ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2003

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE D.P. GUPTA, J.

Civil Misc. Writ Petition No. 27753 of 2003

Dr. U.S. Sinha ...Petitioner
Versus
State of U.P. through Secretary Medical Education and others ...Respondents

Counsel for the Petitioner:
Sri A.P. Sahi
Sri R.N. Singh
Sri G.K. Singh

Counsel for the Respondents:
Sri V.C. Misra
Sri A.K. Shukla
Sri S.P. Gupta
Sri V. Swarup, Addl. A.G.
S.C.

Constitution of India Article 226- Service Law Suspension-enquiry by disciplinary committee not finalized- denovo enquiry conducted-but some charges of suit a grave nature proved in regular enquiry-no interference- called for petition dismissed: AIR 1994 SC 2296 relied on.

Held- Para 25, 33

In view of the aforesaid settled legal propositions, the Disciplinary Authority was under an obligation to record the reasons as to why instead of concluding the enquiry a de novo enquiry was required and whether enquiry had suffered from some procedural defect or has been conducted in violation of some statutory provisions. It appears that Authority has not considered this aspect at all though it was necessary to do so when charges of grave nature were found proved against the petitioner and all other formalities except taking a decision for imposing the punishment stood completed.

(B) Constitution of India Article 226-Practice of ad hocism-service-Vacancies-In Medical Colleges should be filled in regular way immediately-stop gap arrangements must come to an end--Tug of war between two officials-students and suffer patients vicariously for no fault of theirs.

It is a fit case where the suspension order ought to have been quashed. But considering the gravity of the charges, and particularly, in view of the fact that some of the charges of grave nature stood proved in a regular enquiry report which had been accepted though the Disciplinary Authority for the reasons best known to him did not consider it proper to conclude the enquiry by passing an order in accordance with law. In a larger public interest, we are not inclined to interfere with the impugned suspension order.

Case laws Referred:
1970 (1) SCC 108, 1993 (1) SCC 419, 1992 (2) SCC 145, JT 1996 (6) SC 502, 1995 (Supply.) SCC 374, 1998 (SC) 2118, AIR 1960 SC 806, 1993 (Suppl.) 3 SCC, 1996 (6) SCC 417, 1996(3) SCC 157, 1997 SCC (L& S) 897, AIR 1980 SC 379, AIR 1987 SC 877. AIR 1992 SC 604, AIR 1975 SC 2227, 1997 SCC (L&S) 88, AIR 1962 Sesson 17, 1989 Lab LIC 329, AIR 1971 SC 1447, 1999 (1) SCC 733, AIR 1960 SC 992, AIR 1964 SC 1854, AIR 1971 SC 823, AIR 1997 SC 1488, 1996 (3) UPLBEC 1821, AIR 1952 SC 16, AIR 1973 SC 855, AIR 1980 319, AIR 1985 SC 1622, 2002 (7) SCC 222.

(Delivered by Hon'ble Dr. B.S. Chauhan, J.)

1. The present case depicts a sorry state of government's mind and approach. It is revealed from the facts available that what a shabby manner the State is running its administration. The officers of the State instead of resolving the problems and performing their duties, have tried to

make the situation more complex for extraneous considerations. They had been ex facie exhibiting malice and partisanship. It is a case of tug of war between two officials of a distinguished medical college of the State. The State administration apparently is divided into two lobbies, each taking positive sides with the errant teacher and staff member. Nobody appears to take any interest towards the ailing patients who rush to such colleges for the amelioration of their medical crisis.

2. The writ petition has been filed by the officiating Principal of Motilal Nehru Medical College, Allahabad challenging the suspension order dated 24.6.2003 on various grounds, including mala fides against respondent no. 6, who is not the senior most Professor in the Medical College as respondent no. 1 ignored the legitimate claims/expectations of Professors promoted under Personal Promotion Scheme or Career Advancement Scheme, who according to the petitioner, are also eligible and entitled to officiate as Principal.

3. Facts and circumstances giving rise to this case are that vide order dated 29.7.2000 the petitioner was required to discharge duties of Principal, and for that, he was not conferred any financial benefit. It was only an honorarium, an stop gap arrangement. However, litigation started by one Professor S.K. Jain who claimed that as the College had been handed over to the Society, he was to retire at the age of 60 and not 58, and he succeeded in procuring an order from Department in April, 2001. Being aggrieved and dissatisfied, petitioner filed a writ petition and obtained an interim order from this Court. Ultimately, the writ petition was allowed and in pursuance thereof, petitioner continued to officiate as Principal. Petitioner was put under suspension vide order dated 13.6.2001. He preferred writ petition no. 2355 of 2001. Said order of suspension dated 13.6.2001 was stayed vide order date 2.7.2001, observing that very serious allegations of malafides have been raised, and prima facie, there was some substance in those allegations. Subsequently, the order dated 14.8.2001 was passed withdrawing the financial and administrative powers of the petitioner. Being aggrieved, petitioner preferred another writ petition no. 31167 of 2001, in which operation of the order date 14.8.2001 was stayed on 21.8.2001.

4. The causa dramatis interceded here. Complaints and counter complaints started between the petitioner and respondent no. 5. Regular enquiry in pursuance of the charge sheet dated 30.6.2001 was completed by the Enquiry Officer and he submitted the enquiry report on 14.9.2001. The Disciplinary Authority considered the report and accepted the same. A copy of the said enquiry report was furnished to the petitioner, along with show cause notice for imposing the punishment and for filing the explanation to the said enquiry report, on 26.12.2001. Petitioner submitted his reply to the said show cause notice on 31.8.2002. The Disciplinary Authority did not consider it proper to pass any final order and conclude the enquiry, though charges against the petitioner had been very serious and grave in nature and the Enquiry Officer found some of them proved and one or two serious charges partially proved.

5. A new twist was added to this scenario. A preliminary enquiry was conducted in a most unusual manner unwarranted in law against respondent no. 5. Allegations made against the respondent no. 5 were held to be **not proved**, only on the basis of his own evidence. He was pronounced **innocent**. The enquiry officer made allegations against the petitioner and advised the Government to hold a regular enquiry against him . Here lies the fallacy. Another preliminary enquiry was held against the petitioner on complaints filed by some persons and the report thereof was submitted on 17.10.2002 recommending a regular enquiry against him. Respondent no. 1 constituted a Committee of three officials, headed by the Divisional Commissioner, Allahabad, vide order dated 2.12.2002 for holding another preliminary enquiry against the petitioner. Report thereof was submitted by the said Committee on 1st February, 2002, recommending for holding a regular enquiry against him.

6. After considering the entire material, the Disciplinary Authority did not conclude the enquiry conducted by Sri Faroqui but decided to hold the enquiry afresh on all the charges including those duly proved in the earlier enquiry with additional charges dealt with in two subsequent preliminary enquiries held against the petitioner and one against the respondent no. 5. Thus came to be passed the impugned suspension order. Hence this petition.

7. Sri R.N. Singh, learned counsel appearing for the petitioner has submitted that impugned suspension order has been passed on malafides and without application of mind without considering that operation of the earlier suspension order, based on mostly the same charges, had been stayed by this Court, the Authority did not consider it proper to make an application before this Court to vacate/vary/modify the said interim order, and thus, circumvented the interim order passed by this Court earlier on 2.7.2001 respondent nos. 5 and 7 have malice against the petitioner, and became instrumental for getting him suspended. Thus the suspension order is liable to be quashed.

8. On the contrary, Sri V.C. Misra, Senior Advocate, Sri Vinod Swarup, Additional Advocate General, appearing for all the respondents except no. 7, opposed the averments advanced on behalf of the petitioner submitting that this was not a fit case for interference by this Court.

9. We have considered the rival submissions made by learned counsel for the parties and examined the record, very closely including the one produced suo motu by Sri Swaroop.

10. The scope of interference by the Court in suspension matters has been examined by the Hon'ble Supreme Court in a catena of cases, particularly in State of M.P. v. Sardul Singh, (1970) 1 SCC 108, EV Srinivas Shastri v. Controller & Auditor General of India, 1993 (1) SCC 419, Inspector General of Police & Anr. V. Thavasiappan, 1992 (2) SCC 145, Director General, ESI & Anr. v. E. Abdul Razak, JT 1996 (6) SC 502, Scientific Advisor to the Ministry of Defence v. S. Denial etc., 1995 (Suppl.) SCC 374, Kusheshwar Dubey Vs. M/s Bharat Cooking Coal Ltd. & ors., AIR 1988 SC 2118, Delhi Cloth General Mills v.

Kushan Bhan, AIR 1960 SC 806, U.P. Krishi Utpadan Mandi Parishad v. Sanjeev Rajan, 1993 (Supp) 3 SCC 483, State of Rajasthan v. B.K. Meena & ors., (1996) 6 SCC 417, and Secretary of Government Prohibition and Excise Department v. L. Srinivasan, 1996 (3) SCC 157, and observed that even if a criminal trial or enquiry takes a long time, it is ordinarily not open to the Court to interfere in case of suspension as it is in the exclusive domain of the competent Authority who can always review its order of suspension being an inherent power conferred upon him by the provisions of Article 21 of the General Clauses Act, 1897 and while exercising such a power, the Authority can consider the case of an employee for revoking the suspension order, if satisfied that the criminal case pending would be concluded after an unusual delay for no fault of the employee concerned.

11. In the State of Orissa v. Vimal Kumar Mohanty, AIR 1994 SC 2296, the Hon'ble Supreme Court observed as under: -

"….When an appointing Authority or the Disciplinary Authority seeks to suspend the employee… the order of suspension would be passed taking into consideration the **gravity** of the misconduct sought to be inquired into or investigated and the **nature of evidence** placed before the appointing Authority and on application of the mind by the Disciplinary Authority. Appointing Authority or Disciplinary Authority should consider the above aspects and decide whether it is expedient to keep an employee under suspension pending aforesaid action. It would not be as an administrative routine or an automatic order to suspend an employee. It should be on consideration of the gravity of the alleged misconduct or the nature of the allegations imputed to the delinquent employee. The Court or the Tribunal must consider each case on its own facts and no general law should be laid down in that behalf….In other words, it is to refrain him to avail further opportunity to perpetuate the alleged misconduct or to remove the impression among the members of service that dereliction of duty will pay fruits and the offending employee may get away even pending inquiry without any impediment or to provide an opportunity to the delinquent officer to scuttle the inquiry or investigation to win over the other witnesses or the delinquent having had an opportunity in office to impede the progress of the investigation or inquiry etc. But as Authority earlier, each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact it creates on the service for the continuation of the delinquent employee in service pending inquiry or contemplated inquiry or investigation. It would be another thing if the action is actuated by mala fide, arbitrarily or for ulterior purpose. The suspension must be a step in add to the ultimate result of the investigation or inquiry. The Authority also should keep in mind public interest of the impact of the delinquent's continuation in office while facing departmental inquiry or a trial of a criminal charge."

12. In Allahabad Bank & Anr. vs. Deepak Kumar Bhola, 1997 SCC (L& S) 897, the Hon'ble Supreme Court held that in case involving serious charges, suspension order should not **generally** be interfered. However, the decision of the

competent authority should be based on material collected during investigation/ inquiry.

13. The power of suspension should not be exercised in an arbitrary manner and without any reasonable ground. Suspension should be made only in a case where there is a strong prima facie case against the employee and the allegations involving moral turpitude, grave misconduct or indiscipline or refusal to carry out the orders of superior Authority are there, where the contents of strong prima facie case against him, if proved, would ordinarily result in his dismissal or removal from service. The Authority should also consider taking into account all the available material as to whether in a given case, it is advisable to permit him to continue not to perform his duties in the office or his retention in office is likely to hamper or frustrate the inquiry.

14. If the Court, after considering the evidence on record, comes to the conclusion that it is not such a case, which may justify the Authority to keep the employee under suspension for a prolonged period, the Court may interfere. However, suspension may not be revoked in a case where there is an apprehension of tampering with the evidence in a domestic enquiry/criminal prosecution or retention of the employee in the office is considered to be injurious to public interest.

15. We are of the considered opinion after perusing the record and on submissions made by the learned Additional Advocate General that undoubtedly, petitioner has not been dealt with in accordance with law and allegations of mala fide made by the petitioner are not without substance. But whatever may be the magnitude of mala fide, ill-will or motivation, if in addition thereto, there is some substance in the complaints/allegations, the Court should keep its hands off. (Vide State of Bihar vs. J.A.C. Saldanna, AIR 1980 SC 379, Sheonandan Paswan vs. State of Bihar, AIR 1987 SC 877, and State of Haryana & ors. Ch. Bhajan Lal & ors, AIR 1992 SC 604).

16. In view of this peculiar factual situation, we did not consider it necessary to examine the allegations of mala fide against respondent no. 7.

17. In the regular enquiry held against the petitioner, many of the charges of serious gravity stood proved fully and some partially. Though the Disciplinary Authority did not finalise the enquiry, but it is evident from the said report that allegations against him are not without substance.

18. We are unable to comprehend what impelled the State to dilate the action on the said enquiry report. We visualize it to be for pulling to string from some quarter in favour of the petitioner or another party. Nepotism and parochial interests carry so much weight as to paralise the administration of the medical college to its total disruption and peril.

19. Thus, for this reason, we are not inclined to interfere with the impugned suspension order.

20. Though there is no occasion for us to proceed further, but the facts situation involved in this case compel us to speak before parting with the case. Petitioner had been officiating as

Principal for the last three years. The State Government failed for one reason or the other to appoint a regular Principal in the Medical College and allowed running of its affair by a stop-gap arrangement, which cannot be a sign of governance at all, what to talk of good governance.

21. Once the enquiry report, after a full throat enquiry, had been submitted by the Enquiry Officer Shri Farooqui, there was no justification for the State Government not to conclude the enquiry, and to initiate a fresh enquiry on the same charges when most of the charges stood proved against the petitioner and Disciplinary Authority had nothing to do except to pass a final order as all the other legal requirements stood complied with. The issue of holding the fresh enquiry has been subject matter of judicial scrutiny time and again.

22. De-novo enquiry should generally be directed, if the Authority is satisfied that enquiry stood vitiated for non-compliance of the principles of natural justice or for some other statutory requirement, or evidence could not be properly recorded. For directing enquiry afresh on the same charge, Authority is required to record reasons, otherwise it may become a tool for harassment of the delinquent, in the hands of such Authority and in that case, it would amount to a mala fide colourable exercise of power. (Vide State of Assam & Anr. Vs. J.N. Roy Biswas, AIR 1975 SC 2227; State of Punjab Vs. Kashmir Singh, 1997 SCC (L&S) 88; Keshab Chand Sharma Vs. State of Assam & ors., AIR 1962 Assam 17; Mohd. Abdul Alim Vs. Director Training Institute (CST & MP) Survey of India Lab & IC 1682; and Dinesh Chandra Sarkar Vs. State of West Bengal & ors., 1989 Lab & IC 329).

23. A Constitution Bench of Supreme Court in K.R. Dev Vs. The Collectorate of Central Excise, Shillong, AIR 1971 SC 1447 held that in absence of any statutory rule holding a de novo enquiry is not permissible. In case Disciplinary Authority is of the opinion that there has been some defect in the enquiry conducted by an Enquiry Officer, it may direct the said officer to conduct further enquiries in respect of that matter. But it can neither change the Enquiry Officer nor it can ask to hold the enquiry de novo on the same charges. In the said case the Apex Court interpreted the provisions of Central Civil Services (Classification Control & Appeal) Rules, 1957.

24. In Union of India & ors. Vs. Thayagarajan, 1999 (1) SCC 733, the Hon'ble Supreme Court while interpreting the provisions of Central Reserve Police Force Rules, 1955 considered the aspect of de novo enquiry and observed that if a Disciplinary Authority comes to the conclusion that while holding the enquiry there has been a fundamental procedural defect in taking evidence, it may order a fresh enquiry.

25. Therefore, in view of the aforesaid settled legal propositions, the Disciplinary Authority was under an obligation to record the reasons as to why instead of concluding the enquiry a de novo enquiry was required and whether enquiry had suffered from some procedural defect or has been conducted in violation of some statutory provisions. It appears that Authority has not considered this aspect at all though it was

necessary to do so when charges of grave nature were found proved against the petitioner and all other formalities except taking a decision for imposing the punishment stood completed.

26. For holding preliminary enquiry against respondent no. 5, Shri Lav Verma was appointed as an Enquiry Officer. In his report, referred to above, it has been specifically mentioned by him that there was too much politics and two officers has been in direct confrontation and were in the habit of making allegations and counter allegations against each other. It spoiled the atmosphere of the institution. He submitted the report not only observing that prima facie, allegations had no substance but also gave a finding that charges were **not proved against him** and he was **not guilty** (Nirdosh). This enquiry was only an eye wash, as became apparent from the manner of its conduct. The finding of **not guilty** in favour of respondent no. 5 was recorded on mere denial of the allegations by the said delinquent though in law it is not even necessary to give opportunity of hearing to the delinquent while holding the preliminary enquiry for the reason that the purpose of holding preliminary enquiry is to find out whether there is any substance in the allegations for holding regular inquiry. Report itself is indicative of total lack of knowledge of the procedure on the part of the Enquiry Officer, and if it is not so then it speaks in volumes of the administrative corruptibility. The Enquiry Officer instead of trying to collect evidence to verify the correctness of charges, by adopting this novel method how percolated greater interest in hushing it up. The mala fide of the administration is clear as a crystal. Unwarranted and uncalled for remarks were made against the petitioner pronouncing him **guilty** though it was not object of the said preliminary enquiry. The precipitate partisanship is accountable from the very manner in which the preliminary enquiry was manipulated. The statement of the delinquent at this stage has no legal sanctity. Purpose of holding the preliminary enquiry is not to punish the delinquent on the said report nor he can be punished on the basis of such a report, rather its purpose is to find out as to whether the circumstances and allegations require to hold a regular enquiry (Vide Amlendu Ghosh Vs. District Traffic Superintendent, North-Eastern Railways Katiyar, AIR 1960 SC 992; Champak Lal Chaman Lal Shah Vs. Union of India & ors. AIR 1964 SC 1854, Government of India, Ministry of Home Affairs & ors. Vs. Tarak Nath Ghosh, AIR 1971 SC 823 and Narayan Dattatraya Ramteerathakhar Vs. State of Maharashtra & ors., AIR 1997 SC 2148).

27. The apathy and antagonism of the enquiry against the petitioner does not end here. Sri Lav Verma recommended that the services of the respondent no. 5 were required in the Medical College, Allahabad and allegations against the present petitioner **stood proved**. We fail to understand as to how Sri Lav Verma dared to record such findings against the petitioner and who authorized and inspired him to give an advice to the Government as to whether the services of respondent no. 5 were required in the Medical College, Allahabad. Though the terms of reference of the said enquiry are not before us, however, it appears that he exceeded the terms of reference clearly and abused the authority so conferred by introducing scurrilous remarks against Dr. Sinha, the petitioner in his report. It could

not be called bona fide by any means. The Disciplinary Authority has taken this report also into consideration against the petitioner without realizing that such a role has never been assigned to Sri Lav Verma as he was appointed Enquiry Officer only against respondent no. 5 and the remarks so made by him against the petitioner, may be for some extraneous consideration. We have no compunction in observing that this enquiry by Sri Lav Verma was held in a most unlawful manner. The pernicious intention is not simply discernible but is writ large at the face of it. In such an atmosphere, people attached feel suffocation as it not only breeds frustration but corruption also. Eligible and suitable candidates feeling hapless commit suicide out of frustration while those who can lick the boots of the bosses succeed in their mission. It goes in a deeper mileage of the administration. (vide Km. Poonam Srivastava vs. U.P. Industrial Co-operative Association, Kanpur & Ors. (1996) 3 UPLBEC 1821).

28. Another Enquiry Committee was set up by the Disciplinary Authority appointing the Divisional Commissioner, Allahabad as its Chairman. The preliminary enquiry report submitted by the said Committee is against the petitioner. But , contents of the covering letter sent by the Divisional Commissioner to the Disciplinary Authority is not merely astonishing but shocking also as he doubted the integrity of one of the members of the Enquiry Committee and made remark that he was in collusion with the petitioner. This was a three member Committee. If he was of such an opinion he ought to have reported to the Disciplinary Authority in advance before the conclusion of the enquiry. His failure to act in a legal manner thus exposes a particular frame of mind of the State's governance in this matter. If such a letter was received by the Disciplinary Authority it became his solemn duty to examine as to whether such a report was worth acceptance. Thus, the final direction by the competent authority suffers from serious vices.

29. The respondent no. 6 has been made the officiating Principal of the College and there is nothing on record produced by the learned Additional Advocate General Shri Vinod Swaroop to show as to whether the Competent Authority has applied its mind to the statutory requirement and as to whether the Professors appointed under the Personal Promotion Scheme or Career Advancement Scheme are also eligible for promotion or officiation on this post as it is submitted in the petition that he is not the senior most Professor if other category of Professors are also taken into consideration.

30. The record makes it clear that orders have been passed by the authorities concerned arbitrarily without keeping in mind the statutory requirement.

31. Power vested by the State in a Public Authority should be viewed as in trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public Authorities cannot play fast and loose with the powers vested in them." Decision taken in arbitrary manner contradicts the principle of legitimate expectation. Authority is under legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood

conferred. In this context, 'in good faith' means for legitimate reasons. It must be exercised bona fide for the purpose and for none other. (vide Commissioner of Police, Bombay Vs. Gordhandas Bhanji, AIR 1952 SC 16, Sirsi Municipality Vs. Cecelia Kom Francis Tellis, AIR 1973 SC 855, The State of Punjab & Anr. Vs. Gurdial Singh & ors., AIR 1980 SC 319. The Collector (Distt. Magistrate) Allahabad & Anr. Vs. Raja Ram Jaiswal, AIR 1985 SC 1622, and Delhi Administration Vs. Manohar Lal, (2002) 7 SCC 222).

32. In fact, the petitioner has challenged the impugned suspension order dated 24.6.2003, by which the Disciplinary Authority has passed the order of suspension and is attached in the Directorate of Medical Education and Training, Lucknow. However, there is another order of the same date, i.e. 24.6.2003, therein while issuing a direction for appointing the respondent no. 6 as an officiating Principal, it has been directed that Dr. Sinha will continue to work on his substantive post of Professor, Forensic Medicine in the same Medical College. The orders have been signed by the same officer but gives a contrary impression. This shows not proper application of mind by the authority concerned.

33. To sum up, prima facie, we are of the considered opinion that the attitude of the Authorities against the petitioner has been vindictive. Allegations of mala fide are prima facie preponderous. Authorities holding preliminary enquiry had not been fair to him and we have no hesitation to hold that they were biased and had acted for extraneous considerations, and it is a fit case where the suspension order ought to have been quashed. But considering the gravity of the charges, and particularly, in view of the fact that some of the charges of grave nature stood proved in a regular enquiry report which had been accepted though the Disciplinary Authority for the reasons best known to him did not consider it proper to conclude the enquiry by passing an order in accordance with law. In a larger public interest, we are not inclined to interfere with the impugned suspension order. But the Court being custodian of law cannot remain a silent spectator and close its eyes where the mismanagement by the so called administration, is stinking of malignancy and its officers shamelessly side with one of the parties in a tug of war which spoiled the educational system irretrievably of the Medical College and the students and patients to suffer vicariously for no fault of theirs. This type of a situation if allowed to prevail, just as in the present case, it is bound to contaminate and pollute the otherwise ought to be homogeine environment of such institutions. These institutions were created to impart medical education and not dirty politics. The ethics behind the medical profession is sanguine. It is lost completely to wilderness in such an atmosphere and climate. Apart from, it causes frustrations amongst the deserving teachers who are devoted to their obligation very seriously. It will deter them from discharging their duties with sincerity and devotion. Groupism amongst would raise its ugly head. As the necessary parties, particularly, those who held preliminary enquiry in such an arbitrary and illegal manner, are not before us, we are not in a position to speak against them as it would violate the principles of natural justice. The observation made hereinabove are based

prima facie on an examination of the record submitted by Sri Vinod Swarup, learned Additional Advocate General to the Court. We do not desire to direct any harsh measures ourselves against any errant officer who held both the preliminary enquiries ourselves. We instead seriously advice the learned Chief Secretary of the State of Uttar Pradesh to examine the reports submitted in this case himself and to consider as to whether the affairs of the State can be run in such a casual and lackluster manner. Has the government of this State decided to play with the life of the youth of this nation who are trying to become medicos to serve the masses, the manner in which the matter has been dealt with is most deplorable. We take serious notice of it. The learned Chief Secretary is requested to review the whole issue after going through the record including the so called preliminary reports and order to hold de novo enquiry on the allegations on which regular enquiry had been completed. The Government is directed to take the necessary steps to fill up the vacancies lying unfilled in legal manner immediately. Such stop-gap arrangements must come to an end forthwith in all the Medical Colleges of the State.

34. With these observation, petition stands dismissed.

———

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 9.5.2003

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

Civil Misc. Habeas Corpus Petition No. 43233 of 2002

Bandoo Bedia and others ...Petitioners (Detenue/In Jail)
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri A.N. Mishra

Counsel for the Respondents:
Sri B.N. Singh (Sr.S.C.)
A.G.A.

Constitution of India, Article 226-Detention Order-Challenged-Plea of law and Order and Public Order-Major difference between the two-discussed-detention order the result of misuse of power by the Police personnel-highly condemsed direction issued to release by forthwith.

Held- Para 14

It is now well realised that the line of demarcation between 'law and order' and 'public order' is very marginal. Any act of violence that creates an offence naturally poses problem first to law and order. Every offence necessarily does not come within the purview of 'public order' by virtue of it being an offence committed by an individual or a group of individuals. It would fall within this clan if its ramifications have the capability and potential to disrupt the peace and tranquility of that area wherein the offence was so committed. If it, by its very nature, succeeds in causing disruption in normal mode of living and

even tempo of the society unhesitatingly, it is liable to handle sternly under these preventive laws. The act would be clearly barred by the connotation 'public order'. The presence is in evident and its fall out, we are convinced lacks this qualification.

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

1. There are eight writ petitions connected with each other. Civil Misc. Habeas Corpus Writ Petition No. 43233 of 2002, therefore, is treated as principal case. It was preferred by Bandoo Bedia son of Ralli Bedia. Other petitioners are Bhagoni alias Bhagwan alias Bhagwan Das alias Bhagone, Raghav Bedia, Pappu Bedia, Gabbar Bedia, Vijay Bedia, Raj Pal Bedia and Kallu Bedia.

2. An F.I.R. was registered as case Crime No. 135 of 2002 against the petitioner in Writ Petition No. 43233 of 2002 and nine others under Sections 147/148/149/307/323/353 I.P.C. and Section 7 of Criminal Law Amendment Act at P.S. Madawara, District Lalitpur.

3. The facts of the F.I.R., as disclosed in the grounds of detention, are that on 10.6.2002 at about 4.45 p.m. in a ***Mela*** (fair) which was going on in village Rangaon near Moti Mandir, Pappu Bedia, the brother-in-law of the petitioner, was exhibiting unpleasant behaviour towards females. He was asked to desist from his misconduct by three policemen present in the ***Mela***. He did not stop his unlawful activities with the female members present in the fair. Consequently constable Vimlendra Singh, Karim Khan and Head Constable Ram Prakash Tewari took him into their custody. When they were proceeding with Pappu Bedia to the police station, the petitioner along with his other companions started belabouring them near a ***Imli*** tree with ***Sariya, Lathi*** and ***dandas*** with an intent to kill the constables. He managed the release of his brother-in-law, Pappu Bedia, who in turn also joined this petitioner in the assault of the constables. Constable Vimlendra Singh sustained injuries on his head and hand. There was disturbance in the fair. People started running helter-skelter. The shopkeepers downed their shutters and started fleeing from the fair premises. The entire fair was completely disturbed. The people living in the vicinity had closed their doors and confined themselves within the four walls of their houses. The public order allegedly was completely disrupted. On the arrival of other police personnel in the fair, the petitioner along with his companions and the released accused Pappu Bedia fled from the spot. Constable Karim Khan lodged the report of this incident, as earlier reported. Case Crime No. 135 of 2002 under the abovesaid sections was registered. It is also alleged in the grounds that the petitioners withdrew from the spot by resorting to firing. The people became so panicky and afraid of the petitioner Pappu Bedia that nobody was prepared to state the truth or make any statement in court, though the policemen had all along been trying to checkmate the growing influence and the terror of this petitioner by their frequent visits of the village. Additional force was also deployed in the region for the above said purpose.

4. The Investigating Officer, on his return to the police station on 11.6.2002 from the investigation, had also made some entry in G.D. No. 25 at 8.20 p.m. to this effect. The petitioner was arrested on 14.6.2002 and remanded to jail thereafter.

5. A proposal for detention of the petitioner was mooted by S.H.O. Hargovind Verma of P.S. Madawara, District Lalitpur. The report of the Circle Officer attached to this proposal also indicates that this petitioner is a hazardous person and nobody feels himself secure from him in the society. The public does not dare to challenge him, nor they are prepared to make any statement against him either to the police or in the court. The report of the S.P. submitted along with the proposal of the S.H.O. shows that the petitioner has made an application for his release before the Additional Chief Judicial Magistrate, Mahrauni, Lalitpur, on 18.6.2002, which was to be heard on that very day in addition to. There are every possibility of his immediate release. On being released on bail the petitioner, according to these reports, is likely to indulge into his nefarious activities and he may commit some serious offence, which may cause disruption of the public order. Along with the proposal the sponsoring authority has forwarded life history and criminal antecedents of this petitioner as also others petitioners apart from the copy of the F.I.R., copy of General Diary Report No. 22 dated 10.6.2002 at 5.30 p.m., copy of General Diary Report No. 25 at 8.20 p.m. made by S.H.O. on his return from the investigation of this case on 11.6.2002, copy of the spot inspection report and statements of the witnesses, police and public, recorded under Section 161 Cr.P.C. to the District Magistrate for initiating action under Section 3 of the National Security Act.

6. The bail application filed by the petitioner on 18.6.2002 was rejected by the Additional Chief Judicial Magistrate, Mahrauni, Lalitpur, on 18.6.2002 itself. A copy of the bail application was also produced before the concerned District Magistrate, but the rejection order was not filed, though the proposal was sponsored on 20.6.2002. It is also a fact that no further bail application was filed either before the Sessions Judge or before this Court by the petitioners.

After receipt of the report along with the proposal from the Superintendent of Police, Lalitpur, on 21.6.2002 the District Magistrate, Lalitpur, on the same day passed the impugned order of detention for a period of one year under Section 3 (2) of the National Security Act against the petitioner. The order was served upon the petitioner on the same day in District Jail through the Superintendent of the Jail. So the petitioner's detention commenced with effect from 21.6.2002.

7. After the detention order was passed by the District Magistrate, the papers were submitted to the State Government, which had approved his detention by its order dated 28.6.2002. All the relevant papers were forwarded along with the detention order viz., grounds of detention and other connected papers by the State Government to the Central Government on 1.7.2002. It was received by the Central Government on 5.7.2002.

8. The petitioner submitted a detailed representation through the Superintendent, District Jail, Lalitpur, on 3.7.2002 for the District Magistrate, Lalitpur, to consider the same. The District Magistrate, Lalitpur, called for the comments from the Superintendent of Police on the representation of the petitioner. The S.P. submitted his comments on the representation on 6.7.2002. The representation was forwarded to the State Government and

the Central Government by the District Magistrate, Lalitpur, on 9.7.2002. The State Government received the same on 10.7.2002. On 11.7.2002 the representation along with parawise comments were sent to the U.P. Advisory Board. The State Government rejected the representation of the petitioner by its order dated 15.7.2002, communication of which was made to the petitioner on 16.7.2002 in District Jail, Lalitpur.

9. The petitioner was summoned by the Advisory Board and he appeared in person before the same on 24.7.2002. The Advisory Board expressed its opinion that there are ground for detention of the petitioner on 6.8.2002 for consideration of the State Government. The State Government communicated through radiogram and letter dated 19.8.2002 that the detention of the petitioner is confirmed for a period of 12 months with effect from 21.6.2002. On 14.8.2002 the representation of the petitioner was rejected. The information was communicated to him by the State Government on 28.8.2002. Rejection of his representation by the Central Government was also communicated to the petitioner.

10. Learned counsel for the petitioners has made following submissions that this detention is based upon a solitary case. The entire incident does not give rise to any disturbance to the public order and tranquility, the incident is squarely covered under law and order and the sponsoring authority being badly biased by the assault on the police personnel of the police station had mala fidely sponsored for the detention of the petitioner and his other family members and associates on false and cooked up facts. The facts averred about the character and antecedents of the petitioner were totally false and concocted as revealed from the history-sheet furnished along with the proposal by the said authority. He has also submitted that this is the only case against the petitioner and 7 other petitioners on the basis of which they were detained.

11. The occurrence is dated 10.6.2002. The bare facts were already detailed in the preceding paragraphs. The allegations that the petitioner bears a hazardous character and is infected by criminality and his criminal activities have created a terror amongst the people living in the area and none is there to defy him or make a complaint to the police or the court are ingenious fabrication by the sponsoring authority. The sponsoring authority or other senior police officer, who recommended for the detention of all the petitioners on these facts know that none of them bear any such character. The mother of Pappu Bedia is a celebrated dancer. She is a renowned Folk dancer of Bundelkhand. They are keeping alive the tradition and heritage. They are expert performers of ***Rai Nritya*** (dance) and ***Shera Nritya***. They have been performing these dances through out the country and State capitals. They have also performed these dances on national day celebrations, like Republic Day, 15th August, 26th January, etc. Smt. Phoola Devi was honoured many a times by the President of India and Prime Minister, late Sri Rajiv Gandhi. The present petitioner is a student. Smt. Phoola Devi and two other females were also members of local Zila Panchayat. Smt. Phoola Devi convene and manages the local weekly fair at Moti Mandir in her village Rangaon. On 10.6.2002 she left the village to

participate in a marriage celebration in her family. The management of the fair was left by her in the hands of Pappu Bedia and the petitioner. These three police personnel, who were allegedly assaulted by these petitioners and some others were themselves making indecent gestures and vulgar comments against the village women who were presenting dance performance near ***Jhoola***. Petitioner Pappu Bedia objected to their indecent behaviour. He tried to desist them from repeating the same. On this, these three policemen got enraged and started hurling abuses upon him. They caught and assaulted him. He was forcibly dragged to a lonely corner. He was beaten there also by ***Dandas***, whereupon he shouted for help and these policemen thereon were attacked by the local public gathered in the fair. They had got Pappu Bedia liberated from their clutches. The policemen left for the police station extending serious threat to ruin the life of the entire village. A false case was registered in order to teach the villagemen including the petitioner and other petitioners in the connected writ petitions a lesson for mastering courage to desist them from their misdeeds. The defence is corroborated by complete absence of any criminal antecedents against all these petitioners. We have examined the antecedent chart. Since these people who belong to traditional folk dancing community they and their women are treated with contempt. The policemen were no exception to it.

11. The averments made in the proposal by the sponsoring authority to the contrary, it is contended seriously, were imaginary and fabricated in order to punish these young and old petitioners in all these writ petitions, a lesson for their life, so that they may never act against the police even if the men in robe were behaving in a manner prejudicial to the social interest and dignity of these females. The last submission is that the orders were passed post-haste without any application of mind by the District Magistrate.

12. In our opinion, the facts adverted to above do not make out any case of disturbance of public order. The disturbance caused by the assault on the policemen in the fair did not cause any disturbance to the public order. The fair was organised by Bedia community in their own village. The conduct of Pappu Bedia, as alleged in the F.I.R., in the circumstances, does not inspire confidence that he was misbehaving with the females of his own community or of neighbourhood. Most of them were related closely to these petitioners. In the circumstances, the averments made in the proposal and accepted by the detaining authority, as fostered by the S.H.O., Circle Officer and the S.P., Lalitpur, in our opinion, were flimsy, made up, and tailored only to punish these young men, the petitioners in these impugned petitions for mustering courage to teach these constables who were drunk with the power and had forgotten that there are females in their own families as well. The females ought not to be looked in derogation if they belong to down-to-earth class. The females of the dancer community, therefore, are no public property to be misbehaved or shown disrespect to. As earlier discussed, members of the Bedia community would not show such gesture or conduct, as alleged against Pappu Bedia in the F.I.R. because fair was mostly inhabited and visited by the members of the same

community or females of the nearby villages. The mother of Pappu Bedia being a female of high status in the National Art Gallery being a reputed Folk dancer of the country would not allow any one of them to misbehave indecently in the fair. Pappu Bedia must also be conscious that it would damage their business interest adversely. Some of these accused petitioners are also equally reputed dancers and athletes or sports persons. The behaviour alleged against them by the policemen does not impress us at all. These facts were not discussed by us by way of any criticism of the charges on merit, or by way of any assessment of the activity of the sponsoring authority. We are discussing them in regard to the factum of application of mind by the District Magistrate. The speed with which the entire proceedings were drawn and the detention orders were clamped on these petitioners, leaves hardly any room to doubt that there does not exist any application of mind by the detaining authority to the facts of the case. We are conscious fully that this satisfaction is only subjective and not objective, but subjective satisfaction could not be arrived at without scrutinising the charges levelled by the sponsoring authority in the proposals against these petitioners. These facts were discussed by us in this light. Thus, we are convinced that the entire proceedings were completed within two days, i.e. on 20th and 21st June, 2002. On 20th June the proposals were fostered against these petitioners by S.H.O. Hargovind Verma of P.S. Madawara, District Lalitpur. Both the officers, Circle Officer and the Superintendent of Police, slapped their reports on the proposal on 20th June itself. Armed with these reports the proposal was submitted to the District Magistrate on 21.6.2002. Post-haste, as it is, the order of detention was passed in this case against these petitioners on the same day. They were served also promptly. It clearly puts the facts all-square. Where was the time for the District Magistrate to apply his mind? All these authorities were motivated clearly by the fact that men in robe suffered humiliation at the hands of people of base traditions and culture. It was hurting their pride.

13. Apart from these, as earlier discussed, there is no longevity in the disruption of the fair by the act complained of. If we accept them verbatim, as alleged by the sponsoring authority and accepted by the District Magistrate, the disturbance was not so potent as to cause any disruption to the public order of the area and its tranquility which may entitle the detention of these petitioners under the National Security Act, 1980. Whatever disturbance was caused, was momentary and the police force, in all probability, was not rushed to maintain the public order but was rushed to the ***Mela*** area to quell these Bedias who tried to desist the policemen from treating callously the females in the ***Mela*** area and when the policemen tried to make a vulgar show of their authority, they were made to suffer humiliation. It appears to us a case of offenders trying to punish those who probably acted in defence of the honour of their women folk. One of them lodged a tailored report. Therefore, we do not find in the activities of these petitioners any disturbance to the public order or disruption of the public tranquility of the area. The arm and reach of their act and conduct, in our opinion, was very short-lived. Therefore, in our opinion, it was clearly a law and order

problem and do not pose any threat to the public order and public tranquility of the area, as alleged in its proposal by the sponsoring authority.

14. It is now well realised that the line of demarcation between 'law and order' and 'public order' is very marginal. Any act of violence that creates an offence naturally poses problem first to law and order. Every offence necessarily does not come within the purview of 'public order' by virtue of it being an offence committed by an individual or a group of individuals. It would fall within this clan if its ramifications have the capability and potential to disrupt the peace and tranquility of that area wherein the offence was so committed. If it, by its very nature, succeeds in causing disruption in normal mode of living and even tempo of the society unhesitatingly, it is liable to handle sternly under these preventive laws. The act would be clearly barred by the connotation 'public order'. The presence is in evident and its fall out, we are convinced lacks this qualification.

15. The questions raised in this petition and answered by us equally cover the other seven petitioner's cases as well. Dates of detention in their cases are a few a days later though facts and submissions remain the same.

16. In view of these facts and our findings, these petitions are allowed. The petitioners, who are under detention, shall be released forthwith if not otherwise wanted in any case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2003

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 20449 of 2003

Ram Chandar ...Petitioner
Versus
Deputy Director, Consolidation, Azamgarh and others ...Respondents

Counsel for the Petitioner:
Sri Sankatha Rai
Dr. Vinod Kumar Rai
Sri Vijay Kumar Rai

Counsel for the Respondents:
Sri A.K. Singh
Sri A.P. Singh
Sri Anuj Kumar, Addl. S.C.
C.S.C.

Constitution of India-Article 226-Limitation Act 1963 Sec-5-Time barred appeal filed after 16 years-Consolidation Court Condoned delay-challenged two validity of the said orders

Held- Para 9

In the present case the explanation given by the respondent as noted above is satisfactory and the exercise of discretion by the Assistant Settlement Officer of Consolidation in condoning the delay, cannot be said to be arbitrary, capricious, or ultra vires. Explanation given for condonation has been noted by the Assistant Settlement Officer of Consolidation in his judgement and he having found them satisfactory no case has been made out for interference under Article 226 of Constitution by this Court.

Case law-
1. 1998 R.D. 18 S.C.
2. 1996 A.W.C. 1018

3. 1995 R.D. 102
4. J.T. 1998 (8) S.C. 529
5. 1998 R.D. 607
6. 2002 R.D. 531
7. 1994 ALR 503
8. 2000 R.D. 693
9. AIR 1968 S.C. 222

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

1. Heard Sri Sankatha Rai, learned counsel for the petitioner and Sri A.K. Singh learned counsel appearing for the respondent no. 4.

2. By this writ petition the petitioner has prayed for quashing the order dated 29.4.2003 passed by the Deputy Director of Consolidation, Azamgarh and the order dated 21.3.2003 passed by the Assistant Settlement Officer of Consolidation, Azamgarh.

3. Brief facts giving rise to this writ petition are;

The respondent no. 4 filed a time barred appeal under Section 11 (1) of the U.P. Consolidation of Holdings Act against the order dated 5.4.1986 passed by the Consolidation Officer under Section 9-A (2) of the said Act. Along with appeal affidavit of the Pradhan of the Gaon Sabha was also filed. Benefit under Section 5 of the Limitation Act was also claimed and it was prayed that the delay in filing the appeal be condoned. In appeal it was stated that plot No. 521 area 245 Karis was recorded as pond in basic year records and was also recorded as pond in Khatuani of 1307 F. It was specifically pleaded in paragraph 2 of the appeal that neither any case was registered as case No.034 nor it was ever decided by the court and the objection is ante dated and the order shown to have been passed, was not passed by the Presiding Officer nor it contained the signatures of the Presiding Officer. It was further stated that the aforesaid order was ex parte. In paragraph 6 it was stated that entire proceedings were ante dated and fictitious. In paragraph 7 of the appeal it was stated that the order dated 5.4.1986 was shown to have been incorporated in the records after nine years. It was stated that after coming to know about the above facts the appellant informed the said facts to the District Government Advocate and an application was also filed before the Collector under Section 33/39 of the U.P. Land Revenue Act but the Collector took the view that with regard to legality and validity of the order dated 5.4.1986 proceedings under Section 33/39 of the U.P. Land Revenue Act are not maintainable. It was stated that the order has been passed for filing the appeal by the Incharge Gaon Sabha/ Collector. These facts were verified on affidavit on basis of which benefit under Section 5 of the Limitation Act, was claimed. An objection was filed by the petitioner before the Assistant Settlement Officer of Consolidation in which it was stated that the appeal is barred by 16 years and hence no case has been made out for grant of benefit under Section 5 of the Limitation Act. It was further stated that the proceedings under Section 33/39 were held in the court of Collector in which the Pradhan herself appeared on 29.6.2002 hence it cannot be stated that she had no knowledge. The Assistant Settlement Officer of Consolidation by order dated 21.3.2003 gave the benefit under Section 5 of the Limitation Act in the appeal and condoned the delay in filing the appeal. The Assistant Settlement Officer of Consolidation fixed the appeal for hearing. Against the said order dated

21.3.2003 the petitioner filed a revision under Section 48 of the said Act which revision has been dismissed by the Deputy Director of Consolidation on 29.4.2003. The Deputy Director of Consolidation took the view that the appellate court has only granted benefit under Section 5 of the Limitation Act which does not affect the right of the petitioner. He further observed that on question of Limitation the courts have to adopt liberal view. The Deputy Director of Consolidation with the aforesaid observations refused to interfere with the order of the Assistant Settlement Officer of Consolidation. Against these two orders the writ petition has been filed by the petitioner.

4. Sri Sankatha Rai, learned counsel for the petitioner contended that the error has been committed by the courts below in condoning the delay in filing the application under Section 5 of the Limitation Act. It has been contended that there was no sufficient ground for condoning the delay of 16 years. He further contended that before the Consolidation Officer Pradhan also appeared and it cannot be believed that subsequent Pradhan did not know about the order. Sri Rai further contended that the consolidation authorities while deciding question of limitation had no jurisdiction to consider the merits of the case. Sri Rai further contended that the land in dispute was grove of the petitioner. Learned counsel for the petitioner referred to entries of 1272F and claimed that it was recorded in the name of the ancestor Ramanand Lal who was in possession. The learned counsel for the petitioner has further contended that several documents including comparable table of 1307 F was filed before the Consolidation Officer who rightly upheld the petitioner as grove holder. Counsel for the petitioner also placed reliance on various judgments of this Court, namely, 1998 R.D. 18 **P.K. Ram Chandran** Versus **State of Kerala and another** (Supreme Court), 1996 A.W.C. 1018 **Girja Shankar and another Versus Deputy Director of Consolidation, Bhadoi and others, 1995** R.D. 102 **Ram Charan** Versus **Ziladhikari Deputy Director of Consolidation Banda and others** and Judgment Today 1998 (8) S.C. 529 **Collector of Customs, Bombay** Vs. **Hari & Company, Bombay.** Sri A.K. Singh learned counsel appearing for the respondents refuting the submissions of the counsel for the petitioner contended that sufficient cause was shown for condonation of delay and the Assistant Settlement Officer of Consolidation rightly condoned the delay in filing the appeal. The counsel for the respondents submitted that the land was recorded as Pokhari (pond) in basic year entry and order of Consolidation Officer said to have been passed was ex parte to the Gaon Sabha. He further contended that the consolidation courts are under duty to protect the properties of the Gaon Sabha and no error was committed by the Assistant Settlement Officer of Consolidation in condoning the delay. He has placed reliance on the judgment of the apex Court in 1998 R.D. 607 **N. Balakrishnan Versus M. Krishnapurthy** reported in 2000 RD 531 **Ram Murat (Dead) By L.Rs. and another Versus Deputy Director of Consolidation and others;** 1994 A.L.R. 503 **Ambika Prasad and others Versus Commissioner Jhansi Division Jhansi** and others and 2000 R.D. 693 **Praveen Begum (Smt.)** Vs. **Additional District Judge, Agra and another**.

5. I have considered the submissions of counsel for both the parties and perused the record.

6. The first submission of counsel for the petitioner is that no sufficient cause shown by the respondents for allowing the application under Section 5 of the Limitation Act. For considering the aforesaid submission it is necessary to look into the allegations made in appeal and the cause shown for delay before the appellate court. A copy of grounds of appeal has been filed as Annexure-6 to the Writ Petition. Benefit under Section 5 of the Limitation Act has been claimed in the memo of appeal itself and the relevant facts for claiming benefit under Section 5 of the Limitation Act are contained in the memo of appeal. An affidavit has been filed by the respondent in support of the memo of appeal verifying the contents thereof. In the affidavit also benefit under Section 5 of the Limitation Act has been claimed. In paragraph 2 of the memo of appeal it has been claimed that neither the case No. 934 was ever instituted nor proceeded in the court nor decided by the court. It is claimed that objection is ante dated and the order is rendered by some unknown person which also do not contain the signatures of the Presiding Officer. The allegation in paragraph 5 is that the proceedings are ante dated and fictitious. In paragraph 7 it has been stated that although the order is alleged to have been passed on 5.4.1986 but it has been incorporated in the records after nine years. Alternatively in paragraph 7 it has been stated that in case any proceedings was done in collusion of ex Pradhan there is no binding of such proceedings on the appellant. In paragraph 8 it has been stated that after coming to know an objection under Sections 33/39 of the U.P. Land Revenue Act was filed before the Collector for correcting the entry which application was held not maintainable. For challenging the validity and propriety of the alleged case No. 934 decided on 5.4.1986 it has been stated that thereafter an application was moved before the Incharge Gaon Sabha/Collector who issued direction for filing the appeal and thereafter the appeal has been filed. The facts as narrated in the appeal clearly shows that the case of the appellant is that the order dated 5.4.1986 was ex parte to Gaon Sabha and the Amaldaramad of which was made after nine years. Copy of the order of the Consolidation Officer said to have been passed on 5.4.1986 has been filed as Annexure-5 to the writ petition. The said order do not disclose that the order was passed after contest or the State of Uttar Pradesh who was arrayed as respondent was served. The order shows that the Pradhan appeared as a witness in favour of the petitioner. In the writ petition it has been stated that the objection filed by the petitioner was also barred by time. On the facts as disclosed in the memo of appeal the Assistant Settlement Officer of Consolidation exercising his discretion granted the benefit of Section 5 of the Limitation Act. The Assistant Settlement Officer of Consolidation in his order has noted in detail the facts given in the memo of appeal for explaining the delay. The Assistant Settlement Officer of Consolidation has accepted the facts stated in the affidavit for giving benefit under Section 5 of the Limitation Act. It is true that the order of the Assistant Settlement Officer of Consolidation do not give elaborate finding but the order discloses that the Assistant Settlement Officer of Consolidation has taken into consideration all the relevant facts stated

in the appeal as noted above. The principle for exercise of discretion in condoning the delay under Section 5 of the Limitation Act are well established. In A.I.R. 1968 SC 222 **Sarpanch, Lonand Grampanchayat** Versus **Ramgiri Gosavi and another** the apex Court observed in paragraph 4 which is extracted below:-

"(4) The wording of the second proviso is similar to the provisions of S.5 of the Indian Limitation Act. In Krishna V. Chatrappan (1890) ILR 13 Mad. 269 the Madras High Court indicated in the following passage how the discretion under S. 5 should be exercised:

"We think that Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood the words sufficient cause receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant"

This decision received the approval of this Court in Dinabandhu Sahub v. Jadumoni Mangaraj 1955-I SCR 140 at p. 146 (AIR 1954 SC 411 at p. 414) and Ramlal Motilal v. Rewa Coal fields Ltd. 1962-2 SCR 762 at p. 767: (AIR 1962 SC 361 at p. 363). The words "sufficient cause" in the second proviso to S. 20 (2) should receive a similar liberal construction."

7. The apex court in the aforesaid judgment laid down that sufficient cause should receive a liberal construction. It was further laid down in the said judgment that the High Court will not review the discretion but it may interfere if the exercise of discretion is capricious or perverse or ultra vires. The apex Court in the said judgment also laid down that the High Court will not interfere merely because it may take a different view of the facts in exercise of the discretion differently. Following observations were made by the apex Court in paragraph 6 of the judgment:-

"6. Having regard to all the circumstances of the case, the employees were not guilty of inaction or negligence and the entire delay in presenting the application was due to their honest though mistaken belief that the relief of overtime wages would be granted to them through the intervention of the inspectors and their superior officers. It is not shown that in condoning the delay the Authority acted arbitrarily or capriciously or in excess of its jurisdiction or that it committed any error apparent on the face of the record. In the application under S. 20 (2), some of the employees claimed overtime wages for periods prior to January 1, 1961. The Authority declined to condone the delay in respect of claims for the period prior to January 1, 1961. On a careful consideration of the relevant materials the Authority condoned the delay in respect of claims subsequent to January 1, 1961 only. The Court cannot interfere merely because it might take a different view of the facts and exercise the discretion differently. It is not shown that the impugned order led to grave miscarriage of justice. The High Court refused to interfere under Article 227. We think that this is not a fit case for interference by us under Art. 136."

8. The counsel for the petitioner has placed reliance on the judgement of the apex Court in 1998 R.D. 18 **P.K. Ram Chandran** Versus **State of Kerala and another** (Supreme Court) in which case the High Court has condoned the delay in filing appeal which was set aside by the apex Court. From the judgment of the apex Court in **P.K. Ram Chandran's Case** it is clear that the apex Court noted in the judgement the explanation given by the petitioner and held that no explanation much less the reasonable or satisfactory explanation has been offered by the State for condonation of delay. Following observation was made by the apex Court in the judgment:-

"*We are not satisfied that in the facts and circumstances of this case, any explanation, much less a reasonable or satisfactory one had been offered by the respondent State for condonation of the inordinate delay of 565 days.*"

9. In the present case the explanation given by the respondent as noted above is satisfactory and the exercise of discretion by the Assistant Settlement Officer of Consolidation in condoning the delay, cannot be said to be arbitrary, capricious, or ultra vires. Explanation given for condonation has been noted by the Assistant Settlement Officer of Consolidation in his judgement and he having found them satisfactory no case has been made out for interference under Article 226 of Constitution by this Court.

10. In the judgment of this Court reported in 1996 A.W.C. 1018 **Girja Shanker and another** Versus **Deputy Director of Consolidation, Bhadoi and others** no finding was recorded by the Settlement Officer of Consolidation that the reason is sufficient. Since there was no finding the matter was remanded to the Assistant Settlement Officer of Consolidation for again deciding the application under Section 5 of the Limitation Act by the Assistant Settlement Officer of Consolidation, in the present case the Assistant Settlement Officer of Consolidation has found the reason given in the affidavit sufficient for condonation of delay, the Deputy Director of Consolidation has also refused to interfere in the order of the Assistant Settlement Officer of Consolidation. In this view of matter the aforesaid judgment do not help the petitioner in the present case.

11. In **Ram Charan's Case** (supra) this Court has laid down that the mere fact that the rights of the parties are to be determined in the consolidation proceedings and if such rights are not decided the parties shall be affected itself is not a ground to allow the application which is filed under Section 5 of the Limitation Act. This Court held that the authorities have to consider the explanation offered by the applicant and the affidavit filed in support of such application. In **Ram Charan's case** (supra) this Court ultimately observed in paragraph 12 and 13 which are noted below:-

"12. In the present case, however, looking into the facts of the case it would not be appropriate to remand the case for deciding the application under Section 5 of the Limitation act. The proceedings are pending since the year 1976. The objection filed by respondents was dismissed on 30.7.1986. The contention of the respondents is that the parties have entered into compromise. This Court is

slow in interfering with the orders condoning the delay under Article 226 of Constitution of India.

