ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.1.2003

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

Civil Misc. Writ Petition No. 1306 of 1988

M/s Sonal Metal Industries ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Bharatji Agarwal
Sri R.K. Agarwal

Counsel for the Respondents:
Sri S.P. Kesarwani
S.C.

Trade Tax Act- Section 4-A Small scale industry unit having investment of less than Rs. 3,00,000 would be entitled for exemption for five years- respondent to modify the eligibility certificate dated 30.1.1988 accordingly, that is for a period of five years instead of three years till the issuance of modified eligibility certificate for a period of five years, they should not insist on realizing trade tax for the period 5.1.1983 to 4.1.1988.

Held- Para 8

Having regard to the facts and circumstances of the case, the writ petition is allowed and a direction is issued to the respondent no. 2 no modify the eligibility certificate dated 30.1.1968 accordingly that is, for a period of five years instead of three years. The respondents are further directed that till the issuance of modified eligibility certificate for a period of five years they should not insist realizing trade tax for period 05.11.1986 to 04.01.1988.

Case law referred:
1989 U.P.T.C. 88
1989 U.P.T.C. 118

(Delivered by Hon'ble Prakash Krishna, J.)

1. The present writ petition arises out of proceedings under section 4-A of the U.P. Trade Tax Act. The petitioner claimed exemption from payment of trade tax for a period of five years but the eligibility certificate was issued for a period of three years. The review application filed by the petitioner has been dismissed by the impugned order dated 17.5.1988 (Annexure 6 to the writ petition).

2. The petitioner claimed that it is a new unit within the meaning of section 4-A of the U.P. Trade Tax Act and was registered as a small scale industry on 22.8.1988 by the Directorate of Industries, Ghaziabad vide Annexure 1 to the writ petition. In the said certificate the date of commencement of production was mentioned as February 1981. The petitioner unit has also been registered under the Factories Act w.e.f. 01.02.1983 vide Annexure 2 to the writ petition. On the application claiming exemption under Section 4-A, the District Level Committee made a recommendation for grant of exemption for five years from 05.01.1983 to 04.01.1988 vide annexure 3 to the writ petition. However, the Divisional Level Committee issued the eligibility certificate under 4-A granting exemption from payment of tax for three years only from 5.1.1983 to 4.1.1987. The petitioner thereafter filed a review application which has been dismissed by the impugned order on the ground that the petitioner has purchased machineries etc. worth Rs.19,730/- after the date of production and as such the total capital investment up to the date of production being less than

Rs.3,00,000/-, it is entitled for exemption only for a period of three years. Against the aforesaid order the present writ petition has been filed claiming a writ, order of direction for modifying the eligibility certificate dated 30.01.1988 (Annexure 4 to the writ petition) issued by the respondent no. 2 for a period of five years instead of three years.

3. The respondents no. 2 and 3 have filed separate counter affidavits, although raising similar pleas. It has been stated that as the Divisional Level Committee found the amount of investment below Rs.3,00,000/-, the petitioner is not entitled for exemption for a period of five years.

4. We have heard Sri Bharatji Agarwal, learned Senior Advocate on behalf of the petitioner and Sri S.P. Kesarwani on behalf of the respondents. The only point in the present writ petition is whether the petitioner, being a registered unit both as small scale industry with the Directorate of Industries and under the Factories Act, and having started its production in February 1981, is entitled for eligibility certificate for a period of three years or for a period of five years.

5. Learned counsel for the petitioner has placed reliance upon two Government Orders being no. 8244 dated 30.09.1982 and its clarificatory letter dated 16.3.1983 issued by the Directorate of Industries and the Notification dated 27.8.1984. True copy of the Government order dated 16.03.1983 has been filed as Annexure 7 to the writ petition. The controversy involved in the present writ petition is covered by the judgment of two Division Benches of this Court reported in 1989 UPTC 88 Bajaj Packwell Meerut vs. State of UP and others and M/s Accurate Electronics Pvt. Ltd. vs. State of UP and others 1989 UPTC 118. This court has interpreted the aforesaid two Government orders. It has been held that in paragraph one of the clarificatory letter dated 16.03.1983 it has been clarified that those small scale units which are registered as such with the Directorate of Industries and also registered under the factories Act would be entitled to exemption from payment of sales tax and in addition to such units those which are not registered under the Factories Act but whose investment in land, building, machinery and equipment was more than Rs.3,00,000/- would also be entitled to the same exemption.

6. In M/s Accurate Electronics Pvt. Ltd. (supra) interpreting Government order no. 8244 dated 30.9.1982 it has been held that a small scale industry unit having investment of less than Rs.3,00,000/- would be entitled for exemption for five years. In the present case it is not disputed that the petitioner is registered as a small scale industry unit with the Directorate of Industries and it is also registered under the Factories Act with effect from 1.2.1983. The date of production is 5.1.1983 and the date of first sale is 18th March, 1983 as mentioned in the exemption certificate dated 30.1.1988 granted by the Divisional Level Committee for a period of three years vide Annexure 4 to the writ petition.

7. Following the aforementioned two judgments of this court, we are of the opinion that the petitioners unit is entitled for exemption for a period of five years from the date of starting its production, i.e. 05.01.1983. The fact that the investment in land, building and

machinery was less than Rs.3,00,000/- is of no consequence. The petitioner is entitled for grant of exemption for a period of five years in view of the Government order no. 8244 dated 30.9.1982 and the clarificatory letter dated 16.3.1983.

8. Having regard to the facts and circumstances of the case, the writ petition is allowed and a direction is issued to the respondent no. 2 to modify the eligibility certificate dated 30.1.1968 accordingly, that is, for a period of five years instead of three years. The respondents are further directed that till the issuance of modified eligibility certificate for a period of five years, they should not insist on realizing trade tax for period 05.11.1986 to 04.1.1988.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.6.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 742 of 2002

Sita Ram Rai and others ...Petitioners
Versus
Additional Registrar of Firm, Societies and Chits and others ...Respondents

Counsel for the Petitioners:
Sri R.N. Singh
Sri S.K. Rai
Sri Shashi Nandon

Counsel for the Respondents:
Sri Ashok Khare
Sri Balwant Singh

Constitution of India, Article 226- Sarvodaya Shiksha Samiti Kauri Ram a registered society - By laws 17 (2) a Provides- if any reason on special case- election not held within the prescribed period- the term of erstwhile committee can be extended for another 3 month before expiry of the term the election process started- DIOS refused to nominate the observer on the pretext that the validity of membership is still under consideration before the District Magistrate- held illegal, till the newly elected committee come in existence the erstwhile committee shall continue- other necessary direction issued.

Case law referred:
2000 ACJ 1083, 2002 (1) AWC 771
2002(3) ESC 129
1999 (2) UPLBEC (Summay) 77
1996(3) UPLBEC 154
1977(1) UPLBEC 412

(Delivered by Sunil Ambwani, J.)

1. Sarvodaya Shiksha Samiti Kauriram, district Gorakhpur is a society registered under the Society's registration Act 1860 (in short, the Act), with its registration renewed upto 10.10.05. The society runs many educational institutions including Sarvodaya Kisan Intermediate College, Kauriram, district Gorakhpur . The bye laws of the society provide for several categories of members. This includes ex-officio members, nominated members, Panchayat members patrons, fellows, life members, ordinary members and special members. The management of the society vests in an executive committee. The District Magistrate, Gorakhpur, Sub Divisional Magistrate Basgaon, Tehsildar, Basgaon, all the principals of the institutions run and managed by the societies, and one representative of the employees of every such educational institution are provided to be the ex-officio members. The District Magistrate or person nominated by him is an ex officio, president of the society. Bye laws no. 17 provides for the period of

executive committee. Clause 41 of bye law 17 provides that the period of executive committee shall be of three years, and after every three years members of the committee shall be elected in the annual general meeting. Those members, who have completed their terms are also entitled to be re-elected. A proviso to clause (1) provides that where elections are to be held in the annual meeting, a 60 days notice shall be given to all the members, who are entitled to cast their votes. As far as possible the District Inspector of Schools may appoint an observer for the meeting who shall be a retired member of any government college or a senior officer of the education department who is not concerned with the affairs of the educational selection. Any Senior Dy. Inspector of Schools can also be appointed an observer. Clause 2 of Bye law 17 which is relevant for the purpose of this case provides that if for any special reason the election of committee of management is not held even after 3 years the erst while executive committee can function for another three months, but the said period can not be extended . Under bye law 12 and 14 (6) the election must be held by 30th June, and in any case in special circumstances under specific instructions of committee the elections must be held before October, and if it is not possible, the President shall be competent to take steps under Bye law 3 (2) which gives emergency powers, to be approved by general body in a meeting convened within three months. Clause 3 of Bye law 17 provides that the office bearers of the executive committee shall continue to function until their successors are elected. New office bearers shall be elected according to Bye law 24. These includes a vice president, a secretary (manager) and joint secretary (deputy manager) to be elected from amongst the executive committee.

2. By law 18 provides for Constitution of committee. It provides for representation of each categories of members of society. Two members are to be elected by the ordinary members, one from among panchayat members, two from life members, two from fellow, one from patrons and one from special members. Bye law 19 provides that apart from aforesaid nine elected members the District Magistrate, the Sub Divisional Magistrate Basgaon, Tahsil Basgaon the principal of Sarvodaya Kisan Intermediate College and two representative of teachers and employees as it is provided in the scheme of the administration, shall be the members of the executive committee. Bye law 20 provides that the District Magistrate, Gorakhpur or a member nominated by him shall be the president of the general body and executive committee and in his absence the vice chairman shall discharge the duties. In the absence of both, the Chairman and Vice- Chairman the members present in the meeting shall elect a Chairman to preside over the said meeting.

3. The elections to elect executive committee of the society and consequently the committee of the management of the college were held on 3.11.1993. The next elections were due on or before 03.11.96. The principal of the college by his letter dated 17.10.96 requested District Inspector of School to appoint an observer for the elections to be held on 03.11.1996. By resolution no. 3 dated 27.10.96, the committee of management of the society authorised Sri Sita Ram, the secretary of the committee

and the manager of the committee of the management of the college, to increase members of the society .The District Inspector of School, Gorakhpur by his letter dated 29.11.96 expressed his inability to appoint observer for elections to be held on 3.11.96, on the ground that in pursuance of the direction of the High Court at Allahabad dated 10.9.96 and the order of the District Magistrate, Gorakhpur dated 15.10.96, the matter with regard to membership is to be heard and decided by District Magistrate. It is relevant to state here that respondent no. 3 and 4 to this writ petition had filed a writ petition no. 29102 of 96 in which a direction was issued by this court on 10.9.96 to the District Magistrate to decide their representation dated 18.7.96 regarding their membership. The order for deciding representation was passed by this Court on the first date of hearing without issuing notices and hearing the respondents, and which gave rise to this litigation.

4. In pursuance of resolution dated 27.10.96 of the executive committee of the society, the secretary, proposed induction of new members. The executive committee vide its resolution no. 4 dated 24.11.96, approves their names and decided to admit them as members of the Samiti to 134 excluding the ex-officio members. In the meantime the principal of the college by his letter dated 2.6.97 again requested District Inspector of Schools to permit petitioners to hold the elections.

5. The District Magistrate Gorakhpur vide his order dated 10.6.97 decided the representation made the respondents 3 and 4 and directed the Executive Committee of the society to admit them as members of the society. The committee of management accepted the orders and issued notices dated 25.6.97 to respondents 3 and 4 to deposit their membership fees. It is alleged that they did not pay the fees and thus one more opportunity was given to them to pay the membership fees vide notice dated 19.8.97. The District Magistrate accepted application of one Sri Ram Briksha Rai a member of the society dated 16.9.96, to hold the elections which were due to be held on 3.11.96 on the basis of the members admitted prior to 03.11.93. One Sri Markandey Rai approached District Magistrate stating that the order has been passed without hearing the affected parties. On this representation the District Magistrate stayed operation of his order dated 18.8.97. Thereafter principal of the college as well as secretary sent several letters to District Inspector of School, Gorakhpur to permit them to hold the electing vide their letter dated 30.6.98, 06.11.98, 05.04.99 and 21.4.99 and continued to request to District Inspector of School, Gorakhpur to appoint an observer for holding elections. Finally by election notice dated 30.12.99 the elections were announced and the list of members of the society were published on the notice board of Sarvodaya Kisan Intermediate college Kauriram, Gorakhpur, on 5.1.2000 informing elections to be held within 15 days. It is alleged that notices were given to all the members which included the names of members admitted by resolution no. 6 dated 30.6.1996 and resolution no. 4 dated 24.11.96, and once again request was made to District Inspector of School to appoint an observer. The District Inspector of School directed the Accounts Officer of his office to verify the validity

of the list of the members on which the Accounts Officer made enquiries and submitted his report dated 11.4.2000 verifying its validity. The District Inspector of School Gorakhpur, thereafter by his letter dated 27.5.2000 informed the secretary of the society that the list of the members has been verified and was found to be genuine and that one Sri Ravinder Nath Tripathi was appointed as observers for the elections. The election were held on 11.6.2000 in which Sri Sitaram Rai, Petitioner no. 1 was elected as Secretary of the society. It is alleged that 92 members participated in the election. The observer submitted his report on 16.6.2000 to the District Inspector of Schools and on the aforesaid report the District Inspector of Schools approved signatures of Sri Sita Ram Rai, petitioner no. 1 vide his orders dated 3.7.2000.

6. Respondents 3 to 10 filed an application before the Additional Registrar of Accounts, Society and Chips Gorakhpur and Respondent no. 1 on 10.10.2001 to declare the elections of the society dated 11.6.2000 as invalid and to hold fresh elections, on the grounds that the members admitted after 03.1193 were not valid members, respondents no. 3 and 4 were illegally excluded from the voters list, and that executive committee of which the term had expired could not have held the elections on 11.6.2000. The District Inspector of Schools on the instructions received from the District Magistrate summoned an urgent meeting to be held in the college regarding the elections of the society on 23.10.2001. It is alleged that petitioner produced all the records in the meeting before the District Magistrate Gorakhpur but he did not care to look at them. An order was issued on 24.10.2001 by the District Magistrate directing Assistant Registrar to enquire into the validity of the elections. In pursuance of the notices issued by Additional Registrar, respondent no.1, petitioners submitted there reply on 11.12.2001. The matter was heard and by impugned order dated 20.12.2001 the Assistant Registrar declared the elections of the executive committee of the society dated 11.6.2000 as invalid and directed fresh elections to be held in exercise of powers under section 25 (2) of the Act, appointing District Inspector of Schools Gorakhpur as election officer, to hold elections from the list of members of general body appended to the order. The District Magistrate in exercise of powers under bye law 33 (2) by his order dated 31.12.2001 assumed the entire powers of management of the society to discharge the functions of the management. He notified the election schedule fixing 3.3.2002 as a date for holding elections of the Committee of Management and 9.3.2002 for election of office bearers for committee of management.

7. On 3.3.2003 nine members were elected as members of the committee of the Management including Sri Bindumati Rai, Markandey Rai, Ram Sarash Rai and Pramod Kumar Rai. On 9.3.2003 the elections of the office bearers of the committee of management was held in which Sri Chandra Sen Nagar was elected as Vice president, Sri Bindumati Rai as manager and Sri Sourabh Rai as Joint Secretary/Assistant Manager. The documents concerning the elections were sent to Regional Committee constituted under government order dated 19.12.2000 which approved the elections on the basis of which Joint Director of Education, Gorakhpur issued an order dated 16.3.2002 approving the committee of

management, and the signatures of Sri Bindumati Rai were attested. A writ petition no. 98006 of 2000 was filed by Markandey Rai and others versus Regional Educational Committee and others against orders of Regional Committee and the Joint director of Education. By an order dated 11.11.2002, the operation of the order dated 16.3.2002 was stayed. A special appeal no. 1275 of 2002 against the order was decided by Division Bench on 29.11.2002 against the order was decided by Division Bench on 29.11.2002 and while setting aside the ex parte said order dated 11.11.2002, the matter was directed to be listed before learned Single Judge after ex charge of affidavit. Learned Single Judge by his order dated 11.12.2002 disposed off the writ petition with direction to the Regional Committee to consider the validity of the election in the light of the objections raised and after affording opportunity of hearing, production of evidence and to take decision within two months. The Regional Committee heard the matter and vide orders dated 25.3.2003, the elections dated 3.3.2002 and 9.3.2002 were declared invalid. Directed Regional Accounts Officer (Regional Audit Units) Gorakhpur was required to act as Prabandh Sanchalak for holding fresh election within a period of three months. This order of Regional Committee dated 25.3.2003 has been challenged by the committee of management represented by Smt. Bindumati Rai in writ petition no. 14716 of 2003.

8. Heard Sri Salil Kumar Rai, Counsel for petitioners in writ petition no. 742 of 2002 and for respondents in writ petition no. 14716 of 2003, and Sri Ashok Khare assisted by S.P.K. Tripathi for respondents in writ petition no. 742 of 2002 and for petitioners in writ petition no. 14216 of 2003.

9. Sri Salil Kumar Rai addressing Court in writ petition no. 742 of 2002 submits that the registrar of society did not have jurisdiction under section 25 (2) of the Act to call for meeting of the general body of the society for electing executive committee and office bearers. According to him the provisions of subsection (2) of Section 25 are attracted only where the election has been set aside or an office bearers are held no longer entitled to continue in office after deciding a dispute under sub section (1) of Section 25 of the Act. He submits that even if the term of the committee of management has expired and the extended period for holding elections has also expired. The Registrar can not assume powers and usurp the authority of the office bearers of the society to hold fresh elections. In the present case he submits that the process of holding elections was initiated before the term of executive committee expired ,by fixing a date of holding elections on 3.11.96, and District Inspector of Schools was requested for sending an observer. The society had in the past held elections, only under the supervision of an observer appointed by District Inspector of School. Inspite of repeated requests made to the District Inspector of Schools observer was not appointed. The District Magistrate had no authority to decide validity of the membership. As an ex-officio president of the society he was not authorised to intervene into the affairs of the society and decide disputes to be raised by the members. Respondent no. 3 was a class IV employee of the college and by his letter dated 15.8.1988 he has resigned

from ordinary membership. He had filed a writ petition no. 23198 of 1989 for payment of salary in which notices were issued on 6.9.1989. His vacancy was filled by appointment of Sri Ram Lakhan Rai on 18.1.1990 as member of the executive committee. Respondent no. 4 did not pay the membership fees inspite of notices dated 18.3.1993 and 23.3.1993. The application for membership dated 18.7.1996 was misconceived and that the entire dispute arose from a direction issued by this Court in Writ petition no. 29702 of 1996 directing District Magistrate to decide the representation of respondents 3 and 4. The District Magistrate as ex officio President acted beyond his role assigned to him in Bye laws and caused unwanted intervention tainted with malafides. According to Sri Salil Kumar Rai the bye laws of the society provide that the term of executive committee can not extended beyond three months. However, the office bearers continue to function under Bye law 17 (3) and there is no restriction imposed upon them, not to hold elections. The registrar of the society acted on the dictates of the District Magistrate and assumed powers under section 25 (2) of the Act, which he did not posses and wrongly held that petitioners did not have authority to hold election. The Assistant Registrar could not have ordered fresh elections to be held and in any case he could not have excluded, the validity inducted 61 members without giving any reason whatsoever. He did not decide, and had no authority to decide the validity of the membership and to annex a list of members of general body excluding almost forty percent of the members for holding fresh elections.

10. Sri Ashok Khare, Senior Advocate, on the other hand submitted that the bye law 17 (2) authorize the outgoing committee to hold fresh elections before the expiry of its term and in any case within three months thereafter. According to him the committee the management could only function upto three months beyond the expiry of its term . Thereafter the executive committee will cease to function and that only the office bearers are allowed to continue. Bye laws provides for only for office bears including the President and that since By law 25 provides for a quorum of five members of the committee to transact any business of committee, the election meeting could not have been convened. He further submits that the committee of management could not have inducted number on the eve of the elections. The 61 members were illegally inducted. He has relied upon copy of membership register, which shows illegally inducted. He has relied upon copy of membership register, which shows the membership fees of some members were deposited much after the election were held. The Assistant Registrar, according to him, acted within his authority under section 25 (2) of the Act, to call the meeting of the general body to elect the office bearers as the election of office bearers of the society was not held within the time specified in the Bye laws of the society. He rightly excluded the numbers of members who were wrongly inducted and it is incorrect to say that his order was made on the dictates of District Magistrate. Sri Khare has relied upon a Division Bench judgment of this Court in ***Committee of Management, Adarsh Shiksha Neketan, Renukoot and another versus the Assistant Registrar, Firms***

Societies and Chips, Varanasi, 2000 All CJ 1083, and judgement in ***Seva Samiti Allahabad versus Assistant Registrar Firms Societies and Chips, Allahabad and others*** 2002 (1) AWC 771, in support of his submissions that where the election of the society has not been held within the specified period prescribed under the Bye laws, the Assistant Registrar gets authority to direct fresh elections.

11. Both the counsels also addressed the Court on the validity of the elections dated 3.3.2002 and 9.3.2002, which have been set aside by the Regional Committee by his order dated 25.3.2003 impugned in writ petition no. 17216 of 2003. Since the question of validity of the elections dated 3.3.2002 and 9.3.2003 and the validity of the order of Regional Committee dated 25.3.2003 will depend upon the result of the writ petition no. 742 of 2002. I propose to consider the submissions and decide Writ Petition no. 742 of 2000 before considering the submissions advanced in the later petition.

12. Societies Registration Act 1960 was enacted for registration of literary, scientific and charitable societies. Any seven or more persons associated for any literary, scientific or charitable purpose or for any such purpose as described in Section 20 of the Act, may be subscribing their names to a memorandum of association and filing the same with the Registrar, Firms from themselves into a society under the Act. Section 4 provides for annual list of managing body to be filed to the Registrar. By U.P. Act number 11 of 1984, a proviso has been added to section 4 (1) which provides that if the managing body is elected after the last submission of the list, the counter signatures of the old members shall as far as possible, be obtained on the list. If the old office bearers do not countersign the list, the Registrar may, in his distinction, issue a public notice or notice to such persons inviting of objections within specific period and decide all objections received within the said period. The powers and duties of Registrar have been specified in various provisions of the Act. He can cancel registration under Section 12-D and apply for dissolution on any of the grounds mentioned in clauses (a) to (e) of sub section (1) of section 13-A after giving show cause notice to the society, and thereafter moving the Court under section 13-B for making an order for dissolution of society. He can call for information under section 22 and investigate into the affairs of the society under Section 24, Section 25 inserted by U.P. Act No. 13 of 1978, with effect from 27.2.1978, provides for disputes regarding election of office bearers. A reference can be made by Registrar or by atleast one third of member of the society registered in U.P., to the prescribed authority to hear and decide in a summary manner, any doubt or dispute in respect of the election or continuance in office of an office bearer of such authority, and may pass any such order in respect thereof as it deems fit. The prescribed authority can set aside the election of an office bearer, on the ground of corrupt practices, or on the ground that the nomination of any candidate has been improperly rejected, or that the result of the election has been materially affected by improper acceptance of nomination or by improper reception, refusal or rejection of any vote or the reception of any void vote, or by any non compliance with the provisions of any rules of the society, Sub section 2 and 3 of section 25 provide as follow :

"(2) Where by an order made under sub section 1, an election is set aside or an office bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office bearers of a society has not been held within the time specified in the rules of that society, he may call meeting of the general body of such society for electing such office bearer or office bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officer authorised by him in this behalf, and the provisions in the rules of the society relating to meetings and elections shall apply to such meeting and election with necessary modifications.

(3) Where a meeting is called by the Registrar under sub section 2 no other meeting shall be called for the purpose of election by any other authority or by any person claiming to be an office bearer of the society.

13. The object and purpose of sub section 25 is to provide for a forum to decide disputes regarding election of office bearers of registered societies. Sub section 2 of section 25, quoted as above, comes into operation after the election is set aside, or an office bearer is held no longer entitled to continue in office. The satisfaction of the Registrar that any election of office bearers of a society has not been held within the time specified in the Rules of that society is to be arrived, in accordance with the provisions in Bye laws of the society, to which the members have subscribed. If there is no provision in the Bye laws for holding elections after the expiry of the tenure of the executive committee or office bearers, the registrar may intervene to fill in gap and to provide for such any eventuality by calling the meeting of the general body of the society for electing office bearers. Where the election of office bearers of society has been set aside under sub section 1 and the time limit of holding elections has expired the registrar may step in the provide for holding elections. However, in cases where the By laws of the society do not provide for any such eventuality the registrar does not get authority to call any meeting of the general body of the society to elect executive committee or office bearers and to preside over such meeting or to authorize any officer in that behalf. The Rules of the society have to take precedence, except where they are inconsistent of the provision of the Act. In ***Committee of Management, Adarsh Shiksha Neketan, Renukoot*** (supra) the Court interpreted Para 8 of the Bye law of the said society which provided for a term of three years to the office bearers, from the date of election. They were entitled to function even after the expiry of three years till the election was held. The election was held on 8.7.92 and that the next election took place after about five years. Another person namely, Dwarika also claimed election to have taken place on 13.12.98 i.e. after six years. There were rival elections set up by the claimants upon which the Assistant Registrar exercised powers under Section 25 (2) of the Act and directed a fresh meeting of the general body to be held. In ***Seva Samiti, Allahabad*** (supra) there were rival parties claiming that they have held fresh elections after the term of three years had expired. In these circumstances in both the aforesaid cases Court held that after the term had expired nobody could hold elections except the registrar. In both these cases there was an element of dispute and that the rival committees claimed elections to be held after the term

of the outgoing Committee of Management had expired.

14. The present case offers different set of facts. The election programme was announced within three years, and the District Inspector of Schools was requested to appoint an observer. The District Inspector of Schools refused to appoint an observer until the dispute about membership of respondents 3 and 4 was decided by District Magistrate. The election process was thus initiated, before the term of the outgoing executive committee had expired. Thereafter, inspite of repeated reminders the District Inspector of Schools did not agree to appoint an observer. The committee found itself mandated by Bye law 17 (1) for appointment of an observer and to abide by best traditions of the society in which all earlier elections were held under the supervision of an observer appointed by the District Inspector of Schools. The decision of the District Magistrate on the membership of respondents 3 & 4 had no material bearing on the elections and that the District Inspector of Schools was not justified in refusing appointment of an observer. At one stage the District Magistrate realized his mistake, and directed the elections to be held on the basis of list of members valid upto 3.1193, but later he stayed his order. Ultimately the District Inspector of Schools agreed with the request and after carrying out the exercise of verifying the list of members appointed Sri Ravinder Nath Tripathi, as observer. The election was finally held on 11.6.2000. These elections were in fact postponed elections, which were scheduled to be held on 3.11.96. The Assistant Registrar has set a side the election only on the ground that it could not have been held after the expiry of three years and three months, and that the newly enrolled members in the year 1996 had no right to participate in the election. However, there is no rival Committee nor any other elections were held by any other person to create doubt over validity of elections.

15. Bye laws 17 (1) and (2) of the society provide for term of the Committee of Management. Bye law 17 (3), however provides for an eventuality in which the election may not be held within three years and three months. In such situation the office bearers of the Committee of Management are allowed to continue until they are replaced by their successors. These provision read with Bye law 24,25 and 33 go to show, that although the term of the executive committee come to an end, there was no restriction in bye laws for holding fresh elections. The office bearers could call for a meeting and hold elections of the executive committee and office bearers to replace them. The quorum under Bye law 25 is provided for ordinary meeting of executive committee. It does not cover the event when the term of the executive committee has expired and that the office bearers are continuing till fresh elections are held. Such an event is an exception to the provisions of bye law 25, which provides for quorum for meeting in normal circumstances.

16. The aforesaid interpretation is supported by amendment by insertion of a proviso, to Section 4 of U.P. Act No. 11 of 1994 which provides that if the managing body is elected after the last submission of the list, the counter signatures of the old members, shall as far as possible be obtained on the lists.

17. Sri Salil Kumar Rai is correct in his submission that the provisions of section 25 (2) were not attracted in the present case, and that the registrar could not have assumed powers to direct fresh election to be held. He is also correct in submitting that outgoing executive committee had initiated the process of election before its term had expired. The District Magistrate an annex officio president had no authority to decide the membership of respondents 3 and 4 and to postpone elections on that account. The District Inspector of Schools initially failed to discharge his statutory obligation arising out of registered bye laws of society to appoint an observer. The voters list was subsequently verified by the District Inspector of Schools and the elections dated 16.6.2002 were held under an observer appointed by District Inspector of Schools who submitted his report on the basis of which the signatures of petition no. 1 were approved.

18. The Assistant Registrar has not been given powers to decide the disputes arising out of the elections of the society. These powers have been given to the prescribed authority authorized by State Government by notification published in official Gazettee. It is only when there is a stalemate, or rival committees who have set up the elections after the expiry of the term of the outgoing Committee of Management, and these elections are not found to be valid, and there is no provision in Bye laws to hold elections after expiry of tenure of executive committee, reasonably inferred from the Bye laws that the Registrar can step in and provide for elections. He, however, can not decide on the validity of the members, who are entitled to vote. The election disputes, if any, including validity of members entitled to vote can only be decided under Section 25 (1) by the prescribed authority, and that any person aggrieved thereafter has a right to approach civil court.

19. In ***Committee of Management Bal Avadh Inter College, Lalitpur Mau versus State of U.P.*** 2002 (3) ESC page 129, this Court held that the elections beyond the expiry of the tenure of the Committee of Management were valid on the ground that the election process was started well before the expiry of term and that there was no lack of bonafide is getting the election conducted in time. While reading to the aforesaid conclusion the Court relied upon the decision in ***Committee of Management versus Secretary, Arya Kanya Inter College*** 1999 (2) UPLBEC (summary of case)77 and ***B.N.B Inter College versus Regional Deputy Director of Education*** (1996 (3) UPLBEC 154). In ***Committee of Management Mubarakpur Inter College, Mubarakpur versus Regional Deputy Director of Education (second) Azamgarh*** (1977) (1) UPLBEC 412), this Court has relied upon the decision in ***Committee of Management, Aley Ahmad Girls Inter College versus Deputy Director of Education*** (civil misc. writ petition no. 10869 of 1996, decided on 15.11.1996 in holding that outgoing Committee of Management can be treated to be functional in law even after expiry of the period of tenure provided in Rule, given the dispute, and elections have been held complying with the conditions as provided in the Bye laws. Such a Committee of Management can be recognized for administrative purpose. In the present case though the term of the Committee of Management had expired, the office bearers were entitled to

continue until they were relieved by their successors. The elections were held in a meeting convened by them under observer appointed by District Inspector of Schools who had delayed such appointment unreasonable and illegally for about four years. The list of members was verified by District Inspector of Schools and that no irregularity was found in the elections. The Assistant Registrar did not find any error, and any irregularity or illegality of lack of bonafide in holding the elections, except the fact that it was held after the expiry of the term of the executive committee. Under the Bye law of the society and under section 25 (2) he could not have proceeded to set a side the elections and to direct fresh elections to be held under the District Inspector of Schools as an Election Officer.

20. Sri Ashok Khare pointed out that the new members enrolled by the outgoing Committee of Management were not valid members as they have not deposited their membership fees and that they had no authority to participate in the elections. Registrar did not proceed to set a side elections on the basis that the elections were not held among the valid members. The Bye laws of the society provide for the executive committee to represent various classes of the members of the society. The respondents have not pleaded as to which categories of members are not valid members. In the absence of such material the elections of all the members in the Committee of Management could not questioned. In any case it was open to the respondents to raise these disputes before the registrar who could have referred the matter to the prescribed authority to be decided under section 25 (1) of the Act. The validity of the electoral list, therefore, could not be a ground for the registrar to set a side the entire election and that he rightly did not decide this objection.

21. For the aforesaid reasons, the writ petition no. 742 of 2003 is allowed. The impugned orders dated 20.12.2001 of the Additional Registrar, Firms, Societies and Chit, Gorakhpur Division, Gorakhpur and the order dated 31.12.2001 passed by District Magistrate, Gorakhpur are set aside. The Committee of Management elected on 16.6.2000 shall be entitled to continue and to hold fresh elections. Since its extended term is going to end on 16.6.2003, it will have right to hold fresh elections in accordance with the Bye laws.

22. The reliefs claimed in the writ petition no. 14216 of 2003 were dependent upon the result of the writ petition no. 742 of 2003. Since the said earlier writ petition namely 742 of 2003 has been allowed, and elections held on 16.6.2000 have been held to be valid. The reliefs claimed in writ petition no. 14216 0f 2003 have become infractuous. The writ petition no. 14216 pf 2003 is accordingly, dismissed . There shall be no orders as to costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.5.2003

BEFORE
THE HON'BLE TARUN CHATTERJEE, C.J.
THE HON'BLE R.K. AGARWAL, J.

Special Appeal No. 881 of 1999

The Committee of Management, Nanak Chand Adarsh Inter College, Chandausi, Moradabad and another ...Appellants
Versus
The District Inspector of Schools, Moradabad and others ...Respondents

Counsel for the Appellants:
Sri P.S. Baghel

Counsel for the Respondents:
Sri K.A. Ansari
Sri M.D. Singh
S.C.

U.P. Secondary Services Commission Rules 1983- Rule 7 (i)- Life of the selection list- one year from the date of notification- top merit candidate joined and worked as principal for six months- proceeded on leave- not turned up- whether the next in seniority list can claim for appointment within one year from the date of termination of earlier principal ? held- no- in view of provisions of Rule 8- the life of the list was only one year from the date of publication of the list.

Held- Para 10

Therefore in our view the life of the panel came to an end as soon as Satya Pal Singh had joined the service and continued without break for about 6 months or at best till the time fixed in Rule 8 of the Rules. The period fixed in Rule 8 of the Rules. The period fixed in Rule 8, in our view has already expired and, therefore, in view of our discussions made hereinabove, we are unable to accept the contention of the private respondent that the life of the panel could survive up to the date of termination of the service of Satya Pal Singh, as he was on leave up to that date.

(b) U.P. Secondary Services Commission Rules 1983- Rule 8 (5)- whether the provision of Rule 8 (5) are mandatory ? held- No.

Held- Para 12

So far as the present case is concerned, we are of the view that on a close scrutiny of sub rule 5 of Rule 8 of the Rules, the three eventualities had not, at al, occurred because in the present case Satya Pal Singh joined the post of Principal of the institution and worked more than six months and thereafter left the college initially taking leave and finally his services were terminated by a resolution. Therefore, in the present case, in view of the aforesaid admitted fact, sub rule 5 of Rule 8 of the Rules cannot apply and the writ petitioner-private respondent could not pray for sending his name for appointment as Principal of the Institution as he stood next in order of merit in the panel after Satya Pal Singh. In our view , Rule 8 (5) of the Rules cannot be said to be mandatory provision.

Case law referred:
1996(9) SCC 309
1969 (1) UPLBEC 271

(Delivered by Hon'ble Tarun Chatterjee, C.J.)

1. This Special Appeal is directed against the judgment and order dated 30.7.1999 passed a learned Judge of this Court in Civil Misc. Writ Petition No. 33807 of 1994.

2. Briefly stated the facts of this special appeal are that Nanak Chand Adarsh Inter College, Chandausi,

Moradabad (hereinafter referred as to the institution) is a recognized institution where education is imparted up to the level of Intermediate. The institution receives grant-in- aid from the State Government. Thus, the provisions of U.P. Intermediate Education Act, 1921, U.P. Secondary Education (services and selection board) Act, 1982 and U.P. High Schools and Intermediate Colleges (Payment of Salaries of teachers and other employees) Act, 1971 would be applicable to this institution. On attaining the age of superannuation by the Principal of this institution, a substantive vacancy in the post of principal arose which was duly intimated to the U.P. Secondary Education Services Commission (hereinafter referred to as the Commission). The Commission advertised the said post. After holding selection, the commission recommended the name of one Satya Pal Singh, who is respondent no. 2 in this appeal at serial no. 1 and name of Rajendra Pal Gupta, writ petitioner- respondent no. 3 (in this appeal), at serial no. 2. The selected candidate Satya Pal Singh joined his duty as Principal of the institution on 7th December, 1988 and continued to function as such till 30th June, 1989. From 1st July, 1989 up to 23rd of January, 1994, Satya Pal Singh did not join the institution and on that day by a resolution, the committee of management, terminated the services of Satya Pal Singh and papers relating to his termination were forwarded to the District Inspector of Schools on 14th February, 1994. After the termination of the services of Satya Pal Singh, the writ application was filed by Rajendra Pal Gupta, who is respondent no. 3 in this appeal for a direction upon the appellants to issue appointment order in his favour allowing him to join as Principal of the institution and for other incidental reliefs.

3. This writ application was disposed of by the learned Judge of this Court by holding that since the vacancy of Principal arose within a period of one year, the second person in the panel, namely Rajendra Pal Gupta, would be entitled to be appointed by the appellant-Committee of Management.

4. Feeling aggrieved by this order, the present special appeal has been preferred at the instance of Committee of Management Nanak Chand Adarsh Inter College, Chandausi, Moradabad and one Puran Chand Upadhyay, officiating Principal of the institution.

5. Before us, the learned counsel appearing on behalf of the appellant submitted that in view of Rule 7 (2) of the U.P. Secondary Education Services Commission Rules, 1983 (hereinafter referred to as the Rules) life of the panel prepared under Rule 7 (1) of the Rules shall remain alive for one year from the date of its notification by the commission and, therefore, in view of the fact that the life of the panel had already exhausted, question of appointing the writ petitioner-respondent no. 3, Rajendra Pal Gupta, from the said panel, life whereof had already stood expired, cannot arise, at all. In support of this contention the learned counsel for the appellants had drawn our attention to a decision of the Supreme Court in ***State of U.P. and another vs. Harish Chandra and others*** (1996 (9) SCC 309).

6. The submission so made by the learned counsel for the appellants was disputed by the learned counsel appearing

for the respondent no. 3. According to the learned counsel for the respondent no. 3, the life of the panel did not exhaust in view of the fact that the respondent no. 3 could be appointed within one year from the date of termination of the services of Satya Pal Singh. Accordingly the learned counsel for the respondent no.3 submitted that the appeal must be dismissed.

This is the only question, which is to be decided by us in this appeal.

7. Before taking up the submissions of the learned counsel for the parties, we may refer to Rule 7 of the Rules, which runs as follows:

"7. Preparation of panel- *(1) The Commission shall prepare an institution wise panel of those found most suitable for appointment and arrange them in order of merit inter alia mentioning-*

(i) the name of the institution and where it is situate;
(ii) the subject in which vacancy existed and selection made
(iii) names of selected persons in order of merit and with due regard to their preference for appointment in a particular institution.

(2) The panel, prepared under sub rule (1) shall hold good for one year from the date of its notification by the Commission (emphasis supplied).

8. In this connection reference of Rule 8 of the said Rules may also be made which is extracted herein below :

"8. ***Notification of selected candidate*** *- (1) The Commission shall forward the panel, referred to in Rule 7, in quadruplicate, to the Deputy Director and shall also notify the same on its notice board and publish it in such other manner as it may consider proper -*

(2) Within 15 days of the receipt of the panel by him, the Deputy Director shall notify it on the notice board and send two copies thereof to the Inspector.

(3) Within 15 days of the receipt of the panel by him, the Inspector shall-

(i) notify it on the notice board.

(ii) Intimate the name of selected candidates, standing first in order of merit, and where there are more than one vacancies, as many names in order of merit as there are vacancies, to the Manager of the concerned institution with directions that no authorization under resolution of the Management, an order of appointment, in the proforma given in Appendix B be issued to the candidate by registered post within one month of the receipt of intimation, requiring him to join duty within 10 days of the receipt of the order or within such extended time, as may be allowed to him by the Management, and also intimating him that on his failure to join within the specified time, his appointment will be liable to be cancelled.

(iii) Send an intimation to the candidate, referred to in clause (ii) with directions to report to the Manager within 10 days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him, by the Management

(4) The manager shall comply with the directions given under sub rule 3 and

report compliance to the Commission through the Inspector.

(5) when the candidate referred to in sub rule (3) fails to join the post within the time allowed in the letter of appointment or within such extended time as the management may allow in this behalf or where such candidate is not available for appointment, the Inspector may, on the request of the management, send fresh name or names standing next in order of merit on the panel, under intimation to the Deputy Director and the Commission and the provisions of sub rule 3 and 4 shall mutates mutandis apply."

9. From a plain of sub-rule (2) of rule 7 of the Rules it is clear to us that the panel prepared under sub-rule (1) of Rule 7 of the Rules shall hold good for one year **from the date of its notification by the Commission**. In this case, as noted herein earlier, learned counsel for the private respondent submitted before us that the life of the panel could not exhaust as the private respondent was entitled to be appointed form the same panel within one year from the date of termination of services of Satya Pal Singh. We are unable to accept this contention of the learned counsel for the private respondent.

10. From a plain reading of rule 8(1) to Rule 8(4) of the said Rules which deals with notification of selected candidates, we are of the view that in view of the admitted fact that from the same panel Satya Pal Singh, who was at serial number 1, was in fact appointed and worked with the college for about 6 months and thereafter went on leave till the year 1994, the question of remaining alive of the panel could not arise. As noted herein earlier, Rule 8 of the Rules clearly postulates as to what would be the date of notification by the Commission. For this reason, we have carefully examined Rule 8 of the Rules to find out the period of one year from the date of notification by the Commission. In our view , by no stretch of imagination, it can be said that the panel could be said to remain alive up to the date of termination of services of Satya Pal Singh. Admittedly, Satya Pal Singh joined the college on 7th December, 1988 and, thereafter remained on leave till the year 1994 when his services were terminated. It can only be said that at best the life of the panel could survive up to the time prescribed in Rule 8 of the Rules. In any view of the matter, the question of panel to remain alive, in the facts of this case, cannot arise at all as we find that from the same panel, Satya Pal Singh, who was figuring at the top of the panel, was appointed and he joined the service in the college and continued about 6 months and thereafter went on leave till his services was terminated in the year 1994. Therefore in our view the life of the panel came to an end as soon as Satya Pal Singh had joined the service and continued without break for about 6 months or at best till the time fixed in Rule 8 of the Rules. The period fixed in Rule 8 of the Rules. The period fixed in Rule 8, in our view has already expired and, therefore, in view of our discussions made hereinabove, we are unable to accept the contention of the private respondent that the life of the panel could survive up to the date of termination of the service of Satya Pal Singh, as he was on leave up to that date.

11. There is another aspect of this matter. Sub rule 5 of Rule 8 of the Rules

clearly lays down that when a candidate **"fails to join the post"** within the time allowed in the letter of appointment or within such extended time as the management may allow in this behalf or where such candidate is not available for appointment, **"the Inspector may"** on the request of the management, send **fresh name or names standing next in order of merit on the panel.** Under intimation to the Deputy Director and the Commission, and the provisions of sub rule 3 and 4 shall mutatis mutandis apply. **(Emphasis supplied).**

12. If we carefully examine sub rule 5 of Rule 8 of the Rules as mentioned above, it would be clear that the question of sending the name of the candidate standing next in order of merit on the panel would arise only when the candidate referred to in sub rule 3 of Rule 8 of the Rules **fails to join** the post within the time allowed in the letter of appointment or within such extended time as the management allows in this behalf or where such candidate is not available for appointment. Therefore, from a plain reading of this provision, it is clear that when a candidate fails to join the post within time allowed in the letter of appointment or within such extended time as the management allowed in this behalf or such candidate is not available for the appointment, only then the question of sending the name of next candidate in the panel would arise. So far as the present case is concerned, we are of the view that on a close scrutiny of sub rule 5 of Rule 8 of the Rules, the three eventualities had not, at all occurred because in the present case Satya Pal Singh joined the post of Principal of the institution and worked more than six months and thereafter left the college initially taking leave and finally his services were terminated by a resolution. Therefore, in the present case, in view of the aforesaid admitted fact, sub rule 5 of Rule 8 of the Rules cannot apply and the writ petitioner- private respondent could not pray for sending his name for appointment as Principal of the Institution as he stood next in order of merit in the panel after Satya Pal Singh. In our view, Rule 8 (5) of the Rules cannot be said to be mandatory provision. We find that sub rule 5 of Rule 8 of the Rules clearly says that the Inspector on the request of the management may send fresh name or names standing next in order of merit on the panel. Therefore, it is clear from this provision that at the discretion of the Inspector, it is open to him to send fresh name or names standing next in order of merit on the panel for appointment only on the request of the management. If this position is accepted the question of appointment as of right to the private respondent could not at all arise as the Inspector did not send his name on the ground that he was standing next in order of merit on the panel nor there was any request from the management of the institution for sending the name of next candidate standing in order of merit in the panel.

13. Before we part with this judgment, we may deal with a decision cited by the learned counsel for the private respondent rendered in ***Nagar Palika Inter College, Jaunur vs. Dr. Havildar Singh and others.*** (1969) 1 UPLBEC 271. We have carefully examined the decision cited at the Bar as well as the relevant provisions, namely, Rule 7 and Rule 8 of the Rules as quoted herein earlier. In our view, the aforesaid decision cited by the learned counsel for the respondents, in this behalf, cannot be

said to have any application to the facts and circumstances of this case, as in that decision, the candidate did not at all join the post and, therefore, it was open for the next man to come in the field of eligibility in view of sub rule 5 of Rule 8 of the rules. As we have discussed already in the present case, on the other hand, Satya Pal Singh, admittedly joined the institution as Principal and worked for about 6 months in the said institution. Therefore, the decision cited on behalf of the writ petitioner- respondent no. 3 is not, at all, applicable to the facts and circumstances of the instant case.

No other point was raised by the learned counsel for the parties.

14. In view of our discussions made above, it is not necessary for us to deal with the decision of the Supreme Court relied on by the learned counsel for the respondent. However, the decision of the Supreme Court as referred to above, in our view, is also of no help to the appellant.

15. For the reasons aforesaid, this special appeal deserves to be allowed, the order of the learned Judge, under appeal, is liable to be set aside and we hold that the private respondent is not entitled to be appointed as Principal of the institution from the said panel.

16. Accordingly the special is allowed. The impugned order, under appeal, is set aside and the writ petition stands dismissed. However, there will be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.5.2003

BEFORE
THE HON'BLE TARUN CHATTERJEE, C.J.
THE HON'BLE R.K. AGARWAL, J.

Special Appeal No. 664 of 2002

State of U.P. and others ...Respondents
Versus
Smt. Rosalia Minj Sohanta and another ...Petitioner

Counsel for the Petitioners:
Sri Ran Vijay Sigh
S.C.

Counsel for the Respondents:
Sri R.K. Ojha

U.P. Recognized Basic Schools (Recruitment and conditions of service of teacher and other conditions) Rules 1975- Rule 19 (i) Requisites qualification for Assistant Teacher in Primary School- BTC- provided in 1995 –Respondents was appointed 1973 having diploma from Pune University- G.O. dated 21.10.94- provides to give salary as trained teacher who have completed 10 years as untrained teachers- whether such teacher was entitled to treated as trained teacher ? held- yes- when the appointed made- Rule 1975 was not enforced- completed 10 years long service- entitled for every consequential benefits like Regular teachers.

Held- Para 7

When the respondent no. 1 was appointed i.e. on 17.7.1973, the 1975 Rules was not in force. Thus, the qualification prescribed by the Board for appointment on the post of assistant teachers in a recognised school was not in force at the time when the respondent no. 1 was appointed. The learned standing counsel has not placed any

material on record before us, to show as to what was the qualification prescribed for appointment on the post of Assistant teacher in recognised schools in the year 1973 when the respondent no. 1 was appointed. Thus, it can be presumed that the Diploma in Education given by the recognised University was treated as equivalent training for appointment on the post of Assistant teacher in the recognised Basic school. In this view of the matter when the respondent no. 1 was appointed as assistant teacher on 17.7.1973 and had been paid salary as trained teacher right up till 1992 i.e. for 19 years, the presumption is that she was duly qualified and had rightly been appointed on the post of assistant teacher in trained grade. Moreover, we find that the State Government has vide Government order dated 21.10.1994 provided the benefit of trained grade to those untrained teachers, who have also completed more than 10 years of service. In any event the respondent no. 1 was entitled for being treated as a trained teacher and payment of salary as trained teacher.

Case law referred:

1998 (3) SCC-146, 2001 (2) UPLBEC-1685
1998 (8) SCC-326

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

1. The present special appeal has been filed against the judgment- dated 16.2.2000 passed by the learned Judge in civil misc. writ petition no. 1303 of 1993 whereby the learned Judge, had disposed of the writ petition quashing the order dated 8.10.1992 contained in annexure 8 to the writ petition and directing the authorities to treat the petitioner as trained teacher in terms of the Government order dated 21.10.1994 and pay the salary as trained teacher in the revised scale alongwith arrears.

2. Briefly stated the facts giving rise to the present special appeal are that the respondent no. 1 writ petitioner was appointed on 17.7.1973 as Assistant Teacher in Primary school namely Bal Vidyalaya Nayapura, Stanely Road, Allahabad (hereinafter referred to as the school). She was given trained grade as she was having certificate of diploma in Education from the Pune University. Sometimes in February 1992 the authorities found that the diploma possessed by the respondent no. 1 was not recognised as equivalent to B.T.C. and since B.T.C. was the only training after obtaining of which a person becomes eligible for appointment as Assistant teacher in primary school, therefore, vide order dated 8.10.1992 she was designated as untrained teacher and ordered to draw salary as untrained teacher. The respondent no. 1 challenged the said order by filing a writ petition in this court under Article 226 of the constitution of India which had been finally disposed off by the learned Judge vide order dated 16.2.2000 which is impugned in this Special Appeal.

We have heard Sri Ran Vijay Singh learned standing counsel and Sri R.K. Ojha learned counsel for the respondent no. 1.

3. The learned standing counsel submitted that on the date when the respondent no. 1 was appointed as trained teacher in primary school on 17.7.1973, she did not posses the requisite training i.e. B.T.C. and, therefore, she was not eligible and could not have been appointed as a trained teacher. According to him, the certificate of Diploma in Education from Pune University is not recognised as equivalent to B.T.C.

Training by the Government of Uttar Pradesh, and thus, no benefit can be derived from the said certificate. He further submitted that the respondent no. 1 has rightly been granted salary treating her to be as untrained teacher and the learned Judge was not justified in directing payment of salary as trained teacher to the respondent no. 1. He relied upon the decision of Hon. Supreme Court in the case of Union of India and others Vs. Ravi Shanker and others, 1998 (3) SCC 146 and decision of a Division Bench of this Court in the case of State of U.P. and others vs. Param Hansh Singh (2001) 2 UPLBEC 1685.

4. According to him, the government order 21.10.1994 did not have any retrospective effect and all those untrained teachers who have completed 10 years' service or were going to attain the age of superannuation within 2 years, were to be treated as trained teachers after a committee constituted under the aforesaid Government order examined their cases. Thus, the single Judge was not justified in directing the respondent no. 1 to be treated as trained Teacher bye-passing the Government order dated 21.10.1994. He further submitted that the learned Judge had granted the relief, which was not even claimed by the respondent no. 1. He relied upon the decision of Hon. Supreme Court in the case of Chandigarh Administration vs. Laxman Roller Flour Mills Pvt. Ltd. (1998) 8 SCC 326.

5. Sri R.K. Ojha learned counsel for the respondent no. 1, however, submitted that the respondent no. 1 was appointed as Assistant Teacher in the School on 17.7.1973. She possessed the certificate of Diploma in Education from Pune University, which is a recognised University by he University Grant Commission and, therefore, its Diploma is recognised all over India. He further submitted that as far back in the year 1986, a doubt was expressed on the question as to whether the diploma granted by the Pune University is recognised or not and the Director of Education, UP Allahabad vide letter dated 21.8.1989 had informed the Principal of the School reliving upon the Government order dated 29.8.1966 that any degree or diploma given by the University in India which is a recognised University by the University Grant Commission, is recognised for appointment in the State. Thus, he submitted that the respondent no. 1 had rightly been appointed as a trained teacher in the School and, therefore, treating her as untrained teacher was wholly illegal. In any event, he submitted that in view of the Government order dated 21.10.1994 which provided for treating those untrained Assistant Teacher who had been working for more than 10 years to be trained teacher, the judgement and order dated 16.2.2000 calls for no interference. He relied upon the decision in the case of Smt. Santosh Yadav vs. State of Haryana reported in 1997 (1) UPLBEC 259.

