APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.5.2003

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

Second Appeal No. 2694 of 1982

Santu and others ...Appellant
Versus
Jagannath and others ...Respondent

Counsel for the Appellant:
Sri P. Prakash
Sri J.A. Azami
Sri Lalji Yadav
Sri J.J. Muneer

Counsel for the Respondents:
Sri Shirish Pd.

Code of Civil Procedure 1908- Section 100- Second Appeal- possessory title- whether appellant entitled to the decree of permanent injunction on the basis of possessory title alone even without proving the sale deed? Held ' Yes'.

Held- Para 6
The appellant is therefore, entitled to the decree of permanent injunction on the basis of possessory title alone. That this aspect of the matter has been totally ignored by the first appellate court. I agree with the argument of the learned counsel for the appellant that the appellant is entitled to the decree for the permanent injunction on the basis of the possessory title against the respondents who have no title over the land nor are in possession of the same.

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

1. The appellant Santoo (since deceased) filed the suit for permanent injunction to restrain the respondents from interfering in his possession over the land in dispute as shown in the said plan given at the foot of the plaint. The relief for mandatory injunction has also been sought directing the respondents to remove cattle troughs etc. The respondents contested the suit and they claimed the ownership and possession of the disputed land. The trial court held that the plaintiff failed to prove his possession over the disputed land. He has also failed to prove his title over the same. That the cattle troughs put by the respondents could not be removed. The trail court accordingly dismissed the suit with costs. Aggrieved by it the appellant preferred first appeal no. 30 of 1981. The respondents also preferred appeal no. 605 of 1981. Both the appeals were heard and dismissed on 18.8.1982. Therefore, the present second appeal has been filed.

2. I have heard Shri J.J. Muneer, learned counsel for the appellant. None appeared for the respondents at the time of the hearing of the appeal. However, I have gone through the entire record.

3. According to the appellant, the disputed property originally belonged to Nibar who transferred it by the sale deed to Sahabdin. The appellant purchased the property from Sahabdin by sale deed dated 30.1.1973 and he got the possession of the same. The first appellate court after considering the evidence in detail has held that Nibar was the owner and in possession of the property in dispute. He further held that Nibar transferred the property to Sahabdin and he became owner of the property in dispute by sale deed. However, the appeal was dismissed by the appellate court for the reason that the sale deed alleged to have been executed by Sahabdin on 30.1.1973 in favour of the plaintiff- appellant has not

been proved. Sahabdin was examined by the plaintiff to prove both the sale deeds executed by Nibar in his favour and sale deed executed by him in favour of the appellant. The appellate court has held that the sale deeds have not been proved in accordance with law as Sahabdin was totally illiterate. He has only identified the thumb marks of the sale deed, which is not possible, as he is not a finger print expert. That the sale deed should have been read over to him. That therefore, the execution of the sale deeds has not been proved in accordance with law.

4. The second appeal was admitted on this question alone by the following order :

"The substantial question of law involved in the second appeal is that the lower appellate court seems to have acted illegally in taking the view that the sale deed executed by Sahabdin who has been found to be the owner of the property in dispute in favour of the appellant had not been proved notwithstanding the statement of Sahabdin himself proving the said sale deed."

5. After considering the argument of the learned counsel, I am of the view that there is no illegality in the finding of the first appellate court that Sahabdin has not proved the sale deed in accordance with law. He has only stated that the sale deed bear his thumb mark, which statement cannot be believed. If a document is to be proved by illiterate person, it should be read over to him. Therefore, I find that there is no illegality in the order of the first appellate court that the sale deed has not been proved in accordance with law.

6. However, it has been argued by Sri J.J. Muneer, learned counsel for the appellant that even if the sale deed has not been proved the suit should have been decreed by the appellate court on the basis of the finding of possession in favour of the appellant. It has been argued that the lower appellate court has held that Nibar was owner and he was in possession over the property in dispute. Thereafter, Sahabdin was the owner in possession. Sahabdin has entered into the witness box and stated that he has transferred the ownership and possession to the appellant. Therefore, it has been argued that the appellant is in legal possession over the property in dispute. As against this the respondents have failed to prove their title over the disputed land. They have also failed to prove their possession. The appellant is therefore, entitled to the decree of permanent injunction on the basis of possessory title alone. That this aspect of the matter has been totally ignored by the first appellate court. I agree with the argument of the learned counsel for the appellant that the appellant is entitled to the decree for the permanent injunction on the basis of the possessory title against the respondents who have no title over the land nor are in possession of the same.

7. Accordingly, the appeal is allowed and the respondents are restrained by way of permanent injunction from interfering in the possession of the appellant over the land in dispute and to take possession of the same without due process of law.

8. In the circumstances, the parties shall bear their own costs throughout.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.05.2003

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

Criminal Misc. Application No. 3056 of 2003

Ram Anuj Dubey ...Applicant
Versus
State of U.P ...Opposite Party

Counsel for the Applicant:
Sri N.D. Shukla

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

Criminal Procedure Code 1808-Sec.-156 (3) application under section 156 (3)-Direction to register as complaint case-order without jurisdiction-direction to register case under Section 156 (3) Cr.P.C. is quite different to the complaint case under Section 200 Cr.P.C.

Held-Para 9

Thus the pronouncement of this Court in the case of *Dinesh chandra and others (Supra)* clarified the position of complaint under Section 200 Cr.P.C and application under Section 156(3) Cr.P.C. I, therefore, find that the learned C.J.M. Bhadohi exceeded the jurisdiction in registering the application under Section 156 (3) Cr.P.C as a complaint. The application is, therefore, allowed. The impugned order dated 19.4.2003 so far as it relates to registration of application under Section 156 (3) Cr.P.C as a complaint case is quashed. The C.J.M. Bhadohi is directed to proceed and pass appropriate order on the application under Section 156 (3) Cr.P.C at an early date.

Case law:-
2001 (1) J.I.C. page 4701
2001 (1) J.I.C. page 942 Alld.
AIR 1997 S.C. page 3104

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

1. The present application has been filed against the order dated 19.4.2003 passed by Chief Judicial Magistrate, Bhadohi whereby he directed to register the application under Section 156 (3) Cr.P.C as complaint.

2. The brief fact giving rise to this application are that an application under Section 156 (3) Cr.P.C was moved by applicant for registration of the case and investigation. The C.J.M Bhadohi ordered for registering of the case as a complaint case.

3. The learned counsel for the applicant has submitted that the procedure of complaint case and application under Section 156 (3) Cr.P.C are quite different and the C.J.M. Bhadohi has without caring for this passed the impugned order. In support of the contention he has relied upon two case law.

4. Being aggrieved by the said order the present application has been filed.

5. I have heard learned counsel for the applicant and learned A.G.A and also perused the impugned order.

6. In the case of ***Mahboob Ali*** Vs. ***State of U.P. and others,*** reported in 2001(1) JIC page 470, Alld. It has been held that the scope of application under Section 156 (3) Cr.P.C and that of complaint are different. The facts of the case referred in the case of **Mahboob Ali** (Supra) are similar to those of the present case. In that too the applicant had moved an application under Section 156 (3) Cr.P.C which was ordered to be registered as a complaint.

7. In the above case the order of the Magistrate was set aside and he was ordered to pass proper order.

8. In the case of ***Dinesh Chandra and others*** Vs. ***State of U.P*** 2001(1) JIC page 942, Alld., it was held that the powers under Section 156 (3) Cr.P.C are quite different to the power under Section 200 Cr.P.C. The case of ***Madhu Bala*** Vs. ***Suresh Kumar and others***, AIR 1997 Supreme Court page 3104 was fully discussed. In the case of ***Dinesh Chandra and others (Supra)*** and it was held as follows.

"The Apex Court has definitely not used the term complaint to thwart or defeat the purpose behind the enactment of Section 156 (3) itself. The term was never used with any intention that the reference order appears to channelise. Thus in my view it should be an application and not a complaint."

9. Thus the pronouncement of this Court in the case of ***Dinesh chandra and others (Supra)*** clarified the position of complaint under Section 200 Cr.P.C and application under Section 156(3) Cr.P.C. I, therefore, find that the learned C.J.M. Bhadohi exceeded the jurisdiction in registering the application under Section 156(3) Cr.P.C as a complaint. The application is, therefore, allowed. The impugned order dated 19.4.2003 so far as it relates to registration of application under Section 156 (3) Cr.P.C as a complaint case is quashed. The C.J.M. Bhadohi is directed to proceed and pass appropriate order on the application under Section 156(3) Cr.P.C at an early date.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2003

BEFORE
THE HON'BLE R.K. DASH, J.
THE HON'BLE V.N. SINGH, J.

Civil Misc. Writ Petition No. 21659 of 2003

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

Counsel for the Petitioner:
Sri Ranjit Asthana

Counsel for the Respondents:
Sri Hari Ashok Kumar, S.C.

U.P.Z.A. & L.R. Act-Section 281-readwith Article 21 of the Constitution of India-validity of detention of the defaulter-only when the defaulter has sufficient means to pay but avoiding the Payment-such finding must be recorded in detention order.

Held-Para 9

Though we are not dealing with the question of legality and constitutional validity of Section 281 of the Act, however, keeping in mind the International Covenant to which India is a signatory coupled with Article 21 of the Constitution, we are of the opinion that merely on failure of the defaulter to discharge his liability upon receipt of demand notice, harsh method of arrest and detention to coerce him to make the payment should not be resorted. When arrest and detention affects personal liberty of a person, the authority before taking recourse to such method must be satisfied that the defaulter in spite of having sufficient means, has willfully and with mala fide intention refused to pay. This satisfaction must be evident from the order passed by the recovery

authority for arrest and detention of the defaulter.

Case law discussed:

AIR 1980 SC-470

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

1. Heard learned counsel for the petitioner and learned Standing Counsel.

2. The question of quite considerable importance that arises in this case is as to whether non-payment of any debt due, personal liberty of the debtor can be curtailed and he be put behind the prison. The petitioner had incurred loan from Punjab National Bank, Branch Nanda Nagar (Rajahi), district Gorakhpur and was in arrear of Rs.94,937/-. A recovery certificate was sent to the Tahsildar, Gorakhpur for realization as arrear of land revenue under the U.P. Zamindari Abolition and Land Reforms Act. The petitioner's case is that neither he was noticed nor he was given breathing time to discharge his liability by making payment of the amount as claimed. He was all of a sudden arrested in the morning of 8.5.2003 and sent behind the prison. On the same day, his father some how could arrange Rs. 34,100/- and deposited with the Tehsildar Sadar, Gorakhpur and asked for a copy of the citation, but his prayer was turned down. It is urged, financial condition of the petitioner does not permit him to pay the remaining amount in lump sum and therefore, easy monthly installments may be fixed so as to enable him to clear up the debt.

3. It is submitted at the bar that it is the usual practice all over the State that on the basis of citation received from the banks, financial institutions and others, recovery proceedings are initiated under the U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short 'the Act') for realization of unpaid loan/dues as arrears of land revenue. Without following the procedure for service of notice and without being satisfied that the defaulter willfully avoided to receive the notice, the Tehsildar who exercises power as an execution court proceeds to get him arrested and detained in the custody. Though arrest and detention is prescribed in the Act, it is a 'draconian' law which seriously affects one's personal liberty, a precious right guaranteed under the Constitution. After sending the defaulter to prison, the Tehsildar resorts to other methods provided in the Act to recover the amount, which procedure he should have followed at the first instance. In the case on hand, the petitioner was not served with any notice. He was unaware of the recovery proceeding. In absence of any material and without any order being passed that he willfully defaulted to pay the debt, the Tehsildar got him arrested and detained in prison, even though from the properties, both movable and immoveable which he owns, recovery could have been made by attachment and sale thereof.

4. Learned Standing Counsel, on the other hand, contends that Section 279 of the Act prescribes different modes of recovery of land revenue and arrest and detention of the debtor being one of the modes no fault can be found with the authority for adopting such mode at the first instance.

5. Section 279 of the Act prescribes following procedures for recovery of arrear of land revenue:

(a) by serving a writ of demand or a citation to appear on any defaulter,

(b) by arrest and detention of his person.
(c) by attachment and sale of his moveable property including produce,
(d) by attachment of the holding in respect of which the arrear is due,
(e) {by lease or sale} of the holding in respect of which the arrear is due,
(f) by attachment and sale of other immovable property of the defaulter, and
(g) by appointing a receiver of any property, moveable or immovable of the defaulter."

6. The other relevant provisions which are necessary to be referred to, are Sections 280 and 281 of the Act. Section 280 provides that when arrear of land revenue has become due, Tehsildar may issue writ of demand calling upon the defaulter to pay the amount within specified time and in addition to or in lieu of writ of demand the Tehsildar may also issue citation against the defaulter to appear and deposit the arrears. Next comes Section 281 which envisages that the person defaulted in the payment may be arrested and detained in custody. The other relevant provisions relate to attachment and sale of movable and immovable properties of the defaulter.

7. Arrest and detention of a defaulter as provided under Section 281 are borrowed from Section 51 and Order XXI Rule 37 C.P.C. Section 51 runs thus:

"Powers of Court to enforce execution:- Subject to such conditions and limitation as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree--

(a) by delivery of any property specifically decreed;
(b) by attachment and sale or by the sale without attachment of any property;
(c) by arrest and detention in prison (for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section);
(d) by appointing a receiver; or
(e) in such other manner as the nature of the relief granted may require:
(Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgement-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied--

(a) that judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgement-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgement-debtor was bound in a fiduciary capacity to amount.

Order XXI Rule 37 under the heading arrest and detention in the civil prison reads as under:

"Discretionary power to permit judgement debtor to show cause against detention in prison:- (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court shall, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

(Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that with the object or effect of delaying the execution of the decree, the judgement-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.)

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

8. A conjoint reading of both section 51 and Order XXI Rule 37 C.P.C. what appears is that warrant of arrest shall not be issued as a matter of course. It is when the court is satisfied that the judgment-debtor with the object of delaying the execution of the decree is likely to abscond or leave the local limits of its jurisdiction or has dishonestly transferred, concealed or removed any part of his property or having means to pay the decreetal amount or substantial part thereof refuses or neglects to pay the same, in that case, the court may order for his arrest and detention in prison. The question as to whether it would be reasonable and fair to arrest a judgment-debtor for his not satisfying the decree came for consideration before the Apex Court in case of ***Joll George Varghese and another Versus the Bank of Cochin, (AIR 1980, SC, 470)***. Referring to Article 11 of International Covenant on Civil and Political Rights, which inter-alia says that 'no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation as well as Article 21 of the Constitution the Court held:

"XXX The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasizes the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction sauced law with justice, harmonized S. 51 with the Covenant and the Constitution."

9. The Act with which we are concerned in the present case is a special statute. It empowers the recovery authority to arrest and detain a defaulter if fails to pay the arrear of land revenue after notice of demand was issued to him. Attachment and sale of his properties comes later and it is because of that the Tehsildar in the present case got the

petitioner arrested and detained in the prison. Though we are not dealing with the question of legality and constitutional validity of Section 281 of the Act, however, keeping in mind the International Covenant to which India is a signatory coupled with Article 21 of the Constitution, we are of the opinion that merely on failure of the defaulter to discharge his liability upon receipt of demand notice, harsh method of arrest and detention to coerce him to make the payment should not be resorted. When arrest and detention affects personal liberty of a person, the authority before taking recourse to such method must be satisfied that the defaulter in spite of having sufficient means, has willfully and with mala fide intention refused to pay. This satisfaction must be evident from the order passed by the recovery authority for arrest and detention of the defaulter.

10. So far as the present case is concerned since the petition through his father has deposited a sum of Rs. 34,100/- we direct that on his depositing a further sum of Rs.10,000/- within ten days from today the Tehsildar Sadar, respondent no. 2, shall release him from prison. For payment of the remaining amount liberty is given to the petitioner to move an application for grant of instalments to the Tehsildar. In the event, such an application is moved the same shall be decided keeping in mind his financial position coupled with the fact that he has already paid certain amount.

11. Since this order is dictated in open Court we direct learned Standing Counsel to communicate operative part of the order to the Tahsildar Sadar, district Gorakhpur for compliance.

12. Registry is directed to send a copy of this order to the Chief Secretary, U.P. Lucknow, who in turn shall communicate to all the District Magistrates for guidance and compliance.

13. A copy of the order be supplied to the learned counsel for the petitioner on payment of usual charges.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MAY 14, 2003

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

Second Appeal No. 1619 of 1980

Shri Subodh Kumar ...Plaintiff-Appellant
Versus
The Zila Parishad, Bulandshahr and others ...Respondents

Counsel for the Appellant:
Sri Arun Tandon
Sri R.K. Sharma
Sri Anurag Khanna
Sri R.B. Singhal
Sri Ramendra Asthana

Counsel for the Respondents:
Sri J.N. Chaturvedi
Sri S.C. Dwivedi

Code of Civil Procedure-Section 80-readwith Transfer of the Property Act-Section 106- Lease granted for construction of woman Hospital-subsequently shifted another place-Notice providing 2 month for termination of tenancy whether more period than the statutory period in notice is bad in law? Held- 'No' notice can not be said to be invalid.

Held: Para 11

I have carefully gone through the notice (Ex. 4). An unequivocal intention to terminate the tenancy has been expressed. However, in place of one month two months time has been given. Therefore, more time was given than required under the law. Therefore, no prejudice has been caused to the defendant. Under the circumstances, the notice cannot be said to be invalid.

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

1. This is an appeal against the judgment and decree dated 8.2.1980 passed by Additional District Judge, Bulandshahr in Civil Appeal No. 341 of 1970 arising out of a judgment and decree of Suit No. 115 of 1975.

2. The above suit was filed by the present appellant for eviction of the respondents from the disputed land area 802 Sq. yard situated in plot no.1345. It is admitted that Lala Jamuna Prasad and Ganga Sahai predecessors in title of the appellant were Zamindars of the said plot. In the year 1882 it was let out to the Crown. The Civil Surgeon, Bulandshahr A.G. Bilcock executed a registered lease deed in their favour agreeing to pay Rs.12/- per year as rent and that the land shall be used only for women's hospital only.

3. It is alleged by the plaintiff that the women's hospital has been shifted to another building. That in the building constructed in the disputed land there is Veterinary hospital, library and few residences. It is also alleged that the rent had not been paid since 31.3.1952 hence the suit was filed.

4. The respondent contested the suit. However the fact that the defendant is the tenant of the land and the ownership of the same of the appellant has not been denied. It has been pleaded that tenancy has not been for-feited as there was no clause for for-feiture. That the notice is not valid. That the suit is bad for want of notice under Sections 106,111 and 114 A of Transfer of property Act (hereinafter referred to as the T.P. Act) and that the suit is also barred by time. The trial court framed necessary issues and decreed the suit with costs for eviction as well as for recovery of rent. Aggrieved by it the defendant-respondent preferred civil appeal no. 341 of 1978 which has been allowed solely on the ground that the notice of termination of tenancy is invalid and tenancy has not been terminated in accordance with law and provisions of Sections 111 (g) and 114 A of the T.P. Act have not been complied with. Therefore this second appeal was filed by the plaintiff.

5. This second appeal was admitted on 10.3.1981 on the substantial questions of law firstly whether the respondent was a lessee or a licensee of the disputed land and secondly whether the defendant has done any thing on the land such as to enable the plaintiff to determine the licensee or the lessee as the case may be.

6. I have heard Shri R.B. Singhal, learned for the appellant. None appeared for the respondent and therefore could not be heard. However, I have gone through the record.

7. Regarding the first question framed at the time of admission of appeal it is not disputed that the respondent was a lessee of the disputed premises and the registered lease deed was executed on behalf of the crown by the civil surgeon.

The said deed is (Ex.1). The lease is not for any fixed period nor it is perpetual lease. Therefore, the lease could be terminated at any time by a notice under Section 106 of the T.P. Act. This lease is only regarding the open land, therefore the question whether the lease is stood for-feited or not is not very material. The lease has been terminated by the notice as it was not perpetual lease.

8. It may also be mentioned that the lease was executed by the Civil Surgeon and it is specifically mentioned that the land has been taken only for the women's hospital. Now the property is not being used for the women's hospital and therefore, the lease also stood for-feited.

9. The next and the main question that arise for decision is whether the notice of termination of lease deed is invalid. The notice is (Ex.-4). It is clearly mentioned in the notice that the defendant was lessee at the rate of Rs.12/- per year. The intention to terminate the lease and to get the vacant possession of the land has been clearly expressed. However, the appellate court has held that the notice is invalid because two months time have been given to vacate the premises.

10. According to Section 106 T.P. Act one month's notice only is required as a lease was not for agricultural or manufacturing purposes. The question is whether the notice is invalid because two month's time has been granted. The learned counsel for the appellant has referred to two decisions on this point; the first is of the case between ***Rama Kant Gupta Vs. State of U.P. and another*** reported in 1983 (2) Allahabad Rent Cases Page 158. In this case a combined notice under Section 80 C.P.C. and 106 T.P. Act was served and two month's time was given to vacate the premises. The notice was held to be valid. It has been argued by Shri R.B. Singhal that in the present case two month's notice was also required to the Zila Parishad and therefore, two months' time was given to vacate the premises. The other case referred to by the learned counsel for the appellant is the decision of this court in ***Sylvania & Luxman Vs. Raminder Singh and another*** 1997 (2), Allahabad Rent Cases Page 656. In this case it was observed by the Court that the Court should be liberal in the interpretation of the notice.

11. I have carefully gone through the notice (Ex. 4). An unequivocal intention to terminate the tenancy has been expressed. However, in place of one month two months time has been given. Therefore, more time was given than required under the law. Therefore, no prejudice has been caused to the defendant. Under the circumstances, the notice cannot be said to be invalid.

12. Accordingly, I find that the first appellate court has erred in finding that the notice is invalid. The appeal is therefore, fit to be allowed.

13. The appeal is allowed with costs and the judgment and decree of the appellate court are quashed and that of the trial court are restored.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.5.2003

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

Criminal Misc. Application No.3011 of 2003

Virendra Singh and others ...Applicants
Versus
Addl. Sessions Judge, Ballia and others ...Respondents

Counsel for the Applicants:
Sri G.K. Singh
Sri S.P. Uppaddya

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

Criminal Procedure Code 1808 Sec-482 Application against the revisional order-once Revision of a party dismissed by Session Judge under sec. 397 (3)-application can not entertained under sec. 482 Cr.P.C.-unless great miscarriage of justice or abuse of process is there.

Held- Para 8 and 10

Thus, the conclusion which can be drawn, by going through above authorities is that once the revision of a party has been dismissed, if the revision by him is barred under Section 397 (3) Cr.P.C. he can not take recourse to the inherent powers of this Court but in rare cases where there is great miscarriage of justice or abuse of the process of the court, the inherent power can be invoked.

The revisional court considered the matter in the right perspective. The impugned order does not show any abuse of the process of the Court hence power under Section 482 Cr.P.C. can not be invoked.

Case law discussed:
1989 JIC 540
(2002) 9 SCC 630
2002 (44) A.C.C. 1102 S.C.

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

1. The present application under Section 482 Cr.P.C. has been filed against the order dated 28.2.2003 (Annexure 7 to the application) passed by the Additional Sessions Judge, Fast Track Court No. 3, Ballia, in Revision No.378 of 2002 Virendra Singh and others Vs. State of U.P. and others.

2. The brief facts giving rise to this application are that opposite party no. 3 filed a complaint in the court of respondent no. 2. The statements of complainant and witnesses were recorded. The Magistrate took the cognizance and summoned the applicants as accused by order dated 20.8.2001. The applicants filed objection against the said summoning order, which was rejected by order dated 15.4.2002. The applicants then filed a revision against the said order which was registered as Criminal Revision No. 378 of 2003 and the said revision was also dismissed on 28.2.2003. Now the applicants have come up against the said orders.

3. I have heard learned counsel for the applicants and the learned A.G.A.

4. Learned AGA raised a preliminary point that once the revision has been dismissed by the Sessions Judge the application under Section 482 Cr.P.C. can not be entertained. Learned counsel for the applicants objected to it and submitted that there are a number of authorities which lay down that even in such circumstances the application under Section 482 Cr.P.C. is maintainable. In

1989 JIC 540, HK Rawal Chairman, Mussoorie National School, Srinagar Estate Mussoorie District Dehradun and others Vs. Nidhi Prakash and another which is a full Bench decision of this Court. This matter came up for consideration. The Full Bench of this held that:

"Similarly, the order of the Sessions Judge in revision in cases under Section 125, 133/138 and 145 Cr.P.C. against an order of discharge by the Magistrate can not be interfered with by the High Court either in exercise of its revisional powers at the instance of the same party or suo motu or in the exercise of its inherent powers under Section 482 Cr.P.C. for these are also some of the orders of the Sessions Judge which determine the dispute between the parties. The order of the Sessions Judge in revision against a summoning order or an order framing charge are however different as it does not determine the dispute between the parties if it resulted in the abuse of the process of the court/or call for interference to secure the ends of justice it can be interfered with by the High Court in the exercise of its inherent powers under Section 482 Cr.P.C. as this is not bared under Section 397 (3) and Section 399 (3) Cr.P.C.

5. In ***Kirshnan and another Vs. Krishnaveni and another 1997 (4) SCC 241***, it has been held as follows:

"10. Ordinarily, when revision has been barred by Section 397 (3) of the Code, a person- accused/ complainant – cannot be allowed to take recourse to the revision to the High Court under section 397 (1) or under inherent powers of the High Court under Section 482 of the Code since it may amount to circumvention of the provisions of section 397 (3) or Section 397 (2) of the Code. It is seen that the High Court has suo motu power under section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of the process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under section 397 (1) read with Section 401 of the Code. As stated earlier, it may be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that trial is concluded expeditiously before the memory of the witness fades out. The recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. These malpractices need to be curbed and public justice can be ensured only when trial is conducted expeditiously."

6. This authority has been followed in ***Prasanta Kumar Dey Vs. State of West Bengal and another (2002) 9 SCC 630 and Laxmi Bai Patel Vs. Shyam Kumar Patel (2002) 44 ACC 1102 SC and***

Rajendra Prasad Vs. Bashir and another 2002, Cr.L. J. 90.

7. In Laxmi Bai Patel's case (supra) it has been held that:

"The position is well settled that in such a case power under Section 482 Cr.P.C. can be exercised by the; High Court in rare cases and in exceptional circumstances where the court finds that permitting the impugned order to remain undisturbed will amount to abuse of process of the court and will result in failure of justice."

8. Thus, the conclusion which can be drawn, by going through above authorities is that once the revision of a party has been dismissed, if the revision by him is barred under Section 397 (3) Cr.P.C. he can not take recourse to the inherent powers of this Court but in rare cases where there is great miscarriage of justice or abuse of the process of the court, the inherent power can be invoked.

9. As per the facts of this case the brother of the applicants had lodged FIR against opposite party no. 3 and others and as counter blast the present complaint has come up. I have perused the order of the revisional court which show that the Magistrate summoned the accused considering the statement of complainant examined under Section 200 Cr.P.C. and 202 Cr.P.C. The Magistrate also considered the injury report. There is nothing on record to even suggest that the summoning order has in any way resulted in the miscarriage of justice. The order is based on consideration of the prima facie evidence as required under Section 204 Cr.P.C.

10. The revisional court considered the matter in the right perspective. The impugned order does not show any abuse of the process of the Court hence power under Section 482 Cr.P.C. can not be invoked.

11. The application is therefore devoid of any force and is hereby dismissed.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.5.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Criminal Misc. Application No. 3758 of 2003

Baij Nath Prajapati ...Applicant
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Applicant:
Sri S.K. Dubey

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

Criminal procedure Code 1808-Section 482-vehicle seized by ARTO- Application for release rejected-Held- No seized vehicle can keep for a long period- Direction to Transport authorities to pass appropriate order and release vehicle.

Held- Para 5

In view of the aforesaid decision, facts and law, it would be expedient in the interest of justice that the A.R.T.O., Jaunpur is directed to consider and pass appropriate order on the application of the applicant for releasing the vehicle- Maxi Cab Jeep No. WE:20-B:0332 after deposit of adequate security except cash or bank guarantee to the satisfaction of the A.R.T.O. within a period of two

weeks from the date of filing of the application by the applicant.

Case Law:

2003 (46) ACC 223

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

1. Heard the counsel for the applicant and the A.G.A.

2. The applicant has filed the present petition under section 482 Cr.P.C. against the orders dated 10.12.2002 and 4.2.2003 passed by the court-below in Misc. Case No. 52 of 2003 State Vs. Baij Nath Prajapati under Section 207 of the Motor Vehicle Act, P.S. Line Bazar, District Jaunpur, by which it has refused to release the vehicle- Maxi Cab Jeep No. WS 20-B:0332 in favour of the applicant.

3. The applicant is a registered owner of the vehicle. The alleged Maxi Cab Jeep of the applicant was seized by the Assistant Regional Transport Officer (Enforcement) Jaunpur on 19.11.2002.

Under Section 207 (2) of the Motor Vehicle Act, 1988 it is provided that:

"(2) Where a motor vehicle has been seized and detained under sub section (1), the owner or person in charge of the motor vehicle may apply to the transport authority or any officer authorized in this behalf by the State Government together with the relevant documents for the release of the vehicle and such authority or officer may, after verification of such documents, by order release the vehicle subject to such conditions as the authority or officer may deem fit to impose."

4. In **Sunderbhai Ambalal Desai Vs. State of Gujrat, 2003 (46) ACC 223,** the Apex Court has held that it is no use to keep the seized vehicles for a long period. They may be released immediately after taking appropriate security, if not required at that point of time.

5. In view of the aforesaid decision, facts and law, it would be expedient in the interest of justice that the A.R.T.O., Jaunpur is directed to consider and pass appropriate order on the application of the applicant for releasing the vehicle-Maxi Cab Jeep No. WE:20-B:0332 after deposit of adequate security except cash or bank guarantee to the satisfaction of the A.R.T.O. within a period of two weeks from the date of filing of the application by the applicant.

6. With the aforesaid directions, the petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 45445 of 2000

Ranbir Singh Malik, A.S.I.O. Hathras
...Petitioner
Versus
Inspector General of Police and another
...Respondents

Counsel for the Petitioner:
Sri Divakar Rai Sharma

Counsel for the Respondents:
S.C.

Constitution of India-Article 226 Transfer whether an employee holding cadre post be transferred to the ex-cadre post without his consent?

Held: Para 10

The law settled that an employee can not be transferred from his original post without his consent and further he can not be transferred to ex cadre post on permanent basis from one branch of police force to another. The policy decision is not statutory but it is obvious from its perusal that five years period has been specified therein for transfer to ex cadre post.

Cases referred to:

1984 (1) All India Service Law Journal 61 (Bombay)
1979 (3) S.L.R. Page 805
1983 (2) S.L.R. 221 (Patna)

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

1. This petition arises out of order dated 26.08.2000 by which representation of the petitioner seeking repatriation to Civil Police in pursuance of Government policy has been rejected.

2. The petitioner was initially appointed as Sub-Inspector in the department of police (Civil Branch) in 1982. He was transferred to Local Intelligence Unit at Muzaffarnagar and he has been working in Local Intelligence Unit for more than 16 years. He made an application for being repatriated back to Civil Police on the ground that he was transferred to local intelligence Unit without his consent for transfer.

3. When no order was passed on his application the petitioner moved this Court by means of Civil Misc. Writ Petition No. 13430 of 2000 which was disposed of vide judgment and order dated 16.03.2000 with a direction to the respondents to decide representation of the petitioner. Pursuant to the order of the Court dated 16.03.2000, the representation of the petitioner was considered and was rejected vide order dated 26.08.2000 on the ground that the petitioner is suitable for services in Local Intelligence Unit.

4. The contention of the petitioner is that the respondents have acted arbitrarily in denying benefit of policy decision and rejecting his representation on the ground that the benefit of transfer policy is to be given only to new comers. It is submitted that the transfer policy (Annexure no. 1 to the writ petition) does not contain any recital to the effect that the transfer policy is applicable to new comers only and that there is hostile discrimination with the petitioner and as such impugned order is liable to be set aside. He further submits that the case of the petitioner is squarely covered by Writ Petition No. 36250 of 1997 inre; Ashok Kumar Singh Vs. State of U.P. and others and Writ Petition No. 3042 of 2001 Ashok Kumar Singh Vs. Additional Director General of Police (Intelligence Department) Lucknow and others.

5. Aggrieved by the order dated 26.08.2000 by which the representation of the petitioner was rejected, he filed Writ Petition No. 45445 of 2000 for a writ of mandamus commanding the respondents to transfer him to Civil Police forthwith.

6. It is contended on the basis of aforesaid two judgments that pursuant to the direction issued in Writ Petition No. 36250 of 1997 the Government framed policy dated 24.1.1999 in which it was held that a Sub Inspector who is transferred from Civil Police to Local Intelligence Unit, can not be retained in Local Intelligence Unit for more than 5 years and he has to be transferred back to

Civil Police. It was further provided in the policy that the Sub Inspector can only be retained in Local Intelligence Unit if he gives his consent to continue there.

7. In Writ Petition No. 3042 of 2001 it has been held by the Court that the petitioner in that petition who was appointed as Sub Inspector in the department of Police (Civil Branch) and was transferred to Local Intelligence Unit is entitled for being transferred to Civil Police and the transfer policy should be implemented giving him benefit. It is submitted on behalf of the petitioner that Sri Ashok Kumar Singh of writ petition No. 3042 of 2001 is of the same batch and was selected along with the petitioner.

8. The various posts in the Intelligence Department are ex cadre posts and the petitioner could not be sent to Intelligence department on an ex cadre post without his consent as has been held in **1984(1) All India Service Law Journal-61 (Bombay) Prakash R. Broker Vs. Union of India in which reliance was place on a judgment of apex court reported in 1979(3) S.L.R. page 805 Bhagwati Prasad Vs. State of Gujrat** in which it was held that a person who is holder of civil post in service of the State is entitled to certain conditions of service prescribed for that post till the date of superannuation. It was observed that this was a guarantee which flows from Article 16 and Part XIV of the Constitution. The transfer of an employee from out side the cadre is not a valid transfer as has been held in **1983(2) S.L.R. 221(Patna) Krishna Kumar Srivastava Vs. Bihar State Agricultural Marketing Board.**

9. The learned Standing Counsel submits that the government policy are mere guide lines and has no statutory force and the petitioner can not claim repatriation to civil police as a matter of right.

10. The law settled that an employee can not be transferred from his original post without his consent and further he can not be transferred to ex cadre post on permanent basis from one branch of police force to another. The policy decision is not statutory but it is obvious from its perusal that five years period has been specified therein for transfer to ex cadre post. The case of the petitioner is also covered by the Government Order dated 24.10.1999 as he completed more than 10 years service and is entitled to be considered for transfer in Civil Police.

11. Considering the arguments of the counsel for the parties, the law and the policy decision of the government, the retention of employee without his consent in local Intelligence Unit on ex cadre post is arbitrary as he looses the privileges and avenues of promotion in civil police which are far better than in Local Intelligence Unit department. Since policy decision has been taken by the Government for not retaining a person on deputation beyond 5 years in Local Intelligence Unit, it would not be proper for this court to interfere in the policy decision. The petitioner has already put in 16 years of his service in Local Intelligence Unit. He has lost avenues of promotion and the benefits and this is a good ground for passing an order for transferring him back to Civil Police as transfer to Local Intelligence Unit which was without his consent.

12. The impugned order dated 26.08.2000 rejecting representation of the petitioner on the ground that the policy decision framed in pursuance of judgment of this Court does not cover the case of the petitioner after five years of service in Intelligence department is arbitrary. The petitioner under the policy decision of the government dated 24.10.1999 can opt for transfer to Civil Police. The criteria laid down in the policy has not been considered in the order dated 26.08.2000 and it is totally silent about transfer of Inspectors who give their option for repatriation to Civil Police after specified period of five years from Local Intelligence Unit.

13. For the reasons given above, the writ petition is allowed and the impugned order dated 26.08.2000 (Annexure no. 4 to the writ petition) passed by the respondent no. 2 is quashed. The respondents are directed to transfer the petitioner to Civil police forthwith from local Intelligence Unit preferably within a period of six weeks from the date of production of a certified copy of the order of this Court No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.5.2003

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

Civil Misc. Writ Petition No. 21661 of 2003

M/s Willard India Limited ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Yashwant Varma
Sri R.N. Singh

Counsel for the Respondents:
Sri A.K. Singh
Sri Tarun Varma
Sri B.N. Singh
S.S.C.

Debts due to Banks and Financial Institution Act, 1993- Section 19- Award of the Tribunal given at Kolkata validity thereof cannot be challenged at Allahabad before High Court- No.

Held- Para 5

The prayer that Rule 6 be declared ultra vires Section 19 of the Act is nothing but a prayer for declaration. Hence without a prayer for a consequential relief, such declaration can not be granted. As regards, the consequential relief, which is contained in relief (ii) of the petition it is really a relief for a prohibition though as a declaration, as already observed by us above, such relief can be claimed before the Calcutta High Court and not before this Court.

Case referred to:
AIR 1951 SC 41
AIR 1968 SC 381
AIR 1953 All. 477
AIR 1962 Allahabad 187
AIR 1978 Alld. 386
2002 UPLBEC 1789

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

1. Heard Sri R.N. Singh, learned counsel for the petitioner, Sri A.K. Singh for the Union of India, and Sri Tarun Varma, Counsel for the Allahabad Bank.

2. The petitioner has prayed for an appropriate writ, order direction declaring the provisions of Rule 6 (1) of the Debts Recovery Tribunal (Procedure) Amendment Rules 6 (1) of Debts Recovery Tribunal (Procedure)

Amendment Rules, 2003 as being ultra vires Section 19 of the Recovery ojf Debts Due to Banks and Financial Institutions Act, 1993. The petitioner has also prayed for an appropriate writ, order or direction declaring proceedings filed by the respondent no. 2, Allahabad Bank before the Debt Recovery Tribunal, Kolkata as without jurisdiction.

3. The petitioner is a Company registered under the Indian Companies Act. The respondent, Allahabad Bank filed an application before Debt Recovery Tribunal, West Bengal at Kolkata under Section 19 of the aforesaid Act claiming a sum of Rs. 5,09,76,803/- as principal amount and payable with interest in the alleged capacity of debenture holders and debenture trustee. True copy of the application under Section 19 filed before the Debt Recovery Tribunal, West Bengal at Kolkata dated 17.12.1999 has been filed as Annexure-1 to the writ petition.

4. In our opinion, this petition is liable to be dismissed on the preliminary point as this Court has no jurisdiction in the matter at all and it is Calcutta High Court which has the jurisdiction. The proceedings are pending before Debt Recovery Tribunal. West Bengal at Kolkata and the petitioner really wants a writ of prohibition against those proceedings, although that prayer has not been specifically mentioned in the prayer of the writ petition. The difference between a writ of certiorari and a writ of prohibition is that a writ of certiorari is filed after the impugned order is passed whereas a writ of prohibition is filed before an order is passed. Thus, a writ of prohibition is filed when a proceeding before an inferior Court or Tribunal is pending and it is alleged that they are without jurisdiction. Thus, the relief really claimed by the petitioner in this writ petition is the relief of prohibition to prohibit the Debt Recovery Tribunal, West Bengal at Kolkatta from proceeding with the case before it. In our opinion, such a writ petition should be filed before the Calcutta High Court, which, in our opinion, alone has the jurisdiction to grant such relief. Learned counsel for the petitioner then submitted that we may ignore the prayer for writ of prohibition and we should consider the petitioner's prayer for declaring Rule 6-1 of the Debts Recovery Tribunal (Procedure) Amendment Rules, 2003 as being ultra vires Section 19 of the Act, 1993. In our opinion, this would really be a prayer for a declaration only and it is well settled that a writ petition does not lie only for giving a declaration. In *Charanjeet Lal Versus Union of India, AIR 1951 SC 41*, while considering the scope of a petition under Article 226 of the Constitution of India, the Supreme Court observed. –

"A proceeding under this Article can not really have any affinity to what is known as a declaratory suit. The first prayer made in the petition seeks relief in the shape of a declaration that the Act is invalid and is apparently inappropriate to an application under Article 32. "

In *Makkhan Singh V. State of Panjab and Haryana AIR 1964 SC 381 (vide para 45)*, it was held that a mere declaration is outside the purview of proceedings under Article 226 of the Constitution. A full Bench of this Court in *Maqbool Unissa and others v. Union of India AIR 1953 Allahabad 477*, has held that the powers of issuing writs, orders or directions under Article 226 of the Constitution should not be utilized for giving what is in essence a

declaratory relief. Similar view has been taken in two other full Bench decisions of this Court in *D.G. Vidyalaya Association Vs. State of U.P. AIR 1962, Allahabad 187 and Sheo Kumar V. State of U.P. AIR 1978 Allahabad 386*. Similar view has been taken by the division Bench decision of this Court in *Green Field Corporation Limited and another versus U.P. Financial Corporation 2002 UPLBEC, 1789 vide para 12.*

5. The prayer that Rule 6 be declared ultra vires Section 19 of the Act is nothing but a prayer for declaration. Hence without a prayer for a consequential relief, such declaration can not be granted. As regards, the consequential relief, which is contained in relief (ii) of the petition it is really a relief for a prohibition though as a declaration, as already observed by us above, such relief can be claimed before the Calcutta High Court and not before this Court.

6. For the reasons given above, this petition stands dismissed but with liberty to the petitioner to approach the Calcutta High Court for appropriate relief.

7. We have not gone into the merits of the case we have only dismissed this petition on a preliminary point.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.7.2003

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

Civil Misc. Writ Petition No. 26386 of 2003

Devendrajeet Vadra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri D.K. Misra

Counsel for the Respondents:
S.C.

Constitution of India-Article 226-maintainability–writ petition against private body-held-not maintainable–petition dismissed.

Held- Para 2

In our opinion this writ petition is not maintainable as the respondent no. 3 is a private body being a Company registered under the Indian Companies Act.

Case law referred:
2003 (1) AWC 503, 2003 ALJ 980

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

1. The petitioner has prayed for a mandamus directing the respondent no. 3. M/s Motion Pictures Association, Mangal Market, Chandni Chowk, New Delhi to treat the petitioner as one of its members as per Article of Association.

2. In our opinion this writ petition is not maintainable as the respondent no. 3 is a private body being a Company registered under the Indian Companies Act.

3. It is well settled, that ordinarily, no writ lies against private body except a writ of habeas Corpus vide **Dr. A.K. Gupta v. Rajghat Education Centre 2003 (1) AWC 503 and General Manager, Modipon Fibre Co. v. Narendra Pal 2003 ALJ 980 etc.**

4. In paragraph 5 of the petition it is stated that as per the Constitution and Articles of Association of respondent no. 3 unless one is a member of the association one cannot be provided with film for exhibition of films from any other member who is engaged in distribution of films in U.P. and Delhi.

5. In our opinion a private body can always make a rule restricting its membership on certain conditions. The respondent no. 3 is not an instrumentality of the State and hence this writ petition is not maintainable and it is **dismissed**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2003

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

Civil Misc. Writ Petition No. 43985 of 1997

Kanpur Aloo Arhati Association and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri Arun Kumar

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

Constitution of India–Article–226-U.P. Krishi Utapadan Mandi Adhiniyam 1964 Sec. 7 (2) (b) Transfer of business premises–Notification issued–whole seller of food grain and Vegetables–held–Notification issued in the public interest–to avoid congestion in the city – Advocate Commissioner's report in favour of shifting market–can not be interfered under writ jurisdiction

Held-Para 15

An Advocate Commissioner Sri J.J. Munir Advocate, High Court by our order dated 22.04.2003 for inspecting the existing mandis of foodgrains, fruits and vegetables, etc. at Kanpur City and he has submitted a report to which an objection has also been filed by the Mandi Samiti, Kanpur. In this report the Advocate Commissioner after discussing the facts in details has observed in conclusion that it is apparent that the public is put to great inconvenience due to the existing subzi mandi.
1987 UPLBEC 394
1993 A.W.C. 1593
1983 ALJ 786
AIR 1981 S.C. 1127

Held- Para 25

Since it has been held that a Notification under section 7 (2)(b) is a legislative activity we are of the opinion that the Court should exercise judicial restraint in interfering with such legislative activity. A Notification under section 7 (2)(b) is a piece of delegated legislation and it can be struck down only if (1) it violates some provision of the parent Act, or (2) it violates some provision of the Constitution. In our opinion the impugned Notification dated 09.03.1981 and the subsequent Notification e.g. of 15.11.1997 are clearly within the ambit of section 7 (2)(b) of the Act, and it has not been shown that they violate any other provision of the Act. Hence, it cannot be said that these Notifications are ultra vires any provision of the U.P. Krishi Utpadan Mandi Adhiniyam, 1964.

AIR 1981 SC 1127
1993 AWC 1513
AIR 1953 SC 375 (370)
AIR 1991 SC 1792 (Para-6)
AIR 1966 SC 416 (421)
AIR 1990 SC 1637
AIR 1977 SC 2279 (Para-16)

Constitution of India–Article–19 (1)(G) whether Notification violates the provision of Art 19 (1) (g)

Held-Para 26

In our opinion they do not. The material on record in these petition, which includes the report of the Advocate Commissioner Mr. Munir and Hon. Justice Ganguly (Retd.) as well as the affidavits of the respondents clearly indicates that the present wholesale mandis in Kanpur City are causing immense traffic problems, congestion, diseases, noise pollution etc. and have become a headache for the public there. Hence the shifting of the wholesale mandis from the existing sites is clearly reasonable. No doubt the petitioners right to do business under Articles 19 (1)(g) is to some extent affected by the impugned notification, but this right is subject to reasonable restrictions under Article 19 (6) of the Constitution.

Case law:
AIR 1958 SC 731
AIR 1969 SC 634 (vide para 52)
AIR 1981 SC 873
AIR 1986 SC 1323
1952 SCR 597
AIR 1952 – SC 1033
AIR 1970 SC 1453
AIR 1961 SC 1602
AIR 1978 SC 771
AIR 1982 SC 1016

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

1. This writ petition and other similar writ petitions are being disposed off by a common judgment. **Writ petitions Nos. 43985 of 1997 and 43987 of 1997** relate to whole sellers of fruits and vegetables in Kanpur city, while **Writ No. 27865 of 2000, Writ No. 27730 of 2000 and Writ No. 27711 of 2000** relate to food grains whole sellers. **Writ No. 27731 of 2000 and Writ No. 27864 of 2000** relate to whole sellers of Khandsari.

2. The petitioners in all these writ petitions are wholesalers of various items e.g. food grains, fruits and vegetables, khandari sugar etc. in Kanpur City. The common grievance of all the petitioners in these writ petitions is that they have been asked to shift their business premises from the present place in the heart of Kanpur city etc. Kidwai Nagar, Cooperganj, Collectorganj etc. to a new market yard called the Navin Mandi Sthal at Naubasta (Hamirpur road) which is at the outskirts of Kanpur City. All the petitioners have been informed that if they do not shift from their respective business places to the Navin Mandi Sthal, the Krishi Utpadan Mandi Samiti, Kanpur, which is a statutory body, constituted under the UP. Krishi Utpadan Mandi Adhiniyam 1964 (hereinafter referred to as an Act), would not renew their licenses.

3. As stated in paragraph 9 of Writ Petition No. 27730 of 2000, the foodgrains traders had been issued notices in the year 1977 to shift their business premises (including shops and godowns) to the Navin Mandi Sthal, Naubasta Against those notices the dealers filed various writ petitions which were allowed on 21.09.1978 vide writ petition No. 4833 of 1978 and connected writ petitions. Copy of the said judgment of this Court is Annexure-4 to writ petition No. 27730 of 2000. In that decision this Court held that there was no statutory provision

empowering the State Government to force a person to shift his place of business. However subsequently by U.P. Act No. 19 of 1979 the Act was amended and section 7 (2)(b) was introduced which states:-

"The State Government, where it considers necessary or expedient in the public interest so to do, may, by notification:
(b) declare that the whole-sale transactions of all or any of the specified agricultural produce in respect of a market area shall be carried on only at a specified place or places within its principal market yard or sub-market yards."

4. Pursuant to the aforesaid amendment the U.P. Government issued Notification dated 09.03.1981 copy of which is Annexure-5 to writ petition No. 27730 of 2000. This Notification issued under section 7 (2)(b) stated that the wholesale trade of certain commodities mentioned in that Notification should be conducted at Kanpur at the new mandi site whose location has been specified in the said notification. By subsequent Notification dated 05.11.1997 Annexure-6 to writ petition No. 27730 of 2000 several fruits and vegetables have also been added to the items mentioned in the Notification dated 09.03.1981. These notifications have been challenged in this bunch of petitions.

5. The petitioner no. 1 in Writ Petition No. 43985 of 1997 is an Association of whole sellers of potato and other vegetables, which is registered under the societies Registration Act. Its members are carrying on the business of purchase and sale of vegetables including potatoes in wholesale under valid licenses issued by the Krishi Utpadan Mandi Samiti, Kanpur. True copy of the Certificate of Registration of petitioner no. 1 and a list of its members are Annexure-1 and 2 to the writ petition.

6. It is alleged in paragraph 5 of Writ Petition No. 43985 of 1997 that the fruits and vegetables Mandi was uprooted and established thrice in as many years at Kanpur. In the year 1976 the Kanpur Development Authority (KDA) vide its resolution dated 25.06.1976 approved a scheme to establish a modern and organized fruits and vegetables market at 'O' Block, Qidwai Nagar, Kanpur and invited the whole sellers of fruits and vegetables situate at dense localities of Badshahi Naka and Cooperganj to purchase plots and shift to the new mandi. By a subsequent resolution dated 15.02.1977 the KDA fixed the land rate at Rs.100/- per sq. yard and decided to allot plots on advance deposit of Rs.5750/-. A total number of 730 big plots and 574 small plots were offered for allotment out of which 442 were allotted by the year 1981 and by 1984 all the plots were allotted and a fully developed and organized fruits and vegetables market started functioning at 'O' Block Qidwari Nagar, Kanpur. A true copy of the resolution of the meeting of the Association and KDA dated 24.04.1996 under the Presidentship of the Vice Chairman, KDA giving details is annexed as Annexure-4 to the writ petition. In the lease deeds executed by the KDA in favour of the whole sellers it was specifically provided that since the KDA had resolved that the subzi mandi should be shifted from the crowded area of the city on the land set apart for allotment to such dealers at southern city extension

scheme no. 2, Qidwai Nagar, Kanpur, the plots are being allotted to carry on the business of selling potatoes in the allotted open space. The lease thus confines the petitioners to do business of vegetables only on the allotted land. True copies of some lease deeds are Annexure-5 and 5A to the writ petition. The Mandi Samiti, Kanpur also joined in maintaining the subzi mandi at Qidwai Nagar, Kanpur and had invested Rs.204 lacs for maintenance of sewage cleaning and internal road in the year 1994. By notification dated 09.03.1981 issues under section 7 (2)(b) of the Act, the State Government notified the Naubasta market yard for wholesale of 39 specified agricultural produce, excluding fruits and vegetables.

7. It is alleged in paragraph 12 of the petition that for the reason best known to the Mandi Samiti inspite of the aforesaid notification the wholesale trade of foodgrains could not be shifted and the Mandi Samiti, Kanpur permitted illegal trade of foodgrains outside the Naubasta market yard. It is alleged that the Mandi Samiti did not take effective steps to shift the foodgrains trade to Naubasta. It is alleged in paragraph 14 of the writ petition that since the Mandi Samiti, Kanpur failed to shift the foodgrains trade to Naubasta inspite of the Notification it had to justify the constructions of Navin Mandi Sthal Naubasta and therefore in order to protect any administrative action against the officials of the Mandi Samiti, Kanpur it proposed to shift the site of wholesale trade in fruits and vegetables. In paragraph 15 of the writ petition it is alleged that whereas foodgrain trade is not organized and is carried out in Kanpur in various congested localities causing problem of transportation, traffic congestion, pollution and unhygienic condition in Kanpur, the officials of the Mandi Samiti, Kanpur proposed to shift an organized, well maintained and systematic fruits and vegetables mandi established by KDA at 'O' Block Qidwai Nagar between the year 1981 and 1984 to Navin Mandi Sthal, Naubasta. It is alleged that the object of taking this decision was not to regulate the market at Qidwai Nagar but this decision was taken in connivance with the foodgrain dealers in Kanpur and was initiated by the Chairman and the Secretary of the Mandi Samiti, Kanpur to save themselves from the responsibility of shifting the wholesale trade of notified commodities and allowing an illegal trade to be carried on in the congested city of Kanpur. The Chairman, Mandi Samiti, Kanpur gave a notice to the President of the petitioner association to attend a meeting on 11.07.1997 vide Annexure-7 to the writ petition. The petitioner submitted a reply protesting against the proposal to shift the wholesale trade of potato and vegetables to Navin mandi Sthal, Naubasta vide Annexure-12 to the writ petition. Thereafter the impugned notification dated 15.11.1997 has been issued by the Governor of U.P. under section 7 (2) of the Act vide Annexure-12 to the writ petition.

8. It is alleged in paragraph 19 of the writ petition that before issuing the impugned notification dated 15.11.1997 the respondents have failed to consider the objections of the petitioners and have completely ignored taking into account that an organized fruits and vegetables market was established at 'O' Block Qidwai Nagar, Kanpur by the KDA between the year 1981 and 1984 and has been maintained by the KDA and the Mandi Samiti, Kanpur at the costs of

crores of rupees and that the market is well developed and does not need any change of site. In paragraph 20 of the writ petition it is alleged that the vegetables and fruits market at Qidwai Nagar has been established in a wide open area with broad roads in an extension scheme of the City having no congestion, no traffic problems, having well maintained lane, sewerage and waste disposal system etc. Hence there was no need to shift the market to Naubasta. It is alleged that this is being done in connivance with the foodgrain dealers who refused to shift their trades to Naubasta inspite of the said notification. It is alleged in paragraph 28 of the writ petition that the wholesale traders had invested lacs of rupees in constructing their shops and had earned goodwill in the organized market. The shifting of the entire trade will cause great hardships to the traders.

9. A short counter affidavit has been filed in writ petition no. 43985 of 1997. In paragraph 3 of the same it is stated that a detailed counter affidavit has been filed in writ petitioner no. 43987 of 1997, which may be treated as the counter affidavit in this case also.

10. We have perused the counter affidavit in writ petition No. 43987 of 1997. In paragraph 3 of the same it has been stated that similar notification under section 7 (2)(b) have been upheld by this Court as well as by the Supreme Court. Vide **M/s Amrit Rice Mill v. Krishi Utpadan Mandi Samiti, 1987 UPLBEC 394, Karedin Jaiswal v State, 1993 AWC 1513, Vishal Traders v. State of U.P., 1983 ALJ 786, R.K. Porwal v. State of Maharashtra, AIR 1981 SC 1127, etc.** Hence this petition is also liable to be dismissed.

11. In Paragraph 4 of the counter affidavit it is stated that the notification under section 7 (2)(b) is legislative in character and hence it was not necessary to give opportunity of hearing before issuing the same. The notification has been issued in the public interest as the wholesale market of fruits and vegetables is in a congested locality and mostly fruits and vegetables are brought by trucks and other vehicles, and there is paucity of space in the existing market yard. In paragraph 7 of the same it is stated that even if the fruits and vegetables market is shifted three times in 50 years it makes no difference. The notification was issued in the public interest and to avoid congestion in the City. Wholesale transactions in all agricultural produce are to go outside the main city, which has grown up as a residential area. Carrying on wholesale trade in specified produce is hazardous to the residents and results in accidents due to congestion of traffic and is also unhygienic. Due to rainy season it becomes impossible to transact business and people at large are put to hardship. After the wholesale trade is shifted to the outskirts of the City in the declared market area at Naubasta (Hamirpur road) the fruits and vegetables can be taken by the retail traders and sale can be made in the city. It is further alleged that even if the resolution was passed by the KDA in the year 1976 to organize fruits and vegetables markets in 'O' Blocks Qidwai Nagar Kanpur that has outlived its utility since the business has grown many times and Kanpur city has grown many times. Even if the resolution was relevant in the year 1976 it is not relevant in the year 1999 or even in the year 1997 when the notification was issued. The fruits and vegetables arrive in several truckloads daily causing congestion, and because of

the rotten smell in the city the thickly polluted area like Qidwai Nagar becomes unhygienic. The wholesale trade is of a very high magnitude and therefore the administration felt difficulty in having wholesale transactions of fruits and vegetables in the existing market and it has been decided to shift the trade to Navin Mandi Sthal at Naubasta (Hamirpur Road).

12. In paragraph 8 of the counter affidavit it is stated that most of the wholesale traders in fruits and vegetables applied for allotment of shops and they have been allotted shops and some of them had even been given possession at the new mandi site. This writ petition has only been filed to forestall shifting of the trade. In paragraph 9 of the same it is stated, that looking to the quantum of arrivals, which is lacs of quintals daily, the problem of road and sewerage has multiplied manifold. They are not functional, and hence shifting of trade of wholesale in fruits and vegetables is absolutely necessary. The roads have developed potholes and there is no sufficient place for parking trucks and other auto vehicles. In paragraph 10 of the same it is stated that there are sufficient number of shops in Navin Mandi Sthal and some of them have been allotted to the traders in fruit and vegetables. The Mandi Samiti has constructed more than 300 shops and the process of construction of further shops is going on. In paragraph 11 of the same it is stated that the market yard at Hamirpur road is suitable for carrying on wholesale business in fruits and vegetables as most of the arrivals are from that side The Mandi Samiti is also considering acquiring and developing a new Mandi Sthal for other agricultural produce. In paragraph 12 of the same it is stated that notice was given to the whole sellers to apply for shops and some of them had even taken possession. There is certainty of allotment of shops. None of the whole sellers of fruits and vegetables carrying on business in Qidwai nagar would be left without allotment of shops, and if any individual trader makes a grievance regarding allotment he would be allotted a shop. In paragraph 25 of the same it is stated that only the wholesale trade is being shifted and not the retail trade.