13. In *Smt. Ram Thakur v. Deputy Director of Consolidation and others* (1975 RD 271) it was held that the High Court should not interfere, under Article 226 of Constitution of India, in the exercise of discretion in condoning the delay by the Consolidation Authorities. Similar view was expressed in *Ram Chand and another v. Deputy Directory of Consolidation and others (1984 RD 258)"*

12. In the present case the Assistant Settlement Officer of Consolidation has not allowed the said application ultimately on the ground that the rights of the parties should be determined in the consolidation proceedings on merits rather the Assistant Settlement Officer of Consolidation found the affidavit and the reasons given therein sufficient for condonation of delay. In **Ram Charan's case** (supra) the Court refused to interfere with the order of the Assistant Settlement Officer of Consolidation condoning the delay. Learned counsel for the petitioner has also relied on the judgement of the apex Court in **Ram Kali Devi (Smt.) vs. Manager, Punjab National Bank Shamshabad and others** reported in JT 1998 (8) SCC 529 in which the apex Court observed that the merits of the case cannot be looked at without condoning the delay. The ratio laid down by the apex Court in the said judgment is well established. In the present case the Assistant Settlement Officer of Consolidation has not considered the merits of the case nor the condonation has been allowed relying on the merits of the claim of the respondent no. 2. The Assistant Settlement Officer of Consolidation has fixed a date for hearing of the appeal on merits. The judgement of this Court in **Ram Kali Devi's** case has no application on the facts of this case.

13. The judgment of 1998 R.D. 607 **N. Balakrishnan versus M. Krishnapurthy** relied upon by the counsel for the respondents do support his contention. The apex Court in the said judgment has laid down the principles which are to govern the exercise of discretion while considering the application under Section 5 of the Limitation Act. The following was laid down by the apex court in the aforesaid case:-

"*A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shankutala Devi Jain v. Kuntal Kumari (AIR 1969 SC 575) and State of West Bengal v. The Administrator, Howrah Municipality (AIR 1972 SC 749).*

It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party

deliberately to gain time then the court should lean against acceptance of the explanation. While condoning the delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a salutary guidance that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.

In this case explanation for the delay set up by the appellant was found satisfactory to the trial court in the exercise of its description and the High Court went wrong in upsetting the finding, more so when the High Court was exercising revisional jurisdiction."

14. In view of what has been said above, it is clear that no such error was committed by the Assistant Settlement Officer of Consolidation in exercise of his discretion by condoning the delay in filing the appeal which may warrant interference by this Court under Article 226 of Constitution of India. It has also not been shown that any great injustice has been done to the petitioner by condoning the delay in filing the appeal. Petitioner will have an opportunity to have his say on merits of the claim before the Assistant Settlement Officer of Consolidation. In facts and circumstances of this case I do not find it a fit case for interferences under Article 226 of Constitution of India.

15. The writ petition lacks merit and is summarily rejected.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.5.2003

BEFORE
THE HON'BLE K.N. SINHA, J.

Criminal Revision No. 472 of 2003

Santosh Kumar and others ...Revisionists
Versus
State of U.P. and another ...Respondents

Counsel for the Revisionists:
Sri Dharmendra Singhal

Counsel for the Respondents:
Sri Sunil Kumar
A.G.A.

Cr.P.C.- S. 227- Stage of framing charge- court to see prima-facie evidence against accused and not to evidence. Held- there was primafacie evidence.

Case referred to:
2000 (1) JIC 765 (SC)
2001 (42) ACC 39
2001 (42) ACC 469
2001 (42) ACC 840

(Delivered by Hon'ble K.N. Sinha, J.)

1. The above two revisions arise out of the same judgment hence taken up together for hearing and disposed of.

2. The facts giving rise to the present revisions are that on the report of Smt. Minakshi Verma, opposite party no. 2 in revision no. 472 of 2003 the case was investigated and chargesheet was filed against revisionists and others in case crime no. 161/02. This chargesheet was filed against Santosh Kumar Verma, Phool Chand Adhupia, Satya Prakash, Smt. Kamla Devi, Smt. Anita alias Guddi, Raj Kumar and Smt. Shashi Verma under Section 498-A, 307, 323, 506 I.P.C. and

Section 3/4 of Dowry Prohibition Act. The Magistrate committed the case to session court where order for framing of charges under aforesaid sections was passed on 28.11.2002. In consequence of the said order, accused Santosh Kumar Verma, Satya Prakash, Phool Chand Adhupia and Raj Kumar Verma were charged for the offence under Section 323/34, 307/34 and 506 I.P.C. Santosh Kumar was further charged for the offence under Section 307 I.P.C. Against the said order framing the charges, the accused approached this Court by filing criminal misc. application no. 40 of 2003 which was decided on 7.1.2003 quashing the order framing charge and it was directed that the trial court shall rehear the parties on the point of framing of charges under Section 307 I.P.C. and then pass a speaking order before proceeding to frame the charge. In compliance of the said order, the learned trial court heard the parties' counsel and passed the impugned order dated 14.2.2003.

3. By the impugned order applicants Santosh Kumar Verma, Smt. Kamla Devi, Smt. Anita alias Guddi and co-accused Smt. Shashi Verma were ordered to be charged for the offence under Section 307/34 I.P.C. However, co-accused Phool Chand Adhupia, Satya Prakash and Raj Kumar Verma were discharged for the offence under Section 307/34 I.P.C.

4. The revisionists Santosh Kumar, Smt. Kamla Devi and Smt. Anita alias Guddi who were ordered to be charged for the offence under Section 307 I.P.C. filed the revision no. 472 of 2003 and opposite party no. 2 Smt. Minakshi Verma filed revision no. 487 of 2003 against Phool Chand Adhupia, Satya Prakash Verma and Raj Kumar Verma as they were discharged.

5. I have heard the learned counsel for the parties. Perused the impugned order. This court by the order dated 7.1.2003 had directed to rehear the parties on the point of framing of charge under Section 307 I.P.C. A close scrutiny of the impugned order shows that there were two incidents with lady Smt. Minakshi Verma. One which related to offence dated 3.3.2002 and the other which related to the offence dated 3.5.2002. The order framing above charge under Section 307 I.P.C. was passed on the occurrence which took place on 3.3.2002, on which date the kerosene oil was sprinkled on the body of Smt. Minakshi Verma but revisionists could not lit the fire as some acquainted person appeared. However, in the next occurrence dated 3.5.2002, the neck of the complainant Smt. Minakshi Verma was pressed and she was directed to bring Rs. 8 lacs. The trial court found that as Smt. Minakshi Verma was asked to bring a dowry of Rs. 8 lacs hence it couldn't be said that there was any intention to kill her by pressing the neck. It is settled principle that it is the intention of the accused which is material for proceeding under Section 307 I.P.C. In this case the accused had intended to get dowry hence it cannot be said that they had any intention to kill informant Smt. Minakshi Verma. Consequently the order of the trial judge in respect of this occurrence is perfectly justified as according to the F.I.R. Satya Prakash, Phool Chand Adhupia and Raj Kumar Verma were involved in this incident hence they were rightly discharged for the offence under Section 307 I.P.C.

6. So far as the case of revisionists of revision no. 472 of 2003 is concerned, the allegation against them is that they had sprinkled kerosene oil on the body of informant Smt. Minakshi Verma but when someone known to the husband of Smt. Minakshi Verma appeared at the scene of occurrence, the accused could not put fire on her body and lady was saved. The F.I.R. Annexure-1 contains the recital of this occurrence in the body. The informant Smt. Minakshi Verma had mentioned in the F.I.R. that Santosh Kumar, Smt. Kamla Devi (mother-in-law), Smt. Anita alias Guddi (sister-in-law and Shashi Verma (sister-in-law) sprinkled the kerosene on the body of the informant Smt. Minakshi Verma and made an attempt to put fire but did not succeed by arrival of someone acquainted to informants husband. This act shows revisionists intended to kill her and also made an attempt towards the same by doing the act of pouring kerosene oil on the body of informant and making an attempt to put fire.

7. In the cases for framing charge, prima facie evidence had to be seen and this is no stage to weigh the evidence.

8. Section 227 of the Code of Criminal Procedure runs as follows:

"Discharge- If, upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

9. This provision lays down that accused can be discharged for any offence only when there is no sufficient ground for proceeding against the accused. This provision of Cr.P.C. has been inter preted in number of judgments of the Apex Court. In the case of State of M.P. Vs. S.B. Johari and others and State of M.P. Vs. Sudhir Pingle [2000 (1) JIC 765 (SC)], it has been held as follows:

"It is settled law that at the stage of framing the charge, the Court has to *prima facie* consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a *prima facie* case is made out for proceeding further then a charge has to be framed."

10. In the case of State of Delhi Vs. Gyan Devi and others [2001 (42) ACC 39) it was held as follows:

"The legal position is well settled that at the stage of framing of charge the trial court is not to examine and assess in detail the materials placed on record by the prosecution nor is it for the Court to consider the sufficiency of the materials to establish the offence alleged against the accused persons. At the stage of charge the Court is to examine the materials only with a view to be satisfied that a prima facie case of commission of offence alleged has been made out against the accused persons.

…..It is to be kept in mind that once the trial court has framed a charge against an accused the trial must proceed without

unnecessary interference by a superior court and the entire evidence from the prosecution side should be placed on record. Any attempt by an accused for quashing of a charge before the entire prosecution evidence has come on record, should not be entertained sans exceptional cases."

11. Similar view was taken by the Apex Court in the cases of Ram Kumar Laharia Vs. State of Madhya Pradesh and another [2001 (42) ACC 469) and Smt. Omwati and another Vs. State (Delhi Administration) and others [2001 (42) ACC 840].

12. Thus the allegation set forth in the F.I.R. and coupled with the evidence collected during investigation is sufficient to frame the charge and order of the trial court does not call for any interference.

Consequently, both the revisions no. 472 of 2003 and 487 of 2003 are devoid of merit and are hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.5.2003

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 4222 of 1975

Ram Narain ...Petitioner
Versus
Dy. Director of Consolidation, Kanpur and others ...Opposite Parties

Counsel for the Petitioner:
Sri Shankata Rai
Sri K.M. Sahai
Sri C.K. Rai
Sri R.M. Sahai
Sri A.K. Banerji

Counsel for the Opposite Parties
Sri R.K. Misra
Sri N.K. Srivastava
Sri Neraj Agarwal
Sri S.N. Agarwal
S.C.

U.P. Zamindari Abolition Act and Land Reform Act- Sec. 209- Limitation for brining the suit 3 years- Petitioner being minor- can not file the suit after elapsed of 8 years from the date of attaining the majority.

Held- Para 15

In the present case, admittedly no suit was filed by respondent no. 4 under section 209 of U.P. Zamindari Abolition & Land Reforms Act. After issue of notification dated 29.4.1969, more than 8 years clasped from attaining majority by respondent no. 4. Period of limitation as prescribed under Section 209 of U.P. Zamindari Abolition and Land Reforms Act was six years, but since the respondents was under disability he was entitled to the benefit of section 6 of limitation Act which enable him to file the suit within three years from attaining majority.

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

Heard Sri Shankata Rai, learned counsel for the petitioner and Sri Nagendra Kr. Srivastava, learned counsel appearing for respondent no. 4.

By this writ petition, the petitioner has prayed for quashing of the order dated 25.2.1975 passed by Deputy Director of Consolidation and the order dated 15.1.1971 passed by Settlement Officer of Consolidation.

Brief facts which emerge from the pleading of parties are;

(1) Dispute in writ petition relates of plots of Khata No. 46 namely plot no. 210, 223, 331, 353 and 378/2. Notification under section 4 of the U.P. Consolidation of Holdings Act 1953 herein after referred to as Consolidation Act was published in the U.P. Gazette dated 10.5.1969. In the basic year records the name of petitioner Ram Narain was recorded over land of Khata in dispute. An objection under section 9 of Consolidation Act was filed by respondent no. 4 who stated in the objection that name of petitioner is wrongly recorded over land in dispute. It was stated that the land was earlier recorded in the name of Smt. Ganga Devi, step mother of Babu Ram, respondent no. 4 and she having no authority to transfer the land executed sale deed in favour of the petitioner. It was claimed that land originally belongs to Raja Ram father of respondent no. 4 and respondent no. 4 being heir of Raja Ram is entitled for the land in dispute. It was further claimed that Smt. Ganga Devi, step mother of petitioner was only looking after the land during period of minority of respondent no. 4. The objection filed by respondent no. 4 was contested by the petitioner. It was claimed that Smt. Ganga Devi had acquired the land in dispute from whom petitioner purchase the land by registered sale deed dated 28.6.1967. Both the parties led oral as well as documentary evidence before the Consolidation Officer. The Consolidation Officer vide his order dated 13.5.1970 rejected the objection of respondent no. 4. The Consolidation Officer directed that entry in the name of the petitioner shall continue. The Consolidation Officer recorded the finding that land in dispute was self-acquisition of Smt. Ganga Devi. The Consolidation Officer held that respondent no. 4 having not filed suit for possession for 8 years after attaining majority, he is debarred from recovery of possession of the land in dispute. The Consolidation Officer also noted in his judgement that name of Smt. Ganga Devi was recorded under the orders dated 14.12.1954 case no. 235/3094 passed by Tahsildar.

2. An appeal was filed before the Settlement Officer of Consolidation by respondent no. 4 who vide order dated 15.1.1971 allowed the appeal setting aside the order of Consolidation Officer. The settlement Officer of Consolidation directed recording of name of respondent no. 4 in place of the petitioner. A revision was filed by the petitioner which was dismissed by the order of Deputy Director of Consolidation vide his order dated 17.4.1971. The petitioner filed a writ petition no. 3076 of 1971 challenging the order of Deputy Director of Consolidation. This Court vide its judgement dated 19.4.1973 allowed the writ petition filed by petitioner by setting aside the order of Deputy Director of Consolidation dated 17.4.1971. The case was remitted to the revisional court for deciding the revision afresh according to law. Copy of judgment of the High court has been annexed as annexure–4 to the writ petition.

3. After the remand by the High Court, the Deputy Director of Consolidation vide his order dated 25.2.1975 dismissed the revision of petitioner. The Deputy Director of Consolidation in his order observed that it is acceptable to both the counsels that land in dispute was acquisition of Raja Ram. The Deputy Director of Consolidation further held that adverse

possession of the petitioner can at best be treated with effect from 1967 when sale deed was executed in his favour by Smt. Ganga Devi and since consolidation operation started in the Village in 1969, the revision of the petitioner is liable to be dismissed. The Deputy Director of Consolidation further observed that respondent no. 4 Babu Ram cannot be held responsible for litigation started by Smt. Kailasa the mother of respondent no. 4 against Smt. Ganga Devi. It has further been observed that there is no evidence that there has been any litigation between respondent no. 4 and Ganga Devi after 1959 when Babu Ram attained majority. This writ petition has been filed by the petitioner challenging the order of Deputy Director of Consolidation dated 25.2.1975 as well as the order of Settlement Officer of Consolidation.

4. It is also necessary to note certain more relevant facts which are on the record for appreciating the controversy between the parties. On the land in dispute, the name of Ram Swaroop was recorded as tenant who died before abolition of Zamindari. It has come in the evidence that Raja Ram, husband of Smt. Kailasa and Smt. Ganga Devi was in possession from 1357 to 1361, Fasli. Raja Ram also died and after the death of Raja Ram. Smt.Ganga Devi filed an application for recording her name before the revenue officer on which an order was passed on 14.12.1954 for recording the name of Smt. Ganga Devi as Sirdar. The name of Ganga Devi is recorded from 1362 fasli onwards. A dispute under section 145 Cr.P.C. started regarding possession of land in dispute between Smt. Ganga Devi and Smt. Kailasa under section 145 Cr.P.C. By the order of the Sub Divisional Magistrate dated 25.7.1955 Smt. Ganga Devi was declared in possession. A suit no. 858/1955 was filed by Babu Ram (as minor in guardianship of Smt. Kailasa against Smt. Ganga Devi with regard to other lands). Babu Ram attained majority on 20.5.1959 having been born on 21.5.1941. A sale deed was executed by Smt. Ganga Devi in favour of petitioner in the year 1957. An application for mutation was given by the petitioner on the basis of sale deed. The said mutation application was allowed by the order dated 14.2.1969 passed by Sub Divisional Officer. Notification dated 29.4.1969 was issued under the Consolidation Act with regard to Village in question in which objection was filed by respondent no. 4 under section 9 on 5.2.1970.

5. The counsel for the petitioner Sri Sankhata Rai in support of the writ petition raised following submissions:

(i) The Deputy Director of Consolidation committed error in not deciding the question as to whether the land in dispute was self acquisition of Smt. Ganga Devi whereas this Court vide its judgment dated 19.4.1973 after setting aside the order of Deputy Director of Consolidation dated 17.4.1971 remanded the matter for deciding the case afresh. Observation of Deputy Director of Consolidation that counsel for both the parties have has conceded before him that land in dispute is self acquired property of Raja Ram is a incorrect statement.

(ii) The respondent no. 4 having not filed suit for possession after attaining the majority within time prescribed in law, his claim during consolidation is bared by time.

(iii) Smt.Ganga Devi had perfected the right by continuing in possession for more than statutory period, the claim of respondent no. 4 as well as adverse possession of Smt. Ganga Devi, step mother of respondent no. 4 has to be tagged.

Reliance has been placed by the counsel for the petitioner also on several decisions which will be referred to while considering the said submissions.

6. Sri N.K. Srivastava, learned counsel appearing for the respondent refuted the submission of the counsel for the petitioner and submitted that petitioner's counsel having conceded before Deputy Director of Consolidation that land in dispute was self acquired property of Raja Ram, it is not open for the petitioner to contend to the contrary before this Court. He further submitted that no right by adverse possession can be perfected against a minor. The counsel for the respondent in support of his submissions placed reliance on judgment of the Apex Court in AIR 1963 Supreme Court 70 ***Padma Vithoba Chakkayya versus Mohd. Multani and another*** and AIR 1948 Nagpur 253 ***Mt. Maltibai and another versus Wamanrao Sheoram and others.***

7. I have considered the submissions and perused the record. The first submission of counsel for the petitioner is that Deputy Director of Consolidation has not adverted to the question as to whether the property was acquired by Smt. Ganga Devi or Raja Ram.

8. The counsel for the petitioner has also relied on an affidavit of counsel who appeared before Deputy Director of consolidation to the effect that no such concession was made before Deputy Director of Consolidation that land in dispute is self acquired property of Raja Ram. The Deputy Director of Consolidation in his judgment dated 25.2.1975 has clearly noted that now it is acceptable to counsel for both the parties that disputed land was self acquisition of Raja Ram. The counsel for the petitioner has challenged the said statement in the judgment and has placed reliance on affidavit of counsel Ram Balak Misra, counsel for the petitioner who appeared before Deputy Director of Consolidation. Judgement of the Apex Court reported in 1971 RD 162 Bachan Singh and others versus Gauri Shanker Agarwal & others has been relied by the counsel for the petitioner for the said submissions. Before the case in Apex Court, the question was as to whether particular point was argued before the Board of Revenue by counsel for the appellant or not.

9. In view of the aforesaid context, following was observed by the Apex Court:

"An attempt was made to argue before this Court that the counsel for the appellants had in fact argued before the Board of Revenue that the evidence in support of the finding of the Additional commissioner as regards possession is inadmissible but the Board had ignored that argument. We are unable to accept this contention. "

In the above case the counsel who argued the case before the Board of Revenue has not filed any affidavit either before the High Court or before the Apex court stating that the Board had ignored his argument as regards the admissibility

of certain evidence. The aforesaid observation were made by the apex court in that context which do not help the petitioner in the present case.

10. It is relevant to note that the impugned order of Deputy Director of Consolidation was passed on 25.2.1975 and the writ petition was filed immediately on 30.4.1975. In the writ petition, there is no averment to the effect that counsel for the petitioner did not concede before Deputy Director of Consolidation that land in dispute is self acquisition of Raja Ram, rather in paragraph 11 of the writ petition, it was stated that even accepting without conceding that the land in dispute belongs to Sri Raja Ram, the possession of Smt. Ganga Devi in denial of the opposite parties was adverse and she having remained in possession for more than the statutory period and the opposite party having not filed any suit for ejectment after attaining majority he lost right and title in the land in dispute. The averment to the effect that counsel for the petitioner never admitted before Deputy Director of Consolidation that land in dispute is self acquired property of Raja Ram for the first time was taken in the affidavit dated 12.1.1988 i.e. after more than 12 years from filing of the writ petition. Taking consideration of over all facts, petitioner cannot be permitted to challenge the statement of above fact as recorded in the judgment of Deputy Director of Consolidation dated 25.2.1975. Further more in the affidavit of counsel for the petitioner dated 7.9.1987, although it has been specifically stated that no concession was made before the Deputy Director of Consolidation as recorded by Deputy Director of Consolidation, but it has not been averred that submission was pressed before Deputy Director of Consolidation that land is self acquired property of Smt. Ganga Devi.

11. In view of the aforesaid, Deputy Director of Consolidation did not commit any error in not considering the question as to whether land in dispute is self acquired property of Smt. Ganga Devi.

12. Second and Third submissions of the counsel for the petitioner being inter related are being considered together. The Deputy Director of Consolidation in his judgement dated 25.2.1975 has found that petitioner attained majority in the year 1959. The date of birth of the petitioner as noted by Deputy Director of Consolidation is 21.5.1941. The petitioner according to the certificate filed before the consolidation authorities attained majority on 20.5.1959. It is not disputed that Raja Ram married Smt. Ganga Devi after his marriage with Kailasa. Babu Ram is the son of first wife Smt. Kailasa. Raja Ram died before 2.4.1954 since on that date Smt. Ganga Devi filed an application before Revenue Officer to record her name. The name of Smt. Ganga Devi was entered on 19.12.1954. The Revenue Officer vide his order dated 19.12.1954 directed for recording the name of Smt. Ganga Devi as Sirdar in case no. 235/3094 and the name of Smt. Ganga Devi was recorded in revenue record of 1362 fasli. Immediately thereafter dispute arose regarding possession between mother of respondent no. 4 and Smt. Ganga Devi in proceedings under section 145 Cr.P.C. Both, mother of respondent no. 4 and Kailasa Devi were claiming possession. Sub Divisional Magistrate vide his order dated 25.7.1955 declared possession of Smt. Ganga Devi. The

mother of respondent no. 4 being natural guardian of respondent no. 4 and also having claimed possession of land in dispute, it cannot be accepted that possession of Smt. Ganga Devi over land in dispute was on behalf of respondent no. 4. It is also on the record that suit no. 858 of 1955 was filed by Babu Ram (as minor in guardianship of Smt. Kailasa) against Smt. Ganga Devi with regard to other lands which was decided on 6.11.1967 by the Civil Court. It is relevant to note that in the suit filed in civil court, the land in dispute was not included, although the said suit was filed by mother of respondent no. 4 Smt. Kailasa Devi on his behalf. Majority was attained by respondent no. 4 on 20.5.1959 and when respondent no. 4 attained majority he was not in possession of land in dispute.

13. The U.P. Zamindari Abolition & Land Reforms Act does not make any provision for acquisition of rights by a tenure holder by adverse possession. All it provides for is suits for dispossession of persons taking wrongful possession and it is only after the period of limitation for such suits expires and suit become time bared with consequential extinguishing the right of tenure holder are extinguished. Division Bench of this Court 1966 RD 42 ***Puttu Singh and other versus Kirat Singh and others*** laid down that after expiration of period of limitation provided for suit for dispossession of person taking wrongful possession right of tenure holder extinguishes. Following was held in paragraph- 4-

"4. To clarify the position, we may indicate the distinction that arises in cases where the only question is whether a suit of a particular nature, for which the period of limitation is prescribed, has become time bared or not and a suit where right to property may be acquired by adverse possession over the prescribed period of time. The UP Zamindari Abolition & Land Reforms Act does not make any provision for acquisition. All it provides for is for suits for dispossession of persons taking wrongful possession and it is only after the period of limitation for such suits expires and a suit becomes time barred that the right to bring suit would become extinguished with the consequential result that the right of the tenure-holder will also become extinguished under Section 28 of the Limitation Act, 1908.

14. At the relevant time limitation for filing the suit for ejectment of person taking or retaining possession of the land unlawfully was six years. With effect from 14.10.1971, the said period has been amended into 12 years. Now the question is that since respondent no. 4 was minor, what will be the period of limitation for a minor to bring a suit for ejectment under section 209 of U.P. Zamindari Abolition & Land Reforms Act. This question has been considered by Division Bench of our court in 1987 Allahabad Law Journal 588 ***Parwan versus The UP Board of Revenue, Allahabad and others.*** While considering the provision of Section 229-B, read with Section 209 of the U.P. Zamindari Abolition & Land Reforms Act 1951, in the aforesaid case, the petitioner Parwan was a minor who attained majority in 1.3.1962. Suit was filed by him on 20.11.1966 complaining that his guardian committed fraud. The suit was filed under Section 209 read with section 229 B of U.P. Zamindari Abolition & Land Reforms Act. One of the issues raised in the case was bar of limitation.

The Division Bench laid down in paragraph 11 & 12-

"11. Section 8, therefore, cannot be read in isolation. If s. 6 is applicable to a suit , then S. 8 is automatically dragged in. The two sections are not mutually exclusive. The suit under S. 209 of the act cannot be instituted beyond three years after the plaintiff attained majority. The view to the contrary taken by this Court in Onkar Nath Dubey case (AIR 1977 NOC 4) and in Ram Krishore case (1983 Rev Dec 62) (Supra) cannot be said to have laid down the correct law. They are, therefore, overruled.

12. The suit filed by the petitioner was barred by time since it was beyond three years after he attained majority. "

15. In the present case, admittedly no suit was filed by respondent no. 4 under section 209 of U.P. Zamindari Abolition & Land Reforms Act. After issue of notification dated 29.4.1969, more than 8 years clasped from attaining majority by respondent no. 4. Period of limitation as prescribed under Section 209 of U.P. Zamindari Abolition and Land Reforms Act was six years, but since the respondents was under disability he was entitled to the benefit of section 6 of limitation Act which enable him to file the suit within three years from attaining majority.

16. Admittedly, petitioner did not file any suit after attaining majority within three years, the suit was barred by time and the petitioner's objection under consolidation proceedings were also bared by time. The Deputy Director of Consolidation in the impugned judgement has held that at best adverse possession can be treated from 1967 when he took the sale deed. Prior to execution of sale deed Smt. Ganga Devi was in possession. There has been litigation between Smt. Ganga Devi with Smt. Kailasa, the mother of respondent no. 4 in proceedings under section 145 Cr.P.C. which was held between Smt. Ganga Devi with Smt. Kailasa, the mother of respondent no 5 and Smt. Ganga Devi, possession of Smt. Ganga Devi was found on 25.7.1955. Smt. Kailasa has also filed civil suit on behalf of Babu Ram as his mother and guardian with regard to properties other than disputed land being suit no. 858 of 1955.

17. In view of the aforesaid, it cannot said that possession of Smt. Ganga Devi on land in dispute was on behalf of respondent no.4, Respondent no. 4 being out of possession was entitled to file a suit under section 209 for taking possession within three years from attaining majority. Now coming to the decision cited by counsel for the respondent. The first decision relied by the respondent is AIR 1963 SC 70 ***Padma Vitoba Chakkayya versus Mohd. Multani and another***.

18. In the case before Apex court also, the Apex court affirmed the finding of the High court that suit was instituted more than three years after the plaintiff has attained majority. Paragraph 2 & 3 of the judgement notes the facts and the said contention.

"(2) The learned District Munsiff, Nirmal, who tried the suit held that as the endorsement of cancellation of the sale deed in favour of Rajanna was unregistered, no title passed to the second defendant by reason of that endorsement & that accordingly the sale by him in

favour of the first defendant conferred no title on him in favour of the first defendant conferred no title on him in favour of the first defendant conferred to title on him and further that the suit had been instituted within three years of the plaintiff's attaining majority and that it was in time and so he decreed the suit. Against this Judgement and decree there was an appeal by the respondents to the Additional District court of Adilabad, which held that the plaintiff had not established that he had attained majority within three years of the suit and on that finding the appeal was allowed. The appellant took the matter in second appeal was allowed. The appellant took the matter in second appeal was allowed. The appellant took the matter in second appeal to the High Court of Hydrabad which agreeing with the District Judge, held that the suit was instituted more than three years after the plaintiff had attained majority and dismissed the appeal plaintiff had attained majority and dismissed the appeal. It is against this judgement that the present appeal by special leave has been filed.

(3) The first contention that is urged on behalf of the appellant is that the finding that the plaintiff had attained majority more than three years prior to the suit was erroneous. But there are concurrent findings on what is a question of fact, and we see no sufficient reason to differ from them."

The aforesaid judgement did not help the petitioner in any manner.

19. Next case relied by counsel for the respondent is AIR 1948 ***Nagpur 253 Mt. Maltibai and another vs. Wamanrao Sheoram and others***. The counsel for the respondent submitted that Nagpur High Court in the aforesaid judgement held that there cannot be adverse possession against a minor. The Nagpur High Court in the aforesaid judgement itself has laid down that there cannot be any general proposition that there cannot be adverse possession in property which belongs to minor and the question in each cases is to be decided with reference to the anterior relationship between the person taking possession and the minor. Following was held in paragraph 6-

"6. The plaintiff's contention that the suit is not bared by limitation rests almost entirely on the contention that there can be no adverse possession against a minor. That question was considered at length in 45 Mad. 361, and the conclusion of the learned Judges was that it cannot be stated as a general proposition that there can be no adverse possession of property which belongs to a lunatic or minor during the continuance of the lunacy or minority of the owner, and that the question has in each case to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic and to whether any circumstances exist which would entitle the Court to hold that the person was entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic. That decision has been followed or cited with approval in AIR 1982 Bom. 23, 57 Bom. 488. Mr. Mangalmurti for the plaintiff- appellant referred us to certain remarks in AIR 1940 Cal. 589 and 57 Bom. 488 where it was said that adverse possession would not run against the plaintiffs during their minority , but those statements must be read in relation to the facts of those cases, and we do not think that there was any

intention to lay down any general proposition. In LLR (1940) Kar. 534 Labo. J. , after an analysis of the case law deducted the proposition that minority is no bar to the acquisition of title by adverse possession if the person claiming such adverse possession does not bear to the person against whom he claims it any anterior relationship such as that of agent, bailee, trustee, etc. Subsequently, however, he went on to say that he could not see how title by adverse possession could originate during the minority of the owner as no knowledge of the assertion of a hostile title could be attributed to him. It is not necessary that ouster should be brought to the notice of the competitor and it is sufficient if the possession is over and without concealment so that the competitor, if he exercised due diligence, ought to be aware of the ouster, and in 48 Bom. 411. Lord Philimore remarked that to assume that you cannot impute knowledge to a minor is a view which is certainly not in accordance with the facts of human nature. We, therefore, respectively agree with the view taken in 45 Mad. 861 that there may be adverse possession against a minor."

20. The aforesaid judgment do not support the submission of learned counsel for the respondent that there can be no adverse possession against the minor. In the present case, it is unnecessary to consider the aforesaid submission any further in view of the fact that even after attaining the majority, the suit was not filed within six years period which is period for bringing suit for possession under section 209 of U.P. Zamindari Abolition & Reforms Act. There having been civil and criminal litigation between the mother of respondent no. 4 and Smt. Ganga Devi, it cannot be accepted that possession of disputed land of Smt. Ganga Devi was on behalf of respondent no. 4. Moreover after attaining the majority, there was no excuse for respondent no. 3 to treat the possession of Ganga Devi on his behalf.

21. In any view of the matter, the objection filed by respondent no. 3 before consolidation authority was barred by time. The Consolidation Officer in his judgement dated 13.5.1970 has recorded a clear finding that respondent no. 4 waited for more than 8 years after attaining majority in filing objection in the mutation case. The Consolidation Officer also held that respondent no. 4 was entitled to file suit within 3 years after attaining majority and he is debarred from moving for recovery of possession of land in dispute. The Deputy Director of Consolidation has neither set a side the aforesaid finding of the Consolidation Officer nor has adverted to the said question. The Deputy Director of Consolidation only observed that unauthorized possession of petitioner at best again begun in 1967. Possession of petitioner from 1967 was not determinative factor. Smt. Ganga Devi who transferred the land in dispute to the petitioner having right to the land in dispute can very well transfer the property. The suit for taking possession against Ganga Devi was also barred. It is relevant to note that this Court while remanding the matter to the Deputy Director of Consolidation vide its judgment dated 19.4.1973 has made following observation,

"The Consolidation Officer has recorded a clear finding that the disputed plots were the self acquisition of Smt. Ganga Devi and that the claim of

respondent no. 4 was barred by limitation. The Assistant Settlement Officer Consolidation reversed the order of the Consolidation Officer on the sole ground that Smt. Ganga Devi had not appeared as a witness before the Consolidation Officer. This was obviously under some apprehension. Smt. Ganga devi had appeared before the Consolidation Officer and a certified copy of her deposition as has been filed as Annexure 3. The petition. The Assistant settlement Officer Consolidation did not record any finding on the question of adverse possession or limitation. The Deputy Director of Consolidation however, non suited the petitioner only on the ground that in the earlier mutation case, she had admitted that the disputed plots were the tenancy of Raja Ram and in face of her admission she could not now claim that the disputed plots were her self acquisition. So the question of adverse possession, he only made a bald observation that it would be preposterous to believe that the possession of Smt. Ganga Devi was adverse to that of Babu Ram who was entitled to be recorded on the death of his father Raja Ram. He did not take into consideration the material circumstances which had weighed with the consolidation Officer, namely the various litigation between the mother of respondent no. 4 and Smt. Ganga Devi. The Consolidation Officer has recorded a finding that the question of adverse possession after taking into consideration the long standing litigation between Smt. Ganga Devi on the one hand, in these circumstances, the consolidation officer recorded a finding that the possession of Smt. Ganga Devi could not be on behalf of the minor Raja Ram , respondent no. 4. The Deputy Director of Consolidation has completely lost sight of these circumstances and he has not given a proper deal of this aspect of the matter."

22. This Court observed that considering the question of nature of possession, the Deputy Director of Consolidation has not considered various circumstances which weighed with the consolidation officer namely the various litigation between mother, respondent no. 4 and Smt. Ganga Devi. The various litigation between Ganga Devi and mother of respondent no. 4 makes it clear that possession of disputed land by Ganga Devi cannot be treated on behalf of respondent no. 4 and the possession being not on behalf of respondent no. 4, respondent no. 4 was entitled to claim possession during the period of limitation prescribed under section 209 of U.P. Zamindari abolition & reforms Act read with Section 6 of Limitation Act. The Settlement Officer of Consolidation also not adverted to the question as to whether claim of respondent no. 4 is barred by limitation. Adverse inference was drawn against the petitioner by Settlement Officer of Consolidation on the ground that Ganga Devi did not appear in witness box where as this Court in its earlier judgment has clearly found that Ganga Devi had appeared in the witnesses box on behalf of the petitioner. The statement of Ganga Devi dated 11.4.1970 has also been brought on the record as Annexure – 8 to the supplementary affidavit dated 10.9.1997. The order of Settlement Officer of Consolidation also cannot be sustained.

23. In view of the foregoing discussion, the order of Deputy Director of Consolidation dated 25.2.1975 as well as the order of Settlement Officer of Consolidation dated 15.1.1971 are set

aside and the order of Consolidation Officer dated 13.5.1970 is upheld.

The writ petition is allowed accordingly. Parties will bear their own costs.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.6.2003

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 26121 of 2003

Brij Raj Pandey and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri A.N. Singh
Sri S.K. Chaubey

Counsel for the Respondents:
S.C.

U.P. Basic Education teachers' service rules, 1981- Rule 29-Entitlement of benefit under- age of superannuation– Petitioners attaining age of superannuation on 30.6.2003 i.e. on last day of academic session-Held, cannot be permitted to be extended for next academic session.

Held- Para 3

Admittedly the academic session begins on 1st July and ends on 30th June. The said rule provides that in case if a teacher attains the age of superannuation during the commencement of the academic session, he shall be permitted to continue till the end of the academic session, he shall be permitted to continue till the end of the academic session i.e. till June 30. In the present case all the petitioners are to attain the age of superannuation on 30.6.2003. In such circumstances the benefit of rule 29 of the Rules of 1981 cannot be extended to the petitioners as they are to retire on the last day of the academic session. The petitioners cannot be permitted to be on extended service from the beginning of the next academic session.

(Delivered by Hon'ble Vineet Saran, J.)

1. This writ petition has been filed with a prayer for a direction to the respondents that the petitioner may be treated in service on extension till the end of the next academic session i.e. upto 30.6.2004.

2. The petitioners are assistant teachers in the Primary schools. Their date of birth is 1.7.1943. They are claiming benefit of Rule 29 of the U.P. Basic Education teachers service Rules, 1981 which is quoted below:

"Every teacher shall retire from service in the afternoon of the last day of the month in which he attains the age of 60 years;

Provided that a teacher who retires during an academic sessions (July 1 to June 30) shall continue to work till the end of the academic session i.e. June 30 and such period of service will be deemed as extended period of employment."

3. Admittedly the academic session begins on 1st July and ends on 30th June. The said rule provides that in case if a teacher attains the age of superannuation during the commencement of the academic session, he shall be permitted to continue till the end of the academic session i.e. till June 30. In the present case all the petitioners are to attain the age of

superannuation on 30.6.2003. In such circumstances the benefit of rule 20 of the Rules of 1981 cannot be extended to the petitioners as they are to retire on the last day of the academic session. The petitioners cannot be permitted to be on extended service from the beginning of the next academic session.

4. Thus in my view the petitioners are not entitled to any relief. This writ petition is, accordingly, dismissed. However, there shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 14TH, 2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. writ Petition No. 34389 of 1994

U.P. State Electricity Board, Lucknow and another ...Petitioners

Versus

Presiding Officer, Labour court (I), Kanpur and another ...Respondents

Counsel for the Petitioners:
Sri Tarun Agarwala

Counsel for the Respondents:
Sri G.L. Tripathi
S.C.

U.P. Industrial Dispute Act 1947- workman-whether the enrolled apprentice can claim protection as a workman? held- 'No'-person appointed under Apprentice act 1961 is not a workman.

Held- Para 5

A person who is enrolled as apprentice in accordance with the provisions of the Apprentices act, 1961 cannot claim the benefit of the workman as stated under the U.P. Industrial Disputes Act, 1947 but in the present case, on the facts the labour court recorded a finding that on the facts and circumstances of the case, the workman cannot be said to have been enrolled as Apprentice because of non compliance of the provisions of the Apprentices Act.

Case law Discussed:
1996 (72) FLR 328
1996 (72) FLR 335
1998 (78) FLR 511
1999 LAB IC –1026

(Delivered by Hon'ble Anjani Kumar, J.)

1. The employer- U.P. State Electricity Board has challenged the award of the Labour Court (1) U.P. Kanpur dated 29th April, 1994 passed in Adjudication Case No. 277 of 1993 by means of this writ petition under Article 226 of the Constitution of India.

2. The following dispute was referred to the Labour Court (1), Kanpur for adjudication

> "क्या सेवायोजकों द्वारा श्रमिक विरेन्द्र कुमार बाजपेयी पुत्र श्री राम अवतार बाजपेयी को दिनांक ३१.३.८७ से कार्य से पृथक/वंचित किया जाना उचित एवं वैधानिक है? यदि नहीं, तो संबंधित श्रमिक क्या हितलाभ/क्षतिपूर्ति पाने का अधिकारी है, किस तिथि एवं अन्य किस विवरण के साथ?"

3. The employer and the workman concerned have exchanged their pleadings and also adduced evidence. For the purposes of decision of this writ petition, the facts which are not disputed are that the petitioner- employer have engaged the concerned workman on an application being made by the respondent no. 2 as Apprentice and after the expiry of the period of Apprentice-ship, his services were terminated for which a dispute has

been raised, as stated above, and the reference is made to the labour court for adjudication. The Labour court considered the case set up by the employer and arrived at the conclusion that the concerned workman cannot be treated to be an Apprentice because he has not been registered under the provisions of the Apprentice Act, 1961. The labour court found that irrespective of the nature of engagement of the workman concerned, the employer are under statutory obligation under the provisions of the U.P. Industrial disputes act, 1947 and have to comply with the provisions of section 6-N of the U.P. Industrial disputes act, 1947 before terminating the services of the workman concerned which, admittedly, has not been done. The labour court came to the conclusion that the termination of services of the workman by the employer is illegal and the workman concerned is, therefore, entitled for reinstatement with continuity of service and full back wages. The labour court has recorded a finding which has not been disputed by the employer that the workman concerned has not been registered under the provisions of the Apprentices Act and the benefit of the Apprentices Act can be conferred on a person only if he is registered under the provisions of the Apprentices Act.

4. In reply thereto, Sri Tarun Agarwal, learned counsel appearing for the petitioner- employer has invited my attention to the application filed by workman concerned himself wherein he has applied to be engaged as Apprentice and has submitted that now it can not take a stand against his own admission. After having applied for the post of Apprentice, it is now not open for workman to take a different stand contrary to his own admission, so he is entitled for the benefits, which are available to a workman under the U.P. Industrial Disputes Act. Sri Tarun Agarwal in support of his contention has relied upon a recent decision of the learned single Judge of this court passed in civil misc. writ petition no. 3232 of 1997, U.P. State Electricity, through Kanpur electricity supply Administration, KESA House, civil lines, Kanpur through its General Manager versus Ashok Kumar Shukla and another decided on 31 March, 2003 wherein the learned single Judge has relied upon several decision of the Apex Court and has held that the workman concerned being Apprentice cannot be treated to be a workman and the view taken by the labour court to the contrary deserves to be set aside as has been done by the learned single Judge in the aforesaid *Civil Misc. Writ Petition No. 3232 of 1997 (supra) Sri Tarun Agarwal has further relied upon the decision reported in 1996 (72) FLR page 328,Raj Kumar Srivastava Vs. State of U.P. and others* and the case reported in *1996 (72) FLR page 335, Vazir Glass Works Ltd. Vs. Maharashtra General Kamgar Union and another*. The decision of another learned single Judge of this court reported in *1998 (78) FLR page 511, U.P. state Electricity Board and others versus P.O. Labour court, Kanpur and others* and also the decision of another learned single Judge of this court reported in 1996 (74) FLR page 1847, M/s U.P. Sugar Company Ltd. Deoria versus Ram Nath Prasad and others has also been relied upon by the learned counsel for the petitioner.

5. Sri G.L. Tripathi, learned counsel appearing for the workman concerned, on the other hand, has relied upon the

decision of the Division Bench of Patna High Court reported in *1999 LAB I.C. 1026, Ram Dular Paswan and others versus Presiding Officer, Labour court, Bokaro and another* and two decisions of the learned single Judge of this court passed in civil misc. writ petition no. 18 of 1995, U.P. State Electricity Board through Kanpur electricity supply Administration, KESA House, Kanpur through its General Manager versus The Presiding Officer, Labour court-II, Kanpur and others decided on 6th February, 2001 and the decision of Civil Misc. Writ Petition no. 21560 of 1995, U.P. State Electricity Board through General Manager, Kanpur Electricity supply Administration, KESA House, Civil Lines, Kanpur versus Presiding Officer, Labour court-III, U.P. Kanpur and others, decided on 26th September, 2002 and has submitted that there is no dispute in the proposition laid down by the Apex Court that a person who is enrolled as apprentice in accordance with the provisions of the Apprentices Act, 1961 cannot claim the benefit of the workman as stated under the U.P. Industrial Disputes Act, 1947 but in the present case, on the facts the labour court recorded a finding that on the facts and circumstances of the case, the workman cannot be said to have been enrolled as Apprentice because of non compliance of the provisions of the Apprentices Act.

6. In this view of the mater, it is not necessary for this court to go further into the proposition of law submitted by Sri Tarun Agarwal, learned counsel appearing for the petitioner with which there is no dispute but since on the facts of the case as has been held by the decision of the learned single Judge relied upon Sri G.L. Tripathi, learned counsel appearing for the workman concerned, it has been found that the workman concerned cannot be treated to be an Apprentice because of non compliance of the provisions of the Apprentice Act. Therefore, he is nothing but as workman under the provisions of the U.P. Industrial Act. Sri Tarun Agarwal has submitted that as far as employer is concerned, it has complied with the entire provisions of the Apprentices Act so far it requires on behalf of the employer concerned it has also submitted requisite papers for registration were submitted to the authorities. If the authorities under the Apprentice Act did not register. The workman as Apprentice , there is no fault of the employer and the workman cannot be given the benefit of the lapses on the part of the authorities concerned constituted under the provisions of the Apprentice Act.

7. So far at this argument is concerned, the law is well settled that if the statute requires a thing to be done in a particular manner, it has to be done in that manner alone and not otherwise. *(See AIR 1980 S.C. page 303, Safruddin vs. Abdul Gani Loni).* Therefore, the submission of Sri Tarun Agarwal that the employer have performed their part so far as the recruitment of the workman as apprentice is concerned and if the statutory authority did not perform their part, they cannot be blamed that the action on the part of the authorities concerned cannot be accepted.

8. In view of what has been stated above and in view of the finding recorded by the labour court on the basis of the admitted facts of the case, I do not find that the labour court has committed any error of law so as to warrant interference

by this court in exercise of power under article 226 of the Constitution.

9. In view of what has been stated above, it is not necessary for this Court to consider the other arguments advanced on behalf of Sri G.L. Tripathi, learned counsel appearing for the workman as the writ petition deserves to be dismissed.

10. For the reasons stated above, this writ petition fails and is hereby dismissed. The interim order, if any, stands vacated. There will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.7.2003

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No.21533 of 1987

Thakur Ram Jankee ...Petitioner
Versus
Additional District Judge, Basti and others ...Respondents

Counsel for the Petitioner:
Sri J.P. Pandey
Sri K.N. Tripathi
Sri Tarun Verma
Sri V.N. Pandey

Counsel for the Respondents:
Sri Dinesh Pathak
S.C.

Code of Civil Procedure- Ord. 23 Rule-3-B- Representation Suit- Compromise Decree-obtained without permission of Court- Suit dismissed in Default-restoration along with Compromise application engaging another new counsel obtained-The role of Presiding Judge Sri A.K. Srivastava found doubtful-considering long period of litigation cost of Rs.1000/- per year basis emposed-court has to objectively find that the Compromise was Convention for non parties-Compromise Decree set aside.

Held- Para 5 & 6

In the present case, there is nothing on record to show that the court was taken into confidence about the binding nature of the compromise on non-parties. The word, "expressly recorded in the proceedings" signify that the leave of the court for entering into a compromise should invariably be recorded in writing in the proceedings. Mere mentioning of the compromise in the order-sheet would not amount to compliance of the requirements of the rule. For express approval, the court has to objectively find that the proposal of compromise in the facts of each case was just and convenient even for the non-parties against whom the compromise could operate.

The proceedings in the suit also casts a doubt upon the integrity of the then Presiding Officer Sri A.K. Srivastava. In my opinion, even on this score the entire proceedings including the compromise decree cannot be sustained

Case law discussed:
AIR 1988 Punj. and Haryana 124

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard learned counsel for the parties.

2. This writ petition is primarily directed against a compromise decree passed by the trial court and upheld by the revisional court vide its order dated 26.4.1983 and 10.3.1987.

3. The brief facts for decision of this writ petition are that Sri Beni Madho Lal built a Ram Janki temple and gifted a house, well etc, including plot no.97 vide

registered endowment deed dated 17.11.1936. A trust was created to be managed by a sarvarkar and Pujari. It is admitted to the plaintiff-respondents that at the relevant time, Sri Madan Mohan was the pujari and sarvarkar of the Deity and the trust. The plaintiff respondent who is employed as a clerk in the local civil courts, instituted a suit no.359 of 1971 for injunction, demolition and possession. After exchange of pleadings and striking of issues, a date was fixed for hearing. It appears that the matter was adjourned on couple of occasions for filing a compromise, but ultimately the suit was dismissed for non-prosecution on 25.4.1975. An application for recall was made which was fixed for 9.3.1979 and then for 27.5.1979. It is the case of the petitioner that without his knowledge a new vakalatnama on his behalf in favour of Virendra Nath Pandey, Advocate was filed, along with an alleged compromise on 27.3.1979 in the restoration case. It appears, on 27.3.1979 the case was restored and on the next day i.e. 28.3.1979 the suit was decreed on the basis of the compromise. When the petitioner went to court on 27.5.1979, the next date fixed, he came to know about the fraud committed on him and the deity. The petitioner moved a recall application for setting aside the compromise decree. It was alleged therein that the petitioner never engaged Virendra Nath Pandey and the entire transaction was fraud and prayed for calling a report from an expert for its opinion and examination of Virendra Nath Pandey etc. However, the application was dismissed on 26.4.1983 and so also the revision has been dismissed by order dated 10.3.1987. All these three orders dated 28.3.1979, 26.4.1983 and 10.3.1987 are under challenge in this writ petition.

4. The learned counsel for the petitioner has urged that the compromise was hit by Or.23 r. 3-B. His contention is that Rule 3-B mandates that in any suit of a representative nature, any compromise entered into without the express permission in writing of the court would be void. However, learned counsel for the respondents urged that the suit was not representative in nature and, therefore, the requirements of Rule 3 (B) will not apply. Explanation to Rule 3 (B), details the nature of a representative suit for the purposes of Rule 3(B). It would be useful to note Rule 3(B) of Or.23 which reads as under :

"3B. Before granting such leave the court shall give notice in such manner as it may think fit to such persons as may appear to it to be interested in the suit.

Explanation- In this rule "representative suit" means, -
(a) a suit under section 91 or section 92,
(b) a suit under rule 8 of Or.1.
(c) a suit in which the manager of an undivided Hindu family sues or is sued as representing the other members of the family.
(d) Any other suit in which the decree passed may, by virtue of the provisions of this court or of any other law for the time being in force, bind any person who is not named as party to the suit."

5. From a bare perusal of the Explanation to rule 3 (B), it is apparent that where a decree binds any person who is not named as a party to the suit, would be deemed to be representative suit for the purposes of the said rule. The petitioner-defendant is a public trust which has its followers and devotees of the deity for

which the trust was created. It has not been averred that the court was taken into confidence about the binding nature of the compromise on the followers of the trust and the deity. Even the compromise does not show that they were informed about such a compromise. In some what similar facts where one of the two co-landlords had entered into a compromise with the tenant in a eviction suit. It was found that the co-landlord was not taken into confidence that a non-party (co-landlord) would also be bound by the decree. The Punjab and Haryana High Court in the case of ***Dr. Madan Gopal v. Deen Dayal & another*** (A.I.R. 1988 Punjab & Haryana 124) held such a compromise to be void, in view of Rule 3(B). In the present case, there is nothing on record to show that the court was taken into confidence about the binding nature of the compromise on non-parties. The word, "expressly recorded in the proceedings" signify that the leave of the court for entering into a compromise should invariably be recorded in writing in the proceedings. Mere mentioning of the compromise in the order-sheet would not amount to compliance of the requirements of the rule. For express approval, the court has to objectively find that the proposal of compromise in the facts of each case was just and convenient even for the non-parties against whom the compromise could operate. Therefore, merely recording the compromise and deciding the suit on its basis would not satisfy one of the sacrosanct object of rule 3 (B). A bare perusal of the compromise shows that it is a one sided document. Normally, a compromise consists of 'give and take', but the compromise in question curiously relieves the trust of all its rights in the property in favour of an individual. In the case at hand, as the requirements of rule 3 (B) were not satisfied, the compromise was void and has to be ignored.

6. Learned counsel for the petitioner has further urged that the entire exercise of restoration of the case and decision of the suit on the basis of the compromise was fraudulent. In paragraph 12 of the writ petition, it has been averred that 25th May, 1979 was the date fixed for disposal of the restoration application. This fact has not been denied in paragraph 10 of the counter affidavit. Further in paragraph 15 of the writ petition, it is clearly stated that the restoration was allowed on 27th March, 1979 while the suit itself was decided on the basis of the compromise on 28th March, 1979. This averment too has not been denied in paragraph 13 of the counter affidavit. These facts, coupled with the fact that the plaintiff was an employee in the civil court, leaves no room of doubt that he was able to maneuver the proceedings of the court and was also able to procure the compromise decree. The proceedings in the suit also casts a doubt upon the integrity of the then Presiding Officer Sri A.K. Srivastava. In my opinion, even on this score the entire proceedings including the compromise decree cannot be sustained.

7. From the discussion and noting the facts and also the way in which the proceedings were conducted, this court would be failing in its duty if heavy cost is not imposed upon Sri Astbhuja Prasad, respondent no.3, the plaintiff in the suit. Though, it is difficult to quantify the costs, but keeping in mind that the suit was instituted in 1971 which was dismissed for default in 1975 and then recalled in 1979 and this writ petition of

the year 1987 is being disposed off in 2003 at lease Rs.1000/- a year should be the costs payable by the respondent no.3.

8. For the discussions and reasons hereinabove, the writ petition succeeds and is allowed and the impugned orders dated 28th March, 1979 26th April, 1983 and 10th March, 1987 are hereby quashed. The petitioner shall be entitled to costs of Rs.28,000/- which should be paid to the petitioner by the respondent no.3 through an account payee bank draft drawn in favour of the petitioner trust within a period of six weeks from today. In case the aforesaid costs is not paid within the said time, the same shall be recovered as arrears of land revenue by the Collector, Basti and paid to the petitioner trust.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.7.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 12372 of 2003

M/s Baidyanath Ayurved Bhawan (Pvt.) Ltd. ...Petitioner

Versus

State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri Arun Tandon

Counsel for the Respondents:
Sri B.D. Mandhyan, S.C.

(A) U.P. Krishi Utpadan Mandi Adhiniyam 1964- Section 9 (i)-Domestic consumption-means-consumption by himself-petitioner-manufacturer of Ayurvedic Medicine-storage of Gur, Ghee and Amla etc. -held-not liable to possess the licence.

