ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.4.2004

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

Civil Misc. Writ Petition No.20661 of 1999

Devendra Kumar ...Petitioner
Versus
Rajya Krishi Utpadan Mandi Parishad, U.P., Luknow and others ...Respondents

Counsel for the Petitioner:
Sri V.B. Upadhyaya

Counsel for the Respondents:
Sri V.K. Birla
Sri B.D. Mandhyan
Sri O.P. Lohia
Sri Satish Mandhyan

Financial Hand book (Vol. II-A)–Chapter III R. 14-a-Permanent Employee-Deputation-Rights of deputationist service in parent department where he was appointed on permanent basis and was confirmed after expiry of period of probation, can not be dispensed with by prescribing any arbitrary conditions such as that service of such employee would come to an end on expiry of period of deputation- Petitioner was on deputation and holds a lieu in his parent department. This principle also enshrined in Ch. III R. 14-A of Financial Hand Book Vol. II-A held, corporation has great sanctity of deputation-By putting such conditions that petitioners service shall automatically be terminated after one year, of great prejudice to inherent right of petitioner in his parent department- conditions imposed set aside and services of petitioner ordered to be restored forthwith.

Thus from the facts and law as stated above, it is abundantly clear that the service of the petitioner in the parent department where he was appointed on permanent basis and was confirmed after expiry of period of probation, could not be dispensed with by prescribing any irrelevant, unreasonable and arbitrary conditions indicated in the letter dated 3.7.1995 (Annexure-10) to the effect that the service of such employee would come to an end on expiry of period of deputation. The petitioner in the case in hand was on deputation and he holds the lien in his parent department. This principle is also enshrined in Rule 14-A of Chapter III in Financial Handbook Vol. 2-A. Para 31

By imposing irrelevant abnormal, unreasonable conditions, in the order dated 5.7.1999 (Annexure-10) while sending petitioner on deputation to the Corporation to the ' Mandi Parishad' the Corporation has marred the sanctity of deputation and by putting such conditions that petitioner service shall automatically be terminated after one year is great prejudice to the inherent right of the petitioner in his parent department. The conditions imposed in the letter dated 5.7.1995 is unwarranted, legally not sustainable therefore these are being set aside.

The action in question 'Mandi Parishad' is punitive passed without affording opportunity of hearing to the petitioner in a peculiar facts and circumstances of the case. Therefore, the order dated 18.3.1999 being illegal is set aside. Para 33

Case law discussed:
(1999) 4 SCC 656 AIR 1999 SC 1948: 1999 (3) JT 627
AIR 1990 SC 1132
AIR 1989 SC 968
AIR 1965 SC 868
(1964) 7 SCR 471
(1969) 3 SCC 633
AIR 1976 SC 1737
AIR 1965 SC 8681
(1988) 7 ATC 275
1084 Lab. IC (NOC) 135
1999 (8) SCC 381: 1999(7) JT 44
AIR 1970 SC 1263: (1970) 3 SCC 173
AIR 1964 SC 72
1993 (2) LJ (SC) 654

(1996) 7 SCC 260
(1996) 2 SCC 282: 1995 (9) JT 566: AIR 1996 SC 888
(1986) 3 SCC 156
1991 Supp. (1) SCC 600
(2003) 1 SCC 591
(1996) 8 SCC 654
AIR 2000 SC 2076: (2000) 5 SCC 362: 2000 (6) JT 574

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

The present writ petition has been preferred to quash the order dated 18.03.1999 passed by the Additional Director (Administration) of Rajya Krishi Utpadan Mandi Parishad, (in short called 'Mandi Parishad') U.P. Lucknow (Annexure-18 to the writ petition) and the order dated 10.03.1999 passed by the Director, 'Mandi Parishad,' as referred in the order dated 18.03.1999. The petitioner has inter-alia prayed for other relief including for quashing the unreasonable terms and conditions incorporated in the letter dated 05.07.1995 of the Managing Director, Sugar Corporation (Annexure-10 to the writ petition) so much so saying that the service of the petitioner was automatically come to an end after expiry of period of one year from the date of joining at ' Mandi Parishad.'

1. Heard Sri V.B. Upadhaya, learned Senior Counsel along with Sri Vidya Bhushan Upadhaya, for the petitioner and Sri V.K.Birla, learned counsel for respondents no.4 and 5 and Sri Satish Mandhyan, learned counsel for 'Mandi Parishad'.

2. The facts giving rise to the present writ petition in brief are that the petitioner applied to the post of Junior Engineer (Civil) in respondent U.P. State Sugar Corporation Limited (hereinafter called 'Sugar Corporation') being fully eligible to the said post, was invited by Managing Director of 'Corporation' by its letter 17.4.85 (Annexure-1) invited for interview to be held on 3.5.1985, and was duly selected and appointed to the post of Junior Engineer (Civil). The select list dated 30.1.1986 is (Annexure-2 to the writ petition).

3. The petitioner reported duty on 13.2.1986, and was kept on probation for a period of two years thereafter was confirmed to the said post. The petitioner has discharged his duties in different units of 'Corporation' after being transferred from time to time under the orders of the superior officers. The different orders of the transfer and certificates are enclosed (Annexures 4,5,6 and 7 to the writ petition).

4. The petitioner came to know that 'Mandi Parishad', Junior Engineer was being taken on deputation. Consequently, the petitioner also applied for deputation by his application dated 10.02.1995 (Annexure-8 to the writ petition). The petitioner vide his letter dated 18.05.1995 informed the Corporation that he has given an undertaking that in case he was sent to 'Mandi Parishad' on deputation, he would come back to the Corporation when recalled for being posted in any unit. Copy of the said letter is (Annexure-9 to the writ petition).

5. The Sugar Corporation allowed the petitioner to join the 'Mandi Parishad' on deputation subject to the condition contained in the letter dated 05.07.1995 (Annexure-10 to the writ petition). The contents of the letter dated 5.7.1995 are given here as below:-

Uttar Pradesh State Sugar Corporation Limited.

Par/As.As.C./3 (Av.Av.(C)/ 2260 Dinank 5 July, 95

Adesh

Rajya Krishi Utpadan Mandi Parishad, Uttar Pradesh, Lucknow Ke Patrank Arth.(Ka)-2 (252/ 11)/95-568, Dinank 13.6.95 Ke Sandarbh Mein Sri Davendra Kumar, Avar Abhiyanta (Civil), Jo Vartman Samay Main Nigam Ki Vatalpur Ekai Main Tainat Hai, Ki Seva Mein Tatkalik Prabhav Se Rajya Krishi Utpadan Mandi Parishad Ko Eted Dwara Pratiniykti Par Ek Varsh Ke Liya Ish Shart Ke Sath Uplabdh Kariyee Jati Hai Ki Parishad Mein Karya Grahan Karney Ki Tithi Se Ek Varsh Ki Ukt Nirdharit Pratiniyukti Avadhi Purna Hota Hee Sri Davendra Kumar Ki Sevayen Nigam Se Swatah Hee Samapt Man Lee Jayagee. Vahya Sewa Ki Avadhi Mein Sri Davendra Kumar Ko Nigam Mein Anumanya Vatenman Avem Ush Par Anumanya Sabhi Bhatta Jo Samay Samay Par Dei Hai, Anumanya Honge. Jiska Sampurn Bhar Pratinukti Ki Sewa Avadhi Mein Rajya Krishi Utpadan Mandi Parishad Ko Vahan Karna Hoga.

Sri Davendra Kumar Ki Vahya Sewa Ki Anney Shertey Sanlagn Parishist Ke Anusar Hogi.

Sudhir Kumar
Prabadh Nirdeshak

vil

Subsequently, he was transferred in the 'Mandi Parishad' at Ghaziabad on 05.07.1996. The petitioner was never recalled back to the parent department of 'Sugar Corporation' but surprisingly the petitioner was reverted back to the parent department by the 'Mandi Parishad' by an order dated 20.12.1996, (Annexure-15 of the writ petition). Subsequently, the said order was recalled by order dated 08.01.1997 (Annexure -16) and the petitioner was transferred to Bulandshahr. When the period of deputation had come to an end as per order dated 05.07.1995, the 'Mandi Parishad' by its letter dated 21.07.1988 requested the 'Sugar Corporation' to extend the period of deputation. In response to the said letter the 'Sugar Corporation' wrote to the 'Mandi Parishad ' by its letter dated 17.02.1999 that the service of the petitioner had come to an end on expiry of the period of deputation as per terms and conditions contained in the letter dated 05.07.1995 as such there is no occasion for extension of service any more. The said letter dated 17.02.1999 is (Annexure-17 to the writ petition). The 'Mandi Parishad' thereafter by its order dated 18.03.1999 (Annexure-18 to the writ petition) reverted the petitioner to the parent department, which is the main impugned order challenged in writ petition moreso, without affording the petitioner opportunity of hearing against the principle of natural justice.

6. The main controversy involved in the present writ petition is as to whether the petitioner's lien in the parent department, i.e., Sugar Corporation could come to an end automatically on expiry of the period of one year as contained in the letter dated 05.07.1995 although he was continuing in service in the ' Mandi Parishad ' and as to whether the Sugar Corporation could legally prescribed a condition stipulating therein that the service of petitioner would come to an end in the parent department on expiry of period of deputation granted by said letter and as to whether such a condition was unreasonable, arbitrary, and violative of Article 14 of the Constitution of India and

in derogation to the provisions of section 23 of the Indian Contract Act.

7. The petitioner in paragraphs 20 and 21 of the writ petition has clearly stated that the condition incorporated in the letter granting permission to work on deputation in the ' Mandi Parishad ' was unreasonable, arbitrary and in clear violation of law as well as principles of natural justice. The relevant paragraphs are referred as below:-

"20. That the general terms and conditions in regard to deputation does not contain any condition that services of the petitioner would come to an end after a period of one year and this particular condition has been added at the whims and fancies of the Managing Director by their letter dated 0.5.07.1995 and as such, no reliance has been placed of the disputed terms and conditions and the services of the petitioner could not be dispensed with in such an arbitrary and whimsical manner."

"21. That the aforementioned terms and conditions are totally unreasonable and arbitrary inasmuch as, when the petitioner was going on deputation, the said term and conditions could not have been attached and the said terms on the face of it appears to be unreasonable and liable to be struck down."

8. The petition being a permanent employee in the 'Sugar Corporation' and having joined the 'Mandi Parishad' on deputation, his lien in the parent department was automatically to come to an end after one year. In case the Sugar Corporation was not inclined to extend the period of deputation, it ought to have recalled the petitioner from the 'Mandi Parishad'. The petitioner had already given an undertaking to return to the parent department without any objection when called upon to come back. The 'Sugar Corporation ' never informed or asked the petitioner to return to his parent department and as such the service of the petitioner could not be dispensed with on the basis of an conditions as contained in the letter dated 05.07.1995, (Annexure-10 to the writ petition) which turns out to be arbitrary and illegal inasmuch as the said condition was violative of Article 14 of the Constitution of India and Section 23 of the Indian Contract Act.