13. An impleadment application has been filed in this case by 119 dealers, which was allowed by means of an order dated 27.09.2003.

14. A short rejoinder affidavit has been filed. In paragraph 4 of the same it is stated that the rejoinder affidavit filed in writ petition No. 43987 of 1997 may be treated as the rejoinder affidavit in this case also. We have perused that rejoinder affidavit.

15. In this case we had also appointed an Advocate Commissioner Sri J.J. Munir Advocate, High Court by our order dated 22.04.2003 for inspecting the existing mandis of foodgrains, fruits and vegetables, etc. at Kanpur City and he has submitted a report to which an objection has also been filed by the Mandi Samiti, Kanpur. In this report the Advocate Commissioner after discussing the facts in details has observed in conclusion that it is apparent that the public is put to great inconvenience due to the existing subzi mandi. They are also exposed to hazards of disease and have to face problems of traffic congestion in the entire area of Qidwai Nagar.

16. In the earlier part of the repot on page 18 the learned Advocate Commissioner has stated that upon inspection of the Qidwai Nagar Mandi he found the same to be a relocated, well organized and planned mandi with ample space within its premises for movement of vehicles, loading and unloading of goods etc. However at page 32 of his report the learned Advocate Commissioner stated, ***"As I was standing on the main public road in front of the Mandi, I noticed a uniformed guard wielding a lathi asking a truck driver to move away his vehicle. I rushed to the spot and made enquiries from the guard. First, he refused to answer but then relented. He identified himself as Radhey Shyam, a security guard with the Mandi. He confessed that he had instructins from the Mandi traders to ensure for two or three days that no truck is parked on the public road. A transporter standing nearby also said that they had been asked for a few days by the Mandi office bearers not to park trucks on the road. It is thus evident that the Mandi Office bearers show managed the parking pattern of the trucks during my inspection."*** At page 34 of his report the learned Advocate Commissioner stated, ***"In conclusion it is apparent that the public are put to great inconvenience due to the existing subzi mandi. They are also exposed to hazards of disease and have to face problem of traffic congestions in the entire area of Qidwai Nagar."*** Thus, despite his earlier observation in page 18 of his report, the learned Advocate Commissioner has ultimately accepted that the Qidwai Nagar Mandi is causing problems of Traffic congestion, diseases etc. On inspecting the Navin mandi Sthal, Naubasta, which is almost 6 km. from Kidwai nagar the learned Advocate Commissioner after detailed inspection, and consideration has come to the conclusion that the traders of Qidwai nagar, mandi would decidedly suffer if the mandi is shifted to Navin mandi Sthal, Naubasta as the latter does not seem to be very congenial to the traders. Though the Mandi Sthal is located in a very large area, the shops constructed there seem to be woefully deficient for traders of perishables. The shops may be suitable for wholesale of foodgrains, but they are unsuitable for fresh vegetables, fruits, potatoes etc. Also while some of the shops at Kidwai Nagar are designed to stock huge quantities of commodities, they cannot be stocked at the Naubasta shops. The Naubasta mandi is 10 km. from the Transport Nager, and this would lead to escalation in prices. He has also observed that in Qidwai Nagar mandi there are in existence about 1300 traders in vegetables and fruits alone while Navin Mandi Sthal has at present only a total of 348 shops as per the statement of the Mandi Samiti officials themselves. The learned Advocate Commissioner has stated that it does not appear to be feasible that such a large number of traders at Qidwai Nagar mandi can be shifted to the new mandi site as the same is short of accommodation. However, the learned Advocate Commissioner has also observed that more shops can be constructed at Navin Mandi Sthal because space is available in abundance.

17. In pages 26 to 31 of his report the learned Advocate Commissioner has referred in detail to his meeting with various people, many of whom handed over representations to him. On 01.05.2002 about 31 resident of Qidwai Nagar gave him a representation expressing unequivocal support for

shifting of the mandi from Qidwai Nagar. The learned Advocate Commissioner spoke to many Doctors who stated that the Mandi at Qidwai Nagar was causing many problems e.g. road accidents, air pollution etc. which cause Asthama and Allergy, and had created unhygienic conditions in the locality due to dumping of rotten vegetables, which cause many diseases. The Principals of some schools also complained that the Qidwai Nagar Mandi was causing problems of traffic jams etc. Many traders also said that the Qidwai Nagar mandi was causing adverse effects on local trade and business. The local market of retail business of cloth; electrical goods, general merchants etc. was once a flourishing market but due to the increasing traffic flow in the mandi in question the local market has been deserted by the customers who avoid visiting Qidwai Nagar due to traffic jam. All trade there has flopped. Many citizens said that they could not sleep due to the constant movement of trucks and had to face breathing problems. The truck drivers park their vehicles in the residential area and indulge in nuisance. The learned Advocate Commissioner has also seen filth and garbage lying in the side of the mandi and rotting vegetables.

18. The Krishi Utpadan Mandi Samiti, Kanpur, has filed an objection to the report of the learned Advocate Commissioner and we have perused the same. In paragraph 5 of the objection it has been stated that the learned Advocate Commissioner gave information about a week before his visit to the parties as well as to the their counsels and therefore the traders at Kanpur were quite conscious that the Commissioner has been appointed and he would be visiting the place on 01.05.2003. Hence they managed that there may be no rush in the market at the time of his visit. They succeeded in preventing the producers to bring their produce through trucks at the time of inspection and hence both the mandis gave a deserted look and there was not buying and selling at that time, which was an unusual phenomenon. Hon'ble Mr. Justice N.L. Ganguli (Retd.) who had been appointed Commissioner in connected writ petition No. 43987 of 1997 (which related to food grains trade) had visited the markets at Kanpur incognito and he had submitted a report that there was lot of congestion creating unhygienic conditions and road blocks by constant truck traffic and he has suggested in his report that the entire wholesale trade in foodgrains and fruits and vegetables be shifted to Navin Mandi Sthal. In paragraph 6 of the objection of the mandi Samiti to the report of the Advocate Commissioner it is stated that the foodgrains mandi at Collectorganj and Cooperganj, Kanpur is 120 years old. It is in a very congested area and it is not possible for trucks to move in the mandi. The trucks are parked on the main road, and from there goods are brought inside the market. At the time when the learned Advocate Commissioner visited the spot it was deserted on account of his prior intimation. The vegetables, fruits and grains mandis of Kanpur are biggest mandis is U.P. and the entry of trucks in the city in daytime is prohibited. Hence there is a long queue of trucks in the night and they stand on the road blocking it. Due to that the entire traffic during evening and night hours makes it an inaccessible place. Upto 11.00 o'clock in the night there is a traffic jam. It takes hours to reach from one point in the city to another. Kanpur itself is a heavily crowded city. The population of Kanpur

has gone upto 50 to 60 lakhs and hence the wholesale trade should go outside the city and only the retail trade should continue in the city. The report of the SSP, CMO and the D.M. etc. filed with the supplementary counter affidavit of the Mandi Samiti shows that due to the wholesale trade in foodgrains and fruits and vegetables there is immense traffic problems and unhygienic conditions resulting in epidemics. The wholesale trade means trade of not less than 10 quintals in one transaction. If the wholesale trade is taken outside the city then 80% congestion would be removed from the city. Only retail sale causing only 20% problem would be left in the city. In paragraph 11 of the same it is stated that there is a lot of open space in the new market yard and about 100 trucks can be parked there. There are three types of shops and small godowons constructed 120 years ago and since then production and sale has increased manifold and the mandis have consequently to be shifted to a suitable place. During rainy season the old mandis are inaccessible due to lack of drainage, and they are often submerged with water and filth. There has been constant demand from the public that the wholesale trade should be shifted to the outskirts of the city. In Western countries wholesale trade takes place about 10 to 20 km away from the city. In paragraph 16 of the same it is stated that there are only two main roads connecting Kidwai Nagar, viz G.T. Road and Kalpi Lucknow road. Everyday there is flow of 500 trucks on these two roads loaded with potato, onion, fruits and vegetables etc. and the trucks are on the roads for hours together completely block the traffic. There is no parking place. There are about 10 educational institutions, which vehemently protested against the running of the wholesale trade in Kidwai Nagar.

19. We have also perused the report of Hon'ble Mr. Justice N.L. Ganguly (Retd.) in Writ Petition No. 43987 of 1997. Hon'ble Ganguly has in his findings in his report state that the markets at Collectorganj, Cooperganj, Kidwai Nagar, and Badshahi Naka are congested and in the thickly populated area of Kanpur. Wholesale business is being carried on in the congested area of the city. The condition of the roads is bad, with ditches, and the narrow lanes often causes traffic jams. Most of traders have encroached on the Corporation footpaths, which creates traffic congestion. He has stated that the market yard at Naubasta is bound with high walls connected with road, with water and sewerage facilities, Hospital, Post Office, Bank and Police outpost. The distance of 11 km. Is nothing in present days. The roads are good and fast moving vehicles are available for going to Naubasta.

20. From a Perusal of the facts as disclosed in the affidavits in all these connected writ petitions as well as from the reports of Hon. Mr. Justice N.L. Ganguly (Retd.) as well as Advocate Commissioner Mr. J.J. Munir, it is evident that the present wholesale goodgrains, vegetables, fruits and khandsari mandis in Kanpur City at Kidwai Nagar, Cooperganj, Collectorganj, and Badshahi Naka etc. are causing huge problem of traffic congestion, pollution, spread of diseases etc. Obviously this is because these wholesale mandis were established about a century ago and since then the population of Kanpur City has gone up several times. It is not necessary for us to repeat in detail of all the allegations in the

counter affidavit filed in these writ petitions as well as in the reports of the Commissioners appointed by this Court. Suffice it to say that all these clearly prove that the existing wholesale mandis in Kanpur are causing huge problems for the citizens of Kanpur and therefore it would be in the public interest if they are moved out to a more appropriate site.

21. It may be mentioned that a wholesale dealer does not have to be in direct contact with the public, unlike a retailer. Hence even if the wholesale business is carried on from a place outside the city or at the outskirts the public will not suffer.

The validity of section 7 (2)(b) of the Act has already been upheld by a Division bench of this Court in M/s Amrit Rice Mil, Pilibhit v. Krishi Utpadan Mandi Samiti 1987 UPLBEC 394.

22. In **R.K. Porwal v. State of Maharashtra** AIR 1981 SC 1127 the Supreme Court observed (vide paragraph 17) that ***shifting of a market yard is a legislative act and not a judicial or quasi-judicial function, and hence the rules of natural justice have no application.*** In the same decision it was also observed ***"Nothing may be expected to remain static in this changing world of ours. A market, which is suitably and conveniently located today, may be found to be unsuitable and inconvenient tomorrow on account of development of the area in another direction or the congestion, which may have reduced the market into an impossible, squalid place or for a variety of other reasons. To so interpret the provision of the Agricultural Produce Marketing Regulation Act as prohibiting the abolition of a market once established and bar the transfer of the market to another place would, as we said, be to defeat the very object of the Act."***

23. In Karedin v. State of U.P. 1993 AWC 1513 this Court again upheld the validity of section 7 (2)(b), and following the decision of the Supreme Court in R.K. Porwal's case (supra) held that a declaration under section 7 (2)(b) is a legislative function and hence no opportunity of hearing need be given.

24. It is well settled that a legislative act cannot be challenged on the ground of malafides, and its motive cannot be gone into by the Court, vide **K.C.G. Narayan Deo v. State of Orissa, AIR 1953 SC 375 (370) Ashok v. Union of India, AIR 1991 SC 1792 (para 6), Narora Sugar Mills v. State of M.P., AIR 1966 SC 416 (421), Federation of Hotels and Restaurants V. Union of India, AIR 1990 SC 1637, R.S. Joshi v. Ajit Mills, AIR 1977 SC 2279 (para16), etc.** Hence it cannot be said that the impugned notifications amount to colourable exercise of power.

25. Since it has been held that a Notification under section 7 (2)(b) is a legislative activity we are of the opinion that the Court should exercise judicial restraint in interfering with such legislative activity. A Notification under section 7 (2)(b) is a piece of delegated legislation and it can be struck down only if (1) it violates some provision of the parent Act, or (2) it violates some provision of the Constitution. In our opinion the impugned Notification dated 09.03.1981 and the subsequent Notification e.g. of 15.11.1997 are clearly within the ambit of section 7 (2)(b) of the

Act, and it has not been shown that they violate any other provision of the Act. Hence, it cannot be said that these Notifications are ultra vires any provision of he U.P. Krishi Utpadan Mandi Adhiniyam, 1964.

26. The question, which arises, is whether the impugned Notifications violate any provision of the Constitution. In our opinion they do not. The material on record in these petition, which includes the report of the Advocate Commissioner Mr. Munir and Hon. Justice Ganguly (Retd.) as well as the affidavits of the respondents clearly indicates that the present wholesale mandis in Kanpur City are causing immense traffic problems, congestion, diseases, noise pollution etc. and have become a headache for the public there. Hence the shifting of the wholesale mandis from the existing sites is clearly reasonable. No doubt the petitioners right to do business under Articles 19 (1)(g) is to some extent affected by the impugned notification, but this right is subject to reasonable restrictions under Article 19 (6) of the Constitution.

27. It may be mentioned that to test the reasonability of a restriction we have to see the subject matter, extent of restriction, the mischief which it seeks to check, etc. The reasonableness of the restriction has to be determined in an objective manner and has to be seen from the point of view of the interest of the general public and not merely from the point of view of the persons upon whom the restrictions are imposed vide *Hanif Quareshi vs. State of Bihar A.I.R. 1958 SC 731.* Moreover the impugned notifications cannot be said to be unreasonable merely because in a given case they may operate harshly vide *State of Gujrat vs. Shantilal AIR 1969 SC 634 (vide para 52).* As observed by the Supreme Court in *Laxmi Khandsari Vs. State of U.P. AIR 1981 SC 873, Trivedi vs. State of Gujrat AIR 1986 SC 1323, State of Madras Vs. Row 1952 SCR 597, Peerless vs. Reserve Bank AIR 1992 SC 1033, Harakchand vs. Union of India AIR 1970 SC 1453* etc. the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed and the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions at the time etc. are the relevant consideration for determining whether the restriction is reasonable.

28. Further, as held in ***Jyoti Pershad vs. Union Territory of Delhi*** *AIR 1961 SC 1602,* the standard of reasonableness must also vary from age to age and be related to the adjustments necessary to solve the problems which communities face from time to time. In adjudgining the validity of the restriction the Court has necessarily to approach the question from the point of view of the social interest which legislation intends to promote vide *Puthumma vs. State of Kerala AIR 1978 SC 771, P.P. Enterprises vs. Union of India AIR 1982 SC 1016, Joyoti Prasad vs. Union Territory of Delhi* (Supra) etc.

29. Judged by these standards the impugned Notifications cannot be faulted on the ground of lack of reasonableness. As stated in the counter affidavits filed in these connected writ petition and the report of the Commissioners, the existing wholesale mandis in Kanpur have become the cause of immense traffic congestion in Kanpur City, apart from causing diseases pollution etc. Hence shifting the mandis

to the outskirts of the city or beyond is clearly reasonable.

30. It must be remembered that certain matters are by their very nature such as had better be left to the administrators instead of Court themselves seeking to substitute their own views and perception as to what is the best way in which to remove aberrations creeping into that field. The present is clearly an instance where this Court should not interfere with the steps taken by the respondents to resolve a pressing problem. In matters of policy the Courts have a limited role and it should only interfere with the same when it is clearly illegal. That clearly is not the case here. The impugned Notifications are a salutary step for undoing a mischief, which was crying out for redress for a long time. And they are not illegal.

31. As observed by the Supreme Court in **Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731,** the Court must presume that the legislature understands and correctly appreciates the need of its own people. The legislature is free to recognize degrees of harm, and may confine its restrictions to those where the need is deemed to be the clearest.

32. In our opinion the State should not be hampered by the Court in dealing with evils at their point of pressure. All legislation, including delegated legislation (such as the kind we are examining) is essentially ad hoc. Since social problems nowadays are extremely complicated, this inevitably entails special treatment for distinct social phenomena. If legislation is to deal with realities it must address itself to variations in society. The State must therefore be left with wide latitude in devising ways and means of social control and regulation, and the Court should not, unless compelled by the law, encroach into this field.

33. As Justice Frankfurter of the U.S. Supreme Court observed in American Federation of Labour v. American Sash and Door Co., 335 US 538(1949);

"Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a Court debilitates popular democratic government. Most laws dealing with social and economic problems are matters of trial and error. That which before trail appears to be demonstrably bad may belie prophecy in actual operation. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed by the legislature than that the law should be aborted by judicial fiat. Such an assertion of judicial power defeats responsibility from those on whom in a democratic society ultimately rests. Hence rather than exercise judicial review Courts should ordinarily allow legislatures to correct their own mistakes wherever possible."

34. Similarly in his dissenting judgment in **New State Ice Co. V. Liebemann, 285 U.S. 262 (1932)** Mr. Justice Brandies of the U.S. Supreme Court observed that the government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences, depends on "a process of trail and error", and Courts must not interfere with necessary experiments.

Justice Brandies also observed:-

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation."

35. No doubt the petitioners will suffer some hardship, as they will have to leave their existing place of business where they would be having goodwill. However, the interest of the public overrides that of the petitioners. In the report of the Mr. J.J. Munir Advocate Commissioner it has been mentioned that many persons including Doctors and teachers recommended that the existing mandis should be transferred to some other place as they are causing great inconvenience to the public due to traffic congestion and hazard of diseases. A Large Number of other citizens have given similar suggestions to the Advocate Commissioner Mr. Munir in this connection. This is also supported by the letters of the Dy. S.P. and C.M.O. Kanpur, copies of which are Annexures SCA-3 and 4 to the supplementary Counter Affidavit of Cahbi Nath Pathak in writ No. 43987 of 1997.

36. At any event it is not for this Court to sit in appeal over the impugned orders of the State Government under section 7 (2)(b). The Court must exercise judicial restraint in such matters, as it is not an expert in administration.

In the words of Chief Justice Neely:

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

37. The notification under section 7 (2)(b) has been held to be a legislative activity by this Court as well as by the Supreme Court in the aforesaid decisions. Hence we would like to comment on the subject of judicial review of a Statute or a delegated legislation. We feel justified in making these comments because the times which this country is passing through requires clarification of the role of the judiciary vis-à-vis the Legislature and the Executive.

38. Under the constitution the Judiciary, the Legislature and the executive have their own spheres of operation. It is important that these organs do not entrench on each others proper spheres and confine themselves to their own, otherwise there will always be danger of a reaction. The judiciary must therefore exercise self restraint and eschew the temptation to act as a super legislature or a Court of Appeal sitting over the Laws validly made by the Legislature or the Executive (as delegated legislation) or as a third house of Parliament. By exercising restraint it will enhance its own respect and prestige. Of course if a law clearly violates some provision of the Constitution or is beyond its legislative competence it will be declared by the Court as ultra vires, but as long as it does not do so it is not for the Court to sit in appeal over the wisdom of the legislature or its delegate. The Court may feel that the mischief sought to be

remedied by the law may better have been achieved by adopting some other course of action or by some other law, but on this ground it cannot strike down the law. The legislature (or its delegate) in its wisdom is free to choose different methods of remedying an evil, and the Court cannot say that this or that method should have been adopted. As Mr. Justice Cardozo observed in *Anderson vs. Wilson 289 U.S20:*

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

39. It must never be forgotten that the legislature has been elected by the people, while Judges are not, and in a democracy it is the people who are supreme. No Court should therefore strike down an enactment or a piece of delegated legislation solely because it is perceived by it to be unwise. A Judge cannot act on the belief that he knows better than the legislature or its delegate on a question of policy, because he can never be justifiably certain that he is right. Judicial humility should therefore prevail over judicial activism in this respect.

40. As Mr. Justice Holmes of the U.S. Supreme Court observed in his dissenting judgment in **Tyson v. Banton, 273 U.S. 418 (at p 447):**

"I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say they want it, I see nothing in the Constitution of the United States to prevent their having their will."

41. Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First, judicial restraint not only recognizes the equality of the other two branches with the judiciary, but also fosters that equality by minimizing inter branch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect; that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results make the judiciary a moving target and thus decreases its ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of inter branch equality.

42. Second, judicial restraint tends to protect the independence of the judiciary. When courts become engaged in social legislation, almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators, it follows that judges should be elected like legislators. This is counterproductive. The touchstone of an independent judiciary has been its removal from the political process. Even if this removal has sometimes been less than complete, it is an ideal worthy of support and one that has had valuable effects.

43. The constitutional trade–off for independence is that judges must restrain themselves from the areas reserved to the other separate branches. Thus judicial restraint complements the twin,

overarching values of the independence of the judiciary and the separation of powers.

44. The Court should always hesitate to declare a statute unconstitutional, unless it finds it clearly so, and it should avoid supplementing or modifying statutes when construing them, for that is the task of the legislature. As observed by the Supreme Court in M.H. Qureshi vs. State of Bihar (supra), the Court must presume that the legislature understands and correctly appreciates the need of its own people. The legislature is free to recognize degrees of harm and may confine its restrictions to those where the need is deemed to be the clearest. In the same decision it was also observed that the legislature is the best judge of what is good for the community on whose suffrage it came into existence.

45. In *Lochner vs. New York, 198 U.S. 45 (1905)*, Mr. Justice Holmes of the U.S. Supreme in his celebrated dissenting judgment criticized the minority of the Court for becoming a super legislature by inventing a 'liberty of contract' theory, thereby enforcing its particular laissez–faire economic philosophy, Similarly, in his dissenting judgment in *Griswold vs. Connecticut, 381 U.S. 479,* Mr. Justice Hugo Black warned that *"unbounded judicial creativity would make this Court a day-to-day Constitutional Convention."* Justice Cardozo stated this principle eloquently *"The judge is not a knight errant, roaming at will in pursuit of his own ideal of beauty and goodness.* Justice Frankfurter has pointed out that great judges have constantly admonished their brethren of the need for discipline in observing their limitations (See Frankfurter's 'Some Reflections on the Reading of Statues').

46. IN this connection we may usefully refer to the well-known episode in the history of the U.S. Supreme Court when it dealt with the New Deal Legislation of President Franklin Roosevelt. When President Roosevelt took office in January 1933 the Country was passing through a terrible economic crisis –the Great Depression. To overcome this, President Roosevelt initiated a series of legislation called the New Deal, which were mainly economic regulatory measures. When these were challenged in the U.S. Supreme Court the Court began striking them down on the ground that they violated the due process clause in the U.S. Constitution. As a reaction, President Roosevelt proposed to reconstitute the Court (which has nine Judges) with six more Judges to be nominated by him. This threat was enough, and it was not necessary to carry it out. The Court in 1937 suddenly changed its approach and began upholding the laws (see West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400), 'Economic due process' met with a sudden demise.

47. The moral of this story is that if the judiciary does not exercise restraint and over-stretches its limits there is bound to be a reaction from politicians. The politicians will then step in and curtail the powers, or even the independence of the judiciary (in fact the mere threat may do, as the above example demonstrates). The judiciary should therefore confine itself to its proper sphere, realizing that in a democracy many matters and controversies are best resolved in a non-judicial setting.

48. We hasten to add that it is not our opinion that judges should never be 'activist' Sometimes judicial activism is a useful adjunct to democracy such as in the School Segregation and Human Rights decisions of the U.S. Supreme Court, vide Brown v. Board of Education, 347 U.S. 483 (1954), Miranda vs. Arizona, 384 U.S. 436, Roe v. Wade, 410 U.S. 113, etc. or the decision of our own Supreme Court which expanded the scope of Article 14 and 21 of the Constitution. This, however, should be resorted to in exceptional circumstances when the situation forcefully demands it in the interest of the nation, but always keeping in mind that ordinarily the task of legislation or amending the law is for the legislature, and not the judiciary.

49. It has been stated in paragraph 9 of the supplementary counter affidavit in Writ Petition No. 43987 of 1997 sworn by Chabbi Nath Pathak that the Mandi Samiti, Kanpur has got sufficient funds to purchase the land for establishment of a market yard and it will not require acquisition proceedings. The Mandi Samiti has funds to proceed with the construction of the market yard immediately. In paragraph 11 of the said affidavit it is stated that the District Magistrate, Kanpur has sent a letter dated 14.10.1995 to the Vice Chairman, Kanpur Development Authority requesting him to make available 50 acres of land on the bypass which is about 10 km. from the existing foodgrains market yard. The Kanpur Development Authority is making genuine efforts to spare 50 acres of land on the by-pass and there is every possibility of getting the land within a short duration. The mandi samiti is prepared to pay the price of the land immediately vide Annexure-SA-1 to the Supplementary Affidavit. Thus it is apparent that there is no shortage of funds with the Mandi Samiti, Kanpur, for improving and expanding the Navin Mandi Sthal at Naubasta and it should do so immediately.

50. We may mention that the proposal of shifting the existing wholesale mandis has been pending since the year 1977 i.e. for about 26 years but the wholesellers have managed by various means (including interim orders of this Courts) to continue in their existing sites for 26 years, thus obviously increasing the enormous problems in Kanpur City of traffic jams and congestion, accidents etc. and unhygienic conditions, diseases, noise pollution etc. due to which there is great deal of resentment in the public of Kanpur City. In this connection the letters of the Dy. S.P., Kanpur dated 20.10.1999 Annexure-SA-3 to the Supplementary Counter Affidavit of Chabbi Nath Pathak may be seen. The CMO, Kanpur has also written a letter to the District Magistrate on 29.10.1999 (vide Annexure-SCA-4) that the existing mandis at Kidwai Nagar germinate unhygienic conditions and epidemic diseases because the place has become filthy due to the rotting fruits and vegetables thrown on the roads and drains which give rise to foul smell in the atmosphere. It is stated in paragraph 15 of the Supplementary Counter Affidavit that about five trucks reach the mandi every day and roads are blocked for several hours causing enormous traffic problems. There is a crying need to shift the wholesale trade from Kanpur City to some other place.

51. **Hence, we find no illegality in the impugned notifications, and all**

these writ petitions are dismissed and interim orders vacated.

52. However, since the wholesale mandis at Kanpur City have been existing for a long time in our opinion it would not be appropriate if they are immediately and abruptly ordered to be shifted to the Navin Mandi Sthal at Naubasta (Hamirpur Road). As pointed out in the report of Mr. J.J. Munir, the learned Advocate Commissioner, the Navin Mandi Sthal at Naubasta requires to be developed so that the whole sellers can appropriately shift there. We therefore, direct that a Committee shall be set up forthwith for this purpose under the Chairmanship of the Commissioner, Kanpur Division and the members of the Committee will include representatives of the Associations of whole sellers of foodgrains, fruits and vegetables, khandsari etc. as also officials of the various concerned departments e.g. the Kanpur Development Authority, the Krishi Utpadan Mandi Samiti, Kanpur, Nagar Nigam, Kanpur, Jal Sansthan, Kanpur, U.P. Power Corporation, Telephone Department etc. This Committee will form a rational plan for shifting all the existing wholesale mandis at Kanpur to the Navin Mandi Sthal, Naubasta (Hamirpur Road). The Committee will ensure that the petitioners and the other wholesellers of Kanpur are provided appropriate space, accommodation and facilities including sewerage, water supply, electric and telephone supply etc.

53. However, we give a firm directive to the authorities that under no condition should the existing wholesale mandis in Kanpur City be allowed to remain at their existing sites at **Kidwai Nagar, Cooperganj, Collectorganj, Badshahi Naka etc.** beyond one year from the date of this judgment, and they must be shifted to the Navin Mandi Sthal, Naubasta (Hamirpur Road) latest within one year from the date of delivery of this judgment. It is made clear that there will be no pick and chose in this connection, and all the wholesale dealers have to go to the new site within one year from today. The matter has been dragging on for 26 years, and it cannot be allowed to drag on forever.

54. Let the Register General of this Court send copy of this judgment forthwith to the Chief Secretary, U.P. Secretaries of the Department of Food and Civil Supplies, Home, Law as well as the D.G.P., U.P. and the Commissioner, Kanpur Division who will ensure strict compliance with this judgment.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.7.2003

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

Civil Misc. Writ Petition No. 17767 of 2001

Shailendra Nath Mishra ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri S.S. Sharma
Sri V.K. Dixit

Counsel for the Respondents:
Sri V.B. Singh
Sri Vijay Sinha
Sri S.N. Srivastava
S.C.

Easement Act-sec. 60- House allotted by company to his General Manager-Company directed to vacate house-in question-Allotment made in official capacity-Held-Petitioner simply a Licencee and not the tenant-licence can be terminated at any time.

Held- Para 12

Writ jurisdiction is equity jurisdiction and we are not inclined to exercise our discretion under Article 226 of the Constitution of India in favour of a person like the petitioner who has illegally remained in possession of the accommodation in question and has abused the sympathy shown to him. In our opinion the petitioner was only a licencee of the premises in question, and a licence can be terminated at any time vide Section 60, of the Easements Act.

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

1. Heard learned counsel for the parties.

2. The petitioner is challenging the impugned order dated 15.1.2001, contained in Annexure 1 to the writ petition.

3. The respondent no. 3 British India Corporation Limited (BIC) was an associate of Cawnpore Sugar Work. Limited. The Chairman of B.I.C. was also Chairman of Cawnpore Sugar Works Limited. It is alleged in para 5 of the writ petition that the petitioner was initially appointed in Cawnpore Sugar Works Limited in 1980. Thereafter, he was transferred to several places. The house in question, which belongs to BIC was allotted to the petitioner in the year 1997, as has been stated in para 7 of the writ petition, being house no. 14/104. This was allotted free of cost to the petitioner, who was the General Manager of the Cawnpore Sugar Works Limited at that time. It was provided in his capacity as an officer of the Company. Subsequently, in the year 1998, the petitioner was appointed as an Additional Director of the said company, as is stated in para 9 of the writ petition (vide Annexure 3 to the writ petition).

4. In para 12 of the writ petition, it is stated that the petitioner was suspended by the Chairman of Cawnpore Sugar Works Limited vide letter dated 7.1.1999 vide annexure 4 to the writ petition. In para 18 of the writ petition, it is stated that on 15.1.2001, the respondent no. 1 had asked the petitioner to vacate the premises in his occupation. The petitioner is residing in half portion of house no. 14/104. The petitioner has alleged that he is willing to purchase the said house. He has also alleged that the respondents have no right to evict him.

5. We have also perused the counter affidavit of the BIC Annexure CA-1 is a copy of the allotment order dated 27.6.1997. That order states (in para 2) that the premises is being allotted to the petitioner in view of his employment in Cawnpore Sugar Works Ltd. It is also stated in para 3 of Annexure CA-1 that the allotment cannot confer any tenancy right on the petitioner. In para 5 there of it is stated that the permission granted to the petitioner to occupy the accommodation was at the will of the management and could be terminated at any time. Thus, a perusal of the allotment order shows that the petitioner was purely a licencee and not a tenant of the said accommodation. In view of Section 60 of the Easement Act, a licence can be terminated at any time and a licencee has no right. The

petitioner was given the accommodation in view of his employment in the Cawnpore Sugar Works Limited. In para 4 of the counter affidavit it is stated that since the Cawnpore Sugar Works Limited now is not part of BIC, as such the petitioner was required to vacate the bungalow (vide Annexure CA II of the counter affidavit.

6. In para 5 of the counter affidavit, it is stated that when the period of the allotment came to an end, notice dated 10.5.2000 was issued to the petitioner to vacate the premises, and till it is vacated, the petitioner would have to pay damages of Rs. 10,000/-and lease rent of Rs. 2000/- per month- totaling Rs.12,000/- per month vide Annexure CA III.

7. Thereafter, the petitioner requested through his letter dated 26.4.1999 (vide Annexure CA 4) for allotment/permission for living in the bungalow for further two years, which was considered through letter dated 16.7.1999 on sympathetic ground, vide Annexure CA 5. A perusal thereof, shows that the petitioner was allowed to retain the bungalow for one year w.e.f. 1.5.99 on a licence fee of Rs. 2000/- per month. It was made clear in para 4 of the said letter that the permission granted to the petitioner will not confer any tenancy right on him. It was also stated that permission granted for the premises can be terminated at any time by giving a notice. IN para 6, it is stated that after one year the petitioner would have to vacate the premises, failing which he will have to pay Rs. 10,000/- per month as damages for unauthorized occupation. The petitioner did not pay the license fee of Rs. 2000/-per month from December, 1999, as is evident from the letter of BIC dated 10.5.2000, Annexure CA VIII. Hence he was asked to vacate the premises.

8. Thereafter the petitioner again approached the BIC for extension of the permission for one year w.e.f. 1.6.2000 which would expire on 31.5.2001, vide letter dated 19.5.2000 (annexure CA VII). Evidently, this was done again on sympathetic ground.

9. It is alleged in para 8 of the counter affidavit that the petitioner was an erstwhile employee of Cawnpore Sugar Works Limited, which was an associate of BIC. However, the Cawnpore Sugar Works has ceased to be an associate of BIC. The petitioner is not the employee of BIC and as such he has no right to live in the accommodation in question.

10. From the above facts, we are sorry to note that the petitioner, who has held high posts in Cawnpore Sugar Works Limited, is refusing to vacate the premises belonging to BIC without any right or justification. Although the respondents have taken a sympathetic view and allowed the petitioner to remain in possession of the accommodation till 31.5.2001, the petitioner has abused this sympathy and has not vacated the premises till now. This is indeed regrettable. The petitioner has held high posts, and he was not expected to behave in such an improper manner. Decent people vacate premises the moment they realize that they have no right to remain there, but it seems that decency has become a rare commodity nowadays, even among people who are occupying, or have occupied high posts.

11. In our opinion no sympathy can be shown to a person like the petitioner who has illegally remained in possession after 31.5.2001.

12. Writ jurisdiction is equity jurisdiction and we are not inclined to exercise our discretion under Article 226 of the Constitution of India in favour of a person like the petitioner who has illegally remained in possession of the accommodation in question and has abused the sympathy shown to him. In our opinion the petitioner was only a licence of the premises in question, and a licence can be terminated at any time vide Section 60, of the Easements Act.

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

14. The S.S.P. Kanpur Nagar is directed to evict the petitioner from the accommodation in question within 10 days from today. The learned counsel for the petitioners will serve copy of this judgment on the SSP Kanpur Nagar at the earliest who will ensure strict compliance of this order.

15. The petitioner must also pay damages of Rs. 12,000/- per month from 31.5.2001 till the date of vacation of the accommodation, and this amount must be paid by the petitioner to the BIC within two months from today. If he does not pay the said amount, it will be realized from the petitioner as arrears of land revenue by the District Magistrate, Kanpur Nagar.

16. Let copy of this judgment be given to the learned counsel for the respondents by 10.7.2003 on payment of usual charges. The Registrar General of this Court will send copy of this judgment forthwith to the D.M. Kanpur Nagar.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2003

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 1000 of 2000

Ashish Kumar Chaurasia ...Petitioner
Versus
The Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi and another ...Respondents

Counsel for the Petitioner:
Sri S.P. Gupta
Sri Pankaj Bhatia

Counsel for the Respondents:
Sri Vikram Gulati, S.C.
Sri S.N. Srivastava, S.S.C.

Customs Act S.-129- wiver Application-Confiscation of 79 silver bricks worth of Rs. 2.5 crores-against demand of Penalty wiver application filed-on the ground except ancestral property-No bank account or immovable Property-rejection by tribunal held-not proper-tribunal directed to decide the controversy-if the amount of Rs.50,000/-deposited within one month-without insisting to deposit the further amount.

Held- Para 4

For the decision of the waiver application the authority should have considered as to whether the appellant is in a position to pay or deposit the duty and interest demanded on the penalty levied. In my view since non grant of waiver will make the appeal ineffective, the Tribunal should be very careful in rejecting the waiver application. Right of appeal is a substantive statutory right circumstancealised by the condition of

deposit of the disputed amount of tax etc.

Case law discussed:

1988 (35) ELT 445

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

1. By this writ petition under Article 226 of the Constitution of India the petitioner has sought a writ, order or direction in the nature of Certiorari quashing the impugned order dated 14th July, 2000/21st July, 2000 (Annexure No. 6) passed by the respondent No. 1 in appeal No. 376/99 and has also prayed a writ of Mandamus commanding the respondent No.1 to hear and decide the appeal of the petitioner on merit who is insisting to deposit the amount as directed in the impugned order.

2. According to the petitioner he let out the property situate at Pony Road, Brahma Nagar, Jhandewala Chauraha, Shuklaganj, Unnao to one Shri Ram Autar Singh on rent who was carrying some illegal activities from the premises in question. A team of the Custom Officials on 18.12.1992 seized certain silver from the possession of Shri R.A. Singhal in a Maruti Van and Gypsy. Notice under the provisions of Customs Act was issued to the petitioner and other persons. The Commissioner (Central Excise) Kanpur by the order dt. 4th August, 1999 ordered for absolute confiscation of 79 silver bricks, weighing 2,640.227 Kgs. And imposed a penalty of Rs.2.5 crores on the petitioner. Penalty was also imposed upon other person. The petitioner filed an appeal against the aforesaid order under Section 129 A of Customs Act before the Appellate Tribunal. Section 129 A provides besides other things deposit of penalty levied. Proviso to section 129 E gives power to appellate Tribunal to waive the duty and interest demanded on penalty levied if it is satisfied that the deposit of duty and interest demanded on penalty would cause undue hardship to such person. The petitioner filed an application before the Tribunal. In the appeal for waiver of penalty to the tune of Rs. 2.5 crores on the allegation that the petitioner is a Doodh wala and has no financial capacity to deposit the amount. I have gone through the said application. A copy of which has been filed as Annexure No. 4 to the writ petition. In para-5 of the said application it is mentioned that he is not having any movable and immovable property except an ancestral property in which he is as co owner. The monthly income of the petitioner is about Rs.3,000/- and he is not having any bank account. The Tribunal by the impugned order has granted partial waiver and directed the petitioner to deposit Rs. .25 lacs. Aggrieved against the aforesaid order the present writ petition has been filed.

3. Heard Shri Pankaj Bhatia in support of petition and Shri Vikram Gulati, the learned standing counsel for the department. It was submitted by Shri Bhatia that the order of the Tribunal is not based on relevant considerations. In contra Shri Vikram Gulati submitted that the petitioner was master mind behind the smuggling activities and does not deserve any sympathy of the Court.

4. I have considered the respective submissions of the counsel for the parties and also gone through the order of the Tribunal. The order of the Tribunal is a detailed order and it contains 10 paragraphs. Up to paragraph No. 6 the Tribunal has given the history of the case. In paragraph No. 7 which is relevant

paragraph for the consideration the Tribunal has said that looking to the recovery of silver worth Rs.2.4 crores the explanation of financial position submitted by the petitioner is not convincing. Proviso to Section 125 E is relevant to decide the present controversy. A reading of the said proviso shows that for decision of waiver application the relevation consideration is cause of undue hardship to the appellant. Unfortunately in the detailed order of the Tribunal there is no such finding. The dispute on merits shall be heard and decided in appeal. Undoubtedly the finding of the Commissioner is against the petitioner wherein it has been found that the petitioner was the master mind person behind the smuggling activities. I am not making any comments on the merits of the case but a close reading of the order of the Tribunal shows that it has mis-directed itself. Shri Vikram Gulati tried to support the order with reference to the order passed by the Commissioner. The averment of the petitioner that he has no bank accounts or has no immovable property except the ancestral property in which he is co sharer has not been disputed or denied by any authority at any stage. The said fact has not been even disputed in the counter affidavit filed to the writ petition. For the decision of the waiver application the authority should have considered as to whether the appellant is in a position to pay or deposit the duty and interest demanded on the penalty levied. In my view since non grant of waiver will make the appeal ineffective, the Tribunal should be very careful in rejecting the waiver application. Right of appeal is a substantive statutory right circumstancealised by the condition of deposit of the disputed amount of tax etc. Reliance was placed upon a Division Bench Judgment of this Court in the case of ***M.C. Goel Vs. Union of India***, 1988 (Volume-35) E.L.T. 445. In the paragraph No. 6 of the aforesaid judgment the law has been clarified. Reliance was placed on few other judgments by Shri Pankaj Bhatia. All those judgments need not be referred to in view of the fact that Shri Bhatia made concession on behalf of the petitioner that the petitioner is prepared to deposit Rs.50,000/- within a period of one month from today in addition to Rs.15,000/- already deposited. This concession has not been seriously disputed by the Learned Standing Counsel. He only submitted that since a huge revenue is involved the appeal should be heard and disposed of expeditiously. Anxiety of both the counsel is that the appeal may be heard and decided on merits as soon as possible. Considering the totality of the facts and circumstances of the case the order dated 14th July, 2000/21st July, 2000 is modified so far as it relates to the petitioner to this extent that if the petitioner deposits a sum of Rs.50,000/- within one month from today the appeal filed by him shall be heard and disposed of by the Tribunal without insisting the payment of the remaining amount during the pendency of the appeal. With these observations the writ petition is disposed of.

5. In case at any stage the Tribunal comes to the conclusion that the appellant is unnecessarily delaying the hearing of the appeal and is not cooperating in its disposal it shall be open to the Tribunal to pass appropriate orders in accordance with law without being influenced by any of the observations made in this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.7.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 21398 of 1997

Dhan Pal Jain ...Petitioner
Versus
State of U.P. and another ...Respondent

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

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

A) Arms Act Section 14 (3)-Grant of Arms dealer Licence-State Government Refused to grant Licence-No reason recorded- Held- Reason must be recorded as per section 14 (3) of the Act-Impugned order quashed-

Held- Para 5

Case law:-
AIR 1967 S.C. 829
AIR 1998 S.C. 2779
AIR 1985 S.C. 1118

B) Constitution of India-Article 226-grant of Fire Arms licence-whether the Court can itself deal with the grant of licence-Held, No Article 226 can not assume the function of the licensing authorities-matter remanded back to licencing authority to decide accordance with law-

Held- Para 6

This Court in exercise of power under Article 226 of the Constitution of India cannot assume the function of the licensing authority for grant or refusal of the arms licence.

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

1. Heard Sri Ravi Kiran Jain, learned senior counsel appearing on behalf of the petitioner and learned Standing Counsel for the Respondents.

2. By means of present writ petition under Article 226 of the Constitution of India, the petitioner has challenged the impugned order dated 19th June, 1997, whereby the State Government has refused to grant arms dealer's licence to the petitioner under Form No. XI, copy whereof is annexed as Annexure '1' to the writ petition.

3. Learned counsel for the petitioner Sri Jain argued that considering the facts and circumstances of the case that the petitioner has already possessed of a licence under the Arms Act and is running his business in the name and style of M/s Cheap Gun House since 1972. He further stated that the aforesaid arms dealer licence is in Form 13, therefore there is no justification for the State Government to refuse the permission of grant of licence to the petitioner which, according to Shri Jain, is contrary to the provisions of Section 14 of the Arms Act. Shri Jain further submitted that in view of Sub-section (3) of Section 14 of the Arms Act while refusing to grant of licence, the licensing authority is under the legal obligation to record reasons for the same. Sub-Section (3) of Section 14 of the Arms Act is quoted below:

"Refusal of Licences

(1) ……

(2) …….

(3) *Where the licensing authority refuses to grant a licence to any person, it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement."*

4. A bare perusal of the order impugned in the present writ petition demonstrates that no reason whatsoever has been assigned in rejecting the application for grant of Arms Dealer's licence of the petitioner. Even on perusal of the records, learned Standing Counsel could not point out anything, which may demonstrate that any reason has been given by the State Government in rejecting the petitioner's application for grant of licence.

5. Learned counsel for the petitioner Shri Jain tried to argue that this writ petition deserves to be allowed on the short ground that no reason whatsoever has been assigned in rejecting the petitioner's application for grant of licence, but the petitioner should not be relegated again to the licensing authority in the facts and circumstances of the present case and for this purpose he relied upon decisions of the apex Court, reported in A.I.R. 1967 Supreme Court, 829 ***Hari Chand Sarda Versus Mizo District Council and another,*** and A.I.R. 1998 Supreme Court, 2779 ***National Buildings Construction Corporation Versus Raghunathan and others***. He further relied upon decisions of the apex Court, reported in A.I.R. 1985 Supreme Court, 1108 ***State of U.P. and another Versus Raja Ram Jaiswal and another***; and A.I.R. 1985 Supreme Court, 1118 ***Mohd. Azeem Versus District Judge, Aligarh and others***, as well as some other decisions has also been relied upon by learned counsel for the petitioner.

6. Shri Jain next argued that this Court should itself deal with the merits or otherwise of the case of the petitioner as to whether the petitioner is entitled for the grant of licence in question or not? I am afraid that this argument advanced on behalf of the petitioner cannot be accepted. This Court in exercise of power under Article 226 of the Constitution of India cannot assume the function of the licensing authority for grant or refusal of the arms licence. In this view of the matter, the argument advanced by Shri Jain deserves to be rejected and is hereby rejected.

7. In view of what has been stated above, since there is no reason whatsoever mentioned in the order impugned in the present writ petition, the impugned order deserves to be quashed.

8. In the result, the writ petition succeeds and is allowed. The impugned order dated 19th June, 1997, Annexure-'1' to the writ petition is quashed. The matter is remanded back to the Licensing Authority to decide the same in accordance with law and also in the light of the observations made above by this Court in this judgment. Since the matter is very old, therefore the Licensing Authority is directed to decide the matter expeditiously, preferably within a period of three months from the date of production of a certified copy of this order before it.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.7.2003

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

Civil Misc. Writ Petition No. 13693 of 2003

Satendra Kumar Tripathi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.N. Singh
Sri H.N. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Article 14- settlement of contract with civil supply department-G.O. dated 13.8.81 provides the mode for settlement only through tender-contract finalized with the authorities inflagrant violation of the said G.O., without inviting any tender- held- illegal- amounts to discrimination for other interested persons.

Held- Para 9

In the present case this entire procedure has been given a complete go bye, and instead respondent no. 3 has been fragrantly violating the law and evidently in collusion with respondents 6 and 7 has been granted transport and work contracts without calling for any tender. This has been done year after year since the last three years or so. Not only Article 14 of the Constitution has been violated but also the G.O. dated 13.5.2001 Annexure 1 to the writ petition which states that contract shall be given by inviting tender has been violated.

Case law discussed:

AIR 1979 SC 1628, AIR 1983 SC 1207, AIR 1985 SC 1147, 1999 (i) AWC-817, 2003 (i) (51) ALR 791

Constitution of India, Article 226- Practice or Procedure-settlement of contract without following the procedure prescribed either in G.O. or the ambit of Article 14 of the Constitution court expressed its great concern-direction issued to enquire into the matter to single court those guilty officer-held responsible for violation of constitutional ambit.

Held- Para 16

Since this petition has brought to light a case of flagrant violation of law and grant of public contracts illegally we direct the Secretary, Food and Civil Supply, U.P. to order a thorough investigation into the matter and strong legal action against those responsible for those illegalities, must be taken. Compliance report must be sent to this Court at the earliest.

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

1. By means of this writ petition the petitioner has prayed for a mandamus restraining the respondents 6 and 7 from working as transport contractor for the respondent department after 31.3.2003 and to appoint transport and handling contractor of Food and Civil Supply Department of districts Sonbhadra, Sant Ravi Das Nagar, Mirzapur for the financial year 2003 –04 in accordance with the G.O. dated 13.5.2001 only after inviting tenders from the public at large and permitting all eligible persons.

2. In this case on 30.1.2003 this Court granted learned Standing Counsel three weeks time to file counter affidavit and issued notices to respondents 6 and 7 returnable at an early date. The order

sheet of 20.5.2003 shows that there is an office report that the notices were issued to the respondents 6 and 7 vide Registered A.D. Post but neither the acknowledgement nor undelivered cover has been received back after service and no counter affidavit has been filed.

3. On 7.7.2003 when this case was listed before us none appeared for the respondents 6 and 7 and no counter affidavit had been filed by the learned Standing Counsel. Since notice had been issued to the respondents 6 and 7 as is evident from the office report dated 20.5.2003 we treat the notices to have been served on respondents 6 and 7 in view of Explanation II Chapter 8 Rule 12 of the Allahabad High Court Rules.

4. The petitioner claims to be a contractor of the Food and Civil Supply Department of districts Mirzapur, Sant Ravi Das Nagar and Sonbhadra. He takes contract of handling and transporting grains and other food articles from the Department. The State Government issued a G.O. dated 13.5.2001 for appointing transport contractors. True copy of the G.O. dated 13.5.2001 is Annexure 1 to the writ petition. Clause 4 of the said G.O. provides that the appointment of the transport contractor may be made by inviting tenders.

5. It is alleged in paragraph 9 to 12 of the writ petition that the respondents 6 and 7 Mahendra Kumar Gupta and Jag Narain Singh as well as the Senior Marketing Inspector, Sonbhadra are in collusion and have caused number of irregularities and embezzled huge amounts. An FIR was lodged and the District Magistrate, Mirzapur after conducting the enquiry has recommended suspension of the Senior Marketing Inspector, Sri G.P. Singh vide letter dated 4.9.2002, Annexure 3 to the writ petition. As stated in paragraph 10 of the writ petition, an enquiry was held against these illegal acts and the Marketing officer, Mirzapur recommended to the Regional Food Contractor, Varanasi division vide enquiry report dated 20.8.2002 to black list respondents 6 and 7. True copy of the enquiry report is Annexure 4 to the writ petition. However, despite these recommendations no action was taken against the respondents 6 and 7 or against the Senior Marketing Inspector Sri G.P. Singh.

6. In paragraph 12 of the writ petition it is alleged that the officials of the Food and Civil Supply Department, district Mirzapur and Sonbhadra are also in collusion with respondents 6 and 7 and they have influenced the Regional Food Controller, Mirzapur in such a manner that they have been granted transport contracts again and again continuously for the last three years **without any tender**. Others are not allowed to participate in the contract, and thus there is violation of Article 14 of the Constitution. True copy of the representation of the petitioner and other contractors is Annexure 5 to the writ petition. The Commissioner, Mirzapur by order dated 12.4.2002 addressed to the Regional Food Controller, Vindhyachal Division called for an explanation as to why new contractors are not being registered and old contractors are being given contracts at the old rates. True copy of this letter is Annexure 6 to the writ petition. The Commissioner, Mirzapur has also requested the Commissioner, Food and Civil Supply, U.P. to direct the Regional Food Controller, Mirzapur to register new contractors and finalize the

contract after inviting the tender vide Annexure 7 to the writ petition.

7. It is alleged in paragraph 17 of the writ petition that the Regional Food Controller Vindhyachal Division, Mirzapur has again and again extended the period of transport contract given to the respondents 6 and 7 for the last three years without calling for any tender.

8. This petition discloses an alarming state of affairs. It is well settled that public contracts are in not large as held by the Supreme Court in Ramana Dayaram Shetty vs. International Airport Authority of India AIR 1979 SC 1628. Ordinarily, before any public contract is granted there must be an advertisement in well known newspapers having wide circulation in which the date, time and place of the public auction/tender is fixed so that all eligible persons can apply and there can thus be compliance of Article 14 of the Constitution. This will also ensure transparency in administration.

9. In the present case this entire procedure has been given a complete go bye, and instead respondent no. 3 has been fragrantly violating the law and evidently in collusion with respondents 6 and 7 has been granted transport and work contracts without calling for any tender. This has been done year after year since the last three years or so. Not only Article 14 of the Constitution has been violated but also the G.O. dated 13.5.2001 Annexure 1 to the writ petition which states that contract shall be given by inviting tender has been violated.

10. What is shocking is that these contracts have been granted to persons who are under a cloud, as stated in paragraph 9 to 12 of the writ petition. There are serious allegations against respondents 6 and 7 who appear to be in collusion with the Senior Marketing Inspector. The Marketing Officer Mirzapur has recommended to the Regional Food Controller to black list the respondents 6 and 7 and the district Magistrate has recommended for suspension of the Senior Marketing Inspector Sri G.P. Singh with whom respondents 6 and 7 appear to be in collusion. However, no action has been taken against these persons for reasons best known to the Government, and instead the malpractice has been allowed to continue.

11. The allegations in the writ petition are un rebutted and no counter affidavit has been filed and we see no reason to disbelieve the same. There is total violation of Article 14 of the Constitution because other eligible persons were not given opportunity to apply for the contract.

12. It has been held by the Supreme Court in ***State of Haryana Vs. Jageram AIR 1983 SC 1207*** and ***Ram and Shyam Company vs. State of Haryana and others AIR 1985 SC 1147*** that public contract should not ordinarily be given by private negotiations.

13. In ***Panchu vs. Collector 1999 (1) AWC 817*** and ***Ram Pravesh Vishwakarma vs. State of U.P. 2003 (1) (51) ALR 791*** etc. this Court held that public contract should be granted only after public auction/ public tender after publicity in newspapers having wide circulation in the area, otherwise there will be violation of Article 14 of the Constitution.

14. Since the allegations in the writ petition are un rebutted we have to accept the same. Thus it must be held that there was no tender before awarding the contract to the respondents 6 and 7 and evidently it was done by private negotiations and in collusion with the authority concerned. Hence any contract awarded to respondents 6 and 7 are consequently quashed.

15. The petition is allowed. The respondents 6 and 7 are restrained from functioning as transport contractors of the department.

16. Since this petition has brought to light a case of flagrant violation of law and grant of public contracts illegally we direct the Secretary, Food and Civil Supply, U.P. to order a thorough investigation into the matter and strong legal action against those responsible for those illegalities, must be taken. Compliance report must be sent to this Court at the earliest.

Let a copy of this judgement be sent by the Registrar General of this to the Secretary, Food and Civil Supplies, and Chief Secretary, U.P. forthwith.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2003

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

Criminal Misc. Writ Petition No. 3298 of 2003

Taiyab ...**Petitioner**
Versus
State of U.P. and others ...**Respondents**

Counsel for the Petitioner:
Sri Santosh Tripathi
Sri V.P. Srivastva

Counsel for the Respondents:
A.G.A.

Constitution of India Article 226-Read with Section 178 Cr.P.C.-Territorial Jurisdiction-F.I.R. Lodged against petitioner at New Delhi and Ghaziabad-whether Delhi Police or the U.P. Police has jurisdiction to investigate? -Held-Both the state's Police have jurisdiction to investigate.

Held- Para 15

Investigation is a preliminary stage in the detection of a crime. So far as investigation into any crime or offence is concerned, it is purely for the collection of evidence. It is immaterial whether it is done by Delhi police or U.P. Police. Till the stage of investigation, question of prejudice is not likely to arise.

In cases like this, both the State's police has jurisdiction to investigate, there is no doubt in the legal position.

Case Law:
AIR 1957 S.C. 196,
AIR 1966 SC 128,
AIR 1967 Delhi 88,
AIR 1923 Mad 666,
AIR 1959 AP 657,

AIR 1958 Mad 155

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

1. This writ petition has been filed for restraining the Delhi Police from investigating the matter in pursuance of the F.I.R. in Case Crime No. Nil of 2003, under Sections 302 and 201 I.P.C., registered at Police Station Masoori, District Ghaziabad, U.P.

2. The facts as alleged in the petition and are revealed by the documents annexed by the petitioner himself, remain that on 25.5.2003 a report of 'gumsudgi' was lodged at Police Station Paschim Vihar, New Delhi by the wife of deceased Sanjay Gupta, Smt Ritu Gupta, wherein it was mentioned that in the evening of 25.5.2003 her husband Sanjay Gupta, had gone along with two persons, namely, Aman Bhardwaj and Taiyab (petitioner), who were known to him, in a Maruti Car of white colour, bearing No. DL 3 CT 4150. While leaving the house, the deceased told his mother that he would come back soon. When he did not return, the deceased's wife phoned on his mobile at about mid night. Deceased told her that he was in NOIDA and would return home soon. But he did not come back. In view of the information the report of missing of Sanjay Gupta was registered on 25.5.2003. The dead body of the deceased was found within territorial jurisdiction of Police Station Masoori, District Ghaziabad and an F.I.R. was lodged at the said Police Station under Section 302 read with Section 201 I.P.C. by deceased's brother giving all those details which had been given by deceased's wife at Police Station Paschim Vihar, New Delhi earlier alleging that Taiyab and co-accused Aman Bharadwaj had committed the said murder. The Delhi Police, respondent no. 3, started the investigation. Hence this petition.

3. Shri V.P. Srivastava, learned counsel appearing for the petitioner has submitted that as the dead body of said Sanjay Gupta was found within the territorial jurisdiction of P.S. Masoori, District Ghaziabad, the said Police Station alone has a competence to investigate the crime, hence investigation being carried out by the respondent no. 3 is without competence, and therefore, respondent no.3 be restrained from investigating the matter.