Held- Para 11

In our opinion this petition deserves to be allowed on the ground that the expression "*domestic consumption*" in the proviso to Section 9 (1) means consumption by the person himself who is doing the storing. Hence in our opinion the petitioner does not require to take a licence under Section 9 of the Act.

(B) U.P. Krishi Utpadan Mandi Adhiniyam-1964 Agricultural Produce-Domestic use in the word internal includes consumption in factory also-not limited to home only.

Held- Para 21

The meaning of 'domestic consumption' in the proviso to Section 9 (1) is '*internal*' and is not limited to '*home*'. The petitioner uses the agricultural produce which he is buying for internal purpose, that is, for the purpose of consumption in its factory, and not for external consumption by some one else to whom he may transfer the agricultural produce.
25 SCT 222 196 U.S. 207, 19 F 679

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

1. This writ petition has been filed for quashing the proceedings under section 37 of the U.P. Krishi Utpadan Mandi Adhiniyam, 1964 (hereinafter referred to as the Act) pending before the Chief Judicial Magistrate, Allahabad as also the summoning order.

Heard learned counsel for the parties.

2. The petitioner is a company registered under the Indian Companies Act. It has an industrial unit for manufacture of Ayurvedic medicines at

Naini, Allahabad. For the purpose of manufacture of these Ayurvedic drugs the petitioner purchases commodities including certain products which are agricultural produce e.g. *Gur, Ghee, Amala* etc. It is alleged that the petitioner consumed these agricultural products in its factory for manufacturing ayurvedic drugs.

3. In paragraph 9 of the writ petition it is alleged that the petitioner is not a producer under section 2 (p) of the Act nor is it a broker under section 2 (b), or a trader under section 2 (y) of the Act. It is alleged that the petitioner is not a buyer or seller of agricultural produce nor is it engaged in processing of agricultural produce only as raw material for its production in its factory. Hence it is alleged that the petitioner is under no obligation to take a licence under Section 9 (2) and the provisions of Rule 70 of the Rules made under the Act have no application.

4. It is alleged in paragraph 13 of the writ petition that to the utter surprise of the petitioner it was served with the notice dated 17.3.1999 Annexure 1 to the writ petition from the office of the Secretary, Krishi Utpadan Mandi Samiti, Mundera, Allahabad stating that the petitioner should obtain a licence under the Act failing which proceedings will be taken against him. On receiving this notice the petitioner sent a reply dated 31.3.1999 stating that the petitioner is not a trader and hence is not liable to take any licence under the Act. True copy of the petitioner's reply is Annexure 2 to the writ petition. However, vide letter dated 2.12.2000 the respondent Secretary, Mandi Samiti issued an order stating that the petitioner's explanation has been considered but it is not acceptable and hence the petitioner should take a licence under Section 9 (2) read with Rule 70 of the Rules otherwise legal action will be taken against him. True copy of the said letter dated 2.12.2000 is Annexure 3 to the writ petition. The petitioner sent reply dated 3.12.2000 vide Annexure 4 to the writ petition. However, thereafter vide letter dated 16.12.2000 and 15.2.2001 the petitioner was directed again to take licence vide Annexure 5 and 6 to the writ petition. The respondents have initiated proceedings for penalty under Section 37 of the Act against the petitioner for which summons have been issued. Hence this petition.

5. A counter affidavit has been filed and we have perused the same. In paragraph 8 it is stated that *Gur, Ghee, Amla* are specified agricultural produce as notified in the Schedule to the Act. Hence the transactions in those commodities entails market fee, and after declaration of the market area all the traders or consumers who effect sales and purchase or even store agricultural produce are liable to take a licence under Section 9 of the Act.

6. In paragraph 9 of the counter affidavit it is denied that the petitioner does not sell or purchase specified agricultural produce. It is alleged that even storage of agricultural produce requires licence under Section 9. It is alleged in paragraph 10 that the petitioner is storing agricultural produce, and hence he has to obtain a licence.

7. A perusal of the Schedule to the Act shows that *Gur, Ghee and Amla* are mentioned therein. Hence in view of Section 2 (a) they are definitely

agricultural produce under the Act. The submission of the learned counsel for the petitioner, however, is that the petitioner is not engaged in the business of buying or selling agricultural produce nor is engaged in processing of agricultural produce. Hence it is alleged that the petitioner is neither broker, as defined in Section 2 (b), nor a commission agent as defined in Section 2 (e), nor a producer as defined in Section 2 (p), nor a trader as defined in Section 2 (y) of the Act.

8. Learned counsel for the petitioner has submitted that the petitioner is exempt from Section 9 (1) to the Act in view of the proviso to the provision which states:

"*Provided that the provisions of this sub-section shall not apply to a producer in respect of agricultural produce produced, reared, caught or processed by him or to any person who purchases or stores any agricultural produce for his domestic consumption."*

9. Learned counsel submitted that the words "*domestic consumption*" in the proviso to Section 9 (1) means consumption for the use of that person and is not limited to consumption in homes. Hence he has submitted that Section 9 (1) has no application to the petitioner.

10. Sri B.D. Mandhyan, learned counsel for the respondents, however, urged that the petitioner is bound to take a licence under Section 9 because it stores agricultural produce.

11. In our opinion this petition deserves to be allowed on the ground that the expression "*domestic consumption"* in the proviso to Section 9 (1) means consumption by the person himself who is doing the storing. Hence in our opinion the petitioner does not require to take a licence under Section 9 of the Act.

12. There is no dispute that the petitioner purchases the agricultural produce for use as raw material in its factory at Naini, Allahabad. In our opinion, when the petitioner purchases these agricultural produce and stores it for use in its manufacturing activities such purchases and storage is for domestic consumption. In this case the whole issue turns on the meaning of the word "**domestic**".

13. One word may have several meanings, and one meaning may have several words (synonyms). Hence the correct interpretation given to a word must take colour from the context, otherwise it may lead to strange results. No doubt the word "*domestic*" can have a meaning associated with the home or house. For example a domestic servant means a servant employed in the house rendering personal service to the employer.

14. However, the word domestic can have other meanings too e.g. the expression "*domestic trade*" means trade pertaining to the home country as opposed to foreign trade, vide ***Law Lexicon by P. Ramanatha Aiyar*** page 587.

15. In this sense the word "*domestic"* means '*internal*" and not 'external'. From this point of view, the expression "domestic" would mean consumption by the party purchasing the goods himself and not by someone else to whom the said party sells the goods. From this point of view the storage of

agricultural produce by the petitioner is clearly for domestic consumption as it is used by him for manufacturing activity.

16. No doubt the words '*any person who purchases or stores any agricultural produce for his domestic consumption'* in the proviso to Section 3 (1) can also mean a person who grows agricultural produce and eats it or consumes it himself. However, in our opinion, the expression "*domestic consumption*" in the proviso to Section 9 (1) includes both the agricultural producer who consumes his own production and also the manufacturer who uses the agricultural produce in his manufacturing activity-

In Catto v. Plant 137 A. 764, 106 Conn. 236 it was observed:

"*The term "domestic" has widely varying meanings, and while its primary significance relates to the house or home, it is often used in a vastly broader sense, and its significance is determinable with reference to the subject matter or relation in which it appears."*

17. In *United States v. United Verde Copper Co. 25 S.Ct. 222 196 U.S. 207* it was observed that the word 'domestic' may relate to a broader entity than household. Thus a domestic manufacturer means not only those of the household but may also mean those of a country, state or nation, according to the context.

18. In *Louisville & N.R. Co. v. Railroad Commission of Tennessee 19 F. 679* it was observed that domestic commerce is commerce which is entirely within one state.

19. In the New Shorter Oxford dictionary the word '*domestic*' has been shown to have several meaning e.g. of or pertaining to one's own country or nation; not foreign or international indigenous; made in one's own country, not imported, etc.

20. In Websers New International Dictionary among the various definitions of the word 'domestic' given there one definition is '**internal**'. This is also mentioned in the Oxford Thesaurus p. 108.

21. In our opinion, the meaning of 'domestic consumption' in the proviso to Section 9 (1) is '*internal*' and is not limited to '*home*'. The petitioner uses the agricultural produce which he is buying for internal purpose, that is, for the purpose of consumption in its factory, and not for external consumption by some one else to whom he may transfer the agricultural produce.

22. In view of the above this petition is allowed. We hold that the petitioner is not liable to take licence under Section 9 of the Act. The impugned proceedings are accordingly quashed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.33103 of 1997

Etawah Kshetriya Gramin Bank ...Petitioner
Versus
Presiding Officer, Central Government Industrial Tribunal cum labour court, Kanpur and another ...Respondents

Counsel for the Petitioner:
Sri Kushal Kant

Counsel for the Respondents:
Sri V.K. Jaiswal
Sri K.M. Misra
Sri V.K. Agnihotry
Sri U.N. Sharma
S.S.C.
S.C.

Constitution of India Article 226-Practice and Procedure-Necessity of Recording the reasons-every authority are bound to record the reason to justify the test of fairness.

Held- Para 15

The recording of reason is a factor constituting an essential component of the principles of natural justice in the eyes of law. It is one of the basic principle of Constitution that the administrative authorities have been empowered and caste the duty to decide an act judicially and it is for this reason that the administrative authority is required to give reasons in its order, so that it may not act arbitrary. Since no reason has been assigned, as such the order cannot be sustained.

(B) U.P. Industrial Dispute Act 1947- 2 (5)- workman engaged to work on Daily wages basis- worked only for 170 days- in exigencies of work-Daily wager held no Post-can not be awarded the relief of reinstatement.

Held- Para 17

Admittedly, the respondent no. 2 was only engaged as a part time daily worker in exigency of work by the Bank. He was not working on any post and as such the labour court has committed an error of law in awarding reinstatement instead of compensation. The findings of the labour court are perverse and cannot be sustained.

Case law Discussed:
1997 FLR 2045
1995 HBD-1
1984 (49) FLR 38 Alld.
1979 (39) FLR 70

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard the counsel for the parties and perused the record.

2. The petitioner has filed the present writ petition challenging the award dated 3.7.1997 published on 16.8.1997, Annexure-1 to the writ petition. The petitioner-Bank is the Regional Rural Bank established under the Regional Rural Bank Act. The terms and conditions of the employment of the Bank are government in accordance with the Bank Services Regulations and the guidelines issued by the Government of India and the Reserved Bank of India.

3. The facts of the case are that respondent no.2 was engaged as a part time daily worker in Etawah Kshetriya Gramin Bank Raja Ka Bagh Branch, Etawah for doing odd jobs as and when exigency of work required. He was terminated from service with effect from 2.4.1987 and raised an industrial dispute, which was referred to the Central Government Industrial Tribunal, Kanpur, hereinafter referred to as C.G.I.T.

4. The case of the Bank is that respondent no.2 never worked for 240 days as claimed by him. He had worked only for 170 days. He was neither discharged nor retrenched from service nor he had worked continuously in the Bank, hence the provisions of Sections 25-B, 25-G and 25-J of the Industrial Dispute Act, 1947 are not attracted in his case and also that part time workman is

not covered within the meaning of Section 2(5) of the Industrial Dispute Act.

5. The counsel for the petitioner submits that C.G.I.T. had committed an error of law by applying the provisions of Section 25-R of the Act after giving a categorical finding that there is no breach of Sections 25-G and 25-H of the Act. There has been miscarriage of justice by allowing the claim of respondent no.2, inspite of the aforesaid findings particularly in the circumstances that burden of proof was on respondent no.2 to prove that he had continuously worked and that termination of his service by the Bank was illegal and as such the award is illegal, void and is without jurisdiction.

6. Apart from the above he has challenged the award basically on the following questions of law:-

1. The impugned award of the labour court is perverse as respondent no.2 was engaged as a part time casual labourer by the Bank for doing odd job and there was a specific plea that maximum number of days on which respondent no.2 had actually worked, was 172 days, yet C.G.I.T. had allowed the claim of the workman, which is not only against the evidence of record, but the findings also are perverse and are liable to be quashed.

2. The engagement of a part time daily wage worker cannot be determined within the meaning of Industrial Disputes Act, 1947 and the claimant-workman has to prove his claim of continuous service which cannot be presumed and the labour court has committed an illegality in relying upon the statement of the workman, which was not supported by any document for drawing adverse inference against the employer.

3. The service conditions of the employees are governed by the statutory rules and regulations, hence according to the law laid down in 1997 FLR 2045 Himanshu Kumar Vidhyarthi Vs. State of Bihar, the Apex Court held that the Bank is not a factory.

7. The case of respondent-workman is that he was appointed in Kshetriya Gramin Bank, Raja Ka Bagh Branch, Etawah on class-IV post as daily wager on 18.2.1986, but the respondent –Bank terminated his services without any rhyme and reason with effect from 2.4.1987 in breach of Section 25(f) of the Industrial Disputes Act, 1947. The counsel for the respondent-workman submits that from the certificate issued by the Branch Manager of the Branch of Kshetriya Gramin Bank , Etawah, it is clear that he had completed more than 240 days in one calendar year. He further submits that the services of the employees, who worked 29 hours in a week, have been regularised by the Bank on the basis of Central Government order dated 11.3.1990 and R.R.B. Rule 4 (10) dated 22.2.91, but the workman has neither been reinstated on the post nor his services have been regularized with effect from 18.2.1986 inspite of the order dated 29.9.97 of this Court, which is as under:-

"Admit.

Notice on behalf of respondent no.2 workman has been accepted by Sri K.M.Mishra, who may file counter affidavit within six weeks.

List thereafter.

Meanwhile, it is provided that in case petitioner prays to Rakesh Kumar his wages at the rate of his last drawn pay

from the date of filing the writ petition and continue to pay the same during the pendency of the writ petition. The operation of the order shall remain stayed. However, it shall be open to the petitioner either to take the work from the respondent-workman or not.

Sd/-S.H.A. Raza
29.9.1997"

8. From the perusal of the award, it appears that the labour court had drawn an adverse inference against the employer in respect of the working days on the ground that the papers like vouchers have not been filed by the employer which could go to show the exact number of working days of the workman. Relying upon the statement of the workman it was by the C.G.I.T. held that the workman completed 240 days in a year preceding the date of termination and had awarded reinstatement of the workman as part time worker without back wages, as part time worker.

1- The Industrial Disputes Act has been enacted for investigation and settlement of industrial disputes and for certain other purposes, for rights and liabilities of both employer and the employee. The scheme and object of the Act disclose that any industrial disputes can be investigated for settlement of the dispute by the various modes provided under the Act such as conciliation, arbitration, adjudication and settlement.

2- The Industrial Disputes (Central) Rules, 1957 have been framed in exercise of powers conferred under Section 38 of the Industrial Disputes Act, 1947. These rules also apply to industrial disputes concerning to the Banking or Insurance Companies. Rule 15 of the Rules provides that "A Board, Court, Labour Court, Tribunal or National Tribunal or an arbitrator may accept, admit or call for evidence at any stage of the proceedings before it/him and such manner as it/he may think fit." Under Rules 23 of the Rules A Labour Court Tribunal has powers of entry and inspection and the Board, Courts, Labour Courts, Tribunal and National Tribunal have the same powers as are vested in a civil court under the Code of Civil Procedure, trying a suit in respect of the matters, namely, discovery and inspection granting adjournment and reception of evidence taken on affidavit. Under Rule 24 of the Rules the Labour Court Tribunal also has power to summon and examine any person whose evidence appears to it to be material and shall be deemed to be a civil court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1998.

3- Thus under the Act both employer and employees can raise industrial dispute and they vested rights and liabilities. It is the duty of the labour court or the Tribunal to act as neutral person and not to be influenced by the C.G.I.T. under the aforesaid Rule framed under the Act, could have summoned any person or any document, which according to it, was relevant for settlement of dispute. It is for the labour court or the Tribunal to give an award on the basis of an adverse inference, as the Industrial Disputes Act is to be read as evidence and is not applicable to the Industrial Disputes Act. It is for this reason that there has been various modes under the Industrial Disputes Act, 1947. If the labour Court or the Tribunal is of the view that the employee has proved his case by submitting documents, it has simply direct

the Bank to produce the document by not exercising jurisdiction under Sections 23 and 24 of the Act. The labour court has committed illegality on the face of record.

9. Industrial dispute has been defined in Section 2 (iii) of the Act is as under:-

"In the case of daily paid workman, in the twelve full working days, preceding the date on which the average pay becomes payable if the workman had worked for three complete calendar months or four complete weeks or twelve full working days, as the case may be, and where such calculation cannot be made, the average pay shall be calculated as the average of the wages payable to a workman during the period he actually worked."

10. In **Himanshu Kumar Vidhyarthi Vs. State of Bihar, 1997 FLR 2045,** the Apex Court has held that where the daily wage employees are engaged on the basis of need of work, termination of their services cannot be construed as retrenchment. They are at the most temporary employees. In this case the question for determination before the Apex Court as to whether the termination of service of daily wager came within the ambit of retrenchment of the workman under the provisions of Section 25-F of the Industrial Disputes Act, 1947.

11. It is a well settled law that the burden of proof cannot shift on a party at whose instance the dispute is raised. The Apex Court in **Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd., 1995 HVD (1)**, which was followed in **Airtech Private Ltd. Vs. State of U.P. and others, 1984(49) FLR 38 (Alld.)and V.K.Raj Industries Vs. Labour Court and others, 1979(39) FLR 70 (All)**., it has been held that the burden of proof has to be discharged by the party, who raised the dispute. The law therefore is that the case of the workman does not lead evidence and discharges the burden of proof. Therefore, it is the workman, who has to lead evidence and the labour court could not have shifted the onus on the employer. This is the position of law.

12. Further the provisions of Rule 10-B of the Industrial Disputes (Central) Rules,1957, which provides that–

"While referring an industrial dispute for adjudication to a Labour Court, Tribunal or National Tribunal, the Central Government shall direct the party raising the dispute to file a statement of claim complete with relevant document, list of reliance and witnesses with the labour Court, Tribunal or National Tribunal within fifteen days of the receipt of the order of reference and also forward a copy of such statement to each one of the opposite parties involved in the dispute."

13. Rule 10(6) of the Industrial Disputes (Central) Rules, 1957 provides that-

"Evidence shall be recorded either in Court or on affidavit, but in the case of affidavit the opposite party shall have the right to cross-examine each of the deponents filing the affidavit. As the oral examination of each witness proceeds, the Labour Court, Tribunal or National Tribunal shall make a memorandum of the substance of what is being deposed. While recording the evidence the Labour Court, Tribunal or National Tribunal shall follow the procedure laid down in rule 5

or Order XVIII of the First Schedule to the Code of Civil Procedure, 1908."

14. All this would show that the labour court did not exercise powers vested in it and if any party was not able to produce the documents, which could have been filed, the labour court ought to have summon those documents for adjudication of the industrial dispute.

15. The recording of reason is a factor constituting an essential component of the principles of natural justice in the eyes of law. It is one of the basic principle of Constitution that the administrative authorities have been empowered and caste the duty to decide an act judicially and it is for this reason that the administrative authority is required to give reasons in its order, so that it may not act arbitrary. Since no reason has been assigned, as such the order cannot be sustained.

16. No reasons have been given by the labour court in accepting the statement of respondent no.2 that he had completed 240 days of service in one calendar year, when the same was denied by the employer that he had worked only 172 days.

17. Admittedly, the respondent no.2 was only engaged as a part time daily worker in exigency of work by the Bank. He was not working on any post and as such the labour court has committed an error of law in awarding reinstatement instead of compensation. The findings of the labour court are perverse and cannot be sustained.

18. For the reasons stated above, the writ petition succeeds and is allowed. The impugned award dated 3.7.1997 in so far as reinstatement is concerned, is quashed. The petitioner is directed to pay wages for six months at the rate of last drawn wages with 10% per annum interest to respondent no.2. No order as to costs.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.4637 of 1998

National Insurance Company Ltd. ...Petitioner

Versus

The Presiding Officer, Central Government Industrial Tribunal, Kanpur and another ...Respondents

Counsel for the Petitioner:
Sri A.K. Gupta
Smt. Sarita Singh
Sri Satish Chaturvedi

Counsel for the Respondents:
Sri K.P. Agrawal
Km. Suman Sirohi
Sri U.N. Sharma
S.C.

Constitution of India-Article 226-General Insurance (Conduct, discipline & appeals) Rules, 1975- Service Law-Removal from Service with direction of full back-wages-Against award petition filed-question-Burden to prove lies on whom?

Held- Burden to prove lies on the party who envoke jurisdiction of court-Petition partly allowed with 50% of the back wages from the date of reference to the date of retirement with 10% Interest.

Held- Para 10 & 14
Case law:
1979 (39) FLR 70
1996 (74) 2004
1984 (49) FLR 38

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard the counsel for the parties and perused the record.

2. This writ petition has been filed challenging the validity and correctness of the award dated 13.5.1997 passed by the Central Government Industrial Tribunal cum labour court, Kanpur. By the impugned award, C.G.I.T. has held that the order of removal of the workman/respondent no.2 dated 4.6.1986 was quashed and that the workman is entitled for reinstatement in service with back wages from the date of reference.

3. The petitioner is an Insurance Company in which respondent no.2 was working as Inspector Grade-II. He was charge sheeted for the following misconducts:-

(a) Failure to maintain absolute integrity thus committed breach of Rule 3 of the General Insurance (Conduct, Discipline and Appeal) Rules, 1975.
(b) Dishonesty in connection with the business of the Company.
(c) Acting in a manner prejudicial to the interest of the Company.
(d) Willful insubordination or disobedience of lawful and reasonable order of his superior.

4. The brief facts of the case are that respondent no.2 was authorized to accept the premium from the parties and to issue the certificate in insurance. The workman/respondent no.2 issued certificate of Insurance No.111/ 6302089/029863/12303/India dated 20.11.1980 for comprehensive insurance in respect of Tractor bearing Engine No.35696 Escort 335 Model 1980, belonging to one Kabiruddin son of Late Abdul Majeed resident of village and post Ahmadpur Asrauli, District Allahabad. He did not deposit the premium receipts of the aforesaid insurance documents issued by him. He thus collected Rs.700/- in cash as premium from the aforesaid insurer. The Branch Officer/Company was thus completely unaware about the aforesaid risk. As per General Insurance (Conduct, Disciplinary and Appeal) Rule, 1975, no insurance document can be issued to any party without prior receipt. Respondent no.2, who received the amount, was required to deposit the office copy or copy of certificate of Insurance as well as the amount with the branch office on the very date of the receipt of premium or latest by the following working day.

5. When the aforesaid facts came to the notice of the Officers of petitioner's company, respondent no.2 was directed vide letter no.111/HSS/Vig/82 dated 13.3.1982 to return all used/unused certificates of insurance and cover notes lying with him, but inspite of clear directions, he did not do so.

6. The respondent no.2 was charge sheeted and after domestic enquiry, charges levelled against him were found proved. The Disciplinary Authority looking into seriousness of charges proved against respondent no.2 passed the penalty order removing him from service. Aggrieved by the order, respondent no.2 filed an appeal against the order of removal-dated 4.6.1986, which was dismissed by the appellate authority.

Thereafter, he submitted a memorial on 5.6.1989 before the Chairman cum Managing Director of Insurance Company and the competent authority under Rule 40 of the General Insurance (Conduct, Discipline and Appeal) Rules, 1975 rejected the memorial of respondent no.2 dated 5.6.1989 and upheld the decision of the removal passed by the competent authority. Aggrieved, the workman/respondent no.2 raised an industrial dispute after six years, which was referred by the State Government after six years, which was referred by the State Government for adjudication before the C.G.I.T. Kanpur, by making following reference:-

"Whether action of the management of the Regional Manager, National Insurance Co. Ltd. Allahabad in removing Sri Anant Ram Saxena son of Late Sri Badri Prasad Saxena, Inspector Grade-II from the service vide order dated 4.6.1986 was just and legal? If not, to what relief is the workman concerned entitled to?"

7. On the pleadings of the parties, a preliminary issue regarding fairness and propriety of the domestic enquiry was framed. By finding dated 7.11.1996 C.G.I.T. Kanpur held that the enquiry was not fair and proper and the management was given an opportunity to prove misconduct on merits.

8. Several dates were fixed by the labour court, but the management failed to adduce any evidence on 4.12.1996, 21.1.1997, 21.2.1997 and 26.3.1997. Ultimately, the management was debarred from giving evidence and the arguments were heard on 28.4.1997.

9. By the impugned award, the labour court held that the burden of proving the misconduct as given in the charge sheet rests with the management. It has further held that the management has failed to adduce evidence and as such the charges have not been proved. Consequently, the order of removal of respondent no.2 from service-dated 4.6.1986 is bad in law. C.G.I.T. Kanpur further held that the workman/respondent no.2 is entitled for reinstatement in service with back wages from the date of reference because of belated claim.

10. The counsel for the petitioner submits that the burden to prove the case lies on the workman and the C.G.I.T. has committed illegality in shifting the burden of proof on the Insurance Company. He states that the initial burden is on the workman, who has to discharge the same and only then the onus would shift on the employer. When workman raised industrial dispute and invoked the jurisdiction of the Court, he seeks relief of setting aside the order of removal from service and reinstatement with full back wages. The workman after deciding the preliminary issues that the enquiry was not fair and proper. The burden of proof was upon the workman to prove his case, but he did not produce any evidence, hence he has not discharged his burden. In the case of **V.K. Raj Industries Vs. Labour Court and others, 1979 (39) FLR 70**, a Division Bench of this Court held that if a party challenges the illegality of an order, the burden lies on him to prove the illegality of the order. Reliance has been placed on **Meritec India Ltd. Vs. State of U.P. and others, 1996(74) 2004 and Shankar Chakravarti Bs. Britannia Biscuit Co. Ltd., 1984(49) FLR 38.** In the aforesaid

cases also it has been held that the burden of proof lies on the party, who invokes the jurisdiction of the court. "The test would be, who would fail if no evidence is led." The court answered that the person, who invokes jurisdiction and raises the dispute, has to discharge his burden of proof and the onus shift on the other party. Thus when the whole case was open before the Tribunal, the burden to prove that the order of removal was wrong, was on the workman, who was challenging the order. It appears that the workman did not examine himself neither at the time of decision of preliminary issue nor thereafter. The pleadings are not proved., hence there was no evidence before the Tribunal to prove that the order of removal was illegal and the award is not based on any evidence.

11. The second contention of termination is covered by Section 25-F of the U.P. Industrial Dispute Act, 1947. The Apex Court in Himanshu Kumar Vidhyarthi Vs. State of Bihar, 1997 (76) FLR 237, has held that the services of a workman are regulated by the statutory Rules, concept of industry is excluded and as such the award passed by the labour court is also without jurisdiction.

12. Lastly, it has been submitted that in para 11 of his written statement the workman had stated that he was out of employment for merely 19 years and has prayed for lesser punishment, hence the award of reinstatement with full back wages was illegal. The reason has been given by the labour court in awarding full back wages.

13. In the writ petition there was an interim order. From the counter affidavit, it appears that the workman was aged about 55 years. He must have retired by now. No purpose would be served by the order of his reinstatement at this stage.

14. For the reasons stated above, the writ petition partly succeeds and is allowed. The petitioner is directed to pay 50% of the back wages to respondent no.2 from the date of reference to the date of his retirement with 10% interest, as the workman had not worked during the period, within two months from the date of production of this order. The interim order dated 10.3.1998 is vacated. No order as to costs.

———

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.8.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.K. AGARWAL, J.

Special Appeal No. 523 of 2002

U.P. Public Service Commission, Allahabad ...Appellant
Versus
Surendra Kumar Singh ...Respondent

Counsel for the Appellant:
Sri B.N. Singh
Sri Neeraj Tiwari

Counsel for the Respondent:
Sri A.K. Bajpai
Sri S.P. Pandey
Sri J.P. Rai

U.P. Transport (Subordinate) Technical Service Rules 1980-Rule 15 (3)-gives a vide discretion to adopt any procedure for selection of candidates. The court cannot sit over the judgment and must observe judicial restraint. (Para 11)

In our opinion, it is open to the Commission to adopt any method of fixing the standard under Rule 15 (3) as long as it is an objective standard applicable to all candidates. It is not for this Court to sit in appeal over the decision taken by the Commission in this regard. If the Commission feels that 40% marks should separately be obtained for the written as well as the practical test, it is not for this Court to sit in appeal over that decision of the Commission. The Court must observe judicial restraint in such administrative matters.

Case law referred:
285 US 262 (1932)
AIR 1996 SC 11
J.T. 1996 (8) SC 130
2003 (4) S.C.C. 289

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

1. This Special Appeal has been filed against the judgment of the learned Single Judge of this Court dated 12.4.2002 in Writ Petition No. 53701 of 2000. In that decision the learned Single Judge has followed his own judgment in Writ Petition No. 55771 of *Sushil Kumar Srivastava v. U.P. Public Service Commission decided on 12.4.2002.*

2. We have heard learned counsel for the parties.

3. The facts of this case are that the U.P. Public Service Commission (hereinafter referred to as the Commission) issued an advertisement in the newspaper 'Rashtriya Sahara; dated 3.7.1999 inviting applications for the post of Regional Inspector (Technical) and Assistant Regional Inspector (Technical). Copy of the advertisement is Annexure-1 to the Writ Petition. The writ petitioner applied against that advertisement. His application was rejected on the ground that he was overage, and hence he filed writ petition no. 30063 of 1999 in this Court in which an interim order dated 26.7.1999 was passed permitting him to appear in the examination. Accordingly he appeared in the written examination and practical examination whose result was declared on 25.11.2000 in which he was not declared selected. Aggrieved this petition was filed before the learned Single Judge who allowed the same, hence this Special Appeal.

4. It may be mentioned that writ petition no. 30063 of 1999 was dismissed by a learned Single Judge of this Court on 15.3.2001, and it was held that the writ petitioner was overage.

5. We have carefully perused the judgment of the learned Single Judge, and we respectfully disagree with the view he has taken. The learned Single Judge has observed that the main issue which arose for determination in the case was as to whether for calling a candidate in the interview a candidate has to separately obtain 40% marks in both written and practical tests, or whether 40% marks have to be obtained after adding the aggregate marks of the written and practical examination together. The writ petitioner submitted that if the marks in the written and practical examination are added he would have secured 40% of the aggregate and he would be held to have qualified for the interview. However, the respondents in the Writ Petition alleged that 40% have to be obtained separately in both written as well as practical test.

6. The recruitment to the post of Regional Inspector (Technical) and Assistant Regional Inspector (Technical) is governed by the U.P. Transport

(Subordinate) Technical Service Rules, 1980. Rules 14 and 15 have been quoted in the judgment of the learned Single Judge and hence it is not necessary to repeat the same. However, we may refer to Rule 15 (3) of the Rules which states:

"*After the results of the written examination have been received and regulated, the Commission shall, having regard to the need for securing due reservation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and others categories under rule 6, summon for interview such number of candidate as on the result of the written examination have come up to the standard fixed by the Commission in this respect. The marks awarded to each candidate at the interview shall be added to the marks obtained by him in the written examination.*"

7. A perusal of Rule 15 (3) shows that the Commission has to summon for interview such number of candidates who have come up to the standard fixed by the Commission in the written examination. The marks awarded in the interview will then be added to the marks in the written examination.

8. Thus it is to be noted that Rule 15 (3) does not itself fix the requisite standard for the written examination but leaves that to the Commission.

9. The advertisement has mentioned that the two written papers have 50 and 100 marks respectively. The practical test has 100 marks and the personality test has 30 marks. The advertisement further states that the personality test will be held by the Commission after the written and practical examinations on dates to be communicated by the Commission and will be confined to such number of candidates only as have qualified in the written and practical test. In para 8 of the Counter Affidavit to the writ petition it is stated that only 111 candidates appeared for the written and practical test and only 77 could score the minimum qualifying marks fixed by the Commission.

10. A Supplementary Counter Affidavit has also been filed by the Commission. In para 3 of the same it is stated that the Commission in its meeting on 22.11.2000 considered the report of the examination Committee and subject Committee and reiterated its decision fixing minimum qualifying marks in both written as well as practical examination vide Annexure-SCA- 1 and SCA-2.

11. In our opinion, it is open to the Commission to adopt any method of fixing the standard under Rule 15 (3) as long as it is an objective standard applicable to all candidates. It is not for this Court to sit in appeal over the decision taken by the Commission in this regard. If the Commission feels that 40% marks should separately be obtained for the written as well as the practical test, it is not for this Court to sit in appeal over that decision of the Commission. The Court must observe judicial restraint in such administrative matters. We are, therefore, not in agreement with the view taken by the learned Single Judge that the Commission must necessarily add the marks in the written and practical test and only thereafter determine the required 40% in the aggregate for qualifying for the interview. In our opinion it is in the discretion of the Commission either to require 40% after adding the result of both written and practical examination, or

to require 40% separately in each of the results of the written and practical examination for qualifying for the interview.

12. The administrative authorities must be left with the discretion to adopt different procedures in such selections, and it is not proper for this Court to interfere in this connection, as Judges do not have expertise in such matters.

13. Of course if there had been a specific Rule that the marks of the written and practical test have to be added and only thereafter 40% of the aggregate shall be taken as the requisite qualifying marks for the interview, the position would have been different. However, Rule 15 (3) is silent as to what procedure should be adopted, and hence it is open to the Commission to adopt any procedure at its discretion provided the same is not wholly arbitrary or illegal. The administrative authorities must be left with wide latitude in such matters. It is singularly inappropriate for this Court to sit in appeal over administrative decisions, unless they are clearly illegal.

As observed by Chief Justice Neely:

"I have very few illusions about my own limitations as a Judge. I am not an accountant, electrical engineer, financer, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator."

14. Merely because in the past the Commission has been adding the marks of the written and practical test and then determining 40% for the qualifying standard, it does not mean that the Commission cannot adopt a new practice. In such matters the Court must give wide latitude to the administration to make experiments and to change the past practice if it so think fit, unless the new practice is wholly illegal. After all, starting a new practice is making an experiment, and this Court should not interfere in this.

15. In his dissenting judgment in *New State Ice Co. Vs. Liebmann. 285 US 262 (1932)* Mr. Justice Brandeis, the celebrated Judge of the U.S. Supreme Court observed that the government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences, depends on "a process of trial and error" and Courts must not interfere with necessary experiments.

16. Justice Brandeis observed:

"*To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." (see also "The Legacy of Holmes and Brandeis' by Samuel Konefsky)*

17. As held by the Supreme Court in *Tata Cellular vs. Union of India AIR 1996 SC 11,* judicial review of administrative decisions is concerned with reviewing not the merits of the decision but the decision making process. Hence it is not for the Court to determine whether the particular decision is fair or not. The Court is only

concerned with the manner in which the decision has been reached. The Supreme Court also observed that the modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of appeal over administrative decisions as it does not have the expertise to correct those decisions.

18. In *Secretary (Health) v. Dr. Anita Puri, J.T. 1996 (8) SC 130* the Supreme Court observed (vide para 9) that where there is no statutory rule or guideline issued by the Government for the Commission for the purpose of evaluation of merit of the candidates, the sole authority and discretion vests with the Commission. In such matters "*the courts should be slow to interfere with the opinion expressed by experts unless allegations of mala fide are made and established. It would be prudent and safe for the courts to leave the decisions on such matters to the experts who are more familiar with the problems they face than the courts.*"

19. In *Federation of Railway Officers Association v. Union of India, 2003 (4) S.C.C. 289* (vide para 12) the Supreme Court observed:

"On matters affecting policy and requiring technical expertise the Court would leave the matter for decision of those who are qualified to address the views. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the Court will not interfere with such matters."

20. The learned Single Judge has held that the decision dated 23.11.2000 (Annexure-SCA-1 to the Supplementary Counter Affidavit to the petition) is not a decision of the Commission, and hence the decision of the Commission dated 19.11.1997 still holds the field. The learned single Judge has observed that the decision dated 23.11.2000 is a decision of the Pariksha Samiti (examination committee) and not a decision of the Commission.

21. The Examination Committee is a body set up by the Commission. Its decision dated 23.11.2000 was never disapproved by the Commission, rather it seems that the Commission had tacitly or by implication endorsed the decision dated 23.11.2000 since the Commission has not specifically set aside that decision, rather it is proceeding on the basis of that decision.

22. It may be mentioned that under Section 5 of the U.P. State Public Service Commission (Regulation and Procedure) Act, 1985 the Commission can delegate its function to any Committee. At any event, since the Commission has not disapproved the decision of the Committee dated 23.11.2000, the said decision must be deemed to have been impliedly approved by the Commission, and has to be treated as the decision of the Commission.

23. We may further add that since the petitioner had been declared overage and Writ Petition No. 30063 of 1999 in this connection had been dismissed on 15.3.2001 by this Court which held that the petitioner was overage for the examination, it was not proper for the learned Single Judge to have directed that the petitioner shall be treated as having qualified for the interview on the basis of

aggregate marks secured in written and personality test. If the petitioner is not even eligible that is the end of the matter.

24. It may be mentioned that another petitioner Sri S.K. Srivastava had filed Writ Petition No. 37358 of 2000 which had been dismissed by a learned Single Judge by 14.8.2000. In that petition, the candidature of the petitioner Sri S.K. Srivastava had been rejected as he did not posses the essential qualification as the experience certificate produced by him was not valid. Against the judgment in Writ Petition No. 37358 of 2000, Sri S.K. Srivastava filed Special Appeal No. 516 of 2000 which is pending in this Court.

25. The learned Single Judge in his impugned judgment in the petition filed by S.K. Srivastva has observed at the end of his judgment that "*the result of petitioner no. 1 shall be subject to the result of Special Appeal No. 516 of 2000 filed by petitioner no. 1 (S.K. Srivastava).*"

26. The learned Single Judge in his judgement in the case of the respondent in this Appeal Sri Surendra Kumar Singh has merely followed the judgment in Writ Petition No. 55771 of 2000 filed by S.K. Srivastava. It may be mentioned that the candidature of Sri S.K. Srivastava had been rejected on an altogether different ground than the candidature of Sri Surendra Kumar Singh. The candidature of Sri S.K. Srivastava was rejected on the ground that he did not posses the appropriate experience certificate, whereas the candidature of Sri S.K. Srivastva was rejected on the ground that he was overage. The Writ Petition filed by Sri Surendra Kumar Singh (in writ petition no. 30063 of 1999) by which he challenged the order rejecting his candidature on the ground that he was overage was dismissed by this Court and it was held that he was overage. When Sri Surendra Kumar Singh, the respondent in this Appeal has been held by this Court to be overage, we fail to see how the learned Single Judge could have allowed his writ petition following the judgment in the case of Sri S.K. Srivastava whose candidature had been rejected on an altogether different ground. If a person is overage obviously he cannot appear in the examination.

27. For this reason also the judgment is not sustainable in law. The Appeal is therefore allowed. The impugned judgment is set-aside. No order as to costs.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2003

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

Civil Misc. Writ Petition No. 13955 of 1990

Nagar Mahapalika, Varanasi and another ...Petitioners

Versus.

U.P. Public Services Tribunal No.II, Lucknow and others ...Respondents

Counsel for the Petitioners:
Sri Beni Prasad Agarwal
Sri C.K. Parekh
Sri Anurag Pathak

Counsel for the Respondents:
Sri S.S. Sharma
Sri M.C. Dwivedi
Sri D.V. Jaiswal
S.C.

Constitution of India-Article 311 (2)-Financial Hand Book Vol. II, Parts II to IV- U.P. Palika Centralised Rules, 1962-Rule 27 and 31 Principle of Natural Justice-services terminated without opportunity of hearing termination order held illegal Principle no work, no pay whether applies-held-'Yes'

Held- Para 9

The respondent no.3 has not rendered any service during the said period and she is not entitled to be given back wages or salary or arrears of salary or allowances etc. for the back period, however she may be permitted for seniority and if the respondent no. 3 had already been paid her salary for the period she had not worked and she is not entitled for salary from 15.1.81 till the date of her reinstatement after adjusting permissible leave, therefore, excess payment is to be adjusted while making payment to respondent no.3's retiral benefit. The payment, which has already been made, is to be adjusted towards the payment of retirement.

(Delivered by Hon'ble R.B.Misra, J.)

1. In this petition order dated 28.2.1990 (Annexure-4 to the writ petition) passed by U.P. Public Services Tribunal, Lucknow has been challenged whereby the respondent no.3 was reinstated in the service with all arrears of salary and allowances and seniority etc.

(1) Heard Sri C.K. Parekh learned counsel for the Nagar Mahapalika, Varanasi and Sri S.S. Sharma for the respondent no.2 as well as Sri M.C. Dwivedi for the respondent no.3 Smt. Sudha Bharagava.

(2) It appears that petitioner appointed respondent no. 3 as a Social worker in Nagar Mahapalika, Varanasi on 31.7.1967 and she was also given promotion as Extension Educator with effect from 1.8.1970. She proceeded on casual leave from 3.10.1979 to 6.10.1979 and left Varanasi. Thereafter she requested for extension of her leave and she was expected to return on 31.3.1980. Subsequently on the ground of ailment she wanted to avail leave from 20.7.1980 to 30.11.1980 and she also requested leave from 31.3.1980 to 12.7.1980, however considering the absence of the respondent no.3 as unauthorised and after considering her case under Rule 157-A of Financial Handbook Volume II, Parts II to IV she was terminated from service. According to respondent no.3 the termination could not be made under the provisions of Financial Handbook as well as provisions of U.P. Palika Centralise Rules are also not applicable and the U.P. Nagar Mahapalika Sewa Niyamavali, 1962 (In short called 'Rule 1961'). According to the respondents the punishment order was passed by the petitioner terminating the service of respondent no.3 without adopting the proper procedure as laid down under Rules 27 and 31 of 'Rule, 1962' and without affording the proper opportunity of hearing to the respondent no.3, more so, in derogation to the provisions of Article 311 (2) of the Constitution of India. The order dated 15.1.1981 is by way of an order simplicor indicating that the service of respondent no. 3 has been terminated treating the respondent no.3 as a temporary employee w.e.f. 18.12.1979. However as contended on behalf of the respondent no. 3 that if the circumstances are unveiled the foundation for termination of the respondent no.3 was to give punishment on the ground of long absence. According to the petitioner respondent no. 3 was a temporary employee and her long absence was not

permissible, therefore, under Rule 157-A of Financial Handbook Volume II the service of the respondent no.3 has rightly been terminated and the order of the Tribunal dated 28.2.1990 reinstating the service of the petitioner (respondent no. 3) with back wages is illegal.

2. Rule 27 of 'Rule 1962' deals with the punishment and Rule 31 deals with the Procedure for disciplinary proceedings. For convenience Rule 31 is provided herewith as below:

*"**31**. Procedure for disciplinary proceedings -(1) No order (other than an order based on facts which have led to his conviction on a criminal charge) 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 any servant of the Mahapalika 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. The grounds on which it is proposed to take action shall be reduced in the form of a definite charge or charges which shall be communicated to the person charged and which shall be so clear and precise as to give sufficient indication to the charged servant of the facts and circumstances against him. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so directs an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that inquiry such oral evidence will be lead as the inquiring officer considers necessary. The person charged shall be entitled to cross-examine the witnesses called as he may wish provided that the officer conducting the inquiry may for sufficient reason to be recorded in writing refuse to call a witness. Neither the Mahapalika nor the servants of the Mahapalika shall be entitled to be represented by a counsel. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof. The officer conducting the enquiry may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged servant.*

(2) 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 inquiring officer be waived without injustice to the person charged.

(3) This rule shall also not apply where it is proposed to terminate the employment of either a temporary servant, or of a probationer whether during or at the end of the period of probation. In such cases a simple notice of termination which in the case of temporary servant, must conform to conditions of his service, will be sufficient.

(3) In view of the above provisions, it is clear that for disciplinary proceeding an employee permanent or temporary has to be served a definite charge and the documents relied upon and after affording the opportunity of hearing and allowing

the employee to defend one's case by filing written statement for his defence, by adducing oral and personal hearing and adducing evidence and avail opportunity of cross-examining the witnesses and for conducting proper disciplinary proceeding day, time and place are to be indicated. In my respectful consideration the proper procedure before removing the respondent no.3 was to be followed in view of Rule 31 of 'Rule 1961' above mentioned. The respondent no.3 was by virtue of holding a civil post in Nagar Mahapalika was entitled to be given protection of Article 311 (2) of the Constitution when her service was being terminated, however all these aspects were considered in the impugned order dated 28.2.90 where the termination of respondent no. 3 was found not legally justified.

(4) The counsel for the respondent no. 3 has referred several judgements of the Supreme Court and this Court in support of his submission for consideration the first decision relied by the respondent no. 3 is **AIR 1958 Supreme Court 800, Khem Chand Vs. Union of India and others.** In paragraph 19 of the aforesaid judgment the Supreme Court has laid down as under :-

"(19) To summarise the reasonable opportunity envisaged by the provision under consideration includes :

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) An opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government Servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government Servant.

In short the substance of the protection provided by rules, like Rule 55 referred to above, was bodily lifted out of the rules and together with an additional opportunity embodied in Section 240 (3) of the Government of India Act, 1935 so as to give a statutory protection to the Government Servants and has now been incorporated in Article 311 (2) so as to convert the protection into a constitutional safeguard."

(5) The next judgment relied upon by the counsel of the respondent no. 3 is **AIR 1961 Supreme Court 1070, Jagdish Prasad Saxena Vs. The State of Madhya Bharat,** where the Supreme Court has held that in taking disciplinary action against the public servant; a proper disciplinary enquiry must be held against him after supplying him with the charge-sheet, and allowing him the reasonable opportunity to meet the allegations contained in the charge-sheet.

(6) Much emphasis has been given by the counsel for the respondent no. 3 on Paragraph 5 of the judgment of the Supreme Court in the case of **Kulwant**

Singh Gill Vs. State of Punjab, reported in 1991 Supreme Court Cases (L & S) 998, where the Supreme Court has observed in paragraph 5 as under:-

"5. The further contention of Shri Nayar that the procedure under Rule 8 was followed by issuance of the show cause notice and consideration of the explanation given by the appellant would meet the test of Rules 8 and 9 of the Rules is devoid of any substance. Conducting an enquiry, de hors the rules is no enquiry in the eye of law. It cannot be countenanced that the pretence of an enquiry without reasonable opportunity of adducing evidence both by the department as well as by the appellant in rebuttal, examination and cross-examination of the witnesses, if examined, to be an enquiry within the meaning of Rules 8 and 9of the Rules. Those rules admittedly envisage, on denial of the charge by the delinquent officer, to conduct an enquiry giving reasonable opportunity to the presenting officer as well as the delinquent officer to lead evidence in support of the charge and in rebuttal thereof, giving adequate opportunity to the delinquent officer to cross-examine the witnesses produced by the department and to examine witnesses if intended on his behalf and to place his version; consideration thereof by the Enquiry Officer, if the Disciplinary Authority himself is not the Enquiry Officer. A report of the enquiry in that behalf to be placed before the Disciplinary Authority who then is to consider it in the manner prescribed and to pass an appropriate order as for the procedure to vogue under the Rules."

(7) In the aforesaid case the Supreme Court held that without reasonable opportunity of adducing evidence both by the department as well as by the appellant in rebuttal, examination and cross-examination of the witnesses, it cannot be said to be valid enquiry under the Rules. As observed above, there cannot be any dispute that opportunity is required to both the delinquent and the employer. The Division Bench of this Court in the case of **1994 (4) AWC 3227 para 45 (Subhash Chandra Sharma Vs. M.D., U.P. Cooperative Spinning Mills Federation. Ltd.),** held that the dismissal is illegal since no regular enquiry was held in that case. It was held by the Division Bench that the evidence should have been led against the delinquent in his presence and he should have been given opportunity to cross-examine the witnesses; Similar view has been taken in another Division Bench's judgment of **Smt. Ram Pyari Vs. State of U.P. and another, reported in 2000 (2) AWC 1711 (LB).**

(8) The petitioner placed reliance on the judgment dated 25.5.2001 of this Court (DB) (M. Katju and R.B. Misra,JJ.) in **Writ Petition No. 7133/2001, Radhey Shyam Vs. Secretary, Minor Irrigation Department and Rural Engineering Services, U.P. and others (2001) 2 UPLBEC 1676,** where the writ petitioner working as Incharge Executive Engineer in the Rural Engineering Services and Minor Irrigation Department was charge-sheeted for his alleged involvement of embezzlement, financial irregularities and financial loss, however, was made handicapped to participate in the inquiry for non-payment of subsistence allowance as well as legal dues during his suspension and the request of change of Inquiry officer was not accepted by the Competent Authority and the ex parte inquiry was conducted behind his back

without adopting proper procedure, no specific date, time and place of inquiry was fixed, oral and documentary evidence against the writ petitioner was not adduced in his presence and he was not given opportunity to cross-examine the witnesses against him and he was not afforded opportunity to produce his own witnesses and evidences. The ex parte inquiry was found illegal and the order of dismissal of writ petitioner was quashed while allowing the writ petition, however, keeping in view the financial loss and irregularities it was made open to the respondents to hold a fresh inquiry in accordance with law and pass a fresh order. It is pertinent to mention that the Special Leave Petition No. 15226/2001, State of U.P. Vs. Radhey Shyam Pandey and others, preferred against the above order dated 25.5.2001 was dismissed on 1.2.2002 by the Supreme Court.

(9) I have heard learned counsel for the parties. I find that though the order of termination is an order of simplicitor but intention to punish the respondent no.3 on the ground of long absence was the foundation and she was entitled to be given protection of the provisions of Article 311 (2) of the Constitution and before termination order the disciplinary proceeding was to be conducted in view of the procedure prescribed under Rule 31 of 'Rule 1962'. Since the proper procedure has not been adopted and the respondent was not afforded proper and adequate opportunity of hearing as such the termination order was not legally sustainable. I do not find any impropriety and illegality in the said impugned order dated 28.2.90 of learned Tribunal, therefore, this court is not inclined to interfere so far as setting aside the termination order dated 15.1.1981 of learned Tribunal. However since an employee has right to be given pay for the work rendered by him subject to the admissibility of permissible leave in accordance to the provisions of law and the rules applicable to the service of a particular employee. One employee is not to be given salary for the period he has not worked on the principle of no pay without work. Even if it is presumed that the respondent no. 3 was entitled for reinstatement and seniority, however she had not rendered any work and she was only given due leave permissible to her after being reinstatement into service but not the payment of those days for which she has not worked. The respondent no.3 has not rendered any service during the said period and she is not entitled to be given back wages or salary or arrears of salary or allowances etc. for the back period, however she may be permitted for seniority and if the respondent no. 3 had already been paid her salary for the period she had not worked and she is not entitled for salary from 15.1.81 till the date of her reinstatement after adjusting permissible leave, therefore, excess payment is to be adjusted while making payment to respondent no.3's retiral benefit. The payment, which has already been made, is to be adjusted towards the payment of retirement.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.06.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 20053 of 2003

Ram Saran Goyal ...Petitioner
Versus
State of U.P. through Special Secretary (Home) and others ...Respondents

Counsel for the Petitioner:
Sri S.M. Haider Zaidi

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Judicial Review-Scope-High Court while exercising writ jurisdiction cannot form a different opinion as an appellate court-impugned order quashed.

Held- Para 9

This Court while exercising powers of judicial review, cannot form a different opinion or sit in appeal over the order. It can only interfere where the committee has not considered the case; relied upon some irrelevant materials or has failed to take into consideration the materials which were relevant to the matter. The fact that the petitioner was recommended for police medal for gallantry was one of the circumstance but that cannot be said to conclusive reason to arrive at a decision.

(B) Service Law- Out of turn promotion-Petitioner posted as Sub-Inspector- G.O. dated 3.2.1994 providing out of turn promotion to only those showing exemplary courage and bravery in an encounter with some notorious or hardened Criminals or for showing courage or bravery in their arrest or for taking risk in performance of duty-In present case impugned order of Committee showing that in joint operation in comparison to heavy force and weapons, there were four Criminals-Three of them made good their escape-From one Criminal shot dead only a Single barrel gun and a pistol were recovered-Committee further found that neither of police personals either individually or collectively demonstrated any such exemplary courage or bravery, which may entitle them out of turn promotion- Award of Police Medal for gallantry may be one of consideration for out of turn promotion on ground of exemplary courage and bravery or taking risk in performance of duties, but that by itself cannot be conclusive proof to form an opinion for bravery and courage-Petition dismissed.

Held- Para 10

The award of police medal for gallantry may be one of the consideration for out of turn promotion on the ground of exemplary courage and bravery or taking risk in performance of duties, but that, by itself, cannot be a conclusive proof to form an opinion for bravery and courage.

Case Law Referred:
Krishna Kumar Pundir V. State of U.P., 2001 (3) A.W.C. 2163

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Petitioner is at present posted as Sub Inspector, Civil Police, Kanpur Nagar. He joined the services on 16th January, 1984. In the year 1999, petitioner was posted at Fatehgarh. An office message was communicated to him on 27.10.1999 by the Senior Superintendent of Police, Farrukhabad for immediate rushing to Village Ishapur. Petitioner immediately rushed to the spot with additional police force and was engaged in operation in which hardened criminal Nem Kumar alias Bilaiya was flushed out from inside a house where he had taken

shelter and had opened fire. Petitioner sustained injuries in his forehead. He was immediately taken to the District Hospital, Farrukhabad where he was treated and lateron shifted to Priya Hospital, Kanpur.

2. The encounter was widely reported and that petitioner along with other police personals, engaged in the encounter, were recommended for awarding police medal for exhibiting extraordinary courage, gallantry and bravery. Sri Rajeev Krishna, Senior Superintendent of Police, Fatehgarh has also recommended and forwarded petitioner's for out of turn promotion. Vide notification dated 27.3.2002, petitioner was declared for award of police medal by the President's Secretariat for gallantry. Government Orders dated 3.2.1994 and 19.1.1995 provide for out of turn promotion to those police officers who show exemplary courage and bravery in performance of their duties.