6. Having heard the learned counsel for the parties, we find that it is not in dispute that the respondent no. 1 possesses certificate of Diploma in Education given by the Pune University. She was appointed as Assistant Teacher in trained grade in school on 17.7.1973 and had been paid salary as trained teacher since then. In the year 1986 on some doubt being expressed regarding her training i.e. certificate of Diploma in Education awarded by the Pune

University, the Director of Education had clarified the matter that all the degrees and diploma awarded by the Universities recognised by the University Grant Commission, is recognised for the purposes of service in the State of UP. Thereafter, the matter rested there. However, in month of February 1992, when the salary in the revised pay scale was to be fixed and certificates were examined, the question about training again cropped up and authorities held that the Diploma in Education held by the respondent no. 1 is not equivalent to B.T.C. training. In this background of the matter, the question is as to whether the respondent no. 1 was entitled to be treated as trained teacher or not ?

7. To regulate the basic education in the State of U.P., the U.P. Basic Education Act 1972 (hereinafter referred to as the Act) has been enacted. Under section 19 (1) of the Act, the Governor of U.P. framed Rules known as U.P. Recognised Basic Schools (Recruitment and Condition of Service of teachers and other conditions) Rules 1975 (hereinafter referred to as the 1975 Rules). Rule 3 of the 1975 Rules provided that every recognised school shall be bound by the conditions and restrictions hereinafter specified. Rule 9 relates to appointment of teachers which provides that no person shall be appointed as teacher or employee in any recognised school unless he possesses such qualification as are specified in this behalf by the Board and for whose appointment the previous approval of the Basic Shiksha Adhikari has been obtained in writing. These Rules came into force on 1.7.1975. In exercise of powers under Rule 9 of the 1975. Rules, the Board prescribed the necessary qualification for appointment on the post of Assistant teachers in recognised primary schools. When the respondent no. 1 was appointed i.e. on 17.7.1973, the 1975 Rules was not in force. Thus, the qualification prescribed by the Board for appointment on the post of assistant teachers in a recognised school was not in force at the time when the respondent no. 1 was appointed. The learned standing counsel has not placed any material on record before us, to show as to what was the qualification prescribed for appointment on the post of Assistant teacher in recognised schools in the year 1973 when the respondent no. 1 was appointed. Thus, it can be presumed that the Diploma in Education given by the recognised University was treated as equivalent training for appointment on the post of Assistant teacher in the recognised Basic school. In this view of the matter when the respondent no. 1 was appointed as assistant teacher on 17.7.1973 and had been paid salary as trained teacher right up till 1992 i.e. for 19 years, the presumption is that she was duly qualified and had rightly been appointed on the post of assistant teacher in trained grade. Moreover, we find that the State Government has vide Government order dated 21.10.1994 provided the benefit of trained grade to those untrained teachers, who have also completed more than 10 years of service. In any event the respondent no. 1 was entitled for being treated as a trained teacher and payment of salary as trained teacher.

8. In the case of Union of India and another vs. Ravi Shanker and another (supra), the Apex court has held that the degree of Vaidya Visharad awarded by Hindi Sahitya Sammelan, cannot be held to be a recognised qualification under the Recruitment Rules. The said decision is of

no assistance to the appellants in as much as in the present case, there is no material on record to show as to what was the prescribed qualification for the appointment of Assistant Teacher in primary school in the year 1973. The respondent no. 1 had been appointed on the said post in the year 1973 and she continued to work till 1992 as trained teacher and the salary in that grade had also been paid, thus, it cannot be said that she did not possess the requisite qualifications

9. In the case of state of U.P. and others vs. Param Hansh Singh (supra) this Court has held that the Rule has fixed the minimum height and the measurement of chest (expanded and unexpanded) and there is no scope for any kind of variation in the same. If a candidate is unable to meet the prescribed standard even by a slight margin , he has to be held as unqualified.

10. In the present case we find that the prescribed qualification for appointment on the post of Assistant teacher for the first time came into force on 1.7.1975 whereas appointment had been made on 17.7.1973. In the absence of any prescribed qualification, there was no illegality in the appointment of the respondent no. 1.

11. So far as the contention that the relief which was not prayed for, was allowed by the learned Judge is concerned, we find that the appointment of the respondent no. 1 was perfectly valid and justified and, thus, this question does not arise.

12. In view of foregoing discussions, we do not find any merit in this Special Appeal. The special appeal is dismissed.

13. However, the parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.4.2003

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

Contempt Appeal No. 1673 of 2003

Sri T. George Joseph, Principal Secretary, Tax Registration Government of U.P., Lucknow ...Appellant

Versus

Vijay Kumar Srivastava ...Respondent

Counsel for the Appellant:
Sri Upadhyay
Sri R. Vijai
S.C.

Counsel for the Respondent:
Sri Satish Chaturvedi
A.G.A.

Contempt of courts Act- Section 19- Appeal against order summoning the appellant to produce the evidence in defence for non compliance of order passed by the single Judge whether is appeal against interfere order maintainable ? held- yes- appeal admitted- appellant to more vacation of the order- impugned order stayed for period of 3 months.

Held- Para 11

Order decides some disputes raised before the Court by the contemnor asking it to drop the proceedings on one

ground or the other, the appeal against the said order is maintainable.

Case law referred:

1978 (2) SCC-370
2000(4) SCC-400
AIR 1996 SC-2131

(Delivered by Hon'ble Tarun Chatterjee, C.J.)

1. The alleged contemnor Mr. T. George Joseph, Principal Secretary, Tax Registration, Government of U.P., Lucknow is the appellant before us. He files this appeal against an order of a learned Judge exercising contempt jurisdiction in which the learned Judge after considering the allegations made in the application for contempt has framed a charge which is as follows :-

"That you failed to follow the directions given by the Division Bench of this Court on 7.12.2000 passed in civil misc. writ petition no. 38807 of 2000 and connected writ petitions in preparing the seniority list of entertainment and betting tax inspector grade-II and thereby willfully disobeyed the above order of this court."

2. After framing the charge the learned Contempt Judge also directed the appellant to produce evidence in his defence of the charge by affidavit within three weeks.

3. A preliminary objection has been raised by the private respondent saying that no appeal lies against the impugned order in view of the fact that there was no final decision of the matter. According to the learned counsel for the private respondent, an appeal shall lie against only those orders or decisions in which some point was decided or finding given in the exercise of jurisdiction of the High Court to punish for contempt. Learned counsel for the private respondent further submitted that from the impugned order it could not be said that the learned Judge has initiated the proceeding to punish for contempt. In support of his submission learned counsel for the respondent relied on several decisions of the Supreme Court, the first of which is reported in AIR 1976 SC 1206 ***Barada Kanta Misra v. Orissa High Court***. The next decision on which the learned counsel for the respondent has relied on is the decision of the Supreme Court in the case of. ***State of Maharasthra Vs. Mahbood S. Allibhoy and another*** AIR 1996 SC 2131 and also another decision of the Supreme court in the case of ***Purshottam Dass Goel v. Hon'ble Mr. Justice B.S. Dhillon and others*** reported in (1978) 2 SCC 370. Relying on these decisions the learned counsel for the private respondent submitted before us that no appeal lies against the impugned order.

4. Sri Upadhyay appearing on behalf of the alleged contemnor, refuted the arguments of the learned counsel for the private respondent. According to Sri Upadayaya an appeal is maintainable against the impugned order as from the impugned order it appears that cognizance of the contempt proceeding has been taken and a contempt proceeding has been initiated and finally by the impugned order the learned contempt Judge has framed a charge against the alleged contemnor and thereby directed the alleged contemnor to produce- evidence in support of his defence. Sri Upadaya has taken us through certain paragraphs of the application for discharge filed by the alleged contemnor and sought to argue that from the impugned order it will be apparent that it was really the initiation of

the contempt proceedings to punish for contempt. In support of his contention Sri Upadaya relied on a decision of the Supreme Court in the case of ***R.N. Dey and others vs. Bhagyuabati Pramaniak and others*** (2000) 4 SCC 400.

5. After considering the submissions made on behalf of the respective parties and after going through the decisions cited at the Bar we are of the view that this appeal is maintainable in law. Before we decide this question, we may refer to Sections 17 and 19 of the contempt of courts act, 1971 (herein after referred to as the Act).

6. Section 17 of the Act deals with procedure after cognizance. Section 17 (i) says that a notice of every proceeding under section 15 shall be served personally on the person charged, unless the court for reasons to be recorded directs otherwise. Sub section 3 of Section 17 provides that the Court may, if it is satisfied that a person charged under section 15 is likely to abscond or keep out of the way to avoid service of the notice, order the attachment of his property of such value or amount as it may deem reasonable. Sub section 5 of section 17 says that any person charged with contempt under section 15 may file an affidavit in support of his defence, and the court may determine the matter of the charge either on the affidavits filed or after taking such further evidence as may be necessary and pass such order as the justice of the case requires.

7. Section 19 of the Act provides for an appeal against any order or decision of the High Court in the exercise of its jurisdiction to punish for contempt, where the order or decision is that of a Single Judge, to a Bench or not less than two Judges of the court, where the order or decision is that of a Bench to the Supreme Court.

8. Now the question is whether the impugned order comes within the meaning of any order or decision to punish for contempt. If we hold that it is so, then there will be no difficult in holding that an appeal lies against the aforesaid order. In our view the appeal is maintainable in law. As noted above section 19 of the Act clearly says that an appeal shall lies as of right from any order or decision of the High Court, to a Division Bench of the High Court when a situation arises to punish for contempt. Therefore, let us see whether by the impugned order the learned Contempt Judge has exercised his jurisdiction to punish for contempt.

9. We have carefully read the judgement under appeal and we find that the learned contempt judge after considering the entire materials on record has come to a finding that there was intentional violation of the order of the Division Bench of this court as the alleged contemnor had failed to follow the directions given by the Division Bench of this court on 7.12.2000 passed in civil misc. writ petition no. 38807 of 2000 and connected writ applications in preparing the seniority list of Entertainment and Betting tax Inspector grade II and thereby willfully disobeyed the above order of this Court. From the impugned order it also appears that the learned Contempt Judge has also exercised his jurisdiction by coming to a conclusion that the alleged contemnor had failed to follow the directions given by the Division Bench of this court.

10. In the case of ***R.N. Dey and others*** the Supreme Court clearly observed in Paragraph 2 which is important for our purposes as follows:

"2. These appeals are filed against the judgement and order dated 4.8.1998 passed by the High Court of Calcutta in CR No. 628 of 1998 and CPAN No. 1822 of 1997 in FA No. 232 of 1988. By the impugned order, the Court accepted unqualified apology tendered by the appellants in compliance with the orders of the Court for not paying the balance award money due to the respondents. The Court further directed the appellants to deposit with the Registrar (Appellate Side) the compensation money determined in terms of the order of the learned Land Acquisition Judge in respect of the lands acquired by the state as mentioned in the order and decree within two weeks from the date of the order without prejudice to the rights and contentions of the parties in such proceedings. Further, the Court did not pass any order on the application filed by the Collector for vacating the rule issued in the contempt proceeding holding that the Collector cannot go behind the award passed by him as provided under the Land acquisition act, 1894."

11. In paragraph 12 of the said judgement the Supreme Court has also observed that if the order decides some disputes raised before the Court by the contemnor asking it to drop the proceedings on one ground or the other, the appeal against the said order is maintainable.

12. In our view, in the present case a dispute had arisen before the learned Contempt Judge asking the learned Contempt Judge to drop the proceedings on the ground that there was no willful violation or disobedience of the order of the Division Bench of this court as the alleged contemnor had not acted in that fashion and intentionally violated the order of the Division Bench. In the Counter affidavit filed the appellant has clearly stated that after the order of the Division Bench was passed, the matter was sent to the Law Department of the Government and the Law Secretary submitted a report on the basis of which the alleged contemnor had directed the Commissioner concerned to proceed on the basis of the Division Bench decision of this court. Therefore, so far as the alleged contemnor is concerned, the question of violating any order of the Division Bench could not arise at all. In any view of the matter from the impugned order it appears that the learned Contempt Judge had exercised his jurisdiction to initiate contempt proceedings mainly on the basis that the alleged contemnor had failed to follow the directions given by the Division Bench. Prima facie he was satisfied that there was no ground to exercise jurisdiction to initiate contempt proceeding in view of the fact that cannot be said to be a willful disobedience of the order of the Division Bench at the instance of the alleged contemnor.

13. In the decision of the Supreme Court in the case of ***Barada Kanta Misra v. Orissa High Court*** on which the learned counsel for the private respondent relied on, it has been clearly stated that an appeal shall lie against those orders or decisions in which some point was decided or finding was given in the exercise of the jurisdiction of the High Court to punish for contempt. As we have already noted that in the impugned order

the learned Contempt Judge has decided some point and a finding has been arrived at in the exercise of jurisdiction to punish for contempt for which a charge has been framed and the alleged contemnor has been directed to produce evidence in support of his defence, we are of the view that the decision of the Supreme Court as relied upon by the learned counsel for the private respondent does not help him for the purposes of holding that the appeal is not maintainable.

14. So far as the other decision on which the learned counsel for the respondent relied upon is the decision of the Supreme Court in the case of ***State of Maharashtra vs. Mahboob S. Allibhoy and another*** AIR 1996 SC 2131. In our view this decision of the Supreme Court is also not applicable to the facts and circumstances of the case. In that decision an order dropping the proceedings for contempt or refusing to initiate a proceeding for contempt was under appeal before the Division Bench under section 19 of the Act. This is not the fact arising in this case. It is neither an appeal from an order dropping proceeding for contempt or refusing to initiate proceeding to punish for contempt. That being the position this decision does not apply to the facts and circumstances of the present case.

15. The last decision on which the learned counsel has relied on is a decision of the Supreme Court in the case of ***Purshotam Dass Goel v. Hon'ble Justice B.S. Dhillon and others*** (1978) 2 SCC 370. In our view, this decision does not also help the respondent. On the other hand this decision helps the appellants. In this decision the Supreme Court at page 371 has observed which is as under: -

"…. The order or the decision must be such that it decides some bone of contention raised before the High Court affecting the right of the party aggrieved……"

The Supreme Court has also held in the same decision that it is neither possible, nor advisable, to make an exhaustive list of the type of orders which may be appealable to this Court under Section 19. At page 371 of this decision the Supreme Court has also observed as follows :-

"….We are not called upon to express our final opinion in regard to such an order, but we merely mention this type of order made at some intermediate stage in the proceeding may be appealable under Section 19. In our considered judgment, an order merely initiating the proceeding without anything further, does not decide anything against the alleged contemnor and cannot be appealed against as a matter of right under Section 19. In a given case special leave may be granted under Article 136 of the Constitution from an order initiating the proceeding. But that is entirely a different matter. What we are deciding in this case is that the present appeal filed under Section 19 (1) of the Act does not lie and is incompetent."

16. From the aforesaid observation of the Supreme Court it is, therefore, clear that an appeal shall lie against an order under section 19 of the Act even where the orders were passed at some intermediate stage in a proceeding. As we have discussed already that some bone of contention was raised by the appellant before the learned Contempt Judge and, therefore, it cannot be said that no appeal lies against such order. The view expressed by the Supreme Court in the

said decision has also taken the help of the decision of the Supreme Court in the case of Barada Kanta Misra which has also been discussed by us in the foregoing paragraph of this order.

17. For the reasons aforesaid we are of the view that the preliminary objection raised by the respondent is devoid of any merit and it should be overruled.

Later

18. Heard learned counsel for the parties on the question whether this appeal should be admitted or not. Learned counsel for the respondent, however, prays for production of the records relating to the writ petition as well as the contempt proceedings and at the same time also prays for production of the records now lying in the Law Department.

19. After going through the impugned order and after hearing the learned counsel for the parties we are of the view that this appeal should be admitted and, accordingly, we admit the appeal and in view of the nature of the order passed by the learned Contempt Judge we stay the operation of the impugned order for a period of three months from this date with liberty to apply for extension, vacation and variation of the interim order in the presence of the other side or till the disposal of the appeal, whichever is earlier.

20. Regarding the question of production of records we keep it open that at the time of hearing of the appeal if production of the record is found to be necessary, the records shall be called for.

21. Counter affidavit be filed within three weeks. Rejoinder affidavit, if any, may be filed within one week thereafter.

Let the appeal be listed after a month.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MAY 22ND, 2003

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

Civil Misc. Writ Petition No. 44021 of 1997

Raj Net Chauhan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri D.N. Shukla

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- the extreme penalty of dismissal. This punishment has been so awarded keeping in view the facts and circumstances of this case in as much as the nature of service which is expected of a person belonging to a disciplined force. If the authorities below keeping in view of this fact that the petitioner being a member of the disciplined force of the State Police when deliberately absented from duty, committed great misconduct, this Court while acting under Article 226 of the Constitution of India is not supposed to interfere in the said finding recorded by them.

Held- para 12

The petitioner being a police personnel belonging to a disciplined force made his deliberate absence from duty and did not perform the assigned job of Santari on

the date 2.6.1992, instead he left for his village home where he is shown to have involved himself in a murder case which has ended into his conviction from the trial court, his alleged misconduct is not to be taken lightly and if the punishing authority has awarded the extreme penalty of dismissal from his service and the same has been confirmed by the appellate authority as well as the Tribunal, there is no scope for interference in such orders under Article 226 of the Constitution of India by this Court.

Case law referred:

JT 2002 (6) SC 162, JT 2002 (6) SC 157
AIR 1992 SC 2188, 1999 (i) ESC 339 SC
JT 2000 (3) SC 173

(Delivered by Hon'ble Umeshwar Pandey, J.)

1. The petitioner, who was working as Constable in U.P. Police Department, challenges the orders dated 13.7.1994, 24.11.1994 and 26.8.1997 (annexures 4,5 and 8 to the writ petition) under Article 226 of the Constitution of India and prays for issuance of writ in the nature of certiorari to quash the same. He also seeks, through this petition, a direction in the nature of mandamus commanding the respondents to reinstate him in service of his original post of constable in the Department.

2. The facts narrated in the present petition are that while working as a constable at Police Station Holagarh district Allahabad on 1.6.1992 when the petitioner applied for two days casual leave with effect from 3.6.1992 the same was granted. But inspite of the fact that he was posted on duty of Santari at the Police Station on 2.6.1992 he absented without obtaining any leave or permission from the Station Officer concerned. Thereafter he was arrested by the police of Tarwa Police Station district Azamgarh in a case of murder, which was registered at Crime No. 64 of 1992. He was sent to lockup as a named accused in the aforesaid case and could report to his duty only on 2.7.1992 after his release on bail. The petitioner was accordingly charged for his unauthorized absence from duty and the enquiry proceeded.

3. The petitioner submitted his reply to the charges admitting to the aforesaid fact that he had left the Police station Holagarh 2.6.1992 after obtaining casual leave for two days with effect from 3.6.1992. He requested the Head Constable concerned for making a note of his departure from the Police Station in the General Diary and on his assurance that the entry in the relevant General Diary about such departure of the petitioner would be made, he left the Police station. After he reached home, he was falsely implicated in the aforesaid criminal case of murder and the local police which, was seized with the investigation of the case, arrested him. As a result of his detention in the lock up he could come to join his duties at the Police Station Holagarh only on 2.7.1992.

4. The Enquiry Officer, in the aforesaid disciplinary proceedings, found that on 2.6.1992 the petitioner was assigned ***Santari*** duty at the Police Station from 9 AM to 12 Noon, but without obtaining permission from the concerned authority, he left the police station and neglected his duty. He was found absent without making entry (of his departure) in the General Diary and later on when he reached his village home, he was implicated in the criminal case of murder and rioting etc. and arrested. Finding the petitioner guilty for the unauthorized absence from duty, the

punishing authority (S.S.P. Allahabad), acting upon the enquiry report, awarded the punishment of dismissal.

5. This award of punishment was challenged by the petitioner in appeal, which too was dismissed vide impugned order dated 24.11.1994 (Annexure 5 to the writ petition). Subsequent thereto the petitioner preferred claim petition challenging the order of punishing authority as well as the appellate authority before the State Public Service Tribunal where also he could not get any relief and the petition was dismissed, vide impugned judgement dated 26.8.1997 (Annexure 8 to the writ petition).

6. The petitioner being aggrieved with the aforesaid three orders of punishing authority, appellate authority and the Tribunal, (Annexures 4, 5 and 8 to the writ petition) has approached this Court. While challenging the aforesaid orders, the petitioner took grounds inter alia stating that penalty of dismissal from service imposed against him in respect of the charges does not commensurate with the gravity of alleged misconduct. Such extreme penalty is imposed only in respect of charges of grave misconduct. For unauthorized absence of a day from duty the imposition of extreme penalty upon a civil servant, is unwarranted.

7. Learned counsel for the petitioner emphasized before us that a day's absence from duty is the only charge, which has attracted the award of extreme punishment of dismissal. Such a misconduct of a day's absence from duty is not so grave. In the present case of petitioner, while awarding punishment, the fact that he was involved in a murder case and was arrested in his village home by the local police has weighed too much in the mind of the Enquiry Officer and the punishing authority to hold the petitioner guilty of a misconduct of gravest nature. Such punishment should be awarded in the cases of misconduct, which shows incorrigibility and renders one unfit and disqualified for the service.

8. The learned counsel while making the aforesaid contention has, however, not disputed the misconduct of alleged absence of the petitioner from duty on 2.6.1992. Citing the case law of ***Kuldeep Singh Vs. The Commissioner of Police and others, reported in 1999 (1) ESC 339 SC*** and ***UP State Road Transport Corporation and others Vs. Mahesh Kumar Mishra and others reported in JT 2000 (3) SC 173***, he has further emphasized that the award of punishment of dismissal in the aforesaid two cases has been held by the Apex court to be illegal and disproportionate.

9. So far as the aforesaid two cases of Kuldeep Singh and U.P. State Road Transport Corporation (supra) are concerned, the ratio laid down by the Apex Court are not applicable, as the present case factually stands apart to those cases. In the case of Kuldeep Singh (supra) the Hon'ble Apex Court found the dismissal from service of a constable of Delhi police to be illegal because the charge of retention of sum of money handed over to the constable by the complainant was not found to be established in accordance with law as the complainant had refused to have given the said amount to him and he was not examined in the enquiry held before the Enquiry Officer. In the other case it was a bus conductor, who was dismissed from service for having issued tickets of

Rs.150/- inspite of Rs.180/- to the passengers. Those passengers were not examined on the spot when the checking was conducted nor they were examined during the enquiry. It was under these circumstances that the Hon'ble Supreme Court found that the interference under Article 226 of the Constitution made by the High Court in regard to the quantum of punishment was justified. Thus, the aforesaid two cases relied upon by the learned counsel for the petitioner do not help to the arguments rendered by the learned counsel in respect of the award of punishment being disproportionate to the alleged misconduct with which the petitioner was charged.

10. The petitioner is a member of state of U.P. Police, a disciplinary force. He was directed to perform his duty as ***Santari*** at the police station of his posting on the said date (2.6.1992). For no good reason shown by him in his reply to the charges he absented from the said duty and left the police station without making any endorsement in the General Diary maintained for the purpose. As a member of police force, the petitioner is supposed to maintain the standards of discipline while performing his duty assigned from time to time. If such a police personnel flouting the orders of his superior does not stick to the strict discipline of the force and absents without any reasonable cause, it would definitely constitute a gravest misconduct warranting his dismissal from service. The word ***'misconduct'*** has not a precise definition of its own. Its reflection receive its connotation from context, the delinquency in its performance and its effect on the discipline and the nature of the duty. Such misconduct may involve improper or wrong behaviour, forbidden act, a transgression of established and definite rule of action or code of conduct. The police service is obviously a disciplined service and it requires to maintain strict standard of such discipline. Laxity in this behalf erodes established norms of the service causing serious effects in the maintenance of law and order. The petitioner in the present case by flouting the order of his superior authority when did not join the duty of Santari on the said date and left the police station without permission or information, this would constitute gravest misconduct warranting his dismissal from service. The authorities while awarding this extreme penalty upon the petitioner do not appear to have transgressed any established norm or propriety expected from them in the present matter of disciplinary proceeding. They were wholly justified in awarding penalty of dismissal and in passing of the orders impugned. The learned Standing Counsel for the respondents, in this context has relied and cited the case law ***State of Punjab and others vs. Ram Singh Ex. Constable reported in AIR 1992 SC 2188***.

11. The learned Standing Counsel while replying to the contentions of the petitioner has submitted that this Court under Article 226 of the Constitution of India has certain norms of interference with the orders of inferior tribunal and other authority. The High Court is not to go into the factual aspects of the matter. There is an existing limitation on it to that effect. The Tribunal as well as the punishing and appellate authorities have held the alleged misconduct of the petitioner as a grave misconduct while awarding the extreme penalty of dismissal against him. This punishment has been so awarded keeping in view the facts and

circumstances of this case inasmuch as the nature of service which is expected of a person belonging to a disciplined force. If the authorities below keeping in view of this fact that the petitioner being a member of the disciplined force of the State Police when deliberately absented from duty, committed grave misconduct, this Court while acting under Article 226 of the Constitution of India is not supposed to interfere in the said finding recorded by them. The learned counsel in this context has placed reliance on the case law of ***M/s Lakshmi Precision Screws Ltd. V. Ram Bahagat, reported in JT 2002 (6) SC 162 and the Regional Manager and Disciplinary Authority State Bank of India, Hyderabad and another vs. S. Mohammed Gaffar, reported in JT 2002 (6) SC 157.***

12. In the aforesaid view of the matter that the petitioner being a police personnel belonging to a disciplined force made his deliberate absence from duty and did not perform the assigned job of Santari on the date 2.6.1992, instead he left for his village home where he is shown to have involved himself in a murder case which has ended into his conviction from the trial court, his alleged misconduct is not to be taken lightly and if the punishing authority has awarded the extreme penalty of dismissal from his service and the same has been confirmed by the appellate authority as well as the Tribunal, there is no scope for interference in such orders under Article 226 of the Constitution of India by this Court.

13. In the result, the writ petition having no merit, fails and it is hereby dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.6.2003

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE ASHOK BHUSHAN, J.

Criminal Misc. Writ Petition No. 3155 of 2003

Hanumant Kumar Gupta ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Appellants:
Sri D.V. Singh

Counsel for the Respondents:
A.G.A.

Constitution of India, Article 226- quashing of Criminal proceedings- the inherent power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability of geniuses of otherwise of allegations made in the F.I.R. or complaint and the extra ordinary and inherent powers of court do not confer an arbitrary jurisdiction on the Court to act according to its whim of caprice.

Held- Para 3

The inherent power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R. or complaint and the extraordinary and inherent powers of Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice.

Case law referred :
AIR 1945 PC 18, AIR 1988 SC 709,
AIR 1977 SC 2229, AIR 1982-709,
AIR 1993 SC 892, AIR 1003 SC 1082,
(1995) 6 SCC 194, (1996) 7 SCC 440,
JT 1996 (1) SC 601,(1998) 1SCC 133,
(1998) 5 SCC 749,JT (1999)1 SCC 548,
1999 (1) SCC 188, AIR 1999 SC 1044,
1999 (6) SC 146, 1999 (8) SCC 728,
2000 (1) SCC 722, 2000(2) SCC 636,
1996 (7) SCC 705, AIR 1985 SC 628,
AIR 1976 SC 1947, AIR 1983 SC 1219,
1997 SCC (Crl) 1073, 1998 (8) SCC 745,
JT 2000 (2) SC 426, 1992 SC 604,
AIR 1947, SC 877, AIR 1980 SC 329,
AIR 1995 SC 785, AIR 2001 SC 40,
1994 (4) SCC 142, (2000) 2 SCC 57,
AIR 2001 SC 556, AIR 2001 SC 1507,
(2002) 8 SCC 161, (2002) 5 SCC 371

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

1. This writ petition has been filed for quashing the FIR dated 28.5.2003 lodged by the respondent no. 4 in case crime no. 3453 of 2003 under section 395 IPC in Police Station Kotwali, Khalilabad district Sant Kabir Nagar.

2. Learned counsel for the petitioner has submitted that the FIR has been lodged as the respondent no. 4 complainant was having grievance against the petitioner and had malicious intention, thus , the same is liable to be quashed.

3. Legal maxim "quando Aliquid Mandatur, Mandatur Et Omne Per Quod Per Venitur Ad Illud"- means if anything is commanded, every thing by which it can be accomplished is also commanded. But the inherent power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R. or complaint and the extraordinary and inherent powers of Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. The same can be resorted to for correcting some grave errors that might be committed by the subordinate courts or where the complainant, at the instance of somebody else wants to settle his score with other party and uses deliberately the machinery of the court for oblique purpose and the party is likely to be subjected to unnecessary harassment for facing criminal proceedings or where the court is satisfied that in case the proceedings are not quashed, there will be gross miscarriage of justice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can soft pedal the course of justice at a crucial stage of investigation/ proceedings. (vide Emperor vs. Khwaja Nazir Ahmed AIR 1945 PC 18, Kurukshetra University vs. state of Haryana, AIR 1977 SC 229, State of West Bengal vs. Swapan Kumar Gupta AIR 1982 949, Madhavrao Jiwaji Rao Scindia vs. Sambharjirao Chandrojirao.

4. Angre & ors. AIR 1988 SC 709, Janta Dal vs. H.S. Chowdhary & ors. AIR 1993 SC 892, Union of India vs. W.N. Chandha AIR 1993 SC 1082, Rupal Deol Bajaj & anr. Vs. Kanwar Pal Singh Gill & Anr. 1995) 6 SCC 194, Musthaq Ahmad vs. Mohammed Habibur Rahman Faizi & ors. (1996) 7 SCC 440, State of Bihar vs. Rajendra Agarwal, JT 1996 (1) SC 601, Ashim Kumar Roy vs. Bipinbhai Vadilal Mehta, (1998) 1 SCC 133, M/s Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. (1998) 5 SCC 749, M. Krishna vs. State of Karnataka, JT 1999 (1) SC 540, Rakesh Ranjan Gupta vs.

State of U.P. & ors. (1999) 1 SCC 188, State of Kerala vs. O.C. Juttan AIR 1999 SC 1044, Arun Shanker Shukla vs. State of U.P. & ors. (1999) 6 SCC 146, Satvinder Kaur vs. State (Govt. of NCT of Delhi & Anr. (1999) 8 SCC 728, Kanti Badra Shah & Anr. Vs. State of West Bengal (2000) 1 SCC 722 and G. Sagar Suri & Anr. Vs. State of U.P. & ors. (2000) 2 SCC 636).

5. In State of U.P. vs. O.P. Sharma (1996) 7 SCC 705, the Hon'ble Supreme Court has indicated that the High Court should be loath to interfere at the threshold to thwart the prosecution exercising its inherent power under section 482 of Code or under article 226 or 227 of the Constitution of India, as the case may be, and allow the law to take its own course. Similar view had been taken in Pratibha Rani vs. Suraj Kumar & Anr. AIR 1985 SC 628.

6. State of Karnataka vs. L. Muniswami AIR 1977 SC 1489 the Apex court held that for the purpose of determining whether there is sufficient ground for proceeding against an accused the court possesses a comparatively wider discretion in the exercise of which it can determine the question whether the material on record, if unrebutted, is such on the basis of which a conviction can be said reasonably to be possible".

7. In Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi AIR 1976 SC 1947, the Hon'ble Supreme Court held as under:-

"(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused,

(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused,

(3) Where the discretion exercised by the Magistrate in issuing process in capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible, and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of complaint by legally competent authority and the like,

The cases mentioned by us are purely illustrative and provide sufficient guide lines to indicate contingencies where the High Court can quash proceedings.

8. In L.V. Jadhav vs. Shankararo Abasaheb Pawar AIR 1983 SC 1219, the Apex court held that Court's power is limited only to examine that the process of law should not be misused to harass a citizen and for that purpose, the high Court has no authority or jurisdiction to go into the matter or examine the correctness of allegations unless the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion and that there is sufficient ground for proceeding against the accused but the Court, at that state, cannot go into the truth or falsity of the allegations.

9. Similar view has been reiterated in the Nagpur Steel and Alloys Pvt. Ltd. vs. P. Radhakrishna, (1997) SCC (Crl.) 1073.

10. In Trisuns Chemical Industry vs. Rajesh Agarwal & ors. (1999) 8 SCC 686, the Supreme Court placed reliance upon its earlier judgment in Rajesh Bajaj vs. State N.C.T. of Delhi, AIR 1999 SC 1216 and observed that the inherent power of the High Court be limited to very extreme exceptions.

11. In M/s Medchi Chemicals & Pharma Pvt. Ltd. vs. M/s Biological E. Ltd. & ors, JT 2000 (2) SC 426, the Apex Court placed reliance upon its earlier judgement including

12. Dr. Sharma's Nursing Home vs. Delhi Administration, (1988) 8 SCC 745, and held that a criminal prosecution can be short circuited in rarest of rare cases, and even in a case of breach of contract, not only civil remedy is attracted but a person can be held responsible for criminal prosecution and under no circumstance civil profile can out way the criminal out fit.

13. In State of Haryana & ors. Vs. Ch. Bhajan Lal & ors. AIR 1992 SC 604, the Hon'ble Supreme Court laid down the guide lines for exercising the inherent power as under :-

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under S. 156(1) of the Code except under an order of a Magistrate within the purview of S. 155 (2) of the Code.
(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out as case against the accused.
(4) Where, the allegations in the FIR do not constitute a cognizable offence, no investigation is permitted by as police officer without an order of a Magistrate as contemplated under S. 155 (2) of the Code.
(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision the code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
(7) Where a criminal proceeding is manifestly attended with malafide and/ or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private personal grudge."

14. The issue of mala fides decided by the Hon'ble Apex Court in clause (7)

referred to above has to be read with the observations made in the same judgment further where it has been held as under :

"At this stage, when there are only allegations and recriminations on no evidence, this Court could not anticipate the result of the investigation and rendered a finding on the question of mala fides on the materials at present available. Therefore, we are unable to see any force in the contentions that the complaint should be thrown over board on the some unsubstantiated plea of mala fides."

15. In Sheonandan Paswan vs. State of Bihar, AIR 1987 SC 877, the Hon'ble Apex Court while dealing with the issue of mala fides in criminal law observed as under:

"It is well established proposition of law that a criminal prosecution, if otherwise, justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant."

16. Similarly, in State of Bihar vs. J.A.C. Saldanna AIR 1980 SC 329, the Apex Court has held as under:

"It must, however, be pointed out that if an information is lodged at the police station and an offence is registered, the mala fide of the informant would be of secondary importance if the investigation produced unimpeachable evidence disclosing he offence."

17. In Sarjudas & anr. Vs. State of Gujrat, 1999 (8) SCC 508 the Hon'ble Supreme Court held that there must be cogent evidence of mala fide or malicious intention of the informant or the complainant for taking note of the allegations of mala fide. The bald statement in this respect is not sufficient.

18. Similar points have been formulated by the apex court in State of west Bengal vs. Mohammaed Khalid AIR 1995 SC 785.

19. In state of Delhi vs. Gyan Devi and ors. AIR 2001 SC 40, the Hon'ble Supreme Court deprecated the practice of interference in exercise of the power under sections 228 and 482 Cr.P.C. for quashing the charges in a matter where no strong reason could be found and held that in the interest of justice and in order to avoid the abuse of process of the Court, the charges needed to be quashed. The Apex Court observed as under:

"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 made out against the accused persons. It is also well settled that when the petition is filed by the accused under section 482 Cr.P.C. seeking for the quashing of charge framed against them the court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the court a charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions. 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."

20. In Minakshi Bala vs. Sudhir Kumar (1994) 4 SCC 142, the Hon'ble Apex Court held that once the charge had been framed under section 240 Cr.P.C. ,the high court, in exercise of its revisional jurisdiction, is not justified in invoking its inherent power to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. Similar view has been reiterated by the Hon'ble Supreme Court in State of Madhya Pradesh vs. S.B. Johan (2000) 2 SCC 57.

21. In Ram Kumar Laharia vs. state of Madhya Pradesh & Anr. AIR 2001 SC 556, the Supreme Court considered the scope of exercise of revisional powers and held that at this stage, the Court is not permitted to weight the evidence. Whatever is permissible in law is that the court can assess the improbability or absurdity of the statement of witnesses. In case the evidence so collected prima facie suggests direct contact with the accused, the court cannot interfere with the order of framing the charge.

22. In Smt. Om Wati & Anr. Vs. State through Delhi Admn. & Anr. AIR 2001 SC 1507, the Apex Court held that in exercise of the revisional jurisdiction, the High Court is not permitted to interfere at initial stage of framing the charges merely on hypothesis, imagination and far-fetched reasons. The Court observed as under :

"We would again remind the High Courts of their **statutory obligation not to interfere at initial stage** of framing the charges merely on hypothesis, imagination and far-fetched reasons which, in law, amounts of interdicting the trial against accused persons. Unscrupulous litigants should be discouraged from protracting the trial and prevent culmination of the criminal cases by having resort to uncalled for and unjustified litigation in the cloak of technicalities of law."

23. Thus, in view of the above, it is settled legal proposition that the High Court in exercise of its powers under Article 226/227 of the Constitution or Section 482 Cr.P.C. is not permitted either to weigh the evidence or examine the adequacy of the evidence for framing of the charges and if it comes to the conclusion that there is some prima facie evidence connecting the accused with the crime the charge cannot be quashed at this stage. However, the Court has to examine that in case the ingredients of the offence alleged against the accused are absent in the fact and circumstance of the case and the trial was noting but an abuse of the process of the court, the court should not hesitate in quashing the charges.

24. In Sanju alias Sanjay Singh Sengar vs. State of Madhya Pradesh & ors. (2002)5 SCC 371, the Hon'ble Apex Court quashed the charges for the reason that the appellant therein had been charged of the offence of abetment and after considering the evidence, the Apex Court recorded the finding that the ingredients of abetment were totally absent in the facts and circumstances of the case. Similarly, in Ram Ekbak Missir vs. Ram Niwas Pandey & ors. (2002)8 SCC 161, the Hon'ble Supreme Court quashed the criminal proceedings wherein the cognizance of the offence was taken

after twenty one years of lodging the first information report and the case had been dragged for more than two decades without any fault on the part of the accused. More so, the Apex Court also came to the conclusion that the cognizance had been taken in a mechanical manner. It has further been observed that neither the victim nor the accused should suffer by the mischief of the investigating agency or the staff of the court and such a delay was found to be a ground for quashing the charges.

25. Thus in view of the above if the case of the petitioner is examined in the light of the aforesaid settled legal proposition, it is evident that the F.I.R. clearly makes out a case against the petitioner as it has been alleged by the respondent no. 4 in the F.I.R. that the petitioner alongwith others entered into her house broke open the lock, searched for the file of litigation and had taken away large number of articles, including the ornaments and cash and caused serious injuries to her husband. The defence taken by the petitioner cannot be taken into consideration at this stage.

26. Thus petition is found to be devoid of ay merit and accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.3.2003

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

Civil Misc. Writ Petition No. 20497 of 1998

Supher Ram ...Petitioner
Versus
Additional Director and others ...Respondents

Counsel for the Petitioner:
Sri Somesh Khare
Sri Grdhar Nath
Sri Pranay Krishna

Counsel for the Respondents:
Sri M.B. Singh

(a) U.P. Agricultural Produce Market Committee (Centralised) Services (Amendment) Regulations, 1991, Reg. 24 (1) Transfer- order of legality – transfer order made in special circumstances- Not necessary to elaborate special circumstances- Authority indicating that transfer made in interest of administration and in public interest- impugned transfer order, held- valid.

Held (Para 13)

I find that by the impugned transfer order in question dated 30.5.1988 the petitioner has been transferred from Jhansi region to another region of Mirzapur by Addl. Director, therefore, the Addl. Director was in power to pass such order of transfer under Regulation 24(1) of Regulation, 1991 and in the impugned order itself it has been mentioned that in special circumstances, the transfer in question has been made. It is not necessary to elaborate the special circumstances if the authority himself has indicated that the transfer has been made in special circumstances in the

interest of administration and in the interest of public. Transfer is exigency of service provided it is made in the interest of service administration, to prove service condition and to maintain the system of the service. The court generally does interfere or make judicial review in the transfer order made in the public interest or in the interest of administration. The transfer is the exigency of service unless it is not made on political vendetta and in colourable exercise of power or malafidely or in order of harass the petitioner or in derogation to the provisions of Act or rule.

(b) Constitution of India, Article 226- Judicial Review- Scope.

Held (Para 12)

The scope of judicial review of transfer under Article 226 of the Constitution of India has also been settled by the Supreme Court in view of the decisions of Rajendra Roy vs. Union of India and another (1993) 1 Supreme Court cases 148, National Hydroelectric Power Corporation Ltd. vs. Shri Bhagawan and another 2001 (8) Supreme Court cases 574, State Bank of India vs. Anjan Sanyal and others 2001)5 Supreme Court cases 508. This court following the aforesaid principal laid by the Supreme Court in Vijay Pal Singh vs. State of U.P. and others. 1997 (3) ESC 1668 and Onkarnath Tiwari vs. The Chief engineer, Minor Irrigation Department, UP Lucknow and others, 1997 (3) ESC 1866, has held that the principle of law unfold in the aforesaid decisions is that an order of transfer is a part of service conditions of an employee and is not required to be interfered with lightly by a Court of law in exercise of its discretionary jurisdiction unless the Court finds that either the order is mala fide or that the service rules prohibit, such transfer or that the authorities, who issued the orders, were not competent to pass the orders.

Case law referred:

AIR 1986 SC 1955, AIR 1991 SC 532, AIR 1993 SC 1605, AIR 1993 SC 2444, AIR 1993 SC 2486, (1994) 6 SCC 98, 1995 Supp. (4) SCC 169, (2003) 1 UPLBEC 262, (1993) 1 SCC 148, (2001) 8 SCC 574, (2001) 5 SCC 508, 1997 (3) ESC 1668, 1997 (3) ESC 1866

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

1. Heard Sri Somesh Khare holding brief of Sri Girdhar Nath learned counsel for the petitioner.

2. This mater was listed yesterday in the cause list and it was heard and the matter was to be disposed of on 27.3.2003. No counsel has bothered to appear on behalf of Rajya Krishi Utpadan Mandi Parishad for representing the case of Chairman/Secretary, Director or Addl. Director and case was almost to be finalized, however at the end of the day Sri Somesh Khare learned counsel mentioned the matter to point out some relevant aspects, therefore, this matter has been directed to be listed as unlisted matter today. Today also Sri Somesh Khare holding brief of Sri Girdhar Nath has been heard for and on behalf of the petitioner and no counsel on behalf of the respondents has appeared to assist the court.

3. In this writ petition the order dated 30.5.1998 (Annexure 1 to the writ petition) passed by the Addl. Director (Administration) Rajya Krishi Utpadan Mandi Parishad U.P. Kisan Mandi Bhawan, Vibhuthi Khand, Gomti Nagar, Lucknow has been challenged where by 11 persons working in different categories had been transferred in special circumstances in the interest of administration as well as in the interest of service. According to the petitioner. *The Uttar Pradesh Agricultural Produce*

Market Committees (Centralised) Services (Amendment) Regulations, 1991 provides in the amended provision of Regulation 24 (1) provides that the transfer of a member of centralized service out of routine could be made by Director or Addl. Director or the Regional Deputy Director (Administration). According to Regulation 24 (2) which provides as below:

"(2) The Director or the Additional Director or the Regional Deputy Director (Administration) may in special circumstances transfer any Mandi Sahayak (Kamdar) from one Market Committee to another market committee, within the region or any member of the service holding Group D post other than Mandi Sahayak (Kamdar) from one Market Committee to another Market Committee within the district."

4. According to the learned counsel for the petitioner no special circumstances was existing for transferring the petitioner from the place of posting i.e. from Atarra/Jhansi to Mirzapur, however the counter affidavit has been filed. Noting has been averred in the counter affidavit to get assistance for the disposal of the case as it is poorly drafted.

In B. Varadha Rao vs. State of Karnataka and others AIR 1986 Supreme Court 1955, their Lordships of the Apex Court laid down as follows (Paragraph 4 of the said AIR).

"4. …….We agree with the view expressed by the learned Judges that transfer is always understood and construed as an incident of service. The words or other conditions of service in juxtaposition to the preceding words' 'denies or varies to his disadvantage his pay, allowances, pension' in Rule 19 (1) (a) must be construed ejusdem generic. Any alteration in the conditions of service must result in prejudice to the Government Servant and some disadvantage touching of his pay, allowances, pension, seniority, promotion, leave etc. It is well under stood that transfer of a Government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service and therefore, does not result in any alteration of any of the conditions of service to his disadvantage. That a Government Servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of Government service and no Government servant can claim to remain in a particular place of in a particular post unless, of course, his appointment itself is to a specified, non transferable post….."

5. In Mrs. Shilpi Bose and others vs. State of Bihar and others, AIR 1991 Supreme Court 532, their Lordships of the Supreme Court laid down as follows (Paragraph 4 of the said AIR) :

"4. In our opinion, the Court should not interfere with a transfer order which are made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory Rule or on the ground of mala fide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed

in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department. If the Courts continue to interfere with day to day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer orders."

6. In Union of India and another vs. N.P. Thomas, AIR 1993 Supreme Court 1605, their Lordships of the Supreme Court laid down as follows (Paragraph 8 of the said AIR):

"8. In the present case, it cannot be said that the transfer order of the respondent transferring him out of Kerala Circle is violative of any statutory Rule or that the transfer order suffers on the ground of mala fide. The submissions of the respondent that some of his juniors are retained by Kerala Circle and that his transfer is against the policy of the Government posting the husband and wife in the same station as far as possible cannot be countenanced since the respondent holding a transferable post has no vested right to remain in the Kerala Circle itself and cannot claim, as a matter of right, the posting in that Circle even on promotion."

7. In Union of India and others vs. S.L. Abbas, AIR 1993 Supreme Court 2444, their Lordships of the Supreme Court laid down as follows (Paragraphs 7 and 8 of the said AIR):

"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly, if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right.

8. The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Article 226 of the Constitution of India in service matters. This is evident from a perusal of Article 323-A of the Constitution. The constraints and norms which the High Court observes while exercising the said jurisdiction apply equally to the Tribunal created under Article 323-A. (We find it all the more surprising that the learned Single Member who passed the impugned order is a former Judge of the High Court and is thus aware of the norms and constraints of the writ jurisdiction). The administrative Tribunal is not an Appellate Authority sitting in judgment over the orders of transfer. It cannot substitute its own judgement for that of the authority competent to transfer. In this case the Tribunal has clearly exceeded its jurisdiction interfering with the order of transfer. The order of the Tribunal reads

as if it were sitting in appeal over the order of transfer made by the Senior Administrative Officer (Competent Authority)."

8. In State of Punjab and others Vs. Joginder Singh Dhatt, AIR 1993 Supreme Court 2486, their Lordships of the Supreme Court laid down as follows (Paragraph 3 of the said AIR):

"3. We have heard learned counsel for the parties. This Court has time and again expressed its disapproval of the Courts below interfering with the order of transfer of public servant from one place to another. It is entirely for the employer to decide when, where and at what point of time a public servant is transferred from his present posting. Ordinarily the Courts have no jurisdiction to interfere with the order of transfer. The High Court grossly erred in quashing the order of transfer of the respondent from Hoshiarpur to Sangrur. The High Court was not justified in extending its jurisdiction under Article 226 of the Constitution of India in a matter where, on the face of it, no injustice was caused."

9. In N.K. Singh vs. Union of India and others, (1994)6 Supreme Court cases 98, their Lordships of the Supreme Court laid down as follows (Paragraph 23 of the said SCC) :

"23…….Assessment of worth must be left to the bona fide decision of the superiors in service and their honest assessments accepted as a part of service discipline. Transfer of a Government Servant in a transferable service is a necessary incident of the service career. Assessment of the quality of men is to be made by the Superiors taking into account several factors including suitability of the person for a particular post and exigencies of administration. Several imponderables requiring formation of a subjective opinion in that sphere may be involved, at times. The only realistic approach is to leave it to the wisdom of that hierachical superiors to make that decision. Unless the decision is vitiated by mala fides or infraction of any professed norm or principle governing the transfer, which alone can be scrutinized judicially, there are no judicially manageable standards for scrutinizing all transfers and the Courts lack the necessary expertise for personnel Management of all Government departments. This must be left, in public interest, to the departmental heads subject to the limited judicial scrutiny indicated."

10. In Abani Kanta Ray vs. State of Orrisa and others, 1995 suppl. (4) Supreme Court cases 169, their Lordships of the Apex Court laid down as follows (Paragraph 10 of the said SCC):

"10. It is settled law that a transfer which is an incident of service is not be interfered with by the Courts unless it is shown to be clearly arbitrary or vitiated by mala fides or infraction of any professed norm or principle governing the transfer. (See N.K. Singh v. Union of India)."

11. As held in ***(2003) 1 UPLBEC 262 Riaz Ahmad vs. Additional Registrar (Administration) Co operative Societies, UP Lucknow and others***, this Court is declined to interfere the transfer order by saying that transfer is an incident of service and the court does not interfere normally in the transfer orders unless there is violation of any statutory Rules or the transfer is malafide.

12. The scope of judicial review of transfer under Article 226 of the Constitution of India has also been settled by the Supreme Court in view of the decisions of Rajendra Roy vs. Union of India and another (1993) 1 Supreme Court cases 148, National Hydroelectric Power Corporation Ltd. vs. Shri Bhagawan and another 2001 (8) Supreme Court cases 574, State Bank of India vs. Anjan Sanyal and others 2001)5 Supreme Court cases 508. This court following the aforesaid principles laid by the Supreme Court in Vijay Pal Singh vs. State of U.P. and others 1997 (3) ESC 1668 and Onkarnath Tiwari vs. The Chief Engineer, Minor Irrigation Department, UP Lucknow and others, 1997 (3) ESC 1866, has held that the principle of law unfold in the aforesaid decisions is that an order of transfer is a part of service conditions of an employee and is not required to be interfered with lightly by a Court of law in exercise of its discretionary jurisdiction unless the Court finds that either the order is mala fide or that the service rules prohibit, such transfer or that the authorities, who issued the orders, were not competent to pass the orders.

13. I have heard learned counsel for the petitioner and have perused the document. I find that by the impugned transfer order in question dated 30.5.1998 the petitioner has been transferred from Jhansi region to another region of Mirzapur by Addl. Director, therefore, the Addl. Director was in power to pass such order of transfer under Regulation 24 (1) of Regulation, 1991 and in the impugned order itself it has been mentioned that in special circumstances, the transfer in question has been made. It is not necessary to elaborate the special circumstances if the authority himself has indicated that the transfer has been made in special circumstances in the interest of administration and in the interest of public. Transfer is exigency of service provided it is made in the interest of service administration, to prove service condition and to maintain the system of the service. The court generally does interfere or make judicial review in the transfer order made in the public interest or in the interest of administration. The transfer is the exigency of service unless it is not made on political vendetta and in colourable exercise of power or malafidely or in order of harass the petitioner or in derogation to the provisions of Act or rule.

Learned counsel for the petitioner has referred and relied upon the judgement dated 6.9.96 passed in writ petition no. 27721 of 1996 Shashi Kant and another vs. Addl. Director (Administration) Rajya Krishi Utpadan Mandi Parishad Uttar Pradesh, Lucknow annexed as Annexure 3 to the writ petition. The facts and circumstances of that case, in my respectful consideration, is different and distinguishable to the present case, more so, the legality of the matter of transfer of an individual has to be looked into in the facts and circumstances of that particular case only where there is no infringement of Act or provisions of any rule therefore, in these circumstances, this court shall not invoke its jurisdiction under Article 226 of the Constitution of India.

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

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.5.2003

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

Second Appeal No. 315 of 1982

Sri Gorakh Giri ...Appellant
Versus
Sri Ram Chandra Kuer (Since Deceased) and others ...Opposite Parties

Counsel for the Appellant:
Sri Tribhuwan Upadhyaya
Sri R.A. Sharma
Sri G.K. Parekh
Sri Dhurva Narayana
Sri C.P. Ghildyal
Sri Kuldeep Kumar Singh

Counsel for the Respondents:
Sri R.N. Singh
Sri S.N. Singh
Sri Faujdar Rai
Sri V.N. Pandey
Sri R..K. Shahi
Sri G.K. Rai

(A) Code of Civil Procedure- Section 92- Mahant of Public Trust died during pendency of suit- Will deed also not disclosing about the management of the Math- Trustee appointed by the villager- held illegal.