4. On the contrary, it has been submitted by the learned Additional Government Advocate that petitioner and Aman Bharadwaj had gone to the house of the deceased, and taken him from there. As at what place, time and for what reason the murder has been committed would be revealed only in investigation. Merely because the dead body was found in District Ghaziabad, that does not deprive the Delhi Police to investigate into the matter as the commencement of the offence had started from Delhi, therefore, petition is liable to be dismissed.

5. This is a settled legal proposition that lodging of F.I.R. under Section 154 Cr.P.C. is a statutory right and report can be lodged/registered before any Police Station in India, but if the Police Station where it is lodged comes to the conclusion that offence has been committed within the territorial jurisdiction of some other Police Station, it would transmit the F.I.R. there.

6. Section 178 of the Code of Criminal Procedure, 1973 (hereinafter called the Cr.P.C.) provides for a place of enquiry or trial and reads as under:-

(a) when it is uncertain in which of several local areas an offence was committed, or
(b) where an offence is committed partly in one local area and partly in another, or
(c) where an offence is continuing one and continues to be committed in more local areas than one, or
(d) where it consists of several acts done in several local areas,
(e) it may be enquired into or tried by a Court having jurisdiction over **any** of such local area.

7. Therefore, it becomes clear that where it is uncertain that in what area offence has been committed, or where offence has been committed partly in one area and partly in another area, then enquiry and trial may be held in any of the said areas. Therefore, the scope and applicability of this provision seems to be to resolve the difficulty that may arise in a case where there is a conflict in respect of commission of an offence between different areas, or partly committed in one area or in several places, the accused may not go scot-free and escape the punishment on a technical ground of competence/jurisdiction, and in such a case, enquiry or trial may be held at either or any of those places. The provisions of Section 178 Cr.P.C. are analogous to the provisions of Section 67 of old Code of 1872 and Illustration A thereof provided that an offence committed in the course of a journey or voyage had to be treated as fallen within the purview of the Section and it was provided that it could be tried or enquired into by any Court in whose jurisdiction the offender passed in the course of the journey or voyage. In fact, this provision is a specific one and supplemental to the 3rd clause of Section 181 (2) of the Code. In this case it remains uncertain as to at which particular place offence has actually been committed, petitioner may be tried at any of those places covered by him in the course of his journey.

8. In ***State of Madhya Pradesh Vs. K.P. Ghiara****, AIR 1957 SC 196*, the Hon'ble Apex Court while dealing with the case of embezzlement, held that in the circumstances when it was not certain that an offence of embezzlement was committed at Bombay or Nagpur, the jurisdiction of trial or enquiry may be held at either of those places.

9. In ***Mangaldas Raghavji Ruprel Vs. State of Maharashtra & ors***, *AIR 1966 SC 128*, a Constitution Bench of the Hon'ble Supreme Court has categorically held that in a matter where it is not certain as to where the offence actually occurred, it becomes immaterial at what place the trial is held. The Court should keep its hands off unless prejudice has resulted to the accused thereby and for determining whether failure of justice has resulted, the Court is required to have regard to the fact as to whether objection has been raised at the trial, and in case no objection has been raised, it would be legitimate to presume that the accused apprehended no prejudice.

10. In ***State of Delhi Administration Vs. Sinha Govindji***, *AIR 1967 Delhi 88* it was held that the Court in whose jurisdiction even an offence has partly been committed, would have jurisdiction

to hold a trial or enquiry. In case a defamatory letter is posted at A to be read at B, the offence can be tried either at place A or B (Vide *M.R. Krishnamurthi Iyar Vs. C.V. Parasurama Iyar, AIR 1923 Mad. 666; and Pisupati Purnaiah Sidhanthi Vs. Pisupati Satyanarayana Sidhanthi, AIR 1959 AP 657*).

11. In *The Public Prosecutor Vs. T.A. Rathnam Pillai, AIR 1958 Mad 155*, it was held that where an offence is a continuing offence, it may be enquired into or tried in any local area in which it continues to be committed.

12. Thus in view of the above, an inference can be drawn that any Court, in whose territorial jurisdiction an offence has partly been committed, would have jurisdiction to hold the trial or enquiry. It appears that the provisions of Cr.P.C. are analogous to the provisions of Section 20 of the Code of Civil Procedure, which provides that Courts have a territorial jurisdiction where the cause of action has arisen fully or partly.

13. In the instant case, if examined in the light of aforesaid settled legal proposition, it remains undisputed that the accused had gone to the house of the deceased at Delhi and taken him with them from there. His wife has lodged the report of his missing at Police Station Paschim Vihar, New Delhi and it is a matter of investigation as to with what intent the accused had gone to the deceased's house and where, in fact, the offence has been committed.

14. We are of the considered opinion that in this fact situation Delhi Police has a competence to investigate into the matter. More so, learned counsel for the petitioner failed to satisfy us as what is the right of the accused to choose the investigating agency in such a case and what is the prejudice which is likely to occur to him if the investigation is carried out by the Delhi Police and the trial is held in Delhi.

15. Investigation is a preliminary stage in the detection of a crime. So far as investigation into any crime or offence is concerned, it is purely for the collection of evidence. It is immaterial whether it is done by Delhi police or U.P. police. Till the stage of investigation, question of prejudice is not likely to arise. It generally occurs at the stage of trial. It is more so in the cases like the one at hand. Here there are two F.I.R., one of gumshudgi, lodged by the wife, and the other lodged at Ghaziabad by the brother of the deceased. In cases like this, both the State's police has jurisdiction to investigate, there is no doubt in the legal position.

16. Petition is totally misconceived, lacks merit, and therefore, dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.7.2003

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

Civil Misc. Writ Petition No. 13397 of 1993

Madhuwan Nagar Sahkari Avas Samiti Ltd. Agra and another ...Petitioner
Versus
Agra Development Authority, Agra and another ...Respondents

Counsel for the Petitioners:
Sri B.D. Mandhyan

Counsel for the Respondents:
Sri Swami Dayal
Sri K.S. Chaudhry
Sri V.K. Birla
S.C.

Constitution of India, Article 226-Writ of Mandamus Society raising unauthorized construction over green belt area-whether can mandamus be issued to continue such illegality? Held-No-Direction issued to the Registrar General for information and proper enforcement.

Held-Para 17 and 18

In this case by making such illegal constructions in the green belt the law has been thrown to the winds. This court cannot accept this state of affairs. No constructions can be permitted to continue any longer in the green belt, and even a map for construction cannot be sanctioned there.

The respondents are directed to forthwith demolish all the constructions including those of the members of the petitioner society in the green belt area of Agra forthwith with an iron hand, without any pick or choose. No leniency must be shown in this matter. The petition is dismissed, and interim order is vacated.

Case law discussed-
1999 (6) SCC 464 (vide paragraph 73), 1999 (6) 2177, 1974 SC 2177, 1991 (4) SCC 54 and 1995 (2) SCC 577.

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

1. This petition furnishes a typical instance of a widespread malady which has infected our society and the body politic, namely the belief in the rich and mighty of our country that they are above the law.

2. By means of this writ petition the petitioners have prayed for a mandamus directing the respondents not to demolish the houses in Jangjeet Nagar, Agra or the houses of any individual member of the petitioner society and to regularise the colony of the petitioners on payment of compounding fee.

3. The petitioner no. 1 is a society registered under the Societies Registration Act. It purchased land from agriculturists, which is recorded as abadi land. On that land the Society members have constructed residential houses, and the colony is known as Jangjeet Nagar. The society has 200 members, all of whom have been allotted plots in the colony. It is alleged in paragraph 3 of the petition that out of them 100 have constructed full fledged houses and are residing therein and the remaining have raised boundary walls with gates. It is alleged that it is posh locality inhabited by Advocates, Engineers, Army Officers, Bank Managers, Government employees etc. with Public Schools etc. The petitioner society has developed the land as stated in paragraph 6 of the petition.

4. In paragraph 7 of the writ petition it is alleged that the respondents are harassing the colonizers and they are trying to extract illegal money from them or their members. They are terrorizing the inhabitants and are threatening to demolish the houses. The officials of the Agra Development Authority come with police and are creating terror in the locality. Aggrieved this writ petition has been filed.

A counter affidavit has been filed and we have perused the same.

5. In paragraph 4 of the counter affidavit it is denied that the land in

question was recorded as abadi. In paragraph 5 of the counter affidavit it is stated that the petitioners have not disclosed the names of the alleged members of the society nor they have filed any documents to support their allegations. It is stated that on the spot some houses ranging between 10 to 12 have been erected in a haphazard manner, but such constructions are wholly unauthorized. There is no sanctioned lay out plan in favour of such persons and as such these constructions are illegal.

6. In paragraph 9,14 and 15 of the counter affidavit it is stated that the colony is situated in an area ear- marked as green belt in the master plan of Agra. Hence the question of sanctioning of any colony or compounding the unlawful constructions of the petitioner does not arise. In paragraph 16 it is stated that even the Agra Development Authority is not entitled to convert the user of the land shown in the master plan as green belt as the master plan has been prepared by the Government and the Government alone can change the land user. In paragraph 17 of the counter affidavit it has been stated that the land in Shastripuram colony is not in the green belt area while the land of the colony in question is wholly within the area of green belt as shown in the master plan . Hence there is no discrimination.

7. In paragraph 22 of the same it is denied that the people are being terrorized. The action is only being taken in accordance with law. In paragraph 26 of the same it is stated that the constructions of the petitioners are not only unauthorized, there is also no sanctioned plan for the same. Also they have made constructions in a haphazard manner and have obstructed the development process.

8. In our opinion there is no merit in this petition. As stated in paragraph 9, 14 and 15 of the counter affidavit, the constructions in question are wholly illegal and unauthorized having been made in the green belt area shown in the master plan. The constructions have been raised without sanction of lay out plan and are hence liable to be demolished. We are of the clear opinion that the members of the petitioner society have raised constructions on green belt area, which is wholly impermissible, and no lay out or map can be sanctioned on the same. Compounding of any construction made on the green belt is out of the question as it not permissible under the law, and all constructions in the green belt area have to be demolished forthwith.

9. In **M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu 1999 (6) SCC 464** (vide paragraph 73) the Supreme Court observed: -"***This court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorized. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorized construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing***

the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles."

10. As seen from the observation of the Supreme Court, it has specifically been laid down that unauthorized constructions if they are illegal and cannot be compounded have to be demolished.

11. In **R.A. Agarwal v. Corporation of Calcutta, 1999 (6) 2177, the Supreme Court** ***directed demolition of a multi storeyed building, which had been constructed in violation of the building rules. The Supreme Court also granted police protection to carry out the compliance order.***

12. In **K.P. Shenoy v. Udipi Municipality, AIR 1974 SC 2177**, ***the Udipi Municipalityk had permitted construction of a Cinema House in a residential area. This grant of permission was challenged in the Supreme Court, which held that a public authority has no power to contravene the bye laws made by that authority (vide paragraph 27). It was further held by the Supreme Court (in paragraphs 28 and 29) that illegal commercial use by constructing a Cinema house invades the right of the residents.***

13. In **Munshi Ram v. Union of India, 2000 (7) SCC 22**, the Supreme Court has observed (in paragraph 9):

"The continued unauthorized user would give the paramount lessor the right to re-enter after cancellation of the lease deed. As already noticed, DDA is insisting on stoppage of misuser. The misuser is contrary to the terms of the lease. DDA cannot be directed to permit continued misuser contrary to the terms of the lease on the ground that the zonal development plan of the area has not been framed."

14. In **Banglore Medical Trust v. B.S. Muddakppa, 1991 (4) SCC 54**, the Supreme Court observed that open space reserved for a public park cannot be converted into a site for hospitals and nursing homes. In **Virendra Gaur v. State of Haryana, 1995 (2) SCC 577** it was held that Municipal Land earmarked for open space for public use cannot be leased out to a private party.

15. In the present case the rules have been totally flouted by the so called elite of society. They have illegally made constructions in the green belt area of the master plan. No indulgence can be granted to such so called sophisticated people who claim to be the cream of society but flout the law so flagrantly. If these so called educated people can flout the law in this manner and get away with it what example will be set for others ? Does the law exist in our country only for the poor and not for the rich, influential or powerful.

16. The matter has been dragging on since the year 1993 in view of the interim order of this Court dated 26.4.1993, and we are of the opinion that it should not be allowed to drag on any longer and all constructions in the green belt must be demolished forthwith. The mere fact that there are Advocates, Engineers, Army Officers, Government Employees and Bank Managers living in the said colony

is neither here or there. No one is above the law. These so called educated and affluent persons have committed gross violation of the law by making constructions on the green belt without any sanctioned lay out plan. If this is permitted it will send a wrong signal that the Rules and Regulations exist only on paper and are not to be taken seriously. This Court cannot countenance such a state of affairs. The Rule of Law postulates that every one however mighty he may be, should be under the law. "Be you ever so high, the law is above you."

17. In this case by making such illegal constructions in the green belt the law has been thrown to the winds. This court cannot accept this state of affairs. No constructions can be permitted to continue any longer in the green belt, and even a map for construction cannot be sanctioned there.

18. The respondents are directed to forthwith demolish all the constructions including those of the members of the petitioner society in the green belt area of Agra forthwith with an iron hand, without any pick or choose. No leniency must be shown in this matter. The petition is **dismissed**, and interim order is vacated.

19. Let the Registrar General of this Court send copy of this judgment forthwith to the Commissioner, Agra Division, the District Magistrate, Agra and the Vice Chairman, Agra Development Authority who will ensure strict compliance of this judgement. Copy of this order will be supplied to the learned Standing Counsel free of charge today and he will communicate it to these authorities.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.7.2003

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 21651 of 2001

Mohd. Naseem Ansari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K.S. Misra

Counsel for the Respondents:
Sri Rakesh Pande
C.S.C.

Constitution of India Article 226- oral termination contractual employee of corporation working for more then three years claiming regularisation. Held- appointment not made on substantive Post can not claim regularisation in absence of Policy for regularisation.

Held-Para 6

The appointment letter of the petitioner on contractual basis clearly indicates that he was engaged for a certain period and thereafter he had no right of employment of any post with the respondents-Corporation. His appointment not having been made on any substantive post, he cannot claim regularization. Learned counsel for the petitioner has not been able to place any policy of the Corporation under which he is claiming regularization. On the contrary it is the specific case of the respondents that the U.P. Government had issued Government Orders, which strictly prohibited the creation of any post during the financial year in question. In the absence of any policy for regularization of service, the relief prayed for cannot be granted.

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

1. This writ petition has been filed with a prayer for quashing the oral order of termination of the petitioner passed on 15.4.2001 by respondent no. 4, Project Manager, Project and Tube-well Corporation Unit, Bareilly. Further prayer has been made for a direction to the respondents to regularize the service of the petitioner on the post of Store Munshi cum Clerk and also to pay salary for the post of junior clerk since 1998.

2. The brief facts relevant for the adjudication of this case are that the petitioner was engaged on contractual basis from time to time for periods of six months each beginning from 1.12.1998. The last contractual engagement of the petitioner made by the respondent-Corporation ended in December 2000. In this manner the petitioner was engaged with the respondent-Corporation for about two years and on that basis, the petitioner is now claiming for regularization of his service. From the averments made in the writ petition it is not clear whether the appointment was on any substantive vacancy or not.

3. Sri K.S. Misra, learned counsel for the petitioner has submitted that the petitioner having worked for nearly three years, has a right to be regularized in service. He has further submitted that the employees junior to the petitioner are still working in the same department. However, the same is not substantiated by the specific averments in the writ petition as to which of the employees junior to the petitioner are still continuing to work. An attempt has been made in the rejoinder affidavit to show that certain persons who had been recruited after the petitioner had been allowed to continue to work. In the said paragraphs of the rejoinder affidavit, which has not even been properly sworn and said to be based on legal advice, certain names of the persons working as Class IV employee, Stenographer, and Junior Engineer have been given who are said to be still working. It has not been stated even in the rejoinder affidavit that any person who was junior to the petitioner and working as Store Munshi cum Clerk is still continuing to work. It has also not been stated that whether any fresh hand has been recruited on the post on which the petitioner claims to have worked.

4. The learned counsel for the petitioner also contended that the service of the petitioner could not have been terminated except in accordance with Section 6N of the U.P. Industrial Disputes Act, 1947. In support of his contention Sri K.S. Misra, learned counsel for the petitioner has placed reliance upon the judgments of the Apex Court rendered in **Chief Conservator of Forests and another Vs. Jagannath Maruti Kondhare and others** (1996) 2 Supreme Court Cases 293, **Khagesh Kumar and others Vs. Inspector General of Registration and others** 1995 Supp. (4) Supreme Court Cases 182, as well as the judgment of this Court in the case of **State of U.P., through Executive Engineer, Tube Well Division-I, Saharanpur Vs. Presiding Officer, Labour Court, Dehradun and another** (2002) 3 UPLBEC 2404. I have perused the said judgments. The same relate to regularization of daily wage employees in which the employees working on daily wages had first approached the Industrial Adjudicator before filing the writ petition in the High Court. In the present case, the

petitioner has filed a writ petition directly without availing the alternative remedy.

5. Sri Rakesh Pandey, learned counsel appearing for the contesting respondents-U.P. Project and Tube-well Corporation has submitted that violation of Section 6N of the U.P. Industrial Disputes Act, 1947 has not been raised in the writ petition and even if that be so, the petitioner can at best raise the issue before the appropriate authority under the Industrial Disputes Act. Sri Pandey has further submitted that it has been categorically stated in paragraphs 11 and 14 of the counter affidavit that there is no post available on which the petitioner is claiming regularization of service and also that there are no funds for payment of salary. The contention of the learned counsel for the respondents-Corporation is that the petitioner was engaged on contractual basis on account of some extra work which was required to be carried out on a particular project and on the completion of the project, the respondent-Corporation has discontinued the engagement made on contractual basis. Sri Pandey has also submitted that no discrimination has been made in the case of the petitioner, as the petitioner has not been able to point out that the service of any other person, who was similarly situated as the petitioner, has been regularized. Sri Pandey has placed reliance on a decision of the Apex Court rendered in **State of Himachal Pradesh Vs. Suresh Kumar Varma and another** 1996 (72) Supreme Court Indian Factories Labour Reports 804, wherein it has been held that the appointment on daily wages cannot be a conduit pipe for regular appointments which would be a back-door entry, detrimental to the efficiency of service and would breed seeds of nepotism and corruption. He has further placed reliance on another decision of the Apex Court rendered in **Dr. Arundhati Ajit Pargaonkar Vs. State of Maharasthra and another** 1994 (69) Supreme Court Indian Factories & Labour Reports 695 wherein it has been held that even a person who has worked on temporary basis for nine years without break would also not be entitled for regularization, and that regular selection cannot be substituted by human consideration.

6. Having heard learned counsel for the parties and on perusal of the record, in my view, the petitioner has not been able to make out a case for grant of any relief. Since the petitioner was admittedly engaged on contractual basis on fixed payment, he had a right to continue only till the period of his appointment as set out in the contract. The appointment letter of the petitioner on contractual basis clearly indicates that he was engaged for a certain period and thereafter he had no right of employment to any post with the respondents-Corporation. His appointment not having been made on any substantive post, he cannot claim regularization. Learned counsel for the petitioner has not been able to place any policy of the Corporation under which he is claiming regularization. On the contrary it is the specific case of the respondents that the U.P. Government had issued Government Orders, which strictly prohibited the creation of any post during the financial year in question. In the absence of any policy for regularization of service, the relief claims cannot be granted. In the present case, there is no question of termination of service of the petitioner as after the end of period of the contract under which he worked, he ceases to have

any right on the post. The submission of the petitioner for being granted the benefit of Section 6N of the U.P. Industrial Disputes Act, 1947 also cannot be accepted. No such ground has been raised in the writ petition. Even otherwise, for deciding such an issue, evidence would be required to be considered which can best be done by the Industrial Adjudicator and not in this extraordinary writ jurisdiction. There is no averment in the writ petition with regard to non-payment of salary to the petitioner since 1998. Thus, the prayer for payment of arrears of salary since 1998 also cannot be granted.

7. For the foregoing reasons, the petitioner is not entitled to any relief. This writ petition is accordingly dismissed without there being any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.7.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 35865 of 2000

Puttu Lal Sashtri ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Anil Bhushan

Counsel for the Respondents:
Sri P.D. Tripathi
S.C.

Constitution of India, Article 226- Disciplinary proceeding-initiated during pendency-the delinquent employee retired- disciplinary enquiry can not continue.

Held- Para 5

The contention of the petitioner is that after attaining the age of superannuation on 30.6.87 the order of suspension would automatically lapse after retirement. It is submitted that the disciplinary enquiry can not continue after the retirement of an employee in view of the judgment in Bhagrirathi Jena vs. Board of Directors, OSFC and others wherein the Apex Court has held that disciplinary proceedings could not be continued even for the purpose of making reduction of the retrial benefits inasmuch as there was no statutory regulations made by the Corporation for such reduction from the retrial benefits. From the facts of the case as appear from the judgment the Apex Court was of the view that there was no specific provision for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of departmental enquiry after superannuation and as such the Corporation had no legal authority to make any reduction to the retrial benefits of the appellant. It has further been held that there was also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision that a deduction could be made from retiral benefits.

Case law discussed:
Bhagirathi Jena Vs. Board of Director OSFC
W.P. No. 3829 of 1996 decided on

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

Heard learned counsel for the parties and perused the record.

1. By means of this writ petition, the order dated 22.4.2000 passed by the District Basic Education Officer, Shahjahanpur dismissing the petitioner from service w.e.f. 30.6.1987 has been challenged.

2. The brief facts of the case are that the petitioner was initially appointed as Assistant Teacher in Primary Pathshala, Nahlora Buzurg, district Shahjahanpur. He was promoted as Head Master in 1951. Thereafter he was appointed as Assistant teacher in Junior High School, Dhaka Ghanshyam Khand, Banda district Shahjahanpur in 1955. He was placed under suspension on 15.3.1978 by the District Basic Education Officer and a charge sheet was served on him 4.4.79 leveling following charges.

"**आरोप पत्र**

आप पर जूनियर हाईस्कूल ढकाश्याम के प्रधान अध्यापक पद पर कार्यकाल की अधावधि निम्नलिखित आरोप लगाये जाते हैं।

आरोप नं० १- आप पर अपने विद्यालय के अध्यापक को एवं चतुर्थ वर्गीय कर्मचारियों को अभिलेख मनमाने ढंग से परिवर्तित किये जाने का आरोप है।
प्रमाण पत्र विद्यालय की पत्र व्यवहार पंजिका।
आरोप नं० २- विद्यालय के तथा कथित चपरासी श्री रामेन्द्र जो आपके पुत्र हैं की गलत उपस्थिति पंजिका में अंकित किये जाने का आरोप है। प्रमाण उपस्थिति पंजिका तथा विद्यालय के कर्मचारी एवं अध्यापकों के बयान ।
आरोप नं० ३- आप पर अपने पद की गरिमा एवं आधार सहित के विरूद्ध कार्य कर अधिकारियों को धोखा देने का असफल प्रयास किये जाने का आरोप है।
प्रमाण उक्त तवत
आरोप नं०४- आप हर आचार संहिता के विरूद्ध उच्चाधिकारियों से पत्र व्यवहार का आरोप है ।
प्रमाण-आपका शिक्षा निदेशक, उ०प्र० को सम्बोधित पत्र दिनांक १८.१०.७८
उक्त आरोपों के सम्बन्ध में आप अपना बिन्दुवार उत्तर उप विद्यालय निरीक्षक, शाहजहाँपुर को पत्र प्राप्ति के पन्द्रह दिन के अन्दर है। यदि आप उक्त आरोप प्राप्ति सम्बन्ध में की गयी साक्ष्य अथवा साक्षी देना चाहे तो साक्ष्य की संक्षिप्त प्रवृति तथा साक्षी अथवा साक्ष्यों के नाम व पते अधोहस्ताक्षरकर्ता के पूर्व सूचित करें । यदि निर्धारित अवधि के अन्दर आप का उत्तर प्राप्त नहीं है तो यह समझा जायेगा कि आपको इस सम्बन्ध में कुछ नहीं कहना है और तदनुसार एक पक्षीय निर्णय लेकर आप को सूचित कर दिया जायेगा।

ह०/- अपठनीय
(रमेश चन्द्र त्रिवेदी)
जिला बेसिक शिक्षा अधिकारी,
शाहजहांपुर।"

3. The petitioner submitted his reply on 15.4.79 to the charge sheet and the enquiry did not proceed thereafter. He retired from service as suspended employee on 30.6.1987 after attaining the age of superannuation. The retiral benefits of the petitioner were not paid to him after his superannuation. By letter dated 24.5.1997 i.e. after period of more than 10 years the petitioner demanded his retiral benefits when the District Basic Education Officer did not pay. He thereafter filed writ petition no. 3951 of 2000 praying for a direction to the respondents to make payment of his retiral benefits.

4. In the mean time, the District Basic Education Officer vide letter dated 1.4.2000 directed the petitioner to appear before him regarding finalization of his retrial benefits. It is alleged that the copy of the order was not served upon the petitioner and vide order dated 2.4.2000 the petitioner was dismissed from service w.e.f. 30.6.1987 the date of superannuation of the petitioner from service.

5. The contention of the petitioner is that after attaining the age of superannuation on 30.6.87 the order of suspension would automatically lapse after retirement. It is submitted that the disciplinary enquiry can not continue after the retirement of an employee in view of the judgment in **Bhagrirathi Jena vs. Board of Directors, OSFC and others** wherein the Apex Court has held that disciplinary proceedings could not be continued even for the purpose of making reduction of the retiral benefits inasmuch as there was no statutory regulations made

by the Corporation for such reduction from the retiral benefits. From the facts of the case as appear from the judgment the Apex Court was of the view that there was no specific provision for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of departmental enquiry after superannuation and as such the Corporation had no legal authority to make any reduction to the retiral benefits of the appellant. It has further been held that there was also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision that a deduction could be made from retiral benefits. The Apex Court held that :

"Once the appellant had retired from service on 30.6.95, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

6. In writ petition no. 3829 of 1996 **Dr. R.B. Agnihotri Vs. State of U.P.** and others it was also held that the disciplinary enquiry can not continue after retirement. The relevant paragraph nos. 6 and 7 of the judgement are as under :

"6. On the materials on the record, this much is crystal clear that the Vice Chancellor had passed his order according approval to the resolution terminating the services of the petitioner on 27th August, 1999 that is to say much after the statutory superannuation of the petitioner. The ratio laid down by the Supreme Court is binding on us.

7. Accordingly, we hold that in the absence of any express provision the departmental enquiry could not have continued after superannuation of the petitioner on 30th June, 1998 and thus it lapsed.

7. Counter affidavit has been filed by the State. It is admitted to the standing counsel that the petitioner was suspended and the enquiry is pending in the charges as stated above. The Standing Counsel submits that the enquiry was conducted against the petitioner and the U.P. Public Services Tribunal has found the petitioner guilty in the judgment given in case no. 387 (1)/1989 Sri Ramendra Shastri Vs. Deputy District Basic Education Officer and others, district Shahjahanpur. He submits that because the charges were found to be proved by the U.P. Public Services Tribunal and even in the enquiry proceedings also as such he was rightly dismissed from service and he is not entitled to any salary for the period of suspension.

8. It is lastly submitted that the petitioner had a remedy of appeal under Rule 5 of the U.P. Basic Education Employees Rules 1973 but he has not taken recourse to the remedy available to him and this writ petition has been filed by concealing the material facts. From the order dated 22.4.2000 it appears that the authority has passed this order on the basis that charges against the petitioner were found to be proved by the U.P. Public Service Tribunal vide order dated 4.5.96 in claim petition no. 387 (1) of 1989 Ramendra Shastri vs. Deputy District Basic Education Officer, Shahjahanpur. The authority by its order

dated 22.4.2000 has held that in such circumstances the petitioner could not have been reinstated in service and as such he was dismissed from service w.e.f. 30.6.1987. However, the authority accorded approval for payment of retiral benefits to the petitioner. Thus the controversy is confined only to the payment of salary to the suspension period as to whether the petitioner should be treated on duty or not during the aforesaid period. From the records it appears that the petitioner remained on suspension till he attained the age of superannuation.

9. For the reasons stated above the authority has rightly held that the petitioner is not entitled to any relief as the charges leveled against the petitioner were found to be proved and he has not worked. In so far as the order dated 30.6.87 is concerned, the authority has accorded approval for grant of retiral benefits and as such this order had virtually no effect whether the petitioner had been dismissed from service or not.

10. The case law cited by the learned counsel for the petitioner is clearly distinguishable on facts, as the charges have been found to be proved against the petitioner in the enquiry as well as by the U.P. Public Services.

11. There is no illegality or infirmity in the order impugned in the writ petition. It is not a fit case for interference under Article 226 of the Constitution of India and is dismissed.

No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.7.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 7448 of 1998

D.C.M. Sriram Industries ...Petitioner
Versus
Presiding Officer, Labour Court, Meerut and another ...Respondents

Counsel for the Petitioner:
Sri Tarun Agarwala

Counsel for the Respondents:
Sri Siddharth
S.C.

Constitution of India-Article 226-Labour & service Termination-Labour court award challenged-Held-workman worked continuously for more than 240 days-in previous calendar year-provisions not followed-Termination order quashed.

Held- Para 5

The Labour Court after going through the entire pleadings and the evidence on record have found that the workman concerned has completed more than 240 days of working in the previous calendar year on the date when his services have been terminated and admittedly the provision with regard to payment of compensation for retrenchment has not been complied with by the employer. Therefore Labour Court have held that the workman concerned is entitled for reinstatement with continuity of service and full back wages. This finding being findings of fact cannot be assailed and no ground is made out by the employer for interference with this finding in exercise of power under Article 226 of the Constitution of India.

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

1. Petitioner-employer aggrieved by an award of the Labour Court, U.P., Varanasi dated 8th August, 1997, passed in adjudication case No. 75 of 1991, approached this Court by means of present writ petition under Article 226 of the Constitution of India, copy whereof is annexed as Annexure- '1' to the writ petition.

2. The following reference was made to the Labour Court for adjudication:-

"क्या सेवायोजकों द्वारा अपने श्रमिक श्री जगबीर सिंह पुत्र श्री तोताराम, सिक्योरिटी गार्ड को दिनाँक 24.10.88 से कार्य से पृथक/वंचित किया जाना अनुचित/अथवा वैधानिक है, यदि हाँ, तो सम्बन्धित श्रमिक क्या लाभ/अनुतोष (रिलीफ) पाने का अधिकारी है तथा अन्य किस विवरण सहित?"

3. After the reference was received, both the parties have filed written statement and adduced evidence before the Labour Court. The case set up by the concerned workman before the Labour Court was that he was working with the employer with effect from October, 1982 and since then he is continuously working with hard work and honesty and to the satisfaction of his higher officers, but the employer have terminated his services without giving him any notice in writing or without disclosing any fact.

4. The employer have set up their case before the Labour Court that M/s D.C.M. Shriram Industries Ltd. is an unit of M/s Daurala Sugar Works and the fact, which has been stated by the workman in his written statement, is not correct. The employer have further stated that several complaints have been received against the workman concerned and on enquiry the same has been found true, therefore the employer have lost their confidence.

5. The Labour Court after going through the entire pleadings and the evidence on record have found that the workman concerned has completed more than 240 days of working in the previous calendar year on the date when his services have been terminated and admittedly the provision with regard to payment of compensation for retrenchment has not been complied with by the employer. Therefore Labour Court have held that the workman concerned is entitled for reinstatement with continuity of service and full back wages. This finding being findings of fact cannot be assailed and no ground is made out by the employer for interference with this finding in exercise of power under Article 226 of the Constitution of India.

6. It has been next argued by learned counsel for the employer that the Labour Court has not considered the case set up by the employer that the employer have lost confidence with the workman. In this view of the matter, this Court, declines to interfere with the findings recorded by the Labour Court, as the findings recorded by the Labour Court, on the basis of pleadings and the evidence adduced on behalf of the parties. Learned counsel for the petitioner lastly contended that on the principles of "***No work No Pay"***, since the workman concerned admittedly has not worked during all these years, the award of the Labour Court deserves to be modified.

7. In view of the law laid down by the apex Court and also by this Court, the ends of justice will meet if the award of the Labour Court is modified to the extent

that the workman concerned will be entitled only half of the wages from the date of termination of his services till the date of the award and thereafter he shall be entitled to full back wages.

8. In view of what has been stated above, this writ petition has no merit and is accordingly dismissed with the modification to the extent that the workman concerned shall be entitled to half back wages from the date of termination of his services till the date of the award and thereafter workman shall be entitled for full back wages. The interim order, if any, stands vacated. However, there shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.8.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 7263 of 2003

Sri Dilip Kumar Sharma and another ...Petitioners

Versus

Civil Judge (Senior Division), Mathura and others ...Respondents

Counsel for the Petitioners:
Sri B.D. Mandhyan
Sri Satish Mandhyan

Counsel for the Respondents:
Sri M.K. Nigam
Sri V.K. Burman
Sri Rahul Chaturvedi
Sri H.N. Pandey

Civil Procedure Code-Order 40 Rule 3 and 4- appointment of receiver-whether a judicial officer could be appointed receiver? Held-No.

Held- Para 14

Although in the present case, the receiver was appointed on the application of plaintiff to which no objection was filed by the defendant, a judicial officer should not have been appointed and should not have accepted the office of receiver. A judicial officer is not only a government servant under the administrative control of the High Court, but he also holds a position of status and responsibility which requires him to maintain absolute fairness and impartiality. His conduct both inside and outside the court should be above board. He is bound by the Conduct rules applicable to government servants. He, has to discharge greater sense of responsibility in performance of duties. His actions and demeanor should be impeccable. He cannot be permitted to act in positions where his actions may be subjected to scrutiny, contempt or objected to by any of the parties.

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

1. By this writ petition, Sri Dilip Kumar Sharma, claiming himself to be Secretary/Pradhan Mantri of Committee of Management, Sri Giriraj Sewak Samiti, Bara Bazar, Goverdhan, Mathura (in short 'Society') and Sri Devendra Kumar Sharma have prayed for a writ of certiorari for quashing the plaint of Original suit no. 332 of 1999 pending in the Court of Civil Judge, (Senior Division), Mathura; orders dated 8.11.2002 appointing Dr. Rajesh Singh as Receiver; and orders dated 20.12.2002 and 21.1.2003 by which the trial court has denied non-Godhania Brahmins of Bara Bazar, Goverdhan, Mathura from making bid at the auction of income of Thakur Giriraj Ji Maharaj Temple (in short 'Temple'). They have also prayed for a direction to respondents 1 and 2 to hold auction of the temple permitting both

Gudhania and non-Gudhania Brahmins in all future auctions of Tekas as per by-laws and to issue any other writ, order or direction.

2. Brief facts as set out in the writ petition are stated as follows: Sri Giriraj Ji Maharaj Temple was constructed at Danghati, Goverdhan, by Sri Sankatha Baba, a Adivasi Brahmin of Goverdhan. After his death his heirs continued to manage the temple and perform sevapuja and bhograj which was subsequently divided into four different parts known as 'thoks', namely Udho thok, Madho thok, Murali thok and Narain thok. In the year 1957, a society was registered with a constitution including the representatives of all the aforesaid thoks. A twenty one members committee is provided under the by-laws consisting of 6: 3: 4: 4; representatives of the aforesaid thoks and these 17 representatives nominate 4 members. The members of the Committee of Management include both Gudhania and Non-Gudhania Brahmins of Bara Bazar. It appears that some disputes arose between the members and an Original Suit no. 44 of 1970; Har Prasad and others Vs. Giriraj and others was filed, in which rights of the parties to have a share in the management and the income of the temple was in issue. The suit was dismissed by order and decree dated 15.9.1977 against which a Civil Appeal No. 281 of 1977 was filed. The appeal was also dismissed on 13.11.1981. A Second Appeal No. 649 of 1982 against the aforesaid judgment and decree has been filed and is pending before this Court in which no interim orders have been passed.

3. Elections to elect 17 members of the committee of management were held in the year 1998. These members nominated four members in accordance with constitution. Thereafter the election of the office bearers of the committee of management were held on 15.4.1998 in which Sri Jamuna Prasad Kaushik was elected as President and Govind Prasad Purohit as Mantri. It is alleged that fresh elections were held for election of members of the committee of management on 24.4.1999 in which petitioner was elected as Matri/ Pradhan Mantri and documents were sent to Deputy Registrar, Firms and Societies Chits, Agra for registration and were registered on 6.11.1999. Sri Govind Prasad Purohit filed writ petition No. 48227 of 1999 which was disposed of with direction of Registrar to refer the matter under section 25 of the Act. The Prescribed Authority by his order dated 11.2.2000 recorded finding that the elections were invalid. Aggrieved Govind Prasad Purohit has filed writ petition No. 9601 of 2000 which is still pending and no interim orders has been passed. It is contended that elections were also held in 2000 and in these elections also petitioner Dilip Kumar Sharma was elected Mantri/Pradhan Mantri. The documents sent for registration, however, were refused by the Deputy Registrar. It is further contended that in the year 2001 once again petitioner was elected but the list of newly duly elected members of the committee was not accepted by the Deputy Registrar.

4. Original Suit No. 332 of 1999 has been filed by Sri Govind Prasad Purohit claiming to be Mantri/ Pradhan Mantri of the Samiti for permanent injunction restraining defendants from interfering in the rights of the plaintiff's society in administration and management of the

temple and specially operation of accounts by Govind Prasad Purohit Mantri, Bara Bazar, Goverdhan and for holding meeting, Bhent, thoks and for any other benefits which the court may deem fit and proper in the circumstances of the case. An application for interim injunction was initially rejected. A Misc. Appeal No. 19 of 2000 was filed which was allowed and the matter was remanded back and in the meantime the parties were directed to maintain status quo. Aggrieved against the order petitioner filed writ petition 6162 of 2001 which was dismissed by this Court on 26.6.2001. A contention was raised by petitioner in the said writ petition that during the pendency of the suit fresh elections have been held and that appellate court was not justified to grant any injunction. This Court while dismissing the writ petition make it open to petitioner to raise these points before the Court concerned which has to consider the matter afresh in pursuance of the order of remand by appellate court.

5. On 27.2.2001, the defendants informed the court that the High Court has decided the matter on 26.2.2001. It was pointed out to the court by the plaintiff that the defendants want to adjourn and delay the matter to continue to receive the offerings in the temple. The defendants offered to give statement of account with effect from 16.10.2001 provided plaintiff also gives statement of account up to 16.10.2000. Counsel for the plaintiff agreed to give the accounts provided the account books which have been kept by the Station House Officer Goverdhan under lock in temple area given to him, and requested that the Station House Officer may be required to produce account books. The trial court directed that plaintiff shall produce the accounts up-to 16.10.2000. A direction was issued to the Station House Officer Goverdhan to submit his report whether the account books are under his lock and key. By the same order dated 27.2.2001, defendants were also directed to submit account book on 26.10.2000. On 28.3.2001, the trial court found from the report of the police that no such lock, as alleged by plaintiff, has been put by police on the temple and that the police has no control over the temple premises and the record room. Both the parties agreed that senior Advocate Sri Lalta Prasad Garg, may be appointed to prepare a list of documents. With the consent of parties, Sri Garg was appointed as Commissioner to prepare the list of account books with regard to realization from 10.5.1999 to 16.10.2000 and to produce them in court and also permit both the parties to put their locks on the room.

6. On 7.11.2002, the trial court considered the application of the defendants dated 28.10.2002 with a prayer to appoint any senior judicial officer as receiver of the temple. The plaintiff did not object to the application. On this application, the trial court directed that the parties may approach the District Judge, Mathura for appointment of any judicial officer as receiver. The District Judge nominated Dr. Rajesh Singh, Additional Chief Judicial Magistrate (Railways), Mathura and on his nomination, with the consent of parties, the Civil Judge appointed him on 8.11.2002 with the condition that his appointment may be approved by the High Court on the next date. On 13.11.2002, the trial court passed an order that the receiver will take entire charge of the temple from Naib Tehsildar, Mathura

including books and accounts and is permitted to spend up to Rs. 10,000/- for the management of the temple. He was permitted to take cooperation of one or more persons for management and will be authorised to auction the theka for every month and deposit the amount in the bank account of the temple.

7. Thereafter it appears that several orders were passed with regard to giving permissions to the receiver for management of the temple and its properties and for causing necessary repairs for purchase of pumping sets etc. and to pay salaries to a teacher of college run by Society. The trial court did not take any interest in disposal of application for injunction, in pursuance of the remand order passed by appellate court and affirmed by this Court. On 20.12.2002, an objection was taken by Gudhania Brahmins that non-Gudhania Brahmins do not have a right to participate in the auction as customary auction can be settled only in favour of Gudhania Brahmins. The trial court found that since only Gudhania Brahmins have been taking theka in the past, as an interim arrangement, only they will be allowed to participate and fixed 24.12.2002 for disposal of the application. Thereafter it appears that the said interim arrangement continued On 21.1.2003, the receiver auctioned the theka for the period 23.1.2003 to 22.2.2003 for Rs. 7,78,000/-. The said theka was approved by the trial court. On 30.1.2003, the trail court granted permission to receiver to purchase certain articles of silver and idols and to install them after the religious ceremonies. It is at this stage that the defendants have filed this writ petition to quash the plaint and the orders for appointment of receiver and for allowing only Gudhania Brahmins to participate in the theka.

On 17.2.2003 while issuing notice this Court observed as follows:

"It is not desirable for a sitting Judicial Officer to be appointed as a 'Receiver' on account of the fact (a) that he is answerable to the Court, which is the court of co-ordinate jurisdiction in the same district; and (b) that he can also be subjected to criminal liability and his personal properties can be made liable in case he fails to submit accounts or fails to pay the amount or to any loss to the property by his willful default or gross negligence, as provided under Order 40 Rule 4, C.P.C. The parties shall address the Court on the question whether a sitting judicial officer can be appointed as a 'Receiver' in any Court proceedings."

8. When the matter came up today, it was found that no reply has been filed by the receiver. Both the parties are not interested in making submissions on the question whether a sitting judicial officer can be appointed in the court proceedings. Both of them pointed out that Dr. Rajesh Singh awaiting transfer orders, has resigned and that in the meantime one Sri Vineet Narain, Senior Journalist of Hawala fame, has been appointed by the trial court as receiver on 26.6.2003. Sri B.D. Madhyan counsel for petitioner made an application dated 7.7.2003 stating that Sri Vineet Narain has been appointed receiver without issuing notice to the defendants. It is contended that the resignation of Dr. Rajesh Singh has been accepted and Sri Vineet Narain has been appointed receiver without issuing notice to defendant only to circumvent the order of this Court and that no notice was issued

nor any opportunity was given to make objection to such appointment. It is contended that new receiver has no concern with the temple and is the own man of respondent no. 3 and has been appointed as receiver for their own personal benefits. The orders dated 26.6.2003, annexed to the application, shows that the trial court accepted the resignation of Dr. Rajesh Singh and a cheque of Rs. 1,100/- as donation to the temple and accepted the application for appointment of Sri Vineet Narain as receiver, on his own offer. He was permitted to spend Rs.5,000/- per month for maintenance of temple. He was appointed on the ground that Sri Vineet Narain is senior journalist residing at Vrindavan and is editor, Kalchakra, Investigative, News Bureau.

9. This Court disposed of the aforesaid application vide its order dated 14.7.2003 giving liberty to the defendant-petitioner to take objection with regard to appointment of Vineet Narain as receiver as may be open to him in law.

10. Sri B.D. Madhyan appearing for petitioners, who were defendants in suit, submits that plaintiff-respondent no. 3 has no right to represent the society. The elections set up by respondent no. 3, have not been accepted by Prescribed Authority vide order dated 11.2.2000 and there is no order passed in the writ petition against the order of the Prescribed Authority under section 25 of Societies Registration Act as amended in U.P. He has not submitted any returns with regard to elections in the year 1999,2000 and 2001 and thus the suit at his instance claiming to be Mantri of the Society is not maintainable. Respondent no. 3 has no right to represent the society and its affairs. Sri Madhyan further submits that instead of deciding the injunction application, in pursuance of the remand order of the appellate court as affirmed by this court, the trial court proceeded to appoint receiver and acted illegal and against the judicial norms in appointing a sitting judicial officer as receiver of the temple. He submits that the receiver started acting illegally and against his authorization in giving theka and carrying out relegious functions for which he had no authority. He excluded non-Gudhania Brahmins from participating in the theka, and after this court raised objection with regard to appointment of judicial officer as receiver, the resignation of Dr. Rajesh Singh was accepted and Sri Vineet Narain appointed without issuing notice or inviting objection from petitioner, who is the Secretary of the Society. According to Sri B.D. Mandhyan, Petitioner is validly elected General Secretary of the Society, and has right to manage and administer the affairs of the society and the temple.

11. Sri Manish Kumar Nigam appearing for Sri Govind Prasad Purohit, plaintiff-respondent no. 3, submits that respondent no. 3 was elected as President on 30.4.1999. His return was wrongly accepted by the Deputy Registrar and that the order of Prescribed Authority is still under challenge before this Court in writ Petition No. 9601 of 2000. He denies that any election were held in 2000 and 2001 in which petitioner was elected as Mantri. No election took place as alleged on 1.4.2001 and for office bearers on 8.4.2001. It is submitted by him that in suit no. 44 of 1970 issues were framed between the parties to the effect whether plaintiff Har Prasad and others had a right to share in the management and the income of the temple and whether the

Brahmins of Gudhania and Kunchangia set alone have a right to manage and share in the offerings. The suit was dismissed. An appeal was also dismissed and the Second Appeal No. 639 of 1982 is pending. According to Sri Nigam, findings was recorded by both the courts below in the said suit that only Gudhania Brahmins had a right to manage and take part in the thekas. He submits that receiver was appointed with the consent of the parties and that no objection was taken to the management by the receiver. According to Sri Nigam Sri Vineet Narain Senior Journalist of Hawala fame is public spirited person. The defendants have not taken any objection to his appointment as receiver before the trial Court.

12. After hearing counsel for parties and perusing the record, I find that the trial court has completely misdirected itself and took extra-ordinary interest to appoint receiver and to continue theka without making any effort to decide the application for interim injunction which includes the right of the plaintiff to represent the society and to file a suit. There have been certain disputes with regard to rights of the parties in the past belonging to Gudhania and non-Gudhania Brahmins. The original suit No. 44 of 1970 filed by Late Sri Har Prasad and others was dismissed and the judgment and decree was affirmed in appeal. The issues with regard to the rights of different sets on the management were subject matter of consideration and decided in the said suit. It was held that the constitution of the society in the year 1977 was in respect of Gudhania and Kuchania Brahmins alone and it was only they had right to the exclusion of that non-Gudhania Brahmins. The constitution of the society dated 14.3.1997 was upheld by the Court. The non-Gudhania Brahmins were not held to have a right for realising of amount. Section 92 C.P.C. did not operate a bar to the institution of the suit. These findings are still subject matter of second appeal. Prima facie these findings operate as resjudicata between parties for managing the affairs of the temple.

13. A receiver can be appointed under Order 40 Rule 1, C.P.C. where it appears to be just and convenient whether before or after decree for management, protection, preservation and improvement of the suit property. Remuneration has to be fixed under Rule 2 and its enforcement is provided under Rule 3 & 4. Receiver, however, should not be appointed without ascertaining the right of plaintiff to file a suit. Where right of the plaintiff to maintain the action and his locus standi to represent the society is in question, the trial court must decide the same before appointing a receiver, unless the trial court finds that the delay in such disposal will defeat the purpose or will result into waste or gross mismanagement. In the present case, the application for interim injunction was rejected. The appeal was allowed and remanded for deciding injunction application afresh. This Court affirmed the order. The trial court as such ought to have first decided injunction application. Both the parties could not show the reasons as to why the trial court instead of deciding injunction application, which necessarily required him to consider the right of Sri Govind Prasad Purohit to represent the society, proceeded to appoint a receiver. The record shows that after appointment of receiver, the Trial Court did not take any steps in fixing the application for interim

injunction for hearing and got busy in deciding applications moved by the receiver from time to time and in arranging for monthly thekas. He did not even care to decide the application/objection for giving rights to non-Godhania Brahmins for participating in thekas.

14. Before concluding the matter and issuing orders for deciding injunction application, it is necessary to consider petitioner's objections of the plaintiff with regard to appointment of a sitting judicial officer as receiver in respect of a dispute relating to the management of the society or temple. Although in the present case, the receiver was appointed on the application of plaintiff to which no objection was filed by the defendant, a judicial officer should not have been appointed and should not have accepted the office of receiver. A judicial officer is not only a government servant under the administrative control of the High Court, but he also holds a position of status and responsibility which requires him to maintain absolute fairness and impartiality. His conduct both inside and outside the court should be above board. He is bound by the Conduct rules applicable to government servants. He has to discharge greater sense of responsibility in performance of duties. His actions and demeanor should be impeccable. He cannot be permitted to act in positions where his actions may be subjected to scrutiny, contempt or objected to by any of the parties. The nature of duties of receiver as enjoined by Rule 3 requires him to furnish security if any court deem fit. He is required to submit accounts of such periods and in such forms as the court directs and pay amount due from him as the court may direct. Rule 3 (d) holds him responsible for any loss occasioned to the property by his willful default or negligence. These duties can be enforced under Rule 4 by attachment and sale of his personal properties. Apart from the attachment and sale he can also be held liable for his actions by taking criminal proceedings. Although a collector has been provided to be appointed as receiver under Rule 5, where any property is land paying revenue to the Government, a judicial officer should not submit himself to such unwanted risk of making him subject of scrutiny, criticism, recovery or criminal liability. In case of private disputes allegations may be easily levelled against the receiver. In such cases his conduct in discharge of his duties will become subject matter of scrutiny by an officer of either same rank or of higher or lower rank. In the said event it will be embarrassing from a brother judicial officer to examine his conduct. It is, therefore, in the interest of justice and fair play that a serving judicial officer should not be appointed as a receiver by any court of law. In the present case Dr. Rajesh Singh, Additional Chief Judicial Magistrate (Railway) Mathura was appointed as receiver. This Court takes strong exception and directs that in view of the aforesaid discussion henceforth no serving judicial officer of any rank should be appointed or continued as receiver by any subordinate court. A copy of this order may be given to the Registrar General for communication to all the District Judges in the State.

15. In the present case since this Court has already given opportunity to the counsel for defendant to object to the appointment of the receiver Sri Vineet Narain no further orders requires to be

passed in respect of his appointment. The averments in paragraph 27 of the Counter affidavit of Sri Govind Prasad Purohit shows that on account of theka given to non Gudhania Brahmins some tension was prevailing and proceeding under section 107/116 and 145,146, Cr.P.C. were initiated. Notices were sent and police report was obtained on 2.8.2002. In the circumstances the Court does not propose to interfere with the order of appointment of receiver.

16. For the aforesaid reasons, the writ petition is partly allowed. The Civil Judge (Senior Division), Mathura is directed to decide the pending injunction application in suit no. 332 of 1999 as expeditiously as possible preferably within two months. In deciding application, he will decide whether the plaintiff have any prima facie case and shall also consider the balance of convenience and fact of hardship to any of the parties. He will take into account the findings given by the courts between the parties in previous litigation and also consider whether any of the parties has a right to manage the temple under the constitution of the Society. There shall be no order as to costs.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2003

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

Criminal Appeal No. 1694 of 1981

Ram Bharosey ...Appellant
Versus
State of U.P. ...Opposite party

Counsel for the Appellant:
Sri A.B.L. Gaur
Sri R.P. Singh
Sri Ravindra Singh

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

Indian Panel Code 1860, Section 302,102 I.P.C.- Criminal appeal-Deceased body recovered from well-No eye witness enmity proved-based on circumstantial evidence-Deceased lastly seen in the company of appellant-prosecution proved motive to commit murder extra judicial confession also proved-Appeal dismissed.

Held- Para 32
Taking above circumstances cumulatively it was proved that appellant Ram Bharosey out of grudge against Dinesh and his brothers took Dinesh deceased on the evening of 24.2.1981, murdered him by causing injury by khurpi, and threw his dead body into the well of Tara Singh Pradhan. There is no explanation from the side of appellant that after 5 p.m. on 24.2.1981 he left the company of deceased and the deceased was murdered by some one else. If the prosecution proved that the deceased was last seen in the company of appellant and thereafter, his dead body was recovered from the well of Tara Singh Pradhan on the clue provided by the appellant, it was duty of the appellant to establish that after 5 p.m. on 24.2.1981 he had left the company of deceased. No such explanation has come forward from the side of appellant.

Case law:
AIR 1984 S.C. 1622
2002 (8) SCC 45

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

1. This appeal has been directed against the judgement and order dated 28.7.1981 passed by the then VIIIth

Additional Sessions Judge, Etah in Sessions Trial No. 165 of 1981 convicting appellant Ram Bharosey under Section 302 IPC and 201 IPC and sentencing him to undergo imprisonment for life under Section 302 and R.I. for a period of one year under Section 201 IPC. Both the sentences were ordered to run concurrently.

2. The prosecution story, briefly stated, was that the appellant Ram Bharosey, Umesh Chandra (P.W. 1) and his younger brother Dinesh (9) deceased were residents of village Kamalpur Mai, P.S. Sakeet, district Etah. Father of Umesh Chandra (P.W.1) had died some 8 years ago leaving behind his 5 sons Dinesh (9) deceased was youngest amongst his brothers. His three elder brothers Mahesh Chandra, Suresh Chandra and Girish Chandra were living at Firozabad. Dinesh deceased along with his brother Umesh Chandra (P.W.1) and mother was residing at village Kamalpur Mai.

3. During consolidation operation, a well of Umesh Chandra (P.W.1) had gone into chak of Ram Bharosey appellant and the appellant Ram Bharosey had to pay its compensation to Umesh Chandra (P.W.1) and his brothers. But he did not pay the same. Therefore, Umesh Chandra and his brother had filed a suit and then Ram Bharosey paid compensation. On account of it, there was enmity between the parties. A year before the occurrence, Ram Bharosey appellant had beaten Mahesh Chandra elder brother of Umesh Chandra (P.W.1).

4. On the evening of 24.2.1981 at about 4 p.m. Dinesh deceased was playing in the village. Umesh Chandra (P.W.1) returned from School at 5 p.m. and did not find Dinesh deceased at his house. He searched him in the village and in the nearby fields, but he could not be traced. On the next morning Umesh Chandra (P.W.1) and his mother were again searching Dinesh deceased. At about 10 a.m. when Umesh Chandra (P.W.1) reached near the house of Ajay Pal (P.W.2) and Mahendra Singh (P.W.6) they told him that on the previous evening at about 5 p.m. they had seen Ram Bharosey appellant and his son Aaram Singh taking Dinesh deceased towards village Noorpur. Thereafter, Umesh Chandra (P.W.1) taking Kitab Singh (P.W.3), Lalta Singh (P.W.4) and Ram Khilaf went to the house of Ram Bharosey and enquired from him about Dinesh deceased. Firstly he did not tell any thing, but on pressure laid by the villagers Ram Bharosey told that he and his son Aaram Singh had cut Dinesh deceased with Khurapi and threw him into the well of Tara Singh, Pradhan. Thereafter, Umesh Chandra (P.W.1)) along with other persons went to the well of Tara Singh in which dead body of Dinesh deceased was seen. The dead body was taken out from the well. It had injuries and there were cut marks on ear and neck. Leaving the dead body at the well Umesh Chandra (P.W.1) came to his house and prepared report (Ext. Ka-1). He went to police station Sakeet along with Kishan Lal, Ram Khilaf and Pratap Singh and lodged report there at 7.10 p.m. on 25.2.1981. The chik F.I.R. (Ext. Ka-10) was prepared by Head Constable Karan Singh, who made an endorsement of the same at G.D. report and registered a case against Ram Bharosey and his son Aaram Singh under Section 302 and 201 IPC,

5. The investigation of the case was taken up by Hira Lal Sharma, I.O. (P.W.7). He proceeded to the village of occurrence on 25.2.1981 along with Station Officer Onkar Singh. The dead body of deceased was lying at the house of Umesh Chandra (P.W.1) where Hira Lal Sharma conducted inquest of the dead body and prepared inquest report (Ext. Ka-3) and other relevant papers. He sealed dead body and sent it for post mortem.

6. The I.O. interrogated witnesses on 26.2.1981. He inspected place of occurrence and prepared site plan (Ext. Ka-8). On completion of investigation Onkar Singh submitted charge sheet (Ext. Ka-8) against Ram Bharosey and Aaram Singh.

7. Cognizance of the case was taken up by the Magistrate, who committed the case to the Court of Sessions.

8. The appellants Ram Bharosey and his son Aaram Singh were charged with the offences punishable under Section 302 and 201 IPC. They pleaded not guilty and contended that they were falsely implicated on account of enmity and witnesses were relatives of the complainant.

9. The prosecution in support of its case examined Umesh Chandra (P.W.1), Ajay Pal (P.W.2), Kitab Singh (P.W.3), Lalta Prasad (P.W.4), Dr. Raja Ram (P.W.5), Mahendra Singh (P.W.6) and Hira Lal (P.W.7). The appellants did not adduce any evidence in their defence.