3. By impugned order dated 1.3.2001, the Superintendent of Police (Establishment) U.P. had informed petitioner that the matter of his out of turn promotion vide Government Order dated 3.2.1994 along with other police personnel's, involved in the encounter, was considered by a committee. The Committee has considered all the documents and after taking into consideration all the facts and circumstances, refused to recommend petitioner and other officers for out of turn promotion. By this writ petition, petitioner has prayed for quashing the impugned communication/order dated 1.3.2001 as well as for directing the respondents to promote petitioner out of turn to the post of Inspector for showing extraordinary gallantry and courage in the encounter dated 27.10.1999.

4. I have heard Sri S.M. Haider Zaidi for petitioner and learned standing counsel for the respondents.

5. For the reasons given below, this writ petition is dismissed at the admission stage.

6. Learned counsel for petitioner submits that petitioner sustained injuries on his forehead and neck. The Senior Superintendent of Police in his recommendation mentioned that petitioner has shown extra-ordinary courage and bravery and this fact needs no further enquiry inasmuch as on the same footing, petitioner and other police officers involved in the encounter of hardened criminal, were recommended for police medal for gallantry. Petitioner has relied upon a judgment of this Court in Krishna Kumar Pundir Vs. State of U.P. (2001 (3) AWC 2163).

7. Learned standing counsel, on the other hand, submits that a committee of senior police officers has been constituted to consider each and every case on its own merit. The Government Order dated 3.2.1994 provides for out of turn promotion to only such Constables, or Sub Inspectors/Platoon Commanders of the Police who have shown exemplary courage and bravery in the encounter with some notorious or hardened criminals or for showing courage and bravery in their arrest, or for taking risk in performance of their duties. The committee has considered the merits of the present case and has given reasons for refusing out of turn promotion to the police personnel's, including petitioner, who were involved

in the encounter. These reasons, according to the learned standing counsel, have been given on the basis of relevant materials available on record and that this Court cannot substitute its own opinion as an appellate authority or to review the order.

8. In the present case, the impugned order shows that the committee found that under the leadership of the Senior Superintendent of Police, Fatehgarh; Superintendent of Police; four Circle Officers; three Sub Inspectors and many Station Officers alongwith large number of police and P.A.C. personnel's were included. Out of this group, twenty four officers were armed with modern and power-full weapons, viz; A.K.-47 Rifles and S.L.R.'s with which they fired upon the criminal. In comparison of this heavy force and weapons, there were four criminals. Three of them made good their escape, and only one was shot dead from whom only a single barrel gun and a pistol were recovered. In the joint operation and firing, although some police personnel's received injuries but neither of them, either individually or collectively, demonstrated any such exemplary courage or bravery which may entitle them out of turn promotion.

9. I have gone through the documents, annexed to the writ petition, including the F.I.R., injury report and recommendation. Petitioner was only a member of Police party involved in the encounter. The first information report shows that he had fired four shots from his pistol. Hand grenades were thrown in the room in which Nem Kumar alias Bilaiya was hiding. He was armed only with a single barrel gun and a country made pistol which were recovered from the room where he was hiding. The operation, in general, was single sided affairs in which the police party surrounded the criminals. The facts given in the F.I.R. and the recommendation does not show that petitioner showed any such bravery or courage or took initiative either on the direction of leader of the police party, or on his own, in the operation. He may have sustained injury but that does not appear to have been caused in demonstration of some extra-ordinary part taken by petitioner in the operation, where three criminals escaped and one was killed, and thus it cannot be said that any one of them either individually or collectively, demonstrated any such exemplary courage or bravery. This Court while exercising powers of judicial review, cannot form a different opinion or sit in appeal over the order. It can only interfere where the committee has not considered the case; relied upon some irrelevant materials or has failed to take into consideration the materials which were relevant to the matter. The fact that the petitioner was recommended for police medal for gallantry was one of the circumstance but that cannot be said to conclusive reason to arrive at a decision.

10. Gallantry has been defined as dashing bravery; showily attentive behavior to women; a compliment made to a woman flirting with her (New Lexicon Webster's Dictionary). The same dictionary defines bravery as courage, and courage has been defined as the capacity to meet danger without giving way to fear. The exemplary courage and bravery as such requires something more that being gallant. The award of police medal for gallantry may be one of the consideration for out of turn promotion on

the ground of exemplary courage and bravery or taking risk in performance of duties, but that, by itself, cannot be a conclusive proof to form an opinion for bravery and courage.

11. For the aforesaid reasons, I do not find any ground to interfere with the impugned order. The writ petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.06.2003

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 3305 of 2003

Animesh Jain ...Petitioner
Versus
Home Secretary U.P., through State of U.P. and Another. ...Opposite Party

Counsel for the Petitioner:
Sri C.M. Shukla
Sri C.B. Shukla

Counsel for the Opposite Party:
Sri R.S. Maurya
A.G.A.

Constitution of India- Article 226- maintainability against the Government Officers or the employees of the State-if filled against the State and the State is not impleaded, the writ not maintainable (Held in para)

Case law referred:
AIR 1965 277
AIR 1976 SC 2538
AIR 1964 SC 669
(2003) 3 SCC 472
AIR 1977 SC 1701

Held- Para 13

Writ is not maintainable against the Government officers or the employees of the State, it lies only against the State and if State is not impleaded, the writ is not maintainable.

(Delivered by Hon'ble Dr. B.S.Chauhan, J.)

1. This writ petition has been filed for seeking a direction to the Home Secretary of the State of Uttar Pradesh to transfer the investigation to the C.B.C.I.D. in Case Crime No. 92 of 2003 Under Section 302 I.P.C. relating to Police Station Adarsh Mandi, Muzaffarnagar.

2. The present writ petition has been filed on the ground that the petitioner does not expect a fair investigation by the police for the reasons that the Area is dominated by the Jats and they are pressurizing the investigating Agency to involve the petitioner. Therefore, the investigation may be transferred to the C.B.C.I.D.

3. The Learned A.G.A. has raised preliminary objection regarding the maintainability of the writ petition as it has been filed impleading only respondent no. 1 i.e., The Home Secretary, U.P. Lucknow, through State of U.P. It has been submitted by him that the State has not been impleaded as a respondent and the writ cannot be entertained against the officer of the State without impleading the State as has been held by the Court's time and again.

4. In Ranjeet Mal Vs. General Manager, Northern Railway, New Delhi & Anr, AIR 1977 SC 1701, the Hon'ble Apex Court considered a case where the writ petition had been filed challenging

the order of termination from service against the General Manager of the Northern Railways without impleading the Union of India. The Apex Court held as under:

"The Union of India represents the Railway Administration. The Union carries administration through different servants. These servants all represent the Union in regard to activities whether in the matter of appointment or in the matter of removal. It cannot be denied that any order which will be passed on an application under Article 226 which will have the effect of setting aside the removal will fasten liability on the Union of India, and not on any servant of the Union. Therefore, from all points of view, the Union of India was rightly held by the High Court to be a necessary party. The petition was rightly rejected by the High Court."

5. While considering the similar view in Chief Conservator of Forests Government of A.P. Vs. Collector & ors; (2003) 3 SCC 472, the Hon'ble Supreme Court accepted the submission that writ cannot be entertained without impleading the State if relief is sought against the State. The Hon'ble Apex court had drawn the analogy from Section 79 of the Code of Civil Procedure, 1908, which directs that the State shall be the authority to be named as plaintiff or defendant in a suit by or against the government and Section 80 thereof directs notice to the Secretary of that State or the Collector of the district before the institution of the suit and Rule 1 of Order 27 lays down as to who should sign the pleadings. No individual officer of the government under the scheme of the constitution nor under the Code of Civil Procedure, can file a suit nor initiate any proceeding in the name and the post he is holding, who is not a juristic person.

6. The Court also considered the provisions of Article 300 of the Constitution which provide for legal proceedings by or against the Union of India or State and held that in a suit by or against the government, the authority to be named as plaintiff or defendant, as the case may be; in the case of the Central Government, the Union of India and in the case of State Government, the State, which is suing or is being sued.

7. Rule 1 of Order 27 only deals with suits by or against the Government or by officers in their official capacity. It provides that in any suit by or against the Government, the plaint or the written statement shall be signed by such person as the Government may like by general or special order authorise in that behalf and shall be verified by any person whom the government may so appoint. The Court further held as under:

"It needs to be noted here that a legal entity-a natural person or an artificial person-can sue or be sued in his/its own name in a court of law or a tribunal. **It is not merely a procedural formality but it is essentially a matter of substance and considerable significance**. That is why there are special provisions in the Constitution and the Code of Civil Procedure as to how the Central Government or the Government of a State may sue or be sued. So also there are special provisions in regard to other juristic persons specifying as to how they can sue or be sued. In giving description of a party it will be useful to remember the distinction between **mis description or misnomer** of a party and **misjoinder**

or non-joinder of a party suing or being sued. In the case of misdescription of a party, the court may at any stage of the suit/proceedings permit correction of the cause-title so that the party before the court is correctly described; however a misdescription of a party will not be fatal to the maintainability of the suit/proceedings. Though Rule 9 of Order 1 CPC mandates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, it is important to notice that the proviso thereto clarifies that nothing in that Rule shall apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the court, be it a plaintiff or a defendant, **otherwise, the suit or the proceedings will have to fail.** Rule 10 Of order 1 CPC provides remedy when a suit is filed in the name of the wrong plaintiff and empowers the court to strike out any party improperly joined or to implead a necessary party at any sage of the proceedings."

8. The Court thus held that writ is not maintainable unless the Union of India or the State, as the case may be, impleaded as a party.

9. A Full Bench of Kerala High Court in Kerala State Vs. General Manager, Southern Railway, Madras, AIR 1965 Ker 277 held that suit is not maintainable if instituted against Railway Administration. The condition precedent for its maintainability is that it must be instituted against the Union of India.

10. A similar view has been reiterated by Hon'ble Apex Court in State of Kerala Vs. General Manager, Southern Railway, Madras, AIR 1976 SC 2538.

11. A Constitution Bench of Supreme Court in State of Punjab Vs. O.G.B, Syndicate Ltd, AIR 1964 SC 669 held that if relief is sought against the State, suit lies only against the State, but, it may be filed against the Government if the Government acts under colour of the legal title and not as a Sovereign Authority, e.g., in a case where the property comes to it under a decree of the Court.

12. The Rajasthan High Court in Pusha Ram Vs. Modern Construction Co. (P) Ltd, AIR 1981 Raj 47, held that to institute a suit for seeking relief against the State, the State has to be impleaded as a party. But misdescription showing the State as Government of the State may not be fatal and the name of party may be permitted to be amended, if such an application is filed.

13. Thus, we reach the inescapable conclusion that the writ is not maintainable against the Government officers or the employees of the State, it lies only against the State and if State is not impleaded, the writ is not maintainable.

14. Thus, in view of the above, the preliminary objection raised by the learned A.G.A. is worth acceptance being preponderous.

15. In the instant case petition has been filed in a casual and cavalier manner without impleading the necessary parties. The only respondent which has been impleaded is the Home Secretary, U.P., through State of U.P. We fail to understand how the Home Secretary can be impleaded through the State; perhaps the other way round was permissible.

Learned counsel for the petitioner does not ask for time for filing any amendment application or for impleading the necessary parties. The F.I.R. seems to have been lodged at Police Station Adarsh Mandi, Shamli, District Muzaffarnagar. But in the prayer clause, reference is made to the case related to the Police Station Adarsh Mandi Muzaffarnagar. Affidavit has been filed in support of the writ petition originally, of the pairokar, without disclosing his relation with the petitioner. A supplementary affidavit was filed today in the Court explaining the relation and also for furnishing many other informations. However, no reference is given in the said affidavit that case related to the Police Station Adarsh Mandi Shamli, and not Muzaffarnagar. The practice of filing the writ petition in such a casual manner is not worth approval as it amounts to dis-service to the Court and community as a whole.

16. In view of the above, we do not find the petition as maintainable. It is, accordingly, dismissed. However, dismissal of the writ petition shall not prejudice the cause of the petitioner to file a properly maintainable writ petition before this Court.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2003

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

Civil Misc. Contempt Petition No. 4005 of 1999

Akhilesh Kumar Naik (Nayak) ...Petitioner
Versus
Sh. K.G. Ramchandran, Chairman & Managing Director and others
...Respondents

Counsel for the Petitioner:
Sri K.M. Asthana

Counsel for the Respondents:
Sri Sandeep Saxena

Contempt of Courts Act 1972-will full disobedience- Removal from Service- Order Stayed by High Court-opposite parties complied with order- But again removed from service on fresh misconduct- Contempt Petition filed.

Held- Once order passed by High Court in favour of petitioner for continuing in service does not mean that he can not remove from service on fresh misconduct- No ground to proceed Contempt Petition.

Held- Para 8

Order of the court in favour of petitioner for continuing him in service when he was removed earlier, he can not be removed on fresh misconduct. Therefore, there is no question of proceeding in contempt. The question whether the misconduct has been committed by the petitioner or not can not be decided in this contempt proceedings. The petitioner may file fresh writ petition challenging the removal on the ground of alleged fresh misconduct.

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

1. Request has been made to punish the opposite parties for disobedience of the order dated 30.09.1997 passed by this court in Civil Misc. Writ Petition No.32916 of 1997.

2. I have heard Sri K.M. Asthana, learned counsel for the petitioner and Sri Sandeep Saxena, learned counsel for the opposite parties.

3. The petitioner was worker in the factory. He alongwith four other persons filed the above writ petition, in which the direction was given that if the petitioners are still working with the opposite parties, they are directed to continue on the posts occupied by them till further orders.

4. It has been argued by Sri K.M. Asthana, learned counsel for the petitioner that this order has not been complied with and the services of the petitioner have been discontinued from 16.10.1999. As against this, the contention of Sri Sandeep Saxena, learned counsel for the opposite parties is that the order of this Court was immediately complied with and the petitioner as well as four other petitioners were taken into service immediately after the order dated 30.09.1997. That the petitioner was later on discontinued for gross misconduct.

5. It is contended that the petitioner misbehaved with the contractor on 05.07.1998 and threatened to kill him. Therefore, show cause notice was issued to the petitioner, which is annexure no. CA-2. An F.I.R. was also lodged on 25.11.1998, which is annexure no.CA-3. That the petitioner also participated in the mass movement of contract labour in the plant premises on 23.11.1998 and 24.11.1998. The report regarding which is annexure no. CA-4. That misconduct and indiscipline of the petitioner was increasing day by day and smooth functioning of the administration became impossible because of the conduct of the petitioner. The complaint regarding it was also made on 07.10.1999. The copy of which is annexure no.CA-6. That the petitioner also hampered the production of the factory for these reasons he was discontinued.

6. The petitioner has filed rejoinder affidavit denying all these allegations and it is contended that all these allegations are false and has been concocted in order to defeat the order of this court. That the F.I.R. was investigated and it was found to be false as is clear from annexure no. RA-2. The final report was submitted. That annexure no.RA-3 show that no case has been registered against the petitioner. Annexure no. RA-4 further shows that even as many as twenty two workers have given in writing that the petitioner is sincere worker and is pressing the other labourers to work. It has been contended that the petitioner being Secretary of the union he is being harassed.

7. I have considered the arguments. It has also been argued by Sri Sandeep Saxena, learned counsel for the opposite parties that there were five petitioners in the writ petition and all of them were taken on service immediately after the order of this court. That four are still continuing in service and it was the petitioner alone who has been removed. That there is no malafide against him and the opposite parties has not shown any disobedience of the order of this court.

8. After considering the arguments of the learned counsel for the parties I find that the impugned order of this court dated 30.09.1997 was complied with by the opposite parties and the petitioner was taken into service. The petitioner was removed again in October, 1998 on the ground of fresh misconduct. It can not be accepted that once there is order of the court in favour of petitioner for continuing him in service when he was removed earlier, he can not be removed on fresh misconduct. Therefore, there is no question of proceeding in contempt.

The question whether the misconduct has been committed by the petitioner or not can not be decided in this contempt proceedings. The petitioner may file fresh writ petition challenging the removal on the ground of alleged fresh misconduct.

9. I do not find any ground to proceed against the opposite parties for contempt. The petition for contempt is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MAY 23, 2003

BEFORE
THE HON'BLE TARUN CHATTERJEE, CJ
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 12599 of 2003

M/s Harihar Contractors ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Madhur Prasad
Sri Yogeshwar Prasad
Sri V.C. Misra
Sri Hari Om Tiwari

Counsel for the Respondents:
Sri C.S. Singh
Sri Rajiv Dhawan
Sri Prashant Kumar
Sri Akhilesh Kalre
Sri Somesh Khare
S.C.

Auction proceeding- highest bidder not reached the fixed reserved Price- recommendation not accepted by the authorities-highest bid can not be accepted- direction for re auction held proper.

Para- 15

In such circumstances we can not let the State exchequer be put to such a huge loss by permitting the auction to become final, which was apparently done surreptitiously. In our view, if the reserve price fixed by the respondents was not being reached at the auction dated 19.2.2003, and re-auction had already been held on 27.2.2003 and 28.2.2003, and there was no recommendation for acceptance of the highest bid made at the auction held on 19.2.2003, which in any case had not become final because of the order of re-auction, such bid should not have been accepted. In such a situation, the only option left for the State-respondents was to re-advertise the area for re-auction after determining afresh the reserve price for the area.

(Delivered by Hon'ble Vineet Saran, J.)

The moot question in this writ petition is whether it is the sanctity of the auction proceeding which is to be preserved or the revenue of the State which is to be of prime consideration.

1. In an auction held on 19.2.2003 for the grant of mining rights of minor minerals of Tehsil Sarila, District Hamirpur, the respondent no.4, M/s Chaudhary Associates Co. was the highest bidder. Their bid of Rs. 1.51 Crores was forwarded by the District Magistrate to the State Government for its approval. After the State Government accorded its approval, the lease deed for the said area was executed in their favour on 15.3.2003. By means of this writ petition the petitioner M/s Harihar Contractors have challenged the grant of the lease in favour of respondent no.4, and have also prayed that the offer of the petitioner of 2% above the reserved price (fixed by the State at Rs. 2,21,19,485/-) be accepted, and the lease for a period of three years

for excavation of minerals from the area in question be executed in their favour.

2. The facts in brief, relevant for the adjudication of this petition are that on 7.2.2003 a notice was issued by the respondent no.2, District Magistrate, Hamirpur fixing 19.2.2003 as the date for auction for grant of mining rights for 3 years of certain areas, including the area in question i.e. Tehsil Sarila, District Hamirpur. The auction was to be conducted and lease granted in accordance with Rule 27 of the U.P. Minor Mineral (Concession) Rules, 1963 (hereinafter referred to as the Rules). It was also specified in the notice that in case if the auction for the entire area was not completed on the said date, then the remaining areas would be auctioned on 27.2.2003. The reserve price for the area in question was fixed at Rs.2.21 crores and odd. At the auction held on 19.2.2003, the respondent no.4 was the highest bidder. Their bid of Rs. 1.51 crores, though about Rs. 70 lacs below the reserve price, was provisionally accepted by the respondent no.2. As per Rule 27 of the Rules read with the G.O. dated 2.11.2002, the papers were sent to the State Government for its approval/acceptance. The State Government accepted the said bid on 7.3.2003 and thereafter the lease deed for a period of three years was executed in favour of respondent no.4 on 15.3.2003.

3. The main grounds of challenge of the said auction are that the bid of respondent no.4 could not have been accepted as it was much below the reserve price; that the auction was not conducted in a free and fair manner; and that the offer of the petitioner of 2% above the reserve price ought to have been accepted which would be in the interest of the State revenue as well. Malafides on the part of the respondents were also alleged by the petitioner.

4. At the time of filing of the writ petition, the petitioner had made an offer of 2% above the reserve price, which comes to about Rs. 2.25 crores. In order to prove their bonafide, this Court vide order dated 27.3.2003 directed the petitioner to deposit a sum of Rs. 1.12 Crores with the District Magistrate, Hamirpur. The said amount has admittedly been deposited on 31.3.2003 and an affidavit to this effect has also been filed by the petitioner.

5. We have heard Sri Yogeshwar Prasad, learned Senior Counsel assisted by Sri Madhur Prasad on behalf of the petitioner; as well as Sri C.S. Singh, learned Standing Counsel for respondent nos. 1, 2 and 3 and Sri Rajiv Dhawan learned Senior Counsel assisted by Sri Prashant Kumar and Akhilesh Kalra for respondent no.4.

6. Sri Yogeshwar Prasad, learned Senior Counsel, has submitted that the petitioner, through its various partners, participated in the auction proceedings on 19.2.2003 but their offer was not recorded and the State-respondents, ignoring the bid of the petitioner, accepted the bid of Respondent no.4 which was much below the reserve price. It was thus contended that by having done so, substantial loss had been caused to the State exchequer. He further submitted that the petitioner had sent its offer by Fax as well as by registered post to the State Government on the very next day i.e. 20.2.2003 stating that at the time of auction, the petitioner was not aware of the reserve price and

was now offering an amount 2% above the reserve price for the area in question. A copy of the said communication dated 20.2.2003 has been filed as Annexure-2 to the writ petition. Sri Prasad also submitted that the auction was not conducted in a free and fair manner. That the malafides of the respondents were clear as the bid of Respondent no.4 was accepted for an amount substantially below the reserve price and also that the entire acceptance and the execution of the lease deed were clearly rushed through.

7. Sri C.S. Singh, learned Standing Counsel, has in reply submitted that even prior to 19.2.2003 the auction for the said area had been held on several dates but no bid equaling the reserve price was made and ultimately in the absence of any higher bid coming forth, the highest bid of Rs. 1.51 crores made by respondent no.4 was accepted. It was further submitted that even after 19.2.2003, the auction for the said area was again held on 27.2.2003 in which no bidder participated. Thereafter the area was re-auctioned on 28.2.2003 and again none came forward with any bids. Thus, the District Magistrate was left with no option but to forward the papers of the highest bid of respondent no.4 made in auction dated 19.2.2003 to the State Government for its approval.

8. We had called for the original record of the State Government relating to the auction proceedings which was placed before us and we have examined the same. However, we may state that for reasons best known to the State-respondents, the papers relating to the grant of the final approval by the State Government were not placed for our consideration.

9. Sri Rajiv Dhawan, learned Senior Counsel appearing for respondent No. 4 M/s Chaudhary Associates Co. submitted that the filing of the petition was motivated and intentional as admittedly the petitioner-firm could not have participated in the auction held on 19.2.2003 as the firm itself was not in existence on the said date. Undisputedly the firm was registered only on 25.02.2003. He also submitted that the petitioner had not completed the requisite formality for participating in the auction and that the partners of the firm participated in the auction proceedings in their individual capacity and had also made bid against each other. That the filing of the writ petition was only an after thought and no bid had been made on behalf of the firm. He submitted that after the auction was held on 19.2.2003, the petitioner firm merely send their offer on 20.2.2003, which may have been for 2% above the reserve price, but the State Government was not under any obligation to accept the same. On a request made by Sri Dhawan, we had summoned the original record of the State Government pertaining to the auction proceedings. Sri Dhawan further contended that despite the auction having been held on several occasions, since there was no higher bid than the one made by the respondent no. 4, the State Government was justified in accepting their bid, as otherwise daily loss was being caused to the State exchequer as they were losing royalty on the minerals everyday. He also submitted that it would be inequitable to interfere with or set aside a contract already concluded in favour of his client, as they had deposited over Rs. 75 lakhs as half of the bid amount initially, and besides that they had invested about Rs. 50 lakhs on stamp duty and over Rs. 40 lakhs on structures, etc.

constructed for the purpose of excavating the minerals. Learned counsel also submitted that malafide should be specifically pleaded and in the absence of the same, the argument based on malafide could not be looked into.

10. Having heard the learned counsel for the parties at length as well as on perusal of the record of the case, and also the record of the State Government relating to the said auction as placed before us by the learned Standing Counsel, we are of the view that although the petitioner firm may not have been able to establish their right for the contract being awarded in their favour, but once from the record of the State Government and otherwise also, it has been established before us that the auction proceedings had neither been conducted fairly nor strictly in compliance with the Rules, the acceptance of the bid of respondent No. 4, which was much below the reserve price fixed by the State Government, as well as the finalisation of the contract in favour of respondent No. 4, are liable to be set aside. The Courts cannot be expected to shut their eyes to the irregularities and illegalities of the respondents, even though the same may not have been specifically pleaded but are otherwise clear from the perusal of the original record of the auction proceedings.

11. From the record it is clear that the auction was postponed on several occasions earlier. After it was held on 19.2.2003, the office of the District Magistrate, Hamirpur in its memorandum dated 20.2.2003 clearly stated that in the said auction held on 19.2.2003, the bid offered was less than the minimum official bid for Tehsil Sarila. As a result, the auction was to take place again on the already determined date i.e. 27.2.2003 and if the same could not be held on the said date, then it was to be held on 28.2.2003. This notice/memorandum makes it clear that the bids offered on 19.2.2003 had not become final. It is not clear that in what circumstances, when the bid at the auction dated 19.2.2003 had neither been accepted nor had become final, the District Magistrate accepted the deposit of 25% of the bid towards security amount plus another sum of 25% towards first installment of royalty from respondent no. 4 under Rule 27 (e) (i) of the Rules. However, thereafter on 27.2.2003 and 28.2.2003 no bidder came forward for the area in question. Then on 1.3.2003 the District Magistrate forwarded the minutes/report of the Auction Committee relating to the auctions dated 19.2.2003, 27.2.2003 and 28.2.2003 to the State Government without making its recommendation for acceptance of the said bids as was required under Rule 27 read with the Government Order dated 2.11.2002, which was further clarified by Government Order dated 28.11.2002. Para 3 of the latter Government Order required that just after receiving the bids in the auction proceedings, the details thereof, alongwith the recommendations, were to be forwarded to the State Government for its approval. A perusal of the communication dated 1st March, 2003 shows that on the basis of the recommendation of the Auction Committee, the final bid at the auction held on 19.2.2003 for Tehsil Sarila was not accepted, as the same was lower than the minimum prescribed Government bid. However, still without there being any recommendation for its acceptance, the said bid of the respondent No. 4 was accepted by the State Government on

7.3.2003, in pursuance of which the lease deed was executed in their favour on 15.3.2003. The papers relating to the acceptance of the bid by the State Government have not been placed before us. It is not known to us that under what circumstances the bid of respondent No.4, which was substantially lower than the reserve price fixed by the State Government, was accepted by them, in spite of the fact that the offer made by the petitioner vide communication dated 20.2.2003 was on record of the file of the State Government, on such offer an endorsement had been made on 25.2.2003 by an officer of the State Government that an enquiry be conducted through a Committee. The outcome of such enquiry which was directed to be conducted on the offer made by the petitioner, is not on the record of the file of the State Government placed before us, and the learned Standing Counsel has also not been able to apprise us of such decision. It has not been explained by the learned Standing Counsel as to why the bid of respondent No. 4 had been accepted before the conclusion of the said enquiry, specially when the bid of respondent No. 4 was substantially lower then the reserve price, and also when a positive offer of 2% above the reserve price, which comes to about Rs. 2.25 crores, had been made, which would be about 50% over the bid amount of respondent No. 4, which was only for Rs. 1.51 crores. Why the same was not considered by the State Government before the finalisation of the auction, or why they did not await the outcome of the enquiry as had been directed on such offer, are questions which raise serious doubts on the fairness and the intention of the State Government in hurriedly finalising the contract.

12. As has already been noted above, the petitioner-firm has already deposited an amount of Rs. 1.12 crore to show their bonafide and seriousness of the offer made by them, which was for 2% above the reserve price of about Rs. 2.21 crores and amounts to about Rs. 2.25 crores. During the course of hearing, the learned counsel for the petitioner also stated that the petitioner would be prepared to deposit any further amount as may be directed by this Court.

13. At the time of arguments Sri Yogeshwar Prasad had also stated that in case if the area is put to re-auction, the offer of Rs. 2.25 crore of the petitioner may be taken as its reserve price for which the amount of Rs. 1.12 crore already deposited by the petitioner may be kept as security, and in case if the petitioner does not make a bid of at least Rs. 2.25 crores, the security amount deposited under orders of this Court may be forfeited. At this stage, Sri Rajiv Dhawan appearing for respondent No. 4, also made a conditional offer, that in case if the present dispute could be put to rest and the parties, which include the petitioner as well as State Government, would not raise any further dispute, his client was also prepared to enhance the amount of his bid to Rs. 2.25 crores.

14. Be that as it may, on considering the totality of the circumstances as well as the fact that both the contesting parties i.e. the petitioner and respondent No. 4 are now prepared to pay a minimum amount of Rs. 2.25 crores for getting the mining rights in their favour, and also considering the fact that the records of the State Government pertaining to the auction proceedings placed before us clearly disclose that the auction dated 19.2.2003

had actually not become final, and the State Government did re-auction the said area again on 27.2.2003 as well as on 28.2.2003, which virtually amounted to washing off the earlier auction, we cannot accept the submission of the respondents that the auction proceedings had been conducted in a fair manner so as to get the best price. In fact, on the contrary, the record speaks otherwise.

15. Although the Courts normally do not interfere in matters where a contract has been concluded, and also even though the petitioner may not have made out a case entitling them to the relief of grant of contract in their favour, but still in a matter like this, the conscience of the Court is pricked, as we find from the record that the finalisation of the contract was done in a hurry, and at a price much below than the one which could have been procured by the State Government or that which had been fixed by them as its reserve price. The minimum amount which has now actually been offered by both the contesting parties is nearly 50% more than the amount on which the contract has been awarded. Learned counsel for the petitioner made a statement that his client was prepared to raise the amount further in case if this Court permitted the bidding between the contesting parties at the time of hearing itself. We, however, are not inclined to permit bidding in Court as there could be other parties also interested in participating, who would not have notice of such process having been undertaken by this Court. However, the loss to the State exchequer if calculated on the minimum offer now made by the contesting parties, would come to about Rs. 75 lakhs per annum. Since the contract is for a period of three years, the cumulative loss comes to about Rs. 2.25 crores. We have no reason to believe that in case if the area in question is put to re-auction, and if the same is held in a free and fair manner, the bid amount could go well over Rs. 2.25 crores per annum. Thus it is obvious from the facts of the case and the record, that the true potential of the mining price of the area has not been exploited by the State-respondents, thereby causing immense loss to the State exchequer. Even though the sanctity and finality of the contract is normally required to be preserved but since in the present case, the difference between the accepted bid of Rs. 1.51 crores and the reserve price fixed by the State Government of over Rs. 2.21 crores is reasonably high. Further the offer of about Rs.2.25 crores made by the petitioner on 20.2.2003 is even more than the reserve price, and the respondent no. 4 as also agreed to enhance the amount of his bid matching the said offer. In such circumstances we can not let the State exchequer be put to such a huge loss by permitting the auction to become final, which was apparently done surreptitiously. In our view, if the reserve price fixed by the respondents was not being reached at the auction dated 19.2.2003, and re-auction had already been held on 27.2.2003 and 28.2.2003, and there was no recommendation for acceptance of the highest bid made at the auction held on 19.2.2003, which in any case had not become final because of the order of re-auction, such bid should not have been accepted. In such a situation, the only option left for the State-respondents was to re-advertise the area for re-auction after determining afresh the reserve price for the area.

16. In view of the aforesaid positive conclusion that we have arrived at on the basis of the examination of the original record relating to the auction proceedings, we do not consider it necessary to go into the other questions raised by respondent No. 4 relating to the petitioner firm not being in existence on the date of auction or that the partners of the petitioner firm were bidding against each other in the auctions held for the other blocks. We are also not inclined to consider the various case laws cited by the respondents in support of their contention that judicial review in cases of tender or auction is very limited, since there is no quarrel with the said proposition. The same however does not mean that the Court should not interfere even where it is found that the State Government has not acted fairly. The Apex Court in the case of **Monarch Infrastructure (P) Ltd. V. Commissioner, Ulhasnagar Municipal Corporation and others** (2000) 5 S.C.C. 287 has laid down the principles on which the Courts may interfere and one of such principle is when the Government acts arbitrarily or contrary to public interest. In the facts of the present case we have no doubt that the State Government has finalized the auction in an arbitrary manner which is indefensibly unreasonable and is also against the public interest, as a huge loss to the State exchequer has been caused by such action of the State Government.

17. In the aforesaid circumstances and in the light of the discussion made above, we direct that the auction dated 19.2.2003, on the basis of which the contract had been awarded in favour of respondent No. 4, be set aside and the mining rights of the area i.e. Tehsil Sarila, District Hamirpur be put to re-auction, in accordance with the Rules and the Government Orders, on the condition that the petitioner deposits a further amount of Rs. 1.13 crores by 31st May, 2003, besides the sum of Rs. 1.12 crores which has already been deposited by them on 31.3.2002 as directed by this Court vide order dated 27.3.2003. The said re-auction should take place within a period of six weeks from the date of deposit of the further amount of Rs. 1.13 crores by the petitioner i.e. when the total sum deposited by the petitioner comes to Rs. 2.25 crores. The reserve price for the said re-auction shall be fixed at Rs. 2.25 crores which is the minimum amount offered by both the contesting parties and also the amount which the petitioner would thus have deposited as security. It is made clear that in case if the petitioner does not deposit the further sum of Rs. 1.13 crores within the time granted, which would mean that they do not wish to participate in the re-auction, the sum of Rs. 1.12 crores already deposited by them under orders of this Court shall stand forfeited.

18. It is further provided that under the contract dated 15.3.2003, the respondent no.4 shall be permitted to excavate the minerals from the area in question only upto 31st May, 2003. Out of the amount deposited by them under the contract, the State Government shall charge only for the proportionate period during which they have carried on the excavation, and refund the balance amount to the said respondent No. 4. In case if respondent No. 4 is inclined to participate in the re-auction proceedings, the amount to which they may be entitled to refund, may be kept as security on their behalf till the finalisation of the re-auction. It is also made clear that in case if the bid of either the petitioner or

respondent No. 4 is not accepted in the re-auction, they shall be refunded their respective security amounts forthwith.

19. In the result, subject to the directions issued above, the writ petition is partly allowed, without there being any order as to costs. The auction dated 19.2.2003, in pursuance of which the contract has been granted in favour of respondent No. 4, is set aside. The other prayer for the acceptance of the offer of the petitioner at 2% above the reserved price is however refused.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2003

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE D.P. GUPTA, J.

Civil Misc. Writ Petition No. 27686 of 2003

Raj Kumar and others ...Petitioners
Versus
Public Service Commission Uttar Pradesh, Allahabad ...Respondent

Counsel for the Petitioner:
Sri R.S. Chaudhary

Counsel for the Respondent:
Sri Neeraj Tiwari
S.C.

Constitution of India Article 226-Service Law Selection-eligibility-criterion for-settled law-candidate must possess requisite qualifications/illegibility on the last date of submission of the application.

1993 (2) SCC 429. Dr. M.V. Nair Vs. U.O.I and 1995 (Suppl) 4 SCC 706 Harpal Kaur Chahal Vs. Director Punjab Instructions, relied upon

Case laws discussed:

AIR 1983 SC 852
AIR 1983 SC 1143
AIR 1988 SC 1143
AIR 1988 SC 2068
AIR 1990 SC 405
1994 (2) SCC 723
1994 (6) SCC 151
1997 (10) SCC 419
1997 (4) SCC 18
1997 SC 1803
AIR 1999 SC 2093

Held- Para 15

In view of the above, as it is settled legal proposition that the candidate must possess requisite qualification/eligibility on the last date of submission of the Application Form, we see no ground to interfere. The petition is, accordingly, dismissed.

(Delivered by Hon'ble Dr. B.S.Chauhan, J.)

1. This writ petition has been filed seeking direction to the respondent to consider the candidature of the petitioners in pursuance of the Advertisement No.1/2003-2004, issued by the U.P. Public Service Commission.

2. Facts and circumstances giving rise to this case are that on 21/27th June, 2003 Public Service Commission advertised the vacancies of Medical Officers, prescribing the eligibility that the person applying must have the internship completed by the last date of submitting the Application Form, for what, petitioners had not completed their internship till the last date of submitting the Application Forms. Hence this petition.

3. Learned counsel for the petitioner has submitted that as there has been irregularities in holding the examination and completing the internship by the

authorities concerned, and it was beyond control of the petitioners, they should not suffer for no fault of theirs. Therefore, this Court should issue direction to the respondent to consider their candidatures.

4. Learned Standing Counsel has opposed this submission vehemently contending that prescribing the eligibility for a particular post is a legislative question and the Court does not have power to issue direction for contravention of the said policy, and thus, the Court cannot grant any relief to the petitioners.

5. In Y.V. Rangaiah & ors. Vs. J. Sreenivasa Rao & ors., AIR 1983 SC 852; A.A. Calton Vs. Director of Education & Anr., AIR 1983 SC 1143; P. Gyaneshwar Rao & ors. Vs. State of Andhra Pradesh & ors., AIR 1988 SC 2068; and P. Mahendran & ors. Vs. State of Karnataka & ors., AIR 1990 SC 405, the Hon'ble Supreme Court has taken the view that candidates have to be assessed for selection as per the eligibility criteria existing on the date of advertisement of vacancies for the reason that selection process starts with advertisement and all those persons who apply in response to the same, would be eligible to be considered.

6. All the judgments, referred to above, have been given by the two Hon'ble Judges' Bench except P. Mahendran (supra), which was given by the Bench of three Hon'ble Judges.

7. The Three Judges Bench of the Hon'ble Supreme Court, in Dr. M.V. Nair Vs. Union of India & ors., (1993) 2 SCC 429, without taking note of P. Mahendran (supra), held as under:-

"It is well settled that suitability and eligibility have to be considered with reference to the last date for receiving the applications, unless, of course, the notification calling for applications itself specifies such a date."

8. In U.P. Public Service Commission Vs. Alpana, (1994) 2 SCC 723, the Hon'ble Supreme Court, after considering a large number of its earlier judgments, held that eligibility conditions should be examined as on last date for receipt of applications by the Commission though that was a case where result of a candidate was declared subsequent to the last date of submission of the applications. The Hon'ble Supreme Court held that as the result does not relate back to the date of examination and eligibility of the candidate is to be considered on the last date of submission of the applications, a candidate, whose result has not been declared upto the last date of submission of applications, would not be eligible.

9. In State of M.P. & ors Vs. Raghuveer Singh Yadav & ors., (1994) 6 SCC 151, the Apex Court examined a case where during process of selection, the Rules were amended but subsequently the Commission/ State abandoned the selection process and advertised vacancies afresh to be filled up in accordance with the amendment. The Hon'ble Supreme Court upheld the action of the State on the ground that the persons, who had applied earlier, had not acquired any vested right, therefore, the State's action was justified.

10. In Harpal Kaur Chahal Vs. Director, Punjab Instructions, 1995 (Suppl.) 4 SCC 706, the Hon'ble Supreme Court held:-

"It is to be seen that when the recruitment is sought to be made, the last date has been fixed for receipt of the applications, such of those candidates, who possessed of all the qualifications as on that date, alone are eligible to apply for and to be considered for recruitment according to Rules."

11. In State of Rajasthan Vs. R. Dayal & ors., (1997) 10 SCC 419, the Hon'ble Supreme Court, while considering the case for promotion, held that the eligibility for promotion must be as in the year when the vacancies arose, but that was not a case of direct recruitment.

12. In Ashok Kumar Sharma Vs. Chandra Shekhar & ors., (1997) 4 SCC 18, the Hon'ble Supreme Court held that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be adjudged with reference to that date and that date alone, is a well established proposition of law.

13. In Dr. Ramulu & Anr. Vs. Dr. S. Suryaprakash Rao & ors., AIR 1997 SC 1803, the Hon'ble Apex Court considered a large number of its earlier judgments and held that if the Rules have been amended, person has a right to be considered as per the amended Rules unless his existing rights prior to the amendment have specifically been saved and for the reason that he cannot claim to have acquired any vested right for being considered in accordance with the Rules existing prior to the amendment.

14. In Utkal University etc. Vs. Dr. Nrusingha Charan Sarangi & ors., AIR 1999 SC 943; and Gopal Krushna Rath Vs. M.A.A. Baig, AIR 1999 SC 2093, the Hon'ble Supreme Court again reiterated that the eligibility is to be assessed as per the Rules existing on the last date of submission of the applications.

15. In view of the above, as it is settled legal proposition that the candidate must possess requisite qualification/ eligibility on the last date of submission of the Application Form, we see no ground to interfere. The petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2003

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 22253 of 1987

Shiv Shanker Pal ...Petitioner
Versus
Gorakhpur Mandal Vikas Nigam Ltd. ...Respondent

Counsel for the Petitioner:
Sri Dr. R.G. Padia

Counsel for the Respondent:
S.C.

Constitution of India Article 226-Govt. Com. and controlled by the Govt.-within the meaning of state-writ petition held maintainable

Held- Para 6

The first argument of the learned counsel for the petitioner appears to be correct. A bare perusal of the counter affidavit filed on behalf of the respondents shows that it is a Government company and fully controlled by the State Government

which nominates the Board of Director etc. and is also amenable to State control, therefore, there is no hesitation in holding that the respondent is a State within the meaning of Article 12.

Service promotion order issued by such person having who did not have no power or authority-totally illegal & a void order-do not confer any right.

Held- Para 9

The petitioner's promotion order is Annexure-2 to the writ petition and which is authored by Sri P.L. Srivastava. Counsel for the petitioner urged that the promotion order has been signed by Sri P.L. Srivastava as Managing Director. Nomenclature is not determinative of the power legally exercisable by an individual. As it has already been noted above, Sri P.L. Srivastava was neither authorized by the Board of Directors to make appointment nor was he ever appointed as Managing Director by the Government. So merely signing the order as General Manager/ Managing Director would not validate the promotion order. Even this promotion order is purely temporary and does not confer any right to the petitioner.

(Delivered by Hon'ble D.P. Singh, J.)

1. Learned counsel for the petitioner is present while none has appeared for the contesting respondent even in the revised list.

2. From the record, it is apparent that earlier Sri G.P. Mathur, as he then was (now Hon'ble Mr. Justice G.P. Mathur) was appearing as counsel for the respondents and after his elevation notice was issued in the year 1993 to the respondents for engaging another counsel but none has filed his appearance, though notice is sufficient in view of the office report dated 1.7.2003. I see no reason to adjourn the case on this score, especially so, when pleadings have been exchanged between the parties.

3. I have heard learned counsel for the petitioner and the learned Standing Counsel.

This writ petition is directed against an order dated 24.11.1987 by which the temporary promotion of the petitioner has been recalled and he has been reverted to his original post. The respondent is a company incorporated under the Indian Companies Act having its own memorandum and Service Rules as "Gorakhpur Mandal Vikas Nigam Limited, Gorakhpur General Service Rules" (hereinafter referred to as the Service Rules). The Company is engaged in promoting and establishing industries and enterprises for manufacturing goods and other materials having its own Board of Directors. It is fully controlled by the State of U.P. and has a Managing Director, who is appointed by the State Government.

4. The petitioner was working as Assistant Grade-I in the scale of Rs.490-760/- at the Head Office when he was asked to temporarily discharge the functions of a Manager vide an order dated 15.6.1985. The said order makes it clear that he would remain in the pay scale of Assistant Grate-I and would be liable for reversion to his original post without notice. Again vide order dated 1.3.1986 he was granted temporary promotion and also scale of Manager with the condition that he can be reverted to his original post without notice. By the impugned order he has been reverted to his original post of Assistant Grade-I.

5. Learned counsel for the petitioner has raised two submissions before me. Firstly, that the respondent company being wholly controlled by the State Government is a State within the meaning of Article 12 and secondly, that the reversion being made without any enquiry especially when charges were leveled against him, it is against the principles of natural justice and thus the impugned order be set aside.

6. The first argument of the learned counsel for the petitioner appears to be correct. A bare perusal of the counter affidavit filed on behalf of the respondents shows that it is a Government company and fully controlled by the State Government which nominates the Board of Director etc. and is also amenable to State control, therefore, there is no hesitation in holding that the respondent is a State within the meaning of Article 12.

7. A perusal of the counter affidavit shows that the Managing Director is appointed by the Governor and Board of Directors is appointed by the State Government. One Sri P.L. Srivastava who was working a Block Development Officer was appointed as Manager, Head Office, by the Commissioner of the Division, who is the ex-officio Chairman of the Nigam. The post of Managing Director fell vacant in 1985 and the Board vide its resolution dated 12.4.1985 authorised said Sri P.L. Srivastava to operate the accounts of the Nigam and to furnish Government guarantee etc. A copy of the resolution is annexed with the counter-affidavit. The power of making appointment is governed by the service Rules. Under Rule 16, the Board of Directors is the competent authority to nominate the appointing authority for various categories of employees, but till the authority is created, the Managing Director was made the appointing authority. Classification of posts has also been given in the service rules and the post of Manager is classified as group-A post. Under Rule 17 all groups 'A' posts are selection posts and the appointing authority is the Board or the Managing Director as already observed hereinabove. From the rules and the counter affidavit, it is apparent that (a) the appointing authority, unless resolved otherwise by the Board, is the Managing Director and (b) the post of Manager is a selection post. In paragraph 13 of the counter affidavit, it has been mentioned that the petitioner was placed at serial no.5 in the seniority list of Assistant Grade-I in the respondent Nigam. This specific averment has not been denied in the rejoinder affidavit. Further, in paragraph 9 it has been averred that Sri P.L. Srivastava was never given the power or authority for making appointment by the Board except the power as given by the Board of Directors in its resolution dated 12th April, 1985. Though, there is bald denial, no resolution has been annexed with the rejoinder affidavit to show that the Board of Directors had authorized Sri P.L. Srivastava to function as the Managing Director.

8. From the aforesaid, it would be evident that Sri P.L. Srivastava had limited power as described in the resolution dated 12.4.1985 and this power does not include the power of Managing Director or the power of making any appointment. With this background, it has to be examined as to whether the petitioner's reversion to his original post was valid.

9. The petitioner's promotion order is Annexure-2 to the writ petition and which is authored by Sri P.L. Srivastava. Counsel for the petitioner urged that the promotion order has been signed by Sri P.L. Srivastava as Managing Director. Nomenclature is not determinative of the power legally exercisable by an individual. As it has already been noted above, Sri P.L. Srivastava was neither authorized by the Board of Directors to make appointment nor was he ever appointed as Managing Director by the Government. So merely signing the order as General Manager/ Managing Director would not validate the promotion order. Even this promotion order is purely temporary and does not confer any right to the petitioner.

10. Counsel for the petitioner went on to urge that prior to the impugned order, he was issued a show cause notice listing several alleged charges against him. The show cause notice is annexed as Annexure-3 to the writ petition. The stand taken in the counter-affidavit is that right from the date of his alleged promotion to the post of Manager, the petitioner had been working in a manner detrimental to the interest of the Nigam. In paragraph 14 it has been averred that several warning letters were issued to the petitioner, the warning letter dated 24.1.1986, 10.10.1986, 10.12.1986, 19.2.1987 and 27.10.1987, are annexed with the counter-affidavit. A perusal of the same would show that he had always been warned to improve his functioning but to no effect. It appears that the letter dated 21.11.1987 was also in continuation of the earlier warning letters and asking for his explanation. Therefore, the contention of the petitioner that the order is stigmatic has no force. Even otherwise the very promotion of the petitioner was totally illegal and against the rules and fell into the category of a void order. Such an order that too a temporary promotion order, will not clothe the petitioner with any defensible right. An explanation was called from the petitioner in this case where the petitioner has no right to the post, no full fledged enquiry was necessary, especially in the background of the facts noted above. Thus, the second argument of the petitioner has no force.

11. In view of the discussions above and after perusal of the record, I do not find that it is a fit case for interference under Article 226 of the Constitution of India. The writ petition is hereby dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2003

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE D.P. GUPTA, J.

Civil Misc. Writ Petition No.28394 of 2003

Union of India and others ...Petitioners
Versus
G.P. Yadav and another ...Respondents

Counsel for the Petitioners:
Sri B.N. Singh, S.S.C.

Counsel for the Respondents:
Sri S.N. Gupta
Sri Rakesh Verma
Sri J.P. Singh, Caveator
Sri B.N. Singh, S.C.C.

Constitution of India Article 226- Factual controversy raised questioning the order passed by tribunal-can not be gon by High Court- only remedy to file review application before the same tribunal-

Held- Para 12

Thus in view of the aforesaid settled legal proposition, emerges that the writ court cannot conduct the enquiry as to what issues had been agitated before the Tribunal and if a party is aggrieved that some of the issues agitated by it have not been dealt by the Tribunal, the only remedy available to it is to file an application of Review before the Tribunal as those issues cannot be dealt with by the writ Court.

Case law discussed:

AIR 1982 SC 1249; AIR 1917 PC 30; AIR 1926 PC 36; AIR 1921 Cal. 584; AIR 1924 Cal. 257; 1995 (6) SCC 45; 1997 (4) SCC 662

(Delivered by Hon'ble Dr. B.S.Chauhan, J.)

1. This writ petition has been filed against the impugned judgment and order dated 25.3.2003, by which the learned Central Administrative Tribunal has allowed the application of the respondent no. 1 and granted him the relief of reinstatement with all back wages along with confirmation of temporary status w.e.f. 1.9.1993.

2. Facts and circumstances giving rise to this case are that respondent no. 1 had been engaged as part-time Farras vide order dated 27.3.1989. He had been granted enhancement from time to time. He made an application for giving him job on daily wages which was accepted and he was allowed to work on full time. Acceptance of his request was proved vide order dated 23.3.1991 and he was being paid Rs.27.92 per day. Subsequently Government of India framed the Scheme on 10.9.1993 for granting temporary status to daily wage employees for their regularization. As the case of the said respondent workman was not considered, he filed objection on 17.5.1993 making it clear that he had initially been engaged as a part-time employee. His case was not considered. Thus being aggrieved, he filed O.A. No. 1297 of 1994 which was disposed of by the learned Tribunal vide order dated 11.4.2002 issuing direction to the authorities concerned to consider the case of the petitioner in terms of the Scheme dated 10.9.1993. In pursuance of the said order his claim was considered and rejected vide order dated 27.7.2002. Being aggrieved, he again approached the learned Tribunal by filing O.A. No. 905 of 2002 which has been allowed by the impugned judgment and order. Hence this petition.

3. A large number of issues had been raised by Shri B.N. Singh and very heavy reliance had been placed upon the judgment of the Hon'ble Supreme Court issuing certain directions regarding the regularization under the Scheme of the Government. However all the issues which have been agitated before this Court by Shri B.N. Singh do not find reference place in the impugned judgment and order. Thus, he was confronted as to whether the factual issues could be raised first time in the writ petition without laying down in a factual foundation before the learned Tribunal. In reply it has been submitted by him that all the issues including the application of the Scheme etc. and the judgment of the Hon'ble Supreme Court had specifically been agitated before the learned Tribunal and the Tribunal has erred in not taking into consideration and deciding the same.

4. Shri J.P. Singh, learned counsel appearing for the caveator-respondent workman has disputed the factual position submitting that issue raised before this

Court had not been agitated while making submission before the learned Tribunal and he contended that this Court cannot go into those factual matrix and decide the case afresh. If petitioner is aggrieved by any means, he can maintain a review application before the learned Tribunal.

5. We have considered the rival submissions made by the learned counsel for the parties on this aspect and perused the record.

6. In State of Maharashtra Vs. Ramdas Shrinivas Nayk, AIR 1982 SC 1249 the Hon'ble Supreme Court while dealing with a similar case, held as under:-

"We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena---if a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party--- to call the attention of the very Judges---"

7. While deciding the said case the Hon'ble Apex Court placed reliance upon the judgment of the Privy Council in Madhusudan Vs. Chandrabati, AIR 1917 PC 30; and Somasundaran Vs. Subramanian, AIR 1926 PC 136. In the latter case, it has been observed as under:-

"*Judgment cannot be treated as mere counters in the game of litigation."*

8. A similar view had been taken by the Calcutta High Court in Sarat Chandra Vs. Bibhabati, AIR 1921 Cal 584, observing that the record of the Judge is conclusive and it is not permissible either for the lawyer or litigant to contradict it except by moving application before the same Judge.

9. In King Emperor Vs. Barendra Kumar Ghose, AIR 1924 Cal 257, the Full Bench of Calcutta High Court reiterated the same view observing that the judgment of the Court "is not to be criticized or circumvented; much less has to be exposed to any animad version."

10. In Union of India & ors. Vs. N.V. Phaneendran, 1995 (6) SCC 45, the Apex Court has held that if a party has taken various grounds before the court below and not made submissions on all of that, it is not even desirable to remit the matter to the said Court. The Court held that "no doubt, several contentions had been raised on merit, the Tribunal dealt with only one issue. The prayer of the party that they may be given an opportunity to agitate those issues/questions by remitting the matter to the Tribunal, cannot be accepted as the party itself had chosen to agitate a limited number of issues and there can be no justification to remit the matter."

11. The same view has been taken by the Supreme Court in Kanwar Singh Vs. State of Haryana & ors., (1997) 4 SCC 662.

12. Thus in view of the aforesaid settled legal proposition, emerges that the writ court cannot conduct the enquiry as to what issues had been agitated before the Tribunal and if a party is aggrieved that some of the issues agitated by it have not been dealt by the Tribunal, the only

remedy available to it is to file an application of Review before the Tribunal as those issues cannot be dealt with by the writ Court.

As we are not inclined to entertain the new questions of facts, petition stands dismissed with liberty to the petitioner to approach the learned Tribunal, on the said grounds if so advised, by filing a Review Application.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.7.2003

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

Civil Misc. Writ Petition No. 48309 of 2000

Sri Omkar Nath Kushwaha and others ...Petitioners

Versus

Central Administrative Tribunal Allahabad and others ...Respondents

Counsel for the Petitioners:
Sri Sekhar Kumar Yadav

Counsel for the Respondents:
Sri S.N. Srivastava, S.S.C.
Sri S.C. Srivastava
Sri Subodh Kumar

Constitution of India Service Law parity in pay scales-Markers claiming salary that of Painters and decorators-by pay commission and Departmental Sub-Committee-court not required to evaluate job, nature of duty-only to ensured that employees doing similar and identical duty-principle of equal pay for equal work-to be followed.

Held- Para 8

In view of this, the Court is not required to evaluate job, nature of duty performed by Markers vis-à-vis Painters and Decorators. The Court anxious only to ensure that an employer, (covered under Article 12 of the Constitution of India) is treating its employees, who are discharging similar and identical duty, without discrimination on the principle of 'Equal Pay for Equal Work.'

