ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 9.4.2001

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

Civil Misc. Writ Petition No. 2216 of 1993

Smt. Prabhawati Devi, since deceased represented by legal representatives and others ...Petitioners
Versus
Ist A.D.J., Azamgarh and others ...Respondents

Counsels for the Petitioners:
Sri S.U. Khan
Sri D.R. Azad

Counsel for the Respondent:
Sri R.C. Gupta

Constitution of India, Article 226 read with Provincial Small Causes Courts Act-1884-S.25- Suit for ejectment on ground of sub-tenancy proved by evidence on record-suit decreed- Revisions by both the parties under S.25- Revisions dismissed- Concurrent findings of fact recorded by both the Court- Findings not perverse-Writ Petition dismissed.

Held- Para 7 and 10

The law on the point is that to prove sub letting production of affirmative evidence showing payment of monetary consideration by the sub tenant to the tenant is not necessary. Inference to sub-letting can be drawn from proof of delivery of exclusive possession of the premises by the tenant to sub-tenant. Such tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof.

I find that the trial court has come to a reasonable and logical conclusion that Servaject was inducted as a sub-tenant in the tenanted accommodation after the death of principle tenant-late Ram Charan. This finding, which has been affirmed by the revisional court, cannot be said to be perverse or, in any manner, based on misreading or misconstruction of the relevant documents and materials. There is no warrant to deviate with the finding recorded by the two courts below on the point. The case of ejectment on the ground of sub tenancy is clearly made out.

(B) Constitution of India, Article 226 read with Provincial Small Causes Courts Act 1887, S.25- New plea in writ petition-suit is not maintainable on the ground that the land lady is not the owner or title is not required to be gone into- Further on petitioner's own admission and materials on record land lady's title is proved.

Held- Para 11

It is well established that the petitioners have acknowledged the respondent no. 3 as their land lady. In a suit for ejectment, relationship of land lady and tenant only is to be seen. The question of title is not required to be gone into. There are cases where a person, though may not be owner, acts as a land lord.

Case law referred:
AIR 2000 SC 3094
AIR 1998 SC 1240
AIR 1999 SC 3087
1995 All C.J. 108

By the Court

1. The dispute relates with regard to an accommodation in the form of a Kotha situate in Mohalla Farash Tola, Tahsil Sadar district Azamgarh. It was under the tenancy of late Ram Charan initially at a monthly rent of Rs.25/-. Ram Charan died in the month of September 1981. The

tenancy rights were inherited by defendant no. 1- Bacchi Devi, widow and two daughters of the deceased- tenant. A.S.C.C. suit no. 10 of 1992 was instituted by Smt. Khairulnnisan, present respondent no. 3 against Smt. Bacchi Devi widow of the deceased tenant and his two daughters, who were arrayed as defendant nos. 1,2 and 3. The ejectment of the legal heirs of the deceased tenant was sought on the ground that they have sub let the tenanted accommodation in favour of Sarvajeet son of Jag Mohan who was imploded as defendant No.4 in the suit. The suit was contested by the defendants resisting the allegations made by the plaintiff-respondent no.3- Khairun Nisan. It was maintained that Sarvajeet who is now petitioner no.2, was not the sub tenant in the tenanted accommodation but was, in fact, joint tenant and in occupation of the disputed accommodation right from the life-time of Ram Charan. The suit was decreed by the Munsif City, Azamgarh on 27.5.1992 recording a categorical finding that the legal heirs of deceased-tenant Ram Charan have, in fact, sub let the tenanted accommodation in favour of Sarvajeet. The widow of the deceased tenant died and consequently a revision application no.198 of 1992 under section 25 of the Provincial Small Causes Court's Act (hereafter referred to as 'the Act') was preferred by Smt. Prabhawati Devi, daughter of the deceased Ram Charan and others. The landlady Smt. Khairulnnisan also filed a Civil Revision No.215 of 1992 under Section 25 of the Act challenging the findings of the court below on certain other points which are not germane to be recited for the purposes of decision in the present writ petition. Both the revision applications were dismissed by the Ist Additional District Judge, Azamgarh by order dated 5.1.1993. Smt. Prabhawati who died during the pendency of the present petition and Sarvajeet came up before this Court under Article 226 of the Constitution of India to challenge the orders passed by the trial court as well as revisional court.

2. Heard Sri S.U. Khan, learned counsel for the petitioners as well as Sri R.C. Gupta, appearing on behalf of the landlady respondent no.3.

3. Sri S.U. Khan, learned counsel for the petitioners urged that Sarvajeet-petitioner no.2 was never a sub-tenant of the disputed accommodation but, in fact, was a joint tenant in his own right with Ram Charan and was in joint possession of the disputed accommodation with him and continued to enjoy the said position with the legal heirs of the deceased Ram Charan and, therefore, he cannot be labelled as a sub-tenant and, therefore, the order of eviction passed against the petitioners is wholly illegal and is based on misreading of the evidence. It was also urged that the respondent no.3- Smt. Khairulnnisan was never the owner of the disputed accommodation and relationship of landlady and tenant did not subsist between her and the petitioners. All these submissions have been emphatically repelled by Sri R.C. Gupta appearing on behalf of the landlady.

4. After having heard learned counsel for the parties, the moot points which arise for determination by this court are (1) whether the petitioner no.2 is occupying the tenanted accommodation as a sub-tenant or he was a joint tenant along with late Ram Charan who admittedly was the tenant in the disputed shop, and (2) whether the suit at the instance of Smt.

Khairulnnisan for ejectment of the petitioners is maintainable.

5. To begin with, it may be mentioned that the two courts below have recorded very elaborate and reasoned concurrent finding of fact that Sarvajeet was let into possession and inducted as sub-tenant in the tenanted accommodation after the death of late Ram Charan. The concurrent finding of fact normally is not capable of being disturbed in writ jurisdiction under Article 226 of the Constitution of India. The revisional court has also dealt with the circumstances in which Smt. Khairulnnisan became the owner and landlady of the tenanted accommodation.

6. In view of the concurrent finding of the two courts below with regard to the fact of sub-tenancy it is uphill task for the petitioners to assail it; nevertheless, since the question of sub letting is not a pure question of fact but mixed question of fact and law, I would do better in my quest to reach the truth to enter into the controversy. If a finding recorded by the two courts below is perverse or is based on misconstruction of relevant documents and materials, the writ court can interfere. (See **Shama Prasant Raje V. Ganpat Rao and others**- A.I.R. 2000 S.C.-3094). I have heard learned counsel for the parties at considerable length and have waded through the entire evidence on record.

7. Before embarking upon the question of sub-letting, it would be proper to refer to the decision of the apex court in **M/s Bharat Sales Ltd. Vs. Life Insurance Corporation of India**- A.I.R. 1998 S.C.-1240 in which the circumstances from which sub-letting may be inferred and the nature of the evidence required to be taken into consideration have come to be laid down. The law on the point is that to prove sub letting production of affirmative evidence showing payment of monetary consideration by the sub tenant to the tenant is not necessary. Inference to sub-letting can be drawn from proof of delivery of exclusive possession of the premises by the tenant to subtenant. Such tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person not had he allowed or consented to his entering into possession over the demised property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump-sum in advance covering the period for which the

premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let. In the backdrop of above observations of the apex court, the question of exclusive possession becomes highly relevant. Where a person is not found to be in exclusive possession, it would be difficult to infer that he is a sub-tenant, vis-à-vis, the principal tenant. In **Shana Prasant Raje's** case (supra), it was held that parting with possession has to be established in making out a case of sub-letting. Such possession must be backed by some consideration. Where a person was found to be in exclusive possession and is paying rent as consideration money for parting with the premises, sub-tenancy is inferable. According to Sri S.U. Khan, the essential element of exclusive possession is missing in this case and, therefore, Sarvajeet cannot be branded as a sub-tenant. He also placed reliance on the decision of the apex court in **Resham Singh Vs. Raghbir Singh and another**- A.I.R. 1999 S.C.-3087. I find that the observations made in said decision are not applicable squarely to the facts of the case in hand. In **Resham Singh's** case (supra) the principal tenant was involved in criminal proceedings and was, therefore, absconding. His real brother was looking after the shop premises. It was in these circumstances that it was held that there was no evidence to show that the possession of the premises was parted by the tenant exclusively in favour of his brother and consequently the relationship of lessor and lessee between the tenant and his brother was not established. The case of sub-letting in the above circumstances was not held to have been made out. **Resham Singh's** case (supra) is hardly of any help to the petitioners.

8. From the evidence on record, it is well established that Bechan Munim who admittedly was the owner-landlord of the disputed accommodation let Ram Charan alone into possession as a tenant. Ram Charan had executed a rent note in favour of the landlord. He was carrying on the pipe business from the tenanted accommodation. It was Ram Charan alone, who was paying rent to the landlord. At the initial stage when Ram Charan was inducted as tenant Sarvajeet did not figure at all. It was suggested that Sarvajeet was also inducted as a tenant by Bechan Munim along with Ram Charan. Servajeet carries on the work of tailoring. It is not established when and by whom he was inducted as tenant. It is not understandable why Servajeet would be inducted as tenant along with Ram Charan. The tenanted accommodation which is in the form of a shop could not have been utilised for the purposes of tailoring and stitching as well as the carrying on the pipe business. There is nothing in common between the original tenant Ram Charan and Sarvajeet. They are not related to each other in any manner. They belong to the different castes. There is firm and convincing evidence on record to indicate that Sarvajeet was carrying on tailoring work from another place and that he never sat on the tenanted shop along with Ram Charan. The case of Sarvajeet himself is destructive of the plea that he was inducted as a joint tenant along with Ram

Charan. According to him, he came to be inducted in the disputed shop soon after the death of Ram Charan. This assertion of Sarvajeet is clearly in conflict with his stand that he was also inducted with Ram Charan as a joint tenant by Bechan Munim.

9. Late Ram Charan left no male member in his family. He was survived by his widow and two daughters. The daughters were married in other families. It was after the death of Ram Charan that Servajeet was let into exclusive possession of the tenanted shop. The respondent no.3- landlady or, for that matter, any other landlord, did not acknowledge Servajeet as the tenant along with the legal heirs of the deceased Ram Charan. There is no evidence of the fact that Servajeet had directly paid rent in his own right to the landlady.

10. Some documents have been brought on record to indicate that somehow the name of Servajeet came to be mentioned. It was a result of fabrication and manipulation on the part of Servajeet that his name came to be shown along with late Ram Charan. This fact was noticed by the courts below. On the other hand, after the death of Ram Charan, landlady refused to receive the rent from Servajeet. If Servajeet was really a joint tenant along with late Ram Charan, there was hardly any occasion for the landlady to refuse to receive the rent. Without dilating the matter any further, I find that the trial court has come to a reasonable and logical conclusion that Servajeet was inducted as a sub-tenant in the tenanted accommodation after the death of principal tenant- late Ram Charan. This finding, which has been affirmed by the revisional court, cannot be said to be perverse or, in any manner, based on misreading or misconstruction of the relevant documents and materials. There is no warrant to deviate with the finding recorded by the two courts below on the point. The case of ejectment on the ground of sub-tenancy is clearly made out.

11. Now it is the time to consider the second limb of the submission made by Sri S.U. Khan, learned counsel for the petitioners that Smt. Khairulnnisan-respondent no.3 could not maintain the suit as she was neither the owner nor landlady of the tenanted accommodation, and therefore, the decree of ejectment of the petitioners passed in her favour stands vitiated. Sri R.C. Gupta, learned counsel for the respondent no. 3 urged that it is a new plea which is being taken before this court and in any case, the relationship of landlady and tenant is not in dispute. It was urged on behalf of the respondent no.3- landlady that the petitioners have acknowledged her as their landlady and now they cannot be permitted to wriggle out of the admitted position. The submission made by Sri R.C. Gupta, learned counsel for the respondent no. 3 appears to have substantial force. In para 4 of the written statement, the petitioners have admitted that the rent had been paid to the landlady even after the death of Ram Charam. Being an illiterate lady, she did not issue receipts; that she had issued the receipts by putting her thumb mark on the receipts scribed by her servants or children. In para 5 of the written statement, it is stated that the respondent no.3- landlady was told to accept the rent and to issue the receipts. Not only this, in para 3 of the writ petition, it has been mentioned that Servajeet, petitioner no. 2 was joint tenant with late Ram Charan for

a long period within the 'knowledge and express consent' of the landlady. The expression 'landlady' obviously has reference to the respondent no. 3. From the above averments, it is well established that the petitioners have acknowledged the respondent no. 3 as their landlady. In a suit for ejectment, relationship of landlady and tenant only is to be seen. The question of title is not required to be gone into. There are cases where a person, though may not be owner, acts as a landlord.

12. Even otherwise, certain facts have come on record to indicate that the respondent no.3- the plaintiff is also owner of the tenanted accommodation. One Mattar who was the owner of the property was having two sons, namely, Ali Hasan alias Bechan Munim and Kamaruddin alias Chamru who pre-deceased Mattar. Smt. Khairulnnisan-respondent no. 3 was the wife of Kamaruddin and after the death of her husband, she married Ali Hasan alias Bechan Munim, brother of her husband. The first wife of Ali Hasan alias Bechan Munim had developed insanity. Out of the wedlock of Ali Hasan alias Bechan Munim and Smt. Khairulnnisan-respondent no. 3, two children took birth. Smt. Khairulnnisan had undoubtedly a share in the property owned by her father-in-law Mattar, being widow of his pre-deceased son in her own rights. Ali Hasan alias Bechan Munim had also made a gift in her favour. Sri S. U. Khan learned counsel for the petitioners urged that the oral gift (Hiba) by a husband in favour of his wife in lieu of dower is void as immovable property worth more than Rs.100/- can be transferred by a duly registered instrument. In support of his submission he placed reliance on the decision of this court in **Samsuddin Vs. Smt. Ameer Zahan Begum**- 1995 All. C.J.-108.

13. Sri R.C. Gupta learned counsel for the respondent no. 3 pointed out that a suit for partition was filed and the litigation between the sons of Ali Hasan alias Bechan Munim from his first wife and respondent no.3 took place which culminated in Second Appeal No.1929 of 1990 decided by this court on 6.9.1994. The respondent no.3, therefore, was the owner of the property in dispute. In view of the fact that the relationship between the landlady and tenant stood established between the parties, the suit could be filed by the respondent no. 3 for the ejectment of the petitioners.

14. In the conspectus of above facts, the writ petition turns out to be devoid of any force or substance. It is accordingly dismissed without any order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.3.2001

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

Civil Misc. Writ Petition No. 20956 of 2000

Union of India through Secretary, Ministry of Supplies &others ..Petitioners
Versus
IVth A.C.M.M., Kanpur Nagar, Kanpur
...Respondents

Counsel for the Petitioners:
Shri Shishir Kumar

Counsels for the Respondent:
S.C.

Smt. Ira Sharma
Sri B.K. Sharma (In person)

Constitution of India, Article 226- Alternative Remedy- not flew from constitutional provisions- but self emposed re striction- held no absolute bar. Para-7

Alternative remedy, which does not flow from any constitutional provisions is a self imposed restriction. Existenance of the alternative remedy has been consistently held by the apex court not to operate as a bar in the following three contingencies, namely, (I) where the writ petition has been filed for the enforcement of any of the Fundamental Rights, or, (ii) where there has been a violation of the principle of natural justice, or (iii) where the order and proceedings are wholly without jurisdiction or the vires of the Act is challenged. Where there is a pure question of law involved for determination in the writ petition, this court would not throw it out merely on the ground of alternative remedy.

Case law discussed

1980(4) Sec. 556
AIR 1973 Delhi- 108
AIR 1977 SC- 893
AIR 1954 SC- 207
AIR 1958 SC- 86
AIR 1961 SC- 1506
AIR 1961 SC- 372
1995 (1) Sec.-614

By the Court

1. The Union of India through the Department of Supply, Directorate of Supplies, Disposals placed two orders dated 24th April and 23rd August, 1990 with M/s Sukhdev Steel Cutters and Welders, 83/23B (43) Building Material Market, Juhi Khurd, Kanpur- respondent no. 2 in the writ petition (for short called 'the supplier') respectively for the supply of 273 and 31 Iron Safes Fire Resistant Special Iron Safe Record Room. The agreement executed between the parties is said to contain an arbitration clause. After the supplies were made, the Union of India is alleged to have paid the entire amount to the manufacturer except a sum of Rs.79,257/- withheld for rectification of defects. There arose a dispute with regard to the payment. The supplier filed a suit under Section 20 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act') which was registered as Original Suit no. 42 of 1996 for resolution of the dispute by arbitration. The suit was decreed and Sri Pradeep Kumar Srivastava, an Advocate was appointed as arbitrator by order dated 17.12.1996. He made an award on 27.2.1999, a copy of which is Annexure 3 to the writ petition. The claim of the supplier for compensation/damages to the extent of Rupees Twelve lacs Fifty Thousands with interest at 18 percent per annum was allowed. The award was filed in a sealed over under Section 14 of the Act before trial court, i.e., Additional Civil Judge/IVth A.C.M.M. Kanpur Nagar where upon a notice was issued under Section 14(2) of the Act on 8.4.1999 and was served on the Union of India at its Calcutta office on 12.4.1999. No objection under section 30 and 33 of the Act was filed on behalf of the Union of India within the specified period of 30 days of the service of notice of the making of the award. After receiving a certified copy of the award on 6.9.1999, the Union of India filed objection against it along with an application for condonation of delay under Section 5 of the Limitation Act on 27.10.1999. The application for condonation of delay and the objection were rejected by trial court by order dated 19.2.2000 (Misc. Case No. 6/74- Annexure 8 to the petition). It is in

these circumstances that the Union of India approached this court by filing Civil Misc. Writ No. 20956 of 2000 in which the following interim order was passed by this court at the initial stage:-

"……..In the meantime, operation of the award shall remain stayed provided the petitioners deposit the entire amount under the award after calculating the amount of interest upto the period 21st March, 2000. This amount shall be deposited by the Union of India by 30.6.2000 positively with respondent no. 1. In case the petitioners fail to deposit the amount aforesaid, this interim order shall stand automatically discharged and the respondent no. 1 shall be entitled to proceed with the case and pass appropriate order."

2. Pursuant to the said order Union of India has deposited a total sum of Rs.15,97,908 before the trial court. There have been certain objections with regard to the deposits and the supplier maintained that since the aforesaid order passed by this court in the writ petition has not been complied with, further proceedings for making the award 'rule of the court' under Section 17 of the Act be taken. The trial court rejected the application of the supplier on 29.7.2000. This order has given rise to the revision no.371 of 2000 filed by the supplier.

3. Counter and rejoinder affidavits have been filed both in the writ petition as well as in the revision application. The revision petition came up for admission before Hon'ble V.M. Sahai, J who by his order dated 20.9.2000 observed that the revision and the writ petition, aforesaid, may be decided together so that the controversy may come to an end. It is in this manner that the present two cases- writ petition and Civil Revision- were connected and have been received by nomination made by Hon'ble the Chief Justice. Since common questions of fact and law are involved in both these cases, they are being decided by this common judgement.

Heard Sri Shishir Kumar, learned counsel for the petitioner- Union of India, and Smt. Ira Sharma assisted by Sri B.K. Sharma (in person) for the supplier at considerable length.

4. To begin with, it would be worthwhile to make a reference to a preliminary objection taken by Smt. Ira Sharma on behalf of the supplier that the writ petition filed by the Union of India is not maintainable firstly for the reason that the petitioner had alternative remedy under the provisions of the Act which provides a complete apparatus for redressal of the grievances and in any case, the proceedings which resulted from the arbitration reference made by the court in a suit under Section 20 of the Act are not amenable to the writ jurisdiction under Article 226 of the Constitution of India. It was also urged that the extraordinary remedy is not available to enforce contractual right. A reference was made to the decision of **Smt. Rukanibai Gupta Vs. Collector Jabalpur and others**-(1980) 4 S.C.C.-556 in which it was observed that in the event of dispute remedy lies under the Act only and writ jurisdiction under Article 226 is barred. Moreover, writ jurisdiction cannot be invoked to avoid contractual obligation voluntarily incurred and **Bal Kishan Gulzari Lal Vs. Pannalal and others**-A.I.R. 1973 Delhi-108, in which it was held that a writ of mandamus cannot issue

as the arbitrator appointed under the Act is not amenable to High Court's jurisdiction. Placing reliance on J**ai Singh V. Union of India and others**- A.I.R. 1977 S.C.-893 it was urged that this court will not grant relief when the case involves determination of disputed questions of fact or when the petitioner has an alternative remedy. Smt. Ira Sharma went on the emphasise that this court has been hoodwinked and misled to entertain the writ petition and pass an interim order dated 22nd May, 2000, inasmuch as, if the correct facts were brought before the court without misrepresentation and playing the fraud, the writ petition could not have been entertained. She placed reliance on the decision of **Welcome Hotel and others V. State of Andhra Pradesh and others**- A.I.R. 1983 S.C.-1015 and **Daulat Singh and others V. The Deputy Commissioner Karnal and others**- A.I.R. 1972 P & H,-23 to fortify the submission that where a writ petition got his petition admitted by hoodwinking the court by making a deliberated false statement or by suppressing the facts in the petition, such conduct renders him under serving of any assistance which the court may have otherwise thought proper to extend him in its writ jurisdiction. All these submissions have been repelled by Sri Shishir Kumar appearing on behalf of the Union of India. It was pointed out that the question involved in the present writ petition pertains to the interpretation of the expression 'service of notice' as occurring in Section 14(2) of the Act, as well as the applicability of the provisions of Section 5 of the Limitation Act.

5. I have given thoughtful consideration to the matter. The question of maintainability of the writ petition on the ground of alternative remedy/ exhaustion of remedy has come to be considered in the celebrated decision of the apex court in **Whirlpool Corporation V. Registrar of Trade Marks, Mumbai and others**-(1998)8 S.C.C.-1. Law on the point has been crystallised in the following paragraphs of the Report, which are being quoted, in extenso:-

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for 'any other purpose'.

15. Under Article 226 of the Constitution, the High Court, having regard in 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 the Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of

he evolutionary era of the Constitutional law as they still hold the field.

16. **Rashid Ahmed V. Municipal Board Kairana**- A.I.R. 1950 S.C.-566 laid down that existence of an adequate legal remedy, was a factor to be taken into consideration in the matter of granting writs. This was followed by another **Rashid** case, namely, **K.S. Rashid & Son V. Income Tax Investigation Commission**- A.I.R. 1954 S.C. 207 (1954) 25 IRT-167, which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. The proposition was, however, qualified by the significant words "unless there are good grounds therefor" which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

6. 17. A specific and clear rule was laid down in **State of U.P. v. Mohd. Nooh-**A.I.R. 1958 S.C.-86 1958 SCR-595, as under:-

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in **A.V. Venkateswaran Collector of Customs v. Ram chand Sobhraj Wadhwani**- A.I.R. 1961 S.C.-1506;(1962) 1 SCR-753 and was affirmed and followed in the following words:-

"The passages in the judgements of this court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court."

19. Another Constitution Bench decision in **Calcutta Discount Co. Ltd. v. I.T.O. Companies Distt.**- A.I.R. 1961 S.C.0372: (1961) 41 ITR-191 laid down:

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences.

Writ of certiorari and prohibition can issue against the Income Tax Officer acting, without jurisdiction under Section 34, Income Tax Act".

20. Much water has since flown under the bridge but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in the alternative statutory remedies, is not affected specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

7. The bar of alternative remedy, which does not flow from any constitutional provisions is a self imposed restriction. Existence of the alternative remedy has been consistently held by the apex court not to operate as a bar in the following three contingencies, namely, (i) where the writ petition has been filed for the enforcement of any of the Fundamental Rights, or, (ii) where there has been a violation of the principle of natural justice, or, (iii) where the order and proceedings are wholly without jurisdiction or the vires of the Act is challenged. Where there is a pure question of law involved for determination in the writ petition, this court would not throw it out merely on the ground of alternative remedy. This aspect of the matter was clarified by the apex court in **Bal Krishna Agarwal (Dr.) v. State of U.P.** (1995) 1 S.C.C.-614 in which it was observed that dismissal of writ petition by High Court on ground of non-exhaustion of alternative remedy was not proper where the petition was kept pending for a number of years and the point involved was a pure question of law which, in any case, would have come before the High Court. In another decision reported in (1999) 4 S.C.C.-526- **K. Venkatachalam v. A. Swamickan** the point came to be considered in the background of the provisions of the Representation of People Act and Article 329(b) of the Constitution of India and it was urged that in election matters, a writ petition is not maintainable. In that case, the appellant before the apex court lacked the basic qualifications under clause (c) of Article 173 of the Constitution of India read with Section 5 of the Representation of People Act and consequently he was disqualified for being a Member of Legislative Assembly of Tamil Nadu. It was observed that Article 226 is couched in the widest possible terms and unless there is clear bar of the High Court, its powers under Article 226 can be exercised when there is any act which is against any provision of law or violation of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. It was further observed that the High Court rightly exercised its jurisdiction in entertaining the writ petition and declaring that the appellant (of that case) was not entitled to sit in Tamil Nadu Legislative Assembly with the consequent restraint order on him from functioning as an M.L.A..

8. It is true that normally a writ petition does not lie to enforce a contractual right but this proposition of law is not sacrosanct or immutable. In certain extraordinary circumstances, a writ petition even in the matters of enforcement of contractual rights may be maintained. This aspect of the matter was dealt with by the apex court in **State of**

Himachal Pradesh V. Raja Mahendra Pal (1999) 4 S.C.C.-43. The Hon'ble Supreme Court observed that the powers conferred upon the High Court under Article 226 of the Constitution of India are discretionary in nature which can be invoked for the enforcement of any Fundamental Right or legal right but not for mere contractual rights arising out of agreement, particularly, in view of the existence of an efficacious alternative remedy. The constitutional court should insist upon the parties to avail of the same instead of invoking extraordinary writ jurisdiction of the court. This does not, however, debar the court from granting the appropriate relief to a citizen under peculiar and special facts, notwithstanding the existence of alternative efficacious remedy. The existence of special circumstances are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article. In that case, the order of the High Court was criticised on the ground that it had no jurisdiction under Article 226 of the Constitution to grant State largess to an exruler of an erstwhile Princely State whose claim was based on contractual right and whose assumption of being equal in status to the State Government was erroneous. The High Court did not also notice any special circumstance which could be held to have persuaded it to deviate from the settled position of law regarding exercise of writ jurisdiction under Article 226.

9. In the instant case, a number of legal questions have been raised, for example, meaning of the expression 'service of notice' as occurring in Section 14(2) of the Act and the applicability of the provisions of Section 5 of the Limitation Act to arbitration proceedings to enlarge the time on sufficiently explained ground. The legal jurisdiction of the arbitrator to embark upon an enquiry and to order payment of substantial amount as compensation/damages has also been the subject matter of challenge before this court in writ jurisdiction.

10. In support of the plea that the writ petition should be thrown out on the ground of misrepresentation and fraud played on behalf of the Union of India, Smt. Ira Sharma placed reliance on the decisions of the apex court in **Welcome Hotel and others V. State of Andhra Pradesh and others**- A.I.R. 1983 S.C.-1915 and **S.P. Chengalvarava Naidu Vs. Jagannath**-A.I.R. 1994 S.C.-853. The plea is otiose in view of the fact that this court had entertained the writ petition after hearing learned counsel for the petitioner and passed an elaborate order at the initial stage on 22.5.2000. The order, in question, in the writ petition passed at the time of its entertainment cannot be said to be the product of any misrepresentation, hoodwinking or fraud for and on behalf of the Union of India. The following facts would reveal that as a matter of fact, it was a fit case in which intervention of this court by invoking the extraordinary jurisdiction was called for with a view to prevent the miscarriage of justice and put the law on rails.

11. Admittedly, the Union of India had placed two separate orders for the supply of Safe Orderly Room. The first order is dated 24.4.1990 whereby 273 number of Safes Orderly Rooms bearing category number KE/4336 for the value of Rs.15,16,000 were required to be supplied by the supplier. The general conditions of

the contract as per Form No. DGS&D-68 (revised) and as amended to date including clause-24 were to apply to the contract. The other order for the supply giving rise to the contract is dated 23.8.1990 pursuant to which 31 numbers of Safe Inon-1500X750X670 mm. (single door type) conforming to I.S. 350-1979 class 'A' as amended up to date category no.7110-000028 for the value of Rs.8,28,940 were to be supplied by the supplier. This contract was governed by the instructions contained in DGS & D pamphlet 36-DGS&D-29 and general conditions of the contract as contained in Form DGS & D 68 (revised) all as amended till date excluding clause 24 thereof. Clause 24 refers to arbitration clause. Supplies were accordingly made but there arose some dispute with regard to the rectification of defects in some Iron Safes. The case of the Union of India is that out of the 31 Iron Safes covered by contract no.CP-5/243 dated 23.8.1990, 9 were defective and consequently withholding of a sum of Rs.79,257 became necessary, though the entire balance amount had been paid to the supplier (Rs.8,28,940)-(79,257) Smt. Ira Sharma pointed out that the dispute was with regard to the payment of 273 Safe Orderly Rooms covered by contract no.101/630/K-4/918 C.O.A.D. dated 24.4.1990 under which a sum of Rs.15,16,000 was to be paid to the manufacturer and since the Union of India was not prepared to invoke the arbitration clause, an application under Section 20 of the Act was moved giving rise to Original suit no.42 of 1996. The Union of India put in appearance and at some stage contested the petition but subsequently it decamped with the result, an ex parte order was passed by the court under Section 20 of the Act on 17.12.1996 appointing Sri Pradeep Kumar Srivastava, Advocate as the sole arbitrator. Even before the arbitrator, the Union of India had put in appearance. After contest, the award was made by the arbitrator on 27.2.1999. The manufacturer had preferred the following claims:-

(i) damages amounting to Rs.25 lacs on account of financial loss of money and damage of S.S.I. unit on average profit caused by breach of conditions of the contract having arisen from withholding of Rs.79,257.

(ii) A sum of Rs. 25 lacs for physical and mental agony, inconvenience and hardship causing heart trouble to the proprietor of the manufacturer, loss of career and goodwill of manufacturer and

(iii) Interest at the rate of 22.75 per cent w.e.f. 1.7.1992 till the amount of damages claimed under clauses (I) and (ii) above was paid.

The arbitrator has recorded the finding that there has been breach of the contract on the part of the Union of India in withholding the amount of Rs.79,257 from the supply bill no.03/92-93 dated 1.7.1992. The arbitrator awarded a sum of Rs.12.5 lacs as compensation/damages (being half of the amount claimed under clause (i) above) with interest @18% per annum and rejected the claim in respect of clause no. (ii) above. The award was filed in the court on 4.3.1999 in a sealed cover as per requirement of Rule 8 of Chapter XXXI Arbitration Rules contained in the Allahabad High Court Rules of 1952 and notice issued by the court on 8.4.1999 was served on Union of India (at its Calcutta office) admittedly on 12.4.1999. On behalf of the Union of India, a number

of applications were moved for inspection of the award, issue of certified copy of it and for time to file objection against the award. The certified copy of the award was obtained on behalf of the Union of India on 6.9.1999 and thereafter, objections were filed under Sections 30/33 of the Act on 27.10.1999 with an application under Section 5 of the Limitation Act for condonation of delay. The objections were not decided on merits by the court below as they were preferred beyond 30 days' period prescribed for the purpose in Article 119 (b) of the Limitation Act, which runs as follows:-

"119(b) For setting aside an award or getting the award remitted for reconsideration 30 days from the date of service of the notice of the filing of the award."

12. Smt. Ira Sharma urged that if there was no response from the Union of India, or after making the response it has deliberately withdrawn to contest the suit under Section 20 of the Act or withdraw from proceedings before the arbitrator it cannot be heard to say that the award was without jurisdiction, illegal or was the outcome of misconduct on the part of the arbitrator. It was maintained that the trial court was justified in rejecting the objections as being barred by time. Reference was made to the decisions in **G. Ramchandra Reddy and Cp. Vs. Chief Engineer Madras Zone, Military Engineering Service**-A.I.R. 1994 SC-238; **India Lease Development Ltd. Vs. Shri Satish Kumar Singh**- Arbitration Law Reporter 1996(2)-469 **M/s Goodwill India Ltd. Vs. M/s Elizabeth Thomas and another** – Arbitration Law Reporter 1996(2)-378; **Union of India and others Vs. M/s Allied Construction Company** (1980) 2 S.C.-215; **Prasun Roy V. Calcutta Metropolitan Development Authority and another** (1987) 4 S.C.C. 217 and on the authority of **C.Srinivasan Rao and etc. V. P. Amankutty and others**- A.I.R. 1999 Madras-210. She further urged that it is permissible to the arbitrator to decide the liability to pay particular amount or damages and, therefore, the court cannot interfere with the decision taken by the arbitrator.

13. Sri Shishir Kumar urged that there was no service of notice in law unless the copy of the award accompanied the notice with all necessary documents and since the contents of the award were not known to the Union of India, it would not effectively file an objection. A reference was made to the provisions of Order V Rule 2 of the Code of Civil Procedure which reads as follows:-

"2. Copy or statement annexed to summons-every summons shall be accompanied by a copy of the plaint or, if so permitted by a concise statement.

(The words 'or, if so permitted by a concise statement' have been omitted by Allahabad amendment) The above provision came to be interpreted by this court in **Ravindra Kumar Chopra Vs. IIIrd Additional District Judge Matura-** 1984(1) 387 in the context of the determination of the first date of hearing after service of the summons. An earlier Division Bench decision of this court in the case of **Safiqur Rahman Khan V. IInd Additional District Judge, Rampur and others**-1982(1) A.R.C.-729 wherein it was held that in a case where summons had been served but was not accompanied with the copy of the plaint, the date fixed in the summons

cannot be treated as the first date of hearing for the purpose of Section 20(4) of the U.P. Act No. XIII of 1972 was relied upon. The same point came to be considered by the Bombay High Court in **Shevaram Vs. Indian Oil Corporation**- A.I.R. 1969 Bombay-117. It was held that the summons cannot be treated to have been served on the defendants insofar as it was admittedly not accompanied by a copy of the plaint as required under Order V Rule 2 as framed under Section 122 of the Code of Civil Procedure. On the strength of the above decisions, Sri Shishir Kumar urged that since the award was kept in a sealed cover and it could not be opened as the Arbitrator had himself moved an application that till his fee is paid it should not be unsealed, there was no legal service. This submission on behalf of the Union of India is to be dealt with in the light of the provisions of Sections 14(1), 14(2) and 17 of the Act, which read as follows:

"14(1)- When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration of the award."

14(2)- The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in court and the court shall thereupon give notice to the parties of the filing of the award.:"

"17. Judgement in terms of award. Where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it proceed to pronounce judgement according to the award and upon the judgement so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award."

14. The period of limitation for filing the objections seeking the setting aside of arbitration award undoubtedly commences from the date of 'service of notice' issued by the court upon the parties regarding filing of the award under Section 14(2) of the Act. It has been held in **Secretary to Government of Karnataka and another Vs. Harishbabu**- J.T. 1996(6) S.C.-489 that though the notice contemplated under Section 14(2) be oral also, but what is necessary is that a notice, communication or information to the effect that an award has been filed in the court must be given by the court to the parties concerned. Notice to the pleaders of the parties, who are representing the parties before the court would, of course, be sufficient compliance with the requirement of sub-section (2) of Section 14 of the Act. It was held that a notice by the arbitrator under sub-section (1) of Section 14 of the Act is not a substitute for the notice which the court is enjoined upon to issue under sub-section (2) of Section 14 of the Act. To

the same effect is the decision in **Deo Narain Chodhay Vs. Sri Narain Choudhary**- J.T. 2000(Suppl.)(2) S.C.-260 in which it was ruled that the notice must be some act of the court. In that case, the award made on 21.1.1996 was filed in the court on 14.5.1996 after notice to the parties by the arbitrator. One of the parties filed a caveat on 11.6.1996. The court sent the notice on 16.7.1996 which was received by the caveator on 25.7.1996. The objections filed on 21.8.1996 were held to be not beyond time as the date of service of the notice sent by the court was found to be relevant for the purpose and not the date on which information was given by the arbitrator. In an earlier case in **Union of India Vs. Union Builders**- A.I.R. 1985 Calcutta-335, it was held that the limitation to file objection shall start to run from the date on which he notice sent by the court is served on the parties. It is, therefore, well established position of law that the issue of notice by the court is sine qua non to commence the period of limitation of 30 days for filing objection.

15. The objection contemplated under Section 30 a reference of which has been made in Section 17 of the Act is supposed to be against the validity or otherwise of the award filed by the arbitrator or filed at the instance of either of the parties. An objection against the award cannot effectively be made unless the contents of the award itself are knows to the objector. If the notice/summons is not accompanied with the award, it is well-nigh impossible to the noticee to file an effective objection. To require a party to file objection within 30 days from the date of the service of the notice without disclosing him the contents of the award would be a futile exercise and cannot be said to be sufficient compliance of provisions of Section 14(2) of the Act. A notice to be served on the party has to be valid one and for a valid notice, it is necessary that it should accompany with the copy of the award. In the instant case, the award was admittedly kept in a sealed cover and was not opened till the date 12.4.1999 on which the notice was served. The Union of India was not aware of the contents of the award and the circumstances in which damages were awarded against it. Though the service of the notice on the Union of India was there on 12.4.1999, it was inchoate and incomplete. 'Service of notice' as provided under Article 119(b) of the Limitation Act and as contemplated under Section 14(2) would be complete when the contents of the award were made known to the Union of India.

16. It is an indubitable fact that the certified copy of the award was made available to the Union of India on 6.9.1999 i.e., after about six months of the filing of the award and about five months of the service of the notice. The Union of India could file the effective objections against the award only after 6.9.1999 on which date the certified copy of the award was made available to it. It did not have any occasion or opportunity to have its 'say' for want of the contents of the award. Since the notice dated 8.4.1999 issued by the Court under Section 14(2) of the Act and served on the Union of India on 12.4.1999 was not accompanied with a copy of the award, there was no effective service of notice and for purposes of reckoning and computing the period of limitation of 30 days for filing objection, it should be 6.9.1999 which was the date on which the contents of the award came to the knowledge of the

Union of India. The objection against the award was filed on 27.10.1999. There was thus a delay of 21 days in filing the objection reckoned from the date of effective service i.e. 6.9.1999. The objection was filed by the Union of India along with an application under Section 5 of the Limitation Act. An objection was raised on behalf of the manufacturer that the enlargement of the period of limitation in filing the objection was impermissible in view of the decision of the apex court in **Madan Lal Vs. Sundar Lal and another** – 1967(3) S.C.R.-147 in which it was observed:-

".....It may be conceded that there is no special form prescribed for making such an application and in an appropriate case, an objection of the type made in this case may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation, it cannot be treated as an application to set aside the award for if it is so treated, it will be barred by limitation."

17. Besides the aforesaid decision, there are series of other cases in which earlier the view taken was that the period of limitation of 30 days as prescribed under Article 119(b) of the Limitation Act is not expandable and if no objection is filed within a period of 30 days, the court will proceed under Section 17 of the Act to pronounce judgement according to award and upon the judgement so pronounced, the decree shall follow. Smt. Ira Sharma made reference to the two decisions of the apex court in **Nilkantha S. Ningashetti v. Kashinath Somanna Nangshetti and others**- A.I.R. 1962 S.C.-666 and **Indian Ravon Corporation Ltd. V. Raunag & Co. Printer Ltd.**- AIR 1988 SC-2054 as well as the decision of **Himanchal Pradesh High Court in Union of India Vs. M/s J.M. Builers and Engineers**- AIR 1999 H.P.-52. The law that 30 days period is not capable of enlargement in any circumstance stands varied in view of change in law and the various decisions of the apex court. Only recently, there have been a number of decisions on the point. In **Bharat Coking Coal Ltd. Vs. L.K. Ahuja and Company**- 2001(3) JT (S.C.)-294 the scope of Section 5 and Article 119(b) of the Schedule to the Limitation Act came to be considered. In that case, the award was filed in a sealed cover and presented to the court. It was observed that:

"……even an objection setting out the grounds specified in Section 30 of the Arbitration Act would amount to an application as contemplated under Article 119 of the Schedule to the Limitation Act and, therefore, such objection will have to be filed within the period of limitation. Courts have taken the view that inasmuch as agreement of reference to arbitration is an instrument of solemn character, which is binding on the parties, and so is the Award, if, therefore, a party desires to avoid the effect either of the agreement or the award, he must strictly comply with the provisions of law and an objection to the Award must be filed within the time which cannot be extended. In certain circumstances, courts have taken the view that by grating time to file objection the court had impliedly extended the time even without a formal application under section 5 of the Limitation Act. An application for condonation of delay is permissible to file objections under Section 30 of the Arbitration Act by resorting to Section 5 of the Limitation

Act. Section 5 of the Limitation Act, 1963 provides that any application, other that those contemplated under Order XXI C.P.C. could be admitted after the prescribed period if the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. It is clear that Section 5 of the Limitation Act is applicable to all applications other than those under Order XXI C.P.C. Hence scheme of an enactment of an enactment cannot be availed of to defeat such a right conferred under the statute of limitation in clear terms."

18. It was further observed that the object of filing the objections is to question the validity of the award on the grounds mentioned in Section 30 of the Act. If such a course is not possible for want of copy in respect of award certainly the circumstances as arising in that case should be taken note of. In the Case before the apex court, since the award was filed in a sealed cover parties were not in a position to file objections unless the award is made available and the delay due to such procedure should be taken to be sufficient cause for the delay in filing the application/objection. In another case- **Essar Construction V. N.P. Rama Krishna Reddy**-2000 (4) Supreme Today-266, it was held that an application to set aside the award, which is rejected on the ground that it is delayed and no sufficient cause has been made out under Section 5 of the Limitation Act would be an appealable order. This decision implies applicability of Section 5 of the Limitation Act. It further goes to lay down that even after a decree is passed under Section 17 of the Act, an application under Section 30 can be entertained sufficient cause is established. It was made clear that **Madan Lal's** case (supra) was decided in the context of Indian Limitation Act, 1908 when the provisions of Section 5 were inapplicable to applications under Section 30 of the Act. The period prescribed under Section 158 of the 1908 Act for challenging the award was absolute. In para 32 of the report it has been laid down that:

"….Section 5 of the Limitation Act, 1963 is now applicable to all applications under the Arbitration Act. Provided that the delay is sufficiently explained there is no such compulsion on the court to reject the application filed beyond the prescribed period of limitation nor is there any question of the prescribed period of limitation being negatived by entertaining an application under Section 30 beyond the period of limitation."

In **Union of India Vs. M/s Hanuman Prasad and Brothers**- 2000(4) J.T. (S.C.)-330, the view taken by the courts below that the Limitation Act is not applicable to the arbitration proceeding was disapproved by the apex court and the delay of 82 days in filing the objections under Section 30 of the Act was condoned. It was held that Section 5 of the Limitation Act applies to the arbitration proceedings also. In view of the above decisions, it is well settled proposition of law that delay in filing the objections under Section 30 of the Act may be condoned by invoking the provisions of Section 5 of the Limitation Act if explained for sufficient reasons. However, it has to be remembered that law of Limitation has to be applied with all its vigour when the statute so prescribes. Court cannot extent the period of limitation on equitable grounds.

(**Lacchiman Das Arora Vs. Ganeshilal** (1999) 8 SCC-532).

Sri Shishir Kumar, learned counsel for the Union of India pointed out that as a matter of fact there was no delay in filing the objections as they were filed on 27.10.1999 after inspecting the record on 21.10.1999. The court below has observed that if at all limitation is to be computed from the date of inspection of record, it had been inspected on 12.8.1999 and, therefore, the objections could be filed within 30 days thereafter. The reasoning adopted by the court below is wholly untenable and unjustified for one simple reason that the certified copy of the award was made available to the Union of India for the first time on 6.9.1999 and, therefore, the inspection of record by the Union of India on 12.8.1999 was of no consequence. There is nothing on record to indicate that on 12.8.1999, the date on which the record was inspected by the Union of India, the award was not in a sealed cover and was available for inspection. The subsequent date of inspection, i.e., 21.10.1999, is of no consequence for the purpose of computing the limitation. The period of limitation as has been determined above, is to be reckoned from 6.9.1999 on which date the certified copy of the award was with the Union of India. The objection undoubtedly came to be filed with a delay of 21 days. In the application under section 5 of the Limitation Act moved on behalf of the Union of India, adequate and sufficient reasons have been stated for condoning delay in filing the objections. In my view the position of the Union of India before the court below was unenviable and bristled by too many complexities to get over the award. There were various official rigmarole's. Before the objections could be filed, the matter tossed about from one table to another. The District Government Counsel who appeared for Union of India before the court below was also consulted. In these circumstances, the delay of only 21 days cannot be treated to be inordinate.

19. The Hon'ble Supreme Court in **Collector Land Acquisition Anantnag and another Vs. Mst. Katil and others**-JT 1987(1) S.C.-537 has held that the expression 'sufficient cause' employed by the legislature in the Limitation Act is adequately elastic to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice. The primary function of a court is to adjudicate disputes between the parties and to advance substantial justice. The time limit fixed for approaching court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. The object of providing legal remedy is to repair the damage caused by reason of legal injury. If the explanation given does not smack mala fies or is not shown to have been put forth as a part of dilatory strategy the court must show utmost consideration to the suitor. The test to determine sufficiency of the explanation for delay is whether the factual statement made was probable and acceptable. (See **Punjab Small Industries and Export Corporation Ltd. Vs. Union of India**-1995 (Supp.) 4 S.C.C.-681.) Reference may also be made to a recent decision of apex court in **State of Bihar and others Vs. Kameshwar Prasad Singh and another**-JT 2000(5) S.C.-389 in with the earlier decisions of the apex court on the point have been considered in paragraphs 11,12 and 13 of the Report and the delay of 679 days was condoned. In view of the

various decisions of the apex court, the present one was a fit case in which delay of twenty one days in filing objections under Section 30 of the Act should have been condoned by the court below. Instead of referring the matter back to the court below, I propose to condone the delay in filing the objection under Section 30 of the Act. The application for condonation of delay would thus stand allowed and the objections filed by the Union of India are now to be decided on merits.

20. Sri Sishir Kumar, learned counsel for the petitioner urged that the dispute was referred under Section 20 of the Act without there being an arbitration clause and in respect of the contract to which clause 24 (of the Conditions of Contract) was inapplicable; that the arbitrator who was appointed was a lay man as he not well versed about the nature of the goods supplied and did not have expertise to gauge the defects pointed out by the department; that the arbitrator misconducted himself by awarding escalated damages in the absence of escalation clause. With regard to misconduct of the arbitrator, a reference was made to the decision of the apex court in **State of Orissa Vs. Sudhakar Das**- 2000(2) Supreme Today-119 and **V.G. George Vs. India Rear Earth Ltd. and another**- JT 1999(2) SC-629. Sri Sishir Kumar further argued that the award does not reflect the mental process of the arbitrator in fixing the lump sum amount of compensation/damages and, in any case, the claim for compensation does not flow from the contract of supplies. It was further urged that the view taken by the arbitrator is to be characterised as not emanating from the agreement and does not fall squarely within the various clauses of the agreement. The arbitrator has, it was further urged, not applied his mind to the pleadings adduced before him and the terms of the contract. It was maintained that it sounds ridiculous that as against a sum of Rs.79,257 withheld by the Union of India, award was made for payment of compensation/damages to the extent of Rs.12.50 lacs with interest at the rate of 18 percent per annum against the fantastic and wholly untenable claim of Rs.50 lacs with interest at the rate of 22.75 percent annum. All these submissions were repelled by Smt. Ira Sharma. After condonation of delay, the objections filed under Section 30/33 of the Act are to be decided by the court below on merits. Lest the rights and interest of either of the parties may be prejudiced, this court cannot embark upon an investigation of the merits of the objections. Therefore, I refrain from making any observations touching the merits of the objections raised on behalf of the Union of India and leave the matter to be decided on merits by the court below uninfluenced by any observation made by this court.

21. To sum up, it may be mentioned that the present petition is maintainable as the controversy with regard to the interpretation of statutory provisions has come to be raised which required consideration by this court. The period of limitation for filing the objection under Section 30 of the Act is to be recknoned w.e.f. 6.9.1999 and the delay of 21 days in filing the objection is liable to be condoned. The objections have to be decided by the court below with all expedition on merits after affording a reasonable opportunity of hearing to the parties. In the conspectus of the above

facts, the writ petition filed by Union of India succeeds and is to be allowed.

22. Now it is the time to take up and consider the Revision No. 371 of 2000 filed by the supplier. It raises the question of the compliance of the interim order dated 22.5.2000 (quoted above) passed by this court in the present writ petition mentioned above. The civil court was closed on 30.6.2000 on account of summer vacations. A sum of Rs.15,97,908 through draft dated 28.6.2000 was filed before the court below on the opening day, i.e., on 1.7.2000. The supplier/revisionist took the objection before the court below that the deposit was not in accordance with the interim order passed by this court in the writ petition, inasmuch as on correct calculations only a sum of Rs.14,87,702 was required to be deposited and that the deposit was not in the name of the court. By the order dated 29.7.2000 impugned in the civil revision application, in hand, the court below has directed that the amount shall continue to remain in deposit subject to further clarification by this court. Smt. Ira Sharma urged that a disobedient beneficiary of an order cannot be heard to complain against any disobedience alleged against another party. She founded this argument on the observations made by the apex court in **A. Venkatasubbiah Naidu V. S. Chellapan and others**- AIR 2000 S.C.-3032 in which it was observed that a party who secured an order cannot take advantage of it with complying with its requirements. She also urged that the High Court cannot correct errors of fact, however gross or even errors of law unless the said errors have relation to the jurisdiction of the court to try the dispute itself (**Ramlal Dhirta Ram Vs. Delhi Municipal Corporation**- AIR 1973 Delhi-112). I have anxiously perused the order dated 29.7.2000 and find that the court below has unnecessarily resorted to technicalities. The fact remains that on behalf of the Union of India, an amount which was far in excess of the amount required to be deposited under the interim order of this court in writ petition had, in fact, been deposited within time. If Union of India has made wrong calculations and as a matter of abundant precaution, more than the amount required to be deposited has been deposited by it, the supplier can have no cause of complaint. The deposit made by the Union of India shall be treated to be in sufficient and substantial compliance of the interim order dated 22.5.2000. Moreover, since the writ petition has been allowed on merits, the revision application, which is the outcome of the interim order passed in the writ petition, falls to the ground.

23. In the result, the writ petition no. 20956 of 2000 which has succeeds is allowed. The order dated 19.2.2000 passed by the court below, i.e., IVth Additional Chief Metropolitan Magistrate/Additional Civil Judge, Kanpur Nagar, copy of which is Annexure 8 to the writ petition, is hereby quashed. Condoning the delay in filing the objection under Section 30/33 of the Act, it is directed that the court below shall decide the same on merits according to law. The civil revision no. 371 of 2000 is dismissed as being devoid of any merits.

24. The substantial amount of Rs.15,97,908 is lying in deposit with the court below. In order to balance the rights of the parties, it would be proper if the said amount is directed to be invested in

Fixed Term Deposit of some Nationalized Bank. It is, therefore, directed that the court below shall immediately invest the amount deposited by the Union of India in Fixed Term Deposit with the Main Branch of State Bank of India initially for a period of one year so that it may earn interested and this deposit shall be subject to ultimate decision and adjudication of the objections filed by the Union of India against the award.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MAY 4, 2001
BEFORE

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

Civil Misc. Writ Petition No. 38201 of 1995

Sri Kanhiya Lal ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsels for the Petitioner:
Mr. J.S. Tomar
Mr. Sankatha Rai

Counsel for the Respondent:
Advocate General
Sri R.P. Goyal,

Uttar Pradesh Public Services (Reservation for physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) Act, 1993- Section 2(b) leaves no manner of doubt that no rider has been added by the Legislature that in order to be dependent, the grand son has to be economically dependent on his grand father. This being a beneficial piece of legislation for the sons, daughters grand sons and unmarried Grand daughter (daughter of a son) of freedom fighters, who had participated in the freedom struggle of the Country, should not be given a restricted meaning, but a wider meaning.

Held in para 14

On the findings of fact recorded by the Collector, Farrukhabad petitioner no. 1 happens to be a freedom fighter and petitioner no. 2 is his grand son. On a true construction of the relevant provisions of the Act we hold that the reasons given by the Collector, Farrukhabad in the impugned order are irrelevant and his order of refusal to grant the desired certificate is vitiated in law and must be set aside.

By the Court

Following prayers have been made in this writ petition by the two petitioners, who are related as Grand-father and Grand-son respectively :-

(i) to quash the order dated 17.6.1995 passed by the Collector, Farrukhabad (as contained in Annexure -17).

(ii) to command Respondent No. 1, State of U.P., which has been sued through the District Magistrate, Farrukhabad, to issue a certificate of dependent of Freedom fighter.

(iii) to issue any writ, order or direction as may be deemed fit and proper, and

(iv) to award costs.

1. A perusal of the impugned order shows rejection of the petition dated 17.5.1995 filed by the Petitioner No. 1 before the Collector, Farrukhabad (as contained in Annexure-15) for issuing a certificate that his Grandson Hari Narain

Sharma (Petitioner No. 2 herein) is actually dependent on him.