10. The learned Sessions Judge on considering evidence of the prosecution held that the prosecution had proved that the appellant Ram Bharosey had motive to commit murder of Dinesh deceased; the deceased was last seen in the company of appellant Ram Bharosey at about 5 p.m. on the date of occurrence; Ram Bharosey made extra judicial confession before Umesh Chandra (P.W.1), Kitab Singh (P.W.3) and Lalta Prasad (P.W.5) and dead body was recovered from the well of Pradhan, where the appellant Ram Bharosey had thrown it. Therefore, the chain of circumstantial evidence is so complete as to exclude every other hypothesis save the one that accused Ram Bharosey is guilty of the offences punishable under Sections 302 and 201 IPC.

11. With these findings he convicted appellant Ram Bharose under Sections 302 and 201 IPC and sentenced him as mentioned above. However, he acquitted Aram Singh as there was nothing on record to show as to what part he played in the murder of deceased.

12. Aggrieved with his above conviction and sentence, the appellant has come up in this appeal.

13. We have heard Sri A.B.L. Gaur, learned counsel for the appellant and learned A.G.A. for the respondent and have perused the entire evidence on record.

14. In this case there is no direct evidence and the case is based on circumstantial evidence. The conditions precedent, in the words of the Apex Court in Sharad Birdhi Chand Sarda Vs. State of Maharastra, AIR 1984 SC, 1622, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) The circumstances from which the conviction of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

15. The prosecution has relied on following circumstances:-

(1) The appellant Ram Bharose had motive to murder the deceased.

(2) The deceased was last seen in the company of appellant Ram Bharosey at 5 p.m. on 24.2.1981 and thereafter, he was not seen alive.

(3) The appellant Ram Bharosey made extra judicial confession on 25.2.1981 before Umesh Chandra (P.W.1), Kitab Singh (P.W. 2), Lalta Prasad (P.W.4) that he murdered deceased and threw his body into the weli of Pradhan Tara Singh.

(4) The dead body of Dinesh deceased was recovered from the well of Tara Singh, Pradhan, the place where appellant Ram Bharosey threw it.

16. It is to be considered whether the above circumstances have been established and the above circumstances taken together complete the chain of circumstances leading to the hypothesis of guilt of appellant and excluding hypothesis of his innocence.

17. Before considering the above circumstances it is relevant to refer that the appellant had not disputed the death and cause of death of Dinesh deceased. The ocular witnesses stated that dead body of Dinesh was recovered from the well of Tara Singh, Pradhan. Dr. Raja Ram (P.W.5), who conducted autopsy on the dead body of deceased found following ante mortem injuries on the person of the deceased:-

(1) Stabbed incised wound 6 cm x 1 cm x bone deep, 7 cm & 1 cm x bone deep on the left temporal region 2 cm away from the outer angle of left eye brow. Margins clean cut.

(2) Incised wound 2 cm x 1 cm x scalp deep on the left side head 6 cm above the injury no.1. Margins clean cut.

(3) Incised wound 1 ½ cm x ½ cm x nasal bone cut on the Right side of nose 1 cm below the inner angle of right eye. Margins clean cut.

(4) Abrasion 4 cm x 1 cm on the front of lower part and middle part of left chest.

(5) Abrasion 1 ½ cm x 1 cm 3 cm above and on the left knee joint.

(6) Abrasion 1 cm x ½ cm 3 cm above and on middle of the left knee joint.

18. He further stated that internal examination showed that all the layer of scalp cut through under injury No.1 Ecchymosis present under injury no. 1 and 2. Membranes were congested. Brain was congested and deeply ecchymosed. No mud no congestion found in the trachea and larynx. There was no congestion in oesophagus. Stomach was empty. The cause of death was haemorrhage and comma due to ante mortem injuries.

19. Dr. Raja Ram denied the suggestion of the appellant that the ante mortem injuries of the deceased were caused due to fall in the well. It is also mentioned in the post mortem report that the dead body was smeared with dried mud. The doctor has further stated that there was no congestion or mud in the trachea and larynx and oesophagus. Both lungs were also normal. There was no symptom of death of deceased by drowning into the well. The presence of incised injuries on the person of the deceased as ante mortem injuries and cause of death clearly established that the deceased was murdered before throwing the dead body into the well. As such it is established from the evidence on record that the deceased was murdered and thereafter his dead body was thrown into well.

20. On the point of motive, there is evidence of Umesh Chandra (P.W.1), who stated that a well belonging to him and his brothers had gone into the chak of Ram Bharosey and appellant had to pay its compensation to him and his brothers. Ram Bharosey did not pay compensation, therefore, a case was filed and thereafter, Ram Bharosey paid the compensation. On account of it, Ram Bharosey was having enmity with him and his brother. That a year before the occurrence of this case, Ram Bharosey has beaten his brother Mahesh Chandra. Though, prosecution has not filed any documentary evidence regarding above motive, but there is no cross examination on the above evidence of Umesh Chandra (P.W.1), which shows that the motive stated by Umesh Chandra (P.W.1) has not been challenged and not rebutted. Non lodging of the report of beating is also not fatal to the prosecution as in villages the people do not lodge report of trifling matters. Therefore, the prosecution has established that appellant Ram Bharosey had motive.

21. On the point of last seen, there is evidence of Ajay Pal (P.W.2) and Mahendra Singh (P.W.6). Ajay Pal (P.W.2) stated that on the evening of occurrence at about 4 p.m. he was operating engine of his tube well installed in his field, which was adjacent to the field of Mahendra Singh (P.W.6). Mahendra Singh (P.W.6) was taking irrigation water from his tube well. At about 5 p.m. he saw Ram Bharosey and Aaram Singh taking Dinesh deceased, younger brother of Umesh Chandra (P.W.1), towards village Noorpur. On next day at about 8-9 a.m. Umesh Chandra (P.W.1) came to his house and he told him that at about 5 p.m. on the previous evening he had seen Ram Bharosey and Aaram Singh taking Dinesh towards village Noorpur. In the after noon at about 3 p.m. he along with other villagers went to the well of Tara Singh and dead body of Dinesh was recovered from the said well.

22. Mahendra Singh (P.W.6) stated that on the date of occurrence at about 5 p.m. he was present on his field and Ajay Pal (P.W.2) was present on his tube well. At about 5 p.m. he saw Ram Bharose and Aaram Singh taking Dinesh towards village Noorpur. On next day Umesh Chandra (P.W.1) came to his house and told that his brother was missing. He told him that on the previous evening at 5 p.m. he had seen Ram Bharosey and Aaram Singh taking Dinesh towards village Noorpur.

23. Learned counsel for the appellant contended that Ajay Pal (P.W.2) and Mahendra Singh (P.W.6) were interested witnesses as they were relatives of complainant and that they had also changed their version told before the I.O. and therefore, were not reliable. It was suggested to Ajay Pal (P.W.2) that a quarrel had taken place between him and Ram Bharosey on account of taking water from tube well. But he repelled the above suggestion. It was also suggested that he was relative of Umesh Chandra but the witnesses denied the above suggestion. There is nothing on record to show that the witness was in any way inimical with the appellant or had any reason to depose falsely against him. The witness has stated that at the time of occurrence he was operating his tube well and Mahendra Singh (P.W.6) was taking irrigation water from his above tube well. He also clarified that there was rasta towards west of his chak and Ram Bharosey and Aaram Singh were seen taking Dinesh deceased through said rasta. He also clarified that there was no obstruction in between his tube well and the rasta as wheat and pea crop were up to height of 2 or 3 feet only. There was no Arhar or mustard crop in his field. However, the witness denied to have told before the I.O. that at the time when he saw the appellant taking Dinesh he was coming from jungle. The I.O. had no doubt proved his above statement as (Ext. Kha-1), but above contradiction is not very much material, as there is nothing on record to show that the witness was not present on is tube well on the evening of 24.2.1981 at about 5 p.m. Therefore, we find no ground to disbelieve the evidence of Ajay Pal (P.W.2).

24. Mahendra Singh (P.W.6) stated in his cross examination that he had told before the I.O. that on the evening of the occurrence he was taking irrigation water from the tube well of Ajay Pal and had not told before the I.O. that on the last evening he and Ajay Pal Singh were coming from jungle. However, he admitted that Ram Bharosey had purchased land of Shivdar, but he denied the suggestion that he was cultivating land of Shivdar and was annoyed with Ram Bharosey on account of purchasing land of Shivdar by him. The contradiction referred to above is not material and does not make his testimony unreliable. No enmity, ill will or interestedness of the witness appeared from the cross examination of the witness.

25. As held by the Apex Court in BodhRaj @ Bodha and others vs. State of Jammu and Kashimir (2002) 8 SCC, 45 the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead in so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the

deceased was last seen with the accused when there is a long gap and possibility of other person coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in these cases.

26. In this case appellant Ram Bharose was last seen in the company of deceased at about 5 p.m. on 24.2.1980. The probable time of death of deceased as given in post mortem report was two days from 26.2.1981 at 3 p.m. Thus, the time of death taking into consideration the variation of 6 hours comes between 5 and 9 p.m. on 24.2.1981.Therefore, the gap in between last seen and death of deceased was so short (2 or 3 hours only) and it excluded the possibility of any other person coming in between.

27. From the evidence of Ajay Pal (P.W.2) and Mahendra singh (P.W.6) it is established that appellant Ram Bharosey was seen taking Dinesh deceased on 24.2.1981 at about 5 p.m. and thereafter Dinesh was not seen alive.

28. On the point of extra judicial confession there is evidence of Umesh Chandra (P.W.1), Kitab Singh (P.W.3) and Lalta Prasad (P.W.4). Umesh Chandra (P.W.1) stated that when Ajay Pal (P.W.2) and Mahendra Singh (P.W.6) told him that they had seen appellant Ram Bharosey taking Dinesh on the previous evening, he along with Kitab Singh (P.W.3), Lalta Prasad (P.W.4) and Ram Khilaf went to the house of Ram Bharose and enquired about Dinesh from him. Firstly Ram Bharosey did not tell any thing about Dinesh, but on the pressure laid by the witnesses, he confessed that he had cut Dinesh with Khurpi and threw him into the well of Tara Singh Pradhan. Kitab Singh (P.W.3) stated that at about 9.10 a.m. Umesh Chandra (P.W.1) came to his house and told that Dinesh was missing since last evening and Mahendra Singh and Ajay Pal had told that they had seen Ram Bharosey and his son Aaram Singh taking Dinesh towards village Noorpur. Then he along with Lalta Prasad (P.W.4), Umesh Chandra (P.W.1), Bharat, Ram Khilaf and others of the village went to the house of Ram Bharosey and enquired about Dinesh from him. Firstly Ram Bharosey did not tell any thing and subsequently on pressure laid by the villagers he confessed that he had killed Dinesh and threw him into the well of Tara Singh. In his cross examination the witness admitted that his mother's sister was married with Lalta Prasad (P.W.4). Ram Singh was son of Lalta Prasad husband of his mother's sister. The marriage of Ram Singh was settled with the daughter of Ram Bharosey of village Nagla Naya He was cultivating land of Umesh Chandra for last 2-3 years. From the above facts it cannot be said that Kitab Singh (P.W.3) had any reason to depose falsely against the appellant. It is true that he was cultivating land of Umesh Chandra (P.W.1), but on account of it he was not expected to depose falsely against the appellant with whom he had no grudge, ill will or animosity.

29. Lalta Prasad (P.W.4) stated that on the morning of 25.2.1981 at about 8-9 a.m. Umesh Chandra (P.W.1) came to his house and told that his brother Dinesh was missing from previous evening and Ajay Pal (P.W.2) and Mahendra (P.W.6) had told that Ram Bharosey and Aaram Singh were seen taking Dinesh deceased towards village Noorpur. On it he along

with Umesh Chandra (P.W.1) Kitab Singh (P.W.3), Ram Swaroop and Ram Khilaf went to the house of Ram Bharosey and enquired about Dinesh from him. Firstly he denied that Dinesh had gone with him, but on the pressure laid by him and others he admitted that he had cut Dinesh and threw him into the well of Tara Singh Pradhan.

30. An attempt was made from the side of appellant that on the morning of 24.2.1981. Lalta Prasad (P.W.4) had gone in a marriage party at village Malahpur and was not present in the village. The witness had no doubt admitted that he had gone to village Malahpur in the morning of 24.2.1981 but he returned on the evening of same day. There is nothing in the cross examination of the witness to disbelieve his testimony.

31. From the above evidence of Umesh Chandra (P.W.1), Kitab Singh (P.W.3) and Lalta Prasad (P.W.4) it is established that appellant Ram Bharosey made extra judicial confession of murdering Dinesh deceased and throwing his dead body into the well of Tara Singh Pradhan. His above extra judicial confession is corroborated by recovery of dead body of Dinesh from the well of Tara Singh as well as the medical evidence of Dr. Raja Ram (P.W.5) that previously the deceased was murdered by causing incised injuries (by khurpi) and then his dead body was thrown into the well.

32. Taking above circumstances cumulatively it was proved that appellant Ram Bharosey out of grudge against Dinesh and his brothers took Dinesh deceased on the evening of 24.2.1981, murdered him by causing injury by khurpi, and threw his dead body into the well of Tara Singh Pradhan. There is no explanation from the side of appellant that after 5 p.m. on 24.2.1981 he left the company of deceased and the deceased was murdered by some one else. If the prosecution proved that the deceased was last seen in the company of appellant and thereafter, his dead body was recovered from the well of Tara Singh Pradhan on the clue provided by the appellant, it was duty of the appellant to establish that after 5 p.m. on 24.2.1981 he had left the company of deceased. No such explanation has come forward from the side of appellant.

33. The above circumstances thus lead to infer one and the only conclusion that appellant Ram Bharosey murdered the deceased and threw his dead body into the well, as the possibility that deceased died due to fall in the well has completely been ruled out by the evidence of Dr. Raja Ram (P.W.5). The chain of circumstances relied on by the prosecution is thus so complete that it established the hypothesis of the guilt of the appellant and it had also completely ruled out hypothesis of innocence of the appellant. Therefore, we find no ground to interfere with the conviction and sentence of the appellant.

34. The appeal having no force is, accordingly, dismissed.

35. Appellant Ram Bharose is on bail. He shall surrender before the C.J.M. concerned to serve out the sentence. C.J.M. Etah is directed to issue non bailable warrant against the appellant to secure his arrest and sending him to jail.

36. Office is directed to send copy of this order to C.J.M. Etah for compliance and report within a month.

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 06.08.2003

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

Civil Misc. Writ Petition No. 20230 of 2001

Ghaziabad Development Authority, Ghaziabad and another ...Petitioner
Versus
Union of India, & another ...Respondent

Counsel for the Petitioners:
Sri U.N. Sharma
Sri A.K. Bajpai

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

Consumer Protection Act 1986 –Section 27–Power of the forum to initiate contempt proceeding whether is such provision unconstitutional? Held, 'No'
1999 CTJ 570
AIR 1973 SC 1034
AIR 1987 SC 117
(1983) I ALLER 226
AIR 1955 SC 376
AIR 1957 SC 907
AIR 1960 SC 936
AIR 1932 PC 165
AIR 1965 SC 458
AIR 1951 Pat. 443
1991 ALJ 816
1964 (1) Cr. L.J. 449
AIR 1955 Madras 121
1986 (2) ARC 385
5 U.S. (1 Cranch) 137 (1803)
AIR 1958 S.C. 731
198 U.S. 45 (1905)
381 U.S. 479
273 U.S. 418 (at 447)

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

1. Heard learned counsel for the petitioner and learned Standing Counsel.

2. The petitioner has challenged the Constitutional validity of Section 27 of the Consumer Protection Act, 1986.

3. The petitioner, Ghaziabad Development Authority, is a statutory body constituted under the U.P. Urban Planning & Development Act, 1973. The petitioner no. 2 is Secretary of the Ghaziabad Development Authority and he is aggrieved by the orders dated 28.2.2001 passed by the district consumer Forum, Ghaziabad convicting and sentencing him to six months imprisonment, vide Annexure 1 and 2 to the writ petition.

4. Learned counsel for the petitioner submitted that Section 27 of the consumer Protection Act 1986 is unconstitutional as it has not provided for any procedure for the trial. Learned counsel relied on a Division Bench decision of the Karnataka High Court in *Paramjit Singh vs. Union of India 1999 CTJ 570* in which it was held that the proviso to Section 27 of the Consumer Protection Act is violative of Articles 20 and 21 of the Constitution. It was held by the Karnataka High Court therein that while the main part of Section 27 of the Act is not unconstitutional the proviso thereto is unconstitutional. Hence is was held that the offence created by Section 27 can only be tried by filing a criminal complaint before the Criminal Court and cannot be tried by the District Consumer Forum, State Commission or National Commission as the case may be.

5. We respectfully disagree with the view taken by the Karnataka High Court.

6. Section 27 of the Act states:

"***Penalties---*** *Where a trader or a person against whom a complaint is made (or the complainant) fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees, or with both:*

Provided that the District Forum, the State Commission or the Nnational Commission, as the case may be, may, if it is satisfied that the circumstances of any case so require, impose a sentence of imprisonment or fine, or both for a term lesser than the minimum term and the amount lesser than the minimum amount specified in this section."

7. A perusal of Section 27 shows that the main clause prescribes punishment for noncompliance of an order of the District Consumer Forum, State Commission or National Commission. However, the proviso to Section 27 states that the District Forum, the State Commission or the National Commission, as the case may be, may impose a sentence of imprisonment or fine.

8. Thus the language of the proviso to Section 27 is very clear. The sentence of imprisonment or fine can be imposed by the District Forum, State Comission or the National Commission themselves, and they need not make a complaint to the regular criminal Court for this purpose.

9. It is well settled that where the language of the statute is clear the literal rule of interpretation should be followed and the Court should not twist or distort the meaning. It is a basic principal of interpretation that if the language of the statute is clear, the natural and grammatical meaning should be given to it.

10. In M/s Hiralal Ratanlal vs. STO AIR 1973 SC 1034 (vide para 21) the Supreme Court observed:

"*In construing a statutory provision the first and foremost rule of construction is the literary construction. All that we have to see at the very outset is what does the provision say? If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear."*

11. As observed by Viscount Simon in *Nokes v. Doncaster Amalgamated Collieries Ltd. (1940) 3 All ER 447 (553): "The golden rule is that the words of a statute must prima facie be given their ordinary meaning." (*followed in *Chandavarkar Sita Ratna Rao vs. Ashalata AIR 1987 SC 117 vide para 62).* The natural and ordinary meaning cannot be departed from by the Judges in the light of their own views as to policy vide *Shah vs. Barnet London Borough Council (1983) 1 All ER 226.*

12. In *Jugalkishore Saraf vs. Raw Cotton Co. Ltd. AIR 1955 SC 376* (vide para 6) the Supreme Court observed:

"*The cardinal rule of construction of statutes is to read the statute literally, that is, by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation. In the present case a literal construction of the rule leads to no apparent absurdity, and therefore, there can be no compelling reason for departing from that golden rule of construction."*

13. In Kanai Lal Sur vs. Paramnidhi Sadhukhan AIR 1957 SC 907 (vide para 6) the Supreme Court observed:

"The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise."

Similarly in *Mahadeolal Kanodia vs. Administrator General of West Bengal, AIR 1960 S.C. 936 (vide para 8) the Supreme Court observed:*

"The intention of the Legislature has always to be gathered from the words used by it; giving to the words their plain, normal, grammatical meaning."

14. In *Nagendra Nath Dey vs. Suresh Chandra Dey AIR 1932 PC 165 the Privy Council observed:*

"The strict grammatical meaning of the words (of a statute) is, their Lordship think, the only safe guide."

The above view was followed by the Supreme Court in *Municipal Board, Pushkar vs. State Transport Authority, Rajasthan, AIR 1965 SC 458* (paras 22 and 23).

15. Since the language of the proviso to Section 27 is clear we have to hold that the District Forum, State Commission or National Commission can themselves impose sentence of imprisonment or fine and they need not refer a complaint to the regular criminal court for this purpose.

16. With profound respect to the Karnataka High Court which held that the proviso to Section 27 is ultra vires Article 20 and 21 of the Constitution, we are of the opinion that perhaps the real nature of proceedings under Section 27 of the Consumer Protection Act was not understood. In our opinion proceedings under Section 27 are really in the nature of proceedings for civil contempt. Although Section 27 itself does not mention that the proceedings therein are proceedings for civil contempt, in our opinion we have to see the substance of the matter i.e. the nature and purpose of these proceedings.

17. It is well settled that there are tow types of contempt, namely, civil contempt and criminal contempt.

18. The meaning of civil contempt and criminal contempt have been explained in the Contempt of Courts Act, 1971. Section 2 of the said Act states:

*"(a) "*Contempt of Court" means civil contempt or criminal contempt;
(b) "civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to a Court;
(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which ---
(i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of any Court; or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other matter;"

19. Thus criminal contempt means scandalizing the Court or lowering its authority or interfering with the Court of justice. On the other hand, civil contempt means disobedience of any order of the Court and the purpose of civil contempt is to compel obedience of the order of the court. The principle object of civil contempt proceedings is hence to secure enforcement of the order of the Court vide State v. Dasrath Jha AIR 1951 Pat. 443, Vidya Sagar vs. IIIrd A.D.J. 1991 ALJ 816; C.S.Majoo v. Administrator General 1964 (I) Cr. L.J. 449; In re Swaminathan AIR 1955 Madras 121; Bhagwati Prasad Tripathi v. Sri Raj Vir Singh 1986 (2) ARC 385, etc.

20. A perusal of Section 27 clearly shows that proceedings therein are in the nature of proceedings for civil contempt, and their object is to compel obedience of the orders of the District Forum, State Commission or the National Commission.

21. Once this aspect is understood it will be immediately realized that the submission of the learned counsel for the petitioner that the proviso to Section 27 is unconstitutional as it has not provided for any procedure for the trial is totally misconceived. The proceedings under Section 27 are really not ordinary criminal proceedings in respect of offences under the I.P.C. or some other statute. The proceedings under Section 27, as stated above, are really in the nature of civil contempt proceedings. Hence the only procedure required in these proceedings is that the principles of natural justice should be complied with.

22. It may be mentioned that under the Contempt of Courts Act 1952 there was no procedure for the contempt of court proceedings and only the well settled customary principles were applicable to such proceedings. No doubt under the Contempt of Courts Act 1971 and Chapter 35-E of the Allahabad High Court Rules the procedure for contempt of Court proceedings in the Allahabad High Court has been prescribed, but in our opinion this procedure need not be followed by the District Forum, State Commission or the National Commission proceedings under Section 27. Hence the District Forum, State Commission or National Commission need only to follow

the rules of natural justice in respect of such proceedings.

23. It appears that Parliament has specifically enacted Section 27 so as to give teeth to the provisions of the Consumer Protection Act. Had there been no provision for enforcement of the orders of the authorities under the Act the entire purpose of the Statute would have been frustrated as nobody would obey the orders of these authorities. Without the sanction of Section 27 the entire consumer jurisdiction would only be a paper tiger lacking teeth.

24. For the reasons given above we respectfully disagree with the Karnataka High Court which held that the proviso to Section 27 is ultra vires; In our opinion a statute should not be declared as ultra vires so readily.

25. For the reasons given above we are of the opinion that Section 27 including its proviso is constitutionally valid. The petition is hence dismissed.

26. Before parting with this case we would like to briefly comment on the subject of judicial review of a statute, which was first enunciated by Chief Justice Marshall of the U.S. Supreme Court in Matbury vs. Madison, 5 U.S. (1 cranch) 137 (1803). We feel justified in making these comments because the times which this country is passing through requires clarification of the role of the judiciary vis-à-vis the legislature.

27. Under the Constitution the judiciary and the Legislature have their own spheres of operation. It is important that these organs do not entrench on each others proper spheres and confine themselves to their own, otherwise there will always be danger of a reaction. The judiciary must therefore exercise self restraint and eschew the temptation to act as a super legislature or a Court of Appeal sitting over the Laws made by the Legislature or a as a third house of Parliament. By exercising restraint it will enhance its own respect and prestige. Of course if a law clearly violates some provision of the Constitution or is beyond its legislative competence it will be declared by the Court as ultra vires, but as long as it does not do so it is not for the Court to sit in appeal over the wisdom of the legislature.

28. It must never be forgotten that the legislature has been elected by the people, while Judges are not, and in a democracy it is the people who are supreme. No Court should therefore strike down an enactment solely because it is perceived by it to be unwise. A Judge cannot act on the belief that he knows better than the legislature on a question of policy, because he can never be justifiably certain that he is right. Judicial humility should therefore prevail over judicial activism in this respect.

29. Judicial restraint is consistent with and complementary to the balance of power among the three independent organs of the State. It accomplishes this in two ways. First, judicial restraint not only recognizes the equality of the other two branches with the judiciary, but also fosters that equality by minimizing interbranch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results make the judiciary a

moving target and thus decreases the ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of interbranch equality.

30. Second, judicial restraint tends to protect the independence of the judiciary. When courts become engaged in social legislation, almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators, it follows that judges should be elected like legislators. This is counterproductive. The touchstone of an independent judiciary has been its removal from the political process. Even if this removal has sometimes been less than complete, it is an ideal worthy of support and one that has had valuable effects.

31. The constitutional trade off for independence is that judges must restrain themselves from the areas reserved to the other separate branches. Thus, judicial restraint complements the twin, overarching values of the independence of the judiciary and the separation of powers.

32. The Court should always hesitate to declare a statute unconstitutional, unless it finds it clearly so, because invalidating a statute is a grave step. Of the three organs of the State, only the judiciary has the power to declare the Constitutional limits of all three. This great power should therefore be used by the judiciary with the utmost humility and self-restraint.

33. As observed by the Supreme Court in *M.H. Qureshi vs. State of Bihar, AIR 1958 SC 731*, the Court must presume that the legislature understands and correctly appreciates the needs of its own people. The legislature is free to recognize degrees of harm and may confine its restrictions to those where the need is deemed to be the clearest. In the same decision it was also observed that the legislature is the best judge of what is good for the community on whose suffrage it came into existence.

34. One of the earliest scholarly treatments of the scope of judicial review is Prof. James Bradley Thayer's article "The Original and Scope of the American Doctrine of Constitutional Law," published in 1893 in the Harvard Law Review. This paper is a singularly important piece of American legal scholarship, if for no other reason than that Justices Holmes and Brandeis, among modern judges, carried its influence with them to the Bench, as also did Mr. Justice frankfurter.

35. Thayer, who was a Professor of Law at Harvard University, strongly urged that the courts must be astute not to trench upon the proper powers of the other departments of government, nor to confine their discretion. Full and free play must be allowed to "that wide margin of considerations which address themselves only to the practical judgment of a legislative body." Moreover, every action of the other departments embodies an implicit decision on their part that it was within their constitutional power to act as they did. The judiciary must accord the utmost respect to this determination, even though it be a tacit one.

36. This meant for Thayer–and he attempted to prove that it had generally

meant to the courts–that a statute could be struck down as unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,-so clear that it is not open to rational question." After all, the Constitution is not a legal document of the nature of a title deed or the like, to be read closely and construed with technical finality, but a complex charter of government, looking to unforeseeable future exigencies. Most frequently, reasonable men will differ about its proper construction. The Constitution leaves open "a range of choice and judgment," and hence constitutional construction 'involves hospitality to large purposes, not merely textual exegesis'.

37. In *Lochner vs. New York, 198 U.S. 45 (1905)*, Mr Justice Holmes, the celebrated Judge of the U.S. Supreme Court in his classic dissenting judgment pleaded for judicial tolerance of state legislative action even when the Court may disapprove of the State Policy. Similarly, in his dissenting judgment in *Griswold vs. Connecticut, 381 U.S. 479*. Mr. Justice Hugo Black of the U.S. Supreme Court warned that "*unbounded judicial creativity would make this Court a day-to-day Constitutional Convention.*" Justice Frankfurter has pointed out that great judges have constantly admonished their brethren of the need for discipline in observing their limitations (see Frankfurter's 'Some Reflections on the Reading of Statutes')

38. As Mr. Justice Holmes of the U.S. Supreme Court observed in his dissenting judgment in Tyson v. Banton, 273 US 418 (at petitioner 447)

"I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say they want it, I see nothing in the Constitution of the United States to prevent their having their will."

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.8.2003

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

Civil Misc. Writ Petition No. 27427 of 2003

Chilhuwan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Gupta

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

Constitution of India, Article 14 Fishery Right-Fishery lease granted without public auction/public tender, without advertising in well known newspapers having wide circulation. Held, illegal.

Held–Para 3

It has been held in several division bench decisions of this Court that fishery lease can only be granted by public auction/public tender after advertising the same in well known newspapers having wide circulation in which all persons can bid vide *Ram Bharosey Lal vs. State of U.P. 2002 (93) RD 659, Diwaker Rai vs. SDO 2003 (95) RD 84, Panchoo Vs. Collector 1995 (90) RD 186 etc.* that fishery lease can only be granted by a public auction/public tender after advertising it in well known

newspapers having wide circulation. In these decisions it has also been held that the grant of fishery lease cannot be confined to societies or members of any particular caste.

Case referred to :

2002(93) RD 659, 2003 (95) RD 84, 1995 (90) RD 186

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

1. Heard learned counsel for the parties.

2. The petitioner has challenged the impugned order dated 12.5.2003 Annexure-2 to the writ petition by which fishery lease has been granted to respondent no. 6.

3. It has been held in several division bench decisions of this Court that fishery lease can only be granted by public auction/public tender after advertising the same in well known newspapers having wide circulation in which all persons can bid vide ***Ram Bharosey Lal vs. State of U.P. 2002 (93) RD 659, Diwaker Rai vs. SDO 2003 (95) RD 84, Panchoo Vs. Collector 1995 (90) RD 186 etc.*** that fishery lease can only be granted by a public auction/public tender after advertising it in well known newspapers having wide circulation. In these decisions it has also been held that the grant of fishery lease cannot be confined to societies or members of any particular caste.

4. Sri Ashok Mehta learned counsel for the respondent no. 6 has admitted that the fishery lease in question was granted to respondent no. 6 without holding public auction and without advertising the same in well known newspapers having wide circulation. Thus it is evident that the grant of fishery lease to the respondent no. 6 was wholly illegal. The impugned order is therefore **quashed**.

5. The petition is allowed.

6. The District Magistrate shall now proceed to hold public auction/public tender of the fishery lease after advertising it in well known newspapers having wide circulations and allowing everyone to bid. This should be done at the earliest. As an interim measure we direct the District Magistrate through his officials to operate the fishery rights in the pond in question.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 23.5.2003

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

Civil Misc. Writ Petition No. 2978 of 1999

Shashi Kant Pandey ...Petitioner
Versus
Executive Engineer, Anusandhan Avam Niyojan, Jal Sansadhan Prakhand, Varanasi and another ...Respondents

Counsel for the Petitioner:
Sri S.K. Varma
Sri Sidhartha Varma

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

Constitution of India, Article 226-termination order-appointment on the post of Sinch Paryavekshak-Sinch Parveshak Sangh made complaint-alleging the appointment to be fictitious-in enquiry report dated 12.9.94 found innocent-after submitting reply to the chares-No any enquiry held-dismissal

order passed in utter violation of principle of natural justice- held- order of dismissal cannot sustained, but before the joining, the Chief Engineer directed to pass appropriate order considering the records if the petitioner desires oral hearing may be allowed- continuance on the post and other benefit shall depend upon the decision.

Held- Para 23

I have heard learned counsel for the parties. I find that in view of the serious allegations against the selection grade doubt has been raised with regard to the selection, appointment and alleged involvement of forgery on the part of the petitioners, although the order dated 20.11.1998 is not legally sustainable for lack of providing opportunity of natural hearing therefore, it is directed that before the petitioner is permitted to join the post a decision is to be taken by the competent authority on issues raised after giving proper opportunity to the petitioner. In view of the above I direct the chief Engineer of Anusandhan Avam Niyojan, Jal Sansadhan Prakhand, Varanasi to issue a notice to the petitioner regarding the allegation against the selection and alleged forgery in the appointment and after considering the records, documents and earlier enquiry and explanation and material submitted by the petitioner take a proper decision in the matter. If the petitioner wants oral hearing he may be allowed to do so and if petitioner gives only written statement submission that would be treated to be sufficient that he has been heard properly. The petitioner's continuance to the post and providing other benefits will depend upon the decision to be taken by the Chief Engineer of the above department. The Chief Engineer will issue proper notice to the petitioner within a period of two months from the date of receipt of certified copy of this judgment and after receiving the explanation from the petitioner after hearing the petitioner, after providing opportunity of hearing or after considering the written submission of the petitioner shall pass final order within a period of six months from today.

With these observation the order dated 20.11.1998 is sset aside and with the above observation and direction the writ petition is finally disposed of

Case law discussed:

1995 J.T. (6) 146
2002 (2) AWC 1550
2001 (1) UPLBEC 908
1998 (6) JT(SC) 464
1993 (6) JT 1
2002 (1) UPLBEC 352
AIR 1990 SC 307
1991 (1) SCC (Supp.) 330
AIR 1998 SC-3261
1999 (1) ESC 490 (Alld.)
1999 ESC (1) 754 (Alld.)
1999 (1) UPLBEC 575
JT 1998 (6) 55 (SC)
JT 1998 (3) SC 123
AIR 1994 SC-2166
1997 SC-1629
JT 2000 (Supply 2) SC 417

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

Being agrived by the order of removal dated 20.11.1998 the petitioner has filed this writ petition for direction to the respondents to reinstate the petitioner.

1. I have heard learned counsel for the petitioner as well as learned counsel representing the respondents.

2. The relevant facts necessary for adjudication of this writ petition are that the petitioner was appointed to the post of Seenchpal on a temporary basis in Sinchai Khand, Second Division, Deoria. He joined the post on 3.11.1987 and thereafter the petitioner was posted at different places including pump canal division (II), Ghazipur from 30.6.1994 to 3.2.1997, the petitioner remained at Sichai

Nirman Khand, Ghazipur on 4.2.1997, thereafter, he was transferred to Anusandhan Avam Niyojan, Jal Sansadhan Khand, Varanasi. The petitioner's services were made permanent by an order dated 24.7.1993 w.e.f. 7.2.1991. It appears that the petitioner also appeared in the examination of Seenchpal Parivekshak and he was declared successful on 22.3.1994. The President of Seenchpal Sangh Lucknow made a complaint to the Chief Engineer, Varanasi that the appointment of the petitioner was fictitious. On superferous preliminary enquiry made by Executive Engineer on 12.9.1994 the petitioner was found to be innocent, however, the salary of the petitioner for the month of November 1997 and for subsequent period was stopped and he was placed under suspension by an order dated 6.12.1997.

3. The writ petition no. 42374 of 1997 filed by the petitioner was disposed of on 17.12.1997 and the suspension order dated 6.12.1997 was quashed as no departmental enquiry against the petitioner was pending.

4. It appears that prior to passing the above order by High Court there was already a confidential intimation by one Chief Engineer (Karmik) to another Chief Engineer of Irrigation Department of the records that there were complaints which arose suspicion about the credibility of all Seenchpal/ Seenchpal Parivekshak as many of them have managed such appointments by forgoing and fabricating documents of initial appointment orders. These records/documents were to be scrutinized thoroughly because by such forgery the State Government has been defrauded affecting State Exchequer and if necessary, the First Information Report (F.I.R.) were to be lodged in such scandal for taking legal action against them. In reference to the records of petitioner another order dated 23.1.1998 was passed by the Executive Engineer placing the petitioner under suspension on the following charges;

(i) For forging the documents and fraudulently procuring the appointment to post of Seenchpal on 3.11.1987 in Sichai Khand Division-II.
(ii) For defrauding the Irrigation Departments by Forging documents.
(iii) For causing financial loss and damage to the State Government by fabricating the forged appointment.

5. The writ petition no. 6334 of 1998 challenging the above suspension order was dismissed on 26.2.1998 by this Court. Against this order a Special Appeal No. 269 of 1998 had been filed which was pending consideration, in the meanwhile the Executive Engineer served a charge sheet on 2.6.1998 to the petitioner expected reply of petitioner by 30.6.1998. The detail reply was filed by the petitioner in the extended time. It appears after submission of the reply removal order dated 20.11.1998 was passed (annexure 14 to the writ petition) based on the enquiry report dated 23.5.1998 with indications that the petitioner had prepared forged documents in respect of his initial appointment to the post of Seencpal and had managed forged signature and seal of officers in his service record to get the posting in the district Deoria and subsequently managed his transfer fraudulently on forged transfer orders dated 12.8.1998 as if issued by Chief Engineer.

6. The counter affidavit has been filed on behalf of the respondents indicating that the petitioner was never appointed on 15.10.1987 as alleged by him rather he manufactured false and fabricated documents of appointment and in an enquiry made in this respect the Executive Engineer Seechai Khand-II, Deoria by his letter no. 178/Seenchai -2 E-9 dated 22.1.1998 had informed that the office order no. 4/87 and the letter no. 2738 dated 15.10.1987 in question was never issued from his office. According to the Executive Engineer in the dispatch register 3/87 to 8/87 (page no. 6 to 298) on page no. 165 the last letter was issued on 31.12.1987 by letter no. 2640. It was further clarified that for the year, the office order at serial no. 1 and continued upto serial no. 381 dated 6.8.1988 and the office order no. 44/87 (85-86) allegedly purported to have been issued by letter no. 1913 of the Executive Engineer on 11.7.1985 was never issued for the petitioner. According to para 5 of the counter affidavit, Sri Anand Mohan Prasad, Assistant Engineer by a letter no. 271/Memo, dated 27.1.1998 to the Executive Engineer and on personal contract obtained the specimen signature of Sri R.K. Pandey, Superintending Engineer (copy of which is annexure CA-2 to the writ petition) which on a comparison apparently differs to the forged signature of Sri R.K. Pandey shown by the petitioner in his service book.

7. On the first page of the service book of the petitioner there appears to be the signature of Assistant engineer, IInd, Seenchai Khand II, Deoria as at the relevant time in the year 1987, one Sri Azaz Aalam was working as a Assistant Engineer after transfer of Sri Azazz Alam, was now working at Fatehpur, an inquiry committee consisting of Mr. R.K. Misra, when contacted to Sri Azaz Alam the later by his letter no. 22/Sa.Aa. III/- dated 9.3.1998 alongwith his three specimen signatures informed that the alleged signature is not his signature.

8. In respect of verification of Service Book and regarding payment from 3.11.1987 to 31.8.1988, the Executive Engineer Seechai Khand-II Deoria by his letter no. 178/Se.Sa-2 Deoria/E-9 dated 22.1.1998 informed that no salary was paid to the petitioner during above period.

9. It has been contended on behalf of the respondents that in respect of alleged transfer of petitioner from Deoria to Narainpur one Sri Indrasena a staff officer (E-4 K ha) by his D.O. letter no. 373 (E-4 Kha) dated 31.3.1988 has informed that the letter no. 5555/E-4 Kha-B-203 E/Sa. Estha/87-88, dated 12.8.88 was never issued from his office and established that transfer order dated 12.8.88 was forged one by subsequent forged transfer order the petitioner came to Narainpur Head Work Division Varanasi Seenchpal from Deoria on 7.11.1988. It has also been pointed out in the counter affidavit that full fledged enquiry was conducted by the inquiry officer and the appeal lies before the Chief Engineer against the order dated 20.11.1998 and thereafter before the Public Service Tribunal. In these circumstances writ petition filed by the petitioner is liable to be dismissed.

10. Through the rejoinder affidavit filed on behalf of the petitioner, the petitioner has tried to built a case that after the appointment and different transfer orders having been made and

after allowing him to appear in the examination of promotion in the post of Seenchai Parivekshak his initial appointment and subsequent steps are treated to be legalized by the State Government.

11. It has been submitted on behalf of the petitioner as follows: -

(a) The two inquiries were held earlier in regard to the validity of the petitioner's appointment. The first report was made on 12.4.1993 by the Executive Engineer, Deoria, after making inquiries. (annexure no. 4 to the writ petition). It was found that the petitioner's appointment was perfectly valid. Again on 12.9.1994 the Executive Engineer, Deoria (annexure no. 6 to the writ petition) reported to the Superintending Engineer that the petitioner's initial appointment was perfectly valid. Thus after two inquiries it was found that the petitioner's appointment was perfectly valid and thus the two reports could not be ignored without giving any opportunity of hearing to the petitioner.

(b) On 24.7.1993 the petitioner was made permanent with effect from 7.2.1991 after holding an inquiry in regard to the validity of the petitioner's initial appointment.

(c) The Chief Engineer has been dictating his subordinate authorities for suspending the petitioner and for taking action. (Annexure no. 9 to the writ petition). In fact the Chief Engineer ought not to have dictated his subordinate authorities for taking action against the petitioner. This meant that the orders of suspension and dismissal were passed on the dictation of the superior authority and it became ip-so-facto illegal, for which the petitioner has placed reliance on 1995 (6) Judgment Today page 146 (S.C.) (Aanirudhsinhji Karansinhji Jadeja & another. Vs. The State of Gujrat).

(d) In reference to the infringement of natural justice the petitioner has submitted that in the instant case only a charge sheet was submitted to the petitioner. (Annexure no. 11 to the writ petition). The petitioner replied to the charge sheet (Annexure no. 12 to the writ petition). Thereafter there was absolutely no inquiry of any sort and the petitioner was never taken into confidence. He did not know anything about the inquiry itself. No witness was ever examined by the opposite parties in the presence of the petitioner. The opposite parties had the duty to inform the petitioner about the date, place and other details of the inquiry, but nothing of the sort was done. It appears that some sort of exparte inquiry was done by the opposite parties without the participation of the petitioner in the inquiry. Thereafter the impugned order of dismissal was passed. Paragraph no. 16 of the writ petition has not been replied at all by the opposite parties and in a very cursory manner it has been stated that a full fledged inquiry was done (in paragraph 15 of the counter affidavit). There was a blatant violation of the principles of natural justice. It was the duty of the respondent to have allowed the petitioner to participate in the inquiry. The petitioner had to be taken into confidence before an inquiry report was given. No such thing was ever done. In the instant case the petitioner only knows this much that he was given a charge sheet and he replied to it and thereafter the order of dismissal was passed. (Annexure no. 14 to the writ petition). In

this respect the petitioner has placed reliance on 2002(2) AWC 1550 (Neeraj Bhardwaj vs. Marathwada Institute of Technology and others), 2001 (1) UPLBEC 908 (K.P. Girl vs. State of UP and others) and 1998 (6) Judgment Today (SC) 464 (Basudeo Tiwary vs. Sido Kanhu University and others).

(e) According to the petitioner he was not supplied with a copy of the inquiry report, which had been prepared exparte, without giving an opportunity of hearing to the petitioner and without the petitioner's participation in the inquiry. This also was an infringement of the principles of natural justice. The inquiry report was relied upon by the disciplinary authority while removing the petitioner and thus it was the bounden duty of the Disciplinary Authority to have heard the petitioner after giving the enquiry report. The inquiry report was prepared in an exparte manner by one D. Singh and the order of dismissal was passed by one R.P. Singh and thus there were two entities. The inquiry officer as well as the Disciplinary Authority were not one and the same person as referred in 1993 (6) JT page 1 (Managing Director, ECIL, Hyderabad vs. B. Karunakar).

(f) If we peruse the dismissal order (Annexure no. 14 of the writ petition) we find that not even point raised by the petitioner in his defence, was taken into account while passing the order of dismissal.

Basically the order of dismissal has been passed without giving any opportunity of hearing to the petitioner and thus there was a gross violation of the principles of natural justice in every respect possible and thus it shall be in the interest of justice that the order of dismissal may be set aside. Since, there was a violation of principles of natural justice the order this purpose the petitioner has placed reliance on AIR 1999 SC 22 (Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others).

12. In 2002 (1) UPLBEC 352, *Ram Vikas Vs. State of U.P. and others* the appointment of employee writ petitioner of Government Medical Hospital was cancelled on the basis of the alleged irregularities in the selection process and on enquiry made for the purpose by higher authorities the Government passed order of cancellation of appointment of writ petitioner. Such cancellation of appointment was held illegal and the appointment was cancelled without any opportunity of hearing to the writ petitioner. This Court in para 11 has observed as below: -

"In the present case since the petitioner has joined and was working, the cancellation of his appointment would have adversely affected his right which required a notice on the issues which have been raised in enquiry report dated 20.4.1996 petitioner ought to have given an opportunity to have his say. May it be, that the petitioner in his reply could not have stated any fact which would have dispelled the charges levelled against the selection proceedings but justice must not only be done should always seem to be done. In all fairness and in conformity with the principle of natural justice notice ought to have been given to the petitioners."

13. The foremost submission which has been raised by the Counsel for the

petitioner is regarding the violation of principle of natural justice. Counsel submitted that the petitioner having already been appointed and working his appointment could not have been cancelled without notice. Counsel for the petitioner in support of his submission that notice was required before cancellation of the appointment has placed reliance on the following cases :

(I) Shridhan Vs. Nagar Palika, Jaunpur, AIR 1990 SC 307.
(II) Shrawan Kumar Jha Vs. State of Bihar, AIR 1991 (suppl.) (1) SCC 330.
(III) Basudeo Tiwary V. Sido Kanhu University and others, AIR 1998 Supreme Court 3261.
(IV) Pancham Ram and others Vs. Chief Engineer, UP Jal Nigam and others, 1999 (1) ESC 490 (All), (1999) 1 UPLBEC 537.
(V) Sanjeev Kumar and others vs. State of U.P. and others 1999 (1) ESC 754 (All) (1999) 1 UPLBEC 575.

14. Learned Standing Counsel on the other hand relied on the judgment of the Apex Court in Ashwani Kumar and others Vs. State of Bihar and others, reported in JT 1997 (1) SC 243. The Apex Court has considered the question of natural justice in large number of cases. In Shridhar Vs. Nagar Palika, Jaunpur (supra) the Apex Court held that it is elementary principle of natural justice that no person should be condemned with out hearing. In paragraph it was held :

"8. The High Court committed serious error in upholding the order of the Government dated 13.2.1980 in setting aside the appellant's appointment without giving any notice or opportunity to him. It is an elementary principle of natural justice that no person should be condemned without hearing. The order of appointment conferred a vested right in the appellant to hold the post of Tax Inspector, that right could not be taken away without affording opportunity of hearing to him. Any order passed in violation of principle of natural justice is rendered void. There is no dispute that the Commissioner's order had been passed without affording any opportunity of hearing to the appellant, therefore, the order was illegal and void. The High Court committed serious error in upholding the Commissioner's order setting aside the appellant 's appointment. In this view, order of the High Court and the Commissioner are not sustainable in law."

15. In Shrawan Kumar's case was also a case in which appointments were cancelled by the Deputy Development Commissioner on the ground that the Deputy Superintendent Education had no authority to make appointment. Apex Court held that the impugned order cancelling the appointment was liable to be quashed on the ground that the appellant therein had not been given opportunity of hearing before cancelling the appointment. Basudeo Tewari in a case in which in accordance with the provisions of Section 35 (3) of the Bihar University Act, 1951 services were terminated on the ground that the appointment was irregular. Section 35 (3) of the act provides:

"35 (3) Any appointment or promotion made contrary to the provisions of the Act, Statutes, Rules or Regulations or in any irregular or

unauthorized manner shall be terminated at any time without notice."

16. Exercising the power under section 35 (3) of the act order was passed which was challenged before the High Court. In paragraph 12 of the judgment the Apex Court laid down:

"12. The said provision provides that an appointment could be terminated at any time without notice if the same had been made contrary to the provisions of the Act, Statutes, Rules or Regulations or in any irregular or unauthorized manner. The condition precedent for exercise of this power is that an appointment had been made contrary to Act, Rules, Statutes and Regulations or otherwise. In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, Statutes, Rules or Regulation etc. a finding is recorded, the termination cannot be made, but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act etc. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily enquiry notice will have to be held and in holding such an enquiry the person whose appointment is under enquiry will have to be issued to him. If notice is not given to him then it is like playing Hamlet without the Prince of Denmark, that is if the employee concerned whose rights are affected, is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable as noticed by this Court in DTC Mazdoor Sabha's case, AIR 1991 SC 101. In such an event we have to hold that hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the Act, Statutes, Rules or Regulations etc. and it only on such a conclusion being drawn, the services of the persons could be terminated without further notice. That is how section 35 (3) in this case will have to be read."

The other judgments cited by the counsel for the petitioner do support the contention of the petitioner that he was entitled for notice before cancelling his appointment. In the present case since the petitioner has joined and was working, the cancellation of his appointment would have adversely affected his right which required a notice on the issues which have been raised in enquiry report dated 20.4.1996. Petitioner ought to have given an opportunity to have his say. May it be, that the petitioner in his reply could not have stated any fact which would have dispelled the charges leveled, against the selection proceeding but justice must not only be done but should always seem to be done. In all fairness and in conformity with the principle of natural justice notice ought to have been given to the petitioner. The reliance place by the learned Standing Counsel on the case of Ashwani Kumar and others (supra) is not applicable on the facts of the present case. In Ashwani Kumar's case the Apex Court while dealing with the question of natural justice had observed that the principle of natural justice is observed in that case since public notices were given to the petitioners of that case and all other employees have submitted their explanations. In the aforesaid case the High Court had directed the State Government to appoint the committee and thoroughly investigate the entire matter in pursuance of which the committee issued

notices to all the affected persons and thereafter thus after giving opportunity submitted its report. In Ashwani Kumar's case against 2500 posts appointments of 6000 persons were made. The Apex Court in that case observed:

"Thus the basic principles of natural justice cannot be said to have been violated by the Committee which ultimately took decision on the basis of the personal hearing given to the concerned employees and after considering what they had to say regarding their appointments. Whatever was submitted by the concerned employees was taken into consideration and then Committee came to a firm decision to the effect that all these appointments made by Sri Malik were vitiated from the inception and were required to be set aside and that is how impugned termination orders were passed against the appellant. On the facts of these cases, therefore, it cannot be said that principles of natural justice were violated or full opportunity was not given to the concerned employees to have their say in the matter and before their appointments were recalled and terminated."

17. In J.T. 1998 (6) SC page 55, *State of U.P. Vs. Shatrughan Lal & another* it was held:

"One of the principles of natural justice is that a person against whom an action is proposed to be taken has to be given an opportunity of hearing. This opportunity and not a mere pretence. In departmental proceedings where charge sheet is issued and the documents which are proposed to be utilized against that person are indicated in the charge sheet but copies thereof are not supplied to him in spite of his request, and he is, at the same time, called upon to submit his reply, it cannot be said that an effective opportunity to defend was provided to him (Para 4)".

"Preliminary inquiry which is conducted invariably on the back of the delinquent employee may, often , constitute the whole basis of the charge sheet. Before a person is, therefore, called upon to submit his reply to the charge sheet, he must, on a request made by him in that behalf, be supplied the copies of the statements of witnesses recorded during the preliminary enquiry particularly if those witnesses are proposed to be examined at the departmental trial. (para 6)".

"Merely saying that the respondent could have inspected the documents at any time is not enough. He has to be informed that the documents, of which the copies were asked for by him may be inspected. The access to record must be assured to him. The respondent was not afforded an effective opportunity of hearing particularly as the appellant failed to establish that non supply of the copies of statements recorded during preliminary enquiry had not caused any prejudice to the respondent in defending himself. (Para 8, 10)".

18. In J.T. 1998 (3) SC 123, *State of Andhra Pradesh vs. N. Radha Kishan* it was held :

"In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the

face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. Disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeat s justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations. (Para 19)"

"It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter in that the Court has to take into consideration all relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. (Para 19).

"Charges have been framed against the respondent merely on the basis of the report dated November 7, 1987 from the Dirctor General, Anti Corruption Bureau, which is of general in nature raising accusing fingers on the various officers of the Corporation, but without any reference to the relevant files and pin pointing if respondent or any other official charged was at all concerned with the alleged deviations and unauthorized construction in multi storied complexes. (Para 15)"

"If memo of charge had been served for the first time before 1991 there would have been no difficulty. However, in the present case it could be only an irregularity and not an illegality vitiating the inquiry proceedings in as much as after the Inquiry officer was appointed under memo no. 1412 dated December 22, 1987, there had not been any progress, If a fresh memo is issued on the same charges against the delinquent officer it cannot be said that any prejudice has been caused to him. (Para 17)

"The case depended on records of the Department only and Director General, Anti Corruption Bureau had pointed out that no witnesses had been examined before he gave his report. The Inquiry Officer, who had been appointed one after the other, had just to examine the records to see if the alleged deviations and constructions were illegal and unauthorized and then as to who was responsible for condoning or approving the same against the bye laws. It is no body's case that respondent at any stage tried to obstruct or delay the inquiry proceedings. The Tribunal rightly did not accept the explanations of the State as to why delay occurred. In fact there was hardly any explanation worth consideration. In the circumstances the Tribunal was justified in quashing the charge memo dated July 31, 1995 and directing the State to promote the respondent as per recommendation of the DPC ignoring memos dated October 27, 1995 and June 1, 1996 (Para 20)."

19. It is also relevant to note that in AIR 1994 SC 2166 Krishan Yadav and

another Vs. State of Haryana and others, where the selection of Taxation Inspectors was cancelled because the selection process was stinking, conceived in fraud and delivered in deceit, therefore, cancellation of the entire selection was upheld and the plea of innocence of selectees was found not tenable and selectees were not required to repay salary and perks. It was observed in Krishan Yadav (supra) as below: -

"As regards the selection made without interview, fake and ghost interviews, tempering with the final records, fabricating documents, forgery, an inference that all was motivated by extraneous consideration can be drawn. The entire selection thus is arbitrary and is liable to be set aside. The plea that innocent candidates should not be penalized for the misdeeds of others is not applicable to such cases. The effect of setting aside the selection would mean the selectees will have no right to go to the office. Normally they will have to repay the entire salary and perks which they have received from the said office. The court however refused to order repayment in this case."

20. In AIR 1997 SC 1629, *Ashwani Kumar and others Vs. State of Bihar and others*, where the recruitment in T.B. Eradication Programme of State Government to the post of Class III and Class IV employee made in derogation to the prescribed procedure for the recruitment laid down by the State Government and without sanctioned post backed by financial budget approval was found ex facie illegal and not binding on the State Govt. and was found not contradictory to the provisions of Article 16 of the Constitution and the employees so recruited and for regularization in service were treated to be illegal in respect of their entry into service and as a total disregard of recruitment rules or being not on existing vacancy, as such no case of regularization was possible. The Supreme Court in Ashwani Kumar (supra) observed as below: -

"13. In this connection it is pertinent to note that question of regularization in any service including any Government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued from time to time and if it is found that the concerned incumbents have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career or such employees who are continued on ad hoc basis for a given substantial length of time to regularise them so that the concerned employees can give their best by being assured security of tenure. But this would require one pre condition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the

exigency of administrative requirement for waiving such irregularity in the initial appointment by competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to the concerned incumbent. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularizing the appointment of an employee whose initial entry is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could even be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularizing such an illegal entrant would ever survive for consideration, however competent the recruiting agency may be. The appellants fall in this latter class of cases. They had no case for regularisation and what ever purported regularisation was effected in their favour remained an exercise in futility."

"16. So far as the principles of natural justice are concerned it has to be stated at the outset that principles of natural justice cannot be subjected to any strait- jacket formula. They will vary from case to case, from circumstance to circumstance and from situation to situation. Here is a case in which 6000 employees were found squatting in the Tuberculosis Scheme controlled and monitored by Dr. Mallick for the entire State of Bihar and there was no budgetary sanction for defraying their expenditure. At least out of 6000 employees as seen earlier 3750 were totally unauthorized and were squatting against non existing vacancies. A grave situation had arisen which required immediate action for clearing the stables and for eradicating the evil effects of these vitiated recruitments so that the Tuberculosis Eradication Scheme could be put on a found footing.

xxx xxx xxx

Whatever was submitted by the concerned employees was taken into consideration and then the committee came to a firm decision to the effect that all these appointments made by Dr. Mallick were vitiated from the inception and were required to be set a side and that is how the impugned termination orders were passed against the appellants. On the facts of these cases, therefore, It cannot be said that principles of natural justice were violated or full opportunity was not given to the concerned employees to have their say in the matter before their appointments were recalled and terminated. Point No. 3 is, therefore, answered in the negative.

"17… The initial entry of the employees is itself unauthorized being not against sanctioned vacancies nor was Dr. Mallick entrusted with the power of creating vacancies or posts for the schemes under the Tuberculosis Eradication Programme. Consequently the termination of the services of all these appellants cannot be found fault with. Nor any relief as claimed by them of reinstatement with continued service can be made available to them."

21. In J.T. 2000 (Suppl. 2) SC 417, Nazira Begum Iashkar and others vs. State of Assam and others the Supreme Court has held that the persons appointed as Assistant Teachers in Primary Schools when no post was advertised and without following statutory rules, without constituting Selection Committee and without holding interviews, are not entitled to claim any legal right for any appointment. In Nazira Begum Lashkar (supra) the Supreme Court has also considered in para 10 as below:

"10… In Ashwani Kumar and others Vs. State of Bihar and ors., (JT 1997 (1) SC 243=1997 (2) SCC 1), so that while considering these teachers for the posts pursuant to the directions of the Division Bench of the High Court, due weightage should be given for the experience gained by these teachers who had been teaching for a number of year. In support of this contention, Mr. Parikh also relied upon a decision of this court in Arun Kumar Rout and ors. V. State of Bihar and ors., (JT 1998 (4) SC 490 =1998 (9) SCC 71), wherein this Court had indicated that the appointees deserve sympathetic consideration in getting appointment against sanctioned posts on humanitarian consideration . The learned counsel also placed reliance on the judgment of this Court in H.C. Puttaswamy and ors, vs. The Hon'ble Chief Justice of Karnataka High Court, Bangalore and ors. (JT 1990 (4) SC 474=1991 Supp. (2) SCC 421`), where under this court reviewed the earlier orders of the court and treated the services of the appointees to be regularly appointed."

