a proper enquiry has been made by the Manager. According to the learned counsel for the appellant-writ petitioner, admittedly in the present case, the appellant writ petitioner had been dismissed from services without holding any enquiry. Thus, the impugned order of dismissal has been passed in utter disregard and gross violation of the principle of natural justice. In such circumstances, the alternative remedy available to he petitioner is not an absolute bar in entertaining the writ petition. In support of the above submission, he relied upon the following decisions.

(1) Ambika Singh Vs. State Sugar Corporation Ltd. and others (1990) 1 U.P.L.B.E.C. 699,

(2) Whirlphool Corporation vs. Registrar of Trade Markets Mumbai and others (1998)8 , Supreme Court Cases 1),

(3) Satya Ram Yadav vs. Deputy Managing Director UP State Ware Housing Corporation Lucknow 2000 (1) E.S.C. 504 (All.),

(4) State of U.P. and others vs. Ali Abbas Abdi, 2001 (2) E.S.C. 619(Allahabad)

(5) Dr.(Smt.) Kamta Gupta vs. Management of Hindu Kanya Mahavidyala Sitapur (UP) and others (AIR 1987 SC 2186).

6. The learned counsel further submitted that the decision of the Full Bench of this Court in the case of Chandra Singh (supra) is not applicable in the present case in as much as the Full Bench itself had held that the High Court must not allow its extraordinary jurisdiction under Article 226 of the Constitution of India to be invoked if it is established from the material on record that there exists exceptional or extraordinary circumstances to deviate from well settled normal rules of relegating the petitioner of alternative remedy provided to him. According to the learned counsel for the appellant-writ petitioner, in the present case, there is violation of the principles of natural justice, and therefore, the alternative remedy of raising the dispute before the Industrial Tribunal could not be a ground for declining to exercise the jurisdiction under Article 226 of the Constitution of India in view of the decision of Hon. Supreme Court in the case of Whirelpool Corporation (supra) wherein the Hon. Supreme Court has held that where there has been violation of principle of natural justice, the alternative remedy would not be a bar in exercising jurisdiction under Article 226 of the Constitution of India. Shri Ojha also relied upon the decision in the case of Rakesh Chandra Gangwar vs. State of U.P. and others (Civil Misc. writ petition no. 38619 of 1998 decided on 28.5.1999). According to him, this Court had been exercising the jurisdiction under Article 226 of the Constitution of India in writ petitions filed by the employees of the Corporation where violation of natural justice had been alleged, therefore, the Court should not have dismissed the petition on the ground of alternative remedy in as much as admittedly neither any enquiry nor any opportunity of hearing was given to the appellant-writ petitioner before terminating his services.

In support of this plea he relied upon the following decisions:

(1) Ambika Singh vs. U.P. State Sugar Corporation Limited and others reported in 1990(1) U.P.L.B.E.C. 699,
(2) Special Appeal No. 198 of 1997, Narendra Tyagi vs. U.P. State Sugar Corporation Limited and others decided on 8.4.1997,
(3) Civil Misc. Writ Petition No. 2602 of 1998- Ram Vijay Singh vs. U.P. State Sugar Corporation Limited and others decided on 9.2.1998,
(4) Special Appeal No. 195 of 1998, U.P. State Sugar Corporation Limited Lucknow and others vs. Ram Vijay Singh decided on 13.5.1998.

7. On the merits of the case, Shri R.K. Ojha submitted that since the services of the appellant-writ petitioner had been terminated without giving any show cause notice or any opportunity of hearing, the said order is liable to be set aside being violative of the principal of natural justice and he relied upon a decision of this Court in the case of *Sunil Kumar Pathak vs. Chairman Indian Oil Corporation, New Delhi and others reported in 2000(89) F.L.R. 1112.*

8. Shri S.S. Nigam learned counsel for the respondents, however, submitted that the appellant-writ petitioner is admittedly a workman as defined under Section 2 (ii) of the U.P. Industrial Dispute Act, and, therefore, proper forum for adjudication of dispute is Labour Court under the provisions of U.P. Industrial Dispute Act and not by invoking the extraordinary jurisdiction under Article 226 of the Constitution of India. For the aforesaid proposition he relied upon the following decision :

(1) Chandrma Singh Vs. Managing Director, U.P. Cooperative Union Lucknow and others reported in 1991 U.P.LB.E.C. 898 (2) Scooters India and others Vs. Vijay E.V. Elder, 1998, S.C.C. (L-S) 1611.

9. He further submitted that the principles of service law cannot be applied under labour law and submitted that even if the order of dismissal has been passed without holding any enquiry it cannot be set aside solely on that ground and if no enquiry is found to be held or is found to be defective, then employer has right to lead evidence before the Tribunal/court to substantiate the charges. He relied upon the following decisions:

(1) J.K. Cotton Spinning & Weaving Mills Co. Ltd. Kanpur Vs. State of U.P. and others 1997 (76) F.L.R. P-372,
(2) Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh AIR 1972 SC 1031,
(3) Cooper Engineering Work Limited Vs. P.P. Munder AIR 1975 SC 1900.

10. The learned counsel for the respondent further submitted that despite sending registered letter to the appellant-writ petitioner, he did not join the duties and, therefore, he is not entitled to any relief under Article 226 of the Constitution of India. In support of this plea, he relied upon the decision of Hon. Supreme Court in the case of Aligarh Muslim University and others Vs. Mansoor Ali Khan (2000) 7SCC 529. He further submitted that the Standing order has no statutory force and, therefore, any

violation of it cannot be challenged under article 226 of the Constitution of India. He relied upon the decision of Hon. Supreme Court in the case of Rajasthan State Transport Corporation Vs. Krishna Kant reported in A.I.R. 1995 SC 1715.