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

1. Heard learned counsels appearing on both sides and perused the record.

Petitioners, namely, Sarvshri Omkar Nath Kushwaha, D.C. Banerjee, Mahabir, Prithwi Pal, Lallan Prasad, Talib Raza, Baram Din, G.R. Singh, S.N. Nishad, Mewa Lal, Ram Gopal, Nankoo Ram, Moti Lal and K.N. Gupta, working as 'Markers' and being aggrieved by the disparity in the pay-scale available to them vis-à-vis the pay-scale which was made applicable to 'Painters' and Decorators' trade have approached this Court by means of the present writ petition under Article 226, Constitution of India seeking to challenge the judgment and order dated 25-7-2000/Annexure-1 to the petition passed by Central Administrative Tribunal rejecting O.A. No. 1275 of 1999.

2. It is not in dispute that three Tradesmen- 'Markers', 'Painters' and 'Decorators' were getting one and the same pay-scale till 1981. After 1981, 'Painters' and 'Decorators' were treated in the skilled category and given pay-scale of Rs. 260-400, while 'Markers' remained in the pay-scale of Rs.210-290.

Later 'Markers' were made entitled to pay-scale of Rs. 800-1150, Painters and

Decorators were placed in pay-scale of Rs. 950-1500.

3. Petitioners, apart from other contentions, place reliance upon the report of Sub-Committee formed at the instance of the staff side members of the J.C.M. of Army Head Quarters which urged that Markers be treated as skilled trade and should be give skilled grade.

4. The Sub-Committee under the Chairmanship of Brig. S.A. Zamir along with other members of the Committee undertook an exercise to find out the details of the nature of job performed by Markers, Painters and Decorators and came to the conclusion that identical duties and job was performed by all the three and all the three placed in one and same pay-scale. Apart from the recommendation of the aforesaid Sub-Committee at departmental level, Fifth Pay-Commission specifically considered the above subject of demand of parity in pay-scale and merger of 'Markers', 'Painters' and 'Decorators' in one Grade.

5. Recommendation made by Fifth Pay-Commission has been quoted in the impugned judgment by the Tribunal and the same reads:

"*It has been intimated that there is a long standing demand for parity of pay scales and merger of Markers with that of Painters and Decorators in A.O.C. We have considered the issue and find that in terms of essential qualifications for direct recruitment, the exist markers are at Par with semi skilled painters and Decorators (Mate). Keeping in view the similarity in job content, we recommend merger of Marker with the semi skilled Painters and Decorators (Mate) in the pay scale of Rs. 800-1150."*

6. The Tribunal, however, we fail to appreciate, dismissed the Original Application with observation that job evaluation and fitment in a particular pay-scale on the basis of nature of work has to be performed by an Expert Committee as it requires certain amount of expertise.

7. We are at loss to make out the logic on the basis of which the Tribunal has rejected the application by making aforesaid observation. Pay-Commission and Departmental Sub-Committee have already considered the issue and made recommendations. In fact, the conclusion drawn by the Tribunal in para-4 of its impugned judgment runs contrary to the contents of judgment contained in para-3 of the said judgment itself.

8. In view of this, the Court is not required to evaluate job, nature of duty performed by Markers vis-à-vis Painters and Decorators. The Court anxious only to ensure that an employer, (covered under Article 12 of the Constitution of India) is treating its employees, who are discharging similar and identical duty, without discrimination on the principle of 'Equal Pay for Equal Work.'

9. In view of the above, we quash the impugned judgment and order dated 25.7.2000 passed by the Tribunal/Annexure-1 to the petition and hereby issue a writ of mandamus commanding the respondents to fix 'Markers' in the pay-scale which is being made admissible to 'Painters' and 'Decorators' with effect from the date of filing of the writ petition and pay their salary accordingly. If the petitioners have

already retired, they will be paid their arrears with 10% simple interest.

10. The petition stands allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.7.2003

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 29212 of 2003

Hina Siksha Niketan Shri Syed Asghar Hussain Uchtar Madhyamic Vidyalaya, Kura Muridan, Sirathu, Kaushambi
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri V.A. Ansari

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

U.P. Zamindari Abolition & Land Reform Act, 1955, Sec. 198 (1)- allotment of land for housing site- petitioner an educational institution-not covered by any of the categories mentioned in Section 198 (1)- whether entitled for allotment-'no' cancellation of lease-held- proper.

Case law discussed:
1996 RD 190
2002 (93) RD 30
Held - Para 6

Section 198 (1) enumerates various categories of persons who are entitled to be admitted to land. The categories of persons who are entitled to be admitted to land. The categories which have been mention are with specific objects. The allotment of land is not open to any person. The scheme of allotment as provided under Section 195, 197, 198 read together makes it clear that admission to land is restricted to the categories mentioned in Section 198 (1). A person who is not covered in any of the categories cannot claim allotment. The submission of the counsel for the petitioner that he is entitled for allotment thus cannot be accepted.

Constitution of India, Article 226- discretionary jurisdiction- interference- with an order the effect of which is to restore an illegal order-though passed by an authority lacking jurisdiction-court will not exercise its discretion in writ jurisdiction.

Held- Para 7

The Additional Collector has observed that allotment of land in favour of the petitioner was contrary to the provisions of U.P. Zamindari Abolition & Land Reforms Act. Interfering with the order of Additional Collector will be restoration of an illegal order and this Court even if the order of Additional Collector was not within his jurisdiction will not exercise its discretion for restoring an illegal order.
Case law relied upon:
AIR 1966 SC 828

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

1. Heard counsel for the petitioner and the learned standing counsel.

By this writ petition, the petitioner has prayed for quashing of the orders dated 12.6.2003 and 24.6.2003 passed by Additional Commissioner, Allahabad Division, Allahabad and order passed by Additional District Magistrate (Finance & Revenue). The petitioner claims to be Educational Institution who claims allotment of plot no. 1011 Kha. An application was filed for cancellation of

the lease under section 198 (4) which was allowed by Additional Collector. It was held by Additional Collector that institution do not come in any of the categories as mentioned under Section 198 (1) of the U.P. Zamindari Abolition & Land Reforms Act to whom lease can be granted.

2. The counsel for the petitioner contended that Section 198 (1) only enumerate the preference and there is no prohibition regarding allotment in favour of Educational Institutions. The counsel for the petitioner next contended that Patta was cancelled by Additional District Magistrate (Finance & Revenue) and in view of the Division Bench judgment reported in 1996 RD 190 ***Shiv Avtar Versus Ravi,*** the Additional Collector does not mean Collector and the Additional Collector has no jurisdiction to cancel the lease.

3. I have considered the submissions and perused the record. Section 198 (I) contemplates admission of persons to land. There is no dispute that petitioner does not fall in any of the categories. The submission of the counsel for the petitioner is that even though he does not fall in any of the categories under Section 198 (1), there is no prohibition in the Act for allotment in favour of the petitioner.

4. Admission to land as contemplated under Section 195 and 197 has to be made in accordance with the preference as mentioned in section 198. The admission to land under Section 195, 197, 198 is for a specific purpose. Object is to allot land to certain category of persons which are mentioned in the section 198. This Court had occasion to consider the provisions pertaining to allotment of land for housing site under U.P. Zamindari Abolition & Land Reforms Rules. This Court in 2002 (93) RD 30 Yog Sansthan versus Collector, Moradabad has held that allotment of land for housing sites refers to natural person. The ratio laid down in the aforesaid judgment also covers the object and purpose of allotment under sections 195, 197 & 198 also. Petitioner is not covered by any of the categories, mentioned in Section 198 (1), he is not entitled for allotment and no error has been committed by the respondent in cancelling the lease of the petitioner.

5. The counsel for the petitioner referring to Sections 195 and 197 has submitted that said sections do not lay down any limitation and the word used in the said section is "any person". Section 195 and 197 are extracted below:

"195. Admission to land- *The (Land Management Committee) (with the previous approval of the Assistant Collector in-charge of the sub-division) shall have the right to admit any person as (bhumidhar with non-transferable rights) to any land (other than land being in any of the classes mentioned in Section 132) where-*

(a) the land is vacant land,
(b) the land is vested in the (Gaon Sabha) under Section 117, or
(c) the land has come into the possession of (Land Management Committee) under Section 194 or under any other provision of this Act."

"197. Admission to land mentioned in Section 132- *(1) The (Land Management Committee) (with the previous approval of the Assistant*

Collector in charge of the Sub-Division) shall have the right to admit any person as asami to any land falling in any of the classes mentioned in Section 132 where-

(a) the land is vacant land,
(b) the land is vested in the (Land Management Committee) or
(c) the land has come into the possession of the (land Management Committee) under Section 194 or under any other provision of the Act.

(2) Nothwithstanding anything contained in any other provision of this Act, the right to admit any person as asami of any tank, pond or other land, covered by water shall be regulated by the rules made under this Act."

6. Section 198 (1) provides that in the admission of person to land as (Bhumidhari with non transferable right) or assami under Section 195 or Section 197, the land Managing Committee shall observe, the order of preference as given in said sub section. Section 198 (1) itself clarify that admission of persons to land as mentioned in Sections 195 and 197 is subject to provisions of Section 198 (1). Section 198 (1) enumerates various categories of persons who are entitled to be admitted to land. The categories of persons who are entitled to be admitted to land. The categories which have been mention are with specific objects. The allotment of land is not open to any person. The scheme of allotment as provided under Section 195, 197, 198 read together makes it clear that admission to land is restricted to the categories mentioned in Section 198 (1). A person who is not covered in any of the categories cannot claim allotment. The submission of the counsel for the petitioner that he is entitled for allotment thus cannot be accepted.

7. The second submission of the counsel for the petitioner is that Additional Collector has no jurisdiction to cancel the lease. Division Bench judgment relied by the counsel for the petitioner do support the contention of the counsel for the petitioner. However, it is well settled that this Court in exercise of writ jurisdiction will not interfere with an order the effect of which is to restore an illegal order. The Additional Collector has observed that allotment of land in favour of the petitioner was contrary to the provisions of U.P. Zamindari Abolition & Land Reforms Act. Interfering with the order of Additional Collector will be restoration of an illegal order and this Court even if the order of Additional Collector was not within his jurisdiction will not exercise its discretion for restoring an illegal order.

8. The Apex Court in AIR 1966 SC 828 ***Gadde Venkateswara Rao versus Government of Andhra Pradesh and others*** has observed that while exercising jurisdiction under Article 226, High Court will not exercise its jurisdiction, the affect of which is to restore an illegal order. The relevant paragraph of the aforesaid judgment is extracted below:

"(17) The result of the discussion may be stated thus; The Primary Health Centre was not permanently located at Dharmajigudem. The representatives of the said Village did not comply with the necessary conditions for such location. The Panchayat Samiti finally cacelled its earlier resolutions which they were entitled to do and passed a resolution for locating the Primary Health Centre

permanently at Lingapalem. Both the order of the Government, namely, the order dated March 7, 1962, and that dated April 18, 1963, were not legally passed; the former, because it was made without giving notice to the Panchayat Samithi, and the latter, because the Government had no power under Section 72 of the Act to review an order made under Section 62 of the Act and also because it did not give notice to the representatives of Dharmajigudem Village. In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963? If the High Court had quashed the said order, it would have restored an illegal order it would have given the health center to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case."

9. The counsel for the petitioner lastly contended that by U.P. Ordinance No. 4 of 2002, the U.P. Zamindari Abolition & Land Reforms Act has been amended by substituting Clause (h) to the following effect-

"*(h) any educational institution situated within the terminal area of the Kshettra Panchayat as established by a persons belonging to a Scheduled Castes or Scheduled Tribes on such terms and condition as may be prescribed."*

10. The aforesaid Ordinance No. 4 of 2002 was promulgated on June 21, 2002. The said ordinance has already been repealed by U.P. Act no. 11 of 2002 and Clause (h) which was added/substituted in Section 198 (1) has not been retained in the amendment Act. Further more the said Ordinance does not help the petitioner in any manner since firstly, the petitioner do not belong to Scheduled Caste and secondly, the allotment in favour of the petitioner was made much earlier to above Ordinance. The submission of the counsel for the petitioner based on Clause (h) of Section 198 (1) as substituted by U.P. Ordinance No. 4 of 2002 is misconceived.

11. None of the submission as raised by the counsel for the petitioner has any substance. No good grounds have been made out for exercise of jurisdiction by this Court under Article 226 in the facts of present case.

The writ petition is rejected summarily.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 10.7.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 28765 of 2003

Naresh Chandra and others ...Petitioners
Versus
Meerut Development Authority Meerut and another ...Respondents

Counsel for the Petitioners:
Sri P.K. Jain

Counsel for the Respondents:
Sri B. Dayal, S.C.

Land Acquisition Act, 1894 sec. 3 (a)- land covered by constructions- whether respondents bound to exempt such land-

held no it an administrative decision- no interference called for.

Held- Para 5

Learned counsel for the petitioners submitted that in the impugned order it is mentioned that the development authority took possession, which is not correct. Be that as it may, we are not inclined to interfere with the impugned order in exercise of our discretion under Article 226 of the Constitution. The respondents are not bound to exempt the land over which there are constructions. That is their discretion, and it is an administrative decision.

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

1. Heard learned counsel for the parties. This is the third round of litigation in the matter.

2. The petitioner no. 1's father challenged notifications of the year 1980 under sections 4 and 6 of the Land Acquisition Act in respect of the land in dispute but the Supreme Court upheld the validity of the said notifications as stated in para 3 of the writ petition.

3. The Supreme Court gave liberty to the acquiring authority to pass award within two years. The award was given within that time, and writ petition no. 6198 of 1988 against that award has been dismissed on 3.8.98 by this Court vide annexure 4 to the petition.

4. A perusal of the judgment dated 3.8.98 Annexure 4 to the petition shows that it was held therein that so far as the land acquisition proceedings are concerned, the matter is concluded, the petitioners may make a representation before the Meerut Development Authority, Meerut and the State Govt. praying for release of the land. The petitioners made representation vide annexure –8 but the same has been rejected by the orders dated 22.4.2003/21.5.2003 annexure 9 to the petition.

5. We have carefully perused the impugned order and find no illegality in the same. Learned counsel for the petitioners submitted that in the impugned order it is mentioned that the development authority took possession, which is not correct. Be that as it may, we are not inclined to interfere with the impugned order in exercise of our discretion under Article 226 of the Constitution. The respondents are not bound to exempt the land over which there are constructions. That is their discretion, and it is an administrative decision. As held in Tata Cellular V. Union of India, AIR 1996 SC 11 this Court has a very limited scope of interference in administrative decisions. Whether to grant exemption or not requires consideration of various factors by the concerned authority. Some times grant of exemption may disrupt the entire scheme. At any event, it is not for this court to interfere in such administrative matters.

6. It may be mentioned that the definition of land in Section 3 (a) of the Land Acquisition Act states:

"(a) the expression' land' includes benefits to arise out of land and, things attached to the earth or permanently fastened to any thing attached to the earth."

7. As held in Bai Malimabu v. State of Gujrat AIR 1978 SC 515 and Kashi Nath and others versus State of U.P. 1193 ALJ 154 the word land in section 3 (a) includes the superstructures on the land. This view has been reiterated in Manveer Singh Vs. State of U.P. 2003 (i) AWC 116 and in Horam Singh V. State of U.P. Writ petition no. 24627 of 2003 dismissed on 2.7.2003. Thus the constructions on the land in dispute are certainly land within the meaning of Section 3 (a).

8. The matter has been dragging on since 1980 and it is not proper for this Court to interfere again and again. There is no force in this petition. The writ petition is dismissed.

———

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2003

BEFORE
THE HON'BLE U.S. TRIPATHI, J.
THE HON'BLE V.N. SINGH, J.

Habeas Corpus Writ Petition No. 44365 of 2002

Raju ...Petitioner

Versus

District Magistrate, Mathura and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Agarwal

Counsel for the Respondents:
Sri B.N. Singh, S.S.C.
Sri P.K. Sharma
A.G.A.

Constitution of India, Article 226- Criminal Law-detention order- satisfaction of detaining authority- nature of incident antecedents and apprehension of repeating tendency, are relevant factors-indicate that petitioner would again indulge in similar activities- Compelling necessity before detaining authority- petition dismissed.

Held- Para 16

Therefore, the previous as well as subsequent conduct of the petitioner indicated that he was indulged in realizing Chowth from the shopkeepers and he who dared to oppose him and his associates, he would be done to death. These activities of the petitioner were thus sufficient material to record satisfaction of the detaining authority that on release on bail the petitioner would again indulge in similar activities prejudicial to the maintenance of public order and thus there were compelling necessary before the detaining authority to pass the detention order.

Case laws discussed:
1990 SCC (Crl.) 372;
2000 (Suppl.) ACC 266
JT 1999 (8) SC 252;
1990 SCC 249;
1990 (27) SCC 67;
1998 SCC (Crl.) 178

(Delivered by Hon'ble U.S. Tripathi, J.)

1. This writ petition has been filed by the petitioner for quashing his detention order dated 12.7.2002, passed by District Magistrate, Mathura, respondent no. 1, under Section 3 (2) of National Security Act.

2. The petitioner was served with the grounds of detention along with the order of detention, which stated that on 28.4.2002 at about 3.30 p.m. the petitioner along with his associates Jamuna, Kanja and Jatwar armed with fire arms came to the grocery shop of Pachan Kumar Agarwal, situated at Mohalla Hathi Darwaza Bazar, Goverdhan for realizing Chowth. The petitioner and his

associates abused and said Pachan Kumar Agarwal for refusal to pay 500/- as Chowth and caused injuries to them. He also exhorted his associates Jamuna and Kanja to kill and fire on Govind Prasad . Govind Prasad was seriously injured and fell down. Complainant, Pachan Kumar, his father Lakkhi Lal and other customers were also injured. The petitioner and his associates threw away the articles stored in the shop of complainant. The incident took place in a busy market situate at Parikrama Marg and a sense of fear and terror was created. Shopkeepers left their shop and started running helter skelter. The pilgrims performing parikrama of Goverdhan Parvat were also affected and they started running helter skelter in the mid of parikrama. On account of dare devil act of the petitioner and his associates, a sense of fear and terror was created in Kasba Goverdhan and shopkeepers were forced to pay chowth to him. On previous occasions also the petitioner and his associates had terrorized the complainant and his family members regarding realization of chowth. During treatment of his injuries Govind Prasad died. On the report of the incident a case at crime no. 216 under section 384, 307, 323 and 504 IPC was registered at P.S. Goverdhan, which was altered under section 302/34 IPC, after the death of Govind Prasad.

3. On 30.4.2003 at about 7.30 p.m. when the complainant Om Prakash was taking out some articles from his go-down, situated at Barsana Road the petitioner and his associates went there and threatened him saying that he was doing pairvi in the case of death of his brother and in case he did not stop doing pairvi, he would not be spared alive. The above incident was witnessed by nearby shopkeepers. Feeling them unsecured on account of act of petitioner and his associates several traders and citizen of Kasba Goverdhan had moved a joint application before the Station Officer, P.S. Goverdhan that they apprehended danger of their life from the petitioner and his associates. On the above report a case at crime no. 217 of 2002, under section 504 and 506 IPC was registered at the police station.

4. The petitioner was detained in District Jail Mathura in connection with case crime no. 216 of 2002 and 217 of 2002 and was attempting to get him released on bail. There was real possibility of his being released on bail and after release on bail of indulging him in similar activities prejudicial to the maintenance of public order. The petitioner was also informed that he had a right to make representation to the Detaining Authority, State Government, Central Government and Advisory Board.

5. We have heard Sri S.K. Agarwal, learned counsel for the petitioner, learned AGA for the respondent no. 1,2 and 3 and learned Standing Counsel for the respondent no. 4, Union of India and have perused the record.

6. Learned counsel for the petitioner raised following grounds for challenging the detention order:-

1. The detention order was passed on some extraneous consideration which were not based on any material on record and the aforesaid extraneous material placed before the detaining authority might have influenced his mind,

2. At the time of passing of detention order no bail application moved on behalf of the petitioner was pending and the police had concocted a forged bail application to create a ground for passing detention order,
3. There were no sufficient material and compelling necessity before the detaining authority to record his satisfaction that after release on bail the petitioner would indulge in similar activities prejudicial to the maintenance of public order.

Point No. 1.

7. It was contended by the learned counsel for the petitioner that detaining authority had passed the detention order on some extraneous consideration as the material placed before him indicated that the petitioner and his associates had terrorized the complainant and his family members on the point of realization of chowth, but there was no material on record and, therefore, the detention order is bad in law. He also placed reliance on Apex Court decision in Vashistha Narain Karwaria Vs. State of U.P. and another, 1990 SCC (Crl.) 372. In the said case the letters submitted by the SHO to the Senior Superintendent of Police contained averments that Vashistha Narain Karwaria @ Bhukkhal was a hardened criminal and had a gang. In his gang his son Kapil and two other big offenders Ram Chandra Tripathi and Gaya Prasad were included. Those people often used to commit heinous crime by which terror and fear prevailed in the people. Many crime were registered against Vashistha Narain Karwaria in may police stations. On the above facts it was held that no particulars or details were given in the documents enclosed with the ground of detention in regard to the alleged many of cases/offences said to have been registered in various police stations against him and in regard to the allegations that he was hardened criminal and had a gang often committing heinous crimes and it had become habit to detenue, though not referred to in the grounds of detention might have influenced the mind of the detaining authority to some extent one way or the other in reaching subjective satisfaction to take decision of directing the detention of the detenue.

8. Further reliance was placed on Division Bench decision of this Court in Sabit Vs. District Magistrate, Rae Bareli, 2000 (suppl) ACC 266. In the said case SHO who was the sponsoring authority in his letter addressed to the Superintendent of Police Rae Bareli which was ultimately sent to the District Magistrate had mentioned that the petitioner had become a person of criminal tendency. On the above facts it was held that the District Magistrate considered the extraneous material while passing the detention order against the petitioner, which vitiated the subjective satisfaction rendering the detention order invalid. In the instant case the report of the Station Officer P.S. Goverdhan has not been annexed along with writ petition. However, the report of the Sponsoring Authority (SSP, Mathura) dated 8.7.2002 has been annexed along with the writ petition which contained mention of the incident in question. The facts mentioned in the report of the Sponsoring Authority are based on the report of the case crime no. 217 of 2002 lodged by Om Prakash at P.S. Goverdhan as well as the report of case crime no. 216 of 2002, under section 384, 307, 323 and 504 IPC. It is clearly mentioned in the

said report that prior to ten days of the occurrence of the said case the petitioner had come to the shop of the complainant and had demanded Rs 500/- as Chowth. When the complainant refused to pay the above money, the petitioner threatened him. It is also mentioned in the said report that prior to it the petitioner and his associates had realized Chowth from the Shopkeepers of the market and due to fear and terror of petitioner and his associates no body could dare to raise voice against him. It is also mentioned in the report of case crime no 217 of 2002 that on 30.4.2002 (after incident of case crime no. 216 of 2002) the petitioner along with his associates came to the shop of complainant, Om Prakash, the brother of Govind Prasad deceased at about 7.30 p.m. and threatened him saying that he was doing pairvi in the murder case of his brother and in case he did not stop doing pairvi of the said case he would not be spared. As such the facts mentioned in the grounds of detention are based on material placed before the detaining authority and it can not be said that there was any extraneous matter in the report of the sponsoring authority which could prejudice the mind of the detaining authority in passing detention order. The decisions relied on by the learned counsel for the petitioner are thus not applicable to the facts of the present case.

Point No. 2.

9. Learned counsel for the petitioner contended that the petitioner had not moved any bail application in the court and no bail application was pending at the time of passing of the detention order. He further contended that the informant of the case in collusion with the police got some application on behalf of the petitioner moved so that the petitioner could be detained under National Security Act, that the petitioner on coming to know this fact made a complain to the Sessions Judge to the effect that the petitioner had never engaged Sri Chhiddi Singh Jais as his Advocate. The said Advocate was own man of the police and informant, therefore, there was no ground for the detaining authority to pass detention order as the petitioner was in jail and had not applied for bail.

It may also be mentioned at this stage that in para 23 of the writ petition the petitioner has alleged that he never applied for bail and no application for bail on behalf of the petitioner was pending at the time his detention order was passed, but it is also mentioned in the writ petition that the petitioner was granted bail on 7.9.2002. The bail order dated 7.9.2002 has also been annexed as Annexure -6 to the writ petition. It is not the case of the petitioner that the bail order dated 7.9.2002 was passed on any application which was not moved by him. However, the petitioner has not filed bail application on which the order dated 7.9.2002 was passed.

10. The pendency of bail application is not necessary for recording satisfaction of the detaining authority that there was real possibility that the petitioner would be released on bail.

11. It has been held by Apex Court in the case of Ahmad Nassar Vs. State of Tamil Nadu and others, JT 1999 (8) SC 252 that the matter of testing satisfaction of any detaining authority it has to be decided on the facts and circumstances of each case in spite of rejection of bail by a court once it is open to the detaining

authority to come to his satisfaction based on the contents of the bail application that there is likelihood of defence being released on bail. Merely because no bail application was then pending is no premises to hold that there was no likelihood of his being released on bail. The words ' likelihood to be released' connote chance of being bailed out in case the pending bail application or in case it is moved in future is decided. The word likely' shows that it can be either way. So without taking any such risk if on the facts and circumstances, the type of crime to be dealt under the criminal law including contents of the bail application, each and compositely all would constitute to be relevant material for arriving at the conclusion. The contents of bail application would vary from one case to the other coupled with the different set of circumstances in each case. It may be legitimately possible in a given case for the detaining authority to draw an inference that there is likelihood of detenue being released on bail.

12. In the instant case the detaining authority has recorded his satisfaction as below:-

"That you Raju are detained in District Jail in connection with case crime no. 216 of 2002 under section 383, 307, 323, 504 and 302/34 IPC, relating to P.S. Goverdhan and are attempting to obtain bail. There is possibility that you would be released on bail very shortly and would come out "……

13. In view of the facts and circumstances of the case and wordings of the above satisfaction of the detaining authority that there is likelihood of the petitioner being released on bail can not be said to be based on no relevant material. It is also evident that subsequently the petitioner was granted bail in the above case on 7.9.2002. The point is answered accordingly.

Point No. 3

14. The contention of the learned counsel for the petitioner was that there was no material on record to the effect that the petitioner if released on bail would likely indulge in activities prejudicial to the maintenance of public order and, therefore, the satisfaction of the detaining authority on this score was wrong. Reliance was placed on the Apex Court decision in Dharmendra Sugan Chandra Chelawat Vs. Union of India 1990 SCC 249, Smt. Shashi Agrawal Vs. State of U.P. 1988 SCC (Crl.) 178 and Agya Ram Verma Vs. Union of India.

15. It is ruled out in the above decision that the detention order can be passed against a person if he is in jail provided (i) the detaining authority was aware of the fact that the detenue is already in detention (ii) there were compelling reasons justifying such detention despite the fact that the detenue was already in detention that expression compelling reasons in context of making of an order of authority concerned of a person already in custody implies that there must be cogent material before the authority on the basis of which it may be satisfied that (a) the detenue is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenue, it is likely that after his release from custody be would indulge in prejudicial activities and it is necessary to detain him

in order to prevent him from engaging in such activities.

16. The satisfaction of the detaining authority that the petitioner, if released on bail would indulge in similar activities prejudicial to the maintenance of public order depends upon the nature of incident and antecedents and apprehension of repeating tendency. In the instant case there were materials before the detaining authority that prior to the incident of 28.4.2002 the petitioner had demanded chowth from the brother of the deceased as well as from other shopkeepers. It is also clear from the material on record that after above incident of 28.4.2002 again the petitioner threatened the complainant of the case with dire consequences, in case he did pairvi of the murder case of his brother. Therefore, the previous as well as subsequent conduct of the petitioner indicated that he was indulged in realizing Chowth from the shopkeepers and he who dared to oppose him and his associates, he would be done to death. These activities of the petitioner were thus sufficient material to record satisfaction of the detaining authority that on release on bail the petitioner would again indulge in similar activities prejudicial to the maintenance of public order and thus there were compelling necessary before the detaining authority to pass the detention order.

17. In view of our findings on the above points we find no force in the writ petition.

18. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2003

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

Civil Misc. Writ Petition No. 24112 of 1988

Kailash Nath Gupta ...Petitioner
Versus
Enquiry Officer (Sri R.K. Rai) Allahabad Bank, Regional Officer, Allahabad and others. ...Respondents

Counsel for the Petitioner:
Sri A.S. Rai
Sri Rajendra Kumar

Counsel for the Respondents:
Sri R.K. Kakkar
Sri S.K. Kakkar

Constitution of India Article 226- Service- dismissal- for infraction at duty- charges not gravious warrant dismissal- Service record unbleshished- petitioner compelled to enter into litigation upto Apex Court-meanwhile retired-held- petitioner entitled to notional reinstatement-and all benefit, privileges in terms of money, arrears of salary etc.- treating him in continues service till his reinstatement-entitled to all post retiral benefit as if without break in service- Bank, however, entitled to deduct Rs.46,000 for losses on account of petitioners negligence-petition partly allowed.

Held- Para 9, 10

(A) The petitioner had throughout an unblemished service record.

(B) Infraction of duty, if any, responsible for loss to the Bank was not of a gravity or of serious/extreme nature which warranted dismissal from service.

(C) The appellant can be called upon to mitigate seriousness of lapse on his part and restore the interest of the Bank by depositing the amount in question, in the instant case- as observed by the Apex Court, about Rs. 46,000/-.(Rupees Forty Six Thousand only).

Service-quantum of punishment-infraction of duty- resultant losses to the bank of Rs. 46,000/- Service record of petitioner unbleshished -petitioner should deposit amount in question to restore interest of bank- does not warrant dismissal.

Held-Para 10

The petition stands partly allowed to the extent and subject to the directions indicated above.

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

Shri A.S. Rai, Advocate for the petitioner
Shri R.K. Kakkar, Advocate alongwith Shri S.K. Kakkar, Advocate for the Respondents

1. Shri S.K. Kakkar, Advocate informs that this writ petition was decided in the past by this Court, Respondents have taken away file from him and at present he has no instruction in the matter.

2. The record shows that the matter went to the Supreme Court against the High Court judgment and order dated 1-5-1996. The Bank contested the matter in supreme Court. It had a review petition wherein Apex Court passed order dated March 27,2003, the relevant extract is reproduced:

"*.....The High Court is requested to dispose of the matter within six months from the date of receipt of this order.....*"

We do not appreciate the conduct of the Respondent Bank.

3. It was incumbent upon the Respondent Bank to have instructed Sri R.K. Kakkar, Advocate or engaged another counsel (if so advised) immediately on the rendering of the aforesaid judgment and order dated 27-3-2003, if they were serious to contest the matter. The Bank has done nothing of the kind. Such practice is not uncommon. when a party is to gain by ensuring to delay the hearing of the case. It may be one of that kind of case.

4. We, therefore, decline to adjourn the case. Proceed further with the hearing of the case more so because the petitioner has retired, and no detailed arguments are required to decide the question of quantum of punishment only on the basis of facts already ascertained by the court while adjudicating and holding petitioner guilty of the charge.

5. Having perused the record of the case we wish to extract relevant portion of the judgment of the Apex court which is as follows:

"*.....The disciplinary authority found that some charges had been proved, i.e., the appellant had not taken proper care in obtaining collateral security etc. However, there is no finding recorded by the authority that he has done this for his personal gain or with corrupt motive. It would mean that he was slack in the performance of the duty. For this, the major punishment of dismissal from service is not the appropriate remedy. On the facts and circumstances of the case, we think that the appropriate punishment would be stoppage of three increments with cumulative effect. The order of*

dismissal stands set aside. Instead, the authority is directed to calculate his pension and other benefits on the basis of the stoppage of three increments with cumulative effect.

The appeal is accordingly allowed. No costs.

S.D/.(K. Ramaswamy,J.)
New Delhi (D.P. Wadhwa,J.)"
May 5,1997

6. Review Petition (C) No. 284/98) filed against the aforesaid judgment was allowed by the Supreme Court vide judgment and order dated 2-3-1998 which is as follows:

"Heard both sides in the Review Petition.

There is an error apparent on the face of the impugned order which has not been taken into account the settled position of law, as propounded by this Court in State Bank of India & another Versus Samrendra Kishore Endow another 1994(2) SCC 537. The impugned order is set aside and the Special Leave Petition shall be placed for consideration.

In view of our order in the Review Petition, the contempt Petition is dismissed."

7. After review, the Apex Court again disposed of the appeal and made following observations:

"..... In the background or what has been stated above, one thing is clear that the power of interference with the quantum of punishment is extremely limited. But when relevant factors are not taken note of, which have some bearing on the quantum of punishment, certainly the court can direct re-consideration or in an appropriate case to shorten litigation, indicate the punishment to be awarded. It is stated that there was no occasion in the long past service indicating either irregularity or misconduct of the appellant except the charges which were the subject matter of his removal from service. The stand of the appellant as indicated above is that though small advances may have become irrecoverable, there is nothing to indicate that the appellant had misappropriated any money or had committed any act of fraud. If any loss has been caused to the Bank (which he quantifies at about Rs.46,000/-) that can be recovered from the appellant. As the reading of the various articles of charges go to show, at the most there is some procedural irregularity which cannot be termed to be negligence to warrant the extreme punishment of dismissal from service.

These aspects do not appear to have been considered by the High Court in the proper perspective. In the fitness of things, therefore, the High Court should examine these aspects afresh. The consideration shall be limited only to the quantum of punishment and not to any other question. As the appellant would have superannuated in the normal course in the year 1994, and the matter is pending for a long time, the High Court is requested to dispose of the matter within six months from the date of receipt of this order. It is made clear that no opinion has been expressed by us as to what would be the appropriate punishment. In this view, the impugned order is set aside. The writ petition is remitted to the High Court for disposal in the light of what is stated above.

The appeal stands disposed of in the above terms with no order as to costs.

(Sd/-Shivraj V.Patil,J.)
(Sd/- Arijit Pasayat.)"
New Delhi (underlined by us to lay
March 27, 2003 emphasis)

8. The observations made by the Apex Court in the afore quoted passage extracted from the judgment and order dated 27-3-2003 are to the following effect:

(1) Interference with the quantum of punishment is extremely limited. Quantum of punishment can be the subject matter of re-consideration by the Authority or the Court itself in an appropriate case to shorten litigation.
(2) Factors relevant for deciding the issue of quantum of punishment will be (i) gravity of the offence (ii) previous antecedent of the employee in question.

Supreme Court, in above context, took note of the following:
(i) There has been no other complaint/charge of misconduct or otherwise against the appellant except the subject matter of the disciplinary enquiry in question leading to removal of his service.
(ii) The appellant's case (which has not been dis-believed) that in the charge with respect to unrecoverable small advances, there is nothing to indicate that the appellant had mis-appropriated himself the said money or guilty of committing any fraud.
(iii) If loss has been caused to the Bank (quantified at Rs. 46,000/-) that can be recovered from the appellant; apparently in view of the fact that loss to the Bank was not because of any mal-intention, or negligence in duty. Supreme Court has noted- "*As the reading of the various articles of charges go to show, at the most there is some procedural irregularity which cannot be termed to be negligence to warrant the extreme punishment of dismissal from service.*"

9. In view of the above observations of the Apex Court, the circumstances, relevant for consideration in order to settle quantum of punishment, we take into account the following:
(A) The petitioner had throughout an unblemished service record.

(B) Infraction of duty, if any, responsible for loss to the Bank was not of a gravity or of serious/extreme nature which warranted dismissal from service.

(C) The appellant can be called upon to mitigate seriousness of lapse on his part and restore the interest of the Bank by depositing the amount in question, in the instant case- as observed by the Apex Court, about Rs. 46,000/-.(Rupees Forty Six Thousand only).

(D) The petitioner (employee in question) has already attained the age of superannuation on August, 1994 and in that view of the matter he is not going to be reinstated in the service of the Bank so as to give rise to apprehension on the part of the employer of any nature like loss of trust and confidence or recurrence of similar lapse in future. On the other hand, the minor punishment in the nature of awarding adverse entry like, warning and/or censure entry, even if now awarded shall be of no relevance and will serve no purpose because the petitioner has already retired.

(E) The employee was subjected to disciplinary enquiry in the year 1987 and he has been compelled to enter into litigation upto the Apex Court. This petition is part of second inning. Thus, it is evident that petitioner has spent considerable amount on this litigation.

In view of the above, our conclusions are-

(1) The petitioner is entitled to be notionally reinstated forthwith since the order of dismissal has already been set aside by the Apex Court vide judgment and order dated 27-3-2003 in Civil Appeal treating the petitioner in continuous service till he attained the age of superannuation.

(2) The petitioner will be entitled to all benefits, privileges in terms of money, arrears of salary; etc, had he continued in service without taking into account the order of dismissal and later set aside by the Supreme Court along with 10% per annum simple interest from the date amounts became due till the date of actual payment.

(3) The petitioner will be entitled to all post retrials benefits treating as if there has been no break in service and he continued throughout, as indicated above. Relevant papers shall be submitted by the petitioner forthwith along with certified copy of this judgment within six weeks from today before the concerned authority for necessary compliance as above within three months of receipt of certified copy of this judgment.

(4) The petitioner shall deposit Rs. 46,000/- along with 10% simple interest per annum from the date of dismissal till the date of actual payment. The Bank shall be entitled to deduct and account for the aforesaid amount while making payment of any arrears to the petitioner from 1987 till he attained the age of superannuation, provided the loan amounts or part thereof, in respect of which, petitioner was charged, has not been refunded by the borrower or realised by the Bank so far.

10. The petition stands partly allowed to the extent and subject to the directions indicated above.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 865 of 2001

M/s Rapti Commission Agency...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri P.K. Misra
Sri Bharat Ji Agarwal
Sri Piyush Agrawal

Counsel for the Respondents:
S.C.

U.P. Trade Tax Act- Section 8E-the petition is firm M/s Tian Yuan India Pvt. Ltd.- Consignment of mentha oil- on the ground that the firm has not deducted the Taxes from the seyers and agriculturist- held liable to pay the trade taxes.

Held -Para 21

The petitioner is certainly liable to pay purchase tax under the U.P. Trade Tax Act in respect of his purchases within the State. Hence there can be no doubt that intra state purchases made by the petitioner can be subjected to tax under the Act.

Case law discussed:

1982 U.P.T.C. 971, 1998 U.P.T.C.-1140, 1999 U.P.T.C.-969, 1983 U.P.T.C. 387, 2000 U.P.T.C.-374, 2000 U.P.T.C. 459, 2001 S.T.I. 169, 12 S.T.C. 357, 1993 (3) SCC-677, AIR 1989 SC 2015, AIR 1986-1041, AIR 1959 SC 459, 1977 (4) SCC 98, AIR 1955 SC-367, AIR 1962 SC-1044, AIR 1971 SC 2486, AIR 1995 SC-142, 1979 (1) SCC 23, AIR 1978 SC 1675, AIR 2001 SC-724, AIR 1997 SC-1511, AIR 1978 747, AIR 1963 SC 1207, AIR 1963 SC 1638, AIR 1964 SC-1230, 1975 (4) SCC 754, AIR 1978 SC-747, AIR 1970 SC 494, AIR 1970 SC 264, 273 U.S. 418

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

1. In this bunch of writ petitions the petitioners have challenged the constitutional validity of Section 8-E of the U.P. Trade Tax Act (hereinafter referred to as 'the Act') which has been inserted by Section 7 of the U.P. Act No. 11 of 2001. We are treating writ petition no. 865 of 2001 as the leading case. The petitioner in that petition has also challenged the notices, copies of which are Annexure 2 and 11 of the writ petition issued under Section 8-E.

2. The petitioner in writ petition no. 865 of 2001 is a sole proprietorship concern whose business is to get purchase orders from its Ex-U.P. principals, and to purchase goods in pursuance of such orders from agriculturist / farmers. The petitioner has entered into an agreement with M/s Tian Yuan India (P) Limited, Raigarh, Maharastra, for purchasing goods on their behalf. The petitioner purchases Mentha oil for and on behalf of Ex-U.P. principals and it dispatches the same to its Ex-U.P. principals, namely, M/s Tian Yuan India Pvt. Limited in accordance with the agreement dated 2.4.2001 Annexure 1 to the writ petition. Earlier also the petitioner entered into similar agreement with the said company.

3. By notice dated 8.7.2001 the consignment of Mentha oil was detained by the respondent no. 3, Trade Tax Officer, Mobile Squad, Jhansi, and the driver of the vehicle was informed about it on 9.7.2001 by the notice dated 8.7.2001, Annexure 2 to the writ petition which has been issued under Section 8-E of the Act. A perusal of the said notice shows that the detention has been made because the petitioner has not deducted the tax from the sellers/agriculturists and has not deposited the same.

4. The petitioner sent a reply on 11.7.2001 stating that the purchase of Mentha oil was for and on behalf of Ex-U.P. principals from the agriculturists and all documents accompanying the consignment clearly established this fact. Section 8-E of the Act states as follows:

" Deduction by Agent –Every agent referred to in sub-clause (v) of Clause (c)of Section 2 who for the dealer residing outside the State, is responsible for making payment to a person who is not treated as a dealer under the proviso to clause (c) of the said Section, or discharge of any liability on account of the valuable consideration payable for the sale of agricultural or horticultural produce grown by that person or grown on any land in which such person has an interest, whether as owner, usufructury mortgage, tenant or otherwise, or for the sale of poultry of diary products from fouls or animals kept by him, shall at the time of making such payment, deduct an amount equal to four percent or at such lower rate mentioned under Section 3-D and the provisions of sub-sections (3) to (9) of Section 3-D shall mutatis mutandis apply in respect thereof."

5. A perusal of the above provision shows that it provides for deduction of 4% while making payment to a seller who is not a dealer under the U.P. Trade Tax Act for discharge of any liability on account of valuable consideration payable for the sale of agricultural or horticultural produce grown by that person or grown on any land in which such person has any interest. It is alleged in paragraph 13 of the writ petition that a seller who is not liable for payment of any tax, as he is not a dealer under the Act, will not permit a deduction of 4% on the sale price which he is entitled to receive.

6. The petitioner has relied on the decision of the Supreme Court in *CST vs. Bakhtawar Lal Kailash Chand Arhati, 1992 UPTC 971*. He has also relied on the decision of this Court in *Commissioner of Trade Tax vs. M/s Tian Yuan 1998 UPTC 1140* and the decision in *CST vs. Rapti Commission Agency 1999 UPTC 969.* Photocopy of the reply of the petitioner to the notice is Annexure 4 to the writ petition.

7. In paragraph 29 of the writ petition it is alleged that the deduction, if any, can be made if the agriculturist/selling dealer is liable for payment of tax but not otherwise. It is alleged in paragraph 30 of the writ petition that the seller is not liable to pay any tax as he is not a dealer under the Act in view of the proviso to Section 2 (c) of the Act. Hence it is alleged that there cannot be any deduction from the petitioner while paying the sale price to the agriculturalist.

8. It is further alleged in paragraph 31 of the writ petition that the goods accompanying the documents cannot be detained under Section 13-A. The petitioner has relied on the decision of this Court in *Shaw Scott Distilleries vs. S.T.O. 1983 UPTC 387*. In that decision it was held that the provisions of Section 13-A made it clear that the power to seize goods is conferred upon an officer authorized in that behalf where either the goods cannot be traced to any bona fide dealer or where it is doubtful if the goods are properly accounted for. It is alleged that these two conditions do not exist in the present case, and hence the detention is illegal.

9. The petitioner has alleged that a provision similar to Section 8-D was considered by the Supreme Court in *Steel Authority of India vs. State of Orissa 2000 UPTC 374* and the Supreme Court has struck down Section 13- AA of Orissa Sales Tax Act which provided for deduction of 4% as TDS in respect of payment made to the contractors. The judgment of the Supreme Court is Annexure 5 to the writ petition. Similarly In *M/s Nathpa Jhakri Jt. Venture vs. State of Himachal Pradesh, 2000 UPTC 459* a similar provision of the Himachal Pradesh General Sales Tax Act was declared void, vide Annexure 6 to the writ petition.

10. The petitioner has also alleged that it was an interstate sale and hence the U.P. Trade Tax does not apply vide *CST vs. M/s Bakhtawar Lal Kailash Chand* (Supra), *CST vs. Vanaspati Trading Company, Gorakhpur 2001 STI 169 and CTT vs. Munshi Ram Madan Lal 2001 UPTC 343* vide Annexure 8 and 9 to the writ petition.

11. In paragraph 38 of the writ petition it is alleged that photocopies of the documents accompanying the

consignment clearly show that these documents are duly accounted for and the same had been dispatched in pursuance of the earlier agreement.

12. After the petitioner filed his reply the respondent no. 2 issued notice dated 11.7.2001 Annexure 11 to the writ petition stating that the petitioner has not made deduction as required under Section 8-E while making the payment to the farmers/agriculturists.

Aggrieved this petition has been filed in this Court.

13. A counter affidavit has been filed on behalf of the State Government. It is alleged in paragraph 3-A of the counter affidavit that a final determination has yet to be made whether the goods were purchased by the petitioner on his own account or in the course of interstate purchase. It is alleged in paragraph 10 that Section 8-E is a valid piece of legislation under Entry 54 of List II of the 7th Schedule of the Constitution. It is alleged in paragraph 12 that a person who is not a dealer under the Act may yet be a dealer under the Central Sales Tax when he is making interstate sales to the agent of an Ex-U.P. principal. It is alleged that Section 8-E is in parimateria with Section 8-D whose validity has been upheld by this Court. It is alleged that Section 8-E provides an effective mechanism for collection of tax.

14. A counter affidavit has also been filed by the respondent no. 3 and we have perused the same. It is alleged in paragraph 8 that the goods were detained because the detaining authority could not be satisfied about the deduction made under Section 8-E.

We have also perused the rejoinder affidavit.

15. Learned counsel for the petitioner, Shri Bharatji Agarwal, submitted that this writ petition deserves to be allowed as it is squarely covered by the decisions of the Supreme Court in *Steel Authority of India Limited vs. State of Orissa and others 2000 UPTC 374* and *M/s Nathpa Jhakri Jt. Venture vs. State of Himachal Pradesh and others 2000 UPTC 459*. In both these decisions similar provisions for deduction of 4% were struck down on the ground that these provisions made no distinction between interstate or export sale / purchase on the one hand, and intra-state sale / purchase on the other.

16. Shri Agarwal submitted that if Section 8-E had provided that it will not apply to interstate, outside, or export, sales / purchases then it is possible that it could have been held to be a valid provision. However, he submitted, a careful perusal of Section 8-E shows that it applies to all kinds of sales and purchases, whether intrastate, interstate, outside or export, and in every case there has to be 4% deduction.

17. Learned counsel, relying on the Supreme Court decision in *C.S.T. vs. Bakhtawar Lal Kailash Chand* (Supra) submitted that the U.P. legislature has no jurisdiction to legislate on a sale or purchase in the course of inter state trade or commerce, or regarding outside / export sales and purchases. It can only legislate regarding intrastate sales or purchases. Since Section 8-E makes no such distinction, and it taxes all sales, whether intra state, inter state, outside or export, which fall within its purview,

hence in view of the decisions of the Supreme Court in *Steel Authority of India's* case (Supra) and *M/s Nathpa Jhakri's* case (Supra) it must be held that Section 8-E is ultra vires the legislative competence of the State legislature, and consequently the impugned notices must also be held to be illegal.

Section 2 (c) of the U.P. Trade Tax Act define dealer as follows:

""dealer" means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred deferred payment or for commission, remuneration or other valuable consideration and includes ---
(i) ……
(ii) a factor, broker, Arhati, commission agent, del credere agent, or any other mercantile agent, by whatever name called and whether of the same description as herein before mentioned or not, who carries on the business or buying, selling, supplying or distribution goods belonging to any principal, whether disclosed or not;
(iii) ……
(iv) ……
(v) every person who acts within the State, as an agent of a dealer residing outside the State, and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as --
(a) a mercantile agent as defined in the Sale of Goods Act , 1930; or
(b) an agent for handling of goods or documents of title relating to goods; or
(c) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or such payment;"

18. A perusal of the above provision shows that a dealer includes a commission agent as well as an agent of a dealer residing outside the State who buys, sells or supplies goods in the State on behalf of such dealer outside the State. From the above definition it is evident that the petitioner is a dealer since admittedly he buys goods on behalf of Ex-U.P. principal.

19. No doubt the agriculturist / farmer who sells his produce to the petitioner is not a dealer in view of proviso to Section 2(c) which states:

"Provided that a person who sells agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as an owner, usufructuary mortgagee, tenant, or otherwise, or who sells poultry or dairy products from fowls or animals kept by him shall not, in respect of such goods be treated as a dealer."

20. However, though the farmer / agriculturist, not being a dealer, may not be liable to pay sales tax under the Act, the petitioner as a dealer is certainly liable to pay purchase tax in view of Section 3(1) of the Act which states:

*"**Liability to tax under the Act** --- (1) Subject to the provisions of this Act, every dealer shall, for each assessment year, pay a tax at the rates provided by or under Section 3-A, or Section 3-D on his turnover of sales or purchases or both as the case may be] which shall be determined in such manner as may be prescribed."*

21. It may be noticed that Section 3 of the Act imposes tax on not only sales

but also on purchases. Since the petitioner is purchasing the goods from the farmers / agriculturists, and he is a dealer within the meaning of definition in Section 2(c), the petitioner is certainly liable to pay purchase tax under the U.P. Trade Tax Act in respect of his purchases within the State. Hence there can be no doubt that intra state purchases made by the petitioner can be subjected to tax under the Act.

Section 8-E is only a convenient method of collecting tax which the legislature thought may otherwise would have been evaded.

22. In *West U.P. Sugar Mills Association and others vs. State of U.P. 2001 UPTC 1110* a Division Bench of this Court held that a provision which was a convenient device for facilitating the collection of tax which the Legislature thought would otherwise be evaded is valid. In that decision this Court relied on the Supreme Court decisions in *Orient paper Mills vs. State of Orissa, 12 STC 357* and *Chhote Bhai Jetha Bhai Patel vs. State of M.P. 30 STC 1* in which it was held that power to collect a tax means the power to collect it properly and effectively. The same view was taken by the Supreme Court in *Venkateshware Theatre vs. State of Andhra Pradesh, 1993 (3) SCC 677, Buza Dooras Tea Company vs. State of West Bengal, AIR 1989 SC 2015, Govind Saran Ganga Saran vs. Commissioner of Sales Tax, AIR 1986 SC 1041, Kheer Bori Tea Company vs. State of Assam, AIR 1964 SC 925 and M.D. Century Co-operative Bank vs. ITO AIR 1975 SC 2016, etc.*

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 includes the power of its 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.

In our opinion the legislature in its wisdom can always provide for a convenient device for collection of tax. It is not for this Court to go into the question whether there could be a better method than that devised by the legislature for collection of the tax. The Court may feel that the mischief sought to be remedied by the law may better have been achieved by adopting some other course of action or by some other law, but on this ground it cannot strike down the law. The legislature in its wisdom is free to choose different methods of remedying an evil, and the Court cannot say that this or that method should have been adopted. As Mr. Justice Cardozo observed in *Anderson vs. Wilson, 289 U.S. 20*:

"We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it."

There are various provisions in various Taxing Statutes which provide for deduction at source e.g. under the Income Tax Act, Sales Tax Act, etc. and the validity of all these provisions have been upheld. Hence Section 8-E is not a new concept in Tax Law. It was made by the Legislature in its wisdom for more efficient mechanism for collection of tax. This court cannot sit as a Court of appeal over the wisdom of the Legislature as long as the Legislature is acting within its legislative competence.

Sales and purchase tax are mentioned in Entry 54 of List II of the 7th Schedule to the Constitution which states:

"Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of sentry 92 A of List I."

It is well settled that the Entries in the Lists in the Constitution should be given the widest scope of their meaning vide *Sri Ram Vs. State of Bombay AIR 1959 SC 459 (vide para 12); Banarasi vs. WTO AIR 1965 SC 1387 (vide para 6), etc.* It has also been held by the Supreme Court that the general words in an entry would be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it vide *R.S. Joshi v. Ajit Mills, 1977 (4) SCC 98, Hans Muller vs. Superintendent AIR 1955 SC 367, Navin Chandra Mafatlal vs. C.I.T. AIR 1955 SC 58, Chaturbhai vs. Union of India AIR 1960 SC 424; Rai RamKrishna vs. State of Bihar AIR 1963 SC 1667* etc. The various entries in the three lists are not powers of legislation but fields of legislation vide *Union of India vs. Dhillon 1971 (2) SCC 779 (vide para 22), Harakchand vs. Union of India 1970 (1) SCR 479, Calcutta Gas Co. vs. State of W.B. A.I.R. 1962 SC 1044 etc.*

The submission of the learned counsel for the petitioner that the deduction in question can only be made if the selling dealer is liable for payment of tax has no merit. As already mentioned above, even if a seller who is not a dealer is not liable for payment of tax, the purchaser, if a dealer, is liable for payment of tax as is evident from a bare perusal of Section 3 (1) of the Act.

As regards the submission of the petitioner that the goods in question cannot be detained in view of the decision in *M/s Shaw Scott Distilleries Private Ltd vs. S.T.O. 1983 UPTC 387*, a perusal of Section 13-A of the Act makes it clear that goods can be seized by the authorized officer where either the goods cannot be traced to any bonafide dealer or when it is doubtful if such goods are properly accounted for by the dealer vide Section 13-A (1-A). Hence we make it clear that the detention in respect of Section 8-E shall only be made if the conditions of sub-section (1-A) of Section 13-A are fulfilled, and the other provisions in Section 13-A must also be complied with. At this stage we cannot say whether the provisions of sub-section (1-A) of Section 13-A are fulfilled or not and this should be decided by the detaining authority at the earliest.

We come now to the main submission of the learned counsel for the petitioner on which he has heavily relied, namely, that Section 8-E has to be struck down in view of the Supreme Court decisions in *Steel Authority of India Limited vs. State of Orissa (Supra) and M/s Nathpa Jhakri's case (Supra).* Under Entry 92 A of List I of the Seventh Schedule, inter-state sales can only be taxed by Parliament, but, it is submitted, Section 8-E makes no distinction between intra state sales and inter-state sales.