9. The following contentions were raised for and on behalf of the respondent 'Sugar Corporation'

(i) in view of a specific condition given in the order dated 6.6.1995 {the correct date is 6.6.1995 not 6.7.1995 as stated in writ petition, para 9 of counter affidavit of 'Sugar Corporation '(Annexure- CA-1 to the counter affidavit)} the petitioner was sent on deputation on a period of one year only with the condition that on completion of the period of deputation the service of the petitioner was come to an end in the 'Sugar Corporation'.

(ii) In the facts and circumstances the petitioner himself had accepted the terms in writing, though his letter dated 29.6.1995 (Annexure 9-A to the writ petition)

(iii) The petitioner had accepted the terms in writing that he is being sent on deputation for a period of one year only and his services will come to an end in the Corporation after completion of the period of deputation as such by his own conviction petitioner relinquished his lien with parent department.

(iv) In view of the fact that the petitioner had accepted the terms and conditions of deputation that his lien and service shall

come to an end in the parent department after completion of the period of one year but the petitioner has filed the present petition after a lapse of more than three years as such no relief can be granted to the petitioner as against the 'Sugar Corporation".

10. The U.P. Fundamental Rules as contained in Financial Handbook Vol.II-IV Chapter III Rule-14 A contemplates as under:

"14-A. (a) A Government Servant's lien on a post may in no circumstances be terminated, even with his consent, if the result will be to leave him without a lien or suspended lien upon a permanent post.
(b) In a case covered by sub-clause (2) of Clause (a) of Rule 14, the suspended lien may not, except on the written request of the Government servant who is not performing the duties of the post to which the lien relates, even if that lien has been suspended."

11. The concept of deputation is an assignment of an employee of one department or organisation to another department or organisation. It arises in public interest to meet the exigencies of public service. Concept of deputation is consensual and involves a voluntary decision of employer to lend service of his employee corresponding to acceptance by borrowing employer and consent of the employee to go on deputation to {(H. Umapati Choudhary v. State of Bihar, 1999 (4) SCC 656=AIR 1999 SC 1948}

12. A person on deputation do not get any right to be absorbed in the deputation post. They can be reverted to parent cadre at any in view of the Supreme Court in (Ratilal B.Soni v. State of Gujrat, AIR 1990 SC 1132).

13. Normally vacancies should be filled up from the cadre and taking persons on deputation is an exception in utter exigencies likewise

"filing up of higher posts by inducting deputationists should be an exception and not the rule, if suitable juniors are eligible and available for promotion but in no case abnormal, irrelevant stipulations shall mar the sanctity of deputation."

14. The service on deputation is equivalent to and is deemed to have been rendered in the parent department. When increments and promotion can be earned, there is no reason why he should not be treated as being on probation also in the post held by him in the parent department even while he is on deputation, in view of R.L. Gupta vs. Union of India AIR 1989 (SC) 968. In this case the services of the petitioner while on deputation as Secretary to the Commission of Inquiry under the Chairmanship of Shri Ranganath Misra, a sitting judge of the Supreme Court, was held to satisfy the requirements of probation in his parent department in terms of Rule 12 (2) of the Delhi Higher Judicial Service Rules, 1970.

15. The benefits can not be denied on the only ground that he had given his consent to go on deputation. It is well known that many officers have to be sent on deputation in the public interest to other departments in order to meet the exigencies of public service and that before sending them on deputation their consent to go on deputations they should not be allowed to suffer unless there is a specific rule to the contrary or other good reasons for it. That is the ratio of the

decision in State of Mysore v. M.H. Bellary, AIR 1965, SC 868, (1964) 7 SCR 471 and of the decision in State of Mysore v. P.N. Nanjundiah, (1969) 3 SCC 633 (ibid, para 13).

16. The parent department does not lose administrative control over the employee sent on deputation. Where an employee of the Punjab Government was on deputation to the Government of Himanchal Pradesh, it was held by the Supreme Court that the former could place him under suspension and cancelled his leave preparatory to retirement granted by the borrowing authority in view of Khemi Ram v. State of Punjab, AIR 1976 SC -1737.

17. A Government servant sent on deputation retains right of promotion in his parent department. The service on deputation is treated as equivalent to the service in the parent department and hence for the purpose of promotion in the parent department it will be deemed to have been rendered in that department itself. The Government servant on deputation has therefore to be considered for promotion in his turn in the parent department. This principle has been embodied in the 'Next Below Rule". (State of Mysore v. M.H. Bellary, AIR 1965 SC- 8681.

18. The period of deputation originally fixed can be cut short, if considered necessary. A deputationist has no right to continue in the deputation post. It depends upon several factors like aptitude for different type of work, ability to pick up quickly the intricacies of new work etc. If found inadequate, a deputationist can be reverted to his parent department. There is no stigma attached to it. (L. Jason Dayavanthappa v. G.M.Southern Railway, (1988) 7 ATC 275; Shambhunath Lal Srivastava v. State of U.P., 1984 Lab. I.C. (NOC) 135).

19. Absorption of deputationist in the department where he is on deputation. The appellant working in the U.P. Small Scale Industries Corporation Ltd., joined U.P. Rajkiya Nigam Ltd., on deputation. The Nigam wrote a letter to him that if he is willing for permanent absorption in the Nigam, he can send his option. The appellant, after completion of three years, submitted his option letter for permanent absorption. The deputationist was absorbed after he completed statutory period of five year on deputation whereupon, he became entitled to be absorbed as per the relevant rules. The Nigam did not repatriate him to his parent department his deputation allowance was also stopped on completion of five years. It was held that the appellant stood absorbed on completing five years and the order relieving the appellant from the post on which he was on deputation was quashed.

In Rameshwar Prosad v. Managing Director U.P. Rajkiya Nirman Nigam, Ltd. 199 (8) SCC 381=1999 (7) JT 44. The power of absorption though discretionary, cannot be exercised arbitrarily or at his or caprice of any individual. There must be a justifiable reason before selecting the application for absorption.

20. The appellant, a lecturer in the University was sent on deputation to the Bihar Sanskrit Board, he was authorised to discharge there all duties and responsibilities of controller of examination of the Board. The

Government of Bihar confirmed the appellant as controller of examination Registrar of the University also gave consent. It was held that the appellant was a permanent employee of the Board on the date of his retirement from the post of controller of Examinations of the Board, and therefore the retirement benefits should be calculated on that basis. Acknowledging and conferring over deputationist by the borrowing department to authorities to discharge all duties and responsibilities of a post entitled him the status of permanent employee of borrowing department for all purpose in view of (Npapati Chaudhary v. State of Bihar, AIR 1999 SC 1948 SC 1948=1999 (3) JT 627).

21. If the employee is transferred from one department to another, it is not necessary that he should be re-appointed to the department to which he is transferred. As soon as he is transferred permanently, he begins to hold the permanent post which he starts holding in the transferee department. Further, whether a person has lien in one department or in other department the Government is entitled subject to the provision of Article 311 (i) of the Constitution, to delegate the power of dismissal to any offer. (State of U.P. v. Ram Nareshlal, AIR 1970 SC 1263; (1970) 3 SCC 173.)

22. The power vested in a public body to transfer on deputation, any official must be exercised honestly, bonafide and reasonably. It should be used in the interest of public purpose. If the power is used on extraneous consideration or for achieving an alien purpose or on oblique motives, its use would be mala fide and any colourable exercise of that power would, therefore, be struck down by the court in the light of the observation made in S.Pratap Singh v. State of Punjab, AIR 1964 SC 72.

23. If transfer by way of deputation is motivated by a desire to victimize any person the specific deputation could always be tested in a cannon of law. No person can, however, be struck down on the ground that although it was for the good of employee but likely to be used for an unauthorised purpose in view of Sukumar Mukherjee v. State of West Bengal, 1993 (2) UJ (SC) 654.

24. The deputationist cannot be put to prejudice in so far as their service career in their parent department is concerned. The deputationist are entitled to all the benefits in the parent department as were granted to the juniors or these who were similarly situated. (Block Development Officer Association v. State of M.P. 1996 (7) SCC 260).

25. Temporary promotion granted to an employee on deputation does not entitle him to hold his or two substantive posts at the same time as in his parent department as well as borrowing department, however the grant of promotion to such candidate by the parent department is proper. (Balkrishna Pandey v. State of Bihar, 1996 (2) SCC 282; 1995 (9) JT 566; AIR 1996 SC 888.

26. The Supreme Court of India in Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Gangula, (1986) 3 SCC 156 laid down the principle that unreasonable terms and conditions cannot be imposed by the employer on its employees, in view of doctrine of equality

contained in Article 14 of the Constitution of India.

27. The Supreme Court in Central Inland Water Transport Corporation Ltd. (supra) and in the Delhi Transport Corporation Vs D.T.C. Mazdoor Congress 1991 Supp (1) SCC 600 as well as in the case of Hindustan Times Vs State of U.P. and others 2003 (1) SCC 591, has held as under:-

"39. The respondents being a State, cannot in view of the equality doctrine contained in Article 14 of the Constitution of India, resort to the theory of " take it or leave it." The bargaining power of the State and the newspapers in matters of release of advertisements is unequal. Any unjust condition thrust upon the petitioners by the State in such matters, in our considered opinion, would attract the wrath of Article 14 of the Constitution of India as also Section 23 of the Indian Contract Act. See Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly and Delhi Transport Corporation Vs D.T.C. Mazdoor Congress. It is trite that the State in all its activities must not act arbitrarily. Equity and good conscience should be at the core of all governmental functions. It is now well settled that every executive action which operates to the prejudice of any person must have the sanction of law. The executive cannot interfere with the rights and liabilities of any person unless the legality thereof is supportable in any court of law. The impugned action of the State does not fulfil the aforementioned criteria."

28. The Supreme Court of India in Satya Narain Pareek Vs. State of Rajasthan (1996) 8 SCC 654 para 4 has held that the permanent employee in Technical Education Department during his deputation in the transport department shall retain his lien in the parent department.

29. The irregular, unscheduled and unreasonable transfer of an official on deputation by placing him in jacket of unreasonable terms and condition may cause impairable harm to the government servant, uproot his family, disrupting the education of his children and number of other complications. The Government, therefore, should be reasonable and fair in implementation of its policy relating to deputation.

30. It is well settled that unless the claim of the deputationist for permanent absorption in the department where he works on deputation is based upon any statutory Rule, Regulation or order having the force of law a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that, the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position, therein at the instance of either of the departments and there is no vested right in such a person to continue for long deputation or get absorbed in the department to which he had gone on deputation, in view of Kunal Nanda v. Union of India, AIR 2000 SC 2076; 2000 (5) SCC 362 = 2000 (6) JT 574;

31. Thus from the facts and law as stated above, it is abundantly clear that the service of the petitioner in the parent department where he was appointed on permanent basis and was confirmed after expiry of period of probation, could not be dispensed with by prescribing any

irrelevant, unreasonable and arbitrary conditions indicated in the letter dated 3.7.1995 (Annexure-10) to the effect that the service of such employee would come to an end on expiry of period of deputation. The petitioner in the case in hand was on deputation and he holds the lien in his parent department. This principle is also enshrined in Rule 14-A of Chapter III in Financial Handbook Vol. 2-A.