11. So far as the question of alternative remedy by way of raising industrial dispute being available to the appellant-writ petitioner is concerned, there cannot be any dispute that the appellant- writ petitioner can raise industrial dispute under the provisions of the U.P. Industrial Dispute Act. The question is as to whether there being an alternative remedy of raising the industrial dispute, the writ petition filed by the appellant -writ petitioner, should have been entertained or not when violation of the principles of natural justice is alleged.

12. In the case of Ambika Singh (supra), this Court, in para 6 of the judgement has held as under:

"6. Before we had taken up the cases for hearing on merits, learned counsel appearing for the respondents raised a preliminary objection. The preliminary objection is that since the petitioners have an alternative remedy by agitating the matter before the Labour Court under the U.P. Industrial Disputes Act, these petitions may be dismissed on the ground of alternative remedy. No doubt, the petitioners have an alternative remedy by getting the matter referred to the Labour Court for adjudication. But, the question is as to whether on the facts on record, we should declining to interfere in the matter on the ground that the petitioners have alternative remedy. In these writ petitions counter affidavits have already been called for and are filed. The argument of the learned counsel for the petitioners is that the year of birth of the petitioners have been changed as recorded in their service-books without giving any opportunity to them and for that purpose he does not rely upon any fact contained in the writ petitions or documents annexed therewith but relies only upon facts stated in counter affidavit and annexures filed alongwith it. For the purpose of deciding this case, there is no controversy about facts before us nor any inquiry regarding any facts had to be made. Only question of law whether impugned order is void being passed against principle of natural justice has to be decided on the basis of a document annexed with the counter affidavit filed by the respondents. No doubt whenever there is disputed question of fact, even if the counter-affidavit is called for , the courts normally decline to interfere with the matter in case it is found that the petitioner has an alternative remedy available to him under law. But in view of the above factual and legal position we overrule the preliminary objection and proceed to decide these writ petitions on merits."

13. In the case of Whirlpool Corporation (supra) the Hon. Supreme Court in para 15 of the judgement has held as follows:

"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of, which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its

jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

14. In the case Satya Ram Yadav (supra) this Court while following the decision of Hon. Supreme Court in the case of Whirlpool Corporation (supra), in para 8 of its judgment, has held as under :

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

15. In the case of State of U.P. and others vs. Ali Abbas Abdi, the Division Bench of this Court, presided over by the Hon'ble the Chief Justice, followed the decision of the Hon. Supreme Court in the case of Whirlpool Corporation (supra) and held that inspite of the availability of alternative remedy, if the order impugned, suffers from lack of jurisdiction or is in violation of principle of natural justice, the High Court can entertain the writ petition and pass appropriate orders. In paras 3,5 and 6 of the judgment the Division Bench of this Court has held as under :

"3. It is true that normally where a statute itself prescribes a remedy, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution of India, and the High Court while exercising its writ jurisdiction under Article 226 of the Constitution may decline to grant relief in the writ petition until such statutory remedy is exhausted. However, this rule of exhaustion of statutory remedy is a rule of policy, convenience and discretion and not a rule of law nor it bars the jurisdiction of the High Court under Article 226 in granting relief in appropriate case and exceptional circumstances."

5. Therefore, it is a well settled legal position that inspite of availability of alternative remedy if the order impugned suffers from the lack of jurisdiction, or is in violation of principles of natural justice the High Court can entertain the writ petition and pass appropriate orders. In the case in hand the learned Single Judge has found that the alleged second departmental proceeding pursuant to the direction of the learned Tribunal was not initiated in terms of the direction after giving appropriate opportunity to the writ petition. It has been found by the learned Single Judge that in fact no departmental inquiry was initiated afresh and petitioner was not afforded opportunity to defend as directed by Tribunal vide its judgment and order dated 28.10.1980, a copy whereof has been annexed as Annexure 1 to the writ petition.

6. Therefore, when the impugned order was itself found to be in violation of principles of natural justice the learned Single Judge has rightly entertained the writ petition. No other point has been urged by the learned counsel for the appellant. Besides that during course of arguments of this appeal it has been stated at the bar that the writ petitioner has already retired from service."

16. In the case of Dr. Smt. Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya Sitapur, (supra) the Hon. Supreme Court in para 12 of the judgement, has held as under:

"12. The next question that falls for our consideration is whether the High Court was justified in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy. It is true that there was an alternative remedy for challenging the impugned order by referring the question to the Chancellor under Section 68 of the U.P. State Universities Act. It is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. In the instant case, the Vice-Chancellor had no power of review and exercise of such a power by her was absolutely without jurisdiction. Indeed, the order passed by the Vice-Chancellor on review was a nullity such an order could surely be challenged before the High Court by a petition under Article 226 of the Constitution, in our opinion, the High Court was not justified in dismissing the writ petition on the ground that an alternative remedy was available to the appellant under sec. 68 of the U.P. State Universities Act."