We have carefully considered the aforesaid decisions of the Supreme Court. In Steel Authority of India Limited case (Supra), it has been observed by the Supreme Court (vide paragraph 15) that:

"Section 13AA of the Orissa Sales Tax Act should have been precisely

drafted to make it clear that no tax was levied on that part of the amount credited or paid that related to inter-state sales, outside sales and sales in the course of import ……..”

A careful perusal of the above two decisions, namely, *Steel Authority of India Limited case (Supra) and Nathpa Jhakri’s* case (Supra) shows that the Supreme Court was not invited to consider, nor did it actually consider, the principle of statutory interpretation of reading down the language of a statutory provision if that is necessary to make the provision constitutionally valid, rather than to adopt the plain or wide meaning which would make it unconstitutional. This principle has been laid down in a series of Supreme Court decisions, (referred to below) many of which are Constitution Bench decisions, whereas the decision in *Steel Authority of India Limited case* (Supra) is a three Judge Bench decision and the decision in *Nathpa Jhakri’s case* (Supra) is a two Judge Bench decision of the Supreme Court.

It is well settled that there is presumption in favour of the constitutional validity of a Statute vide *Chiranjit Lal vs. Union of India 1950 SCR 869, Madhu Limaye Vs. S.D.A. AIR 1971 SC 2486, P.J. Krishnalal vs. Government of Kerala 1995 AIR SCW 1325, Jilu Bhai Nan Bhai vs. State of Gujrat AIR 1995 SC 142* etc.

If two interpretations are reasonably possible the Court should take an interpretation which would uphold the constitutional validity of the statute even if that involves narrowing down the scope of the statutory provision. No doubt a plain reading of Section 8-E indicates that even inter-state sales are covered by it, but such an interpretation would make the provision unconstitutional. Hence narrower interpretation should be adopted.

In our opinion the decision of the Supreme Court in *Steel Authority of India case (Supra) and M/s Nathpa Jhakri’s case (Supra*) are distinguishable because they have not noted the decisions of the Supreme Court in a plethora of cases (including several Constitution Bench decisions) where it was clearly laid down that the language of a statutory provision can be narrowed down if that is necessary to sustain its Constitutional validity. In our opinion, the language of Section 8-E can be narrowed down so as to make it applicable only to intra – state sales / purchases, as this would make the provision valid.

In *Mark Netto vs. State of Kerala, 1979 (1) SCC 23 (vide para 6)* a Constitution Bench decision of the Supreme Court read down a statutory provision so as to make it constitutional. In that case the constitutional question was whether Rule 12(iii) of the Kerala Tax Rule 1959 was violative of Article 30 of the Constitution. A plain and literal interpretation of the provision would make it violative of Article 30 of the Constitution, and hence the Supreme Court narrowed down the scope of the said rule so as to sustain its validity.

Similarly in *Sunil Batra Vs. Delhi Administration, AIR 1978 SC 1675* (vide para 38) another Constitution Bench decision the Supreme Court observed:

"Constitutional deference to the Legislature and the democratic assumption that people's representatives express the wisdom of the community lead courts into interpretation of statutes which preserves and sustains the validity of the provision,"

There is always a presumption that the Legislature does not exceed its jurisdiction vide *Union of India vs Elphinstone Spinning and Weaving Co. Ltd. AIR 2001 SC 724 (page 733), State of Bihar vs. Bihar Distillery Ltd. AIR 1997 SC 1511 (1519)* etc.

It follows from the above principle that if one construction of the statute will make it ultra vires whereas another construction will sustain its constitutional validity the Court should prefer the latter on the ground that the legislature is presumed not to have intended to exceed its jurisdiction vide *Union of India vs. Tulsiram Patel AIR 1986 SC 1541, State of Kerala vs. Krishnan Nayar AIR 1978 SC 747, (759), Rayala Corporation vs. Director of Enforcement AIR 1970 SC 494 (499), Jothi Timber Mart vs. Calicut Municipality AIR 1970 SC 264 (266), Venkataraman & Co. vs. State of Madras AIR 1966 SC 1089 (1104), Corporation of Calcutta vs. Liberty Cinema, AIR 1965 SC 1107 (1113), Govindlalji vs. State of Rajasthan AIR 1963 SC 1638 (1655), Kedarnath vs. State of Bihar AIR 1962 SC 955 (969), State of Bihar vs. Charusiladasi AIR 1959 SC 1002 (1010) and Express Newspapers Ltd. vs. Union of India AIR 1958 SC 578 (623)*.

It is a well settled principle of interpretation that the general words in a statute may be construed narrowly in order to sustain its validity vide *New Delhi Municipal Committee vs. State of Punjab AIR 1997 SC 2847 (2901)*. Hence if it is possible to read a statutory language as subject to an implied term to sustain its validity the Court should be very ready to make such an implication vide *A.G. Gambia vs. Momodon Jobe, (1984) AC 689 (702) (PC, Hector vs. Attorney General of Antique and Barbuda, (1990) 2 All ER 103, p.107 (PC).*

In *re, Hindu Women's Right to Property Act. AIR 1941 FC 72,* the Federal Court upheld the validity of the Hindu Women's Rights to Property Act, 1947 by construing the word 'property' as meaning 'property other than agricultural land.'

In that decision Gwyer, C.J. observed:

"If that word 'property' necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature, but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other."

The learned Chief Justice further observed:

"There is a general presumption that a Legislature does not intend to exceed its jurisdiction, and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it."

The above rule was applied by the Supreme Court in *Kedarnath vs. State of Bihar AIR 1962 SC 955* and the Supreme Court took a narrow construction of Section 124-A of the Indian Penal Code so as to avoid making it unconstitutional in view of Articles 19 (1)(a) and 19(2) of the Constitution.

Section 124-A of the Indian Penal Code which relates to sedition makes a person punishable who 'by words either spoken or written or by sign or visible representations or otherwise, brings or attempts to bring into hatred or contempt, or excites disaffection towards the Government established by law.'

A perusal of the above provision shows that if it is construed in a plain or wide manner it will violate Articles 19(1)(a) and 19(2) of the Constitution. Hence, the Supreme Court, in order to make the provision constitutionally valid, limited the scope "to acts involving intention or tendency to create disorder or disturbance of law and order or incitement to violence."

Sinha, C.J. speaking for the Court in that decision observed :

"It is well settled that if certain provisions of law, construed in one way, would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction.

*I*n *Sunil Batra vs. Delhi Administration* (Supra) the Supreme Court upheld the validity of Section 30(2) of the Prisons Act, 1894, which provides for solitary confinement of a prisoner under sentence of death in a cell and Section 56 of the same Act, which provides for the confinement of a prisoner in irons for his safe custody, by construing these provisions narrowly so as to avoid their being declared invalid on the ground that they were violative of the rights guaranteed under Articles 14, 19 and 21 of the Constitution.

Similarly, in *New India Sugar Mills vs. Commissioner of Sales Tax AIR 1963 SC 1207*, a wide definition of the word 'sale' in the Bihar Sales Tax Act, 1947 was restricted by construction to exclude transactions, in which property was transferred from one person to another without any previous contract of sale, since a wider construction would have resulted in attributing to the Bihar Legislature an intention to legislate beyond its competence.

In *New Delhi Municipal Committee vs. State of Punjab AIR 1997 SC 2847* provisions in the municipal laws levying property tax on lands and buildings did not contain any exception in respect of the property of the State. These provisions was upheld by taking a narrow construction by excluding the property of the State since such property is exempted from taxation under Article 289 of the Constitution. Although the aforesaid provisions did not expressly exclude property of the State from taxation, yet by adopting a narrow construction the validity of the provisions was sustained.

In *Govindlalji vs. State of Rajasthan AIR 1963 SC 1638* the words 'affairs of the temple' occurring in Section 16 of the Rajasthan Nathdwara Temple Act were construed as restricted to secular affairs, as on a wider construction the section

would have violated Articles 25 and 26 of the Constitution.

In *R.L. Arora vs. State of U.P. AIR 1964 SC 1230* (at page 1234) the Supreme Court while construing Section 40(1) (aa) of the Land Acquisition Act, as amended by Act 31 of 1962 construed the words 'building or work' to such building or work which would sub serve the public purpose of the industry or work in which the company, for which acquisition is made, is engaged. A wider and literal construction of the clause would have brought it in conflict with Article 31(2) of the Constitution, and hence the narrower construction was adopted.

In Indian *Oil Corporation vs. Municipal Corporation AIR 1993 SC 844 Section 23* of the Punjab Municipal Corporation Act 1976 which empowered the Corporation to levy octroi on articles and animals 'imported into the city' was read down to mean articles and animals 'imported into the municipal limits for purposes of consumption, use or sale,' since a wide construction would have made the provision unconstitutional being in excess of the power of the State Legislature conferred by Entry 52 of List II of 7th Schedule.

In *Union of India vs. Elphinstone Spinning & Weaving Co. AIR 2001 SC 724 (733)* the Supreme Court observed :

"It is also a cardinal rule of construction that if one construction being given the statute will become ultra vires the powers of the Legislature whereas on another construction which may be open, the statute remains effective and operative then the Court will prefer the latter, on the ground that the Legislature is presumed not to have intended an excess of jurisdiction."

In *Morey vs. Doud (354 US 457 (1957)* Mr. Justice Frankfurter, of the U.S. Supreme Court observed :

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. The uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events – self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

In the same decision Justice Frankfurter also observed:

"The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaptation of remedy are not always possible" and that "judgment is largely a prophecy based on meager and uninterrupted experience." Every legislation, particularly in economic matters, is essentially empiric and it is based on experimentation, or what one may call trial and error method, and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental

economic legislation but on that account alone it cannot be struck down as invalid."

In *Superintendent and Remberancer of Legal Affairs, West Bengal vs. Girish Kumar Navalakha 1975 (4) SCC 754 (SC)* the Supreme Court observed:

"It would seem that in fiscal and regulatory matters the court not only entertains a greater presumption of constitutionality but also places the burden on the party challenging its validity to show that it has no reasonable basis for making the classification."

In *State of Kerala vs. Krishnan Nair AIR 1978 SC 747* (vide paragraph 11) a seven Judge Bench decision of the Supreme Court observed:

"There is ample authority of this Court for the proposition that where two constructions are possible, that one which leads to unconstitutionality must be avoided and the other which tends to make the provision constitutional should be adopted, ***even if straining of language is necessary."***

In M/s *Rayala Corporation (P) Limited vs. The Director of Enfocement, AIR 1970 SC 494* (vide paragraph 7) (which is also a Constitution Bench decision) the Supreme Court in order to validate the law took a view that whenever there is contravention by any person punishable under clause (a) or (b) of Section 23-D (1) of Foreign Exchange Regulation Act, the Director of Enforcement must first initiate proceedings under the principal clause of Section 23-D (1), and he is empowered to file complaint in Court only when he finds that he is required to do so in accordance with the proviso to Section 23 –D (1).

In *Jothi Timber Mart vs. The Corporation of Calicut AIR 1970 SC 264* the Supreme Court observed (vide paragraph 6):

"When the power of the Legislature with limited authority is exercised in respect of a subject – matter, but words of wide and general import are used, it may reasonably be presumed that the Legislature was using the words in regard to that activity in respect of which it is competent to legislate and to no other, and that the Legislature did not intend to transgress the limits imposed by the Constitution."

In *K.S. Venkataraman and Co. vs. State of Madras AIR 1966 SC 1089* (vide paragraph 40) the Supreme Court following the decision of the Federal Court in *AIR 1941 FC 72* observed:

"There is general presumption that a Legislature does not intend to exceed its jurisdiction and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it."

In *Corporation of Calcutta vs. Liberty Cinema AIR 1965 SC 1107* (vide paragraph 9) the Supreme Court observed that a statute has to be read so as to make it valid and, if possible, an interpretation leading to a contrary position should be avoided. It has to be construed ut res magis valeat quam pareat (vide Broom's Legal Maxims (10th Ed.) p. 361, Craies on Statute (6th Ed.) p. 95, Maxwell on

Statutes (11th Ed.) p.221, and Cooley's 'Constitutional Limitations.' In the aforesaid decision the word 'fee' in Section 548 of the Calcutta Municipality Act was read as meaning a tax, for any other reading would make the Section invalid.

In State of Bihar vs. Smt. Charusila Dasi, AIR 1959 SC 1002 the Supreme Court observed :

"It is now well settled that there is a general presumption that the legislature does not intend to exceed its jurisdiction, and it is a sound principle of construction that the Act of a sovereign legislature should, if possible, receive such an interpretation as will make it operative and not inoperative."

It may be noticed that in neither of the two decisions relied upon by the learned counsel for the petitioner viz. *Steel Authority of India Limited (Supra)* and *M/s Nathpa Jhakri* (Supra) the plethora of decisions mentioned above (many of which are Constitution Bench decisions) were brought to the notice of their lordships. The principle laid down in the aforesaid decisions namely that if a narrow or restricted interpretation of a statutory provision can save its constitutional validity, it should be preferred to the plain and literal meaning which invalidated it, was also not brought to the notice of their lordships in the cases of *Steel Authority of India Limited* (Supra) and *M/s Nathpa Jhakri's case* (Supra). Hence these two decisions are clearly distinguishable.

A careful perusal of these two decisions also shows that there is no discussion therein about the aforesaid settled principle of interpretation which has been upheld in a plethora of Supreme Court decisions referred to above.

There is a catena of Supreme Court decisions which have firmly laid down that a statute can be narrowly construed if that is necessary to sustain its constitutional validity, and these decisions were unfortunately not brought to the notice of the Supreme Court when it decided the cases of *Steel Authority of India Limited* (Supra) and *M/s Nathpa Jhakri's case* (Supra). Most of these decisions are Constitution Bench decisions, that is, decisions of benches larger that those which decided these two cases.

In our opinion the validity of Section 8-E can be sustained by giving it a narrow meaning so as to exclude from its purview inter state, outside and export, sales/purchases. In other words, in our opinion, Section 8-E will only apply to sales / purchases which are intra state.

As to when a sale will be intra state and when it will be inter state is discussed in the decision of the Supreme Court *in CST vs. Bakhtawar Lal Kailash Chand's* case (Supra) and it is not necessary for us to repeat the principles laid down in that decision. It will be for the Trade Tax Authorities to determine in each particular transaction whether it is an intra state sale / purchase or not, as held by the Supreme Court in *CST vs. Bakhtawar Lal Kailash Chand* (Supra). Whether the sale / purchase is an inter state sale or purchase depends on the facts found in each case, to which the principles laid down in *C.S.T. vs. Bakhtawar Lal Kailash Chand's* case (Supra) and other relevant cases, should be applied.

Hence the Trade Tax Authority concerned may decide in respect of each transaction on the facts of each case whether it is an intra state sale / purchase or not. However this does not in our opinion affect the validity of Section 8-E, which in our opinion is constitutionally valid in view of the narrow interpretation of Section 8-E which we are taking in this case so as to sustain its validity.

Thus there is no force in this and the connected writ petitions and they are all dismissed, and interim orders vacated.

Before parting with this case we would like to briefly comment on the subject of judicial review of a statute, which was first enunciated by Chief Justice Marshall of the U.S. Supreme Court in *Marbury vs. Madison, 5 U.S. (1 Cranch) 137 (1803).* We feel justified in making these comments because the times which this country is passing through requires clarification of the role of the judiciary vis –a- vis the legislature.

Under our Constitution the judiciary and the Legislature have their own spheres of operation. It is important that these organs do not entrench on each others proper spheres and confine themselves to their own, otherwise there will always be danger of a reaction. The judiciary must therefore exercise self restraint and eschew the temptation to act as a super legislature or a Court of Appeal sitting over the Laws validly made by the Legislature or as a third house of Parliament. By exercising restraint it will enhance its own respect and prestige. Of course if a law clearly violates some provision of the Constitution or is beyond its legislative competence it will be declared by the Court as ultra vires, but as long as it does not do so it is not for the Court to sit in appeal over the wisdom of the legislature.

It must never be forgotten that the legislature has been elected by the people, while Judges are not, and in a democracy it is the people who are supreme. No Court should therefore strike down an enactment solely because it is perceived by it to be unwise. A Judge cannot act on the belief that he knows better than the legislature on a question of policy, because he can never be justifiably certain that he is right. Judicial humility should therefore prevail over judicial activism in this respect.

Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First, judicial restraint not only recognizes the equality of the other two branches with the judiciary, but also fosters that equality by minimizing interbranch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results make the judiciary a moving target and thus decreases the ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of interbranch equality.

Second, judicial restraint tends to protect the independence of the judiciary. When courts become engaged in social legislation, almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act

like legislators, it follows that judges should be elected like legislators. This is counterproductive. The touchstone of an independent judiciary has been its removal from the political process. Even if this removal has sometimes been less than complete, it is an ideal worthy of support and one that has had valuable effects.

The constitutional trade–off for independence is that judges must restrain themselves from the areas reserved to the other separate branches. Thus, judicial restraint complements the twin, overarching values of the independence of the judiciary and the separation of powers.

The Court should always hesitate to declare a statute unconstitutional, unless it finds it clearly so, because invalidating a statute is a grave step. Of the three organs of the State, only the judiciary has the power to declare the Constitutional limits of all three. This great power should therefore be used by the judiciary with the utmost humility and self-restraint.

As observed by the Supreme Court in M.H. Qureshi vs. State of Bihar, AIR 1958 SC 731, the Court must presume that the legislature understands and correctly appreciates the needs of its own people. The legislature is free to recognize degrees of harm and may confine its restrictions to those where the need is deemed to be the clearest. In the same decision it was also observed that the legislature is the best judge of what is good for the community on whose suffrage it came into existence.

One of the earliest scholarly treatments of the scope of judicial review is Prof. James Bradley Thayer's article "The Origin and Scope of the American Doctrine of Constitutional Law," published in 1893 in the Harvard Law Review. This paper is a singularly important piece of American legal scholarship, if for no other reason than that Holmes and Brandeis, among modern judges, carried its influence with them to the Bench, as also did Mr. Justice Frankfurter.

Thayer, who was a Professor of Law at Harvard University, strongly urged that the courts must be astute not to trench upon the proper powers of the other departments of government, nor to confine their discretion. Full and free play must be allowed to "that wide margin of considerations which address themselves only to the practical judgment of a legislative body." Moreover, every action of the other departments embodies an implicit decision on their part that it was within their constitutional power to act as they did. The judiciary must accord the utmost respect to this determination, even though it be a tacit one.

This meant for Thayer –and he attempted to prove that it had generally meant to the courts – that a statute could be struck down as unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one, - so clear that it is not open to rational question." After all, the Constitution is not a legal document of the nature of a deed of title or the like, to be read closely and construed with technical finality, but a complex charter of government, looking to unforeseeable future exigencies. Most frequently, reasonable men will differ about its proper construction. The

Constitution leaves open "a range of choice and judgment," and hence constitutional construction 'involves hospitality to large purposes, not merely textual exegesis.'

In *Lochner vs. New York, 198 U.S. 45 (1905),* Mr. Justice Holmes, the celebrated Judge of the U.S. Supreme Court in his classic dissenting judgment pleaded for judicial tolerance of state legislative action even when the Court may disapprove of the State Policy.. Similarly, in his dissenting judgment in *Griswold vs. Connecticut, 381 U.S. 479*, Mr. Justice Hugo Black warned that "*unbounded judicial creativity would make this Court a day-to-day Constitutional Convention*." Justice Frankfurter has pointed out that great judges have constantly admonished their brethren of the need for discipline in observing their limitations (see Frankfurter's 'Some Reflections on the Reading of Statutes').

In our opinion the State should not be hampered by the Court, particularly in tax and social regulatory measures unless they are clearly unconstitutional. All legislation (such as the kind we are examining), is essentially ad hoc and experimental. Since social problems nowadays are extremely complicated, this inevitably entails special treatment for distinct social phenomena. If legislation is to deal with realities it must address itself to variations in society. The State must therefore be left with wide latitude in devising ways and means of imposing and collection of taxes or social control measures, and the Court should not, unless compelled by the Constitution, encroach into this field.

As Justice Frankfurter of the U.S. Supreme Court observed in *American Federation of Labour v. American Sash and Door Co. 335 US 538 (1949):*

"Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a Court debilitates popular democratic government. Most laws dealing with social and economic problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed by the legislature than that the law should be aborted by judicial fiat. Such an assertion of judicial power defeats responsibility from those on whom in a democratic society it ultimately rests. Hence rather than exercise judicial review Courts should ordinarily allow legislatures to correct their own mistakes wherever possible."

Similarly in his dissenting judgment in *New State Ice Co. vs. Liebmann. 285 US 262 (1932)* Mr. Justice Brandeis, the renowned Judge of the U.S. Supreme Court, observed that the government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences, depends on "a process of trial and error" and Courts must not interfere with necessary experiments.

In the same decision Justice Brandeis also observed:

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to

experiment may be fraught with serious consequences to the Nation."(see also 'The Legacy of Holmes and Brandeis' by Samuel Kanefsky).

As Mr. Justice Holmes of the U.S. Supreme Court observed in his dissenting judgment in *Tyson v. Banton, 273 US 418 (at p 447):*

" I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say they want it, I see nothing in the Constitution of the United States to prevent their having their will."

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 48095 of 2002

Jawahar Singh ...Petitioner
Versus
The State of U.P. and others...Respondents

Counsel for the Petitioner:
Sri R.K. Malviya

Counsel for the Respondents:
S.C.

Constitution of India, Article 311 (2) (b)- U.P. Police Officers of the Subordinate Ranks (Punishment & Appeal) Rules, 1991, Rule 8 (2) (b)- dismissal- order of- not reasons disclosed for not holding departmental enquiring-Held-such order, illegal.

Held-Para 5

A perusal of the dismissal order will demonstrate that it does not disclose any reason whatsoever as to why holding of the departmental enquiry against the charges leveled on the petitioner is not possible. In this view of the matter, this writ petition deserves to be allowed and the impugned order of dismissal deserves to be quashed.

(Delivered by Hon'ble Anjani Kumar, J.)

1. The petitioner, who was a police constable in U.P. Police, by means of present writ petition under Article 226 of the Constitution of India, has challenged the dismissal order dated 3rd August, 2002, copy whereof is annexed as Annexure-'1' to the writ petition, whereby the petitioner has been dismissed from service on different charges.

2. Heard learned counsel appearing on behalf of the petitioner and the learned Standing Counsel representing the Respondents.

3. The authority in exercise of power under Article 311 (2) (b) of the Constitution of India, read with Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991, read with Rule 8 (2) (b), has passed the aforesaid order of dismissal. A perusal of the aforesaid Rule and the provision of Article 311 (2) (b), clearly demonstrate that the punishing authority can dispense with the holding of departmental enquiry, if it comes to the conclusion that it is not possible to hold an enquiry for the reasons stated in the aforesaid clause. The provision of Article 311 (2) (b) is reproduced below :-

"311. Dismissal, removal or reduction in rank of persons employed

in civil capacities under the Union or a State----

(1) .....

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed :

Provided further that this clause shall not apply.....

(a) .....

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

4. Similar the provision of Rule 8 (2) (b) of the 1991 Rules is also reproduced here-in-below :-

"Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991----

8. Dismissal and removal :-

(1) .....

(2) No police officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules :

Provided that this rule shall not apply---

(a) .....

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

5. A perusal of the dismissal order will demonstrate that it does not disclose any reason whatsoever as to why holding of the departmental enquiry against the charges leveled on the petitioner is not possible. In this view of the matter, this writ petition deserves to be allowed and the impugned order of dismissal deserves to be quashed.

6. In view of what has been stated above, this writ petition succeeds and is allowed. The order dated 3rd August, 2002, Annexure-'1' to the writ petition, is quashed. However, it will be open for the Respondents to hold a regular enquiry and may take action against the petitioner in accordance with law after affording him an opportunity of hearing. There will be no order as to costs.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 09.07.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 40476 of 1998

U.P. State Road Transport Corporation ...Petitioner
Versus
Presiding Officer, Industrial Tribunal(5), Meerut and another ...Respondents

Counsel for the Petitioner:
Sri Sameer Sharma
Sri N. Mishra
Sri Avanish Mishra
(P) S.C.

Counsel for the Respondents:
Sri Sidhartha
S.C.

Labour & Service-termination-employers treated the period of absence of workman as leave without pay-Labour Court awarded reinstatement without continuity of service and full backwages-award modified by High Court-workman entitled for only half backwages-as workman had not worked after termination and when effered employment subsequently.

Held- Para 6

Learned counsel for the petitioner lastly submitted that admittedly the workman's services were terminated w.e.f. 14th February, 1990 and he has not worked during all these years and when the workman was offered employment, he has not accepted it and since this fact has not been disputed by the workman, therefore, he is not entitled for full back wages.

(Delivered by Hon'ble Anjani Kumar, J.)

1. By means of this writ petition under Article 226 of the Constitution of India, the employer, U.P. State Road Transport Corporation, Meerut has challenged the award dated 22.12.1997 passed in Adjudication Case No. 47 of 1992 by Presiding Officer, Industrial Tribunal (5), U.P., Meerut *{hereinafter referred to as the 'Tribunal'}*, copy whereof is annexed as Annexure-'1' to the writ petition. The Dy. Labour Commissioner vide order dated 4.3.1992 referred the following dispute to the tribunal:

"क्या सेवायोजकों द्वारा अपने श्रमिक श्री महाबीर सिंह, पुत्र श्री मांगे सिंह को दिनॉक १४.२.९० से कार्य से पृथक/वंचित किया जाना अनुचित/अथवा अवैधानिक है? यदि हॉ, तो सम्बन्धित श्रमिक क्या लाभ/अनुतोष (रिलीफ) पाने का अधिकारी है तथा अन्य किस विवरण सहित?"

2. On receipt of the reference, the labour Court issued notices to the parties. Both the parties exchanged their pleadings and on the basis of the pleadings two additional issues were framed by the tribunal, which are as under:

(1) Whether the departmental enquiry conducted against the workman was not fair and proper and was against the principles of natural justice?

(2) Whether the action of the employers in treating the period of absence of the workman as leave without pay amounts to condonation of his misconduct? If so, its effect?"

3. The parties have adduced their evidence. The Labour court has proceeded to take up the reference as well as additional issues together. The Labour Court has held that the enquiry against the workman was neither fair and proper nor it was conducted in accordance with the principles of natural justice. It was further held by the Labour Court that the employers' action of charge sheeting the workman for the period for which they had granted him leave amounted to condoning of his alleged misconduct. The employers have failed to prove that the workman remained in gainful employment after his termination. As such, the workman is entitled for

reinstatement with continuity of service and full back wages.

4. Learned counsel for the petitioner questioned the aforesaid finding which, in my opinion, is unassailable as the learned counsel for the petitioner could not point out as to whether the finding is contrary to material on record or is perverse thus in any way suffers from manifest error of law so as to warrant interference under Article 226 of the Constitution of India.

5. In this view of the matter, this court in exercise of powers conferred under Article 226 of the Constitution of India will not interfere with the findings recorded by the Labour Court being findings of fact.

6. Learned counsel for the petitioner lastly submitted that admittedly the workman's services were terminated w.e.f. 14th February, 1990 and he has not worked during all these years and when the workman was offered employment, he has not accepted it and since this fact has not been disputed by the workman, therefore, he is not entitled for full back wages.

7. In view of the above submissions made by learned counsel for the petitioner-employer and also in the interest of justice, in my opinion, the award is required to be modified to the extent that the workman shall be entitled for only half of the back wages instead of full back wages from the date of termination till the date of award. Rest of the award is upheld.

8. In view of what has been stated above, the writ petition is dismissed except for above modification. The interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.22890 of 1996

L.P. Saxena ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava
Sri S.K. Srivastava

Counsel for the Respondents:
Sri B.K. Pandey
S.C.

Service Law-Natural justice-petitioner reverted on basis of an adverse entry-relevant documents-not supplied-reasonable opportunity not given-order can not sustained.

Serive Law- Reversion-adverse entry awarded after third enquiry conductecd for same charges--petitioner exonerated in two previous enquiries- such act of respondents- held, not proper- intended to cause harassment.

Held- Para 9

The petitioner was denied the relevant documents asked by him for the purpose of his defence, though it is not necessary to supply every document asked for, but the authorities are under obligation to supply material and relevant document and no person can be dismissed ,removed or reduced in rank or violated with adverse consequences in violation of the principles of natural justice and without giving him reasonable

opportunity to defend himself. The respondents were under constitutional obligations to provide an opportunity to the petitioner particularly where they have been conducting enquiries on the same charges against the delinquent employee again and again. The respondents have not act reasonably and fairly. Conducting enquiry after 13 years after the petitioner was exonerated in the first enquiry, in the second enquiry and again in the third enquiry is nothing but outcome of malice and vindictive attitude causing harassment of the employee.

Case law discussed:
ESC (Alld) 2002 (4) 388
AIR 1971 SC 1447

(Delivered by Hon'ble Rakesh Tiwari, J.)

Heard the counsel for the parties and perused the record..

1. By means of the present writ petition, the petitioner has challenged the order dated 18.6.1996, whereby the petitioner has been awarded an adverse entry and was reverted to his original post of Junior Clerk/Routine Clerk.

2. The facts of this case are that the petitioner was appointed in the year 1964 on the post of Routine Clerk. He was promoted on the post of Senior Assistant in the year 1985.An enquiry was conducted against the petitioner in 1981 in respect of some missing Forms-31. In the enquiry the petitioner was not found guilty vide enquiry report dated 3/4-6-1982 and responsibility was fixed upon one Sri V.K. Srivastava. After a lapse of 13 years a second enquiry was conducted by the Assistant Commissioner Trade Tax in the same matter/charges in which the petitioner was again exonerated from the charges. The relevant extract of the enquiry report dated 2.5.1995 is quoted below:

मुझे एक जांच अधिकारी के रूप में इस बात से बडी कुण्ठा का अनुभव हुआ है कि श्री एल० पी० सक्सेना जिसे कानपुर परिक्षेत्रीय नेत्रत्व में आकर कई वर्षो से उत्कस्ट कार्य निष्पादन के लिये मानदेय से सम्मानित किया हैं। वर्ष १९९४/९५ के लिये भी उन्हें ऐसा सम्मान प्राप्त हुआ जो अकारण ही फार्म गायब किये जाने तथा उन्हें बेच लिये जाने के आरोप में मानसिक त्रासदी की गयी है। दूसरे इनकी कार्य पद्वति एवं मनोदशा पर प्रतिकूल प्रभाव होना अस्वाभाविक नहीं है। अपराधो को निःसन्देह दण्डित किया जाना चाहिये किन्तु जो अपराधी नहीं है उसे परेशान करना उचित नहीं है मेरी संस्तुति है कि श्री एल०पी० सक्सेना को इस आरोप पत्र से बरी किया जाये।

3. Though the petitioner was exonerated in two enquiries dated 3/4.6.82 and 2.5.93, he was subjected to third enquiry for the same charges in the year 1995.He raised objections against initiation of third enquiry for the same and similar charges.

4. The petitioner in pursuance of the order dated 15.4.1996 passed by this Court in Writ Petition No.13063 of 1996 and the order dated 25.4.1996 passed by this Court in Special Appeal No.362 of 1996, moved a detailed representation on 15.5.1996 and again on 13.6.1996 raising all the objections before the punishing authority for consideration before taking any final decision in the matter.

5. It is submitted by the counsel for the petitioner that ignoring the aforesaid representations made before the punishing authority, the impugned order was passed on 18.6.1996. It is further submitted by the counsel for the petitioner that before framing the U.P. Government Servants (Discipline and Appeal) Rules, 1999, there was no provision of second or successive enquiry, while in the present case not only second but even third

enquiry was conducted for the same and similar charges and thus the impugned order being based on third enquiry report (all the three reports being submitted much prior to framing of aforesaid Rules 1999) is not sustainable and deserves to be quashed.

6. In **E.S.C.(All.)2002(4) 388 Sushil Kumar Vs. Engineer –in-Chief, Irrigation U.P.Sinchai Bhawan, Lucknow and others**, it has been held by this Court that without canceling/rejecting the earlier enquiry report, fresh enquiry into one and same incident is not maintainable . In **K.R. Deb V. Collector Excise Shillong, AIR 1971 SC 1447**, it has been held by the Apex Court that;

"Rule 15. on the face of it, really provides for one enquiry but it may be possible if in a particular case there has been no proper enquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of the enquiry or were not examined for some other reason, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. But there is no provision in Rule 15 for completely setting aside previous inquiries on the ground that the report of the Inquiry Officer or Officers does not appeal to the Disciplinary Authority. The Disciplinary Authority has enough powers to reconsider the evidence itself and come to its own conclusion under Rule 9.

7. It further held in para 14 that

"In our view the rules do not contemplate an action such as was taken by the Collector on February 13, 1962. It seems to us that the collector, instead of taking responsibility himself was determined to get some officer to report against the appellant. The procedure adopted was not only unwarranted by the Rules but was harassing to the appellant."

8. From the above it is clear that a disciplinary enquiry is vitiated on account of certain technical and procedural flaws. In such circumstances the employer is at liberty to get the matter re-examined on merits by initiating the second enquiry. Other conclusion, which flows from the above decisions is that if after considering the material on record, the disciplinary authority has found that an employee was not guilty of the charges and has been exculpated of the allegations made against him in that event, the de novo enquiry would be nothing but harassment of the concerned employee and therefore the de novo or second enquiry would not be legally permissible.

9. The petitioner was denied the relevant documents asked by him for the purpose of his defence, though it is not necessary to supply every document asked for, but the authorities are under obligation to supply material and relevant document and no person can be dismissed, removed or reduced in rank or violated with adverse consequences in violation of the principles of natural justice and without giving him reasonable opportunity to defend himself. The respondents were under constitutional obligations to provide an opportunity to the petitioner particularly where they have been conducting enquiries on the same charges against the delinquent employee again and again. The respondents have not acted reasonably and fairly. Conducting enquiry after 13 years after the petitioner was exonerated in the first enquiry, in the second enquiry and again

in the third enquiry is nothing but outcome of malice and vindictive attitude causing harassment of the employee. This also appears from the recommendation of the enquiry report dated 2.5.1995 extracted above.

10. For all the aforesaid reasons and the provisions of law discussed above, the writ petition succeeds and is allowed with costs of Rs.2000/- to be recovered from Sri Dharam Singh, the then Upper Commissioner (Prashashan) Vyapar Kar, U.P. Lucknow and paid to the petitioner as arrears of land revenue within two months. The District Magistrate will submit compliance report to this Court immediately thereafter.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.4.2003

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

Civil Misc. Writ Petition No. 32183 of 2001

Rishi Muni Giri ...Petitioner

Versus

The Regional Manager, U.P. State Road Transport Corporation and others ...Respondents

Counsel for the Petitioner:
Sri S.N. Singh
Sri P. Dwivedi

Counsel for the Respondents:
Sri Sameer Sharma

Constitution of India-Article 226-removal from service-Removal-serious lapses in discharge of duty- findings of enquiry officer and disciplinary authority-no perversity or mistake found- no interference called for.

Held- Para 10

In view of the aforesaid analysis it is clear that petitioner has been punished on the charge of serious lapses on his part in discharge of duty. The explanation given by him has not been found to be substantiated by any material and there being a finding on a question of fact the court do not find any perversity or apparent mistake in the findings and conclusions arrived at by the enquiry officer or the disciplinary authority and thus petitioner is not entitled to get any relief from this Court

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

1. Challenge in this petition are the orders dated 31.7.1998 (annexure no. 5 to the writ petition) 11.10.2000 (annexure no. 6 to the writ petition) and 30.5.2001 (annexure no. 7 to the writ petition), passed by the respondents no. 1, 2 and 3 respectively. By the order dated 31.7.1998, referred above, the disciplinary authority removed the petitioner from service, which has been confirmed in appeal and revision by the other two orders, referred above.

2. For the purpose of decision brief facts can be summarized thus. The petitioner had been working as conductor in the U.P. State Road Transport Corporation, herein after referred to as the Corporation. Petitioner claims that he was allotted duty on 22.9.1996 for running with the bus from Lalganj to Delhi and Delhi to Lalganj and thereafter from Bahraich to Lalganj and to Allahabad and thus after completing three days continuous duty petitioner was to take rest at his quarter as he was not feeling well and was suffering with serious headache. It is said that although the petitioner was to be allowed double duty rest but on account of non availability of any conductor to proceed with the bus from

Lalganj-Allahabad-Faizabad-Bahraich, on 25.9.1996 at about 4.30 P.M. he was forced to go to Allahabad. Petitioner showed his inability to do the duty but he was assured that some other conductor will be provided from Pratapgarh but as no body was available petitioner has to continue in the bus. It is stated that there were 59 passengers in the bus when it started from Pratapgarh to Allahabad but as there was severe headache and physical ailment petitioner committed mistake in issuing tickets to the passengers. The bus appears to have been checked near Mauaima at 6.15 P.M. by the checking staff of the Corporation and on finding certain irregularities checking report was prepared and was submitted to the Assistant Regional Manager, Pratapgarh Depot. Thereafter petitioner was placed under suspension. Charge sheet was issued to him. Enquiry proceeded. On submission of the enquiry report the disciplinary authority proceeded to pass the order of petitioner's removal from service which stood confirmed in appeal and revision in the higher forum. It is these orders which are under challenge before this Court.

3. Learned counsel for the petitioner submits that petitioner has not committed any financial irregularity as it is a case of certain incorrect entry in the way bill and not issuing proper tickets and thus the impugned order of removal from service cannot be sustained. It is further submitted that the explanation given by the petitioner has not been properly considered and examined either by the enquiry officer or by the disciplinary authority and even by the appellate/revisional authority and, therefore, on the facts, the finding of misconduct on the part of the petitioner is totally perverse. It is argued that petitioner has established that he discharged continuous duty for about three days and thus on the date of incident he was entitled for double duty rest but he was compelled to join the bus from Lalganj in the express bus service i.e. Lalganj-Pratapgarh- Bahraich on the pretext that in Pratapgarh some other conductor will be provided. Although the petitioner was suffering from severe mental headache which he informed to the staff who came to the petitioner to compel him to join the bus but even then petitioner was compelled to proceed for duty and, therefore, on account of his mental disbalance and physical ailment, irregularity in the way bill and issuing the ticket happened. It is submitted that all these aspects have not been taken into account and all the authorities without assigning reason to disagree with the explanation given by the petitioner in an arbitrary manner agreed to the findings of the enquiry officer and has passed the impugned order. In support of the submission that if the decision by the disciplinary authority and its confirmation by the higher authority is without assigning any reason to disagree with the explanation of the petitioner, it amounts to a non speaking order, which is to be termed to be in violation of principles of natural justice, reliance has been placed on decisions given in the case of **Prem Prakash Misra Vs. U.P. State Road Transport Corporation and others, (1994) 2 U.P.L.B.E.C. 1047 and Smt. Kamlesh Saxena Vs. U.P. Secondary Education Service Commission, Allahabad and others, (1999) 3 U.P.L.B.E.C. 2133.** In support of the submission that for technical omission of not entering some of the tickets in the way bill punishment of removal from service

is not justified, reliance has been placed on the case of **Ram Babu Gupta Vs. U.P.S.R.T.C. & others** reported in **(1999) 3 U.P.L.B.E.C. 2175.**

4. In response to the aforesaid submission learned counsel for the respondents submits that the petitioner has been charged for the serious misconduct leading to financial irregularity as he has taken money from all the passengers who were traveling from Pratapgarh to Allahabad, but neither tickets have been issued in that respect nor there is proper entry in the way bill. It is argued that on the clear finding as has been recorded by the enquiry officer in which the charges against the petitioner have been proved the disciplinary authority has rightly passed the order of removal agreeing with the findings given by the enquiry officer which has been rightly confirmed by the higher authorities. It is submitted that if the disciplinary authority and the further higher forum after noticing the substance of the enquiry report and the reply of the petitioner, have chosen to record a finding that explanation of the petitioner is not sufficient as there is no satisfactory material/ fact to disagree with the report of the enquiry officer, no further reasons are required to be given and it cannot be said to be a case of passing a non speaking order as has been submitted by the learned counsel for the petitioner. In support of the aforesaid submission learned counsel for the respondents has placed reliance on the decision given in the case of **Ram Kumar Vs. State of Haryana reported in AIR 1987 SC 2043 and Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi and another** reported in **AIR 1996 SC 326.** It is further argued that petitioner has not discharged the burden of establishing his stand of his ailment and the mental condition so that to accept the plea of lapses having been occasioned on account of his mental disbalance. It is argued that in view of the nature of the defence of the petitioner burden to prove his stand heavily lay on him for which no evidence whatsoever was given for which reliance has been placed on a decision given in the case of **Orissa Mining Corporation and another Vs. Ananda Chandra Prusty, 1997 (75) FLR 100.** It is pointed out that this Court as well as the Apex Court has not interfered in respect to the quantum of punishment which is claimed by the petitioner to be disproportionate in the matter where charges of corruption have been found to be proved, reliance has been placed on a decision given by the Apex Court in the case of **Municipal Committee, Bahadurgarh Vs. Krishnan Behari and others, JT 1996 (3) S.C. 96** and also on the decision given by this Court in the case of **Sri Kishan Sharma Vs. Assistant Regional Manager, U.P.S.R.T.C. and others in writ petition no. 9102 of 1980** and in the case of **Ashok Kumar Vs. U.P. State Road Transport Corporation and others in writ petition no. 27968 of 1992.**

5. In view of the aforesaid submission as has come from both sides pleadings as existed have been examined.

6. There appears to be no dispute about the fact that the petitioner himself admits that some irregularity and lapses has occasioned in relation to the facts as has been reported by checking staff. The charge against the petitioner is that 59 passengers were traveling from Pratapgarh to Allahabad and none of them were issued tickets and there was no

proper entry in the way bill. Petitioner has taken a stand that on account of continuous duty for three days, on the date of incident he was not in a position to undertake further duty as he was suffering from severe mental headache and he was not in a fit mental state but he was compelled by the staff to proceed with the bus from Lalganj to Pratapgarh where other Conductor was to be provided but on account of non availability of other Conductor he has to continue up to Allahabad. It is in the light of the aforesaid assurance he initially proceeded. Thus so far the charge of the irregularity is concerned it was not required to be proved as most of the facts relating to irregularity in respect to non issuance of the tickets, incomplete way bill and issuance of some tickets of wrong destination etc. have been admitted by the petitioner himself.

7. In view of the aforesaid, the only question which is to be examined, on which attention of this Court is to be focused is, in respect to correctness of the findings rejecting the defence taken by the petitioner i.e. he being not in fit mental condition, suffering from physical ailment i.e. severe mental headache etc. Although the question on which if the finding comes in favour of the petitioner he can be said to be entitled to get relief, is a pure question of fact but in the light of the submission made by the learned counsel for the petitioner this aspect is also examined. On a perusal of the enquiry officer's report it is clear that the Traffic Inspector, who has checked the bus has clearly stated that petitioner was in a fit mental condition and was totally balanced at the time of checking. The statement in this respect can be referred at this stage:

"प्रश्न- क्या प्रार्थी चेकिंग के समय संतुलित था ।
उत्तर- हमारे हिसाब से संतुलित थे ।"

8. Further examination of the enquiry officer's report indicates that the petitioner has given his statement in which he has only reiterated his stand that he was not in a fit mental condition but he has not adduced any supporting and corroborative evidence in respect to his theory of physical ailment leading to such a situation which resulted in such a major lapse. It has been admitted by the petitioner that when he was lying in his quarter he was compelled by the Corporation staff namely Vishwanath, a driver; Ramnath, Checking Clerk and another driver Mohd. Rashid who came to the petitioner to whom the petitioner informed that he is not well as he took the medicine for his severe mental headache. Although any one out of the aforesaid staff or any other person to whom the petitioner informed about his ailment, on their examination could have been able to substantiate the factum of ailment of the petitioner, but in spite of the query having been made by the enquiry officer that whether he intends to lead any evidence the petitioner flatly stated that he is not ready to lead any evidence. The relevant facts as are contained in the enquiry report which are relevant in this context will be useful to be quoted here:

"प्रश्न- आप को इस सम्बन्ध में किसी से और कुछ कहना है तथा कोई साक्ष्य प्रस्तुत करना है ।
उत्तर- श्रीमान जी किसी से कुछ नहीं पूछना है और न ही कोई साक्ष्य ही प्रस्तुत करना है ।"

9. In view of the aforesaid, it is clear that the petitioner has not adduced any evidence either oral or documentary to substantiate his version of ailment which was of such a nature that he being well

versed with the duty of the conductor has committed very basic mistakes which he claims to be innocuous in nature i.e. no entry in way bill, not issuing tickets after taking money from 59 passengers. Needless to say that the burden is always first on the department/employer of proving charges but at the same time in view of the nature of the allegations and the explanation so offered by the charged employee the proof is to be insisted from the party who is in position to give positive evidence being in his control. As explanation offered by the petitioner in the light of defence could have been proved by some positive evidence, no negative evidence can be expected from the employer. So far the case in hand is concerned the departmental witness says that the petitioner was in a fit mental condition at the time of checking then what proof or evidence in this respect could be expected from them and on the other hand as the petitioner has stated to be suffering from mental disbalance and physical ailment for which he has stated that it is in the full knowledge of the three of the staff of the Corporation whose name have also been given as referred above but in spite of the opportunity by the enquiry officer petitioner has not chosen to examine any of the staff. It has also come in the order of the disciplinary authority that petitioner has stated in his reply that he has not been given opportunity to cross examine the Traffic Inspector and the bus driver but the disciplinary authority has rightly concluded that the petitioner himself has stated that he need not to examine/cross examine any body. It also appears from the report of the enquiry officer that charge against the petitioner is that he is responsible for cancellation of the bus service from Allahabad to Bahraich as after reaching Allahabad he did not turn up for which the driver has also reported in writing. In view of the aforesaid it appears that the disciplinary authority after taking into consideration the findings of the enquiry officer after noticing them in detail and reply as has been submitted by the petitioner, after assigning reason that the explanation of the petitioner has not been found to be sufficient has confirmed the proposed punishment and removed the petitioner from service. The appellate authority and the revisional authority have also agreed with the findings of the disciplinary authority. Appellate authority has mentioned the matter in detail. Full facts have been mentioned, the explanation of the petitioner have been mentioned, findings of the enquiry officer have been referred and thereafter the agreement with the decision of the disciplinary authority has been recorded and, therefore, it cannot be said to be a case of non application of the mind leading to violation of principles of natural justice. Same is the situation with the order of the revisional authority. Although the revisional authority has not mentioned facts in great detail as has been done by the two authorities but on a reading of the order it is clear that he was conscious of all the facts and he has rightly observed relevant aspect of the matter that during the course of the enquiry petitioner has just reiterated his stand of ailment but has not adduced any evidence in support thereof and, therefore, in the absence of any evidence that cannot be accepted. In view of the aforesaid examination it is clear that on the facts of the present case it cannot be said that the orders passed by either of the authority suffer from non application of the mind, for the reason of there being no reason. In view of the aforesaid, decisions as has

been referred by the learned counsel for the petitioner having no application to the present case are of no assistance to him. On the other hand decisions as has been referred by the learned counsel for the respondents that in the event the disciplinary authority refers to the findings of the enquiry officer and then proceeds to record a reason that there is nothing to discard the reasonings and the findings and to disagree with the same then it is a clear case of application of mind and no further reiteration of all the facts an independent reason is required. It has been stated by the Apex Court that it is only in those cases where the fresh enquiry is to be directed or the disciplinary authority intends to disagree with the findings then only the independent reasonings are required.

10. In view of the aforesaid analysis it is clear that petitioner has been punished on the charge of serious lapses on his part in discharge of duty. The explanation given by him has not been found to be substantiated by any material and there being a finding on a question of fact the court do not find any perversity or apparent mistake in the findings and conclusions arrived at by the enquiry officer or the disciplinary authority and thus petitioner is not entitled to get any relief from this Court.

11. For the reasons recorded above writ petition fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.7.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 9052 of 2001

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

Counsel for the Petitioners:
Sri Ashok Khare
Sri A.K. Singh
Sri B.P. Yadav
Sri B.P. Singh
Sri R.S. Singh

Counsel for the Respondents:
S.C.

Education & Service - U.P. Homeopathy Medical Colleges Acquisition and Misc. Provisions Act 1981, Sec 4 (2)- amalgamation- of two or more colleges- State Government issued UP Ordinance No. 4 of 2001 for such purpose- amounts to policy decision- should not be interfered.

W.P. No. 34022 of 2002 XL-IIT Forum & others Vs. State of U.P. & others and W.P. No. 43985 of 1977 Kanpur Aloo Arhati Association & another Vs. State of U.P. & others

Held- Para 9 & 10

A perusal of section 4 (2) of the 1981 Act shows that the State Government has power to amalgamate two or more colleges and transfer students and teachers from one college to another. The U.P. Ordinance no. 4 of 2001 Annexure-2 to the writ petition confers further power for such transfer and

amalgamation. Thus it cannot be said that there is no power to issue the impugned Government Order and Circular letter.

The impugned Government Order and Circular amounts to policy decision and this court should not ordinarily interfere with such policy decisions.

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

1. By means of this writ petition the petitioner has prayed for a writ of certiorari to quash the impugned Government order dated 17.2.2001 Annexure-3 to the writ petition and the Circular letter dated 24.2.2001 Annexure-4 to the writ petition in so far as they direct merger of Rajkiya Tilakdhari Homeopathic Medical college, Jaunpur (hereinafter referred to as Jaunpur College) with Rajkiya Lal Bahadur Shastri Homeopathic Medical College, Allahabad (hereinafter referred to as Allahabad College) and transfer of students and teachers to the Allahabad college.

2. We have heard learned counsel for the parties.

The Jaunpur College was a privately managed Homeopathic Medical College. The petitioners were appointed as lecturer in that College when the same was under private management. On 23.10.1981 the State Legislature enacted the U.P. Homeopathic Medical colleges Acquisition and Misc. Provisions) Act, 1981 copy of which is Annexure-1 to the writ petition. As a consequence , the Rajkiya Tilakdhari Homeopathic Medical College, Jaunpur stood provincialised and the petitioners stood absorbed in the service of the State Government by virtue to section 6 of the 1981 Act.

3. The U.P. Government promulgated the U.P. Ordinance No. 4 of 2001 which was published in the U.P. Gazette extra–ordinary dated 15.2.2001 vide annexure–2 to the writ petition . By means of this Ordinance power has been conferred for transfer of students, teachers and employees from one schedule College to another schedule college or to the National Homeopathic Medical College, Lucknow. On 17.2.2001 the State Government issued a Government order directing amalgamation of the Jaunpur College with Allahabad college, and transfer of all the teaching and non teaching employees to the Allahabad college except the Officer Incharge of the Hospital, Pharmacist attached to the outdoor and the peon. True copy of the Government Order dated 17.2.2001 is Annexure–3 to the writ petition.

4. It is alleged in paragraph 16 of the writ petition that the impugned decision of amalgamation and transfer is not based on any administrative reason nor prompted by financial constraints and it is not in the public interest. It is alleged that the impugned decision is arbitrary and violative of Article 14 of the constitution.

5. A counter affidavit has been filed and we have perused the same. In paragraph 4 of the same it is stated that the State Government, looking to the financial burden and shortage of funds decided to combine and amalgamate the two colleges, and hence it issued the ordinance and orders of 2001.

6. In paragraph 6 and 7 of the counter affidavit it is stated that not only

the Allahabad and Jaunpur Medical colleges have been amalgamated but several other Homeopathic Medical Colleges have also been amalgamated.

7. We have carefully considered the submissions of the learned counsel for the parties. Sri Ashok Khare learned counsel for the petitioner submitted that the Government order dated 17.2.2001 while directing the amalgamation of the Jaunpur College. In our opinion this decision was taken on administrative grounds and it is not for this court to sit in appeal over such administrative decisions. Whether the Hospital attached to the Jaunpur College should be transferred to Allahabad or not is for the authorities to decide and not for this Court. Moreover, as stated in paragraph 13 of the counter affidavit, in the Hospital attached to the Jaunpur College there were two departments namely outdoor department and indoor department. The indoor patient department has been closed down at Jaunpur and merged with the Allahabad College. The outdoor patient department is still functioning at Jaunpur for which the post of Medical Officer Incharge, a Pharmacist and a peon have been retained at Jaunpur. In paragraph 14 of the same it is stated that out of 54 employees and teachers who were posted at Jaunpur College 46 joined at Allahabad and only the petitioners did not join and they obtained exparte interim orders concealing the true facts.

8. In paragraph 16 of the same it is stated that in the year 1981 when the U.P. Act 21 of 1981 came into force two College which were not found upto the mark were amalgamated with the Jaunpur College but by lapse of time the Jaunpur College also could not maintain the standards, which were required and hence it was amalgamated with the Allahabad college.

9. A perusal of section 4 (2) of the 1981 Act shows that the State Government has power to amalgamate two or more colleges and transfer students and teachers from one college to another. The U.P. Ordinance no. 4 of 2001 Annexure-2 to the writ petition confers further power for such transfer and amalgamation. Thus it cannot be said that there is no power to issue the impugned Government Order and Circular letter.

10. The impugned Government Order and Circular amounts to policy decision and this court should not ordinarily interfere with such policy decisions.

11. Education is in Entry 25 of List III of the VIIth schedule of the Constitution , and hence the State Legislature can certainly legislate on this subject.

12. In **Dental Council of India vs. Subhatri KKB charitable Trust AIR 2001 SC 2151** (vide paragraph 13) and in **M/s Aruna Rai v. Union of India 2002 (7) SCC 368** the Supreme Court has observed that in matters of policy the Courts have a limited role of jurisdiction, and can intervene only if the policy is against some provision of the Constitution . In our opinion the impugned Government Order do not violate any provision of the Constitution.