32. The petitioner is permanent employee of the ' Sugar Corporation ' and is an instrumentality of State within the meaning of Article 12 of the Constitution of India and as such his service could not be dispensed with by placing arbitrary and unreasonable terms and conditions in violation of Article 14 of the Constitution as well as Section 23 of the Indian Contract Act as well as Rule 14-A of the Financial Rules as contained in Financial Handbook Vol. 2-A Chapter III, governing the employees of State of U.P. The actions of the respondents are in clear violation of law laid down in the cases referred to above and against the principle of natural justice. In these circumstances, the writ petition deserves to be allowed with cost and the services of the petitioner be restored forthwith.

33. By imposing irrelevant abnormal, unreasonable conditions, in the order dated 5.7.1999 (Annexure-10) while sending petitioner on deputation to the Corporation to the 'Mandi Parishad' the Corporation has marred the sanctity of deputation and by putting such conditions that petitioner service shall automatically be terminated after one year is great prejudice to the inherent right of the petitioner in his parent department. The conditions imposed in the letter dated 5.7.1995 is unwarranted, legally not sustainable therefore these are being set aside. The deputationist absorbed with the consent of the transfer or department and transferee/borrowing department may also be given increment and promotion under the fair terms and conditions could be reverted back to the original parent department to avail his own rights with his gains legally permissible to him in the parent department but a deputationist who has been absorbed in the transferee/borrowing department/Mandi Parishad if he was confirmed employee his repatriation or sending back to the parent department of Corporation could not be made without affording opportunity of hearing. Undisputedly, the petitioner herein is not confirmed in ' Mandi Parishad ' however, by transferring the petitioner/deputationist from ' Mandi Parishad ' to Corporation knowing it fully well that in the light of unreasonable terms indicated in the letter dated 5.7.1995 of the Corporation petitioner shall have no place for sustinance, the order as indicated in the order dated 18.3.1999 in the garb of letter dated 5.7.1999 shall tantamount terminating the service of the petitioner/deputationist. The action in question 'Mandi Parishad' is punitive passed without affording opportunity of hearing to the petitioner in a peculiar facts and circumstances of the case. Therefore, the order dated 18.3.1999 being illegal is set aside. 'Mandi Parishad' however is at liberty to consider the case of the petitioner for absorption in 'Mandi Parishad' itself or may negotiate with the Corporation to keep alive the original lien and to accept his own original employee in parent department with consequential gains to be given to the petitioner in the Corporation only on consensus is arrived between the transferee Corporation and

the 'Mandi Parishad', then the petitioner could be thrown away by order simiplicitor dated 18.3.1999 otherwise shall be punitive in nature. The 'Mandi Parishad' shall have to deal with the situation by making negotiations with the Corporation and both may rectify the terms and conditions bonafidely, fairly and in public interest and if 'Corporation ' is willing to take back the petitioner then only the 'Mandi Parishad' shall pass the order of repatriation or order of sending back the petitioner from the 'Mandi Parishad' to the Corporation. Therefore, 'Mandi Parishad' shall pass appropriate order within six months from the date of production of a certified copy of this order after taking consent of the petitioner and providing opportunity of hearing and after deliberation with the Corporation. However, the petitioner shall be treated the employee of the Corporation and shall be entitled to receive his salary and increments due to him.

In view of the above observations the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No.16040 of 2004

Ashutosh Agrawal ...Defendant
Versus
Lala Ramanuj Dayal Vaishya Bal Sadan ...Plaintiff

Counsel for the Petitioner:
Sri M.K. Gupta

Counsel for the Respondent:
Sri P.K. Jain

Code of Civil Procedure, 1908-O, VIII R.1 Proviso by amendment Act 46 of 1999 and as amended by Act 22 of 2002-S.15-b)-Applicability- time limit for filing Written Statement-Ord. VIII R.1 made inapplicable to pending suits by S. 15-b of Act 22 of 2002-Provision of O.22 R.1 as amended not retrospective-Writ allowed.

"Provision of Order VIII, Rule 1 requiring the written statement to be filed within 30 days from the date of service of summons and confers power upon the Court for reasons to be recorded to extend time for filing the written statement to a day not later than 90 days from the date of service of summons. This provision has been made inapplicable to pending suits by virtue of the provisions of Section 15-b of act 22 of 2002. The scheme of the amended provisions which has been discussed above indicates in the matter of time for filing the written statement he amended provisions of Order VIII, Rule 1 would not be applicable to pending suits and although the provision is procedural retrospectively as textually inadmissible." Para 4

Case law discussed:
AIR 2003 A.P. 409
AIR 2003 Kant 417
2003 (1) ARC 556

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

1. Heard Sri M.K. Gupta, learned counsel appearing on behalf of the petitioner and Sri P.K. Jain, learned counsel for the respondent. Both the counsels for the parties are agree that the matter may be heard on merits, as it relates to the pure question of law. In these circumstances, it is not necessary to invite any counter affidavit.

2. The sole argument advanced on behalf of learned counsel appearing on behalf of the petitioner is that the

amended provision of the Code of Civil Procedure, Order VIII, Rule 1 by which the proviso has been added by the Act of 1999, which says that no time for filing the written statement shall be granted after the Court is adjourned beyond 90 days in terms of the above Order VIII Rule 1 of the Code of Civil Procedure, which is reproduced below:-

"**Order VIII, Rule 1. Written statement.----**The defendant shall, within thirty days from the ate of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by this Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons"

3. Learned counsel for the petitioner has relied upon a decision reported in **A.I.R. 2003 Andhra Pradesh, page 409 Nachipeddi Ramaswamy vs. P. Buchi Reddy,** by which Andhra Pradesh High Court interpreted the Order VIII Rule 1 of the Code of Civil Procedure, particularly paragraphs 6,7 and 8 which read as under:-

"**6.** A reading of Rule 1 of Order VIII, CPC does not support the contention of the learned counsel for the petitioner. The normal requirement of law is that the defendant shall within 30 days from the date of service of summons, present the written statement of his defence subject to other Rules contained in Order VIII. This Rule is not inflexible or rigid. This is made clear by the proviso to Rule 1 of Order VIII as amended by Act 22 of 2002. It stipulates that it is competent for the Court to specify the time beyond 30 days and in any case the same shall not be later than 90 days from the date of service of summons. It is also interesting to note that Rules 8-A, 9 and 10 in the Code of Civil Procedure 1908 were omitted by Act 46 of 1999 but again they were reintroduced after Act 22 of 2002. Rule 10 of Order VIII reads as under:

Procedure when party fails to present written statement called for by Court:- Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

7. A plain reading of the above would show that if a defendant fails to present the written statement within the time permitted or fixed by the Court, the Court has to pronounce judgment and make such order relating to the suit as it thinks fit. The very fact that the Parliament which chose to delete Rule 10 of the Order VIII CPC again decided to reintroduce it by Act 22 of 2002 would show that Order VIII, Rule 1 CPC as amended by Act 22 of 2002 cannot be interpreted in strict terms. Further, to my mind, Rules 1, 1 (a) and 10 of Order VIII together would show that though a defendant is required to file written statement within 30 days after receipt of summons and though the Court can extend the time till 90 days, the Court is not divested of power to fix further time for filing the written statement. It is well

settled that this cardinal principle of interpretation of law with an enactment has to be read as a whole and then the entire section has to be read and thereafter the act has to be interpreted section by section. One Rule or one Section in the enactment cannot be a guiding factor for arriving at the intendment of the legislature. The very fact that Rule 10 is reintroduced by Act 22 of 2002 by the Parliament would show that the Parliament never intended the Civil Court to pronounce judgment immediately after the failure on the part of the defendant to file written statement within 90 days.

8. Further, Section 148, CPC empowers the Court to enlarge the time. In addition to this, we must not forget that the Civil Court being a Court of equity, justice and good conscience is also vested with inherent posers under Section 151 CPC to avoid miscarriage of justice. It is always open to the Civil Court to exercise inherent powers provided such exercise is not totally derogatory to the main provisions of the Act and the Rules made thereunder."

Further decision relied upon by learned counsel appearing on behalf of the petitioner is reported in **A.I.R. 2003 Karnataka, page 417 A.V. Purushotam Vs. N.K. Nagarj,** particularly paragraph 9 which is reproduced below:-

9. It is also relevant to note at this juncture that the Legislature in its wisdom has not stated decisively what consequences would follow in the event of the written statement not being filed within the period stipulated. In other words, in the absence of expressly stating what the penal consequences would be when the written statement is not filed within the stipulated period, notwithstanding the use of the work 'shall' in Order 5 Rule 1, Order 8 Rule 1, Order 8 Rule 9 and Order 8 Rule 10, it cannot be said that the said provisions are mandatory."

4. Learned counsel appearing on behalf of the resporent has relied upon a decision of this Court in support of his contention reported in **2003 (1) Allahabad Rent Cases, page 556 Waqf Mausooma Syed Husain and another Vs. Daleep Kumar Jain and others**, wherein the learned single Judge of this Court has held *"provision of Order VIII, Rule 1 requiring the written statement to be filed within 30 days from the date of service of summons and confers power upon the Court for reasons to be recorded to extend time for filing the written statement to a day not later than 90 days from the date of service of summons. This provision has been made inapplicable to pending suits by virtue of the provisions of Section 15-b of act 22 of 2002. The scheme of the amended provisions which has been discussed above indicates in the matter of time for filing the written statement he amended provisions of Order VIII, Rule 1 would not be applicable to pending suits and although the provision is procedural retrospectively as textually inadmissible."*

In view of what has been discussed above and in view of the case relied upon by learned counsel for the respondent, this writ petition deserves to be allowed and the order impugned in the present writ petition dated 10th March, 2004, passed by Additional District Judge, Court No. 18, Meerut deserves to be set aside.

5. In view of what has been stated above, this writ petition succeeds and is allowed. The order impugned in the present writ petition dated 10th March, 2004, passed by Additional District Judge, Court No. 18, Meerut is quashed. So fare as the order passed by the trial Court is concerned, the trial Court is directed to proceed with the hearing of the suit expeditiously, preferably within a period of one year from the date of production of a certified copy of this order before him.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.5.2004

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 10771 of 2004

Ram Rakhan Singh & others ...Petitioners
Versus
Hon'ble the Chief Justice, High Court of Judicature, Allahabad and another ...Respondents

Counsel for the Petitioners:
Sri Shashi Nandan
Sri Pankaj Misra
Sri Devendra Swaroop

Counsel for the Respondents:
Sri K.R. Sirohi
S.C.

Constitution of India, Articles 14 and 16- Allahabad High Court Officer and Staff (Condition of Service and Conduct) Rules, 1976-Rr. 11, 8 and10- Petitioners seeking direction to quash advertisement-from Assistants of High Court for appointment of Bench Secretary Grade II petitioners also seeking direction from Registrar General to make appointment of 21 Bench Secretaries Grade II, for which application have been invited by said advertisement dated 6.2.2004, out of approved select list dated 19.1.2003- Held, appointing authority did not act illegally, arbitrarily or in violation of fundamental rights under Articles 14 and 16 in declaring fresh selections for 21 vacancies of Bench Secretary Grade II and curtailing life of previous select list dt. 21.1.2003.