17. In the case of Chandrama Singh (supra), the Full Bench of this Court in paras 9 and 13 of the judgement has held as under :

"9. Having regard to the above noticed decisions of the Hon'ble Supreme Court of India, it is ruled that where a complete machinery/remedy for obtaining relief is provided in Statute and such machinery and remedy fully covers the grievance of the petitioner then, unless extraordinary or exceptional circumstances exist or the machinery /remedy does not cover the grievance of the petitioner or the machinery or remedy is demonstrated and proved by the petitioner to be inadequate or inefficacious, the petitioner has to be relegated to the alternative remedy and the Court should not entertain a writ petition under Article 226 of the Constitution of India for redressal of the grievance by the petitioner…….

"13. The decisions of the Hon'ble Supreme Court of India and this Court, noted above, lead to an irresistible conclusion that the High Court must not allow its extraordinary jurisdiction under Article 226 of the Constitution of India to be invoked if the petitioner has got an alternative remedy and such remedy is not pleaded and proved to be inadequate or inefficacious, or if it is not established from the material on record that there exist exceptional or extraordinary circumstances to deviate from the well settled normal rule of relegating the petitioner to alternative remedy and permit him to by-pass the alternative remedy. The hurdle of alternative remedy

cannot be allowed to be skipped over lightly on a casual and bald statement in the petition that there is no other equally efficacious or adequate alternative remedy than to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India." The petitioner must furnish material facts and particulars to sustain such a plea."

18. In the case of Scooters India and others (supra), the Hon. Supreme Court in para 2 of the judgment has held as under:

"2. The above facts alone are sufficient to indicate that there was no occasion for the High Court to entertain the writ petition directly for adjudication of an industrial dispute involving the termination of disputed questions of fact for which remedy under the industrial laws are available to the workman. That apart, the writ petition was filed more than 6 years after the date on which the cause of action is said to have arisen and there being no congent explanation for the delay, the writ petition should have been dismissed on the ground of laches alone. It is also extraordinary for the High Court to have held clause 9,3,12 of the standing orders as invalid. Learned counsel for the respondent rightly made no attempt to support this part of the High Court's order. In view of the fact that we are setting aside the High Court's judgment, we need not deal with this aspect in detail."

19. In the case of J.K. Cotton Spinning & Weaving Mills Co. Ltd. Kanpur (supra) this court has held that the principle of service law has no automatic application to labour law.

20. In the case of Aligarh Muslim University and others (supra), the Hon. Supreme Court in paras 21 to 25 of the judgment has held as under :

"21. As pointed recently in M.C. Mehta v. Union of India there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in Gadde Venkateswara Rao vs. Govt. of A.P. it is not necessary to quash the order merely because of violation of principles of natural justice.

22. In M.C. Mehta it was pointed out that at one time, it was held in Ridge v. Baldwin that breach of principles of natural justice was in itself treated as prejudice and that no other "de facto" prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In S.L. Kapoor v. Jagmohan Chinnappa Reddy, J. followed Ridge v. Baldwin and set aside the order of suppression of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

23. Chinnappa Reddy, J. in S.L. Kapoor case laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion

was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases, In K.L. Tripathi v. State Bank of India Sabyasachi Mukharji, J. (as he then was) also laid down the principle that no mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Edn. Pp. 472-75), as follows : (SCC p. 58, para 31)

(I) it is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. There is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala v. S.K. Sharma. In that case, the principle of 'prejudice' has been further elaborated. The same principle has been reiterated again in Rajendra Singh v. State of M.P.

25. The 'useless formality' theory, it must be noted, is an exception. Apart from the class of cases of 'admitted or indisputable facts leading only to one conclusion' referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingharm, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smt. Wade, D.H. Clark etc. some of them have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend of the facts of a particular case."

21. In the case of Rajasthan State Road Transport Corporation (supra) the Hon. Supreme Court in para 32 of its judgment has held as under :

"32. We may now summarize the principles flowing from the above discussion :

(1) Where the dispute arises from general law of contract, i.e. where relief’s are claimed on the basis of the general law of contract, a suit filed in civil court cannot be said to be not maintainable, even though such a dispute may also constitute an 'industrial dispute' within the

meaning of Section 2 (K) or Section 2-A of the Industrial disputes Act, 1947.

(2) Where, however, the dispute involves recognition, observance or enforcement of any of the rights or obligation created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.

(3) Similarly, where the dispute involves the recognition, observance or enforcement of rights and obligations, created by enactment like Industrial employment (Standing orders) Act 1946- which can be called 'sister enactments' to Industrial Disputes Act- and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by Industrial Disputes Act, provided they constitute industrial disputes within the meaning of Section 2 (k) and Section 2-A of Industrial Disputes Act or where such enactment says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act, otherwise, recourse of Civil Court is open.

(4) It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate government. The power to make a reference conferred upon the government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one ex facie. The power conferred is the power to refer and not the power to decide, though it may be that the government is entitled to examine whether the dispute is ex facie frivolous, not meriting an adjudication.

(5) Consistent with the policy of law aforesaid, we commend to the Parliament and the State Legislatures to make a provision enabling a workman to approach the Labour Court/Industrial Tribunal directly- i.e. without the requirement of a reference by the Government- in case of industrial disputes covered by Section 2-a of the Industrial Disputes Act. This would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

(6) The certified Standing orders framed under and in accordance with the Industrial Employment (Standing orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to ' statutory provisions'. Any violation of these Standing Orders entitles an employee to appropriate relief either before the forums created by the Industrial Disputes Act or the Civil Court where recourse of Civil Court is open according to the principles indicated herein.