2. The case of the Petitioners, in substance, is as follows- Since his childhood the Petitioner no. 2 has been living with Petitioner no. 1 as his dependent and he has no concern with his father Om Prakash. Petitioner no. 2 is a Diploma holder in Civil Engineering since 1986 and still unemployed and eligible for being appointed as a Junior Engineer. The fact that the Petitioner no. 1 happens to be the guardian of Petitioner no. 2. As per the Government order dated 7.9.1972 (as contained in Annexure -3 clarifying the earlier Government Order dated 6.2.1972) the grand-sons, who are dependants of freedom-fighters, are entitled for certificate of dependent of freedom fighters which after its deletion by Government Order dated 3.4.1972 (as contained in Annexure -4) was again included vide Government Order dated 19.1.1977 (as contained in Annexure-5). Vide another Government Order dated 22.1.1982 (as contained in Annexure -6) a clarification was issued to the Public Service Commission in respect of reservation in service for the dependants of freedom fighters. Vide Government Order dated 15.1.1983 (copy appended as Annexure-7) the facilities provided to the dependants of the freedom fighters were made applicable upto 1985 and by another Government Order 3.9.1992 (copy appended as Annexure -9) the same was extended upto 31.12.1997. The Petitioner no. 2 being fully dependent on Petitioner no. 1 is entitled to such a certificate. In January, 1993 an application was submitted for grant of such a certificate. On the said application enquiries were made by the Lekhpal, Kanoongo and Tahsildar. From the report dated 28.12.1993 of the Lekhpal and reports dated 29.12.1993 of the Kanoongo & Tahsildar submitted to the Collector, Farrukhabad (as contained in annexure -10) even though it was clear that the Petitioner no. 2 was reported to be dependent on the Petitioner no. 1 with whom be resides whereas his father Om Prakash Sharma does "Lohargiri" (blacksmith by profession) yet the District Magistrate, Farrukhabad refused to issue the desired certificate. A representation dated 9.2.1994 was made by the Petitioner no. 1 to the Special Secretary, U.P. Government, who vide his order as contained in letter dated 9.2.1994 (copy appended as Annexure-11) asked the District Magistrate, Farrukhabad to pass appropriate order in the light of G.O. dated 15.1.1983. On 8.9.1993 a certificate (copy appended as Annexure-12) was issued to Petitioner no. 1 to the effect that Petitioner no. 2 in his grand son but relying upon the Government Order dated 8.12.1986 it was stated that Petitioner no. 2 is not dependent of a freedom-fighter and thus not entitled to such a certificate. Various efforts were made for issuance of the desired certificate. An advertisement for appointment to the post of Junior Engineers in the Department of Rural Engineering Service was published in 1995 pursuance in 1995 pursuance to which Petitioner no. 2 applied, appeared in the written test, called for an interview and was asked by the Public Service Commission, vide its letter dated 1.3.1995 (copy appended as Annexure -13) , to submit such a certificate, which served on him on 16.5.1995. On receipt of this letter another application dated 18.5,1995 alongwith his affidavit (copy appended as Annexure -14) was filed by Petitioner no. 1 before the Collector. The Lekhpal vide

his report dated 21.5.1995 (copy appended as Annexure-15) submitted to the effect that the Petitioner no. 2 is in fact totally dependent on his Grand-father who is a freedom-fighter pensioner. The Kanoongo, vide his report dated 24.5.1995 (which is part of Annexure -15 itself), also submitted his report favourably Despite favourable reports and recommendations the desired certificate has not been issued till date. Respondent no. 1 has no authority to withhold issuance of the desired certificate. Petitioner no. 2 personally visited the office of Respondent no. 1 on 22.5.1995 and requested him for issuance of the desired certificate but the latter refused to do anything. The petitioners moved this Court in Civil Misc. Writ Petition No. 15435 of 1995 which was disposed of vide order as contained in Annexure -16 with a direction to the District Magistrate, Farrukhabad to decide the representation in accordance with the Government Order and thereafter vide impugned order the representation was rejected without giving any opportunity of being heard and thereby it is liable to be set a side. In rejecting his representation the District Magistrate has completely ignored and not at all considered the reports of the Lekhpal and Kanoongo as contained in Annexure-10 and 15, which were already on the record clearly proving that the Petitioner no. 2 came within the purview of dependent of a freedom-fighter. The Public Service Commission is going to declare the result of selection and it is apprehended that in the absence of desired certificate he may not be considered and thus an irreparable loss will be suffered.

3. A Counter Affidavit, sworn by the Additional Tehsildar, was filed on 11.9.1996 asserting to the following effect- He has been authorised to file Counter Affidavit on behalf of Respondent No. (leaving the number blank) who has full knowledge in regard to the facts stated in the writ petition and is competent to answer them, Petitioner no. 2 is not dependent on his grand father Kanhiya Lal but on his father Om Prakash who is doing in Iron grill manufacturing business, in the School Leaving Certificate the name of Kanhaiya Lal stands entered as a Guardian and the Petitioner no 2 has not been shown as his dependent, Petitioner no. 1 resides with his second son Ram Narain from which it is clear that even the father of Petitioner no. 2 is not dependent on Petitioner no. 1, the Government Order dated 22.1.1982 clearly states that for civil services merely being a dependent is not sufficient but one should be factually dependent whereas Petitioner no. 2 is in fact not independent on his grand father and the Government Order in question does not apply, from the spot-inspection in question it is clear that Petitioner no. 2 is in fact not independent on his grand father and the Government Order in question does not apply, from the spot-inspection in question it is clear that Petitioner no. 2 is not dependent on his grand father but is dependent on his father, the reports relied upon are incomplete besides the Tahsildar, who is the competent authority, has not submitted his report, but has merely forwarded which has no justification inasmuch as his report should have been clear and made after a thinking which was not accepted by the Pargana Adhikari, who recommended for non-issuance of the certificate and accordingly it was not issued, the Government has not passed any order to issue certificate without holding a complete enquiry, only reports of a gazetted officer is liable for

acceptance and the reports of Lekhpal and Kanoongo are not acceptable, the petitioners were not found entitled for issuance of the certificate which can be issued only as per the rules, the impugned order has been passed as per the rules in which there is no error, the petitioners are not entitled to the relief's prayed for under Article 226 of the Constitution of India and the writ petition is worthy of dismissal with cost.

4. In their Rejoinder filed on 21.7.1999, sworn by petitioner no. 1, it has been asserted by the Petitioners, inter alia, that Petitioner no. 2 is dependent on Petitioner no. 1 and not on his father, mentioning of the fact that Petitioner no. 1 is guardian of Petitioner no. 2 in the School Leaving Certificate clearly shows that Petitioner no. 2 is dependent on his and it has been wrongly stated that he is dependent on his father. Petitioner no. 1 has four sons including the father of Petitioner no. 2 and the members of the family are living in one house, the reply that Petitioner no. 1 is living with his second son or that the father of petitioner no. 2 is not dependent on petitioner no. 1 is wholly irrelevant for deciding the controversy involved in the case, Petitioner no. 1 is taking all pains in bringing up petitioner no. 2 regarding his education, food, clothing and other liabilities and Petitioner no. 2 is in fact dependent on him and the averments to the contrary have been made without any basis and are false, the residence of the petitioners fall in Tehsil Tiruaganj, earlier it was Tahsil Kannauj which has now been made district whereas the Counter Affidavit has been filed by the Upper Tahsildar of Tahsil Chhibramau which is situated about 40 kilometers away from Tahsil Tiruaganj, admittedly no counter affidavit has been filed by any authority of Tahsil Tiruaganj, and the deponent of the Counter Affidavit is not supposed to know facts mentioned in the Counter Affidavit, the reports made by the authorities are genuine besides submitted after through enquiry and the assertion that they are incomplete or wanting from the Tahsildar who had merely forwarded are wholly irrelevant, the Tahsildar had rightly forwarded the report after satisfying himself, the Sub Divisional Magistrate had not made any enquiry before submission of his alleged report dated 17.8.1994 as mentioned in the impugned order, at no point of time the petitioners were afforded any opportunity in regard to the alleged inspection made by him (Sub Divisional Magistrate, Kannauj), a copy of which has also not been filed, and thus the respondents are guilty of withholding material documents, no opportunity was afforded to the petitioners to file objection against his aforementioned report either, which is absolutely incorrect, no provision has been shown by the Respondents that enquiry has to be made by a gazetted officer, good grounds having been made, the petitioners are entitled to the relief's claimed by them and the writ petition is liable to be allowed.

5. On 3.2.2000 a Supplementary Affidavit, sworn by Petitioner no. 1 was filed appending a copy of Government Order dated 15.1.1983 as Annexure-SA 1 and copy of Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) Act, 1993 (hereinafter referred to as the Act) as Annexure-SA2.

6. Sri Sankatha Rai, the learned counsel for the Petitioners had contended

as follows- Section 2 (b) of the Act defines the word 'dependent' which with reference to a freedom fighter means his 'grandson' and this definition being plain and exhaustive cannot be interpreted to mean such dependants who are financially/economically dependent on their Freedom Fighter Grand Father. The mere relation of Petitioner no. 2 as grandson to Petitioner no. 1, who is admittedly a freedom Fighter under the Act, was sufficient for issuance of the desired certificate. Thus the reasons given in the impugned order is liable to be quashed on this ground alone. Findings have been recorded admittedly violating the -principles of justice and completely ignoring the favourable reports of the Lekhpal, Kanongo and Tahsildar which were on the record. Nothing has been brought on the record to show that only reports of the Gazetted Officers alone are to be relied upon. The report of Respondent no. 2 was incorrectly submitted and wrongly relied upon. The report of Respondent no 2 was incorrectly submitted and wrongly relied upon about which the Petitioners were kept in darkness. Had an opportunity been granted the Petitioner No. 1 would have filed an objection. Thus, this writ petition be allowed with cost.

7. Learned Advocate General Sri R.P. Goyal, appearing on behalf of the Respondents, on the other hand, had contended that description of son and daughter in clause (I) and of the grandson and unmarried grand daughter (daughter of a son) in clause (ii) of Section 2 (b) of the Act clearly shows the intention of the Legislature that during the life time of the son, the grandson cannot be treated as dependent son and daughter referred to in clause (I) aforementioned has to be necessarily given preference. Even under Section 8 of the Hindu Succession Act, 1956 the property of a male Hindu dying intestate shall devolve firstly on the son and not on the grandson, the Government has taken a correct stand in the Counter Affidavit to which no effective answer has been given by the petitioners, and the writ petitioner is fit to be dismissed.

8. Sri Rai, in reply, apart from reiterating his submissions, had also referred to two decisions of the Supreme Court (I) **Purshottam H. Judye and others Vs. V.B. Potdar** A.I.R. 1966 SC 856 (ii) **Jagir Singh and others etc. V. State of Bihar and another** A.I.R. 1976 SC 997, and relied upon passages at pages 121-122 from the book 'Principles of Statutory Interpretation by Mr. Justice G.P. Singh (5th Edition, Reprint, 1994).

9. In our view the following questions crop up for our consideration -

(i) Whether a Grandson of a Freedom fighter, who even assuming is not financially dependent on his such a Grand father, will be dependent as defined under Sub-section 2(b) of the Act?

(ii) Whether the findings recorded in the impugned order are vitiated and liable to be set aside for the grounds urged on behalf of the Petitioners?

(iii) Whether the prayers made by the Petitioners should be allowed?

(iv) Whether the Petitioners are entitled to cost?

Our Findings:-

10. In January, 1993 on an application submitted for grant of the

desired certificate an enquiry was made through Lekhpal, Kanoongo, and Tahsildar. Copy of the enquiry report has been filed as Annexure -10. A perusal of this document shows that it contains the Report dated 28.12.1993 of the Lekhpal, the Report dated 29.12.1993 of the Kanoongo and the Report dated 29.12.1993 of the Tahsildar, In his report the Lekhpal had stated that the applicant Hari Narain is dependent on his grand father Kanhaiya Lal s/o Gauri shanker who is a freedom fighter and the applicant happens to be son of Om Prakash Sharma who does the work of blacksmith. The Kanoongo in his report had reiterated the facts reported to by the Lekhpal. The Tahsildar also reiterated the something adding that these facts are based on the enquiry report of Bhu Lekh Nirikshak Mulayam Singh, Tirwa Region. A perusal of the letter (Annexure-11) of the Secretary shows that a request was made to the Collector of the District Farrukhabad to take appropriate action in the light of the Government Order dated 6.2.1972 which has already been circulated. From the document appended as Aannexure-12 it is clear that Collector of the District Farrukhabad though certified Petitioner no. 2 to be grand son of a freedom fighter but after recording a finding that as per the Government Order dated 8.12.1986 of the Education Department he does not come in the category of dependent of a freedom fighter. The order dated 30.5.1995 passed by a learned Single Judge of this Court in Civil Misc. Writ Petition No. 15435 of 1995, filed by the petitioners, shows that the District Magistrate was directed to consider and dispose of the petitioner's application dated 18.5.1995 as contained in Annexure-14. A perusal of the impugned order shows that the entire claim of the petitioners this time was got examined by the Sub Divisional Magistrate, Kannauj (Respondent no. 2 herein) who vide his report dated 17.8.1994 reported, inter alia, to the effect that Petitioner no. 1 is residing along with his son Ram Narain, that concrete materials were not available that Petitioner no. 2 is really dependent on his grand father, that Om Prakash Sharma father of Hari Narain sharma is alive who is dependent on him, that Hari Narain sharma himself has not made any prayer for grant of the certificate of dependent nor has he filed any affidavit to the effect, that Kanhaiya Lal has also not filed an affidavit to the effect that he is not residing with Om Prakash Sharmak but is residing along with Ram Narain, his another son, that in the School Leaving Certificate of Hari Narain his grand father has been shown to be his guardian and from being a guardian it is not proved that Hari Narain was really dependent on him and thus the application dated 16.5.1995 of Petitioner no. 1 Kanhaiya Lal is baseless and is rejected. The report, however, has not been brought on the record nor were the petitioners apprised of it by the Collector prior to passing of his orders.

11. Be that as it may, let us examine the relevant provisions of the Act which came into effect from December 11, 1992 as it is apparent from sub-section (2) of Section 1 of the Act, which alone have the binding effect.

12. From clause (ii) sub-section (I) of Section 3 it is clear that 5% of the vacancies at the stage of direct recruitment in favour of physically handicapped, dependent of freedom fighters and Ex-Servicemen have been

reserved in public services and posts in connection with the affairs of the State Under sub-section (2) of Section 3 the respective quota of the aforementioned three categories shall be such as may be determined by the State Government from time to time by an order to be notified. Section 4 contains the clause for removal of difficulties with a rider that no order in that regard shall be made after the expiration of two years period from the commencement of the Act. No order has been brought on the record by either side notifying by way of removal of difficulties in giving effect to any of the provisions of the Act. The G.Os. referred to by one or the other party of the period before December 11, 1992 are not relevant.

12 1. Now let us revert to the definition clause. Section 2 of the 'the Act' contains the definitions.

12.2. Section 2 (d) read thus:-

"(d) "freedom fighter means a person domiciled in Uttar Pradesh who had participated in the freedom struggle of India and had -

(i) laid down his life, or

(ii) undergone sentence of imprisonment for ask period of at least two months, or

(iii) been detained in prison as an under trial or a detained for a period of at least three months or

(iv) been sentenced with at least ten canes, or

(v) been declared as an absconder, or

(vi) sustained bullet injuries, or

(vii) participated in 'Peshawar Kand', or

(viii) been a member of Indian National Army, or

(ix) been a certified member of Indian Independence League, or

(x) been released under the 'Gandhi Irwin Pact'

Explanation- For the purposes of this clause, a person who had sought and had been pardoned shall not be deemed to be a freedom fighter.

The fact that the Petitioner No. 1 is a freedom fighter stands admitted.

12.2. Section 2 (b) read thus -

"(b) "dependent" with reference to a freedom fighter means -

(i) son and daughter (Married or unmarried)

(ii) grandson (son of a son) and unmarried grand daughter (daughter of a son),

of the freedom-fighter"

12.4. In Civil Misc. Writ Petition No. 44354 of 1998 **Raj Bahadur V. State of U.P.** decided on 25.5.1999 by one of us (Binod Kumar Roy,J.) and Hon'ble Mr. Justice D.R. Chaudhary when the District Magistrate, Chandauli refused

to issue a similar certificate to a Grandson of a Freedom Fighter Grand Father on the ground that since his father is alive, who is a Lecturer, and thus could not be deemed to be a dependent, after taking in account the stand taken in the Counter Affidavit, sworn by the Special Secretary (Personnel) of the State Government, that the Act concedes grant of certificate in favour of a dependent of a freedom fighter who could be a son as well as grandson and the view of the District Magistrate that since the Petitioner is dependent on his father, who is a Lecturer, and thus not entitled to such a certificate, is not correct in the light of the plain language of the provisions of the Act as the intention of the Legislature is abundantly clear that it does not choose to impose any restriction or condition and thus it is sufficient if the person claiming certificate as a dependent is son or a daughter or a grandson and unmarried grand daughter who will be entitled for grant of such certificate, this Court directed the District Magistrate to grant such a certificate.

A bare perusal of Section 2 (b) leaves no manner of doubt that no rider has been added by the Legislature that in order to be dependent the grand son has to be economically dependent on his grand father. This being a beneficial piece of legislation for the sons, daughters, grand sons and unmarried Grand daughter (daughter of a son) of freedom fighters, who had participated in the freedom struggle of the Country, should not be given a restricted meaning, but a wider meaning, but a wider meaning. We accept the submissions of Mr. Rai that the definition of the word 'dependent' is an exhaustive and restrictive definition. The argument of Mr. Rai also finds support from the passages occurring at Pages 121-122 of G.P. Singh's Principles of Statutory Interpretation.

We also find that a 'learned Single Judge of our Court in **Kumari Priyanka Agarwal versus Director General, Medical Education & Training 2000**(1) A.W.C. 473-2000 A.L.J. 1805 has also held that a Grandson in order to qualify as a dependent of a freedom fighter Grand Father need not be financially dependent upon his Grand Father after correctly distinguishing **Haryana Public Service Commission Versus Harinder Singh** 1998 (5) S.C.C. 452- A.I.R. 1999 SC 551 on the ground that the provision therein was different, which was not even referred to and relied upon by the learned Advocate General. To crown all it is not the case of the Respondents that the Petitioner No. 2 is gainfully employed.

13. It is not possible for us to accept the contention made by the learned Advocate General that the 'son and daughter' mentioned in sub-clause (I) of clause (b) excludes Grand Sons or an Unmarried daughter of a son of a freedom fighter keeping in mind the plain language of the Statute and the observations of the Hon'ble Supreme Court in **Satya Charan Dutta versus Urmila Sundari Dassi** A.I.R. 1970 S.C. 1714 that the Legislature while using Arabic numerals in class II of the schedule attached to Section 8 of the Hindu succession Act, 1956 never intended to create an order of preference and lay down the same by use of Arabic numerals.

14. On the findings of fact recorded by the Collector, Farrukhabad Petitioner no. 1 happens to be a freedom fighter and Petitioner no. 2 is his grand son. On a true

construction of the relevant provisions of the Act we hold that the reasons given by the Collector, Farrukhabad in the impugned order dated 17.6.1995 as contained in Annexure -17 is quashed and the Collector of the District Farrukhabad is commanded to grant the desired certificate to Petitioner no. 1 and/or Petitioner no. 2 within one week from the date of receipt of a copy of this order from any quarter.

15. In the facts and circumstances the Petitioners are also entitled to cost.

16. This writ petition is allowed with cost quantified to Rs. 2,000/-.

17. The office is directed to hand over a copy of this order within one week to Sri P.K. Bisaria, the learned Standing Counsel for its intimation to and follow up action by the District Magistrate-cum-Collector of the District Farrukhabad.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2ND MAY 2001

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

Civil Misc. Writ Petition No. 3572 of 2001

Tareef Singh ...Petitioner
Versus
The Commissioner, Agra Division, Agra and others ...Respondents

Counsels for the Petitioners:
Mr. S.S. Chauhan
Mr. M.A. Qadeer
Mr. V.S. Pandey
Ms. Sunita Sharma
Mr. N.L. Srivastava and
Mr. Swapnil Kumar

Counsel for the Respondent:
S.C.

Constitution of India, Article 226- Scope in Non-Statutory Agreement- Breach of any term or condition- Licence to run fair price shop- remedy to approach civil court- writ jurisdiction is not available.

Held- Para 29

The law, as said above, is well settled that in case on non statutory agreements, if there is a breach of any term or condition, remedy of the dealer/licence holder is to approach the civil court for the redressal of his grievances. For the remedial measures, the writ jurisdiction under Article 226 of the Constitution of India is not available.

Case law discussed:
2000 (1) AWC -1,
W.P. No. 57595 of 99 decided on 10.12.99
1993 (21) ALR 121
1992 (2) EFR 655
1991 (17) ALR 406
(1979) 3 SCC – 489
(1981)1 SCC- 280
(1994) 6 Sec –651
1997 (1) Sec- 134
1999 (1) Sec- 4925
2000 (2) Sec – 716
2000 (6) Sec – 293
AIR 1991 Sc 537
1975 ALJ 437
AIR 1989 Sc 1076
JT 1995 (3) SC-1
1977 3 SCR 249= AIR 1977 SC – 1496
(1980) 2 SCR -704= AIR 1980 SC 738
AIR 1981 SC-1368

By the Court

1. There has been a spate of litigation with regard to the grant, suspension and cancellation and non-renewal of the licence/permit to run the fair price shop meant for distribution of essential commodities as well as release of the assigned quota for the purpose. No

sooner the agreement to sell essential commodities is suspended or cancelled or the supplies are stopped and the appeal against the offending order is dismissed, the dealer rushes to this Court. In some cases, the rival claimants who have not been successful in getting the agency or dealer ship in their favour, make complaints against the existing dealers and when the Y fail to achieve the desired goal at the hands of the executive authorities, they, in their litigative zeal, come before this Court. The matter has been dwelt upon and waded through in a number of decisions of this court including that of the Division Benches, Full Benches and Larger Bench. With a view to clear the mist and in an attempt to settle the law on the point, it is considered appropriate to survey the back ground which has promoted the State Government to pass the Control Orders with a view to regulate the supply and distribution of the essential or scheduled commodities and which generated litigation.

2. In its historical retrospect, it may be stated that an urgent need was felt to ensured the availability of essential goods to the community at the proper price and to curb the malaise of monopoly, hoarding and black marketing by the traders and their allies. The Essential Commodities Act, 1955 (Act No. X of 1955) (hereinafter referred to as 'the Act') came to be enacted by the Parliament with a view to provide, in the interest of general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities. Under Section 3 of the Act, the Central Government has been conferred powers to issue orders to control production, supply, and for securing their equitable distribution and availability at fair price etc., of the essential commodities. Section 4 of the Act provides for imposition of duties on State Government etc., by making the provision that an order under section 3 may confer powers and impose duties upon the Central or State Government or officers or authorities of the Central or State Government, and may contain directions to any state Government or to officers and authorities thereof as to exercise of any such powers or to discharge any such duties. The State Government issues the various distribution and control orders under Section 4 of the Act. The expression 'essential commodity' has been defined in clause (a) of Section 2 which expression takes within its sweep cattle fodder, coal, cotton and woollen textiles, drugs, food stuffs including edible oil seeds and oils, petroleum and petroleum products, paper, iron and steel, raw cotton, raw jute and any other class of commodity which the Central Government may be notified order declare to be an essential commodity for the purposes of the Act. In Section 5 of the Act, it has been provided that the power of the Central Government in respect of making of the Control Orders may be delegated by a notified order in favour of the State Government. In exercise of the power under Section 3 read with Section 5 of the Act, the State Government had issued an umpteen number of Distribution Control Orders, interalia. The U.P. Food-grains Dealers (Licensing and Restriction on Hoardings) Order, 1975; The U.P. Oilseeds and Oilseeds Products Control Order, 1966; The U.P. Pulses (Licensing and Storage) Control Order, 1979 and The U.P. Sugar and Gur Dealers' Licensing Order, 1962. Pursuant to the aforesaid Orders,

licenses/permits were granted to the individuals carrying on business activities with regard to the different types of scheduled commodities. The system of trial and error went on for about a quarter of the century. The distribution and control mechanism under the aforesaid Control Orders did not work to the satisfaction of the consumers and certain mal-practices came to be adopted. Therefore, to be more specific in the matter of distribution and punishment, two new Control Orders, namely The U.P. Scheduled Commodities Dealers' (Licensing and Restriction on Hoarding) Orders 1989 and The U.P. Scheduled Commodities (Regulation of Distribution) Order, 1989 came into being. Earlier Control Orders were suspended. The U.P. Scheduled Commodities (Regulation of Distribution) Order, 1989 was found to be unworkable and, therefore, it was rescinded and substituted by another Control Order, namely, U.P. Scheduled Commodities Distribution Order, 1990. With a view to propel the scheme of distribution and control of the essential commodities/scheduled commodities, the State Government had issued an order on 3rd July 1990. Paragraph 2 of the Control Order, 1990 defines the meaning of certain expressions. "Agent' means a person authorised to run a fair price shop; Fair price shop' has been defined to mean a shop set up under the order of the State Government for distribution of scheduled commodities. The expression ' scheduled commodity' for the purposes of the Control Order of 1990 means a commodity specified in the schedule appended to the Order, products thereof and include such other commodities which the State Government may direct to be sold through a fair price shop. The Control Order, 1990 came into being on 3.7.1990. Looking to the urgency of the matter and concern of the State Government to ensure fair and even distribution of the essential or scheduled commodities, simultaneously with the commencement of the Order, 1990 a Government order dated 3.7.1990 was issued. Since the entire controversy in the present petitions centers round the Government Order dated 3.7.1990, it is being reproduced, as below, for the sake of clarify and ready reference:-

"**विषयः** सार्वजनिक वितरण प्रणाली ग्रामीण क्षेत्रों में उचित दर की दुकानदारों का चयन।

महोदय,

शासनादेश संख्या 34/89 दिनाँक 23 सितम्बर,1989 के द्वारा प्रत्येक ग्राम सभा में उचित दर की राशन की दुकान चलाने हेतु दुकानदार का चयन ग्राम सभा की खुली बैठक में पारित प्रस्ताव के अनुसार ही जिला प्रदेश अनुसूचित वस्तु (वितरण अधिनियम) आदेश 1989 के प्राविधानों के अर्न्तगत न होने के कारण शासनादेश संख्या 241929-छाद-8-9(34) 69 दिनाँक 2 जून 1990 के द्वारा विखण्डित कर दिया गया है। इस परिप्रेक्ष्य में उचित दर की दुकानों के वितरण और उनके चयन की प्रक्रिया पर पुनः विचार किया गया।

2. पुनः आवश्यक वस्तु प्राप्त करने के लिये लोगों को ज्यादा दूर न जाना पड़े इसलिये यह उचित प्रतीत होता है कि प्रत्येक गांव सभाओं में कम से कम एक उचित दर की दुकान जरूर हो यदि स्पष्ट है कि यदि दुकानें व दुकानदार जनता की सुविधा को ध्यान मे रखकर काम करने में यदि ग्राम वासियों की आम राय को महत्व दिया जाये तो सही दुकानदार का चयन हो सकेगा और दुकानदार स्थानीय जनता के मत को महत्व देगा।

3. यह कि देखा गया है कि जो मात्रा एक दुकानदार को उपलब्ध करायी जाती है उससे यदि चह सही रूप में बांटता है तो नियमानुसार जो लाभांस मिला है वह उसकी जीविका चलाने के लिये पर्याप्त

नहीं होता है यदि ऐसी दशा में दुकान का चयन इस बात को ध्यान में रखकर किये जाने का अत्यधिक महत्व हो गया है कि वह उस दुकान के लाभांस पर अपनी जीविका के लिए पूर्ण रूप से निर्भर न हो। अन्यथा, वह या तो एक दो दिन ही दुकान से आवश्यक वस्तुएं बेचकर शेष दिन दुकान बन्द कर अन्य कोई रोजगार करेगा। या आवंटित वस्तुओं की चोर बाजारी करेगा। दोनों ही परिस्थितियों में अधिकांश दुकान बन्द रहने का आवश्यक वस्तुएं उपलब्ध होने की शिकायतें बनी रहेंगी।

4. उपरोक्त पृष्ठभूमि में ग्रामीण क्षेत्रों में सार्वजनिक वितरण प्रणाली जनोन्मुख बनाने के लिए शासन द्वारा निम्नलिखित निर्णय लिए गए हैं-

(1) प्रत्येक गांव सभा में उचित दर की दुकान खोली जाये और जिस ग्राम सभा में 4000 से अधिक यूनिट है वहां यदि ग्राम सभा यह महसूस करती है कि एक से अधिक दूकान खोलने से लोगों को सुविधा होगी तो 4000 यूनिट के लिए एक दुकान खोलने का प्रस्ताव कर सकती है।

4(2) जिन ग्राम सभा में एक से अधिक दूकानें होंगी वहां यह सुनिश्चित किया जायेगा कि दोनो दुकानों में लगभग बराबर यूनिट सम्बद्ध रहे।

4(3) गाँव सभा की दुकानें जहां तक सम्भव हो उस पूर्वे टोले मोहल्ले मजरे में प्रस्तावित की जाये जो परम्परागत रूप से अधिकांश उपभोक्ताओं को जाना चाहिए।

4(4) गांव सभा की राय से यह उचित दर की दुकानें खोली जायेगी गांव सभा की राय उनकी खुली बैठक में पारित प्रस्ताव के माध्यम से प्राप्त की जाये।

4(5) उचित दर की दुकानों के एजेन्ट दुकानदार के चयन के सम्बन्ध में प्रस्ताव पारित करते समय ग्राम सभा निम्नलिखित वरीयता क्रम का पालन करेगी।

1. साधन सहकारी समिति, जिसका मुख्यालय उस ग्राम सभा में हो व जो ठीक से चल रही हो।
2. गांव सभा में स्थित दुकानदारों पर चूनी, जिसमें मिटटी के तेल विक्रेता भी सम्मिलित हैं।
3. युद्ध में मारे गये परिवार/ भूतपूर्व सैनिक/ के अभाव में प्रस्तावित 4 2(6) उक्त वरीयता श्रेणी की संस्था/ व्यक्ति के न होने की दशा में ही उससे नीचे की श्रेणी के पक्ष में प्रस्ताव किया जायेगा।

प्रस्ताव में अलग-अलग यह अंकित किया जायेगा कि उक्त श्रेणियों के व्यक्तियों/संस्थाओं के न होने के कारण निम्न श्रेणी के पक्ष में प्रस्ताव किया जा रहा है। आवश्यक विवाद न हो इसके लिए गांव सभा द्वारा पारित किये जाने वाले प्रस्ताव का नमूना संलग्न किया जा रहा है।

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(4) 7- ग्राम प्रधान या उप प्रधान के परिवार के सदस्यों/ सम्बन्धियों के पक्ष में उचित दर की राशन की दुकान का आवंटन नहीं किया जायेगा। परिभाषा निम्नलिखित मानी जायेगी। परिवार की परिभाषा निम्न होगी। स्वयं, स्त्री, पुत्र, अविवाहित पुत्री, माता-पिता भाई या अन्य कोई सदस्य जो साथ में रहता हो तथा एक ही चूल्हे का बना खाना खाता हो।

(4) 8- आवश्यक वस्तु अधिनियम के अर्न्तगत दण्डित व्यक्ति को दुकान नहीं आवंटित की जायेगी।

(4) 9- 13-9-89 के शासनादेश के तत्कालीन विनियम आदेश के अर्न्तगत न होने के कारण पूर्व में गांव सभा द्वारा पारित प्रस्ताव के अनुसार नियुक्त दुकानदारों का अस्तित्व समाप्त हो गया है। दिनांक 23-9-89 के उपरिलिखित शासनादेश के अर्न्तगत नियुक्त दुकानदारों से निम्न दुकानदारों के विषय में उनके निर्गत किये गये अनुबन्ध पत्र की शर्तों के अनुसार उनका अनुबन्ध समाप्त कर उपभोक्ता प्रक्रिया के अनुसार नयी नियुक्ति की जाये।

(4)10- उचित दर की दुकान की नियुक्ति में उपभोक्ताओं के मत को महत्व देने के लिये यह प्रक्रिया निर्धारित की गयी है। अतः यदि गांव सभा चाहे तो पूर्व में दुकान चलाने वाले व्यक्ति के पक्ष मे दुकान कर सकती है। बशर्ते वरीयता में आते हों।

(4)11- जिन दुकानदारों के पास माननीय उच्च न्यायालय के स्थगन या अन्य आदेश हैं उनके विषय में माननीय उच्च न्यायालय के अर्न्तगत कार्यवाही की जाये।

(4)12- ग्राम सभा का प्रस्ताव प्राप्त होने पर सामान्यतया किसी अन्य गांव की आवश्यकता नही होगी। परन्तु यदि किसी विशिष्ट मामले में जिलाधिकारी कोई जांच करवाना चाहें तो इस पर कोई रोक नहीं है। लेकिन यह सुनिश्चित कर दिया जाये कि जांच के कारण नियुक्ति में विलम्ब न हों।

5- गांव सभाओं में उचित दर की दुकानों के चयन का कार्य निर्धारित समय के अन्दर पूरा हो जाये व गांव सभा की खुली बैठक वास्तव में हो जाय इनको सुनिश्चित करने के लिये यह सुझाव है कि जिलाधिकारी व्यवहारिक रोस्टर बना लें। जिसमें गांव पंचायत अधिकारी के साथ एक उसके उच्च् स्तर का परिवेक्षक अधिकारी जरूर उपस्थित रहे।

5(1)- पारित प्रस्ताव को एस0डी0एम0 को उपलब्ध कराने की जिम्मेदारी द्वारा आकस्मिक निरीक्षण करके रोस्टरों के अनुसार बैठक का होना सुनिश्चित किया जाये।

6- गांव सभा का प्रस्ताव पारित होने के दो सप्ताह के अन्दर जिलाधिकारी यह सुनिश्चित करेंगे कि एस0डी0एम0 समस्त विधिक औपचारिकतायें पूर्ण कर दुकानदार को दुकान चलाने का अनुबन्ध कर देते हैं। इस हेतु जिलाधिकारी उ0प्र0 अनुसूचित वस्तु वितरण आदेश 1990 की धारा 2 ब के अर्न्तगत एस0डी0एम0 को प्राधिकृत का प्रारूप सुलग्न है।

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7- यदि किसी दुकानदार द्वारा अनुसूचित वस्तुओं के उठान या वितरण में गड़बड़ी की जाती है तो शिकायत या ग्राम सभी के प्रस्ताव पर जिलाधिकारी दुकान निलम्बन/ निरस्त कर सकते हैं।

7(2)- दुकान के निलम्बन/निरस्तीकरण आदेश की प्रति ग्राम प्रधान एवं उप प्रधान को अनिवार्य रूप से दे दी जायेगी तथा ग्राम सभाओं की ओर से सामग्री उठाने की वास्तविक वैकल्पिक व्यवस्था करने को कहा जाये तथा एक माह के अन्दर नया प्रस्ताव पारित कर दूसरे दुकानदार की नियुक्ति कर दी जाये।

7(3)- यदि गांव सभा दुकान निरस्तीकरण का प्रस्ताव करती है तो साथ ही उसे कोई नई दुकान की नियुक्ति के संबंध में उपरोक्त प्रक्रिया के अनुसार प्रस्ताव करना होगा ताकि वितरण कार्य में व्यवधान न हो।

8- यदि गांव सभा में दुकानें हो जाने के उपरान्त एक गांव को स्वेच्छानुसार किसी दूसरे गांव के दुकानदार से सम्बद्ध करने की प्रक्रिया को तत्काल समाप्त किया जाता है। केवल अपरिहार्य परिस्थितियों में एक माह के लिए गांव के न्याय पंचायत में रिक्त सहकारी समिति से सम्बद्ध कर दिया जाये/ यदि किसी न्याय पंचायत में सहकारी समिति कार्य नहीं कर रही है तो न्याय पंचायत मुख्यालय के ग्राम में स्थित दुकानदार के साथ उसे सम्बद्ध कर दिया जाये। इस सम्बद्धता की सूचना दोनों ग्राम प्रधान व उप प्रधान को अनिवार्य रूप से दी जायेगी। और उसकी प्राप्ति रसीद तहसील मुख्यालय पर रखी जायेगी।

9- प्रत्येक गांव सभा में दुकानें खोलने के निणर्य के फलस्वरूप प्रत्येक दुकानदार को अपने गांव सभा के स्टेण्डर्ड आवंटन के अर्न्तगत ही कोटा (सामग्री) आवंटित की जाये। विभिन्न वस्तुओं से स्टैण्डर्ड आवंटन किसी प्रकार निर्धारित किये जायेंगे इसका वर्णन उन वस्तुओं के वितरण से सम्बन्धित शासनादेश में किया जा चुका है।

10- जिलाधिकारी द्वारा नियुक्त दुकानदार (एजेन्ट) की नियुक्ति यदि इस सूचना से पूर्व समाप्त कर दी गई हो तो प्रत्येक वर्ष 31 दिसम्बर को स्वतः समाप्त मानी जायेगी। एजेन्ट द्वारा 30 नवम्बर तक प्रस्तुत नवीनीकरण प्रार्थना पत्र के आधार पर उनकी पुर्ननियुक्ति 15 दिसम्बर के पूर्व कर दी जायेगी।

11- जिलाधिकारी द्वारा दुकान नियुक्ति/निलम्बन / निरस्तीकरण करने सम्बन्धी पारित आदेश के विरूद्ध अपील सम्बन्धित मण्डलायुक्त के समक्ष प्रस्तुत की जाएगी इन मामलों में द्वितीय अपील की व्यवस्था नहीं होगी।

12- प्रस्तर-4,5,6,7,10 एवं 11 के निर्देश तथा संलग्नक 1 एवं 2 उत्तर प्रदेश अनुसूचित वस्तु वितरण आदेश 1990 की धारा 4 के अधीन जारी किए जा रहे हैं इस विषय पर पूर्व में जारी समस्त आदेश निरस्त/अतिरिक्त दिये जाते हैं।

13- चूंकि शासनादेश दिनाँक 23-9-89 के अर्न्तगत नियुक्त दुकानों को इस शासनादेश के अर्न्तगत दुकानों की नियुक्ति की कार्यवाही त्वरित विलम्बतम 1 अक्टूबर 1990 तक सभी गांव सभाओं में उचित दर की दुकान खोलवाने हेतु कार्यवाही सुनिश्चित करें। एस0डी0एम0 तथा जिलाधिकारी अपने स्तर से इसकी मासिक प्रगति समीक्षा करेंगे। तथा संलग्न प्रपत्र संलग्नक 3 में अपेक्षित पर्यवेक्षक सूचना प्रत्येक माह की 2 एवं 17 तारीख को भेजना सुनिश्चित करें।

14- ट्रांजिशन की अवधि में अनुसूचित वस्तुओं का वितरण करवाने के लिए जिलाधिकारी अस्थायी व्यवस्था करेंगे। जो पूर्ण रूप से तदर्थ व्यवस्था होगी एवं नई दुकानों की नियुक्ति के साथ ही स्वतः समाप्त हो जायेगी।

15- उपर्युक्त वितरण प्रणाली को संतोषप्रद ढंग से चलाने में उचित दर की दुकानों व दुकानदारों की भूमिका निर्णायक होती है।

अतः दुकानदारों के चयन में अपेक्षित सावधानी बरती जाए व उपरोक्त आदेश का अक्षरशः पालन उसकी भावना के अनुसार किया जाये"।

3. The provisions of the aforesaid Government order for the sake of clarity may be summarised as follows:

(1) S.D.M. executes an agreement in favour of the person selected to run a fair price shop and for execution of this agreement the S.D.M. will act within clause 2 (d) of the Distribution Control Order, 1990

(2) The District Magistrate on receipt of complaints from Gram Sabhas can suspend or cancel this agreement.

(3) An appeal shall lie before the Divisional Commissioner against orders passed by the District Magistrate for appointment, suspension, cancellation or renewal of agreements to run a fair price shop.

(4) Last but not the least, is the provision that the agreement to run fair price shop will be in pursuance of powers under para 4 of the Distribution Control Order, 1990.

4. The fair price shops which were charged with the duty and responsibility to distribute the scheduled commodities continued to function in a limping manner till a new scheme was enforced. The earlier scheme of distribution of the essential commodities as prevalent under the Government order dated 3.7.1990 was paid a goodbye by the subsequent order dated 10.8.1999 with regard to the establishment of fair shops in rural areas in the back ground of decentralization of powers in view of the Seventy Third Constitution Amendment by which Part IX In re

"The Panchayats" and "the Eleventh Schedule" were added in the Constitution Part IX consists of Articles 243 to 243-ZG, Article 243-G is relevant for the controversy in hand and is quoted below:-

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

(a) the preparation of plans for economic development and social justice;

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

5. Matters listed in the Eleventh Schedule include 'public distribution system' at item no. 28. With a view to accentuate and achieve the object of decentralisation of power as visualized in Article 243-G of the Constitution of India, the U.P. Panchayat Raj Act 1947 was suitably amended with respect to the preparation of plans for economic development and social justice etc. and the emplementation of the schemes for economic development in relation to matters listed in Eleventh Schedule. Section 15 of the U.P. Panchayat Raj Act as it stands substituted by U.P. Act no. 9 of 1994 in the light of the constitutional mandate envisaged under Part IX of the Constitution of India enlists the functions that are to be performed by a Gram Panchayat. The Section, insofar as it is relevant reads as under :

" 15. Functions of Gram Panchayat-subject to such conditions as may be specified by the State Government from time to time a Gram Panchayat shall perform the following functions, namely,

…….

(xxix) Public Distribution System:

(a) Promotion of public awareness with regard to the distribution of essential commodities.

(b) Monitoring the public distribution system.

(xxx) ……."

6. It is, thus, clear that so far as the matter relevant to the public distribution system is concerned, the State Legislature has amended the U.P. Panchayat Raj Act by substituting Section 15 in the light of the constitutional mandate contemplated by Article 243-G. The Government order dated 10.8.1999 and the other orders which have been referred to therein had been issued in exercise of power under Section 15 of the U.P. Panchayat Raj Act specifying therein conditions of allotment of fair price shops and their cancellation under the public distribution scheme. The Hindi version of the Government order dated 10.8.1999 runs as follows :

"विषयः सत्ता के विकेन्द्रीकरण की व्यवस्था के अर्न्तगत ग्रामीण क्षेत्र की उचित दर की दुकानों के चयन आदि की नई व्यवस्था।

महोदय,

उपर्युक्त विषयक शासनादेश संख्या 938/29-खा-6-99, दिनांक 3 मई 1999 एवं शासनादेश संख्या-1113/29-खा-6-37 सामा0/99, दिनांक 18 मई 1999 तथा शासनादेश संख्या 2792ए/29-खा-6-99-37(सामान्य)/99, दिनांक 30 जुलाई, 1999 का संदर्भ ग्रहण करें जिसके द्वारा ग्रामीण क्षेत्र में सार्वजनिक वितरण प्रणाली के अर्न्तगत उचित दर की दुकानों की नियुक्ति तथा निरस्तीकरण के समस्त अधिकार ग्रामसभाओं को दिये जाने के सम्बन्ध में विस्तृत दिशा निर्देश जारी किये गये हैं। सुगमता की दृष्टि से उक्त तीनों शासनादेशों में दिये गये निर्देशों को सम्मिलित करते हुए यह संकलित शासनादेश जारी किया जा रहा है ताकि गाँव सभा स्तर पर तथा जिला स्तर पर इस नयी व्यवस्था के संबंध में स्थिति स्पष्ट रहे।

II. संविधान के 73वें संशोधन के अनुक्रम में अब ग्रामीण क्षेत्र की सार्वजनिक वितरण प्रणाली के अंतर्गत उचित दर की दुकानों की नियुक्ति तथा निरस्तीकरण का अधिकार ग्राम सभाओं को दे दिया

गया है। अतएव ग्रामीण क्षेत्र की उचित दर की इन दुकानों के चयन आदि के सम्बन्ध में पूर्व में निर्गत समस्त शासनादेशों में आवश्यक संशोधन करते हुए निम्न निर्देश दिये जाते हैं।

(1) ग्रामीण क्षेत्र में उचित दर की दुकानों का चयन अब अन्तिम रूप से ग्राम सभाओं द्वारा ही किया जायेगा। प्रत्येक ग्राम सभा में उचित दर की एक दुकान खोली जायेगी। जिन ग्राम सभाओं में 4000 से अधिक यूनिट है वहाँ यदि ग्राम सभा यह महसूस करती है कि एक से अधिक दुकानो खोलने में लोगों को सुविधा होगी तो गाँव सभा एक से अधिक दुकान खोलने की कार्यवाही कर सकती है। उचित दर की दुकानों का चयन ग्राम सभा की खुली बैठक में बहुमत से प्रस्ताव पारित कर किया जायेगा।

(2) जिन ग्राम सभाओं में एक से अधिक दुकानें होगी वहाँ यह सुनिश्चित किया जायेगा कि दुकानों से लगभग बराबर-बराबर यूनिट सम्बद्ध रहें। गांव की दुकानें जहाँ तक संभव हो उस पुरवे/टोले-मोहल्ले/मजरे में प्रस्तावित की जाये जहाँ परम्परागत रूप से अधिकांश उपभोक्ताओं का आना जाना होता हो।

(3) शासन द्वारा अब उचित दर की दुकानों की नियुक्ति के लिए वरीयता क्रम समाप्त कर दिया गया है तथा निर्धारित की गई अनिवार्य अर्हता को ध्यान में रखते हुए श्रेष्ठ उपयुक्तता के आधार पर चयन की कार्यवाही सुनिश्चित की जायेगी।

(4) उचित दर की दुकानों के चयन के लिए पात्र व्यक्ति के लिए निम्न अर्हताएं अनिवार्य होगीः-

(क) उसकी आर्थिक स्थिति अच्छी हो तथा वह दुकान को आवंटित एक माह की समय का एक बार में ही उठान करने में आर्थिक रूप से सक्षम हो।

(ख) उसकी सामान्य ख्याति अच्छी हो।

(ग) वह शिक्षित हो ताकि वह दुकान का हिसाब किताब सही रूप से रख सके।

(घ) कार्यरत राशन के दुकानदार की मृत्यु के फलस्वरूप यदि दुकानदार की ख्याति अच्छी रही हो तो दुकानदार की विधवा अथवा आश्रित पुत्र का दुकान आवंटित की जा सकती है।

(5) ग्राम प्रधान या उप प्रधान के परिवार के सदस्यों/संबंधियों के पक्ष में उचित दर के दुकान के आवंटन का प्रस्ताव नहीं किया जायेगा। परिवार की परिभाषा निम्नवत होगी।

स्वयं,स्त्री, पुत्र, विवाहित पुत्री,माता, भाई या अन्य कोई सदस्य जो साथ में रहता हो तथा एक ही चूल्हे का बना खाना खाता हो।

(6) आवश्यक वस्तु अधिनियम के अंर्तगत दण्डित व्यक्ति को दुकान आवंटित नहीं की जायेगी।

(7) उचित दर की दुकान के चयन के संबंध में गाँव सभा द्वारा बहुमत से पारित प्रस्ताव के अनुसार अब ग्राम सभा के प्रधान तथा ग्राम पंचायत विकास अधिकारी के संयुक्त हस्ताक्षर से दुकान की नियुक्ति के आदेश जारी किये जायेंगे। दुकान चलाने के पूर्व ग्राम पंचायत विकास अधिकारी द्वारा निम्न विधिक औपचारिकताएं पूर्ण करायी जायेंगी-

(अ) दुकानदार द्वारा संलग्न प्रारूप पर 100 रूपये के नान ज्यूडिशियल स्टाम्प पेपर पर अनुबन्ध पत्र हस्ताक्षरित किया जायेगा तथा उसके बाद इस पर ग्राम पंचायत अधिकारी तथा ग्राम प्रधान के संयुक्त हस्ताक्षर होंगे।

(ब) दुकानदार द्वारा प्रतिभूति के रूप में रू01000/- ग्राम निधि में जमा कराये जायेंगे।

(8) इस व्यवस्था के पूर्व से ग्रामीण क्षेत्र में नियमानुसार कार्यरत राशन के दुकानदारों की दुकानें यथावत चलती रहेगी। किन्तु इन पुराने दुकानदारों से कराए गए पुराने अनुबन्धों के स्थान पर तीन माह के अन्दर ऊपर प्रस्तर 7(अ) में उल्लिखित नये अनुबन्ध पत्र पर नया अनुबन्ध

कराया जायेगा तथा उनसे भी प्रतिभूति की धनराशि रू01000/- ग्राम निधि में जमा करायी जायेगी।

(9) प्रतिभूति की धनराशि जो ग्राम निधि में जमा करायी जायेगी उसको ग्राम सभा सुरक्षित रखेगी तथा उसे अन्य किसी कार्य में व्यय नहीं करेगी।

(10) किसी दुकानदार द्वारा अनुसूचित वस्तुओं के उठान एवं वितरण में अनियमितता एवं गड़बड़ी किये जाने की शिकायत प्राप्त होने पर अथवा अन्य प्रकार से ऐसी जानकारी मिलने पर इसकी जाँच ग्राम पंचायत की प्रशासनिक समिति द्वारा की जायेगी जाँच आख्या तथा समस्त तथ्य ग्राम सभा की खुली बैठक में रखे जायेंगे जिन पर विचार विमर्श के बाद बैठक में निर्णय लिया जायेगा। ग्राम सभा के निर्णय के अनुसार ग्राम पंचायत अधिकारी द्वारा अग्रिम कार्यवाही की जायेगी।

(11) दुकान निलम्बित/निरस्त होने पर ग्राम पंचायत इसकी सूचना संबंधित उप जिलाधिकारी तथा जिला पूर्ति अधिकारी को देगी एवं नई नियुक्ति तक वैकल्पिक व्यवस्था करने के लिए अनुरोध करेगी। सूचना प्राप्त होने पर उप जिलाधिकारी/ जिला पूर्ति अधिकारी निलम्बित/ निरस्त दुकान से सम्बद्ध राशन कार्डों को पास के अन्य दुकान से सम्बद्ध करने के आदेश करेंगे।

(12) ग्राम सभा यथा संभव एक माह के अन्दर निलम्बित दुकान के विरूद्ध अग्रिम कार्यवाही पूर्ण कर नये दुकानदार के चयन अथवा पुराने दुकानदार की बहाली जैसी भी स्थिति हो, का निर्णय लेगी। इस निर्णय के बाद उप जिलाधिकारी द्वारा की गई व्यवस्था स्वतः समाप्त हो जायेगी।

(13) ग्राम सभा के अतिरिक्त राशन के दुकानदार के कार्यों की जाँच जिलाधिकारी, अपर जिलाधिकारी, जिला पूर्ति अधिकारी तथा उप जिलाधिकारी द्वारा स्वप्रेरणा अथवा शिकायत आदि मिलने पर की जा सकती है तथा गम्भीर अनियमितता की स्थिति में यह अधिकारी भी राशन की दुकानों के निलम्बन अथवा निरस्तीकरण के आदेश दे सकते हैं और ऐसे आदेश ग्राम सभा तथा दुकानदारों पर बाध्यकारी होंगे।

(14) जिले में तैनात खाद्य तथा रसद विभाग व राजस्व विभाग के सभी अधिकारी/कर्मचारी तथा जिलाधिकारी द्वारा अधिकृत अन्य अधिकारी/कर्मचारी ग्रामीण क्षेत्र की राशन की दुकानों के कार्य तथा सार्वजनिक वितरण प्रणाली का नियमित रूप से पर्यवेक्षण करते रहेंगे तथा गड़बड़ी पाये जाने पर गाँव सभा तथा जिला प्रशासन के संबंधित अधिकारियों को सूचना देंगे ताकि आवश्यक कार्यवाही की जा सके।

(15) ग्राम सभा द्वारा राशन की दुकान के निलम्बन/निरस्तीकरण के आदेश के विरूद्ध अपील किये जाने की कोई व्यवस्था नहीं होगी। अब ग्राम सभा द्वारा जारी आदेश ही अन्तिम माना जायेगा जिसके विरूद्ध कोई अपील ग्राहय नहीं होगी। परन्तु वर्तमान मे मण्डलायुक्तों के स्तर पर पुरानी लम्बित अपीलों का निस्तारण संबंधित मण्डलायुक्तों के स्तर पर पुरानी लम्बित अपीलों का निस्तारण संबंधित मण्डलायुक्त ही करेंगे।

(16) राशन के दुकानदार द्वारा खाद्यान्न/चीनी/ मिटटी का तेल तथा अन्य अनुसूचित वस्तुओ के वितरण पर निगरानी हेतु ग्राम स्तर पर पूर्व में गठित सर्तकता समितियों को अब समाप्त कर दिया गया है। अब ग्राम पंचायत की प्रशासनिक समिति ग्रामीण क्षेत्र की राशन की दुकान से वितरित होने वाली अनुसूचित वस्तुओं तथा खाद्यान्न, चीनी, मिटटी का तेल आदि पर निगरानी रखेगी तथा राशन की दुकान संबंधी समस्त कार्यों का पर्यवेक्षण करेगी।

(17) शासन द्वारा खाद्यान्न, चीनी तथा मिट्टी के तेल के उठान एवं वितरण के लिए एक समय सारिणी निर्धारित की गई है। ग्राम सभा का यह उत्तरदायित्व होगा कि उनके अधीन कार्यरत दुकानदार शासन द्वारा निर्धारित समयसारिणी के अनुसार समस्त अनुसूचित वस्तुओं का उठान एवं वितरण सुनिश्चित करें। चालू माह के अन्त तक

दुकानदार द्वारा अगले माह वितरित की जाने वाली सामग्री तथा खाद्यान्न व चीनी का पूर्ण उठान निश्चित रूप से कर लिया जाना चाहिये ताकि माह की पहली तारीख से वितरण कार्य आरम्भ हो सके। यदि दुकानदार द्वारा इसमें शिथिलता/उदासीनता बरती जाती है तो ग्राम सभा को दुकानदार के विरूद्ध कार्यवाही करनी चाहिए।

III. दुकानों के संचालन आदि के सम्बन्ध में शासन, खाद्य आयुक्त तथा जिला प्रशासन द्वारा निर्गत सभी आदेश ग्राम सभा तथा राशन के दुकानदार पर बाध्यकारी होंगे।

IV. जिलाधिकारी से अपेक्षा है कि उक्त आदेशों के अनुसार कार्यवाही सुनिश्चित करायें तथा इस शासनादेश की प्रतियाँ जिले की प्रत्येक गाँव सभा को उपलब्ध कराना सुनिश्चित करें।"

7. The Government order dated 10.8.1999 inter alia, provided, as under:-

(i) That the fair price shops established earlier shall continue to operate but the dealers/licence holders were required to execute the fresh agreements;

(ii) That the concerned Gram Sabha will have power to appoint new dealers or licence holders to run fair price shops, and to suspend or cancel the agreements, and

(iii) That the orders passed by the concerned Gaon Sabha to cancel or suspend agreements shall be final and no appeal shall lie against the said order, though it would be subject to the approval of the Sub Divisional Officer concerned.