For the reasons given as above, I do not find that the appointing authority acted illegally, arbitrarily or in violation of petitioners rights under Article 14 and 16 of the Constitution of India in declaring fresh selections for 21 vacancies of Bench secretary Grade II, and curtailing the life of previous select list dated 21.1.2003. Consequently the writ petition fails and is dismissed, with no order as to costs. Para 18

Case law discussed:
(2004) 1 SCC 136
(1987) UPLBEC 1006
(1991) 3 ACC 47
(2001) 6 SCC 380

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

1. Heard Sri Shashi Nandan, Senior Advocate, assisted by Sri Pankaj Misra for petitioner and Sri K.R. Sirohi for respondents.

2. The petitioners have sought a direction to quash the advertisement dated 6.2.2004 issued by Registrar General, High Court at Allahabad inviting application from the Assistants of the High Court for selection through competitive examination for appointment of Bench Secretary Grade-II. The petitioners have also prayed for a direction to the Registrar General to make appointment of 21 Bench Secretary Grade II, for which applications have been

invited vide aforesaid advertisement, out of approved select list dated 19.1.2003.

3. Counter and rejoinder affidavits have been exchanged. With the consent of the parties, the writ petition, nominated to this bench, is being finally decided.

4. The method of selection to the post of Bench Secretary is provided in Rule 11 of Allahabad High Court Officer and Staff (Condition of Service and Conduct) Rules, 1976. Whenever it is required to make selection to fill up any vacancy/vacancies for the post of Bench Secretary Grade-II, Rule 11(1) requires the appointing authority to invite application from the eligible assistants as mentioned in clause (e) of Rule 8 for admission to competitive examination. The source of recruitment in Rule 8 (c) is by selection through competitive examination conducted by the appointing authority, open to the Assistants having not less than 10 years continuous service in Class-III post. These Assistants includes Routine Grade Clerks, Lower Division Assistants, Upper Division Assistants and Personal Assistants. Sub Rule (2) of Rule 11 provides that the procedure and syllabus relating to the competitive examination shall be such as may be prescribed by the appointing authority from time to time. Sub Rule (3) provides that the rest of the procedure of selection and the period during which the select list shall hold good shall be the same as laid down in Rule 10.

5. Rule 10 of the Rules of 1976 provides for method of selection for the posts of Routine Grade Clerks, which has been made applicable to Bench Secretary Grade-II by Rule 11 (3). Under Sub Rule (1) of Rule 10, the appointing authority is required to ascertain the probable number of vacancies likely to occur in the post during the course of the year of recruitment, and determination the number of vacancies, if any, to be reserved for candidates belonging to the Scheduled Castes and others under Rule 23. Sub Rule (g) of Rule 10 provides for the total marks obtained by the candidates in the written examination and interview will determine their position and the merit list shall be prepared accordingly. The select list shall hold good for three years or till the next selection is held whichever is earlier. The year of recruitment is defined under Rule 2(m), which means, the period of twelve months commencing from the 1st day of July of a calendar year. Rule 30 provides that on the occurrence of substantive vacancy, the appointing authority shall make appointment to the various categories of post in the establishment from the respective list of persons duly selected under these rules. Where a select list has been prepared appointments shall be made in the same order in which the names appear in the list.

6. The selection process for the last recruitment was initiated vide Office Memorandum dated March 5, 2002, inviting applications for selection to the post of Bench Secretary Grade II. The number of vacancies were not given either in the Office Memorandum or in the notice inviting applications. IN all, 150 (111 from Allahabad and 39 from Lucknow Bench) applications were received, out of which 138 candidates were found eligible and only 92 appeared in the written examination. Out of these 89 candidates qualified for interview and that a select list of 67 candidates was prepared and published by the Registrar

General on 21.1.2003. Out of these, 39 were appointed.

7. The notice under challenge, was issued on 6.2.2004 inviting applications for Assistants in the High Court having not less ten years service in class III post as on 1.1.2004 for selection through competitive examination for appointment as Bench Secretary Grade II. Para 3 of the notice gave the number of vacancies to be 21 which may decrees or increase. A Committee has been constituted by Hon'ble the Chief Justice on 21.1.2004 for selections. Sri K.R. Sirohi appearing for the Court, informs that 60 applications have been received out of which 20 new and eligible Assistants have applied.

8. In the counter affidavit of Sri Pramod Kumar Goel, Joint Registrar (Inspection), High Court it has stated in para 11 that the selection committee resolved that there are 21 vacancies of Bench Secretary Grade II which includes 18 vacancies for the new judges, 2 vacancies already in existence and one anticipated to fall vacant due to retirement before June, 2004. In para 13, it is stated that these 18 posts were sanctioned by the Government Order dated 8.11.2001 with a rider that appointment against these posts shall be made in such a way that the staff is made available to the Hon'ble Judges on their elevation, and therefore, the same were not included in the selection of 2002. Since the said posts were not notified for the recruitment in the year 2002, a fresh selection process has been initiated for these 18 posts along with three additional vacancies in the recruitment year 2003-04.

9. In the same paragraph it is stated by Sri Pramod Kumar Goel, Joint Registrar (Inspection), High Court that earlier selections were held pursuant to notice dated 5.3.2002 but since some other Assistants working in the establishment of the Court on class III posts were likely to have complete ten years of continuous service, and may have acquired eligibility to undertake competitive examination, in all fairness a fresh selection process was started, more-so, when the post included in the present advertisement, were not included in the advertisement dated 5.3.2002. Sri K.R. Sirohi informs the Court that about 30 Upper Division Assistants, 7 Lower Division Assistants and 1 Routine Grade Clerk have acquired eligibility, after the previous selection vide notice dated 5.3.2002

10. Learned counsel for petitioner, Sri Shashi Nandan submits that Rule 10 (4) of the Rules of 1976 provide that select list shall hold good for three years or till next selection is held, whichever is earlier. The selections in pursuance of notification dated 5.3.2002 was held for indeterminate number of vacancies. The advertisement did not specify the number of vacancies which has now been provided in para 4 of the counter affidavit of Sri Pramod Kumar Goel, Joint Registrar (Inspection) High Court, Allahabad. He submits that the 18 posts were sanctioned by the State Government by Government Order dated 8.11.2001 much before the advertisement was issued on 5.3.2002 inviting applications for selection. These 18 vacancies were already existing were illegally and arbitrarily excluded from the previous selections. There has been no change whatsoever either in the method of selection, or syllabus, and thus the commencement of the next selection,

cutting short the validity of the previous select list is a wholly arbitrary and irrational exercise of power by the High Court. The petitioners have completed and have passed the examination. They are available for appointment to the posts which were sanctioned by the State Government prior to their selections. Out of this list 46 were called for training 39 were appointed. He submits that all the 21 vacancies ought to have been filled up from the select list available with the Court. The fresh advertisement, according to him, is not only arbitrary, irrational but also violates petitioner's right under Article 14 and 16 of the Constitution of India. He has relied upon the judgment in **Oriental Insurance Co. Ltd. Vs. T.S. Shastri (2004) 1 SCC 136, and dr. Arvind Kumar Vs, State of U.P., (1987) UPLBEC 1006,** in support of his submission that where the vacancies were not determined prior to the selection, all the vacancies arising during the currency of the select list should be filled up from the selected candidates impanneled the select list.

11. Sri K.R. Sirohi, on the other hand, submits that the selections were held in the year 2002 for only 30 vacancies. The 18 posts sanctioned by the State Government on 8.11.2001 were to be filled up subject to the availability of Hon. Judges on their elevation. These vacancies were not included in the previous selections and that the Court decided to fill these vacancies and two more which came into existence and one anticipated vacancy due to retirement before June, 2004 by making fresh selection, including all those who were not eligible on 5.3.2002. Sri Sirohi submits that under Rule 10 (4), the select list holds good for three years or till the next selection is held whichever is earlier with the decision to hold fresh selection, the select list dated 21.1.2003 does not hold good any longer. He submits that after the previous selections, more Judges have been appointed giving rise to shortage of staff, on account of which officials have been taken from administrative/weeding work and have been posted as Bench Secretary on temporary measure till further orders. He submits that the decision to fill up 20 vacancies and one anticipated vacancy up-to June, 2004, ceased the select list dated 21.1.2003. In the meantime a number of Assistants completed 10 years of service and became eligible. In order to give wider base to the selection and to include all those who had become eligible after the previous advertisement and to give equal treatment to them, the decision to hold fresh selection cannot be treated to be arbitrary or violative of Article 14 and 16 of the Constitution of India.

12. The Rule 10 of 1976 provide for ascertaining probable number of vacancies likely to occur in the year of recruitment, which under 2(m) is defined as period of 12 months continuous service from 1st day of July of the calendar year. The selection is provided under Rule 11 by a competitive examination. Sub Rule (4) of Rule 10 gives a life of three years to the list which can be cut short by commencement of the next selections. The short question to be decided in this writ petition is, whether the respondents acted arbitrarily and in violation of petitioners right under Article 14 and 16 of the Constitution of India in deciding to hold next selection during the currency of the select list dated 21.1.2003.

13. In **Shankarsan Dash Vs. Union of India (1991) 3 ACC 47,** the Supreme Court held that the inclusion of a name of candidate in the panel indicating their selection does not give such person any indefeasible right for appointment even against the existing vacancies, and the State is under no legal duty to fill up all or any of the vacancies. Para 7 of the Judgement is quoted as below:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up. The State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This Correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana Vs. Subash Chander Marwaha2 Neelima Shangla Vs. State of Haryana3 or Jatinder Kumar Vs. State of Panjab4."*

2. (1974) 3 SCC 220; 1973 SCC (L&S 488.

3. (1986) 4 SCC 268: 1985 SCC (L&S) 759

4. (1985) 1 SCC 122: 1985 SCC (L&S) 174.

14. The Constitution Bench decision in Shankarsan Dashwas followed by Supreme Court in **All India SC & ST Employees Association Vs. Arthur Jeen (2001) 6 SCC 380**. In Dr. Arvind Kumar (supra) this Court held that the list may be examination or selectionwise or it may be list for one year or till the next selection is made or till the list is cancelled. Whereas the list is examination or selection wise the candidates in the waiting list can claim to be appointed if the selected candidate do not join and vacancy arises. But the purpose of periodical list is to keep it alive for certain period and if a vacancy arises in that period then it should be offered to the candidates from the list. A candidate has a right to claim that he should be appointed against vacancy which occurs during that period, otherwise there can be no purpose in keeping the list operative for a certain period. In Oriental Insurance Co. Lt. (supra), the Supreme Court found that promotion policy stipulating ranking list to include 20% beyond the declared vacancies. The contingent list was issued for the purpose of giving promotion from a vacant post as and when required prior to the formation of the next Promotion Committee. In the facts and circumstances of the case, the Supreme Court found that the vacancies at Kurnool and Srikakulam were actually filled up by the transfer of the existing cadre. The Supreme Court approved the finding of the High Court that these two branches were opened by transferring of the cadre was an act of mala fide on the part of the appellant. The two branches were opened during the currency from the list prepared by the Selection Committee, and the vacancies

were filled up only to deprive the right of promotion to the respondent who was placed as contingent reserve.