(7) The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and un-encumbered by the plethora of procedural law and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the Courts and Tribunals under the Industrial Dispute Act are far more extensive in the sense that they can grant such relief as they think appropriate in the

circumstances for putting an end to an industrial dispute.

22. Thus, from the various decisions referred to above the following principles emerge regarding maintainability of a petition under Article 226 of the Constitution of India.

(I) While exercising its writ jurisdiction under Article 226 of the Constitution of India, the High Court may decline to grant relief until such statutory remedy is exhausted. However, this rule is a rule of policy, convenience and discretion and not a rule of flaw nor it bars the jurisdiction of the High Court under Article 226 of the Constitution in granting relief in appropriate case and exceptional circumstances; (II) Alternative remedy is not a bar where a writ petition has been filed for enforcement of any fundamental rights, or where there is violation of principles of natural justice, or where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged.

23. In the present case before us, the appellant writ petition has complained that the order of dismissal has been passed against him without giving any show cause notice or opportunity of hearing. Thus, the violation of principle of natural justice has been alleged which falls within one of the exceptions carved out by the Hon. Supreme Court in the case of Whirlpool Corporation (supra). Thus, the writ petition is maintainable.

24. In the case of Rakesh Chandra Ganwar (supra) this Court has held as follows:

The Courts, as a matter of principle, ought to have regard to the functions being performed by the body whose decision is impugned, rather than the formal source of its power, and this should be so whether or not the body in question is ostensible a 'public' or 'private' one. In the words of S. Arrow Smith.' The way forward now for the Courts to adopt the same approach to the judicial review of contractual powers as they do to the review of other activities of the government. In other words, they should accept that those powers are reviewable as a matter of principle but that review may be negated or limited by special police factor, rather than continue searching for some ' public law' element to the decision as the justification for applying public law doctrines to the case before them ' see Dee Smith (supra) page 178. This seems to be in the time with the jurismetrics of our Constitution.

Having thus given my thoughtful consideration to the question of maintainability of the writ petitions, I am of the view that Article 226 of the Constitution which is phrased in a language of very wide amplitude, does not admit of any restraint on the powers of the High Court. In fact the High Courts in India being court of record have plenary powers of unlimited jurisdiction. They are repository of all judicial powers except what expressly excluded. A writ under Article 226 of the Constitution can be maintained as against a non statutory body such as a co-operative society not only for performance of its statutory duties but also for the performance of duties of public nature by whatever means imposed.

I am further of the view that the duties imposed by Certified Standing Orders are duties of public nature and exercise of power there under would be open to judicial review under Article 226 of the Constitution on the touch stone of reasonableness and procedural fairness despite availability of alternative remedy under the provisions of the U.P. Industrial Disputes Act 1947. The preliminary objection is, therefore, unsustainable.

Before parting with the preliminary objection as to review ability under article 226 of the Constitution of the impugned decision taken by the co-operative society, it would be apt to observe that if, in a given case, it is found that the decision impugned therein has been taken against fundamental principles of reasonableness and procedural fairness, and/or against any provision of certified standing orders, this court would simply demolish the impugned decision and require the concerned society to take a fresh decision in accordance with law. The submission that by giving such relief the court would in fact be granting specific performance of contract of service which, in view of the provisions of Specific Relief Act, 1963, is impermissible, is untenable for this Court in exercise of its power under Article 226 of the Constitution would quash, the decision in accordance with law the decision in Executive Committee, Vaish Degree College vs. V. Lakshmi Narain, (1976) 2 SCC 58 is thus, distinguishable."

25. It is further found that this Court had been entertaining the writ petitions under Article 226 of the Constitution of India, against U.P. State Sugar Corporation Limited as would be seen from the judgment of this Court in the Cases of Ambika Singh, Narendra Tyagi and Ram Vijay Singh (supra).

26. Thus, from the various principles laid down by this Court in the case of Rakesh Chandra Gangwar, it can be safely said that writ petition under Article 226 of the Constitution is maintainable against the U.P. State Sugar Corporation Limited as it falls within the term 'State' as defined under Article 12 of the Constitution. In fact this position has not been disputed by the learned counsel appearing for the respondent-C.

27. Apart from above, we find that the writ petition was filed as far back in the year 1993 and was admitted by this Court subsequently. It remained pending for more than 5years. In the case of L. Hirday Narain vs. Income Tax Officer, Bareilly, reported in AIR 1971 Supreme Court 33, the Hon. Supreme Court in para 12 of the judgement has held as under :

"12. An order under Section 35 of the Income -tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained his petition, Hirday Narain could have moved the Commissioner in revision because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

28. In the case of Bal Krishna Agarwal vs. State of U.P. and others reported in 1995 All. L.J. 454 the Hon. Supreme Court in para 10 of the judgment has held as under :

"10. Having regard to the aforesaid facts and circumstances, we are of the view that the High Court was not right in dismissing the Writ petition of the appellant on the ground of availability of an alternative remedy under Section 68 of the Act specially when the Writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than five years. Since the question that is raised involves a pure question of law and even if the matter referred to the Chancellor under Section 68 of the Act it is bound to be agitated in the court by the party aggrieved by the order of the Chancellor, we are of the view that this was not a case where the High Court should have not-suited the appellant on the ground of availability of an alternative remedy.