8. It was urged that selection and cancellation of fair price shops were, therefore, no longer a contractual matter but came to be governed by the statutory provisions of section 15 of the U.P. Panchayat Raj Act as has been held by a Division Bench of this Court in the case of **Pappu Vs. State of U.P. and others**- 2001 (1) A.W.C.-1 The Gram Panchayats came to be vested with the power of selecting persons to run the fair price shops. On account of party factions, local politics, inexperience and other extraneous considerations, the public distribution system under the Government order dated 10.8.1999 came to be criticized and challenged before this court and a thousand of writ petitions poured in A Division Bench of this Court in **Chokha Singh Vs. Sub Divisional Magistrate Thakuardwara Moradabad and others** (civil Misc. Writ No. 51595 of 1999) by order dated 10.12.1999 referred the matter for decision to a larger Bench on the ten specific formulated questions as **Pappu's case** (supra) was found to be in direct conflict with Full Bench decisions of this court in **Shiv Mohan Lal Vs. State of U.P. and others**- 1993 (21) A.L.R. 121, **U.P. Sasta Galla Vikreta Parishad Vs. State of U.P. and others** 1992 (2) E.F.R. -655; **Gopal Das Sahu V. State of U.P. and others** 1991 (17) A.L.R. -406. A Bench of five Hon'ble Judges of this court, was constituted to answer the questions framed in **Chokha Singh's case** (supra). Before the larger Bench could answer the reference, the State Government passed an order on 13.1.2000 whereby the Government order dated 3.7.1990 was restored. The order dated 13.1.2000 reads as below:-

" विषयः विकेन्द्रीकृत ग्राम सभाओं को ग्रामीण क्षेत्र की राशन की दुकानों की नियुक्ति/ निरस्तीकरण सम्बन्धी दिये गये अधिकारों को समाप्त किये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक मुझे यह कहने का निर्देश हुआ है कि प्रदेश सरकार द्वारा सत्ता के विकेन्द्रीकृत व्यवस्था के अर्न्तगत ग्रामीण क्षेत्र की राशन की दुकानों की नियुक्ति/ निरस्तीकरण सम्बन्धी अधिकार ग्राम सभाओं को दिये गये है और इस सम्बन्ध में शासनादेश संख्या 3035/21-खा-6-99 37 सा0/99 दिनांक 10-6-99 द्वारा विस्तृत दिशा निर्देश जारी किये गये हैं। शासन स्तर पर सम्यक विचारोपरान्त यह निर्णय लिया गया है कि विकेन्द्रीकृत व्यवस्था के तहत ग्रामीण क्षेत्रों में राशन की दुकानों की नियुक्ति तथा निरस्तीकरण का जो अधिकार ग्राम पंचायतों को दिये गये हैं उन्हें समाप्त कर दिया जाय और विकेन्द्रीकृत व्यवस्था लागू होने से पूर्व की व्यवस्था लागू की जाय और पूर्व की भाँति ग्रामीण क्षेत्र की राशन की दुकानों की नियुक्ति/ निरस्तीकरण का अधिकार जिलाधिकारियों को दे दिया जाय। इस प्रकार उक्त शासनादेश दिनाँक 10-8-99 निरस्त करते हुए शासन स्तर पर दिये निर्णय के तहत अब ग्रामीण क्षेत्र की राशन की दुकानों के चयन सम्बन्धी कार्यवाही पूर्व में निर्गत शासनादेश संख्या-एफ-3967/29-6-90 दिनाँक 3-7-90 में अंकित प्रस्तर 4,5 को छोड़कर शेष निर्धारित प्रक्रिया के अनुसार सम्पन्न की जायेगी।

2. शासनादेश संख्या-1230/29-8-99 दिनाँक 22-3-99 द्वारा अब ग्रामीण क्षेत्र तथा नगरीय क्षेत्र की उचित दर की दुकानों की नियुक्ति के लिए वरीयता क्रम समाप्त कर दिया गया है तथा उसके स्थान अब शासनादेश दिनाँक 27-3-99 तथा 18- -99 में निर्धारित की गयी अनिवार्य अर्हता को ध्यान में रखते हुए श्रेष्ठ उपयुक्त के आधार पर चयन किये जाने का मापदण्ड रखा गया है जिसके अनुसार राशन की दुकानों के चयन की कार्यवाही सुनिश्चित की जायेगी।

3. जिन ग्राम सभाओं में ग्राम प्रधानों द्वारा विकेन्द्रीकृत व्यवस्था के तहत ग्रामीण क्षेत्र की राशन की दुकानों के चयन सम्बन्धी कार्यवाही की जा चुकी है और नियुक्ति आदेश निर्गत किये जा चुके हैं तथा राशन के दुकानदारों के अनुबन्ध पत्र कराये जा चुके हैं उन राशन की दुकानों का चयन/नियुक्ति समाप्त नहीं की जायेगी अपितु शासनादेश दिनाँक 3 जुलाई 1990 के अनुसार ऐसे राशन की दुकानदारों से जिलाधिकारी द्वारा नया अनुबन्ध पत्र कराया जायेगा तथा जिन ग्राम सभाओं में ग्राम प्रधानों द्वारा नियुक्ति आदेश जारी करने के पश्चात राशन के दुकानदारों से अनुबन्ध पत्र अभी तक नहीं कराया गया है उनसे भी जिलाधिकारी द्वारा शासनादेश दिनांक 3-7-90 के निर्देशानुसार अनुबन्ध पत्र कराया जायेगा जिन ग्राम सभाओं में राशन के दुकानदारों की नियुक्ति/चयन सम्बन्धी कार्यवाही प्रक्रिया में है और नियुक्ति आदेश निर्गत नही किये गये हैं ऐसे मामलों में जिलाधिकारी ग्राम सभा के प्रस्ताव का पुनः परीक्षण कर नियुक्ति आदेश निर्गत करेंगे और शासनादेश दिनाँक 3-7-90 के निर्देशानुसार राशन के दुकानदारों से अनुबन्ध पत्र भरायेंगे।

ग्राम सभाएं राशन की दुकान से वितरित होने वाले खाद्यन्न, चीनी, मिटटी का तेल एवं अन्य अनुसूचित वस्तुओं के वितरण पर निगरानी रखेगी तथा यह सुनिश्चित करेगी कि उपभोक्ताओं को शत प्रतिशत वितरण उपलब्ध हो सके तथा अनुसूचित वस्तुओं की कालाबाजारी न होने पाये।

जिलाधिकारी से अपेक्षा है कि उक्त आदेशों के अनुसार ग्रामीण क्षेत्रों की राशन की चयन सम्बन्धी कार्यवाहीसुनिश्चत करायें।"

9. In view of the fact that the Government order dated 10.8.1999 impugned before this court had been withdrawn the larger Bench of this court had been withdrawn the larger Bench of this court comprising Hon'ble Mr. S.K. Sen, Chief Justice, Hon'ble Mr. D.S. Sinha, J., Hon'ble Mr. Palok Basu, J. Hon'ble Mr. G.P. Mathur, J and Hon'ble S.R. Singh, J. declined to answer the question referred to it by observifng:

"..... Since the said order dated 10.8.1999 has become redundant even according to the contention of the learned Advocate for the petitioner, it appears to us that no useful purpose shall be served by answering the questions referred to Larger Bench as the reference was based upon the contents of the said Government

order dated 10.8.1999. Accordingly, we decline to answer the questions."

10. The order dated 13.1.2000 by which the earlier order dated 10.8.1999 was withdrawn was also challenged before the Larger Bench in Civil Misc. Writ No.16923 of 2000 **Bhimsen V. State of U.P. and other**s. In this case it was directed by the larger Bench that the petition filed by Bhimsen and other writ petitions in which the order dated 13.1.2000 has been challenged shall be de-linked from the reference made in **Chokha Singh's case** (supra) and shall be listed separately before the appropriate Bench in usual course. In this manner, all the writ petitions connected with Chokha Singh and Bhimsen are to come up before the appropriate Division Bench.

11. The position as it stands is that the public distribution of the scheduled commodities or say essential commodities is to take place under the earlier Government order dated 3.7.1990 by which the power of suspension and cancellation of the licence/agreement to run fair price shop and to receive their essential commodities for distribution to the ration card holders vests in the District Magistrate and a person aggrieved by the order passed by the District Magistrate may prefer an appeal before the Commissioner of the Division concerned.

12. In all the eight writ petitions, which are now before this Court, the licences of the petitioners for running the fair price shops meant for distribution of essential commodities have been cancelled and the appeals filed by them before the Commissioner of the Division have also failed. It is in these circumstances that the petitioners are before this Court under Article 226 of the Constitution of India for the appropriate relief's.

13. Heard S/Sri M.A. Quadeer, S.S. Chauhan, Mr. V.S. Pandey, Ms. Sunita Sharma, N.I. Srivastava, and Swapanil Kumar learned counsel for the petitioners as well as learned Standing counsel on behalf of the State of U.P., at a considerable length.

14. Sri Ramendra Asthana learned Advocate also intervened to make his submissions as the matter concerns the public distribution system and is of great public importance. Sri Ramendra Asthana was also heard and the various decisions cited by him have been taken into consideration.

15. The common ground to challenge the orders passed by the authorities cancelling licences as well as appellate authorities are that the Collector/District Supply Officer/Sub Divisional Officer have acted in an arbitrary and discriminatory manner of cancel the licences without at all affording a reasonable opportunity to canvass and explain the point of view of the petitioners, that the orders passed by the authorities below are violative of Articles 14 and 16 of the Constitution of India. In civil Misc. Writ No. 2853 of 2001. An additional ground that the licence was cancelled at the behest of Chandra Sekhar Singh, Ex State Minister on account of acrimony has also been taken. A supplementary affidavit has also been filed in the said case pointing out that the requisite advertisement has been published on 20.1.2001 inviting application for grant of licence/ agreements executed by the petitioners do

not give rise to statutory contracts and consequently the proper remedy of the petitioners is to approach the civil court for redressal of their grievances.

16. The crucial question involved in these writ petitions for consideration and determination by this court is whether the appointment of the petitioners as agents for running the fair price shops for distribution of the essential commodities to the assigned ration card holders in pursuance of the agreements executed by them in favour of the State of U.P. through the Collector/Sub Divisional Magistrate is the outcome of a statutory or a non statutory contract. The fate of these writ petitions obviously would turn out on the answer of the above question, inasmuch as, the parties would swim or sink with the finding on the point.

17. To begin with, it may be observed that the law relating to an award of contract by the State, its corporation and bodies acting as instrumentality's and agencies of the Government has been settled by the decision of the apex court in **Ramana Daya Ram Shetty V. International Airport Authority of India** (1979) 3 SCC-489, **Fertilizer Corporation Kamgar Union (registered) V. Union of India** (1981) 1 SCC-568; **CCE Vs. Dunlop India Ltd.** (1985) 1 S.CC.-260; **Tata Cellular V. State of Maharashtra**-1997 (1) SCC - 134; **Raunak International Ltd. V. I.V.R. Construction Ltd.** (1999) 1 SCC-492; **Air India Ltd. V. Cochin International Airport Ltd. and others** (2000) 2 SCC -716 and **Kerala State Electricity Board and another V. Kurien E. Kalathil and others** -2000 (6) SCC-293. The view taken in the above decisions is that the award of contract whether it is by a private party or by a body or State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are commercial considerations. A State may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Disputes arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a convenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise or statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In **Kerela State Electricity Board** (supra), the dispute was relating to the terms of the contract with statutory body. It was held that a contract does not become statutory simply because it has been awarded by a statutory body for the construction of a public utility. The contract between the parties in that case was held to be in the realm of private law. In the background of this fact, it was held that the dispute relating to interpretation of the terms and conditions of such a contract, i.e., a non-statutory contract could not have been agitated in a petition under Article 226 of the Constitution of India; that is a matter of adjudication by civil court or in arbitration if provided for the contract whether any amount is due and if so, how much and refusal of the Electricity Board to pay it is justified or

not, it was observed, are not matters, which could have been agitated and decided in a writ petition. The view taken was that the Contractor should have relegated to other remedies.

18. The learned Standing Counsel pointed out that earlier a firm view had been taken by this court that the agency to distribute the essential commodities is the product of the non statutory contract and, therefore, a writ petition under Article 226 of the Constitution is not maintainable. Obviously the reference was to the decision of a Division Bench of this Court in **Gopal Das Sahu V. State of U.P.** -1991 (17) A.L.R. 406 which dealt with cancellation of contract executed by an agent with the Collector for the sale of scheduled commodity under the Control order. It was held that neither Article 14 of the Constitution of India nor principles of natural justice are attracted when agreement to sell governing food grains through fair price shops is terminated. It was further laid down that the relationship of the agents with Government is contractual and non-statutory in nature, and, therefore, a writ under Article 226 of the Constitution of India is not maintainable to compel the Government to supply the quota of scheduled commodities to the petitioner therein. Subsequently, a full Bench of this court in **U.P. State Sasta Galla and Vikreta Parishad Allahabad Vs. State of U.P.**- 1992 (2) E.F.R.-655, and **Shiv Mohan Lal v. State of U.P.** 1993 (21) A.I.R. -121 approving the decision in **Gopal Das Sahu's** case (supra) held that the order of termination or suspension of an agreement entered into between the petitioner and the District Magistrate for sale of scheduled commodities through fair price shop pursuant to the U.P. Scheduled Commodities Distribution Order, 1990 cannot be challenged in a writ petition and the proper course, for the agent or say that dealer, was to vindicate his grievance by filing a civil suit. It was canvassed before the Full Bench that in view of the decision of the apex court in **Km. Srilekha Vidyarthi V. State of U.P.**-AIR 1991 SC 537 and host of other decisions, the decision in **Gopal Das Sahu's** case (supra) required reconsideration. The Full Bench reiterated the view taken in **Gopal Das Sahu's** case (supra) as laying down the correct law by observing that the apex court has consistently taken the view that where the contract which has been entered into between the State and the person aggrieved is non-statutory, the rights of the parties thereto are governed by the terms of the contract and not by constitutional provisions and no writ or order can be issued under Article 226 of the Constitution of India by the High Court for enforcing such a contract.

19. With regard to the fact that the rights arising out of non-statutory contract cannot be enforced by means of a writ petition, a reference may profitably be made to another Full Bench decision of this court in **Shitla Prasad V. M. Saidullah, District Magistrate Pratapgarh and others** - 1975 A.L.J. -435. In that case, a person was appointed to sell levy sugar. His agreement was terminated allegedly in an unjustified manner. It was held that the action complained against amount to infringement of merely contractual right and the aggrieved party can take action for breach of contract but cannot invoke jurisdiction of the High Court under Article 226 of the Constitution of India.

20. With regard to the contract made by the authorized agent with the Collector for the sale of scheduled commodities through fair price shops, there is a line of decisions of this court holding that these contracts are non-statutory and the rights of the parties thereto are governed by contract and not by constitutional provisions, and therefore, a writ petition, under Article 226 of the Constitution is not maintainable.

21. Sri Ramendra Asthana urged that the decisions of the Full Bench in the **U.P. Sasta Galla Vikreta Parishad** (supra) and **Shiv Mohan Lal** (supra) are preimarily based on the observations made by the apex court in **Bareilly Development Authority V. Ajai Pal Singh** A.I.R. 1989 SC-1076 which was not approved by the apex court in its subsequent decision in **Indore Development Authority V. Smt. Sadhna Agarwal**- JT 1995 (3) SC-1. In both these decisions, the question involved was whether the Development Authorities could increase or enhance the cost of the land/flats or houses developed and constructed by them after having indicated lower cost to the buyers and such an action on the part of the Development Authorities can be labelled as arbitrary and discriminatory. In **Bareilly Development Authority** (supra) the writ petition was held to be not maintainable and the view taken in paragraphs 21 and 22 of the Report of that case runs as follows:

"21. There is line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple:

Radha Krishana Agarwal V. State of Bihar (1977) 3 SCR 249 (AIR 1977 SC-1496), **Premji Bhai Parmar V. Delhi Development Authority** (1980) 2 SCR 704 (AIR 1980 SC 738) and **D.F.O. V. Biswanath Tea Company Ltd**. (1981) 3 SCR-662 (AIR 1981 SC-1368).

22. In view of the authoritative judicial pronouncements of this court in the series of cases dealing with the scope of interference of a High Court while exercising its writ jurisdiction under Article 226 of the Constitution of India in cases on non-statutory concluded contracts, like the one in hand, we are constitutional to hold that the High Court in the present case has gone wrong in its finding that there is arbitrariness and unreasonableness on the part of the appellants herein the increasing the cost of the houses/flats and the rate of monthly instalments and giving directions in the writ petitions as prayed for ."

22. In **Indore Development Authority** (supra) the apex court has not deviated from its earlier view taken in **Bareilly Development Authority's** case (supra), but justified the interference in the background of special facts and circumstances by holding that the Development Authority owed a duty to explain and satisfy the Court the reason for such high escalation. A cautious approach was adopted by the court by making the observation that-

" …..We may add that this does not mean that the High Court ion such

dispute while exercising the writ jurisdiction has to examine every detail of the construction with reference to the cost incurred. High Court has to be satisfied on the materials on record that the Authority has not acted in an arbitrary and erratic manner….."

23. The view taken in **Bareilly Development Authority's** case (supra) that the nature of the contract was non-statutory has not been disturbed in the decision in **Indore Development Authority** (supra). The law laid down in **Bareilly Development Authority's** case, therefore, is in tact and it cannot be argued that the Full Bench decision in **U.P. Sasta Galla Vikreta Parishad's** case (supra) and **Shiv Mohan Lal's** case (supra) are based on a law, which has been subsequently held to be not good.

24. A reference was made to another decision of the apex court in **M/s Hyderabad Banaspati V. Andhra Pradesh State Electricity Board and others** - JT 1988 (3) SC -84, in which certain tests have been laid down for determining whether a contract is statutory or non-statutory and on the strength of this decision, Sri Ramendra Asthana strenuously argued that the agreement executed by the petitioners in favour of the District Magistrate with a view to obtain licence to run fair price shop for distribution of essential commodities would fall within the ambit of statutory contract. He further pointed out that a Division Bench of this court in a recent decision in **Pappu V. State of U.P.and others** (supra) has held that the contracts fork running the fair price shops have statutory flavour and a writ petition for the enforcement of the rights in the event of their breach is maintainable under Article 226 of the Constitution of India. The law laid down by the Full Bench in **U.P. Sasta Galla Vikreta Parishad** (supra) and **Shiv Mohan Lal** (supra) was held to have no application in view of the fact that it came into being prior to the insertion of Article 243-G of the Constitution by means of Seventy 15 of U.P. Panchayat Raj Act by Act no. IX of 1994. It was pointed out that before the Full Bench, clause 4 of the U.P. Scheduled Commodities Distribution Order, 1990 was under consideration. The Full Bench visialized that fair price shops would be run by such persons, in such a manner, as the Collector, subject to the direction of the State Government, may decide and the person authorized to run a fair price shop would be run by such persons, in such a manner, as the Collector, subject to the direction of the State Government, may decide and the person authorized to run a fair price shop would be treated as the agent of the State Government. By a letter dated 3.7.1990, the Government issued instructions to all the District Magistrate had been directed to get the contracts executed in the prescribed proforma by the agents running the fair price shops. Clause 11 of the said letter made provision for appeal against the order of appointment, suspension, cancellation or non-renewal of contracts. Under the new system which was introduced as a result of the amendment in the Constitution and incorporation of Section 15 in the U.P. Panchayat Raj Act and the issue of Government order dated 10.8.1999, it was pointed out that the allotment of fair price shop is done pursuant to a resolution, passed in that regard by the concerned Gram Sabha. Certain qualifications have been prescribed in the Government order. The status of the allottee, it was held, is

not that of an agent of the State Government. The matter of allotment and the procedure for cancellation as prescribed in the Government order have the force of law. Once an allotment is made in favour of a person, he acquires a right to run the shop in the manner prescribed in the Government order. The allottee runs the risk of cancellation only in the event of committing irregularities in the distribution of scheduled commodities. A Gaon Sabha is a legal authority within the meaning of Article 12 of the Constitution of India and its decision affecting the rights of citizen cannot go beyond the purview of judicial review under Article 226 of the Constitution of India. To be more precise, specific, and for the sake of clarify, it would be proper to quote paragraph 5 of the decision in **Pappu's** case (supra), which reads as follows:

"5. It would thus appear that the selection and cancellation of fair price shops are no longer a contractual matter. It is now governed by the statutory provisions, namely, Section 15 of the U.P. Panchayat Raj Act read with Government Order dated 10.8.1989 which has the force of law being a provision having statutory flavour. In the instant case, the allotment of fair price shops in favour of the petitioners- appellant herein was cancelled by the concerned Gram Panchayat but without following the procedure prescribed in para 10 of the Government order referred to above which provides for an 'enquiry' by the Administrative Committee of the Gram Panchayat into the complaints regarding irregularities in the distribution of scheduled commodities by the allottee of the fair price shop. The enquiry visualised by clause 10 of the Government order must, in our opinion, be held in a fair manner in tune with the principles of natural justice. The fact that the decision regarding cancellation is required to be taken by the Gram Sabha in its open meeting would suggest that there should be transparency in the decision making process. A decision regarding cancellation of fair price shop taken by the Gaon Sabha sans may enquiry in tune with the principles of natural justice cannot be sustained being contrary to the procedure laid down in the Government order aforesaid which ensures procedural fairness in the matter of cancellation of fair price shops."

25. On the strength of the decision in **Pappu's** case (supra) Sri Ramendra Asthana pointed out that the earlier view taken **Gopal Das Sahu's** case (supra) as well as **U.P. Sasta Galala Vikreta Parishad** (supra) and **Shiv Mohan Lal** (supra) does not hold good and a writ petition is now maintainable under Article 226 to enforce the breach of the rights and obligations arising out under the agreement executed by the petitioners for obtaining the essential commodities for distribution to the ration card holders respectively allocated to them. It was further urged that there can be no enquiry without observance of the principles of natural justice as has been laid down by the apex court in **Style (Dress Land) Vs. Union Territory Chandigarh and another** -1999 (7) SCC-89, **V.D. Bhavasan V. Bar Council of India**-1999 (1) SCC 45 and S**ahi Ram V. Avtar Singh and others**-1999 (4) S.C.C.-511.

26. In view of the conflict in the Full Bench decision in **U.P. Sasta Galla Vikreta Parishad** (supra) as well as Division Bench decision in Pappu, a

reference to a larger Bench was made by another Division Bench in **Chhokhe Singh V. Sub Divisional Magistraste**- Civil Misc. Writ No. 51595 of 1999 posing as many as ten specific questions to be answered by the larger Bench. The larger Bench did not answer the questions on merits by observing that since the order dated 10.8.1999 (which was subject matter of challenge in **Pappu's** case (supra) has become redundant on account of its withdrawal and revival of the old scheme of distribution, as envisaged in Government order dated 3.7.1990, there was no need to answer the questions. The larger Bench had the occasion to sift the various legal points which have been raised by Sri Ramendra Asthana in the present writ petitions, but since the larger Bench declined to answer the questions referred to it, as the reference was found to have become redundant, the judicial discipline demands that this court sitting singly has to take into consideration the scheme of distribution of essential commodities as adumbrated by the revived Government order dated 3.7.1990 and the achere to the decisions in which said Government order came to be tested. The law laid down in the Full Bench decision in **U.P. Sasta Galla Vikreta Paraishad** (supra) and **Shiv Mohan Lal** (supras) hold good as regards the scheme propounded under the Government order dated 3.7.1990. The agreements executed under the said scheme shall be treated to be non-statutory and the law laid down in **Pappu's** case (supra) cannot be taken into consideration as it proceeded on the premises of the new scheme as contemplated under the Government order dated 10,.8.1999 which came into being on account of insertion of Article 243-G of the Constitution of India and substitution of Section 15 of the U.P. Panchayat Raj Act.

27. **Gopal Das Sahu's** case (supra) as well as **U.P. Sasta Galla Vikreta Parishad** (supra), therefore, settle the law that the matter of statutory contracts, rights and obligations of the parties arising there under are governed by the terms and conditions of the contract and constitutional provisions like, Article 14, cannot be extended in such cases and consequently, the question of violation of the said Article or the provisions of the Constitution by the State or its officials does not arise. Any action taken or any order passed under such a contract by the State or its officials, howsoever wrong or arbitrary it may be, cannot be challenged under Article 226 of the Constitution of India. It is not open to this Court to enforce such a contract or to remedy the breach thereof by the State in exercise of its original jurisdiction under Article 226 of the Constitution of India.

28. Sri M.A. Quaeer pointed out that an aggrieved person cannot be left remedy less. A complete answer to this submission of Sri Quadeer is to be found in paragraph 21 of **Shiv Mohan Lal's** case (supra) which runs as under:-

"Even though the petitioners and other authorised agents cannot challenge the breach of their contract on the ground of violation of constitutional provisions before this Court under Article 226 of the Constitution but they are not remedy less. Government order itself provides for appeal against some of the orders, which may be passed by the authorities. That apart, the authorised agents like the petitioners have remedy of civil suit before the appropriate civil court, which

they can institute before filing of the appeal as well as after the appeal is decided.'"

29. To sum up, it may be pointed out that what has been canvassed, discussed and decided by a Division Bench of this Court in **Pappu's** case (supra) is not applicable in the present circumstances as in that case the Government order dated 10.8.1999 was the subject matter of challenge which came to be issued in the wake of insertion of new Article 243-G of the Constitution of India and substitution of Section 15j of the U.P. Panchayat Raj Act. After the withdrawal of the said Government order and reverting to the position as obtained at the time when the Government order dated 3.7.1990 was issued, the decision in **Pappu's** case (supra) has lost its relevance and the cases on which reliance cannot be ignored are **Gopal Das Sahu** (supra); **U.P. State Galla Vikreta Parishad** (supra) and **Shiv Mohan Lal** (supra) in which agreements executed persuant to the Government order dated 3.7.1990 were held to be non statutory contracts. After the decision of the larger Bench to which the conflict was referred for resolution, the legal position which emerges is that the whole controversy is to be decided with reference to the Government order dated 3.7.1990 validity of which, as a matter of facts, already stands concluded by the decisions aforesaid. Off necessity, therefore, the agreements which are in force persuant to the Government order dated 3.7.1990, are to be treated as non-statutory agreements. The law, as said above, is well settled that in case on non statutory agreements, if there is a breach of any term or condition, remedy of the dealer/licence holder is to approach the civil court for the redressal of his grievances. For the remedial measures, the writ jurisdiction under Article 226 of the Constitution of India is not available. All the writ petitioner, therefore, turn out to be devoid of any merits and substance.

30. Before parting, it may be pointed out that recently, the State Government has issued at least three Government orders on 4th January, 2001. One of them - No. 78/39.7.2001-D(5)/2000 dated 4.1.2001 is with regard to the issue of licence for the sale of high speed diesel oil by retail/petty diesel oil dealers. The licence, is to be granted by a committee headed by the District Magistrate. The condition s of licence have further been circulated by Government order No. 557/29-7-2001-D (15)/2000 dated 3.2.2001. Similarly separate orders have been issued by the State Government with regard to the enforcement reservation policy in the public distribution system-both for rural and urban areas. The policy governing the urban areas is contained in Government order no. 21/29-Kha-6-2001-53(सामान्य)/99 dated 4.1.2001 and that of rural area is no. V.I.P. 169/29 Kha-6-2000-53(सामान्य)/99h of date. These two Government orders are relevant for the purposes of the appointment of the dealers/licence holders for distribution of the essential commodities through fair price shops, In both the cases i.e. urban and rural, reservation in respect of Scheduled Caste, Scheduled Tribes and other Backward classes has been provided besides horizontal reservation in respect of women, ex-servicemen, members of the family of service-men who laid their lives in war or we injured, wife or widow of the freedom fighters and physically handicapped persons. In case of rural areas a fair price ration shop is to be opened for every 4000- units and the

selection of such shops is to be done by a resolution to be adopted by the Gaon Sabha in its open meeting. In case of urban areas, a ration shop is to be provided for every 3000- units by a committee headed by the District Magistrate as its Chairman and District Supply Officer as its convenor/sachiv. In both the Government orders, necessary qualifications and eligibility formulae have been provided.

31. A note of caution is required to be sounded. The new scheme which is prevalent for distribution of essential commodities in the State is contained in the Government order dated 3.7.1990 as amended from time to time by subsequent orders, particularly the orders dated 4.1.2001. The new ration shops dealers are to be appointed after due advertisement and as per the requisites and eligibility criteria provided in the Government orders dated 4.1.2001 referred to above. However, there are yawning gaps in the existing scheme of distribution of essential commodities adopted by the State Government in a truncated form, as the position existing prior to the Seventy Third Constitutional amendment, which came into force on 24.4.1993 has been revived. It does not appear to fulfil the aspirations which culminated in the Seventy Third Amendment of the Constitution of India. The State Government has to give a fresh look to the matter. It has to consider whether the prevalent scheme is in keeping with the parameters prescribed in the newly inserted provision of Article 243-G of the Constitution of India and the substituted new Section 15 of the U,.P. Panchayat Raj Act. If the existing scheme does not fulfil the mandate of the Seventy Third Amendment in the Constitution and the statutory provision of Section 15 of the U.P. Panchayat Raj Act, it is like to invite adverse criticism and may be struck down by the appropriate forum. Taking note of situation, the State Government would do well to remove the anamoly before it is too late. This Court sitting singly has reframed to delve into the realm of this aspect of the matter.

32. In the conspectus of the facts and observations made above, all the eight petitions fail and are dismissed without any order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 15.3.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE BHAGWAN DIN, J.

Civil Misc. Writ Petition No. 21108 of 1996

N.C. Jain ...Petitioner
Versus
The Chief Secretary, Govt. of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri Pankaj Mithal.
Shri Ravi Kiran Jain

Counsel for the Respondents:
S.C.
Shri U.K. Uniyal

Constitution of India, Article 226- Compensation illegal realization of Trade Tax the authorities found most negligent in issuing the Recovery Certificate even no reasonable time given to submit the reply held the Chief Secretary is responsible to pay Rs.10,000/- as compensation with eiperty to take appropriate proceeding and to realise

the amount of compensation from the guilty officer.

Held Para 18 and 19

As regards the allegation of the petitioner that the recovery certificate was negligently issued by the Trade Tax Officer and warrant of arrest issued by the Deputy Collector (Collection), Trade Tax, the material placed before us leaves us with no doubt that both of them were negligent resulting in illegal confinement of the petitioner in Jail.

The petitioner was a man of social status having reputation and was confined to jail for no fault of his own. Considering the facts and circumstances we direct respondent no.1 to pay sum of Rs. 10,000/- as compensation to the petitioner within one month from the date of production of a certified copy of this order. It is open to the Government to take appropriate proceedings against those officers and realise the amount of compensation from them also.

Case law discussed

AIR 1984 SC 1213
403 (1971) umted state 388
AIR 1990 SC 513
AIR 1985 SC 117
AIR 1992 SC 248
AIR 1986 SC 494
2000 (2) Sec 465

By the Court

1. The petitioner has sought compensation for his confinement in jail alleging that he was arrested and confined in jail illegally and maliciously by the respondents causing mental and physical pain and affecting his reputation in the society.

2. The factual matrix of the case is that the petitioner was a partner in the firm M/S Monika Bakeries, Industrial Area, Partapur, Meerut. One Sri Abdul Hameed was also partner. In the year 1979 they agreed to dissolve the partnership and a dissolution deed dated 26.3.1979 was executed where by the assets and liability of the firm were given to Sri Abdul Hameed. All the tax liabilities prior to dissolution where also cleared.

3. The recovery proceeding were taken against the petitioner for recovery of Rs.2,400/- as arrears of Sales Tax for the year 1983-84 and a notice was issued in his name. The said recovery proceedings were, however, withdrawn after the Sales Tax Officer Sector-V, Meerut found that the Firm has been dissolved as per dissolution deed on record and, there, the petitioner was not liable for payment of the said Sales Tax. He passed on order on 26t^{h} September, 1988 Stating that the petitioner is not liable to pay any Sales Tax as the Firm has been dissolved by a dissolution deed.

4. On 9.2.1996 while he had come to Meerut, where his son was living, at about 7.00 A.M. three persons, namely, Kurk amim Sri Beer Narain (Respondent no.10), his peon Sri Abbas Mehandi (respondent no. 11) along with an armed constable, raided his Meerut residence claiming Sales Tax of Rs.1,55,000/- purporting the amount residence claiming Sales Tax of Rs. 1,55,000/- purporting the amount of Sales Tax recovery for the years 1980-82, 1981-82, and 1982-83 of the Firm Monika Bakeries. He informed the Kurk Amin that he is not liable for any tax dues standing in the name of Monika Bakeries inasmuch as he has served all his links with the said Firm vide dissolution deed. The Kurk Amin, However, demanded illegal gratification for himself and his peon as also for Naib

Tahsildar, respondent no.9, who was sitting in the jeep outside. The petitioner refused to oblige them. The Kirk Amin and the peon mercilessly dragged him form his bed and broke down his reading spectacles and when he tried to contact some officer on phone, the apparatus was snatched and broken. The petitioner was dragged in humiliating condition on to the street without even allowing him to change the clothes. He was heart patient and wanted to take medicine but he was not permitted to take medicine. He was forcibly hurdled on the floor of the jeep and was taken to medicine. He was forcibly hurdled on the floor of the Jeep and was taken to the District Jain, Meerut. He was lodged in barrack no.10 in the jail along with hardened criminals. He complained pains. The jail authorities asked Dr. Tyagi to examine the petitioner. Dr. Tyagi, on examining the petitioner, was satisfied that the petitioner was heart patient who had gone bye-pass surgery and gave him medicines.

5. The younger son of the petitioner submitted an application with the Trade Tax Officer, Sector V, Meerut stating that the petitioner was not liable to pay any sales tax against the Firm M/S Monika Bakeries as the Firms had been dissolved in the year 1979 and prior to that all the liabilities have been cleared and after the said period the petitioner was not liable to pay the amount. Sri Ram Asre Prasad, Trade Tax Officer, Sector V, Meerut, in the evening, issued a letter dated 19.2.1996 to the Deputy Collector (Collection), Trade Tax, Meerut that as the Firm had been dissolved on 26.3.1979 the petitioner is not liable to pay any tax and the recovery of such tax should not be made against him. The Deputy Collector (Collection), Trade Tax, on receiving the information, asked the jail authorities to release the petitioner from the jail. The petitioner was thereafter in the late evening was released in the late evening.

6. The Contention of the petitioner that he was illegally taken into custody and unlawfully detained in jail maliciously and in any case negligently with the result that he suffered mental torture, physical pain and his reputation was also affected in the society. He is an active member of Rotary International and he and his wife both are holding permanent income tax account. He is working as Regional Manager, Alaknanda Road Funds, Ltd. and was getting Rs.1,25,000/- as remuneration per annum at time.

7. There are two aspects of the matter. One, the petitioner was illegally taken into custody on account of alleged sales tax dues against him and secondly, the manner in which he was taken by the authorities concerned to jail and was confined there.

8. The Trade Tax Officer, Sector V, Meerut is alleged to have issued recovery certificate against the Firms M/S Monika Bakeries, Industrial Area, Partapur, Meerut showing the name of the petitioner as partner of the Firm. The deed of dissolution dated 26th March 1979 was already on the record of the Sales Tax Office. In the year 1988 the proceedings were taken against the petitioner for recovery of sales tax for the year 1983-84. The Sales Tax Officer V, Meerut wrote a letter on 26.09.1988 (Annexure-2 to the writ petition) to the Deputy Collector (Collection), Sales Tax, Meerut intimating that as the partnership has been dissolved the petitioner is not liable to pay any sales

tax for the Firm Monika Bakeries. The Trade Tax Officer without looking to the record again sent recovery certificate to the Deputy Collector (Collection, Trade Tax Department, Meerut for recovery of dues pertaining to the years 1980-81, 1981-82 and 1983-84 on 10.2.1996 without examining its own record. It was not the case where the petitioner was required to submit any dissolution deed before any action could be taken against him for recovery of sales tax dues against the firm.

9. The recovery of the sales tax dues against the Firm was taken against the petitioner in the year 1988 and the then Sales Tax Officer had written a letter dated 26.9.1988 that the petitioner was not liable to pay any sales tax dues against the Firm as the Firm has been dissolved and he is no longer a partner of the said Firm. It was not the case that prior to he date of dissolution of the partnership firm the liability, as then was existing, was against the petitioner.

10. An officer when he sends recovery certificate is bound to examine its own record before he sends it for execution. The forwarding of recovery certificate to the Collector involves various consequences. The person may be imprisoned for not making payment of the amount mentioned in the recovery certificate. The conduct of the Trade Tax Officer, Sector V, Meerut was highly negligent resulting in the confinement of the petitioner in jail without any justification. He had sent the recovery certificate on 10th February 1996 and on letter being submitted by the son of the petitioner to him, after the petitioner was confined to jail, he sent a letter to the Deputy Collector that the petitioner is not liable to pay any sales tax against the Firm in view of the fact that the partnership had been dissolved in the year 1979 with no liability on the petitioner. This he could have examined before issuing the recovery certificate on 10th February 1996. The respondents have filed counter affidavit and it has not been stated that any additional material was placed before the Trade Tax Officer. The recovery certificate was sent by him negligently without considering that the person may be imprisoned for this won negligence and fault.

11. Another aspect is the conduct of the Deputy Collector (Collection), Trade Tax, Meerut .The recovery of sale tax itself is to be made as arrears of land revenue in accordance with the provision of Section 279 of the U.P. Zamindari Abolition and Land Reforms Act which provides that arrears of land revenue my be recovered by any one or more of the processes mentioned therein. Clause (a) provides for recovery by serving writ of demand or citation to appear on any defaulter. Clause (b) of Section 279 provides for recovery process by arrest and detention of the person. In Ram Narayan Agarwal etc. Vs. State of U.P. and others, AIR 1984 SC 1213, the Apex Court referring to sub rule (2) of Rule 51 of U.P. Zamindari Abolition and Land Reforms Rules observed that the defaulter should not be detained in custody unless there is a reason to believe the process of detention will compel the payment of whole or substantial portion of the arrears. The Court observed:-

"Under this sub-rule there is necessity to enquiry into the question whether detention of the defaulter would be productive of payment of the arrear of

a substantial portion thereof. The officer concerned is, therefore, required to decide on the basis of material before him and any evidence tendered or submissions made by the defaulter whether there is nay justification for detaining him and it is only after he is satisfied that the detention of the defaulter will compel him to make payment of the whole or substantial part of the arrear he can order his detention."

The Supreme Court in this case held on facts that as no such enquiry was made the detention in pursuance of any warrant of arrest was illegal and quashed the warrant of arrest.

13. In the present case Sri Vishal Srivastava, who was then posted as Deputy Collector, Trade Tax, Meerut, has filed counter affidavit. He has stated that he was given a recovery certificate pertaining to assessment year 1980-81, 1981-82 and 1982-83 on 10.02.1996 which was sent by the Trade Tax Officer, Sector V, Meerut for recovering the amount of Rs.89325/-outstanding in the sole name of Sri N.C. Jain, the petitioner. He, on the same date, issued a citation fixing 17.2.1996 for appearance of the petitioner and for filing objection, if any. The petitioner was served with the citation by affixation on 16.2.1996 As the petitioner did not appear on 17.2.1996 he sent warrant of arrest and the petitioner was arrested and sent to jail on 19.2.1996. The copy of the citation, annexed as Annexure-5 to the counter affidavit, contains a report of the Kurk Amin reporting that he had gone at the residence of the petitioner with the citation. He was informed that the petitioner mostly remains out and at his residence nobody accepted the citation. A copy of the citation was affixed at the door and the witness refused to put their signatures. This report was given on 16th February 1996. The Deputy Collector (Collection) did not satisfy himself as to whether the petitioner was inside his residence and refused to accept the citation. The report, on the other hand, was that he remains mostly out of station.

14. Secondly, the citation was alleged to have been affixed on 16th February 1996. The date for appearance in the citation was on 17th February 1996. The time for filing objection was hardly one day. The Deputy Collector did not satisfy itself before issuing a warrant of arrest that the petitioner was duly served. Even assuming the petitioner was served on 16th February 1996 by affixation, the time granted for filing objection was insufficient. It was incumbent upon the Deputy Collector (Collection) to make necessary enquiry before issuing an order of arrest against a person for recovery of the amount. Admittedly he had earlier not issued any other citation. He had earlier not taken any steps for realisation of the amount by attachment of property of the petitioner and without making any enquiry issued the order for arrest affecting the liberty of the petitioner. An officer, who is passing an order of arrest without following the procedure prescribed by law, is liable for his own action for torts and the State has vicarious liability to pay compensation for unlawful confinement.

15. Unlawful confinement by violating the provisions of law or without following the procedure of law affects the liberty of a person guaranteed under Article 21 of the Constitution of India. Where the Constitutional guarantees are

infringed the Court has developed a new jurisprudence which may be termed as 'Constitutional Torts'. This principal has been applied by the United State Supreme Court in **Bivens Vs Six unknown agents of the Federal Bureau of Narcotics** 403 (1971) United State 388 where the cause of action for damages against federal law enforcement officers who violated the constitutional guarantees was held could be inferred directly through constitutional guarantees was held could be inferred directly through constitutional provisions. In the case of **Saheli Vs Commissioner of Police, Delhi**, A.I.R. 1990 Supreme Court, 513, a nine year old Child died having been beaten and assaulted by a Police Officer, the Supreme Court in its extra ordinary jurisdiction on the principle for protection of constitutional rights held that an action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injury, and death. In **Avtar Singh Bagga Vs State of U.P.** A.I.R. 1985 Supreme Court 117 where for illegal detention and threat to each of the persons illegally detained and humiliated for no fault of theirs, the Supreme Court awarded a sum of Rs.10,000/- and Rs.5,000/- respectively. The matter in **Union Carbide Corporation Vs. Union of India** (A.I.R. 1992 Supreme Court 248) was a class action for a class of people and the court awarded damages in the case where the cause of action arose on account of negligence.

16. In **Bhim Singh, MLA Vs State Of J.K. and others,** AIR 1986 SC 494, where a Member of Legislative Assembly was arrested while en route to seat of Assembly and in consequence, the member was deprived of his constitutional rights to attend the Assembly Session, the Apex Court directed the Government to pay compensation of Rs.50,000/-

17. In **Chairman, Railway Board and others Vs. Chandrima Das (Mrs) and others**, (2000) 2 SCC 465, where a girl was raped by the employee of the Railway, the Supreme Court held that it is violation of fundamental right by public functionaries which amounts to violation of fundamental right of a person and the Court can award compensation. The State is vicariously liable to pay compensation to the victim.

18. We are not going into the controversy as whether the allegation of the petitioner in regard to the manner in which he was arrested from his house by the Kurk Amin in the morning, thrown in the jeep and thereafter taken to the jail and confined to jail with in human treatment are correct. These matters can be examined when the Civil Suit is filed for tort. As regards the allegation of the petitioner that the recovery certificate was negligently issued by the Trade Tax Officer and warrant of arrest issued by the Deputy Collector (Collection), Trade Tax, the material placed before us leaves us with no doubt that both of them were negligent resulting in illegal confinement of the petitioner in jail.

19. The petitioner was a man of social status having reputation and was confined to jail for no fault of his own. Considering the facts and circumstances we direct respondent no.1 to pay sum of Rs.10,000/- as compensation to the petitioner within one month from the date of production of a certified copy of this order. It is open to the Government to take appropriate proceedings against those

officers and realise the amount of compensation form them also.

The writ petition is allowed with the direction given above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 25.4.2001

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 18621 of 1991

Bhaskar Sahkari Awas Samiti Ltd. and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Devendra Pratap
Sri Arvind Srivastava,
Sri Ravi Kant,

Counsel for the Respondent:
S.C.
Sri Sandeep Mookerji

Constitution of India, Article 226 read with Indian Stamp Act Section 9 G.O. dated 12.7.90 providing total exemption of stamp duty in respect of instruments to which Housing Cooperative Societies are party- whether such provisions are voilative to Article 14 of the Constitution of India ? Held No. (Para 2)

Sri Sandeep Mookerji, learned Standing Counsel of the State of U.P., representing the respondents, submits, and rightly so, that controversy raised in instant writ petition is no longer res-integra in as much as it is covered by a division Bench decision of this Court rendered in Swatantra Bihar Sahkari Awas Samiti Ltd. Vs. State of U.P. and others, reported in AIR 1992 Alld. at page 196.

Case law relied on
AIR 1992 Alld. 196

By the Court

1. Government Order dated 12th July,1990. Purporting to withdraw the total exemption for payment of stamp duty in respect of instruments to which housing Co-operative Societies are party, granted under Section 9 of the Indian Stamp Act., 1899, Vide Notification dated 18th July 1979, is under challenge in this petition under Article 226 of the Constitution of India on the ground of discrimination and there by violation of Article 14 of the Constitution of India.

2. Sri Sandeep Mookerji, learned Standing Counsel of the State of U.P., representing the respondents, submits, and rightly so, that controversy raised in instant writ petition is no longer res-integra in as much as it is covered by a Division Bench decision of this Court rendered in Swatantra Bihar Sahkari Awas Samiti Ltd Vs. State of U.P. and others reported in AIR 1992 Alld. at Page 196.

3. Sri Arvind Srivastva, holding brief of Sri Ravi Kant learned Senior Advocate appearing for the petitioner, has not been able to dispute this position despite strenuous efforts to wriggle out from binding effect of the aforesaid Division Bench decision.

4. In view of the decision of the Court in **Swatantra Bihar Sahkari Awas Samiti Ltd. Versus State of U.P. and others** (supra), this petition must fail.

Accordingly the petition is dismissed. There is no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.5.2001

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Review Application No. 34218 of 1996

Mst. Ahmadeen Begum and others
...Applicants
Versus
Abdul Qayum Khan and others
...Respondents

Counsel for the Applicants:
Sri Sankatha Rai
Sri S.N. Singh
Sri R.N. Singh

Counsel for the Respondents:
Sri Vivek Pd. Misra

Provident Fund Act-Section 5-(1) Right to receive the Provident Fund – whether the nominee of the deceased employee confer any beneficial right upon the natural heirs? Held 'No.' – Provident Fund will form the part of estate of deceased – liable to be distributed amongst the heirs.

Held – (Para 13)

In view of the above, it is held that Section 5 of the Act does not confer any beneficial interest upon the nominee. The nominee has no right to appropriate the provident fund on the death of the subscriber of the provident fund. The provident fund will form part of the estate of the deceased and will be available for distribution amongst his heirs.

Case law discussed.
AIR 1936 – audh – 32
AIR 1984 – 346
1985 AP – 321
1990 L.I.C. 89
1968 Orissa – 8

By the Court

1. This is an application for review of the judgment of Hon'ble D.C. Srivastava, J. The plaintiff Abdul Qayum Khan filed suit for declaration against the defendant Ashiq Husain, that he is the only son and heir of the deceased Jan Mohammad. The dispute related to entitlement to the provident fund of the deceased Jan Mohammad. The plaintiff claimed the sums on the basis of being son of the deceased while the defendant claimed to be real brother and also relied on a nomination made in his favour by the deceased. The question which arose for determination in the Second Appeal was whether the nomination will prevail or the plaintiff being son had a right of declaration in respect of the said sums. It was held by this Court that relying upon decision of the Supreme Court in AIR 1984 Supreme Court page 346 that the nominee does not have a right to appropriate the moneys of the provident fund but the heirs have a right to the said fund.

2. In support of this Review Application, Sri Sankatha Rai counsel of the applicants contends that this Court did not consider the effect of the provisions of Section 5 of the Provident Fund Act, 1925 and as such the judgement of this Court is liable to be reviewed. He has relied upon various decisions that in case a statutory provision is over-looked in a judgement it construes a valid ground of review. There can be no quarrel with this proposition and as such it is not necessary to consider the cases cited by Sri Rai on this point. It is true that the provisions of Section 5(1) of the Provident Fund Act have not been considered in so many words by this Court in the judgement under review, as

such the contention of Mr. Rai is being dealt with.

3. In support of his contention Mr. Rai has relied on a Full Bench Decision of the Oudh Court reported in AIR 1936, Oudh, page 32, Mohd. Naim & another Vs. Mt. Munumunnissa. By a majority of two judges, it was held that Section 5 of the Provident Fund Act conferred right upon the nominee to deal with the moneys due under the provident fund in his own way. It was held that the declaration under the Provident Fund Act made by the deceased operated as a Will and as such the personal law of the depositor would give way to the declaration made in the provident fund and the nominee was entitled to received the money absolutely. Section 5(1) of the Provident Fund Act as it stood at the time when the matter was considered by the Full Bench may be quoted as below:-

"Subject to the provisions of this Act, but otherwise notwithstanding anything contained in any law for the time being in force or any disposition whether testamentary or otherwise, by a subscriber to, or depositor in, a Government of Railway provident Fund of the sum standing to his credit in the Fund, or of any part of thereof, any nomination, duly made in accordance with the rules of the Fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor, shall be deemed to confer such right absolutely, until such nomination is varied by another nomination made in the like manner or is expressly cancelled by the subscriber or depositor by notice given in such manner and to such authority as is prescribed by those rules."

4. This Section has now been amended. Section 5(1) as it stands after the amendment may now be reproduced as under:-

"5(1) – Notwithstanding anything contained in any law for the time being in force or in any deposition, whether testamentary or otherwise, by a subscriber to or depositor in a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, where any nomination, duly made in accordance with the rules of the Fund, purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor occurring before the sum has become payable are before the sum having become payable, has been paid, the said person shall, on the death as aforesaid of the subscriber or depositor, become entitled to the exclusion of all other persons, to receive such sum or part thereof, as the case may be, unless—

(a) such nomination is at any time varied by another nomination made in like manner or expressly cancelled by notice given in the manner and to the authority prescribed by those rules, or

(b) such nomination at any time becomes invalid by reason of the happening of some contingency specified therein,--

and if the said persons predeceases the subscriber or depositor, the nomination shall, so far as it relates to the right conferred upon the said person, become void and of no effect:
Provided that where provision has been duly made in the nomination in accordance with the rules of the Fund,

conferring upon some other person such right in the stead of the person deceased, such right shall upon the decease as aforesaid of the said person, pass to such other person."

5. Sri Sankatha Rai contended that on a proper interpretation of Section 5(1) of the nominee would be deemed to have received the provident fund money as absolute owner. He gives two reasons in support of his contention. The first reason according to him, is that Section opens with a non obstinate clause and therefore, over-rides the personal law of succession. The second reason given by him is that under the section, the nominee becomes entitled to receive the sum to the exclusion of all other persons. It is contended that the effect of the exclusion clause would be that the heirs of the deceased would have no right over the provident fund. In 1968 Orissa, page 8, **M. Malati & Others Vs. M. Dharma Rao & another,** it was held that there is nothing in Sections 3, 4 and 5 of the Provident Fund Act to indicate that the nominee receives the amount for the benefit of depositor's heirs or dependants. The Orissa High Court after noticing the divergent opinion expressed upon the interpretation of Section 5 has taken the view that the nominee receives the amount as absolute owner.

6. On the other hand, Sri V.P. Mathur has relied upon the Supreme Court decision in AIR 1984, 346, **Smt. Sarbati Devi & another vs. Smt. Usha Devi** and the decision of the Supreme Court reported in Supreme Today Vol. 5, **Shri Vishin N. Khanchandani & another vs. Vidya Lachmandas Khanchandani & another**. He also relies upon 1985 Andhra Pradesh, 321, **Shaik Dawood & Others. Vs. Mahmooda Begum & Others** and upon the judgement of this Court reported in 1990 Labour & Industrial Cases, NOC 89, **Smt. Sarju Devi Vs. Naresh Chandra Nigam & another**.

7. In Sarbati Devi's case (Supra) the Supreme Court was dealing with the nomination under Section 39 of the Insurance Act, 1938. The Supreme Court held that on the death of the policy holder, the amount under the policy becomes part of the estate which is governed by the law of succession applicable to the deceased and that there was no warrant for the preposition that Section 39 operates as a third kind of succession. It was held that sub-section (6) of Section 39 does not have the effect that the amount shall belong to the nominee.