Held- Para 14

The appeal was decided by Sri P.K. Chaterjee as Vth Additional District Judge, Ballia. The suit under section 92 C.P.C. can be filed with prior permission of the court or the Advocate General. There was no such permission. The suit can be filed in the Principal Civil Court of original jurisdiction. The suit was filed in the court of Munsif for declaration and injunction. In such a suit an scheme for the management can not be prepared by the Court. There is no inherent powers under section 151 C.P.C. to prepare the scheme of management of a math. The same can be prepared in the suit under section 92 C.P.C. by the Principle Civil Court or by the District Judge under the provisions of the Indian Trusts Act. Therefore, the right of management given to the plaintiff by the first appellate court is against law and totally without jurisdiction and the same can not be maintained.

(B) Code of Civil Procedure- Order 22 Rule 2- Abatement-Sole plaintiff died-the heirs of Mahant already on record- suit can not be abated.

Held- Para 10

According to the case of the plaintiffs, they were appointed mahant by the will dated 14.06.1967 by Basdeo Giri and also by assembly of persons of the village. However, it is not alleged that there was any such direction that their heirs will become the mahant of the math or who shall replace them after the death. It is also not alleged that in place of the deceased plaintiffs somebody else have been appointed as mahant of the math. The claim of the plaintiffs as mahant is for their life time and the claim does not survive after the death of any of the plaintiffs. Even if the claim survives the claimants will be the surviving plaintiff and not outsider or legal heirs. The surviving plaintiff is already respondent in the suit. Therefore, there is no question of abatement. It may also be pointed that the respondents themselves have not clarified as to who should be substituted as legal heirs of the deceased plaintiffs. Therefore, for the purpose of the suit regarding the property in dispute the deceased plaintiffs have left no heirs. Therefore, the question of substitution does not arise and this appeal has not abated.

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

1. This second appeal is against the judgment and decree dated 2.12.1981 passed in Civil Appeal No. 20 of 1979 by Vth Additional District Judge, Ballia . The facts giving rise to this appeal are as follows:

2. The suit no. 36 of 1973 was filed by the respondents in the court of Civil Judge, Ballia for declaration and injunction. The case of the plaintiff-respondents is that there is math in the village Mauza Bairia, Paragana Deaba, district Ballia which belong to Dasnami Shankara Charya Sampardaya.. The owner of the math is Lord Srinath Jee, who is installed in the building of the math. According to the directions of Dasnami Shankaraa Charya Sampardaya every mahant should belong to duiz vansh. The math is the charitable and religious trust and its entire property is endowed and dedicated. The mahant of the math manages the property for and on behalf of Srinath Jee as sarbarakar.

3. It is further alleged that one Basdeo Giri was the mahant of the math. He had no chela. Therefore, the defendant claimed himself to be chela of math, but he could not be chela in accordance with the directions of the religious books as he is married person and got sons also. There was no mahant of the math and therefore, people of the village formed a committee of the plaintiffs to manage the affairs of the math.

4. It was further alleged that the defendant fraudulently obtained will from mahant Basdeo Giri on 13.4.1967 and 12.5.1967 which were cancelled by Basdeo Giri on 14.6.1967 and by that document he authorized the managing committee of the plaintiffs to manage the affairs of the math. The defendant fraudulently again obtained another will of Basdeo Giri on 2.9.1967 but it was again cancelled by Basdeo Giri. That therefore, the plaintiff- respondents have right to manage the affairs of the math. Basdeo Giri died in June, 1968 and since then the plaintiffs are managing the entire property of the math and the agricultural land of the same.

5. The proceedings under section 145 Cr.P.C. also started. Therefore, the plaintiffs filed a suit for declaration that they are sarvarakar of the math and for injunction to restrain the appellant from interfering in their working as mahant of the math.

6. The appellant contested the suit and alleged that the plaintiffs were never appointed as mahant of the math and never managed the math. The rights of the parties have already been decided under the consolidation proceedings and the same operate as resjudicata.

7. The trail court framed necessary issues and recorded a finding that the plaintiffs are not the mahant of the math and have no right to manage the same. The trial court accordingly dismissed the suit. The plaintiff- respondents preferred First Appeal No. 20 of 1979 which have been allowed and the suit have been decreed by the first appellate court and therefore, the present second appeal has been preferred.

8. I have heard Sri Tribhuwan Upadhyaya, learned counsel for the appellant and Sri Faujdar Rai, learned counsel for the respondents.

9. A preliminary objection has been raised by Sri Faujdar Rai, learned counsel for the respondents that the suit was filed by as many as eight plaintiffs and all of them were respondents in the appeal. That during the pendency of this appeal all the plaintiffs, who were respondents in the appeal have died except one. That their heirs have not been substituted. That therefore, the appeal has abated. It is necessary to disposed of this preliminary objections first.

10. According to the case of the plaintiffs, they were appointed mahant by the will dated 14.06.1967 by Basdeo Giri and also by assembly of persons of the village. However, it is not alleged that there was any such direction that their heirs will become the mahant of the math or who shall replace them after the death. It is also not alleged that in place of the deceased plaintiffs somebody else have been appointed as mahant of the math. The claim of the plaintiffs as mahant is for their life time and the claim does not survive after the death of any of the plaintiffs. Even if the claim survives the claimants will be the surviving plaintiff and not outsider or legal heirs. The surviving plaintiff is already respondent in the suit. Therefore, there is no question of abatement. It may also be pointed that the respondents themselves have not clarified as to who should be substituted as legal heirs of the deceased plaintiffs. Therefore, for the purpose of the suit regarding the property in dispute the deceased plaintiffs have left no heirs. Therefore, the question of substitution does not arise and this appeal has not abated.

11. Now coming to the merits, the memo of appeal show that as many as five substantial questions were framed by the learned counsel for the appellant and the appeal was admitted on all the questions mentioned in the memo of appeal.

12. The appellant claim the right to manage the trust firstly is based on the registered deed dated 14.06.1967. However, this deed was not relied on by any of the courts below. There is concurrent findings that this deed does not confer any right on the plaintiffs to manage the math. Second, claim is based on the ground that people of the village assembled and appointed the plaintiffs as mahant. There is oral evidence regarding it. However, there is no document. It has not been alleged that as to how the people of the village were authorized to appoint the mahant. If there was no body to look after the property, the management could be ordered under section 92 C.P.C. or under the provisions of the Trusts Act. The appointment by the assembly of people is wholly void. Therefore, the plaintiffs are not entitled to manage the math under any circumstances and trial court rightly dismissed the suit.

13. However, the suit has been decreed by the first appellate court in the first appeal. After perusal of the judgment of the first appellate court, I am of the view that his approach was absolutely eratic and he has committed a gross error of law in allowing the appeal. The learned first appellate court has framed an scheme for the management of math under section 92 C.P.C. Perhaps the first appellate court has failed to consider whether he had such power. I am afraid that he had no such power.

14. The appeal was decided by Sri P.K. Chaterjee as Vth Additional District

Judge, Ballia. The suit under section 92 C.P.C. can be filed with prior permission of the court or the Advocate General. There was no such permission. The suit can be filed in the Principal Civil Court of original jurisdiction. The suit was filed in the court of Munsif for declaration and injunction. In such a suit an scheme for the management can not be prepared by the Court. There is no inherent powers under section 151 C.P.C. to prepare the scheme of management of a math. The same can be prepared in the suit under section 92 C.P.C. by the Principle Civil Court or by the District Judge under the provisions of the Indian Trusts Act. Therefore, the right of management given to the plaintiff by the first appellate court is against law and totally without jurisdiction and the same can not be maintained.

15. Before parting this appeal, it may also be mentioned that from the oral evidence recorded in this case it appears that the plaintiffs never managed the math. The plaintiff examined Ramchander, PW-1, who in his statement has said that no meeting of the alleged management committee ever took place. He further stated that the trust was never managed by the plaintiffs but was being managed by Gorakh Giri, defendant. That no account of the properties were ever maintained. Therefore, from the statement of the Ram Chander, PW-1 itself it appears that the alleged allegation regarding the appointment is false.

16. Accordingly, this appeal is allowed with costs throughout. The judgment and decree of the first appellate court is set a side and that of the trial court is restored.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2ND MAY, 2003

BEFORE
THE HON'BLE TARUN CHATTERJEE, C.J.
THE HON'BLE R.K. AGRAWAL, J.

Special Appeal No. 36 of 2000

State of U.P. and others ...Appellants
Versus
Vinod Kumar Chand and others ...Respondents

Counsel for the Appellants:
Sri Ran Vijay Singh

Counsel for the Respondents:
Sri Ashok Khare
Sri A.K. Mishra

Constitution of India Article 226- selection of the Candidate for B.T.C. training- vacancy advertised on 8.3.98 providing 3 marks extra under sport Quota. Candidate- Subsequent G.O. dated 24.02.99 providing 5 marks under sport Quota, apart from qualifying marks-held- not illegal-selection can not be questioned.

Held- Para 7

Thus, the contention that the Government order dated 24.2.99 would not apply to the candidates who had applied pursuant to the advertisement dated 8.3.1998 is misconceived and cannot be accepted.

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

The present Special Appeal has been filed against the judgment and order dated 18.11.1999 passed by the learned single Judge, whereby the writ petition filed by the respondents- writ petitioners, has been allowed and the order dated 11.5.1999 passed by the Principal, District Institute of

Education and Training, Didihat Pithauragarh, has been quashed.

Briefly stated that facts giving rise to the present special Appeal are that all the respondents (writ petitioners) herein, claimed themselves to be sports men having participated in the State Level Sports, except the respondents- writ petitioner no. 2 who participated in National Level Sports. The State Government issued an order on 9.1.1998 providing for Special B.T.C. Training to be imparted to those candidates who possessed training qualification of Bachelor of Education and otherequivalent qualifications for appointment as Assistant Teacher in Basic Schools run by the Board of Basic Education U.P. In the said order it was provided that those candidates who are sports men at the State Level would be entitled to additional 3 marks whereas those candidates who are sports men of National level would be entitled to additional 5 marks. The quality point marks was to be determined on the basis of educational qualification and weightage to various categories provided in the said order. An advertisement was also issued on 8.3.1998 in terms of the Government order dated 9.1.1998 by the Director, state Council for Educational Research and Training inviting the application for special B.T.C. Training. The last date for making application was 30.3.1998. All the respondent- writ petitioners applied in pursuance of the said advertisement. A select list was prepared on 21.4.1999 which included the names of the respondent (writ petitioners). They reported on 1.5.1999 to the District Institute of Education and Training, Didihat Pithoragarh and were granted admission. According to them, they attended the course till 11.5.1999. However, the Principal, District Institute of Education and Training, didihat Pithoragarh, cancelled their candidature on the ground that the weightage granted to them on account of being sports persons was contrary to the Government order dated 24.2.1999 which provided for giving additional marks to a sports person who had won any prize at the state level Tournament or National level Tournament and since the respondents (writ petitioners) had not won any such prize and merely participating at the state level or National Level Tournament would not make them eligible and entitled to weightage of additional 3 or 5 marks respectively as the case may be. The order dated 11.5.1999 was challenged by the respondents (writ petitioners) invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India by filing Writ Petition which had been allowed by the learned Single Judge vide judgement and order dated 18.11.1999.

We have heard Sri Ran Vijay Singh learned Standing counsel for the Appellants and Sri Ashok Khare learned Senior Counsel for the respondents (writ petitioners).

The learned Standing Counsel submitted that in view of the Government order dated 24.2.1999 which provided for the criteria of giving additional marks to sports persons of State level or National level, the respondents (writ petitioner) were not entitled for additional marks and if additional marks which were awarded to them was excluded then they were not entitled for admission in Special B.T.C. Course. He further submitted that by the Government order dated 24/2/1999 the only criteria for making a person eligible for awarding additional marks as State level sports men or National level sports men had been clarified and does not take away any vested right. According to him no written examination was held and the merit list had been prepared on the basis of quality points marks obtained

by the candidates according to their qualification. The weightage on account of sports persons cannot be claimed as a matter of right. Thus, the learned Single Judge was not justified in quashing the order dated 11.5.1999.

Sri Ashok Khare learned Senior Counsel, however, submitted that the respondents (writ petitioners) had applied on the basis of Government order dated 9.1.1998 and the advertisement dated 8.3.1998 which provided for giving additional marks to sports persons of State level and National level. Neither the Government order dated 9.1.1998 nor the advertisement dated 8.3.1998 stipulated any condition whatsoever that the sports persons of State level or National level should have also won prize in the State level Tournament or National level Tournament. He thus, submitted that the State Government subsequently cannot apply changed criteria for awarding additional marks to sports persons. He further submitted that the selection has to be made on the basis of criteria given in the advertisement dated 8.3.1998. According to him the Government order dated 24.2.1999 would apply prospectively and cannot be applied to the advertisement dated 8.3.1998. He further submitted that first list of selected candidate was published in February 1999 and additional marks to sports person to State level and National level has been given to the candidates applying the Government order dated 9.1.1998 and if the said Government order dated 24.2.1999 is applied to the selected list published in April 1999, then it would amount to hostile discrimination and hit by Article 14 of the constitution of India.

Having heard the learned counsel for the parties, we find that in the Government order dated 9.1.1998, it was provided that 5 marks would be given for sports etc. Clause Ga of the said Government order dealing with the award of 5 additional marks to the sports etc. read as follows:

"(ग) खेल कूद आदि के आधार पर पाँच अंक निम्न प्रकार दिये जायेंगे ।
(१) यदि अभ्यर्थी राष्ट्रीय स्तर का खिलाड़ी है तो ५ अंक देय होंगे ।
(२) यदि अभ्यर्थी प्रदेश स्तर का खिलाड़ी है तो ३ अंक देय होंगे ।
(३) एन०सी०सी० के "सी" प्रमाण पत्र धारक अभ्यर्थी को ५ अंक देय होंगे ।
(४) एन०सी०सी० के "बी" प्रमाण पत्र धारक अभ्यर्थी को ३ अंक देय होंगे ।

उक्त प्रमाण पत्रों के आधार पर अधिकतम ५ अंक ही देय होंगे भले ही अभ्यर्थी ने एक से अधिक प्रमाण पत्र प्राप्त दिए हों।"

From a reading of the aforesaid clause, it is seen that it only provides for awarding of 5 additional marks to National level sports person and 3 marks of the State level sports person but who would be of National level or State level has not been defined. Vide Government order dated 24.2.1999, the state Government has clarified that for the purpose of giving additional marks to sports person in Special B.T.C. Training Course, only those sports person would be eligible who have won any prize in State level/National level Tournament. It is to be borne in mind that the candidates were to be admitted on the basis of their qualification and interview. No written examination was held. The select list in which the name of the respondents (writ petitioners) has been included was published in April 1999 after the Government order dated 24.2.1999 had been issued. In the earlier Government order dated 9.1.1999 and the advertisement issued pursuant thereto, it was not specified as to who would be considered as National/State Level sports man. It was clarified only by the Government

order dated 24.2.1999. It has not affected any vested right of the respondents- writ petitioners as only criteria for awarding additional marks to sports persons has been clarified. Thus, the contention that the Government order dated 24.2.1999 would not apply to the candidates who had applied pursuant to the advertisement dated 8.3.1998 is misconceived and cannot be accepted.

So far as the contention that the sports person of state and National level whose name find place in the select list of February 1999 without having won any prize in the State/National level Tournament is concerned, it may be mentioned that the respondents (writ petitioners) have not brought any material on record to establish the same. This was also not the ground of challenge by the respondents (writ petitioner) in their writ petition before this Court. Even otherwise, in the absence of any such material having been brought on record, we are not in a position to hold that any candidate has been selected in violation of Government order dated 24.2.1999.

In view of foregoing discussions, we are of the considered opinion that the impugned order passed by the learned Single Judge, quashing the order dated 11.5.1999 suffers from manifest legal infirmity and cannot be sustained. It is accordingly, set aside.

The Special Appeal is allowed.

However, the parties shall bear their own costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.5.2002

BEFORE
THE HON'BLE TARUN CHATTERJEE, C.J.
THE HON'BLE R.K. AGARWAL, J.

Special Appeal No. 223 of 1999

Anilesh Pratap Singh ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Anil Bhushan

Counsel for the Respondents:
Sri Ran Vijay Singh
S.C.

U.P. Secondary Education Service Commission (Removal of Difficulties order) 1981 Para 5- Adhoc appointment on direct recruitment post- permanent Principal retired on 30.6.91- vacancy advertised by the Management on 4.7.91 in only one News Paper- appointment made on 4.8.91- whether such appointee is entitled for salary ? held "No".

U.P. Secondary Education Service Commission (Removal of Difficulties order 1981) – adhoc appointment by direct recruitment post- whether the provisions for appointment only after expiry of the period of two months from the date of advertisement the 4 vacancy is mandatory on obligatory.

Held- Para 16

Applying the principles laid down in the aforementioned cases, we are of the considered opinion that the provisions of section 18 of the 1982 Act is mandatory and unless and until the period of two months expires from the date of notifying the vacancy to the commission, the committee of management does not

get any power to fill up the vacancy on adhoc basis.

Case referred to:

1988 UPLBEC-397, 1998 UPLBEC 1722, 1997 (II) SCF-153, AIR 1998 SC 331

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

1. The present special appeal has been filed against the judgement and order dated 11.12.1998 passed by a learned Single Judge of this Court in civil misc. writ petition no. 15293 of 1992, whereby, the writ petition filed by the writ petitioner- appellant has been dismissed.

2. Briefly stated the facts giving rise to the present special appeal are as follows :

Janta Inter College, Barsathi, Jaunpur (hereinafter referred to as the college) is a recognized and aided college under the provisions of U.P. Intermediate Act 1921`. One Sri Karam Raj Mishra, lecturer in Civics retired on 30.6.91. The Committee of management of the said college advertised the vacancy on 4.7.1991 in the local newspaper "Dainik Manyavar", a newspaper published in the district Jaunpur. The Committee of management of the college vide resolution passed on 4.8.1991 selected the writ petitioner–appellant on the post of lecturer in civics and issued an appointment letter on 16.8.1991. The appointment of the writ petitioner appellant was made on adhoc basis. He joined on the post of lecturer in civics in the said college on 19.8.1991. When the appellant was not being paid the salary, he approached this Court by filing a writ petition under Article 226 of the Constitution of India, which as mentioned herein-before had been dismissed by the learned Single Judge whose order is under challenge in the present special appeal.

3. We have heard Sri Anil Bhushan, learned counsel for the appellant and Sri Ran Vijay Singh, learned Standing counsel appearing on behalf of the respondents.

4. The learned counsel for the appellant submitted that the appellant was appointed on 16.8.1991 as adhoc lecturer in civics against the vacancy caused by the retirement of Sri Karam Raj Mishra. The college authority had sent the requisition under section 18 of the U.P. Secondary Education Service Commission and Selection Board Act 1982 (hereinafter referred to as the 1982 Act). The vacancy was notified to the commission and even if the appointment has been made before the expiry of a period of two months from the date of notifying the vacancy to the Commission, the appointment would not be bad and illegal, but would take effect after the expiry of the period of two months. He further submitted that the vacancy was advertised in the local newspaper "Dainik Manyawar" published on 24.7.1991, which is a widely circulated newspaper in the district of Jaunpur and if the vacancy was not advertised in two daily newspapers, as per UP Secondary Education Service Commission (Removal of Difficulties) order 1982, then it is only in irregularity, which will not make the appointment void. He further submitted that the requirement of advertisement in two newspapers was directory and non mandatory. He relied upon the following cases:

1. **Km. Madu Chauhan v. District Inspector of Schools 1988 UPLBEC 397**

2. **Ashika Prasad Shukla v. District Inspector of schools Allahabad and another 1998 (3) UPLBEC-1722**

3. **Radha Raizada and others v. Committee of Management, Vidyawati Darbari Girls Inter College and others 1994 (3) UPLBEC 1551**
4. **Konch degree College, Jalaun and others v. Ram Sajivan Shukla and another 1997 (11) SCF-153**
5. **Arun Tiwari and others v. Zila Medhavi Shikshak Sangh AIR 1998 SC 331.**

5. Sri Ran Vijay Singh, learned standing counsel, however, submitted that under section 18 of the 1982 act, the management has been given powers to make appointment by direct recruitment or promotion of teacher on purely adhoc basis only after the management had notified the vacancy to the Commission in accordance with sub section 1 of section 10 of the aforesaid Act and the post of the teacher actually remained vacant for more than two months. According to him the post of lecturer in civics in the college fell vacant only on 1.7.1991 and the appointment of the appellant was made on 16.8.1991, even without waiting for the expiry o the period of two months. Moreover, the Committee of management had taken steps for filling up the vacancy immediately after the vacancy had occurred and had in fact, advertised the same on 4.7.1991, whereas, the committee of management could have exercised the powers for filing up the vacancy on adhoc basis only after the expiry of the period of two months from the date of notifying the vacancy to the commission in the event the said vacancy was not filled up by the Commission. He submitted that under para 5 of the U.P. Secondary Education Services Commission (Removal of Difficulties order 1981 (hereinafter referred to as the first removal of Difficulties order), the adhoc appointment by direct recruitment can be made only after the vacancy is advertised in at least two newspapers having adequate circulation in U.P., which is a mandatory requirement and therefore, the advertisement made in only one newspaper and that too in a local newspaper of district, Jaunpur, does not fulfil requirement of the aforesaid paragraph. Thus, the appointment of the writ petitioner appellant is wholly illegal and contrary of law and the learned Judge had rightly dismissed the writ petition, which calls for no interference in appeal.

6. Having heard the learned counsel for the parties, we find that admittedly, the vacancy on the post of lecturer in civics in the college occurred on 1.7.91 on the retirement on one Sri Karam Raj Mishra on 30.6.1991. The vacancy was advertised in the local newspaper 'Dainik Manyavar' on 4.7.1991. There is no material on record to show as to on what date the committee of management of the college had notified the vacancy to the Commission. Under section 18 of the 1982 Act, the management gets the power to fill up the vacancy by way of adhoc appointment only after the said remains vacant for a period of two months from the date the vacancy has been notified to the Commission. In the present case without waiting for the expiry of the period of two months from the date of

notifying the vacancy to the Commission, if any, the management immediately advertised the vacancy on 4.7.1991, held the interview on 4.8.1991 and filled up the vacancy on 16.8.1991 i.e. within a short span of one month. The Committee of management had no power to fill up the vacancy at that time, when the appointment was made. Thus, the appointment of the appellant was wholly illegal and contrary to law and the learned single Judge had rightly dismissed the writ petition.

7. In the case of Madhur Chauhan (supra) a Division Bench of this Court considered the provisions of section 16 (1) of U.P. Higher Education Service Commission Act, 1980, which relates to appointment of adhoc teachers. It read as follows :

"Where the management has notified a vacancy to the commission in accordance with sub section 2 of section 12 and the Commission fails to recommend the names of suitable candidates in accordance with sub section (1) of that section within three months from the date of such notification, the management may appoint a teacher on purely adhoc basis from amongst the persons holding qualification prescribed thereof."

8. After considering the provision of the aforesaid section, the court thought it proper not to deprive the petitioner therein of her salary as it appeared that no name had been recommended by the Commission till date. The relevant portion of para 12 of the reports is reproduced below: -

9. **"The question that now arises is whether the appointment of Kumari Madhu Chauhan falls within the ambit of Section 16 (1) in order to entitle her to claim salary for the post of lecturer in Sociology. The management does not dispute the validity of her appointment. The opposite parties in her writ petition have not filed any counter affidavit to controvert her claim. However, one irregularity does appear in her appointment. In Management's writ petition it has been stated that the vacancy was notified to the commission in the first week of September 1986. It is then stated that the Committee of Management adopted resolution on 26th November, 1986 for appointing Kumari Madhu Chauhan to the post in question. In paragraph 9 of the management's writ petition is mentioned that Kumari Madhu Chauhan was appointed with effect from 4th December, 1986. Under section 16 (1) the Management acquires right to make adhoc appointment only after the commission fails to recommend names of suitable candidates within three months from the date of notification of vacancy. In the present case the Committee of Management adopted resolution in favour of Kumari Madhu Chauhan's appointment before the period of three months expired. The Management has not stated the exact date on which the vacancy was notified to the Commission and has merely stated that the notification made in the first week of September, 1986. The appointment letter was issued on 4th December, 1986. It, therefore, appears that the period of three months referred to in Section 6 (1) had not expired when Kumari Madhu Chauhan was appointed lecturer in Sociology.**

However, on the ground we do not propose to deprive her salary as it appears that till date no name has been recommended by the Commission. Her petition also, therefore, deserves to be allowed.

10. From a reading of the aforesaid paragraph, it is clear that the Division Bench had not held that the appointment made prior to the expiry of the period of three months from the date of notifying the vacancy to the Commission is directory or will take effect after the expiry of three months, as canvassed by the learned counsel for the writ petitioner-appellant.

11. In the case of Ashika Prasad Shukla (supra), the Division Bench of this Court was examining the provision of para 2 of the U.P. Secondary Education Services Commission (Removal of Difficulties order 1981, which provided for the procedure for filling up short term vacancy. It provided that the manager shall forward the names and particulars of the candidates selected and also other candidates and the quality point marks allotted to them to the District Inspector of schools for his prior approval and the District Inspector of Schools shall communicate his decision within seven days of the date of receipt of the papers by him, failing which the Inspector will be deemed to have given approval and on receipt of the approval of the District Inspector of Schools or as the case may be, on his failure to communicate the decision within seven days of the receipt of the papers by him from the Manager, the management was empowered to appoint the selected candidate and to issue an order of appointment under his signature.

12. The Division Bench of this Court in the case of Ashika Prasad Shukla (supra) have held that if the appointment is made prior to the approval or deemed approval then it would become effective from the date of approval of deemed approval. The relevant paragraph 15 and 16 of the reports are reproduced below :

"15. The next question that falls for consideration is whether the appointment of the petitioner appellant could still stand invalidated on the ground that it was made without prior approval of the District Inspector of School. Sri Yatindra Singh place reliance on a Division Bench decision of this Court in A.K. Pathshala vs. Smt. M.D. Agnihotri, 1971 Alld. LJ 983, wherein it was held, on construction of Section 16 F (1) of the U.P. Intermediate Education Act, 1921, that appointment without prior approval by the Competent authority would, in the eye of law, be no appointment. The ratio of the said decision as held by a subsequent Division Bench in Lalit Mohan Mishra vs. District Inspector of Schools, 1979 Alld.LJ 1025, is that a person gets the status of a teacher when requisite formality is completed. The relevant observations are as under :

"Without approval the person does not get the status of a teacher even though the approval is to be followed by formal letter but in the absence of formal letter the person gets the status of a teacher after approval to the appointment is given by the District Inspector of Schools. The appointment of a person as a teacher becomes effective only from the date approval is given and even if a person is allowed to work before the same has no

recognition under the U.P. Intermediate Education Act.

16. Paragraph 2 (3) (iv) of the Second Removal of Difficulties order is not phrased in a prohibitory language as was the language used in Section 16-F (1) of the U.P. Intermediate Education Act, 1921. The words 'prior approval' have been used in sub clause (ii) of paragraph 2 (3) of the Second Removal of Difficulties order and conjoint reading of sub clauses (ii), (iii) and (iv) of clause (3) of paragraph 2, no doubt, leads to an inescapable conclusion that the appointment would be issued under the signature to the Manager only on the approval having been communicated by the District Inspector of schools within seven days of the receipt of the papers or where the approval is deemed to have been accorded as visualized by sub clause (iii) of clause (3) of paragraph 2 of the Second Removal of Difficulties order. However, appointment if made prior to approval of deemed approval, would become effective from the date of approval of deemed approval as held by the Division Bench of this Court in Lalit Mohan Mishra. There is nothing on the record to connote that pre-requisite conditions attracting deemed approval were not satisfied in the instant case. The learned Single Judge has also not addressed himself to this facts of the matter and the judgment under appeal on this score too cannot be sustained."

13. From a reading of the aforesaid paragraphs it will be seen that the Division Bench had no occasion to consider the provision of section 18 of the 1982 Act, which puts a complete embargo on the powers of the committee of management to fill up any vacancy on adhoc basis unless and until the expiry of the period of two months from the date of notifying the vacancy to he Commission.

14. In the case of Radha Raizada (supra), a Full Bench of this Court has held that the power to appoint adhoc teachers by direct recruitment in a substantive vacancy is available only when the pre conditions mentioned in section 18 of the Act, are satisfied. It further held that the adhoc appointment of a teacher by direct recruitment can be resorted to only when the condition precedent for such powers, as stated in para 18 of the Act are present and only in the manner provided for in paragraph 5 of the Removal of Difficulties Order. The relevant paragraph 41 and 42 of the report are reproduced below:

"41. It has already been noticed that Section 18 of the Principal Act provides for power to appoint a teacher purely on adhoc basis either by promotion or by direct recruitment against the substantive vacancy in the institution when the condition precedent for exercise of powers exist namely that the Management has notified the said vacancy to the Commission in accordance with the provisions of the Act and the Commission has failed to recommend the name of any suitable candidate for being appointed as a teacher within one year from the date of such notification of the post of such teacher has actually remained vacant for more than two months. However, since the state government was alive to the situation that the establishment of the Commission may take long time and

even after it is established, it may take long time to make available the required teacher in the institution and as such issued three Removal of Difficulties orders namely Removal of Difficulties order dated 11.9.81, Removal of Difficulties order dated 14.4.1982. In fact these Removal of Difficulties orders were issued to remove the difficulties coming the way of a Management in running the institution in absence of teacher. This power to appoint adhoc teachers by direct recruitment thus, it is available only when the pre conditions mentioned in section 18 of the act are satisfied, secondly, the vacancy is substantive vacancy and thirdly, the vacancy could not be filled by promotion. Neither the act nor the Removal of Difficulties orders defines vacancy. However, the vacancy has been denied in Rule 2 (11) of UP Secondary Education Services Commission Rules 1983 'Vacancy means' a vacancy arising out as a result of death, retirement, resignation, termination, dismissal, creation of new post or appointment/promotion of the incumbent to any higher post in substantive capacity. Thus, both under section 18 of the Act and under the Removal of Difficulties orders the management of an institution is empowered to make adhoc appointment by direct recruitment, in the manner laid down in paragraph 5 of the First Removal of Difficulties order only when such vacancy cannot be filled by promotion and for a period till a candidate duly selected by the Commission joins the post, as noticed earlier both section 18 of the Act and the provisions of First Removal of Difficulties order provide for adhoc appointment of teacher in the institution, later further providing for method and manner of such appointments are part of one scheme. Scheme being provision for adhoc appointment of teacher in the absence of duly selected teachers by the commission. The provisions may be two but the power to appoint is one and the same and therefore, the provisions contained in Section 18 and Removal of Difficulties order are to harmonized. It is, therefore, not correct to say that appointment of a teacher on adhoc basis is either under section 18 of the Act or under the Removal of Difficulties order. Thus, if contingency arises for adhoc appointment of teacher by direct recruitment the procedure provided under the First Removal of Difficulties order has to be followed. Paragraph 5 of the First Removal of Difficulties order provides that the management shall, as soon as may be, inform the District Inspector of Schools about the details of vacancy and the District Inspector of Schools shall invite application from the local Employment Exchange and also through public advertisement in at least two newspapers having adequate circulation in Uttar Pradesh. Sub paragraph (8) of paragraph 5 of the Removal of difficulties order provides that the District Inspector of schools shall cause the best candidate selected on the basis of quality point specified in Appendix. The compilation of quality point may be done by the Retired Government Gazetted Officer, in the personal supervision of the Inspector. Paragraph 6 of the First Removal of Difficulties order further provides for appointment of such teacher under paragraph 5 who shall possess such

essential qualification as laid down in Appendix –A referred to in the Regulation 2 of Chapter II of the Regulation made in the Intermediate Education Act.

42. In view of these provisions the adhoc appointment of a teacher by direct recruitment can be resorted to only when the condition precedent for exercise of such powers as stated in section 18 of the Act are present and only in the manner provided for in paragraph 5 of the Removal of Difficulties order. This view of mine finds support in a number of decisions namely, Ran Bahadur Singh and others vs. District Inspector of Schools, Saharanpur, 1991 (2) UPLBEC page 1079 and Lalta Prasad Yadav and others vs. State of U.P. 1988 UPLBEC page 345. When a teacher is appointed on adhoc basis is in accordance with the paragraph 5 of the First Removal of Difficulties order there is further no requirement of approval or prior approval of the District Inspector of Schools for such appointment. However, it goes without saying that if a management without following the procedure indicated above makes an adhoc appointment the District Inspector of Schools makes an adhoc appointment the District Inspector of Schools possess general power under the Payment of Salaries Act to stop payment of salary to such teacher."

15. The Full Bench decision of this court in Radha Raizada's case has been approved by the Apex Court in the case of Prabhat Kumar Sharma and others vs. State of U.P. and others JT 1996 (6) SC-579. The Apex Court in the aforesaid case has held that any adhoc appointment of the teachers under section 18 shall be only transient in nature pending allotment of teachers selected by the commission and recommended for appointment and such adhoc appointments should also be made in accordance with the procedure prescribed in para 5 of the First 1981 Order and any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees.

16. Applying the principles laid down in the aforementioned cases, we are of the considered opinion that the provisions of section 18 of the 1982 Act is mandatory and unless and until the period of two months expires from the date of notifying the vacancy to the commission, the committee of management does not get any power to fill up the vacancy on adhoc basis.

17. Since we have come to the conclusion that the Committee of management had no power to make appointment on adhoc basis on the substantive vacancy of the post of lecturer in civics in the college before the expiry of the period of two months from the date of notifying the vacancy to the commission, the date being not on record and even if it is taken that immediately after the occurring of the vacancy the same was notified to it on 2.7.1991 and as the period of two months did not expire before 31.8.2001 and the appointment having been made much before i.e. on 16.8.1991, the Committee of management could not have made such appointment and the same is contrary to law, therefore we are not going into the other question as to whether the advertisement in two newspapers, as provided in para 5 of the First Removal of Difficulties order is

mandatory and is to be strictly complied with or not.

18. In view of the foregoing discussions, we do not find any merit in this appeal and it is dismissed. However, the parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2003

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

Civil Misc. Writ petition No.16978 of 1996

U.P. State Electricity Board ...Petitioner
Versus
Presiding Officer, Labour Court, U.P., Rampur and others ...Respondents

Counsel for the Petitioner:
Sri Ranjit Saxena

Counsel for the Respondents:
Sri P.C. Jhingan
Ms. Sarita Jhingan
S.C.

Constitution of India, Art 226 and 227-Scope of supersory power–High Court can not re-appreciate the evidence by regarding its own finding.
Case law discussed:
1995(6) SCC-576, 1997(7) SCC-300
1998(5) SCC-749, 1999(1) SCC-47
1998(3) SCC-341, 1999(2) SCC-171
1999(2) SCC-143, 1999(4) SCC-1
1999(4) SCC-521, 1999(6) SCC-82
AIR 2000 SC-931, 2001(4) SCC-472
2000(4) SCC-245, 2001(1) SCC-4
AIR 1973 SC-1227, AIR 1982 SC-1552
1984(1) SCC-152, AIR 1984 SC-914
1987(4) SCC-691, 1990(3) SCC-565
AIR 1965 SC-917, 2000(87) FLR-483
AIR 1990 SC-2174, 1997(1) SCC-9
AIR 1997 SC-2661, 1998 (2) SCC-159
1999(7) SCC-645

Practice & Procedures – Petitioner workman-about 15 charges stand proved-punishment of removal awarded –Labour Court found all the charges grave in nature–even interfered by granting reinstatement without back wages–held–the order of punishment relates back from the date of dismissed–cannot be interfered by the labour court; number of reasons discussed.

Held- Para 17

In the instant case as the result of the enquiry held by the Labour Court relate back to the date of removal by the employer, the workman cannot be awarded any relief.

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

1. This writ petition has been filed for setting aside the Award passed by the Labour Court dated 13th November, 1995, by which the learned labour Court has quashed the order of removal from service of respondent workman in spite of proving all the 15 charges against him, on the ground that his family members would suffer and directed for reinstatement of the workman with all consequential benefits except the back wages.

2. Facts and circumstances giving rise to this case are that the respondent workman raised the industrial dispute and the appropriate Government vide order dated 05.06.1992 made a reference as to whether termination of the services of the workman w.e.f. 08.03.1977 was in accordance with law, and if not, to what relief he was entitled to? In pursuance of the said reference the workman filed the claim petition submitting that he had been employed as a clerk on daily wage w.e.f. 3rd December, 1973 and he was issued a charge sheet dated 18/20th September, 1976 containing 15 charges. Enquiry was

conducted which was not in accordance with law. He had not been given any opportunity to defend himself nor the copy of the statement of the witnesses had ever been supplied to him and vide order dated 08.07.1977 his services had illegally been terminated. Allegations of malafide were also alleged as the workman had been office bearer of the union.

3. The management contested the case submitting that charges against the workman had been very serious. Enquiry had been conducted in accordance with law and his removal from service was justified and there was no occasion for the Labour Court to interfere. However, in view of the pleadings parties were heard and the Labour Court came to the conclusion that the disciplinary enquiry conducted against the workman was not in accordance with law, and therefore, the order of the termination stood vitiated. In view of the provisions of the Industrial Disputes Act, 1947 (hereinafter called the Act 1947) parties were permitted to lead the evidence, and after appreciating the same the Labour Court was satisfied that the management proved all the 15 charges against the workman successfully. It came to the conclusion that some of the charges were of really grave nature and delinquency of the workman was very grave, but considering the fact that he had served for some time and he was unemployed after termination from service, the Labour Court set aside the order of termination and directed for reinstatement of the workman with all consequential benefits except the back wages. Hence this petition.

4. Shri Ranjit Saxena, learned counsel for the petitioner has submitted that whatever may be the fate of the domestic enquiry held by the management against the workman, once the Labour Court after holding enquiry itself came to the conclusion that all the charges stood proved, there was no occasion for the Labour Court to interfere with the punishment.

5. On the contrary, Ms. Sarita Jhingan, learned counsel appearing on behalf of the workman has submitted that once the Labour Court was satisfied that the punishment imposed was too harsh and workman should be deprived only of the back wages, in a limited jurisdiction of this Court under Article 227 of the Constitution no interference is required and the petition is liable to be dismissed.

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

6. This Court has very limited scope under Article 227 of the Constitution as per the law laid down in ***Mohd. Yunus*** Vs**.** ***Mohd. Mustaqim & ors.,*** AIR 1984 SC 38, wherein it has been held that even the errors of law cannot be corrected in exercise of power of judicial review under Article 227 of the Constitution and the power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal etc. has resulted in grave in justice. (Vide Constitution Bench judgments of the

Apex Court in ***D.N. Banerji Vs. P.R. Mukherjee,***) AIR 1953 SC 58; and ***Nagendra Nath Bora*** Vs***. Commissioner of Hills Division & Appeals,*** AIR 1958 SC 398). For interference under Article 227, the finding of facts recorded by the Authority should be found to be perverse or patently erroneous and dehorns the factual and legal position on record. (Vide ***Nibaran Chandra Bag*** Vs. ***Mahendra Nath Ghughu,*** AIR 1963 SC 1895; ***Rukmanand Bairoliya*** Vs. ***The State of Bihar & ors.,*** AIR 1971 SC 746; ***Gujarat Steel Tubes Ltd.*** Vs. ***Gujarat Steel tubes Mazdoor Sabha & ors.,*** AIR 1980 SC 1896; ***Laxmikant R. Bhojwani*** Vs. ***Pratapsing Mohansingh Singh Pardeshi,*** (1995) 6 SCC 576; ***Reliance Industries Ltd.*** Vs***. Pravinbhai Jasbhai Patel & ors.,*** (1997) 7 SCC 300; ***M/s. Pepsi Food Ltd. & Anr.*** Vs. ***Sub-Judicial Magistrate & ors.,*** (1998) 5 SCC 749; and ***Virendra Kashinath Ravat & ors.*** Vs. ***Vinayak N. Joshi & ors.*** (1999) 1 SCC 47).

7. It is well settled that power under Article 227 is of the judicial superintendence which cannot be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them. (Vide ***Rena Drego*** Vs. ***Lalchand Soni & ors.,*** (1998) 3 SCC 341; ***Chandra Bhushan*** Vs. ***Beni Prasad & ors.,*** (1999) 1 SCC 70; ***Savitrabai Bhausaheb Kevate & ors. Vs. Raichand Dhanraj Lunja***, (1999) 2 SCC 171; and ***Savita Chemical (P) Ltd. Vs. dyes & chemical Workers' Union & Anr.***,(1999) 2 SCC 143). Unless the findings are patently erroneous and dehorns the factual and legal position on record, exercising the power under Article 227 of the constitution may not be justified and in that eventuality disturbing the findings of facts would amount to jurisdictional error. (Vide ***Dattatraya Laxman Kamble Vs. Abdul Rasul Moulali Kotkunde & Anr.***,(1999) 4 SCC 1). Power under Article 227 of the Constitution is not in the nature of power of appellate authority enabling re appreciation of evidence. It should not alter the conclusion reached by the Competent Statutory Authority merely on the ground of insufficiency of evidence. (Vide Union of India & ors. Vs. Himmat Singh Chahar, (1999) 4 SCC 521). Similarly, in ***Ajaib Singh Vs. Sirhind Co-operative Marketing cum Processing Service Society Ltd.***, (1999) 6 SCC 82, the Hon'ble Apex Court has held that there is no justification for the High Court to substitute its view for the opinion of the Authorities/ Courts below as the same is not permissible in proceedings under Articles 226/227 of the Constitution.

8. In ***Mohan Amba Prasad Agnihotri Vs. Bhaskar Balwant Aheer,*** AIR 2000 SC 931; the Hon'ble Supreme Court held that jurisdiction of the High Court under Article 227 of the Constitution is not appealable but supervisory and, therefore, it cannot interfere with the findings of fact recorded by the Courts below unless there is no evident to support the findings or the findings are totally perverse. Similarly, in ***Union of India Vs. Rajendra Prabhu***, (2001) 4 SCC 472, the Hon'ble Apex Court held that the High Court, in exercise of its extraordinary powers under Article 227 of the Constitution, cannot re-appreciate the evidence nor it can substitute its subjective opinion in place of the findings of Authorities below.

9. In ***Indian Overseas Bank Vs. Indian Overseas Bank Staff Canteen Workers' Union*** (2000) 4 SCC 245, the Hon'ble Supreme Court observed that it is impermissible for the Writ Court to re appreciate the evidence liberally and drawing conclusions on his own on pure questions of fact for the reason that it is not exercising the appellate jurisdiction over the awards passed by the Tribunal. The findings of fact recorded by the fact finding authority duly constituted for the purpose and which ordinarily should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient or credible in the opinion of the Writ Court to warrant those findings, at any rate, as long as they are based upon some material which are relevant for the purpose or even on the ground that there is yet another view which can reasonably and possibly be taken.

10. Similar view has been reiterated by the Supreme Court in State of ***Maharashtra Vs. Milind & ors.,*** (2001) 1 SCC 4; ***Extrella Rubber Vs. Dass Estate (P) Ltd.,*** (2001) 8 SCC 97; and ***Omeph Mathai & ors. Vs. M. Abdul Khader***, (2002) 1 SCC 319.

11. In view of the provisions of Section 6(2-A) of the Act 1947 Labour Court is competent to set aside the discharge or dismissal and reinstate the workman and competent also to substitute any of lesser punishment for discharge or dismissal, ***as the circumstances of the case may require***. The issue of jurisdiction of the Industrial Tribunal/Labour Court to interfere with the quantum of punishment has been considered by the Hon'ble Apex Court time and again and it has categorically been held that generally Tribunal should not interfere with the same but in exceptional circumstances where the punishment is so harsh as to suggest victimization and found not to be commensurate with the degree of guilt, interference is permissible. For such an interference, the Industrial Tribunal **must record reasons** as the award is subject to judicial review in writ jurisdiction. (Vide ***The Workmen of M/s. Firestone Tyre & Rubber Co. of India P. Ltd. Vs. The Management & ors***., AIR 1973 SC 1227; ***Rama Kant Misra vs. State of U.P. & ors.***, AIR 1982 SC SC 1552; ***Management of Hindustan Machine Tools Ltd. Vs. Mohd. Usman & Anr.,*** (1984) 1 Scc 152; ***Ved Prakash Gupta M/s. Delton Cable India (P) Ltd.***, AIR 1984 SC 914; ***Christian Medical College, Hospital employees' Union & Anr. Vs. Christian Medical College, Veelore Association & ors.***, (1987) 4 SCC 691; and ***Workmen Vs. Bharat Fritz Werner (P) Ltd. & Anr.***, (1990) 3 SCC 565).

12. In ***Llyods Bank Ltd. Vs. Panna Lal Gupta***, AIR 1967 SC 428 the Supreme Court held that Tribunal should interfere with the punishment only if the conduct of the employer shows lack of bonafides or victimization of employee or unfair labour practice. In ***Hind Construction & engineering Company Ltd. Vs. Their workmen*** AIR 1965 SC 917 the Hon'ble Apex Court held as under:-

"The Tribunal may in a strong case interfere with a basic error on a point of fact or a perverse finding but it cannot substitute its own appraisal of the evidence for that of the officer conducting the domestic enquiry though it may interfere where the principles of natural

justice or fair play have not been followed or where the enquiry is so perverted in its procedure as to amount to no enquiry at all… The tribunal is not required to consider the propriety or **adequacy of the punishment of whether it is excessive or too severe.** But where the punishment is shockingly disproportionate regard being had to the particular conduct and the past record or is such as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice……"

13. In ***Janatha Baza etc. Vs. The Secretary, Sahakari Noukarara Sangha etc***., 2000 (87) FLR 483 the Hon'ble Supreme Court held that where the Labour Court comes to the specific finding of fact that charges of breach of trust and misappropriation of goods had been clearly proved, the Labour Court cannot set aside the order of removal or workman and pass the order of reinstatement.

14. The case of the petitioner requires to be examined in view of the aforesaid settled legal propositions. Admittedly, 15 charges had been framed against him and found proved by the Labour Court itself after holding the enquiry. The said charges included not posting the meter reading in the ledgers though the meter readings were handed over to him by the meter reader and he did not issue the bills. Thus charge of failure to discharge his duties; realizing the cash from the consumer on 01.05.1976 and failed to paste the receipt in the revenue cash book on the same date, and refusal to receive the letters of warning of his misconduct; failed to realize the cash from consumers who had come to make payments on 03.05.1976; coming late to the office by 1,1/2 hours on 10.05.1976 without any prior permission or intimation and handing over the keys of the cash chest to another R.G.C.; refusing to receive the letters dated 11.05.1976 and thus defiance of the orders of the superiors; not issuing the receipts to the consumer Shri M.L. Goel on 14.06.1976 and thus guilty of violation of discharge of his duties; not depositing the cash in the two Banks realized by him from consumers on 07.06.1976 and 08.06.1976; absence from duty on 06.07.1976 without leave; refusing to receive the letters mentioned therein from time to time; entering into the office of Shri Prem Kumar, S.D.O. on 08.07.1976 and pressurizing him to sanction the leave for 06.07.1976 with full pay and as it was not agreed upon getting agitated and making an attempt to cause physical harm to him; addressing the letter to the high authorities, i.e., Chief Minister directly without sending them through proper channel; taking unauthorized possession of residential unit breaking open the lock; and further making misrepresentations in the application twisting the facts that the said residence was lying vacant without any lock.

15. If all the 15 charges stood proved before the Labour Court itself, the only question remains as to whether Labour Court would be justified in interfering with the punishment of removal? The charges of absence from duty without leave, coming to the office late, not depositing the money in time received from the consumers, not making meter readings in the ledgers and not sending the bills in time stood proved. But more serious charges remain nos. 12, 14

and 15. Charge No. 12 had been that respondent workman pressurized his officer concerned to grant him leave with full pay and as he did not agree he not only abused him but tried to assault him physically. Had other person on the scene not intervened workman could have given a good thrashing to the said officer. Charges No. 14 and 15 relate to occupying a house unauthorisedly by the workman by breaking open the lock and further twisting the fact and making a misrepresentation that the house was lying vacant unlocked and therefore, he occupied it. Thus, charges are of a grave nature. The cumulative effect of all the charges warrant showing no sympathy whatsoever to such a workman. The Labour Court has gravely erred in showing misplaced sympathy which the respondent workman did not deserve. Respondent-workman was employed on 3rd February, 1973 and removed on 8th March, 1977, thus worked only for a period of three years three months. Reference to the Labour Court was made on 5th June, 1992, i.e., after 15 years and 3 months. Where was the occasion for the Labour Court to grant such a relief at such a belated stage. The Labour Court failed to appreciate that the dispute itself might not have been in existence after 15 years of termination of his services. The consideration taken by the Labour Court that his family members would suffer is an extraneous consideration which ought not to have taken into account at all. In such a fact situation where the charges have been of a very grave nature, punishment of removal from service could not be held to be disproportionate to the delinquently and thus there was no occasion of the Labour Court to substitute the punishment lesser than awarded by the employer. It is shocking that the Labour Court had not awarded any punishment whatsoever except depriving the workman from back wages which he could have been deprived of otherwise also for getting the reference from the appropriate authority at such a belated stage.

16. There is no dispute to the settled legal proposition that the result of the enquiry held by the Labour Court relates back to the date of termination. In ***Desraj Gupta Vs. Industrial Tribunal***, AIR 1990 SC 2174, and the Apex Court held that in a case where Industrial Tribunal comes to conclusion that the domestic inquiry was unfair and holds the inquiry itself and even then it comes to conclusion that the termination was valid or termination order was passed on substantial evidence; the termination would be effective from the date the labour court passed the order. However, in ***R. Thiruvirokolam Vs. Presiding Officer & Anr.***, (1997) 1 SCC 9 the Supreme Court took a contrary view and held that in such an eventuality, the order of the labour court will relate back to the date of order of termination was passed by the employer and in such a case, the workman cannot be held entitled for any relief for the interregnum period from the date of termination order passed by the employer and final award made by the Tribunal.

17. All these cases were reconsidered by Supreme Court in ***Punjab Dairy Development Corporation Ltd. & Anr. Vs. Kale Singh***, AIR 1997 SC 2661, and the Apex Court held that the judgment in ***Desraj Gupta's*** case (supra) was not a correct law. The Supreme Court had subsequently, in ***Director, State Transport, Punjab Vs. Gurinder Singh & ors.,*** (1998) 2 SCC 159, has reiterated the law laid down by Supreme Court in ***R.***

Thiruvirkolam's case (supra). More so, in ***Graphite India Ltd. & Anr. Vs. Durgapur Project Ltd.***, (1999) 7 SCC 645, the similar principle has been reiterated and it has been held that when an action is approved, it would relate back to the date of action.

18. In the instant case as the result of the enquiry held by the Labour Court relate back to the date of removal by the employer, the workman cannot be awarded any relief.

19. In view of the above, petition succeeds and is allowed. Labour Court Award dated 13.11.1995 is hereby set aside and the punishment of removal imposed by the employer is held to be commensurate to the delinquently.

20. In the facts and circumstances of the case, there shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ petition No.11678 of 2003.

Rama Shanker Pandey ...Petitioner
Versus
Director General (Administration) Medical Health, Family Welfare Swasthya Bhawan, Lucknow ...Respondents

Counsel for the Petitioner:
Sri Jagdish Lal
Sri R.M. Singh
Sri. S.K. Pandey

Counsel for the Respondents:
S.C.

Constitution of India, Art 226-Mandamus –seeking direction to decide the representation–No statutory provisions about representation shown-held court declined to issue any direction.

Held- Para 17

Court, therefore, declines to exercise its extra-ordinary jurisdiction under Article 226 of the Constitution of India as prayed for by the petitioner on the ground that a claim which would have become bared by time cannot be permitted to be revived under the guise of seeking a direction for deciding the representation. Admittedly, the petitioner has made a prayer for a direction to the respondents to decide his representation dated 12th August, 1999 which claims the payment which was due in the year 1984.