29. There can be no dispute that the Certified Standing Orders framed by the Corporation under the provisions of Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed condition of services and are binding upon both the employer and the employee though they do not amount to statutory provisions. There is no dispute that in the Standing Orders framed by the Corporation before terminating the service of an employee opportunity of hearing is required to be given. Even where there was no provision for giving opportunity of hearing to an employee when he had absented himself and such absence is treated as voluntarily abandonment of service, the Hon. Supreme Court in the case of D.K. Yadav Vs. J.M.A. Industries Limited reported in 1993 (67) F.L.R.111 and a Division Bench of this Court in the case of Sunil Kumar Pathak vs. Chairman, Indian Oil Corporation New Delhi and others (supra) had held that such provision is violative of Article 14 of the Constitution and employee should be given opportunity of hearing. Admittedly, the Corporation is a state as defined under Article 12 of the Constitution of India and, therefore, even if the Standing Orders are not statutory, any order which has been passed in violation of the principles of natural justice would be arbitrary and violative of Article 14 of the Constitution and can be challenged under Article 226 of the Constitution of India. The decision of Hon. Supreme Court in the case of Aligarh Muslim University (supra) would not be applicable to the facts of the present case in as much as the petitioner has been removed from service without holding any enquiry. The Court is yet to consider the question of prejudice caused to the petitioner as the writ petition has been dismissed by the learned Single Judge on the ground of alternative remedy.

30. Thus, in view of the principles laid down by the Hon. Supreme Court in the case of L. Harday Narain (supra) and B.K. Agarwal (supra), we are of the view that since the writ petition was filed in the year 1993 and was also admitted by this Court and remained pending for more than 5 years the learned Single Judge was not justified in dismissing the writ petition on the ground of alternative remedy of raising an industrial dispute.

31. Accordingly, we set aside the judgement and order passed by the

learned Single Judge. The writ petition shall be heard and decided on merit on the basis of affidavits filed by the parties. It is made clear that we have not adjudicated the respective contentions on the merit of the case advanced by the learned counsel for the parties. In the result, the Special Appeal is allowed. However, the parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.10.2001

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

Special Appeal No. 149 of 1996

State of U.P. ...Appellant
Versus
Mohan Lal ...Respondent

Counsel for the Appellant:
Sri K.S. Kushwaha
Sri Ranvijay Singh

Counsel for the Respondent:

High Court Rules, Allahabad 1952- Chapter VIII Rule 5- the appellant-authorities should have adopted the policy of last come first go. Retaining a junior in service and terminating the services of the Senior is absolutely unfair, unjust, arbitrary and discriminatory in nature.

(Held in para 4)

From the order under appeal we find that the learned Single Judge has also given an opportunity to the authorities to reconsider the matter so that the grievance of the writ petitioner to the effect that his junior was retained in service may be reconsidered. As such, we find that the order passed by learned Single Judge does not call for interference.

(Delivered by Hon'ble S.K. Sen, C.J.)

We are of the view that sufficient ground exists for condonation of delay of 66 days in preferring the special appeal. The delay is accordingly condoned. The application under section 5 of Limitation Act stands allowed.

1. We have heard Mr. Ranvijay Singh, learned Standing Counsel appearing on behalf of the appellant- State of U.P..

2. This special appeal which arises at the instance of State of U.P. is directed against an order allowing the writ petition whereby the termination of the writ petitioner-respondent herein was kept in abeyance. Mr. Ran Vijay Singh, learned Standing Counsel has contended that the appointment of the petitioner- respondent herein being illegal, his services were rightly terminated and as such, the order of the learned Single Judge allowing the writ petition is not sustainable.

3. It is the admitted position that no counter affidavit has been filed in the writ petition, Therefore, the allegations contained in the writ petition stand uncontroverted. It appears from the judgment under appeal that admittedly, a similarly situated person namely, Shashi Pal who is junior to the writ petitioner, is still working as Class IV employee in the school, whereas the services of the writ petitioner were terminated on the ground that his services were no long required. We are of the view that the appellant-authorities should have adopted the policy of last come first go. Retaining a junior in

service and terminating the services of the senior is absolutely unfair, unjust, arbitrary and discriminatory in nature. In that view of the matter, the contention of the learned Standing Counsel cannot be accepted. Accordingly, we are not inclined to interfere with the order passed by learned Single Judge.

4. Moreover, from the order under appeal we find that the learned Single Judge has also given an opportunity to the authorities to reconsider the matter so that the grievance of the writ petitioner to the effect that his junior was retained in service may be reconsidered. As such, we find that the order passed by learned Single Judge does not call for interference.

Special Appeal fails and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD OCTOBER 30, 2001

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ Petition No. 4518 of 1986

Shri Ram Avadh Prasad ...Petitioner
Versus
U.P. Public Services Tribunal, Lucknow and others ...Respondents

Counsels for the Petitioner:
Sri Govind Kumar Singh
Sri R.N. Singh
Sri S.N. Singh

Counsel for the Respondents:
S.C.
Vinay Malviya

Constitution of India- Article 226- void appointment cannot bestow upon the appointee any legally cognizable and judicially enforceable right. The appointment of the petitioner being void abinitio, no benefit could ensure in his favour, and his claim has been rightly turned down by the Tribunal. (Held in para 8).

The petition lacks merit, and it is dismissed accordingly.

(Delivered by Hon'ble D.S. Sinha, J.)

1. Heard Sri Govind Kumar Singh, holding brief of Sri R.N. Singh, learned Senior Advocate appearing for the petitioner, and Sri Vinay Malaviya, learned Standing Counsel for the State of U.P., representing the respondents.