8. In **Shaik Dawood & others** (Supra), the Andhra Pradesh High Court interpreted the Employees' Provident Funds & Misc. Provisions Act (Act 19 of 1952) and it was held that the nominee of the provident fund has only the exclusive right to receive the fund. His rights are similar to that of a nominee under Section 39 of the Insurance Act and the provident fund remains the property of the deceased subscriber and was available for distribution amongst his heirs in accordance with their personal law. The Andhra Pradesh High Court dissented from the view taken in 1968 Orissa, page 8. In this decision the Andhra Pradesh High Court also considered Section 5 of the Provident Fund Act, 1925. In paragraph 13 of the judgement, the Andhra Pradesh High Court noticed the amendments made in Section 5 of the Provident Fund Act by which the word `absolute' occurring before the

amendment was omitted. The view taken was that the nominee has after the amendment only the right to receive the amount which had become payable without any legislative expression that such nominee has any right to enjoy the money. In **Shri Vishin N. Khanchandani & another** (Supra), the apex court has interpreted Sections 6, 7 and 8 of the Government Saving Certificates Act, 1959. Section 6 of that Act also contains a clause entitling the nominee to be paid the sum due on the saving certificate to the exclusion of all persons. The said Section also begins with a non obstante clause. The Supreme Court in paragraph 11 of its judgement has observed as follows:-

"It is contended on behalf of the appellants that the non obstante clause in Section 6 excludes all other persons, including the legal heirs of the deceased holder, to claim any right over the sum paid on account of the national savings certificates, to the nominee. There is no doubt that by non-obstante clause the Legislature devices means give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other statute. In other words such a clause is used to avoid the operation and effect of all contrary provisions. The phrase is equivalent to showing that the Act shall be no impediment to measure intended. To attract the applicability of the phrase, the whole of the section, the scheme of the Act and the objects and reasons for which such an enactment is made has to be kept in mind."

10. The Supreme Court in the aforesaid decision noticed the difference employed in the language of Section 6 of the Government Saving Certificates Act, 1959 and Section 39 of the Insurance Act but held that the effect of both the provisions is the same. It was held that any amount paid to the nominee becomes the estate of the deceased and it devolves upon the persons who are in law entitled to succession.

11. In Smt. Sarju Devi (Supra) the court considered the provisions of Section 5 of the provident Fund Act and held that the right entitles the nominee to receive the amount initially. It does not deprive the real heir of his right in the estate left by the deceased. Sri Rai has sought to distinguish this decision on the ground that it did not consider the clause relating to the exclusion of other persons from receiving the provident fund which was payable to the nominee.

12. The non obstante clause contained in Section 5 merely gives over-riding effect to the provisions of that Section over other enactment. The non obstante clause does not enlarge the meaning of the expression "received" used in that provision. The legislature has by the amendment omitted the expression "absolutely" which was occurring in the Section before its amendment. The effect of exclusion of other persons form receiving the provident fund is to make the nominee alone eligible to receive the provident fund. The provision has been made for convenient payment with effective discharge of liability of the department making the payment without being faced with the problem of deciding competing claims. The nominee, however, does not receive the money as beneficial owner. The provisions of Section 6 of the Government Saving Certificates Act, 1959 are quite similar to the provisions of Section 5 of the

Provident Fund Act, 1925. The decision of the Supreme Court in **Sri Vishin N. Khanchandani** (Supra) will govern the interpretation of Section 5 of the Provident Fund Act.

13. In view of the above, it is held that Section 5 of the Act does not confer any beneficial interest upon the nominee. The nominee has no right to appropriate the provident fund on the death of the subscriber of the provident fund. The provident fund will form part of the estate of the deceased and will be available for distribution amongst his heirs.

In the result, there is no error in the judgement of this Court sought to be reviewed.

The review application is accordingly dismissed.

Review Application Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD: 28.2.2001

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

Criminal Misc. Application No. 4386 of 1999

Ram Kumar and others ...Applicants
Versus
State of U.P. and others ...Opp. Parties

Counsel for the Applicants:
Shri N.K. Mishra
Counsel for the Respondents:
A.G.A.,
Shri R.N. Sharma
Sri A. Vashisth

Code of the Criminal Procedure – S – 482 – Summoning Order- validity challenged on the ground – No opportunity given after rejection of final report submitted by Police-whether if prior opportunity of hearing is required on principle of equity and natural justice? Held-No-in view of specific procedure prescribed in Cr.P.C.- Right to claim discharge contemplated-if the charge sheet is submitted and even later on after the evidence recorded.

Held-Para 3

The entire Criminal Procedure Code do not contain any provision for affording any opportunity of hearing to an accused before he is summoned by the Court in a case in which final report has been filed by the Police. This issue has been settled beyond reckoning. Not only the apex court but a Full Bench of this Court in 2000 ACC page 342-Ranjit Singh Vs. State of U.P. has held that there is absolutely nothing in the Criminal Procedure Code on the basis of which such opportunity can be granted to any accused. Principle of equity and natural justice has hardly any teeth to bite where a specific procedure is prescribed by the Code of Criminal Procedure for the conduct of any particular proceeding. Farmers of the Code have not thought it proper to allow multiplicity of proceedings at interim stage. The right to claim a discharge is contemplated for this purpose only to an accused if charge sheet is submitted and he is summoned. This right is available to him at any stage before the charge is framed and even later on after the evidence recorded does not prove the charge.

Case Law discussed:
2000 ACC – 342 (F.B.)

By the Court

1. Heard learned counsel for the applicants Sri N.K. Misra, learned counsel for the respondents Sri R.N. Sharma and learned AGA for the State.

2. It has been contended by the

learned counsel for the applicants that summoning order is bad in law inasmuch as it has been passed on a final report after its rejection without affording any opportunity of hearing to the applicants.

3. The entire Criminal Procedure Code do not contain any provision for affording any opportunity of hearing to an accused before he is summoned by the court in a case in which final report has been filed by the police. This issue has been settled beyond reckoning. Not only the apex court but a Full Bench of this Court in 2000 ACC page 342-**Ranjit Singh Versus State of U.P.** has held that there is absolutely nothing in the Criminal Procedure Code on the basis of which such opportunity can be granted to any accused. Principle of equity and natural justice has hardly any teeth to bite where a specific procedure is prescribed by the Code of Criminal Procedure for the conduct of any particular proceeding. Framers of the Code have not thought it proper to allow multiplicity of proceedings at interim stage. The right to claim a discharge is contemplated for this purpose only to an accused if charge sheet is submitted and he is summoned. This right is available to him at any stage before the charge is framed and even later on after the evidence recorded does not prove the charge. In view of the above discussions the argument advanced by the learned counsel for the applicants is rendered wholly unsustainable. As earlier stated no where in the Criminal Procedure Code any such provision is contained. No court can go beyond what is contained in the concerned Code wherein procedure is prescribed for taking cognizance of an offence by the court in a specific manner. No deviation from the established procedure is permissible. Rule of interpretation of statutes also does not permit any such liberty.

In the circumstances this submission does not hold any water. This application is accordingly rejected.

Application Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 24.5.2001

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

Civil Misc. Writ Petition No. 33665 of 1996

Smt. Sukh Devi and others ...Petitioners
Versus
IVth Addl. District Judge, Etah and others ...Respondents

Counsel for the Petitioners:
Shri Vinod Sinha

Counsel for the Respondents:
Shri Amit Daga
Shri Rakesh Dwivedi

U.P. Act No. XIII of 1972 – Section 2(I) Applicability of the provision of the Act – concurrent finding of fact recorded by the Courts below premises constructed in the year 1970 first assessed on 1.4.71, suit filed in February 1979-No specific denial in written statement-lease deed of other tenant is immaterial-provisions held not applicable.

Held – Para 9

There is also concurrent finding of fact by both the courts below that the premises in dispute was constructed in the year 1970. There is no dispute that the shops were first assessed from 1.4.1971. The suit was filed in February, 1979. Therefore, at that date U.P. Act No. XIII of 1972 was not applicable to the premises in dispute. In view of the

explanation referred above the lease deeds of other tenants are also immaterial.

Case law discussed:

1995 ARC(2) 462
AIR 1987 SC – 2284

By the Court

1. The dispute is regarding two shops situated in Mohalla Chola Market, Qasba and tehsil Kasganj, District Etah. The respondent nos. 2 and 3 filed S.C.C. suit No. 20 of 1979 for eviction of the petitioners from the disputed shops and for recovery of arrears of rent. It was alleged that U.P. Act No. XIII of 1972 does not apply to the shops in dispute as it was constructed in the year 1970 and first assessment came into force in the year 1971. The suit was filed on 09.02.1979 after the termination of tenancy by notice under section 106 of Transfer of Property Act. The suit was dismissed by the trial court on 28.02.1987 by judgement, annexure no. 3 to the writ petition. Against that order, the respondent nos. 2 and 3 filed S.C.C. revision no. 17 of 1987 which have been allowed on 21.08.1996 by judgement annexure no. 4 to the writ petition. Therefore, the petitioners have filed this writ petition invoking the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India with the request that judgement of the revisional court dated 21.08.1996, annexure no. 4 to the writ petition be quashed.

2. I have heard Sri Vinod Sinha, learned counsel for the petitioners and Sri Amit Daga, learned counsel for the respondent nos. 2 and 3.

3. The only point that arise of decision in this petition is whether the U.P. Act No. XIII of 1972 is applicable to the premises in dispute or not. It is contended by the learned counsel for the respondents that there is concurrent findings of fact that the first assessment of the premises in dispute took place in the year 1971. That the suit was dismissed by the trial court on the basis of the findings that the Act became applicable during the pendency of the suit and therefore, the petitioners are entitled to the benefits of Section 39 of the Act. It is contended that this position is now clear from the various judgement and it is to be seen whether the U.P. Act No. XIII of 1972 was applicable at the date when the suit was filed. The question whether the Act became applicable during the pendency of the suit is immaterial. This position of law has very fairly conceded by the learned counsel for the petitioners.

4. However, the argument is that the premises was constructed more than ten years before the filing of the suit and U.P. Act No. XIII of 1972 was applicable at the date when the suit was filed.

5. In this connection Sri Vinod Sinha, learned counsel for the petitioners has referred to the two registered lease deeds Paper Nos. 58 and 62, which is on the record of this petition. It is contended that disputed shops are situated in Chola Market. That by these deeds the other shops of Chola Market was let out by the mother of the respondent nos. 2 and 3 in the year 1969. The first lease deed was registered on 09.05.1969. That these lease deeds therefore show that the entire Chola Market was ready in the year 1969 and two shops were let out in that year. That therefore, U.P. Act No. XIII of 1972 was applicable at the date when the suit was filed.

6. As against this it is contended on behalf of the respondents that in the notice, annexure no. 4 to the writ petition it was mentioned that the shops were constructed in the year 1970 and it was assessed for the first time in the year 1971. That there is finding of both the courts below that the first assessment of the shops became into force from 01.04.1971. That therefore, according to the provisions of explanation I of the proviso II of section 2(1), of the Act 01.04.1971 shall be deemed to be date of first construction. It is also contended that this fact was also not denied in the original written statement by the petitioners. In para 3 of the written statement it was pleaded that the shops were constructed prior to 15.07.1972 and therefore, U.P. Act No. XIII of 1972 apply to the same. It has been argued that it was not pleaded that the shops were constructed more than ten years before the date of filing of the suit. The copy of the written statement is RA-1. Apart from this the lease deed also do not show that the Act was applicable on 09.02.1979 when the suit was filed as the lease deeds are dated 09.05.1969 and 02.08.1969.

7. It has also been argued by Sri Amit Daga, learned counsel for the respondents that the suit for ejectment against the tenants, who were let out shops by lease deeds, Paper Nos. 58 and 62 have also been decreed on the basis of the findings that U.P. Act No. XIII of 1972 is not applicable. That therefore, it can not be accepted that U.P. Act No. XIII of 1972 is applicable to the premises in dispute.

8. Learned counsel for the respondents have also referred to certain cases. The first is **Ravindra Kumar Rai and another Versus District Judge, Azamgarh and others, A.R.C. 1995(2), 462.** In this case, it was alleged that the shop was constructed in the year 1979 and U.P. Act No. XIII of 1972 was not applicable at the date of the filing of the suit. The defence of the defendant that U.P. Act No. XIII of 1972 is applicable was not accepted for the reason that there was constructed in the year 1979. Reference has also been made to the decision of Apex Court in **Nand Kishore Marwah and others Versus Smt. Samundri Devi,** A.I.R., 1987 SC, 2284. It was held by the Apex Court in this case that the restriction put under Section 20 is to the institution of the suit itself.

9. There is also concurrent finding of fact by both the courts below that the premises in dispute was constructed in the year 1970. There is no dispute that the shops were first assessed from 01.04.1971. The suit was filed in February, 1979. Therefore, at that date U.P. Act No. XIII of 1972 was not applicable to the premises in dispute. In view of the explanation referred above the lease deeds of other tenants are also immaterial.

10. There is no ground to interfere in the judgement of the court below. The writ petition is dismissed. The stay order, if any is hereby vacated.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 05.07.2001

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

Civil Misc. Writ Petition No. 12430 of 2001.

Indian Oil Corporation Ltd. ...Petitioner
Versus
Additional District Judge-I, Allahabad and others ...Respondents

Counsel for the Petitioner:
Shri Prakash Padia
Dr. R.G. Padia

Counsel for the Respondents:
S.C.
Shri Rajesh Tandon
Shri Shiv Nath Singh

U.P. Urban Buildings (Regulation of Rent and letting) Act, 1972-Section 21(8) – Enhancement of Rent – During pendency of proceeding the Respondent No. 4 moved application under Order 22 r. 4C.P.C. – held in view of provisions contained in Section 34(4) of the Act – provisions of Order 22r. 4 C.P.C. are not applicable.

Held – Para 19

After considering the arguments, I am of the opinion that the respondent no. 3 was not entitled to further persue the application under Section 21(8) of the Act. The name of the respondent no. 4 could not have been substituted to persue the application and file an appeal against the order of the Rent Control & Eviction Officer. Therefore, the order of the Rent Control & Eviction Officer as well as of the appellate court can not be maintained. The application for enhancement of rent under section 21 (8) of the Act was wrongly allowed. The application moved by the respondent no. 3 was not maintainable.

Case law discussed
1983 ARC – 479
1981 ARC - 81
AIR 2000-Delhi – 413
AIR 1978-140
AIR 1950-RAJ-31

By the Court

1. The petitioner, Indian Oil Corporation in both writ petitions, is the tenant of house no. 15-B, Amar Nath Jha Marg, Allahabad. An application for enhancement of rent under section 21(8) of U.P. Act No. XIII of 1972 was moved by Sri S.N. Vaish, respondent with the request that the rent which is Rs.1175/- be enhanced to Rs.50,000/- per month. The application was contested by the petitioner and he filed written statement, annexure no. 2 to the writ petition. The respondent no. 4, Sri Prakash Azad moved an application under Order 22 Rule 10 C.P.C. for his impleadment. His application is annexure no. 8 to the writ petition. The same was opposed by the petitioner by objection, annexure no. 9 to the writ petition. It appears that no separate order was passed on the application of respondent no. 4, annexure no. 8 to the writ petition. The matter was finally considered by the Rent Control & Eviction Officer, respondent no. 2, and he recorded a finding that the respondent no. 4, Sri Prakash Azad has become entitled to receive the rent. He, by order, annexure no. 12 to the writ petition ordered that the rent be enhanced to Rs.8,400/- per month. However, he avoided to pass an specific order as to whether the respondent no. 3 or respondent no. 4 will be entitled to receive the enhanced rent, though in the body of the judgment he recorded a

finding that respondent no. 4 has became entitled to realise rent.

2. Aggrieved by the enhancement of the rent the petitioner preferred appeal no. 69 of 2000 before the District Judge, Allahabad against respondent no. 3 and the District Magistrate, Allahabad. The respondent no. 4, Sri Prakash Azad also preferred appeal no. 49 of 2000 requesting for further enhancement of the rent. In Appeal no. 69 of 2000 the respondent no. 4 was not impleaded as party by the petitioner. Therefore, he moved an application for impleading him as party in that appeal. The application was allowed by order dated 14.11.2000 and he was impleaded as party in appeal no. 69 of 2000 also. Thereafter, both the appeals were disposed of on 26.02.2001 by common judgment by the respondent no. 1, annexure no. 15 to the writ petition. He enhanced the rent of the premises in dispute to Rs. 41,284/- per month. Aggrieved by judgments, two separate writ petitions mentioned above have been filed by the petitioner as two appeals were decided by the same judgment. Therefore, both this petitions involve the same question and accordingly are being disposed of by this common judgment.

3. I have heard Dr. R.G. Padia, Senior Advocate for the petitioner and Sri Rajesh Tandon, Senior Advocate for the respondent no. 4.

4. On the basis of the arguments advanced by the learned counsel for the parties the first question that arise for decision in these petitions is whether the respondent no. 4 was rightly substituted in place of Sri S.N. Vaish in the case and the appeal no. 49 of 2000 preferred by the respondent no. 4 was maintainable. There is no dispute regarding the facts that application for enhancement of rent under section 21(8) of the Act was moved by the respondent no. 3 alone. The respondent no. 4 moved an application for substitution of his name under Order 22 Rule 10 C.P.C. It is admitted case of the parties that no separate order was passed on that application. The Rent Control & Eviction Officer considered the matter of substitution in the judgment and held that respondent no. 4 has filed an affidavit on 04.12.1979 according to which he has been nominated by the respondent no. 3 for the freehold of the land and has been given the right to realise the rent. Considering the entire evidence, on the record the Rent Control & Eviction Officer has held that respondent no. 4 has became landlord and is entitled to the rent. This finding of the Rent Control and Eviction Officer was also confirmed by the appellate court. As regard this finding after considering the arguments and the evidence on the record, I am of the view that the respondent no. 4 has become entitled to receive the rent. However, at the risk of the repetition it may be mentioned that the judgments of Rent Control & Eviction Officer as well as of the appellate court are conspicuous by the absence of a specific order as to who is entitled to apply for enhancement of rent and to whom it shall be paid.

5. I may briefly point out the reasons mentioned in the support of the findings that the respondent no. 4 has became entitled to receive rent and is the landlord as defined in section 3(I) of the Act.

6. Admittedly the respondent no.3, the original landlord executed a registered agreement of sale in favour of respondent no. 4, which is annexure no. 5 to the writ

petition. The land on which the building is standing was a nazool land. The respondent no. 3 nominated the respondent no. 4 before the District Magistrate for making the land as freehold. He also executed a power of attorney in favour of the respondent no.4, annexure no.6 to the writ petition, according to which the respondent no.4 became owner and rent is payable to him. After the nomination the District Magistrate, Allahabad executed a transfer deed making the land freehold in favour of respondent no.4, the copy of which is annexure no. Counter Affidavit-1. Not only this the respondent no.3 wrote a letter on 28.02.1999, annexure no. Counter Affidavit-2 to petitioner to pay rent to respondent no.4. Another letter, annexure no. Counter Affidavit-3 for the same was also written. The respondent no. 3 also returned the rent sent to him by the petitioner with the direction that it may be paid to respondent no.4.

7. Learned counsel for the respondent no.4 has also referred to the provisions of section 8 of Transfer of Property Act and contended that by the sale deed of the land by the District Magistrate in favour of respondent no.4, annexure no Counter Affidavit-1, the building which is standing on the land also stand transferred. That therefore, the respondent no.4 became owner and also became entitled to received the rent and is the landlord within the meaning of section 3(j) of the Act.

8. Learned counsel for the respondent in support of the argument has referred to the certain cases. The first is **Ramesh Chandra Versus IVth Additional District Judge, Aligarh and others**, A.R.C. 1983, 479. It has been held that section 3(j) of the Act includes in its ambit a person in whose favour owner has executed the agreement to sell the tenanted accommodation and has authorised him to collect the rent. The other case referred to is **Kishan Singh Versus Rajesh Kumar Gupta and others**, A.R.C., 1981,81. It was held in this case that when the right of enjoyment of the property was transferred, the transferees did become landlords within the definition thereof as given under section 3(j) of the Act. Similar question arose before Delhi High Court in the case of **Sushil Kanta Chakravarty Versus Rajeshwar Kumar**, A.I.R., 2000 Delhi, 413. It was held that a person in whose favour an agreement to sell-cum-power of attorney has been executed became owner of the property.

9. In view of these decision and documents there is doubt that respondent no.4 has became landlord entitled to receive the rent.

10. However, the question raised by the learned counsel for the petitioner is totally different in this case. His contention is that the application under section 21(8) of the Act was moved by the respondent no.3 alone. That in view of the assignment, as I have disclosed above, he is no more entitled to receive the rent nor he is now claiming the rent. He did not prefer an appeal against the decision of the Rent Control & Eviction Officer. The appeal was preferred by the respondent no.4 alone. No application under section 21(8) of the Act was moved by the respondent no.4. That therefore, the enhancement of the rent can not be made in favour of respondent no.4 nor he would have preferred an appeal nor his name was ever substituted. It is also contended

his name could not have been substituted in place of respondent no.3.

11. Learned counsel for the respondents in support of his argument has referred to the decision of this court in **Mrs. Ratna Prasad Versus The VIII Additional District Judge, Allahabad and others**, A.R.C., 1978, 140. It was observed in this case that section 34(4) of the Act permits substitution in two cases only; a) in which proceedings for determination of standard rent; b) in proceedings for eviction from a building. Therefore, it does not envisage substitution in any other case.

It is also necessary to refer to section 34(4) which reads as follows:

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"Section 34(4): Where any party to any proceeding for the determination of standard rent of or for eviction from a building dies during the pendency of the proceeding, such proceeding may be continued after bringing on the record:-

(a) in the case of the landlord or tenant, his heirs or legal representatives:

(b) in the case of unauthorised occupant, any person claiming under him found in occupation of the building."

12. In the above case, it has been interpreted that it does not apply to any other proceedings. Therefore, it does not apply to proceedings under section 21(8) of the Act. It is also contended that this provision applies only in the case of death and not in the case of transfer.

13. The other relevant provisions of law in this regard is Rules 22 and 25 of the Rules framed under the Act. Rule 22 provide regarding the application of the Code of Civil Procedure, 1908 in certain matters. However, it does not apply to the application under order 22 C.P.C. Rule 25 provide the limitation for application for bringing the heirs or legal heirs on the record.

14. Reference made also to be made to sub-section 8 of Section 34 which is as follows:

"Section 34(8) – for the purposes of any proceedings under this act and for purposes connected therewith the said authorities shall have such other powers and shall follow such procedure, principles of proof, rules of limitation and guiding principles as may be prescribed."

15. On the basis of these provisions and the decision of **Mrs. Ratna Prasad** (Supra) it has been argued that the name of the respondent no.4 could not be substituted in place of respondent no.3.

16. After considering the provisions, I am of the view that the argument of the learned counsel for the petitioner is correct. There is no provision for substitution of names in proceedings under section 21(8) of the act. Provisions under Order 22 C.P.C. does not apply. It appears that the respondent no.4 did moved an application for substitution of his name under Order 22 Rule 10 C.P.C. which is annexure no.8 to the writ petition, to which the objection, annexure no.9 to the writ petition were filed by the petitioner. However, it appear that realising the difficulty that Order 22 Rule 10 C.P.C. as has no application, this application was never pressed for disposal nor any order was passed on this application. Only in the judgment it was observed that the respondent no.4 has

became entitled to receive the rent. However, none of the two courts below have considered whether the respondent no.3 or 4 is entitled to continue the application under section 21(8) of the Act and whether the respondent no.4 is entitled to file the appeal against the order. This fact has also not been considered that because of the transfer, the respondent no.3 is not entitled to further prosecute the application moved by him. The name of respondent no.4 could not have been substituted and therefore he was also not entitled to prosecute the same and to file an appeal.

17. In this connection the learned counsel for respondent also pointed out that in the appeal no.69 of 2000 filed by the petitioner, the respondent no.4 moved an application for impleadment which was allowed on 14.11.2000 and he was impleaded. The copy of the order dated 14.11.2000 has not been produced by any party. However, it appears that he was impleaded in the appeal preferred by the petitioner as the appeal against the same order was filed by the respondent no.4. Therefore, the impleadment of respondent no.4 in the appeal filed by the petitioner does not show that his name was substituted in place of respondent no.3.

18. Learned counsel for the respondent in reply to the argument has also referred to the decision of in **Dr. Niranjan Nath Versus Sardar Mal and another**, A.I.R., 1950 Raj., 31. The reference has been made to para 7 of the judgment which deals regarding the matter of substitution under Order 22 Rule 10 C.P.C. It is not necessary to extract the said provisions as I am afraid that it has no application in the present case. This matter was regarding a regular suit in which Order 20 Rule 10 C.P.C. is applicable. However, the same is not applicable to the present proceedings and therefore, the law laid down in this case is of no relevance.

19. After considering the arguments, I am of the opinion that the respondent no.3 was not entitled to further persue the application under section 21(8) of the Act. The name of the respondent no.4 could not have been substituted in place of respondent no.4 and he was also not entitled to persue the application and file an appeal against the order of the Rent Control & Eviction Officer. Therefore, the order of the Rent Control & Eviction Officer as well as of the appellate court can not be maintained. The application for enhancement of rent under section 21(8) of the Act was wrongly allowed. The application moved by the respondent no.3 was not maintainable. Accordingly both the orders, annexure nos.12 and 15 to the writ petition are quashed. However, it may be clarified that I have not expressed any opinion on the merits and if another application under section 21(8) is moved, it shall be disposed of on its merits.

Both the writ petitions are accordingly disposed of.

Petition Disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2001

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

Civil Misc. Writ Petition No. 24359 of 2001.

Gunnu ...Petitioner
Versus
The District Officer, Banda ...Respondent

Counsels for the Petitioner:
Shri W.H. Khan
Shri J.H. Khan

Counsel for the Respondent:
S.C.
Shri Bhagwati Prasad

Constitution of India, Article 226 – Grant of mining lease- Public Property – it should be given only after public auction having wide publicity in well known news papers in accordance with relevant Rules.

Held – (Para 3)

We, therefore, direct that the plot in question should be given only after public auction having wide publicity in well known newspapers and in accordance with the relevant rules. If the petition is eligible he may also apply for the lease amongst others.

Case Law Discussed –
AIR 1979 SC-1628-Relised on 1998 ACJ – 590 distinguished.

By the Court

1. Heard learned counsel for the parties.

The petitioner has prayed for quashing the impugned order dated 17.06.2001 Annexure – 1 to the petition and for a mandamus directing the respondents to decide the petitioners application dated 01.02.2001 for grant of mining lease in respect of the plot in question.

2. It has been held by the Supreme Court in **Ramanna Dayaram Shetty versus The International Airport Authority of India and others** (AIR 1979 SC 1628) that ordinarily public property must be granted by public auction after advertisement in well known newspapers so that all eligible persons may apply, otherwise Article 14 of the Constitution will be violated. Learned counsel for the petitioner has relied on the decision of this court in **Jagmohan Dutt Sharma and others vs. State of U.P. and Others** (1998 ACJ 590). The above decision does not deal with Article 14 and hence it is distinguishable.

3. We therefore direct that the plot in question should be given only after public auction having wide publicity in well known newspapers and in accordance with relevant rules. If the petitioner is eligible he may also apply for the lease amongst others.

4. Petition is disposed off.

Petition Disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25 MAY 2001

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

Civil Misc. Writ Petition No. 7133 of 2001

Radhey Shyam Pandey ...Petitioner
Versus
The Chief Secretary, State of Utter Pradesh, Lucknow and others
...Respondents

Counsels for the Petitioner:
Sri T.P.Singh
Sri Anil Kumar Srivastava

Counsels for the Respondents:
Sri Virendra Swaroop
Addl. Advocate General
S.C.
Sri Pushpendra Singh

Civil Services (Classification, Control and Appeal Rules 1930 R. 30 (55)(i) read with Constitution of India, Article 226- Dismissal Order passed without giving subsistence allowances without charge sheet without information regarding the date fixed –Non supply if enquiry report – only issuing show cause notice proposed punishment- leads inference that the manner of conducting the enquiry to vitiated the entire proceeding held – dismissal order actuated malice in law hence liable to quashed.

Held – Para 15

Non payment of subsistence allowance, not furnishing the charge sheet , not informing, the date fixed in the enquiry and not giving the copy of the enquiry report and the show cause notice regarding proposed punishment only leads to the inference that the respondents have conducted the entire proceedings in a manner which is not warranted in law and has thus vitiated the entire proceedings. Thus the entire proceedings commencing from suspension of the petitioner leading to his dismissal being actuated with malice in law is liable to be quashed.

Case law discussed
2000(7) sec-90
AIR 1973 SC 1183
2000(1) U.P.L.B.E.C. -908
2001(1) U.P.L.B.E.C.-3121
1994(2) Sec –746
1944 supp (2) SC-256
1999 (4) SWC- 3227
AIR 1936 SC-19
1995 supple (3) Sec 21 2
AIR 1960 SC –160
1963(11) LLT.78(SC)

By the Court

1. The petitioner has filed the present writ petition No.7133 of 2001 seeking a writ of certiorari to quash the ex parte enquiry report and for a mandamus commanding the respondents not to give affect or not to take any action against the petitioner on the basis of exparte enquiry report against him. The petitioner has also prayed for a writ of mandamus commanding the respondent No 1 to get the enquiry conducted, if any, against the petitioner through any competent authority of any department other than the present one which is under the ministry of Sri Markandey Chand, the Minister for Rural Engineering Services and Minor Irrigation Department Government of U.P. The petitioner has made initially five respondents e.g. (i) The Chief Secretary, State of Utter Pradesh, (ii) Sri Markandey Chand, Minister for Rural Engineering Services and Minor Irrigation Department, (iii) The Secretary Minor Irrigation Department and Rural Engineering Services (iv) Sri Ajay Kumar Joshi, Secretary Minor Irrigation Department and Rural Engineering

Services (v) Sri R.P. Birla, Enquiry Officer / Superintending Engineer Rural Engineering Services, Varanasi Circle and (vi) The Utter Pradesh Public Service Commission Allahabad through its Secretary. The petitioner has however finally indicated he is not willing to press the allegations of malafide made against original respondent no 2 (i.e. Sri. Markandey Chand) and the respondent no.5 (Sri. R.P. Birla). The petitioner subsequently filed an amendment application 30.03.2001 seeking a direction in the nature of certiorari to quash the dismissal order dated 27.03.2000 passed by respondent no 3 and the same was allowed by this court.

2. The brief facts necessary in the case are that the petitioner was recruited initially as junior Engineer and was promoted as Assistant Engineer and was posted as In-Charge Executive Engineer, Rural Engineering Service, Ballia from 14.07.1995 to 24.07.1997. It is alleged that the District Magistrate Ballia wrote a letter to the State Government that a department enquiry against the petitioner should be conducted for his involvement in embezzlement and financial loss of money to the State Government. It is also alleged that a vertical Audit report was also made by the Accountant General U.P. for financial irregularities committed by the petitioner. It is also alleged that the trouble started when the petitioner claimed his regularisation as an Executive Engineer and he could not please the Hon'ble Minister, therefore, he had to approach the U.P. Public Service Tribunal where by the main claim of the petitioner along with his seniority became final having not been challenged further by the department. However, the petitioner was placed under suspension vide order dated 22.12.1996 (enclosed as Annexure-3 to the writ petition) and Sri Ram Prakash, Chief Engineer Eastern Zone, Rural Engineering Services was appointed as Inquiry Officer on. A detailed charge-sheet was framed against the petitioner for huge financial loss caused by unauthorised work and making negative (i.e. for drawing more amount than sanctioned for the work.) causing financial loss by purchasing unnecessary materials. The petitioner challenged the order of suspension in writ petition no. 928 of 1999 on the ground for malafide and this court on being prime-facie satisfied stayed the operation for the petitioner of the suspension by its order dated 12.04.1999. However, despite the stay of suspension of the petitioner, he was neither reinstated not was paid subsistence allowance or his regular salary. After the superannuaiton of Sri Ram Prakash, Chief Engineer the enquiry Officer on 30.04.1999, the State Government appointed after about four months, one Sri R.P. Birla the Superintending Engineering who is alleged to be `Yes` man of Hon'ble the Minister (as indicated in paragraph 15 of the writ petition) and at whose instance and complaint, the enquiry against the petitioner was started. The petitioner became apprehensive that no fair enquiry shall be conducted against him, therefore, he represented to the Chief Secretary U.P. for nominating another inquiry officer other than Sri. R.P. Birla who should be not from the department under the Ministry of Sir Markandey Chand (as alleged in para16 of the writ petition).

3. By not getting proper response, the petitioner filed a writ petition no. 25702 of 2000 seeking a direction for a decision on his representation for

changing the inquiry officer, The High Court vide its order dated 23.05.2000 directed the Chief Secretary U.P. to decide the representation of the petitioner. As referred in para 18 of the writ petition, no decision in pursuance to the direction of High Court was communicated to the petitioner. In those circumstances, the petitioner had to prefer contempt petition no. 986 of 2001. This Court has taken very strong view and directed the opposite parties to make payment of salary to the petitioner within a month vide its order dated 06.11.2000 (referred in para 30 of the writ petition). Subsequently, it appears that in order to avert the pressure of contempt proceeding, a cheque amounting Rs.386376/- towards the dues from the date of order of suspension i.e. 22.12.1998 to 30.11.2000 was purported to have been issued to the petitioner but that too was not cashed and the same was got bounced on the indication of stop payment request of the inquiry officer. Admittedly the petitioner was not paid the subsistence allowance as well as the salary or any amount from the date of suspension till the conclusion of inquiry dated 12.01.2000 as contented in para 31 of the writ petition. This lapse on the part of the State Government as well as of the contemners was taken note for by this court in its order dated 03.10.2001 where the state government was asked to file counter affidavit on behalf of the contemners explaining the reason for dishonour of the cheque.

4. The petitioner contended that since he was not paid subsistence allowance as well as his legal dues, therefore, in the circumstances he was seriously financial handicapped and he was compelled to shift to his home town i.e. to his village Agror Khurd post Agror Kala, Tahsil Vikramganj, District Rohtas (Presently Sahabad Bihar), an address duly recorded in his service records. The petitioner has contented that no effort was made by the respondents, neither he was served a copy of the charge-sheet nor he was given information in respect of the inquiry proceedings as a result of which the petitioner could be aware about the enquiry proceeding and for want of subsistence allowance and salary due to him he could not go to participate in the inquiry proceedings and an ex-parte enquiry was concluded behind his back without providing the petitioner to defend himself and contrary to the rules and procedures and consequently the dismissal order from service against the petitioner was passed against the principle of natural justice. The petitioner also contended that despite his request, the inquiry officer, the interested party, Sri R.P. Birla who was under the influence of the Hon'ble Minister, was not changed and from this aspect also the exparte inquiry is vitiated. The petitioner also contended that no show cause was given to him even after the conclusion of the exparte enquiry report.

5. The counter affidavit as well as supplementary counter affidavit dated 30.03.2001 were filed on behalf of the respondent no.1 to 3. However no reply was preferred on behalf of the other respondents. The contesting respondents on the other-hand have asserted that effort was made to serve the charge-sheet on the petitioner but he avoided the service in every possible manner. The respondent inquiry officer has claimed that the petitioner attended the office of the Superintending Engineer, Varanasi on 25.02.1999 when he tried to serve the charge sheet, but the petitioner threw the

envelop containing the charge sheet and went away. The petitioner had absconded and his whereabouts were neither known nor he intimated about it, therefore, the notices were published in Daily News paper (Dainik Jagran) on 17.02.1999 and 19.12.1999 By the said notices, the petitioner was directed to come to the office of the enquiry officer to accept the charge-sheet and submit his reply. The respondents have also asserted that the charge sheet was also served on 23.03.1999 through his counsel in the writ petition No. 928 of 1999 where the charge sheet was enclosed to the supplementary counter affidavit and thereby the petitioner was brought to his knowledge about the charge sheet. The respondents have also asserted that since the petitioner has neither given reply to the charge-sheet nor has ever appeared before inquiry officer in these circumstances, the inquiry officer had no alternative but to proceed ex parte and submit his enquiry report to the State Government on 12.01.2000. The respondents has asserted that disciplinary enquiry has been conducted under the provisions of the Civil Services (Classification, Control and appeal) Rules 1930(in short C.C.A. Rules) as applicable to the State of U.P. and in consultation with the U.P. Public Services Commission Allahabad on 21.3.2001 dismissing the petitioner from the service. The respondents have asserted that since the petitioner was a high rank officer being In-charge Executive Engineer drawing salary more than 15000/- per month was posted at Bhadohi, Sant Ravi Das Nagar and the injury was being conducted at Varanasi at a distance of 65 Kms. from Bhadohi, as such, the petitioner could have easily participated in the inquiry proceeding, whereas the petitioner inspite of participating in the disciplinary inquiry was busy in filing writ petitions as well as contempt petitions and engaging senior advocates along – with junior advocates. The subsistence allowance could not be paid to the petitioner because he never attended the head quarter, Had he attended the head quarter, he would have been paid the subsistence allowance already. the respondents have also tried to impress that since the petitioner was transferred from Ballia to district Sant Ravidas Nagar (Bhadohi) on 28.7.1998 and he had embezzled huge money (for which F.I.R. was also lodged at police station Kotwali Ballia on 19.02.1999), as such the petitioner was not suffering from any type of financial crunch and he was able to attend the inquiry proceeding. We have perused the inquiry report where no receipt or proof is available regarding service of charge sheet. It has been mentioned in the inquiry report that effort was made to serve the charge- sheet to the petitioner which was specifically by publishing in the news paper, where it has also been mentioned in the inquiry report by the news publication dated 05.10.1999 in "Dainik Jagran" Varanasi, the petitioner was expected to submit his defence response within a month to the inquiry officer from the date of publication, otherwise by not submitting the reply further action in respect of the inquiry on the basis of the records was to be taken. It is also revealed in para 3 of the inquiry report by publication dated 04.11.1999, the petitioner was also expected to give further reply within 15 days from 04.11.1999.

6. The assertion of the respondents regarding avoidance of charge sheet on 25.02.1999 by the petitioner in the office of the enquiry officer Sri. R.P. Birla was

never referred earlier in the counter – affidavit or by way of affidavit and it has for the first time been brought by way of written argument. While going through the contents of letter no. M-252 dated 25.2.99 it only appears that some sealed envelop was placed before the petitioner which was declined by the petitioner and the contents of the letter do not reveal that charge-sheet was contained in the letter. The contents of the letter do not further fortify the stand of respondent that the charge-sheet was duly served to the petitioner whereas the petitioner also denied the service of the charge- sheet through the counsel of the petitioner in Writ Petition No.928 of 1999 in March 1999.

7. It is therefore evident from the records that no steps were taken by the respondents to service the charge – sheet to the petitioner by registered post, more specifically, on the permanent address mentioned in the service record of the petitioner. It appears that only formality of serving the charge-sheet has been made through publication in the news paper. This attempt to serve the charge-sheet, notice, as well as inquiry report, through the news paper which is mainly in circulation in U.P. only, whereas, the petitioner for want of subsistence allowance and salary was residing at his permanent address in Bihar, where no communication to the charged person through the newspaper publication was necessary to be resorted only when other means of communication were exhausted. The explanation for non payment of subsistence allowance by the respondents was not justified.

8. Regarding the contentions of the petitioner referred in para 16 of the writ petition where the petitioner had prayed for change of Sri. R.P. Birla, the Inquiry Officer, the respondents have simply indicated in the counter affidavit dated 30.03.2001 that the State Government after considering the request of the petitioner has found no justification to change the inquiry officer.

9. In para 7 of rejoinder affidavit dated 03.04.2001 the petitioner has reiterated his contentions that the ex parte inquiry report was made without following the rules and against the principles of natural justice, and at the instance of Hon'ble Minister concerned the dismissal order has been passed. The petitioner through a Civil Application No. 29010 of 2001 dated 27.03.2001 (annexed as Annexure S.A. 1) contended that by the G.O. dated 06.06.1985 only 5% responsibility lies upon the executive engineer, while 20% on Assistant Engineer and 75% responsibility lies upon the junior Engineer in respect of the financial loss and irregularities committed in construction work of the State Government, However, for reasons best known to them ignoring the Government order the entire responsibility was attempted to be fixed on the petitioner. This contention of the petitioner has not been denied by the respondent in para 4 of the supplementary counter affidavit dated 30.03.2001.

10. There are Civil Services (Classification, control and Appeal) Rules 1930 hereinafter called Rules 1930 Rule 55 (I) of Rules 30 provides.

55.(1) Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order (other than an order passed on facts which led to his

conviction in a criminal Court or by a Court Martial) of dismissal, removal or reduction in rank (which includes reduction to a lower post or, time-scale or to a lower stage in a time-scale but excludes the reversion to a lower post of a person who is officiating in a higher post) shall be passed on a person who is member of a civil service or holds a civil post under the state unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself."

(4) This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, for sufficient reasons to be recorded in writing, be waived, where there is difficulty in observing exactly the requirements of the rule and those requirements can in the opinion of the inquiry officer be waived without injustice to person charged."

11. There is also U.P. Government Servant (Discipline and Appeal) Rules, 1999 called Rules 1999. Para 2 of this rule deals with the definitions, para 3 deals with the penalties of minor or major and para 4 deals with the suspension; para 5 deals with pay and allowance etc. during the suspension period, para 7 deals with the procedure for imposing major penalties; the relevant part of para-7 are given here as under;

7(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government Servant of the facts and circumstances against him. The proposed documentary evidences and the name of witnesses proposed to prove the same along with oral evidence, if any, shall be mentioned in the charge-sheet.

7(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specification date, it will be presumed that he has none to furnish and inquiry officer shall proceed to complete the inquiry ex parte.

7(v) The charge-sheet, along with the copy of documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner, the charge sheet shall be served by publication in a daily newspaper having wide circulation.

7(viii) The inquiry officer may summon any witness to give evidence or require any person produce documents before him in accordance with the provisions of the Utter Pradesh Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.

7(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage if the

proceeding in spite of the service of the notice on him or having knowledge of the date, the inquiry officer shall proceed with the inquiry ex parte. In such a case the inquiry officer shall record the statement of witnesses mentioned in the charge sheet in absence of the charged Government Servant.

12. Heard Sri. T.P. Singh, Senior Advocate learned counsel for the petitioner and Sri Virendra Swaroop learned Additional Advocate General U.P. for respondents.

13. The counter affidavit, supplementary counter affidavit rejoinder affidavit along with other records and written statements of the parties have been perused.

14. The petitioner has placed reliance on the decision **Jagdamba Prasad Shukla Vs State of U.P. and other** 2000) 7 S.C.C.90 and para 8 "where the Supreme Court has held that " the payment of subsistence allowances, in accordance with the rules, to an employee under suspension is not a bounty. It is right. An employee is entitled to be paid the subsistence allowance, No justifiable ground has been made out for non payment of the subsistence allowance all through the period of suspension i.e. from suspension till removal. One of the reasons for not appearing in inquiry as intimated to the authorities was the financial crunch on account of non payment of subsistence allowance, and the other was the illness of the appellant. The appellant in reply ton the show cause notice stated that even if he was to appear in inquiry against medical advice, he was unable to appear for want of funds on account of non payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the appellant to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service are quashed."

The petitioner also relied on A.I.R 1973 S.C. 1183 constitutional bench judgement of Supreme Court in the matter of **Ghanhsyam Das Vs State of U.P**. wherein the enquiry was declared invalid because delinquent had failed to attend the enquiry due to paucity of funds resulting from non payment of subsistence allowance.

The petitioner has also placed reliance on A.I.R. 1999 S.C. 1416 para 33 **Capt. M. Paul Anthony Vs Bharat Gold Mines Ltd and another** where the employee 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 ex- parte proceedings against him it was held that the appellant has been punished in total violation of the principles for natural justice and he was literally not afforded any opportunity of hearing. Moreover, on account of his penury occasioned by non payment of subsistence allowance, during pendency of departmental proceedings from his home town, the findings recorded by the Inquiry Officer at such proceedings, which were held ex parte, stood vitiated.

The petitioner also placed reliance on the judgements of this High Court 2001(1) U.P. L.B.E.C. 908 **K.P.Giri Vs State of U.P. and others** para 7 and 8 as

well as 2002 U.P.L.B.E.C.1321, **Bajrang Prasad Srivastava Vs U.P. Pariyojana Prabandhan U.P. State Bridge corporation Ltd. and others**. It was held in the case of **K.P. Giri** (Supra).

"even in the absence of any reply submitted by the petitioner to the charge-sheet, it was incumbent upon the enquiry officer to fix the date in the enquiry and to intimate the petitioner about the same which has not been done in the present case. Moreover, from a perusal of the order of dismissal dated 20.03...8 it will be seen that management had produced the evidence in support of the charges levelled against the petitioner making had been accepted by the enquiry officer without making any effort to confront the same to the petitioner. Thus, the entire proceedings have been conducted in gross violation of equity, fair play and is in breach of the principles of natural justice.

In respect of change of inquiry officer the petitioner has further placed reliance on 1994(2) S.C.C. 746. page 12 (**Registrar of The Co-operative Societies Madras and another Vs F.X. Farnando**).where it was held that justice must not only be done but must be seen to be done, therefore, the Supreme Court directed that another enquiry officer be appointed in order to remove any apprehension of bias on the part of the respondent. In 1994 Supp.(2) S.C.256 Para 5 **Indrani Bai (Smt. Vs Union of India and others.** The Supreme Court has held that.

"It is seen that right through, the delinquent officer had entertained a doubt about the impartiality of the enquiry to be conducted by the enquiry officer. When he made a representation at the earliest, requesting to change the enquiry officer, the authorities should have acceded to the request and appointed another enquiry officer, other than the one whose objectively was doubted.

The petitioner has placed reliance on 1999(4) A.W.C. 3227 Para 5 **Subhash Chand Sharma Vs M.D. U.P. Co-Op. Spg Mills Fed. Ltd**. In this judgement of this Court in which one of us (Hon'ble Mr. Justice M. Katju) a was party has expressed that:

"In our opinion, after the petitioner was relied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross examine the witness against him and also he should have been given an opportunity to produce his own witness and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry, then an ex- parte enquiry should have been held but the petitioners service should have not be terminated without holding an enquiry. In the present case, it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioners reply to the charge-sheet he was given a show cause notice and thereafter the dismissal order was passed. In our opinion, this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion, the impugned order is clearly violative of natural justice. In Meenglas

Tea Estate Vs Workmen A.I.R. 1963 S.C. 19 the Supreme Court observed.

" It is an elementary principle that a person who is required to answer the charge must know not only the accusation but also the testimony by which the accusation is supported he must be given a fair chance to hear the evidence in support the charge and to put such relevant questions by way of cross examination as he desires. Then he must be given a choice to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and the requirement must be substantially be filled before the result of the enquiry can be accepted.

In **S.C.Girotra Vs United Commercial Bank** 1995 Supp. (3) S.C.C. 212 the Supreme Court set aside the dismissal order which was passed without giving the employee an opportunity of cross examination. In **Punjab National Bank AIPNBE Federation, AIR 1960** S.C.160 (vide para 66) the Supreme Court held that in such inquiries evidence must be recorded in the presence of the charge sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in **A.C.C. Ltd Vs Their Work Man 1963 II LLJ 396 and in Tata Oil Mills Co. Ltd. Vs. Their Work Men 1963 II LLJ 78 S.C.**

In these circumstances it has to be held that the respondents have not taken care to serve the charge-sheet as well as enquiry report and without doing so the dismissal order has been passed against the petitioner. The respondents have asserted that the since charged officer did not participate in the enquiry, the enquiry officer could proceed ex-parte. For this purpose the respondents have relied on (I) **State Vs another 1997 (6) S.C.C.415.** Where in the Supreme Court has found that the declaration of ex-parte proceedings against the charge employee, cannot be decalred invalid when he did not participate on the plea that criminal case was pending against them. On careful analysis the facts of the above case is distinguisable and do not support the assertaion of the respondents. The respondents has also placed his reliance on 1994(2) S.C. – 615 **Bank of India Vs Apurba Kumar Saha:** "Where it was found that there is no violation of natural justice in his case. The records of disciplinary proceedings show that the respondent had avoided filing of written explanation for the charges of misconduct levelled against him and also had for no valid reason refused to participate in the disciplinary proceedings. A bank employee who had refused to avail of the opportunities provided to him in the disciplinary proceedings of defending himself against the charges of misconduct involving his integrity and dishonesty, cannot be permitted to complain later that he had been denied a reasonable opportunity of defending himself and the disciplinary proceedings conducted against him had resulted in violation of principles of natural justice."

This case is distinguishable because in the referred case, the disciplinary enquiry was conducted in consonance to the prescribed procedure whereas, the respondent by his action wanted the enquiry to be conducted in a specific and different manner which was treated as refusal from participation in the disciplinary enquiry, where as in the present case of the petitioner, the protection of above cases **Apurba**

Kumar Saha (Supra) can not be extended to the respondent. In the present case we are of the view that the petitioner did not deliberately refused from participating in the disciplinary enquiry since he was unable to participate for the reasons submitted by him.

The respondents have asserted that non-supply of the enquiry officers` report to the petitioner does not render the departmental proceedings invalid unless prejudice is called by non supply of the report. The respondents have placed reliance on two cases A.I.R. 1.96 S.C. 1669 Para 24 and 27 (**State Bank of Patiala Vs S.K.Sharma**) and 1996 (6) S.C.C. 415 Para 3 and 4 (**S.K. Singh Vs Central Bank of India**) The facts of these cases are different where the charged officer has occasion to participate in the proceedings and thereafter the aspect of charged officer being prejudiced by non supply of enquiry report was considered, where as in the present case, the facts and circumstances are different and distinguishable.

15. Admittedly in the present case, the petitioner has not been paid the subsistence allowance for the period from the date of suspension to the date of exparte enquiry. It was thus for non payment of subsistence allowance that the petitioner had suffered prejudice, and as held by the Hon'ble Supreme Court in the case of **Capt. M. Paul Anthony** (Supra) his constitutional right have been violated. Further for non issuance of the show cause notice for the proposed punishment and also for not giving the enquiry report and also because the petitioner was not given the charge sheet the petitioner has suffered great hardship and has been denied his right to put his explanation which has vitiated the entire proceedings. Non payment of subsistence allowance, not furnishing the charge sheet, not informing the date fixed in the enquiry and not giving the copy of the enquiry report and the show cause notice regarding proposed punishment only leads to the inference that the respondents have conducted the entire proceedings in a manner which is not warranted in law and has thus vitiated the entire proceedings commencing from suspension of the petitioner leading to his dismissal being actuated with malice in law is liable to be quashed. The respondents have not conducted the inquiry according to the proper procedure prescribed under Rule 99 No specific date, time and place of inquiry was fixed. Oral and documentary evidence against the petitioner should have been adduced in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. A dismissal order is a major punishment having serious consequences and hence should be passed only after complying with the rules of natural justice. Since in the present case no regular and proper inquiry was held nor was subsistence paid, hence in these circumstances, it is clear case that the petitioner had not been afforded a fair opportunity much less a reasonable opportunity to defend himself that has resulted in violation of principle of natural justice and fair play. The ex parte enquiry is illegal and the order of dismissal dated 27.03.2001 is quashed. In the circumstances, the writ petition of the petitioner is allowed.

However, keeping in view the financial loss and irregularities it would

be open to the respondents to hold a fresh inquiry in accordance with law and pass a fresh order.

No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2001

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

Civil Misc. Writ Petition No. 29874 of 1991.

Ravindra Nath Yadav ...Petitioner.
Versus
The District Inspector of Schools, Deoria and another ...Respondents

Counsel for the Petitioner:
Shri A.N. Singh

Counsel for the Respondents:
S.C.
Shri Ravi Pratap

Constitution of India, Article 226 – Regularisation – working for long period pursuant to interim order passed by the court – do not confer any right to claim regularisation – non filing of C.A. – court has no option except to allow the application to dismiss the writ petition as withdrawn – No cause of action survive in view of Regularisation order passed by the authorities.

Held – (Para 7)

Considering the above facts, and that Petitioner had already worked for several years, may be under interring order, and received salary, I do not find any good reason for not allowing the prayer and creating a situation requiring fresh selection and appointment and relegating the Respondents and other authroties responsible for making selection by inviting application under U.P. Secondary Education Service Commission Act. There is no good ground for not allowing the Petitioner in an Institution when the authorities have themselves failed to discharge their statutory obligation.

By the Court

1. This application has been filed by Ravindra Nath Yadav, applicant Petitioner with the prayer to dismiss the petition as infructiuous in view of the fact that his services as Assistant Teacher, L.T. Grade have been regularised by the concerned Joint Director of education, VII Region, Gorakhpur vide order dated 09th February 2001.

2. Affidavit has been filed in support of the said application by Petitioner Ravindra Nath Yadav himself. Photocopy of regularisation order dated 09th February 2001 has been annexed at Annexure-1 to the said affidavit. A perusal of the said order dated 09th February 2001 shows that Petitioner was found eligible and suitable for being regularised under section 33-B (1) of U.P. Secondary Education Services Commission (as amended upto date) contemplating regularisation of ad hoc appointees on the basis of the record received from the office of the District Inspector of Schools along with his letter dated 20th June 1998.