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

1. This writ petition was heard and dismissed by me on 13th March, 2003 for the reasons to be recorded later on. Now here are the reasons for dismissing the aforesaid writ petition.

2. Heard learned counsel for the petitioner and the learned Standing Counsel for the Respondents. In view of the order proposed to be passed, it is not necessary to invite counter-affidavit.

3. The petitioner, by means of this writ petition under Article 226 of the Constitution of India, has prayed for the following reliefs:

(i) to issue a writ, order or direction in the nature of mandamus commanding and directing respondent no. 3 to decide the representation of the petitioner dated 12.8.1999 (Annexure '12' to the writ petition) forthwith.

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

(iii) to award cost of the petition to the petitioner.

4. The petitioner in paragraph 1 of the writ petition has stated that this is the first writ petition on behalf of the petitioner for mandamus commanding and directing respondent no. 3 to decide the representation of the petitioner dated 12th August, 1999 forthwith.

5. According to the statement of fact made in the writ petition, the petitioner, who is employee of Medical Health and Family Welfare Department, was posted at Mental Hospital, Agra. He was transferred vide order dated 24th April, 1984 passed by the respondent no. 1 from Mental Hospital, Agra to District Hospital, Pratapgarh on the post of Store Keeper. It is further averred in the writ petition that the petitioner was relieved from his post from Mental Hospital, Agra but during the period of joining, he fell ill and was confined to bed on 16th May, 1984 and an intimation to this effect was sent to the respondent no. 1 by the petitioner vide his letter dated 16th May, 1984. It is after the petitioner has recovered from illness, reported for duty to Chief Medical Officer, Pratapgarh on 28th June, 1984 but the respondent no.2 did not allow the petitioner to join his duties and informed the petitioner that the transfer of Sri Panna Lal, Store-Keeper has since been stayed by the respondent no. 1 till further orders vide order dated 14th June, 1984, the petitioner should now see to the respondent no.1 for his alternative posting elsewhere. The petitioner thereafter narrated that he has entered into long drawn correspondence before he filed the Writ Petition No. 15602 of 1984 before this Court for a writ of mandamus commanding the respondent no. 1 to issue joining letter to the petitioner and release his pay from May, 1984 onwards. A Division Bench of this Court was pleased to pass the following order on 19.11.1984 :

"List the petition for admission immediately after the expiry of one month. In the meantime respondent is directed to pay salary to the petitioner including arrears due from May, 1984 within a month or show cause."

6. It is further stated in the writ petition that the respondent no. 1 neither paid the salary to the petitioner nor showed any cause inspite of sufficient time granted to him by this Court.

7. A counter-affidavit has been filed in the aforesaid writ petition no. 15602 of 1984 with the statement that since the petitioner has been relieved from his post at Mental Hospital, Agra and thereafter he did not join his post at Pratapgarh, he was not entitled for any indulgence by this Court. The fact remains that the petitioner having been relieved from Mental Hospital, Agra, did not join at Pratapgarh. The petitioner further stated in this writ petition that so far as transfer order dated 24th April, 1984 is concerned, the same was stayed by the respondent no. 1 on 14th June, 1984 so far as it relates to the transfer of Sri Panna Lal Srivastava, who was transferred vide petitioner and the petitioner was diverted to S.R.N. Hospital, Allahabad vide order dated 24th July, 1984 after the interruption of 40 days whereas by that time, the transfer

order of Sri Panna Lal Srivastava has already been stayed by respondent no. 1 vide order dated 14th June, 1984, as stated above. In these circumstance, according to the petitioner, the order for alternative posting of petitioner should have been passed or the earlier order be recalled but since it had not been done so, the petitioner could not join after the recovery from illness. So far as the order directing the petitioner to join at S.R.N. Hospital, Allahabad vide order dated 24th July, 1984 and 5th November, 1984 is concerned, the petitioner had no knowledge and the statement made by the respondents in the counter-affidavit of the writ petition no. 15602 of 1984 filed by the petitioner that the petitioner was not willing to join at S.R.N. Hospital, Allahabad nor he did join at Pratapgarh is not correct. In these circumstances, the petitioner had no option but to file the present writ petition as stated above.

8. In paragraph 16 of the writ petition, the petitioner has stated that the writ petition itself was filed for a direction to the respondent no. 1 for issuing joining letter to the petitioner and the case of the respondent no. 1 before this Court was that he had issued such a letter which was the duty of the respondent no. 2 to serve such a letter so that the petitioner could have joined his duties at the place directed by the respondent no. 1.

9. Continuing with the narration of fact, the writ petition no. 15602 of 1984 was dismissed by this Court and the petitioner has stated this fact in paragraph 16 of present writ petition in the following sentence:

"Hon'ble High Court dismissed the aforesaid writ petition No. 15602 of 1984 on 25.03.1985" instead of directing respondents to serve the copy of the joining order."

10. Aggrieved by the order of this Court dated 25th March, 1985 dismissing the Writ Petition No. 15602 of 1984, the petitioner preferred special leave to appeal petition before the Supreme Court of India. The said special leave petition was dismissed by the Supreme Court vide its order dated 28th November, 1985 which has been annexed by the petitioner as Annexure '1' to the writ petition, which runs as under :

"Special leave petition is dismissed with the direction that the petitioner be served with the order of posting within two weeks from today. He may be permitted to join his duty."

11. The petitioner has stated in paragraph 20 of the writ petition that after the service of the order of the Supreme Court of India, the respondent no. 1 served the copy of the aforesaid joining order dated 5th November, 1984 on the petitioner and consequently the petitioner submitted his joining report at District Hospital, Pratapgarh on 16th December, 1985. A copy of the order dated 11th December, 1985 is annexed as Annexure '2' to the writ petition. Thereafter, the grievance of the petitioner seems to be that since the respondent no. 1 was deliberately not permitting the petitioner to join his duties and he has been permitted to join the duties only on the direction, as stated above, by the Supreme Court, the petitioner is entitled for the payment of salary for the period of so called absence due to petitioner's non joining at Pratapgarh, the petitioner preferred another writ petition i.e. Civil

Misc. Writ Petition No. 13940 of 1986 before this Court in which this Court was pleased to pass the following order on 29th August, 1986 :-

"We have heard Sri Jagdish Lal, learned counsel for the petitioner and also learned counsel appearing for the respondent.

Let interim mandamus issue directing the Director Medical Health and Family Planning Swasth Bhawan, U.P., Lucknow the respondent to direct payment to the petitioner the arrears towards the salary and other emoluments the period from May, 1984 to Dec. 15.12.1985 within three weeks from the date of presentation before him the certified copy of this order or show cause.

List the petition after three weeks."

12. The aforesaid writ petition no. 13940 of 1986 was finally decided by this Court vide its order dated 11th February 1987 which runs as under :

"Since the allegations contained in the writ petition are disputed we direct the petitioner to file representation in regard to his grievances to the Director of Medical Health and Family Planning Lucknow within three weeks. If the petitioner filed the representation the same shall be decided within six weeks from the date of receipt of the representation. With aforesaid direction, the writ is dismissed."

13. It is this order passed by this Court, which according to the petitioner, has given rise to the filing of the present writ petition as the petitioner though filed his representation but the same has not been decided as per direction of this Court within six weeks from the date of receipt of the representation. The petitioner has stated that he has filed a representation pursuant to the direction issued by this Court dated 11th February, 1987 on 20th April, 1987 but he has not stated as to when the representation was received by the respondent no. 1, who were directed by this Court to decide the representation of petitioner and the allegation of the petitioner is that inspite of direction dated 11th February, 1987 in Writ Petition No. 13940 of 1986, the representation dated 20th April, 1987 has not been decided by the respondent no. 1. However, in the next paragraph, the petitioner has stated that the respondent no. 1 has directed after lapse of about 22 months to release personal service record of the petitioner and last payment certificate be sent and this direction was issued to the respondent no. 2 with further direction to pay arrears of salary to the petitioner, if any. Inspite of the order dated 13th January, 1989, no steps have been taken by the respondent no. 2 nor the salary of the petitioner has been paid, which, according to the petitioner, remained un-paid till date, which has resulted into filing the representation after representation for which a writ of mandamus is sought by the petitioner by means of the present writ petition that the representation dated 12th August, 1999 be decided forthwith.

14. Learned counsel for the petitioner has argued that non complying with the order of this Court dated 11th February, 1987 and the direction issued by the respondent no. 1 to respondent no. 2 makes the petitioner entitled for a writ of mandamus as prayed by the petitioner to get his representation dated 12th August, 1999 decided.

15. I am afraid, this argument cannot be accepted Even if, it is assumed that this Court has issued a direction by the order dated 11th February, 1987 which has not been complied with by the respondent, the petitioner could have approached this Court on the contempt jurisdiction instead waiting the same for such a long time as has been done by the petitioner, which has again resulted into filing of the writ petition.

16. From the facts and circumstances, it is clear that the dispute is with regard to non-payment of salary and other consequential benefits for a period of 40 days. A perusal of the correspondence annexed by the petitioner in the writ petition clearly demonstrates that the petitioner since have not reported for joining pursuant to the transfer from Mental Hospital, Agra at Pratapgrah, the salary and other consequential benefits could not be paid as till the petitioner reported for duty after he has approached the Apex Court by means of special leave petition referred to above, the order whereof is Annexure '2' to the writ petition.

17. Learned counsel for the petitioner has failed to demonstrate any statutory provision under which respondents are under statutory duty to decide the petitioner's representation because the petitioner's right to receive payment itself was under jeopardy for which, according to the narration of the facts, long drawn correspondence entered into. Now, the petitioner by means of this writ petition under Article 226 of the Constitution of India, has sought for a writ of mandamus for the payment of salary and other consequential benefits which ought to have been paid to him, according to the petitioner, in the year 1984 after laps of about 22 months. This Court, therefore, declines to exercise its extra-ordinary jurisdiction under Article 226 of the Constitution of India as prayed for by the petitioner on the ground that a claim which would have become barred by time cannot be permitted to be revived under the guise of seeking a direction for deciding the representation. Admittedly, the petitioner has made a prayer for a direction to the respondents to decide his representation dated 12th August, 1999 which claims the payment which was due in the year 1984.

18. In this view of the matter, this writ petition seeking a writ of mandamus for deciding the representation of the petitioner in equity jurisdiction under Article 226 of the Constitution of India, in my opinion, is not a fit case in which this Court should interfere.

This writ petition is, therefore, devoid of any merits and it is accordingly dismissed.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD MARCH 11, 2003

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE Y.R. TRIPATHI, J.

Criminal Appeal No.1569 of 1981

Bhai Khan ...Appellant (in Jail)
Versus
State ...Respondent

Counsel for the Appellant:
Sri P.N. Misra

Counsel for the Respondent:
A.G.A.

Indian Penal Code, 1860-Section 302 read with Sections 304, Part I and 300, Explanation – I Conviction under S.302 maintainability – Injuries inflicted to deceased in a fit of passion during course of sudden quarrel – Thus act of appellant falls within explanation I to Sec 300 bringing offence proved to be punishable under Section 304 part I I.P.C – Hence appellant's conviction altered from S.302 to S.304 Part I, I.P.C.

(Delivered by Hon'ble Y.R. Tripathi, J.)

1. This criminal appeal is directed against the conviction and sentence recorded by Sri J.N. Bansal, the then Sessions Judge, Lalitpur in Sessions Trial No. 101 of 1980, State Versus Bhai Khan, relating to P.S. Talbehat, District Lalitpur, whereby he having convicted the appellant Bhai Khan under Section 302 IPC has sentenced him to imprisonment for life.

2. The prosecution case, in short, is that the appellant is the real younger brother of the deceased Shamsher Khan. At the time of occurrence, both the brothers were living jointly and they owned a bullock. Shamsher Khan wanted to go out after selling that bullock to which the appellant was not agreeable. It is said that around 12 noon on 17.08.1980, an altercation took place between the two brothers inside their inner courtyard over the disposal of the bullock. Shamsher Khan, as usual, insisted on selling the bullock, whereupon the appellant, enraged over his insistence, gave him several blows from the blunt portion of a spade saying that he was very often insisting on selling the bullock and that he would now finish him. On sustaining injuries Shamsher Khan fell down on the ground. Iddu Khan P.W.I. Hajju P.W.3 and some others, who on hearing the altercation between the two brothers had reached the scene of occurrence, witnessed the incident. The appellant after inflicting injuries to Shamsher Khan went away towards the well in the village. Asghar Ali, Harnam Singh and a constable accompanied by some others gave a chase to the appellant and apprehended him with the spade, the weapon used in assault. They brought the appellant at his house and tied him with the help of a rope. Iddu Khan, P.W.1 with injured Shamsher Khan set out for the police station on a bullock-cart but hardly had he settled a distance of three furlongs and had reached out of his village, Shamsher Khan died. He, therefore, brought the dead body of Shamsher Khan back to the place of occurrence and placed it there. He then got a written report prepared on his dictation by one Govind Singh, Pradhan of the village and took it to the police station Talbehat where he made over that written report to Head Constable Shiv Singh P.W.4, who on the basis of that report drew a chik F.I.R and registered a case at 1-30 p.m. on 17.08.1980. Sub Inspector Surya Prasad Agnihotri P.W.5, who at that time was posted as Station Officer P.S. Talbehat, swung into action. He proceeded to the spot, held inquest on the dead body of the victim and after completing all other necessary formalities dispatched the dead body for its post-mortem examination which was conducted on 18.08.1980 at 12 noon by Dr. Har Narain, P.W.2, then posted as Medical Officer in the District Hospital, Lalitpur.

3. According to Dr. Har Narain, the deceased was of average built and about 36 years old. He had died about a day before. He found both the eyes of the deceased partially closed, oozed clotted

blood on both ears and nostrils and food materials coming out through mouth and nostrils. He also noticed the following ante-mortem injuries on the person of the deceased:

1. Lacerated wound 4 cms x 1 cm x bone deep on right side head, 7 cms above from left ear and left eyebrow, margins lacerated.

2. Lacerated wound 3 cms x 2 cms x bone deep, just front of left ear oblique.

3. Lacerated wound 6 cms x 3 cms x bone deep, left side head just below and above left ear.

4. Lacerated wound 3 cms x 1 cm x bone deep on back of right ear on mastoid process.

5. Lacerated wound 2 cms x 1 cm x bone deep on front of right ear Margins lacerated, clotted blood present.

According to Dr. Har Narain, the deceased had died due to head injuries sustained by him.

4. The police of P.S. Talbehat after due investigation presented charge sheet under Section 302 I.P.C. against the appellant which culminated into his trial. The case of the appellant was that of denial and false implication.

5. The prosecution during the course of trial examined Iddu Khan as P.W.1, Dr. Har Narain as P.W.2, Hajju as P.W.3, Shiv Singh P.W. 4, S.I. Surya Prasad as P.W.5 and Sahid Mohammad as P.W.6 and filed certain affidavits of formal witnesses. The learned court below on conclusion of the trial held the appellant guilty of the charge under Section 302 IPC and sentenced him as aforesaid, dissatisfied from which the appellant has come up in this appeal.

6. The learned counsel for the appellant assailed the conclusions of the learned trial court mainly on the ground of insufficiency and incredibility of the prosecution evidence and also disputed the propriety of conviction under Section 302 I.P.C. and the sentence awarded to the appellant therefore. His main contention was that the prosecution evidence consists of Iddu Khan P.W.1, an interested witness and Hajju P.W.3, a resident of another village, whose presence on the spot is highly doubtful. Iddu Khan, it would be found, has admitted that about 10-12 years prior to his evidence, there had been some litigation between his father on the one hand and the deceased and his brother, the appellant, on the other over some landed property. He has, however, denied having any animosity with the family of the appellant or the deceased. The house in which he resides is divided by Jhankhar from the house of the appellant, suggesting an inference that his house and the house of the appellant at some point of time must have been one. He has stated that he had, just before the incident, returned from his field, which he had cultivated on batai, for taking his lunch. A futile attempt was made by the learned counsel for the appellant on the basis of his replies to leading questions that he had arrived at the spot after the incident and had no occasion to witness the actual assault. His statement, taken as a whole, however, suggests that he had seen the deceased fallen down on a stone in injured condition he answered in the affirmative but his this reply will not be

looked into in isolation. He being a village rustic, unaware of intricacies of cross-examination, appears to have been misled by the leading question. A careful scrutiny of his evidence goes to show that he had arrived at the scene of occurrence while an altercation was still going on between the appellant and his brother and had witnessed the appellant giving the fatal blows with the spade to his brother. His evidence further shows that the litigation between his father and the appellant and the deceased had hardly any impact on his conscious or sub-conscious mind at the time of occurrence. He is not even aware of the fact whether he had any share in the properties held by the appellant and the deceased and has admitted that the landed properties stand recorded in revenue records jointly in the names of the appellant and his deceased brother. So far as his presence on the spot is concerned, that appears natural and portable. His house is part of the same house, half of which was in the occupation of the appellant and the deceased. His evidence finds full support from the evidence of Hajju, P.W.3, who, on hearing the altercation between the appellant and his deceased brother which preceded the actual incident, was attracted on the scene of occurrence from the fair price shop of one Bhaiyadin situated nearby the house of the appellant, where he had gone to purchase kerosene oil. Hajju P.W.3, though not a resident of the village of the incident, was at that time under the employment of one Asghar of that village and he has satisfactorily accounted for his presence on the spot. He is not shown to be in any way inimical to the appellant. He has stated that after the incident, the wife of the appellant had entrusted certain agricultural produce to him for purchase of a Saree for her mother-in-law from the sale proceeds there of and that he had brought the Saree after disposing of the food grain so entrusted to him. This speaks of his normal and cordial relationship with the family of the appellant.

7. Besides the aforesaid two factual witnesses, one Asghar was also said to be present at the time of incident, but he has not been produced. The learned counsel for the appellant urged that non-production of Asghar, a material witness and resident of the same village creates suspicion about the genuineness of the prosecution case. To our mind, however, non-production of Asghar by the prosecution can hardly be taken to have any impact on the genuineness of the prosecution version. It is a cardinal principle of law that evidence is not counted, but weighed. The aforesaid two factual witnesses examined by the prosecution have consistently supported the prosecution case and there appears no reason or motive on their part for giving false evidence.

8. The incident, it would be found, had taken place in broad day-light. Dr. Har Narain, P.W.2, who held autopsy on the dead body, has admitted either way variation of two hours, at the most, in the time of occurrence which works out between 10 a.m. to 2 p.m on 17.08.1980 when there would have been no chance of any wrong identification or misidentification of the assailant. The F.I.R was lodged at 1-30 p.m. at P.S. Talbehat which lies at a distance of six and a half miles from the place of occurrence. The promptitude with which the F.I.R is found to have been lodged also rules out any deliberation or consultation on the part of the informant.

An attempt was though made to show that the F.I.R was concocted after the visit of the Investigating Officer on the spot, but there is no material on record to support such an inference.

9. It was then argued that had the appellant executed the crime, he would not, after the incident, have stayed nearby the place of occurrence facilitating his apprehension by the villagers. This argument relates to behavioral conduct of the appellant and has nothing to do with the merit of the case. It is a matter of common knowledge that different persons act differently in a given circumstance. It was not unlikely that the appellant having no criminal background would not have comprehended such a grave repercussion of his act which was done in a fit of rage during the course of an altercation with none else that his real elder brother.

10. Thus after giving a careful thought to the facts and circumstances of this case, we are of the view that the learned trial court has rightly, relying on the testimonies of Iddu Khan P.W.2 and Hajju P.W.3, concluded about the complicity of the appellant in the incident and there does not appear any infirmity in it.

11. It was lastly urged that even from the materials brought on record offence under Section 302 I.P.C. for which the appellant has been convicted by the learned trial court, is not made out. There appears to be force in this argument. From the evidence adduced, it is found that the appellant and the deceased were living jointly at the time of occurrence. They had very little landed property. They had also only one bullock. Their source of livelihood was agriculture. In such a situation, the disposal of bullock would have adversely affected their livelihood. It is in evidence that during the course of altercation, the deceased was insisting on selling the bullock. It was, therefore, but natural on the part of the appellant to have got enraged with the deceased and lost control over himself. It is also in evidence that the accused after picking a spade dealt certain blows to the deceased. The appellant had not to move anywhere to take the spade with which he assaulted the deceased. The spade was lying there in the inner courtyard itself. Keeping in view the social background and the family status of the appellant it is found that the appellant during the course of sudden quarrel inflicted the injuries to the deceased in a fit of passion. Definitely this act of the appellant falls within Explanation-I to Section 300 I.P.C. bringing the offence proved to be one punishable under Section 304 Part 1, I.P.C. The conviction thus recorded by the learned trial court needs to be altered from Section 302 I.P.C. to Section 304 Part 1 I.P.C. As regards the sentence, considering the fact that the appellant is the sole bread-earner in his family and has also undergone the mental torture for a long time on his conviction. We are of the opinion that a sentence of seven years R.I. would adequately serve the ends of justice.

12. Accordingly the appeal is allowed partly. The conviction of the appellant under Section 302 I.P.C. is altered into one under Section 304 Part 1 I.P.C. and he is sentenced to undergo seven years rigorous imprisonment for that offence.

13. The appellant is on bail. He shall be taken into custody to serve out the sentence.

14. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Lalitpur, who shall cause the appellant Bhai Khan arrested and sent to jail to serve out the sentence awarded to him. He shall also submit compliance report within two months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.3.2003

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

Civil Misc. Writ Petition No. 37571 of 2002

Kunwar Baldevji ...Petitioner
Verses
The XI Additional District Judge, Bulandshahr and others ...Respondents

Counsel for the Petitioner:
Sri Rajesh Tandon
Sri Som Narain Mishra

Counsel for the Respondents:
Sri R.B. Singhal

Code of Civil Procedure- Order 15 rule 5- first dated of Hearing- what is- the tenant denied the liability of rent as well as the relationship- when the court is considering the liability of rent in future should be treated as admitted rent- answered accordingly.

Held- Para 11 and 16 Printed

Having considered the aforesaid decisions we find that the language of order 15 Rule 5 Code of Civil Procedure is unambiguous, clear and there is no scope of doing violence with it and stretch it to mean rent found by the Court to be due, "Question of interpretation- of a statutory provision arises only when it is ambiguous or admits two interpretation or it is required to save the provision from being declared void. No such contingency exist in the present case.

Our answer to the question referred to us is that order 15 Rule 5 Code of Civil Procedure does not contemplate that when Court decides the question of liability of payment of rent in future, the same should be treated as the admitted rent due within the meaning of the expression contained under order 15 Rule 5 Code of Civil Procedure.

Case law discussed:
2001 (44) ALR 804, 1995 AWC 56
1984 (2) ARC-144, 1983 (2) ARC-453
1979 AWC-183, 1976 ALJ 494 Pra 6
1980AWC-124, 1978 ALJ-1310
1985 (2) ARC-21

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

1. Heard Sri Rajesh Tandon, Senior Advocate along with Sri Som Narain Misra, Advocate on behalf of the petitioners (tenants) and Sri R.B. Singhal, Advocate on behalf of the contesting respondents (landlord).

2. Above Writ Petitions have been listed, before us on a reference made by a learned single Judge. Referring order dated September 10, 2002 is extracted:

"*I have heard the learned counsel for both sides.*

Order 15 Rule 5 CPC as added in U.P. requires that the tenant/defendant should deposit the arrears of rent which is admitted by him to be due with interest at the first hearing. He should also deposit future rent month to month during the

pendency of the suit. Failing such deposit the defence in the suit is liable to be struck off.

In this particular case, the tenant/petitioner in his written statement has denied the relationship of the landlord and tenant, and therefore obviously no rent could be said to be admittedly due. He did not deposit any amount towards rent. His defence was struck off on the finding that relationship of the landlord and tenant existed.

Learned counsel for the petitioner relies upon the clear words of Order 15 Rule 5 as interpreted by a decision of this Court in the case of ***Rakesh and company Vs. Heera Lal reported in 2001 (44) ALR 804*** *for the proposition that only such amount is liable to be deposited which is admitted to be due.*

On the contrary, learned counsel for the respondents, Sri R.B. Singhal submits that words "rent admitted by the tenant to be due" used in Order 15 Rule 5 CPC should be interpreted to mean "rent found by the Court to be due although not admitted by the tenant to be due."

Prima facie the Rules of interpretation of statues do not permit of doing such violence to the words of the statute, as to make their meaning just reverse of what the language suggests. Exceptions may be possible (a) where the language used in a statute is ambiguous or capable of two interpretations or (b) where but for such interpretation absurdity or serious anomaly would result.

However, learned counsel for the respondent relies certain single Judge decisions in support of his contention. The decisions are as follows:

(i) 1995 AWC 56 Jai Chand Gangwar Vs. IIIrd A.D.J.
(ii) 1984 (2) ARC 144 Guru Charan Lal Vs III A.D.J.
(iii) 1983 (2) ARC 45 Kishan Lal Vs. Ist A.D.J.
(iv) 1979 AWC 183 Thakur Prasad Vs. Guru Prasad

"--------

of the above the case of Guru Charan and the case of Kishan Lal do not deal with the issue directly. The other two cases namely Jai Chand Gangwar and Thakur Prasad do support the respondent. However the only reason that can be spelt out in support of the conclusion or interpretation of Order 15 Rule 5, appears to be the anxiety on part of the learned judges that the tenant may not deny the liability to pay rent and drag on the proceeding arrears of rent, and (2) secondly regarding the current rent. Both these can be avoided only by denial of the landlord's title, which is highly risky for any tenant as it gives another ground for eviction. Besides as stated above the language of the statutory provision does not permit of the interpretation. And non of the two decisions aforesaid have considered the said language while giving the interpretation. To my mind the aforesaid anxiety would not be sufficient justification on part of the Court to adopt an interpretation which is just reverse of the statutory language. In the circumstances being unable to agree with the decision in the two cases of Jai Chand Gangwar and Thakur Prasad, I refer the following question for consideration by a larger Bench;

"Whether the defence can be struck of under Order 15 Rule 5 CPC for non-deposit of rent which is not admitted to be due despite the express words to the contrary in that statutory provision?"

Let the papers of this case be placed before the Hon'ble the Chief Justice for appropriate orders.

Further proceedings in SCC Suit No.2 of 2002 will remain stayed till further orders."

To answer the 'referred question' we take Kunwar Baldav Ji Vs. XI A.D.J. and others.

3. Dr. Subodh Mohan, Plaintiff-respondent No.3- filed S.C.C. Suit No. 2 of 2002 (Dr. Subodh Mohan Versus Kunwar Baldevji) for eviction and possession (apart from other usual reliefs) in the Court of Judge Small Causes on the ground that Defendant-Petitioner Kunwar Baldev Ji was his tenant of the accommodation described in the plaint of the said suit. The defendant, on the other hand, denied landlord-tenant relationship and contended that he admits no rent to be due under Order 15 Rule 5, Code of Civil Procedure.

4. After parties had exchanged pleadings, the plaintiff filed an application (Annexure 1 to the Writ Petition) before the trial court-praying that defence of the tenant was liable to be struck-of since the tenant had made no deposit and that the defence be struck off at the time of final decision of the suit. Tenant filed objections dated 27.5.2002 (Annexure 1 to the supplementary Affidavit) and also an application dated 27.5.2002/ Annexure 2 to the Writ Petition praying for framing and to decide as preliminary issue whether defence was liable to be struck off under Order 15 Rule 5, Code of Civil Procedure before parties proceeded to lead evidence on other issues.

5. The trail Court accepted the contention of the plaintiff, proceeded to decide issue under Order 15 Rule 5 Code of Civil Procedure and found that the tenant failed to comply with the conditions contained under Order 15 Rule 5 Code of Civil Procedure; and hence his defence was liable to be struck off.

6. The tenant, being aggrieved, filed revision under section 25, Provincial Small Causes Court Act. The said revision was also dismissed by the Court below. Consequently, the tenants have come before this Court by filing present three writ petitions.

7. At the admission stage, learned single Judge referred afore quoted question to larger bench.

8. The Hon'ble the Chief Justice thus nominated this bench to decide the said referred question.

9. The aforesaid question, we may note, need no further deliberations as Division Bench of this Court had already answered it. Order 15 Rule 5 Code of Civil Procedure, as amended in the State of U.P., is reproduced below-

"5. Striking off defence on non-deposit of admitted rent, etc.- (1) In any suit by a lessor for the eviction of a lessee from any immovable property after the determination of his lease, and for the recovery from him of rent in respect of the period of occupation thereof during the

continuance of the lese, or of compensation for the use and occupation thereof, whether instituted before or after the commencement of the Uttar Pradesh Civil Laws Amendment Act, 1972, the defendant shall, at or before the first hearing of the suit (or in the case of a suit instituted before the commencement of the said Act, the first hearing after such commencement) deposit the entire amount of rent or compensation for use and occupation, admitted by him to be due, and thereafter throughout the continuance of the suit, deposit regularly the amount of monthly rent, or compensation for use and occupation, due at the rate admitted by him, and in the event of any default in this regard, the Court may, unless after considering any representation made by him in that behalf it allows him further time on security being furnished for the amount, refuse to entertain any defence or, as the case may be strike off his defence.

(2) The provisions of this rule are in addition to and not in derogation of anything contained in Rule 10 of Order XXXIX.."

10. Sri Rajesh Tandon, Senior Advocate, appearing for the Tenant Petitioner referred to the following decisions-

1. ***Ladly Prasad Vs. Ram Shah Billa 1976 ALJ 494 Pr 6 (DB)***

"---- If, however, the defendant does not admit that any amount is due to the plaintiff as rent or damages for use and occupation, he need not make any deposit. At this stage the court is not required to decide the questions whether any amount is really due and whether the lease has been validly terminated. -----"

2. ***Sri Surendra Nath Dubey Vs. Smt. Shakuntla Devi, 1980 AWC 124 Pr.10***

"----As the defendant in this case did not admit that any amount by way of rent or compensation for use and occupation of the premises was due from him at the time when the first hearing took place on 16th of September, 1976, no question of his making a representation seeking further time to make such deposit, arose-"

3. ***Thakur Prasad @ Bhola Nath Vs. Guru Prasad 1979 AWC 183 Pr.5***

"In a case like the present, it is always necessary for a court to determine the question of relationship of landlord and tenant before striking out the defence. It the court finds that the plea of the defendant to strike off the defence is untenable and that such a recording a finding to that effect and thereafter in making an order striking off the defence under Order XV Rules 5 C.P.C. is adopted, that would discharge a frivolous plea which may be taken to avoid consequences of Order XV Rule 5 C.P.C. ....."

4. ***Ami Singh Vs. Prakashwati Verma 1978 ALJ 1310 Pr.5 K.N. Singh, J.***

"---At that stage, the Court is not required to decide the question whether any amount is really due and whether the lease has validly been terminated. The Court cannot compel the defendant to deposit the amount claimed by the

plaintiff if the defendant does not admit any amount due from him."

5. ***Hoob Lal Vs. District Judge Mirzapur and others 1985 (2) ARC 21- Pr.4. V.K. Khanna, J.***

"----The provisions of Order XV, Rule 5 Civil Procedure Code apply when the defendant admits his liability for payment of rent to the landlord. As has been stated above in this case the petitioner-defendant does not admit his liability to pay rent to the plaintiff landlord the provisions of Order XV, Rule 5, Civil Procedure Code will have clearly no application the present case and the impugned orders passed by the Judge Small Causes Court and the District Judge Mirzapur are liable to be quashed."

11. Having considered the aforesaid decisions we find that the language of order 15 Rule 5 Code of Civil Procedure is unambiguous, clear and there is no scope of doing violence with it and stretch it to mean that expressions "rent admitted by the tenant to be due" should mean rent found by the Court to be due, …." Question of interpretation- of a statutory provision arises only when it is ambiguous or admits two interpretation or it is required to save the provision from being declared void. No such contingency exist in the present case.

12. If amount of rent is admitted then it is not required to be adjudicated by the Court. In case, tenant denies any rent to be due, Court shall be required to decide the same. It is obvious that in such contingency Court will have to adjudicate and its finding will come subsequent to the 'first date of hearing' contemplated under Order 15 Rule 5 Code of Civil Procedure. It is, therefore, evident that by the time the court will render its finding, 'first date of hearing'- which is cut of date for deposition of rent, shall be over. It also requires no comment that such an issue is first to be framed and thereafter adjudicated after parties have lead evidence in accordance with law.

13. In this context we may refer the case of **Hub Lal** (supra) and observations made by the Division Bench of our Court in the case of **Ladly Prasad** (Pr.6), quoted above.

The learned Single Judge has referred to the two judgments of the learned Single Judge, namely, **Gur Charan Lal (supra)** and **Kishan Lal (supra)** and observed that these judgments are not relevant. However, other two judgments were referred to in the referring order. We find that Division Bench judgment in the cases of **Ladly Prasad (supra)** and **Hub Lal** now relied upon on behalf of tenant were not brought to the notice of the Learned Single Judge.

14. Learned counsel for the landlord has placed reliance on the following decisions-

(i) M/S Rakesh & Company and others Vs. M/s Hira Lal and Sons, 2001 (44) ALR 840. Janardan Sahai, J.

(ii) Jai Chandra Gangwar Vs. IIIrd Additional District Judge, Farrukhabad, AWC 1995-A.B. Srivastava, J.

(iii) Ashma Bibi Vs. Ahsan Ali and another, 1990 (1) ARC 48- M.P. Singh, J.

(iv) Guru Charan Lal Vs. IIIrd Additional District Judge, Farrukhabad and others, Allahabad Rent Cases, 1984 (2)- R.B. Lal, J.

(v) Sri Kishan Lal Vs. Ist Additional District Judge, Saharanpur 1983 (2) ARC 453. U.C. Srivastava, J.

(vi) Maqsood Ali Vs. Shamsher Khan, 1983(2) ARC 319- K.C. Agarwal, J.

(vii) Thakur Prasad alias Bholanath Vs. Gur Prasad, AWC 1979 183-K.C. Agrawal, J.

15. As already indicated earlier in our order the aforesaid judgments have no relevance to the question referred to us.

Writ petition is yet to be decided by the learned Single Judge.

16. Our answer to the question referred to us is that order 15 Rule 5 Code of Civil Procedure does not contemplate that when Court decides the question of liability of payment of rent in future, the same should be treated as the admitted rent due within the meaning of the expression contained under order 15 Rule 5 Code of Civil Procedure.

Papers returned with our answer for decision of the Writ Petition by appropriate bench.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 41124 of 2002

Ram Jai Shri, ...Petitioner
Versus
State of U.P. and others ...Respondents

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

Counsel for the Respondents:
Sri S.P. Singh
S.C.

Mines and Mineral Rules Rule-72-Grant of lease for excavating building stone, gitti, bolder and mild stone–renewal application of erstwhile lease holders rejected- application for grant of fresh leave invited and granted in favour of petitioner – cannot be questioned unless it exceed the limit of restriction contained in rule 10.

Held- Para 8

Vinod Kumar was the first applicant in pursuance of the notification dated 01.03.2001 but since he did pursue the matter further, the grant in favour of Ram Jai Shri cannot be questioned or set aside. Bharat Lal was not left with any surviving interest in the area. There is no bar in holding several mining leases in the district except the restriction in Rule 10 which provided that the maximum area for mining else should not cover a total area of thirty acres. There is nothing on record to show that the total area covered or held by petitioner exceeds thirty acres.

Case Law discussed:
2000(I) AWC-433

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

1. Heard Dr. R.G. Padia assisted by Sri Prakash Padia for petitioner and Sri S.P. Singh for respondent No. 4 as well as learned Standing Counsel for rest of respondent.

2. Sri Bharat Lal–respondent no. 4 was granted a mining lease for excavating building stone, gitti, bolder and mild stones in respect of plot no. 485 (area 5 acres) for a period beginning on

01.07.1994 up-to 01.07.1999. He applied for renewal under Rule 5 of The Uttar Pradesh Minor Minerals (Concession) Rules, 1963 (in short the Rules) on 30.10.1998, and deposited Rs.1000/- as renewal fees on 16.10.1998. The renewal application was registered on 30.10.1998, it was to be disposed f within four months and if it was not disposed of within the said period; the mining lease is deemed to have been renewed for six months from the date of its expiry to commence from the date of expiry of the original lease deed. It appears that no action was taken of his application and as such Bharat Lal approached State Government, under Rule 78, upon which a direction was issued on 19.05.1999 to the District Magistrate to decide the application expeditiously. In the meantime, the State Government introduced a new mining policy vide Government Order dated 16.03.1999 providing for auctions. Apart from the exceptions provided with regard to excavating lime stones, morang, sand etc. this Government Order applied Chapter-IV for settlement by auction to the entire area where ever minor minerals were found in the State. The policy provide in para 7 that, such orders under which lease or permit are granted shall continue, till expiration of the period of lease, but as soon as the permit expires, declaration shall be issued under Rule 23 (1) of the Rules for granting lease by auction, or by tender or by auction-cum-tender system, and the period of lease shall be fixed as far as possible so that the else in respect of river bed minerals shall expire in the month of September, and for in situ rock type mineral to expire according to financial year. The new mining policy was upheld by this Court in **Uma Crushing Stone Vs. State of U.P. and others** reported in 2000 (1) A.W.C.433. The Court is informed that special leave petition against the aforesaid judgment is pending.

3. The District Magistrate by his order dated 31.05.1999 rejected the application of Bharat Lal for renewal on the ground that by Government Order dated 16.03.1999 the State Government has provided for auction/auction-cum-tender system under Rule 23 (1) for the areas which became available after the enforcement of the policy. The order was communicated to Sri Bharat Lal on 02.06.1999. He did not challenge the same. This order, as such, rejecting his renewal application become final.

4. A notification was issued on 01.03.2001 under Rule 72 inviting application in respect of the areas for which renewal has not been accepted, after new Mining Policy was enforced, including subject plot no. 485 (area 5 acres) in village – Patti Kala, Tehsil – Chunar, District–Mirzapur. This notification dated 02.01.20003 has not been challenged by Bharat Lal. In the meantime by Government Order dated 30.12.2000 the Mining Policy dated 16.03.1999 was withdrawn, and the old policy with regard to grant of mining leases in Chapter-II was made applicable, and that all those existing leases which were continuing in pursuance of auction/auction-cum-tender system, were provided to continue until the areas became available under Rule 24 be withdrawn from auction system to grant of lease under chapter-II. Para 6 of this Government Order dated 30.12.2000 provided that looking into the geographical position of area and taking into account the technical opinion of the Director Mines and Minerals, the period

of lease shall be ordinarily 3 to 5 years and the renewal shall also be made for the same period, but where the lessee has not applied under Rule 6-A for renewal of lease, the area shall be related to be vacant and shall be notified under Rule 72 for grant of lease areas.

5. In pursuance of the notification under Rule 72 dated 01.03.2001, four applications were received for grant of lease whereas Sri Vinod Kumar applied on 13.02.2001, petitioner Ram Jai Shri applied on 31.02.2001, respondent no. 4 Bharat Lal applied on 02.04.2001 and that one Sri Rangi Lal applied on 11.05.2001. The District Magistrate granted lease to Sri Ram Jai Shri Vide his Order dated 19.06.2001. In the meantime Bharat Lal; respondent No. 4 against applied for renewal on 17.05.2001. Aggrieved against the grant of lease to petitioner Ram Jai Shree, Bharat Lal filed an appeal No. 200A of 2001 and Vinod Kumar filed appeal No. 292 of 2002 before Commissioner, under Rule 77 of the Rules, The appeal filed by Bharat Lal was allowed by the Commissioner, Vindhayachal Division, Vindhyachal, and while setting aside the order dated 19.06.2001 in favour of Ram Jai Shree, the application for renewal for Bharat Lal was accepted, and the record was returned back for registration of renewed lease in favour of Bharat Lal. The appeal filed by Vinod Kumar was dismissed with observation that in case he want mining lease in respect of plot no. 486 he may make application under the Rules. The Revision has been dismissed by Special Secretary Department of Industrial Development, on 19.09.2002 upholding the order of the Commissioner, on the ground that on the date of application for renewal the area was not made available under the new mining policy dated 16.05.1999 and the District Magistrate was required to decide his application for renewal which was wrongly rejected by him.

6. Dr. R.G. Padia has challenged the order in appeal as confirmed by the impugned order passed by the State Government in revision on the ground that the application for renewal as filed beyond the period prescribed under Rule 8 (2) (b). The same could not have been considered under new mining policy. The order rejecting the renewal was not challenged by Sri Bharat La. Further he did not challenge the notification dated 01.03.2001 under Rule 72 of the Rules which as become final and that the areas has become available for fresh grant for which Bharat Lal had also made an application which was found to be later in time than application made by petitioner. He has also challenged the renewal application in favour of Bharat Lal on the ground that he is already a lessee of two other areas in the name of Bharat Stone supplier.

7. Sri S.P. Singh, on the other hand, had defended the impugned orders on the ground that Bharat Lal was not communicated with the order rejecting his renewal application. The judgment in Uma Crushing Stone Co. Vs. State of U.P. (supra) is still under challenge before Supreme Court. The application for renewal was made within time. By the time applications were invited for fresh grant under Rule 72, the Mining policy of 1999 was withdrawn by Government Order dated 30.12.2000 withdrawing the entire areas of State of U.P. for grant of mining lease under Chapter-II of the Rules which revived Bharat Lal's

application for renewal. Chapter-II of the Rules provide for right of tenure of the lease holder where lease was granted in accordance with the provisions of the Rules. The order rejecting the petitioner application for renewal was passed on a policy which subsequently withdrawn. He has also challenged the grant in favour of petitioner on the ground that he is also operating a lease in other area of the district.

8. After considering the submission, as aforesaid, I find that respondent no. 4 had not challenged the orders dated 31.05.1999 passed by the District Magistrate rejecting his renewal application and the notification dated 01.03.2001 under Rule 72 inviting applications for grant of lease under Chapter-II. It is true that by Government Order dated 31.12.2000 the mining policy of 1998 vide G.O. dated 16.03.1999 was withdrawn, but it did not effect those areas where renewal as not granted during the period when the policy under G.O. dated 16.03.1999 was operative, and the areas became available for fresh grant vide notification under Rule 72. Bharat Lal was fully aware of this position and such he made an application for grant of lease in pursuance of G.O. dated 01.03.2001. His application for renewal did not survive to be revived by his application dated 17.5.2001 where the areas were brought under Chapter II vide notification under Rule 72, and were made available for fresh grant of lease. The application of Bharat Lal for renewal, therefore, could not survive and could not be considered. His lease expired on 01.07.1999 and did not have awaited renewal up-to 17.05.2001, when he wanted to press his renewal application. Vinod Kumar was the first applicant in pursuance of the notification dated 01.03.2001 but since he did pursue the matter further, the grant in favour of Ram Jai Shri cannot be questioned or set aside. Bharat Lal was not left with any surviving interest in the area. There is no bar in holding several mining leases in the district except the restriction in Rule 10 which provided that the maximum area for mining else should not cover a total area of thirty acres. There is nothing on record to show that the total area covered or held by petitioner exceeds thirty acres.

9. For the aforesaid reason, the writ petition is allowed, the impugned orders dated 28.05.2002 by the Commissioner, Vindhyachal Region, Mirzapur (annexure-12 to the writ petitioner) and the order dated 18.09.2002 passed by the State Government (annexure-16 to the writ petition) are set aside. There shall be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.03.2003

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE K.N. OJHA, J.

Criminal Appeal No. 399 of 1997

Basant Singh and others ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ramdendra Asthana
Sri Anil Srivastava
Sri A.K. Singh

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

Indian Penal code-section 374 – element of doubt-circumstances show that the murder was committed only by Bharat Singh and participation of Basant Singh and Udai Singh by catching hold of Kripal Singh is some what doubtful. As is well know the element of doubt would go in favour of the concerned accused. (Held in Para)

Case Law Referred:

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

1. Both these appeals have been preferred against the same Judgment dated 22.01.1997, passed by learned IX Additional Sessions Judge, Kanpur Nagar, In S.T. No. 1029 of 1996, State vs. Basant Singh and 2 others by which appellants Basant Singh and Udai Singh have been convicted under section 302 read with 34 I.P.C. and appellant Bharat Singh convicted under section 302 I.P.C. and each one of them is sentenced to undergo life imprisonment and a fine of Rs.5,000/- also and in default of payment of fine, further rigorous imprisonment of six months. On realization of fine a sum of Rs.10,000/- is to be given to Smt. Pushpa Devi, widow of deceased Kripal Singh.

2. Appellants Basant Singh and Udai Singh were represented by Sri Ramendra Asthana, Sri Anil Srivastava and Sri Anil Kumar Singh, Advocates, but they did not appear to advance arguments. Sri Amar Saran, Advocate, was appointed amicus curiae for accused Bharat Singh, who is confined in Jail. Sri Amar Saran agreed and argued the appeal for all the three appellants.

3. According to prosecution, deceased Kripal is the son of accused Basant and real brother of accused Bharat Sing. Udai Singh, another accused is real uncle of Kripal Singh, Basant Singh and Udai Singh caught hold of Kripal Singh alias Badshah Singh aged about 28 years, on 27.05.1996 at 9.30 A.M. near the house of Gulab Singh in their village Nasara, police station Narwal, district Kanpur Nagar and Bharat Singh pierced iron bar in the abdomen of Kripal Singh resulting in his instantaneous death. Informant Smt. Pushpa Devi, widow of the deceased, lodged F.I.R. under section 302, 506 I.P.C. bearing crime no. 91/96 at police station Narwal, district Kanpur on the same day at 10.30 A.M. against all the three appellants. The distance of the police station is 2 km. From the place of occurrence.

4. It is alleged in the F.I.R. that Smt. Pushpa Devi has been living with there husband Kripal Singh in her room in the same house in which accused live, which is situated in village Nasara, police station Narwal, district Kanpur Nagar. Basant Singh accused, father of the deceased, did not give share of deceased to him in landed property. When deceased insisted, threatening was given to get him killed. On 27.05.1996 at about 9.30 P.M. when Kripal Singh was going to Kanpur Nagar to attended his duty, as he was in private service, and reached near the house of Gulab Singh, Basant Singh and Udai Singh caught hold of him and Bharat Singh stabbed iron bar in his stomach, resulting in his instantaneous death. Post-mortem examination on the dead body of Kripal Singh aged about 28 years was done in the mortuary of Kanpur Nagar on 28.05.1996 at 11.30 A.M. and following ante-mortem injury was found:

1. Punctured wound 1 cm. x 1 cm. x abdominal cavity deep 12 cm below right nipple.

5. At the time of post-mortem examination rigor mortis passed off from both extremities. Eyes were closed. Peritoneum was punctured on right side. In abdominal cavity 1.5 litre blood was present. In stomach 4 ounce fluid was present. Small intestine contained half of full gases and big intestines contained hall full faucal matter. Death was due to shock and hemorrhage as a result of ante mortem injury.

6. Chick Report was prepared by P.W.1 constable Hanuman Prasad, investigation was started by P.W.5 Hoti Lal Verma who prepared inquest report, site-plan and recovery memo of iron bar, which was recovered from the possession of appellant Bharat Singh. The recovery of memo in Ext. Ka-11. The recovery is said to have been made from the place near Balika Vidyalaya, Narwal. Rest investigation was completed by P.W.6 police sub-inspector Babu Singh, who recorded the statement of eye-witnesses P.W.3 Smt. Pushpa Devi and P.W.4 Chhanga Singh. Iron bar, pant, shirt, underwear, shoe and trousers of the deceased were sent to chemical examiner, on which human blood was found. After charge sheet was submitted, the case was committed to the Court of Session and the charge was framed by learned IX Addl. Sessions Judge against Basant Singh and Udai Singh under Section 302 I.P.C. read with section 34 I.P.C. and against Bharat Singh under Section 302 I.P.C.

7. Prosecution examined P.W.1 constable Hanuman Prasad, who prepared chick report, P.W.2 Dr. Y.K. Nigam, who performed autopsy on the dead body of Kripal Singh, eye witnesses P.W.3 Smt. Pushpa Devi and P.W. 4 Chhanga Singh, P.W.5 Sub-inspector Hoti Lal Verma and P.W.6 Babu Singh. The last two were investigating officers.

8. The accused denied their participation in the crime. It was alleged the Basant Singh is the father of the deceased Kripal Singh. He was sitting at his betel shop in village Bhagawan Khere which is at a distance of 2 Km. From his village Nasara where he was told at 8.00 A.M. that two unknown persons had committed murder of Kripal Singh. The case of Udai Singh is that he was admitted in a nursing home in Lal Bunglow of city Kanpur Nagar and the injuries were caused by two unknown person in village Nasara, police station Narwal, district Kanpur Dehat on 27.05.1996 at 10.30 P.M. it is also alleged that the appellants have been falsely implicated in the crime by Smt. Pushpa Devi and her father. It is further alleged that Smt. Pushpa Devi and Chhanga Singh witnesses were not present in village Nasara at the time of the occurrence.

9. When none appeared for the appellants Basant Singh and Udai Singh, Sri Amar Saran, amicus curiae, was permitted to argue the case for them also. Arguments of Sri Amar Saran, amicus curiae and learned A.G.A. have been heard and the judgment is being delivered on merits.

10. Two eye-witnesses have been examined in this case. They are P.W.1 Smt. Pushpa Devi, widow of Kripal Singh and P.W.4 Chhanga Singh, father of Smt. Pushpa Devi, who was resident of district Fatehpur and was present in the village of Smt. Pushpa Devi, as there was some dispute of property. These witnesses have made consistent statement that the share of Kripal Singh was not being given in the

landed property by the accused persons. Therefore, dispute did take place. Deceased and the appellants were living in the same house in different rooms in village Nasara, police station Narwal, district Kanpur Nagar. Chhabboo Singh and Chandra Pal Singh alias Gola Singh were two brothers. Chhabboo Singh has two sons Basant Singh and Udai Singh, who are accused. Basant Singh had three sons, Bharat Singh, Kripal Singh and Baljit. Smt. Pushpa, informant is the wife of Kripal Singh. Chandra Pal Singh had no son. Kripal Singh used to live with him. Witnesses have stated that Chandra Pal Singh had assured to given his landed property to Kripal Singh. Kripal Singh was demanding his share in the house and landed property of Chhabboo Singh to which appellants did not agree. Udai Singh used to say that he had purchased the property of Chandra Pal Singh also. Panchayat was also earlier called for due to this dispute. On 27.05.1996 at 9.30 A.M., when Kripal Singh, who was employed at a private shop in Kanpur Nagar, was going out of his village. His wife and others also were at some distance from him. When he reached the house of Gulab Singh of the same village, Basant Singh and Udai Singh caught hold of him and Bharat Singh pierced iron bar in the stomach of Kripal Singh, who died on the spot. The occurrence is said to have been witnesses by P.W.1 Smt. Pushpa Devi and P.W.4 Chhanga Singh, her father. The occurrence is of broad day light. The investigating officer P.W.5 Hoti Lal Verma, police sub-inspector reached the spot on the same day, prepared site-plan inquest report. Thus, we subscribe to the view of the learned Sessions Judge that murder of Kripal Singh was committed in village Nasara, police station narwal, district Kanpur Nagar on 27.05.1996 at 9.30 A.M. as the fact of death, time and place is not disputed by the appellants and there is sufficient evidence to prove the fact. The dead body of Kripal Singh was recovered from the place of the occurrence.

11. The learned counsel for the appellants submitted that F.I.R. is too prompt. The police Station is at a distance of two km. from the scene of occurrence. Both eye-witnesses were present on the spot. The occurrence is of broad day light. The real culprits were seen by Smt. Pushpa Devi. Therefore, there was no confusion as to who caused the injury. In these circumstances, she got the F.I.R. lodged at the police station, which is at a distance of 2 km. from the place of occurrence. The learned Sessions Judge has rightly held that the F.I.R. is not too prompt and it does not suffer from any deliberation and consultation.

12. Learned counsel for the appellant submits that the investigating officer did not find blood on the earth. It means, murder of Kripal Singh was not committed near the house of Gulab Singh, Iron rod, pant, shirt and underwear was sent to scientific laboratory Manager, Lucknow and the opinion was received that these exhibits contained human blood. The dead body of Kripal Singh was lying near the house of Gulab Singh and 1½ litre blood was found in his stomach. It means the blood was collected inside the body and in such circumstance, if the blood was not found on the earth, it does not mean that murder was committed at some other place.