2. Sri Ram Avadh Prasad, asserting to have been appointed as washerman in the upgraded Premary Health Centre, Kasia, district Deoria approached the U.P. Public Services Tribunal No. II, Lucknow, the respondent no. 1, hereinafter called the Tribunal, praying for direction to the opposite parties for payment to him salary for the period between May, 1982 and August, 1983, and from January, 1984 onwards. He also prayed for declaration of continuity of service with consequential benefits.

3. The claim of the petitioner was resisted by the opposite parties on the ground that the alleged appointment of the petitioner was void ab initio in as much as it was made by an authority which was not competent, and the appointment was against a non-existent post.

4. After thorough examination and critical scrutiny of the pleadings of the parties and material produced by them

before it, the Tribunal by the impugned detailed and well reasoned judgment and order held that, indeed, the alleged appointment of the petitioner on the post of washerman was not made by competent authority, and it was against a non-existent post.

5. The twin findings of fact in relation to fact of competence of the authority who made the alleged appointment and non-existence of the post is founded on the relevant Government Orders and the material noticed and relied upon in the judgment.

6. Before this Court, the petitioner has not been able to demonstrate that the findings of fact recorded by the Tribunal suffer from any error apparent on the face of record. The findings of fact being based on relevant material are not open to challenge before this Court in exercise of its special and extraordinary jurisdiction under Article 226 of the Constitution of India.

7. In backdrop of the facts that the appointment of the petitioner was made by an authority which lacked competence; and that the post on which appointment was made itself did not exist at the time of appointment, the Tribunal has rightly held that the appointment of the petitioner was void ab initio. It is well settled that void appointment cannot bestow upon the appointee any legally cognizable and judicially enforceable right. The appointment of the petitioner being void ab initio, no benefit could ensue in his favour, and his claim has been rightly turned down by the Tribunal.

8. All told, the petition lacks merit, and it is dismissed accordingly. There is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.11.2001

BEFORE
THE HON'BLE R.R. YADAV, J.

Civil Misc. Writ Petition No. 34397 of 2001

Gaje Singh ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri A.D. Prabhakar

Counsels for the Respondents:
Sri S.N. Srivastava

Constitution of India Article 226/227- Public Premises (Eviction of unauthorised occupants Act 1971 Section 7(3)- after retirement- for last 13 years remained as unauthorized occupants- even after service of Notice- not given any explanation- interference with the eviction order amounts to tantamount travesty of justice leading to geterque result of indiscipline.

Held- Para 9

Hence in the present case admittedly the petitioner retired from his service on 30.11. 1995 but he did not vacate the official premises allotted to him by the Department up till 8.7.1998 depriving his successor in office for more than thirteen years of official accommodation for which his successor was entitled. To my mind interference with orders impugned (Annexure 5 and 9 to the writ petition), petition passed by respondent no.3 and affirmed by learned Addl. District Judge in appeal, would tantamount travesty of justice leading to grotesque result of

indiscipline amongst the employees of the Department.

(Delivered by Hon'ble R.R. Yadav, J.)

1. By way of filing the instant writ petition the petitioner questions the legality and validity of the order dated 23.2.2001, Annexure 5 to the writ petition, passed by the Estate Officer, Controller of Defence Accounts, (Army) Meerut, respondent no.3 as well as the order dated 12.10.2001 passed by the Additional District Judge Court No. XI, Meerut in Misc. Appeal No. 118 of 2001 between Gaje Singh Versus Union of India and others, a copy whereof is filed and marked as Annexure-9 to the writ petition, whereby the petitioner is to pay Rs. 1,33,301/- for unauthorised use and occupation of premises No. D.A.D. Quarter No. B-1/1 Lekhanagar Meerut Cantt after his retirement from the post of Section Officer.

2. The facts averred in the writ petition revealed that the petitioner was in service of the Union of India and was posted as Section Officer at the Controller of Defence Accounts (Army) Meerut Cantt and was allotted the premises mentioned hereinabove in the preceding paragraph as an employee of the Department. It is further revealed from the averments made in the writ petition that the petitioner's retirement was proposed by the Department treating his date of birth to be 27.3.1927 against which he filed a Civil Misc. writ petition No. 29481 of 1985 before this Court which was allowed and according to the decision rendered by this court, he was ordered to retire from his service with effect from 30.11.1985.

3. Although admittedly the petitioner retired from his service on 30.11.1985 but he continued to remain in unauthorized occupation of the allotted premises upto 8.7.1998 for which registered notice under sub section (3) of Section 7 of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 was sent to him but after service of the registered notice the petitioner did not file any objection or produce any evidence before Estate Officer respondent No.3, hence respondent No.3 has no alternative except to pass the impugned order on 23.2.2001, a copy whereof is filed and marked as Annexure-5 to the writ petition.

4. Aggrieved against the order dated 23.2.2001, Annexure-5 to the writ petition, passed by respondent no.3, the petitioner preferred an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 before the District Judge, which was transferred for disposal in accordance with law before the learned Additional District Judge. The learned Addl. District Judge, after analytical discussion of the materials available on record with reference to the relevant law on the subject dismissed the appeal on 12.10.2001, against which the present petition has been preferred.