3. Petitioner was, admittedly, appointed against short term leave vacancy of one Akhilesh Tiwari, who, according to the Petitioner, as per averments contained in Para 7 of the affidavit, referred to above, filed in support of this application left the Institution on being appointed by the Commission and the post had fallen

substantively vacant. Date of the post of having substantively fallen vacant has not been mentioned. There is no mention that any of the Respondents, i.e. District Inspector of Schools, Deoria or the Committee of Management of the Institution ever intimated the vacancy to the Secondary Education Services Commission for making regular selection and appointment.

4. The Petitioner had an interim order from this Court dated 10th October 1991 and apparently he continued to work on the basis of the said interim order. It also transpires, as the record stands today, that Petitioner succeeded in obtaining his regularisation under order of the Joint Director of Education dated 09th February 2001, referred to above. Under normal circumstances Petitioner can not be permitted to take advantage of anything being done under interim order of the Court and, thus, his regularisation on the basis of his working under interim order of the Court cannot be approved by this Court unless Petitioner succeeds in the petition after adjudication of the issues on merits. Any advantage obtained by persons under interim order of the Court has to shed in case he fails finally.

5. In the instant case, I find that neither the District Inspector of Schools nor the Committee of Management has cared to file Counter Affidavit. It can be under either of the two circumstances, namely, both of them have colluded with the Petitioner or that they are satisfied with the claim of the Petitioner and do not want to contest the petition on merits. The conduct of the District Inspector of Schools in not filing Counter Affidavit cannot be approved as it is the liability of the State Government to pay salary under Payment of Salaries Act, 1971.

6. I have no doubt that persons like the Petitioner have used this Court by filing petitions and obtaining interim order by pursuing their continuance in Institution and thereafter not obtaining regularisation without permitting their authority in law. Be that as it may, this Court cannot be a party to monopolies and ingenuity of the litigant in using pressure on cot in its vested personal interest and I would not have allowed the petition to be withdrawn or infructuous without passing any order and the Joint Director of Education of reconsider the matter of regularisation after deciding the petition on merits. If the Petitioner volunteered to have dismissed the petition or otherwise, I would have dismissed the petition as to have dismissed the petition or otherwise, I would have dismissed the petition as not press making it clear that the Petitioner will not be entitled to any advantage by virtue of his working in the Institution under interim order of the Court. This Court is, however, deviating from above cause taking into account the pragmatic aspect of the matter, i.e. the Institution has no complaint about the suitability or desirability of the Petitioner to function as teacher in its Institution as otherwise it ought to have filed Counter Affidavit or brought requisite facts about mal-functioning or sub-standard competency of the Petitioner. Therefore, it is presumed that Petitioner has proved its worth, as far as his employer, i.e. management of the Institution. Secondly, the Joint Director of Education was passing order of regularisation as the Petitioner has been found eligible and suitable to function and to be regularised

as per order transmitted by the District Inspector of Schools.

7. Considering the above facts, and that Petitioner had already worked for several years, may be under interim order, and received salary, I do not find any good reason for not allowing the prayer and creating a situation requiring fresh selection and appointment and relegating the Respondents and other authorities responsible for making selection by inviting application under U.P. Secondary Education Services Commission Act. There is no good ground for not allowing the Petitioner in an Institution when the authorities have themselves failed to discharge their statutory obligation.

8. In view of the above, this application is allowed.

Petition is allowed to be withdrawn on the ground that Petitioner has no substantive cause of action in view of the order or regularisation dated 09th February 2001, referred to above. Dismissal of the petition as infructuous will not affect his working in the Institution or his regularisation.

9. Petition is dismissed as infructuous subject to the observations made above.

There shall be no order as to costs.

10. Office is directed to send a copy of this order to the Director of Education (Secondary), U.P., Allahabad as well as Chief Secretary to Government of U.P., Lucknow within two months for information.

Petition Dismissed as Infructuous.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 3.7.2001

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE R.P. MISRA, J.

Civil Misc. Writ Petition NO. 15702 of 2000

U.P. Financial Corporation ...Petitioner
Versus
The District Judge, Bareilly and others ...Respondents

Counsel for the Petitioner :
Shri Satish Chaturvedi
Counsel for the Respondents:
S.C.
Shri Avinash Chandra Tripathi

Constitution of India-Article 226 read with code of Civil Procedure Section 115-Revision-Scope -Power exercised by the District Judge found illegal order passed by the Trial Court not amants to case decided-Revision held not mentionable.

Held-Para 4.

The order which was sought to be impugned in revision apparently had not decided any issue whatsoever. Thus, the Civil Revision was not maintainable. Yet instead of dismissing it for the said apparent reason, it is some what surprising that the learned Incharge District Judge, Bareilly had proceeded to entertain it and pass the order impugned which was beyond his jurisdiction. Further, the impugned order was also violative of principle of natural justice, it having been passed against the petitioner behind its back.

By the Court

In Original Suit No. 177 of 1999. **M/s Mahavir Cement Vs. U.P.F.C.** the

Civil Judge (Senior Division), Bareilly on 10.09.1999 passed an order to put up the petition 50 Ga (filed for hearing the petition 6 Ga) for its hearing on the date fixed inviting objection to be filed in the meantime. Respondent No. 3 filed Civil Revision No. 155 of 1999 against the order aforesaid which was disposed of by the order impugned by the Incharge District Judge, Bareilly as contained in Annexure No. 5 behind the back of the writ petitioner directing the Civil Judge (Senior Division), Bareilly to decide positively the application 6-Constitution of India on the date fixed before passing any order in the suit and further directing the writ petitioner not to take possession over the factory till disposal of the said application. The petitioner assails validity of the order before us invoking Article 226/227 of the Constitution of India.

2. Three fold contention have been made by Sri Satish Chaturvedi, learned Counsel for the petitioner in support of the prayers made in this writ petition:- (i) Learned Incharge District Judge has committed an apparent jurisdictional error in passing the impugned order even though the order of learned Civil Judge (Senior Division) did not amount any case decided' within the meaning of section 115 of the Code of Civil Procedure and thus the impugned order is liable to be quashed on this ground alone.

(ii) Learned Incharge District Judge has committed an apparent jurisdictional error in restraining the writ petitioner which was performing its statutory duties under section 29 of the U.P. Financial Corporation Act and that too without giving any opportunity to have its say in the matter and thereby the well settled principles of natural justice have been nakedly breached; and

(iii) The Suit itself was not maintainable.

3. Sri A.C. Tripathi, learned counsel appearing on behalf of the respondent no. 3 fairly takes up a stand that in the peculiar facts and circumstances of the case the Civil Revision itself was not maintainable, besides no opportunity of hearing was afforded to the petitioner by the Incharge District Judge.

4. Section 115-A of the Code of Civil Procedure, as enacted by our State Legislature reads thus:-

"**115A-Revision.—**The High Court, in cases arising out of original suits or other proceedings of the value of twenty thousand rupees and above, including such suits or other proceedings institute before August 1, 1978, and the District Court in any other case, including a case arising out of an original suit or other proceedings instituted before such date, may call for the record of <u>any case which has been decided</u> by any Court subordinate to such High Court or District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate Court appears-

(a) <u>to have exercised a jurisdiction not vested in it by law; or</u>
(b) <u>to have failed to exercise a jurisdiction so vested; or</u>
(c) <u>to have vested in the exercise of its jurisdiction illegally or with material irregularity:</u>

the High Court or the District Court, as the case may be may make such order in the case as it thinks fit:

Provided that in respect of cases arising out of original suits or other proceedings of any valuation, decided by the District Court, the High Court alone shall be competent to make an order under this section.

Provided further that the High Court or the District Court shall not under this section, vary or reverse any order including an order deciding an issue, made in the course of a suit or other proceedings, except where,-

(i) the order, if so varied or reversed, would finally dispose of the suit or other proceedings; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

Explanation.—In this section, the expression any acse which has been decided' includes any order deciding an issue, in the course of a suit or other proceeding." (Emphasis supplied).

4. The order which was sought to be impugned in revision apparently had not decided any issue whatsoever. Thus, the Civil Revision was not maintainable. Yet instead of dismissing it for the said apparent reason, it is some what surprising that the learned Incharge District Judge, Bareilly had proceeded to entertain it and pass the order impugned which was beyond his jurisdiction. Further, the impugned order was also violative of principles of natural justice, it having been passed against the petitioner behind its back.

5. This writ petition is allowed. The order impugned, as contained in Annexure no. 5, is quashed by grant of a writ of ceriorari.

6. However, having regard to the fair stand taken by Sri Tripathi we make no order as to cost.

7. Let a copy of this order be dispatched forthwith to the District Judge, Bareilly.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2001

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

Civil Misc. Writ Petition NO. 35498 of 1999

Nagar Palika Parishad Mathura
...Petitioner
Versus
Rent Control & Eviction Officer (City Magistrate), Mathura and others
...Respondents

Counsel for the Petitioner:
Shri S.V. Goswami

Counsel for the Respondents:
S.C.
Shri D.K. Tripathi
M.D. Singh

U.P. Urban Building (Regulation of Rent and letting) Act, 1972-Section 29-A-Enhancement of Rent-Grant given by the king to the local Bodies-to open an office-grant more than 100 years old-No question of giving the land lease-Nagar Palika on not held tenant-provisions of

U.P. Act No. 13 of 1972 are not applicable-enhancement of rent can not be claimed.

Held-(Para 20 and 21)

Considering the circumstances it appears that it is a case of grant by the King to the Municipal Board, a local body for construction of his office an premium so that ownership may not be challenged. There does not appear to be any question of giving land on lease.

Therefore, considering the circumstances I find that the petitioner, Nagar Palika is not the tenant of the disputed land and is only a licencee. Therefore, the application under Section 29-A of the Act was not maintainable.

Case Law & discussed.

AIR 1967 Cal – 9
AIR 1965 SC – 610
AIR 1974 SC - 396
AIR 1959 SC – 1262

By the Court

1. The respondent no. 2 of the writ petition no. 35498 and petitioner of writ petition no. 32706 (hereinafter referred to as "respondent no. 2") moved an application under section 29-A of U.P. Act No. XIII of 1972 for enhancement of rent before the respondent no. 1, which is annexure no. 1 to the writ petition. The application was opposed by the petitioner of writ petition no. 35498 (hereinafter called as "Petitioner"). The respondent no. 1, Rent Control & Eviction Officer, Mathura decided the application vide judgement, annexure no. 5 to the writ petition, on 25.05.1999 and enhancement the rent to Rs. 13,250/- per month from Rs. 40/- per year. Aggrieved by the order of respondent no. 1, the petitioner has preferred writ petition no. 35498 of 1999 under Article 226 of the Constitution of India invoking the extra ordinary jurisdiction of this Court with the request that the order, annexure no. 5 to the writ petition be quashed.

2. The respondent no. 2 is also not satisfied with the enhancement of the rent and he has filed Writ Petition No. 32706 of 1999 with the request that the judgement of respondent no. 1 is not correct and that the rent be enhanced @ Rs. 2,000/- per square yard since 05.07.1976.

3. I have heard Sri S.V. Goswami, learned counsel for the Nagar Palika Parishad, Mathura, and Sri M.D. Singh, learned counsel for Kunwar Vishwendra Singh, respondent no. 2, and have gone through the records.

4. The facts of the cases are very simple. In the application it was pleaded by the respondent no. 2 that he is the landlord and the land was given long ago on rent of Rs. 40/- per year to the petitioner for construction of the office of Nagar Palika Parishad. That the rent was never enhanced since the tenancy was created. That the rate of the land where the disputed property situated is Rs. 2,000/- per square yard. That therefore, the rent of the disputed land should be Rs. 1,55,000/- per month. Therefore, it has been prayed that the rent be, accordingly, settled.

5. Before coming to the actual controversy between the parties, I may dispose of two objections of the petitioner which in my opinion has been raised unnecessarily in this petition.

6. The first objection is that the application was moved by the respondent no. 2 through Dinesh Chandra Agarwal, as holder of power of attorney. This

objection was taken, as the power of attorney was not filed with the application. Later on the power of attorney dated 31.12.1990 and Trust Deed dated 29.06.1987 executed by the respondent no. 2 in favour of Dinesh Chandra Agarwal were filed. By virtue of this power of attorney, Dinesh Chandra Agarwal could have filed the application on behalf of the respondent no. 2 and controversy does not require a detailed discussions.

7. The other objection taken is that the respondent no. 2 is not the owner of the disputed land and it has vested in the State of Rajasthan. That therefore, he has no right to move the application. In this connection, the learned counsel for the petitioner has referred to the gazette notification, which is annexure no. 4 to the writ petition. It is contended that according to this gazette notification the property has vested in the State of Rajasthan. That the properties which has been left with the respondent no. 2 has been shown separately. I have gone carefully with this gazette notification and of the view that it does not show that the property in disputed has been acquired and has vested in the State of Rajasthan. On the other hand, it appears that it continues to be owned by the respondent no. 2. Apart from this, the petitioner is continuously paying the rent of the premises in dispute to the respondent no.2 as I shall discuss at latter stage. Therefore, it is also not open to the petitioner to plead that the respondent no. 2 is not the owner of the same and is not entitled to move the application. This argument of the learned counsel for the petitioner is also without any merit.

8. The main controversy between the parties is that according to the petitioner he is licencee of the land, which was given to him by the Royal Religious Family, who was owner as King. That the petitioner is not the tenant and therefore, section 29-A of U.P. Act No. XIII of 1972 has no application. In this regard, it is contended that it was a grant from the King and the petitioner is not a tenant. As against this it has been contended by the learned counsel for the respondent no. 2 that the exclusive possession was transferred and permanent structure have been raised. The petitioner is enjoying the exclusive possession of the disputed land since long. That therefore, he is not a licensee. It is further contended that the petitioner in the letters to the respondent no. 2 has been regularly mentioning that the rent is being sent. Several letters have been filed in this regard in writ petition no. 32706 of 1999. The first is annexure no. CA-1 dated 28.06.1980 written by Executive Officer, City Board, Mathura and signed by Accountant on his behalf to the Manager, Bharatpur Royal Family Religious Ceremonial Trust, Bharatpur, in which it is mentioned that the cheque dated 31.03.1980 for Rs. 40.75p. is being sent in full payment of the rent. Another letter written by the same person addressed to the same authority is dated 01.06.1982, annexure no. CA-2. In this letter, it has also been mentioned that the amount of rent Rs. 40.50p. is being sent by cheque no. 244071 dated 25.03.1982. Another letter is annexure no. CA-3, dated 09.12.1986, in which it is mentioned that the rent of the land of Nagar Palika office is being sent by the demand draft. A similar letter is annexure No. CA-4 dated 23.02.1988. It is contended that all these letters shows that the rent was being paid. That therefore,

the petitioner is lessee and not a licencee and this amounts to admission.

9. In this connection it has also been argued that the copy of the settlement of 1244 Fasli, which is equivalent to 1877 Fasli is annexure no. 6 to the writ petition no. 35498 of 1999, in which Raja Saheb Bharatpur is shown to be the owner and land ahs been shown on rent to the Municipal Board at Rs.40/- per year. That therefore, this show tat the land was given on rent and not on premium. It is also contended that the Indian Easement Act was enforced in the year 1882. That the present transaction of lease is prior to the 1882. That at the time there was no concept of licence and also of the grant of the property on premium.

I have carefully considered the argument of the learned counsel.

10. It is no doubt true that many letters of the Executive Officer of the petitioner has written to the respondent mentioning that the rent is being sent. However, it is only a misnomer and it is settled law that because the word rent or licence fee have been used it does not show the character of the transaction as lease or licencee. These words are used by the parties in ignorance of law and fine distinction between the lease and the licence. The parties can no turn a tenancy into a licencee merely by calling it so.

11. Admittedly no deed is available to show whether the nature of the transaction was a lease or licence. Therefore, from the circumstances it has to be inferred whether it was a lease or licence. Before considering the material circumstances it may be mentioned that the argument that concept of licence came in the year 1882 when the Indian Easement Act was enforced is misconceived. The Transfer of Property Act was also enforced in the year 1882 and therefore, on its basis it can not be held that there were no transfers of properties prior to 1882. Both these Act have been enacted to define amend law relating to the transfer and licences existing at the time of the enforcement of these Act as is clear from the Preambles of the Acts. The argument that the transaction took place prior to 1882 and therefore, it can not be a licencee, therefore, does not hold good.

12. According to the definitions, the transfer of exclusive possession or transfer of right of enjoyment only is a criterion to find the nature of the transaction. However, in many decisions it has been held that the transfer of exclusive possession does not show that the transaction is a lease and now it is settled law. On the other hand, it has been held by the different courts that the distinction between the lease and licence is one of the substance or of the intention of the parties. In **Ram Prasad Mandal Versus Sneh Lata Ghosh, A.I.R., 1967 Calcutta**, this view was taken. In many other cases, it was held that the transfer of exclusive possession with payment of amount may be a licence as well as lease and it depends on the intention of the parties. In the present case there is not document evidencing the transaction and therefore, he question of interpretation of document does not arise. However, from the facts, it can be safely inferred in this case that it was a grant from the King and therefore, the King had not executed any agreement of lease. The real test therefore, in the present case is whether

the intention of the parties was to create a lease or licence.

13. In the commentary on the Indian Easement Act of Sri B.B. Katiyar, it has been observed that test of exclusive possession is no means decisive regarding the nature of the transaction. Therefore, on the basis that the petitioner is an exclusive possession of the property in dispute, it can not be held that he is a tenant.

14. The Apex Court in **M.N. Club Wala Versus Fida Hussain Saheb A.I.R., 1965 SC 610** has observed that where there is no formal document embodying of the agreement, the intention is to be inferred from surrounding circumstances and the conduct of the parties.

15. I could not lay hand on any direct authority which may be applicable in the present case. However, it was observed in **Qudrat Ullah Versus Municipal Board, Bareilly, A.I.R., 1974 SC 396** that the intention of parties are material for deciding the nature of the transaction. It was observed in para 7 of the judgment :

"There is no simple litmus test to distinguish a lease as defined in S. 105, Transfer of Property act from a licence as defined in S.52 Easement Act, but the character of the transaction turns on the operative intent of the parties. To put it pithily, if an interest in immovable property, entitling the transferors to enjoyment, is created, it is a lease, if permission to use land without right to exclusive possession is alone granted, a licence is the legal result."

16. However, the Apex Court in the judgment has also referred to law laid down on the point in Halbury's Laws of England. It was held therein that the fact that the agreement grants a right दृढ exclusive possession is not a conclusive evidence of the existence of tenancy, but it is a consideration of first importance. The instances in which the exclusive possession has been granted but the transaction operate as licence only and not as lease have been mentioned.

17. However, it is true that the present case is not covered by any instance given, but as observed in the case of **M.N. Club Wala (Supra)** by the Apex Court the intention has to be inferred from surrounding circumstances and conduct of the parties. Therefore, in the present case surrounding circumstances and conduct of the parties is decisive factor where the transaction was a lease or licence.

18. It is proper to referred to the decision of the Apex Court in **Associated Hotels of India Limited Versus R.N. Kapoor A.I.R., 1959 SC 1262.** It was emphasized that to distinct between a lease and a licence the following proposition well established :

(i) to ascertain whether a document is a licence, or lease, the substance of the document must be preferred to the form;

(ii) the real testis the intention of the parties whether they intended to create a lease or licence;

(iii) if the document creates an interest in the property it is a lease; but if it only permits another to make use of the property of which the legal possession continues with the owner it is a licence;

19. In this case, no formal deed of lease or licence was executed. The grant

was to a local body and yearly premium was fixed. No monthly rent was fixed. The grant was given more than a century before and since then there was no demand for enhancement of rent/premium. It does not appear that the king would have executed a lease of his property in favour of a local body. In India there are many old grants by the King in favour of their ruled persons.

20. Considering the circumstances it appears that it is a case of grant by the King to the Municipal Board, a local body for construction of his office on premium so that ownership may not be challenged. There does not appear to be any question of giving land on lease.

21. Therefore, considering the circumstances I find that the petitioner, Nagar Palika Parishad is not the tenant of the disputed land and is only a licencee. Therefore, the application under section 29-A of the Act was not maintainable.

22. The petition no. 35498 of 1999 is accordingly allowed and the order, annexure no. 5 to the writ petition is quashed. The writ petition no. 32706 of 1999 is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.7.2001

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE A.K. YOG, J.

Special Appeal No. 757 of 2001

Sandeep Chauhan and others ...Petitioners
Versus
State of U.P. through Secretary and others ...Respondents

Counsel for the Appellant:
Ajay Yadav

Counsel for the Respondents:
Sri V.N. Upadhyay

Constitution of India, Article 226-Writ Petition -Maintainability-Private Institution run by Society-not receiving the grant in aid-but emparting education which is a fundamental Right of citizen-held-writ petition against Central Board of Secondary Education Shiksha Kendra Preet Vihar, New Delhi is maintainable.

Held-Para 4

Following the principles laid down by the Supreme Court in the aforesaid decision, we are of the view that the writ petition against Central Board of Secondary Education, Shiksha Kendra, Preet Vihar, New Delhi, is maintainable.

Case law discussed.
AIR – 1998 –SC 295 relied on

By the Court

1. Heard Sri Ajay Yadav, learned counsel for the appellants and Sri V.N. Upadhyay, learned standing counsel appearing for the respondents.

2. This special appeal is directed against an order passed by the learned Single Judge dismissing the writ petition on the ground of the maintainability of the writ petition following decision of this court in the case of **Ashok Kumar Chawla v. Central Board of Secondary Education, Shiksha Kendra, Preet Vihar, New Delhi and others**, reported in 1998 UPLBEC-370. In the aforesaid decision, the view taken by the Court was that a writ petition against a college run by a Society is not maintainable.

3. Learned standing counsel has

however, relied upon a decision in the case of **K. Krishnamacharyulu and others v. Sri Venkateswara Hindu College of Engineering and another**, reported in AIR 1998 SC-295 in which the Supreme Court held that taking into consideration the claim of the employees of the said private educational institution, who were appointed on daily wages and kept in staff on non-teaching posts of Lab Assistants in the respondent-private college, they should also be given on the basis of executive instructions issued by the Government employees. The question that arose for consideration before the Supreme Court was whether in absence of a statutory rule issued in that behalf, and the institution, at the relevant time, also not in receipt of grant in –aid, writ petition under Article 226 of the Constitution was not maintainable? The Supreme Court held that in view of the long line of decisions holding that when there is an interest created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teacher, who teach in the education, performs duties having element of public interest. As a consequence, the element of public interest requires to regulate the conditions of service of those employees at part with Government employees, and, therefore, the State has obligation to provide facilities and opportunities to the people to avail of the right to education.

"The private institution cater to the needs of the educational opportunities. The teacher duly appointed to a post in the private institution also is entitled to seek enforcement of the orders issued by the Government. The question is as to which forum one should approach. The High Court has held that the remedy is available under the Industrial Dispute Act. When an element of public interest is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of the remedy provided under Article 226 of the Constitution of India."

4. Following the principles laid down by the Supreme Court in the aforesaid decision, we are of the view that the writ petition against Central Board of Secondary Education, Shiksha Kendra, Preet Vihar, New Delhi, is maintainable. However, we are not deciding other question on merit. We direct that the writ petition should be listed before the learned Single Judge. It is stated before us that in the writ petition, counter and rejoinder affidavits have been filed. In that view of the matter, the writ petition shall be listed before the learned Single Judge after a week. It is also stated that there was an interim order passed by the learned Single Judge, which stands vacated by virtue of the order of dismissal. However, it is open to the respondents to make an application for interim order before the learned Single Judge.

The matter shall be listed after a week before the learned Single Judge.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.7.2001

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

Second Appeal No. 1572 of 1980

Nasirullah alias Chikhuri, ...Appellant
Versus
Mohd. Murtaza ...Respondent

Counsel for the Appellant:
Sri Siddheshwari Prasad
Sri Ranjeet Saxena,
Sri Someshwari Prasad
Counsel for the Respondent:
Sri R.N. Singh
Sri S.N. Singh

Transfer of Property Act Section 106 Notice-essential requirements typed notice neither bearing the signature of land lord nor his counsel-held invalid.

Held- Para 15

The workings of the above Section show that signing of notice by or on behalf of the person it is one of the paramount essential condition to hold a notice valid. It is not disputed that impugned notice did not bear the signature or thumb impression of the plaintiff or of his counsel or any agent authorized on his behalf and an unsigned notice only bearing the typed name of land lord at the end is invalid, as it does not fulfil the requirement of Section 106 Transfer of Property Act.

By the Court

1. The defeated defendant has referred this Second Appeal against the judgement and decree dated 31.3.1980 passed by Sri R. Singh, the then learned IInd Additional District Judge, Ballia in Civil Appeal no. 224 of 1978 allowing the appeal, setting aside the judgement and decree of the Trial Court dated 27.7.1978 in original suit no. 12 of 1978 by which the Trial court had dismissed the suit.

2. The respondent, hereinafter called the plaintiff, filed suit no. 12 of 1978 against the appellant, hereinafter called the defendant, his real brother, for ejectment of the defendant from the premises in suit and for recovery of arrears of rent amounting to Rs. 50/- per month. The case of the plaintiff, in brief, was that he was owner landlord of room shown in schedule 'B' of the plaint and defendant was its tenant on monthly rental of Rs. 15/-. The defendant fell in arrears of rent from 1.4.1977 to 31.7.1977, which he did not pay despite of the service of composite notice of demand and termination of tenancy dated 11.8.1977 and also failed to vacate the premises in question; hence the suit.

3. The defendant contested the suit denying the relationship of landlord and tenant between the parties and contending that he was real brother of the plaintiff and house in question of which one room is subject matter of suit was ancestral property of the parties. His father Fateh Mohammad had two wives. The plaintiff and defendant were born from the first wife and four sons were also born from the second wife. After the death of father of the parties their step mother and her sons got half share in the northern portion of house and remaining half portion in southern side came in the share of plaintiff and defendant. The southern half portion was further divided between the plaintiff and defendant and room in question came in the share of defendant. The defendant was occupying the above room as owner. The defendant also denied service of notice and raised other legal pleas.

4. The Trial Court framed necessary issues arising out of above pleadings of the parties and on considering the evidence of the parties held that no relationship of landlord and tenant existed between the parties and the defendant was occupying the house as its owner. The notice was invalid and plaintiff was not

entitled to any relief. With these finding it dismissed the suit, vide judgement and decree dated 27.7.1978.

5. Aggrieved with the above judgement and decree, the plaintiff filed Civil Appeal no. 224 of 1978. The Lower Appellate Court reversing the finding of the Trial Court held that defendant was tenant of the premises in question on monthly rental of Rs. 15/- and defendant was also served with the notice under Section 106 of Transfer of Property Act and Section 20 of U.P. Act no.13 of 1972 by refusal. With these findings, it allowed the appeal and set aside the judgement and decree of Trial Court and decreed the suit for ejectment of the defendant from the premises in suit, for recovery of Rs. 81/- as arrears of rent and pendente lite and future damages at the rate of Rs. 15/- per month.

6. The above judgement and decree of Lower Appellate Court has been challenged by the defendant in this Second Appeal.

7. The Second Appeal was admitted on the following substantial questions of law:-

1. Where the finding of the Lower Appellate Court that defendant appellant was the plaintiff respondent's tenant is vitiated in law?

2. Whether the tenancy, if, any, was terminated in accordance with law before the institution of the suit?

FINDINGS

8. Point No. 1. The contention of the plaintiff was that he was owner/landlord of the premises in question and defendant was its tenant on monthly rental of Rs. 15/- and the tenancy started since January, 1977. The tenanted portion is one Kothari. The Defendant denied the relationship of landlord and tenant and contended that house in suit was ancestral property and plaintiff and defendant in partition got southern half portion of it, which was further divided between the plaintiff and defendant and each of them got one room. The Trial Court disbelieved the evidence of plaintiff adduced in support of tenancy by discussing it in detail and also pointed out the inherent weaknesses in the statement of the plaintiff and his witnesses on the above point. The trial Court has also taken into consideration the situation of the houses in suit and the portion occupied by step mother of the parties and her sons as well as portion occupied by the parties. The Lower Appellate Court simply observed that P.W.3 Mohammad Shafiq proved the tenancy and minor contradiction in the statement of the plaintiff and P.W.3 were not sufficient to throw the case of the plaintiff.

9. He further criticised the evidence of defendant and his witnesses. And also had taken into consideration some other facts, which were not proved and only suggestion was given to that effect. The following observations of the Lower Appellate Court are worth quoting:-

10. "The defendant said that he has been separate from both his sons for the last 10 years. He said that this sons had also beaten him. He was given a suggestion that since he was turned out of his sons, he began to live in the rental house given to him by his brother Murtaza. There appears to be truth in the suggestion that the defendant was homeless when he was turned out by his

sons after beating. The tenancy between plaintiff and defendant who are real brothers had been settled with the intervention of some persons. There is no reason to disbelieve the same."

11. The above observation of the Lower Appellate Court is based on guess and surmises and suffers from perversity. The Trial Court has scrutinised the evidence of the parties, their inters relationship and the occupation of the house by step mother of the parties and their step brothers for which the plaintiff had no explanation. Thus, the finding of fact recorded by the Trial Court was wrongly set aside by the Lower Appellate Court purely on guess and surmises. It was not a case where on the evidence of the parties two views were possible and the Lower Appellate Court preferred to take one view. In fact, the finding of the Lower Appellate Court is based on no evidence and suffers from perversity and therefore, the above finding of Lower Appellate Court cannot be sustained. There was also no cogent reason for the Lower Appellate Court to set aside the findings of the Trial Court on this point. As such, the above finding of the Lower Appellate Court is vitiated in law and cannot be sustained and that of Trial Court that there existed no relationship of landlord and tenant between the parties is to be restored. Point no. 1 is answered in the affirmative.

Point No. 2. The Trial Court held that the alleged notice was not served on the defendant. It further observed that admittedly, the above notice was not signed either by the plaintiff or by his counsel and therefore, it was invalid. The Lower Appellate Court set aside above finding of the Trial Court by following observation:-

"The notice given to the defendant is dated 9.8.1977. Through this he had determined the tenancy. This notice has been refused and has been proved by the plaintiff. No doubt, the notice has not been signed by the plaintiff, but he did prove that notice and said that he had sent this notice. The plaintiff has also filed the envelop in which it has been recorded that "refusal" by the defendant. Therefore, the plaintiff sufficiently proved that the defendant was served with the notice under Section 106 of Transfer of Property Act and Section 20 of Act no. XIII of 1972. The finding of the learned Munsif on this issue is set aside".

12. From the above finding of Lower Appellate Court it is clear that the Lower Appellate Court has observed that there was sufficient service by refusal,. But there is no finding regarding validity of the notice.

13. Section 106 of Transfer of Property Act as amended in U.P. by U.P. Act no. 24 of 1954 reads as under:-

"In the absence of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by thirty days, notice.

14. Every notice under this section must be in writing signed by or on behalf of the person giving it and either be sent

by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

15. The wordings of the above Section show that signing of notice by or on behalf of the person giving it is one of the paramount essential condition to hold a notice valid. It is not disputed that impugned notice did not bear the signature or thumb impression of the plaintiff or of his counsel or any agent authorized on his behalf and an unsigned notice only bearing the typed name of landlord at the end is invalid, as it does not fulfil the requirement of Section 106 Transfer of Property Act. The Trial Court has held on the above ground that the notice is invalid, but the Lower Appellate Court totally escaped the omission of signature and simply relieved its responsibility by observing that notice was served and therefore, the finding of Trial Court was liable to be set aside and it did not consider the validity of the notice. The notice was thus invalid for want of signature of the plaintiff or his counsel or agent. The finding of Lower Appellate Court contrary to it cannot be sustained. Since, the notice is invalid, the tenancy of the defendant, if any, was not terminable in accordance with law before the institution of the suit point is answered accordingly.

16. In view of the findings on above points, the appeal succeeds. The Second Appeal is, accordingly, allowed. The judgement and decree of the Lower Appellate Court are set aside and that of Trial Court are restored. Accordingly, the suit of plaintiff stands dismissed with costs through out.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 6, 2001

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

Civil Misc. Writ Petition No. 10342 of 1998

M/s Metal Craft ...Appellant
Versus
Rajya Krishi Utpadan Mandi Parishad and others ...Respondents

Counsel for the Appellant:
Shri J.P. Pandey
Shri Bharat ji Agarrwal

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

U.P. Krishi Utpadan Mandi Niyamawaali 1965- Rrule 66 and 68 read with U.P. Krishi Utpadan Mandi Adhiniyam 1964, Section 17 (11) (b) Demand of Market Fee- Firm doing export of broken rice- having Head Office of firm at Ghaziabad the rice are directly purchased from the State other than U.P. sent to port. No entry in market area Ghaziabad. Whether is the Samiti entitle to charge market fee? –'No'

Held - Para 28
Case law discussed
AIR 1952 SC - 369
AIR 1953 SC -394
AIR 1968 SC -741
AIR 1973 SC -430
AIR 1954 SC -459
1990 ACJ -409
AIR 1977 Punj. -347 (FB)
AIR 1920 Mysore -114

AIR 1941 Fe -72
AIR 1957 SC -628
AIR 1970 SC -264
1891 Fe -455 (K)

By the Court

1. The question which requires consideration here is whether a Market Committee of Krishi Utpadan Mandi Samiti is entitled to levy market fee under Section 17 (iii) (b) of U.P. Krishi Utpadan Mandi Adhiniyam, 1964, (hereinafter referred to as the Act) if the agricultural produce is neither brought in nor taken out of the market area

2. The petitioner M/s. Metal Craft is a registered partnership firm having its business premises and office at 14, Navyug Market Ghaziabad, and it carries on the business of sale and purchase of iron and steel and also export of rice. The petitioner wanted to purchase broken rice from the rice millers of U.P. for the purpose of export to foreign countries and accordingly, made an application on July 31, 1997, to Krishi Utpadan Mandi Samiti, Ghaziabad (respondent no. 2) for grant of a licence. It was also stated in the application that the petitioner had exported rice in November, 1996 by purchasing it from places outside U.P. The respondent no. 2 asked the petitioner to deposit the licence fee for the years 1995-96, 1996-97 and 1997-98, which was done as per the demand. Thereafter, the respondent no. 2 sent a demand notice to the petitioner on October 12, 1997, demanding market fee at the rate of 2 percent amounting to Rs. 12,94,860.00 on the sale price of rice exported by the petitioner which was Rs. 6,47,42,994.00. The petitioner sent a reply on October 18, 1997, stating that it had never purchased any rice from inside the State of U.P. nor any transaction of sale or purchase of rice was carried out within the State. It was accordingly requested that the demand notice/order dated October 12, 1997, be rescinded. The respondent no. 2, however, initiated proceeding for recovery of the amount in question and issued a citation dated December 6, 1997. The petitioner, thereafter, filed G.M. Writ Petition No. 43329 of 1997 in the High Court which was disposed of on December 17, 1997 with a direction to respondent no. 2 to decide the petitioner's representation within a month and recovery proceedings were suspended for six months. The petitioner appeared before respondent no. 2 on the date fixed, namely, January 14,1998, along with the relevant and submitted that the rice had been purchased from places outside the State of U.P. and had been sent directly to the ports for being exported to South Africa and, as such, it was not liable to pay any market fee. The respondent no. 2 passed an order on January 25, 1998, holding that the transaction of sale of the rice exported by the petitioner firm took place within the market area of Ghaziabad, and, accordingly, the market fee imposed by the order dated October 12, 1997 was valid and proper. Feeling aggrieved, the petitioner preferred a revision under Section 32 of the Act before the Rajya Krishi Utpadan Mandi Parishad, Lucknow (respondent no. 1) which was dismissed by the order dated March 9, 1993. The present writ petition under Article 226 of the Constitution has been filed for quashing the orders dated October 12, 1997 passed by respondent no. 2 and the order dated March 9, 1998 passed by respondent no. 1. The learned Single Judge, who heard the petition, was of the opinion that the controversy raised involves a substantial question of law of

general importance and made a reference to large bench. That is how the matter has come before us.

3. The case of the petitioner with regard to the rice exported by it is that certain dealers in South Africa wanted to buy rice from India. The petitioner quoted the rates and entered into negotiations. After the deal was settled, the rice was purchased from rice millers in Haryana, Punjab and Madhya Pradesh from where it was directly dispatched to the ports at Mumbai and Kandla and the clearing and forwarding agents of the petitioner loaded the same on the ship. After the goods had been loaded, a Bill of Lading was prepared and signed by the Master of the ship in the capacity of carrier acknowledging the receipt of the goods. The Bill of Lading was given to the clearing and forwarding agents and on receipt of the bill of lading by the buyer through the petitioner's bankers the goods (rice) were retired by the buyer in South Africa. The SALE price of the rice was received by the petitioner though its banker viz. Oriental Bank of Commerce at Delhi. It is the specific case of the petitioner that the entire quantity of the exported rice was perched from places outside the State of U.P. and was directly sent to the ports without it ever coming within the market area of Ghaziabad or in the State of U.P. it is also asserted that the sale was effected only at the ports when the goods were loaded on the ship and the Bill of Lading was handed over to the petitioner's clearing and forwarding agents.

4. The case of the respondent no. 22 is that the business establishment of the petitioner is at 14, Navyug Market, Ghaziabad, which is situate within the jurisdiction of Mandi Samiti, Ghaziabad, and the entire transaction was done from the said place. The purchase order was received and accepted by the petitioner at Ghaziabad and the sale price was also received there and, therefore, the transaction of sale took place at Ghaziabad. It is also pleaded that the transport of the goods and how it was actually exported was wholly irrelevant for as certaining where the transaction of sale took place.

5. The revisional authority held that the name of the petitioner M/s. Metal Craft, 14, Navyug Market, Ghaziabad, was mentioned in the orders placed by the foreign firms for supply of rice, in the bills as consignors of goods in the Shipping Bills and Bills of Lading and also in the GRs. The sale price of the exported rice had also been received by the petitioner firm. Under Section 17 (iii) (5) of the Act the mandi fee becomes payable on transaction of sale and, accordingly, if the transaction takes place within the market area a liability is created. It was accordingly held that the actual transaction of sale took place within the market area of Mandi Parishad, Ghaziabad and the petitioner was liable to pay the market fee. It was further held that the fact that no sales tax (Central or State) was imposed upon the petitioner by the sales tax authorities of Ghaziabad, was wholly irrelevant for the purpose of decision of the controversy in issue.

6. Shri B.D. Mandhyan, learned counsel for the respondents, fairly admitted that the rice exported by the petitioner was never brought within the market area of Ghaziabad or for that matter within the State of U.P..

7. Before adverting to Section 17(iii) (b), which is the charging section, it will be useful to make reference to the prefatory note of the Act as given in the Statement of Objects and Reasons, which reads as under:

8. "The present chaotic state of affairs a obtaining in agricultural produce markets is an acknowledge fact. There are innumerable charges, levies and exactions which the agricultural producer is required to pay without having any say in the proper utilisation of the amount so paid by him. In matter of dispute between the seller and buyer, the former is generally put at a disadvantage by being given arbitrary awards. The producer is also denied a large part of his produce by manipulation and defective use of weights and scales in the market. The Government of India and the various committees and commissions appointed to study the condition of agricultural markets in the country have also been inviting the attention of the State Government from time to time towards improving the conditions of these markets. The proposal to enact a marketing legislation was first taken up in 1938; but it could not go through as the then Ministry went out of office soon after its inception. The Planning commission stressed long ago that legislation in respect of regulation of markets should be enacted and enforced by 1955-56. Most of the other States have already passed legislation in this respect. The proposed measure to regulate the markets in this State has been designed with a view to achieving the following directions:-

(i) to reduce the multiple trade charges, levies and exactions charged at present from the producer-sellers;
(ii) to provide for the verification of accurate weights and scales and see that the producer-seller is not denied his legitimate due;
(iii) to establish market committees in which the agricultural producer will have his due representation;
(iv) to ensure that the agricultural producer has his say in the utilisation of market funds for the improvement of the market as a whole;
(v) to provide for fair settlement of disputed relating to the sale of agricultural produce;
(vi) to provide amenities to the producer-seller in the market;
(vii) to arrange for better storage facilities;
(viii) to stop inequitable and unauthorised charges and levies from the producer-seller; and
(ix) to make adequate arrangements for market intelligence with a view to posting the agricultural producer with the latest position in respect of the markets dealing with his produce".

9. The preamble of the Act says that tit is "an Act for the regulation of sale and purchase of agricultural produce and for the establishment, superintendence and control of markets therefore in Uttar Pradesh"

10. The prefatory note and the preamble shows that the object of the Act is to save the agricultural producer from innumerable charges, levies, exaction's and to enable him to have a say in the proper utilisation of the amounts paid by him, to reduce multiple charges, levies, exactions, charged from the producer and seller and, generally, to help the agricultural producer to sell his best advantage. Another object of the Act is

the development of new market areas and for efficient data collection and processing of arrivals in the mandis and for establishment of various markets in the State of U.P. Apart from the agricultural producer certain other transactions have also been included within the ambit of levy of fee in which both sides are traders and neither side is an agriculturist but this has been done for the effective implementation of the scheme of establishment of markets mainly for the benefit of producers (See **Rathi Khandsari Udyog Vs. State of U.P.** AIR 1985 SC 679). Therefore, the Act can hardly have any application if the agriculture producer or the agriculture produce are physically not present within the market area.

11. The relevant part of Section 17(iii) (b), which is the charging section, reads as follows:

"17. Powers of the committee:- A Committee shall, for the purpose of this Act, have the power to-

(i) …….
(ii) …….
(iii) Levy and collect:

(a) such fees as may be prescribed for the issue or renewal of licences, and

(b) market fee, which shall be payable on transactions of sale of specified agricultural produce in the market area at such rates, being not less than one percentum and not more than two percentum of the price of the agricultural produce so sold, as the State Government may specify bay notification, and such fee shall be realised in the following manner-

(1) if the produce is sold through a commission agent may realise the market fee from the purchaser and shall be liable to pay the same to the Committee.
(2) if the produce is purchased directly by a trader from a producer the trader shall be liable to pay the market fee to the Committee;
(3) if the produce is purchased by a trader from another trader, the trader selling the produce may realise it from the purchase and shall be liable to pay the market fee to the Committee; and
(4) in any other case of sale of such produce, the purchaser shall be liable to pay the market fee to the Committee:

Provided that no market fee shall be levied or collected on the retail sale of any specified agricultural produce where such sale is made to the consumer for his domestic consumption only:

Provided further that not withstanding anything contained in this Act, the Committee may at the option of as the case may be, the commission agent, trader or purchaser, who has obtained the licence, accept a lump sum in lieu the amount of market fee that may be payable by him for an agricultural year including any agricultural year prior to the commencement of the Uttar Pradesh Krishi Utpadan Mandi (Sanshodhan) Adhiniyam, 1994 in respect of which market fee is outstanding, in respect of such specified agricultural produce, for such period, on such terms and in such manner as the State Government may, by notified order, specify.

12. At the end of the section there is an explanation which reads as follows:

"Explanation:- For the purpose of clause (iii), unless the contrary is proved, any specified agricultural produce taken out or proposed to be taken out of market area by or on behalf of a licensed trader shall be presumed to have been sold within such area and in such case, the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed".

13. In exercise of powers conferred by Section 40, Rules have been framed, which are known as U.P. Krishi Utpadan Mandi Niyamavali, 1965, and Rules 66 and 68 read as follows:

"66. Market Fee (Section 17 (iii):- The Market Committee shall levy and collect market fee in the Market Area in accordance with the provisions of sub-clause (b) of clause (iii) of Section 17 of the Act at such rate as may be specified in the bye-laws:

Provided that no market fee shall be levied and charged prior to the date on which provisions of Section 10 of the Act are enforced:

Provided further that when the specified agricultural produce is presumed to have been sold in accordance with the explanation given under clause (viii) of Section 17 of the Uttar Pradesh Krishi Utapadan Mandi Adhiniyam, 1964, the price of such produce shall be the price prevailed for that type of produce in that market just on the previous working day.

(2) No market fee shall be levied more than once on any consignment of the specified agricultural produce brought for sale in the Market fee has already been paid on it in any Market Yard of the same Market Area and in respect of which a declaration has been made and a certificate has been given the seller in Form No. V"

"Recovery of fees (Section 17 (iii).- (1) The market fee on specified agricultural produce shall be payable as soon as such produce is sold through the Commission agent or directly to the trader, the Commission agent or directly to the trader, the Commission agent or the trader, as the case may be, shall charge market fee from the seller on sale voucher in Form No. VI and deposit the amount of market fee so realised with the Market Committee in accordance with the directions of the Committee issued in this behalf.

(2) The market fee shall be realised from the seller in the following manner:-

(i) If the specified agricultural produce is sold through the Commission agent or directly to the trader, the Commission agent or the trader, as the case may be, shall charge market fee from the seller on sale voucher in From No. VI and deposit the amount of Market fee so realised with the Market Committee in accordance with the directions of the committee issued in this behalf.

(ii) If the specified agricultural produce is sold directly by the seller to the consumer, the markets fee shall be realised by the servant of the market Committee authorised by it in this behalf.

(3) The licence fee shall be said along with the application for licence:

Provided that in case the Market Committee refuses to issue a licence, the fee deposited by the applicant shall be refunded to him.

(4) The payment of market fee and licence fee shall be made to the Committee in cash."

14. For proper appreciation of the provisions of the Act it is necessary to notice the relevant Constitutional provisions. Clause (1) of Article 286 of the constitution lays down that no law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of the territory of India. Article 245 lays down that subject to the provisioned of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. The State has, therefore, no legislative competence to make any I am which may operate or tend to operate beyond the territorial boundary of the State.

15. We may now examine the true scope of the charging section, namely, Section 17 (iii) (b0 of the Act keeping in mind the limitation continued in the Constitution.

16. A plain reading of Section 17 (iii) (b) of the Act shows that a Committee is empowered to levy and collect market fee which shall by payable on transaction of sale of specified agricultural produce in the market area. The words "specified agricultural produce in the market area" are important; and have to be given some meaning. It is well - settled principle of interpretation of statute that effort should be made to give meaning to each and every word used by the legislature. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. In **Aswini Kumar Gosh Versus Arvinda Ghosh**, AIR 1952 SC 369, the Court ruled that it is not a sound principle of construction to brush aside words in a statute as being in apposite surplusage, if they can have the appropriate application in circumstances conceivable within the contemplation of the statute. In **Rao Shiv Bahadur Singh Versus State of U.P.**, AIR 19533 SC 394, it was held that it is incumbent upon the Court to avoid the construction, if reasonably permissible, on the language, which would render a part of the Statute devoid of any meaning or application. The section presupposes the physical presence of the agricultural produce in the market area. If the agricultural produce is not brought physically within the market area and is not physically present then any transaction of sale of such agriculture produce cannot be brought within the purview of the Act. The manner of realisation of market fee as enumerated in sub-clauses (1), (2), (3) and (4) of section 17 (iii) (b) make reference to "produce". This again shows that the physical presence of the agricultural produce within the market area is necessary for levy of market fee. The explanation to clause (iii) appended at the end of the section laws down that unless the contrary is proved, any specific agricultural produce taken out or proposed to be taken out of a market area by or on behalf of a

licensed trader shall be presumed to have been sold within such area. The explanation can have application only if the agricultural produce is physically present within the market area. If Section 17 (iii) (b) is held to be applicable even in such cases where the agricultural produce is neither physically brought nor is in existence within the market area, the explanation can have no application at all. Chapter VI of the Rules deals with Fees, Levy and Collection. Sub-rule (2) of Rule 66 lays down that no market fee shall be levied more than once on any consignment of the specified agricultural produce brought for sale in the Market Yard if the market fee has already been paid on it in any Market Yard of the Same Market Are. The words "specified agriculture produce brought for sale in the market yard" are important and clearly indicate the physical bringing in of the agricultural produce within the market yard. The manner of recovery of the fee is provided in Rule 68 and it lays down that the market fee on specified agricultural produce shall be payable as soon ass such produce is sold in the Principal Market Yards or sub-market Yards. It makes reference to the sale of the agricultural produce in the market yard or sub-market yard, which again means that the liability to pay market fee would arise only after title to the agricultural produce which is present in the market yard or sub-market yard is passed on to the buyer.

17. The view which we are taking is supported by the dictum of the Apex Court. After the enforcement of the Act, the levy of market fee by the different market committees was challenged by traders of the State on variety of grounds which were examined in great detail in Ram Chander Kailash Kumar & Co. Vs. State of U.P. AIR 1980 SC 1124. One of the contentions raised, which has been recorded as point no. 18 (in para 9 of the reports) was as follows:

"(18). No market fee can be charged if only goods are brought in a market area and despatched out side it without there taking place any transaction of purchase and sale in respect of these goods."

18. This point was answered in paragraph 29 and the same is being reproduced below:-

"29. This point urged on behalf of the appellants is well founded and must be accepted as correct. On very wordings of clause (b) of Section 17(iii) market fee is payable on transactions of sale of specified agricultural produce in the market area and if no transaction of sale takes place in a particular market area no fee can be charged by the market committee of that area. If goods are merely brought in any market area and despatched out side it without any transaction of sale taking place their in, then no market fee can be charge. If the bringing of the goods in a particular market area and their despatch therefrom are as a result of transactions of purchase and sale taking place outside the market area, it is plain that no fee can be levied."

19. These observation show that bringing in goods in market area and, thereafter, a transaction of sale takes place therein is sine qua non for levying the market fee and in absence of the presence of the goods in the market area no market fee can be levied.

While examining the sit us of sale for determining the validity of levy of market fee under a similar enactment, namely,

Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966, **Shalimar Chemical Works Ltd.** AIR 1997 SC 2502 took into consideration the provisions of Sales of Goods Act, 1930. The problem here may also be examined in the light of the said Act. The admitted position is that after receipt of the order the petitioner purchased rice from millers in Haryana, Punjab and Madhya Pradesh which was transported by road to the ports at Mumbai and Kandla where it was loaded on the ships for being despatched to South Africa. The clearing and forwarding agent of the petitioner then sent the Bill of Landing to the importing firm in South Africa for retiring the goods. Section 4 (3) of Sale of Goods Act lays down that where under a contract of sale the property in the goods, is transferred from seller to the buyer, the contract is called a sale, but where the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. Since the property in the exported rice was not transferred to the importing firm of South Africa at Ghaziabad, the position of the contract between the parties at Ghaziabad, the position of the contract between the parties at Ghaziabad was only an agreement to sell and not a sale. Chapter III of this Act deals with "transfer of property as between the seller and the Buyer". Section 18 provides that when there is a contract for sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Here the contract for sale at Ghaziabad was with regard to unascertained goods as the precise goods, which had to be appropriated to the contract, had not been identified and the contract was only by description and the weight of goods. Section 19(3) lays down that unless a different intention appears, the rules contained in Sectioned 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Sections 20, 21 and 22 refer to contract for sale of specific goods and, therefore, they can have no application here. Sub-section (1) of Section 23 lays down that where there is contract for sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Sub-section (2) of the same section lays down that where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. In view of these provisions the exported rice will be deemed to have been unconditionally appropriated to be contract when in was loaded on the ship for the purpose of transmission to the buyer and it is at this stage that the property in the goods (rice) passed to the buyer. Therefore, the sale took place only when the rice was actually loaded on the ship and prior to that it was only an agreement. In P.S.N.S. **Aambalavana Chettiar and Ltd. Vs. Express news papers Ltd.**, AIR 1968 SC 741, it was held as under in paragraph 11 of the reports:-

20. "Section 18 of the Sale of Goods Act provides that where there is a contract for the sale of unascertained goods no

property in the goods in transferred to the buyer unless and until the goods are ascertained. It is condition precedent to the passing of property under a contract of sale that the goods are ascertained. The condition is not fulfilled where there is a contract for sale of a portion of a specified larger stock. Till the portion is identified and appropriated to the contact, no property passes to the buyer".

21. In **Mahabir Commercial Company Vs. C.I.T. West Bengal,** AIR 1973 SC 430, the same principle was explained in the following words:

"Under the c.i.f. contract, prima facie, the property in the goods passes once the documents are tendered by the seller to the buyer or his agent as required under the contract. But where the seller retains control over the goods by either obtaining a bill of lading in his name or to his order, the property in the goods does not pass to the buyer until he endorses, the bill to the buyer and delivers the documents to him.

The appropriation of the goods to the contract by itself could not be such as to pass the property in the goods if it appears or can be inferred that there was no actual intention to pass the property but if however the seller's dealing with the bill of lading is only to secure the contract price not with the intention of withdrawing the goods from the contract, and he does nothing inconsistent with an intention to pass the property, the property may pass either forthwith subject to the seller's lien or on conditional performance by the buyer of his part of the contract."

22. In Jute Gunny Brokers Ltd. Vs. Union of India, AIR 1961 SC 1214 (paragraph 44), it was held that in view of Section 18 of the Sale of Goods Act till the appropriation takes place and goods are actually delivered, the pucca delivery orders is a contract for the sale of unascertained goods and no property in the goods is transferred to the buyer. In view of these authoritative pronouncements there cannot be even a slightest doubt that till the rice was actually loaded on the ship (carrier)for the purpose of transmission to the buyer, the goods had not been appropriated to the contract and, therefore, till that stage there was only an agreement of sale. It became a sale only after the rice had been loaded on the ship. Therefore, there was no transaction of sale at Ghaziabad and it was merely an agreement of sale on which no market fee could be charged.