13. The next argument advanced by the learned counsel for the appellants is that if Smt. Pushpa Devi, widow of Kripal

Singh would have been at the place where injury was caused, accused persons would have caused injury to her also. A perusal of the record shows that it was deceased Kripal Singh who demanded the share in the land and house. The problem was from Kripal Singh and not from his wife Smt. Pushpa Devi. In such circumstance, it is not unnatural that injury was caused by Bharat Singh to Kripal Singh and not to Smt. Pushpa Devi, who was empty handed at the spot and could not offer any meaningful resistance to him.

14. It is further submitted by the learned defence counsel that two sisters of Smt. Pushpa Devi are married in the same village. She used to frequently visit the residences of her sisters due to which her husband Kripal Singh was not satisfied and, therefore, it may be that he would have committed suicide. If such plea is taken by the defence, burden is on the accused to prove it. There is nothing in the evidence to show that there was any dispute between Kripal Singh and his wife Smt. Pushpa Devi in this matter. Therefore, this plea is also devoid of force. Besides it, a person commits suicide by hanging himself from a fan or iron rod or by lying on railway track of subjecting himself to electric shock and likewise, then it may sound to be probable, but it does not appear natural that a person will pierce iron rod in his chest to commit suicide, because the moment he will pierce the iron rod in his chest, he will feel unbearable pain due to such attempt and is such circumstance he will not be successful in committing suicide. Hence also, it cannot be believed that Kripal Singh committed suicide.

15. Learned defence counsel has further submitted that P.W.4 Chhanga Singh, father of Smt. Pushpa Devi is resident of district Fatehpur and there was no occasion for his presence on the spot. There was dispute of property and Chhanga Singh is relative of Smt. Pushpa Devi being her father. In such circumstance, if he had gone to the residence of Kripal Singh and was present at the time of the occurrence, the statement of P.W.4 Chhanga Singh cannot be disbelieved on the ground that he could not be present there. If Chhanga Singh would not have been present there, he would not have made detailed reply of the questions asked in cross-examination. He cannot be disbelieved only because he is the relative being the father of the wife of the deceased, he having firmly withstood the test of cross-examination.

16. Learned counsel for the defence further submits that iron rod is said to have been recovered near the wall of Government Girls College, Narwal. It is submitted that if a person uses an iron rod, he will throw it away rather than he will keep it with himself. When a person was in anger and he committed murder, he was chased immediately by the police and on the same day if he was arrested and iron bar was recovered, there is nothing unnatural in it.

17. Learned defence counsel has further submitted that there is no independent witness of the occurrence. It is noteworthy that the occurrence did take place in the same family and no person of the village likes to involve himself in such dispute, where there are chance that such family members may get the matter compromised and such witness will be inimical to the whole family. The statement of Smt. Pushpa Devi cannot be

disbelieved. She was aged about 24 years when her husband was murdered.

18. She lives in one room of the same house where accused live. Her husband died and she is all alone. She has to live in the same society. It cannot be believed that in order to harass the accused persons, she has falsely lodged the F.I.R.

19. Learned counsel for the defence has further relied on medical jurisprudence by Dr. J.P. Modi in which Dr. Modi has expressed opinion that hair becomes loose within 48 to 72 hours after death. In instant case the occurrence is said to have taken place on 27.05.1996 and the post-mortem examination of the dead body of Kripal Singh was done on 28.05.1996 at 11.30 A.M. It means the murder was committed about one day before. Dr. Modi has written in his medical jurisprudence that it is impossible to give exact time when putrefactive process develops in a dead body because such process is only a sign of death. It is a slow process and it differs according to climatic conditions of the place. Besides it, P.W.2 Dr. Y.K. Nigam, who performed autopsy on the dead body of Kripal Singh, has himself written in post-mortem examination report that according to signs of the body, death had taken place about one and a half day before. There may be some marginal error also about time. In such circumstance, if the death did take place one day before and there being no science which may exactly fix the time of death with specific details in minute and second, the time of murder cannot be doubted and there is nothing inconsistent in the F.I.R., post-mortem examination report and statement of witnesses in respect of time of death of Kripal Singh.

20. In this case, Kripal Singh deceased is the son of accused Basant Singh, Udai Singh his uncle and Bharat Singh is brother. According to prosecution, Basant Singh and Udai Singh caught hold of Kripal Singh and Bharat Singh pierced iron bar in his chest, resulting into his instantaneous death. It does not appear natural that the whole family was so much annoyed with the conduct of Kripal Singh that father and uncle cauther hold of him and real brother pierced iron bar in his chest. Kripal Singh had not caused any injury to his father and uncle, which would have irritated them for catching hold of Kripal Singh. Beside it, if anger or plan to commit murder of Kripal Singh would have been such that Basant Singh and Udai Singh caught hold of him, not only one injury would have been caused by Bharat Singh to Kripal Singh, but so many injuries would have been caused so that it could be assured that his death had taken place. Bharat Singh in his brother. He pierced iron bar into his chest. It means he had intention to commit murder and he was known that by piercing iron bar into vital part of the body like chest, death was imminent.

21. Thus, circumstances show that the murder was committed only by Bharat Singh and participation of Basant Singh and Udai Singh by catching hold of Kripal Singh is some what doubtful. As is well known, the element of doubt would go in favour of the concerned accused.

22. In view of above discussion, we arrive at the conclusion that the charges are not proved against Basant Singh and Udai Singh but the charge under section 302 I.P.C. is proved against Bharat Singh. Hence the appeal partly succeeds.

23. The appeal is partly allowed and the order of conviction and sentence passed against Basant Singh and Udai Singh under Section 302 read with Section 34 I.P.C. are set aside and they are acquitted from the charges. The appeal preferred by Bharat Singh is dismissed. Learned Additional Sessions Judge has sentenced him to undergo life imprisonment and a fine of Rs.5,000/- has been imposed on him and in default of payment of fine further rigorous imprisonment of six months has been awarded. In case of deposit of fine of Rs.5,000/- whole of it would be given to Smt. Pushpa Devi, widow of deceased Kripal Singh.

24. As per the record, accused Bharat Singh is in Jail, he will serve out the sentence passed against him. Chief Metropolitan Magistrate, Kanpur Nagar shall verify from jail that accused Bharat Singh actually lodged in jail in connection with this case. If, he is enjoying his liberty, he shall be arrested and lodged in jail to serve out sentence.

25. Let a copy of this judgement and order alongwith record of the case be sent to the lower court for necessary action and compliance under intimation to this Court within two months from the date of receipt of the copy of this judgment.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 24034 of 1995

Tahir Hasan ...Petitioner
Versus
Committee of Management, District Co-operative Bank Ltd. Muzaffarnagar and another ...Respondents

Counsel for the Petitioner:
Sri R.K. Jain
Sri Rahul Jain

Counsel for the Respondents:
Sri M.S. Negi
S.C.

U.P. Cooperative Societies Employees Service Regulation 1975- Regulation 5 (a) (b) Regularisation- Petitioner engaged to work as class 4th employees for different times on different post w.e.f. 16.3.89 filing representations-can not be ground for exemption from limitation- if the appointment approved by Cooperative Institutional Board- detail guidelines given for framing scheme for regulation.

Held- Para 19 printed

Case law discussed:
1997 (4) SC-391, AIR 1992 SC-2130
2001 (i) ESC-65

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

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

2. The petitioner is an under graduate and passed Intermediate (Class XII) examination. He applied for the post

of Class IV in the District Co-operative Bank Ltd., Muzaffarnagar. On 16.3.89, he was called for an interview and was selected as a water boy. An appointment letter dated 9.5.89 was issued to him, which is appended as Annexure-2 to this petition. He was employed for a period of 90 days. The petitioner joined his duties on 2.6.89 as a watch-boy in the Bank at the rate of Rs.30/- per day. His services as a daily rated workman was terminated on 16.8.89, vide annexure-4 to the petition.

3. The petitioner was again appointed on 2.11.89 as a daily wage employee for a specified period of 90 days and his services came to an end on 29.1.90.

4. On 7.2.90, the petitioner was appointed yet for another period of 90 days, for sweeping work at the head office vide letter dated 3.5.90. Thereafter, he was not given any appointment. Thus, in a span of one year, he was employed for 204 days.

5. It has been submitted by the learned counsel for the petitioner that there are 86 sanctioned posts of the class IV employees but only 66 persons are working against these sanctioned posts. The remaining 20 sanctioned posts are still lying vacant in the Bank. It is alleged that the work on these posts is being taken from the daily wage employees, like the petitioner with artificial breaks in service.

6. Learned counsel for the petitioner has invited the attention of the court relating to paragraphs 14 and 16 of the writ petition in which it has been stated that the opposite party has been making fresh appointments for few months and terminates the services of the daily wage employees, like the petitioner.

7. It has been further submitted that a large number of writ petitions have been filed before this Court and the orders passed in one of the writ petition viz. writ petition no.1673/93 is being quoted hereunder:

"Issue notice.

In case the posts are available and juniors to the petitioners are working and the conduct of the petitioners are alright, then the petitioners will be allowed to continue on the post held by them and they shall be paid their salaries."

8. From perusal of the record, it appears that the appointment of the petitioner from time to time was for a specific period according to the exigency of work.

9. The interim order as relied on by the petitioner is of no help to him and the Court has clearly indicated while passing the order that the petitioner may be allowed to continue on the following contingencies:

(i) If posts are available, and

(ii) Juniors to the petitioners are working,

(iii) Conduct of the petitioners are alright.

10. It is the settled law that it is the employers' prerogative to fill-up the post which has fallen vacant. The employer has right to determine the strength of workforce in the establishments. If the employer makes appointment for a specific period due to exigency of work

then the regularization on the post cannot be claimed as a matter or right.

11. It appears from the record that the petitioner was appointed thrice for different types of work for a specific period and did not approach the court at the relevant time for relief. On the contrary he filed representations dated 1.1.91, 16.2.92, 13.7.92, 7.11.93, 11.5.94 and 5.1.95. It cannot be presumed that filing of the representation will extend the period of limitation, if the relief is not claimed within the reasonable time.

12. The stand taken by the respondents is that the petitioner has no right on the post of daily wage employees as all the appointments had been made under Regulation 5 (11) (b) of the U.P. Co-operative Societies Employees Service Regulations, 1975.

13. Regulation 5 (11) (b) provides that an adhoc appointment can be made only for a maximum period of six months. The appointments have to be approved by the U.P. Co-operative Institutional Service Board. The petitioner's appointment has never been approved by the Board. It is stated on behalf of the Bank that there are no vacancy of Class IV employee in the Bank and all the employees are working against 86 vacancies, which was sanctioned for the Bank.

14. It has further been denied by the counsel appearing for the Bank that petitioner has not completed 240 days of continuous service in a year and no fresh appointment has been made. A daily wage employee has no right to the post and if there is a vacancy, then that should be filled in accordance with law.

15. Reliance has been placed in the case reported in 1997 (IV) S.C. 391- **Himanshu Kumar Vidyarthi and others Vs. State of Bihar and others** in which it has been held:

"The petitioners who were appointed on daily wages as Assistant Driver and peon in Co-operative Training Institute under the State Government, were terminated from service. They contended that they were retrenched from service in violation of Section 25-F of the Industrial Disputes Act, 1947.

Rejecting this contention,

Held:- Every department of the Government be treated to be industry. When the appointments are required by the Statutory rules, the concept of industry to that extent stands excluded. The petitioners were not appointed to the posts on the basis of need of the work. They are temporary employees working on daily wages. Their disengagement from service cannot be construed to be retrenchment under the Industrial Disputes Act. The concept of retrenchment therefore cannot be stretched to such an extent as to cover these employees. Since the petitioners are only daily wage employees and have no right to the posts, their disengagement is not arbitrary."

16. In these circumstances, it would be proper to frame a scheme for the regularization/absorption of daily wage employees in the sense. The Apex Court in the case of ***State of Haryana and others Vs. Piare Singh and others,*** 1992 S.C. 2130 and ***Niadar and others Vs. Delhi Administration and others***, has

held that Scheme should be framed for regularization of daily wage employees.

17. These decisions aforesaid have been approved by the Supreme Court in the case of ***Hindustan Machine Tools Vs. M. Ranga Reddy*** 2001 (1) ESC 65.

18. I therefore, dispose of the writ petition in view of the Articles 38(1),19(e) and 43 of the Constitution with the following directions:

(i) Respondents will prepare a list of all daily wages, adhoc employees and casual employees, employed after 1.1.89, who are still in the employment on the date of this judgment.

(ii) The list will also include those employees whose case regarding termination are pending before the High Court, Labour Court or Civil Court.

(iii) The seniority list will be prepared from the initial date of appointment of the employees.

(iv) No further daily wage, adhoc or casual/ temporary employee shall be appointed/engaged henceforth till the list is exhausted.

(v) The list prepared as above will be sent to the Service Institutional Board for approval within three months from the date of this judgment.

(vi) On approval of employees they shall be regularised against the existing sanctioned posts strictly according to seniority in existing vacancies and in future as and when vacancies arise.

(vii) The employees shall be appointed keeping in view the eligibility criteria's and medical fitness, and post conduct of the employees.

19. The petitioner's service having not been approved by the Service Institutional Board, is not liable to be regularised in service. However, his case for appointment in the Bank may be considered according to the scheme given by this Court above or any other scheme of regularization which has been adopted by the Board along with other daily wage employees.

20. In view of the aforesaid observations and reasons, the petition is dismissed.

No order as to costs.

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

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 17727 of 1985

U.P. State Electricity Board, and others
...Petitioners
Versus
The Presiding Officer and another
...Respondents

Counsel for the Petitioners:
Sri Sudhir Chandra
Sri B.P. Singh
Sri Sudhir Agarwal
Sri B. Dayal
Sri Tarun Agarwal
Sri V. Sahai

Counsel for the Respondents:
Sri K.P. Agarwal

Sri A.K. Sinha
S.C.

Industrial Dispute Act-section 6-N-the termination of the workman concerned – without compliance of the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947, which is pari materia to section 25-F of the aforesaid Act termination order was rightly quashed by the tribunal.

Case Law referred:
1985 LAB I.C. 1806, AIR 1965, Calcutta 166
AIR 1960 SC 610, AIR 1976 SC Page 1111
AIR 1960 SC P-600

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

1. The petitioners-employers U.P. State Electricity Board by means of present writ petition under Article 226 of the Constitution of India, have challenged the award of the Industrial Tribunal (1), U.P., at Allahabad, *here-in-after referred to as the 'Tribunal'*, dated 9th August, 1985, copy whereof has been annexed as Annexure-1 to the writ petition.

2. The facts leading to the filing of present writ petition are that the contesting respondent-workman, namely, Mohd. Jameel was employed with the employers, as would be clear from the narration of fact and the written statement filed by the parties and referred to by the Tribunal in the award, which reveals that "the workman concerned Mohd. Jameel was employed as Pump Operator-cum-electrician with the employers w.e.f. 1st June, 1977. The services of the workman concerned were wrongfully terminated by the employers on 1st February, 1979. The workman through the respective union raised an industrial dispute, which was referred to the Industrial Tribunal, Allahabad and was registered by the Tribunal as adjudication case No. 168 of 1980. The Tribunal vide its award dated 17th August, 1981, published on 3rd October, 1981 held that the termination of the workman concerned Mohd. Jameel from service by the employers was illegal. The tribunal directed for re-instatement with continuity of service and back wages for the workman. The workman concerned thereafter moved an application that under Section 6-E of the U.P. Industrial Disputes Act, 1947, *hereinafter referred to as the 'Act'*, the second issue referred to has not been decided. For disposal of the case, it would be convenient to peruse the reference that has been made by the State Government under section 4-K of the Act, which runs as under:

1."क्या सेवायोजकों द्वारा अपने श्रमिक मोहम्मद जमील पुत्र श्री शहामत उल्ला पम्प आपरेटर-कम-इलेक्ट्रीशयन की सेवाएं दिनाँक 19.6.84 से समाप्त किया जा उचित तथा/अथवा वैधानिक है? यदि नही तो; संबंधित श्रमिक क्या लाभ/अनुतोष (रिलीफ) पाने का अधिकारी है तथा अन्य किस विवरण के साथ?"

2. "यदि वाद समस्या1 श्रमिक के पक्ष में निर्णित होती है तो क्या संबंधित श्रमिक को स्थायी घोषित किया जाना चाहिये? यदि हाँ तो, किसी तिथि से तथा अन्य किसी विवरण सहित ?"

3. As already stated, when the services of the workman concerned were terminated w.e.f. 1st February, 1979, a dispute was raised which has been answered in favour of the workman for re-instatement with continuity of service and back wages. The Tribunal directed for re-instatement vide its award dated 17th August, 1981. Pursuance to the aforesaid award, the employers re-instated the workmen and started paying Rs.10/- per day, as according to the employers the workmen was employed on daily wage

basis. In this circumstances, the second issue, which was referred to by the State Government for adjudication, the Tribunal has answered both the issues in favour of the workman by the award impugned in the present petition holding that the termination of the services of the concerned workman w.e.f. 1st February, 1979 were illegal, inasmuch as the provision of Section 6-N of the Act, which is para materia of Section 25-F of the Industrial Disputes Act, 1947, have not been complied with. The Tribunal has also directed reinstatement of the workman with continuity of service and back wages. With regard to the second issue, the Tribunal have directed that the workman is in continuous service since 1977 and has put in more than eight years till 19th June, 1984. The Tribunal has recorded finding that indeed is too long a period to keep a workman employed on causal/daily wage basis, which is the connotation of muster-roll employees and therefore the Tribunal have directed the employers to consider seriously the possibility of the absorbing the workman concerned on regular basis. Learned counsel for the petitioners-employers have raised the argument that a perusal of the order of termination dated 19th June, 1984, Annexure-2 to the writ petitioner, clearly demonstrates that the order purports to comply with all requirements of Section 6-N/Section 25-F of the Act, as according to the petitioners' counsel, it is not necessary that that the amount as contemplated under Section 6-N/25-F of the Act must be paid at the time of the retrenchment, but if the order contemplates the offer to collect the amount contemplated under Section 25-F of the Act, it is the substantial compliance of the said provision and the Tribunal has erred in holding otherwise. A perusal of the termination order dated 19th June, 1984 clearly demonstrates that it purports to terminate the services of the workman and informs the workman concerned that he may collect the retrenchment compensation and wages for one month's notice. This, according to the learned counsel for the petitioners, amount to substantial compliance and nothing further is required to be complied with, particularly when there is a report of the peon that when the notice was offered to the workman concerned, he refused to accept the same and told the peon that the same may be sent to his home address, which was admittedly sent after two days i.e. 21st June 1984; whereas, as per notice Annexure-2 to the writ petition, the services of the workman stand terminated w.e.f. 19th June, 1984. Curiously and particularly in the teeth of the denial by the workman concerned that the order of termination was never offered to him and that he never denied to received the same. The workman also denied that he received the registered letter, which was sent to his home address after three days and he came to know with regard to the termination of his services only when he came to office for collecting the wages at the end of the month. The employers have not produced the person, who was scribe of the report, whereby report has been submitted that with regard to the service of the order of termination dated 19th June, 1984 to the effect that the workman has refused to accept the same. The Tribunal has further dealt with the working and the calculation etc. of the retrenchment compensation on the account slip and have arrived at the conclusion that the same has admittedly been done after the termination of the services of the workman w.e.f. 19th June, 1984. Learned counsel for the petitioner

has not disputed, not challenged the findings recorded by the Tribunal on this account. He thereafter insisted upon that since substantial compliance have been done with regard to Section 6-N/25-F of the Act, the view taken by the Tribunal to the contrary i.e. Sections 6-N/25-F have not been complied with, deserves to be set aside. Learned counsel for the petitioners has relied upon a decision report in **1985 LAB.I.C., 1806-** ***Management of Ramesh Hydromachs Vs.*** **The Presiding Officer, Labour Court, Hubli and another**. The another decision relied upon by the petitioner's counsel is report in **AIR 1965 CALCUTTA 166- B.N. Elias and Col. Priate Ltd. Vs. Fifth Industrial Tribunal of West Bengal and others** in support of this contention.

4. Sri K.P. Agarwal, learned Senior Counsel appearing on behalf of the workman concerned has relied upon a decision of the apex court, report in ***AIR 1960 supreme Court 610, The State of Bombay and others Versus the Hospital Mazdoor Sabha and others,*** which is a judgment of three Judges Bench. The apex Court has held:

"***On a plain reading of Section 25F(b) which is pari materia of Section 6-N of U.P. Industrial Disputes Act, it is clear that the requirement prescribed by is a condition precedent for the retrenchment of the workman. The section provides that workman shall be retrenched until the condition in question has been satisfied. It is difficult to accede to the argument that when the section imposes in mandatory terms a condition precedent, non-compliance with the said condition would not render the impugned retrenchment invalid. Therefore, we see no substance in the argument that the court of appeal has misconstrued Section 25 F(b). That being so, failure to comply with the said provision renders the impugned order invalid and inoperative."***

5. The next decision relied upon by Sri Agarwal is reported in ***AIR 1976 S.C. Page 1111, The State Bank of India Versus Shri N. Sundara Money***, which is equivalent to ***1976 (Vol. 32), F.L.R. 197 – State Bank of India Versus Shri N. Sundara Money,*** wherein the apex Court has approved the judgment reported in ***AIR 1960 SC page 600,*** The Apex Court has held as under:

"Without further ado, we reach the conclusion that if the workmen swims into the harbour of Section 25-F, he cannot be retrenched without payment, at the time of retrenchment, compensation computed as prescribed therein read with Section 25-B(2). But argues the appellant, all these obligation flow only out of retrenchment, not termination outside that species of snapping employment. What, then, is retrenchment? The key to this vexed question is to be found in S.2(00), which reads thus:

"2(00) "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 the employment between

the employer and the workman concerned contains a stipulation in that behalf; or
(c) Termination of the service of a workman on the ground of continued ill-health."

6. In view of the law laid down by the apex Court, referred to above, the finding s recorded by the Tribunal that the termination of the workman concerned, in the present case, has been done without compliance of the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947, which is pari materia to Section 25-F of the aforesaid Act, do not warrant any interference by means of this writ petition.

7. In view of what has been stated above, this writ petition is devoid of any merits and is accordingly dismissed. The interim order, if any, stand vacated. However, the parties shall bear their own cost.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.1.2003

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

Civil Misc. Writ Petition No. 10866 of 2002

Sujeet Kumar Singh and others
...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Sri Anupam Kumar

Counsel for the Respondents:
Sri Tarun Varma
Sri Amit Sthalekar
Sri Govind Saran

Constitution of India- Article 226- temporary employees have no right to the post and they can have no grievance as their appointments are only temporary- At the most the petitioners could have been given preference, had they also applied for screening or had participated in the selection process which they have not done.

Held -para 11

It is an admitted fact that the petitioners are only substitutes and they were appointed on temporary basis till the regular appointments were made by R.R.B., Allahabad. Since they did not participate in the selection process they cannot challenge the process of selection.

Case law referred:
(1998) 6 SCC-619, (1980) 2 SCC-593
(1997) 2 SCC-1, AIR 2000 SC-1401
AIR 2001 SC-102

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

1. Heard learned counsel for the parties.

2. The petitioners have filed this writ petition challenging the impugned orders of their termination of service dated 8.3.2002 Annexure-2a, 2-b and 2-c to the writ petition passed subsequent to the judgment of the Central Administrative Tribunal, Allahabad dated 05.03.2002, Annexure-1 to the writ petition. The petitioners have also sought a direction in the nature of mandamus commanding the respondents to consider the case of their absorption/regularization against existing vacancies in different regions in accordance with the Rules and master Circular issued by the Railway Board dated 29.01.1991 and thereafter the

remaining seats may be filled up out of the selected candidates.

3. The brief facts of the case are that three vacancies of Pharmacist in Grade-III in the scale of Rs.4500-7000 and one post of Radiographer in the scale of Rs. 4500-7000 in the non-gazetted cadre of para-medical category, in Diesel Locomotive Works, hospital were required to be filled in by the administration in the beginning of the year 1998. According to the Rules laid down in Rule 109 read with Rule 162 and 164 of Indian Railways Establishment Manual. Volume-I, 1989 edition, the above vacancies were to be filled by direct recruitment through Railway Recruitment Board (hereinafter referred to as RRB). Accordingly, indents in two phases for recruitment of one post of pharmacist and one post of radiographer were sent to RRB. Allahabad vide letter no. 27/5/56 E/Med/Part-IX dated 15.01.98 and another indent for 2 posts of pharmacist Grade-III Rs. 4500-7000 was placed on RRB vide letter no. 27/5/56 E/Med/Part-IX dated 26.02.98. Thus the total indents were for 3 posts of Pharmacist and 1 post of radiographer. Copies of the aforesaid letters dated 15.01.98 and 26.02.98 are Annexure-CA-1 and CA-2 respectively. In view of the time factor and delay in getting the selected candidate from RRB/ Allahabad, and difficulty in managing the increased work load in D.L.W. hospital, it was decided by the competent authority to engage substitute employees as a temporary measures against the above posts till regularly selected candidates become available.

4. Petitioner nos. 1 Sujeet Kumar Singh and petitioner no. 2 Anand Kumar Mishra were informed about the terms and conditions of service by means of letter dated 24.12.98 specifically stating that they could be offered temporary employment on daily wages for a period of three months or till the directly selected candidates for the post are available after selection by the RRB, Allahabad only if these conditions were acceptable to them. Petitioner no. 3 was also offered employment as substitute Radiographer for a period of three months or till regularly selected candidates on the same terms. Relevant paras 1,3 and 10 of letter dated 24.12.98 appointing them as substitutes are being quoted below:

"मैं आपको वे०मा० रू०४५००-७००० (आर०एस०आर०पी०) में रू० ४५००/- प्रतिमाह वेतन एवं वर्तमान नियमों के अनुसार देय भत्तों के साथ कार्यभार ग्रहण करने की तिथि से तीन महीने के लिए एवजी फार्मासिस्ट-।।। पद के लिए तैयार हूँ । आप स्वास्थ्य परीक्षा के लिये रू०२४/- भी साथ लायें ।"

आपकी यह सेवा किसी भी पक्ष द्वारा एक माह की सूचना देकर समाप्त की जा सकती है । यह भली भाँति समझ लें कि यदि आपको सेवायें रेल भर्ती परिषद, इलाहाबाद द्वारा चयनित अभ्यर्थियों के उपलब्ध होने या जिस अवधि के लिए आपको रखा गया है, के समाप्त होने या आपको शारीरिक दृष्टि से अयोग्य पाये जाने पर समाप्त की जाती है, तो आपको किसी की सूचना देना आवश्यक नहीं होगा ।"

आपको स्पष्ट रूप से यह समझ लेना चाहिए कि आपको पूर्णतया अस्थायी तौर पर रखा जा रहा है और रेल भर्ती परिषद, इलाहाबाद द्वारा चयनित अभ्यर्थियों के उपलब्ध होते ही उपरोक्त पैरा-२ के अनुसार आपकी सेवा स्वतः समाप्त हो जायेगी ।"

5. On acceptance of the above conditions petitioner nos. 1,2 and 3 were given appointments vide appointment letters dated 12.01.99. The appointment letters of all the three petitioners are in the same language and are annexed as

Annexures-3(a), 3(b) and 3(c) to the writ petition. One such letter appointing the petitioners in terms of letter dated 24.12.98 as substitutes is quoted below:

"भारतीय रेल
डी०रे०का०/ वाराणसी
कार्यालय महा प्रबन्धक (कार्मिक)
दिनाँक १२.१.९९
सं०-डी०एस०डबलू/पी/२७/५/५६ ई(मेड)/भाग-१
दिनाँक १२-१-९९
श्री आनन्द कुमार मिश्र
क्रम सं० ११८५६
आत्मज श्री बृजनाथ मिश्र

विषयः वेतनमान रू०४५००-७००० (पु०वे०) में एवजी फार्मासिस्ट के रूप में नियुक्त ।

इस कार्यालय के दिनाँक २४-१२-९८ के समसंख्यक पत्र को आप द्वारा स्वीकृति मिलने पर आपको एवजी फार्मासिस्ट के रूप में नियुक्त की जाती है और ग्रे० रू०४५००-७००० में रू०४५/- प्रतिमाह वेतन दर नियमानुसार स्वीकार्य सामान्य भत्ते पर मुख्य चिकित्सा अधीक्षक डीजल रेल इंजन कारखाना, वाराणसी के अधीन तैनात किया जाता है ।

जिस दिन से आप मुख्य चिकित्सा अधीक्षक डीजल रेल इंजन कारखाना वाराणसी के यहाँ ड्यूटी पर ज्वाइन करेंगे उसी दिन से आप अपना वेतन पायेंगे ।

ह०/अस्पष्ट
१२-१-९९
वरिष्ठ कार्मिक अधिकारी
डी०रे०का०, वाराणसी ।

प्रतिलिपि मुख्य चिकित्सा अधीक्षक डीजल रेल इंजन कारखाना, वाराणसी की सेवा में सूचनार्थ एवं आवश्यक कार्यवाही के लिए प्रेषित । वे सूचना इस कार्यालय को उपयुक्त व्यक्ति के ड्यूटी पर ज्वाइन करने की तारीख सूचित करेंगे। कृपया नीचे दिये हुए फार्म को पढ़ लें और अपने यहाँ उपर्युक्त उम्मीदवार से ड्यूटी पर ज्वाइन करने की तारीख की सूचना देने के लिए इसका उपयोग करें ।

कृते महा प्रबन्धक (कार्मिक)"

6. Since a panel of two pharmacists and one Radiographer of directly selected candidates was yet to be received, the services of the petitioners were continued as substitutes in terms of the conditions of appointment laid down in their letters of appointment as substitutes read with the provisions contained in Note-2 under para 3 of the Railway Board's Master Circular dated 29.1.91.

7. According to the provisions contained para 4.4 of the above Railway Board's Master Circular dated 29.1.1991, a substitute on conferment of temporary status does not become entitled for automatic absorption/appointment in Railway Service unless they are appointed through selection or are absorbed after screening by the Screening Committee.

8. It is contended by the counsel for the petitioners that they were appointed as substitutes on the posts of Pharmacist Grade-III and Radiographer vide appointment order dated 12.1.1999. All the three petitioners were awarded temporary status w.e.f. 13.5.1999 vide order dated 28.10.1999. The claim of the petitioners is that in terms of para 5 of the Master Circular of the Railway Board No. 20/91 dated 29.01.1991, they should have been screened for regular appointment without advertising these posts and as such the procedure adopted by the Railway in advertising these posts is violative of the instructions laid down in the above circular which is liable to be struck down.

9. Action for filling up the posts of pharmacist and radiographer was taken in accordance with the rules in January and February, 1998 in two phases, whereas,

the applicants were engaged as substitutes in January, 1999 i.e. after one year with a clear stipulation that as and when regularly selected candidates from RRB become available, their services will be terminated. Thus their claim is barred by the instant rules and law of estoppel as has been upheld by this Court vide order dated 12.07.85 in Civil Misc. Writ Petition No. 3958 of 1985, U.N. Singh Vs. Union of India & others. A true copy of the order of this Court dated 12.07.98 has been annexed along with counter affidavit as Annexure-CA-4 to the counter affidavit. The cases of substitutes, who are engaged in Group-D category and have rendered a long period of service as substitutes, are considered for absorption by a Screening committee against regular vacancies of Group-D when such regular vacancies become available. But in cases of substitutes engaged in Group C category, who have worked for a longer period (generally more than 3-4 years), information in respect of them is furnished to the Railway board for taking decision regarding them.

10. The counsel for the respondents submits that the indents for recruitment of pharmacists and Radiographer were placed on RRB, Allahabad one year before the engagement of the petitioners as substitutes. The number of posts indented were published by RRB Allahabad in Employment Notice no. 1/99 dated 04.09.99 in Employment News. The applicants could have applied and faced selection for regularization, as opportunity was available to them at the relevant time but it appears that they did not avail such opportunity. It is further submitted that as regards their claim for absorption by the Screening Committee against regular vacancy of group C and D, the petitioners did not apply for screening when these vacancies became available and that in any case a substitute has no right to regularization automatically. Unless the rules provide for such automatic regularization or absorption, which is not there in the instant case.

11. It is an admitted fact that the petitioners are only substitutes and they were appointed on temporary basis till the regular appointments were made by R.R.B., Allahabad. Since they did not participate in the selection process they cannot challenge the process of selection. The petitioners have been appointed on 12.01.99 pursuant to letter dated 24.12.98 Annexure-CA-3 in which it has been clearly laid down that the appointment is only till the duly selected candidates are available to the Railway Recruitment Board. Para 5 of the Master Circular provides that substitutes and temporary employees may be screened by the Screening Committee rather than the Selection Board. Thus facing the Screening Committee is an alternate to Selection Board and a substitute has to apply and face either one of them. This does not bar the Railway Authorities to go through with a regular selection process already indented for. Since the advertisement by the Railway Recruitment Board was initiated long after temporary appointments of the petitioners as substitutes, they could have applied for appointment on the said post and participated in the selection process or for screening process.

12. The Tribunal after hearing the parties and going through the record and after examining para 5 of the Master Circular dated 29.01.91 held that in view of the law laid down by the Apex Court in

Commissioner, Assam State Housing Vs. SCC-619 the appointment of the petitioners was made on temporary basis and a such they had no right to the past and as such the O.A. was without merit and was dismissed.

13. The law is well settled in Gujarat Steel Tubes Limited and others Vs. Gujarat Steel Tubes Majdoor Sabha and others, (1980) 2 SCC-593, Ashwani Kumar and others Vs. State of Bihar (1997) 2 SCC-1, Narsingh Pal Vs. Union of India, AIR 2000 SC-1401 and AIR 2001 SC-102 Nazira Bugum Vs. State of Assam that temporary employees have no right to the post and they can have no grievance as their appointments are only temporary. We have gone through the judgment of the Central Administrative Tribunal and do not find any illegality in the impugned judgment of the Tribunal. At the most the petitioners could have been given preference, had they also applied for screening or had participated in the selection process, which they have not done.

14. In view of the facts stated above we find no merit in this writ petition and it is accordingly, dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2003

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

Wealth Tax Reference No. 128 of 1982

Dr. Gaur Hari Singhania (Individual), Kanpur ...Petitioner
Versus
Commissioner of Wealth Tax, Kanpur ...Respondent

Purna Chandra Bora and another (1998) 6

Counsel for the Applicant:
Sri Vikram Gulati

Counsel for the Respondent:
Sri Bharat Ji Agarwal
Sri A.N. Mahajan

Wealth Tax Act- Section 17 (1) (G)- if the assessing officer had reason to believe that net wealth of a person has escaped assessment due to non disclosure fully and truly of all material facts necessary for the assessment of his net wealth, he could issue the notice for reassessment- In the present case- all the conditions for reassessing of the assessee as prescribed under section 17 (1) (a) of the Wealth Tax Act, existed. Hence in our opinion the reassessment notice was fully justified.

Held -Para 9

If the assessing officer had reason to believe that net wealth of a person has escaped assessment due to non disclosure fully and truly of all material facts necessary for the assessment of his net wealth, he could issue the notice for reassessment. In the present case all the conditions for reassessing of the assessee as prescribed under section 17 (1) (a) of the Wealth Tax Act existed. Hence in our opinion the reassessment notice was fully justified.

Case law referred:
Vol.221 I.T.R. page 538

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

1. The following question has been referred to this court at the instance of the assessee under section 27 (1):-

"Whether on the facts and in the circumstances of the case, the appellate tribunal was justified in holding that the

reopening of the assessment under section 17(1)(a) was valid in law"

The dispute relates to the two assessment years namely 1969-70 and 1971-72.

2. The original assessment of the assessee, who is an individual, was reopened under Section 17 (1) (a) of the Wealth Tax Act on the ground that in the net wealth earlier assessed, the wealth of Rs.20,500/- escaped assessment. The facts in a narrow compass:

3. The assessee took a loan of Rs.20500/- from the Life Insurance Corporation on the security of life policy on 23rd March, 1966, which was deposited in the fixed deposit with Hindustan Commercial Bank. He claimed exemption on the said amount in his wealth tax return, which was allowed by the Wealth Tax Officer. However, the said assessment was reopened and an addition was made of Rs.20,500/- in the net wealth of the assessee by the Wealth Tax Officer by the order dated 28 February, 1979 in respect of both assessment years by separate orders on identical pleas. The aforesaid reassessment orders were set aside in appeal by the Appellate Assistant Commissioner of Wealth Tax by order dated 20.3.1980 on the finding that it was not a case of non disclosure of material facts and as such the notice under section 17 (1) (a) of the Wealth Tax Act was held bad.

4. The department filed two appeals before the Income Tax Appellate Tribunal for the aforesaid two assessment years which were allowed by a common order dated 29.1.1981.

5. Aggrieved against the order of the Tribunal at the instance of the assessee, the above reference was made to the High Court.

6. We have heard Sri Vikram Gulati Advocate for the assessee and Sri Bharat Ji Agarwal Senior Advocate assisted by Sri A.N. Mahajan for the Income Tax Department.

7. The tribunal has found that mere mention that the amount of Rs.20,500/- was a loan from the L.I.C. does not amount to disclosure of the fact that this loan was secured against the life policy of the assessee which was exempt from Wealth Tax. In the wealth tax return there was a specific requirement that such debt should not be claimed as deduction. If the assessee claims such a deduction without mentioning the relevant fact that the debt was secured against the life policy of the assessee, it amounts to non disclosure of the relevant materials for the purposes of assessment.

8. Sri Bharatji Agrawal has placed reliance upon the judgement of the Supreme Court reported in Vol. 221 ITR page 538 Sri Krishna Private Limited etc. Vs. I.T.O. and others. It has been held by the Supreme Court that every disclosure is not and cannot be treated to be a true and full disclosure. A disclosure may be a false one or a true one. It may be a full disclosure or it may not be. A partial disclosure may very often be a misleading one. What is required is a full and true disclosure of all material facts necessary for making assessment for that year.

9. The Tribunal has recorded a specific finding that the loan was secured

against the life policy of the assessee which was exempt from the wealth Tax tax return. Only this much was mentioned in the return that the amount of Rs.20,500/- was a loan from the L.I.C. Till the assessment year 1988-99, if the assessing officer had reason to believe that net wealth of a person has escaped assessment due to non disclosure fully and truly of all material facts necessary for the assessment of his net wealth, he could issue the notice for reassessment. In the present case all the conditions for reassessing of the assessee as prescribed under section 17 (1) (a) of the Wealth Tax Act existed. Hence in our opinion the reassessment notice was fully justified.

10. In view of the above, we answer the above question in the affirmative i.e. against the assessee and in favour of the department.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 38976 of 2002

Moti Lal ...Petitioner
Versus
State of U.P. through Secretary, Irrigation Department and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Misra
Sri Shiveesh Gopesh

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- the case of the petitioner is squarely covered by Regulation 370 of Civil Service Regulations- it gives a right to the petitioner to get pension even assuming his resignation is accepted in the month of December, 1985- the view of the respondents that the petitioner has put in less than 20 years of service, is rejected. (Held in para)

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

1. Petitioner by means of the present writ petition has prayed for the following reliefs:

"i. Issue a writ, order or direction in the nature of mandamus directing the respondents to pay the pension and other retrial benefits "like gratuity", provident fund, G.P.F. etc" to the petitioner.

ii. Issue a writ, order or direction in the nature of mandamus directing the respondents to pay the interest at the current rate on the amount of pension and retrial benefits computed till the date of actual payment.

iii. Issue any other suitable writ, order or direction which this Hon'ble court may deem fit and proper in the facts and circumstances of the case.

iv. Allow the writ petition with costs in favour of the petitioner."

2. The case of the petitioner, as set-up in the writ petition, is that the petitioner was appointed as Tube-well Operator in the month of June, 1962 but under the state of mental imbalance he resigned on 4.12.1985 which though he purports to have subsequently withdrawn. But according to the statement made in

the counter affidavit, before the petitioner opted for withdrawal of resignation, it was accepted by the respondents on 31.12.1985. Petitioner thereafter urged even assuming his resignation to have been accepted, he is entitled for pensionary benefits as he has put in 21 years of service with the respondents.

3. This fact has been denied by the respondents in the counter affidavit. It is stated in para 5 of the counter affidavit that the petitioner has worked on the post of Tube-well-Operator from 18.1.1967 to 4.12.1985. According to this statement the date of resignation, i.e. 4.12.1985, is the last day of working of the petitioner and his services are less than 20 years therefore he cannot qualify for pension. The respondents in their counter affidavit, in reply to para 2 of the writ petition have admitted that for the first time petitioner was appointed on 22.7.1964 as runner in Nalkoop Khand-I Aligarh and thereafter he was appointed afresh on the post of Tube-well-operator in the same Division on 18.1.1967. According to the statement made in the counter affidavit 18.1.1967 is the relevant date of appointment and if it is to be taken the relevant date, the services of the petitioner are less than 20 years.

4. Learned counsel for the petitioner has relied upon the Civil Service Regulations Parts I, IV and X which runs as under:

Conditions of Qualifying Service
Section III- Second Condition
General Principles

368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

369. An establishment, the duties of which are not continuous but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed, qualifies; but the concession of counting as service the period during which the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was given reemployed.

370. An officer may count continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment,

(ii) periods of service in a work-charged establishment, and

(iii) periods of service in a post paid from contingencies.

5. From the perusal of the aforesaid it appears that the case of the petitioner is squarely covered by Regulation 370. It has been admitted by the respondents in the counter affidavit that the petitioner was initially appointed as Runner on 22.7.1964 and subsequently followed by

regular appointment as Tube-well-Operator on 18.1.1967 which is not within the exception of Regulation 370 of Civil to get pension even assuming his resignation is accepted in the month of December, 1985. No other point was urged. The view of the respondents that the petitioner has put in less than 20 years of service, is rejected.

6. In view of the aforesaid the writ petition deserves to be allowed and is hereby allowed. The respondents are directed to consider the case of the petitioner for pension in the light of the observations made in this judgement from the date of production of certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9 JANUARY, 2003

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

Civil Misc. Writ Petition No. 41675 of 2001

Indian Council of Agricultural Research Krishi Bhawan, New Delhi ...Petitioner
Versus
Raja Balwant Singh College, Agra and others ...Respondents

Counsel for the Petitioner:
Sri J.N. Tewari
Sri Vivek Misha

Counsel for the Respondents:
Sri Suresh Singh
Sri A.K. Goel
S.C.

Constitution of India- Article 226- Termination of Temporary employees- temporary employees have no right to the post- The termination of services is not punitive and hence it is valid- When there is a conflict between law and equity it is the law which is to prevail, in accordance with the latin, maxima "dura lex sed lex," which means, 'the law is hard but it is the law'.

Held -para 13)

When there is a conflict between law and equity it is the law which is to prevail, in accordance with the Latin maxim 'dura lex sed lex,' which means, 'the law is hard but it is the law.

Case law referred:
AIR 1982 SC 1107 in 1999 (2) SCC 317
1997 (2) LLJ 677, 1996 (1) SCC 773
AIR 2002 SC 3088, AIR 1975 SC 1087

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

1. This writ petition has been filed against the order of the Central Administrative Tribunal dated 27.4.2001 copy of which is Annexure 10 to the writ petition.

2. We have heard learned counsel for the parties.

3. The petitioner (hereinafter referred to as I.C.A.R.) is a society registered under Societies Registration Act. The Minister for Agriculture is ex-officio President of the Society and it is wholly funded by the Govt. of India. As stated in para 3 of the writ petition, the society was set up for undertaking scientific research in Agriculture, Animal Husbandry and other allied subjects. The research work is done by various institutions situated all over the country. The number of scientists and helping staff and their qualifications are fixed by the I.C.A.R. The I.C.A.R. does not make

selection or appointment of such employees nor are they employees of I.C.A.R. The grantee college/institution invites applications and appoints staff required for the project. The pay scale is determined by the I.C.A.R. but they work under the supervision and control of the grantee institution and are governed by the rules and regulations of the institution in all matters, such as leave, holidays etc. The Indian Council for Agricultural Research has no control or supervision over their work. The I.C.A.R. only provides funds for the project and nothing more and it has not to bear any expenditure on pension etc. All projects approved for the grantee institutions are of temporary nature and are sanctioned for specified periods, normally for a period of five years, and at the end of the project the work done is reviewed. The staff recruited is appointed on temporary basis and no guarantee is given that on completion of the project they will be absorbed. The project employees have no legal right to remain in service after the project comes to an end. In para 9 of the writ petition it is stated that a project titled as "Use of Saline water in Agriculture" was approved for Raja Balwant Singh College, Agra respondent no.1 in the year 1972 . This project was extended by the Indian Council of Agricultural Research in the year 1975 named as "Management of Salt Effected Soil & Use of Saline Water for Agriculture. The respondent nos. 3 to 6 were selected by the said college after due advertisement and were appointed on various dates as mentioned in para 10 of the writ petition True copies of the appointment orders are Annexures 1 to 4 to the writ petition.

4. The management of the college terminated the services of the respondent nos. 3 to 6 on restructuring of the project by letters dated 28.8.1993 Annexures 5 to 8. The respondent nos. 3 to 6 who were working on the project started claiming regularization of their services in the Indian Council of Agricultural Research. The respondent nos. 3 to 6 filed O.A. No. 281 of 1996 before the Central Administrative Tribunal to which the ICAR filed objection stating that they being project employees have no right of regularization and their claim was liable to be rejected. A true copy of the submission filed on behalf of ICAR before the Tribunal is Annexure 9 to the writ petition. However, by means of the judgment dated 27.4.2001 the Tribunal has held that respondent nos. 3 to 6 are liable to be absorbed by the I.C.A.R. True copy of the impugned judgment is Annexure 10 to the writ petition.

5. The petitioner submits that the respondent nos. 3 to 6 were not employees of the petitioner and have no right to claim absorption. The posts in which they were working do not exist in the project any more. It is also submitted that the Tribunal has no justification to direct the creation of posts or giving employment to the respondent no. 3 to 6. The employees of each project are selected by the sponsoring institute according to the nature of research to be done and the employees of one project cannot be employed for any other project of Research.

6. The respondent nos. 1 and 2 have filed a counter affidavit and we have perused the same. In para 7 of the counter affidavit it is stated that the petitioner launched a coordinated scheme for research on use of Saline Water in Agriculture during the Fourth Five Year

Plan period at several centers and the respondent no. 1 College was selected for the aforesaid scheme as one of the centers. The petitioner financed the scheme as 100 percent sponsored scheme during the Fourth Five Year Plan from the grants to be given to the College by the Govt. of India. The Members of the staff employed on the aforesaid Scheme were governed by the aforesaid terms and conditions and the guidelines issued by the petitioner from time to time. Initially the aforesaid Scheme for research was for the Fourth Five Year Plan period vide letter dated 14.4.1972 but it was renewed for the 5th Five Year Plan period vide letter dated 22.4.1975, for the 6th Five Year Plan period vide letter dated 20.3.1980, for the 7th Five Year Plan period vide letter dated 3.10.1986 and for the 8th Five Year Plan period vide letter dated 1.5.199, true copies of which are annexed as Annexure CA-1 and CA-2 to the writ petition. In para 8 of the counter affidavit it is stated that the respondent nos. 3 to 6 were appointed on temporary basis under the aforesaid scheme in accordance with the terms and conditions of the scheme on contractual basis for the period of the Scheme. When the aforesaid scheme during the 7th Five Year Plan came to an end the 8th Five Year Plan changed the staffing pattern and also reduced the strength of the staff vide letter dated 31.5.1993. The college had no option but to terminate the services of the respondent nos. 3 to 6. In para 11 of the counter affidavit it is stated that the College had requested the petitioner through letter dated 10.7.1993 to permit adjustment of respondent nos. 3 to 6, but when the petitioner did not respond the college had no option but to terminate the services of the respondent nos. 3 to 6 as the appointments of the respondent nos. 3 to 6 were on temporary basis. Photostat copy of the letter dated 10.7.1993 is Annexure CA 3 to the counter affidavit. In para 13 of the counter affidavit it is stated that the grantee institutions have a very limited role in the appointment of the staff of the scheme of the petitioner. In para 15 it is stated that the college is not responsible for adjusting the staff of the scheme/project after completion of the project/scheme or after restructuring of the scheme.

7. A counter affidavit has also been filed on behalf of respondent nos. 3 to 6 and we have perused the same. In para 13 it is stated that the Research Project at R.B.S. College, Agra continued for the 8th Five Year Plan (1992-97) with a further stipulation that the Project Coordinator of the All India Coordinated Research Project Saline Water shall locate the new centers and operationalise the same at Tamilnadu Agricultural University and Haryana Agricultural University, Hisar during the 8th Five Year Plan. In paragraph 15 and 16 of the counter affidavit it is stated that the respondent no.3 to 6 were initially appointed after due selection. In paragraph 28 of the counter affidavit it is stated that ICAR vide sanction letter dated 5.11.99 has conveyed the sanction of the Government of India for implementing the ongoing All India Coordinated Research Project on Salt affected soils and use of Saline Water in agriculture during the IX Five Year Plan period as before at all existing Research Centers including the respondent College. As such the answering respondents are entitled for their adjustment in the said Project or another ongoing All India Coordinated Research Project. Photocopy of the

relevant extract of the sanction order is Annexure-CA-8 to the counter affidavit.

8. A Supplementary Counter Affidavit was filed on behalf of respondent no. 3 to 6 and we have perused the same.

9. It is well settled that abolition of a post is a management function and an employee cannot have anything to say in this matter vide ***K. Rajendran V. State of Tamil Nadu AIR 1982 SC 1107. In 1999 (2) SCC 317*** *Rajendra V. State of Rajasthan* the Supreme Court has held that an employee has no right to continue when the post is abolished.

10. In ***1997 (2) LLJ 677 Joyachan M. Sebastian v. The Director General and others*** the Supreme Court has held that on abolition of post, the holder of the post has no right to continue on the post.

11. Similarly, in ***State of Himachal Pradesh V. Ashwani Kumar 1996 (1) SCC 773*** the Supreme Court has observed that when the Project is completed and closed due to non-availability of funds, the employees have to go alongwith the closed Project. The High Court was not right in giving the direction to regularize them or to continue them in other places. No vested right is created in temporary employment. Directions cannot be given to regularise their services in the absence of any existing vacancies nor can directions be given to create posts by the State to nonexistent establishment.

12. ***In 1999 (2) SCC 317 Rajendra v. State of Rajasthan*** the Supreme Court has held that when the posts temporarily created for fulfilling the needs of a particular Project or a Scheme limited in its duration comes to an end on account of the need for the Project itself having come to an end either because the Project was fulfilled or had to be abandoned wholly or partially for want of funds, the employer cannot be compelled by a writ of mandamus to continue employing such employees as have been dislodged because such a direction would amount to requisition for creation of posts though not required by the employer and funding such post though the employer did not have the funds available for the purpose.

13. The Tribunal has observed in para 42 of its judgment that the employees were sacked after they had put in long years of service and had become overage for other employment, and this has in human civil consequences. In our opinion, the law is well settled by the judgments of the Supreme Court referred to above. When there is a conflict between law and equity it is the law which is to prevail, in accordance with the Latin maxim 'dura lex sed lex,' which means, 'the law is hard but it is the law.'

14. Merely because in some decisions the Supreme Court directed regularization of employees it does not amount to laying down any law vide AIR 2002 S.C. 3088, Delhi Administration V. Manohar Lal, A.I.R. 1975 S.C. 1087 Municipal Committee V. Hazara Singh etc.

15. The respondents no.3 to 6 were only purely temporary employees and it is well settled that temporary employees have no right to the post. The termination of services is not punitive and hence it is valid.

16. In view of the above discussion the impugned order of the Tribunal dated 27.4.2001 cannot be sustained and it is hereby quashed. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2003

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

Civil Misc. Writ Petition No. 218 of 2003

Shri Janardan Chaturvedi ...Petitioner
Versus
The Chancellor, Chandra Shekhar Azad University of Agriculture & Technology, Kanpur/Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Yogesh Agarwal
Sri S.N. Tiwari

Counsel for the Respondents:
Sri P. Padia
Sri Vipin Sinha
Sri R.G. Padia

Constitution of India- Article 226- since there is a disputed question involved in this case i.e. what is the nature of the duties and functions of the petitioner- it would be appropriate to relegate the petitioner to his alternative remedy under section 23 of the U.P. Agriculture Universities Act.