In sequence to the observations the Supreme Court has also considered in para 14 as below:-

"14. In view of different submissions made by different sets of Counsels, as referred to earlier, we have examined in detail the report of the Inquiry Committee as well as different orders passed by the High Court and it appears to us that no special case had been made out by the appellants in CA No. 296/99, CA Nos. 279-285/99 and CA No. 286/99 in their writ petitions before the High Court, making out a case that these appointments had been made under a Special Project called' Operation Black Board' and as such, the provisions of the Recruitment Rules need not be complied with and the appointments had been bonafide made by the competent authority and the appointees possess the requisite qualification. Even in the Special leave petition in this court, no such stand has been taken, In this view of the matter, we are constrained to agree with the conclusions of the Division Bench of the High Court that the appointments were made to posts of Assistant Teachers of Primary Schools and such appointments are governed by the statutory Recruitment Rules, which Rules have been framed by the Governor in exercise of the power conferred under the Assam Elementary Education (Provincialisation) Act, 1974. We also do not find any substance in the argument of Ms. Indu Malhotra that the appointments made in CA No. 295/99 were in substantial compliance of the Recruitment Rules in as much as the judgment of the Division Bench clearly indicates that the counsel appearing for the teachers conceded that the appointments had been made on the vacant posts but the same were not done in accordance with the provisions of Rule 3 of the Rules of 1977. In view of the aforesaid concession of the appellants through their counsel before the Division

Bench, it would be difficult for us to entertain the contention of Ms. Indu Malhotra that there has been substantial compliance of the provisions of the Recruitment Rules. As has been stated earlier, while the matter was pending before the Division Bench, the court was persuaded to appoint an Inquiry Committee, in view of the allegations of gross irregularities and illegalities committed in the matter of appointment of teachers in different primary schools in different districts. The said Committee has gone into details and recorded findings that the provisions of the Recruitment Rules have not at all been followed. The High Court has even gone to the extent of recording a finding that there has been no selection, no interview and there has been tampering of records and fabricating the documents. Since the appointments to the posts are governed by a set of statutory rules, and the prescribed procedure therein had not been followed and, on the other hand, appointments have been made indiscriminately, immediately after posts were allotted to different districts at the behest of some unseen hands, such appointments would not confer any right on the appointees nor such appointee can claim even any equitable relief from any court. That apart, the appointments stood annulled hardly after six months from the date of appointments and the appointees cannot claim to be continuing for an unusually long period, so as to claim a humanitarian consideration in their case. The decisions cited by Mr. Parikh, in support of his contention, not only do not support his contention but on the other hand appear to us to be against his contention. In Ashwani Kumar's case, (JT 1997 (1) SC 243=1997 (2) SCC 1), this Court in no uncertain terms held that as the appointments had been illegally and contrary to all recognized recruitment procedures and were highly arbitrary, the same were not binding on the State of Bihar. This Court further went on to hold in the aforesaid case that the initial appointments having been contrary to the statutory rules, the continuance of such appointees must be held to be totally unauthorized and no right would accure to the incumbent on that score. The court had also held that it cannot be said that principles of natural justice were violated or full opportunity was not given to the employees concerned to have their say in the matter before their appointments were recalled and terminated. But, while dismissing the appeals, the court had issued certain directions as to how the appointments should be made in future and how the case of the illegally recruited teachers should be dealt with. In the facts and circumstances of the present case, we are unable to persuade ourselves to give any such direction."

22. In 1990 (4) SCC 633 (U.P. Junior' Action Committee Vs. Dr. B. Sheetal Nandwani and others, where for getting admission in post Graduate Course fake judgment of High Court aborting entrance examination produced, pursuant to which order issued by the High Court cancelling examination and directing State Government to grant admission on the basis of M.B.B.S. results, bogus judgement was found not existent and order issued pursuant thereto having been made on the basis of misrepresentation was set aside. The Supreme Court in para 5 observed as below: -

"5……We are satisfied that there is a deep seated conspiracy which brought

about the fake order from Allahabad, the principal seat of the High Court and on the basis thereof a subsequent direction has been obtained from the Lucknow Bench of the same High Court. The first order being non-existent has to be declared to be a bogus one. The second order made on the basis of the first order has to be set aside as having been made on the basis of misrepresentation. We are alive to the situation that the persons who have been taken admission on the basis of the MBBS results are not before us. The circumstances in which such benefit has been taken by the candidates concerned do not justify attraction of the application of rules of natural justice of being provided an opportunity to be heard."

23. I have heard learned counsel for the parties. I find that in view of the serious allegations against the selection grade doubt has been raised with regard to the selection, appointment and alleged involvement of forgery on the part of the petitioners, although the order dated 20.11.1998 is not legally sustainable for lack of providing opportunity of natural hearing therefore, it is directed that before the petitioner is permitted to join the post a decision is to be taken by the competent authority on issues raised after giving proper opportunity to the petitioner. In view of the above I direct the Chief Engineer of Anusandhan Avam Niyojan, Jal Sansadhan Prakhand, Varanasi to issue a notice to the petitioner regarding the allegation against the selection and alleged forgery in the appointment and after considering the records, documents and earlier enquiry and explanation and material submitted by the petitioner take a proper decision in the matter. If the petitioner wants oral hearing he may be allowed to do so and if petitioner gives only written statement submission that would be treated to be sufficient that he has been heard properly. The petitioner's continuance to the post and providing other benefits will depend upon the decision to be taken by the Chief Engineer of the above department. The Chief Engineer will issue proper notice to the petitioner within a period of two months from the date of receipt of certified copy of this judgment and after receiving the explanation from the petitioner after hearing the petitioner, after providing opportunity of hearing or after considering the written submission of the petitioner shall pass final order within a period of six months from today.

With these observations the order dated 20.11.1998 is set aside and with the above observations and directions the writ petition is finally disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.7.2003

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

Special Appeal No. 600 of 2003

Smt. Shanti Devi ...Petitioner
Versus
Principal, Smt. Sukhdevi Balika Uchchattar Madhyamik Vidyalaya, Etawah and others ...Respondents

Counsel for the Appellant:
Sri Gajendra Pratap
Sri A.K. Singh

Counsel for the Respondents:
Sri R.B. Singhal
Sri Devendra Kumar
S.C.

Constitution of India, Article 226-Service Law- correction in date of birth-shown in service book- verified at least 10 times-held-not permissible at belated stage of retirement.

Held – Para 5

It is an admitted position that the date of birth of the appellant was entered in the service book as 27.10.1940 at the time of her entry in service. Subsequently this date of birth in the service records was verified by her at least ten times. Such being the position it was not open for the appellant to claim a different date of birth just at the time of her retirement. The enquiry report which the learned counsel for the appellant has relied on had been considered by the learned Judge in the impugned judgment and it was noted that the District Inspector of Schools, Etawah while making an enquiry found that the date of birth was 27.10.1946. In our view the learned Judge is fully justified in rejecting the writ-application.

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

1. By consent of parties this Special Appeal is treated as on day's list and taken up for hearing.

2. This is an appeal from a judgment and order of a learned Judge of this Court in a writ petition, being Civil Misc. Writ Petition No. 50763 of 2000, by which the writ-application of the appellant was rejected which was moved for correction of date of birth in her service records.

3. The appellant joined the service as a class IV employee and served for several years. It is not in dispute that in the service record of the appellant, her date of birth was shown as 27.10.1940 and the signature of the appellant was also made on the service book. Subsequent to the entry of the writ petitioner-appellant in the employment, her date of birth was verified on several dates and the writ petitioner-appellant signed and verified her date of birth as 27.10.1940. Just before her retirement, the writ petitioner-appellant produced a certificate of the Gram Pradhan showing that her date of birth was 27.10.1946 and not 27.10.1940. When an enquiry was held by the District Inspector of Schools, Etawah, the relevant documents for the purposes of proving the date of birth were not produced and, therefore, the District Inspector of Schools, Etawah had arrived at a conclusion that her date of birth was 27.10.1946 as claimed by the writ-petitioner-appellant and not 27.10.1940. The learned Judge while rejecting the writ-application came to the conclusion of fact that since the writ-petitioner herself has given her date of birth as 27.10.1940 which was verified by her several times subsequently, it is not open for the writ-petitioner to say at the time of her retirement or just before that, that her date of birth was 27.10.1946 and not 27.10.1940. Feeling aggrieved against the judgment and order of the learned Judge, this appeal has been preferred.

4. We have heard Sri Gajendra Pratap, learned counsel appearing for the appellant and Sri R.B. Singhal, learned counsel appearing for the respondents. We have also carefully examined the order passed by the learned Judge and the material available on the record.

5. After hearing the learned counsel for the parties we are of the view that in the facts and circumstances of the case there is no ground for us to interfere with the order of the learned Judge. Admittedly at the time of entry of the appellant in

service, she herself had given here date of birth as 27.10.1940 and not 27.10.1946. In fact, during her service career she had verified the same date of birth at least ten times. Just before her retirement this correction of date of birth was asked for by the writ-petitioner-appellant on the basis of an enquiry report submitted by the District Inspector of Schools, Etawah. Sri Gajendra Pratap, learned counsel for the appellant, however, submitted that the learned Judge was not justified in rejecting the writ-application without considering the report submitted by the Enquiry Officer, i.e., District Inspector of Schools, Etawah who came to a conclusion of fact that the date of birth of the petitioner-appellant was 27.10.1946 and not 27.10.1940. We are unable to accept this contention of Sri Gajendra Pratap, learned counsel for the appellant. As noted earlier it is an admitted position that the date of birth of the appellant was entered in the service book as 27.10.1940 at the time of her entry in service. Subsequently this date of birth in the service records was verified by here at least ten times. Such being the position it was not open for the appellant to claim a different date of birth just at the time of her retirement. The enquiry report which the learned counsel for the appellant has relied on had been considered by the learned Judge in the impugned judgment and it was noted that the District Inspector of Schools, Etawah while making an enquiry found that the date of birth was 27.10.1946. In our view the learned Judge is fully justified in rejecting the writ-application as we find that the said conclusion of fact, without considering the service record and the verification made on different dates by the petitioner-appellant, cannot be relied on for the purposes of coming to a finding of fact as to whether the date of birth of the appellant was 27.10.1940 or 27.10.1946. The law is well settled and the Hon'ble Supreme Court in various decisions has already laid down the law that it is not open for a person to apply for correction of the date of birth just at the threshold of his retirement from service. Such being the position we do not find any force in the argument of Sri Gajendra Pratap.

6. No other point was raised.

7. Accordingly, this appeal is dismissed summarily. However, there will be no order as to costs. If the writ petitioner-appellant approaches the concerned authority for releasing her pensionary benefits and other benefits to which she is entitled under law, in that case the authority shall release the said pensionary benefits and other benefits in accordance with law within a period of six months from the date of her approaching the authority.

8. We, however, keep it on record that the writ petitioner-appellant, on the basis of the interim order passed by this Court, has worked in Smt. Sukhdevi Balika Uchchattar Madhyamik Vidyalaya, Etawah and also got salary for such period. The authority shall take into consideration liberally as to whether the said amount which the writ-petitioner-appellant has already got, can be waived because she has also worked on the basis of the interim order passed by this Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.8.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 42079 of 2001

Neel Kamal Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Kumar

Counsel for the Respondents:
Sri Krishna Kumar
Sri B.L. Shukla
Sri Anshu Chaudhary
S.C.

Kanpur University-Section 21.03 first statute of class IV employee-appointment to be made by Principal after obtaining the approval from Director who has to pass appropriate order within 2 months.

Held: Para 21

As per the requirements of section 21.03 of the first statutes of Kanpur University, prior approval is necessary before appointment by the authority and no illegality has been committed in denying the approval to the selection of the petitioner. Further the rejection of the approval order has been issued after giving full and proper opportunity to the College authorities who were competent to challenge the order in question. The applicant is required to be appointed just again the same category and the case of the sweeper is of other than the S.C. category. After enforcement of the Act no. 4 of 1994, the G.O. has been superceded as these facts are taken cognizance by the Act itself, which is also in conformity to schedule I annexed along with Act of 1994, which is for the backward class category.

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

Heard counsel for the parties and perused the record.

2. This writ petition arises out of an order-dated 29.9.2001 passed by the Regional Higher Education Officer, Kanpur Nagar.

3. By the aforesaid impugned order the approval to the appointment of the petitioner as class IV employee (Book Lifter) in the Laxmi Yadunandan Degree College, Kayamganj, Farrukhabad has been refused.

4. The Laxmi Yadunandan Degree College, Kayamganj, Farrukhabad is a non-government Aided Degree College, affiliated and is governed by First Statute of Kanpur University, U.P. State Universities Act, 1973 and the Government orders issued from time to time.

5. As per the first statute of University of Kanpur an appointment for the post of Class IV in a college, is to be made by the Principal of the College after making selection, the principal of the college is required to take approval of the selection so made from the Director of Higher Education or an officer authorized by him. After verifying and satisfying the facts that all the formalities of selection have been complied by the principal in fair manner and rules relating to reservation have been followed, order of approval or disapproval is communicated. The provisions of Section 21.02 and 21.03 are as follows:

21.02 (1) Subject to the provisions of these Statutes the appointment to the posts referred to in Statute 21.03 shall be made by the Management of the College and appointment to the posts of Class IV employees shall be made by the principal.

(1) The appointment authority referred to in clause (1) shall have the power to take disciplinary action and award punishment against the class of employee of which he is appointing authority.

(2) Every decision of the appointing authority referred to in clause (2) shall, before it is communicated to the employee, be reported to the District Inspector of Schools and shall not take effect unless it has been approved by him in writing Provided that nothing in this clause shall apply to any termination of service on the expiry of the period for which the employee was appointed;

Provided further that nothing in this clause shall apply to an order of suspension pending inquiry, but any such order may be stayed, revoked or modified by the District Inspector of Schools.

(3) An appeal against the order referred to in clause (2) and (3) shall lie to the regional Dy. Director of Education.

21.03 (1) Appointment to the post of librarian, Deputy Librarian, Physical Education Instructor, Pharmacist, Routine Grade Clerk on any other post either in the pay scale of, or in pay scale hi9gher than that of, Routine Clerk other than the posts mentioned in clause (2) or clause (3) shall be made by direct recruitment of the recommendation of Selection Committee in the manner provided in clause (6) after advertisement of the vacancy in the newspaper:

Provided that the post of Librarian shall be filled by promotion from the post of Deputy Librarian if the incumbent of the latter post possesses the prescribed minimum qualification for the post of Librarian;

(3) Appointment to the post of Head Clerk cum Accountant, Head clerk, officer superintendent and bursar shall be made by promotion according to seniority subject to suitability and fitness from amongst the existing employees having required qualification and appointment to the posts of head clerk cum accountant, Head Clerk, Officer superintendent and bursar may be made by direct recruitment on the basis of selection after advertisement of the vacancy in newspapers.

(3) Appointment of employees shall be subject to the approval of the Director of Education (Higher Education), or an officer authorized by him in this behalf. If the approving authority does not within two months from receiving the proposal intimate its disapproval or does not sent in respect of such proposal, any intimation. To the appointing authority the-approving authority shall be deemed to have approved the appointment.

(4) (a) The selection committee for appointment to the post of librarian, Deputy Librarian or Physical Training Instructor, Deputy Librarian or Physical Training Instructor shall consists of :-
(i) The head of the management or a member of the management nominated by him, who shall be the chairman,
(ii) The principal of the College;

(iii) One officer to be nominated by the Direct of Education (Higher Education).
(b) The selection committee for the appointment to the remaining posts referred to in clause (1) or clause (3) either by direct recruitment or by promotion shall consist of:

6. A perusal of the statutes aforesaid, shows, that once selection process is completed and papers are sent for approval, it is for the Regional Higher Education Officer, respondent no. 2 to pass appropriate order within two months time.

7. It is submitted by the petitioner that though quarry was made on 24.5.2001 as has also been admitted by the authority, but the orders disapproving the appointment of the petitioner were not passed within two months as required under statute 21.07 of the Kanpur University and as such the impugned order dated 29.9.2001 is illegal and without jurisdiction.

8. The facts of the case in brief are that the post aforesaid occurred on account of promotion of one-class IV employees. On 17.1.2001 the sanction for filling up the post was granted by respondent no. 2 and a list of eligible candidates was requisitioned from the Employment Exchange in pursuance thereof. Apart from above the post is also said to have been advertised in daily newspaper i.e. Aaj so as to get the best candidate for the said post. The petitioner was selected and his papers were sent by the principal on 8.4.2001 for approval from respondent no. 2.

9. Some objections were raised by the respondent no. 2 that reservation of Schedule Caste Quota was not filled. The objections were replied by the principal by means of letter dated 13.8.2001. Respondent no. 2 vide letter dated 29.2.2001 disapproved the appointment of the petitioner on the post of Class IV employee. He also referred to G.O. dated 5.6.1987 in which sweeper was shown as separate post to class IV post. This G.O. appears to be applicable to corporation only and not to Degree College.

10. In the impugned order dated 29.9.2001 respondent no. 2 also stated about Government order dated 5.6.82 in which sweeper is a Class IV employee. This appears from Government Order dated 14.3.1984 appended as annexure II to the writ petition, which shows that the post of Sweeper is included in the Class IV employee in a college.

11. As per notification dated 29.3.1994 for the purpose of appointment of Class III and IV posts, a roster list is also to be prepared by the officer of the appointing authority and all the appointments are to be made in accordance with that roster system of poster.

12. A perusal of roster-dated 29.3.1994 (annexure 12 to the writ petition) shows that serial no. 12 is a non-reserved point, which is to be filled up by the candidates of General Category. There are eleven posts of class IV employees sanctioned in the college out of three post are for reserved categories and two for General Category and 50 percents of the seats are to be filled up by the reserved category i.e. ST/SC/OBC etc by the General Category candidates. In the supplementary affidavit filed by the petitioner it is averred that roster points

available for General category are 6,8,10,12. Sri Shyam Lal, Class IV employee belongs to Schedule Caste category while seven others belong to O.B.C. category. Sri Vivek Kumar and Anil Kumar are working in the General Category.

13. The attention of the Court is drawn to the annexure 2 and 3 filed alongwith supplementary affidavit perusal of which shows that one vacancy of class IV was advertised in the year 1999 against which one O.B.C. candidate was appointed.

14. It is submitted that the petitioner belonging to General Category has rightly been selected and appointed against the roster point number 12 under General Category.

15. The counsel for the petitioner states that papers for the approval of the petitioner for the appointment of the of Class IV employee were sent without properly applying the reservation quota and roster system. It is submitted on behalf of the respondent that a query was made by the Regional Higher Education Officer vide letter dated 24.5.2001 regarding approval of selection. The principal vide letter dated 11.6.2001 sent reply, that no General candidate was available at that point of time. The reply was found satisfactory by respondent no. 2 and again he made a query vide letter-dated 1.8.2001 about the present position of reservation quota and roster system from the college. In response the college by letter dated 13.8.2001 stated that there were 11 class IV employees working in the college and their present position was as under:-

A. General – 06
B. O.B.C. – 03
C. S.C. – 03

16. These aforesaid posts do not include post of Sweeper, as it is not included in reservation and roaster system. That on the basis of above statement, against the 12th post of Class IV, the implemented in accordance with reservation Act, 1994. But the College has proposed the appointment in the following order of reservation quota.

General – 03
O.B.C. – 07
S.C. – 01 (+1=2)
(Total 12 posts including the post of Sweeper)

17. It is further submitted that the post of sweeper is not included in reservation and roaster system. On the aforesaid basis it is submitted that the order passed by the Regional Higher Education Officer was fair and legal and there is no violation in denying the approval of the selection to the petitioner as the 12th post in aforesaid circumstances was to be filled by a candidate of S.C. and the appointment of the petitioner against the post of reserved category was not proper.

18. The qualification and conditions of services of non-teaching staff of the College of Kanpur University are contained in the first statute of the University.

19. Counter affidavit has been filed by the Regional Higher Education Officer, Kanpur Nagar, in which it is averred that the state Government, passed U.P. Act No. 4 of 1994 for the upliftment

of financial and social condition of the weaker section of the society and also order dated 15.11.1994 has also been issued by the state Govt., providing that all appointment in the Universities and colleges, shall be made in accordance with the aforesaid U.P. Act no. 4 of 1994.

20. Thus is in the nutshell, the arguments of the respondent are that the selection was not in contravention of the provisions of U.P. Act No. 4 of 1994 and notification dated 29.3.94 as well as read with G.O. dated 15.11.94.

21. As per the requirements of section 21.03 of the first statutes of Kanpur University, prior approval is necessary before appointment by the authority and no illegality has been committed in denying the approval to the selection of the petitioner. Further the rejection of the approval order has been issued after giving full and proper opportunity to the College authorities who were competent to challenge the order in question. The applicant is required to be appointed just again the same category and the case of the sweeper is of other than the S.C. category. After enforcement of the Act no. 4 of 1994, the G.O. has been superceded as these facts are taken cognizance by the Act itself, which is also in conformity to schedule I annexed along with Act of 1994, which is for the backward class category.

22. From the record and the contention of parties it is apparent that 12 posts are required to be filled as per roster point no. 6. The averments made in paragraph 15 of the writ petition are uncontroverted. It is clear that the authority had not given any opportunity to the petitioner. Making an enquiry from the University does no amount to giving an opportunity to the person who was being visited by civil consequences due to illegal termination of his service, By the impugned order dated 29.9.2001.

23. That the respondent no. 2 without any basis raised objection and disapproved the selection of the petitioner. The G.O. dated 5.6.82 only states that list of class IV employee of the schedule caste will be divided into two parts firstly class IV employee in which the sweepers are not included and secondly class IV employee included in only sweepers list. Shyam Lal belonged to S.C. category, not counting the candidature of sweeper within the Scheduled caste. At the same time another default is made, as sweeper has not been shown in any other category. The counting of roster in this manner is faulty and deserves to be rejected.

24. In view of the aforesaid facts and position of law, the writ petition is allowed. The impugned order dated 29.9.2001 is quashed. Respondent no. 1 is directed to approve considering of the appointment of the petitioner within a period of one month from the production of a certified copy of the order No. order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2003

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

Civil Misc. Writ Petition No. 1384 of 1999

Rajendra Singh Yadav ...Petitioner
Versus
Inspector General of Police, C.R.P.F., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri J.S. Tomar

Counsel for the Respondents:
Sri M.P. Shukla
Sri Chandra Prakash
S.C.

Constitution of India-Article 226-C.R.P.F. Act 1949 -Sec.-11(1)-Service law-absence from duty-Dismissal order maintained in appeal and revision also-whether punishment is too hares? Held-willful absence from duty without valid reason is a serious misconduct in the force-dismissal from service held proper.

Held-Para 10

That it is the disciplinary authority to pass appropriate punishment, the civil court or appellate authority cannot substitute its own view to that of the finding of disciplinary authority imposed on the delinquent official on the nature of punishment. The court is also not to sit over the finding of the disciplinary authority in view of the (1997) 7 SCC 463 (Union of India and another v. G. Ganayantham) and also (1998) 9 SCC 220 (U.P. SRTC v. Har Narain and others).

Case law discussed:
1993 (1) UPLBEC 488
1997 (6) SCC 381
1997 (7) SCC 463
1998 (9) SCC 220

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

1. Heard Sri J.S. Tomar learned counsel appeared on behalf of the petitioner as well as learned Standing Counsel appeared on behalf of the respondent.

2. In this petition the orders dated 9.12.1997 and 4.12.1998 passed by the respondents dismissing the appeal and the revision against the dismissal from service was challenged by the petitioner.

3. It appears that the petitioner while functioning as Constable in 46 Bn. CRPF during Dec. 94 committed an act of misconduct in his capacity as a member of the Force U/s 11 (1) of CRPF Act 1949 in that he after being relieved by GC, CRPF Rampur (U.P.) on transfer to this Unit on 2.12.94 (AN) permission to avail 7 days casual leave and did not report in the unit and absented himself from duties w.e.f. 15.12.94 (FN) till ordering of D.E. without any information/permission from the competent authority. Sri Surjeet Singh D/C of 46 Bn, CRPF was appointed as enquiry officer to enquire into the charge framed against Ex. Ct. Rajendra Singh Yadav. A full fledged enquiry was conducted and he was given full opportunity to defend his case but he did not produce any evidence/documents in his support. On the basis of evidence adduced during the course of enquiry, the articles of charges framed against him was proved beyond any shadow of doubt. As a result of Departmental enquiry the disciplinary authority i.e. Commandant 46 Bn CRPF has relied upon the enquiry report, found Ex Ct. Rajendra Singh Yadav not a fit person to be retained in the Force and passed the order of dismissal of said Ex. Const. from service w.e.f. 9.9.95.

4. Aggrieved with the orders of punishment of dismissal from service No. 880820521 Ex. Ct. Rajendra Singh Yadav preferred an appeal dated 6.6.97 to the DIGP, CRPF, Rampur (U.P.) against the aforesaid order of Commandant 46 Bn CRPF. The appellate authority i.e. DIGP, CRPF, Kanpur (U.P.) considered the appeal of the said individual and rejected

the same vide his office order No. R-XIII-1/97-dated 9.12.97 after due consideration.

5. Aggrieved with the order of the appellate authority i.e. DIGP, CRPF, Rampur (U.P.) said Ex. Ct. Rajendra Singh Yadav moved to High Court of Allahabad for redressal of his grievance and filed Writ Petition No. 27601/98. Since the provisions of revision petition is provided under 20 of the CRPF Act and Rules 1955 against the orders passed, in the appeal, the High Court Allahabad dismissed W.P. filed by said Ex. CT on the ground of alternative remedy. Following the courts judgment given in his w/p Ex. Ct. Rajendra Singh Yadav submitted a revision petition.

6. However, after going through the entire service career of the petitioner the Inspector General of Police CS CRPF Lucknow (U.P.) respondent no. 1 rejected the revision of the petitioner vide its order dated 4.12.1998. In the impugned order it was mentioned that the petitioner did not produce medical certificates during the course of D.E. which he failed to do so for the reasons best known to him. However it is noticed that as per Photocopy of medical certificate the petitioner remained admitted in Hospital w.e.f. 13.12.94 to 22.7.95 whereas he was arrested by the Addl. DIGP, CC, CRPF, Rampur (U.P.) on 22.7.95 from quarter No.18 Type-I special GC, CRPF, Campus Rampur, this shows that the medical certificate is either false or fabricated. The date/year of Medical certificate is also tampered at two/three places and it has not been attested by the CMO.

7. The revisional authority has also noticed on the contention of the petitioner that he was not given full opportunity to defend his case and to produce evidence/documents in support of illness is not tenable as he was given full opportunity to defend his case but he did not submit any documents/oral evidence during the course of enquiry. Accordingly the respondent no. 1 affirmed the order of the appellate authority affirming the view taken by the disciplinary authority and dismissed the revision by its order dated 4.12.1998.

8. In the counter affidavit it has been submitted that the petitioner was absent from duty w.e.f. 15.12.94 till arrested by the Addl. D.I.G.P. Group Centre, C.R.P.F. Rampur on 20.7. 1995 from his quarter in Group Centre C.R.P.F. Rampur. He was released from judicial custody from 25.7.1995 and placed under suspension to face the departmental enquiry ordered against him. He did not produce any evidence about his treatment in District Hospital Budaun in his defence during the course of departmental enquiry. Hence his contention in this regard is not tenable. As such according to the respondent the petitioner was unauthorisedly absent without any permission from 15.12.1994 till he was arrested on 20.7.1995. Willful absence from duty without valid reasons is a serious misconduct in the Force and deserves dismissal under section 11 (1) of C.R.P.F. Act 1949.

9. Learned counsel for the petitioner has relied upon the judgment of this court passed is Writ Petition No. 0415 of 1998 Mirza Barkat Ali v. Inspector General of Police, Allahabad and others on May 24, 2002, where the punishment was found to be too harsh and the respondents were directed to reconsider for awarding lessor punishment. Mr. Mirza Barkat Ali was

not arrested for alleged absence from duty. The writ petitioner had endeavor to give proper explanation along with medical certificate of the C.M.O. as such the decision of Mirza Barkat Ali is not applicable in the present facts and circumstances of the present case. The petitioner also relied on the judgment of Shamsher Bahadur v. State of U.P. and others reported in (1993) 1 UPLBEC 488. In the aforesaid facts and circumstances this case is also not applicable in the present case.

10. In (1997) 6 SCC 391 (State of Punjab and others Vs. Bakhshish Singh) the Supreme Court held that it is the disciplinary authority to pass appropriate punishment, the civil court or appellate authority cannot substitute its own view to that of the finding of disciplinary authority imposed on the delinquent official on the nature of punishment. The court is also not to sit over the finding of the disciplinary authority in view of the (1997) 7 SCC 463 (Union of India and another v. G. Ganayantham) and also (1998) 9 SCC 220 (U.P. SRTC v. Har Narain and others).

11. In view of the above observation the disciplinary authority and the reviewing authority in reference to the direction given by this court has decided the revision correctly, there is no scope of any interference in these findings.

12. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2003

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 28029 of 2003

Laxmi Kant ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri M.P. Sinha

Counsel for the Respondents:
Sri Sudhakar Pandey
S.C.

Indian Limitation Act-Section 5 read with U.P. Consolidation of Holdings Act, Section 11 (1)-appeal alongwith delay condonation application-S.O.C. Condoned the delay and on merit remanded the case for fresh decision-High Court declined to interfere-the petitioner will get opportunity to say on merit-

Held- Para 8
In view of the aforesaid discussion, it is clear that no error has been committed by the Settlement Officer of Consolidation in deciding both questions of condonation of delay as well as on merit. The matter having only been remanded to Consolidation Officer, the petitioner will have opportunity to lead his evidence and will have his say on merits. The impugned orders do not call for any interference in exercise of jurisdiction under Article 226 of Constitution of India.

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

1. Heard Sri M.P. Sinha, counsel for the petitioner and Sri Sudhakar Pandey

learned counsel appearing for the contesting respondents.

2. By this writ petition, the petitioner has prayed for quashing the order dated 11th March, 2003 passed by Deputy Director of Consolidation and the order dated 17th January, 2001 passed by Settlement Officer of Consolidation.

3. Brief facts of the case as given in the writ petition are; consolidation operation started in the village. An order was passed by Assistant Consolidation Officer on the basis of compromise regarding share of the parties on 2nd October, 1988. An appeal was filed against the said order by the contesting respondents under Section 11 (1) of U.P. Consolidation of Holdings Act, application was also filed under Section 5 of Indian Limitation Act by the appellants praying for condonation of delay in filing the appeal. Objection was filed by the petitioner stating that appeal is barred by time and should be rejected. The Settlement Officer of Consolidation by order dated 17th January,2001 condoned the delay in filing the appeal, set-aside the order of Consolidation Officer and remanded the case to Consolidation Officer for deciding the case after giving opportunity to the parties to lead evidence. Against the said order dated 17th January,2001, revision was filed by the petitioner which has been dismissed by Deputy Director of Consolidation vide his order dated 11th March,2003.

4. The counsel for the petitioner challenging the order of Settlement Officer of Consolidation contended that Settlement Officer of Consolidation having not condoned the delay in filing the appeal, has no jurisdiction to decide the appeal on merits. It was contended that Settlement Officer of Consolidation could not have even considered the question of delay at the time of hearing of appeal on merit. Reliance was placed by counsel for the petitioner on judgment of this Court in 1990 RD 243; ***Smt. Munaki Devi and another Vs. Deputy Director of Consolidation, Azamgarh and others.***

5. Learned counsel appearing for the contesting respondents contended that Settlement Officer of Consolidation did not commit any error in deciding the question of delay as well as appeal on merit by composite order. It was further contended that Settlement Officer of Consolidation condoned the delay in filing the appeal and thereafter allowed the appeal on merit.

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

7. From the perusal of the order of Settlement Officer of Consolidation dated 17th January, 2001, it is clear that Settlement Officer of Consolidation has specifically given the benefit of Section 5 of Limitation Act in appeal. Delay having been condoned by Settlement Officer of Consolidation in filing the appeal, no error has been committed by Settlement Officer of Consolidation in deciding the appeal on merits. The judgment of this Court in ***Munaki Devi's*** case (supra) do not lay down any proposition that application under Section 5 of the Limitation Act cannot be decided while hearing the appeal, it has only been observed that appeal shall be disposed of on merits only when Section 5 application is allowed. This Court has considered the aforesaid ***Munaki Devi's*** case (supra) in a

recent judgment in 2003 (1) CRC 249; ***Abdul Karim Vs. Deputy Director of Consolidation, Basti and others*** and taken the view that no error was committed by appellate authority in considering the question of limitation as well as merits together. Following was laid down by this Court in paragraph –7 of the aforesaid judgment:-

*"**7.** So far as the submission of learned Counsel for the petitioner that the application under Section 5 of Limitation Act should have been decided by the appellate authority first before proceeding on merits and the appeal was not to be entertained as it was not accompanied by an application under Section 5 of Limitation Act, also merits dismissal. A perusal of the memo of appeal which has been filed by the opposite party which has been brought on record as Annexure 5 to the writ petition clearly indicates that in the memo of appeal itself, explanation has been offered for filing appeal after Director of Education-notification and a specific prayer at several places besides in the prayer clause has been made that the appeal be allowed after giving benefit of Section 5 of Limitation Act and thus the submission that no separate application has been filed in this respect, being too technical on the facts, cannot be accepted. The other submission that the appellate authority was required to decide the question of delay condonation first, also cannot be accepted as the Deputy Director of Consolidation has clearly directed that the appellate authority will decide the question of limitation as well as merits together after hearing the parties. In the event, appellate authority finds that the appeal is barred by time and there is no proper explanation, then there may not be any question of adjudication on merits and, therefore, there appears to be no harm if the appellate authority is permitted to hear the arguments on both aspects together, i.e., the question of limitation as well as merits. The aforesaid exercise will save the time of the Court as well as of both parties. The appellate authority can only proceed on merits when the delay in filing appeal is condoned and thus in the event, the judgment of the appellate authority goes against the petitioner on both issues, i.e. on merits and the limitation, it will be open for him to challenge the same before the revisional authority on both counts. On the facts, this Court finds that in the event the authority is directed to decide only the question of limitation first then in view of the decision either way, it will lead to multiplicity of proceedings, i.e., taking the matter to the higher forum which may not be in the ends of justice."*

Another judgment of this Court which has taken the same view is 1998 R.D. 118; ***Sajjan Kumar Vs. Deputy Director of Consolidation, Muzaffar Nagar and others.*** It was held by this Court in paragraph 4 of the said judgment:-

*"**4.** There is, however, no bar that the authority concerned cannot hear the arguments on the application filed for condonation of delay as well as on the merit of the case. In case the delay is not to be condoned the authority concerned may reject the application. If however, the authority concerned finds that the application for condonation is to be allowed, it can decide the case on merit."*

8. In view of the aforesaid discussion, it is clear that no error has been committed by the Settlement Officer

of Consolidation in deciding both questions of condonation of delay as well as on merit. The matter having only been remanded to Consolidation Officer, the petitioner will have opportunity to lead his evidence and will have his say on merits. The impugned orders do not call for any interference in exercise of jurisdiction under Article 226 of Constitution of India.

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

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.7.2003

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No.1830 of 1973

Sita Ram ...Petitioner
Versus
Deputy Director of Consolidation, Jaunpur and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri S.N. Singh

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

U.P. Consolidation of Holdings Act-S. 3 (5)- U.P. Zamindari Abolition and Land Reforms Act, 1951-S.143-'Land'-Meaning of -Inference drawn by D.D.C. that land in question was abadi on the basis of statement of Counsel that there was pucca well, Sehan etc.- held, illegal.

Held-Para 8

From the facts stated above it is clear that the only basis on which an inference was drawn by the Deputy Director of Consolidation that the land in question was abadi was a statement made by the learned counsel for the respondents that there was pucca well, charani and sehan. I have considered the definition of 'land' in the aforesaid section and it does not appear that the disputed plot would cease to be land within the meaning of Section 3 (5) of the Act.

Case law:
1979 R.D. 78

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

1. Heard Sri S.N. Singh, learned counsel for the petitioner and Sri Sankatha Rai, learned counsel for the respondents.

2. In the basic year the name of the petitioner was recorded over the disputed plots. Objections were filed by the respondents Ram Nath and others before the Consolidation Officer claiming the sole sirdari right as heirs of Buddhu. The case of the respondents was that Buddhu was recorded over the land in dispute since the year 1309 fasali and the name of Ambar son of Buddhu continued to be recorded in 1333 fasali and it was for the first time in 1349 fasali that the name of Puddhu the father's father of the petitioner was recorded. The respondents allege that the name of Puddu from the branch of the petitioner was wrongly recorded. Oral evidence was led by both the parties. The Consolidation Officer by order dated 25.6.1970 allowed the objection of the contesting respondent and directed that the entry of the name of Sita Ram, the petitioner be expunged. On appeal filed by Sita Ram the Settlement Officer of Consolidation reversed the decision. The Settlement Officer of Consolidation relied upon the fact that consistently from 1358 fasali the petitioner was recorded over the land in

dispute. He also placed reliance upon Khasra entries of 1361 to 1370 fasali. The Settlement Officer of Consolidation recorded the finding that Ram Nath and others could not establish their possession over the disputed plots. On revision filed before the Deputy Director of Consolidation by Ram Nath and others the Deputy Director of Consolidation set aside the findings of the Settlement Officer of Consolidation. He recorded the finding that for the first time in 1349 fasali the name of Puddhu came to be recorded and before 1349 fasali the entries were in favour of the branch of the respondents. He found it established that the respondents were in possession. In order to arrive at that finding the Deputy Director of Consolidation relied upon an admission made by Sita Ram that he has nothing to do with the land of Buddhu. He also relied upon the fact that the petitioner was a resident of village Dharamdaspur whereas the land in dispute is situate in village Paltupur. The Deputy Director of Consolidation held that the name of Puddhu the grand father of the petitioner was recorded on account of confusion arising out of similarly of his name with that of Buddhu. The Deputy Director of Consolidation also found that there was abadi upon the disputed land. For arriving at that finding he placed reliance upon the argument of the counsel of the respondents Ram Nath that the land in question forms part of their Sahan and there exists charani and pucca well thereupon and it is a form of abadi. The Deputy Director of Consolidation directed therefore that the name of Sita Ram be expunged and the land in dispute be recorded as abadi.

3. Sri S.N. Singh, learned counsel for the petitioner submitted that the finding of the Deputy Director of Consolidation on the question of possession is perverse and has been arrived at without considering the materials that was filed by the petitioner and relied upon by the Settlement Officer of Consolidation. He referred to the Khasra entries of 1361 to 1370 fasali and also upon the entry of 1358 and 1349 fasali. It was submitted by Sri Singh that the oral evidence of the parties has not been considered by the Deputy Director of Consolidation at all nor he has considered the irrigation receipts filed by the petitioner. Having considered the submission of the learned counsel for the parties it does appear that the Deputy Director of Consolidation failed to take into account the irrigation receipts and effect of long standing Khasra entries 1358 to 1370 fasali. The Deputy Director of Consolidation has also relied upon the admission made by the petitioner that he had nothing to do with the land of Buddhu. It is well settled that an admission in order to bind a party must be unequivocal. A statement that a party has nothing to do with the land of the other party can not be an unequivocal admission, that the disputed land belongs to the other party. Such a statement is not the admission of the claim of title of the other party. The Deputy Director of Consolidation has also not considered the oral evidence. In the circumstances the finding on possession recorded by the Deputy Director of Consolidation can not be sustained as it is vitiated for non-consideration of the materials on the record.

4. With regard to the existence of abadi a submission was made by the learned counsel for the petitioner that once the Deputy Director of

Consolidation recorded the finding that it was abadi he should have laid his hands off the case and should have directed the maintenance of the basic year entry. Reliance was placed upon 1979 R.D. 78, Kamla Shanker and others Vs. Deputy Director of Consolidation and others in support of this proposition that where the Consolidation Authority finds after spot inspection that there was abadi it should not decide the question of title but ought to direct the entry to that effect in Column 24 of C.H. Form No. 2-A.

5. It appears that the finding, which the Deputy Director of Consolidation has recorded that the land in question is abadi is not based upon spot inspection. The findings have been arrived at only on the basis of the statement made by the learned counsel of RamNath the respondent that there was a pucca well, charani and sehan upon the land in dispute. To determine whether these items are land it is necessary to examine the definition of 'land' under Section 3 (5) of the U.P. Consolidation of Holdings Act which is much wider than its definition in Section 3 (14) of the U.P. Zamindari Abolition and Land Reforms Act. It is extracted below;

"5" Land means land held or occupied for purposes connected with agriculture, horticulture and animal husbandry (including pisciculture and poultry farming) and includes-
(i) the site, being part of a holding, of a house or other similar structure; and
(ii) trees, wells and other improvements existing on the plots forming the holding."

6. This definition indicates that a 'well' as well as site of a house is covered within the definition of 'land'. None of the items referred to by the Deputy Director of Consolidation can be excluded from this wides definition of land and on the basis of these items no inference could have been drawn that the property was abadi.

7. Learned counsel for the respondents also placed reliance upon Section 142 of the U.P. Zamindari Abolition and Land Reforms Act and submitted that under the said provision it was open to a Bhumidhar to build a house and unless there was a declaration under Section 143 of the Act the land could not be treated as 'abadi'. Reliance is also placed upon the decision in 1983 Allahabad Law Journal 388 Indrajeet Singh Vs. Sardar Arjun Singh and others wherein it has been held that the Consolidation Authorities are entitled to decide the question of title in respect of land and even if constructions are raised unless a declaration under section 143 Zamindari Abolition of Land Reforms Act is obtained it would not cease to be land and would continue to be part of the holding of a tenure holder and recorded as 'abadi shamil jot' and it would be open to the Consolidation courts to decide the title. While Section 142 of the Zamindari Abolition of Land Reforms Act allows a bhumidar to use his land for any purpose it allows a sirdar to use it for purposes connected with agriculture and not for any purpose. A declaration under section 143 can be made only in respect of bhumidari and not sirdari land. If a sirdar uses his land for any purpose other than that permitted under Section 142 his interest would be extinguished under Section 190 of the U.P. Zamindari Abolition and Land Reforms Act as it then stood. We are here concerned with a khata, which was then a

sirdari khata. The decision cited is therefore distinguishable.

8. From the facts stated above it is clear that the only basis on which an inference was drawn by the Deputy Director of Consolidation that the land in question was abadi was a statement made by the learned counsel for the respondents that there was pucca well, charani and sehan. I have considered the definition of 'land' in the aforesaid section and it does not appear that the disputed plot would cease to be land within the meaning of Section 3 (5) of the Act.

9. In the result, the writ petition is allowed and the orders of the Deputy Director of Consolidation, Jaunpur dated 29.6.1971 and 30.1.1973 are quashed. The case is sent back to the Deputy Director of Consolidation, Jaunpur who is directed to consider the question of title and possession afresh in the light of the observations made above.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 30848 of 2001

Saleem Akhtar Khan ...Petitioner
Versus
Vice Chancellor, Aligarh Muslim University Aligarh and another ...Respondents

Counsel for the Petitioner:
Sri Ch. N.A. Khan
Sri S.A. Khan (In Person)

Counsel for the Respondents:
Sri Dilip Gupta
Sri Arun Pundir
Sri Arun Kumar
S.C.

Constitution of India Article 226 Service Law Promotion -The Post of Assistant (Administration) in various department of A.M.U. -D.P.C. not recommended-some person having less qualification and junior promoted-once participated can not be allowed to challenge the validity.

Held Merely because not selected can not turn around and challenge the selection process after participation -no malice established-petition dismissed.

Held- Para 15

Admittedly, the petitioner has not been found fit by the Selection Committee. The petitioner had participated in the written test and had also appeared before the D.P.C., but his name was not recommended by the D.P.C. and has therefore, not been promoted. Merely because he was not selected, he cannot turn around and challenge the selection process after participation in the selection. No malice could be established against the members of the Selection Committee.

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

1. Heard the petitioner in person and the Standing Counsel.

2. The present writ petition has been filed by the petitioner challenging the office memo dated 21.07.2001, by which the departmental Promotion Committee (DPC) has not recommended the petitioner and has recommended 39 other persons for appointment as Assistant (Administration) in various Departments of the University.

3. The petitioner was appointed on 13.02.1985 by the General Selection Committee on the post of U.D.C. The grievance of the petitioner is that since 1985 he has not been promoted on the post of Assistant (Administration), even though he has put in more than 18 years of service. He alleges that vide order dated 31.03.1998 eighty applications were invited for considering the case of promotion of candidates by the D.P.C. In pursuance thereof, the petitioner submitted duly filled up proforma on 04.04.1998.

4. The petitioner submits that the Assistant Registrar (Administration) had sent letters on 07.06.2001 for test and interview for the post of Assistant (Administration). Assistant Registrar was interested, but the petitioner was not coming in the eligibility criteria alleging malafides against the Assistant Registrar. He states that on 25.06.2001 another letter was issued in which some juniors, who are having less qualification, were called during the period 03.07.2001 to 05.07.2001 and thereafter a select list was published on 21.07.2001. He states that his name at serial no. 6 of the select list was removed from the list and was substituted by one Liyakat Ali.

5. The other contention of the petitioner is that the persons at serial no. 9, 27, 30 and 34 in the select list are having qualification of only P.U.C. for the post of A.F.A. with eight years on probation on the post of U.D.C. which is also given in the proforma annexed as Annexure-1 to the writ petition. He further states that the employees at serial no. 31 to 38 do not have any experience of five years on the post of U.D.C. He also states that incorrect facts have been given in the counter affidavit that twelve employees alleged to have been working since 1992. They have only experience of three and a half years on the post of U.D.C.

6. Thus the contention of the petitioner in short is that the persons mentioned at serial no. 31 to 39 in the office memo dated 21.07.2001 had not completed five years on the lower post. In so far as the person mentioned at serial no. 9 is concerned he had passed P.U.C. Examination in 1968. He was eligible to be considered for promotion to the post of Assistant (Administration).

7. The counsel for the respondents states that qualification for the post of Assistant (Administration) a candidate should either possess a Bachelor Degree from a recognized University and he should have working experience for at least five years continuously in the next lower post of the concerned cadre or relaxation in approved qualifications should be given only for academic qualifications. If a candidate is Intermediate/P.U.C. and has worked for atleast eight years, he could also be considered for promotion. The relaxation in approved qualifications are annexed as Annexure-1 to the writ petition and are to be given upto the extent of next lower degree/certificate. Thus if a candidate is intermediate/P.U.C. and has worked for atleast eight years, he should also be considered for promotion.

8. It is also submitted that for promotion to the post of Assistant (Administration) seniority alone is not the criteria. He submits that the petitioner had appeared for the written test and also appeared before the D.P.C. his name was

not recommended by the D.P.C. and as such he was not promoted to the post of Assistant (Administration).

9. Rebutting the averment that the persons mentioned at serial No. 31 to 39 in the office memo dated 21.07.2001 are not eligible, as they have not completed five years in the next lower post. The detailed chart is given as follows:

Sl. No.	Respondent No.	Date of appointment as U.D.C.
31.	7	8.6.92
32.	8	1.10.92
33.	9	2.2.92
34.	10	1.4.93
35.	11	1.7.95
36.	12	6.11.95
37.	13	1.3.96
38.	14	1.6.96
39.	15	9.11.94

10. From the perusal of the above chart, it is apparent that these persons have worked as U.D.C. and have completed more than five years in the next lower post.

11. In so far as the candidates mentioned at serial no. 17 to 30 are concerned, it is submitted that they had passed the P.U.C. Examination in the year 1968 and it is wrongly stated by the petitioner that they are only High School. Having passed P.U.C. Examination in the year 1968, they were eligible to the post of Assistant (Administration) in view of the relaxation as they had worked as U.D.C. for more than eight years as U.D.C.

12. Sri Dilip Gupta, counsel for the respondents has argued that the persons mentioned at serial no. 9, 17 and 30 were appointed on the post of U.D.C. on 04.08.1989 and 11.09.1991 respectively.

13. The counsel for respondents further submits that the promotion have been made to the post of Assistant (Administration) in accordance with law and all the averments to the contrary are incorrect and the recommendations of an expert like the Selection Committee should not be normally interfered with by the High Court in exercise of its writ jurisdiction. He also submits that no material has been placed before this Court by the petitioner by which malafide could be established. Reliance has been placed on the decisions of the Apex Court in 2000(2) ALR 606, Dr. Angshula Sarkar Vs. State of U.P. and others, in AIR 1990 SC 434, Dalpat Abasaheb Solanki Vs. B.S. Mahajan and in (1997) 3 SCC 124, Osmania University Vs. Abdul Rayees Khan and another, wherein the Apex Court has held that the Court has found it not necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the merits of the candidates. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates.

14. Lastly, it is submitted by the counsel for the respondents that the petitioner has an alternative remedy of filing an appeal to the Executive Council under Section 36-B of the Aligarh Muslim University Act, 1920 as amended from time to time and also a representation to the visitor of the University under Section 13 (6) of the aforesaid Act.

15. Admittedly, the petitioner has not been found fit by the Selection Committee. The petitioner had participated in the written test and had also appeared before the D.P.C., but his name was not recommended by the D.P.C. and has therefore, not been promoted. Merely because he was not selected, he cannot turn around and challenge the selection process after participation in the selection. No malice could be established against the members of the Selection Committee.

16. The writ petition, therefore, fails and is dismissed. However, looking at the long service of the petitioner, it is directed that his case in the next P.U.C. Examination be considered sympathetically. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.8.2003

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

Civil Misc. Writ Petition No. 525 of 1997

Smt. Pavitra and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri R.N. Singh
Sri A.K. Rai
Sri A.P. Sahi
Sri P.K. Singh

Counsel for the Respondents:
Sri A.K. Banerjee
Sri R.M. Pandey
S.C.

U.P. Imposition of Ceiling on Land Holdings Act- Section 11 (2)- objection u/s 11 (2) Rejected-without notice-held-mere their substitution in earlier proceeding under section 10 (2) of the Act finalized-objection under section 11 (2) of the Act lying his independent claim held to be permissible even at the instance of unrecorded tenure holder-Petition allowed and matter remitted back to the prescribed authority for passing fresh order.

Held-Para 11

Section 10 (2) of the Act is finalized and person files objection under Section 11 (2) of the Act laying his independent claim, which has been held to be permissible even at the instance of unrecorded tenure holder. Accordingly this is clear that so far finding given in any earlier proceedings are concerned on any particular issue that is always there but at the same time if a person files objection under section 11 (2) of the Act that is to be examined on the merits with whatever result on the merits i.e. either by rejecting the claim of the objector or by accepting it.

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

1. By means of this writ petition petitioners have challenged the judgment of the appellate authority and of the prescribed authority dated 19.12.96 and 16.9.96 (Annexures 8 and 6 respectively) by which petitioners application under section 11 (2) of the U.P. Imposition of Ceiling on Land Holdings Act, hereinafter referred to as the Act has been rejected.

2. There appears to be no dispute about the fact that proceedings under Section 10 (2) of the Act was started against one Data Ram. Petitioners who are although married daughters of Data Ram, referred above but they claim to be having; their independent rights on the basis of registered sale deed in their

favour dated 22.9.71 on the basis of which their names was also mutated on 14.1.72. In the proceedings under section 10 (2) of the Act land covered by the sale deed in favour of the petitioners was claimed for being excluded, but Data Ram could not succeed and the prescribed authority by its judgement dated 2.1.75 declared certain area as surplus. Having unsuccessful upto this court Data Ram took up the matter to the Apex Court. During pendency of the appeal before the Apex Court Data Ram died. It is claimed that although he left behind him Dayawati his widow as heir but by moving substitution application petitioners were also brought on record. Finally the Apex Court also dismissed the appeal by its judgment dated 14.11.95 by accepting the findings of the authorities that the agreement was manufactured. After dismissal of the appeal by the Apex Court it is on the premises that when Ceiling authorities intended to take possession from the petitioners then they came to know about the fact that their land is to be taken by virtue of declaration of land as surplus in the proceedings against Data Ram , they filed objection on 13.12.95 under Section 11 (2) of the Act which came to be rejected by the respondents 2 and 3 by judgments referred above against which petitioners have come up to this court.

3. Sri R.N. Singh, learned Senior Advocate assisted by Sri A.K. Rai, learned Advocates submits that as on 8.6.73 petitioners were recorded tenure holder and therefore if the statement in CLH form 3 includes the land ostensibly held in the name of any other person it was obligatory on the part of the State authority to serve notice on the petitioners as well in CLH form–1 together with the copy of the statement in CLH-3 calling upon him to show cause. It is argued that as this was not done which is mandatory on the part of the State Authority the entire proceedings by which land held by the petitioner has been declared as surplus is nullity and is void. It is submitted that premises on which the authorities have rejected petitioner's application that petitioners had knowledge of the proceedings by virtue of the fact that they were brought on record in the pending appeal before the Apex Court is totally mis conceived for the simple reason that bringing on record of the petitioners can be said to be only for the purpose of prosecution of the case and they cannot be expected to have any other say except to plead for the claim/rights of the parties/tenure holder for whom they have been substituted. Otherwise also they were substituted as heirs of the deceased but in the event if the petitioners have their independent rights in the land they can very well lay their claim as and when occasion arises. It is argued that as even the unrecorded tenure holder laying his claim to the land has been permitted by this court to file an objection under section 11 (2) of the Act, so far the petitioners are concerned they were recorded much before 8.6.73 and therefore they have every right to file their objection for consideration of their claim on the merits whatever it has worth either to be accepted or to be rejected, but the authorities cannot be permitted to refuse to entertain their claim and consider it on the merits.

4. Learned counsel for the petitioner in support of submission that in view of the 1st proviso of Rule 8 of U.P. Imposition of ceiling of Land Holdings Rules, 1961, hereinafter referred to as the

Rules, issuance of the notice to the petitioner was mandatory, has placed reliance on the decision given by full Bench of this court in case of **Shantanu Kumar vs. State of U.P. reported in 1979 ALJ, 1174.** In support of the submission that there may not be a presumption about knowledge to the person to whom notices were not issued even if he may be the son and even doing pairvi on behalf of the tenure holder reliance has been placed on the decision given by this Court in case of **Mahfuzul Rahman vs. State of U.P., reported in 1987 R.D, 239 and Hari Ram vs. Special Addl., District Judge, Faizabad and others reported in 1989 RD, 295**. In view of the aforesaid, it is submitted that judgment of the respondents 2 and 3 be quashed so that petitioners may get opportunity to get their claim adjudicated on the merits.

5. In response to the aforesaid submissions Sri A.K. Banerjee, learned Standing Counsel submits that as genuiness of the sale deed on the basis of which petitioners are laying their claim has already been adjudicated upto the Apex Court and it has not been found to be genuine transaction, petitioners are not entitled to get opportunity in the matter specially in view of the fact that they were brought on record in the proceedings before the Apex Court and they had full knowledge of the proceedings but they have never pleaded about their claim. It is further submitted that the respondents 2 and 3 has rightly taken the view that the contention of the petitioners that they could come to know about their factum of taking of their land on account of declaration of the land as surplus on 30.11.95 cannot be accepted as petitioners were brought on record in the proceedings before the Apex Court itself. It is then submitted that in view of the Rule 19 (4) of the Rules where tenure holder dies his heirs or other legal representatives are to file their objection within the time so provided which petitioners failed to file and thus petitioners cannot be permitted to get the same controversy re opened by filing present objection under section 11 (2) of the Act. It is argued that on the fact, rejection of the petitioner's objection cannot be said to be erroneous in any manner.

6. In view of the aforesaid arguments, the facts as has come on the record has been examined.

7. There is no dispute about the fact that the proceedings under Section 10 (2) of the Act was started against Data Ram. Petitioners happened to be recorded tenure holder before 8.6.73 on the basis of registered sale deed in their favour dated 22.9.71 of which mutation was effected on 14.1.72. Petitioners are the married daughters of the tenure holder Data Ram and thus they cannot be treated as members of the family of the tenure holder in view of the definition of the family as has been given in Section 3 (7) of the Act. Section 3 (7) of the Act defines family which states thus-

"Family' in relation to a tenure holder means himself or her self and his wife or her husband, as the case may be (other than a judicially separated wife or husband), minor sons and minor daughters (other than married daughters)'.

In view of the aforesaid if the ceiling authorities were of the view that Data Ram continued to be tenure holder of the

entire land and his name included the land ostensibly held in the name of the petitioners it was for them to have served notice in CLH form 4 together with copy of the statement in CLH form 3, calling upon the petitioners to show cause that why the statement in CLH form 3 be not taken as correct.