13. In **Civil Misc. Writ Petition No. 34022 of 2002 XL-IIT forum and others v. State of U.P. and others** decided on 27.5.2003 a division bench of this court

observed that the Court should exercise restraint in policy matters and should not sit in appeal over the decision of the Legislature. In **Civil Misc. Writ Petition No. 43985 of 1997 Kanpur Aloo Arhati Association and another v. State of U.P. and others** decided on 1.7.2003 a division bench of this court considered the challenge to the validity of the Notification under section 7 (2) (b) of the U.P. Krishi Utpadan Mandi Samiti Ltd. Adhiniyam and held that the said Notification amounts to delegated legislation and hence the Court has very limited scoped of interference.

14. In both the aforesaid decisions this court stressed the importance of judicial restraint by the court towards legislative or administrative decisions.

15. In the counter affidavit the respondents have mentioned in paragraph 4 the reasons for issuing the impugned orders, and we cannot say that these reasons are arbitrary.

16. Following the decisions of this court in Civil Misc. Writ Petition No. 34022 of 2002, XL-IIT Forum and others v. State of U.P. and others and Civil Misc. Writ Petition No. 43985 of 1997, Kanpur Aloo Arhati Association and another v. State of U.P. and others (supra), this writ petition is dismissed. Interim order is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 40420 of 2001

Ram Singh Yadav ...Petitioner
Versus
The Commissioner/Director Handloom and Technology Nideshalaya, U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Sudhakar Pandey
Sri Prabhakar Pandey

Counsel for the Respondents:
S.C.

Service Law-appointment vacancy arising out resignation of a general candidate, belonging to Backword Community-claimed by an OBC candidate-such claim contrary to G.O. dated 25.3.94-which entitles candidates from amongst the waiting list of that particular category-held-candidate who resigned even though from backward community, ceases to be as OBC category-claim cannot survive.

Held- Para 9

I have given my considered thought to the aforesaid argument and gone through the Government Order dated 25.3.1994 and in my opinion, the contention of learned counsel for the petitioner, cannot be accepted, in as much as the impugned Government Order clearly demonstrates that if the vacancy of General Category candidate occurs during the lifetime of panel, the same shall be filled in amongst the waiting list of that particular category. Shri Rajesh Kumar Yadav who has resigned and due to his resignation the vacancy occurred which has given rise to

the filing of the present writ petition, has already been placed at Serial No. 1 of General Category candidates having secured highest marks, therefore, he ceases to be candidate belonging to Other Backward Class category. That being the factual and legal position, the claim of petitioner, Ram Singh Yadav cannot survive.

JT 1998 (6) SC 464 referred to .

(Delivered by Hon'ble Anjani Kumar, J.)

1. This writ petition was directed to be listed along with writ petition no. 25549 of 2002. For the sake of convenience the writ petitions are being taken up chronologically. The petitioner, Ram Singh Yadav has earlier filed writ petition No. 20229 of 2000 which was finally disposed off by this Court vide its order dated 2.5.2000 with the following directions:

"Heard learned counsel for the parties.

With regard to his grievance the petitioner has already made a representation dated 16.12.1999, Annexure-4 to the writ petition, before respondent.

This writ petition is finally disposed of with a direction to respondent to decide the petitioner's aforesaid representation by a speaking order, within a period of three months from the date of production of a certified copy of this order before him**."**

2. Pursuant to the aforesaid direction the representation filed by the petitioner, Ram Singh Yadav was disposed off by impugned order dated 8.8.2000 and 31.5.2001, copies whereof have been annexed as Annexures 6 and 12, passed in the present writ petition. Petitioner, Ram Singh Yadav filed one more writ petition No. 36179 of 2000 which was allowed by this Court on 18.4.2001 with the following directions "Heard Shri Sudhakar Pandey, learned counsel for the petitioner and the learned counsel representing the respondents. The petitioner was appointed as Industrial Supervisor in Hathkargha Evam Vastroudhyog, U.P. by the order dated 4.8.2000 which order has been cancelled by the impugned order dated 8.8.2000 on the ground that the appointment was defective (Trutipurna). The defect has not been depicted in the order impugned herein. The reason which led to passing of the impugned order was referred to be recorded in separate office memorandum dated 8.8.2000 referred to in the impugned order but the same has not been brought on record. Undisputedly, the petitioner was not afforded any opportunity of showing cause nor was he served the said office memorandum dated 8.8.2000, which pointed out defects on the basis of which the appointment of the petitioner has been cancelled.

3. **In *Basudev Tiwari Versus Sido Kanhu University and others, JT 1998 (6) SC, 464,*** it has been held that the question whether the appointment was illegal or defective should be decided without affording any opportunity of showing cause. In my opinion, the order impugned herein is liable to be quashed.

4. Accordingly, the writ petition succeeds and is allowed. The impugned order dated 8.8.2000 is quashed without prejudice to the right of the competent authority to pass such order as it may deem fit and proper after affording an

opportunity of showing cause to the petitioner. The petitioner shall be entitled to all consequential benefits.

5. The facts leading to filing of the aforesaid writ petitions are that the petitioner who belongs to Other Backward Class Category applied pursuant to the advertisement dated 10.8.1998 issued by the respondent No. 1 for appointment to the post of Industrial Supervisor.

6. The admitted case of the parties is that one Rajesh Kumar Yadav who also belongs to Other Backward Class category has secured highest marks amongst all categories and therefore, he was placed at Serial No. 1 amongst the General Category candidates. The petitioner, Ram Singh Yadav was selected and was placed at serial No. 3 in the waiting list of Other Backward Class candidates. Rajesh Kumar Yadav who was placed at Serial No. 1 in General Category, has resigned after the appointment. Thus the petitioner, Ram Singh Yadav filed an application that since Rajesh Kumar Yadav has resigned, who belongs to Other Backward Class category, the vacancy caused by his resignation namely resignation of Rajesh Kumar Yadav, should now be filled in from amongst the candidates of Other Backward Class Category and petitioner being candidate belonging to Other Backward Class category, should be given appointment. It is this contention of petitioner Ram Singh Yadav led to filing of the two earlier writ petitions and the present writ petition.

7. After the order dated 8.8.2000 was quashed by this Court, the respondent pursuant to the direction issued by this Court afforded full opportunity to the petitioner and stated that according to the relevant Government Order since Rajesh Kumar Yadav was placed in the category of General candidates, the vacancy caused due to resignation of Rajesh Kumar Yadav will be filled in amongst the candidates of waiting list of General Category and not amongst the candidates of waiting list of Other Backward Class category. In this view of the matter, the earlier letter of appointment issued in favour of the petitioner, Ram Singh Yadav deserves to be cancelled and is cancelled by the order dated 31.5.2001, which is subject matter of challenge of the present writ petition.

8. Learned counsel for the petitioner argued that the impugned order is illegal as according to him the provisions of Government Order dated 25.3.1994 are not applicable to the case of the petitioner, Ram Sigh Yadav.

9. I have given my considered thought to the aforesaid argument and gone through the Government Order dated 25.3.1994 and in my opinion, the contention of learned counsel for the petitioner, cannot be accepted, in as much as the impugned Government Order clearly demonstrates that if the vacancy of General Category candidate occurs during the lifetime of panel, the same shall be filled in amongst the waiting list of that particular category. Shri Rajesh Kumar Yadav who has resigned and due to his resignation the vacancy occurred which has given rise to the filing of the present writ petition, has already been placed at Serial No. 1 of General Category candidates having secured highest marks, therefore, he ceases to be candidate belonging to Other Backward Class

category. That being the factual and legal position, the claim of petitioner, Ram Singh Yadav cannot survive.

10. In view of above discussion, this writ petition deserves to be dismissed and is hereby dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2003

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE K.N. OJHA, J.

Civil Misc. Writ Petition No. 4604 of 1980

M/s Kailash Motors, Kanpur ...Petitioner
Versus
Presiding Officer, Labour Court (1), Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri J.N. Tiwari
Sri C.B. Gupta

Counsel for the Respondents:
Sri K.P. Agarwal
Sri Y.D. Dwivedi
Ms. Suman Sirohi
S.C.

Labour & Service- Removal- muster roll employee abandonment -whether amount to retrenchment? Question referred to larger bench- held, such removal amount to retrenchment- without following mandatory provisions his name can not be struck from muster roll.

Held- Para 9

In absence of fixed term contract the termination of service of a workman or striking off his name from muster-roll would not be covered in the exception to retrenchment. The petitioner's service had been terminated by the respondents under the standing orders treating it to be abandonment of employment. The abandonment of service has not been excluded from the definition of retrenchment. Therefore, before terminating the services of the workman the petitioner was required to follow the mandatory procedure of retrenchment. The removal of the name of workman from the register and depriving him from work would amount to retrenchment and would be bad, as mandatory provisions of retrenchment had not been followed.

Case laws discussed:
1990 (61) FLR 1
1991 (63) FLR 721
1993 (66) FLR 211
1998 (79) FLR 233
2001 (88) FLR 274
2001 (88) FLR 383
2000 (85) FLR 807
2002 (95) FLR 43

(Delivered by Hon'ble V.M. Sahai, J.)

1. The question which has been referred to larger bench by the learned Single Judge is extracted below:-

"Whether removal of name of a workman from the muster-roll on the ground of abandonment amounts to retrenchment as contemplated by the Industrial Disputes Act, 1947 and the Uttar Pradesh Industrial Disputes Act, 1947?"

2. The facts in brief are that the petitioner is a small-scale unit engaged in sales and purchase of Tata Diesel vehicles, Bajaj Scooters and other auto vehicles and was employing about 40 workmen. The establishment of the petitioner is a shop within the meaning of U.P. Shops and Commercial Establishments Act, 1962. The State of Uttar Pradesh has framed standing orders

which are known as Standing Orders 1972 which came into force under section 3 (b) of the U.P. Industrial Disputes Act, 1947 (in brief the U.P. Act) with effect from 14.8.1972. Sri Pratap Singh, the respondent no. 3 (in brief the workman), was employed on 7.4.1971 in the petitioner's establishment. He applied for one day's casual leave on 13.11.1972. After expiry of leave he did not report for duty and remained absent for four weeks. On 5.12.1972 his name was struck off from the register on the ground that he had abandoned his employment. He was informed about the order sent by registered as well as ordinary post on 6.12.1972. He reached the office on 6.12.1972 and signed the attendance register, which was cut off by the manager of the establishment. The workman raised an industrial dispute. The State Government on 25.7.1973 referred the dispute, under section 10 (1)(c) to the Labour Court, Kanpur which was registered as Adjudication Case No. 209/1973, as to whether the name of Sri Pratap Singh clerk had been validity struck off on 5.12.1972 from the register depriving him from his work and as to what relief the workman was entitled?

3. The Labour Court by its award dated 31.1.1980 held that the workman overstayed his leave but it was not a case of abandonment of employment. It directed reinstatement of the workman within a week and granted 25% back wages from 14.11.1972 till the date of reinstatement. The was challenged before this court. Two questions arose, whether absence by the workman after expiry of the leave amounts to abandonment of employment and whether striking off the name of workman from muster-roll, due to absence without leave, after expiry of the period in the standing orders amounted to retrenchment. Since there was difference of opinion on these aspects, the learned Single Judge hearing this petition referred the matter to the larger bench to resolve the conflict. A Single Judge in Kshetriya Shri Gandhi Ashram Magahar v. Ram Samujh Maurya and others 1990 (61) Indian Factories and Labour Reports 1 held that where a workman has himself abandoned his job his service would be deemed to have been terminated automatically. It further held that abandonment of service shall not constitute retrenchment. In the other decision namely Afsar Mian v. Labour Court, Bareilly and others 1991 (63) Indian Factories and Labour Reports 721 it was held that every termination, for whatsoever reason it may be, is retrenchment excepting the categories of termination specified in Section 2(00) of the Central Act. Similarly in Arun Kumar Mathur v. Labour Court and another 1993 (66) Indian Factories and Labour Reports 211 Section 2 (00) of the Central Act was interpreted and it was held that voluntary abandonment of service would not fall within the exception of Section 2 (oo) and removal of the name of a workman from the muster-roll amounted to retrenchment.

4. We have heard Sri J.N. Tiwari learned senior counsel for the petitioner and Sri K.P. Agarwal learned senior counsel appearing for the respondents. We would first take up the question of abandonment. The petitioner's service was terminated on the ground of absence from duty in view of clause 15 (ix) of the Standing Orders which is extracted below:-

"A workman remaining absent without leave for a period exceeding 15

days at a stretch shall be deemed to have abandoned the employment."

5. It provided that if a workman remained absent without leave for a period exceeding 15 days at a stretch, he shall be deemed to have abandoned his employment. Such standing orders were framed by industrial units after enactment of Industrial Employment (Standing Orders) Act 1946 requiring the management to define clearly the conditions of employment of the workman working in the establishment. In Uptron India Ltd. V. Shammi Bhan and another 1988 (79) Indian Factories and Labour Reports 233 the apex court while considering a case of permanent employee took the view that a clause providing for automatic termination of service without there being any provision for opportunity of hearing to the delinquent employee was invalid. In M/s Scooters India Ltd. V. M. Mohammad Yaqub and another 2001 (88) Indian Factories and Labour Reports 274 the apex court held that even if the standing orders provide that if an employee overstays leave then if results in automatic termination of his service, was bad if no opportunity of hearing was afforded. The decisions in Uptron India Ltd. and M/s Scooters India Ltd. were decisions rendered by two Judges. Sri J.N. Tewari has placed reliance on a three Judges bench decision of the apex court in Punjab & Sind Bank and others V. Sakattar Singh 2001 (88) Indian Factories and Labour Reports 383 wherein the apex court took the view that if an employee remained absent from duty without any leave for sufficiently long period then his absence from duty would amount to abandonment of service and no opportunity of hearing was required to be given to such an employee. This too was a case of permanent employee. But it appears the earlier decision in Uptron India Ltd. was not brought to the notice of the bench. It was decided in favour of the management relying on the decision in Syndicate Bank v. General Secretary, Syndicate Bank Staff Association and another 2000 (85) Indian Factories and Labour Reports 807 wherein it was held that when a bank employee unauthorisedly absented himself from work for the period exceeding the prescribed time limit of 90 days and the bank having served a notice upon him requiring to submit an explanation to join work within the prescribed period of 30 days, as otherwise he would be deemed to have retired, was held to be proper and such action was not in violation of principles of natural justice. In Syndicate Bank (supra) the order of the Management was upheld because the Management by sending a show cause notice had complied with principles of natural justice. This was relied in Punjab & Sind Bank (supra) because the workman failed to bring on record any material to show that his absence from work was justified. In a later decision in M/s Lakshmi Precision Screws Ltd. v. Ram Bhagat 2002 (95) Indian Factories and Labour Reports 43 this decision was explained and it was held "…factual context differs in material particulars and even the bipartite settlement involved therein was much accommodative in nature". It was further held that the doctrine of natural justice is an inbuilt requirement of standing orders and the workman was entitled for an opportunity of hearing before termination of his service even if the standing orders did not provide for affording any opportunity of hearing.

6. The apex court thus has settled that the services of a permanent or regular workman cannot come to an end automatically under the standing orders framed by the Industrial Units without complying with principles of natural justice except where the workman does not avail the opportunity afforded by the employer or does not place any material before the court to prove that his absence was bona fide, thereby, giving rise to an inference that even if opportunity would have been given, he had no explanation to offer. The services of a permanent or regular workman, therefore, could not come to an end under clause 15 (ix) of the standing order unless the principles of natural justice was complied. Since the workman in Kshetriya Shri Gandhi Ashram Magahar (supra) was a permanent workman his service could not come to an end automatically without compliance of principles of natural justice.

7. The next question is whether removal of name of a workman from muster-roll amounts to retrenchment. The word 'retrenchment' has been defined both in Central and U.P. Act. Section 2 (00) of the Industrial Disputes Act is extracted below:-

"retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(a) voluntary retirement of the workman; or
(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or
(c) termination of the service of a workman on the ground of continued ill-health."

8. The definition in section 2 (s) of the U.P. Industrial Disputes Act, 1947 is extracted below:-

"'Retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include-

(i) voluntary retirement of the workmen; or

(ii) retirement of the workmen on reaching the age of superannuation if the contract of employment between the employer and workman concerned contains a stipulation in that behalf."

9. Both these definitions have come up for consideration from time to time and the courts have given wider meaning to the word 'retrenchment'. It has been held that except for the circumstances mentioned in the clauses, every termination of workman could be retrenchment. In Uptron India Ltd. (supra) which was a decision from this court, the apex court held that the latter part of clause (bb) of section 2 (00) of the

Industrial Disputes Act, namely, termination in pursuance of a stipulation to that effect in the contract was confined to fixed term employment referred in earlier part. Therefore, in absence of fixed term contract the termination of service of a workman or striking off his name from muster-roll would not be covered in the exception to retrenchment. The petitioner's service had been terminated by the respondents under the standing orders treating it to be abandonment of employment. The abandonment of service has not been excluded from the definition of retrenchment. Therefore, before terminating the services of the workman the petitioner was required to follow the mandatory procedure of retrenchment. The removal of the name of workman from the register and depriving him from work would amount to retrenchment and would be bad, as mandatory provisions of retrenchment had not been followed. For these reasons we are of the opinion that the learned Single Judge in Kshetriya Shri Gandhi Ashram Magahar v. Ram Samujh Maurya and others 1990 (61) Indian Factories and Labour Reports 1 did not lay down the law correctly. The answer to the question referred in the circumstances is as under:-

"Where the name of a permanent or regular workman is removed from the muster roll on the ground of abandonment of service it would amount to retrenchment as contemplated by the Industrial Disputes Act, 1947 and the U.P. Industrial Disputes Act, 1947."

Let the records be places before the learned Single Judge.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2003

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 6166 of 2003

CN 141 CP Kaushlesh Singh and others ...Petitioners

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioners:
Smt. Poonam Srivastava

Counsel for the Respondents:
S.C.

U.P. Police Regulation, Regulation 525-Transfer of constables-from armed police to civil police-petitioners working as constables for more than 15 years-transfer to armed police not proper-conditions of Regulations not fulfilled-hence, transfer order quashed.

Held- Para 5

It is the specific case of the petitioners that they have been in service as constables for periods ranging from 15 to 20 years. Specific averments to this effect have been made in Paragraph 17-A of the writ petition which fact has not been denied by the respondents in their counter affidavit. Considering the fact that the Superintendent of Police of the district has the power to transfer a constable from Civil Police to the Armed Police only under Regulation 525 of the Regulations and the conditions of the said Regulation have not been fulfilled in the present case as all the petitioners are admittedly working as constables for more than 15 years, they could not have been transferred from the Civil Police to the Armed Police under the said Regulation. The impugned order dated 28.1.2003 thus deserves to be quashed.

(Delivered by Hon'ble Vineet Saran, J.)

1. Petitioners are aggrieved by the order dated 28.1.2003 passed by Respondent no.2, Superintendent of Police, Mahoba. The petitioners are Constables in Civil Police and by the impugned order they have been transferred to the Armed Police for a period of six months.

2. Smt. Poonam Srivastava, learned counsel appearing on behalf of the petitioners, has urged that constables of the Civil Police can be transferred to the Armed Police by the Superintendent of Police only under Regulation 525 of the U.P. Police Regulations (hereinafter referred to as the Regulations). It has been contended that since the conditions of the said regulation are not fulfilled in the present case, the petitioners could not have been transferred.

3. Learned Standing Counsel has submitted that transfer of the constables from the Civil Police to the Armed Police can be made by the Superintendent of Police as per the requirement which may be assessed by the Superintendent of Police of the district and in case if he finds that there is shortage of armed police personnel, the constables of Civil Police can be transferred to the Armed Police. He has, however, not been able to show any other regulation besides Regulation 525 of the Regulations by virtue of which the Superintendent of Police of a district can transfer the constables of the Civil Police to the Armed Police.

4. Having heard learned counsel for the parties and on perusal of record, I am of the opinion that this writ petition deserves to be allowed. Regulation 525 of the Regulations empowers the Superintendent of Police to transfer a constable of Civil Police to the Armed Police who has put in more than two years and less than ten years of service, for a period not exceeding six months in any one year. Regulation 525 of the Regulations is quoted below:-

"525. Constable of less than two years' service may be transferred by the Superintendent of Police from the armed to the civil police or vice versa. Foot police constables may be transferred to the mounted police at their own request. Any civil police constable of more than two and less than ten years' service may be transferred to the armed police and vice versa by the Superintendent for a period not exceeding six months in any one year. All armed police constables of over two years' service and civil police constables of over two and under ten years' service may be transferred to the other branch of the force for any period with the permission of the Deputy Inspector General.

In all other cases the transfer of police officers from one branch of the force to another or from the police service of other Provinces to the Uttar Pradesh requires the sanction of the Inspector General".

5. It is the specific case of the petitioners that they have been in service as constables for periods ranging from 15 to 20 years. Specific averments to this effect have been made in Paragraph 17-A of the writ petition which fact has not been denied by the respondents in their counter affidavit. Considering the fact that

the Superintendent of Police of the district has the power to transfer a constable from Civil Police to the Armed Police only under Regulation 525 of the Regulations and the conditions of the said Regulation have not been fulfilled in the present case as all the petitioners are admittedly working as constables for more than 15 years, they could not have been transferred from the Civil Police to the Armed Police under the said Regulation. The impugned order dated 28.1.2003 thus deserves to be quashed.

6. The writ petition is, accordingly, allowed and the order dated 28.1.2003 is quashed in so far as it relates to the petitioners. The respondents are restrained from transferring the petitioners from Civil Police to the Armed Police. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 23210 of 2001

Janpad Auta Rickshaw Chalak Sangh, Azamgarh and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri J.P. Singh

Counsel for the Respondents:
Sri Govind Krishna
S.C.

U.P. Municipalities Act-1916, Section 298- power to frame bye-lays-emposition of licence fee of about Rs. 40/- per month on auto rickshaws-enforced on basis of Govt. order dated 15.12.99-hence approval by State Govt. not needed-amount imposed not arbitrary or exorbitant-

Held- paras 6 and 7

The State of U.P. had framed model bye-laws and sent them for implementation. In para 20 it is stated that the bye-laws have been enforced on account of the G.O. of the State Govt. dated 15.2.99, and as such there is no need of approval by the State Govt. In para 21 it is stated that the publication has been made in Rashtirya Sahara which is a daily news paper having wide circulation all over U.P. The allegation that local inhabitants were not in a position to see the advertisement was denied.

Annexure 3 to the petition indicates that the fees for licence of Auto Rickshaw is Rs.500/- per year which works out to about Rs.40/- per month. Hence the impugned fee is not in anyway exorbitant or arbitrary. Similar notification imposing licence fee on vehicles, nursing homes, insurance companies, etc. has been upheld by us.

Case laws discussed:
2001(3) UPLBEC 2483
C.M.W.P.No. 14037 of 1999 decided on 19.5.03.

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

1. This writ petition has been filed for a writ of certiorari to quash the impugned bye-lays dated 28.6.1999 Annexure 3 to the writ petition which were published in U.P. Gazette dated 20.5.2000. The petitioners also prayed that respondent nos. 4 and 5 be directed not to realize licence fee from auto Rickshaws and not to harass their operators in this connection.

2. The petitioner no. 1 is a registered union of Auto Rickshaw Operators Society and petitioner no. 2 is the Secretary of the Society. It is alleged in para 3 of the petition that the Nagar Palika Parishad, Azamgarh respondent no.4 has been in the habit of imposing illegal taxes on Auto Rickshaws and hence a Writ petition No. 543 of 2000 had been filed in this Court which was disposed of by judgment dated 11.7.2000 Annexure 1 to the petition. By that order petitioner was directed to make a representation to the Nagar Palika Parishad.

3. In para 4 of the petition it is stated that on 30.4.2001 the Chairman, Nagar Palika Parishad, Azamgarh notified the rate of annual licence fee to be implemented from 1.4.2001. True copy of the notification dated 30.04.2001 is Annexure 2. The rate schedule has been fixed in accordance with the bye-lays published in U.P. Gazette dated 20.3.2000 Annexure 3 to the petition.

4. A perusal of Annexure 3 shows that the notification has been issued under Section 298 of the U.P. Municipalities act, 1916 which gives the power to the Municipal Board to frame bye laws. Section 298 (1) of the U.P. Municipalities Act states :

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

(2) In particular, and without prejudice to the generality of the power conferred by sub section (1), the board of a municipality, wherever situated, may in the exercise of the said power, make any bye law described in List 1 below, and the board of a municipality, wholly, or in part, situated in the hilly tract may further make, in the exercise of the said power, any bye law described in List II below.'"

5. It is alleged in paras 6,7 and 10 of the petition that the licence fee can only be realized if some service is rendered by the Nagar Palika but it is alleged that the Nagar Palika Parishad, Azamgarh does not render any service to the Auto Rickshaws operators. It is alleged in para 11 of the petition that the impugned bye laws were published without complying with the provisions of Section 44 (3) and Section 132 of the U.P. Municipalities Act. In para 12 of the petition it is stated that without approval of the board and earlier Chairman of the Nagar Palika sent the impugned bye laws for publication in the Gazette on 28.6.99. A true copy of the letter of the Chairman dated 28.6.99 in this connection is Annexure 4. It is alleged that in the absence of any approval by the Board, the impugned bye laws could not have been given effect to. In para 14 it is stated that the impugned bye laws were framed without inviting proper objections as per rules. However, a news items were published in Rashtriya Sahara in Lucknow but it is alleged that the local inhabitants were not in a position to see the news item and objections were not filed. It is alleged in para 16 of the petition that there is a lot of resentment in the general public as well as in the owners

of Auto Rickshaws. It is alleged that the fee imposed is unreasonable.

6. A counter affidavit has been filed on behalf of the Nagar Palika Parishad and we have perused the same. In para 5 it is stated that the petitioners had tried to create confusion between Tempo and Auto Rickshaw. It is stated that tempo consists of 7 passengers whereas Auto Rickshaw consists of 2 or 4 passengers as indicated in the G.O. dated 29.9.92 issued by the U.P. State Road Transport Corporation vide Annexure CA-1. In para 7 of the counter affidavit it is stated that the State Government imposed licence fees on Auto Rickshaws after following the legal procedure. In para 12 of the counter affidavit it is denied that the Nagar Palika Parishad is in the habit of imposing illegal taxes on the Auto Rickshaw. It is stated in para 14 that the licence fee has been levied in accordance with law in order to maintain the roads, for providing light, sanitations and other facilities. In para 19 it is stated that the letter dated 28.6.99 indicates that the same had been sent for publication to the Govt. Press, Allahabad. The State of U.P. had framed model bye-laws and sent them for implementation. In para 20 it is stated that the bye-laws have been enforced on account of the G.O. of the State Govt. dated 15.2.99, and as such there is no need of approval by the State Govt. In para 21 it is stated that the publication has been made in Rashtirya Sahara which is a daily news paper having wide circulation all over U.P. The allegation that local inhabitants were not in a position to see the advertisement was denied.

7. We have also perused the rejoinder affidavit.

Annexure 3 to the petition indicates that the fees for licence of Auto Rickshaw is Rs.500/- per year which works out to about Rs.40/- per month. Hence the impugned fee is not in anyway exorbitant or arbitrary. Similar notification imposing licence fee on vehicles, nursing homes, insurance companies, etc. has been upheld by us in Writ Petition No. 14037 of 1999 United India Insurance Co. Ltd. Versus Nagar Nigam, Allahabad decided on 19.5.2003. In this decision we followed the decision of the Division Bench in Chakresh Kumar Jain Versus State of U.P. 2001 (3) UPLBEC 2483. As stated in paras 14 & 17 of the counter affidavit, several services are being provided by the Nagar Palika in this connection, and hence it cannot be said that there is no quid pro quo.

8. As regards Section 132 of the U.P. Municipalities Act the same has no applicability because that relates to taxes and not fees. Thus there is no force in this petition. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.7.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ petition No. 9693 Of 1997.

L.S. Sharma ...Petitioner
Versus
Presiding officer, Labour Court (I), U.P., Ghaziabad and others ...Respondents

Counsel for the Petitioner:
Sri A.C. Tripathi

Counsel for the Respondents:
Sri V.R. Agrawal

S.C.

Industrial dispute Act, reference by Govt.-statutory duty of labour court- to consider the case of the respective parties and the evidence adduced by them- on failure-award cannot sustains.

Held- Para 5

In this view of the matter, in my opinion, the labour court has miserably failed to perform its statutory duty conferred upon it and as held by the Apex Court in a decision reported in [2001 (90) FLR 754] (Supreme Court); *Sapan Kumar Pandit* Versus *U.P. State Electricity Board and others*. The provisions of law indicate that if in the opinion of the Government, an industrial dispute exists then Government can make a reference and the labour court is under statutory obligation to answer the same.

Case law relied on:
2001(90) FLR 754

(Delivered by Hon'ble Anjani Kumar, J.)

1. By means of this writ petition under Article 226 of the constitution of India, petitioner-workman has challenged the award dated 16th August, 1996 passed by the Presiding Officer, Labour Court (I), Ghaziabad in Adjudication Case No. 511 of 1994. The following dispute was referred to the labour Court:

"क्या सेवायोजकों द्वारा अपने श्रमिक श्री एल०एस० शर्मा, पुत्र श्री हर प्रसाद शर्मा, स्टेनोग्राफर को दिनांक १३.२.७५ से सेवा से समाप्त किया जाना उचित तथा/अथवा वैधानिक है? यदि नहीं, तो सम्बन्धित श्रमिक क्या लाभ क्षतिपूर्ति पाने का अधिकारी है तथा अन्य किस विवरण सहित?"

2. The Labour Court issued notice to the parties and allowed the parties to exchange their pleadings and lead evidence. On the pleadings and evidence adduced by the parties, the labour court framed following seven additional issues apart from reference made to it:

(1) Whether the reference is illegal?

(2) Whether the labour Court has jurisdiction to hear the matter?

(3) Whether the transfer order dated 11.1.1975 is binding on the workman concerned, if so, whether the workman concerned is disobeying the transfer order?

(4) Whether the workman has voluntarily abandoned the employment?

(5) Whether the workman is entitled for relief of reinstatement?

(6) To what further relief the workman is entitled?

(7) Whether the workman has utilised four days' leave and thereafter he has not presented himself for employment, if so, what is the effect of the absence on this reference?

3. By the impugned award the labour court decided the additional issues in the following manner:

Additional issue no. 1- against the employer.

Additional issue No. 2-The labour court found that the reference is maintainable before it and it has jurisdiction to hear the same.

Additional issue No. 3- The labour court have recorded findings that the transfer order of the workman was not contrary to

the law, therefore, the workman was not justified in not complying the same.

Additional issue No. 4- The labour court arrived at the conclusion that the workman has voluntarily abandoned the employment and he has not joined his services after his transfer to Ahemdabad.

Additional issue Nos. 5 and 6- The labour court has found that since the workman has not complied with the transfer order and has rushed up to the Court, therefore, it was not necessary to hold a domestic enquiry by the employer particularly when it has already been held that the workman has voluntarily abandoned the employment.

Additional issue No. 7-The labour court has recorded finding regarding the effect of the workman's status after he has been transferred by impugned order as to whether he was entitled for four days' leave or not and finally labour court has found that the termination of the services of the workman by the employer w.e.f. 12.2.1975 was valid and legal and the workman is not entitled for any relief.

4. Aggrieved by the aforesaid award workman approached this Court. It is not disputed that the letter of appointment dated 26th October, 1971 issued to the workman clearly states that the workman is being appointed on the post of Stenographer at its Ghaziabad office. The workman stated that there is no such term and condition which could ask him to be transferred from Ghaziabad. The workman has taken up the defence that because of his participation in the trade union activities, he has been victimised by the employer by way of transferring him at Ahemdabad contrary to the terms and conditions of the appointment letter. This fact was not denied by the employer in the rejoinder affidavit. But as stated above, the award of the labour court only deals with the additional issues framed by the labour court and does not deal with the reference made to it and answered to the reference only in one sentence which is the last sentence of the award.

5. In this view of the matter, in my opinion, the labour court has miserably failed to perform its statutory duty conferred upon it and as held by the Apex Court in a decision reported in **[2001 (90) FLR 754] (Supreme Court); *Sapan Kumar Pandit* Versus *U.P. State Electricity Board and others.*** The provisions of law indicate that if in the opinion of the Government, an industrial dispute exists then Government can make a reference and the labour court is under statutory obligation to answer the same.

6. From the facts of the present case, it is clear that the labour court except for answering the additional issues has not considered the reference made to it by the authority and has not considered the case of the respective parties and the evidence adduced by them in answering the reference made to it.

7. In this view of the matter, in my opinion, the labour court has miserably failed to perform its statutory duty when it has answered the reference in one sentence without considering the respective case particularly when the workman set up the case that he has been victimised by the employer and further that according to the terms and conditions of the letter of appointment he could not be transferred from Ghaziabad to Ahemdabad, clearly demonstrates that

what the workman says, may be true. Since at this stage it would not be proper to express any opinion with regard to the case set up by the workman, suffice to say that for the reasons stated above, the award of the labour court deserves to be quashed and is hereby quashed.

8. In the result, this writ petition succeeds and is allowed. The award of the labour Court dated 16.8.1996 is quashed. The labour court is directed to answer the reference made to it expeditiously considering the long pendency of the litigation between the parties and since there is no interim order in this writ petition, therefore employers are directed to pay half of the wages that would have been paid had his services been not terminated on 12.2.1975 till the date of this judgement, as it was admitted that the employers have absolutely no material to demonstrate that the workman was gainfully employed during this period. With the aforesaid direction the labour court is directed to decide the matter expeditiously preferably within six months from the date of presentation of certified copy of this order before it.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.06.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 42075 of 2002

Agra Engineering Industries Employees Union ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri K.P. Agarwal
Sri S.S. Nigam
Sri Vijay Sinha

Counsel for the Respondents:
Sri S.P. Gupta
Sri Tarun Agarwal
Sri H.N. Shukla
S.C.

Constitution of India Article 226-Practice and Procedure- order passed under Section 25(0)-Review application rejected-No reason disclosed-held- not proper-order rejecting the review application quashed-recording reason- is must to assess the validity of order or even to challenge the validity before higher authorities.

Held-Para 26

These reasons, however, cannot be the only reason to be taken into account while considering the application for closure. There are other facts and circumstances including bonafide of the employers, or such compelling over riding circumstances including the interest of general public, on which the application for closure may be considered. The petitioners in their objection had not only assailed the reasons given in the application namely financial difficulties, but it also challenged the correctness of balance-sheet as documents prepared for the purposes of closure to avoid the consequence in M.C. Mehta's case. The State Government ought to have addressed itself to these questions and to consider whether the objections, had substance. It has been held in Orissa Textile and Steels Ltd. (supra) that the interest of general public has known concept. It is a guiding factor which should have been taken into consideration. The record does not show that the State Government had taken into account the interest of general public as one of the factors, specially when order was to deprive 238 employees of their right to the retrenchment compensation to be

determined in accordance with the Act, as well as compensation of six years wages to be paid to them under the orders of the Supreme Court.

Case law discussed:

1978 (4) SCC- 224
1992 (3) SCC- 336
2002 (92) FLR 648
1989 (1) LLJ 599
2001 LIC 3628
1999 LIC-1749
1986 (2) SCC-624
AIR 1960 SC-56
1997 (2) SCC-353

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Agra Engineering Industries Atroni, Agra, respondent no. 2 is a unit of Jay Engineering works Ltd., a Company incorporated under the Companies Act. Petitioner is a union of Agra Engineering Industries employees. It has prayed for quashing the order dated 26.4.2002 (Annexure-4 to the writ petition), passed by the State Government, allowing application of the company for closure of respondent no. 2, establishment at Agra under section 25 'O' of the Industrial Disputes Act, 1947, and has further prayed for a direction in the nature of mandamus to the respondents not to close down the company i.e. respondent no. 2 and to pay regular salary to its workers.

2. The facts giving rise to this petition are, that respondent no. 2 suspended its production activities w.e.f. 1.8.2001. Wages were, however, paid to the workers with a total strength of 238 including 52 members of the staff and 186 workmen, up to 31.5.2001. A recovery certificate was issued by the Deputy Labour Commissioner under U.P. Industrial Peace (Timely Payment of Wages) Act, 1978 for wages for the month of November, 2001. In writ petition No. 5480 of 2002 this Court with the consent of petitioner company and employees union, stayed the operation of the order for a period of two months, allowing the management to remove finished goods, semi finished goods and scrap from factory and pay the amount under the orders after the removal of the goods. On 26.2.2002, respondent no. 2 made an application to Secretary Labour Government of U.P., informing that it proposes to close down the undertaking with effect from 30.5.2002, and sought permission for closure. In para 4 of the application a declaration was made that in the event approval for the closure was granted, every workman in the undertaking to whom sub section (8) of the said section 25 'O' applies, will be given notice and paid compensation, as specified in Section 25-N of the Industrial Disputes Act, 1947 as if the workman had been retrenched under the said section. The application enclosed a list of workmen, details relating to licensed capacity and utilization capacity of the manufacture of ceiling fans, annual production for preceding three years production in progress itemwise and valuewise etc. It also included balance-sheet and profit and loss account and audit reports for the last three years, which reflected losses. Reasons for the proposed closure were given in appendix XXII appended to the application dated 26.2.2003. These reasons stated that Agra Engineering Industries Agra is a unit of the Jay Engineering Works Ltd. a sick industrial unit with accumulated losses of Rs. 107 crores and a negative networth of Rs. 82 crores. The continued losses had made the financial position of the company so bad that it was not possible to pay suppliers wages and other statutory dues. The Indian Electric fan industry is

facing tremendous pressure both in the terms of prices and business volume with rapidly changing economic environment both within the country and internationally. The organized fan industry in India continuously for 5 years is loosing its market shares to the unorganized sector. The Government Tax policies are continuously making the organized sector uncompetitive at the market place, the gradual increase in excise duty and other government levies over the past few years have further widened the gap between the organized and unorganized sector. The company's BIFR scheme was approved in November, 1997 and provided major portion of rehabilitation funds sources from sale of surplus land at Kolkata, which unfortunately could not materialize despite best efforts by the company in close coordination with Government of West Bengal. In view of continued cash losses the company in June 2002, having no option submitted a supplementary proposal to BIFR proposing to close down manufacturing facility Agra i.e. Agra Engineering Industry. The financial position became so worse that the company was not in a position to continue procuring raw material as suppliers declined to supply fresh materials to the Agra unit before their old dues are settled. The unit suffered huge losses both in terms of productivity and financial losses because of go slow adopted by Agra Workmen during the year 2000-2001. The production activities was suspended with effect from 1.8.2001. The manufacturing plant of Agra Unit was manufacturing most of the economy price models and were the worst hit because of the domestic/international price pressures. The Company have no funds to invest in machines overhauling/reconditioning and that the unit became the weakest link in terms of quality and reliability and thus it was decided to close down Agra Engineering Industry. In annexure XXIII the company disclosed attempts to avoid closure. It was stated that vide order dated 21.11.1997 the BIFR sanctioned a scheme of rehabilitation with cost of Rs. 63.34 crores, including Rs 33 crores from promoters and Rs. 30.34 crores by sale of surplus land at Calcutta. The promoters inducted Rs. 28.77 crores. In financial year March 1993, the company owed an amount of Rs 3306 lacs to the bank and Rs. 166.66 lacs to the term landing institutions besides deferred creditors of Rs. 0.52 lacs due to the banks. Due to non-conclusion of sale of land the expected fund could not become available and thus unfortunate step to take decision to close Agra unit was taken.

3. On receipt of the application the Assistant Labour Commissioner, Agra Region, Agra sent notice dated 20.3.2002 to the parties to appear on 23.3.2002. The petitioner filed their objection on 23.3.2002 denying the facts stated in the application for closure. A preliminary objection was raised that the application could have been made under section 6 (W) of the Industrial Disputes Act, 1947 which provides the procedure for closing down an undertaking. It was stated that the Agra Engineering Unit was established in 1969 and is earning profit for 32 years. The company was manufacturing 1850 fans per shift per day and its high quality fans were sold at Rs. 1200 as against cost of production of Rs. 742 per fan.. In para 5 of the objection it was stated that the unit was notified at sl. no. 170 by the supreme Court in Public Interest Litigation No. 13381 of 1984 and was required to be closed on 31.12.2001.

In order to avoid the compliance of the direction of the Supreme Court and to avoid payment of wages to its workmen, the company filed under section 25 'O' of the Act. The B.I.F.R. has passed two orders for rehabilitation in June 2001 and 11.1.2002, which have not become final and that rehabilitation proposal has not been rejected so far. The application under section 25 (O) was filed in order to avoid liability of payment. On 26.4.2001 the management had entered into settlement with workmen in which workmen agreed for higher production. The other two units of Jay Engineering works at Calcutta and Hyderabad are showing more losses and that no such proposal of closure was sent to either West Bengal or Andhra Pradesh Governments. It was further stated in para 13 of the objection that since the U.P. is a backward Industrial State and that 292 industries of Agra has been closed down, it was not possible to obtain alternative employment. It was stated in para 14 that up-to 1994 the unit was in profits and bonus was paid at 10.6%, 14%,17% and up-to 20%. Production of 20 fans per day in 1969 was increased by workmen upto 1850 fans per day. In the financial year 1999-2000 4,11,140 fans were manufactured. The workmen challenged and objected to the correctness of the balance-sheet and required that the balance-sheet should be re-examined. The workmen raised doubts over the intention of the company inasmuch as the production never ceased and fell below the target.

4. The Labour Commissioner, Kanpur heard both the parties on the date fixed and directed respondent no. 2 to file audited balance-sheet for the last 10 years which were file by the respondent no. 2. After last hearing dated 23.4.2002, the Labour Commissioner submitted his report on the same day, to the Secretary Labour Department. The impugned order refers to the application dated 26.2.2002, the hearing given by the Labour Commissioner, U.P. Kanpur to the employers and the representative of the workmen on various dates. It thereafter concluded that the unit was running in losses for the last 10 years and had accumulated losses of Rs. 9.55 crores, and thus granted permission to Agra Engineering a unit of Jay Engineering Works Ltd. Agra for closure under Section 25 'O' of the U.P. Industrial Disputes Act, 1947.

5. Petitioner filed a detailed and comprehensive review application dated 6.6.2002 under section 25 'O' (5) of the Industrial Disputes Act, 1947. It was heard by Labour Commissioner. He found that no new ground has been taken and recommended on 2.8.2002 to dismiss the review petition. By an order dated 2.9.2002, State Government rejected the review petition.

6. I have heard Sri K.P. Agarwal, Senior Counsel, assisted by Sri S.S. Nigam for petitioner and Sri S.P. Gupta, Senior Counsel, assisted by Shri Tarun Agarwal for respondent No. 2 and learned Standing Counsel. By order dated 14.2.2003 the Court had summoned the original record which was produced on 12.2.2003 and that the records were retained. The matter was heard on 19.2.2003 and thereafter, after three adjournments the order was reserved on 27.3.2003. Sri K.P. Agarwal submits that application for closure has not been allowed for genuine and adequate reasons. The industry was running in profit. There

was and is huge demand of its products and the difference between the sale and profit is not genuine. He submits that the accounts were manipulated for closing the unit. The rehabilitation scheme had been proposed and was not rejected by BIFR. Retrenchment compensation, as directed by Apex Court in M.C. Mehta's case was not paid. He also challenged the adequacy of the grounds for closure as well as the fact that the State Government unduly hurried to close the proceedings as the statutory period of consideration of application was coming to an end. He submits that the Labour Secretary did not apply his mind and failed to consider the report of the Labour Commissioner before granting permission. It will effect the future of the workmen and will vitiate the industrial climate. The workmen were making their best efforts to increase production. According to Sri K.P. Agarwal the application of the company by which the unit was sought to be closed and proposed to retrench its workmen was not bonafide and should not have been allowed.

7. Sri S.P. Gupta, Senior Advocate , appearing for respondent no. 2 defended the order and submitted that the majority of the workmen were given detailed hearing by the Labour Commissioner. Their objections were duly considered and after looking into the entire material on record, the State Government found that the company is running into accumulated losses of 9.55 crores for the last 10 years. He submits that the contention of the petitioner that the application of the respondent company for closure has been made to circumvent the order dated 30.12.1996 passed by the Supreme Court is patently erroneous. In its order dated 30.12.1996 Supreme Court categorically stated, that those who do not opt for gas connection or re-allocate themselves on alternate plots will have to close their factory irrevocably w.e.f. 30.4.1997 and will have to pay compensation to its workers by 31.5.1997. Despite the fact that the unit is not using coal/coke, it applied for gas for manufacturing activities at that moment of time. A huge amount was paid to the gas industry for gas connection. In the meantime the respondent company continued to suffer losses. The production had to be stopped with effect from 1.8.2001 although the management continued to pay its workmen. The question of circumventing the order dated 30.12.1996 passed by the Supreme Court did not arise. It was lastly submitted that the review application filed by petitioner has been considered and was rejected and that no ground has been made out to interfere with the order.

8. Section 25 'O' of the Industrial Disputes Act, 1947 (in short the Act) provides for a detailed procedure for closing an undertaking. Every employer has a right to close down the undertaking. He, however, cannot escape the liability of payment of wages unless he has applied for permission for closure and has been granted such permission. Where the permission has been refused under sub section (2) of Section 25 'O', the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits as if the undertaking has not been closed down. Sub Section (8) provides that where, however, the permission has been granted, under sub section (2), or is deemed to have been granted under sub section (3), every workmen employed immediately before the date of application

for permission, shall be entitled to receive compensation which shall be equivalent to 15 days average pay, for every completed year of continuous service or any part thereof in excess of six months. The object of section 25 'O' is to obtain permission by satisfying the appropriate government with the reasons which are in the interest of general public to close down the undertaking and to legally retrenched its workmen. The Constitutional validity of Section 25 'O' was challenged in **Excel Wears Vs. Union of India and others** (1978) 4 SCC 224. The Constitution Bench of Supreme Court, hearing the case struck down section 25 'O', as it then stood before its amendment, by Amendment Act No. 46 of 1982. The Apex Court held that right to close down business was an integral part of fundamental right to carry on business as guaranteed under Article 19 (1) (g) of the Constitution. There can be a reasonable restriction on this right under Article 19 (6) to restrain or deter, reckless, unfair, unjust and malafide closure. It held that 25 'O' falling in Chapter-V B dealt only with bigger undertaking and of a few type and thus the classification was reasonable, but the procedure and requirement of not giving reasons by the State Government and absence of provisions for a right of appeal or revision or even review after some time, were unreasonable. It also held that even after the valid closure, section 25 'N' was attracted, and that the restrictions imposed were more excessive then were necessary for achieving object and were highly unreasonable.

9. In **Workmen Vs. Meenakshi Mills Ltd.** (1992) 3 SCC 336), while considering the constitutional validity of section 25-N, (as it then stood) Excel Ware's case was considered. It was held that the object and reasons underlining enactment was to prevent unavoidable hardship of the employees resulting from retrenchment, by protecting existing employees and to check growth of unemployment. One of the object was also to achieve higher production and productivity by preserving industrial peace and hormony. Supreme Court held that ordinarily a restriction which had effect on promoting or effectuating a directive principle can be presumed to be a reasonable restriction, and must, therefore, be regarded to have been imposed in the interest of general public. The employers right is not absolute, and that a restriction imposed on employers right to terminate services of an employee is not alien to the constitution of the scheme.

10. The reasons given in declaring the restrictions imposed by section 25'O' in Excel case as unconstitutional were sought to be cured by Amendment Act No. 46 of 1982, and that on the legal position as obtained in Minakshi Mills case, the opinion in Excel Wears Case was referred to a constitution bench in **M/S. Orissa Textile & Steels Ltd. Vs. State of Orissa and others** 2002 (92) FLR 648. The Supreme Court examined the amended provisions of Section 25 'O' in the light of law laid down in Meenakshi Mills Case and held that amending section 25 'O' is not ultra virus the Constitution and is saved by Article 19 (6) of the Constitution of India. Some of the observations, and conditions of valid exercise of powers by State Government in M/S. Orissa Textile & Steel Ltd. relevant for the purposes of this case and contained in paras 10,11,13,15,17,18,20

and 21 of the Judgment are summarized as below:

(a) The appropriate government before passing an order is bound to make an inquiry. The order passed by the appropriate government has to be in writing and is required to contain reasons.
(b) The requirement of making an inquiry postulates an inquiry into the correctness of the facts stated by the employer in the notice served by him, and also all other relevant facts and circumstances including the bonafides of the employer. Opportunity of hearing has to be afforded to the employer, workmen and all persons interested.
(c) The detailed information given by the employer enables the appropriate government to make up its mind and collect necessary facts for the purposes of granting or refusing the permission. The appropriate government would have to ascertain whether the information furnished is correct and whether the proposed action is necessary, and, if so, to what extent.
(d) The making of an inquiry, affording opportunity to the employer, and the workmen, and all other existing persons, and the necessity to pass written order containing reasons, envisages exercise of functions which are not purely administrative in character but are quasi judicial in nature. Government cannot dispense with enquiry, however, the nature of enquiry is at the discretion of Government.
(e) The right of review under sub section (5) of amended section 25 'O' is not at the discretion of the State Government. The word 'may' in sub section (5) has to be read as 'shall' and that the review would necessitate to make an inquiry into all relevant facts, particularly the genuineness and adequacy of the reasons stated by the employer, and giving of an opportunity of being heard. An order passed on review would have to be an order giving reasons. The exercise of powers of review is also a quasi judicial functions performed by the State Government. The review application has to be disposed of within reasonable period. Supreme Court confined this period to 30 days.
(f) Even if the reasons are genuine and adequate, it does not mean that permission to close must necessarily be granted. There can be cases where interest of general public may require that no closure takes place. Such reasons must be all compelling or over-riding in nature such as manufacturing items require for defence of the country, manufacturing vaccine or drugs for an epidemic which is prevalent for that particular time etc. However, the Court clarified that it is not laying down the law that some difficulty or financial hardship in running the establishment would be sufficient. The employer must show that it has become impossible to continue to run the establishment.
(g) The phrase "in the interest of general public" is a phrase of a definite connotation, and a known concept, in section 25'O' which had been bodily lifted from Article 19(6) of the Constitution of India. It is not vague or undefined term.

11. The facts and circumstances which may be sufficient to justify the closure have been the matter of consideration in a number of cases including **Associated Cement Co. Ltd. and another Vs. Union of India and others** by Full Bench of Gujrat High Court; In **1989 (1) LLJ. 599; BPMEL employees Union and others Vs. Union**

of India, 2001 LIC 3628; **Mrs. Noorjahan Begum and others Vs. Orissa State Leather Corporation Ltd. and others** (1999 LIC 1749). In **S.G. Chemicals Employees Union Vs. Management** (1986) 2 SCC 624, the Supreme court interpreted the expression : an undertaking of an industrial establishment" in section 25 'O' and held that the terms of 'undertaking', though it occurs in several sections of the industrial Disputes Act, has not been defined in the Act. It means an establishment or undertaking in which the industry is carried out unless a specific meaning is given to that it has to be understood in its ordinary meaning and sense and thus it means an undertaking which is a part of industrial establishment and both taken together constitute one establishment. The test laid down to determine whether the undertaking constitute one establishment in **Associated Cement Co. Ltd. Vs. Workmen (AIR 1960 SC 56)** were approved. The test which have been followed in subsequent decision included that there must be functional integrally and interdependence of power, unity of financial control and management of the sales office and factory of the appellant company and that too must be considered part of one and the same unit of industrial production.

The thrust of submission of Mr. K.P. Agarwal is that the closure has been effected with malafide intention to avoid consequences of the direction given by Supreme Court in **M.C. Mehta (Taj Trapezium matter) Vs. Union of India** (1997) 2 SCC 353. In order to protect Taj Mahal which is amongst world wonders, the Supreme Court took into account the report of Central Board of Prevention and Control of Water Pollution, New Delhi (Control of Urban Pollution Series CUPS/7/1981-82 page 1981-82) titled as "inventory and assessment of pollution emission in and around Agra-Mathura Region" and the 'Overview Report' regarding status of air pollution around the Taj in 1990 by National Environment Engineering Research Institute (NEERI), and got a survey conducted through the U.P. Pollution Control Board, identified and categorised number of industries situate in Agra Region. Out of 511 types of industries 292 Industries, including 46 Engineering Industries were identified which included respondent industry namely Agra Engineering Industry Artoni, Agra at item 170, at page 379 of the report. The Supreme Court considered these 292 industries out of the aforesaid list as responsible for air pollution and issue orders as against all of them contained in para 35 of the report. In para 34 it was held that 292 industries detailed in para 29 of the report included respondent industry at item no. 170 to change to natural gas for natural fuel. The industries which are not in a position to obtain gas connection for any reason, were required to stop functioning with the aid coke & coal in TTZ and made relaxation as per direction given in para 35. The first direction provided that the industries (292 listed above), shall approach/apply to the GAIL before 15.2.1997 for grant of industrial gas connection. Those which are not in a position to obtain gas connection and which do not wish to obtain gas connection shall apply to UPSIDC before 28.2.1997 for allotment of alternative plots in the industrial estates outside TTZ. The GAIL was required to give final decision by 31.3.1997 and communicate the allotment letters to the individual industries. Direction No. 4 provided that

those industries which neither apply for gas connection nor for alternative industrial plot shall stop functioning with the aid of coke/coal in the TTZ with effect from 30.4.1997. Supply of coke/coal to these industries shall be stopped forthwith. Direction No. 5 provided that GAIL shall commence supply of gas to the industries by 30.6.1997. As soon as the gas supply to an industry commences, the supply of coke/coal to the said industry shall be stopped with immediate effect. Direction no. 13 has been cited as a reason for apply for closure of the respondents industry. This direction No. 13 is quoted as below:

"13. The workmen employed in the above mentioned 292 industries shall be entitled to the rights and benefits as indicated hereunder.

(a) The workmen shall have continuity of employment at the new town and place where the industry is shifted. The terms and conditions of their employment shall not be altered to their detriment.

(b) The period between the closure of the industry in Agra and its restart at the place of relocation shall be treated as active employment and the workmen shall be paid their full wages with continuity of service.

(c) All those workmen who agree to shift with the industry shall be given one year's wages as "shifting bonus" to help them settle at the new location. The said bonus shall be paid before 31.1.1998.