Held -para 5

Since there is a disputed question involved in this case what is the nature of the duties and function of the petitioner it would be appropriate to delegate the petitioner to his alternative remedy under Section 23 of the U.P. Agriculture Universities Act.

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

1. Heard learned counsel for the parties.

2. This writ petition has been filed against the impugned order dated 27.12.2002 Annexure 1 to the writ petition.

3. The petitioner is an employee of Chandra Shekhar Azad University of Agriculture and Technology, Kanpur. The petitioner's date of birth is 1.1.43 and as such he retired on reaching the age of 60 years on 31.12.2002. The petitioner claimed that being a teacher of the Institution he is entitled to continue till the end of the academic sessions i.e. till 30.6.2003. Under Chapter 27 para7 of the Statutes of the University which has been quoted in para 9 of the writ petition a teacher is entitled to continue till the end of the academic session i.e. 30th June. The question, therefore, is whether the petitioner is a teacher as defined in the Act.

4. Section 2 (k) of the U.P. Agriculture Universities Act 1998 define teacher as follows:

"Teacher" means a person appointed or recognized by the University for the purpose of imparting instruction or conducting and guiding research or extension programmes and includes a person who may be declared by the statutes to be a teacher"

5. The petitioner claimed that he is a teacher in the University as defined in Section 2 (k). However, in para 6 of the counter affidavit it is stated that the petitioner has never been a teacher in the

University and his basic job was to impart training to the farmers in the various villages. In our opinion since there is a disputed question involved in this case what is the nature of the duties and function of the petitioner it would be appropriate to delegate the petitioner to his alternative remedy under Section 23 of the U.P. Agriculture Universities Act. The writ petition is, therefore, dismissed on the ground of alternative remedy with the liberty to the petitioner to file a representation to the Chancellor under Section 23 of the U.P. Agriculture Universities Act and the Chancellor is requested to decide the representation as the earliest preferably within two months in accordance with law after hearing parties concerned.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 3RD, 2003

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

Civil Misc. Writ Petition No. 24643 of 1988

Pradeep Kumar Pandey ...Petitioner
Versus
Sanjukta Sachieu Uttar Pradesh Shashan Avas Anubhag-3 & others ...Respondents

Counsel for the Petitioner:
Sri S.D. Pathak
Sri B.P. Singh
Sri Rakesh Pathak
Sri Dinesh Pathak

Counsel for the Respondents:
Sri Jokhen Prasad
S.C.

U.P. Municipalities Act- S-181- map sanctioned by Municipal Board on 25.2.82-Construction started in March 82-U.P. Regulation of Building operation Act 1958 came into force in District Basti on 14.10.83- in progress of Construction work stay order operation- Construction could not be completed within on year- whether further fresh permission required? Held-"No" matter of common sense when the stay order was operation how can a construction be completed within one year- order passed by the authorities quashed- Petition allowed with cost of Rs.20,000/-.

Held- Para 5

It is evident from the perusal of the three impugned orders that they are based on the premise that the construction on the strength of sanctioned map under the U.P. Municipalities Act ought to have been completed within a period of one year or in any case prior to the enforcement of the Act. This approach is totally perverse. The further finding of the authors of the three impugned orders is that there is no provision that in case the on going constructions are stopped by any authority in purported exercise of powers, the duration of stay for which the construction was stopped, would be immaterial for computing the period of one year as provided under sub-clause (2) of section 181 of the U.P. Municipalities Act. This finding is also perverse. It is a matter of common sense that if an act was initiated within the specified period, the stoppage time in view of intervention through stay orders would have to be excluded. In that view of the matter, the three impugned orders are totally perverse and it appears have been passed with malafide intention to cause harassment and loss to the petitioner.

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

1. The present writ petition arises out of proceedings under section 10 of the U.P. Regulation of Building Operation

Act, 1958 by which the orders passed for demolition of the constructions of the petitioner have been challenged.

plot no. 146/1 having an area of 3 biswas and 10 dhurs. After the aforesaid purchase the petitioner moved an application under section 180 of the U.P. Municipalities Act for sanction of the plan for construction. This sanction was granted by the Municipal Board vide its order dated 25.2.1982. It is submitted that the constructions started in February/March, 1982. One Kapildeo Gupta moved an application under section 133 Cr.P.C. in respect of the construction on 20.1.1983 and the Sub-Divisional Magistrate vide its order dated 25.1.1983 directed for registering a case and issued notices to the petitioner. During the proceedings, the Naib-Tehsildar submitted its report dated 11.4.1983, which report was in favour of the petitioner and thus the proceedings were dropped vide order dated 21.3.1984. In the meanwhile U.P. Regulations of Building Operation Act, 1958 (hereinafter referred to as the Act) came into force in district Basti on 14.10.1983. Again one Ram Chandra father of the respondent no.5 filed a suit no.67 of 1985 for injunction and demolition of the disputed construction. After the petitioner filed his reply, the trial court vide its order dated 2.4.1985 refused the interim injunction. An appeal against the aforesaid order was also dismissed on 16th May, 1985. The suit itself was dismissed in 1987. Thereafter, the respondent no. 5 son of the plaintiff of suit no.67 of 1975 made an application dated 7.5.1985 before the Prescribed Authority claiming that the petitioner was constructing his house in a regulated area without sanction of map. On issuance of show cause notice under section 10 of the Act dated 30.5.1985, the petitioner filed a detailed objection

2. The petitioner vide a registered agreement dated 15.4.1975 had purchased against the said notice. The Prescribed Authority vide its order dated 30.7.1986 held that the petitioner did not possess sanctioned map and, therefore, the constructions going on were illegal. Against the aforesaid order, the petitioner filed an appeal before the Controlling Authority which vide its order dated 29.8.1986 after coming to the conclusion that there was sanctioned map remanded the matter back to the Prescribed Authority. Against the aforesaid, the respondent no. 5 filed a revision under section 15-A of the Act, which was allowed vide order dated 24.1.1987 and the case was remanded before the Controlling Authority. After remand the Controlling Authority again deliberated upon the matter and came to the conclusion as earlier and again remanded the matter vide order dated 16.6.1987 before the Prescribed Authority. Yet again the respondent no. 5 filed revision against the order dated 16th June, 1987 and again the government vide its order dated 21st August, 1987 remanded the matter to the Controlling Authority. On second remand the Controlling Authority vide his order dated 15th September, 1988 dismissed the appeal of the petitioner and confirmed the order of the Prescribed Authority dated 30.7.1986. It held that the order of the government was clear that the sanctioned map of the petitioner had expired on 25.8.1983 and further that there is no provision in the Municipalities Act that if the construction was stopped by a stay order, the duration of validity of the map would automatically stand extended. The petitioner thus filed a revision before the State Government which has been dismissed by an order dated 3rd

December, 1988. It are these orders dated 30.7.1986, 15.9.1988 and 3.12.1988 which are under challenge before this court.

3. Learned counsel for the petitioner has urged firstly that in pursuance of the sanctioned map the petitioner had started construction which was stopped by different authorities, therefore, the validity of the map had not expired. Secondly, he submits that once the map had been sanctioned and construction started, there was no necessity for the petitioner to apply again on the enforcement of the Act in district Basti.

4. In order to appreciate the contention of the petitioner, it would be necessary to quote sections 180 and 181 of the U.P. Municipalities Act:

"180. Sanction of work by board- (1) Subject to the provisions of any bye-law the board may either refuse to sanction any work of which notice has been given under section 178 or may sanction it absolutely or subject to-

(a) any written direction that the board deems fit to issue in respect of all or any of the matters mentioned in sub-head (h) of heading A of section 1298, or

(b) a written direction requiring the setback of the building or part of a building to the regular line of the street prescribed under section 222, or, in default of any regular line prescribed under that section, to the line of frontage of any neighboring building."

"181. Duration of sanction- (1) A sanction given or deemed to have been given by a board under section 180 shall be available for one year or for such lesser period as may be prescribed by bye-law unless it is extended by the Board for a further period up to one year.

(2) After the expiry of the said period the proposed work may not be commenced except in pursuance of a fresh sanction applied for and granted under the same section."

5. A bare perusal of section 181 sub-clause (2) shows that the validity of one year from the date of sanction of the map relates only to the commencement of the constructions and not its completion. It is undisputed that the map was sanctioned on 25th February, 1982. The Sub Divisional Magistrate in his order dated 25th January, 1983 has held on the basis of the report filed before him that the petitioner was constructing the house on the disputed plot. This fact is evident from a perusal of the order of the Sub-Divisional Magistrate dated 25th January, 1983 which is annexed as Divisional Magistrate had got the disputed spot examined by the Naib Tahsildar who in paragraph 3 of his report dated 11.4.1983 has confirmed that the construction on the spot had started prior to 25th January, 1983. These documents have neither been controverted nor their authenticity has been questioned by respondents. Thus, it is evident, that on the basis of sanction of map dated 25.2.1982, constructions had already started on the spot prior to 25.1.1983 i.e. before the period of one year had expired. I am of the opinion, that in view of sub-clause (2) of section 181 of the U.P. Municipalities Act, the petitioner had started construction on the basis of a

sanctioned map and his construction was saved by the aforesaid clause of sub-section (2) of section 181. There is no provision under the Act by which any construction which had started on the strength of sanctioned map under the Municipalities Act, fresh sanction was necessary on the enforcement of the Act. It is evident from the perusal of the three impugned orders that they are based on the premise that the construction on the strength of sanctioned map under the U.P. Municipalities Act ought to have been completed within a period of one year or in any case prior to the enforcement of the Act. This approach is totally perverse. The further finding of the authors of the three impugned orders is that there is no provision that in case the on going constructions are stopped by any authority in purported exercise of powers, the duration of stay for which the construction was stopped, would be immaterial for computing the period of one year as provided under sub-clause (2) of section 181 of the U.P. Municipalities Act. This finding is also perverse. It is a matter of common sense that if an act was initiated within the specified period, the stoppage time in view of intervention through stay orders would have to be excluded. In that view of the matter, the three impugned orders are totally perverse and it appears have been passed with malafide intention to cause harassment and loss to the petitioner.

6. As noted above, while detailing the facts, first the father of respondent no. 5 and now the respondent no. 5 has been able to stall the construction activity. The petitioner, and rightly so, contends that he has suffered a huge monetary loss by the unnecessary intervention of the father of respondent no. 5 and then the respondent no. 5. First the father of respondent no. 5 filed a suit and failed to get any interim injunction, therefore, gets his suit dismissed. Then again starts proceedings under the Act. The counsel for the respondent no. 5 has been unable to show any provision under the Act which entitles him to make any such application for stopping the construction. He appears to be a resourceful man. Twice the Chief Controller taking a reasonable view had remanded the matter to the Prescribed Authority but on both occasions, the respondent no. 5 was able to get orders from the State Government in revision. The respondent no. 5 has been unable to show as to how and in what manner the constructions were visiting him with any consequence. The respondent no. 5 also does not appear to be a public spirit man who puts his mite for a public cause. In my opinion, the respondent no. 5 by his actions has definitely caused much harm to the petitioner both monetarily and in terms of harassment.

7. In view of the discussions above, the petitioner is entitled to costs of this petition, which I assess on the basis of institution of proceedings by the respondent no. 5, the time lapsed and increase in the costs of construction to a sum of Rs.20,000/-

8. In the result, the writ petition succeeds and is allowed and the impugned orders dated 30.07.1986, 15.9.1988 and 3.12.1988 are hereby quashed. The petitioner is entitled to receive Rs.20,000/- as costs from respondent no. 5. The said costs, if not paid within a period of one month from today, the same shall be recovered by the Collector, Basti as arrears of land revenue and after

recovery the same should be paid to the petitioner.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25 FEBRUARY, 2003

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

Civil Misc. Writ Petition No. 4237 of 2003

Satish Chandra Srivastava and others
...Petitioners
Versus
The State of U.P. through Secretary (Homes) and others ...Respondents

Counsel for the Petitioners:
Sri T.P. Singh
Sri Anupam Kumar

Counsel for the Respondents:
Sri Krishna Murari
Ms. Bharti Sapru

U.P. Appointment of (Asstt. Prosecution Officer) Rules 1974 Rule-25 readwith U.P. Regularisation on the Post of Adhoc Appointments (on the Posts within the preview of the Public Service Commission Rules, 1984. Seniority A.P.Os. appointed in 1977-78 on Adhoc basis- regularised w.e.f. 22.3.84- and these A.P.Os. who were appointed by Public Service Commission on 23.4.84. Hon'ble Supreme Court already held that adhoc appointee shall be deemed to be appointed on 17.4.85- as such those who were appointed by Commission shall be Senior to these of Adhoc Appointee- Therefore the remaining regular candidate also shall be senior without being prejudice with facts that they have joined after 17.4.85- court held-once the question of seniority decided by Hon'ble Supreme Court became final every authority is bound by the same-can not be reopened by any one.

Held- Para 14

As observed therein, the adhoc appointment will be deemed to have been appointed from 17.4.85. Hence the Assistant Prosecution Officers selected through the Commission before 17.4.85 will become senior to such adhoc appointees, but those selected by the Commission after 17.4.85 will be junior to the adhoc appointees. This is clear from the aforesaid judgment of the Supreme Court. Hence if a select list was prepared by the Commission prior to 17.4.85, even though appointments were given after 17.4.85, such appointees would be senior to the adhoc appointees who were regularized with effect from 17.4.85 by the aforesaid judgment. The Supreme Court judgment is binding on all Courts and authorities under Article 141 of the Constitution. Even though there were only 5 appellants before the Supreme Court the law laid down therein is of a general nature and hence will apply to all.

Case law discussed:
1997 (2) SCC 6308

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

1. This writ petition has been filed for a writ of certiorari to quash the impugned seniority list dated 2.1.2003 Annexure-2 to the writ petition issued by the State of U.P. communicated by means of letter dated 6.1.2003 Annexure-1 to the writ petition and also the reversion order dated 6.10.2003 Annexure-3 to the writ petition. The petitioners have also prayed for a mandamus directing that respondents should not interfere in the working as Prosecution Officer and should pay them salary accordingly.

Heard learned counsel for the parties.

2. The appointments on the post of Assistant Prosecution Officer was earlier Criminal Procedure Code 1973 in which power was given to the State Government by section 25 for making such appointments. Subsequently the U.P. (Appointment of Assistant Prosecution Officer) Rules 1974 were framed for the purpose of making such appointments. Rule 4 thereof provides that any future appointment on the post of Prosecution Officer and Assistant Prosecution Officer has to be made by the State Government in accordance with the said Rules or with general orders as the State Government may make from time to time issue on that behalf.

3. It is alleged in paragraph 5 of the petition that the petitioners were duly selected and appointed as Assistant Prosecution Officer in February, 1977 after selection by a duly constituted selection Committee. By order date 8.2.77 as many as 192 persons were appointed on adhoc basis on the post of Assistant Prosecution Officers, and by order dated 24.12.77 51 Assistant Prosecution Officers were appointed. Thus a total of 243 Assistant Prosecution Officers were appointed in the year 1977-78. In the year 1979 the U.P. Regularisation of Adhoc Appointment Rules 1979 came into force which was made effective from 14.5.79 and the cut of date was fixed as 1.1.77. From 27.1.82 the post of Assistant Prosecution Officer came within the purview of the U.P. Public Service Commission.

4. On 27.1.82 460 posts of Assistant Prosecution Officer were advertised by the Department for making substantive appointments. It is alleged in paragraph 9 of the writ petition that though the petitioners were appointed in the year 1977 on adhoc basis for a period of one year or till regular selection which ever is earlier, however, till the date of the aforesaid advertisement the petitioners continued on the post of Assistant Prosecution Officer and their tenure was extended from time to time. It is alleged in paragraph 10 of the writ petition that the petitioners were entitled to regularization under the U.P. Regularisation of Adhoc Employees Rules 1979 and hence they filed writ petition No. 6157 of 1982 in this Court in which an interim order was passed on 14.5.82 that the process of selection may go on but the petitioners services may not be terminated on the ground that fresh persons have been recruited. Accordingly a letter was sent to the Commission to recommend 220 candidates in place of 460 candidates on the post of Assistant Prosecution Officer vide letter dated 16.1.84 true copy of which is Annexure-4 to the writ petition.

5. In the meantime the U.P. Regularisation of Adhoc Appointments (on posts within the purview of the Public Service Commission) Rules, 1984 came into force and the cut of date was fixed as 1.5.83. It is alleged in paragraph 14 of the writ petition that though the Government requested the commission to recommend 220 persons for appointment on the post of Assistant Prosecution Officer vide Annexure-4 to the writ petition and also 33 future vacancies, the Commission by letter dated 23.4.84 recommended the

names of 451 persons instead of 253 as requested by the State Government. Out of Select List a total number of 202 persons were appointed vide order dated 28.12.1984. It is alleged in paragraph 16 of the writ petition that the petitioners services were regularized vide order dated 15.3.1994 with effect from 22.3.1984.

6. In paragraph 17 of the writ petition it is alleged that for the purposes of seniority a committee was constituted for determining the inter se seniority of regularized Assistant Prosecution Officers and those appointed through the Public Service Commission. The Committee framed certain principles, which are mentioned in paragraph 17 of the petition. The petitioner and other Assistant Prosecution Officers who had been working on adhoc basis since 1977 and whose services were said to be regularized with effect from 22.3.84 were placed above those selected by the Commission. Five persons appointed through the Commission filed a Writ Petition before this Court Harihar Prasad and others v. State of U.P. and others, which was dismissed by this Court on 16.7.97. Against that judgment an appeal was filed in the Supreme Court, which was allowed by the Supreme Court, vide judgment dated 22.11.2001 Annexure-5 to the writ petition. The five persons who went in appeal were given seniority above the petitioners and other adhoc appointees. The remaining persons who were selected through the Commission who were not issued letters of appointment filed Writ Petition No. 1683 of 1985 Rana Pratap Singh v. State of U.P. and others in which an interim order was passed on 15.4.85. This writ petition was dismissed for default on 23.8.87. However, in pursuance of the interim order the State Government issued an order dated 16.7.85 in respect of the aforesaid petitioners in the aforesaid writ petition against the further vacancies as and when they occur. True copy of the order dated 16.7.85 is Annexure-6 to the writ petition. On 19.12.86 and January, 1987 the remaining 249 vacancies were also filled up from the list of the Commission.

7. In the meantime the petitioners alongwith others were promoted to the post of Prosecution Officer against the vacant posts vide order dated 2.3.2001 Annexure-7 to the writ petition. However, by the impugned order dated 2.1.2003 the petitioners have been reverted to the post of Assistant Prosecution Officer.

8. It is alleged in paragraph 29 of the petition that even the appointees selected by the Commission who were not parties before the Supreme Court in Civil Appeal No. 6104 of 1997 nor had any grievance in respect of their placement in the seniority list have been placed above the petitioners. Certain persons who were appointed subsequent to 1985 have also been placed above the petitioners although they were appointed subsequently, it is alleged that the action of the respondents in placing all the appointees through the Commission above the petitioners and other similarly situate is illegal and in contravention of the Supreme Court judgment dated 22.11.2001. True copy of the order dated 12.12.2001 by which officers appointed through the Commission have been promoted and given promotional pay scale is Annexure-7 to the writ petition. It is alleged that no opportunity of hearing was given to the petitioner before passing the reversion order. In paragraph 34 of the petition it is alleged that such persons

cannot be placed above the petitioners in the seniority list as the petitioners were appointed in February, 1977 and their services regularized from 22.3.1984. Aggrieved this writ petition has been filed.

9. The State Government has filed a counter affidavit and we have perused the same. In paragraph 2 (ga) it is stated that petitioners were given opportunity of hearing against the interim selection list dated 17.9.2002 and they made their representations against the same before the final seniority list dated 2.1.2003 was issued. It is alleged that the same is in consonance with the judgment of the Supreme Court dated 22.11.2001. True copy of the representations of the petitioners are Annexures-CA 1 to CA-10 to the counter affidavit. A Review Application was filed in the Supreme Court against the judgment dated 22.11.2001 which was rejected on 13.3.2002 vide Annexure-CA-12. It is alleged that respondents have complied with the judgment of the Supreme Court dated 22.11.2001 and accordingly those selected through the commission have been placed above the adhoc appointees. In paragraph 2 (cha) it is alleged that a Committee was constituted by the State Government for regularization of the adhoc Assistant Prosecution Officers and this Committee made recommendations on 17.4.85 but the State Government could not act on the same till 1994 due to various interim orders in various writ petition. Ultimately, a Government order dated 7.7.1994 was issued regularizing such persons. However, the Supreme Court by its judgment dated 22.11.2001 observed that such persons should be placed below in seniority to those who were selected through the Commission on 24.3.1984. Accordingly the state government issued the seniority list dated 2.1.2003 after considering the objections of the petitioners and others. In paragraph 2 (chcha) it is stated that the recommendation of the Committee dated 17.4.1985 could not be implemented due to various interim orders in various writ petitions and hence it is only in the year 1994 that the decision could be taken by the State Government.

10. In paragraph 11 of the counter affidavit it is denied that petitioners were entitled for regularization under the Regularisation Rules of 1979. The Rules have been amended and the cut off date was fixed as 1.5.1983. Since the petitioners had not been regularized hence the Select List of 451 Assistant Prosecution Officers were issued.

11. In paragraph 13 of the counter affidavit it is stated that the petitioners were regularized by order dated 15.3.94 vide Annexure-CA-14 to the counter affidavit. In paragraph 18 of the counter affidavit it is stated that according to the Supreme Court the Rules under Article 309 cannot be amended by administrative orders. Hence the directions issued by the Committee were set aside on 7.7.94.

12. A counter affidavit has also been filed on behalf of some of the respondents and we have perused the same. We have also perused the rejoinder affidavits.

13. In out opinion the judgment of the Supreme Court clarifies the entire controversy in this case, and we really fail to understand as to why the controversy has been raked up again after the judgment of the Supreme Court in Civil Appeal No. 6104 of 1997 Harihar Prasad

and others v. State of U.P. and others, copy of which is Annexure-5 to the writ petition.

14. It is not necessary to repeat the facts of the case as they have been dealt with in the aforesaid judgment of the Supreme Court. As observed therein, the adhoc appointment will be deemed to have been appointed from 17.4.85. Hence the Assistant Prosecution Officers selected through the Commission before 17.4.85 will become senior to such adhoc appointees, but those selected by the Commission after 17.4.85 will be junior to the adhoc appointees. This is clear from the aforesaid judgment of the Supreme Court. Hence if a select list was prepared by the Commission prior to 17.4.85, even though appointments were given after 17.4.85, such appointees would be senior to the adhoc appointees who were regularized with effect from 17.4.85 by the aforesaid judgment. The Supreme Court judgment is binding on all Courts and authorities under Article 141 of the Constitution. Even though there were only 5 appellants before the Supreme Court the law laid down therein is of a general nature and hence will apply to all.

15. In G. Deendayalan Ambedkar v. Union of India and others (1997) 2 SCC 638 it was held that a person ranking higher in merit in the selection list has to be placed senior to the person ranking lower in the merit irrespective of the date of appointments. From this it follows that the date of appointment is not relevant but the date of announcement of the select list.

16. Further we may mention that one of the appellant before the Supreme Court in Harihar Prasad's case (supra) namely Mani Lal was placed at serial no.375 in the merit list declared by the Commission and was appointed on 5.2.85 whereas the respondents in the present writ petition are higher in the merit list vide paragraph 27 of the counter affidavit and Annexure-CA-4 to the counter affidavit of Sabhakar Tiwari, though some of the contesting respondents were appointed subsequent to the date of appointment of Mani Lal. Reference may also be made to Rule 5 U.P. Government Servant Seniority Rules, 1991 which provides that intre- se seniority of persons appointed on the result of one selection shall be the same as it is shown in the merit list prepare by the Commission. Hence the date of appointment is not relevant but the date of selection is relevant.

17. The impugned seniority list was hence in consequence with the judgment of the Supreme Court and the aforesaid Rules. The petition is therefore dismissed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2003

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Second Appeal No. 1419 of 2002

Krishna Gopal Pandey and another
...Defendant–Appellants.
Versus
Bans Bahadur Singh and another
...Plaintiff-Respondents

Counsel for the Appellants:
Sri V.K.S. Chaudhary
Sri O.P. Misra
Sri R.K. Singh

Counsel for the Respondents:
Sri R.K. Jain

Sri D.P. Singh

Code of Civil Procedure –Section–100 – Concurrent finding of facts – both the statement–finding of facts can not be interfered by High Court.

Held- Para 18

This contention which was raised before the court below was turned down on the ground that there was no plea in the written statement of the first defendant that he was owner of only a half share and that the other half belongs to his brother. It has also relied upon the admission of the first defendant that he was the owner in possession of the entire land and there was also admission n the sale deed dated 27.11.1984 executed by the first defendant in favour of this wife that the first defendant was the owner of the entire disputed property and was in possession thereof and that none other was the owner. Good reasons have been given by the lower appellate to turn down the contention of the appellant.

B- Specific Relief Set: Section 20 (2) Explanation I – Consideration – Whether in adequacy of consideration would be grand for drawing inference – about obtaining unfair advantage? Held - `No' it depends upon various factors and circle rate is not decisive factors.

Held- para 20
It has relied upon the explanation-I to section 20 (2) of the Specific Relief Act that mere inadequacy of consideration would not be a ground for inferring that unfair advantage has been obtained. The value of a piece of land depends upon various factors and the circle rate is not a decisive factor. The finding of the courts below on the question of adequacy of consideration is a finding of fact.

Case law discussed:
AIR 1999 SC-137

Courts below given good reason – about ownership of exertion for entire property – Defendant also not alleged in written

(Delivered by Hon'ble Janradan Sahai, J.)

1. Bans Bahadur Singh and Vikrama Singh, respondents in this appeal filed a suit for specific performance of a contract of sale dated 20.2.1985 executed by the first defendant, the appellant Krishna Gopal Pandey. Alternatively refund of advance money together with interest was also sought.

2. Before the contract of sale dated 20.2.1985, the subject matter of this appeal, Krishna Gopal Pandey had executed a contract of sale dated 26.11.1984 in respect of a different plot in favour of the plaintiffs. It is not disputed that the second defendant Smt. Damyanti Devi is the wife of the first defendant Krishna Gopal Pandey who had executed a sale deed dated 27.11.1984 in her favour in respect of the land which was the subject matter of the contracts of sale dated 26.11.1984 and 20.2.1985. In this suit the first defendant Krishna Gopal Pandey admitted his signatures on the agreement to sell and also admitted having received a sum of Rs. 40,000/- from the plaintiff but his case was that the document dated 20.2.1985 was obtained from him by practicing fraud in that he had merely taken a loan from the plaintiff and intended to execute a mortgage deed in security but the plaintiff fraudulently obtained his signatures on the agreement to sell.

3. The case of the second defendant who as stated above is none other than the wife of the first defendant was that a sum of Rs. One lac was due to her from her

husband as she had advanced certain amounts to him which she had received from her parents and that the sale deed dated 27.11.1984 was executed by him in her favour in consideration of that loan.

4. Both the courts below have repelled the case of fraud set up by defendant no. 1 and it has been held that the sale deed in favour of the second defendant was a sham transaction and was void. The courts below have decreed the suit for specific performance.

5. I have heard Shri V.K.S. Chaudhary, learned senior counsel for the appellants and Shri Ravi Kiran Jain learned senior counsel for the respondents.

6. The contract of sale dated 20.2.1985 bears the signatures of the first defendant, hereinafter referred to as the `vendor' but it does not to bear the signature of the plaintiffs in whose favour it was executed. It was contended by Sri V.K.S. Chaudhary that under section 54 of the Transfer of Property Act as amended in Uttar Pradesh a contract of sale must be registered – a requirement which implies that it must be in writing and when it is stipulated that the contract is to be in writing the entire contract which is a bilateral transaction consisting of incidents of proposal and acceptance must be in writing and that a unilateral deed such as the one executed in the present case does not meet the requirement of section 54 of the Transfer of Property Act.

7. It is not in dispute that the contract of sale dated 20.2.1985 is a registered document. The copy of the contract has been filed along with the stay application as Annexure-7. It bears the recital that the vendor has agreed with the vendees (an expression loosely being used for the party proposing to purchase) to sell to them for a sum of Rs.48,000/-, the land described in the agreement and that a sum of Rs.40,000/- has been paid by the vendees as advance and that the sale deed would be executed within a period of six months on payment by the vendees of the balance consideration of Rs.8,000/-. This agreement, therefore, does contain the element of mutuality of obligations. It contains also the admission by the vendor of having received from the vendee Rs.40,000/- as advance. The recitals if proved constitute a complete contract. If the document had been signed by the vendees the acceptance by token of the signature would be deemed to be incorporated in the document itself but it is submitted by the learned counsel for the appellant that in the absence of such signatures by the vendees the incidence of acceptance is not contained in the document and as such the document does not fulfil the requirement of a written contract of sale complidly stipulated under section 54 of the Transfer of Property Act.

8. Before examining the cases which have been relied upon the learned counsel for the appellant reference may be made to a decision of the Apex Court cited by the learned counsel for the respondent which appears to be the nearest on the point in issue. In AIR 1999 Supreme Court 37 **Rajendra Pratap Singh Versus Rameshwar Prasad** – a lease for a term exceeding one year was signed by one of the parties. Section 107 of the Transfer of Property Act provides that such a lease for more than a year is required to be made by a registered instrument. The

third paragraph of that provision which though not applicable in U.P. provides for execution by both parties. The question before the Apex court was whether the document could be said to have been executed in the absence of signature of both the parties. The Apex Court stated the law in paragraph 11 of the judgement as follows:-

"11. The word "execute" is given the meaning in Black's Law Dictionary as "to complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfil the command or purpose of." In "Words and Phrases" (Permanent Edition) the word "execute" is given the meaning as "to complete as a legal instrument; to perform what is required to give validity to." An instrument is usually executed through multifarious steps of difference sequences. At the first instance, the parties might deliberate upon the terms and reach an agreement. Next the terms so agreed upon would be reduced to writing. Sometimes one party alone would affix the signature on it and deliver it to the other party. Sometimes both parties would affix their signature on the instrument. If the document is required by law to be registered, both parties can be involved in the process without perhaps obtaining the signatures of one of them. In all such instances the instrument can be said to have been executed by both parties thereto. If the instrument is signed by both parties it is presumptive of the fact that both of them have executed it, of course it is only rebut table presumption. Similarly if an instrument is signed by only one party it does not mean that both parties have not executed it together. Whether both parties have executed the instrument will be a question of fact to be determined on evidence if such a determination is warranted from the pleadings of the particular suit. Merely because the document shows only the signature of one of the parties it is not enough to conclude that the non-signing party has not joined in the execution of the instrument."

9. Shri V.K.S. Chaudhary sought to distinguish the decision of the Apex court on the ground that the ruling relates to lease of a shop which being a transfer can be unilateral whereas a contract is bilateral and consists of reciprocity. He gave the analogy of a deed of gift which being a transfer the acceptance need not be incorporated in the document itself. It was also submitted that the third paragraph of section 107 of the Transfer of Property Act has been repealed in U.P. and the ruling is not applicable to U.P. and further that the lease of property can be oral and is complete when the transferor lets it out and that it is only a lease for a term exceeding one year that has to be made by registered instrument. These grounds for distinguishing the decision of the Supreme Court are not real grounds of distinction. The Apex Court has laid down the law relating to execution of documents by two parties and has held that it is not necessary for due execution of such document that it must be signed by both the parties and that it was a matter of evidence in case the execution of the document was denied.

10. The cases cited by the learned counsel for the appellant thought not direct on the point may now be referred to for what they hold. In AIR 1966 Supreme Court 543 **Bhagwandas Goverdhandas Kedia Vs. M/s. Girdharilal Parshottamdas and Co., and others** it was held that acceptance of offer and its intimation by external manifestation is necessary for a contract. In 1928 ALJ 324 **Sohan Lal Vs. Raghubir Sahai and another** it was held that it is not every

agreement that is binding on a party to it, simply because he agreed to it and where the law requires that a contract to be effective, should be executed in a particular way such as it be registered and attested, the mere registration may make the document admissible in evidence but in the absence of attestation would not create a binding transaction.

11. In 1952 SCR 269 **Ram Kumar Das Vs. Jagdish Chandra Deb Dhabal Deb and another** a Kabuliyat for 10 years was executed. The Apex Court held that the Dabuliyat thought a registered instrument but *ex concessis* is not an operative document at all and can not consequently fulfil the requirements of Section 107 of the Transfer of Property Act. The law in respect of Kabuliyat has been considered by the Apex Court in the case of **Rajendra Pratap Singh Vs. Rameshwar Prasad (Supra)** and a reference was made to a previous decision of Apex Court in AIR 1958 Supreme Court 1183 **Asha Ram Vs. Ram Kali** in that case a Kabuliyat was executed by the lessee in favour of their lessors, but the latter did not execute any instrument in favour of the lessees. It was contended that the lessees could not claim the status of tenants solely on the strength of he Kabuliat, which was only a unilateral undertaking. But the evidence showed that the lessors had accepted the Kabuliat and received rent as prescribed therein. On these facts, the Apex Court overruled the contention that the lessees could not claim the status of tenant.

12. In the present case the plea taken is that the contract of sale was obtained by fraud. There was no plea in the written statement that the document was not a valid document, as it was not executed by both the vendor and vendee. In the case of **Rajendra Pratap Singh Vs. Rameshwar Prasad (Supra)** where the position was similar as in this case, it was held that the defendant having not disputed in the written statement the fact that the lease was validly made it was not open to him to raise a contention later that the instrument was not executed by both the lessor and lessee.

13. The decision in AIR 1938 Cal 136 **Kumar Gokul Chandra Law Vs. Haji Mohammad Din** relied upon by the appellants in which it was held that if there is a proposal in writing and also acceptance in writing, the proposal and acceptance constitute a contract in writing; but if the proposal is in writing but the acceptance is not in writing, the entire agreement not being in writing it can not be said that the contract to lease is in writing, does not help the appellant as section 27-A of the Specific Relief Act applicable in that case provided for a contract to lease immovable property made in writing signed by the parties thereto. The statute itself thus postulated a written agreement `signed' by the parties which is not the requirement under section 54 of the Transfer of Property Act.

14. In **Egged Co-operative Society Ltd. Vs. Levi Geffen** AIR (34) 1947 Privy Council 32 the observation to the effect that a document signed only by one of the parties to it is not therefore, a written agreement does not help the appellant as that observation was rendered in connection with the right of a party to lead oral evidence disputing the fact mentioned in the document. So also the decision in AIR 1952 Allahabad 782 **Mohd. Tahir Vs. Mst. Sardar Bano** in which while interpreting section 91 of the

Evidence Act it was held that the word `document' must be taken to be one executed by a party and therefore signed by him in token of execution also is not directly on the point and is on a different context of facts and can not be construed to mean that if a document is not signed by both the parties it can not be a document executed. The contention of the learned counsel for the appellant that the contract for sale does not conform to the requirement of Section 54 of the Transfer of Property Act is therefore repelled. A contract of sale if interred need not bear the signatures of both the executants to make it a valid one within the meaning of Section 54 of the Transfer of Property Act.

15. Apart from this Section 20(4) of the Specific Relief Act goes against the appellant's contention. It reads as follows:

"The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

16. It was next contended that the contract for sale dated 20.2.1985 can not be enforced against the second defendant-appellant Smt. Damyanti Devi to whom the plot was transferred earlier on 27.11.1984 by a registered deed as section 19, clause (b) of the Specific Relief Act can be enforced only against a subsequent transferee and not against a prior transferee.

17. Both the courts below have held that the sale deed dated 27.11.1984 was without consideration. The sale deed was executed by the first defendant in favour his wife only one day after the contract of sale dated 26.11.1984 though that was in respect of plot no. 82 which was not the subject mater of contract of sale dated 20.2.1985. The lower appellate court has held that the payment of consideration for the sale was not proved and in fact it is stated in the document that the consideration was the service rendered by the second defendant and that the sale deed dated 27.11.1984 was a sham document. This finding that there was no transfer of interest in favour of the second defendant by that document which was sham is a finding of fact. Learned counsel for the appellant relied upon AIR 1957 Supreme Court 434 **Smt. Kamla Devi and another Vs. Bachulal Gupta and others** and AIR 1997 Supreme Court 127 **Smt. Gomtibai Vs. Mattulal** on the point that the transfer becomes complete on registration. These decisions do not apply to cases where the transaction was a sham one. The sale deed was being relied upon the second defendant on the ground that she was the owner of the property on the date the agreement to sell in favour of the plaintiff was executed by the first defendant. In these circumstances it was open to the plaintiff thought they were not parties to the sale deed to allege that no interest was conveyed by the sale deed in favour of defendant no. 2 and the defendant no. 1 continued to be its owner on the date when the agreement to sell was executed.

18. It was then submitted by the learned counsel for the appellant that the first defendant had only a half share in the property and the other half share belongs to his brother who is not a party to the agreement or in the suit and as such specific performance in respect of the entire disputed property could not be enforced. The Katauni entry showing only

half share of the appellant in the property is relied upon and it is submitted that under section 44 of the U.P. Land Revenue Act the court was bound to raise a presumption of law that the first defendant was only the owner of a half share. This contention which was raised before the court below was turned down on the ground that there was no plea in the written statement of the first defendant that he was owner of only a half share and that the other half belongs to his brother. It has also relied upon the admission of the first defendant that he was the owner in possession of the entire land and there was also admission n the sale deed dated 27.11.1984 executed by the first defendant in favour of his wife that the first defendant was the owner of the entire disputed property and was in possession thereof and that none other was the owner. Good reasons have been given by the lower appellate to turn down the contention of the appellant. The decision of the Apex Court in 1994 (4) SCC 18 **Sardar Singh Vs. Krishna Devi (Smt.) and another** relied upon is on different facts. In that case there was an unregistered award of the arbitrator that the appellant in that case and his brother were entitled to a half share in a house and the agreement of sale of the entire house was entered into by the appellant's brother and the Apex Court reversing the decision of the courts below held that the award required no registration and that the courts had erred in exercising discretion of granting degree of the entire house. In that case the challenge made by the person claiming to be the owner who was a party in the suit was allowed by the Apex Court and not a challenge made by the executant of the agreement as the case here is. A person who has executed the agreement is bound by it. That apart in the present case a finding of fact has been recorded that the appellant no. 1 was the owner of the entire property and as such the decision in the case of Sardar Singh (Supra) does not help the appellant.

19. It was urged that the transaction between the first defendant and the plaintiff was a fraud on the statute as the plaintiff Vikrama was a money lender but does not maintain any register or documents required under the U.P. Regulation of Money Lending Act, 1976. There is no pleading brought to my notice to the effect that the transaction was a fraud on the statute and in the courts below no evidence was led to substantiate such a plea. The application for taking additional evidence filed in this appeal has been rejected. This ground is one of fact and never appears to have been raised in the courts below. In my opinion it is not open to the appellants to raise the question for the first time in this appeal.

20. Specific performance is a discretionary relief. It is contended that the plaintiff Vikrama Singh was a money lender and a decree for refund was the appropriate decree and the bargain is unconscionable and gives an unfair advantage to the plaintiff and in the circumstances specific performance should be refused under section 20(2) of the Specific Relief Act. The appellate court has rejected the contention. The finding of the appellate court on this point is that the land covered by the contract of sale is 58 decimals. The sale deed relied upon by the defendant for proving the value of the land in dispute was also considered by the lower appellate court and it was held that that sale deed was in respect of 25x65 ft. which was a very small piece of land about 1 katta whereas

the disputed land was many times larger and that sale deed therefore could not be relied upon for the purpose of determining whether the consideration for the present transaction was adequate. The lower appellate court has relied upon the sale deed dated 27.11.1984 said to have been executed by the first defendant himself whereby an area of 1.89 acres is alleged to have been transferred in favour of the second defendant for a sum of Rupees one lac and the market value of the land shown in that deed was Rs. 43,417/-. It has relied upon the explanation-I to section 20 (2) of the Specific Relief Act that mere inadequacy of consideration would not be a ground for inferring that unfair advantage has been obtained. The value of a piece of land depends upon various factors and the circle rate is not a decisive factor. The finding of the courts below on the question of adequacy of consideration is a finding of fact.

21. Learned counsel for the appellant relied upon AIR 1995 Supreme Court 1769 **S. Rangaraju Naidu Vs. S. Thiruvarakkarasu**. In that case the Apex Court held that the court has discretion to grant specific performance and is not bound to do so. It was held on facts that although the appellant in that case had agreed to sell the property to the respondents, the predominant object thereby was for recovery of the dues with interest. In that case the respondents were money lenders and they had sought to recover the amount due to them and since the appellant was not in a position to pay the amount due on the promissory note, he entered into an agreement to sell the property. From the facts of the present case it can not be inferred that the agreement to sell was entered into predominantly with the object of recovery of dues with interest. Reliance was also placed upon AIR 1987 Supreme Court 2328 **Parakunnan Veetill Joseph's Son Mathew Vs. Nedumbara Kuruvila's Son and others** in which the Apex Court held that in a suit for specific performance the court should see that the litigation is not used as instrument of oppression to have unfair advantage to the plaintiff. The finding recorded in the present case by the lower appellate court is that the first defendant was a literate person and was running medical store and from his conduct it appeared that he was involved in several transactions in respect of land. The appellant's case that consideration was not adequate has also not been accepted.

22. Another decision relied upon is 2001 (3) AWC 2456 (S.C.) **A.C. Arulappan Vs. Smt. Ahalya Naik** in which the Apex Court held that no decree for specific performance can be granted where the plaintiff does not come with clean hands or where he can take unfair advantage over defendant and in such a case refund of money is the adequate relief. This case is not applicable to the facts of the present case. The plea that the bargain was unconscionable has been turned down. Ordinarily in the case of a contract of sale the relief of specific performance is to be granted. The courts below have exercised this discretion on good grounds. Learned counsel for the appellant also relied upon 2000(7) SCC 548 **Gobind Ram Vs. Gian Chand**. In that case an agreement to sell in respect of certain property in Lajpat Nagar, New Delhi was entered on 24.1.1973 for a consideration of Rs. 16,000. The suit for specific performance filed by the purchasers was decreed on 6.10.1976. The vendor preferred an appeal, which was

dismissed by the High Court but it directed the respondent vendee to pay a further sum of Rs. One lac which was raised by 3 lacs by the Apex Court that case there are two distinguishing features. Firstly the property was situate in Delhi where the real estate price had escalated and secondly out of the consideration Rs.16,000/- settled only Rs.1,000/- was paid at the time of the agreement to sell and the balance was to be paid later. In these circumstances the vendee was called upon to pay an additional sum of Rs. 3 lacs. In the present case there is no evidence to indicate that the prices had escalated. That apart out of the total consideration of Rs.48,000/-, Rs.40,000/- was paid as advance and only a small portion of Rs. 8,000/- remained to be paid.

23. The appeal does not involved any substantial question of law. Dismissed.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD FEBRUARY 25, 2003

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

Criminal Misc. Writ Petition No. 483 of 2003

Than Singh and others ...Petitioner
Versus
Kishore Kumar & another ...Respondents

Counsel for the Petitioner:
Sri Dhruva Narayan
Sri Bala Krishna Narayana

Counsel for the Respondents:
Sri Mahendra Pal Singh
A.G.A.

Code of Criminal Procedure, 1973– Section 90 (1) (a) and (b) and S.173 (2)- Scope taking of cognizance under– Incident of beating by both sides–FIR lodged by both sides–Order of Magistrate summoning petitioners– F.I.R. submitted by Police–Magistrate not bound to accept police version–Order of Magistrate showing that there were three eye witnesses besides complainant and a report to S.S.P.–Magistrate on receipt of report under S.173 (2) may accept or reject same and take cognizance of offence under S.190 (1) (b) or S.190 (a) on basis of original complaint and may proceed to examine complainant and his witnesses–On basis of evidence on record, held, there exists sufficient ground to proceed against accused–Impugned orders, held to be justified. Held;

Held- Para 7

I have perused the summoning order and that of the revisional court. If some incident takes place and beating is given from both sides and both sides lodged F.I.R. it cannot be said that the F.I.R. by the other party is the result of the F.I.R. by one party. If this plea is accepted, then every aggrieved person lodging the report, after one party has lodged shall be debarred from taking action against the culprit. The order of the Magistrate shows that there were three eye witnesses besides the complainant and a report to the S.S.P. It is settled principle that the Magistrate on receipt of a report U/s 173 (2) Cr.P.C. may accept the report or reject the same and take cognizance of the offence under section 190 (1) (b) Cr.P.C. or he may take cognizance of offence U/s 190 (1) (a) Cr.P.C. on the basis of the original complaint and proceed to examine the complainant and his witnesses.

Held- Para 9
So far as the question of evidence is concerned, the court has to see whether there exists sufficient ground to proceed of not. By scrutinizing the impugned

order of the Magistrate I find that there exists sufficient ground to proceed against the accused and the order of the learned Magistrate and that of the revisional court are perfectly justified in view of the evidence available on record.

Case Law Referred:

2003 (4) A.C.C. 182

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

1. Heard the learned counsel for the petitioners, the learned A.G.A. and perused the impugned order.

2. The present writ petition has been moved under Article 226 of the Constitution of India for issue of a writ in the nature of certiorari quashing the order dated 11.12.2001 passed by the I Addl. Civil Judge (Junior Division)/ Judicial Magistrate, Badaun and the order dated 29.8.2002 passed by the Addl. Sessions Judge, Court no. 7 Badaun in Criminal Revision No. 38 of 2002, Annexures 9 and 10 to the writ petition.

3. The brief facts giving rise to this petition are that the respondent No. 1 filed an application under section 156 (3) Cr.P.C. on 24.4.2000 where in an order for investigation was passed. The I.O. submitted F.R. before the Magistrate. The II Addl. C.J.M. Badaun issued notice to the informant, respondent No. 1, who filed an application praying to record his statement. The statement of respondent No. 1 was recorded under section 200 Cr.P.C. and that of three witnesses Tejpal, Shivom and Shyam Singh were recorded U/s 202 Cr.P.C. (Annexures 5, 6, 7 and 8 respectively to the writ petition). The learned Magistrate took cognizance and passed an order summoning the petitioners. The petitioners filed a revision before the Sessions Judge, Badaun, which was dismissed. It is alleged that the impugned orders are bad in the eyes of law as the proceedings in question against the petitioners have been instituted as a counter-blast to case crime No. 87 of 2000 under section 323/504 I.P.C. and the three eye witnesses are the main accused in that case.

4. The respondent No. 1 filed a counter affidavit on the ground that the statement of the respondent and witnesses were recorded and the court after examining the evidence passed the order.

5. Rejoinder affidavit was also filed on behalf of the petitioners.

6. It was submitted by the learned counsel for the petitioners that the police has submitted the F.I.R. observing that as a case against the respondent was already proceeding; hence the F.I.R. was submitted. This was the version of the police but the Magistrate is not bound to accept the version of the police.

7. I have perused the summoning order and that of the revisional court. If some incident takes place and beating is given from both sides and both sides lodged F.I.R. it cannot be said that the F.I.R. by the other party is the result of the F.I.R. by one party. If this plea is accepted, then every aggrieved person lodging the report, after one party has lodged shall be debarred from taking action against the culprit. The order of the Magistrate shows that there were three eye witnesses besides the complainant and a report to the S.S.P. It is settled principle that the Magistrate on receipt of a report U/s 173 (2) Cr.P.C. may accept the report or reject the same and take cognizance of the offence under section 190 (1) (b) Cr.P.C. or he may take cognizance of offence U/s 190 (1) (a) Cr.P.C. on the basis of the original

complaint and proceed to examine the complainant and his witnesses.

8. The Apex Court in **Mahesh Chandra Vs. Janardan Reddy and others**, reported in 2003 (4) A.C.C. page 182 has held that merely because the Magistrate has accepted the F.I.R., the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition.

9. So far as the question of evidence is concerned, the court has to see whether there exists sufficient ground to proceed of not. By scrutinizing the impugned order of the Magistrate I find that there exists sufficient ground to proceed against the accused and the order of the learned Magistrate and that of the revisional court are perfectly justified in view of the evidence available on record.

The writ petition is devoid of any merit and therefore it is hereby dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2003

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 2882 of 2003

Daljeet Singh ...Petitioner
Versus
Commissioner, Chitrakoot Dham, Mandal Banda and another ...Respondents

Counsel for the Petitioner:
Sri Vinay Khare

Counsel for the Respondents:
S.C.

U.P. Minor Mineral (Concession) Rules, 1963–R. 21 and 70-Liability to pay royalty–Arises when a lessee removes mineral from leased area question of issue of Form MM-11 by lessee arises only when a consignment of minor mineral is sent by Vehicles animal or any other mode of transport–held, petitioner having issued Form MM-11 between 1.4.2001 to 11.4.2001, he was liable to pay royalty at rate existing on that day-held.

Held-Para- 6 & 7

From the aforesaid rule, it is clear that liability to pay royalty arises at the point when a lessee removes the mineral from leased area. Form MM-11 is issued for transportation of the mineral giving various details in Form MM-11. Rule 70 of U.P. Minor Minerals (Concession) Rules, 1963 is relevant in this respect.

Thus the question of issue of Form MM-11 by lessee only arises when a consignment of minor mineral is sent by vehicle, animal or any other mode of transport. Petitioner having issued the Form MM-11 between 1.4.2001 to 11.4.2001, he was liable to pay the royalty at the rate as existing on that day. The fact that petitioner received Form MM-11 from the office of District Magistrate price to 31.3.2001 is not relevant.

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

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

2. By this writ petition, the petitioner has prayed for quashing of the order dated 25.10.2002 passed by Commissioner, Chitrakoot Dham, Mandal, Banda and the order dated 12.6.2001 passed by Collector, Mahoba. Petitioner is a holder of mining lease. In pursuance of the mining lease he has

excavated and removed mineral in accordance with U.P. Minor Minerals (Concession) Rules, 1963. Petitioner's case is that till Month of March 2001, the royalty was Rs. 20 per cubic metre and from 1.4.2001 it was enhanced from Rs. 20 to 30 per cubic meter.

3. The Collector, Mahoba issued an order dated 12.6.2001 directing the petitioner to deposit difference of royalty on user of Form MM-11 from 12.4.2001 to 30.4.2001. The petitioner filed an appeal against the said order which too has been rejected by Commissioner. Against these two orders the present writ petition has been filed.

4. The counsel for the petitioner contended that Form MM-11 which has been used by the petitioner between 12.4.2001 to 30.4.2001 was issued prior to 31.3.2001, hence royalty can be charged only at the rate of Rs. 20 per cubic metre.

5. The finding recorded by appellate authority is to the effect that Form MM-11 was used by the petitioner between the period 12.4.2001 to 30.4.2001. Rule 21 of U.P. Minor Minerals (Concession) Rules, 1963 provides that holder of a mining lease shall pay royalty in respect of any mineral removed by him from the leased area, Rule 21 is quoted as below :

"21. Royalty:- *(1) The holder of a mining lease granted on or after the commencement of these rules shall pay royalty in respect of any mineral removed by him from the leased area at the rates for the time being specified in the First Schedule to these rules.*

[(2) The State Government may, by notification, in the Gazette amend the First Schedule as to include therein or exclude there from or enhance or reduce the rate of royalty in respect of any mineral with effect from such date as may be specified in the notification.

Provided that the State Government shall not enhance the rate of royalty in respect of any mineral for more than once during any period of three years and shall not fix the royalty at the rate of more than 20 per cent of the pit's month value]

(3) Where the royalty is to be charged on the pit's month value of the mineral the State Government may assess such value at the time of the grant of the lease and the rate of royalty will be mentioned in the lease deed. It shall be open to the State Government to re-assess not more than once in a year the pit's month value, if it considers that an enhancement is necessary."

6. From the aforesaid rule, it is clear that liability to pay royalty arises at the point when a lessee removes the mineral from leased area. Form MM-11 is issued for transportation of the mineral giving various details in Form MM-11. Rule 70 of U.P. Minor Minerals (Concession) Rules, 1963 is relevant in this respect] and is extracted as below :

[70. Restrictions of transport of minerals : *(1) The holder of mining lease or permit or a person authorised by him in this behalf may issue a pass in Form MM-11 to every person varying a consignment of minor mineral by a vehicle, animal or any other mode of transport. The State Government may, through the District Officer, make*

arrangements for the supply of printed MM-11 Form books on payment basis.