8. The 1st proviso of Rule 8 will be useful to be quoted here-

"Provided that where the statement in CLH Form 3 also includes land ostensibly held in name of any other person, the prescribed authority shall cause to be served upon such other person a notice in CLH Form 4 together with a copy of the statement in CLH Form 3 calling upon him to show cause within a period of fifteen days from the date of service of the notice why the aforesaid statement be not taken as correct. "

9. In view of the aforesaid, it is clear that the notice was required to be issued to the petitioners which has been admittedly not issued. The aforesaid provision has been the subject matter of interpretation by this court in the full bench case of Shantanu Kumar (supra) in which it has been held that the entire proceedings will be deemed to be vitiated. At this stage observations as made in para 11 and 12 of the aforesaid judgement of Sdhantanu Kumar (supra) will be useful to be quoted here –

Para 11–It is obvious that service of such a notice is preliminary to the acquisition of jurisdiction to proceed in the matter and decide whether the land ostensibly held in the name of the petitioner could be declared as surplus land in the hands of Bhupendra Singh. In the premises, the proceedings were without jurisdiction and void. Learned Standing Counsel submitted that the petitioner had knowledge and he should have filed an objection under section 11 (2) of the Act as has been held by a Division Bench of this Court in Dilbag Singh Vs. State of U.P. (1978 All. LJ 717). The existence of another remedy under the Act cannot validate the proceedings which are void for lack of jurisdiction and which have resulted in the declaration as surplus land of an area which a person other than the tenure holder who has been heard, claims. The fact that the petitioner could have filed an objection under section 11 (2) will not breathe life into or validate these dead proceedings.

Para 12- It was urged that since the petitioner knew of this proceedings he kept silence all this while, this court need not interfere in exercise of its discretionary jurisdiction under Article 226 of the Constitution. It is well settled that an objection to lack of jurisdiction can be taken at any stage of the proceeding and even in collateral proceedings (see Kiran Singh vs. Chaman Panswan (AIR 1954 SC, 340). Consent or waiver cannot be a ground for refusing to entertain such an objection. We hence cannot deny relief to the petitioner on the ground of alternative remedy. It is equally settled that existence of jurisdiction cannot be conferred by consent or waiver. This plea is only relevant to the exercise of jurisdiction. Here there was lack of jurisdiction by reason of non compliance of the first proviso to Rule 8."

10. It has also been held by this court in case of Mahfuzul Rahman and Hari Ram (supra) that if there is no notice

to the claimant even if he has been doing pairvi in respect to the proceeding of the tenure holder who may be even his father the presumption about knowledge that his land is being declared as surplus cannot be drawn. Otherwise also substitution of name of any person on the death of a party before any court is to be treated for the purpose of prosecution and disposal of the case and as and when any occasion arise in respect to the dispute about the rights and title of that substituted person or any other party that is to be adjudicated in the competent court in the light of rival claim. Otherwise also take a case that if after the decision from 2-3 courts if the matter is pending in appeal/revision before higher court if on the death of a party a person is substituted as his heir and if he places his independent claim then that will certainly require fresh trail and then there may not be any option but to remand the matter to the trial court as higher court may not be in a position to take evidence and to give any finding either way in respect to the claim of the substituted person. Similarly if the petitioners were brought on record before the Apex Court in the event they were required to plead their claim, which requires leading of evidence it might not have been permitted but this is not for this court to give any finding on the score that what could have transpired before the Apex Court in the event petitioners would have pleaded their claim at that stage.

11. On examination of the matter this Court is satisfied that the notice as required vide proviso of Rule 8 of the Rules was not issued to the petitioners and by mere their substitution in proceedings they can be expected to know about the proceedings against Data Ram but at the same time they having their independent claim for trial on the basis of registered sale deed they are entitled to be heard on filing their objection under Section 11 (2) of the Act. Submission of the learned Standing Counsel that in view of Rule 19 (4) of the Rules on the death of the tenure holder the objection should have been filed by the petitioners deserves straightway rejection as aforesaid provision speaks of filing of objection by the legal representative after service of the notice in CLH form 4 disputing the correctness of the statement in CLH form 3. So far the case in hand is concerned no notice was ever served to the petitioners in CLH form 4 and they had no occasion to dispute the correctness of the statement in CLH Form 3. This Court also dis approve the submission as advanced by the learned Standing Counsel that examination of the petitioners claim on the merit will amount to going into same question again which has been earlier finalized for the simple reason that it will be the situation in each and every case where proceedings under Section 10 (2) of the Act is finalized and person files objection under Section 11 (2) of the Act laying his independent claim, which has been held to be permissible even at the instance of unrecorded tenure holder. Accordingly this is clear that so far finding given in any earlier proceedings are concerned on any particular issue that is always there but at the same time if a person files objection under section 11 (2) of the Act that is to be examined on the merits with whatever result on the merits i.e. either by rejecting the claim of the objector or by accepting it.

12. In view of the aforesaid this court is of the view that petitioners are entitled to get their claim attended on merits by Prescribed Authority instead of

refusal to entertain the same. So far the prayer as made by the petitioners in their application dated 13.12.95 for setting aside order passed by the prescribed authority dated 2.1.75 by which land was declared as surplus is concerned, that cannot be allowed/accepted as it is for the prescribed authority to examine the claim of the petitioners in respect to the bonafides in the transaction which has already travelled up to the Apex Court.

13. For the reasons recorded above, this writ petition succeeds and is allowed. The order passed by respondents 2 and 3 dated 19.12.96 and 16.9.96 are hereby quashed. The matter is sent back to the Prescribed Authority for passing fresh orders on the objection of the petitioners which has been filed under section 11 (2) of the Act in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2003

BEFORE
THE HON'BLE S.N. SRIVASTVA, J.

Civil Misc. Writ Petition No. 2093 of 2002

Praveen Kumar ...Petitioner
Versus
The State of U.P. through the Secretary, and others ...Respondents

Counsel for the Petitioner:
Sri R.C. Shukla
Sri Y.K. Sinha
Sri Neeraj Tripathi

Counsel for the Respondents:
Sri Pankaj Mithal
S.C.

(A) Constitution of India, Article 226-Practice and Procedure-Reasoning or anology-classified in 3 categories-unius ad-alterum (2) Duarum and terium (3) Plurium ad-plura- explained by the court.

Held- Para 17

I would also not refrain from stating that analogy is an imperfect form of inductive logic which proceeds on the basis of a number of points of resemblance of attributes or relations between cases. Not only does it emphasize the quantitative nature of resemblance but also the relevance and importance of such attributes or relations which are ultimately matters of practical judgment. Reasoning or analogy has been classified into three categories. 1. Unius ad alterum (a simple comparison which indicates a relationship of similarity in a certain respect, (2) Duarum and terium (based on the proportional relationship in common of two things to a third thing and (3) Plurium ad plura (a relationship of proportionality i.e. A is to B as C is to D. In the instant case, the formula of simple comparison indicating a relationship of similarity in a certain respect should be followed from the Constitution Bench decision in Randhir Singh's case which has been followed with approval in D.S.Nakara v. Union of India, Dharwad District P.W.D. Literate Daily wage Employees Association v. State of Karnataka and Putti Lal's case and in my view, that would be the correct position.

(B) Constitution of India Article 226-Regularisation and payment of salary-Daily wagers working for more than 12 years-whether pending regularization the direction for payment of minimum wages is proper? Held- 'yes' considering the direction contained in Putti Lal case decided by Three Judges of Hon'ble Supreme Court the view of Division Bench judgment in State of Haryana Vs. Jasmer Singh-will not come in the way of minimum wages.

Held- Para 14

By this reckoning, in my considered view, the ratio flowing from the decision of Dharwad Case and also Putti Lal's case squarely applies to the case of daily wage employees who have invoked the jurisdiction of this Court under Article 226 of the Constitution by means of the present petitions aforestated. It would be apt to notice here that the decisions cited by the learned counsel for the respondents do not appear to have reviewed Putti Lal's case with further clarification and elucidations and the antinomy if at all discernible between citations across the bar must await for settlement by the Apex Court. The two Judge Bench decisions cited by the learned counsel for the respondents do not erode the authorities of the four decisions aforestated rendered by Constitution Bench and they have the force of law. As stated supra, the three Judge Bench decision cited by the learned counsel for the respondent cannot be imported for application in the instant case inasmuch as the said decision has been rendered in different context and different perspective.

(c) <u>Words and Pharaceses</u> Minimum wages-denotes the wages prescribed by the statute-provide for male earner and his family-the bare essentials of food, clothing shelter but includes education for children, protection against ill health misfortunes including old age.

Held-Para 19

Before parting I would also notice decision of the Apex court in Express News Paper Ltd v. Union of India, in which the Apex Court elaborated on wages (1) the living wage, (2) the fair wage and (b) the minimum wage. The Apex Court further elaborated that the bare subsistence minimum wage is a wage which would be sufficient to cover the bare physical needs of a worker and his family i.e, a rate which has got to be paid to the worker irrespective of the capacity of the industry to pay. The statutory minimum wage is the minimum prescribed by the statute and it will provide for some measure of education, medical requirements and amenities. The living wage should enable the male earner to provide for himself and his family not merely the bare essentials of food, clothing and shelter but a measure of frugal comfort including education for children, protection against ill-health and misfortunes including old age. In the instant case, the minimum wages being paid to the petitioners is too exiguous to meet the basic requirements of the petitioners and their families considering the spiraling prices and high cost of living. Taking all this into reckoning, it would sub-serve the needs of the petitioners if they are given minimum of the pay scales.

(Delivered by Hon'ble S.N.Srivastava J.)

1. These petitions in hand have been filed by the petitioners who have been stagnating in various Nagar Nigams/Nagar Palika Parishads as Daily wage Class 4 employees ever since their induction in the service prior to June 1991. Since all the petitions are knit together by common cause and have been filed for the common reliefs, they have been heard together for decision as a composite case.

2. Writ petition No.2093 of 2002 Praveen Kumar v. State of U.P. is taken up as a leading case to get hang of the substance of the controversy involved in the petitions. The petitioner in the aforestated writ petition namely Praveen Kumar had entered the service of the Nagar Palika Parishad Modi Nagar on 8.1.1991 as Electrician and ever- since then he has been performing his duties assigned to him in the capacity of daily wage employee in unbroken continuity.

3. I have heard Sarvsri R.C. Shukla, Y.K. Sinha, Neeraj Tripathi and other learned counsels appearing for respective petitioners in the writ petitions taken together for disposal as a composite case.

4. In paragraphs 18 and 28 of the writ petition instituted by Sri Praveen Kumar, the petitioner has specifically averred that he is performing self-same duties and discharging self-same functions at par with regularly appointed persons and he has completed a span of more than 12 years as such and by this reckoning, he is entitled to regular salary as being paid to regularly appointed persons. It is further averred in the writ petition, that representation was also preferred seeking regularisation of service and payment of salary at par with regularly appointed persons. The quintessence of what has been canvassed by the learned counsel for the petitioners is that all the petitioners have been discharging their duties similar to the duties being performed by the regularly appointed persons since as far back as the year 1991 and it would thus transpire that there is felt necessity to have the posts qua the strength of daily wage employees in the Nagar Palika Parishads/Nagar Nigams in the State of U.P. To enforce his submissions, the learned counsel placed credence on a decision in **The Dharwad District P.W.D. Literate Daily Wage Employees' Association and others v. State of Karnataka and another**[1] **and State of U.P. V. Putti Lal**[2]**. In Putti Lal's case**, the Apex Court has directed to consider the case of regularisation according to Regularisation Rules 2002 and for the interim, the Apex Court ordered payment of minimum of the pay scale as applicable to their counter part in the Government until services of such daily wage employees are regularized. The other decisions relied upon by the learned counsel are **Gujrat Agricultural University v. Rathod Labhu Bechar**[3]**, Jayanta Biswas v. University of Calcutta and others**[4] **and Daily rated Casual Labour employed under P & T Department through Bhartiya Dak Tar Majdoor Manch v. Union of India and others**[5] to hammer home the submissions aforestated.

5. In the counter affidavit, the averments made in paras 18 and 28 of the writ petition have not been repudiated in so far as they relate to regularisation. In fact, the stand taken by Sri Pankaj Mittal, is one of avowal of the claim of the petitioners to the extent of their claim for regularisation but at the same time the learned counsel did not mince words to state that the Nagar Palika Parishad Modi Nagar has already put in papers to the State Government for creation of posts and it would act upon regularisation process as soon as the requisite posts are sanctioned by the State Government. The learned counsel however vehemently demurred to the contention of the learned counsel for the petitioners that the petitioners were entitled to minimum of the pay scale applicable to their counter part in the Parishad and in vindication of his stand, cited the authority of a recent decision of the Apex Court in **State of Haryana v. Tilak Raj** in Civil Appeal No. 4570 of 2002 decided on 14.7.2003. It was a decision in appeal aforestated

[1] 1990 (2) SLR 43
[2] 2002 (2) UPLBEC 5195
[3] AIR 2001 SC 706
[4] (2001) 1 UPLBEC 74
[5] AIR 1987 SC 2342

against the judgment rendered by a Division Bench of Punjab and Haryana High Court whereby the respondents were directed to be paid the minimum pay applicable to the regular employees. The Apex Court held that a scale of pay is attached to a definite post and in case of a daily wager, he holds no posts. It was further observed that the respondents cannot be held to hold any posts to claim any comparison with the regular and permanent staff for any or all purposes including the claim for equal pay and allowances and that the equal pay for equal work is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scale and the other group of employees who have already earned such pay scales. It was further observed that the direction about equal pay cannot always be translated into a mathematical formula. In justifying the ratio from this decision, the learned counsel further submitted that the Apex Court has noticed in its decision the **case of Jasmer Singh** in which the quintessence of direction was that pending regularisation, the daily wage employees are entitled to get minimum of the wages and also referred to various other cases including **Ghaziabad Development Authority v. Vikram Chaudhary**[6] in fortifying his stand that the petitioners are not entitled to minimum of the pay scales. As a sequel to citations aforestated, the learned counsel quipped that the aforestated decisions being the latest in the series could be followed for application in the facts and circumstances of the present case. The learned counsel again harking back to the decision in State of Haryana v. Tilak Raj canvassed that in this decision, all the earlier authoritative pronouncements including one rendered in Jasmer Singh's case has been noticed in which the Apex court has painstakingly analyzed the ratio decidendi flowing from all the earlier decisions. It was further canvassed that there is noticeable difference between the functions being performed by daily wage employees and regularly appointed persons and by this reckoning, threadbare formula cannot be applied and therefore, it was submitted that the petitioners are not entitled to get minimum of the pay scales. The learned counsel also drew attention of the court to a decision in **State Bank of India v. M.R. Ganesh Babu**[7]. It is a three Judge Bench decision in which the Apex Court reiterated the principles that the equal pay must depend upon the nature of work done and it cannot be judged by the mere volume of work; there may be qualitative difference as regards reliability and responsibility. It was further observed that functions may be the same but the responsibilities make a difference. It was a case in which respondents 1 and 2 were appointed within the category of specialist officers. The Rural Development Officers who were then considered as specialist officers in the bank made a grievance and claimed parity with the generalist officers contending that having regard to the duties and responsibilities shouldered by them they were entitled to the same benefit as was extended to the probationary and trainee officers who were fitted on appointment/promotion at four stages higher in the scale I applicable to the officers of the junior management grade. The Apex court in that case converged to the conclusion that the

[6] 1995 (9) SCC 210

[7] 2002 (93) FLR 853

duties and responsibilities of probationary officers/ trainee offices are more onerous while the specialist officers are not exposed to operational work/risk and therefore it was held that there existed a valid distinction in the matter of work and nature of operations between the specialist officers and the general category officers. This case is distinguishable inasmuch as decision in that case flows from difference context and perspective and none of the facets involved in three Judge Bench decision can be imported for application to the facts and controversy involved in the instant petition. The learned counsel also stressed the point that the Court should follow with approval the ratio flowing from the decision in Jasmer Singh's case and invited attention of the Court to a Full Bench of this Court in **Ganga Saran v. Civil Judge Hapur**[8] in which it was laid down that *"……..the courts must follow the judgment which appear to them to state the law accurately and elaborately."*

6. I have devoted anxious considerations to the respective contentions of the learned counsel for the parties and the question that forces itself in the forefront for consideration is whether pending regularisation, the petitioners can be granted relief of payment of minimum of the pay scales regard being had to the fact that the petitioners in the instant case have put in more than 12 years of service as Daily wage employees.

7. Before delving into the factual aspects, it is apposite to notice the ratio distilled from the decisions rendered by three-Judge Bench decisions in **Putti Lal, Randhir Singh and in Dharwad District P.W.D. Literate Daily Wage Employees Association's** cases cited by the learned counsel for the petitioners. It is worthy of mention that Randhir Singh case has been followed in number of cases by this Court and has been affirmed by yet another Constitution Bench in **D.S. Nakara v. Union of India (1983) 2 SCR 165** and subsequently, the principles laid down in Randhir Singh's case were observed with approval in Dharwad case. The two Judge Bench decision in Jasmer Singh has been rendered in conflict with the aspects dwelt upon on prolix length in Randhir Singh's case. Randhir Singh's case was followed by Constitution Bench in D.S.Nakara and subsequently in Dharwad and Putti Lal's case on the point whether the daily rated employees are entitled to minimum of the wages or minimum of the pay. In **Randhir Singh's** case observed as under:

"It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right. But it certainly is a constitutional goal. 'Article 39 (d) of the Constitution proclaims 'equal pay for equal work for both men and women' as a Directive Principle of State Policy. 'Equal pay for equal work for both men and women' means equal for pay equal work for everyone and as between the sexes,. Directive Principles, as has been pointed out in some of the judgments of this Court have to be read into the fundamental rights as a matter of interpretation . Article 14 of the constitution enjoins the State not to deny any person equality before the law or the equal protection of the laws and Article 16 declares that there shall be 3equalityof opportunity for all citizens in matters relating to employment or appointment to any office

[8] AIR Alld 114 (FB)

under the State. These equality clauses of the Constitution must mean something to everyone. To the vast majority of the people the equality clauses of the Constitution would mean nothing if they are unconcerned with the work they do and the pay they get. To them the equality clauses will have some substance if equal work means equal pay. Whether the special procedure prescribed by a statute for trying alleged robber-barons and smuggler kings or for dealing with tax evaders is discriminatory, whether a particular governmental policy in the matter of grant of licences or permits confers unfettered discretion on the Executive, whether the take-over of the empires of industrial tycoons is arbitrary and unconstitutional and other questions of like nature, leave the millions of people of this country untouched. Question concerning wages and the like, mundane they may be, are yet matters of vital concern to them and it is there, if at all that the equality clauses of the constitution have any significance to them. Construing Articles 14 and 16 of the Constitution in the light of the Preamble and Article 39 (d), we are of the view that the principle 'equal pay for equal work' is deducible for those articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer."

8. In the case of **Daily Rated Casual Labour employed under P & T Department v. Union of India & Ors. (1988) 1 SCC 122**, the Apex Court reckoned with issue in question and indicated as under:

"It may be true that the petitioners have not been regularly recruited but many of them have been working continuously for more than a year in the department and some of them have been engaged as casual labourers for nearly ten years. They are rendering the same kind of service which is being rendered by the regular employees doing the same type of work. Clause (2) of Article 38 of the Constitution of India which contains one of the Directive Principles of State Policy provides that the State shall, in particular, strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Even though the above directive principle may not be enforceable as such by virtue of Article 37 of the Constitution of India, it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination. It is urged that the State cannot deny at least the minimum pay in the pay scales of regularly employed workmen even though the government may not be compelled to extend all the benefits enjoyed by regularly recruited employees. We are of the view that such denial amounts to exploitation of labour. The government cannot take advantage of its dominant position and compel any worker to work even as a casual labourer on starvation wages. It may be that the casual labourer has agreed to work on such low wages. That he has done because he has no other choice. It is poverty that has driven him to that state. The Government should be a model employer. We are of the view that on the facts and in the circumstances of this case, the classification of employees

into regularly recruited employees and casual employees for the purpose of paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lower is not tenable. India is a socialist republic. It implies the existence of certain important obligations which the State has to discharge. The right to work, the right to free choice of employment, the right to just and favourable conditions of work, the right to protection against unemployment, the right of everyone who works to just and favourable remuneration ensuring a decent living for himself and his family, the right of every one without discrimination of any kind to equal pay for equal work, the right to rest, leisure , reasonable limitation on working hours and periodic holidays with pay, the right to form trade unions and the right to join trade unions of one's choice and the right to security of work are some of the rights which have to be ensured by appropriate legislative and executive measures. It is true that all these rights cannot be extended simultaneously. But they do indicate the socialist goal. The degree of achievement in this direction depends upon the economic resources, willingness of the people to produce and more than all the existence of industrial peace throughout the country. Of those rights the question of security of work is of utmost importance. If a person does not have the feeling that he belongs to an organization engaged in production he will not put forward his best effort to produce more. That sense of belonging arises only when he feels that he will not be turned out of employment the next day at the whim of the management. It is for this reason it is being repeatedly observed by those who are in charge of economic affairs of the countries in different parts of the world that as far as possible security of work should be assured to the employees so that they may contribute to the maximization of production. It is again for this reason that managements and the governmental agencies in particular should not allow workers to remain as casual labourers or temporary employees for an unreasonably long period of time……."

9. Again in **U.P. Income Tax Department contingent Paid Staff Welfare Association v. Union of India and others**[9], the Apex Court having regard to the principles as laid down in P & T Department Case aforestated, gave following relief in the ultimate analysis.

"We accordingly allow this writ petition and direct the respondents to pay wages to the workmen who are employed as the contingent paid staff of the Income Tax Department throughout India, doing the work of Class IV employees at the rates equivalent to the minimum pay in the pay scale of the regularly employed workers in the corresponding cadres……."

10. The **Dharwad District P.W.D. Literate Daily Wage Employees Association v. State of Karnataka**[10] has been rendered noticing the principles in the aforestated case. It was a three Judge Bench decision dealing with the case of confirmation of daily rated and monthly rated employees as a regularly government servants and for payment of normal salary at the rates prescribed for

[9] (1987) Suppl. SCC 668
[10] 1990 (2) SLR 43

the appropriate categories of the Government servants and other service benefits. It was pleaded in that case that about 50,000 such workers were employed in the different Government establishments and though many of them have put in 16 to 20 years of continuous service which is proof of the fact that there is permanent need for the jobs they perform-they have not been regularized in their service and were not being paid equal pay for equal work as has been mandated by this Court by way of implementation of the Directive Principles of State Policy. In ultimate analysis following directions were issued by the Apex Court.

"We can well realize the anxiety of the petitioners who have waited too long to share the equal benefits mandated by Part IV of the Constitution in respect of their employment. At the same time we cannot overlook the constraints arising out of or connected with availability of State resources. Keeping both in view that reposing our trust in the relevant instrumentalities of the State that may be connected with the implementation of the scheme to act with a sense of fairness, anxiety to meet the demands of the human requirements and also anxious to fulfill the constitutional obligations of the State, the directions which we give below will give a final shape to the scheme thus.

1. *the casual/daily rated employees appointed on or before 1.7.1984 shall be treated as monthly rated establishment employees at the fixed pay of Rs. 780/- per month without any allowances with effect from 1.1.1990. They would be entitled to an annual increment of Rs. 15/- till their services are regularized. On regularisation they shall be put in the minimum of the time scale of pay applicable to the lowest Group D cadre under the Government but would be entitled to all other benefits available to regular government servants of the corresponding grade. Those belonging to the B or C Groups upon regularization shall similarly be placed at the minimum of the time scale of pay applicable to their respective groups under government service, and shall be entitled to all other benefits available to regular government servants of these grades.*
2. *From amongst the casual and daily rated employees who have completed ten years of service by 31.12.1989, 18600 shall immediately be regularized with effect from 1.1.1990 on the basis of seniority cum suitability. There shall be no examination but physical infirmity shall mainly be the test of suitability.*
3. *The remaining monthly rated employees covered by the paragraph 1 who have completed ten years of service as on 31st Dec 1989 shall be regularized before 31st December, 1990 in a phased manner on the basis of seniority cum suitability, suitability being understood in the same way as above.*
4. *The balance of casual or daily rated employees who become entitled to absorption on the basis of completing ten years of service shall be absorbed/regularized in a phased manner on the same principle as above on or before December 31,1997.*

At the point of regularisation, credit shall be given for every unit of five years of service in excess of ten years and one

additional increment in the time scale of pay shall be allowed by way of weightage."

11. Putti Lal's case was also a Three Judge Bench decision in which the Apex Court delved into all related aspects and converged to the conclusions that the respondents in that case were entitled to minimum of the pay scales at par with their counter-parts in the Forest Department. In this decision, the Apex Court gave weightage to the principles flowing from the above quoted decisions and held good the relief of minimum of the pay scales. On the other hand, in **State of Haryana v. Jasmer Singh** which the two Judge Bench decision has noticed in **State of Haryana v. Tilak Raj**[11], the observation was to the following effect.

"The principle of "equal pay for equal work" is not always easy to apply. There are inherent difficulties in comparing and evaluating the work done by different persons in different organizations, or even in the same organization. There may be differences in educational or technical qualifications which may have a bearing on the skills which the holders bring to their job although the designation of the job may be the same. There may also be other considerations which have relevance to efficiency in service which may justify differences in pay scales on the basis of criteria such as experience and seniority, or a need to prevent stagnation in the cadre, so that the good performance can be elicited from persons who have reached the top of the pay scale. There may be various other similar considerations which may have a bearing on efficient performance in a job. The evaluation of such jobs for the purposes of pay scale must be left to expert bodies and unless there are any malafides, its evaluation should be accepted.

In the ultimate analysis, the Apex court converged to the following conclusions.

"Therefore, the respondents, who are employed on daily wages cannot be treated as on a par with persons in regular service of the State of Haryana holding similar posts. Daily-rated workers are not required to possess the qualifications prescribed for regular workers, nor do they have to fulfill the requirement relating to age at the time of recruitment. They are not selected in the manner in which regular employees are selected. There are also other provisions relating to regular service such as the liability of a member of the service to be transferred, and his being subject to the disciplinary jurisdiction of the authorities as prescribed, which the daily-rated workmen are not subjected to. They cannot, therefore, be equated with regular workmen for the purposes for their wages. Nor can they claim the minimum of the regular pay scale of the regularly employed. However, if a minimum wage is prescribed for such workers, the respondents would be entitled to it if it is more than what they are being paid."

12. It would thus transpire that the Apex Court considered the ratio flowing from Randhir Singh's case and taking cue from the observation in that case that the judgment of administrative authorities concerning the responsibilities which attach to the post and the degree of reliability expected of an incumbent

[11] 2003 AIR SCW 3382

would be a value judgment of the authorities concerned which if arrived at bonafide reasonably and rationally was not open to interference by the court, converged to the inference to the following effect.

"It is, therefore, clear that the quality of work performed by different sets of persons holding different jobs will have to be evaluated. There may be differences in educational or technical qualifications which may have a bearing on the skills which the holders bring to their job although the designation of the job may be the same. There may also be other considerations which have relevance to efficiency in service which may justify differences in pay scales on the basis of criteria such as experience and seniority, or a need to prevent stagnation in the cadre, so that good performance can be elicited from persons who have reached the top of the pay scale. There may be various other similar considerations which may have a bearing on efficient performance in a job. This Court has repeatedly observed that evaluation of such jobs for the purposes of pay scale must be left to expert bodies and unless there are any mala fides, its evaluation should be accepted."

It was upon consideration of observations in that case that differentiation in pay scales among government servants holding same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation, the Apex Court held the Daily Wagers not entitled to minimum of the pay scales at par with regularly appointed employees. The Apex Court considered in that case the aspect that the principle of equal pay for equal work was originally enunciated as a part of the Directive Principles of State Policy in Article 39 (d) of the Constitution and that in the case of Randhir Singh, it was held that the principle had to be read into Articles 14 and 16 of the Constitution attended with the observation that this was a constitutional goal capable of being achieved through constitutional remedies. It is obvious from the perusal of the decision that the two Judge Bench decision in Jasmer Singh's case held the daily wage employees not entitled to minimum of the pay scale in the perspective of the facts of that case. In **P. & T. Case which has been noticed in Dharwad P.W.D. Literate Daily Wage Employees Association's,** the Apex Court observed that Clause (2) of Article 38 of the Constitution of India which contains one of the Directive principles of State Policy provides that the State shall in particular, strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people. It was further observed that even though the above directive principle may not be enforceable as such by virtue of Article 37 of the Constitution of India, it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination. It was urged in that case that the State could not deny at least the minimum pay in the pay scales of regularly employed workmen even though the government may not be compelled to extend all the benefits enjoyed by regularly recruited employees and in connection with the proposition, it was observed that "We are of the view that such denial amounts to exploitation of labour. The Government

cannot take advantage of its dominant position and compel any worker to work even as a casual labour on starvation wages." It was further quipped by the Court that *"it may be that the casual labourer has agreed to work on such low wages and that he has done because he has no other choice. It is poverty that has driven him to that stage. The Government should be a model employer."* Putti Lal's case has been rendered in the conspectus of all the above decisions. It was also a decision of three Judge Bench subsequent to the decision in Jasmer Singh's case and the ratio flowing from Randhir Singh's case ending with Putti Lal's case has been followed with approval in a recently decision in **State of West Bengal and others v. Pantha Chatterjee and others, 2003 AIR SCW 3316.** In this case, the observation germane to the point was that *"In several cases this Court applying the principle of equal pay for equal work has held that a daily wager, if he is discharging the similar duties as these in the regular employment of the Government should at least be entitled to receive the minimum of the pay scale though he might not be entitled to any increment or any other allowance that is permissible to his counter part in the Government."* It was further observed by the Apex Court in that case that *"In our opinion that would be the correct position and would, therefore, direct that these daily wagers would be entitled to draw at the minimum of the pay scale being received by their counter part in the Government and would not be entitled to any other allowances or increment so long as they continue on daily wage……"*

All the above decisions have been noticed with approval in a recent decision of the Apex court in **State of West Bengal and others v. Pantha Chatterjee and others**[12]. In this case, the Apex Court was seized of the claim of Part Time Border Wing Home Guards vis-à-vis regular Boarder Wing Home Guards of the West Bengal and the Border Security Force personnel. In the matter, it was claimed that the Part time Border Wing Home Guards were performing similar duties and discharging same responsibilities. It was contended in that petition that the part time Border Wing Home Guards are entitled to the honorarium and they are to be paid only as and when their services are required and utilized. It was further claimed in opposition in that case that their appointment was not to exceed for a period of more than three months except in cases where it was recommended otherwise by the authorities of the Border Security Force. It was noticed by the Apex Court that duties of the permanent Border Wing Home Guards and part time Border Wing Home Guards are the same and performed under the same situation and circumstances but there has been disparity in their emoluments and other facilities, necessities for performing their duties. In the background of the facts of that case, it was held by the Apex court that the part time border Wing Home Guards cannot be treated as volunteers engaged in casual nature of work so as to be termed as part time staff of Government of West Bengal and as such they cannot be treated differently from the permanent staff and are to be accorded parity with them.

13. Reverting to the submissions made across the bar, the learned counsel for the petitioners laid considerable stress

[12] 2003 AIR SCW 3316

on the point that the aforesaid decision being of larger Bench, it has over-riding effect over all other decisions cited across the bar by the learned counsel for the respondents and in connection with this proposition, the learned counsel has drawn attention to the decisions of the Apex Court in **State of U.P. v. Ram Chandra Trivedi**[13] and in **Ishwari Khetan Sugar Mills v. State of U.P.**[14]. In **Union of India v. K.S.Subramanian**[15], the quintessence of the observations is that proper course for a High Court would be to try to find out and follow the opinion expressed by larger Benches of Supreme court in preference to those expressed by Smaller Benches of the Court. That is the practice followed by this (S.C.) itself. The practice has now crystallized into a rule of law declared by the Supreme Court. If however, the High Court is of opinion that the views expressed by larger benches of Supreme Court are not applicable to the facts of the case it should have said so giving reasons supporting its point of view. In **Chandra Trivedi's** case, the Apex Court held that conflict between the views expressed by larger Benches and Smaller Benches of Supreme Court, the High Courts have to follow the practice already being followed by the Supreme Court itself in this behalf and to find out and to follow the views expressed by larger Bench. In **Ishwari Khetan Sugar Mills' case (supra)**, it was observed by the Apex court that controversy in decisions of Supreme court- Such decisions are impliedly overruled to the extent of conflict in them by a later larger Constitution Bench on that point. The following decisions should also be reckoned with which have bearing on the controversy involved in this case. In **R.L.D. Corporation v. Labour Court, (1990) 3 SCC**, the substance of what was observed was that a subsequent Bench would not follow the decision of an earlier Bench when it was per incuriam i.e. made in ignorance of a relevant constitutional or statutory provision or of some decision of its own. Yet another ground cited for not following a precedent would be social, industrial or legislative changes which call for a wider outlook or a progressive interpretation. In the aforesaid decision and also in **Keshav Mills v. I.T. Commissioner A. 1965 SC 1630**, it was observed that in reviewing an earlier decision, however, the Court would take into consideration the fact that the said decision has been followed in a large number of cases. In **Indra v. U.O.I. A. 1993 SC 477**, it was observed that where there has been no uniformity in previous decisions, the later Court would examine the principle in the light of the Constitution and the materials placed before it. In **Collector v. Raja (1985) 3 SCC 1** the Apex Court in para 13 observed that the Court would not depart from a long settled interpretation solely depending upon the facts of a given case.

14. Extracting the ratio decidendi of any decided case is as difficult as excavating a vein of gold from a mine. As Solmond points out in his book of Jurisprudence, for every tonne of material quarried, one finds less than an once of gold. The exercise of distinguishing a precedent is exercise in ingenuity and to do so one has to arrive at the principle laid down in the precedent or the ratio decidendi. Bearing the above in mind, I proceed to glean whether the ratio flowing from the Dharwad District P.W.D.

[13] AIR 1976 SC 2547
[14] AIR 1980 SC 1955
[15] AIR 1976 SC 2433

Literate Daily Wage Employees' Association and others' case as followed in the recent case in **State of West Bengal and others v. Pantha Chatterjee and others 2003 AIR SCW 3316** can usefully be applied to the facts of the present case in juxtaposition with the citations made by the learned counsel for the respondents. The aforesaid decision was rendered noticing a three Judge Bench decision in **Randhir Singh v. Union of India and others**[16], **Dhirendra Chamoli and another v. State of U.P. (1986) 1 SCC 637, Surinder Singh & another v. Engineer-in-Chief, C.P.W.D. and others**[17], **Bhagwan Dass & others v. State of Haryana & others**[18], **and Daily Rated Casual Labour employed under P & T. Department v. Union of India & Ors**[19]. **Yet another case noticed in this decision is U.P. Income Tax Department contingent Paid Staff Welfare Association v. Union of India and others**[20]. It is in the above conspectus that the Apex Court gave directions of paying minimum of the pay scale. It is a well-considered decision after analyzing all the aspects on the point. This three Judge Bench decision held good the ratio by applying the principles of 'equal pay for equal work' that those daily wagers discharging duties similar to those in the regular employment of the Government should at least be entitled to receive the minimum of the pay scale. In Putti Lal's case, the ratio in that case flowed from the background that the State of Uttranchal had framed a scheme for regularisation of daily workers. The facts of the case under reference have close resemblance to the cases in hand inasmuch as in the instant case too, the State of U.P. has issued relevant Government order extending coverage of its regularisation Rules to the daily wager employees in the local bodies. By this reckoning, in my considered view, the ratio flowing from the decision of Dharwad Case and also Putti Lal's case squarely applies to the case of daily wage employees who have invoked the jurisdiction of this Court under Article 226 of the Constitution by means of the present petitions aforestated. It would be apt to notice here that the decisions cited by the learned counsel for the respondents do not appear to have reviewed Putti Lal's case with further clarification and elucidations and the antinomy if at all discernible between citations across the bar must await for settlement by the Apex Court. The two Judge Bench decisions cited by the learned counsel for the respondents do not erode the authorities of the four decisions aforestated rendered by Constitution Bench and they have the force of law. As stated supra, the three Judge Bench decision cited by the learned counsel for the respondent cannot be imported for application in the instant case inasmuch as the said decision has been rendered in different context and different perspective.

15. The learned counsel for the respondents again harked back to the decision rendered in State of Haryana v. Tilak Raj's case and propounded that the two Judge Bench decision rendered in **State of Haryana and others v. Jasmer Singh and others**[21], has been noticed. As noticed above, both the decisions have

[16] (1982) 1 SCC 618
[17] (1986) 1 SCC 639
[18] (1987) 4 SCC 634
[19] (1988) 1 SCC 122
[20] (1987) Suppl. SCC 668
[21] (1996) 11 SCC 77

been rendered on the aspect of a value judgment of the authorities concerned which, according to the said decision, if arrived at bona fide, reasonably and rationally was not open to interference by the court. Coming back to the instant case, the State Government took policy decision for regularisation of the services of daily wage employees in the local bodies and consequently extended coverage of the Regularisation Rules to these daily wage employees and it is in this perspective that I feel called to apply the ratio flowing from Dharwad case as also Putti Lal's case. Reverting to Tilak Raj's case, in this case, the Apex court converged to the principle stretching further the ratio in Randhir Singh's case on the basis of observation in that case that judgment of administrative authorities concerning the responsibilities which attach to the post and the degree of reliability expected of an incumbent would be a value judgment of the authorities concerned which if arrived at bonafide reasonably and rationally was not open to interference by the court. It was a decision different from the principles in Dharwad Case and Putti Lal's case taking into reckoning the fact that denial of minimum pay in the pay scales would amount to exploitation of labour and would be compelling worker to work even as a casual labourer on starvation wages. The petitioners in the instant case are class 4 daily wage employees performing duties of electrician, Safai Karamcharies, Beldar etc. and the nature of duties being performed by them are such that they do not entail any of the nuances of requirements as postulated by the Apex Court in Tilak Raj's case.

16. Besides the aforestated cases, certain other decisions on the point should also be reckoned with. In Jaipal and others etc. v. State of Haryana and others etc.[22] the Apex Court held it to be a constitutional obligation to ensure equal pay for equal work where the two sets of employees discharge similarly responsibilities under similar working conditions. In this case, the plea of temporary or casual nature of employment or full time and part time employees had wrecked on disapproval of the Court. In Dhirendra Chamoli and another v. State of U.P.[23] the quintessence of what was held was that casual workers could not be denied same emoluments and benefits as admissible to temporary employees on the premises that they had acquiesced to the employment with full knowledge of their disadvantage. In Grih Kalyan Kendra Workers' Union v. Union of India and others[24], the Apex Court quintessentially held that though on facts no discrimination was found but the principle of 'equal pay for equal work' was upheld and recognized where all were placed similarly and discharging same duties and responsibilities irrespective of casual nature of work. This right had been held to have assumed status of a fundamental right of 'equality' in Articles 14 and 16. In Daily rated Casual Labour through Bhartiya Dak Tar Mazdoor Manch v. Union of India and others[25], the substance of what was held by the Apex Court was that right of daily rated casual workers in the P & T. Department was recognized and they were directed to be paid in minimum of the scale as was

[22] (1998) 3 SCC 354
[23] (1986) 1 SCC 637
[24] (1991) 1 SCC 619
[25] (1988) 1 SCC 122

admissible to the regular workers as both discharged similar work and responsibilities.

17. In the perspective of the above discussions, I feel called to state that ratio of a case has been likened to a lump of clay, which a potter can stretch and shape within limits. If he wants to starch it he can, or he can press it back into a lump. A ratio cannot be stretched indefinitely any more than a lump of clay for there is a limit beyond which the generalization of the statement of specific facts cannot go. When an unmanageable number of such lumps accumulate, they may be gathered together and rolled into a single big lump and the moulding process begins anew. In the instant case, I have tried to gather together and rolled into a single big lump all the decisions on the point which have accumulated unto this date. I would also not refrain from stating that analogy is an imperfect form of inductive logic which proceeds on the basis of a number of points of resemblance of attributes or relations between cases. Not only does it emphasize the quantitative nature of resemblance but also the relevance and importance of such attributes or relations which are ultimately matters of practical judgment. Reasoning or analogy has been classified into three categories. 1. Unius ad alterum (a simple comparison which indicates a relationship of similarity in a certain respect, (2) Duarum and terium (based on the proportional relationship in common of two things to a third thing and (3) Plurium ad plura (a relationship of proportionality i.e. A is to B as C is to D. In the instant case, the formula of simple comparison indicating a relationship of similarity in a certain respect should be followed from the Constitution Bench decision in Randhir Singh's case which has been followed with approval in D.S.Nakara v. Union of India, Dharwad District P.W.D. Literate Daily wage Employees Association v. State of Karnataka and Putti Lal's case and in my view, that would be the correct position.

18. To cap it all, since the petitioners in the instant case have been discharging their duties as class 4 daily wage employees prior to June 1991 to the satisfaction of their authority and there is nothing on the record to indicate that they were at all less efficient at any time qua the regular appointees, I feel called to hold that the petitioners are entitled to minimum of the pay scales pending their regularisation by the department concerned.

19. Before parting I would also notice decision of the Apex court in Express News Paper Ltd v. Union of India[26], in which the Apex Court elaborated on wages (1) the living wage, (2) the fair wage and (b) the minimum wage. The Apex Court further elaborated that the bare subsistence minimum wage is a wage which would be sufficient to cover the bare physical needs of a worker and his family i,e, a rate which has got to be paid to the worker irrespective of the capacity of the industry to pay. The statutory minimum wage is the minimum prescribed by the statute and it will provide for some measure of education, medical requirements and amenities. The living wage should enable the male earner to provide for himself and his family not merely the bare essentials of food, clothing and shelter but a measure of frugal comfort including education for children, protection against ill-health and

[26] AIR 1958 SC 578

misfortunes including old age. In the instant case, the minimum wages being paid to the petitioners is too exiguous to meet the basic requirements of the petitioners and their families considering the spiraling prices and high cost of living. Taking all this into reckoning, it would sub-serve the needs of the petitioners if they are given minimum of the pay scales.

20. In the above conspectus, I am inclined to phrase directions in the following words for action and compliance.

1. The Nagar Palika Parishads/Nagar Nigams are directed to process relevant details and send the list of all such daily wage employees who were engaged on or prior to June 29, 1991 and are still continuing alongwith requisite papers for creation of posts to the State Government within a period of two months and the State Government in its turn shall pass appropriate orders for creation of posts within a period of six weeks from the date of receipt of the papers. In the case of those Nagar Nigams/Nagar Palika Parishads which have already submitted such lists for creation of post, the State Government shall pass appropriate speaking orders in this regard within a period of six weeks from today.

2. The appointing Authority after receipt of orders from the State Government for creation of posts, shall consider the matter of regularisation under the provisions of Regularisation Rules in relation to class 4 daily wage employees already working in their service for the period indicated above within a period not later than six weeks thereafter in accordance with the prescribed procedure and having due regard to the Government Order dated 10.7.2003.

3. The Nagar Palika Parishads/ Nagar Nigam shall initiate action for regularisation on the posts already created and existing taking into reckoning the reservation policy and no appointment shall be made upon any of the posts advertised by the Nagar Nigam/Nagar Palika Parishad as backlog vacancies for SC/ST/OBC under the directions of the State Government and appointment pursuant to such directions shall remain in abeyance till such time, all the posts created and existing are utilized in regularisation of daily wage employees working in respective Nagar Nigam/Nagar Palika Parishads.

4. All the daily wage employees in class 4 category who have completed 10 years of service as on June 29, 2001 are entitled to get minimum of the pay scales of the regularly appointed employees.

The petitions are allowed in terms of the aforestated directions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 09.7.2003

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 28405 of 2003

Prem Jeet and others ...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri Radha Kant Jha
Sri Satyanshu Ojha

Counsel for the Respondents:
Sri Nirpendra Misra

Constitution of India- Article 14 and 16- Regularisation of Service-Kanpur Nagar Nigam advertised for selection of posts of class III and class IV employees- Petitioners claimed for regularization on the grounds that certain class III employees, similarly situate, appointed on consolidated pay have been regularised-held-wrong decision can not be basis for claim pirety.

Held- Para 5

From the above discussion, it would thus follow that the petitioners have no right to the posts held by them and they cannot claim regularization merely on the dint that they have already put in three years of service on the posts. In the instant case, the process of recruitment has already commenced by means of the impugned advertisement. The petitioners who admittedly were appointed on a consolidated pay and they were not selected in the manner in which regular employees are selected nor have they been subjected to the rigours of selection in order to judge their compatibility even with the minimum requirements to hold the posts and in the circumstances, no argument of substance has been made to hold good the submissions that the petitioners are entitled to regularization.

(Delivered by Hon'ble S.N. Srivastava, J.)

1. By means of the present petition the petitioners who claim to have been appointed on consolidated pay of Rs. 1350/- to perform odd works earmarked and assigned to class IV employees, have canvassed the validity of advertisement dated 21.6.2003 and consequently, sought its quashment by means of a writ of certiorari studded with further relief of a writ in the nature of mandamus commanding the respondents to refrain from making appointments on class IV posts held by the petitioners.

2. It transpires from the record that the petitioners 1 to 4 were appointed on 22.12.2000 while petitioners 5 and 6 were appointed on 15.5.2000 and 1.7.2000. According to the allegations in the writ petition, while they were still performing their respective duties assigned to them, Nagar Nigam Kanpur Nagar advertised recruitment on class 3 and class 4 posts in the Nagar Nigam by means of advertisement dated 21.6.2003. It is claimed by the petitioners that they have already preferred their respective representations to the authorities concerned for regularization and while the representation was still sub judice, advertisement appeared in the news paper as for recruitment of class 3 and class 4 posts. In the back drop of the afore stated facts, the relief of quashment of the advertisement in so far as it related to the petitioners and further relief of mandamus to the respondents to refrain from making appointment against six class 4 posts have been claimed.

3. The main plank of the argument put forth by the learned counsel for the petitioners is that in the recent past, certain class 3 employees namely, Sanjay Singh and Mahesh Chandra Shukla appointed on consolidated pay on and around the date on which the petitioners were appointed have already been regularized and on this score, proceeds the submissions, the petitioners' case should also have been reckoned with for regularization but instead of passing appropriate orders on the representations preferred by the petitioners, the respondents have advertised the post. In

aid of his submissions, the learned counsel has referred to para 13 of the writ petition. From a scrutiny of the averments in para 3, it does transpire that the petitioners have named two persons claiming them to have been appointed on consolidated pay and subsequently regularized but have not indicated precise date or any document to vouch for the fact that they were appointed on consolidated pay and further that they were regularized and in the circumstances, the averments cannot be placed on a high pedestal except that the averments are vague and cannot be credited with being authenticated or supported by any documentary evidence.

4. The learned counsel then switched gear to the submission that the petitioners have already completed a span of three years and in deference to the ratio flowing from various decisions of the Apex Court, the petitioners should also be regularised. Indisputably the process of regularization involves regular appointment which can only be done in accordance with the prescribed procedure. **(See- Hindustan Shipyard Ltd. V. Dr. P. Sambasiva Rao, 1996 (1) SLR (SC) 805).** In the instant case, it is not disputed that the petitioners were appointed on a consolidated pay. However, they claim that their representations are still sub judice and pending decision on the representation, the posts including the posts held by the petitioners have been advertised. In connection with the proposition, it is worthy of mention that there should be some statutory provision on which they could claim regularization. No such statutory provision has been adverted to nor the learned counsel has drawn attention to the fact that any scheme for such regularization is in the offing or has been formulated or framed by the Nagar Nigam. It is too patent from the record that the petitioners were appointed on consolidated pay for a definite period interspersed with extention. It is not borne out that they were appointed according to Rules and procedure prescribed for regular appointment. In quintessence, no procedure was adopted in order to adjudge suitability of the petitioners for the posts. In connection with this proposition, ratio flowing from a recent decision in **State of Haryana V. Tilak Raj** may be considered. Though decided in different context, it has been held by the Apex Court that a daily wager holds no posts and the respondent workers in that case cannot be held to hold any posts to claim any comparison with the regular and permanent staff. In **State of Haryana v. Piara Singh**[1] the Apex Court has deprecated the practice observing that direction to regularize adhoc appointments, work charged employees etc. would only result in encouraging of unhealthy practice of back door entry. What cannot be done directly cannot be allowed to be done in such direct manner. In **Hindustan shipyard Ltd. v. Dr. P. Sambasiva Rao**[2], the Apex Court observed that process of regularization involves regular appointment which can only be done in accordance with the prescribed procedure and that regularization of service without following the prescribed procedure is not permissible. It was further observed by the Apex Court that only direction that can be given is that such officers should be considered by duly constituted

[1] 1992 (4) SLR (SC) 770
[2] 1996 (1) SLR (S.C.) 805

selection committee as per the Rules for the purposes of regular appointment.

5. From the above discussion, it would thus follow that the petitioners have no right to the posts held by them and they cannot claim regularization merely on the dint that they have already put in three years of service on the posts. In the instant case, the process of recruitment has already commenced by means of the impugned advertisement. The petitioners who admittedly were appointed on a consolidated pay and they were not selected in the manner in which regular employees are selected nor have they been subjected to the rigours of selection in order to judge their compatibility even with the minimum requirements to hold the posts and the circumstances, no argument of substance has been made to hold good the submissions that the petitioners are entitled to regularization. Mere submission that the petitioners have put in a span of 3 years of service does not furnish foundation for regularization. The learned counsel at this stage has invoked the aid of Articles 14 and 16 of the Constitution on the ground that certain class 3 employees who too were appointed on consolidated pay on and around the date have already been regularized and as such the petitioners too are entitled to extend the benefit on parity ground. As stated supra, the averments as contained in para 13 of the writ petition which is the genesis for claiming parity, are of vague and generalized nature and nothing tangible has been produced before the Court to lend authenticity to the averments in para 13 of the writ petition. I would not forbear from expressing that there should be some basis and the petitioner should lay foundation for claiming the benefit flowing from Articles 14 and 16. At the risk of repetition, it may be stated that it is not the case that the Nagar Nigam has framed any such scheme for regularization nor the counsel has drawn attention to any statutory rule. In case, any such action for regularization of class 3 employees appointed on consolidated pay has been taken, the same has not been proved beyond any shadow of doubt and in the circumstances, benefit of parity can not be taken aid of or claimed in relation to alleged regularization of Class 3 employees as stated in para 13 of the writ petition. Non arbitrariness is no doubt acknowledged as an ingredient of Article 14 pervading the entire realm of State action but in the instant case, no arbitrariness of discrimination has been proved reasonable doubt and hence, the plea of the learned counsel has no cutting edge and is liable to be rejected. Even assuming in connection with the proposition of the learned counsel that certain persons appointed on consolidated pay in class 3 posts were regularized, it is well settled position that the same cannot be invoked in aid to their advantage by the petitioners. In State of Punjab v. Dr. Rajeev Sarwal, the Apex Court observed that wrong decision of the Administrative authority cannot be elevated to the status of a precedent to be applied in other cases. In the like vein in Coromandel Fertilizers Ltd. vs. Union of India the Apex Court echoed the same view holding that a wrong decision in favour of any party does not entitle any other party to claim benefit on the basis of that decision. In the above conspectus, if at all, any administrative order regularizing the services of certain persons on class 3 posts, was made, the same cannot be invoked in aid by the petitioners to seek

parity for similar orders in the matter of regularization.

6. As a result of foregoing discussion the petition fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.7.2003

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

Civil Misc. Writ Petition No. 19966 of 1989

Radha Charan Yadav ...Petitioner
Versus
Chairman, Town Area Committee, Mathura ...Respondent

Counsel for the Petitioner:
Sri Sanjay Goswami
Sri J.K. Sharma

Counsel for the Respondent:
Sri Merun Dey

(A) U.P. Fundamental Rule 1956, Rule 56 (68 CJ) readwith Constitution of India Article 226-whether order of compulsory retirement-passed in public interest can not be interfered under writ jurisdiction.

Held- Para 27

Case law relied on:
2001 (2) AWC 1445, AIR 1971 SC 40 (1971) 1 SCR 791, 1987 SC 948, (1987) 2 SCR 583, AIR 1977 SC 2411, (1977) 9 SCC 345, (1977) 2 SCR 365, AIR 1977 SC 854, (1981) 1 SCR 507, AIR 1980 SC 1894, (1971) 1 SCR 791, AIR 1971 SC 40, (1987) 2 SCR 583, AIR 1987 SC 948, AIR 1977 SC 2411, (1977) 4 SCC 345, (1977) 2 SCR 365, AIR 1977 SC 854, (1981) 1 SCR 507, (AIR 1980 SC 1894), (1971) 1 SCR 791, (AIR 1971 SC 40), (1992) 1 SCR 836, AIR 1992 SC 1020, (1020), (1992) 2 SCC 299, (1970) 2 SCC 876, 1993 AIR SCW 1008, 2001 (3) SCC 314, AIR 1979 SC 193, AIR 1975 SC 1487, AIR 1976 SC 1841, AIR 1980 SC 953, (1980) 1 SLR 847, AIR 1971 SC 2151, AIR 1965 All 142, (1967) 2 SCR 333, AIR 1967 SC 1260, AIR 1971 SC 2151, AIR 1976 SC 2547, (1973) 2 MLJ 485, AIR 1974 SC 423, AIR 1971 SC 1011, (1979 SLJ 517) (1955) 1 SCR 26, AIR 1981 SC 70, (1971) SCR 791, (1975) 1 SCR 814, AIR 1974 SC 2192, (1984) 2 SCR 453, AIR 1980 SC 1095, (1980) Supp. SCC 229, AIR 1989 SC 72, AIR 1994 SC 1261, AIR 1993 SC 383, AIR 1984 SC 630, AIR 1991 SC 534, 1973 SC 698, (1990) 1 SCC 783, AIR (1990) SC 1004, 1994 SUPP. (3) SCC 424, (1995) SUPP. 1 SCC 184, 1995 SCC (L & S) 375, 1995 ATC 146, (1995) II LLJ 757, (1995) 6 SCC 165, 1995 SCC (L& S) 1361, 1995 31 ATC 479, (1996) 5 SCC 111, 1996 SCC (L & S) 1144, AIR 1996 SC 2436, (1996) 5 SCC 231, 1996 SCC (L & S) 1169, 1996 LAB IC 2062, (1997) 11 SCC 366, 1997 SCC (L &S) 1764, (1997) 6 SCC 228, 1997 SCC (L& S) 1654, 1997 LAB. IC 2866, AIR 1998 SC 1661, (1998)4 SCC 92, 1998 SCC (L &S) 1004, (1998) Lab IC 1401, (1998) II LLJ 324, (1998) 3 LLN 94, (1996) 3SCC 672, 1996 SCC (L & S) 799, AIR 1996 SC 1736, (2001) 2 SCC 305, AIR 1954 SC 369, (1955) 1 SCR 26, 1987 2 SCC 188, (1987) 3 ATC 496, 1994 SUPP. (3) SCC (L & S) 521, (1992) 21 ATC 649 (1994) SUPP(3) SCC 424, 1995 SCC (L & S) 74, (1994) 28 ATC 445 (SCC PAGE 430 PARA 9), (2002) 3 SCC 641, (1992) 2 SCC 299, 1993 SCC (L&S) 521, (1992) 21 ATC 649(SCC PAGE 315—16 PARA 34), 1998 4 SCC 92, 1998 SCC (L & S) 1004(SCC P. 99 PARA 11), (1992) 2 SCC 317, AIR 1994 SC 1261, (1998) 4 SCC 92, 1998 (9) SCC 220, (1997) 7 SCC 483, 1997 (6) SCC 381.

In view of the above decisions compulsory retirement order has been passed against the petitioner in the public interest did not indicate any stigma and the principle of natural justice is not attracted. Therefore, no scope of any interference is made out.

(B) Compulsory retirement-entitles no civil consequences can not be questioned in writ jurisdiction.

Held-Para 19

The compulsory retirement when exercised subject to the conditions

mentioned in the Rule, as for example, F.R. 56 (j), one of which is that the authority concerned must be of the opinion that it is in the public interest to do so, then such order of compulsory retirement does not amount to dismissal or removal from service within the meaning of Art.311 of the Constitution. It is neither a punishment nor visits with loss of retiral benefits. It does not cause a stigma. The officer will be entitled to pension that is actually earned and there is no diminution of the agreed benefits. If the competent authority bona fide forms that opinion the same cannot be challenged before the courts.

(C) Principle of Natural Justice- Compulsory Retirement order without affording an opportunity-on the basis of approval of work of the concerned employee whether can be questioned on the ground of Non-compliance of principle of Natural Justice? Held 'No'

Held- Para 13

Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary, in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

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

Heard Sri Jitendra Kumar Sharma learned counsel for the petitioner and Sri Merun Dey learned counsel for the respondents.

1. The Miscellaneous application dated 17.9.02 has been filed recalling the order dated 7.7.99. The cause shown is sufficient, therefore, the order dated 7.7.99 is recalled and the main writ petition is heard on merits.

2. The petitioner was working as a Collection Moharrir in Town Area Committee, Sadabad, Mathura. According to him his service has along been satisfactory and by an order dated 24.7.89 the petitioner's service ignoring so many other persons whose service and collection was inferior to the petitioner has been compulsorily retired behind the back.

3. According to the petitioner the order dated 24.7.1989 has been passed malafidely by a non speaking order of compulsory retirement passed by way of punishment without assigning reasons as the petitioner's record of service is clean and there has been no departmental disciplinary action against him, the order of compulsory retirement is discriminatory in derogation to the provisions of Article 14 and 16 of Constitution and is punitive and has been passed in derogation to the provisions of Article 311 of the Constitution of India and not in public interest. As averred no adverse entry, if any, against the petitioner has ever been communicated to him. According to him if any adverse entry exists the same cannot be made basis of the compulsory retirement. The petitioner was made to retire compulsorily on 24.7.1989 without disclosing anything to the petitioner and without affording the petitioner opportunity of hearing. The petitioner has claimed that the said order is stigmatic when the circumstances are unveiled and effect civil consequences.