15. In the present case, the Rules of 1976 did not provide for periodical list. Rule 10 (1) requires the appointing authority to ascertain the probable number of vacancies likely to occur during the course of the year of recruitment. The impaneled assistants selected after written examination do not have a right to be appointed on the post beyond the vacancies ascertained by the appointing authority to be filled up from the recruitment. There were 30 vacancies for which applications were invited on 5.3.2002 and that out of the select list dated 21.1.2003, 39 persons were given appointment. Nine persons out of the select list received appointment beyond the number of vacancies worked out by the appointing authority. The 18 posts sanctioned by the State Government vide Government Order dated 8.11.2001 were not decided to be filled up in the previous recruitment as these posts were created subject to elevation of Hon'ble Judge. In these circumstances the appointing authority acted well within his authority under the rules to declare next selection for the 20 existing and one likely vacancy to occur on retirement before June, 2004.

16. The petitioners as selected of the list which does not hold good any more now no longer hold good, cannot claim a right to be appointed to the 21 vacancies advertised by notice dated 6.2.2004.

17. I do not find any force in the contention of the counsel for the petitioners that after 1988 the examination to Routine Grade Clerks were held in 1994, and that since the result of 1994 examinations were declared in March, 1994, there will be no one amongst the eligible other than those who appeared along with the petitioners, for selection in 2002, to appear in the selection advertised by notice dated 6.2.2004. Out of 60 applicants in the current selections, there are 20 new applicants, and that 30 Upper Division Assistants, 7 Lower Division Assistants and 1 Routine Grade Clerks have acquired eligibility after the previous selections. In case the subject vacancies were decided to be filled from previous selection, the valuable rights of selections of these persons who have acquired eligibility subsequently was to be likely defeated.

18. For the reasons given as above, I do not find that the appointing authority acted illegally, arbitrarily or in violation of petitioners rights under Article 14 and 16 of the Constitution of India in declaring fresh selections for 21 vacancies of Bench secretary Grade II, and curtailing the life of previous select list dated 21.1.2003. Consequently the writ petition fails and is dismissed, with no order as to costs.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.4.2004

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Sales Tax Revision No. 1444 of 1990

The Commissioner of Sales Tax
...Applicant
Versus
S/S Melrose Biscuit Co., Aligarh
...Opposite Party

Counsel for the Applicant:
S.C.

Counsel for the Opposite Party:

U.P. Sales Tax, Act-S. 4 (a)-Whether commodity called 'Kachari' within meaning of Notification dated 7.9.81 and is liable to be exempted from payment of Sales Tax or Commodity is a 'Namkeen' and is liable to be taxed as such-Held, product in question cannot be called Kachari-It is not covered by said notification in view of fact that Kachari as generally understood is a preparation of rice-Since product in question has been prepared out of Maida, is not understood in common parlance as 'Kachari'-Hence same was rightly taxed as 'Namkeen' by First Appellate authority.

In view of the above the product in question cannot be called Kachari. It is not covered by the aforesaid notification in view of the fact that Kachari as generally understood is a preparation of rice. I find sufficient force in the argument of the learned standing counsel that since the product in question has been prepared out of Maida is not understood in common parlance as 'Kachari' and was rightly taxed as "Namkeen" by the first appellate authority. Para 8

Case law discussed:
1987 U.P.T.C. 1298

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

1. The dealer opp.party deals in the manufacture and sale of bread, biscuits, "Namkeen"s etc. The dispute in these two revisions relate to the assessment year 1982-83 and 1983-84. The following common question of law has been raised by the Commissioner of Sales Tax in the above revisions:-

"Whether on the facts and in the circumstances of the case the Sales Tax Tribunal was legally justified to dismiss the appeal of the Commissioner, Sales Tax U.P. and partly allow the appeal of the assessee by holding that the salted preparation of Maida termed as Kachari by the assessee was covered by notification No.ST-II-5788 dated 7.9.81 and, therefore, exempt from tax though Kachari has been held to be a preparation from rice by the Hon'ble High Court in the case of Kasturi Lal and Sons Vs. C.S.T. U.P. (1987 U.P.T.C. P – 1298) whereas in the present case the impugned commodity was prepared out of Maida which is altogether different commodity like potato chips?"

2. Heard the counsel for the parties and perused the record. In both these revisions the dispute is whether the commodity which is called 'Kachari' by the dealer opp. party is, in fact, a 'Kachari' within the meaning of notification no.5785 dated 7.9.81 and is liable to be exempted from the payment of sales tax or the commodity is a "Namkeen" and is liable to be taxed as such.

3. The assessing authority has found that the 'Kachari' is ordinarily prepared from rice. Admittedly the commodity in question which has been called as 'Kachari' by the dealer opp. party has been prepared out of Maida. The said commodity is used after frying with oil in the frying pan. The argument of the assessee that the since the produce in question is used after frying in oil is, therefore, 'Kachari' has not been accepted by the assessing authority on the ground that it is preparation of Maida. The tax was imposed treating it as unclassified item. The first appellate authority has held that the product in question is "Namkeen" as it was treated as "Namkeen" in the earlier assessment years and as such it

cannot be treated as unclassified item and modified the assessment order accordingly. The tribunal has held that generally the word 'Kachari' is used with respect to such eatable item which are eaten after frying and is crisp. Ordinarily 'Kachari' is made from rice but due to new advancement different kinds of Kacharies are being manufactured. Therefore product though prepared out of Maida is Kachari. It has also observed that in the registration application by way of amendment the dealer opp. party has mentioned that he will manufacture Kachari (Namkeen) which means that registration was applied for Kachari and not only for "Namkeen". This order is under challenge in the revisions. At this stage it is relevant to have the wordings of the notification no.5788 dated 7.9.1981.

"*In exercise of the powers under clause (a) of section 4 of the U.P. Sales Tax Act, 1948 (UP Act No. XV of 1948), the Governor is pleased to order that, with effect from September 7, 1981, no tax under the said Act shall be payable on the sale or purchase of the following goods:-*
1. Flowers, flower seeds, seedlings, plants and seeds of Kakari, Kheera, Kharbooja and Tarbooj.
2. Sewaiyan, Bari, Mungauri, papar and kachari."

The said notification has been issued under section 4 (a) of U.P. Sales Tax Act. This section empowers the State Government to grant exemption on the sale or purchase of water, milk, salts, newspaper, motor spirit, diesel oil or Alcohol or notified goods which the State Government may notify. A bare perusal of the aforesaid notification shows that under clause–2 of the notification Sewayeen, Bari, Mungauri, Papar and Kachari have been exempted from payment of sale or purchase tax by the State Government in exercise of power under section 4 (a) of the Act.

4. Kachari has not been defined anywhere either in the Act or the notification.

5. The settled principle of interpretation of taxing Statute is that the items in taxing Statute must be construed in the sense in which they are sold by the dealer and purchased by the consumer. The operation of a notification has to be judged not by the object which the rule making authority had in mind but by the words which it has employed to effectuate the legislative intents. The words or expressions used in a notification must be construed in the sense in which they are understood by the trade and by the consumer and not by what is understood by the department. There is no ambiguity as regards the word 'Kachari' is concerned. All the authorities below including the tribunal have observed that 'Kachari' is ordinarily made from rice. It is another thing that now with the advancement it can be made of Maida. In the case of ***Kastoori Lal and Sons vs. Commissioner of Sales Tax 1987 U.P.T.C. 1298*** it has held, interpreting notification in question that 'Kachari' is preparation of rice. The relevant portion of the said judgment is quoted below: -

"Finding of the tribunal is that 'Kachari' is a preparation of rice. I quite agree with the tribunal because in common parlance, 'Kachari' is one which is prepared out of rice and, therefore, potato chips cannot be exempted even under notification dated 7.9.81."

6. The court was examining the question as to whether potato chips can be included in the definition of 'Kachari' or not. It was answered that potato chips are not 'Kachari'. In the case in hand the dealer opp. party has submitted that since the produce in question is used after frying in oil, therefore, it is 'Kachari'. If this reasoning would have been correct, it is a matter of common knowledge that the potato chips are also fried with oil in frying pan and would have been treated as 'Kachari'. Therefore, this part of the argument that the product in question is fried with oil in frying pan and therefore has to be treated as 'Kachari', cannot be accepted in view of the aforesaid judgment of M/s. Kastoori lal and Sons.

7. The dealer opp. party was claiming benefit of the exemption notification issued under section (a) of the Act. The burden was upon it to prove that the produce in question is treated in common parlance as 'Kachari'. The tribunal was very much influenced by the fact that the dealer in the sale vouchers has mentioned the product as 'Kachari' and that in the registration certificate, the registration was sought by way of amendments for the purpose of manufacture of 'Kachari' (Namkeen). To my mind these circumstances are wholly irrelevant and should not have been taken into account as they are in the nature of self-serving statement.

8. In view of the above the product in question cannot be called Kachari. It is not covered by the aforesaid notification in view of the fact that Kachari as generally understood is a preparation of rice. I find sufficient force in the argument of the learned standing counsel that since the product in question has been prepared out of Maida is not understood in common parlance as 'Kachari' and was rightly taxed as "Namkeen" by the first appellate authority.

9. In the result both the revisions are allowed to the extent indicated above and the order of the tribunal is set aside accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.06.2004

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

Special Appeal No. 768 of 1999

Executive Officer, Municipal Board, Kosi Kalan, Mathura and another ...Appellants
Versus
Kishan Singh ...Respondent

Counsel for the Appellants:
Sri P.K. Singhal

Counsel for the Respondent:
Sri A.R. Dubey

U.P. Fundamental Rules (Amendment) Act, 1976-Respondent-R.56-J (2)(b)-Compulsory retirement-Adverse entry-non-communication-No opportunity to make representation. Held, cannot be relied upon for compulsory retirement.

A perusal of Clause (2) (b) shows that the authority which is to pass the order of compulsory retirement must consider the representation which is pending against an adverse entry. Now there can be no representation if the adverse entry is not communicated. Hence, it is implicit in the said clause that the entry must be communicated to the concerned employee so that he has an opportunity, of making a representation against the entry. Hence an uncommunicated entry

cannot be relied upon for passing an order of compulsory retirement. Para 7

Case law discussed:

1995 (7) FLR 84
1997 (1) ESC 324 (All)
AIR 1992 SC 1020

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

1. This special appeal has been filed against the judgment of the learned single Judge dated 5.7.99 by which the learned single Judge had allowed the writ petition against the order of compulsory retirement.

2. We have carefully perused the impugned judgment and have heard learned counsel for the parties.

3. We find no infirmity in the judgment of the learned single Judge..

4. It appears that the only material against the petitioner was an adverse entry dated 30.6.89 but that was not communicated to the writ petitioner.

5. Two division bench decisions of this Court, being State of U.P. Vs. M.C. Maheshwari 195 (71) LFR 84 and Sri Dilawar Singh Paul vs. State of U.P. 1997 (1) ESC 324 (All.) have distinguished the Supreme Court decision in Baikunth Nath Das vs. Chief Medical Officer, AIR 1992 SC 1020 and have held that the decision will not apply to Uttar Pradesh because in Uttar Pradesh the law of compulsory retirement is different from that in Orissa.