(2) No person shall carry, within the State, a minor mineral by a vehicle, animal or any other mode of transport, excepting railway, without carrying a pass in Form MM-11 issued under sub-rule (1).

(3) Every person carrying any mineral shall, on demand by any officer authorized under rule 66 or such officer as may be authorized by the State Government in this behalf, show the said pass to such officer and allow him to verify the correctness of the particulars of the pass with reference to quantity of the minor mineral.

(4) The State Government may establish a check post for any area included in any mining lease or permit, and when a check post is so established public notice shall be given of this fact by publication in the Gazette and in such other manner as may be considered suitable by the State Government.

(5) No person shall transport a minor mineral for which these rules apply from such area without first presenting the mineral at the check post established for that area for verification of the weight or measurement of the mineral.

(6) Any person found to have contravened any provision of this rule shall, on conviction, be punishable with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.]"

7. Thus the question of issue of Form MM-11 by lessee only arises when a consignment of minor mineral is sent by vehicle, animal or any other mode of transport. Petitioner having issued the Form MM-11 between 1.4.2001 to 11.4.2001, he was liable to pay the royalty at the rate as existing on that day. The fact that petitioner received Form MM-11 from the office of District Magistrate price to 31.3.2001 is not relevant.]

In the aforesaid view of the matter I do not find any error in the order of appellate authority.

The writ petition lacks merit and is dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.2.2003

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

Civil Misc. Writ Petition No. 4159 of 1993

Mohd. Abdul and others ...Petitioners
Verses
The District Judge, Ballia ...Respondent

Counsel for the Petitioners:
Sri U.N. Sharma
Sri S.B. Pandey
Sri Dinesh Dwivedi
Sri S.K. Singh
Sri A.K. Gupta

Counsel for the Respondent:
Sri K.R. Sirohi
Sri Amit Kumar
S.C.

Constitution of India, Article 226 Regularisation – petitioner was appointed as class III employee on

adhoc basis in 1990- terminated on 6.1.93 -stayed on 3.2.1993 by High Court – the rule 4 (1) of U.P. Regularisation of adhoc appointment on posts outside the preview of Public Service Commission in the way of Regularisation–direction issued by the court accordingly.

Held- Para 3

This submission in my respectful consideration is not correct as the actual services rendered in continuity as ad-hoc employee has to be considered for the purpose of regularization under Rules, 2001. From this point of view all the petitioners are entitled to continue under rules, 2001 against the substantive vacancies. Here vacancies in substantive capacity are available where the petitioners services are being rendered.

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

Heard Sri U.N. Sharma along with Sri S.B. Pandey learned counsel for the petitioners as well as Sri K.R. Sirohi along with Sri Amit Kumar learned counsel for the respondent.

1. The petitioners were initially appointed in the year 1990 in the class III category in the judgeship of district Ballia and when their services were terminated on 6.1.1993 they approached this court by way of this writ petition and the interim order was passed on 3.2.1993 which reads as below :

"Petitioners claim to have been appointed as class III employees in District Ballia in the year 1991-92. Their services have been terminated by an order dated 6.1.1993 by the District Judge , Ballia . It is against this order that this writ petition has been filed .

(3rd amendment Rules 2001 – entitled for Reguarisation – objection about continuity in service pursuant to interim order passed by the court shall not come

The Registrar of this court has now issued an order dated 24.12.1992 according to which adhoc Class III employees of the subordinate Courts who are entitled to the benefit of the U.P. Regularisation of adhoc appointment (on posts outside the purview of the Public Service Commission) Rules 1979 be regularized. In para 2 of the above letter , it has been further been provided that services of those employees of Class III , who were appointed prior to 21.5.1992 shall not be terminated and they may be allowed to continue subject to their appearing and passing the competitive test held for the selection of Class III employees of the Subordinate Court . In view of the above order of the Registrar , the petitioners who were appointed in 1991-92 are also entitled to continue subject to their appearing at and passing in the competitive test to be held for the selection of Class III employees. In view of the facts and circumstances of the case the operation of the impugned order dated 6.1.1993 shall remain stayed.

Learned Standing counsel prays for and it granted one month time to file counter affidavit. Petitioners will have thereafter two weeks time to file rejoinder affidavit.

List this writ petition before the appropriate Court in the 2nd week of April, 1993.

2. Now counter affidavit and rejoinder affidavits have been exchanged and during the course of hearing on 4.2.2003 a necessity was felt as to what

rules in respect of the petitioners are to be adopted. A supplementary affidavit has been filed. Generally the documents are rendered in the registry unless it is accepted by the Court out of necessity when the court intends to dispose of the case finally and other parties to the case are not objecting case. Since the supplementary affidavit is directly submitted to the Court and is being accepted and placed on the record and a advance copy has already been served to Sri K.R.Sirohi learned counsel for the respondent/District Judge Ballia . After perusal of this supplementary affidavit, it reveals that earlier U.P. Regularisation of Adhoc Appointment (on posts outside the purview of the Public Service Commission) Rules 1979 was applicable. Now learned counsel for the petitioners has brought **The Uttar Pradesh Regularisation of ad-hoc Appointments (On Posts outside the purview of the Public Service Commission) (Third Amendments) Rules, 2001** passed on 20th December, 2001 which has been fairly accepted by Sri K.R.Sirohi learned counsel for the District Judge, Ballia/ respondent. According to this in the column of rule 4(1) or earlier rule, 1979 in para(2) to the Rules, 2001 it has been incorporated as given below:

(2) In the Utter Pradesh Regularisation of Ad-hoc Appointment (On Posts outside the purview of the Public Service Commission) Rules, 1979 in rules 4 for existing sub-rule(1) set out in column 1 below, the sub-rule as set out in column 2 shall be substituted, namely ;

Column-1

Existing Sub-rule

(1) Any person who-

(i) was directly appointed on ad-hoc basis before January 1,1979 and is continuing in service, such on the date of commencement of these rules;

(ii) possessed requisite qualifications prescribed for regular appointment as the time of such ad-hoc appointment ; and

(iii) has completed or , as the case may be , after he has completed three years service shall be considered for regular appointment in permanent or temporary vacancy , as may be available , on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant rules of orders.

Sub-rule as hereby substituted;

(1) Any person who-

(i) was directly appointed on ad-hoc basis on or before June 30,1998 and is continuing in service as such on the date of commencement of the Utter Pradesh Regularisation of Ad-hoc Appointments (on posts outside the purview of the Public Service Commission) (Third Amendment) Rules , 2001.

(ii) possessed requisite qualifications prescribed for regular appointment as the time of such ad-hoc appointment ; and

(iii) has completed or , as the case may be after he has completed three years service shall be considered for regular appointment in permanent or temporary vacancy, as may be available , on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant rules or orders.

3. I have heard learned counsel for the parties and I find that undisputedly the petitioners were appointed on ad-hoc

service and at the time of appointment to the post of regular candidates in class III category and they have been were in possession of the required qualifications for appointment to the post of regular dated 4.2.2003. Learned counsel for the respondents has submitted that the continuing in service as a ad-hoc employee in class III category by the interim order of this court dated 4.2.2003 is not a usual continuance and this benefit is not to be extended. This submission in my respectful consideration is not correct as the actual services rendered in continuity as ad-hoc employee has to be considered for the purpose of regularization under Rules, 2001. From this point of view all the petitioners are entitled to continue under rules, 2001 against the substantive vacancies . Here vacancies in substantive capacity are available where the petitioners services are being rendered.

4. Therefore, this writ petition is disposed of with the direction that the respondent/district Judge, Ballia has to consider the cases of regularization of the petitioners in accordance with law as well as in view of the provision of Rules, 2001 as indicated above expeditiously within a period of two months from the date of production of certified copy of this order on behalf of the petitioners.

5. In view of the above observations, writ petition are disposed of.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5TH MARCH, 2003

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

candidates in class III category and they have been working since their initial appointment irrespective of the manner after getting protection of interim order

Civil Misc. Writ Petition No. 28558 of 2002

P.D. Tandon ...Petitioner
Versus
Union of India and another...Respondent

Counsel for the Petitioner:
Sri V.B. Upadhya
Sri R.K. Yadav
Sri H.C. Dwivedi

Counsel for the Respondent:
Sri B.N. Singh
S.C.

Cantonment Act 1924, Section-181–Sanction of Map–refused on the ground the property in question does not belongs to the petitioner–while High Court in. S. Appeal No. 2866/78 decided on 27.11.1981 held the petitioner to be owner–in view of Roman Law Maxim "interest republication at sit litium"–rejection order held illegal but keeping in view of Pendency of appeal authority concerned is directed to decide the same in accordance with law.

Held- Para -5

The prayer for sanction was refused by the Cantonment Board on the ground that the property does not belong to the petitioner. This ground for refusing to sanction the construction is clearly illegal in view of our observations made above. However, since the appeal against the order of the Cantonment Board is pending before the appellate authority we direct the appellate authority to decide the appeal of the petitioner in accordance with law preferably within six weeks treating the property as belonging to the petitioner.

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

Heard learned counsel for the parties.

1. Admittedly, the petitioner's appeal under Section 274 of the Cantonments Act, 1924 against the order dated 14.03.2002 rejecting his application for sanction of map under section 181 of the Act is pending before the appellate authority.

2. We are therefore, disposing off this writ petition with a direction to the appellate authority to decide the appeal of the petitioner preferably within a period of six weeks from the date of production of a certified copy of this order, in accordance with law. We make it clear that in view of the decision of this Court in Second Appeal No. 2866 of 1978 **P.D. Tandon Vs. Union of India and others** decided on 27th November, 1981, copy of which has been filed as Annexure-2 to this petitioner, wherein it has been held that the property in dispute belonged to the petitioner, which decision has been upheld by the Apex court in civil Appeal No. 5931 of 1983 decided on 22.02.1984, annexure-3 to this writ petitioner, the question of title in this case has already become res-judicata and cannot be raked up again. It has been held in that case that the property in dispute belonged to the petitioner. This finding is conclusive and res-judicata and cannot be permitted to be raked up against. In *Iftekhar Ahmad Vs. Syed Mehban Al and others (1974 SC 749) (Para-9)* it has been held, following the decision of the Privy Council in Board Vs. Ramanandan Prasad Narayan Singh, A.I.R. 1916 P.C. 78, that the rule of resjudicata is founded on ancient precedent dictated by a wisdom which is for all time. This rule is based on the Roman Law Maxim "interst republicate ut sit finis Litium" which means that it is the interest republic that there should be an end to litigation, vide A.I.R. 1960 SC 941, A.I.R. 1961 SC 1457, A.I.R. 1957 SC 38, A.I.R. 1967 Alld. 504 (F.B.) etc. Even an erroneous decision between the parties is res-judicata, vide A.I.R. 1953 SC 65, A.I.R. 1966 SC 1061, A.I.R. 1962 Patna, 72 (F.B.), etc.

3. It is submitted by the learned counsel for the petitioner that there are some petitions relating to mutation regarding this property. It is well settled that mutation confers no right. The question of title once decided in Second Appeal No. 2866 of 1978 vide judgment dated 27.11.1981 and as it is res-judicata.

4. The doctrine of res-judicata is base on a sound principle of public policy, namely that a matter already settled by the Court should not be allowed to be re-agitated, otherwise there will be no end to litigation.

5. However, although the property in dispute has been held to belong to the petitioner, the legal position is that even on his own property the petitioner cannot make any construction without the sanction of the Board under section 181 of the Cantonment Board Act. The prayer for sanction was refused by the Cantonment Board on the ground that the property does not belong to the petitioner. This ground for refusing to sanction the construction is clearly illegal in view of our observations made above. However, since the appeal against the order of the Cantonment Board is pending before the appellate authority we direct the appellate authority to decide the appeal of the petitioner in accordance with law

preferably within six weeks treating the property as belonging to the petitioner.

This writ petition is disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11 MARCH, 2003

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

Civil Misc. Writ Petition No. 4927 of 2003

Jai Ram ...Petitioner
Versus
The State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri T.P. Singh
Sri Shailendra

Counsel for the Respondents:
Sri Ravi Kant
Sri Vivek Saran
S.C.

Constitution of India-226- Service law– Promotion petitioner senior at every feeding cadre then the Respondent No. 3. who was promoted on the post of superintending engineer only because of pending of enquiry against the petitioner subsequently expunged hence entitled for promotion w.e.f. the date when the Respondents no. 3 was promoted- keeping in view of number of vacancy- No need to revert the Respondents no. 3.

Held- Para 6

There is no dispute that throughout his service the petitioner has been senior to respondent no.3 at every stage of promotion he was higher in the merit list than the respondents no.3. Even in the notification dated 9.9.2002 Annexure –7 to the writ petition the petitioner is higher in the merit list than the respondent no.3. The only reason why the petitioner was not promoted as Superintending Engineer was because of the pendency of the enquiry against him. Since he has been exonerated in the enquiry and since he has been found suitable by the DPC vide Annexure-7 to the writ petition in our opinion the petitioner has to be treated as senior to respondent no.3.

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

1. This writ petition has been field for quashing the impugned order dated 26.12.2002 and 10.01.2003 Annexure –10 and 12 to the writ petition. The petitioner has prayed for a mandamus that he should be considered for promotion as Chief Engineer.

Heard learned counsels for the parties.

2. The petitioner is working as Superintending Engineer. Rural Engineering Service, U.P. The Service Rules in this connection are the U.P. Rural Engineers (Group A) Service Rules, 1991, copy of which is Annexure-1 to the writ petition. In these rules for appointment as Superintending Engineer, total number of 15 years of service are required which includes six years service as Executive Engineer.

3. The petitioner has alleged that throughout his career he was senior to the respondents no. 3 Uma Shanker. The respondents do not seriously dispute this fact. For selection as Assistant Engineer,

and then as Executive Engineer on both occasions the petitioner was placed higher in the select list than the respondent no. 3. For selection as Superintending Engineer also he was placed higher than the respondent no.3. vide paragraph 4 (iii) of the petition. The petitioner and the respondent no.3 both belong to the S.C. category.

4. As stated In paragraph 9 of the petitioner, the DPC met for selection on the post of Superintending Engineer. Both petitioner and the respondent no.3 were considered by the DPC but since an enquiry was pending against the petitioner the sealed cover procedure was adopted in his case, but the respondent no.3 was given officiating and stop gap promotion as Superintending Engineer vide order dated 13.2.2001 Annexure-6 to the writ petition. Subsequently, as stated in paragraph 11 of the petition the petitioner has been exonerated. A fresh DPC for the post of Superintending Engineer was held on 31.8.2002 in which the petitioner, respondent no.3 and others were considered and a merit list was prepared in which petitioner was at serial no.1 and the respondent no.3 at serial no.2. In this connection notification dated 9.9.2002 is annexed as Annexure-7 to the writ petition.

5. In paragraph 19 of the petition it is alleged that the State Government has thereafter passed the impugned order dated 26.12.2002 vide Annexure-10 the writ petition. By this order the respondent no.3 has been treated as promoted as Superintending Engineer from 14.03.2001. Consequently the respondent no.3 will become senior to the petitioner. It is alleged in paragraph 20 of the writ petition that no opportunity of hearing was given to the petitioner before passing the said order. Against that order petitioner made representation vide Annexure –11 to the writ petition. By order dated 10.01.2003 the State Government Has promoted the respondent no.3 as Chief Engineer vide Annexure-12 to the writ petition Aggrieved this petition has been filed. Counter affidavit and rejoinder affidavits have been filed and we have persued the same.

6. There is no dispute that throughout his service the petitioner has been senior to respondent no.3 At every stage of promotion he was higher in the merit list than the respondents no.3. Even in the notification dated 09.09.2002 Annexure –7 to the writ petition the petitioner is higher in the merit list than the respondent no.3 The only reason why the petitioner was not promoted as Superintending Engineer was because of the pendency of the enquiry against him. Since he has been exonerated in the enquiry and since he has been found suitable by the DPC vide Annexure-7 to the writ petition in our opinion the petitioner has to be treated as senior to respondent no.3.

7. We were orally informed by the learned standing counsel that the DPC which kept the petitioner's result regarding promotion as Superintending Engineer in sealed covered subsequently opened the sealed cover and found the petitioner unfit for promotion as Superintending engineer. This is only as oral submission and no affidavit has been filed by the respondents in this connection and hence we cannot take this oral submission into consideration. However, before reserving the judgement on 05.03.2003 we told learned standing

counsel that we will not deliver judgement for a few days so that if he wishes to file an affidavit in support of his oral submission he can do so. But, he has not filed an affidavit till today. Hence we assuming that the said DPC had found the petitioner unfit we would like to know what was the material on which the DPC found him unfit for promotion. Learned standing counsel could not inform us what was the material on which the DPC found the petitioner unfit. No adverse entry or any other adverse material to the petitioner was brought to our notice. We can therefore, presume that even assuming that the said DPC found the petitioner unfit for the promotion it was only on the basis that there was an enquiry pending against him in which he was subsequently exonerated. Hence even assuming that the earlier DPC found the petitioner unfit for promotion the basis for formation of the said opinion has disappeared after the petitioner was exonerated in the enquiry.

8. Hence we direct that the petitioner shall be treated as having been promoted as Superintending Engineer form the date when respondent no.3 was promoted and shall be treated as senior to him. Since the respondent no.3 is presently functioning as Chief Engineer on officiating basis and as senior to respondent no.3.

9. It is not necessary to quash the promotion of respondent no.3 as Chief Engineer since we are informed there are more vacancies on the post of Chief Engineer on which the petitioner can be promoted. The petitioner shall be given these promotions with all consequential benefits including the arrears of salary. Allowances etc. which must be paid to him within two months.

cannot take the above oral submission into consideration, which is not supported by any affidavit. Moreover we asked learned standing counsel that even

Petition is allowed No orders as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.3.2003.

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

Civil Misc. Application No. 41092 of 2003

Sadhna Upadhyaya ...Petitioner.
Versus
State of U.P. through The Chief Secretary Govt. of U.P. and others ...Respondents

Counsel for the Applicant:
Sadhna Upadhyaya (In Person)
Mr. S.S. Upadhyaya

Counsel for the Respondents:
Sri Q.H. Siddiqui
S.C.

Constitution of India, Act-226-un-authorised occupier/squatting the public road the vegetable sellers without any valid licence can not occupier the public place direction issued for immediate removed and also to see in future again they may not occupy if desirous it is open them to approach before the nagar mahapalika for valid licence some may be granted keeping various consideration including free flow of traffic.

Held- Para 2

This means that such persons who were illegally occupying one place have now started illegally occupying another place. In our opinion this cannot be permitted. One can occupy public land only with the permission/licence form the authority concerned.

Held- Para 4

We make it clear that persons who wish to sell vegetables, grain and/or other items (whether in wholesale or retail) cannot occupy public land for doing so without permission or licence of the authority concerned. They may make applications to the Nagar Nigam or the other concerned authority for this purpose and it is for the Nagar Nigam or such authority, at its discretion, to grant permission at a suitable place for such persons keeping in view various considerations including the free flow of traffic, requirements of the people in the locality etc. and on payment of tehbazari charges as fixed by the said authority.

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

1. This is an application praying that the Nagar Nigam, Allahabad be directed to remove the persons who are illegally squatting on /occupying the Bank road for selling vegetables (whether on retail or wholesale basis).

2. Learned counsel for the petitioner has invited our attention to the Division bench decision of this Court in Sanjay Agarwal V. Nagar Palika, Allahabad being writ petition no. 3119 of 1987 decided on 20.4.1999 copy of which is Annexure-1 to the writ petition. By that judgement the persons who were squatting illegally on Katra road were directed to shift to some other place. It appears that following the said decision those persons have now started illegally squatting on/occupying the Bank road. This means that such persons who were illegally occupying one place have now started illegally occupying another place. In our opinion this cannot be permitted. One can occupy public land only with the permission/licence form the authority concerned. We are informed by Sri Q.H. Siddiqui learned counsel for the Nagar Nigam, Allahabad that the Nagar Nigam Allahabad has not permitted such persons who are occupying/ squatting on the Bank road to do so. We are further informed that this morning the Nagar Nigam officers came to remove such illegal occupiers/squatters on Bank road, but such officials were not given police help and in fact the Nagar Nigam officials as well as the petitioner were attacked by the illegal occupiers/squatters on the Bank road.

3. We therefore, direct the S.S.P. Allahabad the respondent no.5 to give police help to the Nagar Nigam officials for removing the persons who are illegally occupying/squatting on Bank road.

4. The petitioner has stated that such illegal occupiers/squatters were removed four times earlier, but every time they came back and squatted on the Bank road again. The district administration should see to it that this is not repeated. We make it clear that persons who wish to sell vegetables, grain and/or other items (whether in wholesale or retail) cannot occupy public land for doing so without permission or licence of the authority concerned. They may make applications to the Nagar Nigam or the other concerned authority for this purpose and it is for the Nagar Nigam or such authority, at its discretion, to grant permission at a suitable place for such persons keeping in view various considerations including the

free flow of traffic, requirements of the people in the locality etc. and on payment of tehbazari charges as fixed by the said authority. On the application of such persons the Nagar Nigam, Allahabad or the concerned authority shall pass appropriate orders keeping in made the considerations referred to above.

5. Let a copy of this order be issued to learned counsel for the petitioner and Sri Siddiqui today on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.2.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 2603 of 2001

Ram Chandra Pathak ...Petitioner
Versus
State of U.P. through Secretary and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Burman
Sri I.R. Singh
Sri R.K. Ojha
Sri K.C. Shukla
Sri Ranjeet Saxena

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

U.P.S.R.T.C. Employees (other than officer) Service Regulation 1981- (Regulation 4 (1)- employees of U.P. Govt. Roadways department- after the joining with Corporation have to give their option within one month from absorption- these who never given any option availed the benefits of E.P.F. for long period- till their retirement- govt. not deposited any amount, towards contribution- not entitled for pension.

Held Para 22

In the present case on the absorption of an employee holding non-pensionable post in the Corporation, obligation of the State Government came to an end. These employees became employees of the Corporation and started subscribing to the EPF after transfer of the fund, from their account to EPF. They became members of the employees provident fund. The State Government was not required to contribute towards their pension fund as in the case of employees who were holding, pensionable post. Their rights as such crystallized on the date of their absorption in the Corporation in the year 1982. Now after their retirement, having received the retrial benefits and having ceased the relationship as employees of the corporation they cannot agitate their rights after long period of the time. They form a different class than the employees of the State Government holding pensionable posts on the date of absorption.

Case law discussed:
1992 (1) U.P.L.B.E.C.-242
1991 (2) SCC-141
1990 (4) SCC-207
1997 (1) UPLBEC 439
1992 (1) UPLBEC- 242
1999 (82) FLR-174
1991 (Supply) SCC (II) 141

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

1. By the aforesaid batch of writ petitions, the employees of U.P. State Road Transport Corporation, retired from non-pensionable post, have once again approached this court with prayers directing respondents to award pension and other pensionary benefits, after taking back employees share of provident fund from them. They have also claimed

arrears of pension from the date of superannuation with interest @ 18%.

2. I have heard Sri V.K. Burman, Sri I.R. Singh Sri R.K. Ojha, Sri K.C. Shukla, and Sri Ranjeet Saxena, Advocates for petitioners, and Sri Sameer Sharma for U.P. State Road Transport Corporation.

3. The State Government, established a temporary department in 1947, known as U.P. Government Roadways to run its own transport service. On 16.9.1960, a Government Order was issued laying down revised terms and conditions of temporary employees of the Roadways. On 28.101960 another Government Order was issued declaring certain posts in transport and roadways department as pensionary posts. This Government Order was issued in terms of Regulations 350 of the Civil Service Regulation, as adopted for its application in U.P. Regulation 350 is quoted as below:

"350- All Establishments whether temporary or permanent shall be deemed to be pensionable Establishment.

Provided that it is open to the State Government to rule that the service in any Establishment does not qualify for pension.

X X X X

Exception: This Rule does not apply to posts declared pensionable in shram (Kha) Vibhag G.O. No. 810 (E) XXXVI-B- 1069/56 dated May 29, 1963 and Udyog (Gha) Vibhag G.O. No. 375-ED/XVIII-D-AQ-16-EP-60 dated June 5, 1963."

4. For those Government Servants who held non-pensionable posts, provision was made for Contributory Provident Fund (Uttar Pradesh) Rules, 1933. For other government servants holding pensionable posts, U.P. Contributory Provident and Fund-Pension-Fund Insurance Rules, 1948 were made applicable. The Government Order dated 28.10.1960 declaring certain posts in the Roadways Department as pensionable is quoted as below:

"In continuation of G.O. No.31040/XXX-135 v/1959 dated September 16, 1960, I am directed to say that the question of declaring the permanent posts in the Roadways Organization (including the Roadways Central Workshop, Kanpur) as pensionable has been under the consideration of Government for some time past. In this connection, the Governor has been pleased to order that the permanent gazetted and non gazetted incumbents of the following three categories would be entitled to the contributory provident fund-cum-pension Rules:-

(a) The employees working in the office establishment of the Asstt. General Manager, General Manager, Service Manager, Chief Mechanical Engineer, Roadways Central Workshop, Kanpur and the Headquarter office of the Transport Commissioner.

(b) Supervisory staff of the rank of Junior Station Incharge and above on the traffic side

(c) Technical staff of the rank of Junior Foremen and above on the engineering side; 'rank' means position/status but no post.

2. The governor has been further pleased to order, under note 3 below Article 350 of the Civil Services Regulation that the rest of the permanent non-gazetted Roadways employees both in the traffic and Engineering sections of the Organization, would be treated as non-pensionable. The incumbents of the permanent non-pensionable posts referred to above will be eligible for provident fund benefits in accordance with the provision of the employees Provident Fund Act.

3. I am also to add that Temporary Employment of the categories mentioned in para 1 above will be entitled to provident fund benefits as provided under the Employees Provident Funds Act. As and when they became, permanent, they will have the option to elect the contributory provident fund cum pension benefits in lieu of Employees Provident Fund.

5. As regards the grant of Provident Fund benefits to other temporary and work charged employees of the Roadways organization necessary orders have already been conveyed to you in Government Order No. 1488/XXX-219/55 dated 29.07.1960."

6. On 21.04.1961 another Government Order was issued by which the posts mentioned in para 1 of the Government Order dated 28.10.1960 were treated to be pensionable, with effect from the date they were converted into permanent post. Yet another Government Order dated 08.09.1961 provided that the permanent roadways employees mentioned in para 2 of the Government Order dated 28.10.1960 will be treated as non pensionable and they will be eligible for Provident Fund in accordance with the provisions of employees Provident Fund and Misc. Provisions Act.

7. U.P. State Road Transport Corporation was constituted under section 3 of the U.P. Transport Corporation Act, 1950 with effect from 01.06.1972. Government Order dated June 07, 1972 provided that a result of constitution of a Corporation Officers/employees of the State Roadways Organization and the officers and staff of Roadways of the Transport Commissioner, Head Office, whether permanent or temporary, shall be considered on deputation under exiting terms and conditions of their service. During period of deputation such pay and allowance would be admissible to these officers/ employees as would be admissible to them under the Government Service. No additional pay and allowance etc. shall be admissible to them consequent upon taking them on deputation. Permanent officers/staff shall be considered on deputation up to the date of their absorption permanently under the corporation, but their period of deputation of temporary officers/staff shall be at the most for six months. During this period, the Corporation should arrange for their formal appointment in service and also prepare service rules. As the temporary officers/staff will be appointed under the service of the corporation, their deputation on outer service condition shall be ended. Clause 3 of the Government Order provided that all those officers and employees of the Transport Organization, whether permanent on any post under their substantive government service or not, willing to be absorbed in the service of the Corporation under clause (5), shall be absorbed by the Corporation in its service and that the

Corporation shall for this purpose create posts in necessary number and permanent and temporary posts of the grade. Clause 4 of the Government order provided as follows

"However, there shall be compulsory requirement of the said absorption that their service conditions under the corporation, shall in the case be inferior to the conditions as were available under the Government immediately before the absorption and their tenure of Government Service shall be considered for their seniority, promotion, pay fixation, entitlement for leave and for the benefits or retirement in the same way and would have been under the Government service."

8. Clause 5 of the Government Order dated 07.06.1972 provided for absorption by invitation to be taken in the service, to accept the offer and the resign from the post in the Government from the date they will apply on the prescribed form. In case the option and the application are not received within the time limit, it shall be taken that the office of the corporation is not acceptable.

…to them and in their case action under clause 11 shall be taken which provides that service of such officers and employees who are purely temporary under existing government service, shall be terminated on one months notice on paying salary off the one month in lieu thereof, and those who will be permanent on any post of government cadre, shall be retired abolishing the post under the Government held by them, by giving three months notice under Article 43 of Civil Service Regulations, and in this connection pension gratuity etc. due to them under Rules shall be sanction. Clause 8 provided that in respect of the pension, excluding family pension or gratuity ultimately to be paid to the officers and employees, the Corporation shall bear the burden in proportion of their qualifying service as was received by the concerned officers/employees under the Government before going on deputation under the Corporation, the liability of the rest shall be on the corporation. The corporation also took the liability of family pension. Clause 9 provide that those officers and employees so absorbed in case they were not on pensionable job but they are members of contributory provident fund shall be substituted by the provisions that in such cases the Government shall transfer the contribution with interest thereof payable under Rules for prior to the first date of deputation of the concerned officers/employees in the corporation, in the account to be opened under the corporation, and thereafter the officer/employees so absorbed shall stop making subscribe to make all their provident fund account, if any, and the amount deposited in their account with the interest thereof, up-to the month just before the date of transfer payable under the relevant Government Rules, pass on the their new provident fund account which shall be opened under the Corporation.

9. The aforesaid Government Order dated June 7, 1972 was amended by Government Order dated July 5, 1972 providing that ion accordance with para 1(1) (Ka) of Government Order dated June 7, 1972 permanent and temporary officers/employees who were in the service of Government roadways shall be treated to be on deputation in U.P. Road

Transport corporation without fixing any period for deputation. Para 2 of this Government Order provided that the corporation has not made any rules relating to the service of its officers/ employees under section 45 of the U.P. Transport Corporation Act and all the provisions except Clause 1 (1) (Ka) of Government Order dated June 7, 1972 shall be treated to be cancelled at present, but, whenever the service rules are framed by the corporation, these will provide for the assurance of the Government that service conditions of the officers/employees of the Corporation shall not be inferior to the service conditions which were available to these employees, prior to their absorption and that their seniority, promotion, pay, pension and leave and other rights and financial benefits will be considered to be the same as these employees were getting while they were in Government service.

10. Reading both the aforesaid Government Orders together, it is found that all the employees of the erstwhile Government Roadways holding permanent pensionable post were entitled to the same benefits whereas those employees who were working on daily wages; appointed on ad-hoc basis; those who had not completed the minimum prescribed period of service on the post, entitling them to pensionary benefits; those who held post which were not declared pensionable and those who had not been removed from service after domestic enquiry did not draw those benefits.

U.P. State Road Transport Corporation Employees (Other than Officers) Services Regulations, 1981 made in pursuance of powers conferred under section 45 (2)(c) of the Road Transport Corporation Act, 1950, in suppression of all existing regulations and order were made and published by the State Government on 19.06.1981. These were to apply to all the employees (other than officers) except those who are working on deputation on contract and as part time, providing in Regulation 4 that the regulations shall apply to those persons who were in service of the State Government in the U.P. Government Roadways Department and were placed on deputation with the Corporation on terms of Government Order dated 05.07.1972. Regulations 4(1) provided that persons who are employees of the State Government in the erstwhile U.P. Government Roadways Department, shall within one month from the commencement of these regulation, inform the appointing authority or such authority as General Manager may in this behalf appoint, whether or not they want to opt for the service of corporation, and if they opts the terms and conditions of their service shall be subject to the provisions of Government Order dated July 5, 1972. If such persons do not or fail to opt for the service of corporation, their services may be liable to be terminated by the State Government on the ground of abolition or non-availability of the post on the principle of last come first go. Sub regulation (2) provide that existing employees not covered by sub regulation (1) or those who are not exempted under regulation 2, shall, within one month of the commencement of the regulation, inform the appointing authority or such authority as the General Manager, may in this behalf appoint, whether or not they want to be governed by the regulations. If they do not opt, or fail to exercise their option for being governed by these

regulations their terms and conditions of appointment, so far they are inconsistent with these regulation shall stand rescinded, provided that, in respect of workmen where any of the provisions of these regulations in less favorable than the provisions of the U.P. Industrial Disputes Act, 1947, the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Factories Act, 1948, or of any other Act applicable to them, the provisions of such Act shall apply. It was further provided that if such persons do not opt for being governed by these regulations their services may be terminated in accordance with the terms and their appointment.

Regulations 39 relevant for the purposes of pension is quoted as below:

"39(1) (I) Subject to the provisions of clause (ii) of this sub regulation, an employee of the Corporation shall not be entitled to pension, but he shall be entitled to the retirement benefits mentioned in sub-regulation(2).

(ii) A person, who was the employee of the State Government in the erstwhile U.P. Government roadways and has opted for the service of the Corporation, shall be entitled to pension and other retirement benefits in terms of the G.O. No. 3424/302-170-N-72, dated July 5, 1972.

(2) Without prejudice to the provisions of sub regulations (1) an employee (including an employee who was in the service of the State Government in the erstwhile U.P. Government Roadways Department, shall be entitled to the following retirement benefits:
(i) Employees Provident Fund or the General Provident Fund, as the case may be;
(ii) Gratuity in accordance with the Payment of Gratuity Act, 1972 or the relevant Government Rules, as may be applicable.
(iii) amount due under Group Insurance Scheme, 1972.
(iv) one free family pass in a year for journey within the State.
(v) a free family pass for his return to his home from the place of posting at the time of retirement in case he does not accept railway fare
(vi) any other benefit that may be allowed by the Corporation from time to time.

11. Government Orders dated 07.01.1984,16.07.1988, 22.06.1991, 08.09.1992, 18.09.1992, 06.12.1992, 18.09.1992, 04.09.1993, 06.12.1993, 03.02.1994 and 06.05.1995 and the Government Orders dated 22.06.1995 and 28.11.1998 provided for removal of difficulties with regard to employees of erstwhile Government Roadways on non-pensionable post, taken on deputation in the Corporation and for counting their service, and working out of the contribution or defaults committed by them in respect of provident fund applicable to them; as well as provided for contribution of the pension of those employees who were holding pensinable post. These also took care of the deputation of some of the employees who had not given options for their absorption. These Government Orders, however, did not substantively vary the right of these employees who are governed by the regulations of 1981.

12. The first round of litigation stated in the year 1990 when some of the retired employees treated to be holding non-pensionable post filed claim petitions before the State Public Service Tribunal,

Lucknow claiming pension and pensionary benefits. The tribunal by its final order dated 15.12.1998 decided the connected petitions and having considered the effect of G.O. dated 16.09.1960, 28.10.1960, 08.09.1961, 11.12.1962 and the effect of establishment of corporation, the absorption of the claimants in the service of Corporation and their promotion to higher posts, divided these employees into four categories as provided in the aforesaid Government Order dated 28.10.1960. Relying the judgment in Har Bux Pathak Vs. U.P. State Road Transport Corporation, 1992 (1) UPLBEC 242 it found that the employees belonging to category I, II and III being temporary employees, in exercise of option of their absorption for being made permanent were not entitled to pension. The Tribunal later on excluded those employees who fell in category IV and did not exercise the option of absorption. It was held that only those claimants who ere retired as Junior Station Incharge or Senior Station Incharge in the Traffic, or Junior Foreman and above in the engineering side alone can be said to held pensinary posts at the time of retirement. The other petitioners who held posts lower to Junior Station Incharge on the traffic, and Assistant Mechanic or Mechanic Below Post of Junior Foreman, did not hold pensionable post at the time of retirement, and were entitled only the benefit of Employees Provident Fund. The temporary employees on being made permanent on posts of and above rank of Junior Assistant Incharge from the Traffic side and above, the post of Junior Foreman on engineering side were given option to switch over from the employees Provident Fund to the Contributory Provident Fund Scheme within one year to the date of their retirement. Those who failed to exercise their option were not entitled to pernsionary benefit. Those who did not complete 10 years of service on a pensionable post either as permanent or as temporary employees were also not entitled to the benefit or pension, and that they had actually received retirement benefits under E.P.F. Act. Relying upon the cases of State of Rajasthan Vs. Rajasthan Pentioners Samaj 1991 (Supp) (2) SCC 141 in which Krishena Kumar Vs. Union of India (1990) 4 (SCC) 207 was followed wherein the decision in the D.S. Nakara's case was explained and distinguished; All India Reserve Bank Retired Officer's Associatin and another Vs. Union of India, 1992 (Supp) 1 SCC 664 and in the judgment of V.K. Rame Murthy Vs. Union of India, 1997 (1) UPLBEC 439, it was held by the Tribunal that if an Employees who had supper annuated, having received the benefit of Employees Provident Fund, the switching over of his retirement to Contributory Fund was not permissible.

13. In Har Bux Pathak Vs. State of U.P., 1992 (1) UPLBEC 242, this court had the occasion to consider the effect of the aforesaid Government Order, in respect of petitioners who retired in the year 1974 holding the post of Assistant Traffic Inspector. It was held that the Government Order dated 28.10.1960 was concerned primarily with the service conditions of employees of U.P., Government Roadways generally leaving the question of admissibility of pensionary benefit, to be determined later by the Government. The policy relating to payment of pensionary benefit was spelled out by G.O. dated 28.10.1960, and not by G.O. dated 16.09.1960. The Judgment of Har Bux Pathak was

affirmed in Civil Appeal No. 32 of 1992 decided on 22.09.1992 holding that Government Order dated 28.10.1960, was not applicable to all the employees who were already employed and were to be employed in Roadways. The appellant Har Bux Pathak had became member of the Employees Provident Fund Scheme, which was applicable to government servants holding non-pensionable posts and he also withdrew his share as also the Government Contribution at the time of his retirement. The concluding portion of the judgment in Special Appeal dated 22.09.1992 is quoted as below:

"On a conspectus of the entire materials we have therefore no hesitation in concluding that the G.O. dated 28th October, 1960 was not applicable to all the employees who were already employed and were to be employed in the Roadways. While on this point, it must be mentioned that the appellant himself became a member of the Employees Provident Fund Scheme framed under the Employees Provident Fund Act, Which, as has already been noticed, was applicable only to Government servants holding non-pensionable posts. Records further indicate that he also withdrew his share of the C.P.F. as also the Government contribution at the time of his retirement. It is too late in the day, therefore, for the appellant to turn round and claim that he had been holding a pensionable Post.

On the conclusions as above, we dismiss this appeal without any order as to costs."

14. Some of the petitioners who retired from non pensionable post, and received the E.P.F. including the contribution of the employer, filed writ petition before this court, which were disposed of with direction to consider petitioners representation. In leading writ petition no. 2603 of 2001 an order was passed by this Court. The representation was rejected by the impugned order dated 26.05.2000 observing that he was appointed as driver in U.P. State Roadways in 03.06.1962 and had retired on 31.05.1994 and as such he was not entitled to pension in accordance with G.O. dated 16.09.1960. similar orders were passed by the Regional Manager in other writ petition which are subject matter of challenge in this third round or litigation.

15. Sri I.R. Singh leading the arguments submitted in support of Sri Shiv Narain Singh, in writ petition no. 19736 of 2000 that he was working as fitter in UPSRTC and was given promotion as Junior foreman on 21.10.1981, and retired on 30.06.1997. It was contended that petitioner was State Government employee in the State Government Roadways and was on deputation with UPSRTC. He was, as such, entitled for pension. Petitioner had not objected for the terms and conditions of the service of U.P.S.R.T.C. he has relied upon the provisions of Regulation 39 (1) (ii) in submitting that a person who was an employee of State Government under erstwhile U.P. Government Roadways and had opted for service of the Corporation, shall be entitled to pension and other retirement benefits in terms of Government Order dated 05.07.1972. The Government Order dated 05.07.1972 provided that all the employees whether permanent or temporary who were in Government Roadways prior to the establishment of

UPSRTC will be treated in the Corporation on deputation without fixing any period of deputation and since no service rules were framed under section 45 of the U.P. Transport Corporation Act, in respect of such employees, the provisions contained in para 1(i) (a) of Government Order dated 07.06.1972 will be treated to be cancelled and that whenever service condition were to be made by the Corporation, these were to be with the assurance that their service conditions shall not be inferior to the service conditions applicable to the officers and employees of corporation under U.P. Government Roadways in respect of period of service, seniority, promotion, pension, pay, leave and other pensionary benefit applicable as if they were in Government Service. It was thus argued that those petitioners who were entitled to pension as Government Employees will continue to get benefit of pension and pensionary benefits and thus having completed 38 years of service on 30.06.1997, petitioner was entitled to pension.

16. Sri Sameer Sharma, relying upon the aforesaid judgment in Har Bux Pathak case, as above, submitted that Government Order dated 05.07.1972 only gave assurance to State Employees who were sent on deputation to the Corporation that their service condition will not be inferior to those existing prior to absorption of such employees in the Corporation. All such employees were absorbed in government Roadways Organization (Abolition of Posts and Absorption of Employees) Rules, 1982 w.e.f. 28.08.1982 and that till that date all such employees were working on above pensionable post even in the Corporation. There was no change in the service conditions of such employees and they were extended benefit of E.P.F. Scheme availed by them. In reply to argument with regard to regulation 39 of the Service Regulation, 1981, framed w.e.f. 19.06.1981, it was submitted that no post in the Corporation is pensionable and hence the petitioner were not prejudiced in any manner and that the provisions of the Government Order dated 05.07.1972 were not violated. He had relied upon the judgment of this Court with regard to retirement age of such employees which was held to be 58 years as in respect of the employees of the Corporation and this court held in writ petition no. 29846 of 2002 dated 29.07.2002 that since under the service conditions applicable to such employees on 05.07.1972, they were to retire at the age of 58 years, they cannot be extended the benefit of extension of retirement age by the State Government to 60 years in the year 2001; and that inferior service conditions did not mean the applicability of such service conditions which were subsequently amended. Sri Sameer Sharma, relied upon the judgment of Apex Court in T.N. Electricity Board Vs. R. Veerasamy and others 1999(82) FLR 174 in respect of his contention that the employees of the T.N. Electricity Board who retired prior to 01.07.1986 were not treated alike to the employees retired after that date, as they not belong to one class. The workmen, who had retired after receiving all the benefits available under the Contributory Provident Fund Scheme, cease to be employees of the Board with effect from the date of their retirement. They form a separate class.

17. With the aforesaid submissions, this Court is posed with the question to reconsider the decision in Har Bux Patha's

case affirmed by the division Bench in Special Appeal on the ground mainly that it did not consider the effect of the Government Order date 05.07.1972, and the effect of Regulation 39(ii) of the U.P. Transport Corporation Employees (Other than officers) Service Regulation,

18. The assurance given in para 4 of the Government Order dated June 7, 1972 to all the officers employees of the State Road Organization that in the event of the provisions of absorption to be made in service regulations their service conditions, under the corporation, shall in no case be inferior to the conditions as were available under the Government immediately before their absorption and that their tenure of Government service shall be considered for their seniority, promotion, pay fixation, entitlement for leave and for the benefits of retirement in the same way as would have been under the Government service, and so far as the pension is concerned fructified into statutory regulation 39(1)(ii) of the Service Regulation of 1981 notified on 19.06.1981. It is provided that a persons who was employed in the erstwhile Government and has opted in the service of Corporation shall be entitled to pension and other retrial benefit in the terms of Government Order dated 05.07.1972, it is found that whereas it amended the Government Order dated 07.06.1972 by deleting all the paras except para 1 (1)(ka) providing for considering all officers and staff relating to the work on Roadways of the Transport Commissioner, Head officer on deputation under the existing terms and conditions of their service, an assurance was given that whenever service regulation shall be framed, the conditions of service shall not be inferior to those who were applicable to the Government Service prior on their absorption and that same condition of service with regard to their seniority, promotion, pay fixation and other financial benefits shall be applicable as they would be received if they were in the Government Service. It is admitted that all the petitioner were absorbed in the service of the Corporation. Under the conditions of their service the employees who were not holding pensionable post and were contributing to Employees Provident Fund, continued to subscribe to the fund after their absorption even after their absorption. They became the employees of the Corporation and their service conditions were regulated by the U.P. State Road Transport Corporation Employees (Other then Officers) Service Condition, 1981. As Corporation employees, they were not entitled to pension. Petitioners at the time of absorption in service, as the employees of the U.P. Roadways on deputation with Corporation, were not holding pensionable posts and thus it cannot be said that upon their absorption, the service conditions with regard to, the fact that they were not entitled to pension was less advantageous than it was applicable to the employees of Roadways before their absorption.

19. The Government Order did not have the effect of legislation by reference. The intention of the Government Order dated 05.07.1972 was not to continue the rules applicable to government service applicable to the employees of Corporation holding non-pensionable service. Having been absorbed as employees of the corporation, the service regulation applicable to the corporation became applicable to such employees. The assurance given in the Government

Order dated July 5, 1972 was subject to the regulations to be framed for the employees of the Corporation, and thus the later portion of the assurance that their service condition shall not be less advantage, was applicable until the service rules were framed by the Corporation with regard to condition of their service. In case service regulation, 1981 were not acceptable to such employees, they could have opted out from the service of the Corporation under regulation 4(1)(iii) of the Service Regulations, 1981.

20. In writ petition no. 29846 of 2002; Prem Shanker Misra Vs. State of U.P. same view has been taken by this Court in its judgment and order dated 29.07.2002 in respect of the age of superannuation of the employees of the U.P. Government Roadways absorbed in the service of the Corporation. In this case, the Court held that the increase of age of superannuation by the State Government vide notification dated 28.11.2001 will not be applicable to these employees as it was not a part of their service conditions and that the amendment in the service condition shall not be applicable after their absorption in the Corporation.

21. There is yet another aspect of the matter that almost all petitioners have retired long age. For example in writ petition no. 2603 of 2001 petitioner retired on 30.05.1994 as Senior Station Incharge of the Corporation, Fazalganj Depot, Kanpur; in Writ petition No. 2604 of 2001 petitioner retired from the post of Driver on 28.02.1986 working under Regional Manager of the Corporation, Allahabad Region, Allahabad and writ petition no. 19726 of 2002 petitioner retired on 30.06.1997 from Varanasi Gramin Depot. All the petitioners retired on 30.06.1997 from Varanasi Gramin Depot. All the Petitioners have received retrial benefits including the entire amount of employees provident fund, gratuity and other benefits. They were absorbed in the service of the Corporation in the year 1982 and thereafter till the date of their retirement they did not make and protest with regard to the applicability of the Regulations. Having accepted the terms and conditions of the employment as employees of the Corporation, they cannot be allowed to touch around after their retirement and claim applicability of the service condition as Government Service on deputation with corporation. In State of Rajasthan Vs. Rajsthan Pensioners Samaj, 1991 (Supp) (2) SCC 141 Supreme Court upheld the judgment of Constitution Bench in Krishena Kumar Vs. Union of India (1990) 4 SCC 207; explained and clarified the judgment of Apex Court in D.S. Nakara's case (1983) 1 SCC 305 and held that contributory provident fund retirees are not entitled to claim a right to switch over from Provident Fund Scheme to pension scheme on the ground of violation of Article 14 of the Constitution of India. It was found that widows of Jodhpur CPF retirees and pension retirees do not form one homogeneous class but form two different classes and therefore the widows of CPF retirees are not entitled to opt for pension scheme, as the right to opt for pension scheme cannot be inherited or exercised by the widows of the retirees.

22. It was held in Krishena Kumar's case that the right of each individual provident fund retirees crystallized on his retirement after which no continuing obligation remains, while on the other

hand, there is a continuing obligation of the State in respect of pension retirees. In the present case on the absorption of an employee holding non-pensionable post in the Corporation, obligation of the State Government came to an end. These employees became employees of the Corporation and started subscribing to the EPF after transfer of the fund, from their account to EPF. They became members of the employees provident fund. The State Government was not required to contribute towards their pension fund as in the case of employees who were holding, pensionable post. Their rights as such crystallized on the date of their absorption in the Corporation in the year 1982. Now after their retirement, having received the retrial benefits and having ceased the relationship as employees of the corporation they cannot agitate their rights after long period of the time. They form a different class than the employees of the State Government holding pensionable posts on the date of absorption.

All the writ petitions are, accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2003

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 37817 of 2001

Smt. Padma Pathak ...Petitioner
Versus
Managing Director, Punjab Natioal Bank, New Delhi and another ...Respondent

Counsel for the Petitioner:
Sri K.P. Agrawal
Sri B.P. Singh
Sri Suman Sirohi

Counsel for the Respondents:
Sri K.L. Grover
Sri Ramesh Singh

Constitution of India: Article 226 – Compassionate appointment – denied on the ground that widow is getting post retrial benefits apart from pension of Rs.3099/- per month applicant suffering heavy financial crises due to long terms of treatment of her husband – held laconic order without disclosing any reason – illegal – direction issued for reconsideration in view of observation made in the judgment.

Held – para 13

The recording of reason is yet another aspect constituting an essential competent of natural justice, which all the authorities exercising power under the scheme or rules are required to do. As stated supra, a laconic order has been passed and no reasons have been assigned. The laconic order cannot be upgraded to the pedestal of an order based on reasons. The basic principle of Constitution makes it imperative for administrative authorities clothed with the duty to decide something on consideration of policy or scheme, to act judicially as a hedge against arbitrariness. It is in this conspectus that reasons are the imperative requirements for an administrative authority and in the instant case, the authorities having not assigned any reason, have acted in antagonism of the basic principles of the Constitution and as such the order cannot be sustained.

Case law discussed:
2000 (3) ESC 1618 (SC)

(Delivered by Hon'ble S.N. Srivastava, J.)

1. Petitioner, widow of Suresh Chandra Pathak, claim appointment on compassionate ground under the scheme

for employment of the dependents of the employees dying in harness (hereinafter referred to as the Scheme).

children and petitioner and on 20.04.1999 the petitioner moved an application for compassionate appointment on the ground that she had no source of livelihood to fall back upon. The claim of the petitioner was rejected by order-dated 30.09.2000, Annexure-5 to the writ petition, which is impugned in the writ petition. The laconic ground spelt out in the order is that the application of the petitioner did not find favour with the authorities.

3. Learned counsel for the petitioner urged that the order does not contain any reason, It has not disclosed why and how petitioner was not found fit for appointment under the scheme. He further urged that she has no source of livelihood. He further submitted that mere payment of certain amount towards the Provident Fund, Gratuity, Benevolent Fund, Leave Encashment and ex-gratia, Life Insurance cannot be a ground for rejection of appointment on compassionate ground. It is further submitted that in the facts and circumstances of the case where it is clear from the own report of the department that there was no earning member in the family that there was no source of Income to fall back upon and the fact that there were four minor children dependent on the widow the petitioner was entitled to get employment.

4. Sri K.L. Grover, learned Senior Advocate assisted by Sri Ramesh Singh appearing for the Bank urged that order was rightly passed in accordance with law and having regard to the spirit of the Scheme. However, he not draw attention to any material on record in order to show

2. It transpires from the record that the petitioner's husband died on 06.04.1999 leaving behind four minor

reason justifying rejection of appointment on compassionate ground.

5. I have considered the arguments canvassed on behalf of the learned counsel for the parties. The following facts emerge from the record.

6. According to the own report of the Bank submitted to the Deputy General Manager (Personnel), New Delhi dated 22.05.1999, Annexure-8 to the writ petition, Suresh Chandra Pathak died leaving behind the petitioner and four minor children and that he had put in 26 years of service on the date of death i.e. 06.04.1999. The department vide Annexure-8 opined that petitioner was eligible for appointment under the Scheme. It would be borne out from the word 'Yes' marked against the column, which signifies that the petitioner was eligible for appointment under the scheme. What were the terminal dues paid to the window of the deceased may be excerpted below for consideration whether the authorities were justified in holding those due to be sufficient means for the deceased family to keep the pot boiling.