23. It is noteworthy that the charging Section 17(iii) (b) empowers the Committee to levy and collect market fee which shall be payable on the transaction of sale of specified agricultural produce in the market area at such rates, being not less than 1 percentum and not more than 2 percentum of the price of the agricultural produce so sold. The measure of levy of the fee is, therefore, on the price of the goods sold,. It obviously means a completed transaction of sale or a concluded sale. If there is only an agreement and the agreement fails, the remedy for the aggrieved party is to sue for damages. Obviously no fee can be charged on damages. The occasion for levy of fee can arise only on a concluded sale and as the sale has not taken place within the market area of Gghaziabad, no mandi fee can be levied. We are supported in our conclusion by the

following observations of the Apex Court in Sales Tax Officer As, **M/s. Budhya Prakash Jai Prakash,** AIR 1954 SC 459:

"The substance of the matter is that the sales tax is a levy on the price of the goods, and the reason of the thing requires that such a levy should to be laid, unless the stage has been reached when the seller can recover the price under the contract. It is well-settled that an action for price is maintainable only when there is a sale involving transfer of the property in the goods to the purchaser. Where there is only an agreement to sell, then the remedy of the seller is to sue for damages for breach of contract and not for the price of the goods. The position therefore is that a liability to be assessed to sales tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only an agreement to sell which can only result in a claim for damages. It would be contrary to all principles that damages for breach of contract are liable to be assessed to sales tax on the ground that they are in the position as sale price"

Sri B.D. Mandhyan, learned counsel for the respondent, has strenuously urged that market fee is levied on "transaction of sale "and not on "sale" only and, therefore, what is to be seen is where the transaction took place and not the situs of sale. He has referred to the original Hindi text of the Act, where Section 17 (iii) (b) is worded as, "कृषि उत्पादन के क्रय विक्रय के सौदों पर मंडी शुल्क लगाने और वसूल न करने..." and has submitted that there is distinction between the levy of market fee on transactions of sale and the imposition of tax on actual sale when the property in goods is transferred. He has further urged that sales tax could be imposed upon the "goods" when goods are transferred by sellers to buyers but the market fee becomes payable as soon as the transaction(सौदा) takes place in the market area irrespective of whether delivery of goods or price is made immediately or is postponed. According to learned counsel the use of the term "transaction of sale" in plural in Section 17(iii) (b) in compendious sense has been made in the Act to include any of the following events:

(i) Agreement to sell or purchase, or
(ii) event of delivery of goods under the said agreement, or
(iii) payment of price, whether the price is paid at the time of the transaction or is postponed to be paid subsequently after delivery.

24. The argument suggested by Shri Mandhyan would mean that even an agreement to sell without the presence or existence of the agriculture produce will come within the ambit of the charging provision. The argument further suggests that if the agreement takes place outside the boundary of the State of U.P., the provisions of Section 17(iii)(b) of the Act would still become applicable. It may now be examined whether such an interpretation would keep the Act within the constitutional limits. Clause (3) of Article 246 of the Constitutions provides that the legislature of the State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule and power is subject to clauses (1) and (2) of the Article. The preamble of the Act viz. 'An Act to provide for the regulation of sale and purchase of agricultural produce and for the establishment, superintendence

and control of markets thereof in Uttar Pradesh', clearly shows that the Act has been made with reference to Entry 28 of the State List, which is 'markets and fairs'. In **M/s Chandra Prakash Agarwal and Company Vs. State of U.P.**, 1990 ALJ 459, it has been filed by a Full Bench that U.P. Krishi Utpadan Mandi Adhiniyam has been enacted with reference to Entry 28 of the State List. The same view has been taken with regard to similar enactments of other States. In **Kewal Krishan Puri and another Vs. The State of Punjab and others**, AIR 1977 Punjab and Haryana 347 (F.B.), the Punjab Agricultural Produce Markets Act and in **K.N. Marularadhya Vs. The Mysore Marketing (Regulation) Act, 1966,** were held to have been made with reference to Entry 28. The State legislature while making a legislation having reference to Entry 28 can make a law concerning markets and fairs. The meaning of the word 'market' is as under"

New Lexicon Webstor Dictionary:

A place where many sellers display and sell their goods; the body of persons concerned with buying and selling a particular class of goods; a region or outlet for successful trading.

Black's Law Dictionary:

Place of commercial activity in which goods, commodities, securities, services Ltd. are bought and sold.

Oxford Dictionary:

1. The meeting together of people for the purchase and sale of provisions or livestock, publicly exposed at a fixed time and place.

2. A place or seat of trade.

Corpus Juris Secundum:

1. The term 'market' conveys idea of selling and it assumes the existence of a trade and implies competition and also implies the existence of supply and demand for without the existence of either factor no market is shown.

2. The term is used to denote that phase of commercial activity in which articles are bought and sold.

Law Lexican by P. Ramanatha Aiyar:

1. A market is a place set apart for the meeting of the general public of buyers and seller freely open to any such, to assemble together, where any seller may expose his goods for sale and any buyer may purchase.

2. Market implies a public time and appointed place of buying and selling goods.

3. It generally means a designated place in a town or city to which all persons can repair who wish to buy and sell articles there exposed for sale.

25. In common parlance market would mean a place where goods are exposed for sale to which buyers and sellers have free access. It presupposes the physical presence of the seller, the buyer and also the goods, and this activity must be carried out on a large scale. Inspite of the security constraints the jewellers also expose and exhibit their

goods in their shop in a market. An agreement can be arrived at between two parties by letters or telecommunication messages and this can be done easily while sitting at home in a residential area of even in holiday resort. In such a case there is no requirement of a fixed place set apart for the meeting of the general public of buyers and sellers and there is no display of goods. If the agriculture produce is not brought in and is not exhibited for sale at a fixed place there can be no buyers. Such an activity of merely entering into an agreement by letters or telecommunication message can not be held to be a market. As mentioned earlier, the Act in order to be constitutionally valid must pertain to Entry 28 of State List which is 'markets and fairs'.

26. If on a plain interpretation of the language used in the statute, it transgresses limits imposed by the Constitution, the statute should be read down and should be interpreted in a manner which brings it within the constitutional limit. The principle was applied for upholding the validity of the Act while answering the reference made by the Governor General. In the matter of the Hindu Women's Right to Property Act, 1937, AIR 1941 F.C. 72. In **R.M.D. Chamarbaugwalla Versus Union of India**, AIR 1957 SC 628, a Constitution Bench after referring to the aforesaid decision explained the principle as under in para 13 of the reports:

"In 1941 F C R 12: (AIR 1941 F C 72), the question arose with reference to Hindu Women's Rights to Property Act (18 of 1937). That was an Act passed by the Central Legislature, and had conferred on Hindu widows certain rights over properties which devolved by intestate succession and survivorship. While the subject of devolution was within the competence of the Centre under Entry 7 List III, that was limited to property other than agricultural land, which was a subject within the exclusive competence of the Provinces under Entry 21 in list II. Act No.18 of 1937 dealt generally with property, and the contention raised was that being admittedly and ultra vires as regards agricultural lands, it was void in its entirety. It was held by the Federal Court that the Central Legislature must, on the principle laid down in Macleod V. Attorney General for New South Wales, 1891 A.C. 455(k), be presumed to have known its own limitations and must be held to have intended to enact only laws within its competence, that accordingly the word 'property' in Act No.18 of 1937 must be construed as property other than agricultural land, and that, in that view, the legislation was wholly intra vires….."

In Jyothi Timber Mart Vs. Calicut Municipality, AIR 1970 SC 264, the expression 'a tax shall be levied on timber brought into the city' occurring in Section 126 of Calicut City Municipality Act was interpreted as meaning 'brought into municipal limits for the purposes of consumption, use or sale and not for any other purpose' so that the legislation may be compatible with Entry 52 of List II which is "Taxes on Entry of goods into a local area for consumption, use or sale therein."

27. Therefore, the provisions of the Act have to be interpreted in a manner that they tend to operate within the State and they do not affect or have any ramification beyond the boundaries of the State. Further, the legislation must pertain

to the relevant Entry of List II, namely, Entry 28, which is markets and fairs and, therefore, the physical presence of the agriculture produce within the market area is absolutely necessary for the applicability of Section 17(iii) (b) of the Act.

28. The main reason given by the revisional authority for upholding the levy of market fee is that the order for export of rice was received by the petitioner firm at Ghaziabad, the consigor of the rice was the petitioner firm and the sale price of the rice was ultimately received by it at Ghaziabad. In our opinion, these facts alone cannot justify the levy of market fee. Assuming that instead of purchasing rice from Haryana, Punjab and Madhya Pradesh the petitioner firm had purchased the same from a foreign country like Burma or Pakistan and had sold the same to a firm in South Africa the aforesaid three factors would have remained the same. Can it be said that Mandi Samiti was still entitled to levy market fee though the rice was neither produced in India nor it was ever brought inside the country? The word market with reference to which the legislation has been made cannot be ignored, and, as mentioned earlier, it presupposes the existence of goods therein. This being the admitted position that the rice was never brought or was in existence within the market area of Mandi Samiti, Ghaziabad, or for that matter within the State of U.P. and in view of our finding that the sale took place only when the rice was loaded on the ships at the port, we are clearly of the opinion that there was no transaction of sale within the market area of Mandi Samiti, Ghaziabad. Therefore, the Mandi Samiti is not entitled to levy any market fee upon the petitioner and the impugned levy has to be set aside.

29. In the result, the writ petition succeeds and is allowed. The impugned orders dated October 12, 1997 and January 25, 1998 passed by respondent no.2 and the order dated March 9, 1998 passed by respondent no. 1 are hereby quashed.

Petition Allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.7.2001

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

Civil Misc. Writ Petition No. 607 of 2001.

West U.P. Sugar Mills Association and others ...Petitioners
Versus
State of U.P. ...Respondent.

Counsel for the Petitioners:
Shri Sudhir Chandra
Bharati Sapru.

Counsel for the Respondents:
S.C.

Constitution of India, Article 19 (s) read with U.P. Tax on Entry of Goods Act-Section 4-A-whether the provisions of Section 4 are violative to Article 19(I) of the Constitution of India –held-No-Section 4-A is a convenient devices for faciliting. The collection Court can not substitute its wisdom upon the wisdom of legislature.

By the Court

1. By means of this petition the petitioner has challenged the

constitutional validity of U.P. Ordinance No. 6 of 2001 by which a new Section 4 A has been inserted in the U.P. Tax on Entry of Goods Act, 2000 (hereinafter referred as to an Act) and also the Notification No. 508 dated 24.2.2001 and Notification No. 636 dated 26.2.2001.

We have heard learned counsel for the parties.

2. The petitioner No. 1, 2 and 3 are Association of Sugar Mills and other petitioners are the individual Sugar Units manufacturing sugar is a Scheduled Industry under the provisions of the Industrial Development and Regulation Act 1951 and it comes under Item no. 25 of the First Schedule of the Act. Since the whole field in respect of sugar is occupied by the Central Legislation, it is only parliament that can levy any on sugar and the State Government is not empowered to do so. However, Entry 52 of list 2 of the seventh Schedule to the Constitution permits a tax by the State Legislature on entry of goods into a local area for consumption, use or sale therein. Acting under this entry the U.P. Government issued Ordinance No. 21 of 1999 which came into force on 1.11.1999 vide Notification dated 31.10.1999, copy of which has been annexed as Annexure-3 to the petition. Under Section 4 (1) of this Ordinance tax was levied on the entry of any goods specified in the Schedule into a local area; within U.P. Under Section 4(2) the Entry Tax was payable by a dealer who brings into a local area any such goods. Under Section 5, every dealer is to get himself registered under the Trade Tax Act and Section 6 provides for penalty.

3. By Notification dated 31.10.1999. The Governor of U.P. imposed levy of Entry Tax on sugar at 2%. True copy of the Notification is annexed as Annexure – 4 to the petition. However, soon after the promulgation of the ordinance the State Government decided not to impose the same, and hence the Commissioner, Trade Tax issued a circular dated 18.9.1999 conveying the decision of the Cabinet that the collection of Entry Tax will be deferred till further orders. Copy of the Circular is annexed as Annexure –5 to the petition. Subsequently the Ordinance was converted into an Act being No. 12 of 2000 after assent of the Governor. A copy of the Act has been annexed as Annexure-6 to the petition. Copy of the Rules framed under the Act are Annexure –7 to the petition.

4. The U.P. Government by Notification dated 23.8.2000 changed the word ‘Sugar’ appearing at Serial No. 11 of the Schedule to ‘Non-levy Sugar’. True copy of this Notification has been annexed as Annexure –8 to the petition. Immediately thereafter the licensed sugar dealers started an agitation against the levy and the entire sugar trade remained suspended for sometime. Thereafter an agreement with the sugar traders was entered into by the Government and the Minister for Institutional Finance announced that the Entry Tax would be charged from sugar mills owner and not from traders. After this announcement the traders called off their strike. True copies of the news item are annexed as –9 and 10 to the petition. Thereafter, the impugned Section 4 A was added to the Act which casts a liability on the manufacturer to collect the entry tax from dealers at the time of sale of sugar to them. Section 4 A reads as follows:-

"4-A- Realisation of tax through manufacture

(1) Notwithstanding anything contained in any other provisions of this Act, any person who intends to bring into a local area from any area within the State, such goods Specified in the Schedule as may be notified by the State Government shall at the time of taking delivery of the goods from the manufacturer, pay to the manufacturer the tax payable on entry of such goods into the local area and the manufacturer shall receive the tax so paid.

(2) The manufacturer receiving the tax under sub-section (1) shall submit to the assessing authority a return in respect of the goods supplied, and the tax received by him under sub-section (1) and the deposit the tax so received in such manner and within such time as may be prescribed.

(3) Where any manufacturer refuses to receive or fails to deposit the tax under this section he shall be liable to pay the tax alongwith the interest and penalty, if any, payable thereon which shall be recoverable as arrears of land revenue.

(4) Where the assessing authority is satisfied that only goods referred to in sub-section (1) is lost or destroyed after its delivery by the manufacturers and before its entry into the local area, it shall direct that the tax paid in respect of such goods shall be refunded to the person who had paid the tax under sub-section (1): Provided that no claim for such refund shall be entertained after the expiry of six months from the date of the loss or distribution of the goods.

(5) The provisions of section 5 shall not apply to a person making payment of the tax under sub-section (1) and such person shall not be assessed or required to submit under this Act."

Rule 7 inserted by U.P. Tax on Entry of Goods (Amendment) Rules 2001 read as follows: -

"7 Realisation and deposit of tax by the manufacturer: - The manufacturers in Uttar Pradesh responsible for selling, supplying or otherwise dispatching the goods notified by the State Government under section 4-A to any dealer in Uttar Pradesh shall:-

(a) Realise the amount of tax payable on the value of goods through a demand draft in the name of concerned Assessing Authority and shall deposit the same into the Government Treasury before the expiry of the next seceding month.

(b) Submit to the Assessing Authority before the expiry of the next succeeding month. A monthly returns दृढ such turnover in Form 'F' giving detailed information in the in the Annexure thereof, alongwith the treasury challan for proof of the deposit of the tax.

(c) Issue a certificate to the dealer in Form G within two months of the realisation and within one month of the deposit of tax. No single certificate shall cover transactions of more than one month."

5. The U.P. Government vide Notification dated 26.2.2001 notified that non-levy sugar shall be the goods notified that non-levy sugar shall be the goods

notified for the purpose of Section 4 A. A true copy of the same is annexed as Annexure –2 to the petition.

6. In paragraph 19 of the petition it is alleged that section 4A and the new Rule 7 makes it clear that entry Tax will be imposed on the sugar manufacturer who has to collect the Entry Tax at the time of sale of sugar by way of demand drafts even though such sugar has not entered the local area outside the local area of the sugar factory. This is alleged to be contrary to Entry 52 of List –2 of the Seventh Schedule. In paragraph 21 of the petition it is alleged that the sugar mills are not dealers, and hence no liability can be imposed on them to collect tax deposit it file returns by virtually making them dealers and assesses. In paragraph 22 of the petition it is alleged that Entry Tax can be imposed on actual entry of goods into a local area for consumption, use of sale therein, and hence it cannot be collected on the declaration of intention to bring the goods a local area. In paragraph 23 of the petition it is alleged that the imposition of tax and collection of it by the sugar factories at the time of sale of sugar would mean that the tax is being collected at the time of sale of sugar without its entering into a local area. This is alleged to be unconstitutional being ultra vires Entry 52 of List –2 of the Seventh Schedule. In paragraph 27 of the petition it is alleged that by inserting 4 A the State Legislature changed the nature of the Tax itself and Tax can be charged even though there is no event of entry of sugar into a local area.

7. The petitioners have relied on the decision of the Supreme Court in **Entry Tax officer Vs. Chandanmal Champalal and company** (1995 STC 5). They have also relied on **Laghu Udyog Bharti Vs. Union of India** (AIR 1999 SC 2596) of 1999 (6) 418 where it was held that Service Tax can only be imposed on the person rendering the service and not the customer. In paragraph 31 of the petition it is a alleged that simply because the sugar traders agitated and did not want to pay the entry tax directly to the Trade Tax Department this was not a valid ground for the State Government to make the sugar factories liable to collect the tax from the traders by way of demand drafts. It is alleged that placing this burden regarding entry tax on the sugar manufacturer is an unreasonable condition imposed on the sugar factories and is violative of Article 19 (g) of the Constitution of India and it also conflicts with Rule 6.

8. The petitioners have relied on the decision of the Supreme Court in State of Bihar and others Vs Bihar Chamber of Commerce (1996-9 SCC 136) wherein it was held that 'what attracts levy under Entry –52 is the entry of the goods into a local area for consumption or for use or for sale within that local area. In paragraph 33 of the petition the petitioners have also alleged that the Notification dated 31.10.1999 was issued when the U.P. ordinance No. 21 of 199 was not enforced, and the ordinance came into force on 1.11.1999.

A counter affidavit has been filed on behalf of the State Government.

9. In paragraph 3 f/- of the counter affidavit it is alleged that Section 4 A has not disturbed the Entry Tax imposed by Section 4. All that Section 4 A says is that Entry Tax is to be collected by the manufacturer while giving delivery of the

goods to the person who would be liable to pay Entry Tax when he takes the goods into the local area, hence the manufacturer has not been saddled with any liability of tax under the Utter Pradesh Tax on Entry of goods Act. Section 4 A has only been introduced to facilitate the machinery of collection of the entry tax, the liability of which continues to be that of the person who brings the goods into the local area for consumption, use or sale therein. Section 4 A does not provide that the liability to pay the entry tax is that of the manufacturer. The manufacturer has only the liability to collect the tax from the dealers and deposit it with the Government. If the manufacturer fails to deposit the tax then Interest and Penalty can be levied on him. Sub section 4 provides that if after payment of entry tax to the manufacturer the goods in respect of which such tax has been paid is lost or destroyed after their delivery by the manufacturer and before their entry into the local area, the tax paid shall be refunded. Hence it is alleged that section 4 A does not transfer the liability for payment of Entry Tax on the manufacturer, rather it provides for a simplified mechanism for collection of that tax. There are similar Provisions in other Taxing statues also e.g. Section 8-d of U.P. Trade Tax Act and various Provisions in the income Tax e.g. The employer making the payment to the employee earning salary has to deduct tax at source, representative assess (Ss.160 to 167 income Tax Act) etc. The person deduction tax at source is required to deposit those amounts with the Central Government, and if they do not discharge their duties penal consequences are envisaged in the event of failure to deduct or pay such tax. Thus 4 A is not a new concept in Tax Laws, It was made only for more efficient mechanism for collection of the Entry Tax. The person bringing the goods into different local areas may not be easily traceable, which may result in poor collection of the entry Tax or tax avoidance. Hence it was necessary to provide for an effective mechanism to collect the Entry Tax. To provide for an effective mechanism to collect the Entry Tax.

A rejoinder affidavit ahs also been filed and we have perused the same.

10. A perusal of Section 4 A shows that the stand of the Government appears to be correct. Section 4A appears to be only a convenient device for collecting the Entry Tax which continues to be imposed on the dealer and not on the manufacturer. What Section 4 A has done is to provide for payment of the Entry Tax by the dealer to the manufacturer. The Legislature in its wisdom may have through that could facilitate the collection of the Entry Tax regarding which the authorities may be having some difficulties. It is settled law that the motive of Legislation cannot be seen, The doctrine of colourable legislation only relates to Legislative competence and not to the motive of the Law. Moreover, because of some hardship, which the sugar manufacturer has to face, this does not mean that the Act is beyond Legislative competence. There are similar Provisions in various Taxing Institutes, which have been held to be valid by the Court e.g. Section 8 D of U.P. Trade Tax Act, Provisions for deduction at source by the Employer, and for Representative Assesses under Income Tax Act, etc. Greater freedom has to be given to the Legislature and the authorities with regard

to Tax measures, as these are often complicated. The validity of section 8 D of the U.P. Trade Tax Act has been upheld by this Court in **V.K. Singhal and others Vs. State of U.P. and others** 1995 U.P.T.C. 337. It is settled law that the mode of recovery cannot alter the character of the levy nor can it determine the competence of the state Legislature vide **Venkateshwara Theatre Vs State of Andhra Pradesh** AIR 1993 (3) SCC 677, **Buza Dooars Tea Company Vs. State of West Bengal** AIR 1989 SC 2015; **Govind Saran Ganga Vs. C.S.T**. AIR 1985 SC 1041 and **Kheer Bari Tea Company Vs. State of Assam** AIR 1964 SC 925; **M.D. Century Cooperative Bank Vs. 3rd ITO** AIR 1975 SC 2016. The Supreme Court held that the power collect a tax means the power to collect it properly and effectively and the same view was taken in **Orient Paper Mills Vs. State of Orrissa** 12 STC 357 and **Chhota Bhai Jetha Bahi Patel Vs. M.P. 30 STC 1**. In **V.K. Singhal Vs. State of U.P.** 1995 UPTC 337 this Court upheld the validity of section 8 D and observed that the power to impose tax also include the power of collection by means of advance payment of tax or deduction of tax at source to be finally adjusted at the time of filing of the return or the assessment.

11. Sri Sudhir Chandra learned Senior Counsel for the petitioner submitted that Section 4 A puts the entire liability on the manufacturer and even makes him liable to penalty. We do not agree. In our opinion the liability continues to be of the dealer, but Section 4 A was inserted since the Legislature in its wisdom thought there was some difficulty in collection/realisation of the tax. Under Section 4 A manufacturer is in the position of a middle man between the dealer and the Government and this concept is not unknown to Tax Law. For instance under the Income Tax Act the Employer is also in a position of the middle man when deducts tax from the salary of the Employee, or Representative Assesses. The penalty is imposed only if the manufacturer refuses to receive or fails to deposit the tax. If he does not want to suffer the penalty the manufacturer should not fail to receive or deposit the Tax. Moreover, sub section (4) of section 4 A makes it clear that if the goods are lost or destroyed after its delivery by the manufacturer and before its entry into the local area, the concerned authority shall direct that the tax paid in respect of such goods shall be refunded to the person who had paid the tax under sub-section (1). Sub section (4) of Section 4-A thus protects the person who had paid the tax in the contingencies of the goods being lost or destroyed after delivery by the manufacturer and before entry into the local area. This provisions make it clear that what is being imposed is Entry Tax and in case the goods never entered the local area the tax has to be refunded.

12. Sri Sudhir Chandra learned senior counsel for the petitioner submitted that often there is a great delay in refund by the Tax authorities. We are aware of this situation and we are of the opinion that tax refunds whenever a person is entitled to the same must be made promptly. Hence whenever the authority concerned receives an application that goods are lost or destroyed after delivery by manufacturer and before entering into a local area it must decide this application very expeditiously not later than months of the receipt of the application. It the authority is satisfied that such goods were

lost or destroyed before entering into the local area the refund must be paid by the State Government within a month of the recording of the satisfaction of the Assessing Authority. Sri Chandra submitted that Section 4 A levies a tax on intention and not on actual entry of goods into the local area. In our opinion sub section (4) of Section 4A must be read alongwith sub section (1). Sub section 4 deals with the situation where despite an intention goods are not brought into the local area. In such a situation the tax has to be refunded as provided by sub section 4. Hence the statute has also catered for this situation.

13. The only objection can be regarding delay in the refund but we have already directed above that this refund, if there is entitlement, must made within the period specified above.

14. As regards the objection that the tax is only on intention and not on actual entry of goods into a local area, in our opinion the manufacturer obviously cannot predict whether the dealers buying goods will actually bring them into the local area or not. All that the manufacturer can know is what the dealers informs him. However, since the Entry Tax has to paid by the dealers to the manufacturer at the time of taking the delivery of the goods from the manufacturer obviously no dealer in his senses will pay the tax and will yet not bring the goods into the local area. If the goods are lost or destroyed he can get refund vide sub section 4. The real fear of the petitioners as also stated expressly by Sri Sudhir Chandra is that petitioners would be harassed by the Trade Tax Authorities deal with Entry Tax also. It is true that Trade Tax Authorities in our Country have acquired a reputation of harassing even law-abiding businessmen and this is most improper. However, this Court cannot decide the validity of the Statute merely because of a chance of its misuse. It is quite possible that Section 4 A was enacted because of the agitation by the dealers. However, as already stated above, notice of an Act or chance of its musses cannot be a ground for declaring it unconstitutional.

15. Sri Sudhir Chandra learned senior Counsel for the petitioner tried to distinguish the decision of this Court in **V.K. Singhal Vs. State of U.P.** (supra) and submitted that in the present case the manufacturers of sugar have no nexus or connection with the taxable event. For this contention he relied on the decision of the Supreme Court in **Laghu Udyog Bharti Vs. Union of India** (supra). In that case the Government had framed Rules that not only would the service tax payable by the contractor be collected from them by the contractee (i.e. the person receiving the services and paying for them), but he shall also be responsible for filing returns and also subjected to penalties. The Supreme Court held that this was not valid. We have carefully considered the above decision.

16. In our opinion this decision is clearly distinguishable. It may be noticed that in **Laghu Udypg Bharties** case (supra) what was challenged was the validity of the Rules and not some section of the parent Act itself. The Supreme Court in that case was not concerned with the validity of any Provision of the Act. After interpreting Section 65 to 71 of the parent Act the Supreme Court was of the opinion that the Rules were in violation of the provisions of the Act itself. On the

other hand, in the present case we are not concerned with the validity of any Rule made under the Act but we are concerned with the Constitutional validity of Section 4 A which has become part of the Act itself. Hence the decision in **Laghu Udyog Bhartis** case is clearly distinguishable.

17. As regards the argument on the basis of Article 19(1) (g) of the Constitution we are of the opinion that Section 4 A does not place any unreasonable restrictions on the right of the petitioners, to do business. Section 4 A, as already observed by us, is only a convenient device for facilitating the collection of the Tax which the Legislature thought would otherwise be evaded. This Court cannot substitute its own wisdom for the wisdom of the Legislature in such matters relating to fiscal statutes. It is well known that the Legislature and the Government has to think of various contingencies in taxing measures, and this Court can only interfere if there is any Constitutional violation or violation of any Statute. However, we find no Constitutional invalidity in Section 4 A or in the impugned Notification.

The petition is therefore, dismissed.

18. However, before parting with the case we would certainly agree with the apprehension of the petitioners that they may be harassed by the Trade Tax Authorities and hence we direct the commissioner, Trade Tax U.P. to issue a Circular forthwith directing all Trade Tax Authorities that they must not harass the sugar manufacturers, and if they do so they will be severely punished.

Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2001

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

Second Appeal No. 118 of 1982

Kuldeep Sharma and others ...Appellant.
Versus
Satyendra Kumar Sharma and others ...Respondents

Counsel for the Appellants:
Shri I.N. Mishra
Shri Manoj Mishra,
Shri A.M. Mishra
Shri S.M. MIshra
Shri V.S. Saxena
Shri J.P. Pandey
Shri V.K.S. Chaudhary

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Shri Sankatha Rai
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Shri K.N. Tripathi
Shri K.R. Singh
Shri Anurag Jauhari
Shri Rajeev Trivedi

Code of Civil procedure 1908 Section 100- Second Appeal Scope and Limitations- concurrent finding of facts recorded by both the courts below regarding benami transaction not interfered.

Held –Para 29

All these circumstances are very material and coupled with the evidence, as discussed above, show that there is no reason to interfere in the concurrent findings of the Courts below that the sale deed in favour of Smt. Yashoda Devi was benami transaction.

Case Law discussed:

AIR	1980	SC-1754

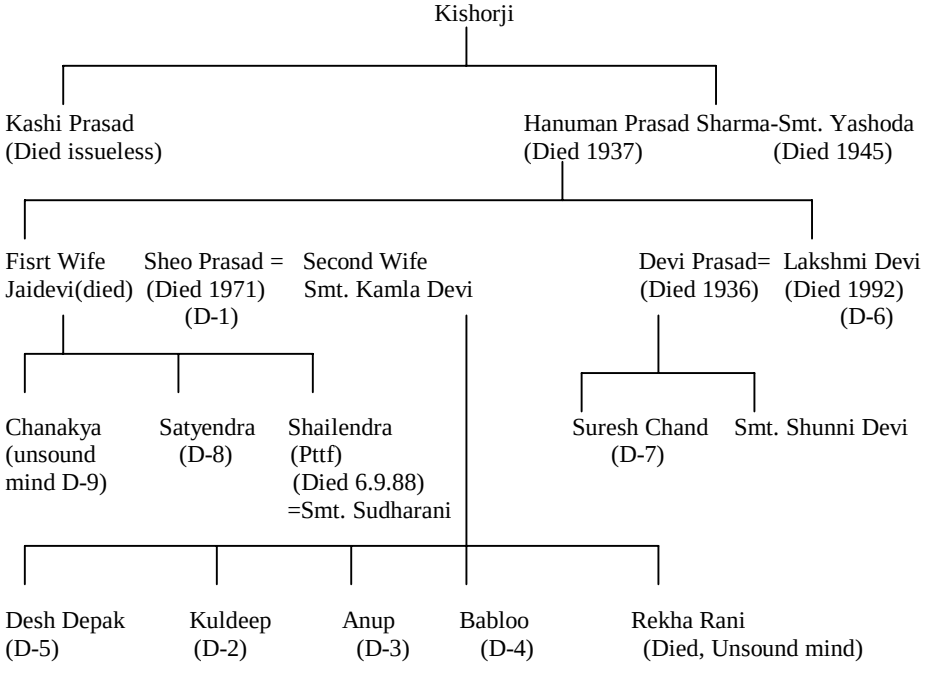
AIR 1977 SC-796
2000 (5)SCC-652
AIR 1969 MAD 229
AIR 1973 ORISSA 85
AIR 1965 SC-271
AIR 1957 ALL-215
1980(2) SEC-237
AIR 1974 SC-171

By the Court

1. The Original Suit No.41 of 1977 was filed by the respondent no. 1 against the appellants and other respondents for partition of his 1/16th share over house no. 22, Dillkusha, New Katra, Allahabad.

The case of the plaintiffs can be understood properly by the following pedigree:

2. It is alleged that the house in dispute was purchased by sale deed dated 1.3.1936 from Allahabad Improvement Trust for Rs. 1200- by Hanuman Prasad, grand father of the plaintiff from his ancestral as well as own founds in the name of his wife. Smt. Yashoda Devi, grand mother of the plaintiff; that Smt. Yashoda Devi was only benamidar das she had no funds of her own to purchase the house; that Smt. Yashoda Devi was under the control of his son Sheo Prasad Who fraudulently got a gift deed executed from her in his favour of the house in dispute on 5.2.1945. Smt. Yashoda Devi died some time after in the year 1945; that the appellants claim the property on the basis of the gift deed. However, Smt. Yashoda Devi was only Benamindar and has no right to execute the gift deed on the house; that, therefore, the plaintiff has 1/16 the share in the same.



3. The appellants only contested the case. The other defendants respondents admitted the plaintiff's case. The appellants however did not dispute the was pedigree, but they claimed that the house in dispute was acquired by Smt. Yashoda Devi from her straidhan and she was absolute owner of the same; that it was not acquired from the ancestral funds of by the earnings of Hanuman Prasad; that Devi Prasad another son of Hanuman Prasad died in October, 1936 and his wife shifted to maika. Sheo Prasad son of Smt.Yashoda Devi was looking after her and the property was gifted by Smt. Yashoda Devi in favour of Sheo Prasad with her own free will; that, therefore, appellants became absolute owner of the property; that the plaintiff has no share in the same.

4. It is further pleaded that the plaintiff is residing in the house as a licensee and the suti is barred by limitation and also by the principle of estoppel and acquiescence.

5. The trial court recorded the oral as well as documentary evidence and recorded a finding that Smt. Yashoda Devi was Benamidar of the house. It was purchased by Hanuman Prasad from his own funds; that, therefore, Smt. Yashoda Devi has no right to right the property to her son Sheo Prasad. The gift deed is void and the plaintiff has $1/16^{th}$ share in the house in dispute. The suit was, accordingly, decreed.

6. The first appellate court considered the evidence in detail and reaffirmed the findings and dismissed the appeal preferred by the present appellants. Aggrieved by it the present appeal has been preferred.

7. I have heard the arguments of Sri Manoj Mishra, learned counsel for the appellants and Sri V.K.S. Chaudhary, learned counsel for the respondents in great detail and have carefully gone through the entire record.

8. Before coming to the merits of the appeal, it may be mentioned that at the time of admission of this appeal no substantial question of law was framed as required by Section 100 C.P.C. Therefore, before starting arguments, the learned counsel for the appellants submitted the following substantial questions of law to be decided in this appeal.

1. Whether the lower appellate court was justified in raising a presumption that in India, if property is purchased by a Hindu Husband in the name of his wife then unless otherwise explained it is presumed to be a benami transaction?

2. Whether the trial court was justified in drawing a presumption that beneficial interest over a property standing in the name of even a female member of a joint Hindu family vests in the family particularly in view of the decisions reported in AIR 1957 All page 215; AUR 1969 Madras page 329 and AIR 1973 Orissa page 85?

3. Whether in the absence of any evidence on the record that Hanuman Prasad had intention to create a banami transaction in the name of his wife the courts below were justified in holding that the property in dispute was acquired benami by Hanuman Prasad and that his wife was merely a benamidar?

4. Whether the finding of the courts below that at the time of purchase of the

disputed property by Hanuman Prasad in the name of the wife there was family dispute between him and his brother is based on conjectures and surmises?

5. Whether the inference drawn by the courts below from the letters namely, exhibits 3,4,5,6,9 and 11 that there must have been some dispute between the brothers Hanuman Prasad and Kashi Prasad at the time of execution of the sale deed dated 1.3.1936 and that the benami transaction was entered to thwart any claim from Kashi Prasad or the heirs of Devi Prasad (son of Hanuman Prasad) purely conjectural inasmuch as those letters were of much later date than the sale deed and more so, as per the evidence on record Devi Prasad was alive eat the time of execution of sale deed therefore, the existence of his heirs at that time did not arise?

6. Whether on the evidence on record, any reasonable person could have come to a conclusion that the disputed property was acquired by hanuman Prasad bannami, and that his wife was merely a benamidar. or in other words the finding of the courts below that Smt. Yashoda Devi was merely a benamidar is perverse?

7. Whether the finding of the courts below that the property in dispute was the property of a joint Hindu family and acquired by Hanuman Prasad as karta and head of the joint Hindu family consisting of his wife, two sons and their children, is unsustainable in view of the finding of the appellate court that there was no ancestral nucleus in the hands of Hanuman Prasad at the time of acquiring the property in dispute?

8. Whether the statement made by Smt. Yashoda Devi in the gift deed dated 5.2.1945 about the exclusive ownership of the property in dispute admissible under section 13 of the evidence Act read with section 32(7) (3) and also under section 8 of the Evidence Act as being her conduct in respect of the property in dispute and that the lower appellate court committed error of law in discarding the same?

9. Whether in the absence of any direct testimony the courts below was justified in holding that the purchase of disputed property was funded by Banuman Prasad only on the circumstance that near abut the date of purchase of the property in dispute Hanuman Prasad had withdrawn certain funds from his provident Fund Account, especially when there was no cogent evidence on the record to establish that Smt. Yashoda Devi had no resources of her own and more particularly when in the gift deed Smt. Yashoda Devi had disclosed that the said property was acquired by her from her own funds.

9. I have considered the above substantial questions of law, they are regarding the presumptions and appreciation of evidence. However, from the pleading of the parties, only two issues are involved in this case.

1. Whether the property was acquired benami by Hanuman Prasad from his own funds/joint family funds in the name of his wife as a consequence of which his wife was only a benamidar?

2. Whether the gift deed dated 5.2.1945 is void?

10. In fact, only issue no. 1 arise for decision in this appeal. In case, it is decided against the appellants the answer to question no. 2 will follow and the gift deed would be void.

11. In this case, it is admitted that Hanuman Prasad have two sons. One of them Devi Prasad died in October, 1937 Hanuman Prasad himself also died in the year, 1937 Learned counsel for the appellants has taken the through the entire oral and documentary evidence adduced by the parties. It is established law that the evidence cannot be analysed in second appeal and it should be decided only on the substantial questions involved in the case. However, it is contended that there is no evidence to show that Smt. Yashoda Devi was a benamidar and the findings of courts below are without any evidence. It is also contended in paragraph 2 of the plaint that the property was purchased by Hanuman Prasad in the name of his wife for her happiness (Diljohi); which itself show that she was not benamidar. However, in my opinion the word diljohi means 'to please'.

12. I briefly consider the evidence of the parties in view of the arguments of the learned counsel that there is no evidence of benami transaction.l The plaintiff in this case examined as many as five witnesses. p.w.l is the plaintiff himself, who has stated regarding entire. facts. It is contended that he was born in the year 1941 i.e. much after the transaction. Therefore his statement is not relevant to show the benami nature of the transaction. p.w. Kalyan Singh has stated that Hanuman Prasad was compounder in the university dispensary where he used to meet Hanuman Prasad; that Hanuman Prasad told him that he want to purchase the house in the name of his wife for which some money has been saved by him. It is contended that his evidence is not of a definite character and can also not be accepted to prove benami nature of transaction; that he was not knowing anything regarding the family of Hanuman Prasad and used to meet casually with Hanuman Prasad in the University dispensary; that, therefore, there was no occasion for Hanuman Prasad to disclose any fact to him. p.w.3 is Sri S.K. Sharma, real brother of the plaintiff. It is contended that his statement was not relied by the courts below, therefore, need not be considered. p.w. 4 is Sangam Lal who claims himself to be neighbour of Hanuman Prasad. He stated that Yashoda Devi had no earning. She came from a poor family and she had no income of her own; that Hanuman Prasad himself built the house and was making payments in that connection. It is contended that he does not know the other relations of Hanuman Prasad and other family members. He also does not know as to where is the maika of Smt. Yashoda Devi and what her father had been doing; that, therefore, he is a cooked up witness and no reliance can be placed. The last witnesses Sri P.C. Jaiswal, p.w.s. He is an office Assistant of the Allahabad University where Hanuman Prasad was employed as compounder. He stated that Hanuman Prasad withdraw Rs.1016/- Rs.135/-and Rs.15/- respectively on 17.11.35, 25.9.35 and 25.1.36 from his Provident Fund Account. However, he has no personal knowledge regarding any other family affairs of Hanuman Prasad.

13. Apart from this, documentary evidence has also been filed by the plaintiff. exhibit A-4 is the sale deed dated 1.3.1936 and Exhibit A-2 is the gift

deed dated 5.2.1945. Certain letters have also been filed which are Exhibits 3 to 6, 9 and 11. It is contended that all these letters were written after the deed of purchase of the disputed property i.e. 1.3.1936; that, therefore, those letters does not show that the property was purchased by Hanuman Prasad so that his brother Kashi Prasad may have no share in the same.

14. After scrutnising the evidence, it has been contended that there is no evidence of the plaintiff to show that the sale deed in favour of Smt. Yashoda Devi was a benami transaction.

15. As against this, it is contended that the appellants evidence is much reliance. They examined Shiv Prasad as D.W.L. who has aged about 75 years. He stated that the house was not benami and was purchased by his mother; that his father suffered from paralysis and was ill since three years before his death and the entire amount earned by him was spent on his treatment; that he was getting Rs.50/- per month as salary; that Smt. Yashoda Devi was exclusive owner of the house and she executed a gift deed in his favour with her own free will. D.w.2 Niranjan Pratap Singh is a witness of the gift deed in favour of Sheo Prasad and has only proved the same. D.W. 3 A.C. Gillbert is an Assistant in Allahabad University and he joind the service in 1931. He was knowing Hanuman Prasad as he was working in the University and stated that Hanuman Prasad suffered an attack of paralysis in the year, 1933. Thereafter, he did not join the service; that the house was in fact constructed by Sheo Prasad. D.W.4 Desh Deepak Sharma is son of Sheo Prasad and proved the letters. It is contended that the defendants have, therefore, adduced the evidence to show that Smt. Yashoda Devi was the real owner of the house and she willingly executed the gift deed. It is further contended that the recitals in the gift deed. It is further contended that the recitals in the gift deed are admissible in evidence under section 32(3) (7) read with section 13 of the Evidence Act; that in the gift deed, it is mentioned that in the gift deed, it is mentioned that the property was purchased by Smt. Yashoda Devi from her own funds and the house was also constructed by her from her own funds; that her husband Hanuman Prasad was a compounder in the dispensary of Allahabad University and suffered and attack of paralysis in the year 1934; that Hanuman Prasad also received Rs.1200/- from the University by way of G.P.F. but this amount was spent on his treatment; that Shiv Prasad alone looked after her (Smt. Yashoda Devi) and, therefore, she executed gift deed. It is contended that the recital of this gift deed, therefore, also shows that the transaction was a benami one.

16. Learned counsel for the appellants has also referred to certain cases regarding the onus of proof regarding benami nature of the transaction and also regarding presumption of the deeds in the name of the wife.

17. The first case referred to is **Jayadal Poddar versus Mst. Bibi Hazra**, A.I.R. 1974 Supreme Court, 171, it was observed "it is well settled that the burden of proving that the particular sale is benanmi and the apparent purchaser is not the real owner, always rest on the person asserting it do be so. This burden has to be strictly discharged by adducing legal evidence of a definite character

which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an ingerence of that fact. The essence of benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rest on him; nor justify the acceptance of mere conjecture or surmises for proof. though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations can be laid down, yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by the circumstances; (1) the source from which the purchase money came,(2) the nature and possession of the property, after the purchase; (3) motive, if any for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged banamidar; (5) the custody of the title deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.".

18. The other case refereed to is Gapadibai versus state of Madhya Pradesh,(1980)2 Supreme Court cases, 237. It was held that "in order to prove the benami nature of a transaction, evidence has to be led to show; (1) that the purchaser paid the consideration; (2) that he had the custody of the sale deed, (3) that he was in possession of the property and (4) the motive for the transaction. In this case the Hon'ble Supreme Court laid much emphasis upon the fact and held that since the party challenging the transaction as Benami had not led any evidence whatsoever to show as to whether there was any such intention of the party concerned to create a benami transaction or not therefore, the benami nature of the transaction could not be established"

19. The other case referred to is **Smt. Sunder Devi Versus Jhaboo Lal**, AIR 1957 Allahabad page 215. In this case this court has held that there is no presumption that the property owned or held by a woman necessarily belongs to her husband or that the funds for the acquisition of such a property had been supposed to her by her husband or by somebody else. Reference has also been made to **Budhia Mandal Versus Raghu Mandal**, A.I.R. 1973 Orissa page 85 and Nagayasami Naidu versus Kochadai Naidu, A.I.R. 1969 Madras page 329 wherein it has been held that even if ancestral nucleus is shown to be in existence it cannot be presumed that the property belongs to the joint family.

20. The other case referred to is **Kanakarathanammal Versus Logantha Mudaliar**, A.I.R. 1965 Supreme Court page 271. It was observed that "it is true that the actual management of the property was done by the appellants father; but that would inevitably be so having regard to the fact that in ordinary Hindu families, the property belonging exclusively to a female member would also be normally managed by the manger of the family; so that the fact the appellants mother did not take actual part in the management of the property would not materially affect the appellants case that the property belong toe her mother.

The rent was paid by the tenants and accepted by the appellants father; but that, again, would be consistent with what ordinarily happens in such matters in an undivided Hindu family. If the property belongs to the wife and the husband mange's the property on behalf, it would be idle to content that the management by the husband of the properties is inconsistent with the title of his wife of the said properties. What we have said about the management of the properties would be equally true about the actual possession of the properties, because even if the wife is the owner of the properties, possession may continue with the husband as matter of convenience.

21. On the basis of the above cases, it has been argued that onus is extremely heavy to prove that the transaction is benami on the person who alleges it to be so; that there is no presumption that the property standing in the name of the wife is either benami or of joint Hindu family; that, therefore, the findings of both the courts below are against the weight of the evidence.

22. Learned counsel for the appellants has also taken me through the judgment of the courts below and the reasoning recorded by the courts below. It is contended that the correct reasoning in the light of the above decisions have not been mentioned.

23. It is also contended that no doubt, it is second appeal and the findings of the courts below are concurrent. However, the findings can be interfered with if there is gross error of law of the finding is based without evidence. learned counsel in support of his argument has referred to the decision of **State of Rajasthan versus Harphool Singh (DEAD)** through his Lrs. (2000)5 Supreme Court cases 652. It was observed that "the first appellate court as well as the High Court ought to have seen that perverse findings not bases upon legally acceptable evidence and which are patently contrary to law declared by this Court cannot have any immunity from interference in the hands of the appellate authority. The trial court has jumped to certain conclusions virtually on no evidence what so ever in this connection. Such lackadaisical findings based upon mere surmises and conjectures, if allowed to be mechanically approved by the first appellate court and the second appellate court also withdraws itself into recluse apparently taking umbrage under section 100 C.P.C., the inevitable casualty is justice and approval of such rank injustice would only result in gross miscarriage of justice."

24. The other case referred to is **Krishananand Agnihotir versus State of Madhya Pradesh**, A.I.R. 1977 Supreme Court, 796. However, this was regarding criminal matter in which the principle of burden of proof are different from the civil matters.

25. The other case referred to is **Hira lal Versus Gajjan**, A.I.R. 1990 Supreme court , 723. It was observed that "So also in a case where the court below ignored the weight of evidence and allowed the judgment to be influenced by inconsequential matters, the High Court would be justified in reappreciating the evidence and coming to its own independent decision as held in **Madan Lal Versus Gopi**, A.I.R. 1980 S.C.1754".

26. As against this, the argument of the learned counsel for the respondents is that the findings of both the courts below are based on the appreciation of evidence; that evidence is to be scrutinised in the circumstances of the case and law has to be applied to the facts. It is argued that while scrutinising the evidence the court should see whether the best possible evidence available regarding the transaction have been adduced by the parties or not; that the sale deed is of the year 1936 and, therefore, it was not possible for the plaintiff to produce direct evidence regarding the transaction. The best evidence has been produced by the plaintiff; that the evidence is to be considered in the light of the fact that the transaction look place in the year 1936 and the evidence is being led after about half a century. It is also contended that both the courts below have properly scrutnised the evidence; that in the case of **Jaydal Poddar** (supra) the apex court has laid down six circumstances to find the nature of transaction and all the six circumstances have been discussed by the appellate court in detail in his judgment and recorded the finding in favour of the respondents; that therefore, in view of the decisions of Apex Court in the case of **Arumugham Versus Sundaramabal** (1999)4 Supreme Court Cases 350 the High Court should not interfere in the second appeal on the ground that the first appellate court failed to advert the reasons given by the trial court.

The learned counsel for respondents has referred to **Satya Gupta (Smt.) alias Madhu Gupta Versus Brijesh Kumar**, (1998) 6 Supreme Court cases, 432 .The following observation of the Apex Court is material"

"At the outset, we would like to point out that the findings on facts by the lower appellate court as a final court of facts, are based on appreciation of evidence and the same cannot be treated as perverse or based on no evidence. That being the position we are of the view that the High Court, after reappreciating the evidence and without finding that the conclusions reached by the lower appellate court were not based on the evidence, reversed the conclusions on facts on the ground that the view taken by it was also a possible view on the facts. The High Court, it is well settled, while exercising jurisdiction under section 100 C.P.C., cannot reverse the findings of the lower appellate court on facts merely on the ground that on the facts found by the lower appellate court another view was possible.

27. I have considered the arguments and carefully gone through the case law referred to by the learned counsel for the parties. There is no dispute regarding principle that the onus of proof heavily lie on the person who alleged a benami transaction to prove it. However, the evidence is not to be scrutnised in the manner in which it has been argued by the learned counsel for the appellants as the transaction is of the year 1936 and no direct evidence is expected. The conclusion is to be arrived on the basis of the circumstance. The recital of the gift deed of the year 1945 in favour of Sheo Prasad, even if taken to be admissible, does not have much evidentiary value. The executant of the document is required to disclose the title of the property, but if there is dispute, the title is to be decided on the basis of other evidence and not on the basis of the recitals in the deed itself. Therefore, the Courts below rightly rejected the contents of the gift deed.

Learned counsel for the appellants cannot take shelter of the recitals of the gift deed of the year, 1945 to argue that Smt. Yashoda Devi was the owner of the property as mentioned in the same.

28. The following are the important circumstances of the case to decide the nature of the transaction.

1. There is no evidence that Smt. Yashoda Devi had any independent income or had stridhan.

2. The appellants have adduced evidence to show that Hanuman Prasad suffered an attack of paralysis in the year 1933 and, therefore, he did not join the service. However, no document regarding the treatment has been filed. ON the other hand, the plaintiff produced evidence to show that Hanuman Prasad was working as compounder in the dispensary of Allahabad University and he withdraw Rs.1016/-,Rs.135/-and Rs.15/- on 17.11.35, 25.9.35 and 25.1.36 respectively from his provident Fund Account. It is very important that it was not suggested to Sri P.C. Jaiswal, p.w.5 who is an Office Assistant in the Allahabad University that at that time Sri Hanuman Prasad was suffering from paralysis .He was not interrogated on the point that Hanuman Prasad was suffering from paralysis , then in what manner this amount was withdrawn from the University and who withdraw the amount on his behalf. It was also not suggested to him that Hanuman Prasad did not joint the duties after 1933 when he alleged to have suffered attack of paralysis. There may be some little ailment to Hanuman Prasad but it does not show that the amount was withdrawn for the treatment. The sale deed is of 1.3.1936 and is for Rs.1200/- for which the money was withdrawn from the provident Fund to pay the sale consideration to Allahabad Improvement Trust.

3. In case, the validity of the gift deed dated 5.2.1945 is accepted, the plaintiff is not left with any interest in the property. However, he was never asked to vacate the permission till the suit for partition was filed. His possession is admitted though it is alleged that he is in possession as a licensee. However, it is important to mention that no steps for eviction of the plaintiff were ever taken.

4. It is true that the letters were of the much later period and the sale deed is of the year 1936 and, therefore, they does not show any motive for the sale deed being executed in favour of Smt. Yashoda Devi. However, there can always an apprehension in the mind of the purchaser, even if there is no dispute, that the other brothers may also claim the share in the property alleging it to be a joint Hindu family. Therefore, usually, it is considered safe to purchase the property in the name of female member as benami. The argument that the letters are of no relevance. Even if, there was no dispute, there can be an apprehension of dispute and claim to the property in future.

29. All these circumstances are very material and coupled with the evidence, as discussed above, show that there is no reason to interfere in the concurrent findings of the Courts below that the sale deed in favour of Smt. Yashoda Devi was a benami transaction.

30. Nine substantial questions of law were raised by the learned counsel for the

appellants in this appeal. I have already mentioned those questions of law. It is not necessary to record a separate findings on each of them, as most of them are regarding facts. I have already discussed the entire evince and the arguments advanced before me and is of the view that the courts below were right in raising the presumption that in India if property is purchased by a Hindu husband in the name of his wife, it is to be presumed to be a benami transaction unless otherwise is shown. Even if, this presumption is not taken to be true, the evidence show that the property was benami in the name of Smt. Yashoda Devi and there is no reason to reverse the findings.

31. The reply of the substantial questions raised is that the question nos. 1,2 and 3 are answered in affirmative. Questions no.s 4 and 5 are answered in the negative . Question no. 6 is answered in affirmative. Question no. 7 is answered in affirmative. Question no. 8 is answered in affirmative that the recitals in the gift deed are admissible but have very little evidentiary value and the first appellate court has rightly discarded the same. Question no. 9 is answered in affirmative.

32. Therefore, after considering the entire arguments, case law referred to by the learned counsel for the parties and the evidence on record, I have no reason to interfere in the concurrent findings of both the courts below. The appeal is without merits and is, hereby, dismissed with costs.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.7.2001

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

Civil Misc. Writ Petition No. 44405 of 1998

Dr. Pradeep Kumar Srivastava
...Petitioner
Versus
State of Uttar Pradesh and others
...Respondents

Counsels for the Petitioner :
Dr. R. G. Padia
Sri Prakash Padia,

Counsels for the Respondents:
B. N . Agarwal
S.C.

U.P. Higher Education Service Commission Act 1980 as Ammended by Ammended Act 1992-Section 31-C-Regularisation Adhoc appointment as Lecturer-of Management can not appoint after 22.11.1991-very initial appointment itself illegal being appointed on 25.11.91-can not claim benefit of Section 31-C-for Regularisation –non maintainable.

Held- (Para 10)

In the instant case, admittedly, the petitioner was appointed on 25th November, 1991 he does not satisfy the requirement of continuous service in the college up to the date of commencement of 1992 Amendment Act which, as noticed earlier, is 22nd November, 1991. Thus, the petitioner, it cannot be gainsaid, does not satisfy the statutory conditions precedent for being eligible to claim the benefit of Section 31-C of the Principal Act. That being so, the question of consideration of the claim of the

petitioner for regularisation is not maintainable.

By the Court

1. Heard Dr. R. G. Padia, the learned Senior Advocate appearing for the petitioner and Sri B. N. Agarwal, the learned Standing Counsel of the State of U.P., representing the respondent Nos 1, 2 and 3.