6. In U.P. the law is governed by the U.P. Fundamental Rule 56 J (Amendment) Act 1976 which provides as follows:-

"(2) ***In order to be satisfied whether it will be in the public interest to require a Government servant to retire under Clause (c) the appointing authority may take into consideration any material relating to the Government servant and nothing herein contained shall be construed to exclude from consideration-***

(a) any entries relating to any period before such Government servant was allowed to cross any efficiency by or before he was promoted to any post in an officiating or substantive capacity or on an adhoc basis; or

(b) an entry against which a representation is pending, provided that the representation is also taken into consideration alongwith the entry; or

(c) any report of the vigilance Establishment constituted under the Uttar Pradesh Vigilance Establishment Act, 1965.

(2-A) Every such decision shall be deemed to have been taken in the public interest)"

7. A perusal of Clause (2) (b) shows that the authority which is to pass the order of compulsory retirement must consider the representation which is pending against an adverse entry. Now there can be no representation if the adverse entry is not communicated. Hence, it is implicit in the said clause that the entry must be communicated to the concerned employee so that he has an opportunity, of making a representation against the entry. Hence an uncommunicated entry cannot be relied upon for passing an order of compulsory retirement.

8. Since the entry was uncommunicated it cannot be taken into consideration.

9. As such there is no material on the basis of which the order of compulsory retirement could have been passed. The appeal is **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2004

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

Civil Misc. Writ Petition No. 40907 of 2001

Rambir Mishra ...Petitioner
Versus
Union of India through General Manager, Northern Railways, Baroda House, New Delhi and others ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi

Counsel for the Respondents:
Sri Govind Saran
Sri Vivek Singh

Constitution of India–Article 226 and 14-Railway Protection Force Rules, 1987-Removal from Service-Disproportionate punishment-Assistant Security Commissioner, RPF heading raiding party himself because enquiry and disciplinary authority-held to be unfair-but this cannot be only a ground for dismissal brushing aside the finding of disciplinary authority-However, petitioner was never asked to be a member of raiding party-Petitioner while discharging his original assigned duty could never suo moto expected to participate in activity of apprehending the criminals-Moreover charges, held to be vague-Further, similar charges against three other constables who were exonerated by revisional authority, but petitioner has only been singled out-cannot be held guilty of charge of not rendering assistance to raiding party-Removal from service–held harsh and disproportionate.

The review of above legal position would establish that Sri S.N. Singh, Assistant Security Commissioner, Railway Protection Force, heading the raiding party himself became the inquiry and disciplinary authority, which is not fair, however, this aspect can not be only a ground of dismissal brushing aside the finding of the disciplinary authority. Mere minor infirmities in procedure of inquiry could not make inquiry and finding of the disciplinary authority absurd when the provisions of Rules, 1987 provided wide power to the Assistant Security Commissioner to act as an inquiry officer and disciplinary authority also, however, the petitioner was never taken into confidence or asked to be a member of raiding party or he was not invited at the spot to become member of the raiding party or to render assistance. The petitioner while discharging his original assigned duty could never suo-moto was expected to come forward and participate in the activity of apprehending the criminals and obstructing the tempos taking away stolen coal bags. In any case, the charges were vague, not specific. Similar charges were against three other constables, and they were allowed to go Scott free in the revision by exonerating them and the petitioner has only been singled out, therefore, the petitioner could not be held guilty of not rendering assistance to the raiding party and removal of petitioner from service is a punishment too harse and disproportionate to the alleged charges against him, and action and quantum of punishing the petitioner is shockingly disproportionate and on the reasons stated above impugned orders dated 28.09.1999, 22.11.1999 and 29.06.2001 are not legally sustainable, therefore, these are set aside. The Senior Security Commissioner, RPF (NR), Allahabad is directed to consider the case of petitioner sympathetically and may taken decision

within six months of awarding minor punishment other than removal of petitioner from service, so that, petitioner may be entitled to his post retiral and other service benefits. Para 31

Case law discussed:

AIR 1975 SC 915
(2001) 1 UPLBEC 67
AIR 1984 SC 1499
(1999) 8 SCC 90
(2001) 1 SCC 416
(1998) 2 SCC 400
(2002) 2 UPLBEC 1871
(1979) 1 LJ 339 (Guj)
1984 Lab 1 C (NOC) 73 (Bom)
(1987) 2 ATC 922 (SC)
(1992) 4 SCC 54 (1992) 21 ATC 435
AIR 1991 SC 1241: 1991 (supp.) 1 SCC 267: 1991 Lab. 1 C 1001
AIR 1991 SC 1067: (1991) 2 SCC 635: 1991 Lab.1 C 1082
(1995) 6 SCC 749
AIR 1997 SC 3387: (1997) 7 SCC 463
1994 (Supp) 2 SCC 479 ; (1994) 27 ATC 937
AIR 1994 SC 215 ; 1994 (Supp) 3 SCC 755
(1995) 5 SCC 157
(1995) 6 SCC 682
(1996) 10 sCC 371
AIR 1997 SC 2447: (1997) 5 SCC 478
JT 1991 (1) SC 77
2001 (2) AWC 983 (1985) 1 SCC 120
1994 SCC 604
(1997) 6 SCC 381
(1998) 9 SCC 220
(2000) 3 SCC 324
(1998) 3 SCC 192
AIR 1965 SC 917
2002 (2) UPLBEC 1195
AIR 1992 SC 417
1992 (2) UPLBEC 851
1998 SCC (L&S) 539
2002 (1) UOLBEC 82
2002(3) UPLBEC 2799
2003(1) UPLBEC 566 (SC)
2002(93) FLR 616 (SC)
JT 2003 (2) SC 27
JT 2003 (2) SC 78
1996 (Vol.2)ILJ (Cal)
1992 (Vol1)LLJ (Bom)
1974 (2) SCR 348
JT 1991 (1) SC 605
JT 1994 (4) SC 532
1985 (2) SCR 287
JT 1889 (3) SC 188
JT 1993 (2) SC 226
JT 1997 (7) SC 572 (1997) 7SCC 463

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

Heard Sri Anoop Trivedi, learned Counsel for the petitioner and Sri Govind Saran, learned Counsel for the respondents. With the consent of learned counsels for the parties this writ petition is decided finally at this stage in view of the Second Proviso to Rule 2 of Chapter XXII of the Allahabad High Court Rules, 1952.

1. In this petition prayer has been made for issuance of a writ of certiorari for quashing the impugned orders dated 28.09.1999, 22.11.1999 and 29.06.2001 passed by the Senior Security Commissioner, Railway Protection Force, Northern Railways, Allahabad; Chief Security Commissioner, Railway Protection Force, Northern Railways, Baroda House, New Delhi and Director General, Railway Protection Force, Railway Board, New Delhi respectively, with a further prayer for commanding the respondents to take the petitioner back in service and allow him all service benefits.

2. The facts necessary for adjudication of the case, as stated by the petitioner, are that he was 'Head Constable' in Railway Protection Force (hereinafter in short called as 'RPF'). The petitioner had initially joined the service as a 'Constable' in the year 1967 and his service was to be governed by the Railway Protection Force Rules, 1987 (hereinafter in short called as 'Rules, 1987'). On 25.01.1999 an incident of coal theft was noticed. Sri S.N. Singh, Assistant Security Commissioner,

Railway Protection Force, Northern Railways, Kanpur (in short A.C.S., RPF, NR) assisted by the Assistant Sub Inspector R. S. Misra of Kanpur Central Post, Assistant Sub Inspector Ram Adhar Rai of Cash Guard Kanpur and constable Satbir Singh arranged night checking of RPF Post "Goods Marshalling Yard" (GMC Post) and they reached in GMC post at about 1.40 hours and noticed that 15 anti-social elements were engaged in unloading and loading of coal bags in two tempos installed at RPF Post GMC. At the time of alleged incident of theft constables Girja Shankar Dubey, Satpal Singh and Bachchi Lal were deployed in beat no. 4 and 5, where the said incident of theft alleged to have taken place. The petitioner was posted on Roznamcha duty and was having the charge of lock-up. The coal was being stolen from Wagon No. SE 27118 Bankola Siding to Bharoli Pathankot and was being taken by a tempo No. U.P./78N- 9418, was apprehended near RPF post GMC loaded with 45 bags of coal and another 47 bags of coal was also being taken away, where the petitioner a Head Constable was available near RPF Office Gate along with Bachchi Lal Yadav, however, he did not make efforts to apprehend the anti-social elements and the tempo and failed to assist the officers in chasing the criminals as well as tempo and as a result of which one tempo with coals managed to escape from in front of RPF Post. However, similar charges were served to all the four constables by Sri S.N. Singh, ASC. The charges are read as follows: -

"(i) Serious misconduct and neglect of duty in that Head Constable Rambir Mishra while he was on roznamcha duty from 02 hours to 04 hours on 25.1.1999 at GMC post, did not make any efforts to apprehend the criminals and tempo No.U.P.-78N-9418 loaded with coal in front of RPF post GMC at 02-04 hours.

(ii) He also failed to assist the Railway Protection Force Officers during chasing of criminals."

Sri S. N. Singh, ASC, RPF being head of the raiding party acted as disciplinary authority and conducted inquiry and passed the removal order dated 28.09.1999. Being aggrieved with the order dated 28.09.1999, the petitioner along with other three constables (alleged accused) preferred appeals, which was rejected by order dated 22.12.1999. Against the above order dated 22.12.1999 the revision of three others accused constables was allowed, whereas, the revision of petitioner was dismissed by the Director General, RPF by its order dated 29.06.2001.

3. According to the petitioner, the revision of three other constables for the same charges was allowed on the ground that Sri S.N. Singh, ASC being head of the raiding party and also reporting officer should not have acted as disciplinary authority and by virtue of the relief granted to other three constables, namely, Bachchi Lal, Girja Shankar Dubey and Satpal Singh, they were reinstated, whereas, for the same charges in similar circumstances, the petitioner's revision was dismissed, as such dismissal of petitioner's revision and affirmation by the appellate authority and rejection by the revisional authority are illegal and the petitioner has been singled out for imposition of penalty, which is shockingly disproportionate.

4. It has been contended on behalf of respondents that the provisions of Rules 151.1, 152.2 and 153.1 & 2 of 'Rules,

1987' are relevant for the case of present petitioner. The rules 151, 152 and 153 of 'Rules, 1987' are quoted as below: -

"**151. Disciplinary Authority:**

151.1 The disciplinary authority in respect of any enrolled member of the Force for the purpose of imposing any particular punishment or the passing of any disciplinary order shall be the authority specified in this behalf in Schedule III in whose administrative control the member is serving and shall include any authority superior to such authority.

151.2 The disciplinary authority, in the case of an enrolled member of the Force officiating in a higher rank, shall be determined with reference to the officiating post held by him at the time of taking action.

152. Authority to institute proceedings:

152.1 The appointing authority or any authority otherwise empowered by general or special order, may--

(a) institute disciplinary proceedings against any enrolled member; or

(b) direct a disciplinary authority to institute disciplinary proceedings against any enrolled member of the Force on whom the disciplinary authority is competent to impose, under these rules, any of the punishments specified in rules 148 and 149.