(d) The workmen employed in the industries who do not intend to relocate/obtain Natural Gas and opt for closure, shall be deemed to have been retrenched by 31.5.1997, provided they have been in continuous service (as defined in Section 25-B of the Industrial Disputes Act, 1947) for not less than one year in the industries concerned before the said date. They shall be paid compensation in terms of section 25-F (b) of the Industrial Disputes Act. These workmen shall also be paid, in addition, six years' wages as additional compensation.

(e) The compensation payable to the workmen in terms of this judgment shall be paid by the management within two months of the retrenchment.

(f) The gratuity amount payable to any workman shall be paid in addition."

12. Sri K.P. Agarwal submits, that since petitioner industry was directed to be closed on the aforesaid directions, and the workers were deemed to have been retrenched by 31.5.1997 and were required to be paid six years wages as additional compensation, and that the guidelines given by Supreme Court were extended in November 2000 for ten months and were last extended by its order dated 31.12.2001 only upto 10.1.2001, the respondents tried to avoid consequences, by applying for permission for closure. The initial deposit for gas connection was made to GAIL but no further steps were taken to obtain gas connection. The respondent took no steps whatsoever to switch over to gas or any alternative technology for running the industry. Each owner of the industry was required to file undertaking on or before 10.10.2001 to switchover the gas and if they failed to contain such undertaking, the State was directed to disconnect electricity power as well as water connection forthwith and such industries were also not permitted to be run even by generators. The respondents as such under the aforesaid threat, which required the company to pay six years wages as

additional compensation and gratuity in addition, applied for closure. According to Sri K.P. Agarwal, the State Government was informed by the Labour Commissioner with the aforesaid consequence and recommendation was made to make order conditional upon such consequences. The Labour Secretary, however, adopted an arbitrary approach, and without going into the judgment and its, consequence formed an opinion only on the fact that the industrial establishment had opted and applied for gas connection and was thus not covered by the said decision. The Labour Secretary did not care to go into the details, and without caring to look whether the reasons given for closure were bonafide and whether the respondents were trying to avoid the consequences of M.C. Mehta's case, proceeded to grant permission for closure in a wholly casual manner. The State Government did not take into account any of the facts and circumstances reported by the Labour Commissioner who had the opportunity to hear both the parties. The entire approach and the assessment was thus vitiated and is contrary to the ratio of judgment of M/S. Orissa Textile and Steels Ltd. in which it was laid down that before passing an order, the appropriate government will have to ascertain whether the information is correct and the proposed action is necessary, and that the fact that there is some financial hardship in running the establishment could not be the only ground to grant permission. There was no finding recorded in the order which took care of the objection of the workmen that the financial position was wrongly projected and that the accounts were manufactured, and that there were no compelling reason to close down industrial establishment and that the whole attempt was to avoid consequences of M.C. Mehta's case.

13. The Court has the benefit of perusing the original records which were summoned, and retained by the Court. The record includes the application made by the Jai Engineering Works Ltd. to close down its undertaking namely M/S. Agra Engineering Industries Artoni, Agra signed by the authorised signatory dated 26.2.2002 which was received by the Principal Secretary Labour, U.P. on 26.2.2002. The application was forwarded to Labour Commissioner, U.P., Kanpur. Notices were issued by the Labour Commissioner to both, employers and the workmen. The Labour Commissioner gave opportunity to both the parties for hearing. The last hearing took place on 23.4.2002. On the same day, the Labour Commissioner vide his letter No. 62/IRD-2002 (Camp) dated 23.4.2002 submitted a report to the Joint Secretary Labour Department, Government of U.P., Lucknow. In his report, the Labour Commissioner Sri Anis Ansari stated that on the record produced by the establishment, it is clear that the establishment is having financial difficulties. It is running into losses continuously for the last ten years totaling Rs. 9.55 crores. Against this the workmen have not produced any factual figure. The employers presented a rehabilitation scheme before the BIFR in the year 1997. The scheme was accepted by the BIFR but for certain reasons it could not be implemented. Consequently, a new rehabilitation proposal has been submitted to BIFR which is pending consideration and in which the closure of Agra unit is proposed. The workmen during the hearing of the matter have drawn the attention towards the order dated

30.12.1996 made by Supreme Court in M.C. Mehta Vs. Union of India in writ petition No. 13381 of 1984 in which Hon. Supreme Court has provided following options to the polluting unit in the Taj Trapezium Area: First the unit (using coke/coal) causing pollution should be transferred to other place, away from Taj Trapezium as a second option, the concerned unit should use gas as fuel in its production process. If both these options are not accepted by the unit by May, 1997 they should be treated to be closed and the workmen employed by them shall be treated to be retrenched. These workmen, apart from their legal dues, shall also be paid six years wages as additional compensation. The subject unit is listed at no. 117 in the list of the units. The management have informed that they have made an application in January, 1997 to Gas Authority of India Ltd. for gas connection and have deposited rupees two lacs as prescribed application fees and have given bank guarantee of rupees six lacs on 18.2.1997, but GAIL has not supplied gas to them. In the meantime because of financial sickness, the management has decided to close the undertaking. On these facts the Labour Commissioner found, after making a inquiry, that it appears that the employers have made an application for closure of the undertaking, to avoid the payment of dues determined by Supreme Court. In these circumstances, the Labour Commissioner was clearly of the view that either the closure application should be rejected on the aforesaid ground or if the State Government decides to give permission for closure, he recommended that the closure should be permitted with a condition so that the orders passed by Hon'ble Supreme Court in writ petition No. 13381 of 1984 may be complied with and special direction should be given in that regard.

14. The notices and orders on the original file, record that on 22.4.2002 the Principal Secretary Labour Government of U.P. recorded a note stating that she had a talk with Labour Commissioner. He will sent his recommendation tomorrow after hearing. The record along with notice should be presented before her in the morning on 26.4.2002 so that orders may be obtained and issued on the same day. The recommendation of the Labour Commissioner were received by the Joint Secretary on 24.4.2002 and that on the same day a note was put before the Principal Secretary, Labour Department stating in detail the recommendations made by the Labour Commissioner. Sri Sant Lal, Joint Secretary, also recommended in his note on the same day, stating that Labour Commissioner has made recommendations for conditional permission of closure. Two days thereafter on 26.4.2002, the Principal Secretary Labour Department Government of U.P. passed an order to be forwarded to the Advisor to the Hon'ble Governor. The English translation of the order reads as follows:

"The period for taking decision on the application for closure filed by Jai Engineering Works Ltd., Agra is going to expire today. After several efforts, the report of Labour Commissioner has been received yesterday. Keeping in view the facts it will be proper to give permission for closure. I have seen the orders passed in the matter of M.C. Mehta and find that this establishment is not effected by the said order regarding retrenchment, as they have applied for gas within time.

Kindly approve the proposal for permission of closure.

Manjulika Gautam,
24.4.2002
Principal Secretary,
Labour Department
Government of U.P."

15. The note appears to have received and approved from the Advisor to Hon. Governor on 26.4.2002 and on the same day the order giving permission for closure was issued under the signatures of Principal Secretary, Labour Department, Government of U.P. The order recorded that the Labour Commissioner has given opportunities to both the parties for hearing and that the notices and documents go to show that the establishment is running into losses for the last 10 years totaling Rs. 9.55 crores, and that Hon'ble Governor has given approval for closure of M/S. Agra Engineering Industries, Agra (a unit of Jai Engineering Works, Agra) under section 25'O' of the Industrial Disputes Act, 1947.

16. The record includes a letter of Senior General Manager, Jai Engineering Works Ltd. dated 13.5.2002 informing that on 10/11.5.2002, the establishment has posted cheques by registered post towards the payment of closure compensation and other dues upon it on closure except gratuity and bonus to all workmen and staff along with intimating them to closure of M/S. Agra Engineering Industries, Agra. It further states that as per Rule 4, proceedings in the record, the establishment has not adjusted any wages payment made earlier of the preceding month and their full and final closing and for payment of gratuity, the workmen have been required to submit their application under prescribed form for which the gratuity and bonus will be payable as per law. The record also includes proceedings for review of the order. A letter of Assistant Labour Commissioner, Agra Region dated 12.6.2002 reported that the establishment has been closed on 30.5.2002, and that all the dues payable to the workmen have been sent by registered post. The application for review made by workmen on 18.5.2002 and received in the office of Principal Secretary, Labour Department on 18.5.2002, enclosing the order of closure, selling arrangement for the last three years, annual production item-wise for preceding three years, letter sent to President/Secretary, Agra Engineering Industries Employees Union for implementation of memorandum of understanding dated 26.4.2001 vide letter dated 31.7.2001, average returns which shows upward growth statement of production and profit and loss account from 1995-96 to 2000-2001, wages cost per fan produce commitment etc. Annexure-12 to review petition, is a letter of the General Manager, District Industries Centre, Agra to Executive Engineer Electricity Distribution Division, Agra for disconnecting the electric supply of 74 units in pursuance of the order of Supreme Court where the undertaking has not received the orders of the Supreme Court dated 3.10.2001 and a list of establishment which have not given undertaking which includes M/S. Agra Engineering Industries at Sl. No. 24.

17. The grounds of review included that the closure has been granted as against the orders of Supreme Court dated 30.12.1996 in writ petition No. 13381 of 1984, and that the permission for closure was granted against the recommendation of Sri B.K. Singh, Deputy Labour

Commissioner dated 25.1.2002. It was further pleaded that the BIFR has not rejected the rehabilitation proposals. There is possibility of resumed production for receiving gas connection from Gas Authority of India Ltd., and that the Principal Secretary Labour has not considered the reply given by the workmen. In paras 2,3 and 4 of the review petition it was reiterated that the production was increased from 20 fans per day in the year 1999 progressively upto 1700 fans per day on 21.5.1993, 1800 fans per day, on 27.4.1994 and 1850 fans per day by settlement dated 15.6.1997 for increasing production. The last settlement dated 26.4.2001 was made for a period upto 30.5.2004 in which the workmen agreed for production of 1850 fans per day. The fans produced were giving profit of Rs.458/- per fan taking profit and loss account, market price Rs.1200/- per fan, and that the establishment has manufactured the losses. For example it was submitted that in the year 1995 as cost production of 382 thousand fans losses of Rs. 30 lacs were shown whereas in the year 1996 as against production of 407 thousand fans losses of Rs. 203 lacs was shown which is beyond the imagination of the workmen. It was further stated that annexure-8 to the review petition shows that the labour charges for production per fan were Rs.16.30 per fan in the year 1994 which was reduced to 15.26 per fan in 1995, Rs. 15.08 per fan in the year 1996 and Rs. 15.33 per fan in 1997, and thus there was absolutely no question of losses suffered by the establishment. In the notice given by management dated 1.8.2001, the establishment did not give the losses, as the cause of closure of production. It was stated in the said notice that the production had been closed to regulate finished stocks, and that the labour dispute in that regard was considered by the Deputy Labour Commissioner, Agra who had recommended by his letter no. 1277 dated 25.1.2002 to withdraw the closure of undertaking. The workmen again stressed the fact that the permission was applied to avoid the consequences of the orders of the Supreme Court, and that on account of closure of polluting unit at Agra, there was large scale of unemployment at Agra on account of which the workmen will not be able to find any alternative employment, and that their families will suffer starvation. According to them Usha Fans were familiar all over the world for their quality and are being exported through M/S. Usha International Ltd. The workmen ensured the quality and production and cannot be made to suffer on account of the arbitrary decision of the management. The workmen prayed in their review application to cancel the order of closure, to ensure payments in accordance with the orders of the Supreme Court dated 30.12.1996 and 3.10.2001 and in the alternative to refer the matter to any competent Industrial Tribunal and as a last alternative to limit the period of closure until the production is resumed either after acceptance of rehabilitation by BIFR or supply of gas by Gas Authority of India Ltd.

18. On the aforesaid facts and circumstances and the position of law as obtained and after decision of the Constitution Bench in M/S. Orissa Textile and steels Ltd. (supra), the Court posed with the question whether the State Government made a proper inquiry into the correctness of the facts stated by the employer in the notice served by him, as also all other facts and circumstances

including the bonafide of the employer. The Court has also to ascertain whether the Government applied its mind and considered the correctness about the information furnished and provided reasonable opportunity to the workmen and all other existing persons, and whether the order contained reasons to support the conclusion of approval. After the aforesaid inquiry, the Court has to further examine whether the right of workmen of review which has been made inherent in sub section (5) of Section 25 'O' to save it from the vice of arbitrariness, was properly dealt with as a quasi judicial function and whether on the reasons given the closure must necessarily have been granted.

19. The workmen strongly opposed the grounds pleaded by the management for permission for closure. They provided material on record to show that there was consistent rise in production and quality of the finished product. Whereas the cost of production of fans and its market price increased from year to year cost of labour charges per fan decreed gradually. The record produced by the establishment demonstrate that at no stage production suffered either on account of grant of raw material or on account of any difficulty placed by the workmen. Along with the application, the establishment annexed balance-sheet of last three years for the years ending on 31.3.1999, 31.3.2000 and 31.3.2001. These balance-sheets demonstrated that the unit suffered progressive losses. The production figures of the year 1999-2000 for ceiling fans and other fans stood at 411140 and of the year 2000-01 at 242413, this fall in production was on account of closure of production in August, 2001, whereas in June total number of 32502 and in July total number of 16935 ceiling fans were manufactured. The reasons for proposed closure given in annexure-22 of the application were accumulated loss which have made financial position so bad that it was not possible to pay suppliers, wages and other statutory dues. The management blamed the Government Tax Policies are continuously making the organized sector uncompetitive at the market place by gradual increase in excise duty and other government levies. It was also stated that the scheme was approved by BIFR in November, 1997 providing for rehabilitation fund sources from sale of surplus land at Kolkata could not materialize, and thus supplementary proposals were sent to BIFR in June, 2000 proposing closing down manufacturing facility at Agra.

20. The record shows that neither the Labour Commissioner nor the State Government considered the objection of the workmen to the plea regarding financial losses. The workmen have placed sufficient material to show that the production was on rise and that at no point of time, the quality and quantity the production suffered. The State Government did not address itself to the cause of financial losses. It took into account the accumulated loss without going into its reasons and possibility of rehabilitation. The Labour Commissioner and the State Government did not care to find out the bonafides of the management and the failure to implementation of the rehabilitation proposals which were approved by BIFR and the pendency of supplementary rehabilitation proposals. The genuineness of reasons for difficulties in failure of selling the properties at Kolkata were not gone into by the State Government. There was

sufficient material before the State Government to show that fresh proposals of rehabilitation were pending with BIFR which included closure of the Agra unit and were in active consideration of the Board. Without awaiting for the finalization of these proposals, the State Government proceeded to permit the closure. There is absolutely nothing on record either in the orders of the Labour Commissioner or in the notices prepared and put before the Principal Secretary, Labour Department, Government of U.P. to show that they applied their mind and considered the objections. The reason of financial difficulties, were taken by the State Government as conclusive reasons to permit the closure. The Labour Commissioner in his recommendation dated 23.4.2002 had specifically stated that the application for closure has been filed to avoid liability of payment of retrenchment compensation of six years of the workmen in pursuance of the directions of the Supreme Court and that the permission should either be refused or be granted with specific condition that the orders of the Supreme Court may be complied with. The Principal Secretary in unusual hurry considered the application for Gas connection as sufficient compliance and recommended closure.

21. The notes and order-sheets of the record shows that whereas the last hearing was held by the Labour Commissioner on 23.4.2002 and on the same day he submitted his report which was received vide endorsement of the Joint Secretary, Labour Department, Government of U.P. at Lucknow on 24.4.2003, and that the Principal Secretary, Labour Department, Government of U.P., Lucknow had passed an order, put up the matter before her on 26.4.2002, she did not even care to look into the recommendations made by the Labour Commissioner, and decided that it will be proper to grant permission of closure.

22. U.P. Pollution Board had notified and included the respondent industry at Agra as a polluting unit in Taj Trapezium amongst the Engineering Industries at item no. 170. It was found responsible for polluting air. The orders with reference to paragraph 5 were applicable to the respondent industry. Options were given either to relocate or to obtain gas connection. GAIL was required to take final decision by 31.3.1997 and to supply gas by 30.1.1997 after which supply of coke/coal was to be stopped with immediate effect. Direction 13 (d) provided that the workmen employed in the industry who did not intend to relocate/obtain natural gas and opt for closure shall be deemed to have been retrenched by 31.5.1997 and shall be paid compensation in terms of section 25 F of the Industrial Disputes Act and shall also be paid in addition six years wages as additional compensation. The time schedule fixed in the aforesaid order were extended by the Supreme Court by its order dated 3.10.2001 only upto 31.12.2001. It is at this time it appears from the record that the respondent industry felt that in case it has to close down in pursuance of the orders of the Court, it will not be required to pay six years wages as compensation to each of these workmen, and thus without waiting for the consideration of the supplementary rehabilitation proposals submitted to BIFR, it closed production from 1.8.2001 and applied for closure on 26.2.2002 with effect from 30.5.2002.

23. Sri S.P. Gupta, Senior counsel laid great emphasis on his submission that the respondent industry was not using coke/coal as fuel for production. It used electricity for production, and that as an abundant caution it had applied for gas connection and deposited the amount and bank guarantee. The gas was not supplied by GAIL, and that in the circumstances, it was not covered by direction 13(d) of the directions given in M.C. Mehta case. Having gone through the orders of the Supreme Court and the order of extension dated 3.10.2001, I find that the order for relocation on listed polluting industries or to obtain natural gas were not confined only to industries using coke/coal. These were applicable to all the industries which were identified as polluting industries, even if they were not using coke/coal as raw material. The petitioner was using electricity as raw material. The electricity connection was disconnected on account of failure to obtain natural gas. The fact that petitioner deposited money and submitted bank guarantee by itself did not discharge its obligation and did not amount to full and due compliance with the orders of the Supreme court. In the circumstances, the respondent establishment with disconnected electric connection was going to face compulsory closure on 10.10.2001 under order of the Supreme Court on 3.10.2001 and in such circumstances it was required to pay six years wages as additional compensation to its workmen. To avoid the consequences the industry applied for closure. The Labour Commissioner in his recommendation dated 23.2.2002 found that the application for closure was not bonafide and was clearly of the opinion that the application for closure should be rejected, and in case the State Government decides otherwise, the permission should be granted conditionally for complying with the orders of the Supreme Court and this opinion was formed after taking into account all the documents and other factors and after hearing both the parties. The Labour Commissioner had the occasion to go through the documents and hear the submission of both the parties. The Labour Commissioner had also committed a patent error in failing to examine and scrutinized the reason given for closures. The workmen objected to and gave details of production, quality, other relevant factors and challenged the financial projections and losses, set up by the company. They pleaded that in view of their continued effort, hard work and tail, the company with its apparent production, capacity could not have suffered losses and even if these losses were taken into account, the supplementary rehabilitation proposals were still pending with BIFR.. The Labour Commissioner required the company to file ten years financial statements which were filed but these were not discussed at all. When a rehabilitation scheme was pending with BIFR, the State Government would not have permitted closure without even considering its validity. The Principal Secretary, Labour Department, had the benefit of the documents supporting the application, the objections of the workmen and all other factors which have been enumerated in the judgment of M/S. Orissa Textile and Steel Ltd. (supra). She, however, was apparently in hurry to avoid the period which was going to expire and after which the permission was deemed to have been granted. The note recorded by her on the order-sheet, clearly demonstrate that there was absolutely no application of mind at all on the facts and

circumstances. Documents, relevant facts and circumstances, and the recommendations of the Labour Commissioner which formed the material to exercise the quasi judicial powers. She considered an application for supply of gas as sufficient compliance with the orders of the Supreme Court and proceeded to recommend for grant of permission of closure.

24. In the present case the Court finds the quasi judicial exercise of power postulates that the authority should arrive at the conclusion based upon reason. The necessity to provide reasons, however, brief, in support of the conclusion is too obvious to be emphasized. Section 25 'O'(2) of the Act mandates recording of such reason, and on this essential condition the validity of the section 25 (O) was upheld in Orissa Textiles Ltd. (supra). Obligation to give reasons not only reduces arbitrariness but also introduces clarity and purpose of exercise of authority, and gives opportunity for the higher forums to test the correctness of reasons, and that the State Government did not apply its mind to the relevant facts and circumstances, bonafide of the employer, objections of the workmen to the reasons given by the employers and failed to record reasons in its order. The State Government was exercising powers which are quasi judicial in nature and was thus required to pass orders containing reasons and visualizing exercise of function.

25. Further the State Government Committed gross error in law in denying the right of review to the petitioner. The review application was also to be decided in exercise of the powers in sub section (5) of Section 25 'O' of the Act as a quasi judicial function to be performed by the State Government, which required consideration of facts and circumstances brought about in the review application as well as recording of reasons. The application for review was also not decided within reasonable time. It was filed on 6.6.2000, and was decided on 2.9.2002 clearly beyond 30 days time limit set up by Supreme Court. The only reason given in the order is that the application dated 8.5.2002 did not contain any new fact which required reconsideration or review by the State Government. Since the impugned order dated 26.4.2002 did not contain any reason except the fact that the unit was running into losses for 10 years, it was incumbent upon the State Government to have given reasons while rejecting the review application.

26. The financial difficulty and constraints faced by an establishment are relevant factors to be taken into consideration. These reasons, however, cannot be the only reason to be taken into account while considering the application for closure. There are other facts and circumstances including bonafide of the employers, or such compelling over riding circumstances including the interest of general public, on which the application for closure may be considered. The petitioners in their objection had not only assailed the reasons given in the application namely financial difficulties, but it also challenged the correctness of balance-sheet as documents prepared for the purposes of closure to avoid the consequence in M.C. Mehta's case. The State Government ought to have addressed itself to these questions and to consider whether the objections, had substance. It has been held in Orissa

Textile and Steels Ltd. (supra) that the interest of general public has a known concept. It is a guiding factor which should have been taken into consideration. The record does not show that the State Government had taken into account the interest of general public as one of the factors, specially when order was to deprive 238 employees of their right to the retrenchment compensation to be determined in accordance with the Act, as well as compensation of six years wages to be paid to them under the orders of the Supreme Court.

27. For the aforesaid reasons the impugned orders dated 26.4.2002 passed by the State Government permitting closure of Agra Engineering Industries, Agra (a unit of Jai Engineering Works Ltd), under section 25 'O' of the Industrial Disputes Act, 1947, as well as the order on review application dated 2.9.2002 are declared to be illegal and arbitrary and ultra virus to the condition of exercise of such power under section 25 'O' of the Industrial Disputes Act, 1947. The writ petition is, accordingly, allowed and the impugned orders dated 26.4.2002 and 2.9.2002 are set aside, and the respondent no. 2 is directed to pay entire arrears and regular wages to its workmen. Petitioner shall be entitled to cost from the respondents quantified at Rs. 10,000/-.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 7768 of 1998

Union of India and others ...Petitioner
Versus
The Presiding Officer, C.G.I.T. Cum Labour Court, Kanpur Nagar and another ...Respondents

Counsel for the Petitioners:
Sri G.P. Agrawal

Counsel for the Respondents:
Sri Ramendra Asthana
S.C.

Industrial Dispute Act 1947, Sec. 33-C (2)- application for computation of arrears of wages-for period in dispute-held not maintainable U/s 33-C (2)-since, the amount claimed is not predetermined and eligibility of workmen for such claim is also disputed-Direction for computation of claimed amount-quashed-workman, however, permitted to take such recourse to law, as open to him.

Held- Para 8

In this view of the matter, the respondent no. 1 has categorically fell in error in directing the computation and payment of amount of Rs.42,450/- as prayed for by the workman. The labour court should have rejected the application on the ground that there is no pre-determined sum and particularly in view of the dispute regarding the workman entitlement to the wages for the period in dispute, atleast an application under Section 33-C (2) of the Act cannot be said to be maintainable in view of the settled law laid down by the Apex Court.

Case law discussed:
AIR 2003 Mad 170

(Delivered by Hon'ble Anjani Kumar, J.)

1. The petitioner-employer aggrieved by the award of the Central Government Industrial Tribunal-Cum-Labour Court, Kanpur Nagar passed in L.C.A. no. 292 of 1996 filed by the respondent no. 2/workman under Section 33-C (2) of the Industrial Disputes Act, which has been allowed by the respondent no. 1 vide its order dated 12th January, 1998 (Annexure '12' to the writ petition) in favour of workman, has approached this Court by means of this writ petition under Article 226 of the Constitution of India.

2. Heard learned counsel for the parties.

The facts leading to the filing of the present writ petition are that the respondent no. 2 workman filed an application purporting to be an application under Section 33-C (2) of the Industrial Disputes Act, 1947 (Central) for computation of Rs.42,450/- as arrears of wages, which, according to the applicant, namely, workman concerned, had not been paid being the wages for the period in dispute. It is not disputed that the workman claimed wages for the period when the workman concerned was transferred from Agra to Gwalior where he did not join pursuant to the transfer order and preferred an Original Application No. 516 of 1995 before the Central Administrative Tribunal, Allahabad wherein the relief claimed was the same, namely, wages with effect from 19th July, 1995 to 18th October, 1996, total comes to Rs.42,450/- During the pendency of this original application, there was an interim order and in pursuance whereof the workman, as the case set up, did not join at Gwalior. Ultimately, this original application was dismissed and during the pendency of the original application before the Central Administrative Tribunal, (for short CAT), Allahabad, the petitioner preferred a contempt petition which has also been dismissed and thereafter the workman concerned has filed an application, as stated above, under Section 33-C (2) of the Industrial Disputes Act, 1947 (Central), hereinafter referred to as the 'Act'. This application under section 33-C (2) of the Act has been allowed and the Presiding Officer of the Central Government Industrial Tribunal-cum-Labour Court, Kanpur has directed for payment of a sum of Rs.42,450/-

3. Learned counsel for the petitioner has submitted that in view of the long litigation before the CAT, this application under Section 33-C (2) of the Act is not maintainable and ought to have been rejected. For this purpose, the learned counsel for the petitioner has relied upon the decision of Madras High Court reported in ***A.I.R. 2003 Madras-170, C.A. Balakrishnan Vs. Commissioner, Corporation of Madras.***

4. I have gone through the aforesaid judgment. The facts of the case show that case has arisen out of proceeding of suit and, thereafter, the writ petition was filed which was dismissed on the ground that the matter once taken up in a suit cannot be permitted to be re-agitated in a proceeding under Article 226 of the Constitution of India. There is no dispute in the aforesaid proposition but the present writ petition arises out of proceeding under the Industrial Disputes

Act. Therefore, in my opinion, the law relied upon by the learned counsel for the petitioner is not applicable to the present case. Learned counsel for the petitioner has laid much emphasis that the conduct of the petitioner has to be seen that he first took his chance before the CAT and on the strength of the interim order, he filed even a contempt petition, which was, ultimately, dismissed. Thereupon, he filed the present application in a proceeding under the provisions of Section 33-C (2) of the Act, as stated above.

5. Learned counsel for the petitioner has further stated that the relief sought in the proceeding before the CAT and the relief sought before the Industrial Tribunal was precisely the same, namely, the wages for the period in dispute. Therefore, the respondent-workman is, in fact, abusing the process of the Court and the application deserves to be dismissed on this ground alone.

6. As already held that the application cannot be rejected on this ground that after the litigation before the Central Administrative Tribunal, the workman has taken recourse to Industrial Disputes Act.

7. However, after going through the application filed and the order impugned in the present writ petition, in my opinion, this writ petition deserves to be allowed on the short question that proceeding under Section 33-C (2) of the Act are in the nature of execution which requires a pre-determined amount and there shall not be any dispute with regard to the same. From the controversy in the present case and from the averments made by the petitioner-employer, it is abundantly clear that the employer has categorically set up the case that in view of the fact that the workman concerned having not objected the transfer order and had not joined at the place where he was transferred, he cannot claim wages for the same period, particularly when there is nothing on record to demonstrate that this transfer order is either reversed or that the petitioner has joined immediately after the transfer order is passed. That being the factual position, it is a clear case of dispute being raised regarding the eligibility of the workman for the amount for which computation was sought under Section 33-C (2) of the Act.

8. In this view of the matter, the respondent no. 1 has categorically fell in error in directing the computation and payment of amount of Rs.42,450/- as prayed for by the workman. The labour court should have rejected the application on the ground that there is no pre-determined sum and particularly in view of the dispute regarding the workman entitlement to the wages for the period in dispute, atleast an application under Section 33-C (2) of the Act cannot be said to be maintainable in view of the settled law down by the Apex Court.

9. In view of what has been stated above, this writ petition deserves to be allowed on the ground referred to above and the order of the labour court dated 12th January, 1998 deserves to be quashed and is hereby quashed. The application filed by the workman under Section 33-C (2) of the Act is held to be not maintainable. However, in the facts and circumstances of the case, it will be open to the workman to take such recourse of law as are open to him.

10. The writ petition succeeds and is allowed. The order of the Labour Court dated 12th January, 1998 (Annexure '12' to the writ petition) is quashed and the application filed by the workman under Section 33-C (2) of the Act is held to be not maintainable. However, it will be open to the workman to take such recourse of law as are open to him. There will be no order as to costs.

———

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.7.2003

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

Civil Misc. Writ Petition No.3818 of 2001

Dr.(Mrs.) Abha Agarwal ...Petitioner
Versus
Vice Chancellor, Allahabad University, Allahabad ...Respondents

Counsel for the Petitioner:
Sri R.B. Singhal

Counsel for the Respondents:
Sri Dr. R.G. Padia
Sri P. Padia
Sri R.G. Tripathi
S.C.

Constitution of India- Article 226-Service Law- whether dearness Allowance can be granted to the family pensioner who is already employed in any office of the State?

Held- Yes- Petition allowed.

Held- Para 10

We find that the Act of the respondent no.4 in deducting the amount Rs.44,824.55 from the account of the petitioner on the alleged ground of her being in employment was illegal, arbitrary and without jurisdiction or justification. Otherwise also no such deduction should have been made without giving notice or opportunity to the petitioner. We deprecate one sided action of Respondent no.4.

Case Law discussed:
2000 (87) FLR 435

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

1. Petitioner before us, Dr.(Mrs.) Abha Agarwal, has filed this petition under Article 226, Constitution of India claiming following reliefs :-

(i) issue a writ, order or direction in the nature of mandamus directing the respondents to pay on Family Pension to the petitioner payable on the basis of death of her husband, Dr. D. C. Agarwal, including DA and other adhoc reliefs w. e. f. 7.7.1992.

(ii) issue a writ, order or direction in the nature of mandamus directing the respondents to refund Rs.44,824.55 deducted from the Bank Account of the petitioner on the basis of excess payment being given to the petitioner in the form of DA on the Family Pension being paid to the petitioner along with interest of 18% per annum.

(iii) issue a writ, order or direction in the nature of Mandamus directing the respondents to pay 18% interest on the amount which has been withheld by the respondents in the form of DA and other adhoc reliefs from the date it falls due to the petitioner.

(iv) Issue any other writ, order or direction which this Hon'ble Court may deem it

fit and proper in the circumstances of the case.

(v) Allow the cost of the petition to the petitioner.

2. Petitioner has approached this Court pleading, inter-alia, that her husband Dr. D. C. Agarwal, an eminent personality in the field of education was serving as Reader in the Department of Applied Physics, University of Allahabad, when he died prematurely on 6th July, 1992 leaving behind his wife (the petitioner) and two minor daughters. Petitioner was also working as Lecturer in the Department of English in an affiliated college of the University (called 'Allahabad Degree College, Allahabad') since July, 1972. She was later promoted on the post of Reader and working as such in the said College when her husband died. Petitioner applied for family pension; University passed requisite orders sanctioning family pension vide order dated 8th February, 1994 at certain rates mentioned in the said order (Annexure-2 to the Writ Petition) at the rate of Rs.1372/- per month for the period 7.7.1992 to 2.6.1999.

3. All of sudden petitioner found that an amount of Rs.44,824.55 has been deducted from the family pension account in the Bank when she happened to see her Pass Book of the said bank account. Petitioner made request for furnishing copy of the order on the basis of which said deduction was made. She was later confronted with Government Order dated 16th May, 1988 (Annexure-4 to the Writ Petition) by the Treasury Officer/ Respondent who referred to Clause (iv) of the said Government order on the basis of which petitioner was not entitled for Dearness Allowance on family pension since she was employed. Petitioner claim to have come across a news report published in 'Northern India Patrika, Sunday dated 20th November, 2000 which referred to a decision of Supreme Court holding that a widow working independently would not be deprived of benefit of Dearness Allowances on family pension (Annexure-4A to the Writ Petition). It is contended that the petitioner cannot be deprived of benefit of Dearness Allowance on family pension on the basis of alleged Government Order in view of the Supreme Court judgement in the case of **H.S.E.B. and others Versus Azad Kaur, 2000(87) FLR 435** (Annexure-5 to the Writ Petition).

4. On behalf of Respondent nos.1, 2 and 3 Counter Affidavit (sworn by V. K. Singh, Legal Assistant of the University) has been filed.

5. The defence of the contesting respondents is contained in para 7 of the Counter Affidavit, which refers to the University letter dated 8.2.1994 issued by the Assistant Registrar (Accounts), wherein it is written "In this connection it is important that in terms of Government Order dated 16.5.88, the dearness allowance is not to be granted to such pensioners/family pensioner who are employed in any department of the State/in any office in the State" and further it is mentioned in the said paragraph of the Counter Affidavit, "admittedly, the writ petitioner is employed as Reader in the Department of English, Allahabad Degree College, Allahabad, from before the death of her husband and she is working even today in the said capacity. Thus, she is not entitled for the benefit of double dearness

allowance ..... The University regrets that inadvertently the same was paid to the petitioner to the extent of Rs.44,824.55 and the said amount has now been deducted by the Treasury Officer, Allahabad being the excess amount paid by mistake to the petitioner ....."

6. In the Rejoinder Affidavit, petitioner has refuted the defence taken by the respondents-University in their counter affidavit relying upon the decision of the Apex Court in the case of H. S. E.B (supra) and it is argued that action of the Respondent is arbitrary and illegal.

7. Heard learned counsel for the parties and perused the record.

8. Learned counsel for the petitioner Sri R. B. Singhal, Advocate, has drawn our notice to the aforementioned Apex Court judgment in the Case of H.S.E.B (Supra) and referred to the observations made in paras 5 & 6 of the said judgment, which reads: -

"It can have no reference to any independent employment or any other independent source of livelihood which the family members may possess. The mere fact that the widow is independently employed is a teacher elsewhere even prior to the death of her husband, cannot deprive the family of the benefit of the ad-hoc relief on family pension."

Again Apex Court had observed that :-

"Our attention is drawn to a decision of the Division Bench of the Punjab and Haryana High Court in the case of Swaran Kaur v. State of Punjab, 1997(I) RSJ 325 (P&H—DB) where the High Court, after ascertaining that the petitioner therein had no secured any job on compassionate grounds on account of the death of her husband, nor had any family member done so, held that dearness allowance on family pension could not be withheld. It said that the fact that the widow was in service at the time when her husband died would not deprive her of dearness allowance on family pension when the employment was not on compassionate grounds. We, therefore, agree with the reasoning and conclusion reached by the High Court in the impugned judgment."

9. We required the learned counsels, representing the respondents to distinguish the aforesaid decision. Learned counsel for the respondents have not been able to distinguish the judgment on any score.

The defence taken by the respondents has no merit.

10. Relying upon the aforesaid judgment of the Apex Court H.S.E.B (supra), we find that the Act of the respondent no.4 in deducting the amount Rs.44, 824.55 from the account of the petitioner on the alleged ground of her being in employment was illegal, arbitrary and without jurisdiction or justification. Otherwise also no such deduction should have been made without giving notice or opportunity to the petitioner. We deprecate one sided action of Respondent no.4.

In the result, petition deserves to be allowed and is hereby allowed.

11. A writ in the nature of mandamus is issued directing the

respondents to pay the petitioner family pension month by month in accordance with law as was being paid on the basis of the University order dated 8.2.1994 (Annexure-2 to the Writ Petition) and refund Rs.44,824.55 along with 10% simple interest per annum from the date it is being deducted till the date it refunded within four weeks of receipt of a certified copy of this order. Further pensionary benefits shall also be paid month by month in accordance with law.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2003

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

Civil Misc. Writ Petition No.31746 of 1997

Arvind Kumar Rai ...Petitioner
Versus
U.P. Public Service Commission and another ...Respondents

Counsel for the Petitioner:
Sri Ajay Sharma

Counsel for the Respondents:
S.C.

Constitution of India Article 226-Service law selection-deliberate concealment of criminal conduct-petitioner initially declared successful-on complaint-his candidature cancelled-plea of bonafide mistake-conduct, projects his ulterior motive and crafty approach-not fit for appointment on gazetted post-petition dismissed.

Held- Para 17 & 18

It is not only that the petitioner had left to mention the pendency of criminal case against him, but had deliberately concealed the fact that in the said criminal case he had already been convicted by the Court of Sessions Judge and in that connection he was also under detention in the lock up/jail for some time. In addition to this deliberate concealment of fact, he while going to appear for the interview held for such merit examination, he gave a deliberate false certificate in the attestation form.

As a matter of fact, we are convinced that the petitioner has absolutely no bona fide in the present matter which could entitle him to obtain a discretionary relief under Article 226 of the Constitution of India, against the impugned orders whereby his candidature to the Combined State Services Examination (Civil) of the year 1991, had been cancelled.
AIR 1999SC page 2326 distinguished

(Delivered by Hon'ble Umeshwar Pandey, J.)

1. The petitioner, Arvind Kumar Rai, a candidate initially declared successful in the Combined State/Upper Subordinate Services (Main) Examination, 1991, has approached this Court under Article 226 of the Constitution of India with a prayer to quash the orders passed by respondent no.1, U.P. Public Service Commission (hereinafter referred to as the 'Commission') dated 2.12.1996 (Annexure-5) and dated 10.6.1997 (Annexure-7) whereby his candidature to the aforesaid examination was cancelled and his representation for review of the said order was rejected.

2. In short, the facts are that the petitioner, after having been finally selected and declared successful as per the Press Release (Annexure-1) of the

Commission to the aforesaid examination was waiting for his letter of appointment to be issued from the State Government on the basis of rank held by him in the merit. He was expecting his appointment on the post of District Commandant, Home Guard. His medical examination as per the rules was also conducted on 9.8.1994 and he was found medically fit for such appointment. He, however, did not receive appointment letter and, on inquiry, it was gathered that the juniors in the merit had received appointment letters. He, thereafter, made inquiries but did not receive any reply, either from the State Government or from the Commission. Ultimately, in August, 1996 he received a show cause notice (Annexure-3) from the office of Commission stating that he deliberately concealed informations regarding his having been held guilty for the offence of murder etc. during trial before the Court of III Additional Sessions Judge, Azamgarh. He knowingly did not fill up the Column-15 (Ka) of the application form for his candidature to the examination and also he did not fill up and give the aforesaid information as required in Column-11 (Ka) of the attestation form which he was required to fill before appearing in the interview of the combined examination. He was asked to explain the circumstances under which he concealed the information of his involvement in the murder case and of having been held guilty for the same by the trial Court. Upon receiving the aforesaid notice, the petitioner sent his reply (Annexure-4), but the Commission having not been satisfied with the explanation, cancelled his candidature for the aforesaid combined examination of the year 1991, vide impugned order dated 2.12.1996 (Annexure-5). Later on, when the petitioner made a representation (Annexure-6) before the Commission that too did not find favour with respondent no.1 and the same was rejected by the impugned order dated 10.6.1997 (Annexure-7); hence, this petition.

3. The Commission, respondent no.1 has filed counter affidavit and disputed the bonafide of the petitioner in the whole affair. It is stated in the counter affidavit that the petitioner not only concealed the information of his involvement in the murder case and his subsequent conviction on having been found guilty for those offences by the trial Court but he also concealed his permanent residential address of village Haraiya, Police Station Jiyanpur, District Azamgarh by deliberately giving incorrect address of his permanent residence being EWS-32, Muirabad, ADA Colony, Allahabad in the application form. The facts of petitioner's involvement in the criminal case and his subsequent conviction by the trial Court had come to light only on a complaint received in the Government. It was further stated on behalf of the Commission that in the attestation form, which is filled by the candidate before his interview, a certificate was required to be given. The petitioner signed the said certificate stating that the informations, which he has furnished in the attestation form, were wholly correct though he had left blank the relevant Column 11 (Ka) of the said form which required the petitioner to give information, if he has been prosecuted, kept in detention, bound, fined or has been held guilty for some offence by the Court. By leaving the said column blank, the petitioner had deliberately withheld the aforesaid information of his involvement in the

criminal case and later on conviction recorded by the trial Court.

4. On receiving the complaint of the aforesaid concealment etc. about the petitioner's involvement in the criminal case, the same was sent by the Commission to the Government. The State Government thereafter sent back the complaint to the Commission (respondent no.1) to take decision in the matter for cancellation of candidature of the petitioner. On scrutiny of the facts and circumstances and on obtaining explanation of the petitioner, the Commission was of the opinion that in view of the entire episode of concealment of important facts relating to petitioner's involvement in the criminal case and his having been found guilty for the offences of murder etc. by the trial Court, his candidature should be rejected and thereafter only the impugned order was passed and communicated to the Government and the petitioner.

5. We have heard the learned counsels Sri Arun Tandon for the petitioner, Sri Pushpendra Singh for respondent no.1 and learned Standing Counsel for respondent no.2.

6. It has been contended on behalf of the petitioner that he had been declared successful after written examination and interview etc. for the aforesaid Combined State Services Examination of 1991, he was also found medically fit at the medical examination and was just by inadvertence that the petitioner while filling his form of the said examination, left Column 15 (Ka) blank which required the candidate to give information of his involvement in a criminal case or his trial or conviction before a criminal Court. The learned counsel for the petitioner has further contended that in the same manner because of inadvertence only the attestation form which the petitioner had filled before his interview, Column 11 (Ka) was left blank. He gave full justification of leaving the said column blank in his explanation submitted to the Commission while replying to the show cause notice. The learned counsel for the petitioner has further tried to stress that the petitioner, when came to know of the mistake of leaving the columns blank, he volunteered entire information of his involvement in the criminal case and subsequent Court verdict holding him guilty in the said case, to the Commission vide his letter dated 21st July, 1994. It is urged that these events show and reflect bona fides of the petitioner.

7. In support of the aforesaid, the learned counsel for the petitioner has placed reliance upon the case of ***Commissioner of Police, Delhi and another Vs. Dhaval Singh, reported in AIR 1999 Supreme Court, page 2326.*** With the aid of the aforesaid case law, it is further submitted that since the petitioner has been finally acquitted in the criminal case by the appellate Court by its judgment dated 3.2.2003, the matter does not remain any more serious as to justify the passing of impugned orders of the Commission whereby petitioner's candidature to the aforesaid examination of the Combined State Services was cancelled.

8. In order to ascertain as to what is what in the whole episode of the concealment of facts about involvement of the petitioner in criminal case and his subsequent declaration as proved guilty in the murder trial, we preferred to summon

the original record of the case of the petitioner available with the Commission which is produced by the learned counsel for the respondent No. 1. We have perused the whole record and found that Column No.15 (Ka) of the application form which was initially filled by the petitioner himself, has been left blank. This column requires a candidate to give information about his ever having been punished in any criminal case by a Court. Likewise Column 11 (Ka) of the attestation form, which is filled by the candidate on 2.1.1994 (before his interview which took place on 3.1.1994) also requires him to give information if he was ever arrested, prosecuted, kept in detention, bound, fined or found guilty by a Court or not. This column does not find any reference given by the petitioner and has been left blank. Likewise in this attestation form itself, the petitioner was required to give a certificate if there was any circumstance, which could render him unsuitable for any post/service in the Government.

9. For convenience relevant extracts of Application Form and Attestation Forms are reproduced –

"१५. (क) क्या अभ्यर्थी को किसी फौजदारी न्यायालय द्वारा दण्डित किया गया है, यदि हॉ तो पूरा पूरा विवरण दें।

(ख) क्या अभ्यार्थी कभी संघ लोक सेवा आयोग अथवा किसी राज्य लोक सेवा आयोग द्वारा वारित अथवा अवैध घोषित किया गया है, यदि हॉ तो विवरण दें ।

(ग) क्या अभ्यार्थी कभी राजकीय सेवा से पदच्युत किया गया है, अथवा हटाया गया है अथवा अनिवार्यतः सेवा निवत्त किया गया है, यदि हॉ तो विवरण दें ।

११– (क) क्या आप कभी किसी न्यायालय द्वारा किसी अपराध के लिये गिरफ्तार अभियोजित (Prosecuted), निरूद्ध (Kept in detention), अथवा आवद्ध (Bound), अर्थदण्डित (Fined), दोष सिद्ध किये गये या किसी लोक सेवा आयोग द्वारा परीक्षा चयनों मे सम्मिलित होने के लिये वारित/अनर्ह किये गये या किसी अन्य शिक्षा प्राधिकारी/ संस्था द्वारा कोई परीक्षा देने के लिये वारित या वहिष्कत (रिस्टीकेट) किये गये ।

(ख) क्या इस प्रमाणीकरण प्रपत्र को भरते समय आपके खिलाफ न्यायालय, विश्वविधालय या किसी अन्य शिक्षा प्राधिकारी/संस्था के समक्ष कोई वाद विचाराधीन है ।

यदि (क) या (ख) का जवाब हॉ है, तो वाद गिरफतारी, निरोध अर्थ दण्ड, दोष–सिद्ध, दण्डादेश आदि का पूरा विवरण तथा इस प्रपत्र को भरते समय न्यायालय/विश्वविद्यालय/शिक्षा प्राधिकारी आदि के समक्ष विचाराधीन वाद का प्रकार दिया जाय ।

(कपया प्रमाणीकरण प्रपत्र के शीर्षक पर चेतावनी भी देखें)

(प्रमाण पत्र जिस पर उम्मीदवार द्वारा हस्ताक्षर किये जायेंगे)

मैं प्रमाणित करता हूँ कि जहॉ तक मेरी जानकारी और विश्वास है उपर दी गयी सूचना सही और पूर्ण है । मैं ऐसी किन्ही परिस्थितियों से अवगत नही हूँ, जो सरकार के मातहत किसी नौकरी के वास्ते मेरी उपयुक्तता को कम कर सकते हैं ।

तारीख २/१/६४
सीन – इलाहाबाद अरविन्द कुमार राय
उम्मीदवार के हस्ताक्षर "

10. From the facts narrated above, it is also clear that the criminal case against the petitioner had been initiated, rightly or wrongly, on the basis of First Information Report (15.6.1986) of murder case lodged against him. He was facing trial of the said murder case in Sessions Trial No.286

of 1986 before the III Additional Sessions Judge, Azamgarh. This trial concluded and final judgment of conviction against the petitioner was rendered on 15.2.1990. It is, therefore, more than obvious on the record that the petitioner was involved in the said criminal case since 1986. This being a murder case it goes without saying that the petitioner must have also been detained before his enlargement on bail in the case and also on his having been found guilty by the trial Court at the time of delivery of judgment. The petitioner could have got his bail order from the appellate Court only after some time when his appeal would have been entertained in this Court. Obviously, during the intervening period, he must have been under detention. These are such facts, which were to be necessarily given by the petitioner when he filled up his form for the aforesaid Combined State Services Examination (Civil), 1991. Explanation offered by the petitioner and claim of his bona-fide (in not mentioning these facts of his involvement and detention etc. in the criminal matter in his application form to the aforesaid combined State Services Examination and his attestation form filled before the interview of such examination), to our mind are not at all acceptable.

11. Learned counsel for the petitioner has given lot of emphasis while pleading the petitioner's claim of bona-fide in the matter, upon his voluntary information given to respondent no.1 detailing all these facts vide his letter-dated 21.7.1994.

12. We have gone through the original letter of the petitioner, which forms part of the Commission's record placed before us by the learned counsel for respondent no.1. It is an one-page letter disclosing the facts about his false involvement in the murder case in which he was held guilty by the trial Court vide judgment-dated 15.2.1990. The petitioner could venture giving this information to the Commission only when he had obtained an order of this Court dated 19.7.1994 whereby the operation of the judgment of conviction, recorded against him, had been stayed in Criminal Appeal No.314 of 1990. Though the appeal was preferred way back in the year 1990, the stay of the operation of the order of conviction rendered by the trial Court, was obtained only on 19.7.1994 and that too in view of his pending consideration of Selection made by the Commission, as is evident from the reading of the said Order of this Court. This itself reflects adversely to the claim of bona fide of the petitioner. The order of the Court was obtained by moving an application to that effect when the petitioner had been declared successful at the Combined State Civil Services Examination through a published notification in the news paper dated 14.2.1994. It is quite obvious that the petitioner had become conscious after he found himself successful in the aforesaid examination, that his criminal back-ground which had existed till then would come to light and put him in adverse situation, more specially in view of the fact that he had concealed by omitting relevant facts well within his knowledge which he was required to mention in the aforesaid relevant columns of the examination form and also the attestation form. This act of the petitioner, viz. not giving information of his involvement in the criminal matter, instead of proving his bona fide, goes to project his ulterior motive and crafty approach to the whole matter. While

going through the attestation form filled by the petitioner we have noticed that the certificate which he gave in that form is to the effect that he was not aware of any fact or circumstance, which could adversely effect his suitability for the appointment to a post/service in the Government. This certificate given by the petitioner in fact renders him wholly unsuitable for appointment to any post in the Government, much less a gazetted post in question. The petitioner was in full know of his involvement in a murder case in which he had been found guilty after conclusion of trial before the Additional Sessions Judge, Azamgarh. By that time, the order dated 19.7.1994 of this Court staying the operation of the judgment of conviction had not been obtained by him in his Criminal Appeal No.341 of 1994.

13. It is not at all expected of a candidate applying for a gazetted post in the Government to misrepresent or conceal an important fact, which was otherwise expected to be prejudicial against a candidate and was required to be disclosed in the application form and/or attestation form. Giving false certificate by such a candidate while appearing in the interview to be held for such examination, actually cannot be justified by any set of facts or circumstances and also cannot be interpreted showing it to be leaning to the bona fides of the candidate. This type of conduct of a candidate at such juncture not only renders him wholly unsuitable for selection and recommendation for the appointment to the gazetted post, but it may also renders him liable to graver consequences.

14. The learned counsel for the petitioner has also given much stress upon the fact that the appellate Court has ultimately declared the petitioner innocent and has finally rendered the judgment of acquittal in the Criminal Appeal No.341 of 1990. Since the petitioner has been found innocent, the whole criminal charges stood washed out and on that basis the petitioner's career should not be left to ruin. He has tried to emphasis that in the identical facts situation, the Apex Court had propounded theory of leniency in the case of Commissioner of Police, Delhi (supra) and the benefit of the same should be extended to the petitioner also.

15. We have very carefully gone through the judgment of the Apex Court in the aforesaid case of Commissioner of Police, Delhi (supra). The learned counsel for the petitioner relies on following paragraphs 5 and 6 :

*"**5.** That there was an omission on the part of the respondent to give information against the relevant column in the Application Form about the pendency of the criminal case is not in dispute. The respondent, however, voluntarily conveyed it, on 15.11.1995, to the appellant that he had inadvertently failed to mention in the appropriate column regarding the pendency of the criminal case against him and that his letter may be treated as "information." Despite receipt of this communication, the candidature of the respondent was cancelled. A perusal of the order of the Deputy Commissioner of Police canceling the candidature on 20.11.1995 shows that the information conveyed by the respondent on 15.11.1995 was not taken note of. It was obligatory on the part of the appellant to have considered that application and apply its mind to the stand of the respondent that he had made an inadvertent mistake before passing the*

order. That, however, was not done. It is not as if information was given by the respondent regarding the inadvertent mistake committed by him after he had been acquitted by the trial Court it was much before that. It is also obvious that the information was conveyed voluntarily. In vain, have we searched through the order of the Deputy Commissioner of Police and the other record for any observation relating to the information conveyed by the respondent on 15.11.1995 and whether that application could not be treated as curing the defect which had occurred in the Form. We are not told as to how that communication was disposed of either. Did the competent authority ever have a look at it, before passing the order of cancellation of candidature ? The cancellation of the candidature under the circumstances was without any proper application of mind and without taking into consideration all relevant material. The Tribunal, therefore, rightly set it aside. We uphold the order of the Tribunal, though for slightly different reasons, as mentioned above.

6. *Learned counsel for the appellants has drawn our attention to a judgment rendered by a Bench of this Court on 4.10.1996 in C.A. No.13231 of 1996. On the first blush, that judgment seems to support the case of the appellants but there is a material difference between the two cases. Whereas in the instant case, the respondents had conveyed to the appellant that an inadvertent mistake had been committed in not giving the information against the relevant column in the Form much before the cancellation of his candidature, in Sushil Kumar's case, no such correction was made at any stage by the respondent. That judgment is, therefore, clearly distinguishable on facts."*

16. From the perusal of fact of the case before the Apex Court, it is evident that the petitioner had applied for the post of constable in a special recruitment and while filling his form he had left to mention his involvement in a criminal case of rioting and Marpeet of which the trial was going on. Later on after he got selected, he intimated the aforesaid facts of his involvement in the criminal case.

17. Here, the case at hand before us, the fact situation is quite different. It is not only that the petitioner had left to mention the pendency of criminal case against him, but had deliberately concealed the fact that in the said criminal case he had already been convicted by the Court of Sessions Judge and in that connection he was also under detention in the lock up/jail for some time. In addition to this deliberate concealment of fact, he while going to appear for the interview held for such merit examination, he gave a deliberate false certificate in the attestation form. This certificate submitted by him to the Commission was wholly misleading for which the petitioner cannot have any excuses. So are not the facts of the case of Commissioner of Police, Delhi (supra). The petitioner thus, cannot seek any help from the aforesaid case law, which is clearly distinguishable on facts from this case.

18. As a matter of fact, we are convinced that the petitioner has absolutely no bona fide in the present matter which could entitle him to obtain a discretionary relief under Article 226 of the Constitution of India, against the impugned orders whereby his candidature

to the Combined State Services Examination (Civil) of the year 1991, had been cancelled.

The petition is devoid of merits and is hereby dismissed.

No order as to costs.

———