2. Relying upon Section 31-C of the Utter Pradesh Higher Education Services Commission Act, 1980, hereinafter called the `Principal Act`, as amended by the Utter Pradesh Higher Education Services Commission (Amendment) Act, 1992, hereinafter called the 1992 Amendment Act, and the Uttar Pradesh Higher Education Service Commission(Amendment)Act, 1997, hereinafter called the 1997 Amendment Act, the petitioner prays for issuance of a writ, order or direction, including a writ in the nature of mandamus, commanding the statutory selection committee, constituted under Section 31-C (2) of the 1997 Amendment Act, Directorate of Higher Education, Allahabad through its Director, to consider his case for regularisation on the post of lecturer in Economics in Sri Murli Manohar Town Degree College, District Ballia, hereinafter called the 'Institution'.

While entertaining the petition, this Court passed an order dated 4th January, 1999 which is extracted below :-

"----------

Meanwhile the statutory Selection Committee, constituted under Section 31-C (2) of the U.P. Higher Education Services Commission (Amendment) Act, 1997, Directorate of Higher Education, Allahabad is directed to consider the question of regularisation of petitioner or to show cause by filing a counter affidavit by 15th March, 1999. List on 22.3.1999.

4.1.1999. Sd./- B. Dikshit
Sd./- A. Chakrabarti."

3. In response to the order of the Court dated 4th January, 1999, the respondent no 2 has opted to show cause by filing counter-affidavit instead of considering the question of regularisation of the petitioner. The principal stand taken by the respondent No 2 is that the alleged appointment of the petitioner on the post of lecturer in Economics in the institution was void *ab initio.* Therefore, the claim of the petitioner for consideration of his regularisation under Section 31-C of the Principal Act on the post is not tenable.

Undisputed acts and events constituting the facts of the case are below.

4. For the purpose of his appointment, the selection committee made recommendation in favour of the petitioner on 10th October, 1991. Following the recommendation of the selection committee, the managing committee of the institution met on 16th October, 1991 and passed unanimous resolution approving the selection of the petitioner and directing requisite further steps to be taken.

5. Exercising the power under Section 16 of the Principal Act, the managing committee of the institution issued on 25th November, 1991 an

appointment letter to the petitioner, and the petitioner joined the post on the same day.

6. For the proper appreciation of the controversy raised herein, it would be apposite to extract below the Section 3 of the 1992 Amendment Act and Section 31-C of the Principal Act, as amended by the 1992 Amendment Act and 1997 Amendment Act.

"**3. Omission of Section 16**.- Section 16 of the Principal Act shall be omitted."

"**31-C. Regularisation of other ad-hoc appointments**-
(1) Any teacher, other than a Principal who –
was appointed on *ad hoc* basis after January 3,1984 but not later than November 2,1991 on a post –

(i) which after its due creation was never filled earlier, or

(ii) which after its due creation was filled earlier, and after its falling fact, permission to fill it was obtained from the Director; or

(iii) which came into being in pursuance of the terms of new affiliation of recognition granted to the College and has been continuously serving the college from the date of such ad hoc appointment up to the date of commencement of the Uttar Pradesh Higher Education Services Commission(Amendment) Act, 1992;

(b) was so appointed after three months of the notification to the Commission under sub-section (1) of section 16 as it stood before its omission by the Act referred to in clause (a), or… if… appointed….within such period ;

(c) possessed on the date of such commencement, the qualifications required for regular appointment to the post under the provisions of the relevant statutes in force on t he date of such ad hoc appointment;

(d) is not related to any member of the management of the principal, of the college concerned in the manner mentioned in the explanation to Section 20 of the Uttar Pradesh State Universities Act, 1973;
(e) has been found suitable for regular appointment by a Selection Committee constituted under sub-section (2);

may be given substantive appointment by the management of the college, if any substantive vacancy of the same cadre and grade in the same department is available on the date of commencement of the Act referred to in clause(a)

(2) The Selection Committee consisting, the following members namely-
(i) a member of the Commission nominated by the Government who shall be the Chairman;
(ii) an officer nor below the rank of Special Secretary, to be nominated by the Secretary tog the Government of Uttar Pradesh in the Higher Education Department;
(iii) The Director;

Shall consider the cases of every such ad hoc teacher and on being satisfied about his eligibility in view of the provisions of sub-section (1), and his work and conduct on the basis of his record, recommend his

name to the management of the college for appointment under sub-section (1).

(3) Where a person recommended by the Commission under section 13 before the commencement of the Act referred to in sub-sect ion (1) does not get an appointment because of the appointment of another person under sub-section (1) in the vacancy in any college and the provisions of subsections(5) and (6) of Section 13 and of Section 14 shall mutatis mutandis apply.

(4) A teacher appointed on *ad hoc* basis referred to in sub-section (1) who does not get a substantive appointment under that sub-section and a teacher appointed on ad hoc basis who is not eligible to get a substantive appointment under sub-section (1) shall cease to hold the ad hoc appointment after March 31, 1992."

7. At the out set, it may be noticed that Section 16 of the Principal Act from which the managing committee of the institution derived the power to appoint the petitioner on 25th November, 1991 stood repealed with affect from 2nd November, 1991, and indeed, the managing committee had no power to appoint the petitioner. Accordingly, the stand taken by the respondent no.2 that the appointment of the petitioner was void *ab initio* is not devoid of substance, and has to be upheld. It is upheld accordingly.

8. A bare perusal reveals that sub-section(1) of Section 31-C of the Principal Act contemplates that for being eligible to claim the benefit of regularisation of ad hoc appointments, the incumbent must be a teacher, other than a Principal, who was appointed on ad hoc basis after January 3, 1984 but not later than November 22, 1991 on a post which was never filled earlier after its due creation, or which was filled earlier after its due creation and after its falling vacant, permission to fill it was obtained from the Director; or which came into being in pursuance of the terms of new affiliation or recognition granted to the college and has been continuously serving the college from the date of such ad hoc appointment up to the date of commencement of the 1992 Amendment Act.

9. Clearly, inter-alia, the appointment of the claimant – incumbent must have been during the period between 3rd January, 1984 and 22nd November, 1991 and he must have been continuously serving the college from the date of such ad hoc appointment up to the date of the commencement of the 1992 Amendment Act, which is, indisputably, 22nd November, 1991.

10. In the instant case, admittedly, the petitioner was appointed on 25th November, 1991, which was after 22nd November, 1991. Obviously, the petitioner having been appointed on 25th November, 1991 he does not satisfy the requirement of continuous service in the college up to the date of commencement of the 1992 Amendment Act which, as noticed earlier, is 22nd November, 1991. Thus, the petitioner, it cannot be gainsaid, does not satisfy the statutory conditions precedent for being eligible to claim the benefit of Section 31-C of the Principal Act. That being so, the question of consideration of the claim of the petitioner for regularisation is not maintainable.

11. For what has been said above, in the opinion of the Court, the claim of the petitioner for regularisation of his ad hoc appointment has rightly not been considered by the respondent no. 2. He is not entitled to any relief in this petition. The petition is devoid of substance. Accordingly, it is dismissed. There is no order as to costs.

Petition Dismissed.

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 Tewari ...Petitioner
Versus
The Superintendent of Police, Jaunpur and others ...Respondents

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

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Service Law – Resignation – when it become effective? – after tendering resignation letter the employee proceeded on leave – the authority accepted the resignation after expiry of 9 days beyond leave period when the employee did not turned up on duty – held the resignation became effective from the date on which the it was accepted by the compitent authority – communication not necessary.

Held – Para 15

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 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.

Case Law Discussed
AIR 1966 SC – 1313
AIR 1969 SC – 180
1966 & I.C. - 1228
1995 (III) Service LJ - 65
1989 SLR 100
1989 (5) SLR 165
1969 ALJ (1) 38
AIR 1940 Cal 227

By the Court

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 pleadings of the parties are:

Petitioner was recruited as a constable in 1974 and was lastly posted at Jaunpur. Petitioner's elder brother died at his village on 11.09.84. 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 02.11.1984 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 27.04.1989 and could report at Jaunpur on 28.04.1989 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 he 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 he 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 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 withdrawl having been recevied 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 can not 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.

2. Counsel for the petitioner Shri S.K. Verma, Senior Advocate assisted by Shri Siddharth 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 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. Varma 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 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**.

3. 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.

4. 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?

5. 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.

6. 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 authoriy 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."

7. 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 hy the appellant on August 21, 1964, and August 30, 1964, did not indicate that the resignation was not to become effective untill 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, I 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 contray, it will not be open to the

public servant to withdraw his resignation after it is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has locus penitential 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."

8. In view of the preposition laid down by the Apex Court in Raj Kumar's case, the contention of the petitioner that receptance 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.

9. 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 28.04.1989. 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 he 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."

10. 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.

11. 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, 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."

12. 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.

13. The counsel for the petitioner has relied on single judge, judgement of Andhra Pradesh High Court reported in 1990 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 non of the judgement relied by Andhra Pradesh High Court but in non 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.

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) SI.J 65 **Ravindra Singh Vs State of MP** which was a case in which the 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.

14. Another judgement and 1989 SLR page 100 S.K. Jain is Preceding 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 26.06.1984. 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.

15. 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 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 the act of resignation was complete and petitioner is not entitled to claim joining on the ground that he never received communication of acceptance.

16. The next submission of counsel for 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 with drawl.

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 litle 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."

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

18. 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.

19. 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. 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.

20. 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.

Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2001

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

Special Appeal No. 870 of 2001

Vice Chancellor, University of Allahabad and another ...Appellants–Respondent Nos.1& 2
Versus
Som Prakash Ratnakar and another ...Proforma Respondent

Counsel for the Appellants:
Sri P.S. Beghel

Counsel for the Respondents:
Sri B.N. Pathak

University of Allahabad – Ordinance XI rule 9 – Declaration about passing the examination – the candidate must have obtained 36 marks in each subject and 45 of the aggregate petitioner obtained only 32 marks in constitutional law in L.L.B. Ist year – can not be declared passed.

Held – (para 4)

The mark sheet of LL.B. Ist year is on record as Annexure 1 to the affidavit filed in support of the appeal, a perusal of which shows that in the subject of constitutional law of India the petitioner has admittedly secured 32 marks only and in aggregate 267 marks only, hence in view of the provisions of Chapter XL of Ordinance No. 9, which provides that in order to pass the examination a candidate must obtain minimum of 36 marks in each subject and minimum of 45 marks in aggregate, could not have been promoted in LL.B. IInd year.

(B) constitution of India-Article 226 – Principle of Promissory estoppal-not attracted against statutory provisions.

Held – Para 6(I)

In view of the settled legal position we are also of the view that in the case in hand the principle of promissory estoppel is not attracted and the University cannot be compelled to declare the petitioner pass in LL.B. Ist year examination when admittedly, he has secured less than pass marks in aggregate as well as in paper of Constitutional law, Rule 9 of the Ordinance provides that a candidate must secure minimum of 36 marks in each subject and minimum of 45 marks in aggregate in order to pass the

examination. The petitioner, admittedly, having secured less than 45 marks in aggregate and less than 36 marks in Constitutional Law of India in LL.B. Ist year examination cannot be declared pass by the university.

(C.) Constitution of India – Article 226 – writ of Mandamus-can not be issued to nullify the statutory provisions.
Held – (Para 6(ii)

By the Court

1. Heard Mr. P.S. Baghel, learned counsel for the appellant and Mr. B.N. Pathak, learned counsel for the respondents.

2. This special appeal has been preferred by the Allahabad University against the order passed by the learned Single Judge whereby the learned Single Judge has held that the University Authorities were not at all justified in holding that the petitioner had failed in LL.B. Ist Year Examination and directed the University to declare the result of the petitioner treating him to have passed in LL.B. Ist year examination.

3. It appears that the petitioner-respondent was a regular student of LL.B. course in Allahabad Degree College, which is an affiliated college of Allahabad University. He appeared in LL.B. Ist year examination, 1995 conducted by the Allahabad University and secured 261 marks in aggregate out of 600 marks. In Criminal Law paper he secured 32 marks out of 100 and in Constitutional Law of India only 32 marks out of 100. However, in view of the provisions of the ordinance, which provides that a candidate can appear in one subject as back paper to clear the examination, he appeared in Criminal Law again in which he secured 38 marks only out of 100 marks. The petitioner was, however, permitted to take admission in LL.B. Part II. He also appeared in the examination of LL.B. IInd year but till then the result of the back paper was not declared. The result of back paper was declared subsequently and mark sheet was issued on 08.10.1999 showing that he had secured 38 marks out of 100 in Criminal Law. However, in the mark sheet he was shown to have been promoted. It appears that the petitioner in LL.B. IInd year examination also failed in papers of evidence Act and Limitation Act and, therefore, he appeared in back paper under the ordinance and on that basis he was permitted to continue with the studies in LL.B. IIIrd year. However, when he was not permitted to appear in the examination of LL.B. IIIrd year on the ground that he had failed to obtain minimum pass marks in aggregate of 1st year examination, filed writ petition no. 12209 of 200 and the learned Single Judge of this Court by an interim order dated 08.03.200 directed the university to permit the petitioner to appear in the examination of LL.B. IIIrd year examination provisionally, which was scheduled to be held from 10.3.2000. It was further ordered that the result shall not be declared and shall be subject to the decision of the writ petition. In compliance of the aforesaid interim order he was permitted to appear in LL.B. IIIrd year examination. However, since he could not obtain the minimum aggregate marks in LL.B. Ist year he was not declared pass. The Learned Single Judge in view of the facts that in LL.B. Ist year mark sheet he has been shown to have been promoted, directed the University to declare his result treating him to have passed in LL.B. Ist year against which

this special appeal has been preferred by the University.

4. The mark sheet of LL.B. Ist year is on record as Annexure I to the affidavit filed in support of the appeal, a perusal of which shows that in the subject of constitutional Law of India the petitioner has admittedly secured 32 marks only and in aggregate 267 marks only, hence in view of the provisions of Chapter XL of Ordinance No.9, which provides that in order to pass the examination a candidate must obtain minimum of 36 marks in each subject and minimum of 45 marks in aggregate, could not have been promoted in LL.B. IInd year.

5. Learned counsel for the University vehemently contended that the University statute does not permit a candidate to be declared to have passed when he has not actually passed the examination. He also submitted that there can be no estoppel against the statute and the doctrine of estoppel cannot be applied to nullify the statutory provisions. Reliance has been placed on the Division Bench judgement of this Court in the case of **Kumari Leena Gupta vs. Ruhailkhand University, Bareilly and others**, reported in (1989) 1 UPLBEC 409 wherein that petitioner was declared to have passed the C.P.M.T. examination. However, subsequently it was detected that due to error committed in decoding the roll number that candidate has secured lesser marks in subject of Botany and, therefore, her admission in medical college was cancelled. Argument was advanced on behalf of the petitioner that the petitioner having been admitted the opposite parties are stopped from ousting her from the class. The Division Bench of this Court relying on various authorities repelled the argument and held that in such case, principle of estoppel is not attracted as admissions are given under the statutory provisions and there can be no estoppel against the Statute. The Apex Court in the case of **Union of India & other vs. Godfrey Philips India Ltd**, reported in AIR 1986 SC 806 has held that promissory estoppel cannot be used to compel the government or a public authority to carry out a representation or promise, which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make such promise. It has further been held that the doctrine of promissory estoppel being an equitable doctrine, it must yield when equity so requires.

6.(i) In view of the settled legal position we are also of the view that in the case in hand the principle of promissory estoppel is not attracted and the University cannot be compelled to declare the petitioner pass in LL.B. Ist year examination when, admittedly, he has secured less than pass marks in aggregate as well as in paper of Constitutional Law. Rule 9 of the Ordinance provides that a candidate must secure minimum of 36 marks in each subject and minimum of 45 marks in aggregate in order to pass the examination. The petitioner, admittedly, having secured less than 45 marks in aggregate and less than 36 marks in Constitutional Law of India in LL.B. Ist year examination cannot be declared pass by the University. The direction, therefore, of the Learned Single Judge to the University to declare the result of the petitioner treating him to have passed in LL.B. Ist year examination is contrary to the provisions of the ordinance.

(ii) It is settled legal position that the mandamus is issued to command the authorities to discharge its statutory functions or to exercise statutory powers and this Court cannot issue mandamus directing any authority or inferior Tribunal to violate or to nullify the statutory provisions or to act contrary to law. Therefore, we are of the view that the Learned Single Judge fell in error by directing the University to treat the petitioner-respondent to have passed the LL.B. Ist year examination when admittedly, in view of the statutory provisions he cannot be declared to have passed. However, during the course of argument Shri P.S. Bhagel, learned Counsel appearing for the appellant University fairly stated before us that the University is prepared to hold special examination for this petitioner-respondent of the paper Constitutional Law of India of LL.B. Ist year within one month and the petitioner may appear in that examination and if he obtains minimum 36 marks, in that event his result made be declared.

7. We are of the view that the learned counsel for the University has taken a very fair stand and the petitioner should avail the same. The question as to whether the petitioner has not committed fraud or made suppression, is not relevant which the Learned Single Judge took into account, since the petitioner could not secure pass marks in aggregate as also in the paper of Constitutional Law of India in LL.B. Ist year examination, there is no scope for declaring him to have been passed. Mere error on the part of the office staff cannot confer a right to an examinee to get the declaration from the Court that he has passed in the examination. Such error is liable to be corrected and the petitioner should appear in the examination, which the learned counsel for the University proposed. Learned counsel appearing for petitioner-respondent no.1 is agreeable to such suggestion made by the counsel for University and submitted that the petitioner shall appear in the said examination.

8. We accordingly, direct the University to hold such examination within a month from the date of communication of this order and declare his result within two weeks thereafter if the petitioner applies with all the formalities of filling up form and paying examination fee for the same and in the event the petitioner secures pass marks and thereby pass in the aggregate, he shall be declared to have passed LL.B. Ist year examination and consequently shall be declared to have passed LL.B. IIIrd year examination.

9. Accordingly, the order passed by the Learned Single Judge is set aside and the Special Appeal is allowed to the extent indicated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 24, 2001

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

Special Appeal No. 364 of 2001

Prof. Y.C. Simbadri and others
...Appellants/Respondents
Versus
Deen Bandhu Pathak
...Respondent/Applicant

Counsel for the Appellants:
Shri V.K. Upadhya
Sri Pankaj
Shri V.B. Upadhya
Naqvi

Counsel for the Respondents:
Shri Aseem Kumar Rai
Shri Dinesh Rai
Shri D.K. Tiwari
Shri Pankaj Srivastava

Constitution of India, Article 215- Contempt of courts Act-Allahabad High Court Rules-Power under Article 215 of the Constitution can not be exercised by the Single Judge or Division Bench without being conferred such jurisdiction or authority by the Chief Justice. The order issuing notice to the Respondents/ appellants and directing them to appear personally before the Court on the application of the writ petitioner under Article 215 of the Constitution, falls within the meaning of 'Judgement' under the relevant clause of Rule 5 of Chapter VIII and is appealable as the question of jurisdiction is involved.

The power conferred under article 215 of the Constitution of India has to be exercised by the entire High Court and not by a Single Judge or by a Division Bench of the High Court. Such power can not be exercised by a Single Judge or by a Division Bench Judge without being conferred such authority or jurisdiction by the Chief Justice – The order passed by the learned Single Judge is void as he has exercised the jurisdiction not vested in him – set aside.

Held – (Para 30 and 31)

The learned single judge on the face on record has exercised the jurisdiction not vested in him and as such, the order passed by him is void and is liable to be set aside.

Accordingly the special appeal is allowed and the impugned order passed by the learned Single Judge is order passed by Single Judge set- a- side.

Cases referred.

1. State vs. Devi Dayal (AIR 1959 Alld. 421)
2. Sohan Lal Baid vs. State of west Bengal (AIR 1990 Cal. 168)
3. Raj Kishore Yadav vs. Principal (1997 (I) UPLBEC 26)
4. High Court Alld. Vs. Raj Kishore Yadav & others (1997 (3) sec.11)
5. State of Rajasthan vs. Prakash Chand & others (1998 (1) Sec.1)
6. Dr. L.P. Misra vs. State of U.P. (1998 (7) Sec. 379)

Shah Babulal Khimji vs. Jayaben D Kenia and another (AIR 1981 SC P. 1786)

By the Court

1. Heard Mr. V.B. Upadhyaya, learned Senior Advocate assisted by Mr. V.K. Upadhyaya, Learned Advocate for the appellants and Mr. D.K. Tiwari and Pankaj Srivastava Learned Advocates for the respondent.

2. This special appeal is directed against an order passed by the learned single Judge on 26th March, 2001 whereby the learned single Judge entertained an application filed by the respondent-writ petitioner under Article 215 of the Constitution of India on the allegation that the order passed by the learned single Judge on 15th March, 2001 has not been complied with by the appellants. By the said order the learned single Judge has permitted to add the present appellants as respondent nos. 1 to 3 in the application under Article 215 of the Constitution. The learned single Judge also directed notice to be issued to the said respondents appellants herein directing them to appear personally before the Court.

3. Mr. V.B. Upadhyaya, learned senior Advocate assisted by Mr. V.K. Upadhyaya, learned Advocate for the appellants have submitted before us that the learned single Judge had no jurisdiction to pass such an order under Article 215 of the Constitution of India. Mr. Upadhyaya has further submitted that the learned Judge, who has been assigned the determination in respect of matters relating to Contempt, is only competent to exercise such jurisdiction. The learned Judge at the material time not having conferred with such determination by the Chief Justice, has exceeded his jurisdiction in passing the order on the application under Article 215 of the Constitution in respect of matters relating to contempt and by directing issuance of notice to respondents therein. He has further submitted that Contempt in respect of High Court means the contempt of the entire composite High Court comprising of the Chief Justice and all other Judges of the High Court under Article 216 of the Constitution of India. It is the Chief Justice alone who has the power to determine as to who shall take up which matter, who will comprise the Division Bench and who shall sit singly. It has further been submitted by Mr. V.B. Upadhyaya, that the order passed by the learned Judge on 26th March, 2001 in exercise of jurisdiction of Contempt under Article 215 of the Constitution is without jurisdiction. He has further submitted that it is the totality of Judges including the Chief Justice, which constitute High Court under Article 216 of the Constitution and not a particular Judge alone. The power to punish for Contempt has been conferred upon every High Court comprising of the Chief Justice and all the Judges taken together and not on one single Judge alone. Mr. Upadhyaya has further submitted that it is for proper and convenient administration of justice that the Chief Justice has been conferred the power under the constitution for making determination and assigning matters to the Judges and the Chief Justice having the sole power for the purpose of allotment of work to the Judges, no Judge can sit and take matters according to his own desire. In support of his contention Mr. Upadhyaya cited the following decisions:

1. State vs. Devi Dayal (AIR 1959 Alld. 421)
2. Sohan Lal Baid vs. State of West Bengal & others (aIR 1990 Cal. 168)
3. Raj Kishore Yadav vs. Principal, Kendriya Vidyalaya, Bamrauli (1997 (1) SCC 11)
4. High Court of Judicature at Allahabad vs. Raj kishore Yadav and others (1997 (3) SCC 11)
5. State of Rajasthan vs. Prakash Chand & others (1998 (1) SCC 1)
6. Dr. L.P. Misra vs. State of U.P. (1998(7) SCC 379)

4. Sri Pankaj Srivastava and Sri D.K. Tiwari, learned Advocates for the respondent-writ petitioner submitted that jurisdiction of the High Court to initiate proceedings under Article 215 of the Constitution of India cannot be taken away by any statutory provision or any other submitted that no rule or procedure has been framed by this High Court in respect of the proceedings for contempt under Article 215 of the Constitution of India and the rules framed under Chapter XXXV-E of the High Court Rules do not provide for any procedure to be followed under Article 215 of the Constitution of India. It has also been urged on behalf of

the respondent – petitioner that Rule 7 of Chapter XXXV-E provides the procedure on the basis of which a learned single Judge is empowered to issue contempt. The learned counsel has also referred to section 19 of the Contempt of courts Act and has submitted that the special appeal is barred in the instant case. For the purposes of defining the word 'contempt of court' he has also referred to Jowitt's Dictionary of English Law Vol. I, page 441 wherein the expression 'contempt of court' is defined in the following manner:

"Contempt of court, where a person who is a party to a proceeding in a superior court of record fails to comply with an order made against him or an undertaking given by him (R.V. Barnardo (1889) 23 Q.B.D.305), or where a person, whether a party to a proceeding or not, does not act which may tend to hinder the course of justice or show disrespect to the court's authority. Contempt's are either direct, which only insult or resist the powers of the court, or the persons of the judges who preside there; or consequential which, without such gross insolence or direct opposition, plainly tend to create a universal disregard to their authority. Contempt's may be divided into acts of contempt committed in the court itself (in facie curiae) and out of court."

5. It has also been contended on behalf of the respondent-writ petitioner that the special appeal is not maintainable being against an interim order and it is liable to be dismissed. It has also been pointed out before us that the appellant no. 1, who is the Vice Chancellor of the University, has violated the provisions of Chapter XXXV of the High Court Rules. The learned counsel have further submitted that the provisions of the Contempt of Courts Act cannot circumscribe or limit the provisions under article 215 of the Constitution of India, whereby, every High Court being the Court of record has been given inherent power to initiate proceedings for Contempt. The contention of the respondent writ petitioner that the jurisdiction of this Court under Article 215 of the Constitution of India to punish for contempt of itself is being curtailed by the provisions of the contempt of Courts act or by the Rules framed thereunder is not correct. Neither the Contempt of Courts Act nor the Rules framed thereunder restricts or curtails the powers of the High Court under Article 215 of the Constitution of India to punish for contempt of itself. The Rules only provide for the procedure for exercising such power.

6. Several important questions have been raised in this special appeal. However, before proceeding further or going into the details of the same, we have to first note the nature of the proceedings with which we are concerned in the instant case. On perusal of the order passed by the learned single Judge dated 26th March, 2001 it appears that the learned single Judge entertained an application filed by the respondent writ petitioner under Article 215 of the Constitution of India on the allegation that the order passed by the learned single Judge on 15th March, 2001 has not been complied with by the appellants and on the said application the learned single Judge directed notice to be issued to the appellants.

7. Under Article 215 of the Constitution of India every High Court is

a Court of record and shall have all the powers, which are exercisable as a Court of record including the power to punish for contempt of itself. Under Article 216 of the Constitution of India every High Court shall consist of a Chief Justice and such other Judges of the High Court. Therefore, considering both the provisions of Articles 215 and 216 the power to punish for contempt lies with the entire High Court, meaning thereby that the High Court comprising of the Chief Justice and all other Judges can exercise the power of contempt of the High Court itself. The power exercisable by the High Court is, therefore, exercisable by the entire High Court comprising of the Chief Justice and other Judges and that includes as one of its powers to punish for contempt of itself.

8. The Rules of the Court provide for jurisdiction of Judges sitting alone or in Division Bench. Provisions contained in Rules 1, 6 and 17 of Chapter V and Rule 2 of Chapter VIII relate to constitution of Benches and to the exercise of judicial power. The said provisions are set out herein below:

"**Chapter V**

1. Constitution of Benches – Judges shall sit alone or in such Division Courts as may be constituted from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions.

6. Reference to a larger Bench – The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein.

17. Places of sitting of Judges – The Chief Justice shall determine the permanent place of sitting of a Judge and may from time to time give directions that a Judge at Allahabad may for such period as he may specify sit at Lucknow and vice versa.

Chapter VIII

2. Powers of a single Judge and Division Court – Any function which may be performed by the Court in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court appointed or constituted for such purpose in pursuance of Article 225 of the Constitution."

9. The question that arises for consideration is how the jurisdiction of the High Court has to be exercised while carrying out its power. This position has been clarified in a Division Bench judgement in the case of **State vs. Devi Dayal** (AIR 1959 Alld.421). In the said case the Division Bench which was concerned with the question of revisional jurisdiction in a criminal case has dealt with the said question in an appropriate manner. A Bench of this court consisting of Mr. Justice James and Mr. Justice Takru had directed a notice to be issued to the opposite party, Devi Dayal, to show cause, within three weeks why the sentences which had been passed on him by the Magistrate by his order dated 29th October, 1957, be not enhanced. This notice was directed to be issued by the

aforementioned Bench ostensibly in the exercise of as they said, 'the High Court's power of Revision". When the mater came in revision before the Bench consisting of Mr. Justice B.Mukerji and Mr. Justice H.P. Asthana it was held that on the facts of the case it was clear that the matter was not placed before the learned Judges who directed notice to be issued, by either the Chief Justice or in accordance with any direction given by him and the case appears to have been taken by the Bench suo motu. The question that came for consideration was whether under the aforementioned circumstances of the case, the order of the Bench directing issue of notice to Devi Dayal to show cause why his sentence should not be enhanced, was within the jurisdiction of that Bench or not. While dealing with the said question, the Division Bench held that notice for enhancement can be issued by this Court under revisional jurisdiction. The relevant portion of the order reads as under:

"Revisional Jurisdiction in criminal cases is conferred on the High Court by S.435 of the Code of Criminal Procedure. The jurisdiction that this section confers is on the 'High Court' and not on any individual Judge of the Court or on any Bench of the Court. The powers which the High Court can exercise while exercising its revisional jurisdiction are provided for in S.439 of the Code of Criminal Procedure and here too it may be noticed, the powers that are described there are the powers of the 'High Court' and not of any individual Judge or any individual or particular Bench of the High Court.

If there is nothing else in the law then whenever any revisional power had to be exercised by the High Court that power could only be exercised by the entire Court and not by any single Judge or a Divisional Bench of the Court."

The jurisdiction of the High Court and the powers are provided for by Art. 225 of the Constitution. The perusal of that article necessitates the consideration of the provisions contained in S.223 of the Government of India Act, 1935 and S.108 of the Government of India Act, 1915. In pursuance of the power vested in the High Court by these provisions, Rule 1 of Chapter V of the Rules of the Allahabad High Court has been made. On a consideration of the aforementioned constitutional position and the rule, the Court came to the conclusion that it is only the Chief Justice who has the right and the power to decide which Judge is to sit alone and what cases such Judge can decide; further, it is again for the Chief Justice to determine which Judge shall constitute Division Benches and what work those Benches shall do. Under the rules of the High Court, it is for the Chief Justice to allot work to Judges and Judges can do only such work as is allotted to them. It is not open to a Judge to make an order, which could be called an appropriate order, unless and until the case in which he makes the order has been placed before him for order either by the Chief Justice or in accordance with his directions. Any order which a Bench or a single Judge may choose to make in a case that is not placed before them or him by the Chief Justice or in accordance with is directions is an order which, if made, is without jurisdiction.

In the aforesaid case when the Bench of the High Court purported to make an order directing a notice to issue under S.439, Criminal P.C. to an accused to

show cause why his sentences should not be enhanced even though it was not a case that had been directed by the Chief Justice to be placed before that Bench for order, it was held that the Bench had no jurisdiction to issue notice to the accused to show cause for the enhancement of the sentences passed against him.

10. The power conferred under Article 215 of the Constitution of India has to be exercised by the entire High Court and not by a single Judge or by a Division Bench of the High Court. The manner in which the High Court exercised such power has been explained in the Division Bench Judgement in the Case of **State vs. Devi Dayal** (supra) It is therefore, clear that such power as contemplated cannot be exercised by a single Judge without being conferred such authority or jurisdiction by the Chief Justice.

11. Similar view has been expressed by the Division Bench of the Calcutta High Court (of which I was a party) in the case of **Sohan Lal Vaid vs. State of West Bengal and others** (AIR 1990 Cal.168) In that case the Chief Justice P.D. Desai assessed how the power to be exercised by the High Court. The relevant portion of the said judgement is quoted below:

"11. The High Court Act or the Charter Act, 1861 (24 and 25 Vict.,C.104), hereinafter called the Charter Act, which received the Royal assent on August 6, 1861, the parent legislation which authorised the establishment of High Courts of Judicature in India. Section 1 of the Said Act providing, inter alia, that it shall be lawful for Her Majesty, by Letters Patent, to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William and, by like Letters Patent, to erect and establish like High Court at Madras and Bombay for those Presidencies respectively, and that the High Court to be established under such Letters Patent shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf. Section 13 of the Charter Act provided that subject to any laws or regulations which may be made by the Governor-General in Council, the High Courts established in any Presidency under the said Act may, by their own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court, in such manner as may appear to such Court to be convenient for the due administration of justice. Section 14 provided that the Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts.

12.The Letters Patent dated May 14, 1862 for the High Court of Judicature to be established in Bengal in accordance with the provisions of the Chapter Act was transmitted to the Governor-General of India in Council by the despatch dated May 14, 1862 from Sir Charles Wood, secretary of State. The said Letters Patent were afterwards revoked by further Letters Patent dated December 28, 1865. Clause 36 of the Letters Patent dated December 28, 1865 in its original form provided, inter alia that any function

which was thereby to be performed by the High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose "under the provisions of the thirteenth section of the aforesaid Act of the twenty-fourth and twenty-fifth years of our region." Reference in the extracted portion aforesaid is to Section 13 of the Charter Act. The said extracted portion was substituted by the words "in pursuance of section one hundred and eighty of the government of India Act, 1915" by the amended Letters Patent of March 11, 1919.

13.Paragraph 35 of the despatch from the Secretary of State accompanying the former Letters Patent mentioned, inter alia, that Clause 36 referred to the powers of single Judges and Division Courts appointed or constituted under the provisions of Section 13 of the Charter Act and that by Section 14 of the said Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, was placed in the hands of the Chief Justice.

14.The Charter Act was repealed and re-enacted with slight modifications by the Government of India Act, 1915. Section 106 of the said Act provided, inter alia, that several High Courts are courts of record and have all such powers and authority over or in relation to the administration of justice, including power to make rules for regulating the practice of the Court, as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent all such jurisdiction, powers respectively at the commencement of the said Act. Section 108 of the said Act reads as follows:

"108(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more judges or by division courts constituted by two or more judges of the High Court of the original and appellate jurisdiction vested in the Court.

(2)The Chief Justice of each High Court shall determine what judge in each case is to sit alone, and what judges of the court, whether with or without the Chief Justice, are to constitute the several division courts."

15. The Government of India act, 1915, was repealed and reenacted with modifications by the Government of India Act, 1935. Section 223 of the said Act read as follows:

"223.Subject to the provisions of this Part of this Act, to the provisions of any order in Council made under this or any other Act, to the provision of any order made under the Indian Independence Act, 1947, and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the establishment of the Dominion."

16.The Government of India Act, 1935, was repealed by the Constitution of India. Article 225 of the Constitution of India, in

so far as it is relevant for the present purposes, reads as follows"

"225. Jurisdiction of existing High Courts – Subject to the provisions of this Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution."

17.In **National Sewing Thread Co. Ltd. vs. James Chadwick & Bros**. AIR 1953 SC 357, it was ruled that power that was conferred by Section 108 of the Government of India Act, 1915 could be exercised from time to time with reference to jurisdiction whether existing at the time of the coming into force of the said Act or whether conferred by subsequent legislation, and that the said power still subsists and that it has not been affected in any manner whatever either; by the Government of India Act, 1935 or by the Constitution. On the other hand, it has been kept alive and reaffirmed with great vigour by those statues. It was further observed that the power is there and continues to be there and can be exercised in the same manner as it could be exercised when it was originally conferred subject, of course, to the alternation by an appropriate legislation.

18. It is thus clear that the Chief Justice of the High Court has the constitutional power to determine what judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several Division Courts. In other words, the function of assignment of judicial business amongst the Judges of the High Court, whether sitting singly or in Division Courts, is entrusted by law to the Chief Justice and the Judge or Judges derive jurisdiction to deal with and decide the cases or class of cases assigned to them by virtue of the determination made by the Chief Justice. This power is derived not only from the provisions of section 108 sub-section (2) of the Government of India Act, 1915, which still subsists and the power where under still continues to be there, as held in National Sewing Thread Co. Ltd.'s case, but also inheres in the Chief Justice.

23.The foregoing review of the constitutional and statutory provisions and the case law on the subject leaves no room for doubt or debate that once the Chief Justice has determined what Judges of the Court are to sit alone or to constitute the several Division Courts and has allocated the judicial business of the Court amongst them, the power and jurisdiction to take cognizance of the respective classes or categories of cases presented in a formal way for their decision, according to such determination, is acquired. To put it negatively, the power and jurisdiction to take cognizance of and to hear specified categories or classes of cases and to adjudicate and exercise any judicial power in respect of them is derived only from the determination made by the Chief Justice in exercise of his constitutional, statutory and inherent powers and from no other source and no cases which is not covered

by such determination can be entertained, dealt with or decided by the Judges sitting singly or in Division Courts till such determination remains operative. Till any determination made by the Chief Justice lasts, no Judge who sits singly can sit in a Division Bench nor can a Division Bench be split up and one or both of the Judges constituting such Bench sit singly or constitute a Division Bench with another Judge and take up any other kind of judicial business. Even cases, which are required to be heard only by a particular single Judge or Division Bench, such as part-heard matters, review cases etc., cannot be heard, unless the Judge concerned is sitting singly or the same Division Bench has assembled and has been taking up judicial business under the extant determination. Such reconstitution of Benches can take place only if the Chief Justice specially determines accordingly. The following observations of Basudeva Mukherjee, J. in the Division Bench case of **State v. Devi Dayal,** AIR 1959 Allahabad, 421 at 432 being pertinent on this point are quoted below:

"It is clear to me, on a careful consideration of the constitutional position, that it is only the Chief Justice who has the right and the power to decide which Judge is to sit alone and what cases such Judge can decide, further, it is again for the Chief Justice to determine which Judges shall constitute Division Benches and what work those Benches shall do. Under the rules of this Court, the rule that I have quoted above, it is for the Chief Justice to allot work to Judges and Judges can do only such work as is allotted to them.

It is not, in my view, open to a Judge to make an order which could be called an appropriate order, unless and until the cases in which he makes the order has been placed before him for orders either by the Chief Justice or in accordance with his directions. Any order which a Bench or a single Judge may choose to make in case that is not placed before them or him by the Chief Justice or in accordance with his directions is an order which, in my opinion, if made, is without jurisdiction."

24.It is pertinent to remember that the jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus the jurisdiction may have to be considered with reference to value, place, nature of the subject matter and age of the case. The power of the Court may be exercised within the defined territorial limits. It may be qualified or confined to subject matter of prescribed value. The Court may have competence to deal only with the cases of a specified character, for instance, testamentary or matrimonial appeals, revisions or writs, or specified subjects, such a, land or service, and so on and so forth. The Jurisdiction may be further restricted with reference to the age of cases if the authority concerned directs the hearing of cases to take place before the Court according to the date of filing. This classification as to territorial jurisdiction, pecuniary Jurisdiction and jurisdiction over the subject matter is obviously of a fundamental character. The cardinal position cannot be overlooked that before jurisdiction over the subject mater is exercised, the case must be legally brought before the concerned Court for the hearing and determination and that a judgement pronounced by Court without investment of jurisdiction is void."

In the case of State of Maharashtra v. Narayan (AIR 1982 SC 1198) the power

of the Chief Justice has been clearly elaborated. The relevant portion of the said judgement is quoted below:

"The Chief Justice is the master of the roster. He has full power, authority and jurisdiction in the matter of allocation of business of the High Court which flows not only from the provisions contained in sub-section (3) of Section 51 of the Act, but inheres in him in the very nature of things."

12. In the case of **Raj Kishore Yadav vs. Principal, Kendriya Vidyalaya, Bamrauli and others** [(1997) 1 UPLBEC 26] it was held that Rule 4(a) is repugnant to the Constitution of India to the extent that it places a case of civil contempt before a Bench or a division of a Court which may not have passed the order, direction or judgement. The relevant portion of the judgement is set out herein below:

"The Rules of the Allahabad High Court dislocate the civil contempt jurisdiction, inconsistent with the understood concept of a Court of Record. This has resulted in adding arrears to the already pending cases. Of every contempt case, civil contempt, two proceedings are born. The main case and the contempt case. Each is registered separately. It is monitored separately right from notice to Judge. The records of the two cases are strangers to each other. This is not all. On record there are several instances of more than one contempt case and more than one case itself (out of which the contempt arises) pending on the same subject matter, between the same parties. Statistics reveal that on the same controversy, counsel intimated the Court, of there existing three, four, five or even six cases, between the case and contempt proceedings. In a Court of record this is not meant to happen. This had caused concern to Chief Justice Hon'ble B.P. Jeevan Reddy, as he then was.

In the circumstances, it is found that Rule 4(a) is repugnant to the Constitution of India to the extent and it places a case of civil contempt before a Bench or a division of a Court which may not have passed the order, direction or judgment. A matter of civil contempt may be placed before a learned judge, but this would be a jurisdiction so nominated by the Hon'ble the Chief Justice, of cases referred by the subordinate courts to the High Court. But of contempt, that is, civil contempt alleged for the violation of an order, direction or judgment of the High Court, as a Court of Record, the only Court would be the Court which passed such an order, direction or judgement and no other.

Consequently and for the reasons given in this order sub-clause (a) of Rule 4 of Chapter XXXV-E of the Rules framed under section 23 of the contempt of Courts Act, 1971, and appended to the Allahabad High Court Rules, for the presentation and hearing of civil contempt case, in so far as they relate to the examination and allegation of a civil contempt on the breach or violation of an order, direction or judgement of a Bench of the High Court, but misplaces the case before a Court which may not have passed the order, direction or judgment, render this particular Rule inconsistent in its concept to a Court of Record and specifically ultra vires to Article 215 of the Constitution of India. This rule as is contained in sub-clause (a) of Clause 4, to

Chapter XXXV-E is struck off accordingly."

13. The matter went up to the apex Court. The apex Court in the case of **High Court of Judicature at Allahabad vs. Raj Kishore Yadav and others** [(1997) 3 SCC 11] allowed the appeal and reversed the decision of the Division Bench. The finding of the apex Court in this connection may be summarized as follows:

"Clause (a) of Rule 4 of Chapter XXXV-E of the Rules of the High Court of Judicature at Allahabad is valid and legal and not inconsistent with Article 215 of the Constitution of India.

A conjoint reading of section 108 of the Government of India Act, 1915, Section 223 of the government of India Act, 1935 and Article 225 of the Constitution of India makes it clear that every High Court by its own rules can provide for exercise of its jurisdiction, original or appellate, by one or more Judges or by division courts consisting of two or more Judges of the High Courts and it is for the Chief Justice of each High Court to determine what Judge in each case is to sit alone or what Judges of the court whether with or without the Chief Justice are to constitute several division courts. In exercise of the aforesaid rule-making power which inhered in all existing High Courts at the time of the advent of the Constitution of India and which was expressly saved by Article 225 of the Constitution of India the Full Court of the High Court had framed these Rules in 1952. The procedure for exercise of contempt jurisdiction can be laid down by the High Court concerned by framing suitable Rules under section 23 of the Contempt of Courts Act, 1971. Pursuant to Rule 4(a) of the said Rules the Chief Justice was entitled to nominate a learned Single Judge to decide civil contempt cases arising under the Contempt of Courts Act, 1971. The aforesaid Rule, therefore, clearly falls in line with the constitutional scheme in connection with the exercise of jurisdiction of the High Court. Thus enactment of the impugned Rule squarely falls within the administrative power of the High Court well preserved by the aforesaid provisions.

14. All that Article 215 states is that every High Court shall be a court of record meaning thereby all the original record of the court will be preserved by the said court and it shall have all the powers of such a superior court of record including the power to punish for contempt of itself. As a superior court of record the High Court is entitled to preserve its original record in perpetuity. Even apart from the aforesaid attribute of a superior court of record the High Court as such has twofold powers. Being a court of record the High Court (I) has power to determine the question about its own jurisdiction and (ii) has inherent power to punish for its contempt summarily.

15. As regards the contention that the Full Court of the Allahabad High Court by framing the impugned Rule had enacted a provision which fell foul on the touchstone of Article 215 of the Constitution it may be stated that the High Court as an institution has the season of the relevant record pertaining to all the cases tried before it. Record cannot be said to be in the custody of the author of the order giving rise to contempt proceedings. The cases may be pending or

might have been disposed of. Civil contempt might be alleged in connection with interim orders in pending matters and can also be alleged in connection with final orders in matters which are already disposed of. The record of such matters would be available in the High Court. All that the impugned Rule has done is to entitle the Chief Justice to assign the work of hearing civil contempt matters to one of the Judges. Such an exercise is perfectly legal and valid in the light of the constitutional scheme. When civil contempt is alleged in connection with breach of any order of the High Court, whether final or interim, while deciding the said question the learned Judge to whom this work is assigned to entitled to look into the relevant record which obviously is available in the High Court and thereby the learned Judge is not depriving any other Judge of the said record. So far as matters which are finally disposed of are concerned, such an eventuality can never arise but even in pending matters where breach of interim orders is alleged, when contempt proceedings in connection with such orders are placed for examination and scrutiny before the learned Judge to whom the work is assigned by the Chief Justice under the Rules it cannot be said that the record of the case in any way gets adversely affected or disturbed. It is the question of internal arrangement and transmission of record from court to court as per the exigencies and necessities of the case.

16. The civil contempt alleged is the contempt of the High Court as such and not the contempt of the author of the order being the Judge concerned who might have passed the said order, whether interim or final. When civil contempt by way of breach of such an order is alleged it is the institution of the High Court as such which is said to have been contemptuously dealt with by the contemnor concerned. For upholding the majesty of the institution as such, therefore, the High Court as a court of record can look into the grievance centring round the alleged breach of its order and it is this power to punish the contemnor that flows from Article 215 of the Constitution of India as well as from the relevant provisions of the Contempt of Courts Act. But how this grievance of the aggrieved party is to be processed and examined pertains to the realm of distribution of work and jurisdiction of the High Court amongst different Division Benches and that exercise is permissible to the Chief Justice of Benches and that exercise is permissible to the Chief Justice of the High Court as per the rules framed by the High Court on its administrative side. That exercise has nothing to do with Article 215. Article 215 saves the inherent powers of the High Court as a court of record to suitably punish the contemnor who is alleged to have committed civil contempt of its order. Order might have been passed by any of the learned Judges exercising the jurisdiction of the High Court as per the work assigned to them under the Rules by the orders of the Chief Justice, but once such an order is passed by a learned Single Judge or a Division Bench of two or more Judges the order becomes the order of the High Court. Breach of such an order which gives rise to contempt proceedings also pertains to the contempt of the High Court as an institution. At that stage Article 215 does not operate, but it is only Article 225 read with the Rules framed by the High Court on administrative side and the power

inhering in the Chief Justice, of assigning work to the appropriate Bench of Judge or Judges, under section 108 of the Government of India Act, 1915 read with Section 223 of the Government of India Act, 1935 which would have its full play. Consequently if under the impugned Rules the task of considering the grievances of the aggrieved party in connection with civil contempt's of high Court'' orders is assigned to one of the Judges of the High Court as a court of record.

17. The analogy of Order 39, Rule 2-A CPC cannot be pressed into service while judging the validity of the impugned Rule on the touchstone of Article 215. Rule 2-A is mainly pressed into service before subordinate courts which at most of the centers consist of sole presiding Judges of the courts. In such cases where the subordinate courts working at these centers consist of only one presiding Judge the applications under Order 39, Rule 2-A CPC will have to be; filed in the very same court and would go to the same Judge or his successor-in-office. Such is not the case with the High Court functioning as a superior court of record under Article 215 of the Constitution of India. The High Court consists of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint as laid down by Article 216. Consequently plurality of Judges appointed to the High court collectively constitute the High court.

Again, while exercising original jurisdiction under Contempt of Courts Act, 1971 in connection with civil contempt of its own orders the high court is not exercising any review jurisdiction wherein statutorily the proceedings may have to be placed for decision of the same Judge or Judges if they are available. Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from the Contempt of Courts Act or under Article 215 of the Constitution of India. How such original jurisdiction can be exercised is a matter which can legitimately be governed by the relevant Rules framed by the High Court on its administrative side by exercising its rule-making power under Section 23 of the Act or under its general rule-making power flowing from the relevant under its general rule-making power flowing from the relevant provisions of the constitutional scheme. Consequently it cannot be said that the impugned Rule is violative of Article 215."

18. In the case of **State of Rajasthan vs. Prakash Chand and others** [(1998) 1 SCC 1] the Supreme Court while allowing the appeal held as follows:

"While on the judicial side the Chief Justice of the High Court is only the first amongst the equals, the administrative control of the High Court vests in the Chief Justice of the High Court alone and it is the prerogative to distribute business of the High Court both judicial and administrative.

The Chief Justice is the master of the order. He alone has the right and power to decide how the Benches of the High Court are to be constituted: which Judge is to sit alone and which cases he can and is required to hear as also as which Judges shall constitute a Division Bench and what work those Benches shall do.

The puisne Judge can only do that work which is allotted to them by the Chief Justice or under his directions. No judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the High Court. No departure from it can be permitted.

Till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a Division Bench and no Division Bench can be split up by the Judges constituting the bench themselves, and one or both the Judges constituting such bench cannot sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice.

In the event a Single Judge or a Division Bench considers that a particular case requires to be listed before it for valid reasons, it should direct the Registry to obtain appropriate orders from the Chief Justice. The puisne Judges are not expected to entertain any request from the advocates of the parties for listing entertain any request from the advocates of the parties for listing of case which does not strictly fall within the determined roster. In such case, it is appropriate to direct the counsel to make a mention before the Chief Justice and obtain appropriate orders. This is essential for smooth functioning of the High Court.

The Chief Justice can take cognizance of an application laid before him under the High Court Rules (Rule 55 herein) and refer a case to the larger bench for its disposal and he can exercise this jurisdiction even in relation to a part-heard case. The Chief Justice has the authority and the jurisdiction to refer even a part-heard case to a Division Bench for its disposal in accordance with law where the Rules so demand. It is a complete fallacy to assume that a part-heard case can under no circumstances be withdrawn from the Bench and referred to a circumstances be withdrawn from the Bench and referred to a larger Bench, even where the Rules make it essential for such a case to the heard by a larger Bench.

The puisne Judges cannot "pick and choose" any case pending in the High Court and assign the same to himself or themselves for disposal without appropriate orders of the Chief Justice.

No Judge or Judges can give directions to the Registry for listing any case before him or them which runs counter to the directions given by the Chief Justice."

19. In the case of **Dr. L.P. Misra Vs. State of U.P.** [(1998) 7 SCC 379] a Division Bench of the Allahabad High Court, Lucknow Bench at Lucknow, holding the appellants guilty under the Contempt of Courts Act, 1971 awarded a sentence to each one of them of imprisonment for one month and a fine of Rs.1000/-; in default of payment of fine to undergo further imprisonment for fifteen days. The matter came up before the Supreme Court. The facts as recorded in its judgment read as follows:

"On 15.7.1994, the Division Bench comprising of Mr. Justice B.M. Lal and Mr. Justice A.P. Singh commenced its proceeding and in fact some of the cases

listed before it were heard. While hearing Writ petition No….. of 1994 (**Deoki Nandan Agarwal v. Commr., Faizabad Division**), Dr. L.P. Misra, Advocate, the appellant in Criminal Appeal No. 483 of 1994 along with his associates entered in the courtroom raising slogans and asking the Court to rise and stop functioning. The Court, however, continued to function whereupon Dr. L.P. Misra along with Shri A.K. Bajpai, Sri Anand Mohan Srivastava, Sri Y.C. Pandey and Shri Shamim Ahmad (appellants in connected appeals) came on the dais and tried to manhandle and in that process Dr. L.P. Misra caught hold of Justice A.P. Singh forcing the Court to rise and then used abusive language against Justice B.M. Lal in the following words:

> "Tum sale utth jaao nahien to jaan se maar daalenge. Tumne Chief Justice se kaha hai ki Lucknow ke Judges 5000 rupya lekar stay grant karte hain our stay extend karte hain. Aaj 2 baje tak agar tum apna boriya bister lekar yahan se nahien bhag jaate to to tumhe jaan se maar daalenge."

4. In view of an alarming and threatening situation, the Court was forced to retire and consequently both the Hon'ble Judges retired to the champber of Justice B.M. Lal. Dr. L.P. Misra then entered the chamber and repeated the same uncivilized language and extended the same threat. It was because of the intervention of Shri J.N. Bhalla, Additional Chief Standing Counsel, State of U.P. and some members of the staff of the Court who persuaded Dr. L.P. Misra and the others to leave the chamber. After some time, the Court reassembled and took a serious note of contemptuous conduct on the part of the appellants and in contemptuous conduct on the part of the appellants and in exercise of its power under Article 215 of the Constitution of India, passed the following order:

"This clearly amounts to the grossest contempt of court, interference in the administration of justice and insult to the Court as it scandalizes the Court and lowers the authority of the Court. Therefore, in our considered opinion, Dr. L.P. Misra, Shri A.K. Bajpai, Shri Anand Mohan Srivastava, Shri Y.C. Pandey and Sri Shamim Ahmad Advocates, are ex facie guilty of contempt of court and accordingly in exercise of powers conferred by Article 215 of the Constitution of India, this Court hereby sentences the aforesaid advocates, namely (1) Dr. L.P. Misra, Advocate, (2) Shri A.K. Bajpaie, Advocate, (3) Shri Anand Mohan Srivastava, Advocate and (4) Shri Shamim Ahmad, Advocate with; imprisonment for one month and fine of Rs.1000 (Rupees one thousand) each and in default of payment of fine they shall undergo further imprisonment for 15 days."

5. The Court further directed the Additional Registrar of the said Court to take steps forthwith for execution of this Court.