152.2 A disciplinary authority competent under these rules to impose any of the minor punishments may institute disciplinary proceedings for the imposition of any of the major punishments notwithstanding that such disciplinary authority is not competent, under these rules, to impose any of the latter punishments.

153. Procedure for imposing major punishments:

153.1 Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal, compulsory retirement or reduction in rank shall be passed on any enrolled member of the Force (save as mentioned in rule 161) without holding an inquiry, as far as may be in the manner provided hereinafter, in which he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded a reasonable opportunity of defending himself.

153.2.1 Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against an enrolled member of the Force, it may itself inquire into or appoint an Inquiry Officer higher in rank to the enrolled member charged but no below the rank of Inspector, or institute a Court of Inquiry to inquire into the truth thereof."

In reference to these provisions of Rules, 1987, it has been submitted on behalf of respondents that Rule 151 deals with the disciplinary authority and Sri S.N. Singh, ASC being a disciplinary authority could initiate the disciplinary proceedings against the petitioner in view of Rule 152.2 and could also inquire into the matter in reference to Rule 153.2.1.

5. According to the respondents, though other three constables of RPF were also charge-sheeted with same charges for same incident, but the role in the said incident was different, therefore, the petitioner has rightly been singled out for imposition of penalty as there was slackness on the part of the petitioner.

6. Endeavourance has been made on behalf of petitioner to controvert that Sri S.N. Singh, ASC assisted by senior police

officials was chasing the party, where the petitioner was not even taken into confidence and asked to participate in the team, as the petitioner was not supposed to leave the duty as he was on guard duty, where arms, ammunitions, cash property were in his custody at relevant time. The petitioner was neither informed with prior intimation regarding the raid nor was asked for becoming a member of raiding party to apprehend the criminals. It has further been submitted on behalf of petitioner that he was in bounded duty to discharge the work and could not leave the duty without orders of the superior officers or without being relieved by another guard from his duty. Suo-moto participation and leaving the roznamcha duty as a guard could have amounted the offence and despite the endeavourance by large number of members of the raiding party if something was desired to be done, for such lapse not only the petitioner, but other three above named constables and the members participating in the raiding party were to be held responsible.

7. The respondents on the other hand contended that the petitioner did not act bonafidely in discharge of duty, which he was expected to perform and role of the petitioner was in derogation to the observations made by the Supreme Court in AIR 1975 SC 915 (Ram Chandra Keshav Adke Vs. Govind Joti Chavare and others), where the Supreme Court has observed as under: -

"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. This rule squarely applies where the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other."

8. However, according to Sri Anoop Trivedi, learned counsel for the petitioner, when the petitioner was not assigned and trusted any duty, in that case nothing was expected from him otherwise it could have amounted unnecessary interference in the functioning of others. In order to substantiate and strengthen the stand of the petitioner it has been submitted by Sri Anoop Trivedi that the Supreme Court did not interfere in the finding of the High Court as well as of the labour court when three workmen charged for same offence, i.e, in the incident of involving drunkenness fighting, riotous, disorderly and indecent behaviour out of which one punished out of disciplinary inquiry with one month's suspension, out of disciplinary inquiry another was reinstated but third was punished with the order of dismissal, such punishment was held to be unjustified. The Supreme Court in (2001) 1 UPLBEC 67 (Tata Engineering and Locomotive Co. Ltd. Vs. Jitendra Prasad Singh and another) has observed as below: -

"Since as many as three workmen on almost identical charges were found guilty of misconduct in connection with the same incident, though in separate proceedings, and one was punished with only one month's suspension, and the other was ultimately reinstated in view of the findings recorded by the Labour Court and affirmed by the High Court and the Supreme Court, it would be denial of justice to the appellant if he alone is singled out for punishment by way of dismissal from service."

9. In AIR 1984 SC 1499 (Singara Singh and others Vs. The State of Punjab and others) the Supreme Court has observed that the dismissal of several members of police force for participation in agitation, but reinstatement of large number of personnel denying the reinstatement of writ petitioners for involvement in similarly situated activities was held to be discriminatory and in derogation to the provisions of Article 14 of the Constitution. The Supreme Court has observed that logically the writ petitioners were to receive the same benefits like those, who were reinstated and without any justification treating the writ petitioners differently without pointing out how the writ petitioners were guilty for more serious misconduct or degree of indiscipline, in such circumstances the discrimination was held to be not justifiable.

10. According to the respondents in view of (1999) 8 SCC 90 (R.S. Saini Vs. State of Punjab and others), the claim of the writ petitioner assailing his removal on the ground of perversity of the inquiry based on no evidence, non-application of mind and malafide, the Supreme Court did not find any scope of judicial review in the finding of the disciplinary inquiry as the same did not suffer from infirmities. The Supreme Court further observed that the inquiring authority is the sole judge of the fact so long as there is some legal evidence to substantiate its findings and adequacy or reliability, which cannot be permitted to be canvassed in the writ proceedings. If the conclusions have been drawn in a reasonable manner and objectively, such conclusions cannot be termed as perverse or not based on any material. The Supreme Court has also held that the High Court as well as the Supreme Court within limited scope of their jurisdiction could hold that the disciplinary inquiry against the delinquent did not suffer from infirmities.

11. According to the respondents in (2001) 1 SCC 416 (High Court of Judicature at Bombay Vs. Shashi Kand S. Patil and another) the Supreme Court has observed that the findings of the Inquiry Officer are not binding on the disciplinary authority and final decision rests with the disciplinary authority, which can come to its own conclusions, bearing in mind the views expressed by the Inquiry Officer, and judicial interference is permissible if there is violation of the natural justice and statutory regulations and the decision of the disciplinary authority is also vitiated by considerations extraneous to the evidences and merits of the case or if the conclusion made by the authority on the very face of it is wholly arbitrary or capricious and no reasonable person could have arrived at such a conclusion on similar grounds.

12. According to the respondents in (1998) 2 SCC 400 (Nagar Palika Nataur Vs. U.P. Public Services Tribunal, Lucknow and others) the Supreme Court has held that the principle of natural justice could not be said to be violated where opportunity was afforded but not utilised by the delinquent employee, despite repeated reminders reply was not given to the charge-sheet nor appearance was shown by the delinquent employee before the Inquiry Officer, and despite being permitted to inspect the records and opportunities were not availed of to inspect the records. In these circumstances, the conclusion reached by

the Inquiry Officer on the basis of available material that the charges were proved, can not be said to be violative of principle of natural justice and hence dismissal was upheld.

13. In {(2002) 2 U.P.L.B.E.C. 1871)} **Mirza Barket Ali v, Inspector General of Police, Allahabad** and others, the police constable was dismissed for absent from duty of 109 days on the ground of illness. The Inquiry Officer recommended for minor punishment, however, S. P. disagreed and imposed punishment of dismissal. High Court found the punishment is too harsh and severe/disproportionate allegations and directed for awarding lessor punishment.

Punishment to be imposed - discretion of the disciplinary authority.

(A) The punishment to be imposed by the disciplinary authority is the discretion of the authority concerned and unless such penalty grossly disproportionate there can be no occasion for the court or tribunal to interfere with the punishment. However, penalty should be commensurate with the magnitude of the misconduct committed. If a lessor penalty can be imposed without jeopardising the interest of the administration, then the disciplinary authority/punishing authority, should not impose the maximum penalty of dismissal from service. When the rules require that the disciplinary authority will determine the penalty after applying its mind to the enquiry report, then this shows that he has to pass a reasoned order. However, taking an overall and cumulative view the disciplinary authority may impose maximum penalty but after considering all aspects of the case. (H.P. Thakore Vs. State of Gujrat (1979) I L.L.J.339 (Guj). When an authority proceeds to impose a penalty, the only question which is ordinarily to be kept in mind is to impose adequate penalty; then punishment shall be neither too lenient nor to harsh. {Ansarali Rakshak Vs. Union of India, 1984 Lab. I. C. (NOC) 73 (Bom)}.

Punishment not to be disproportionate to the gravity of the charge established.

(B) Ordinarily the court or tribunal cannot interfere with the discretion of the punishing authority in imposing particular penalty but this rule has exception. If the penalty imposed is grossly disproportionate with the misconduct committed, then the court can interfere. The railway, employee on being charged with negligence in not reporting to the railway hospital for treatment was removed from service. The Supreme Court has thought it fit to interfere with the punishment of removal from service and modify it to withholding of two increments (Alexander Pal Singh Vs. Divisional Operating Superintendent (1987) 2 ATC 922 (SC).

But when the police constable working as Gunman of Deputy Commissioner of police while on duty was wandering near the bus stand with service revolver in a heavily drunken condition and when he was brought to hospital he began abusing the doctor on duty, the imposition of penalty of dismissal of service cannot be held to be disproportionate because the constable was guilty of gravest misconduct. (State of Punjab Vs. Ex. Constable Ram Singh (1992) 4 SCC 54; (1992) 21 ATC 435.

(C) When the charge of misconduct against the Civil Judge in disposing of the Land Acquisition Reference cases have been proved partially and for fixing

higher valuation of land than was legitimate in L.A. Reference was not proved for which he can be given benefit of doubt, the Supreme Court has modified the penalty of dismissal to compulsory retirement. V. R.P. Katarki Vs. State of Karnataka, AIR 1991 SC 1241; 1991 Supp (1) SCC 267; 1991 Lab. IC 1001. In another case when the employee had 29 years of unblemished record and PSC on consultation had not agreed to the proposal of dismissal, but he was dismissed, the Supreme Court, after the death of employee, held that the evidence in support of the charges which led to dismissal was not very strong and in order to grant relief to poor widow, the punishment of dismissal should be converted to compulsory retirement so that the widow will get the appropriate financial benefit. [Kartar Singh Grewal Vs. State of Punjab, AIR 1991 SC 1067; (1991) 2 SCC 635; 1991 Lab. IC 1082].

However, even though the Supreme Court has power to modify the penalty imposed by the disciplinary authority in exercise of equitable jurisdiction under Art.136 of the Constitution, but the High Court or the Administrative Tribunal has no such jurisdiction to interfere with the punishment imposed by the disciplinary authority. This is the view of the Supreme Court in Samarendra Kishore Endow's case. It is held that the High Court/Administrative Tribunal cannot interfere with the punishment if imposed after holding enquiry and if it is considered that the punishment imposed is harsh, the proper course is not to modify the penalty but to remit the matter to the appellate or disciplinary authority. The Supreme Court has observed as follows:-

"Imposition of appropriate punishment is within the discretion and judgment of the disciplinary authority. It may be open to the Appellate Authority to interfere with it, but not to the High Court or to the Administrative Tribunal for the reason that the jurisdiction of the Tribunal is similar to the powers of the High Court under Art.226 is one of judicial review. It is not an appeal from a decision but a review of the manner in which the decision was made. The power of the judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the authority after according a fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of law, Bhagat Ram Vs. State of H.P. is no authority, (1983) 2 SCC 442; 1983 SCC (L&S) 454 for the proposition that the High Court or Tribunal has jurisdiction to impose any punishment to meet the ends of justice. The Supreme Court in Bhagat Ram's case exercised the jurisdiction under Art.136 of the Constitution. The High Court or the Tribunal has no such power" Bank of India Vs. Samarendra Kishore Endow (1994) 2 SCC 537= 1994 SCC (L&S) 687= (1994) I L.L.J. 872= 1994 (1) SLR 516."