4. The counter and rejoinder affidavits have been filed which indicates that the service records of the petitioner has been seen and in according to the prevailing rules of Uttar Pradesh Town Area Committee and Notified Area Committee (Centralised) Services Rules, 1976 and in reference to rule 38 (1) and (2) of rules 1976 above, the petitioner has been compulsory retired.

5. According to the petitioner the compulsory retirement should not be passed by way of punitive measure in the light of 2001 (2) A.W.C. 1445 (SC) (M.P. Electricity Board vs Shree Baboo). In the case of Shree Baboo there was no material at all in the service record for compulsory retirement, whereas, in the present case as contended by the respondents large number of adverse remarks are available and different suggestive warnings are also available in the service record of petitioner which was indicated to improve and reform the functioning of the petitioner. The fundamental rules provides for compulsory retirement are in the interest of public service and in the present case retiring the petitioner in public interest is not illegal in view of (Union of India v. J.N.Sinha, AIR 1971 SC 40; (1971) 1 SCR 791).

6. According to the learned counsel for the petitioner the public interest in relation to public administration envisages retention of honest and efficient employees in service and dispensing with services of those who are inefficient, dead-wood or corrupt and dishonest in view of (Brij Mohan Singh v. State of Punjab, (1987) 2 SCR 583; AIR 1987 SC 948). In the present case warning have been given to bring the improvement of the petitioner. The provisions of compulsory retirement are constant reminders to the government servants to conduct themselves properly, diligently and efficiently throughout their service career (State of U.P. v. Chandra Mohan, AIR 1977 SC 2411; (1977) 4 SCC 345).

7. Since the service of as many others of the same department was scrutinised by the screening committee and petitioner was compulsorily retired on the analysis of facts and records therefore, such order cannot be treated to be violative of Article 14 and 16 of the Constitution in reference to the decision of (P. Radhakrishna Naidu v. Govt. of A.P., (1977) 2 SCR 365; AIR 1977 SC 854).

8. The retirement of the petitioner made in the public interest shall also be treated to have been made in the interest of public administration and could not be said to be illegal in the light of the decision of (Gian Singh Mann v. The High Court of Punjab and Haryana (1981) 1 SCR 507; (AIR 1980 SC 1894) and Union of India v. Col. J.N. Sinha, (1971) 1 SCR 791; (AIR 1971 SC 40);

9. The principle of natural justice have no place to contest of an order of compulsory retirement as the order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour. Since the action is taken on the subjective satisfaction of the State Government as such there is no room for importing the audi alteram partem rule of natural justice in view of (Baikuntha Nath Das v. Chief District Medical Officer, (1992) 1 SCR 836; AIR 1992 SC 1020; (1992) 2 SCC 299).

10. The order impugned in the present writ petition has been passed taking into consideration the material available in the service record and on the subjective satisfaction of the State Government an order of compulsory retirement may not be passed by a speaking order, in the light of R.L. Butail v. Union of India, (1970) 2 SCC 876 and in view of the decision of (Union of India v. Dulal Dutt, 1993 AIR SCW 1008).

11. The compulsory retirement is not to be treated as punishment for the purpose of Article 311 of the Constitution (State of Gujrat v. Umedbhai M. Patel 2001 (3) SCC 314), the present compulsory retirement is simplicitor does not amount dismissal or reduction in rank as such is not hit by the provision of Article 311 of the Constitution, in view of the judgement of Andhra Pradesh v. L.U.A. Dixitulu, AIR 1979 SC 193, relying on judgment in 'Tara Singh v. State of Rajasthan, AIR 1975 SC 1487 and 'State of Haryana v. Inder Prakash, AIR 1976 SC 1841).

12. The order of compulsory retirement in question has been passed by exercising power of fundamental Rule 1956 where there appears no arbitrariness as such it is not illegal in view of the decision of (Union of India v. K.R. Tahiliani, AIR 1980 SC 953; (1980) 1 SLR 847) by retiring the petitioner before attaining the age of superannuation on the basis of material available on the record shall not tantamount stigma in view of the decision of (State of U.P. v. Shyam Lal Sharma, AIR 1971 SC 2151).

13. The Supreme Court held that the charge or imputation 'that the respondent had outlived his utility' was made the condition of the exercise of power and hence the order amounted to dismissal or removal from service within the meaning of Article 311 (2) of the Constitution. The Supreme Court itself did not agree and over-ruled the view taken by the Full Bench decision in Abdul Ahad v. The Inspector General of Police, U.P. (AIR 1965 All. 142) to the effect that compulsory retirement will always be on the ground that the employee can no longer render useful service, and the position does not become worse because what is implied is expressed in (State of U.P. v. Madan Mohan Nagar) (1967) 2 SCR 333; AIR 1967 SC 1260).

14. The impugned order of compulsory retirement is a simplicitor and stigma is not to be drawn out of which by speculative process as for making the order compulsory retirement the stigma must stems from the order itself and the scheme endeavoured to be derived from the circumstances or possibility or suspicion vide the decision in the State of U.P. v. Shyam Lal Sharma (AIR 1971 SC 2151); State of U.P. v. Ramchandra, AIR 1976 SC 2547 and Sreshta v. Commissioner of Income Tax, (1973) 2 MLJ 485… it has been repeatedly pointed out by the Supreme Court that Courts cannot delve into the records and pierce the veil of the order for discovering a stigma. What is open to the court is that it could find out a stigma if it is apparent on the record or otherwise clear and springs from the order, vide the decision in State of U.P. v. Sughar Singh, AIR 1974 SC 423; State of U.P. v. Ramchandra and State of Bihar v. Shiva Bhikshuk Misra, AIR 1971 SC 1011. Unless the Court is satisfied that such a stigma stems out from the order, an interference with an order of compulsory retirement is not

envisaged while exercising the extra ordinary jurisdiction under Article 226 of the Constitution in the light of (K. Venugopalan v. Government of Tamil Nadu, 1979 SLJ 517).

15. The mere form of order of compulsory retirement though not a conclusive and the court may some times delve into the basis of the order to lift the veil, however, I find that after scrutiny even the present order in question is not stigmative or by way of punishment therefore can not said to passed in derogation of the decision of Shyam Lal v. State of U.P. (1955) 1 SCR 26; Baldev Raj Chadha v. Union of India, AIR 1981 SC 70; Union of India v. J.N. Sinha (1971) SCR 791; Samsher Singh v. State of Punjab (1975) 1 SCR 814; AIR 1974 SC 2192 and Anoop Jaiswal v. Government of India, (1984) 2 SCR 453, the Supreme Court observed:

"On a consideration of the above decision the legal position that now emerges is that even though the order of compulsory retirement is couched in innocuous language without making any imputation against the Government servant who is directed to be compulsorily retired from service, the Court, if challenged, in appropriate cases can lift the veil to find out whether the order is based on any misconduct of the Government servant concerned or the order has been made bona fide and not with any oblique or extraneous purposes. Mere form of the order in such cases cannot deter the Court from delving into the basis of the order if the order in question is challenged by the Government servant as has been held by this Court in Anoop Jaiswal's case."

16. The present order of compulsory retirement has been passed in public interest. It was not necessary to give a detail reason in the order in exercise of power under fundamental rule in view of the State of Maharasthtra vs. V.S. Naik, AIR 1980 SC 1095; (1980) Supp. SCC 229).

17. Uncommunicated adverse entries but mostly based upon general assessment of performance shall not render an order of compulsory retirement invalid as the rule of audi alteram partem does not apply. The Supreme Court has held that their non communication of such adverse entry could not have the effect of vitiating the order of compulsory retirement (Jayanti Kumar Sinha v. Union of India AIR 1989 SC 72 and the similar view was taken to decide the question of compulsory retirement that the rule of audi alteram partem does not apply in view of the decision of Union of India vs. V.P. Seth AIR 1994 SC 1261 and Secretary to Government v. Nityanand Pati AIR 1993 SC 383.

18. The compulsory retirement in question is not based on remote and stale adverse entries but is based on two latest entries as such is not in derogation AIR 1984 SC 630 (J.D. Srivastava v. State of M.P.). The said compulsory retirement is not based on the basis of reports written by a bias officer and the order of compulsory retirement is not hit by the provisions of Article 21 of the Constitution in view to the (State of Sikkim v. Sonam Lama) AIR 1991 SC 534 and order of compulsory retirement does not involve civil consequences hence no show cause notice was necessary in view of decision in (E. Venkateswararao v. Union of India) 1973 SC 698. Since the

decision in the present compulsory retirement by the present order is based on clean and bona fide exercise and as a placid of the doctrine of the State Government in legitimate exercise of power under fundamental rule is not illegal as such compulsory retirement based on material on record can not be interfered with in view of the C.D. Ailawadi v Union of India AIR (1990) 1 SCR 783; AIR (1990) SC 1004.

19. **Compulsory retirement involves no civil consequences:-** The compulsory retirement when exercised subject to the conditions mentioned in the Rule, as for example, F.R. 56 (j), one of which is that the authority concerned must be of the opinion that it is in the public interest to do so, then such order of compulsory retirement does not amount to dismissal or removal from service within the meaning of Art.311 of the Constitution. It is neither a punishment nor visits with loss of retiral benefits. It does not cause a stigma. The officer will be entitled to pension that is actually earned and there is no diminution of the agreed benefits. If the competent authority bona fide forms that opinion the same cannot be challenged before the courts. But it is open to the aggrieved party to contend that the requisite opinion has not been formed or that the decision is based on collateral ground or that it is an arbitrary decision. However, the compulsory retirement involves no civil consequences. While exercising the power various considerations would weigh with the appropriate authority. In some cases, the Government may feel that a particular post may be usefully held in public interest by an officer more competent than the one who is holding the office. That does not mean that the concerned officer is inefficient but the appropriate authority may prefer a more efficient officer or in certain key posts, public interest may require that a person of undoubted integrity and ability should be there. (S. Rama Chandra Raju v. State of Orrisa, 1994 Supp (3) SCC 424).

20. When the charge against the Government servant has been proved by the departmental enquiry and punishment has been awarded and the entry to that effect has been entered in the confidential report compulsory retirement on the basis of that entry is valid and cannot be held to be in the nature of punishment. (Collector v. Chottelal (1995) Supp (1) SCC 184; 1995 SCC (L&S) 375; (1995) 29 ATC 146; (1995) II L.L.J. 757.)

21. In another decision (K. Kandaswamy v. Union of India (1995) 6 SCC 162; 1995 SCC (L& S) 1361; (1995) 31 ATC 479, the Supreme Court has again reiterated that if the appropriate authority forms a bona fide opinion that in view of the doubtful integrity it would not be desirable in public interest to retain the officer concerned in service the action thereof cannot be challenged before the Courts, though it is open to the aggrieved party to impugn it on the ground that requisite opinion is based on no evidence or has not be formed on bona fide ground or is based on collateral grounds or arbitrary. When the order has been passed by the competent authority on the basis of totality of facts and circumstances appropriate to the case the order cannot be held to be arbitrary, unjustified or based on no evidence. When the adverse remarks in the confidential reports contained a reflection on his integrity in discharging the duty, the decision to compulsory retire him on such adverse

remarks is held to be in public interest. (U.P. State Mineral Dev. Corporation v. K.C.P. Sinha (1996) 5 SCC 111; 1996 SCC (L & S) 1144).

22. The competent authority can also take into consideration record of pending disciplinary enquiry against the Government servant along with other relevant record for formation of opinion to compulsorily retire a Government servant in public interest even if such departmental enquiry resulted in imposing a minor penalty. (State of Orissa v. Ram Chandra Das AIR 1996 SC 2436; (1996)5 SCC 331; 1996 SCC (L&S)1169: 1996 Lab IC 2062.)

23. **Bad service record**. Adverse remark made in the confidential report although preceded by promotion constituted a material on the basis of which the opinion could be formed to compulsorily retire the employee concerned in public interest. (H.G. Venkatachaliah v. Union of India (1997) 11 SCC 366). The employee concerned out of last ten years was graded in ACRs for part of one year and for three other years as "average". He was punished by three warnings in respect of various lapses in pre-promotion and post-promotion period. In view of such average gradings and punishment order compulsory retirement passed against him has been upheld by the Supreme Court. (Satya Prakash Gupta v State of Haryana 1997 SCC (L& S) 1764).

When the entire service record of the concerned employee was placed before the Review Committee and the Review Committee on considering the adverse entries and punishment imposed on the Government servant recommended compulsory retirement and the competent authority on the basis thereof passed the order of compulsory retirement. It cannot be held that the order of compulsory retirement was arbitrary or illegal. (I.K. Mishra v. Union of Indian (1997) 6 SCC 228; 1997 SCC (L& S) 1654; 1997 Lab IC 2866). While considering the entire service record of the employee the authority took into consideration an adverse entry even prior to his promotion. The order passed bona fide cannot be faulted because such adverse remarks even prior to promotion is not wiped out by promotion of the concerned employee. (State of Punjab v. Gurdas Singh AIR 1998 SC 1661; (1998) 4 SCC 92; 1998 SCC (L&S)1004; 1998 Lab IC 1401; (1998) II L.L.J. 324; (1998) 3 LLN 94.

When entire service record including the record for the period prior to 1st April 1985 i.e. prior to confirmation, which contained adverse remark was considered it cannot be said that there was no sufficient material for the appropriate authority to form the requisite opinion that further retention of service of the respondent was not in public interest. (Union of India v. P.S. Dhillon (1996) 3 SCC 672; 1996 SCC (L& S) 799; AIR 1996 SC 1736).

(24) In Bishwanath Prasad Singh v. State of Bihar and others (2001) 2 Supreme Court Cases 305 the Supreme Court has observed in para 12 as below:-

"**12**. Compulsory retirement in service jurisprudence has two meanings. Under the various disciplinary rules, compulsory retirement is one of the penalties inflicted on a delinquent government servant consequent upon a finding of guilt being recorded in

disciplinary proceedings. Such penalty involves stigma and cannot be inflicted except by following procedure prescribed by the relevant rules or consistently with the principle of natural justice if the field for inflicting such penalty be not occupied by any rules. Such compulsory retirement in the case of a government servant must also withstand the scrutiny of Article 311 of the Constitution. Then there are service rules, such as Rule 56 (j) of the Fundamental Rules, which confer on the Government or the appropriate authority, an absolute (but not arbitrary) right to retire a government servant on his attaining a particular age or on his having completing a certain number of years of service on formation of an opinion that in public interest it was necessary to compulsorily retire a government servant. In that case, it is neither a punishment nor a penalty with loss of retiral benefits.(see Shyamlal v. State of U.P. AIR 1954 SC 369; (1955) 1 SCR 26), (Birj Mohan Singh Chopra v. State of Punjab (1987) 2 SCC 188; (1987 3 ATC 496), (S Ramachandra Raju v. State of Orissa 1994 Supp (3) SCC 424; 1995 SCC (L& S) 74; (1994) 28 ATC 443), (Baikuntha Nath Das v. Chief District Medical Officer, Baripada (1992) 2 SCC299; 1993 SCC (L& S) 521; (1992) 21 ATC 649). More appropriately, it is like premature retirement. It does not cast any stigma. The government servant shall be entitled to the pension actually earned and other retiral benefits. So long as the opinion forming basis of the order for compulsory retirement in public interest is formed bona fide, the opinion cannot be ordinarily interfered with by a judicial forum. Such an order may be subjected to judicial review on very limited grounds such as the order being mala fide, based on no material or on collateral grounds or having been passed by an authority not competent to do so. The object of such compulsory retirement is not to punish or penalise the government servant but to weed out the worthless who have lost their utility for the administration by their insensitive, unintelligent or dubious conduct impeding the flow of administration or promoting stagnation. The country needs speed, sensitivity, probity, non-irritative public relation and enthusiastic creativity which can be achieved by eliminating the dead wood, the paper logged and callous (see S. Ramachandra Raju v. State of Orissa (1994 Supp (3) SCC 424; 1995 SCC (L& S) 74; (1994) 28 ATC 443). We may with advantage quote the following passage from this decision; (SCC p.430, para 9)

"Though the order of compulsory retirement is not a punishment and the government servant on being compulsorily retired is entitled to draw all retiral benefits, including pension, the Government must exercise its power in the public interest to effectuate the efficiency. Integrity of public service needs to be maintained. The exercise of power of compulsory retirement must not be a haunt on public servant but act as a check and reasonable measure to ensure efficiency in service, and free from corruption and incompetence. The officer would go by reputation built around him. In appropriate case, there may not be sufficient evidence to take punitive act of removal from service. But his conduct and reputation in such that his continuance in service would be a menace in public service and injurious to public interest."

25. The order of compulsory retirement is neither punitive nor

stigmatic and in the formation of opinion while passing order of compulsory retirement the entire service records, character roll or confidential report with the emphasis cannot be taken into account along with the relevant period and the contention that the consideration of adverse material older than ten years vitiated the order of compulsory retirement was rejected by the Supreme Court in the State of U.P. and others v. Vijay Kumar Jain (2002) 3 SCC 641 and order of withholding integrity certificate and censor entry are sufficient entries for compulsory retirement under Rule 56 (c) and (j) of U.P. Fundamental Rules. In Vijay Kumar Jain (supra) the court in para no.13 and 14 had noted below:

"**13**. In Baikuntha Nath Das v. Chief District Medical Officer, Baripada (1992) 2 SCC 299: 1993 SCC (L&S) 521: (1992) 21 ATC 649, this Court laid down certain principles which are as under: (SCC pp. 315-16, para 34).

"34. (i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary, in the sense that no reasonable person would from the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/ character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a court merely on showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

"**14**. In State of Punjab v. Gurdas Singh (1998) 4 SCC 92: 1998 SCC (L&S) 1004, it was held thus: (SCC p. 99, para 11)-

"Before the decision to retire a government servant prematurely is taken the authorities are required to consider the whole record of service. Any adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while

considering the overall performance of the employee during whole of his tenure of service whether it is in public interest to retain him in the service. The whole record of service of the employee will include any uncommunicated adverse entries as well."

26. In the present case the relevant records, character roll, confidential report and service book have been seen and the order in question is not passed arbitrarily and is made in public interest in compliance to the fundamental Rules 56 as such judicial review is not possible in view Vijay Kumar (supra). The present compulsory retirement have been passed fairly, bonafidely free from arbitrariness, in the public interest and in the interest of the administration and in consonance to the fundamental rules by way of order of simplicitor, therefore, is in consonance to the decision of Supreme Court (1992) 2 SCC 317 P & T. Board v. C.S.N. Murthy and on the material available in the service record of the petitioner and in the light of judgment of Baikuntha Nath (supra) and AIR 1994 SC 1261 Union of India v. N.P. Seth, (1998) 4 SCC 92 State of Punjab v. Gurudas Singh 1998 (9) SCC 220; U.P.S.R.T.C. v. Hari Nath Singh (1997) 7 SCC 483; Union of India v. G. Ganayuthan and 1997 (6) SCC 381 State of Punjab v. Bakshi Singh.

27. In view of the above decisions compulsory retirement order has been passed against the petitioner in the public interest did not indicate any stigma and the principle of natural justice is not attracted. Therefore, no scope of any interference is made out.

Writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2003

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

Civil Misc. Writ Petition No. 20219 of 1998

Mohammad Ayub ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Shukla
Sri Surendra Prasad
Sri B.C. Naik

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

(A) Constitution of India Article 226 readwith U.P. Recruitment (Determination date of birth) Rules 1974-Date of Birth in absence of High School certificate-Date of birth recorded in service book duly acknowledged by the concerned employee-Alteration claimed on the basis of medical certificate-Disputed question relating to date of birth can not be decided in writ jurisdiction-Petition Dismissed.

Held- Para 47

Date of birth entered into service book, duly verified by the petitioner and competent authority, is taken as correct date of birth of the petitioner.

Dispute regarding date of birth-being a disputed question of fact cannot be adjudicated in writ petition.

(B) U.P. Recruitment (Determination of Date of Birth) Rules 1974-Correction of Date of Birth-date of Birth once entered in service book remain untouched for a long period can not be questioned.

Held-Para 41

It is settled proposition of law that the date of birth entered in the Service Book cannot be corrected at a belated stage. Where the date of birth entry remains in existence for a long time, the same does not require to be disturbed.

Case law referred:

(2003) 1 UPLBEC-280, S.A. No. 383 OF 1989, AIR 1995 SC 1499, (1995) Vol. 4 SCC 172, 2001 (2) ESC 338 (SC), AIR 2001 SC 1665, AIR 1997 SC 2452, (200) 8 SCC 696, AIR 1967 SC 1269, AIR 1977 SC 746, AIR 1993 SC 2647, 1994 Supp. (1) SCC 155, (1995) Vol. 3 SCC 17, AIR 1995 SC 1349, AIR 1995 SC 850, 1995 (2) SCC 82, (1996) 7 SCC 421, AIR 1997 SC 1986, AIR 1991 SC 308, 1991 Supp. Vol. 2 SCC 387, (1994) Vol. 6 SCC 302, (1995) 2 SCC 98, 1996 (1) SCC 593, AIR 1997 SC 2452, 1997 Vol. 5 SCC 181, (2003) 2 UPLBEC 1602, 1991 (63) FLR 76, (1996) 72 FLR 562, (1995) 71 FLR 950, JT (2002) 10 SCC 207, AIR 1965 Raj. 86, AIR 1978 A.P. 420, AIR 1973 Alld. 23, AIR 1964 SC 370, AIR 1966 SC 1931, AIR 1967 SC 856, AIR 1969 SC 903, AIR 1978 SC 1142, AIR 1999 SC 264, (1999) 7 SCC 510, AIR 1999 SC 264, (200) 7 SCC 719, (2000) 9 SCC 549, (2000) 1 SCC 652, AIR 1981 SC 361, AIR 1965 SC 282, AIR (1970) SC 326, AIR 1964 SC 1625, AIR (2001) SC 703, AIR 1970 SC 1029, AIR 2001 S.C. 2231, AIR 1988 SC 1796, AIR 1998 Raj. 54 DB, AIR 1988 SC 2981, (1999) SCC 141, AIR (2001) SC 1684, (2003) 1 SCC 18, AIR 2003 SCW 3775, 2003 (2) UPLBEC 1780, (1970) 3 SCC 624, 1990 (2) SCC 682, 1993 Supp. 1 SCC 763, 1993 (2) SCC 162, 1993 Supp. 1 SCC 306, 1990 (1) SCJ 59, (1993) Supp. 1 SCC 192, (1991) 2 SCC 716.

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

Heard Sri Brijesh Chandra Naik, learned Counsel for the petitioner and Sri S. S. Sharma, learned Standing Counsel.

1. Listing application is being disposed of and with the consent of the parties the present writ petition is disposed of in view of Second proviso to Rule 2 of Chapter XXII of the High Court Rules, 1952.

2. In this petition the petitioner has prayed for quashing the order dated 2.2.1998 (Annexure-4 to the writ petition), whereby the petitioner was directed to be retired on 30.6.1998, with a further prayer to direct the respondents to continue the petitioner in service till 30.6.2001.

3. According to the petitioner he was appointed as a temporary Bearer in Circuit House w.e.f. 29.1.1962. The petitioner is not High School pass, and while entering into service the date of birth of the petitioner was entered as 05.06.1940 in the service book, which was duly attested by the petitioner as well as by the competent authority the Assistant Engineer. The petitioner in due course was promoted as Work Supervisor w.e.f. 26.5.1979 and had carried on the service satisfactorily and taking the date of birth as 5.6.1940, an order dated 2.2.1998 (Annexure-IV) was issued to petitioner to retire him on 30.6.1998.

4. In the supplementary affidavit filed on behalf of the petitioner on 11.4.2000 the petitioner relied upon the returns given by the office of the Executive Engineer of Public Works Department, where the date of birth of the petitioner was written as 5.6.1943. At the fag end of career the petitioner presented the registration and transfer certificates issued on 15.7.1969 by Jai Narain Pratap Narayan Higher Secondary School Kanpur showing the dispute in the date of birth shown as 5.6.1940 in place of 5.6.1943. According to the petitioner he has been given a certificate by the Chief Medical Officer, Kanpur Nagar dated 25th

May, 1998 (enclosed as Annexure-7 to the writ petition) according to which by physical appearance the age of the petitioner was estimated fifty five years on 25.5.1998. On the basis of this medical certificate, transfer certificate and returns issued by the Executive Engineer, the petitioner has claimed and disputed at the fag end of his service his date of birth as 5.6.1943 and not the date of birth entered into the service book, which was duly attested by the petitioner and verified by the competent authority.

5. Though counter affidavit has not been filed, however, the learned Standing Counsel had submitted that the date of birth entered into the service book and duly verified by the petitioner and endorsed by the competent authority is to be taken as correct date of birth. The petitioner has acknowledged the same and has not agitated or claimed for correction of his date of birth after entering in service. As the dispute of the date of birth is a question of fact and that could only be rectified by Civil Court by way of suit the petitioner might have relied upon evidences and documents of his choice to prove his controvertial date of birth at appropriate forum and the disputed question of fact can not be gone into in the writ petition.

6. In {(2003) 1 UPLBEC-280 Bimlesh Sharma vs. Electricity Board, Office of Chief Engineer, U.P. Rajya Vidyut Parishad, Moradabad and others where date of birth entered in the service book was to be changed by the wife of the deceased employee when the husband of the writ petitioner had died after retirement by disputing the change of date of birth. This court has held disputed question of fact cannot be investigated in the writ petition and the date of birth once entered in the service book of the petitioner under U.P. Recruitment to service (Determination of Date of Birth) Rules,1974, was treated to be correct supported by the relevant documents and supporting entries in the service book and the change of the date of birth disputing the same on the basis of fitness certificate were not treated to be relevant proof of age and such controversy and disputed question of fact could not be resolved by investigating the authenticity of the documents relied upon by the parties concerned in the writ proceedings.

7. In the case of Adhishashi Abhiyanta, Electricity Board, Rihand and Hydel Civil Div. U.P. State Electricity Board, Allahabad and another v. Shitla Prasad and another, Special Appeal No. 383 of 1989, decided on 17.9.1993, a Division Bench of this Court has held that:-

….. in our opinion, the medical fitness certificate dated 25.7.1974 could not be treated an opinion of the Doctor regarding the age of the petitioner. The certificate has been given in the proforma prescribed under Fundamental Rules 10. The Doctor had examined the petitioner in order to ascertain as to whether he suffered from any communicable disease or otherwise and whether he had any constitutional weakness or bodily infirmity which would constitute disqualification for employment in the Hydel department. The Doctor was not asked or required to give an opinion regarding the age of the petitioner. There are well known scientific methods to ascertain the age of a person and ossification of bone gives a fairly accurate idea regarding the age. However, for this purpose X-ray examination has to be performed in case of Doctor had been

asked to give his opinion regarding the age of the petitioner he would have performed necessary tests including X-ray examination etc. and would have also given the scientific date on the basis of which he would have formed his opinion about the age. The Doctor while giving opinion about the age of a person is if the…. Nature of the an expert and in absence of necessary scientific date…weight in view of Section 45 of Evidence Court. We are clearly of the opinion that the medical fitness certificate dated 25.7.1994, could not at all be treated as an opinion of the Doctor regarding the age of the petitioner. As a consequence the said document could not be used for the purpose of determining his age.

8. In the case of Burn Standard Co. Ltd. v. Dinabandhu Majumdar, AIR 1995 Supreme Court 1499, 1995 (4) SCC 172 it was held that the employee of a public sector undertaking whose date of birth was entered in service book and leave record on the basis of the voluntary declaration made by the employee at the time of appointment and authenticated by him was never objected to up to the fag end of service, thereafter he sought for correction of date of birth about two years before his superannuation, when his prayer was refused, he moved the High Court in the writ petition, where relief was granted in his favour, however, the Supreme Court in appeal by special leave has held that ordinarily the High Court should not exercise its discretion in writ jurisdiction and entertain a writ petition filed by an employee of the Government or any instrumentality of State towards the fag end of his service seeking correction of his date of birth entered in his service record or service register with the avowed object of continuing in service beyond the consequential period of retirement.

The Supreme Court has pointed out when an employee of the Government or its instrumentality who remained in service for over decades, with no objection whatsoever raised as to his date of birth accepted by the employer as correct all of a sudden comes forward towards the fag-end of his service career with writ petition before the High Court seeking correction of date of birth in his service record, the very conduct of not raising any objection in the matter by the employee for long should be a sufficient reason for the High Court not to entertain such application on the ground of acquiescence, undue delay and laches.

9. In the case of State of Orissa and others v. Ramnath Patnaik, AIR 1997 Supreme Court 2452, the Supreme Court has observed in para 4." When entry was made in service record and when he was in service, he did not make any attempt to have the service record corrected, therefore, any amount of evidence produced subsequently would be of no avail…".The Supreme Court has held that " an employee cannot be permitted to seek correction of his date of birth after his retirement".

10. In the case of Hindustan Lever Limited v. S.M.Jadhav and another, 2001 (2) E.S.C. 338 (S.C.)=AIR 2001 SC 1665 the Supreme Court, has elaborated its earlier view and held that " an employee cannot be allowed to raise, at the fag end of the career, dispute regarding correction of his date of birth."

11. In the case of General Manager, Bhawani Cooking Coal Limited, West Bengal v. Shib Kumar Dushad and others, (2000) 8 SCC 696, the Supreme Court has held that "no dispute regarding correction of date of birth shall be permitted to be raised after long time his joining service unless it is based on some typographical or arithmetical error and the Court refused to interfere in such matter."

12. In the matter of dispute regarding date of birth, the Government may choose one of the suggested date of birth given by the employee if some preliminary inquiry is made to resolve the controversy of the date of birth and Inquiry Officer holds the preliminary inquiry does not disclose to the person concerned and the decision arrived thereunder was treated to be contrary to the basis of justice and can have no value and shall be treated against the rules of natural justice has to accept one date of birth out of the claims by the employee on the basis of the inquiry report, such inquiry report should be passed on after informing the person concerned and after taking into the evidence in support thereof and after providing opportunity to the persons concerned as held in the State of Orissa v. Dr. Miss Binapani Dei AIR 1967 SC 1269.

13. In Bhupendra Nath Chatterjee v. State of Bihar AIR 1977 SC 746, it was held that the date of birth recorded in service record is to govern the date of superannuation of the person from service.

14. In the matter of correction of date of birth. an application for that purpose is to be filed, according to the procedure prescribed within the time under rules or if no rule is prescribed, such application should be made within reasonable time. The Supreme Court has held that no interim order on application for correction of the date of birth should be passed by the Tribunal or the High Court keeping in view only the public service, directing the employee to be continuing in service unless there are cogent and conclusive materials produced by the employee that the date of birth recorded in the service record was not correct. The onus is heavy on the employee to prove the authenticity of the date of birth claimed for, it was therefore, held that the Court or Tribunal shall be slow in granting such interim relief unless the claim is supported by prima facie evidence of unimpeachable character, as observed in Secretary cum Commissioner, Home Department v. R. Kirubakaram AIR 1993 SC 2647: 1994 Supp. (1) SCC 155.

15. The application for correction of date of birth as recorded in the service book are not permitted to be corrected by inordinate delay as held in Union of India v. Kantilal Hematram Pandiya (1995) 3 SCC 17=AIR 1995 SC 1349. The Supreme Court has held that the document which came into existence subsequent to the entrance in service but while getting the date of birth recorded in the said certificate respondents had not been involved. The Supreme Court considered this issue in Union of India v. Kantilal Hemantram Pandya (supra) and held that court may not place any reliance on a document or certificate of date of birth which had been brought into existence for the benefit of the pending proceedings as the correctness and genuineness of such a certificate is not free from doubt. In Union of India v.

Kantilal Hematram Pandya (supra), the Supreme Court reiterated a similar view observing as under:-

"He allowed the matter to rest till he neared the age of superannuation. The respondent slept over his rights to get the date of birth altered for more than thirty years and woke up from his deep slumber on the eve of his retirement only….. State claims and belated applications for alteration of the date of birth recorded in the Service Book at the time of initial entry, made after unexplained and inordinate delay, on the eve of retirement need to be scrutinized carefully and interference made sparingly and with circumspection. The approach has to be cautious and not casual. On facts, the respondent was not entitled to the relief which the Tribunal granted to him."

16. In another case when long delay was made in seeking the correction of date of birth and the application having been filed beyond the statutory time limit (three years) it was held by the Supreme Court that competent authority may reject such application and the plea of the employee that the alleged mistake was discovered at about the time when he filed the application for date of birth which was about 40 years of the date of joining the service cannot be accepted as correct. {Chief Medical Officer v. Khadeer Khadri AIR 1995 SC 850; (1995) 2 SCC 82;

17. In Union of India v. Ram Suia Sharma 16 {(1996) 7 SCC 421;} the Supreme Court has again reiterated that the claim for correction of the recorded date of birth made 25 years of joining in the service could not have been entertained by the Central Administrative Tribunal and the Tribunal's direction allowing such a claim is per se illegal and that due to long delay and latches, such a claim should not have been entertained by the Tribunal.

18. In respect of condition precedent for correction of date of birth the Supreme Court held the employee seeking the correction of the date of birth must show that the recorded date of birth was made due to negligence of some other person or that the same was an obvious clerical error and that where the employee fails to do so, such relief for correction of date of birth should not be granted by the Administrative Tribunal. In that case, the extract from the Birth Register was produced, subsequently to the recording of date of birth on the basis of the school leaving certificate. The authority refused to correct the date of birth in the service on the basis of such extract. It is held by Supreme Court that in the absence of any material to show that the entry in the school leaving certificate was incorrect, the authority rightly refused to correct the date of birth, more so when the extract from the Birth Register even otherwise was found to be doubtful. {Commissioner of Police, Bombay v. Bhagaban V. Lahane AIR 1997 SC 1986;}

19. The respondent applied for correction of date of birth before the appointing authority on obtaining a decree from civil court in a civil suit filed by the respondent against the Board/University for correction of his date of birth in the matriculation certificate issued by the Board/University. In that suit Government was not made a party. The question arose if the Government was bound to correct the date of birth in the service record on the basis of the said decree obtained

against the Board/University in which the Government was not a party. The Supreme Court has held that as in the suit the Government was not a party, such decree is not binding upon the Government and the Government is not obliged to correct the date of birth on the basis of the said decree. It is also held that at best it is a piece of evidence and the Government has to look into all kinds of evidence for determination in order to decide whether the date of birth should be correct. It is observed that what is the date of birth is undoubtedly a question of fact and so all kinds of evidence can be looked into for such determination and if the Government on consideration of all these facts refused to correct the date of birth, then the order cannot be interfered with by the Court or Tribunal. {Director of Technical Education v. Smt. K. Sitadevi AIR 1991 SC308; 1991 Supp (2) SCC 387;}

20. The object of the rule or statutory instructions issued under the provision to Art. 309 or orders issued by the Government under Art.162 of the Constitution for the correction of date of birth entered in the service record, is that the Government employee, if he has any grievance, in respect of any error or entry in the date of birth, will have an opportunity, at the earliest to have it corrected. Its object also is that the correction of the date of birth beyond a reasonable time should not be encouraged. Permission to reopen accepted date of birth of an employee, specially on the eve of or shortly before the superannuation of the Government employee would be an impetus to produce fabricated records. {State of T.N. v. T.V. Venugopalan (1994) 6 SCC 302;}

21. In reference to the decision of Supreme Court in Burn Standard Co. Ltd.(supra) where entry of date of birth noted in the Admit Card of matriculation Examination could not be relied upon by the employer to correct the date of birth recorded in the service and Leave Register of the employee and authenticated by the employee himself it was the date of birth recorded at the time of joining service on the basis of the S.S.L.C. register was challenged by the employee 35 years later and his previous application for correction seven years earlier had already been rejected by the authority and at the belated stage, the only evidence was his oral evidence and the horoscope evidence. Therefore, the Supreme Court held that at the belated stage the horoscope evidence or oral statements cannot be believed. {Collector of Madras v. Rajamanickram (1995) 2 SCC 98;}

22. The date of birth recorded in periodical medical inspection reports- can be relied up when the employee challenged the declared date of birth as mentioned in the notice of superannuation as incorrect as the service records were missing. The Department pleaded before the Court below that the service record was manipulated and that the service register was removed by the employee in connivance with the Office Superintendent. The employee sought to rely upon the periodical medical reports noting date of birth to uphold his contention that the date of birth mentioned in the notice of superannuation was not correct. It was held that the date of birth recorded in the periodical medical inspection reports are not such reliable piece of evidence to uphold the contention of the employee that the date of birth

mentioned in the superannuation notice is incorrect. {Sheo Nandan Singh v. Union of India (1996) 1 SCC 593;}

23. **In respect of correction of date of birth after retirement**- when claimant retired from the service on 31st December 1978 and in 1981 he filed a suit against the rejection of his representation for correction of his date of birth for declaration that his correct date of birth is 1st January 1925 and not 1stJanuary, 1921. The Trial Court dismissed the suit but the First Appellate Court decreed the suit and the Orissa High Court has dismissed the second appeal in limine. The Supreme Court set aside the order of the High Court and allowed the appeal and also the judgment and decree of the First Appellate Court and restored that the Trial Court. It was held that when entry was made in the service record and when he was in service, he did not make any attempt to have the service record corrected any amount of evidence produced subsequently would be of no avail and that the High Court has therefore committed the manifest error in refusing to entertain the second appeal. {State of Orrisa v. Ramnath Patnaik AIR 1997 SC 2452. (1997) 5 SCC 181;}

24. In (2003) 2 UPLBEC 1602 (Ehtesham Ullah Khan v. Central Administrative Tribunal, Allahabad and others) this court (D.B.) (Hon'ble Dr. B.S.Chauhan and Ghanshyam Dass JJ) has held that once the date of birth is recorded in service record, at time of entrance in service, it can be changed only by production of strong documentary evidence showing that it was incorrect. Any document coming into existence subsequent to entrance in service in correctness or genuineness of entry therein is said not free from doubt. In the instant case, petitioner joined service in 1963 and got his date of birth recorded as 17.5.1934, thereafter, he had passed High School Examination in 1965, wherein date of birth was recorded as 17.2.1943. He filed application for change in his date of birth in 1987, i.e., after 19 years of his service on the strength of this High School Certificate, a documentary proof, which by itself was rightly not found reliable, in view of settled law, besides it the fact about its genuineness also became doubtful as parentage of petitioner was found recorded different than that recorded in service record as such the Tribunal, therefore, rightly held to have rejected application.

25. Similarly as held in Rajasthan High Court in R.S. Mehrotra v. Central Government Industrial Tribunal, 1991 (63) FLR 76, the documents obtained subsequent to the date of joining the service cannot be relief upon for the purpose of correcting the date of birth as it might be very easy for the employee to mention another date in the papers while preparing the other documents, which came into existence subsequently and the Industrial Tribunal should not have accepted the claim of the workman placing reliance on such documents.

26. In Maharashtra State Electricity Board v. Sakharam Sitaram Shinde, 1996 (72) FLR 562, the Bombay High Court has taken a similar view observing that the possibilities of fabricating the documents just to support bogus claim of an employee cannot be ruled out in such circumstances.

27. The Rajasthan High Court in Nagar Mahapalika, Bareilly v. Labour

Court, Bareilly and Anr., 1995 (71) FLR 950, held that the Industrial Tribunal committed an error in placing reliance on the documents prepared by the employee subsequently.

28. In State of Madhya Pradesh and Ors. V. Mohan Lal Sharma, JT (2002) 10 SC 207, the Supreme Court held that while examining the issue of correction of date of birth the Court must be very slow in accepting the case of applicant if issue has been agitated at a much belated stage and it must examine the pros and cons involved, in the case even if not raised by the parties. In the said case, the application for correcting the date of birth was rejected observing, that if it was allowed the applicant had joined the service, when he was below 18 years of age, and therefore, accepting such application would amount to sanctifying the illegal entrance in service.

29. There is a presumption that official acts are regularly performed though such a presumption can be rebutted by adducing evidence. (Vide Jhaman Lal v. State of Rajasthan and ors., AIR 1965 Raj. 86; Somasusudarshan Goud v. The District Collector, Hyderabad and Anr., AIR 1978 AP 420; Ganga Ram v. Smt. Phulwati, AIR 1970 All. 446; Saheed Ahmed v. Syed Qumar Ali and Anr., AIR 1973 All. 23; Gopal Narain v. State of U.P. and ors., AIR 1964 SC 370; Maharaja Pratap Bahadur Singh v. Thakur Man Mohan Dey and ors., AIR 1966 SC 1931; Ajit Singh v. State of Punjab and Ors., AIR 1967 SC 856; State of Punjab v. Satya Pal Dang and ors., AIR 1969 SC 903; Sone Lal and ors. V. State of U.P. and ors., AIR 1978 SC 1142; Municipal Board, Saharanpur v. Imperial Tobacco of India Ltd., and ors., AIR 1999 SC 264; K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr., (1999) 7 SCC 510; Kiran Gupta v. State of U.P. and ors., AIR 1978 SC 1142; Municipal Board, Saharanpur v. Imperial Tobacco of India Ltd., and ors., AIR 1999 SC 264; K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr., (1999) 7 SCC 510; Kiran Gupta v. State of U.P. and Ors., (2000) 7 SCC 719; Superintendent, Narcotics Control Bureau v. R. Paulsamy, (2000) 9 SCC 549 and the State Government of NCT of Delhi v. Sunil and Anr., (2000) 1 SCC 652.

30. In Narayan Govind Gavate v. State of Maharashtra and ors., AIR 1977 SC 183, the Hon'ble Supreme Court observed that presumption provided in Illustration (e) of Section 114 of the Evidence Act is based on well-known maxim of law "omnia praesumuntur rite esse acta" (i.e., all acts are presumed to have been rightly and regularly done). The Court further held that this presumption is, however, one of the fact. It is an optional presumption and can be displaced by the circumstances, indicating that the power lodged in an authority or official has not been exercised in accordance with law.

For rebutting the long standing entry regarding the date of birth of an employee in his service record is a difficult task for the reason that the case of applicant has to be considered in view of the provisions of Section 35 and 114 of the Evidence Act.

31. In Harpal Singh v. State of Haryana, AIR 1981 SC 361, Brij Mohan v. P.B.N. Sinha, AIR 1965 SC 282 and Ramprasad v. State of Bihar, AIR 1970 SC 326, it has been held by the Supreme Court that unless it is proved that the

entries had been recorded in exercise of the official duties by a Government servant, the same cannot be held to be admissible under Section 35 of the Evidence Act. In case, it is proved that it got recorded by an illiterate Chowkidar or by someone else, or entries had been made without proper checking, the same requires corroboration and cannot be assumed to be correct.

32. In Mohammed Ikram Hussain v. State of U.P., AIR 1964 SC 1625, it was held that the age of the girl mentioned in the School Register at the time of admission was a good evidence under Section 35 of the Evidence Act. School Register was found to be admissible on the ground that these entries were made ante litem mortem.

33. In Updesh Kumar and ors. V. Prithvi Singh and ors., AIR 2001 SC 703, the School Admission Register was held to be made admissible under Section 35 of the Evidence Act. Even the age mentioned in Matriculation Certificate by the Education Board was held to be done in accordance with law as required under Section 114, Illustration (e) of the Evidence Act.

34. School should be a Government one only then it can be held that date of birth had been recorded by a public servant in exercise of his official duty. No such presumption would be there in respect of Admission Register of the private school. Entries therein shall require corroboration. (Vide Rammmurti v. State of Haryana, AIR 1970 SC 1029; Brij Mohan Singh (supra).

35. In Ramdeo Chauhan v. State of Assam, AIR 2001 SC 2231, the Supreme Court, while examining the issue regarding admissibility of School Admission Register under Section 35 of the Evidence Act, held that as it was not clear as under what provision of law, the School Register was maintained, the entries made in such a Register cannot be taken as a proof of age of the person concerned for any purpose.

36. Date of Birth, the Secondary School Certificate is not to be taken to be correct unless corroborated by parents-who got the same entries made. (Vide Biradmal Singhvi v. Anand Purohit, AIR 1988 SC 1796 and Tora Devi v. Sudesh Choudhary, AIR 1998 Raj. 54 (D.B.).

37. It is settled proposition of law that a party has to plead the case and produce/adduced sufficient evidence to substantiate his submissions made in the petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. (Vide Bharat Singh v. State of Haryana, AIR 1988 SC 2181; M/s Larsen and Toubro Ltd. v. State of Gujarat and ors., AIR 1998 SC 1608; National Building Construction Corporation v. S. Raghunathan and ors., AIR 1998 SC 2779; Ram Narain Arora v. Asha Rani and ors., (1999) SCC 141; Chitra Kumari v. Union of India and ors., AIR 2001 SC 1684, the Supreme Court observed as under:-

"The findings, in the absence of necessary pleadings and supporting evidence cannot be sustained in law."

38. Similar view has been reiterated in Vithal N. Shetti and Anr. V. Prakash N. Rudrakar and ors., (2003) 1 SCC 18.

39. In 2003 AIR SCW 3775 =(2003) 2 UPLBEC -1780 (State of U.P. and others Vs Smt. Gulaichi) the Supreme Court has held in paras 8 and 9 as below:-

"8. Normally, in public service, with entering into the service, even the date of exit, which is said as date of superannuation or retirement, is also fixed. That is why the date of birth is recorded in the relevant register or service book, relating to the individual concerned. This is the practice prevalent in all services, because every service has fixed the age of retirement, it is necessary to maintain the date of birth in the service records. But, of late a trend can be noticed, that many public servants, on the eve of their retirement raise a dispute about their records, by either invoking the jurisdiction of the High Court under Article 226 of the Constitution of India or by filing applications before the concerned Administrative Tribunals, or even filing suits for adjudication as to whether the dates of birth recorded were correct or not."

"9. Most of the States have framed statutory rules or in absence thereof issued administrative instructions as to how a claim made by a public servant in respect of correction of his date of birth in the service record is to be dealt with and what procedure is to be followed. In many such rules a period has been prescribed within which if any public servant makes any grievance in respect of error in the recording of his date of birth, the application for that purpose can be entertained. The sole object of such rules being that any such claim regarding correction, of the date of birth should not be made or entertained after decades, especially on the eve of superannuation of such public servant. In the case of State of Assam v. Daksha Prasad Deka (1970 (3) SCC 624), this Court said that the date of the compulsory retirement "must in our judgment be determined on the basis of the service record and not on what the respondent claimed to be his date of birth, unless the service record is fist corrected consistently with the appropriate procedure." In the case of Government of Andhra Pradesh v. M. Hayagreev Sarma (1990 (2) SCC 682) the A.P. Public Employment (Recording and Alteration of Date of Birth) Rules, 1984 were considered. The public servant concerned had claimed correction of his date of birth with reference to the births and deaths register maintained under the Births, Deaths and Marriages Registration Act, 1886. The Andhra Pradesh Administrative Tribunal corrected the date of birth as claimed by the petitioner before the Tribunal, in view of the entry in the births and deaths register ignoring the rules framed by the State Government referred to above. It was inter alia observed by this Court.

"The object underlying Rule 4 is to avoid repeated applications by a government employee for the correction of his date of birth and with that end in view it provides that a government servant whose date of birth may have been recorded in the service register in accordance with the rules applicable to him and if that entry had become final under the rules prior to the commencement of 1984 Rules, he will not be entitled for alteration of his date of birth."

40. In Executive Engineer, Bhadrak (R & B) Division, Orissa and Ors v. Rangadhar Mallik (1993 Supp (1) SCC

763), Rule 65 of the Orissa General Finance Rules, was examined which provides that representation made for correction of date of birth near about the time of superannuation shall not be entertained. The respondent in that case was appointed on November 16, 1968. On September 9, 1986, for the first time, he made a representation for changing his date of birth in his service register. The Tribunal issued a direction as sought for by the respondent. This Court set aside the Order of the Tribunal saying that the claim of the respondent that his date of birth was November 27,1938 instead of November 27,1928 should not have been accepted on basis of the documents produced in support of the said claim, because the date of birth was recorded as per document produced by the said respondent at the time of his appointment and he had also put his signature in the service roll accepting his date of birth as November 27,1928. The said respondent did not take any step nor made any representation for correcting his date of birth till September 9,1986.

41. It is settled proposition of law that the date of birth entered in the Service Book cannot be corrected at a belated stage. Where the date of birth entry remains in existence for a long time, the same does not require to be disturbed.

42. In case of Union of India v. Harnam Singh (1993 (2) SCC 162) the position in law was again reiterated and it was observed:

"A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay."

"An application for correction of the date of birth should not be dealt with by the Courts, Tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the Court or the Tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the Court or

the Tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove about the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the Court or the Tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their date of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim order, they continue for months, after the date of superannuation. The Courts or the Tribunal must, therefore, be slow in granting an interim relief of continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to this immediate junior."

43. In general, a disputed question of fact is not investigated in a proceeding under Article 226, particularly where an alternative remedy is available, e.g., the merits of rival claims to property or a disputed question of title; **State of Rajasthan v. Bhawani, (1993) Supp (1) SCC 306** paragraph 7.

44. The High Court may interfere with a finding of fact, if it is shown that the finding is not supported by any evidence, or that the finding is 'perverse' or based upon a view of facts which could never be reasonably entertained; **Arjun v. Jamnadas, (1990) 1 SCJ 59**, paragraph 15.

45. A finding based on no evidence constitutes an error of law, but an error in appreciation of evidence or in drawing inferences is not, except where it is perverse, that is to say, such a conclusion as no person properly instructed in law could have reached, or it is based on evidence which is legally inadmissible; **Board of Wakfs v. Hadi (1993) Supp 1 SCC 192**, paragraph 17.

46. If the conclusion of facts is supported by evidence on record, no interference is called for even though the court considers that another view is possible; **Maharashtra S.B.S.E. v. Gandhi, (1991) 2 SCC 716**, paragraph 10.

47. I have heard learned counsel for the parties, I find that the petitioner is not High School pass and the date of birth entered into service book, duly verified by the petitioner and competent authority, is taken as correct date of birth of the petitioner. On the basis of the returns issued from the office of the Executive Engineer and medical report of estimated age on physical appearance, the date of birth of the petitioner other than what was entered into service book can not be accepted for the purpose of this case,

therefore, the dispute of date of birth of the petitioner being a disputed question of fact cannot be corrected after adjudication in the present writ petition.

In view of the aforesaid observations the writ petition is dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2003

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

Civil Misc. Writ Petition No. 22875 of 1993

Surendra Prasad Misra ...Petitioner
Versus
Engineer-in-Chief, Irrigation Department, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri V.S. Dwivedi
Sri U.S. Mishra
Sri S.K. Tripathi

Counsel for the Respondents:
Sri Raj Kumar
S.C.

Constitution of India Article 11,14,226 & 311 - Service Law - Compulsory Retirement-order passed in public interest -not by way of punishment-after considering entire records of Service-Such order, not violate of provisions of Article 11, 14 and 311 of constitution-cannot interfered.

Held- Para 28

I have heard learned counsel for the parties. I find that the order of compulsory retirement was passed after perusing and considering all the entries available in the service book and the records pertaining to the petitioner by the Screening Committee and in view of the above analysis no opportunity of hearing is required to be given and the provisions of Articles 14, 21 and 311 of the Constitution are not attracted while passing the order of compulsory retirement, more so the said order is passed in the public interest and not by way of punishment. I find no illegality and impropriety in the said impugned order, therefore, this Court is not inclined to invoke its extra ordinary discretionary jurisdiction under Article 226 of the Constitution.

(B) Service Law- Compulsory retirement-after considering uncommunicated adverse entries-though based upon general assessment of performance-whether non-communication of such entries-renders the order invalid-held, no, as the rule of andi alteram portem does not-apply here.

Held-Para 17

Uncommunicated adverse entries but mostly based upon general assessment of performance shall not render an order of compulsory retirement invalid as the rule of audi alteram partem does not apply. The Supreme Court has held that their non communication of such adverse entry could not have the effect of vitiating the order of compulsory retirement (Jayanti Kumar Sinha v. Union of India AIR 1989 SC 72 and the similar view was taken to decide the question of compulsory retirement that the rule of audi alteram partem does not apply in view of the decision of Union of India vs. V.P.Seth AIR 1994 SC 1261 and Secretary to Government v. Nityanand Pati AIR 1993 SC 383.

Case law discussed:
AIR 1971 SC 40, AIR 1971 SC 2151, AIR 1990 SC 1004, 2001 (2) AWC 1445 (SC), AIR 1976 SC 2547 1994 Supp. (3) SCC 424, AIR 1987 SC 948, 1973 (2) Mad 485, 1995 Suppl (1) SCC 184, AIR 1977 SC 2411, AIR 1974 SC 423, 1995 (6) SCC 162, AIR 1977 SC 854, AIR 1971 SC 1011, 1996(5) SCC 331, AIR 1980 SC1894, 1955(1) SCR 26, 1997 (II) SCC 366,

AIR 1971 SC 40, AIR 1981 SC 70, 1997 SCC (L&S) 1764, AIR 1992 SC 1020, 1971 SCR 791, 1997 (6) SCC 228, 1970 (2) SCC 876, AIR 1974 SC 2192, AIR 1998 SC 1661, 1993 AIR SCW 1008, 1984 (2) SCR 453, AIR 1996 SC 1736, 2001 (3) SCC 314, AIR 1980 SC 1095, AIR 1954 SC 369, AIR 1979 SC 193, AIR 1989 SC 72, 1995 (1) SCR 26, AIR 1976 SC 1841, AIR 1994 SC1261, 1987 (2) SCC188,AIR 1980 SC953, AIR 1993 SC 383, 1994 SUPPL.(3) SCC 424, AIR 1971 SC 2151, AIR 1984 SC 630, 1992 (2) SCC 299, AIR 1965 All 142, AIR 1991 SC 534, 2002 (3) SCC 641, AIR 1967 SC 1260, 1973 SC 534, 1992 (2) SCC 299, 1998 (4) SCC 92, 1992 (2) SCC 317, 1998 (4) SCC 92, 1998 (9) SCC 220, 1997 (7) SCC 483, 1997 (6) SCC 381

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

Heard Sri U.S. Mishra learned counsel for the petitioner as well as Sri Raj Kumar learned Standing counsel for the respondents.

1. The listing application is disposed of and the writ petition is being heard right now with the consent of the parties under the Second Proviso to rule 2 of Chapter XXII of the Allahabad High Court Rules, 1952.

2. According to the petitioner, he was diploma holder in Mechanical Engineering and was appointed on 20.8.1964 as a Junior Engineer in the Irrigation department and while working as a Junior Engineer the petitioner was compulsory retired on 5.5.1993. According to the petitioner his work and performance was satisfactory and he has received letter of appreciation during the service and to the best of his knowledge he was never awarded or communicated any adverse entries, therefore, there was no question in making any representation in respect of adverse entry, if any. The petitioner was compulsory retired without looking into the records of the case and appreciation awarded to the petitioner without up-holding opportunity of hearing in derogation to the provisions of Article 311 of the Constitution and Article 14 as well as Article 21 and without observing the norms of principles of natural justice that too by way of punishment. According to the petitioner many of the Junior Engineer have been ignored whose performance was inferior to the petitioner and without affording and providing any opportunity of hearing by Screening Committee the order of compulsorily retirement was passed. According to the petitioner, the said impugned order is not in public interest and has been passed arbitrarily by a non-speaking order without assigning any reason.

3. The counter and rejoinder affidavits have been exchanged. On the other hand in the counter affidavit it has been indicated that right from the year 1984-85 upto 1992 except for one year 1991, the service record of the petitioner was not found satisfactory. The extract of the service record of the petitioner as indicated in para 4 of the counter affidavit provides as below :-

84-85 (12.7.84 to 3.5.85)	Adverse	
85-86 (12.7.85 to 22.7.85)	Adverse	
87-88 (1.9.87 to 12.3.88)	Adverse	
88-89	Adverse	Integrity not certified
89-90	Adverse	" "
90-91	Adverse	" "

Censure entry was recorded in the year 88-89.

4. According to the petitioner the Screening Committee has considered all

the records, entries of service of the petitioner and has found the petitioner not to be kept in service, therefore, following the provisions of the Fundamental Rule 56 (c) of Chapter-II of the Financial Hand Book Part -2 to 4 and after considering the report of the Screening Committee the petitioner has been compulsory retired by the said impugned order. According to the respondents the said impugned order has been passed in public interest and providing opportunity of hearing by the Screening Committee was not required and there is no defiance of the provisions of Article 14, 21 and 311 of the Constitution while looking into the records for arriving at the subjective satisfaction of the Screening Committee for passing the said order of compulsory retirement.

5. According to the petitioner the compulsory retirement should not be passed by way of punitive measure in the light of 2001 (2) A.W.C. 1445 (SC) (M.P. Electricity Board vs Shree Baboo). In the case of Shree Baboo there was no material at all in the service record for compulsory retirement, whereas, in the present case as contended by the respondents large number of adverse remarks are available and different suggestive warnings are also available in the service record of petitioner which was indicated to improve and reform the functioning of the petitioner. The fundamental rules provides for compulsory retirement are in the interest of public service and in the present case retiring the petitioner in public interest is not illegal in view of (Union of India v. J.N. Sinha, AIR 1971 SC 40; (1971) 1 SCR 791).