5. At the out set I am hastened to observe that the filing of the writ petition before this court under Article 226/227 should not be taken an easy access with an oblique motive to abuse the process of the court. To my mind the scope of Article 226/227 of the Constitution is to save citizenry from vagaries and irrational decisions of either of the State or its instrumentalities with an avowed object to

advance justice between citizen and State and its instrumentalities and vice-versa. It is observed that this Court under its extraordinary equitable jurisdiction cannot afford to erase justice in the name of correcting error or law without better and deeper understanding whether injustice has crept into a particular case due to erroneous interpretation of law. He, who seeks justice and equity by invoking extraordinary equitable jurisdiction of this Court under Article 226/227 of the Constitution, is to demonstrate before this Court that he is prepared and willing to do justice with his adversary.

6. With the aforesaid introspection now I proposed to deal with the arguments advanced by the learned counsel for the petitioner.

7. The learned counsel for the petitioner Sri A.D. Prabhakar submitted that the petitioner is aggrieved by the order of recovery of arrears of rent and damages at market rate of the official accommodation allotted to him while he was in service. It is urged by him that the petitioner was not served with any notice as envisaged under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. Alternatively, it is contended by the learned counsel for the petitioner that even if notice is taken to be served upon him, he has not been afforded reasonable opportunity of being heard. It is submitted by the learned counsel for the petitioner that respondent No. 3 who passed the impugned order as Estate Officer, was officiating on the post of Controller of Defence Account, hence he has no jurisdiction to pass the impugned order, Annexure-5 to the writ petition. The bottom line argument of the learned counsel for the petitioner before this court is that the appellate court instead of deciding the aforesaid arguments raised on behalf of the petitioner itself, it ought to have remanded the case to respondent No.3 to decide the same in accordance with law.

8. I have given my thoughtful anxious consideration to the aforesaid arguments raised by the learned counsel for the petitioner. It is to be noticed that except bottom line argument other arguments were advanced before the appellate court and the appellate court after analytical discussion of the material available on record with reference to law dismissed the appeal. The learned first appellate court has given cogent and convincing reasons in support of its order dated 12.10.2001 (Annexure-9 to the writ petition), with which I am at one. The extraordinary equitable jurisdiction of this court cannot be invoked to erase justice in the name of correcting the error of law on pure academic basis having no bearing on merit of the case. I am of the view that mere illegality is not a ground for interference under Article 226/227 of the Constitution provided this court is objectively satisfied that by the impugned order material justice has been done between the parties. In my considered opinion the very purpose of the extraordinary equitable jurisdiction conferred under Article 226/227 of the Constitution is that no citizen should be subjected to injustice by violating the law either by the State or its instrumentalities and vice-versa. This extra ordinary equitable jurisdiction is to be exercised on recognized lines evolved by the Courts of law, but not as appeal or revision.

9. Here in the present case admittedly the petitioner retired from his

service on 30.11.1985 but he did not vacate the official premises allotted to him by the Department up till 8.7.1998 depriving his successor in office for more than thirteen years of official accommodation for which his successor was entitled. To my mind interference with orders impugned (Annexures 5 & 9 to the writ petition), petition passed by respondent No.3 and affirmed by learned Addl. District Judge in appeal, would tantamount travesty of justice leading to grotesque result of indiscipline amongst the employees of the Department.

10. In feeble voice the learned counsel for the petitioner conceded that notice under sub-section (3) of Section 7 of the Public Premises (Eviction of Unauthorized Occupants) Act 1971 even if presumed to have been served upon the petitioner even then he was entitled to be afforded reasonable opportunity of being heard giving him sufficient time to file explanation and adduce evidence in support of his case. The aforesaid alternative argument of the learned counsel for the petitioner is not acceptable to me for the simple reason that since the petitioner has no valid defence to put forth before the Estate Officer – respondent No.3, therefore, he conveniently avoided to give explanation to the notice served upon him under sub-section (3) of Section 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and avoided to adduce evidence with oblique motive to raise the same in appeal.

11. A close scrutiny of the order impugned passed by the appellate court reveals that all the arguments which are being raised before this court except bottom line argument were raised before it, and the appellate court has rejected the aforesaid arguments after analytical discussion on points of law and fact.

12. As regards bottom line argument of the learned counsel for the petitioner to the effect that the appellate court instead of deciding the appeal between the parties on merits ought to have remanded the case to the Estate Officer for decision in accordance with law, is not acceptable to me and it is hereby repelled for the reasons stated hereinabove in the preceding paragraph of this order. I am objectively satisfied that by impugned order (Annexure-9 to the writ petition) material justice has been done between the parties. The argument raised by the learned counsel for the petitioner on this score is of purely academic nature having no bearing on the merit of the case, hence not acceptable to me in writ jurisdiction under Article 227 of the Constitution.

13. After dictation of the order in court, learned counsel for the petitioner Sri A.D. Praphakar stated that the petitioner is a retired employee and it would not be possible for him to deposit such huge amount at a time. He made a request that payment may be ordered to be made in installments.

14. Taking the humanitarian consideration into account since the petitioner is a retired Government employee, therefore, I find it just and appropriate to direct the petitioner to deposit half of the amount of damages within a period of one month from today and the remaining amount in two equal installments at the interval of six months.

15. With the aforesaid observation the instant writ petition is hereby dismissed summarily at admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 5.11.2001

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

Civil Misc. Writ Petition No. 34945 of 2001

Rama Shanker Tewari ...Petitioner
Versus
District Judge, Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri A.C. Tripathi

Counsel for the Respondents:
S.C.
Sri P.K.Ganguly

U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act 1972, U.P. Act No. XIII of 1972 - period of six months for the purposes of first proviso to section 21 (1) (a) of the Act is to be computed from the date of issuing notice. (Held in para 14)

Concurrent findings of fact recorded by the two courts below on the question of comparative hardship do not warrant any interference by this Court under Article 226, Constitution of India, merely when the petitioner fails to demonstrate such finding being perverse or otherwise vitiated.