Amount of Terminal Dues

a. P.F. (Employee's/employer's Contribution	Rs.97,019.38
b. Gratuity	Rs.95,369.00
c. Benevolent Fund	Rs.40,000.00
d. Leave Encashment	Rs.61,080.64
e. Ex-Gratia	Rs.15,000.00
f. Others	Rs. 5,000.00
g. Details of L.I.C.	Rs.15,352.00

7. Besides the above, it is also indicated in the record that petitioner was having a self occupied residential house the cost of which has been assessed to the extent of Rs. two lacs. The report further spells out that there was no source of income to fall back upon. Indisputably, no member of the family has been in employment which fact is implied from the word 'Nil' in the column 'family pension payable'.

8. Though all these materials are available on record, impugned order, Annexure-5 to the writ petition, it appears, has been passed mechanically sans application of mind by the authority to the most material and vital aspects and the application was rejected without assigning any reason. The order is quoted below:

"*The matter has been examined by Head Office and the request made by the widow for employment to her in the bank on compassionate ground has not found favour with the authorities.*"

9. It is obvious from the perusal of letter submitted by Smt. Padma Pathak petitioner to the authorities for compassionate appointment that husband of petitioner was affected with cancer and he succumbed to the dreaded disease on 06.04.1999 and further that the treatment of the deceased entailed huge expenses which led the petitioner to seek loan both from relatives and from outside i.e. money-lenders on heavy interest and in the circumstances most of the terminal benefits were used up in repayment of loan and interest and she was hardly left with any where-withal to sustain herself and her family out of the terminal dues disbursed to her.

10. This question as involved in this petitioner, received most careful attention of this Court in Writ Petition No. **35344 of 2001** Smt. Kanti Srivastava Vs. State Bank of India and this Court in which it was held that it was a well settled position in law that family pension scheme in any way could not be equated with the compassionate appointment and in holding this view, the Court relied on **Balbir Kaur another vs. Steel Authority 2003 (3) ESC 1618 (SC)**. The Apex Court was of the view that if at this juncture some lump sum amount is made available with a compassionate appointment, the grief stricken family may find solace to the mental agony and manage its affairs in the normal course of events. It further observed that it was not that monetary benefit would be replacement of the bread earner but that would undoubtedly bring some solace to the situation. It bears no repudiation that the deceased was suffering from cancer and huge amount was spent on his treatment. At the risk of repetition it may be stated here that according to the petitioner, repayment of loan taken for treatment of the deceased took toll of huge amount coupled with the fact that according to the own report of the Bank, she has no source of earning to fall back upon and that none of the member of the petitioner had a self occupied residential house the cost of which was stated to be Rs. 2 lacs cannot be a ground in vindication of rejection of application for compassionate appointment.

11. The question that falls for consideration is whether a paltry amount of Rs.3093/- being received as pension per month was sufficient to meet the need and necessity of family consisting of four

minor children and a widow. From a bare perusal of the scheme particularly paragraph 10 thereof which has been filed by the Bank along with counter affidavit, it is not susceptible of any doubt that financial condition of a deceased family has to be taken into reckoning in order to arrive at a conclusion whether the family has sufficient means of livelihood. Paragraph 10 of the scheme is excerpted below for ready reference.

"**10. Financial Condition of the family**: The dependents of an employee dying in harness be considered for compassionate appointment provided the family is without sufficient means of livelihood, specifically keeping in view of following:
a. Family Pension.
b. Gratuity amount received.
c. Employee's/Employer's Contribution to PF.
d. Any compensation paid by the bank or its Welfare fund.
e. Proceeds of LIC Policy and other investments of the deceased employee;
f. Income for family from other sources.
g. Employment of other family members.
h. Size of the family and liabilities, if any etc.

12. The benefit of employment by way of compassionate appointment under dying in harness Rules should flow liberally unless there be clinching evidence to demonstrate that the family of the deceased had sufficient means to fall back upon. The scheme for appointment on compassionate ground is a scheme in the nature of beneficial legislation to those on whom the destiny has inflicted the unkindest cut. The underlying object of this beneficial legislation is to alleviate the suffering and to wipe tears to the extent possible off the grief stricken family. During this cataclysmic period, if the family is left to fend on their own and is not extended the fruits of this beneficial legislation, it would be a negation of social protection and in consequence, the social justice, the very sheet-anchor conceived in our Constitution as a welfare State.

13. In the instant case, the Bank authorities appear to be more concerned with precise details and seemed not to have seen the wood for the trees. They proceeded oblivious of the consideration whether widow would be able to sustain herself and her four minor children with the meagre amount of Rs.3093/- blissfully unconcerned with the fact on record that the deceased employee was suffering from a dreaded disease and that a big chunk of the amount was used up in repaying the loan taken out of wifely devotion by the petitioner in a bid to save the life of her husband at all costs and also without having regard to the fact that there will be diminution and not in any increase in future of the amount being received by the petitioner. The word 'Livelihood' mean the money people need to pay for food, a plaice to live, clothing etc. according to the dictionary meaning. The underlying object behind the beneficial legislation is to ensure that the pot of the family keeps boiling and the family is able to maintain itself in a condition like the one prevailing at the time when bread earner was alive. Livili hood maintenance implies a kind of permanent character. These were the factors, which the Bank authorities were required to reckon with. It brooks no dispute that catena of decision both by the Apex court and this court converge to the settled position that person cannot claim

appointment on compassionate ground under the scheme as a matter of right by the authorities at the same time were bound to apply liberally the object of beneficial legislation and to traverse upon all the relevant aspects in order to determine whether the applicant was entitled to get appointment on compassionate ground. In these matters, the decision tempered with compassion is the requirement and not the blinkered approach unconcerned with fair play, compassion and justice. The recording of reason is yet another aspect constituting an essential competent of natural justice, which all the authorities exercising power under the scheme or rules are required to do. As stated supra, a laconic order has been passed and no reasons have been assigned. The laconic order cannot be upgraded to the pedestal of an order based on reasons. The basis principle of Constitution makes it imperative for administrative authorities clothed with the duty to decide something on consideration of policy or scheme, to act judicially as a hedge against arbitrariness. It is in this conspectus that reasons are the imperative requirement for an administrative authority and in the instant case, the authorities having not assigned any reason, have acted in antagonism of the basic principles of the Constitution and as such the order cannot be sustained.

14. As a result of the foregoing discussion, the writ petition succeeds and is allowed and the Competent authority is directed to consider the case of the petitioner in accordance with the scheme and the observation made in the body of this judgment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.3.2003

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

Civil Misc. Writ Petition No. 25104 of 1996

Smt. Savitri Devi ...Petitioner
Versus
Civil Judge, (Senior Division), Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Rai

Counsel for the Respondents:
Sri A.P. Tewari
Sri S.S. Tripathi
S.C.

Code of Civil Procedure–Order 39–Rule–2A-Suit for permanent injution–both the Parties restrained from alienating the disputed land– Respondent no. 3 sold his share to the Respondent no. 4 to 6 – whether the purchasers can put any claim for possession? – held no. but can be punished for violation of interim order passed by the Trial Court.

Held. Para – 26

Petition succeeds and is allowed. Learned trial court is directed to attach the entire land in dispute and force the respondent no. 3 to comply with the order passed by that court on 18.8.1992 and further to conclude the trial of the suit expeditiously.

Case law discussed:
AIR 1953 SC – 487, AIR 1966 SC – 470
AIR 1990 SC – 845, 1995 (6) SCC – 625
AIR 1967 SC – 1386, 2000 (4) SCC – 625
AIR 1961 SC – 221, AIR 1970 SC – 1767
1975 CR.L.J. 1283, 1987 CR. L.J. 1240
AIR 1998 SC – 2765, AIR 1971 ALLD. - 231
AIR 1981 ALLD.–231, AIR 1989 (NOC) 50
AIR 1967 – GUJ. – 124, AIR 1985 P & H. 299
AIR 1961 – 221, AIR 1973 ALLD – 449

AIR 1986 Ker. 63, AIR 1915 PC – 106
AIR 1936 PC – 141, AIR 1954 SC – 186
AIR 1976 SC – 859, 2001 (7) SCC. 530

(B) code of Civil Procedure – O. 39 Rule 2 A-Provisions fro punishment on disobedience of Interim Order – Whether the special provisions of C.P.C. can override effect upon the general provisions of contempt of court Act ? held yes.

Held – para 18

Thus, it is evident from the above discussion that the proceedings are analogous to the proceedings under the Act, 1972. The only distinction is that as the Legislature, in its wisdom, has enacted a special provision enacting the provisions of O. 39 R. 2A, it would prevail over the provisions of the Contempt of Court Act. Though the High Court, by virtue of the provisions of Section 10 of the Act 1972 can initiate the contempt proceeding even for disobedience of the injuction order granted by the civil court, but the exercise of such power is discretionary and generally does not require to be exercised in view of the special power conferred upon the civil court itself as held by the Division Bench.

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

1. This writ petition has been filed for issuing direction to the respondent no.2 to attach the properties of the respondent no.3, including those sold to the respondent nos. 4, 5 and 6 as described at the foot of the plaint in Suit no. 1586 of 1992 and for quashing the order dated 10.11.1995, passed by respondent no. 2 of the extent that it exempted the property of respondent no. 3 from attachment which has been sold to the respondent nos. 4, 5 and 6 in contravention of the interim order passed by the trial court.

2. Facts and circumstances giving rise to this case are that petitioner and respondent no. 3 are mother and son and that they had inherited the bhumidari rights in the agricultural land and there was some apprehension of both the sides that the other party may alienate the land in dispute. Suit No. 1586 of 1992 was filed by the petitioner in the trial court, wherein application for interim relief under Order 39, Rules 1 and 2 of the Code of civil Procedure (hereinafter called CPC) was also filed for restraining the defendant-respondent no. 3 to alienate the property. After receiving the notice of the court, subsequent to passing of the exparte interim order, respondent no. 3 appeared in the court on 18.8.1992 and made a similar application that the petitioner be also restrained from alienating any part of the land. On 18.8.1992 the trial court passed an order restraining the parties in the suit, the petitioner and other sons, including respondent no. 3, from selling the property or any part thereof to any other person till the decision of the suit. The respondent no. 3 alienated his undivided share in the land in dispute on 19.8.1992 and 27.8.1992 executing sale deeds in favour of the respondent nos. 4, 5 and 6. Being aggrieved and dissatisfied, the petitioner-plaintiff filed an application to implead respondent nos. 4, 5 and 6 in her suit and further prayed to initiate the proceeding under the provisions of Order 39, Rule 2-A C.P.C.. As the said sale deeds had been executed in contravention of the interim order dated 18.8.1992, the learned court directed attachment of the property of respondent no. 3 other than those which had been sold to respondent nos. 4, 5 and 6 and further respondent no. 3 was directed to be detained in civil imprisonment vide order dated

10.11.1995 the petitioner preferred an appeal which has been dismissed vide order dated 19.4.1996, hence this petition.

3. Learned counsel for the petitioner has submitted that any action taken in contravention of the order of the court is a nullity. Therefore both the courts below have failed to appreciate that the properties allegedly sold should also have been attached as the sale deeds have been executed in contravention of the interim order passed by the Court. Therefore, the impugned order requires interference.

4. However, learned counsel for private respondents has submitted that once the land had been sold and a 3rd party right had been created and they had been given possession of the land, the question of attachment of the property did not arise and non interference is called for.

I have considered the rival submission made by the learned counsel for the parties and perused the record.

5. Learned counsel for the respondent has made a submission that after execution of the sale deed the purchaser-respondent nos. 4, 5 and 6 had been put into possession of the land sold to them. In fact, the sale deeds have not been placed on record, but it remains an admitted fact that it was the respondent no. 3 who had merely sold the undivided 1/4th share in the property in dispute, and therefore, it is beyond imagination how the respondent nos. 4 to 6 in pursuance of the alleged sale deeds could be put to possession if there had been no partition prior to execution of the sale deeds, and no partition had taken place subsequent thereto.

6. It is settled legal proposition that a co-sharer can transfer/alienate his share but possession of the same cannot be handed over to the transferee unless the properties partition by metes and bounds. Therefore, a transferee is not permitted to take the possession of the share unless partition takes place (vide ***Sidheshwar Mukharjee Vs. Bhubneshwar Prasad Narain Singh*****,** AIR 1953 SC 487; ***M.V.S. Mkanikayala Rao Vs. M. Narasimhaswami & Ors.*** AIR 1966 SC 470; and ***Kartar Singh Vs. Harjinder Singh***, AIR 1990 SC 845).

Hon'ble Apex Court held as under:-

"Equally, it is settled law that a coparcener has no right to sell his undivided share in the joint family property and any sale of undivided and specified items does not bind the other coparceners. Since the specific properties were purchased prior to the institution of the suit for partition, though the appellants have no right to equities, it could be said that the respective share to which their principal alienor was entitled would be allottable to them as a special case."

7. Therefore, in view of the above, even if the respondent nos. 4 and 6 have been put in possession of the land as it was not legally permissible for them to take possession thereof, it may be presumed that they had taken possession illegally, and without any authority of law.

8. Admittedly, there was an order dated 18.8.1992 for both the parties not to alienate any part of the property in dispute. Respondent no. 3 had executed two sale deeds in favour of respondent

nos. 4 to 6. It is settled legal proposition that sale deeds so executed are a nullity as having been executed in disobedience of the interim order of the Court. In ***Mulraj Vs. Murti Raghunathji Mharaj***, AIR 1967 SC 1386 the Hon'ble Supreme Court considered the effect of action taken subsequent to passing of an interim order it its disobedience and held that any action taken in disobedience of the order passed by the Court would be illegal ***subsequent action would be a nullity***.

9. Similar view has been reiterated in ***Surajit Singh & Ors. Vs. Harbans Singh & Ors.,*** 1995 (6) SCC 50; ***Govt. of A.P. Vs. Gudepu Sailoo & Ors.*** 2000 (4) SCC 625; ***Hansraj Tirathram Vs. The Administrator, Municipality Jammu***, AIR 1963 Kerala 18.

10. Therefore, there is no doubt that the alleged sale deeds are nullity, meaning thereby unenforceable and in executable and deserve to be ignored.

11. So for as the scope of Order 39, Rule 2-A is concerned, the issue has been considered by the Court from time to time. The said provisions are of a different nature altogether. A Constitution Bench of the Hon'ble Supreme court, in State of Bihar vs. Rani Sona Bati Kumari, AIR 1961 SC 221, has categorically held that the said provisions deal with the willful defiance of the order passed by the Civil Court. The Apex Court. Held that there must be willful disobedience of the injunction passed by the court and order of punishment be passed unless the court is satisfied that the part was, in fact,. Under a misapprehension as to the scope of the order of there was an unintentional wrong for the reason the order was ambiguous and reasonably capable of more than one interpretation or the party never intended to disobey the order but conducted himself in accordance with the interpretation of the order. The proceedings are purely quasi-criminal in nature and are, thus, punitive. Even the corporate body like municipality/ government can be punished though on officer of it be a party by name. A similar view has been reiterated by the Hon'ble Supreme Court in ***Aligarh Muncipal Board & ors. Vs Ekka Tonga Mazoor union & ors.***, AIR 1970 SC 1767; by the Allahabad High court in ***Ratan Narain Mulla vs The chief Secretary, Govt. of U.P. & ors***, 1975 Cr. L.J. 1283; and by the Delhi High court in ***M/s Jyoti Limited vs. Smt. Kanwaljit Kaur Bhasin & Anr***., Cri. L.J. 1281.

12. In ***Tayabbhai M. Bagasarwalla & ors. Vs Hind Rubber industries Pvt. Ltd.*** AIR 1967 SC 1240, the Hon'ble Supreme Court dealt with a case of disobedience of an injunction passed under O. 39 R. 1 and 2 of the Code, wherein the contention was raised that the proceedings under O., 39 R. 2A cannot be initiated and no punishment can be imposed for disobedience of the order because the civil court, which granted the injunction, has no jurisdiction to entertain the suit. The Apex Court rejected the contention holding that a party aggrieved of the order has a right to ask the court to vacate the injuction pointing out to it that it had no jurisdiction or approach the higher court for setting aside that order, but so long the order remains in force, the party cannot be permitted to disobey it or avoid punishment of disobedience on any ground, including the court had no jurisdiction, even if ultimately the court comes to the conclusion that the court had no jurisdiction to entertain the suit. The

party, who willingly disobeys the order and acts in violation of such an injunction, runs the risk for facing the consequence of punishment.

13. In the ***Samee Khan vs. Bindu Khan***, AIR SC 2765, the Hon'ble Supreme Court held that in Exercise of the power under O, 39 R. 2A of the Code, the civil court has a power either to orders detention for disobedience of the disobeying party or attaching his property and if the circumstances and facts of the case so demand, both steps can also be resorted to. The Apex Court held as under:-

"But the position under R. 2A order 39 is different. Even if the injunction order was subsequently set aside the disobedience does not get erased. It may be a different matter that the rigour of such disobedience may be toned down if the order is subsequently set aside. For what purpose the property is to be attached in the case of disobedience of the order injunction? Sub-rule (2) provides that if the disobedience of breach continues beyond one year from the date of attachment the Court is empowered to sell the property under attachment and compensate the affected party from such sale proceeds. In other words, attachment will continue only till the breach continues or the disobedience persists subject to limit of one year period. If the disobedience cases to continue in the meanwhile the attachment also would cease. Thus, even under Order 39 Rule 2-A the attachment is a mode to complex the opposite party to obey the order of injunction. But detaining the disobedient party in civil prison is a mode of punishment for his being guilty of such is obedience"

14. Thus, in view of the above, it becomes crystal clear that the proceedings are analogous to the contempt of court proceedings but they are taken under the provisions of O. 39 R. 2A of the Code for the reason that the special provision inserted in the Code shall prevail over the general law of contempt contained in the Contempt of Courts Act, 1972 (for short, "the Act, 1972"). Even the High court, in such a case, shall not entertain the petition under the provisions of Act, 1972. (Vide ***Ram Roop Pandey vs. R.K. Bhargave & ors.***, AIR 1971 All 231; ***Smt. Indu teari vs. Ram, Bahadur Chaudhari & ors.,*** AIR 1981 All. 309; and ***Rudraiha vs. State of Karnataks & ors***. AIR 1982 Kar. 1982)

15. In ***Md. Jamal Paramanik & ors. Vs Md. Amanullah Munshi***, AIR 1989 (NOC) 50 Gau), the Gauhati High court held that it is not permissible for the court to impose a fince or compensation as one of the punishments for the reason that the provisions of O. 39 R. 2A do not provide for it. In ***Thakorlal Parshottamdas vs. Chandulal Chunital***, AIR 1967 Guj. 124, Hon'ble Mr. Justice P.N. Bhagwati (As His Lordship then was) held the punishment for breach of interim injunction could not be set-aside even on the ground that the injunction was ultimately vacated by the appellate court. In ***Rachhpal Singh Vs. Gurdarshan Singh***, AIR 1985 P & H 299, a Division Bench of Punjab & Haryana High Court held that if an interim injunction had been passed and is alleged to have been violated and application for initiating contempt proceeding under O. 39 R. 2A has been filed but during its pendency the suit itself is withdrawn, the court may not be justified to pass order of punishment at that state. Thus, it made a distinction from

the above referred Gujarat High Court's decision in ***Thakorlal Parshottamdas*** (supra) that contempt proceedings should be initiated when the interim injunction is in operation.

16. A constitution Bench of the Hon'ble Supreme Court in ***The State of Bihar vs. Rani Sonabati Kumari***, AIR 1961 SC 221 observed that the purpose of such proceedings is for the enforcement or effectuation of an order of execution. Similarly, in Sitarami Vs. Ganesh Das, AIR 1973 Alld. 449 the Court held as under ;-

"The purpose of Order 39, Rule 2-A, Civil P.C. is to enforce the order of injunction. It is a provision which permits the Court to execute the injunction order. Its provisions are similar to the provisions of Order 21, Rule 32, Civil P.C. which provide for the execution of a decree for injunction. The mode of execution given in Order 21, Rule 32 is the same as provided in Rule 2-A of Order 39. In either case for the execution of the order or decree of injunction attachment of property is to be made and the person who is to be compelled to obey the injunction can be detained in civil prison. The purpose is not to punish the man but to see that the decree or order is obeyed and the wrong done by disobedience of the order is remedied and the status quo ante is brought into effect. This view finds support from the observations of the Supreme Court in the case of ***State of Bihar Vs. Sonabati Kumari***, AIR 1961 SC 221; while dealing with O. 39, Rule 2(iii), Civil P.C. (without the U.P. Amendment) the Court held that the proceedings are in substance designed to effect enforcement of or to execute the order, and a parallel was drawn between he provisions of O. 21, R. 32 and of O. 39, R. 2 (iii), C.P.C. which is similar to Order 39, R. 2-A. This curative function and purpose of rule 2-A of Order 39, Civil P.C. is also evident from the provision in Rule 2-A for the lifting of imprisonment, which normally would be when the order has been complied with and the coercion of imprisonment no longer remains necessary. Hence, even if Sitaram had earlier been sent to the civil imprisonment he would have been released on the tinshed being removed, and it would therefore now serve no purpose to sent him to Prison. For the same reason the attachment of property is also no longer needed. The order of the Court below has lost its utility and need no longer be kept alive."

17. In ***Kochira Krishnan Vs. Joseph Desouza***, AIR 1986 Ker. 63, it has been held that violation of injuction or even undertaking given before that court is punishable under O. 39 R. 2 A of the code. The punishment can be imposed even if the matter stood disposed of, for the reason that the court is concerned only with the question whether there was a disobedience of the order of injuction or violation of an undertaking given before the court and not with the ultimate decision in the matter. While deciding the said case, the Court placed reliance upon the judgement of the Privy Council in ***Eastern Truct Co. vs. Makenzie Mann & Co. Ltd.***, AIR 1915 PC 106, wherein it had been observed as under :-

"An injuction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts…"

This Court had taken a similar view in ***Magna Vs. Rustam***, AIR 1963 Raj.3

18. Thus, it is evident from the above discussion that the proceedings are analogous to the proceedings under the Act, 1972. The only distinction is that as the Legislature, in its wisdom, has enacted a special provision enacting the provisions of O. 39 R. 2A, it would prevail over the provisions of the Contempt of Court Act. Though the High Court, by virtue of the provisions of Section 10 of the Act 1972 can initiate the contempt proceeding even for disobedience of the injuction order granted by the civil court, but the exercise of such power is discretionary and generally does not require to be exercised in view of the special power conferred upon the civil court itself as held by the Division Bench of the Delhi High Court in ***Dr. Bimal Chandr sen Vs. Mrs. Kamla Mathur***, 1983 Cri.L.J. 494.

19. In ***Andre Paul Terence Ambard Vs. Attorney General for Trinidad and Tabogo***, AIR1936 PC 141, the Privy Council has observed that the proceedings under the Contempt of Courts Act are quasi-judicial in nature and orders passed in those proceedings are to be treated as order passed in criminal cases. In ***Sukhdeo Singh Vs. Hon'ble the Chief Justice Teja Singh & Hon'ble Justice the Par Pepsu High Court at Patila***, AIR 1954 SC 186, the Supreme Court has taken the same view.

20. A Full Bench of Punjab & Haryana High Court, in ***Sher Singh Vs. R.P. Kapoor***, AIR 1968 Pb. 217, has held that the contempt proceedings are, by all means a quasi-criminal in nature. The applicant must prove his allegations beyond reasonable doubt and the alleged contemnors are entitled to the benefit of doubt. The same view has been taken by the Division Bench of Madras High Court in ***B. Yegnaryaniah***, AIR 1974 Mad.313, and the Lahore High Court in ***Homi Rustom G. Pardiawala Vs. Sub. Inspector Baig & others*** AIR 1941 Lah. 196.

21. In ***S. Abdul Karim vs. M.K. Prakash, AIR*** 1976 SC 859, the Hon'ble Apex court has held that the standard of proof required to establish a charge in contempt proceeding is the same as in any other criminal proceedings. It is all the more necessary to insist upon strict proof of such charged act complained of is committed by a person performing judicial/quasi-judicial proceedings.

22. In ***Jawand Singh Hakum Singh Vs. Om Prakash,*** AIR 1959 Pb. 632, the Punjab & Haryana High Court, while delaing with a contempt matter, had observed that a guilt of a person of having committed contempt of court must rest on reasonable certainty. Suspicion, no matter how strong and speculative, however, suspicions must not form the basis for contempt.

23. In ***Chhotu Ram Vs. Urvashi Gulati & ors.*** (2001) 7 SSC 530, the Hon'ble Supreme Court held that burden and standard of proof in contempt proceeding, being quasi-criminal in nature, is the standard of proof required in criminal proceedings for the reason that contempt proceedings are quasi criminal in nature.

24. In view of the above discussion one reaches the inescapable conclusion that proceedings under O.39 R.2A are quasi criminal in nature and are meant to maintain the dignity of the court in the eyes of the people so that the supremacy

of law may prevail and to deter the people for mustering the courage to disobey the interim injuction passed by the court.

25. To sum up the case, the sale deeds allegedly executed by the respondent no. 3 in favour of respondent nos. 4 to 6 are nullity as had been executed in disobedience of the interim order passed by the trail court on 18.8.1992. Secondly respondent nos. 4 to 6 could not be in possession of the land as there has been no partition by metes and bounds between co-sharers. If they are in possession, it is to be ignored and thirdly as the alleged sale deeds have to be ignored the learned court below ought to have attached the entire property which, including the land sold vide two sale deeds.

26. Petition succeeds and is allowed. Learned trial court is directed to attach the entire land in dispute and force the respondent no. 3 to comply with the order passed by that court on 18.8.1992 and further to conclude the trial of the suit expeditiously.

27. In the facts and circumstances of the case, the respondent nos. 4 to 6 shall pay a sum of Rs.5000/- as a cost to the petitioner.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2003.

BEFORE
THE HON'BLE S.P. SRIVASTAVA, J.
THE HON'BLE M.P. SINGH, J.

F.A.F.O. No. 736 of 2003

National Insurance Company Limited ...Defendant-Appellant
Versus
Naresh Kumar and others ...Claimant-Respondent.

Counsel for the Appellant:
Sri Satish Chaturvedi

Counsel for the Respondents:
Sri J.J. Munir

Motor Vehicles Act 1988-Section 170 – Appeal filed by Insurance Company –No permission obtained before filing the Appeal held Quantum of Compensation can not be questioned.

Held – Para 8
Case law discussed:
J.t. 2002 (7) SC -251
2003 ALJ 247

(Delivered by Hon'ble S.P. Srivastava, J.)

1. Heard Sri Satish Chaturvedi learned counsel for the insurer-Appellant and Sri J.J. Munir, learned counsel for the claimants-caveators.

2. The appellant feels aggrieved by the award of the Motor Accident Claims Tribunal, determining an amount of Rs.2,42,726/- (Rupees two lacs forty two thousands, seven hundred and twenty six only) as just compensation, to which the claimant Naresh Kumar was found entitled to on account of the grievous

injury resulting in permanent disability caused in an accident involving the offending motor vehicle, Jeep insured by the appellant covering the risk

3. The Motor Accident Claims Tribunal on a careful consideration of the evidence and materials brought on record, has come to the conclusion that the injured had a monthly income of Rs.1500/-. The Tribunal utilizing the multiplier of 12 had calculated the amount of compensation. The discretion exercised by the Tribunal holding the disability to be only 73.5%, taking into consideration the nature of the injuries and their effect and impact on the body of the injured workman, cannot be held to be arbitrary.

4. The injured – claimant had asserted that he was getting an income of Rs.5,000/- per month. Before the Tribunal a Salary Certificate has been produced which indicated that he was being paid the salary of Rs.3,000/- per month. The injured had set up a claim that apart from Rs.3,000/- per month, he was getting an income from agricultural holdings. The Tribunal, however, had calculated the amount of compensation taking his salary to be only Rs.1,500/- per month and utilizing the multiplier of 12. The age of the injured at the time of accident was fount to be 32 years.

5. It may also be noticed that the claim of the Insurer as well as the owner to the effect that the injured was traveling in the Jeep as a passenger after paying fare had been disbelieved. It was also found that the injured was traveling in the Jeep without paying any fare being an acquaintance of the driver. It was also found that the motor vehicle in question was not being run for any purpose other than that for which it has been registered. It has also been found that none of the terms and conditions subject to which the insurance policy had been issued, has been violated. The plea of the Insurer to the effect that the driver Amit Kumar had no valid licence to drive the motor vehicle in question was not accepted observing that no evidence had been led in support of such plea.

6. It may be noticed that it is not disputed by the insurer appellant that it had not been granted permission envisaged under Section 170 of the Motor Vehicles Act. Obviously, in facts and circumstances of the present case the ratio of the decision rendered in the case of ***National Insurance Co. Ltd. Chandigarh Vs. Nicolletta Rohtagi and others*** reported in JT 2002 (7) SC 251, stands squarely attracted and the insurer-appellant cannot be deemed to be entitled to challenge the quantum of compensation determined by the Tribunal as just compensation.

7. Learned counsel for the appellant has tried to assail the findings returned against it by the Motor Accident Claims Tribunal. The aforesaid findings, however, could not be demonstrated to be suffering from any such legal infirmity which may justify an interference therein by this Court. The findings returned against the appellant by the Tribunal are amply supported and warranted by the evidence and material brought on record.

8. Taking into consideration the facts and circumstances, as brought on record, no justifiable ground has been made out for any interference in the evaluation of the evidence as done by the

Tribunal. Moreover, the findings returned by the Tribunal about the age of the third party victim and the use of the multiplier as well as the income of the deceased are amply supported and warranted by the evidence and materials brought on record. The amount of compensation, taking into consideration the number of the dependants, does not appear to be unjust.

9. The learned counsel for the appellant has further urged that there was a breach of terms and conditions, subject to which the insurance policy has been issued covering the risk. The contention is that at the time of the accident, the driver of the offending motor vehicle was not having valid licence to run the vehicle.

10. Be what it may, so far as the statutory liability of the insurer-appellant as contemplated under the provisions of Motor Vehicles Act in the matter relating to the payment of just compensation determined by the Motor Accident Claims Tribunal is concerned, the mere fact that there was violation of the terms and conditions subject to which the insurance policy had been issued, cannot have the effect of exonerating the insurer from the statutory liability cast upon him in this regard to pay the amount to the third party victim.

11. The Position in law in this regard has been amply clarified by this Court vide the request rendered by a Division Bench in the case of ***National Insurance Company Ltd. Vs. Smt. Asha Devi and others***, reported in 2003 A.L.J. 247.

12. In such a situation, it is always open to the insurer- appellant to get the amount, paid in excess, refunded to it from the owner/insured in an appropriate proceedings initiated before the Motor Accident Claims Tribunal in which proceedings such a dispute can be decided between the insurer and the insured after affording an opportunity of hearing to the insured in accordance with law.

13. It will, therefore, be open to the insurer-appellant to initiate an appropriate proceeding for the refund of the amount paid by it to the claimants on establishing the breach of the terms and conditions subject to which the insurance policy had been issued.

14. The dismissal of this appeal will not come in the way of the insurer-appellant in initiating such proceedings.

15. Taking into consideration the facts and circumstances, as brought on record, no justifiable ground has been made out for any interference in the impugned award.

16. Taking into consideration the totality of the circumstances as brought on record, the quantum of compensation cannot be held to be unjust.

17. This Appeal is totally devoid of merits, which deserves to be and is hereby dismissed.

18. As prayed, the amount of Rs.25000/- deposited in this Court by the insurer- appellant under section 173 of the Motor Vehicle Act be remitted to the Motor Accident Claims Tribunal concerned so that it may be disbursed to the claimant.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2003

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

Civil Misc. Writ Petition No. 31231 of 1993

Makhan Singh ...Petitioner
Versus
XIth Additional District Judge, Agra and others ...Respondents

Counsel for the Petitioner:
Shri A.K. Goyal

Counsel for the Respondents:
Shri Prakash Gupta
Shri D. K. Agarwal
S.C.

Code of Civil Procedure 1808 Ord. 9 R. 13 – Suit for cancellation–27.2.89 fixed for disposal of issue No. 10–due to Advocates strike 27.4.89 fixed–neither petitioner nor his counsel appeared–Court suo moto decided the suit itself on merit–no notice for final disposal given–application under order 9.R.13 held mentionable.

Held- Para 5

The order dated 9th May 1989 has been passed under Rule 2 and not under rule 3. Applying the ration as set out in Seth Munnalal case (supra), it is clear that an application under Or.9 r.9 and r.13 was maintainable especially in view of the fact that there was no notice to the plaintiff petitioner that the suit itself would be finally heard and disposed of. In my view, the application under Or. 9 was maintainable for recall of the order dated 9th May 1989.

Case law discussed:
AIR 1970 Alld 257
1996 ACJ 1043

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

1. Pleadings have been exchanged and counsel for the parties agree that the writ petition itself may be disposed of finally under the Rules of the Court.

2. The petitioner filed suit no. 693 of 1987 for cancellation of sale deed dated 9.4.1984 and further that the petitioner be declared owner of the disputed plot. The contesting respondents filed their written statement. A number of issue were framed on 21st March 1988. However, subsequently an additional issue was framed on 10th February 1989 which was to the following effect:

"Prastut Vad perjo ki Bainame Samvyavhar per Adharit hai per Adhiniyam 45 San 1988 Ka kya Prabhao hai ?

3. The issue related to as to whether the provisions of Act No. 45 of 1988 dealing with 'benami' transaction were attracted. The trial court had also framed other issues including the issues no. 5 and 9 as to whether any cause of action had arisen and as to what relief the plaintiff is entitled to. The trial court fixed 27.2.1989 for disposal of issue no. 10 only. However, due to Advocates strike the case could not be taken up, though it is averred that the plaintiff was present on that date. The court, thereafter fixed 6th April 1989 for disposal of issue no. 10, which date was adjourned on the request of counsel for the petitioner and 27th April, 1989 was fixed for disposal of issue no. 10. On 27th April 1989 neither the Petitioner nor his counsel appeared before the court and the court after disposing of issue no.10 went on to dismiss the suit of the petitioner by its order dated 9th May

1989. Having come to know of the aforesaid order, the petitioner moved an application for recall of the aforesaid ex parte order on the ground that he had fallen ill on the date fixed and he also annexed a copy of the medical certificate issued by his doctor. After giving opportunity to the parties, the trail court rejected the application by its order dated 18th July 1991 holding that the application under Or. 9r.9 C.P.C. was not maintainable. Aggrieved against the aforesaid, an appeal was preferred which was also rejected by an order dated 31st May, 1993. The writ petition challenges the aforesaid three orders dated 9th May 1989, 18th July 1991 and 31st May 1993.

4. The principal contention of the learned counsel for the petitioner is that the order dated 9th May 1989 was not an order passed under Or.17 r.3 C.P.C. but was referable to rule 2 thereof and thus the application under on 9 r. 9/13 C.P.C. was maintainable. The further contention is that the trial court totally misapplied itself with regard to the applicability of the provisions of Act no. 45 of 1988. However, learned counsel for the respondent contends that since the order was passed on merits under or. 17 r.3 C.P.C. only an appeal lay against such an order and no application under Or.9 was maintainable.

5. As has been noted hereinabove, though 27th April 1989 was the adjourned date fixed for disposal of issue no. 10, the plaintiff petitioner nor his counsel appeared. It is apparent that the suit was fixed for disposal of only one issue that is issue no. 10 and not for disposal of the entire suit itself. A perusal of the order dated 9th May 1989 would show that in fact it is an order disposing of the suit itself on merits for which the court had not fixed any date and no notice was given to the petitioner for final disposal of the suit. Looking to the tenor of the order and the attending circumstances, it is apparent that the order is referable to rule 2 of Or. 17 C.P.C.A. Full Bench of this court while confronting a some what similar circumstances in the case of ***Seth Munna Lal Vs. Seth Jai Prakash*** (AIR. 1970 Allahabad 257) has held that no straight jacket formula can be adopted to find out as to whether the order was referable to rule 2 or 3 of Or. 17. It has been held that the tenor of the order and the attending circumstances can be examined by the court to see if the order was passed under Or. 17 rule 3 or rule 2 C.P.C. As already observed hereinabove, the order dated 9th May 1989 has been passed under Rule 2 and not under rule 3. Applying the ratio as set out in Seth Munnalal case (supra), it is clear that an application under Or. 9 r.9 and r.13 was maintainable especially in view of the fact that there was no notice to the plaintiff petitioner that the suit itself would be finally heard and disposed of. In my view, the application under Or. 9 was maintainable for recall of the order dated 9th May 1989.

6. Even the second contention of the learned counsel for the petitioner has some force. The transaction impugned was of a date much prior to the enforcement of Act no. 45 of 1988. The suit itself was filed prior to the invoking of the aforesaid Act. Thus, in view of the ratio laid down by the Apex Court in the case of Heirs of Virarajlal Ganatra V. Parshotam S. Shah (1996 All C.J. 1043) provisions of Act no. 45 of 1988 were not attracted and thus the impugned order was patently erroneous.

7. As I have already held that the order dated 9th May, 1989 was referable to Or. 17 r. 2 C.P.C. thus, the application for recall under Or. 9 was maintainable, therefore, the order rejecting the application for recall dated 18th July 1991 as not being maintainable is also erroneous. On similar reasons, the order of the appellate court dated 1st of May 1993 also cannot be sustained.

8. In view of the discussions hereinabove, the writ petition succeeds and is allowed. The order dated 9th May 1989, 18th July 1991 and 31st May 1993 are hereby quashed. The case is remanded to the trial court for deciding it afresh in accordance with law after giving full opportunity to the learned counsel for the parties. No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.3.2003

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No. 10566 of 2003

Smt. Saroj Dwivedi ...Petitioner
Versus
Additional District Judge/Special Judge (S.C. & S.T. Act) & others ...Respondents

Counsel for the Petitioner:
Sri Sanjay Srivastava

Counsel for the Respondents:
A.G.A.

U.P. Act No. 13 of 1972 – Section 28 – read with Transfer of Property Act, Section 108 (m)- Repair work by the tenant without permission of land lord suit for injunction interim injunction granted by the Trail Court rejected by the Lower Appellate Court held – proper –when the tenant claim for expenses of repair work only then the provisions of 28 shall be attracted–not otherwise.

Held- Para 4

As already discussed above, the provisions of Section 28 of U.P. Act No. 13 of 1972 apply in a different situation where the tenant wants the landlord to bear the expenses of the repairs. It does not take away the right of the tenant to effect the repairs himself. The order of the appellate court, therefore, does not suffer from any error, which may call for any interference under Article 226 of the Constitution.

Case Law discussed:
1994 ACJ 1140
1999 ACJ 597
AIR 1970 SC 1298

(Delivered by Hon'ble Janardan Sahai, J.)

1. The petitioner is a land lord of premises no. 124/326 B, Govind Nagar, Kanpur. The third respondent is the tenant of the building. The petitioner filed a suit for injuction in the court of the Civil Judge (J.D.), Kanpur Nagar for restraining the defendant from constructing a roof in the room in the tenancy of the respondent. The application for temporary injunction was also filed by the petitioner. The trial court allowed the application and restrained the tenant from reconstructing the roof making it clear, however, that the injunction would not come in the way of orders being passed under Section 28 U.P. Act No. 13 of 1972. The appellate court has allowed the appeal of the tenant third respondent and has dismissed the application for temporary injunction. The appellate court has relied upon the provisions of Section 108m of the Transfer of property Act for holding that the lessee is bound to keep the tenanted property in good condition as it was at the

time when he was put into possession. Reliance has been placed by the appellate court upon the decision in 1994 ACJ 1140 Sri Niwas Vs. Additional District Judge and upon certain other cases.

2. Counsel for the petitioner submitted that the case of Sri Niwas (Supra) was not correctly decided as the provisions of U.P. Act No. 13 of 1972 have in view of Section 38 of that Act overriding effect upon the provisions of Transfer of Property Act. It Section 108 (m) of the Transfer of Property Act is quoted below:-

"(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lesser and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition' and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left."

3. The tenant is bound to keep the property in as good a condition as it was at the time when he was put into possession. The right of the tenant to maintain the premises can not be denied in view of the provisions of Section 108 (m) of the Transfer of Property Act. Section 38 of U.P. Act no. 13 of 1972, however, gives overriding effect to the provisions of U.P. Act no. 13 of 1972,. The contention of the counsel for the petitioner is that the remedy of the tenant is to file an application under Section 28 of U.P. Act no. 13 of 1972. The scheme of the provisions of Sections 26,28 and 38 of U.P. Act no. 13 of 1972 may, therefore, be examined. Section 26 (2) of U.P. Act 13 of 1972 imposes an obligation upon the landlord to keep the building under tenancy wind proof and waterproof and to carry out periodical white washing and repairs. Sub-section (3) of Section 26 provides subject to contract to the contrary in writing that no tenant shall demolish any improvement effected by him in the building. Section 28 provides the procedure to be followed by the tenant for effecting repairs. In case of minor repairs, the tenant may give notice to the landlord to carry out the repairs and if the landlord fails to comply with the notice the tenant may under sub-section (3) of Section 28 himself carry out repairs at a cost not exceeding 2 months' rent in a year and deduct the amount from the rent and to furnish the account of the expenditure to the landlord. In case of major repairs, the cost of which is likely to exceed the amount of two months rent, the tenant may if the landlord fails to comply with the notice apply to the Prescribed Authority under section 28 (4) and the Prescribed Authority may under Section 28 subsection (5) require the landlord to carry out the requisite major repairs and on his failure to do so permit the petitioner to carry out those repairs at a cost which shall not be more that 2 years rent. Where the tenant carries out major repairs, the is required to furnish an account of expenses to the prescribed authority which shall certify the amount recoverable by the tenant and such amount can be adjusted against the rent in monthly installment no exceeding 25% of one month's rent.

4. The provisions of U.P. Act 13 of 1972 referred to above are not inconsistent in the sense that they can coexist with the provisions of Section 108 (m) of the Transfer of Property Act. Under the provisions of Section 108 (m), it is the duty of the tenant to keep the premises in as good a condition, as they were when they were let out. The provisions of the Act no. 13 of 1072 make it obligatory upon the landlord to keep the premises with proof and waterproof and to enforce this obligation, the tenant has been given a right to apply under Section 28 to the Prescribed Authority and to claim adjustment of the expenses against the rent in the manner and to the extent provided for under that Section. The provisions of Sections 26 and 28 of U.P. Act 13 of 1972 are for the benefit of the tenant and they create an obligation upon the landlord to keep the premises wind proof and waterproof and to effect periodical repairs. These provisions do not take away the right of the tenant himself to effect the repairs if he does not want to claim adjustment of the expenses against the rent. The question about adjustment of the expenses against the rent is not involved in this case. This writ petition arises out of a suit filed by the landlord restraining the tenant from reconstructing the roof. In the case of Sudhakar Shukla & Others Vs. Rajesh Kumar Agarwal, it has been held that a suit for injuction filed by the tenant restraining the landlord defendant from interfering with the tenants right of repairing the tiles and repairing the rooms in his tenancy and to keep it wind proof and water proof has been held to be maintainable and not prohibited by the provisions of Section 38 of U.P. Act no. 13 of 1972. It has been held in that case that a tenant can make use of Section 28 of Act No. 13 of 1972 in case where he wishes to have some repairs done at the landlord's expense and the Sections 26 or 28 do not prohibit the institution of a suit in the regular civil court if the relief claimed is for some repairs done by the tenant himself without imposing any financial liability on the landlord. In the present case it is the landlord who has filed the suit for injunction restraining the tenant form reconstructing the roof of the tenanted premises. Such an injunction sought by the landlord would interfere with the tenants right to effect the repairs recognized by Section 108 (m) of the Transfer of Property Act and therefore can not be granted. It has been held in 1999 (4) ACJ 597, Reshma Devi Vs. Civil Judge (S.D.) Prescribed Authority, Azamgarh & Others that repairs will include laying down of the roof or constructing the wall. The scheme of Section 108 (m) of the Transfer of Property Act and Sections 26 and 28 of U.P. Act 13 of 1972 is that if the tenant wants to effect the repairs, he is at liberty to do so in view of the provisions of Section 108 (m) of the Transfer of Property Act, but if he wants the landlord to bear the expenses, he has to apply under Section 28 of U.P. Act No. 13 of 1972 . There is as such no conflict between the two provisions and Section 28 of U.P. Act No. 13 of 1972 does not come in the way of the tenant effecting repairs himself without resorting to the provisions of Section 28 of U.P. Act No. 13 of 1972. The decision in the case of State of West Bengal Vs. Indian Iron and Steel Company Ltd., AIR 1970 Supreme Court 1298 does not help the petitioner. The proposition therein laid down that where finality has been given to orders of special Tribunals the civil courts, it jurisdiction must be held to be excluded if

there is adequate remedy to do what the civil court would normally do in a suit can not be doubted. That was a case under the Bengal Cess Act and the question about determination of annual net profits was involved there. As already discussed above, the provisions of Section 28 of U.P. Act No. 13 of 1972 apply in a different situation where the tenant wants the landlord to bear the expenses of the repairs. It does not take away the right of the tenant to effect the repairs himself. The order of the appellate court, therefore, does not suffer from any error, which may call for any interference under Article 226 of the Constitution.

Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2003

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 55497 of 2002

Shiv Poojan Prasad ...Petitioner
Versus
District Magistrate, Chandauli. and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Shukla

Counsel for the Respondents:
Sri D.K.S. Rathor
Sri S.N. Singh
S.C.

Constitution of India- Article 226 Re-auction of fisheries rights without cancellation of patta duly executed in favour of the petitioner- the decision of administrative or quasi judicial body affecting vested rights or interest of individual could not be altered without affording opportunity of hearing when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice, principles of Audi Alteram partem have to be observed.

Held- Para 4

It is well settled that (decision of administrative or quasi judicial body affecting vested rights or interest of individual could not be altered without affording opportunity of hearing. When there is an obligation to adopt the judicial approach and comply with the basic requirements of justice, principles of Audi Alteram Partem have to be observed.)

(Delivered by Hon'ble S.N. Srivastava, J.)

1. Present petition has its genesis in the order dated 26.11.2002 passed by the District Magistrate Chandauli arrayed as respondent no. 1 and the consequential order dated 29.11.2002 thereby reopening the auction of pond/Tank for fisheries rights, comprising in Plot no. 609/2, 619, 687 admeasuring 2.56 acres situated in village Baburi Pergana Majhwar Tahsil and District Chandauli.

2. Facts shorn of unnecessary details are that the pond/tank in question was, to begin with, put to auction in accordance with law on 9.10.2002 and the fisheries rights came to be settled in favour of the petitioner who being the highest bidder i.e. Rs.70,000/- Subsequently, Patta came to be executed in favour of the petitioner on 30.10.2002 by the competent authority. It transpires from the record that respondent no.4 made an application seeking cancellation of the Patta before the District Magistrate Chandauli on the ground that manipulations were contrived in the proceeding of auctioning the

fisheries rights to the petitioners in the pond/tank in question. In the self-same application preferred for cancellation of Patta, the respondent no.4 gave yet higher offer. It would further transpire from the record that on the said application, Tahsildar - respondent no.3 issued notice on 20.11.2002 fixing 28th Nov. 2002 for appearance and hearing. It would further appear from the record that the District Magistrate took up the matter on 26.11.2002 before the date fixed and made direction to the Sub Divisional Officer to initiate proceeding for re - auction of the pond/tank visibly on the premises that Opposite Party no.4 had made offer of Rs.2,80,000/- for fisheries rights in the said pond/tank. As a sequel to the direction the Sub divisional Officer called for a report from the Tahsildar vide order dated 29.11.2002.

3. I have heard learned counsel for the parties and considered the respective contentions in all its ramifications. One Bablu son of r respondent no.2 who has filed an application for impleadment in the instant petition is represented by Sri D.K.S. Rathore. On behalf of Jagdish Prasad, caveator, Sri S.N. Singh addressed the Court. Learned counsel for the petitioner began his submission stating that auction in favour of the petitioner had attained finality on 9.10.2002 and resultantly Patta was executed accordingly on 30th Oct 2002 by the Competent Authority with consequent approval of the Sub Divisional Officer affixed thereon. He further submitted that the Patta still subsists and has not been rescinded. On application of the Opposite Party no.4, proceeds the submission, a notice was received from Tahsildar to appear on 28th Nov. 2002 and before the petitioner could act upon the notice, orders were made for-reauctioning of the pond/tank for fisheries rights without any authority of law. He further submitted that the impugned order dated 26th Nov. 2002 and consequent order of the S.D.O. dated 29.11.2002 nodding in approval the said order wear the taint of having been passed without jurisdiction and the same militate against the principles of natural justice. The learned Counsel further submitted that the competent authority to award/settle Patta is the Sub Divisional Officer and once the has been executed, even the Sub Divisional Officer is not competent to interfere in the matter for re-auctioning of the fisheries rights. Sri Anuj Kumar, learned Counsel appearing for the Gaon Sabha canvassed his contentions in vindication of the order of Tahsildar and the learned Standing counsel put weight to the contentions made by the learned Counsel appearing for the Gaon Sabha. When they were confronted with the questions as to how the order dated 26.11.2002 was passed without canceling Patta executed in favour of the petitioner post-fixed with the approval of the S.D.O. and further as to how the order was passed exparte behind the back of the petitioner, both the counsel could not furnish adequate reply in vindication of the orders impugned herein.

4. It is borne out from the record that 28.11.2002 had been fixed in the notice issued by Tahsildar on 20.11.2002 for appearance and hearing and before the date fixed, the authorities made the order dated 26.11.2002 exparte for re-auctioning the pond/tank for fisheries rights without allowing the petitioner to have his say on the date fixed in response to the notice. It is worthy of notice that there is nothing on the record nor any material has been brought on record in

vindication of the impugned orders, and in the circumstances, conclusion is irresistible that the impugned order has been passed without giving opportunity of hearing and in breach of the principles of natural justice and thus the impugned orders are vitiated and cannot be sustained in law. It brooks no dispute that it is the Collector who is clothed with the power to cancel Patta and since the Patta in favour of the petitioner had been executed validly post-fixed with the approval of the Sub Divisional Officer, the same was not cancelled before ordering re-auction of fisheries rights. The necessary corollary is that after the settlement of Patta with approval of the Sub Divisional Officer affixed thereon, a right had come to be vested in the petitioner. If the District Magistrate had received any complaint about manipulations in the proceeding of auction or any irregularity whatsoever, he was under a duty to set a foot appropriate enquiry or to pass appropriate orders after affording opportunity of hearing to a person in whose favour Patta had been executed and no cancellation of Patta/auction finally settled in favour of a person or direction for re-auction merely on the basis of a complaint could be made. It is well settled that (decision of administrative or quasi judicial body affecting vested rights or interest of individual could not be altered without affording opportunity of hearing. When there is an obligation to adopt the judicial approach and comply with the basic requirements of justice, principles of Audi Alteram Partem have to be observed.) (In the instant case, the function of awarding Patta is a statutory function under the U.P. Zamindari Abolition and Land Reforms Act and it is too patent to be ignored that the District Magistrate made direction of re-auctioning the fisheries rights without hearing the petitioner in whose favour a right had come to be vested and by this reckoning the principles of natural justice have not been observed in compliance occasioning infringement of Art. 14 of the Constitution). It is quite obvious from the record that the District Magistrate never issued any notice nor gave opportunity of hearing before passing the order dated 26.11.2002 and the order has been made exparte. In the light of the above facts as the Patta executed in favour of the petitioner is still intact in law and the impugned orders are liable to be quashed. In the facts and circumstances of the case, it would be appropriate to remit the matter to the Collector with the direction to decide the application filed by the respondent no. 4 in accordance with law. The question that has to be put into forefront for consideration and adjudication by the Collector is whether Patta executed in favour of the petitioner could be cancelled on the allegations made in the application filed by the respondent no.4 and secondly whether once the auction has attained finality, the matter could be reopened for re-auction at subsequent stage after confirmation of auction and after the Patta had been executed in favour of the petitioner, merely on the ground that a third person has made higher offer for fisheries rights. Besides, he will also go into the question whether the auction had taken place in accordance with law and procedures prescribed. The above questions shall be traversed upon and answered as early as possible. It needs hardly be said that the Collector who is the appropriate authority in the matter of cancellation of Patta, will afford opportunity of hearing to all concerned on the application made by the respondent no. 4 and pass appropriate

orders in the light of the direction embodied in this judgment.

5. In the result, the petition succeeds and is allowed. The impugned order dated 26.11.2002 and consequential order dated 29.11.2002 are quashed. The matter is remitted to the Collector to adjudicate upon the controversy in the light of the direction afore stated.