6. According to the learned counsel for the petitioner the public interest in relation to public administration envisages retention of honest and efficient employees in service and dispensing with services of those who are inefficient, dead-wood or corrupt and dishonest in view of (Brij Mohan Singh v. State of Punjab, (1987) 2 SCR 583; AIR 1987 SC 948). In the present case warning have been given to bring the improvement of the petitioner. The provisions of compulsory retirement are constant reminders to the government servants to conduct themselves properly, diligently and efficiently throughout their service career (State of U.P. v. Chandra Mohan, AIR 1977 SC 2411; (1977) 4 SCC 345).

7. Since the service of as many others of the same department was scrutinised by the screening committee and if petitioner was compulsorily retired on the scrutiny of his entire service record such order cannot be treated to be violative of Article 14 and 16 of the Constitution as the facts of each individual are relevant in reference to the decision of (P. Radhakrishna Naidu v. Govt. of A.P., (1977) 2 SCR 365; AIR 1977 SC 854).

8. The retirement of the petitioner made in the public interest shall also be treated to have been made in the interest of public administration and could not be said to be illegal in the light of the decision of (Gian Singh Mann v. The High Court of Punjab and Haryana (1981) 1 SCR 507; (AIR 1980 SC 1894) and Union of India v. Col. J.N. Sinha, (1971) 1 SCR 791; (AIR 1971 SC 40);

9. The principle of natural justice have no place to contest of an order of

compulsory retirement as the order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour. Since the action is taken on the subjective satisfaction of the State Government as such there is no room for importing the audi alteram partem rule of natural justice in view of (Baikuntha Nath Das v. Chief District Medical Officer, (1992) 1 SCR 836; AIR 1992 SC 1020; (1992) 2 SCC 299).

10. The order impugned in the present writ petition has been passed taking into consideration the material available in the service record and on the subjective satisfaction of the State Government an order of compulsory retirement may not be passed by a speaking order, in the light of R.L. Butail v. Union of India, (1970) 2 SCC 876 and in view of the decision of (Union of India v. Dulal Dutt, 1993 AIR SCW 1008).

11. The compulsory retirement is not to be treated as punishment for the purpose of Article 311 of the Constitution (State of Gujrat v. Umedbhai M. Patel 2001 (3) SCC 314), the present compulsory retirement is simplicitor does not amount to dismissal or reduction in rank as such is not hit by the provision of Article 311 of the Constitution, in view of the judgement of Andhra Pradesh v. L.U.A. Dixitulu, AIR 1979 SC 193, relying on judgment in 'Tara Singh v. State of Rajasthan, AIR 1975 SC 1487 and ' State of Haryana v. Inder Prakash, AIR 1976 SC 1841).

12. The order of compulsory retirement in question has been passed by exercising power of fundamental Rule 1956 where there appears no arbitrariness as such it is not illegal in view of the decision of (Union of India v. K.R. Tahiliani, AIR 1980 SC 953; (1980) 1 SLR 847) by retiring the petitioner before attaining the age of superannuation on the basis of material available on the record shall not tantamount stigma in view of the decision of (State of U.P. v. Shyam Lal Sharma, AIR 1971 SC 2151).

13. The Supreme Court held that the charge or imputation 'that the respondent had outlived his utility ' was made the condition of the exercise of power and hence the order amounted to dismissal or removal from service within the meaning of Article 311 (2) of the Constitution. The Supreme Court itself did not agree and over-ruled the view taken by the Full Bench decision in Abdul Ahad v. The Inspector General of Police, U.P. (AIR 1965 All. 142) to the effect that compulsory retirement will always be on the ground that the employee can no longer render useful service, and the position does not become worse because what is implied is expressed in (State of U.P. v. Madan Mohan Nagar) (1967) 2 SCR 333; AIR 1967 SC 1260).

14. The impugned order of compulsory retirement is a simplicitor and stigma is not to be drawn out of which by speculative process as for making the order compulsory retirement the stigma must stems from the order itself and the scheme endeavoured to be derived from the circumstances or possibility or suspicion vide the decision in the **State of U.P. v. Shyam Lal Sharma (AIR 1971 SC 2151); State of U.P. v. Ramchandra, AIR 1976 SC 2547 and Sreshta v. Commissioner of Income Tax, (1973) 2 MLJ 485**… it has been repeatedly pointed out by the Supreme Court that

Courts cannot delve into the records and pierce the veil of the order for discovering a stigma. What is open to the court is that it could find out a stigma if it is apparent on the record or otherwise clear and springs from the order, vide the decision in **State of U.P. v. Sughar Singh, AIR 1974 SC 423; State of U.P. v. Ramchandra and State of Bihar v. Shiva Bhikshuk Misra, AIR 1971 SC 1011**. Unless the Court is satisfied that such a stigma stems out from the order, an interference with an order of compulsory retirement is not envisaged while exercising the extra ordinary jurisdiction under Article 226 of the Constitution in the light of (K. Venugopalan v. Government of Tamil Nadu, 1979 SLJ 517).

15. The mere form of order of compulsory retirement though not a conclusive and the court may some times delve into the basis of the order to lift the Veil, however, I find that after scrutiny even the present order in question is not stigmative or by way of punishment therefore can not said to passed in derogation of the decision of Shyam Lal v. State of U.P. (1955) 1 SCR 26; Baldev Raj Chadha v. Union of India, AIR 1981 SC 70; Union of India v. J.N.Sinha (1971) SCR 791; Samsher Singh v. State of Punjab (1975) 1 SCR 814; AIR 1974 SC 2192 and Anoop Jaiswal v. Government of India, (1984) 2 SCR 453, the Supreme Court observed:

"On a consideration of the above decision the legal position that now emerges is that even though the order of compulsory retirement is couched in innocuous language without making any imputation against the Government servant who is directed to be compulsorily retired from service, the Court, if challenged, in appropriate cases can lift the veil to find out whether the order is based on any misconduct of the Government servant concerned or the order has been made bona fide and not with any oblique or extraneous purposes. Mere form of the order in such cases cannot deter the Court from delving into the basis of the order if the order in question is challenged by the Government servant as has been held by this Court in Anoop Jaiswal's case."

16. The present order of compulsory retirement has been passed in public interest. It was not necessary to give a detail reason in the order in exercise of power under fundamental rule in view of the State of Maharasthtra vs. V.S.Naik, AIR 1980 SC 1095; (1980) Supp. SCC 229).

17. Uncommunicated adverse entries but mostly based upon general assessment of performance shall not render an order of compulsory retirement invalid as the rule of audi alteram partem does not apply. The Supreme Court has held that their non communication of such adverse entry could not have the effect of vitiating the order of compulsory retirement (**Jayanti Kumar Sinha v. Union of India AIR 1989 SC 72** and the similar view was taken to decide the question of compulsory retirement that the rule of audi alteram partem does not apply in view of the decision of **Union of India vs. V.P.Seth AIR 1994 SC 1261** and **Secretary to Government v. Nityanand Pati AIR 1993 SC 383**.

18. The compulsory retirement in question is not based on remote and stale adverse entries but is based on two latest

entries as such is not in derogation AIR 1984 SC 630 (**J.D. Srivastava v. State of M.P.**). The said compulsory retirement is not based on the basis of reports written by a bias officer and the order of compulsory retirement is not hit by the provisions of Article 21 of the Constitution in view to the (**State of Sikkim v. Sonam Lama**) AIR 1991 SC 534 and order of compulsory retirement does not involve civil consequences hence no show cause notice was necessary in view of decision in (**E. Venkateswararao v. Union of India**) 1973 SC 698. Since the decision in the present compulsory retirement by the present order is based on clean and bona fide exercise and as a placid of the doctrine of the State Government in legitimate exercise of power under fundamental rule is not illegal as such compulsory retirement based on material on record can not be interfered with in view of the **C.D. Ailawadi v Union of India** AIR (1990) 1 SCR 783; AIR (1990) SC 1004.

19. **Compulsory retirement involves no civil consequences**:- The compulsory retirement when exercised subject to the conditions mentioned in the Rule, as for example, F.R.56(j), one of which is that the authority concerned must be of the opinion that it is in the public interest to do so, then such order of compulsory retirement does not amount to dismissal or removal from service within the meaning of Art.311 of the Constitution. It is neither a punishment nor visits with loss of retiral benefits. It does not cause a stigma. The officer will be entitled to pension that is actually earned and there is no diminution of the agreed benefits. If the competent authority bona fide forms that opinion the same cannot be challenged before the courts. But it is open to the aggrieved party to contend that the requisite opinion has not been formed or that the decision is based on collateral ground or that it is an arbitrary decision. However, the compulsory retirement involves no civil consequences. While exercising the power various considerations would weigh with the appropriate authority. In some cases, the Government may feel that a particular post may be usefully held in public interest by an officer more competent than the one who is holding the office. That does not mean that the concerned officer is inefficient but the appropriate authority may prefer a more efficient officer or in certain key posts, public interest may require that a person of undoubted integrity and ability should be there. (**S. Rama Chandra Raju v. State of Orrisa**, 1994 Supp (3) SCC 424)

20. When the charge against the Government servant has been proved by the departmental enquiry and punishment has been awarded and the entry to that effect has been entered in the confidential report compulsory retirement on the basis of that entry is valid and cannot be held to be in the nature of punishment. (**Collector v. Chottelal** (1995) Supp (1) SCC 184; 1995 SCC (L&S) 375; (1995) 29 ATC 146; (1995) II L.L.J. 757.)

21. In another decision (**K. Kandaswamy v. Union of India** (1995) 6 SCC 162; 1995 SCC (L& S) 1361; (1995) 31 ATC 479, the Supreme Court has again reiterated that if the appropriate authority forms a bona fide opinion that in view of the doubtful integrity it would not be desirable in public interest to retain the officer concerned in service the action thereof cannot be challenged before the Courts, though it is open to the aggrieved

party to impugn it on the ground that requisite opinion is based on no evidence or has not be formed on bona fide ground or is based on collateral grounds or arbitrary. When the order has been passed by the competent authority on the basis of totality of facts and circumstances appropriate to the case the order cannot be held to be arbitrary, unjustified or based on no evidence. When the adverse remarks in the confidential reports contained a reflection on his integrity in discharging the duty, the decision to compulsory retire him on such adverse remarks is held to be in public interest. (**U.P. State Mineral Dev. Corporation v. K.C.P. Sinha** (1996) 5 SCC 111; 1996 SCC (L & S) 1144).

22. The competent authority can also take into consideration record of pending disciplinary enquiry against the Government servant along with other relevant record for formation of opinion to compulsorily retire a Government servant in public interest even if such departmental enquiry resulted in imposing a minor penalty. (**State of Orissa v. Ram Chandra Das** AIR 1996 SC 2436; (1996) 5 SCC 331; 1996 SCC (L&S)1169: 1996 Lab IC 2062.)

23. **Bad service record**. Adverse remark made in the confidential report although preceded by promotion constituted a material on the basis of which the opinion could be formed to compulsorily retire the employee concerned in public interest. (**H.G. Venkatachaliah v. Union of India** (1997) 11 SCC 366). The employee concerned out of last ten years was graded in ACRs for part of one year and for three other years as "average". He was punished by three warnings in respect of various lapses in pre-promotion and post-promotion period. In view of such average gradings and punishment order compulsory retirement passed against him has been upheld by the Supreme Court. (**Satya Prakash Gupta v State of Haryana** 1997 SCC (L& S) 1764).

*When the entire service record of the concerned employee was placed before the Review Committee and the Review Committee on considering the adverse entries and punishment imposed on the Government servant recommended compulsory retirement and the competent authority on the basis thereof passed the order of compulsory retirement. It cannot be held that the order of compulsory retirement was arbitrary or illegal. (**I.K. Mishra v. Union of Indian** (1997) 6 SCC 228; 1997 SCC (L& S) 1654; 1997 Lab IC 2866). While considering the entire service record of the employee the authority took into consideration an adverse entry even prior to his promotion. The order passed bona fide cannot be faulted because such adverse remarks even prior to promotion is not wiped out by promotion of the concerned employee. (State of Punjab v. Gurdas Singh AIR 1998 SC 1661; (1998) 4 SCC 92; 1998 SCC (L&S)1004; 1998 Lab IC 1401; (1998) II L.L.J. 324; (1998) 3 LLN 94.*

When entire service record including the record for the period prior to 1st April 1985 i.e. prior to confirmation, which contained adverse remark was considered it cannot be said that there was no sufficient material for the appropriate authority to form the requisite opinion that further retention of service of the respondent was not in public interest. (Union of India v. P.S. Dhillon (1996) 3

SCC 672; 1996 SCC (L& S) 799; AIR 1996 SC 1736).

24. In Bishwanath Prasad Singh v. State of Bihar and others (2001) 2 Supreme Court Cases 305 the Supreme Court has observed in para 12 as below:-

"**12**. Compulsory retirement in service jurisprudence has two meanings. Under the various disciplinary rules, compulsory retirement is one of the penalties inflicted on a delinquent government servant consequent upon a finding of guilt being recorded in disciplinary proceedings. Such penalty involves stigma and cannot be inflicted except by following procedure prescribed by the relevant rules or consistently with the principle of natural justice if the field for inflicting such penalty be not occupied by any rules. Such compulsory retirement in the case of a government servant must also withstand the scrutiny of Article 311 of the Constitution. Then there are service rules, such as Rule 56(j) of the Fundamental Rules, which confer on the Government or the appropriate authority, an absolute (but not arbitrary) right to retire a government servant on his attaining a particular age or on his having completing a certain number of years of service on formation of an opinion that in public interest it was necessary to compulsorily retire a government servant. In that case, it is neither a punishment nor a penalty with loss of retiral benefits. (**see Shyamlal v. State of U.P. AIR 1954 SC 369; (1955) 1 SCR 26), (Birj Mohan Singh Chopra v. State of Punjab (1987) 2 SCC 188; (1987 3 ATC 496), (S Ramachandra Raju v. State of Orissa 1994 Supp (3) SCC 424; 1995 SCC (L& S) 74; (1994) 28 ATC 443**), (**Baikuntha Nath Das v. Chief District Medical Officer, Baripada** (1992) 2 SCC299; 1993 SCC (L& S) 521; (1992) 21 ATC 649). More appropriately, it is like premature retirement. It does not cast any stigma. The government servant shall be entitled to the pension actually earned and other retiral benefits. So long as the opinion forming basis of the order for compulsory retirement in public interest is formed bona fide, the opinion cannot be ordinarily interfered with by a judicial forum. Such an order may be subjected to judicial review on very limited grounds such as the order being mala fide, based on no material or on collateral grounds or having been passed by an authority not competent to do so. The object of such compulsory retirement is not to punish or penalise the government servant but to weed out the worthless who have lost their utility for the administration by their insensitive, unintelligent or dubious conduct impeding the flow of administration or promoting stagnation. The country needs speed, sensitivity, probity, non-irritative public relation and enthusiastic creativity which can be achieved by eliminating the dead wood, the paper logged and callous (see **S. Ramachandra Raju v. State of Orissa** (1994 Supp (3) SCC 424; 1995 SCC (L& S) 74; (1994) 28 ATC 443). We may with advantage quote the following passage from this decision; (SCC p.430, para 9)

"Though the order of compulsory retirement is not a punishment and the government servant on being compulsorily retired is entitled to draw all retiral benefits, including pension, the Government must exercise its power in the public interest to effectuate the efficiency. Integrity of public service needs to be maintained. The exercise of power of compulsory retirement must not

be a haunt on public servant but act as a check and reasonable measure to ensure efficiency in service, and free from corruption and incompetence. The officer would go by reputation built around him. In appropriate case, there may not be sufficient evidence to take punitive act of removal from service. But his conduct and reputation is such that his continuance in service would be a menace in public service and injurious to public interest."

25. The order of compulsory retirement is neither punitive nor stigmatic and in the formation of opinion while passing order of compulsory retirement the entire service records, character roll or confidential report with the emphasis cannot be taken into account along with the relevant period and the contention that the consideration of adverse material older than ten years vitiated the order of compulsory retirement was rejected by the Supreme Court in the State of U.P. and others v. Vijay Kumar Jain (2002) 3 SCC 641 and order of withholding integrity certificate and censor entry are sufficient entries for compulsory retirement under Rule 56 (c) and (j) of U.P. Fundamental Rules. In Vijay Kumar Jain (supra) the court in para no.13 and 14 had noted below:

"**13**. In Baikuntha Nath Das v. Chief District Medical Officer, Baripada (1992) 2 SCC 299: 1993 SCC (L&S) 521: (1992) 21 ATC 649, this Court laid down certain principles which are as under: (SCC pp. 315-16, para 34).

"34. (i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary, in the sense that no reasonable person would from the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/ character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a court merely on showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

"**14**. In State of Punjab v. Gurdas Singh (1998) 4 SCC 92: 1998 SCC (L&S) 1004, it was held thus: (SCC p. 99, para 11)-

"Before the decision to retire a government servant prematurely is taken the authorities are required to consider the whole record of service. Any adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during whole of his tenure of service whether it is in public interest to retain him in the service. The whole record of service of the employee will include any uncommunicated adverse entries as well."

26. The present compulsory retirement have been passed fairly, bonafidely free from arbitrariness, in the public interest and in the interest of the administration and in consonance to the fundamental rules by way of order of simplicitor, therefore, is in consonance to the decision of Supreme Court (1992) 2 SCC 317 **P & T. Board v. C.S.N. Murthy** and on the material available in the service record of the petitioner and in the light of judgment of **Baikuntha Nath** (supra) and AIR 1994 SC 1261 **Union of India v. N.P. Seth**, (1998) 4 SCC 92 **State of Punjab v. Gurudas Singh** 1998 (9) SCC 220; **U.P.S.R.T.C. v. Hari Nath Singh** (1997) 7 SCC 483; **Union of India v. G. Ganayuthan** and 1997 (6) SCC 381 **State of Punjab v. Bakshi Singh**.

27. The verdict of the Supreme Court and different decisions of the High Court were considered earlier also by this Court and this Court (Single Judge) (Hon'ble R.B.Misra, J.) has taken similar view in Writ petition no. 19966/1989 (Radha Charan Yadav Vs. Chairman, Town Area Committee, Mathura decided on 21.7.03, in writ petition no. 1768/92 (**Bhagwan Singh Vs. Distirct Magistrate, Mathura and others**) decided on 23.7.03, in writ petition no. 17445/95 (**Adya Prasad Pandey Vs. State of U.P. and others**) decided on 30.7.2003 and in writ petition no. 8365/96 (**Mathura Prasad Vs. State of U.P. and others**) decided on 19.8.2003, where the order of the compulsory retirement was not interfered with.

28. I have heard learned counsel for the parties. I find that the order of compulsory retirement was passed after perusing and considering all the entries available in the service book and the records pertaining to the petitioner by the Screening Committee and in view of the above analysis no opportunity of hearing is required to be given and the provisions of Articles 14, 21 and 311 of the Constitution are not attracted while passing the order of compulsory retirement, more so the said order is passed in the public interest and not by way of punishment. I find no illegality and impropriety in the said impugned order, therefore, this Court is not inclined to invoke its extra ordinary discretionary jurisdiction under Article 226 of the Constitution.

Therefore, writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2003

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 14269 of 1988.

Sri Arvind Kumar Chaturvedi ...Petitioner
Versus
District Inspector of Schools Jaunpur and another ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh

Counsel for the Respondents:
Sri V. Malviya, S.C.
S.C.

Service Law- U.P. High Schools & Intermediate Colleges (Payment of Salaries of Teachers & other employees) Act 1971, Sections 2 (f), 9- appointment on non existant post though approved by DIOS-later on, approval rescinded and salary stopped-petitioner failed to prove the validity of appointment-whether act of respondents held to be vitiated?-held, 'no'.

Held- Para 5

It transpires from the above conspectus that approval accorded to the appointment by the District Inspector Schools operated in vacuum inasmuch as there was no sanctioned post and resultantly, the action of the respondents in rescinding approval and stopping salary of the petitioner cannot be held to be vitiated. I would not forbear from expressing that the onus lay on the petitioner to prove the validity of his appointment and petitioner having failed to do, the bald averments do not commend to me for acceptance.

Case law discussed:
AIR 1988 SC 2181

(Delivered by Hon'ble S.N.Srivastava, J.)

1. By means of the present petition, the petitioner has canvassed the validity of the order-dated 12.4.1988 passed by the District Inspector of Schools Jaunpur-respondent no.1 as a consequence of which the salary of the petitioner was withheld.

2. The facts forming background to the present controversy as set out in the writ petition by the petitioner are that one Sri Nath Yadav, Asstt. Clerk in Intermediate College Machchlishahr District Jaunpur demitted the office as a consequence of which applications were invited. In the ultimate analysis, the petitioner claims to have been selected and appointed by means of letter dated 18th July, 1986 and in response thereto, he reported for duty and joined on 20th July, 1986. It is further claimed that the appointment of the petitioner received approval on 30th June 1987. Subsequently, Addl. Director of Secondary Education enjoined District Inspector of Schools by means of letter dated 31.12.1987,to enquire into the imputations of irregularities indulged in by Rama Shanker Pandey, the then District Inspector of Schools and Vijay Shanker Srivastava, then Lekha Adhikari in the office of District Inspector of Schools Jaunpur between the period 1.7.83 and 31.12.1987 in the matter of appointments of teachers and non-teaching staff in the aided institutions attended with further direction not to levy implementation to approval accorded by the aforestated two authorities during their tenure to the promotions and appointments in relation to teacher or non teaching staff in various aided institutions in Jaunpur. In obedience to the aforestated directives, the District Inspector of Schools called upon all the Principals/Managers of the aided institutions under the Intermediate Education Act to unfold details of such appointments on prescribed format by 15th April, 1988 at the same time, intimating all concerned that the approval accorded to the appointment and promotions by his predecessor had been invalidated and therefore, it was expressed that it was not possible to order payment on the basis of the approval accorded by his predecessor.

3. The learned counsel for the petitioner assailed the impugned order on the counts that the petitioner was duly appointed by the Committee of Management in the substantive post vacated by Sri Nath Yadav and the appointment was validly accorded approval by the District Inspector of Schools Jaunpur and as a sequel thereto, payment of salary was released and made to the petitioner. It was further canvassed that the impugned order putting hold on payment of salary to the petitioner was made without affording any opportunity of hearing and further that the order stopping salary was made by the Addl. Director of Secondary Education who in law was not clothed with the power to pass the order. Lastly, it was submitted by the learned counsel that the District Inspector of Schools did not apply his mind and had a blinkered approach in passing the impugned order inasmuch as without enquiry into the merit of the imputations, he meekly followed the directives of his superior and acted on it by stopping salary of the petitioner followed by submission that the District Inspector of Schools was not authorized to review decision of his predecessor. In opposition, learned Standing counsel contended that the petition is liable to be dismissed and the petitioner was not entitled to salary and in vindication of his stand, referred to the averments made in paragraph 2 of the writ petition. The precise contention of the learned counsel is that though the petitioner claimed that he was appointed on substantive vacancy consequent upon demission of the office by the incumbent Sri Nath Yadav, Asstt clerk but at the same time, he did not indicate the date of creation of post, date of appointment of Sri Nath Yadav and the date of his demission. The learned counsel further pointed out that even the date of advertisement of post in pursuance of which the petitioner claims to have applied and selected has not been unfolded. Referring to the averments in para 4 of the counter affidavit, learned Standing counsel quipped that the incumbent of the post namely Sri Nath Yadav was in fact never appointed against any sanctioned posts and that there were only three sanctioned posts of non-teaching staff which were occupied by Sri Abdul Hakim as Head clerk, Sri Pyare Lal Maurya as Asstt. Clerk and Sri Bramdeo Tiwari as Librarin-cum-clerk. He minced no words to submit that besides the above three posts, no other post was ever created or sanctioned for the Institution and by this reckoning, the appointment of the petitioner was invalid ab initio.

4. Before delving into the merits of the respective contentions of the learned counsel, I feel called to refer to the provisions bearing on the controversy involved in the instant petition. Section 2 (f) of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 defines an employee as under:

"(f) employee" of an institution means a non-teaching employee in respect of whose employment maintenance grant is paid by the State Government to the institution."

Likewise section 9 of the Act envisages as under-

"9. Approval for post- No institution shall create a new post of teacher or other employee except with the previous approval of the Director, or such other

officer as may be empowered in that behalf by the Director."

5. It cyrstallises from the perusal of the above provisions that the post has to be created and sanctioned by the State Government and the Institution is not empowered to obtain approval for the post which has not been created or sanctioned by the State Government. The contention of the learned Standing counsel bears scrutiny that the petitioner has not enumerated any details in relation to date of creation of post or the date on which advertisement was publicized either in the writ petition particularly paragraph 2 thereof or the rejoinder affidavit in reply to para 4 of the counter affidavit and by this reckoning, the bald averments do not bear out that the petitioner was appointed in substantive post vacated by Sri Nath Yadav and consequently, it lends colour to the suspicion that the approval accorded to the appointment of the petitioner was valid approval. I have been taken through para 2 of the writ petition and again para 4 of the rejoinder affidavit and the averments therein lack requisite details and I am not convinced that the claims of the petitioner deserves to be nodded in acceptance for want of requisite details. If the petitioner has claimed to have been appointed validly he must disclose requisite details. In **Bharat Singh and Ors v. State of Haryana and others**[1] the Apex Court observed that when a point is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. It was further observed that if the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter affidavit, the court will not entertain the point. The Apex Court also observed that there is a distinction between a pleading under the C.P.C. and a writ petition or a counter affidavit and while in a pleading that is, a plaint or a written statement the facts and not evidence are required to be pleaded, in a writ petition or in the counter affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. In the instant case, the petitioner in vindication of validity of his appointment has relied upon his appointment letter (Annexure 1 to the petition) and the information communicated by the Management to the District Inspector of Schools (Annexure 2) and the approval of the District Inspector of Schools (Annexure 3). The aforestated documents do not embody any of the requisite details to prove the point bearing on validity of the appointment. Here in the instant petition, it has not been shown as to on what date the post claimed to be substantive post, was sanctioned and as to on what date advertisement was publicized. The argument of the learned Standing counsel carries substance that the post held by the petitioner was not sanctioned by the State government as envisaged in section 9 of the Act and State did not pay any maintenance grant for the Institution. Besides, the petitioner could not prove validity of his appointment by requisite details that he was appointed on substantive post sanctioned by the Government. In the circumstances, mere bald statement that the post was advertised and the petitioner responded to the advertisement by applying and consequently, he was

[1] AIR 1988 SC 2181

appointed in the substantive capacity in the post vacated by Sri Nath Yadav without unfolding precise dates can at best be termed as generalized and vague averments without any indicia of authenticity and in the circumstances, the conclusion is irresistible that the Committee of Management induced approval from the then District Inspector of Schools against a non-existent post and the petitioner was not appointed in accordance with law on any sanctioned post as contemplated under section 9 of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) act, 1971 and in consequence, he cannot be held entitled to payment of salary from the State Exchequer. It transpires from the above conspectus that approval accorded to the appointment by the District Inspector Schools operated in vacuum inasmuch as there was no sanctioned post and resultantly, the action of the respondents in rescinding approval and stopping salary of the petitioner cannot be held to be vitiated. I would not forbear from expressing that the onus lay on the petitioner to prove the validity of his appointment and petitioner having failed to do, the bald averments do not commend to me for acceptance.

6. As a result of foregoing discussion, the petition fails and is dismissed. Interim order which was granted and operated is hereby vacated and it would be open to the respondents to initiate appropriate action for recovery of the amount already paid as salary from the State Exchequer against invalid approval to the appointment of the petitioner. Before parting it may be observed that if the petitioner feels aggrieved that he has performed duties consequent upon his appointment, he may claim his salary from the Management of the College in question.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.09.2003

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

Criminal Misc. Writ Petition No. 7699 of 2002

The Good Cause Association ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri S.R. Singh
Sri P.K. Singh

Counsel for the Respondents:
Sri B.N. Singh, S.S.C.
Sri Giridhar Nath, S.C.
Sri Satish Chandra Misra
Sri Amarjeet Singh, A.G.A.

Constitution of India Article 226-Practice and Procedure-Judicial Revier-in administrative action-scope and ambit-petitioner unable to make out any case-court not inclined to scrutinize policy decision of the State.

Constitution of India Article 226-Judicial revier in administration actions-relevant report under scrutiny by State Legislature-decision thereon not taken yet-it is premature for the court to hold an inquiry-to establish irregularity or lapses by public authority-however, court may interfere if no decision is taken or there is a delay in taking decision.

Held-Para 10

Keeping in mind the scope and ambit of power of judicial review in administrative actions, we are not inclined to scrutinize the policy decision of the State for creation of Ambedkar Park, particularly when the petitioner has not been able to make out any case for judicial review. Added to that, it may be noted, the report of the Comptroller & Auditor General of India regarding expenditure incurred for the said project is under scrutiny by the State Legislature and no decision has yet been taken thereon. We hope and trust, the august House, a trustee of public exchequer will take a decision on the report of the Comptroller & Auditor General of India without further delay to reinforce people's faith in it. In the event, no decision is taken or there is delay in taking a decision, the Court in due discharge of its constitutional function may pass appropriate order either *suo moto* or approach being made by a public-spirited individual or by any association espousing public cause.

Case laws discussed:

AIR 1996 SC 11
2003 (4) SCC 289

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

1. This is the petitioner's second journey to this Court against the State as well as the Chief Minister and other officials; its earlier writ petition no. 2423 of 1997 having been finally disposed of with certain observations. In the said writ petition, the petitioner had made certain allegations against the present respondent no. 2 and prayed for issue of a writ, order or direction directing the Vigilance Commissioner and Central Bureau of Investigation (C.B.I. for short) for investigation of the offences of cheating the criminal breach of trust. Further prayer was made to direct the aforesaid public authorities to come before the Court and furnish an undertaking to perform their duties of investigation within stipulated time.

2. The grievance of the petitioner as appears from the order, annexure-1, was with regard to creation of Greater NOIDA and investment of huge amount from public exchequer for creation of Ambedkar Park. The Court upon hearing the counsel for the petitioner, Advocate General for respondent no. 2 and counsel for the C.B.I. disposed of the said writ petition with the observation and direction that the Comptroller & Auditor General of India which has taken up inquiry as entrusted to it by the State Government with regard to creation of Ambedkar Park shall make all endeavor to conclude the inquiry preferably within four months. As regard the allegation concerning Greater Noida, in view of submission made by the learned counsel appearing for the CBI that pursuant to notification by the Central Government, the matter had been entrusted to CBI for investigation, the Court held the writ petition to have become infructuous.

3. More than five years thereafter, the petitioner filed the present writ petition when respondent no.2 was elected as leader of the ruling coalition and became Chief Minister of the State. The prayer as made in the writ petition are:

"I) to issue a writ, order or direction commanding the opposite parties no.1, 3 and 4 (State of U.P., Central Bureau of Investigation and Comptroller & Auditor General of India) to submit all inquiry reports made against opposite party no. 2;

ii) to issue a writ, order or direction to comply the direction of this Court made in the earlier writ petition and to put

opposite party nos. 2 and 5 on criminal trial and to punish them."

4. On behalf of respondent-State, two short counter affidavits were filed; one by Ram Brikchh Prasad, Special Secretary, Appointment, Government of Uttar Pradesh and other Amitabh Tripathi, Under Secretary, Housing & Urban Planning, Government of Uttar Pradesh. The Special Secretary in the counter affidavit has stated that the C.B.I. after holding inquiry concerning Greater Noida submitted report on 31-3-1999 recommending that such action as deemed fit may be taken against Babu Ram, the then Chairman of Greater Noida and for departmental action against Yogesh Kumar. After receiving the recommendation, explanations were called from those two officers. Upon receipt of explanations, the Industrial Development Commissioner reported that no case for taking any action is made out against Yogesh Kumar on the basis of materials available on record. So far Babu Ram is concerned, upon examination, it was decided not to take any action against him since he had already retired from service. In the counter affidavit filed on behalf of the CBI, it appears that the allegation against these two officers was with regard to passing resolution for changing nature of the land from industrial to home-stead and after thorough inquiry, the C.B.I. recommended for taking departmental action against them.

5. So. Far the allegation with regard to Ambedkar Park, it stated in the counter affidavit of the Under Secretary that the Comptroller & Auditor General of India made a special audit and submitted a report which was ultimately placed before State Legislative Assembly on 15-7-1999 and as provided under Articles 151 and 154 of the Constitution, the said report is being examined and considered by the Public Accounts Committee of the U.P. Legislative Assembly and since the said Committee is seized of the matter, no writ petition would lie for directing to hold a parallel probe.

6. From the factual scenario as aforesaid, what is deducible is that the petitioner has charged the Ex-Chief Minister Mayawati with two allegations; one concerning Greater Noida and other, regarding creation of Ambedkar Park. The earlier writ petition was finally disposed of with certain observations as referred to earlier. It appears from the counter affidavit filed on behalf of the C.B.I. that the allegations against two officers of Greater Noida for changing the nature of land from industrial to home-stead having been found true, recommendation was made for taking departmental action. In such view of the matter, we do not like to make further inquiry by calling upon the inquiry report from the C.B.I. in exercise of power under Article 226 of the Constitution.

7. Adverting to the allegation of creation of Ambedkar Park, as pointed out in the counter affidavit filed by the Under Secretary, the Comptroller & Auditor General of India having made inquiry submitted report which was then placed before the State Legislative Assembly and the report is now under active consideration of the Public Accounts Committee. The writ petition does not reveal as to what is the petitioner's grievance regarding creation of Ambedkar Park. Besides, the Court is unaware of the contents of the report of the Comptroller

& Auditor General of India, in as much as, whether there was misuse or misappropriation of public money or whether work was entrusted to kith and kin of any person holding high office or whether the work undertaken was not according to prescribed norm and standard. Moreover, when Constitutional body is seized of the matter and is scrutinizing the report, it is pre-mature for the Court to hold an inquiry to find out any irregularity or lapses on the part of the Government and its officials.

8. It need not be emphasized that the three organs of a democratic State namely, legislature, executive and judiciary must act independently within parameters of law. One should not impinge the jurisdiction of the other. It is however, complained that the legislature and the executive have lost the track and are acting in a manner detrimental to the interest of the society causing incalculable harm to the socio-economic development of the country. It is by their such act that interests of the poor, downtrodden peasants and factory workers are seriously affected. So the Judiciary which acts as a bastion of the rights and liberties of the citizen when approached by an individual or group of persons or any community complaining abuse or misuse of power by legislature and the executive, it becomes its solemn duty to take appropriate action in accordance with law and bring about a check in the exercise of their such power. Certain sections of the society are complaining that judiciary is very often encroaching upon the functioning of the legislature and the executive which is not a healthy sign for democracy. We refrain ourselves from making any observation on this aspect. It is to be grasped that judiciary is the last hope of the people. So, when a citizen complaining abuse or misuse of power by those two organs approaches the court for appropriate action, the court does hesitate taking a decision to bring them within their bounds. Of course, while doing so, the court may have committed some mistakes, but those are certainly not grave. No one is infallible and judiciary is not an exception to it.

9. As has been well said, "judicial review" is a great weapon in the hands of the Judges; but the Judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficient power." The Court is to be circumspect while exercising power of review in administrative matters. As the words of 'judicial review' imply, it is not an appeal from a decision but a review of the manner in which the decision was made. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as (i) illegality; (ii) irrationality ('Wednesbury' unreasonableness) and (iii) procedural impropriety. In the celebrated judgement in the case of ***Tata Cellular vs. Union of India & others;*** AIR 1996 SC 11, the Apex Court held that it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. In a latest decision in the case of ***Federation of Railway Officers Association and others vs. Union of India;*** (2003) 4 SCC 289, the Court has also held that unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abouse of power, the court will not interfere with such matter.

10. Keeping in mind the scope and ambit of power of judicial review in administrative actions, we are not inclined to scrutinize the policy decision of the State for creation of Ambedkar Park, particularly when the petitioner has not been able to make out any case for judicial review. Added to that, it may be noted, the report of the Comptroller & Auditor General of India regarding expenditure incurred for the said project is under scrutiny by the State Legislature and no decision has yet been taken thereon. We hope and trust, the august House, a trustee of public exchequer will take a decision on the report of the Comptroller & Auditor General of India without further delay to reinforce people's faith in it. In the event, no decision is taken or there is delay in taking a decision, the Court in due discharge of its constitutional function may pass appropriate order either *suo moto* or approach being made by a public-spirited individual or by any association espousing public cause.

In view of discussions made above, the writ petition having no merit is dismissed. In the circumstances, there shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 9080 of 2003

Raj Kumar ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastva

Counsel for the Respondents:
Sri B.N. Singh, S.S.C.
Sri Deepak Verma, A.S.C.
S.C.

Constitution of India, Article 226-Service Law-termination-false declaration, about pendency of criminal case given before summary departmental proceedings-no procedural irregularity found-dismissal from service-held-proper.

Held: para 13

In the present case, petitioner had willfully made false declaration. He was subjected to proceeding of Summary Security Force Court in which he denied that he denied to the charge. His denial was found to be false. The procedure provided for Summary Security Force Court was duly followed. He was, as such, rightly dismissed from service.

Case laws discussed:
1997 (2) UPLBEC 1201
1999 (2) SCC 247
2000 (1) ESC 688
2002 (1) ESC (Alld) 69
1997 SCC (L&S) 492
JT 2002 (2) SC 256

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

1. Heard Sri Arvind Srivastava for petitioner and Sri Deepak Verma, Additional Standing Counsel for Union of India, respondents 1 to 4.

Petitioner was enrolled as Constable in Border Security Force on 5.3.2002. He completed his training in the month of December, 2002 and was posted as Constable in 14th Battalion in Punjab. On 28.6.2002, petitioner was called by Additional Deputy Director General of Police/Commandant STC, Training

Centre North Bengal, Baikunthour, New Jalpai Guri. The Commandant made enquiries from petitioner, whether any criminal case is pending against him or he has been sent to jail. The petitioner replied to both the questions in negative. The petitioner was also asked whether he had made any false declaration in his enrolment form. The petitioner denied that he had made any such false declaration. By an order dated 17.1.2003 passed by respondent no. 4, petitioner's services have been terminated. The order states that petitioner was tried by Summary Security Force Court on 17.1.2003 for an offence committed by him under Section 23 of the BSF Act for "Making at the time of enrolment a wilfully false answer to a question setforth in the prescribed form of enrolment, which was put to him by the Enrolment Officer before whom appeared for the purpose of his enrolment". Petitioner was found guilty for the charge and awarded punishment," To be dismissed from service". The sentence of the Court was promulgated to him on 17.1.2003, and he was struck off the strength of the Centre with effect from 17.1.2003.

2. In paragraph 8 of the writ petition, petitioner has stated that on 25.1.2003 certain documents were given to him including enrolment form, copy of the letter dated 27.3.2002 for verification of petitioner's character, copy of the letter dated 6.6.2003 by the District Magistrate, Gorakhpur, copy of the report dated 28.6.2002, copy of the proceedings before the Commandant on 28.6.2002 and the copy of the statement of PW1, and the copy of report of Local Intelligence Unit dated 9.5.2002. The District Magistrate on verification of enrolment form reported that a case under section 323,504 and 325 IPC in case crime no. 518 of 2001 is pending against petitioner. This report was made in pursuance of the report of Senior Superintendent of Police, Gorakhpur on 22.5.2002.

3. Sri Arvind Srivastava, counsel for petitioner contends that the proceedings of Summary Security Force Court never took place in presence of petitioner, and that petitioner was not permitted to give his reply, submit his defence and to cross-examine PW-1. He submits that a false F.I.R. dated 30.6.2001 was registered on complaint of Sri Phool Chand against Ram Laut, Behari, Lallan and Pappu alias Jogindra. The allegations were totally false and had no concern with the petitioner. Petitioner was preparing for PCS examination in district Mirzapur and was not even present on the date of occurrence. He submits that Ram Laut has three sons namely- Ramesh, Pappu alias Jogindra and the petitioner which is evident from the Kutumb Register enclosed as annexure 13 to the writ petition. Copy of the report of District Magistrate or Senior Superintendent of Police was not given to petitioner and without giving any charge-sheet petitioner was dismissed violating principles of natural justice. He further submits that enrolment form provided five instances in clause 12 that petitioner had ever been arrested nor any case has been registered against petitioner or he ever been punished or bound over interned, convicted, arrested, prosecuted or otherwise dealt with under any law in force in India or out side. It is contended that petitioner has never been arrested, prosecuted, convicted and dealt with under law in force in India and no case is pending against him.

4. By an order dated 27.2.2003, this Court issued notice for service upon the newly respondents namely, Senior Superintendent of Police, Gorakhpur and District Magistrate, Gorakhpur, and directed them to file counter affidavit to meet the allegations made in the writ petition with regard to generating false report against petitioner.

5. Sri Awanish Kumar Awasthi, District Magistrate, Gorakhpur and Sri Virendra Kumar, Senior Superintendent of Police, Gorakhpur have filed their affidavits verified on 29.3.2003. The District Magistrate in his affidavit has stated in para 8 that the respondent no. 4 vide letter dated 27.3. 2002 directed answering respondent to verify the character and antecedents of Sri Raj Kumar, the petitioner, and submit report to him. Acting upon the said letter of the then District Magistrate the then Senior Superintendent of Police, Gorakhpur got the character and antecedents of Raj Kumar son of Ram Laut verified from police records and Local Intelligence Unit and on the basis of the report dated 22.5.2002 submitted by the Senior Superintendent of Police, Gorakhpur to then District Magistrate, Gorakhpur, then District Magistrate, Gorakhpur submitted a verification report vide letter dated 6.6.2002. Sri Virendra Kumar, Senior Superintendent of Police, Gorakhpur has stated in paragraph 8 of his affidavit that verification of character and antecedents of petitioner was conducted by police/LIU and a report was submitted that case crime no. 518 of 2001 under section 323,504 and 325, IPC has been registered against Sri Raj Kumar at Police Station-Shahjanwan and a criminal case is pending against him in court. Relying upon this report, Senior Superintendent of Police submitted a report dated 22.5.2002 to the District Magistrate. In paragraph 9 it is submitted that a non cognizable report no. 55 of 2001 was lodged by Sri Phool Chandra in Police Station-Shahjanwa, District-Gorakhpur. On the basis of said report, case crime no. 518 of 2002 under section 323 and 325 IPC was registered against Ram Laut son of Dukhi, Bechan son of Ram Jatan, Lallan son of Shiv Balak, Pappu son of Ram Laut. The matter was investigated and during the investigation it was found that Pappu son of Ram Laut named in the aforesaid non cognizable report was also known as Raj Kumar alias Pappu son of Ram Laut and that the aforesaid offence was prima facie found to have been committed by the aforesaid accused persons and accordingly they were challaned and a charge-sheet no. 109 of 2001 was filed in the Court. During investigation, the accused, petitioner Raj Kumar has also made his statement before the Investigating Officer. The charge-sheet as well as various parchas no. 2,3 and 4 prepared by the Investigating Officer, have been annexed to the Counter Affidavit. Petitioner, Raj Kumar surrendered before the ACJM II Gorakhpur and was enlarged on bail. In this regard Photostat copy of 'Hajri Va Jamant Suchana' dated 21.9.2001 was also filed with the affidavit. He has further stated that the questionnaire obtained by petitioner is of no help. The charges were framed against Pappu alias Yogendra. Since the charge-sheet was submitted against Raj Kumar alias Pappu son of Ram Laut, therefore, Pappu mentioned in the charges is to be taken at Raj Kumar alias Pappu son of Ram Laut. The attention of the Court concerned to the aforesaid discrepancy was invited by the police concerned vide application dated

1.12.2002 in which necessary action has been ordered by the Court. The Senior Superintendent of Police, Gorakhpur found it quite clear from the aforesaid documents and information that a criminal case registered against petitioner is pending.

6. Counsel for petitioner took pains in trying to establish from the aforesaid documents and from the supplementary affidavit that Ram Laut had three sons and that Pappu is petitioners brother and that Raj Kumar has been wrongly described as 'Pappu'. He submits that it is case of false identity.

7. I have gone through the Kutumb Register, first information report, charge-sheet, application, parchas prepared by the Investigating Officer who also took statement of Raj Kumar alias Pappu. Although the accused denied the allegations against them, the fact that Raj Kumar son of Ram Laut is an accused and was granted bail and has been charge-sheeted in the aforesaid crime, cannot be doubted. The report of Senior Superintendent of Police and the District Magistrate are specific about the identity of petitioner as an accused in the aforesaid crime.

8. Sri Srivastava further submitted that an extreme and harsh punishment has been given to the petitioner in terminating his services. According to him, even if may been taken that Raj Kumar alias Pappu is facing trial, the nature of offence alleged to have been committed is trivial and that the petitioner should not have been dismissed on this ground. According to him, petitioner is only an accused and has not been convicted of the offence so far.

9. Having heard counsel for parties, I find that proceedings of Summary Security Force Court were held after the reports from District Magistrate was received by respondent no. 4. It was found that petitioner was charged with making willfully false statement in enrolment form. He was given the entire proceedings of Summary Security Force Court and after being punished he was struck off from the Centre. In the enrolment form, the petitioner had replied to Clause XII in negative, whereas he was facing criminal trial in which he was granted bail, and was not convicted. Petitioner has relied upon decisions in **Qamrul Hoda Vs. Chief Security Commissioner, North Estern Railway, Gorakhpur (1997) 2 UPLBEC 1201; Regional Manager, Bank of Baroda Vs. Presiding Officer, Central Government, Industrial Tribunal and another (1999) 2 SCC 247 and a Division Bench of this Court in Awadhesh Kumar Sharma Vs. Union of India (2000) 1 ESC 688 as well as the Judgment in Satish Kumar Shukla Vs. Union of India (2002) 1 ESC(Alld.) 69.**

10. In all the aforesaid cases the services of delinquents were terminated on the ground that at the time of recruitment they were involved in criminal proceedings and they had made wrong statements. In Qamrul Hoda (Supra), petitioner was found to have taken part in a students agitation against increase in fees and was tried under Sections 147/148/332/333/323/342/506/ 336/ 427/307, I.P.C. The Court found that no doubt petitioner did not give the correct facts while filling the declaration form, but human approach should be adopted and that he has already been punished for his fault, in the sense that his

appointment as constable has been held up for three years. In Regional Manager, Bank of Baroda (Supra), the Court found after acquiring knowledge of the criminal prosecution the Bank had thought it fit to await for the decision of the criminal proceedings before taking action against the respondent. The Supreme Court further raised a caveat and held that the decision will not be treated as precedent in future. The Division Bench in Awadhesh Kumar Sharma (Supra) has relied upon the decision of Qamrul Hoda's case and that in Satish Kumar Shukla (Supra) it was found that the petitioner belongs to rural area, and had family enmity and that the complaint resulted in amicable settlement between the parties. Petitioner really was not aware of the substance of the complaint and pleaded ignorance.

11. The question raised before this Court is whether a person joining the armed force of the Union, can be allowed to continue in employment after making a false declaration with regard to his character and antecedent. In **Delhi Administration Vs. Sushil Kumar and others 1997 SCC (L&S) 492** a similar question was raised before Supreme Court arising from judgment of Central Administrative Tribunal. In this case the admitted position was that the respondent appeared for recruitment for police service. He was found physically fit and passed written test, interview and was selected subject to character and antecedent verification. His antecedents on verification were not found to be desirable and his selection was cancelled. The Tribunal allowed the application on the ground that since the respondent had been discharged and/or acquitted from offence punishable under section 304,324 and 34 I.P.C. he could not be denied right of appointment to the post under the State. The Supreme Court allowed the appeal, with following observations:

"The question is whether the view taken by the Tribunal is correct in law? It is seen that verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though he was found physically fit, passed the written test and interview and was provisionally selected, on account of his antecedent record, the important criteria to test whether the selected candidate is suitable to a post under the appointing authority found it not desirable to appoint a person of such record as a Constable to the disciplined force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted. The Tribunal, therefore, was wholly unjustified in giving the direction for reconsideration of his case. Though he was discharged or acquitted of the criminal offences, the same has nothing to do with the question. What would be relevant is the conduct or character of the candidate to be appointed to a service and not the actual result thereof. If the actual result happened to be in a particular way, the law will take care of the consequences. The consideration relevant to the case is of the antecedents of the candidate. Appointing authority, therefore, has rightly focussed this aspect and found it not desirable to appoint him to the service."

12. In **Kendriya Vidyalaya Sangathan & Others Vs. Ram Ratan Yadav** (JT 2002 (2) SC 256) same view was taken. Paragraph 8 of the judgment is quoted as below:

"8. The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify the character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had discretion to terminate his services, which is made expressly clear in para 9 of the offer of appointment. **The purpose of seeking information as per columns 12 and 13 was not to find out either the nature or gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not.** The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature. In the present case the respondent was to serve as a physical education teacher in Kendriya Vidyalaya. The character, conduct and antecedent of a teacher will have some impact on the minds of the students of impressionable age. The appellants having considered all the aspects passed the order of dismissal of the respondent from service. The Tribunal after due consideration rightly recorded a finding of fact in upholding the order of dismissal passed by the appellants. The High Court was clearly in error in upsetting the order of the Tribunal. The High Court was again not right in taking note of the withdrawal of the case by the State government and that the case was not of a serious nature to set aside the order of the Tribunal on that ground as well. The respondent accepted the offer of appointment subject to the terms and conditions mentioned therein with his eyes wide open. Para 9 of the said memorandum extracted above in clear terms kept the respondent informed that the suppression of any information may lead to dismissal from service. In the attestation form, the respondent has certified that the information given by him is correct and complete to the best of his knowledge and belief, if he could not understand the contents of column nos. 12 and 13, he could not certify so. Having certified that the information given by him is correct and complete, his version cannot be accepted. The order of termination of services clearly shows that there has been due consideration of various aspects. In this view, the argument of the learned counsel for the respondent that as per para 9 of the memorandum, the termination of service was not automatic, cannot be accepted."

13. In the present case, petitioner had willfully made false declaration. He was subjected to proceeding of Summary Security Force Court in which he denied that he denied to the charge. His denial was found to be false. The procedure provided for Summary Security Force Court was duly followed. He was, as such, rightly dismissed from service.

For the aforesaid reasons, the writ petition is dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 483 (Tax) of 1994

M/s Harihar Nath Agarwal ...Petitioner
Versus
Assistant Commissioner of Income Tax and another ...Respondents

Counsel for the Petitioner:
Sri V. Gulati

Counsel for the Respondents:
Sri S. Srivastava, S.C.

Constitution of India, Article 226-Taxation Law-assessment by I.T.O.-set aside by C.I.T. (Appeals)-no fresh orders passed by I.T.O. within six months-Central Govt. shall refund amount so deposited-alongwith simple interest-from date of deposit, till date of refund.

Held- Para 11 & 12

In *Hari Nandan Agarwal (HUF) Vs. ITO (1986) 159 ITR 816* a Division Bench of this Court held that where an order of assessment is set aside and the matter was restored to the Income Tax Officer for passing a fresh order of assessment the assessee is entitled to get a refund of the amount deposited by him in pursuance of the assessment order. The same view was taken by a Division Bench of this Court in *Purshottam Dayal Varshney Vs. CIT (1974) 94 ITR 187* in which it was held that in view of Section 240 of the Income Tax Act if the I.T.O. does not grant the refund within a period of six months from the date of appellate order the Central Government shall pay to the assessee simple interest at certain rate per annum on the amount of refund from the date immediately following the expiry of the period of six months to the date on which the refund is granted. The period of six months should be calculated from the date of the appellate order setting aside the assessment and not from the date of the appellate order setting aside the assessment and not from the date on which the I.T.O. makes a fresh assessment.

Following the aforesaid decisions this petition is allowed. A mandamus as prayed for is granted. The respondent shall refund the amount prayed for with interest at 12% per annum from the date of deposit till the date of refund. This refund must be made within two months from today.

Case laws discussed:
(1986) 159 ITR 816
CIT (1974) 94 ITR 187

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

1. This writ petition has been filed for a mandamus directing the respondents to refund a sum of Rs. 3,23,226/- with interest from 1.4.1986 till the date of actual refund in relation to the assessment year 1984-85.

Heard learned counsel for the parties.

2. The petitioner was assessed in the status of A.O.P. and tax was charged at the maximum marginal rate under the Income Tax Act. True copy of the assessment order is Annexure 1 to the writ petition. Against this order the petitioner filed an appeal which was allowed by the C.I.T. (Appeals) which set aside the order of the I.T.O. and directed him to pass a fresh order. True copy of the order of the C.I.T. (Appeals) is Annexure 2 to the writ petition. Against this order the Department filed an appeal before the Income Tax Appellate Tribunal which dismissed the appeal. True copy of the

order of the Tribunal is Annexure 3 to the writ petition.

3. It is alleged in paragraph 4 of the writ petition that in pursuance of the order of the C.I.T. (Appeals) dated 21.3.1988 the I.T.O. was required to pass a fresh order within two years from the date of the order of the C.I.T. (Appeals), but the I.T.O. did not pass any such order, and hence the assessment has become time barred.

4. The petitioner wrote a letter dated 17.1.1994 to the A.C.I.T. (Investigation) Circle II, Agra that since the assessment proceedings has become time barred on 31.3.1990, hence the tax deposited by him should be returned to him with interest. True copy of the letter is Annexure 4 to the writ petition. The petitioner sent reminders after reminders but to no avail. Hence this petition.

5. A counter affidavit has been filed and we have perused the same. In paragraph 3 of the same it is stated that the assessee originally filed return of Rs.2,45,450/- in the status of a Trust. Subsequently, the return was revised declaring an income of Rs.6,89,720/- to which a sum of Rs. 6,00,000/- representing the deposit in the name of M/s Ankur Trust and Ankur Co. was surrendered. Along with the revised return the assessee filed an application stating that the Trust was not genuine, and the earlier return and other papers may be treated as withdrawn During the course of assessment proceedings it was further noticed that there were deposits of Rs.4,44,000/- in the name of C.D. Trust and Rs. 3,49,100/- in the name of Lord Ganesh (P) Trust and unexplained money amounting to Rs. 2,88,609/- with the Trust. The above amounts were added to the assessee's income by the I.T.O. who also disallowed the interest credited on those deposits. The I.T.O. observed that as there was no legal Trust in existence, the income actually belongs to the trustees. Accordingly he framed the assessment on protective basis in the status of A.O.P. and charged the tax at the maximum marginal rate as the members and their shares were found to be undetermined.

6. The C.I.T. (Appeals) allowed the assessee's appeal and directed that the income be assessed substantively and in the status claimed in the return. In further appeal the Tribunal held that the substantive assessment in the name of the real owner of the income should be assessed.

7. It is alleged that effect has been given and relief allowed by the C.I.T. (Appeals) and after giveing relief the remaining demand amounts to Rs. 1,84,365/-. True copy of the tax calculation receipt dated 2.3.1993 calculated on the basis of the direction given by the C.I.T. (Appeals) is Annexure 1 to the counter affidavit. In paragraph 7 it is alleged that the assessing officer has not passed a fresh order after the order of the C.I.T. (Appeals) but he has given effect to the order of the appellate authority.

8. A rejoinder affidavit has also been filed. In paragraph 3 it is stated that the assessee has never stated that the Trust was not genuine or that the earlier return and other papers may be treated as withdrawn. True copy of the application dated 27.3.1986 filed with the revised return is Annexure 1 to the rejoinder

affidavit. The finding of the I.T.O. was that there was no legal Trust in existence, but the C.I.T. (Appeals) has set aside the assessment order and directed the assessing officer to recompute the income of the Trust on substantive basis in the hands of the real owner of the income.

9. A perusal of paragraph 5 of the order of the C.I.T. (Appeals) shows that he has directed:

"*The I.T.O. is accordingly directed to recompute the income of the Trust after considering the material."*

In view of the above observation the Tribunal rightly observed in paragraph 4 of its order that the:

"*issue of framing substantive assessment in the hands of the real owner of the income earned during the year under consideration is wide open in this case resulting in no apprehension of loss of revenue to the Department."*

10. Since the assessment order was set aside by the C.I.T. (Appeals) by his order dated 21.3.1988 a fresh assessment could have been made latest by 31.3.1990 vide Section 153 (2A) of the Income Tax Act but no fresh order was made by that date and hence the petitioner is right in saying that the same has become time barred.

11. In *Hari Nandan Agarwal (HUF) Vs. ITO (1986) 159 ITR 816* a Division Bench of this Court held that where an order of assessment is set aside and the matter was restored to the Income Tax Officer for passing a fresh order of assessment the assessee is entitled to get a refund of the amount deposited by him in pursuance of the assessment order. The same view was taken by a Division Bench of this Court in *Purshottam Dayal Varshney Vs. CIT (1974) 94 ITR 187* in which it was held that in view of Section 240 of the Income Tax Act if the I.T.O. does not grant the refund within a period of six months from the date of appellate order the Central Government shall pay to the assessee simple interest at certain rate per annum on the amount of refund from the date immediately following the expiry of the period of six months to the date on which the refund is granted. The period of six months should be calculated from the date of the appellate order setting aside the assessment and not from the date on which the I.T.O. makes a fresh assessment.

12. Following the aforesaid decisions this petition is allowed. A mandamus as prayed for is granted. The respondent shall refund the amount prayed for with interest at 12% per annum from the date of deposit till the date of refund. This refund must be made within two months from today.