6. It is against this order dated 15.07.1994 passed by the High Court that the appellants have filed these criminal appeals under section 19 of the Contempt of Courts Act, 1971.

7. At the outset, we make it clear that the above recitals are taken from the impugned order which are denied by the appellants. In the view which we are inclined to take at this stage, we have refrained ourselves from going into the merits of the case."

It was urged before the Supreme Court on behalf of the counsel for the appellants that the Division Bench of the Allahabad High Court, Lucknow Bench at Lucknow while passing the said order did not follow the procedure prescribed by law. It was further urged that the court had failed to give a reasonable opportunity to the appellants of being heard. It was also argued that assuming that the incident as recited in the impugned order had taken place, the Court could not have passed the impugned order on the same day after it reassembled without issuing a show-cause notice or giving an opportunity to the appellants to explain the alleged contemptuous conduct. It was also urged that the minimal requirement of following the procedure prescribed by law had been overlooked by the Court. Learned counsel for the appellants had referred to section 14 of the Contempt of Courts Act, 1971 as also the provisions contained in Chapter XXXV-E of the Allahabad High Court Rules, 1952 in support of his contention. Emphasis was laid to Rules 7 and 8, which read as under:

"7. When it is alleged or appears to the Court upon its own view that a person has been guilty of contempt committed in its presence or hearing, the Court may cause such person to be detained in custody, and at any time before the rising of the Court, on the same day or as early as possible thereafter, shall –

(a) cause him to be informed in writing of the contempt with which he is charged, and if such person pleads guilty to the charge, his plea shall be recorded and the Court may in its discretion, convict him thereon.

(b) if such person refuses to plead, or does not plead, or claims to be tried or the Court does not convict him, on his plea of guilt, afford him an opportunity to make his defence to the charge, in support of which he may file an affidavit on the date fixed for his appearance or on such other date as may be fixed by the Court in that behalf.

(c) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed either forthwith or after the adjournment, to determine the matter of the charge, and

(d) make such order for punishment or discharge of such person as may be just.

8. Notwithstanding anything contained in Rule 7, where a person charged with contempt under the Rule applies, whether orally or in writing to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, and the Court is of the opinion that it is practicable to do so and that in the interests of proper administration of justice, the application should be allowed, it shall cause the matter to be placed, together with a statement of the facts of the case, before the Chief Justice for such directions as he may think fit to issue as respects the trial thereof."

It was also urged on behalf of the appellants' counsel that the impugned order was totally opposed to the principles of natural justice and therefore, unsustainable on this score alone. The Supreme Court after hearing the learned Solicitor General, who was requested to

appear and assist the Court held as follows:

"12. After hearing learned counsel for the parties; and after going through the materials placed on record, we are of the opinion that the Court while passing the impugned order had not followed the procedure prescribed by law. It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law. It is in these circumstances the impugned order cannot be sustained."

Thus, the following principles emerge from the foregoing discussions:

1. The administrative control of the High Court vests in the Chief Justice alone and it is his prerogative to distribute business of the High Court both judicial and administrative.

2. The Chief Justice alone has the right and power to decide how the Benches of the High Court are to be constituted; which Judge is to sit alone and which cases he can and is required to hear as also which Judges shall constitute a Division Bench and what work those Benches shall do.

3. The puisne Judges can only do what work which is allotted to them by the Chief Justice or under his directions. No Judge or a Bench of Judges can assume jurisdiction in a case pending in the High court unless the case is allotted to him or them by the Chief Justice.

4. Any order which a Bench or a Single Judge may choose to make a case that is not placed before them or him by the Chief Justice or in accordance with his direction is an order without jurisdiction and void;

5. Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from the Contempt of Courts Act or under Article 215 of the Constitution of India.

6. For exercising the jurisdiction under Article 215 of the Constitution of India the procedure prescribed by law has to be followed.

20. It appears that on 26.03.2001 when the learned Judge passed the said order, he was allotted and assigned the determination with regard to the following matters by the Chief Justice as appears from the printed cause list:

"FRESH WRITS IN EDUCATIONAL MATTERS (EXCEPT SERVICE WRITS) FOR ORDERS, ADMISSION AND HEARING AND ALL SINGLE JUDGE WRIT-C FOR ORDER, ADMISSION AND HEARING INCLUDING BUNCH CASES."

21. The learned Judge on the face of the record, therefore, had no determination assigned to him by the Chief Justice with regard to the matters relating to contempt and the said jurisdiction had been assigned to another Hon'ble Single Judge.

22. In view of the rule as already noted that the power to constitute Benches and allotment of work to the learned Judges vests absolutely in the Chief Justice and the Rules 1,6 and 17 of Chapter V and Rule 2 of Chapter VIII of

the Allahabad High Court Rules also clearly provide for the same. In that view of the matter the order passed by the learned Single Judge in the instant case appears to us to be without jurisdiction and void.

23. As noted above, arguments have been advanced by the learned counsel for the respondent-petitioner that the special appeal is not maintainable. More-over it has also been submitted that the direction, issued in the instant case by the learned single Judge, is in the nature of a proceeding initiated by virtue of the power vested in the High Court to punish for contempt and it does not amount to a judgment or a final order.

24. It is well settled that an appeal lies from a judgement within the meaning of Clause 10 of the Letters Patent as continued by Clause 15 of the United Provinces High Court (Amalgamation) Order 1948 and Rule 5 of Chapter VIII of the Allahabad High Court Rules.

25. In the case of **Shah Babulal Khimji vs. Jayaben D. Kania and another** reported in AIR 1981 SC 1786, although not cited by any of the parties appears to be relevant. What is judgement, under the Letters Patent has been considered, taking into account Clause 15 of the Letters Patent of the Bombay High Court, at length in the aforesaid judgement of the Apex Court. It was held that the interlocutory order in order to be a judgement must contain the traits and trappings of finality either when the order decides the question in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings. It has further been held that every interlocutory order cannot be regarded as a judgement but only those orders would be judgement which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. The Supreme Court in this connection, in paragraph 86 of the said judgement has quoted a portion of the judgement of Calcutta High Court in the case of Shorab Merwanji Modi v. Mansata Film Distributors, reported in AIR 1957 Cal. 727, inter alia, as follows:

"On a strict construction of the Calcutta test, the right or liability must mean some right or liability which is a subject matter of controversy in the suit or proceeding, but in its application to individual cases, that strict construction has not been adhered to and was indeed often departed from by Couch, C.J., himself who was the author of the test. Orders concerning the jurisdiction of the Court to entertain a suit, as distinguished from matters of the actual dispute between the parties, were held by him to come within the category of judgement." (emphasis supplied).

26. In the instant case the learned Judge has exercised the jurisdiction not vested in him and as such the order concerning the jurisdiction to entertain the contempt proceeding clearly falls within the definition of 'judgement' and is accordingly appealable. It also affects the right of the appellants and the order in the instant case also causes injustice to the appellants and, as such, has the trapping of judgement.

27. In the case of **Shah Babulal Khimji** (supra) the Supreme Court also dealt with the case of **Asrumati Debi vs. Kumar Rupendra Deb Raikot** (AIR

1953 SC 198). While considering the case **Shah Babulal Khimji** (supra) the Supreme Court in paragraph 101 of the said judgement had observed as follows:

"101. Thus, from this case an important test tat can be spelt out is that where an order which is the foundation of the jurisdiction of the court or one which goes to the root of the action, is passed against a particular party, it doubtless amounts to a judgement. (emphasis supplied) As we have already pointed out apart from these observations this court refused to embark on an enquiry as to in what cases an order passed by a trial Judge would be a 'judgement' for purposes of appeal before a larger Bench."

In paragraph 106 of the said judgement the Supreme Court had held as follows:

"106. Thus, the only point which emerges from this decision is that whenever a trial Judge decides a controversy which affects valuable rights of one of the parties, it must be treated to be a judgement within the meaning of the Letters Patent." (emphasis supplied)

Amrendra Nath Sen, J. in a separate judgement dealt with the expression 'judgement' with reads as follows:

"In finding out whether the order is a 'judgement' within the meaning of clause 15 of the Letters Patent it has to be found out that order affects the merits of the action between the parties by determining some right or liability. The right or liability has to be found out by a Court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability". In my opinion, an exhaustive or a comprehensive definition of 'judgement' as contemplated in clause 15 of the Letters Patent cannot be properly given and it will be wise to remember that in the Letters Patent itself, there is no definition of the word 'Judgement'. That expression has necessarily to be construed and interpreted in each particular case. It is, however, safe to say that if any order has the effect of finally determining any controversy forming the subject-matter of the suit itself or any part thereof or the same affects the question of Court's jurisdiction or the question of limitation, such an order will normally constitute 'judgement' within the meaning of clause 15 of the Letters Patent." (emphasis supplied)

28. In the instant case, admittedly, the question of jurisdiction is involved and, as such, the order falls within the meaning of 'judgement' under the relevant clause of Rule 5 of Chapter VIII of the High Court Rules and accordingly appears to us to be appealable.

29. In the instant case since the order passed by the learned single Judge was beyond his competence or jurisdiction to pass such order, it is void and non-est and is accordingly appealable. The appellant being Vice Chancellor of Banaras Hindu University, who is holding a responsible position, issue of notice by the order impugned, which is without jurisdiction, has adversely affected his rights and the rights of the appellant having been adversely affected the appeal appears to be maintainable.

30. Considering the facts on record as also the principle of law as laid down in various decisions noted herein before, we are of the view that the learned single Judge on the face of record has exercised the jurisdiction not vested in him and as such, the order passed by him is void and is liable to be set aside.

31. Accordingly the special appeal is allowed and the impugned order passed by the learned single Judge is set aside. However, it is made clear that we have not decided the issue as to whether the appellants have violated the order passed by this Court or not and this order shall not preclude the Court having determination to take appropriate decision in accordance with law. Accordingly, we direct the matter to be listed before the learned Single Judge having determination to hear contempt matters within a week from date.

Special Appeal Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 2.3.2001

BEFORE
THE HON'BLE S. K. SEN, C.J.
THE HON'BLE SUDHIR NARAIN, J.

Criminal Contempt No. 821 of 1993.

State of U.P. ...Applicant
Versus
Satendrea Singh Tomar ...Respondent

Counsel for the Applicant:
A.G.A.

Counsel for the Respondent:
Shri A.D. Giri
Shri H.R. Sharma

Contempt of Courts Act, 1971- Section 2 (C) Criminal Contempt –Contemner and with Advocate tended to prejudice and caused serious obstruction the administration of justice such conduct of disrespect disrepute undermines and erodes the very foundation of judiciary by shaking the confidence of people no sincere regret -failure on the part of court to punish the contemner would be a failure to perform one of essential duties entrusted by the Constitution.

Case law discussed
JT. 1995 (2) SC—587
AIR 1991 SC 2176
Mad LJ. 832 =1911 (12) Crl L.J. 525
AIR 1920 B. 175
AIR 1926 ALL 523 (F B)
AIR 1942 FCI
1944 FCR 364
AIR 1992 SC 904
(I) AER1079
1972 AER 994
1980 SCC 311
AIR 1978 SC 727
AIR 1954 SC 10
1983 (4) SCC-125
(1991) 3 SCC 600

Held—para 3

The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court of the judicial system gets eroded. It is expected from an Advocate to be zealous in maintaining rule of law and in strengthening the people's confidence in the judicial institutions. It, however, appears that the contemner has acted exactly contrary to his obligations and has in reality set a bad example to others while at the same time contributing to weakening of the confidence of the people in the courts, in fact there is no sincere regret for the disrespect he showed to the presiding officer and for the harm that he showed to the

presiding officer and for the harm that he has done to the judiciary. A failure on the part of this court to punish the offender on an occasion such as this would thus be a failure to perform one of its essential duties solemnly entrusted to it by the Constitution and the people. It must be the Principle that self-restraint and respectful attitude towards the court, presentation of correct facts and law with a balanced mind and without overstatement, suppression, distortion or embellishment or embellishment are requisites of good advocacy. A lawyer has to be a gentleman first. His most valuable asset is the respect and goodwill he enjoys among his colleagues and in the Court.

Contempt of Courts Act, 1971—Section 2 (c) – criminal Contempt –A Lawyer has to be gentleman first – valuable asset of a lawyer is his goodwill – an Advocate making vicious allegation against presiding officer – held guilty of contempt of Court Six weeks simple imprisonment—held justified.

Held – para 9

In the instant case, the alleged contemner, who is an advocate had adopted defiant attitude and tried to justify the aspersions made by him even without thinking it necessary to apologies. He has neither expressed' an contrition nor has he any repentance for the vicious allegations made against the presiding officer of the court and on the other hand, he has exhibited a dogged determination to pursue the proceedings in the matter, come what may, Having regard to the gravity of the offence committed by the contemner I have no hesitation in holding him guilty of contempt of Court. I am of the view that awarding him sentence of six weeks simple imprisonment, as directed by my learned brother is fully justified.

By Hon'ble Sudhir Narain, J.

Contempt of Courts Act, 1971 – Section 2 (c) Criminal contempt – affidavits given by the person—attached with the presiding officer- can not be ignored as they are subordinate to the officer concern.

It is not denied that these persons who had filed affidavits were attached with the officer. It is also not the case of the contemner that they were absent from duty. They were the eye witnesses and they could only depose as to what had happened. He has relied upon the decision in Dr. H. singh Khalsa Vs. B.L. Narendra and another, 1998 Cr, L.J. 768 wherein the Court observed that affidavits of persons closely related cannot be accepted. This case is not applicable to the facts of the present case.

Contempt of Court Act—1971—section 2 (c) read with Section 3 of Evidence Act.- Contempt committed in chamber attached to court room—whether the contemner can be punished for offence committed in Chamber ? Held' Yes' .

Held—Para 23

The Judge has been conferred power to decide the matter and if he has such an authority he is himself a Court. The place where he exercises that judicial power is popularly called a Court because the Judge performs judicial functions there.

Contempt of Courts Act 1971—Section 2 (c) – Criminal assaulted the judge who was exercising his judicial function false plea taken – never expressed any apology – vicious allegations against judge- amounts to contempt of court punishment for six weeks simple imprisonment held proper.

By the Court

1. I have the opportunity of perusing the judgement prepared by learned brother Sudhir Narain, J. and while agreeing with the same I like to express

my views on certain aspects of the matter. It is not necessary to reiterate the facts, which have already been narrated by learned brother Suddhir Narain J.

2. Under the common law definition, "Contempt of Court" is defined as an act or omission calculated to interfere with the due administration of justice. This covers criminal Contempt [that is, acts which so threaten the administration of justice that they require punishment] and civil contempt [disobedience of an order made in a civil cause].

3. From the facts which have been elaborately narrated in the judgement rendered by my brother it is clear that the allegations against the contemner by my brother it is clear that the allegations against the contemner, if true, would amount of criminal contemner on the basis of the records appears to be derogatory and there is no other way but to strongly condemn the same. It is an act unbecoming of the conduct of an Advocate. If a learned Advocate behaves in such a manner that will seriously effect the administration of justice. The conduct of the contemner who also happens to be an Advocate has tended to prejudice and caused serious obstruction in the administration of justice. It appears that by his unruly conduct and act the contemner who is an Advocate of the court tended to over-awe the court and tried to prevent the officer of the court to perform duty to administer justice. Such conduct brings the authority of the court and the administration of justice into disrespect and disrepute and undermines and erodes the very foundation of the judiciary by shaking the confidence of the people in the ability of the court to deliver free and fair justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded. It is expected from an Advocate to be zealous in maintaining rule of law and in strengthening the people's confidence in the judicial institutions. It, however, appears that the contemner has acted exactly contrary to his obligations and has in reality set a bad example to others while at the same time contributing to weakening of the confidence of the people in the courts. In fact there is no sincere regret for the disrespect he showed to the presiding officer and for the harm that he has done to the judiciary. The Court will be failing in its duty to protect the administration of justice from attempts to denigrate and lower the authority of the judicial officers entrusted with the sacred task of delivering justice. A failure on the part of this court to punish the offender on an occasion such as this would thus be a failure to perform one of its essential duties solemnly entrusted to it must be the principle that self- restraint and respectful attitude towards the court, presentation of correct facts and law with a balanced mind and without overstatement, suppression, distortion or embellishment are requisites of good advocacy. A lawyer has to be a gentleman first. His most valuable asset is the respect and goodwill he enjoys among his colleagues and in the court.

4. In this connection we may take note of the judgment and decision of the Supreme Court in re: **Vinay Chandra Mishra** (J.T. 1995 (2) SC 587). It must

the principal that cases are won and lost in the court daily as observed by the Supreme Court in the aforesaid decision which is quoted below:

"Case are won and lost in the court daily. One or the other side is bound to lose. The remedy of the losing lawyer or the litigant is to prefer and appeal against the decision and not to indulge in a running battle of words with the court. That is the least that is expected of a lawyer. Silence on some occasions is also an argument. The lawyer is not entitled to indulge in unbecoming conduct either by showing his temper or using unbecoming language."

5. It cannot be disputed that the conduct indulged into by the contemner in the present case, as per report of the District Judge, amounts to criminal contempt of court.

The Supreme Court in paragraphs 40 and 41 of the said decision has further observed which reads as under:-

"40 ……Use of intemperate language is not assertion of right nor is a threat an argument. Humility is not servility and courtesy and politeness are not lack of dignity. Self- restraint and respectful attitude towards the court, presentation of correct facts and law with a balance mind and without overstatement, suppression, distortion or embellishment are requisites of good advocacy. A lawyer has to be a gentleman first. His most valuable asset is the respect and goodwill he enjoys among his colleagues and in the Court."

41. The rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. Hence judiciary is not only the third pillar, but the central pillar of the democratic State. In a democracy like ours, where there is a written Constitution which is above all individuals and institutions and where the power of judicial review is vested in the superior courts, the judiciary has a special and additional duty to perform, viz., to oversee that all individuals and institutions including the executive and the legislature act within the framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilised life in the society. It is for this purpose that the courts are entrusted with the extra-ordinary power of punishing those who indulge in acts whether inside or outside the courts, which tend to undermine their authority and bring them in disrepute and disrespect by scandalising them and obstructing them from discharging their duties without fear or favour. When the Court exercises this power, it does not do so to vindicate the dignity and honour of the individual judge who is personally attacked or scandalized, but to uphold the majesty of the law and of the administration of justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice.

When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded."

6. The duty of the High Court in protecting the subordinate judiciary has been elaborately considered in the case of **Delhi Judicial Service Association, Tis Hazari Court, Delhi Vs. State of Gujarat and Others**(AIR 1991 S.C. 2176). In this connection we may refer to relevant portion of the judgement which is reproduced below:

"24. In India prior to the enactment of the Contempt of Courts Act, 1926, High Court's jurisdiction in respect of contempt of subordinate and inferior courts and regulated by the principals of Common Law of England. The High Courts in the absence of statutory provision exercised power of contempt to protect the subordinate Courts on the premise of inherent power of a Court of record. Madras High Court in the case of **Venkat Rao**, 21 Mad LJ 832☹1911(12) Cri LJ 525) held that it being a Court o record had the power to deal with the contempt of subordinate Courts. The Bombay High Court in **Mohandas Karam Chand Gandhi's** case (1920) 22 Bom LR 368: (AIR 1920 Bom 175) (FB) held that the High Court possessed the same powers to punish the contempt of subordinate Courts as the Court of the King's Bench Division had by virtue of the Common Law of England. Similar view was expressed by the Allahabad High Court in **Abdul Hassam Jauhar's** case (supra) a Full Bench of the Allahabad High Court after considering the question in detail held:

"The High Court as a Court of record and as the protector of public justice throughout its jurisdiction has power to deal with contempt's directed against the administration of justice, whether those contempt's are committed in face of the Court or outside it, and independently or whether the particular Court is sitting or not sitting, and whether those contempt's relate to proceedings directly concerning itself or whether they relate to proceedings concerning an inferior Court, and in the latter case whether those proceedings might not at some stage come before the High Court."

36. Advent of freedom, and promulgation of Constitution have made drastic changes in the administration of justice necessitating new judicial approach. The Constitution has assigned a new role to the Constitutional Court to ensure rule of law in the country. These changes have brought new perceptions. In interpreting Constitution, we must have regard to the social, economic and political changes, need of the community and the independence of judiciary. The Court cannot be a helpless spectator, bound by precedents of colonial days which have lost relevance. Time has come to have a fresh look to the old precedents and to lay down with the charges perceptions keeping in view the provisions of the Constitution. "Law", to use the words of Lord Coleridge, "grows; and though the principles of law remain unchanged, yet their application is to be changed with the changing circumstances of the time". The considerations which weighted with the Federal Court in rendering its decision in Gauba's (AIR 1942 FCI) and Jaitley's Cases, (1944 FCR 364) are no more relevant in the context of the constitutional provisions."

It is not necessary for us to observe at length the other portion of the judgement which has elaborately dealt with the same.

7. The other decision of the Supreme Court in the case of ***Preetam Pal Vs. High Court of Madhya Pradesh, Jabalpur*** reported in AIR 1992 S.C. 904 may also be considered in this connection. The Supreme Court in the aforesaid decision discussed and quoted from various judgements, the principal relating to law of contempt and duty of Court for taking effective steps in contempt matter. The relevant paragraphs of the judgment is reproduced below:

"47. In Morris Vs. The Crown Office, (1970) 1 All ER 1079 at page 1081, Lord Denning M.R. said:

"The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society."

49. In the same case, Lord Justice Salmon spoke:

"The sole purpose of proceedings for contempt is to give our Courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented."

50. Frank Furter, J. in **offutt. V. U S.** (1954) 348 US II expressed his view as follows:

" It is a mode of vindicating the majesty of law, in its active manifestation against obstruction and outrage."

51. In Jennison v. Baker, (1972) I ALL ER 997 at page 1006, it is stated:

"The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."

52. Chinappa Reddy, J Speaking for the Bench in Advocate General, Bihar v. M.P. Khair Industries, 1980 (3) SCC 311: (AIR 1980 SC 946), citing those two decisions in the cases of Offut and Jennison (supre) stated thus (para 7 of (AIR):

".....It may be necessary to punish as a contempt, as course of conduct which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice. The public have an interest, an abiding and a real interest, and a vital stake in the effective and orderly administration of justice, because unless justice is so administered, there is the peril of all rights and liberties perishing. The Court has the duty to protecting the interest of the public in the due administration of justice and, so it is entrusted with the power to commit for contempt of court, not in order to protect the dignity of the Court against insult or injury as the expression "Contempt of Court " may seem to suggest, but to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfere with."

53. Krishna lyer, J. in his separate judgement in re Mulgaokar, (AIR 1978 SC 727) (supra), while giving the broad guidelines in taking punitive action in the

matter of Contempt of Court has stated (para 33):

"…….if the Court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream."

54. In the case of Brahma Prakash, (AIR 1954 SC 10) (Supra), this Court after referring to various decisions of the foreign countries as well as of the Prevy Council stated thus (at P.14):

"It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law."

55. In Asharam M. Jain v A.T. Gupta, (1983) 4 SCC 125 (AIR 1983 SC 1151) the facts were thus:

56. The petitioner who filed a special leave petition accompanying by a affidavit affirming the statement made in the said SLP indulged in wild and vicious diatribe against the then Chief Justice of the High Court of Maharashtra. When the SLP was heard, this Court directed notice to be issued to the petitioner as to why he should not be committed for contempt under the Contempt of Courts Act, 1971. After hearing the parties and then not accepting the unconditional apology of the petitioner, this Court convicted the petitioner for contempt and sentenced him to suffer simple imprisonment for a period of two months. In that case, Chinnappa Reddy, J speaking for the Bench said:

"The strains and mortification of litigation cannot be allowed to lead litigants to tarnish, terrorise and destroy the system of administration of justice by vilification of judges. It is not that judges need be protected; judges may well take care of themselves. It is the right and interest of the public in the due administration of justice that has to be protected."

57. Reference may be made to a recent decision of this Court in M.B. Singh v. High Court of Punjab and Haryana, (1991) 3 SCC 600: (AIR 1991 SC 1834). In that case, the appellant, a practicing advocate having failed to persuade the learned Subordinate Judge to grant an ad interim injunction pending filing of a counter by the opposite party, made certain derogatory remarks against the learned Judge who instead of succumbing to such unprofessional conduct made a record of the derogatory remarks and forwarded the same to the High Court through the District Judge to initiate proceedings for Contempt of Court against the appellant. The High Court holding that the remarks made on the learned sub-Judge are disparaging in character and derogatory to the dignity of

the judiciary found the appellant guilty of Section 2 (c) (I) of the Contempt of Courts Act. The appellant therein though denied to have made the remarks, however, offered an unqualified apology. But the High Court without accepting the apology punished the appellant therein with a fine of Rs.1,000/-. Ahmadi, J. of this Court in his separate judgment has observed (at Pp.1835-36 of AIR):

"The tendency of maligning the reputation of judicial officers by disgruntled elements who failed to secure the desired order is ever on the increase and it is high time it is nipped in the bud. And, when a member of the profession resorts to such cheap gimmicks with a view to browbeating the Judge into sub-mission, it is all the more painful. When there is a deliberate attempt to scandalize which would shake the confidence of the litigating public in the system, the damage caused is not only to the reputation of the concerned judge but also to the fair name of the judiciary. Veiled threats, abrasive behavior, use of disrespectful language and at times blatant condemnatory attacks like the present one are often designedly employed with a view to taming a judge into submission to secure a desired order. Such cases raise larger issues touching the independence of not only the concerned judge but the entire institution. The foundation of our system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the presiding judicial officers with impunity. It is high time that we realize that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system."

58. After having made the above observation, the learned Judge concurred with the conclusion of Agarwal, J. dismissing the appeal and while doing so, he expressed his painful thought as follows:

"When a member of the bar is required to be punished for use of contemptuous language it is highly painful – it pleases none-but painful duties have to be performed to uphold the honour and dignity of the individual judge and his office and the prestige of the institution. Courts are generally slow in using their contempt jurisdiction against erring members of the profession in the hope that the concerned Bar Council will chasten its member for failure to maintain proper ethical norms. If timely action is taken by the Bar Councils, the decline in the ethical values can be easily arrested."

8. We may also note the observations made in paragraph 62 of the Supreme Court in the aforesaid decision which read as under:-

" 62. To punish as advocate for Contempt of Court, no doubt, must be regarded as an extreme measure, but to preserve the proceedings of the Courts from being deflected or interfered with, and to keep the streams of justice, pure, serene and undefiled, it becomes the duty of the Court, though painful, no punish the coutemnor in order to preserve its dignity. No one can claim immunity form the operation of the law of contempt, if his act or conduct in relation to court or Court proceedings interferes with or in calculated to obstruct the due course of justice."

9. In the instant case, the alleged contemned, who is an advocate had adopted defiant attitude and tried to justify the aspersions made by him even without thinking it necessary to apologise. He has neither expressed any contrition nor has he any repentance for the vicious allegations made against the presiding officer of the court and on the other hand, he has exhibited a dogged determination to pursue the proceedings in the matter, come what may. Having regard to the gravity of the offence committed by the contemmer . I have no hesitation in holding him guilty of contempt of Court. I am of the view that awarding him sentence of six weeks simple imprisonment, as directed by my learned brother is fully justified.

Sd/- S.K. Sen C.J.
Sd/- Sudhir Narain J.

RESERVED

Criminal Contempt No.821 of 1993

State
Versus
Satendra Singh Tomar

Hon'ble. S.K. Sen, C.J.
Hon,ble Sudhir Narain, J.

(Delivered by Hon. Sudhir Narain, J.)

1. This is one of the cases in contempt proceedings where a Judicial Officer is alleged to have been assaulted, humiliated and put to mental torture in the performance of his judicial function.

2. The factual matrix of the case is that Sri N.K. Jain, the complainant, (hereinafter referred to as the officer) was functioning as Judge Small Causes Court, Saharanpur at the relevant time. He had decided a case under Section 21 of the U.P. urban buildings Regulation Act registered as P.A. Case No. 33 of 1993, Nisar Vs. Anwar. Irfan is alleged to have filed an application for setting aside the said order. This application was rejected on 16.4.1993. It is further alleged that on 17th April 1993 Sri Satendra Singh Tomar. The Contemner, appeared before the officer with an application that the process for ejectment of the applicant in P.A. Case No.33 of 1993 be recalled from the executing authority in P.A. Case No.33 of 1993 be recalled from the executing authority concerned. To put in the words of the complainant officer on Saturday 17.4.1993 he was sitting in his chamber at 1.30 P.M. as on Saturdays regular work was not taken up because lawyers used to observe each Saturday as strike day as part of their campaign used to observe each Saturday as strike day as part of their campaign for the establishment of Bench of High Court in the western district. Sri Satendra Singh Tomar, Advocate, (hereinafter referred to as contemner) entered into his chamber and requested that his application in P.A. case be heard on the same day. At that time Sri Kulbhushan Gupta, Panel Lawyer (Criminal) attached with his Court was also present in the chamber. The officer moved to his courtroom after the record was brought to the court from the office by the clerk concerned, namely, Sri Praveen Kumar Sharma. The officer occupied his seat at the dais and scrutinised the papers of P.A. Case No.33 of 1993. He did not find power (Vakalatnama) of Sri Satendra Singh Tomar on the record. The application, which was brought for orders, was signed by another Advocate namely Sri Anwar

Ali who was not present in the Courtroom. Sri Satendra Singh Tomar was pointed out this omission and he promised to file Vakalatnama in the midst of the arguments. The officer, after hearing him, dictated the detailed order rejecting his prayer at the dais itself and retired to his chamber and thereafter the following incidence took place as stated in paragraphs 10, 11,12 and 13 of the complaint made by the officer, which reads as under:-

"10. That in the meantime the aforesaid contemner snatched the entire case record and steno note book form the Steno of the petitioner, namely, Shri Pradeep Kumar Mittal and without any permission entered the chamber of the petitioner shouting that if the personal work of the lawyer will not be done he will teach a lesson to the petitioner. This hehaviour of the contemner was an act to bring into disrespect the judicial system and the dignity of the Court.

11. That not only this, the contemner thereafter assaulted the petitioner causing bodily injuries and dashing the petitioner on the ground throwing to winds the entire judicial dignity which is the only asset of a judicial officer. That the contemner's contemptuous behavior could not rest even then and he also torn the judicial record and shirt of the petitioner by grabbing the petitioner's collar.

12. That in the meantime petitioner's staff members, namely, Sarvasri Praveen Kumar Sharma, Pradeep Kumar Mittal, Mangoo Lal Singhal, Rampal and Seth Pal, Orderly, Peon reached there and petitioner was rescued. In the process of rescuing the petitioner from the contemner Sri Praveen Kumar Sharma also received injuries. The wrist watch of the contemner also down on the ground in the chamber which could have been a valuable evidence of this sorry episode.

12. That afterwards when Sri Rajendra Chand, Additional District Judge, Sri R. N. Verma, Additional District Judge, Sarvasri S.P. Tiwari, N.K. Bahal, N.A. Zaidi (All Addl.Civil Judges), O.P. Tiwari, and Laxmi Chand (Addl. C.J. Ms.) reached in my chamber and were deliberating the matter, when the contemner aware of the fact, as a lawyer he is, that his wrist watch has been left in the chamber of the petitioner which could incriminate him, rushed inside the petitioner's chamber accompanied by another lawyer, Sardar Surendrapal Singh, and forcibly took away his wrist watch and the stenographer's note book containing the order which was dictated against him and mentioned above in paragraph 9. The contemner removed the pages containing the relevant order from the stenographer's notebook and threw the Notebook with the Reader."

3. The officer on the same date reported the matter to the District and Sessions Judge, Saharanpur requesting him to take necessary action in the matter and provide him with the security. He also got, on the same date, examined himself by a doctor of District Hospital, Saharanpur. Sri Praveen Kumar Sharma was also examined in the hospital who had also received injuries. The next day i.e. on 18th April 1993 he submitted a reference to the Registrar, High Court of Judicature at Allahabad requesting that the matter may be placed before this Court to draw contempt proceedings against the contemner under Section 2 (c)

of the Contempt of Courts Act, 1971 with the allegations referred to above. On 21.4.1993 he also sent the affidavits sworn By Sri Mangoo Lal Singhal, Reader, Sri Pradeep Kumar Mittal, Steno, Sri Praveen Kumar Sharma, Ahalmad, Sri Rampal, Ardali, Sri Seth Pal Sharma, Peon and the affidavit of Sri Kulbhushan Gupta, panel Lawyer (Criminal). The matter was placed before the then Hon'ble Chief Justice and the matter was directed to be placed before the Court exercising the jurisdiction in criminal Contempt matter.

4. The Division Bench framed the charges against the contemner which read as under:-

"Firstly that on 17.4.93 at about 1.10 P.M. you came to the Court of Judge Small Causes, Saharanpur presided over by Sri N.K. Jain in order to press the application moved by Sri Anwar Ali Advocate without filing your Vakalatnama on behalf of the applicant, seeking to stay the ejectment of the tenant in P.A. Misc. Case No.33 of 1993 Nisar Vs. Irfan and during the Course of the arguments mentioned again and again that the applicant was his friend and he should be favoured in the matter and there by tended to interfere in the due course of Judicial Proceedings.

Secondly that the presiding officer Sri N.K. Jain rejected the above application after hearing you and retired to his chamber and in the meantime you snatched the entire case record and steno note book from the Steno Sri Pradeep Kumar Mittal and without any permission entered the chamber of the petitioner shouting that if the personal work of the lawyer was not done he will teach a lesson to the Presiding Officer Sri N.K. Jain. Your behaviour tended to lower the dignity of the court and was meant to bring disrespect to the judicial system.

Thirdly that inside the chamber of the Presiding Officer Sri N.K, Jain you assaulted him causing bodily injuries to him, felled him on the ground, tore the shirt of the Presiding Officer Sri N.K. Jain by grabbing his collar and also tore the judicial record of the case and thereby you interfered in the administration of justice and tended to lower the authority of the court and in this process you also caused injuries to Sri Pravin Kumar Sharma.

5. The contemner filed affidavit. HE admitted that he had appeared before the officer on 17thApril 1993 to press the application for staying proceedings of ejectment P.A. Case No. 33 of 1992 but he denied that he assaulted the officer in chamber. His version is that Irfan had submitted an application in person on 17th April 1993 before the officer for grant of time to obtain stay order from the higher Court against his order rejecting the application filed by Irfan on previous day and to recall order in respect of execution proceedings. The officer demanded from him Rs.15,000/- and aggrieved by such demand he made a complaint of it before the president of Bar Association. The contemner on listening about the aforesaid demand of illegal gratification, he like a cautious citizen and after hearing story from Irfan, decided to inform the Presiding Officer i.e. the complainant-officer to the said fact. He went to the Court at about 12.45 noon. He requested the officer to pass order on the application of Irfan by granting him time. The officer raised objection that in absence of

Vakalatnama executed in favour of the contemner, only the party concerned can be heard on the application. This objection was overcome as he asked the contemner to make submission in respect of the application and file power later on. The contemner made submissions before him. The officer told the contemner that no time will be granted as he had made an observation in this respect to the party concerned. The officer left the court in the midst of the arguments but while leaving the court he angrily called upon the contemner to meet him in the chamber in presence of the Advocates there. He went in the chamber. The officer in the chamber asked the contemner to instruct the client i.e. Irfan to pay Rs.15,000/- for obtaining a favorable stay order on his application or else to face conviction. The contemner is alleged to have protested against such demand. The officer is alleged to have become furious and threatened the contemner to give him a lesson.

6. The question is which of the version is correct. It is not denied on 17th April 1993 the contemner had pressed an application on behalf of Irfan for grant of stay of the order. It is also admitted that the application was signed by another advocate, namely Anwar Ali, and he was not present. The contemner had not filed nay power either with the application or earlier to it. He was not a counsel at any point of time in the case. It is also admitted that on the same day he entered in the chamber of the officer. His version is that the officer expressed his opinion in the court that he will not grant stay order but on the other and asked the contemner to come in the chamber and there he demanded the amount. The version of the contemner is false for the reasons as under:-

(I) The version of the contemner is that Irfan had moved application for stay on 17.4.1993 before the officer but when the officer asked for illegal gratification for passing a favourable order, he submitted a complaint to the President of the Bar Association against the officer, a copy of the said complaint has been filed as Annexure 'CA-1' to the affidavit filed by the contemner. The application is purported to have been addressed to the President of Bar Association, Saharanpur. There does not seem any reason as to why Irfan did not contact Sri Anwar Ali his counsel who ad put in his signatures on the application which was presented to the officer by him for grant of stay. The normal course of conduct would have been that Irfan would have contacted his counsel Sri Anwar Ali first, instead of approaching the President, Bar Association, Saharanpur.

(II) Irfan is alleged to have given complaint to the President of the Bar Association and thereafter the contemner came to know about the conduct of the officer. He has given the details in para 8 of his affidavit as to how he came to know about the version of Irfan as under:-

" That however on listing about the aforesaid illegal demand of illegal gratification form one Shri G. M. Shah alias Peeru a Social and Political Worker while sitting in Bar room, a notice of the said complaint was taken by few of the Members of the Bar Association, Saharanpur present there. Like a cautious citizen and after hearing awful story of Irfan, few of the advocates present there including the deponent had rightly taken

ill of it and consequently they had decided to inform the learned Presiding officer i.e. the petitioner of the sid fact. On repeated request of those persons including Irfan, the deponent went to the court at about 12.45 noon."

7. The contemner has not filed the affidavit of Sri G.M. Shah from whom he is alleged to have received the information. In para 8 of the affidavit, he further stated that few members of the Bar Association, Saharanpur were present at that time. He did not file any affidavit of any of those Advocates. He has also not filed the affidavit of the President of the Bar Association, Saharanpur who could verify as to whether Irfan had given such complaint to him. In absence of any evidence in this respect, the version of the contemner as contained in para 8 of his affidavit cannot be relied upon.

(3) The Contemner himself admitted that on Saturdays the lawyers used to go on strike in pursuance of the decision taken by the Bar Association for establishment of a Bench in the western district of Uttar Pradesh. The Presiding Officers did not hold the court proceedings and attended to the cases only when the application were presented by the parties concerned. Para 5 of the affidavit reads as under:-

"5. That in reply to the contents of paragraph 2 of the petition it is submitted that in honor of the decision taken by the Bar Association, the deponent to obtain from attending the court work on Saturdays. However, so far as learned Presiding Officers are concerned most of them also do not hold the court proceedings and attend to the cases only when the applications are presented by the parties concerned."

8. (III) The version of the contemner in para 8 of his affidavit is that he visited the court room of the officer at about 12.45 noon and pressed the application of Irfan. On the contrary version of the officer is that he was not in court room as there was strike by lawyers and he was sitting his chamber on 1. There does not seem any reason as to how the officer will be functioning in the court at noon when no court proceedings were going on. The averments made in par 5 of the affidavit of the contemner itself belies the version which has been given in para 8 of the affidavit of the contemner that when he visited Court at 12.45 Noon, the officer was functioning in the Court.

(IV) The contemner is alleged to have appeared in open court on 17th April 1993 at 12:45 Noon and pressed the application for grant of stay. The officer is alleged to have raised objection that the contemner has not filed Vakalatnama and cannot be heard but later on the Officer withdrew his objection subject to the condition that the contemner would file Vakalatnama later on. The officer is alleged to have left the court without permitting the contemner to complete his submissions and angrily called upon the contemner to meet him in his chamber. In paragraph it is stayed:

"While leaving the court room the petitioner had angrily called upon the deponent to meet him in the chamber in presence of the Advocates present there"

9. The contenmner thereafter, it is alleged, went to his chamber where the officer asked the contemner to instruct his

client i.e. Irfan to pay Rs.15,000/- for obtaining favourable order on his application, else to face ejectment. The version of the applicant cannot be believed. The officer having ecpressed opinion earlier, will not call the contemner to his chamber to give him illegal gratification.

10. It may be noted that in January 1992 the officer was working as Chief Judicial Magistrate, Saharanpur. The contemner had filed a bail application before the complaint officer in Crime Case No. 17 of 1992, **State Vs. Pramod Rana**. In paragraph 14 of the reference the officer has alleged that the contemner had threatened him that the bail should be granted to the accused as he is related to him. The prayer was not accepted by the officer and the contemner had threatened him and this fact noted by him in the file of that case. In para 21 of the counter affidavit, the contemner has admitted that he had applied for bail and he had faced the anger of the officer.

11. In the month of July /August 1991 it is alleged that the contemner and some of his associates had assaulted an employee of the Civil Court and abused and threatened the officer in the judgeship. The matter was referred to this Court where the contemner tendered unconditional apology.

12. With the above past history, it is improbable that the complainant officer will ask the contemner to visit his chamber and there in the chamber he will ask the contmner to instruct his client to give illegal gratification to him.

13. On the other hand the evidence on the record leaves no doubt that the allegations made against the contemner are correct. 17th April 1993 was a Saturday. It is well known that on Saturdays in the western districts including Saharanpur the lawyers remain on strike but in urgent matters they file application. The officers, unless there is some important work presented to them in the court, normally do sit in the chamber .It is for this reason that the application for time appears to have been signed by Anwar Ali, Advocate but he did not appear in the case due to strike. The contemner is alleged to have gone in the chamber and requested the officer to take up the matter and the officer thereafter came to the court to hear the application. The fact that the contemner had come to the chamber is proved by the affidavit of Sri Kulbhushan Gupta, Advocate. He is Panel Lawyer (Criminal) and in his affidavit he has stated that he had gone in the chamber of the officer to request him that necessary letters may be sent summoning the witnesses as the witnesses were not being produced by the police. The contemner Satendar Singh Tomar had come to the chamber at 1.10 P.M. requesting the officer that he wants to submit an application. The officer asked Sri Praveen Kumar Sharma, the Clerk to present the application with record in Court room and told the contemner that he would hear the arguments in each court room. There is no reason to disbelieve the affidavit of Sri Kulbhushan Gupta, Advocate. Praveen Kumar Sharma was Ahalmad. He filed affidavit stating that at about 1.50 P.M. the officer gave him instruction to bring the file of Case No. 33 of 1993, **Nisar Vs. Anwar**. He brought the file there and thereafter on the instruction of the officer concerned he took it to the court room.

14. As regards the incidence in the court, the officer in paragraph 9 of the reference has stated that the contemner mentioned again and again that the applicant was his friend and the officer should favour him in this matter. After hearing the contemner, the officer in his presence dictated a detailed order rejecting his prayer on the dais itself and retired to the chamber. In paragraph 10 it is stated that in the meantime the aforesaid contemner snatched the entire case record and the steno note book from the Steno. Sri Pradeep Kumar Mittal was working as Steno. Sri Mangu lal Singhal was working as Reader. rampal was Ardali and Sethpal was peon. They filed affidavit supporting the allegations of the officer. There is no reason to disbelieve their version.

15. Learned counsel for the contemner, Sri H.N. Sharma, urged that the affidavits of these persons cannot be relied upon as they were subordinate to the officer concerned and they were attached with him. The mere fact that they were attached to the officer itself will not be a ground to reject the version in the affidavit. It is not denied that these persons who had filed affidavits were attached with the officer. It is also not the case of the contemner that they were absent from duty. they were the eye witnesses and they could only depose as to what had happened. He has relied upon the decision in Dr. H. Singh Khalsa Vs.B.L. Narendra and another, 1998 Cr.L.J. 768, wherein the Court observed that affidavits of persons closely related cannot be accepted. This case is not applicable to the facts of the present case.

16. On the other hand the contemner is alleged to have approached the court when the members of the bar association showed their anguish with the conduct of the officer on hearing on complaint of Irfan. The contemner did not state that had did come along with other advocates to press the officer not to take illegal gratification and pass the order in accordance with law. It is also not his case that there were other advocates when he argued the application in the court. It is also unusual conduct if the contemner had come to the court only on the basis of complaint against the officer and he would come all alone without other lawyers who had expressed anguish against the conduct of the officer as stated by the contemner himself in paragraph 8 of the counter affidavit.

17. It is further contended that the affidavit is vague and has not been verified. The affidavits filed by the above persons have been duly sworn by the notary and the paragraphs have been verified on personal knowledge. We do not find any infirmity in these affidavits. The cases relied by the contemner are not applicable on the facts of the present case.

18. The next incident took place when the officer had retired to his chamber. In paragraph 11 of the complaint it is stated that he was assaulted by the contemner causing bodily injuries and dashing the officer. This version is supported by the medical report submitted by the doctor of the district Hospital Saharanpur. It was open for the contemner to summon and examine the doctors. The officer as well as Praveen Kumar Sharma both had suffered injuries and injury report is on the record. The contention of the learned counsel for the contemner is that there is a difference of timing in regard to the examination of the

officer in the District Hospital and that of Praveen Kumar Sharma the difference of timing is in respect of examination of these two persons but that does not belie that they had suffered injuries. It is contended that these medical reports have not been proved. The medical reports do not require formal proof in contempt proceedings. Praveen Kumar Sharma had filed affidavit stating that he was duly examined by the doctors.

19. The third visit of the contemner in the chamber takes place when he goes there to lift his wristwatch which he had left after he assaulted the officer. The fact is proved by the letter of the six Judicial Offices namely, Sri Rajesh Chandra IIIrd Additional District Judge Saharanpur, Sri R.N. Verma VIIth Additional District Judge Saharanpur, Sri O.P. Tiwari Additional Chief Judicial Magistrate Saharanpur, Sri S.P. Tiwari Additional Civil Judge Saharanpur. Sri M.K. Bahal Additional Civil Judge, Saharanpur, and Sri N.A. Zaidi Additional Civil Judge, Saharanpur. They had gone to meet the officer after coming to know abut the incident of assaulting the officer. The contention of Sri Sharma, learned counsel for the contemner, is that the incident had not taken place before these officers and the letter written by them is hardly relevant. These may be correct that they were not eye witness of the incident but this proves the version of the officer that the contemner had left his wristwatch and he had taken it away. This establishes that the contemner visited the chamber of the officer as narrated by him. Secondly, if no incident had taken place there was hardly any reason that most of the officers immediately on happening of the alleged incident would have assembled in the chamber of the officer.

20. It is then urged that the officer has neither filed affidavit in support of his complaint nor he has filed any rejoinder affidavit. Rule 10 of Chapter 35-E of the High Court Rules framed under Section 23 of the Contempt of Court Act, 1971 provides that after giving information abut commission of contempt of Court by any persons or person, an information shall have no right to appear or plead or argue before the Court unless he is called upon by the Court especially to do so. The officer had informed the Court through the Registrar about the incident. The Court had never asked him to file any affidavit. The other six persons had filed affidavits supporting the version of the officer. The officer had written a letter dated February 10, 1994 to the Registrar whether he is required to file any rejoinder affidavit. The copy of the said letter is on the record. It appears the Registrar never informed him to file any affidavit. In para 29 of the judgment In Re: Vinaya Chandra Mishra their Lordships of the Supreme Court has held that in facie curie contempt the judge is not required to appear or give evidence.

21. Learned counsel for the contemner then contended that the contemner is entitled to benefit of doubt as is evident from the record, the version of the officer has not been fully established. We are of the opinion that there is not the least doubt a but the contempt alleged to have been committed by the contemner as alleged by the officer.

22. One of the points raised by the contemner is that the incident is alleged to have taken place in the chamber and the chamber is not a Court and therefore the contemnor cannot be held guilty of

contempt of Court. Section 2(a) of the Act defines Contempt of Court but it does not define the word 'Court' the meaning of Court and the Court subordinate to the High Court was considered by the Supreme Court in **Brinjnadan Sinha v. Jyoti Narain**, AIR 1956 SC 66. Their Lordships of the Supreme Court referred to Sections 19 and 20 of the Indian Penal Code. The word 'Judge' has been defined under Section 19 as not only the person who is officially designated as a judge but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive judgment which, if confirmed by some other authority, would be definitive. Section 20 defines the words " Court of Justice" which means a judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body, when such judge or body of judges is acting judicially.

23. Section 3 of the Evidence Act defines 'Court' as including all judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence. This definition, however, held to be not exhaustive but framed only for the purpose of Evidence Act and has not to be extended where such an extension is not warranted. The judge has been conferred power to decide the matter and if he has such an authority he is himself a Court. The place where he exercises that judicial power is popularly called a Court because the judge performs judicial functions there. If the contempt is committed at any other place other than the place where the judicial function is being exercised, still it is contempt of Court. The mere fact that the contempt is committed in the chamber attached to court room will not absolve the contemner of the ground that the contempt was committed in a place where the judge was not performing judicial function in the court room. The contemner will be liable to be convicted and sentenced even if he has committed contempt outside the court room.

The allegation against the official is that he committed criminal contempt. The criminal contempt has been defined under Section 2(c) of the 1971 Act as follows:-

"criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court ;or

(ii) prejudices, or interferes or tends to interfere with, the due course or any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."

24. On the facts found above that the contemner assaulted and scandalised the judge in the course of his judicial function amounts to criminal contempt. All the three charges leveled against the contemner have been duly proved and his conduct is gross criminal contempt of court.

25. Learned counsel for the contemner further raised a plea that this Court should not proceed with the criminal contempt proceedings as a Criminal Case No. 151 of 1993 against the contemner which is pending before the judicial Magistrate for the offences alleged to have been committed by him under Section 332,353,427,452,380 I.P.C read with Section 7 of the Criminal Law Amendment Act. He has referred to the proviso to Section 10 of the Act, which provides that no High Court shall take cognizance of contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under Indian Penal Code. Similar provision was contained under Section 2(3) of Contempt of Court Act, 1926. In Bathinaram Krishna Reddy v. State of Madras, AIR 1952 SC 149, proceedings were taken against the contemner on a publication of an article alleging that the Sub-Magistrate of Kovvu was a bribe taker and was in the habit of harassing litigants. An argument was raised that as the offence is punishable under the Indian Penal Code, the High Court had no jurisdiction to take any action for contempt under the said Act. This contention was repelled by the Supreme Court with the following observation:-

"What is made punishable in the Indian Penal Code is the offence of defamation as defamation and not as contempt of Court. If the defamation of a subordinate Court amounts to contempt of Court proceedings can certainly be taken under S.2, Contempt of Courts Act, quite apart from the fact that other remedy may be open to the aggrieved officer under S499, Penal Code"

26. This question was further considered by Full Bench of the Delhi High Court in the matter of D.B. Vohra, 1974 Criminal Law Journal 899. It was urged that High Court is not empowered to punish for contempt of a subordinate court when the offensive matter is congnizable and punishable as an offence under the provisions of Indian Penal Code on the ground that the proviso to Section 10 prohibits the High Court from taking cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the provisions of Indian Penal Code. The Court repelled the contention. The incidence in this case was that the advocates started making filthy remarks and used abusive language against the reader of the Court. When the reader entered the Courtroom the advocators prevented him from going to his seat along with the files and gave him fist blows and in this assault his shirt was torn. The Court relying upon the decision of the Supreme Court in **Bahthiaram Krishna Reddy** (Supra) held that the offence committed by the advocates may be an offence under the Indian Penal Code but not as Contempt of Court. The Court had a power to proceed with a contempt proceeding. In view of these decisions the contention of the learned counsel for the contemner that the Court should not proceed with the contempt proceedings cannot be accepted.

27. The next question is as to what sentence is to be awarded to the contemner. An advocate is a responsible officer of the Court. He is to assist the Court and has to shoulder responsibility in the administration of justice. If he himself abuses, assaults, intimidates the Court, it

lowers the dignity of the Court and amounts to interference in he administration of justice.

28. The contemner at no stage of proceedings has expressed his apology. He, instead of expressing apology for his own conduct, has further scandalised the officer. In paragraph 10 of the affidavit he has averred:-

"That following the said instruction of the petitioner the deponent went in his chamber but there the petitioner asked to instruct his client i.e. Irfan to pay Rs.15,000/- otherwise to face the eviction."

In paragraph 17 he stated that "the petitioner is making attempt to shadow his own misdeed by....."

29. When an advocate scandalises the Court by making allegations against the judge it is highly offensive, vicious, malicious and beyond condonable limit. The same amounts to onslaught on the independence of judiciary. In Pritam Pal v. High Court of Madhya Pradesh, AIR 1992 SC 904, the High Court convicted the advocate for contempt and awarded tow months' imprisonment. The Hon'ble Supreme Court upheld the judgment holding that when the contemner is an advocate but neither expressed any contrition nor has any repentance for the vicious allegations made against the judge, he is not entitled for any lenient view. It was observed:

"Coming to the question of sentence, it appears from the order of the High Court that the appellant had adopted a defiant attitude and tried to justify the aspersions made by him even without thinking it necessary to apologise. Before this Court also, the appellant has neither expressed any contrition nor has he any repentance for the vicious allegations made against the learned Judges of the High Court. But on the other hand, he has exhibited a dogged determination to pursue the matter, come what may. A reading of his memorandum of grounds and the written and signed arguments show that he has ventured into another bout of allegations against the High Court Judges and persisted in his campaign of vilification. His present conduct has aggravated rather than mitigating his offence."

30. In the present case as observed above the contemner assaulted the Judge while he was performing his judicial function. He took false plea in this Court and never expressed any apology. On the other hand in the affidavit filed by the contemner, he has made vicious allegations against him which itself amounts to contempt of Court.

31. In the year 1991 a reference was made to this Court that the contemner had assaulted an employee of the Civil Court and abused and threatened the officer. The contemner then submitted an apology. Hardly after two years the contemner assaulted the officer while exercising the judicial function.

32. Taking into consideration all the aspects and the conduct of the contemner, he is awarded six weeks simple imprisonment.