Case law discussed.
1998 (1) AWC-580 (SC)
2000(1) Alld Rent cases pg. 43

(Delivered by Hon'ble A.K. Yog, J.)

1. Petitioner, who happens to be a tenant of one room ground floor non-residential accommodation being part of House no. B 20/34, Bhelupura, Varanasi, has approached this Court under Article 226, Constitution of India seeking to challenge concurrent judgements and orders dated 16.5.2001 (Annexure 10 to the petition) passed by the Prescribed Authority under section 21 (1)(a) -1st proviso, U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Act No. XIII of 1972 (for short called 'the Act'), and the appellate judgment and order of affirmance dated 19.9.2001 passed by Appellate Authority, respondent no. 1 (Annexure 12 to the petition).

2. Contesting respondent land-lord is represented by his counsel Sri P.K. Ganguli, Advocate who appeared as counsel for the caveator applicant-respondent no. 2.

3. Heard learned counsel for the parties and perused the record of the case.

4. On behalf of the Petitioner, following two submissions have been made.

5. The Courts below committed manifest error in law apparent on the face of record in interpreting the first proviso of section 21 (1) (a) of the Act. According to the petitioner, the said first proviso was applicable to the facts of present case since the land lord had purchased building with the petitioner as tenant after the commencement of the Act. Petitioner submitted that release application in the instant case was not maintainable since six months' period under the aforesaid proviso, had not expired inasmuch as the 'notice' of six months was received by the petitioner on August 29, 1996, but the release application was filed on 3.3.1997

i.e. before expiry of six months of receiving the notice.

6. Learned counsel for the contesting respondent land-lord submitted that notice was given on 29.8.1996 and if six months' period under the concerned proviso is to be computed from the aforesaid date, then six months had lapsed before filing of the application.

7. Both the Courts below considered the aforesaid contention in the light of the decision of the Apex Court in the case of **Martin and Hharris Limited, Versus VIth Additional District Judge and others** 1998 (1) AWC 580 (SC) para 15 of the said judgement reads as follows:

"15. So far as this point is concerned, it must be held on the clear language of the first proviso to Section 21 (1) of the Act that application for possession under Section 21 (1) (a) had to be filed by the land lord concerned not earlier than expiry of six months from the date of issuance of the notice by the land lord. On the facts of the present case, it cannot be disputed that when the notice was issued on 20th September, 1985, the application for possession could not have been filed by the respondent invoking the grounds mentioned in clause (a) of Section 21 (1) of the Act, at least till 20th March, 1986, while the application was filed in January, 1986. To that extent, it can be said that the application was premature. The provision in this connection has to be treated to be mandatory."

8. And the decision of learned Single Judge, (Hon. Mr. A.K. Yog, J.). In the case of **Anwar Hasan Khan versus District Judge, Shahjahanpur and others** 2000(1) Allahabad Rent Cases page 43, this Court did not consider or held whether six months period is to be calculated from the date of giving of notice or receipt of the notice.

9. The Apex Court in the case of **Martin and Harris Limited** (supra), however, observed that as per the language and expression used in the first proviso to Section 21 (1) (a) of the Act, relevant date for computing the period of six months for the purposes of giving reasonable notice is 'the date of issuance of the notice by the land lord.

10. A careful reading of para 16 of the aforesaid judgment (Martin and Harris Limited) reveals that Supreme Court was not directly concerned with the point (whether six months time is to be reckoned from the date it is given or the date it is received). Expression in para 16 of the judgment ' service of notice' has been used with reference to the objection taken by the land lord in the written statement, other provisions of the Code of Civil Procedure in the context of the arguments of the learned counsel for the tenant, in that case as to whether objection regarding maintainability of the release application, requisite six months could be waived or not, even though essential requirement of giving six months' notice was mandatory.

11. A careful reading of the judgment of the Apex Court in the case of Martin and Harris Limited (supra) clearly shows that period of six months for the purposes of first proviso to section 21 (1) (a) of the Act is to be computed from the date of issuing notice. Apex Court has taken notice of the language used in the said first proviso where the land lord has used the word 'has given a notice'

(Emphasis given by me). I do not find any manifest error apparent on the face of the record in the impugned orders passed by the two Courts below in this respect.

12. Even otherwise I find that petitioner had in fact more than six months before the release application is entertained i.e. allowed. The petitioner had substantially much more time than six months and thus no prejudice appears to have been caused to him. Substantial justice having been done, I do not find this issue to be sufficient for invoking my extra ordinary discretionary jurisdiction under Article 226, Constitution of India.

13. Learned counsel for the petitioner lastly made submission in order to assail findings of fact on the question of comparative hardship on the basis of the extent of accommodation available to the land lord who is a practicing advocate, and his need for the purposes of his Chambers, as well as the circumstance that the tenant has his own accommodation (para 13 of the above judgment pp. 140 of the writ paper book). It cannot be said that hardship likely to be suffered by the tenant as compared to the land lord in the facts and circumstances of the case shall be more.

14. Concurrent findings of fact recorded by the two courts below on the question of comparative hardship do not warrant any interference by this Court under Article 226, Constitution of India, merely when the petitioner fails to demonstrate such finding being perverse or otherwise vitiated.

I find no merit in the petition. It is accordingly dismissed.