Samarendra Kishore Endow case is the authoritative pronouncement of the Supreme Court in the matter of jurisdiction of the High Court or the Administrative Tribunal by way of judicial review of the penalty. It does not ordinarily have power to interfere with the penalty if there is no infirmity in the enquiry but if the punishment imposed is harsh the proper course for the High Court/Tribunal is to refer the matter to the appellate authority or the disciplinary

authority for reconsideration of the penalty imposed. But in the instant case when on a proper departmental enquiry the respondent was removed from service on the basis of the charges of falsely claiming reimbursement of travel expenses on his transfer and there was also another charge of release of construction loan of Rs.1,00,000 in one case to a co-employee without verifying the progress of construction, then the Supreme Court on taking the view that the punishment was harsh directed the appellate authority to consider whether a lesser punishment is not called for in the facts and circumstances of the case.

(D) The three bench judgment of the Supreme Court in B. C. Chaturvedi Vs. Union of India (1995) 6 SCC 749 has to some extent modified the view expressed in Samarendra Kishore Endow's case by holding that even though the High Court/Tribunal, while exercising the power of judicial review cannot normally substitute their own conclusive on penalty and impose some other penalty, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court or the Tribunal it would be appropriate to grant the relief either directing the disciplinary, or the appellate authority to reconsider the penalty or to shorten the litigation, it may itself, in exceptional and rare cases, imposed appropriate punishment with reasons in support thereof.

(E) The decision of B.C. Chaturvedi's case has also been reiterated by the Supreme Court in Union of India Vs. G. Ganayuthan, AIR 1997 SC 3387; (1997) 7 SCC 463. In that case, the Government employee whose disciplinary enquiry was continued even after retirement was imposed penalty of 50% pension and gratuity and he moved the Central Administrative Tribunal against such order. The Tribunal held that gratuity not being part of pension cannot be curtailed and modified the deduction of pension for a limited period. In appeal by special leave, the Supreme Court has held that the Tribunal had no jurisdiction to interfere with the penalty when there is no contention that the punishment imposed is illegal or vitiated by procedural irregularity and there is no finding that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there is a finding, based on material that the punishment is an outrageous defiance of logic.

(F) When the appointing authority disagree with the findings of the enquiry officer in respect of charges 1 and 2 and found those charges also proved even though the disciplinary authority approved the report of enquiry officer and recommended a particular penalty, it is held by the Supreme Court that when the Regulation 68 (3) (iii) of the Bank Regulation clearly stipulates that the appointing authority is not bound by the recommendation of the disciplinary authority relating to penalty of compulsory retirement being quite valid and legal, it cannot be subjected to judicial review on the ground that the appointing authority while imposing penalty cannot differ with the recommendation of the disciplinary authority. State Bank of Hyderabad Vs. Rangachary, 1994 Supp (2) SCC 479; (1994) 27 ATC 937.

(G) A member of the Central Reserve Police who only because he overstayed the leave for twelve years for which had

sufficient reason and had no intention to wilfully disobey the order was dismissed from service, the High Court on the interpretation of s.11 (1) of the Central Reserve Police Force Act, 1949 quashed the dismissal order and reinstated him with all consequential benefit. The Central Government moved the Supreme Court in appeal by special leave. The Supreme Court in the facts of the case has held the dismissal to be harsh, upheld the order of reinstatement of service but gave liberty to the Government to impose any minor penalty for such misconduct. Union of India Vs. Giriraj Sharma AIR 1994 SC 215; 1994 Supp (3) SCC 755.

(H) When the police constable was dismissed from service for using abusive language, but what the abusive words used were not disclosed in the enquiry, then only because a police constable used abusive language there can be no straight jacket formula that in all such cases the constable should be dismissed from service. So, the Supreme Court has considered the punishment to be harsh and disproportionate to the gravity of the charge and modified the penalty to stoppage of two increments with cumulative effect. Ram Kishan Vs Union of India (1995) 6 SCC 157. When subsequent to promotion as inspector the police officer failed to deposit his service revolver and six live centisides, the Supreme Court has held that penalty of dismissal is too harsh when his previous record was unblemished and at the relevant time he was sharing a room with two colleagues. So, the Supreme Court substituted the penalty to compulsory retirement. Mehonga Singh Vs. I. G. of Police (1995) 5 SCC 682.

(I) On the finding delinquent guilty of demanding and accepting illegal gratification, the order of dismissal has been passed against the delinquent. The same has been challenged on the ground that the penalty is harsh and that there is only one witness to prove the charge and that there was no earlier charge of misconduct against him. The Supreme Court has held that it is for the disciplinary authority to decide about the punishment and merely because there was solitary evidence to prove the charge the finding of the guilt by the enquiry officer and disciplinary authority is not illegal. It is also observed that merely because there was no allegation of misconduct against the delinquent employee earlier is inconsequential. Even the recommendation of the Public Service Commission to take a lenient view is not binding on the Government. It was held that the interference with the penalty on the facts of the case is not called for. {N.Rajarathinam Vs. State of T.N., (1996) 10 SCC 371}.

The police constable who was dismissed on account of absence without leave from 7th November 1986 to 1st March 1988 on holding the departmental enquiry filed civil suit challenging such punishment on the ground that the disciplinary rules applicable to him provided that the dismissal could be resorted to if there was a gravest act of misconduct. The Trial Court dismissed the suit on the ground that it could not interfere with the order of punishment imposed in a disciplinary proceeding. But the Appellate Court remanded the matter for reconsideration of the Trial Court on the point of punishment. The Supreme Court has disapproved the order passed by the Appellate Court. It is held that it is for

the disciplinary authority to pass appropriate punishment and the civil court cannot substitute its own view to that of the disciplinary as well as that the appellate authority on the nature of punishment to be imposed upon the delinquent, as he was absent without any leave for over one and half years it ought to not to have interfered with the degree passed by the Trial Court dismissing the suit. Sate of Punjab Vs. Bakshi Singh, AIR 1997 SC 2696; (1997) 6 SCC 381. The Supreme Court has also held that when on the charge of demand and acceptance of illegal gratification by the inspector of police, the inspector has been dismissed from service, then the police officer being guilty of grave misconduct resorting to corruption, there is no occasion for interference with the order of punishment imposed by the disciplinary authority. Government of A. P. Vs B. Ashok Kumar, AIR 1997 SC 2447; (1997) 5 SCC 478.

(J) When a bus conductor was charged for taking certain passengers without tickets and on holding departmental enquiry he was found guilty and the disciplinary authority removed the respondent from the post of the conductor, he moved the High Court challenging the order of removal. The High Court while concurring with the finding of the authority that the charges levelled against the respondent were proved held that the punishment awarded did not commensurate with the gravity of the charge. On that basis the High Court set aside the punishment and directed the reinstatement of the respondent. Being aggrieved an appeal by special leave has been filed by the Corporation before Supreme Court. The Supreme Court has held that it has consistently taken the view that under the judicial review the court shall not normally interfere with the punishment imposed by the authority and this will be more so when the court found the charges were proved and interference with the punishment on the facts of the case cannot be sustained. U. P. Road Transport Corporation Vs. A.K. Parul, Cal. JT 1999 (1) SC 77. When the respondent, a police constable was dismissed from service on the ground that he illegally extracted money from the auto-rickshaw driver by misusing his official position then the interference by the Administrative Tribunal with the penalty imposed by the departmental authority is not warranted in this case, because it is only in a case where the punishment was totally irrational in the sense that it was in outrageous defiance of logic or moral standard that a court or tribunal can interfere with the punishment imposed by the Administrative Authority. As in this case, the police constable was guilty of grave misconduct, there was no reason as to why the tribunal should interfere with the punishment imposed by the disciplinary authority. State of Karnataka Vs. H. Nagraj, (1998) 9 SCC 671.

14. **In 2001 (2) A.W.C. 983 (Sahdev Singh vs. U.P.Public Service Tribunal, Lucknow and others)**, this Court, (Hon'ble M. Katju and Onkareshwar Bhatt, JJ.) decided on 19th February 2001 the writ petition no. 1722/99, where the petitioner a confirmed police constable had consumed liquor in the night, was charge sheeted and after inquiry was dismissed from service. His appeal was rejected and his claim petition before U.P. Public Service Tribunal was also dismissed. In writ petition this Court has observed that before the Tribunal

neither the petitioner has said anything in his defence nor produce any witness but prayed for forgiveness and assured that he will not commit such act again in future. In these circumstances, this Court had indicated that a lenient view should be taken against the petitioner and for awarding some lesser punishment taking view the sense of Shakespeares Merchant of vcnice that justice should be tempered with mercy. In these circumstances the court has found the punishment of dismissal is too harsh and set aside the order of dismissal and directed the petitioner to be reinstated in service with 25% of the back wages from the date of the dismissal to the date of reinstatement.

15. **In (1985) I Supreme Court Cases 120 (Hussaini Vs. Chief Justice of high court of Judicature at Allahabad and others),** the appellant was working as a Sweeper and was placed under suspension for derogation of duty and was dismissed from service after enquiry. At the time of dismissal he had rendered service over 20 years and was denied retirement benefits such as pension, provident found and gratuity to which he would have been entitled if he was compulsorily retired from service. The Supreme Court has observed that the appellant was a low paid government servant, therefore, the order of punishment of dismissal might have been converted into compulsory retirement on compassionate ground so that the appellant may get retiral benefits and the Supreme Court observed that the appellant was a Low paid safai jamadar. We do not propose to minimise the gravity of his misconduct for which the High court thought fit to impose maximum punishment of dismissal from service simultaneously denying him all retiral benefits. Without in any manner detracting from the view taken by the High Court we are of the opinion that there is some scope for taking a little lenient view in the matter of punishment awarded to the appellant. The lenience if at all would render the post-dismissal life of the low paid employee a little tolerable and keep him away from the penury destitution.

16. **In 1994 S.C.C. 604 (Union of India and other Vs. Giriraj Sharma)**, it was held that the punishment of dismissal for over-staying the period of 12 days, on account of unexpected circumstances which have not been controverted in the counter is harsh since the circumstances show that it was not his intention to wilfully flout the order, but the circumstances forced him to do so. It was open to the authority to visit him with a minor penalty, but the major penalty of dismissal from service was not called for.

17. In **A.I.R.1994 SC 215 (Union of India and others v. Giriraj Sharma)**. In this case the respondent who was deputed to undergo a course as an electrician sough leave for 1-0 days which he was granted and while on leave he sent a telegram for extension of leave for 12 days which request was rejected, however, the respondent joined duty after over staying period of 12 days and for this misdemeanour his services came to be terminated and his departmental appeal and revision were also rejected, whereupon he filed a writ petition in the High Court challenging the order of termination and the writ petition was allowed with a direction to reinstate his service with all monetary and other service benefits. The Supreme Court did not find merit in the appeal preferred by

Union of India but has been pleased to modify the order of the High Court by stating that as there was no wilful intention to flout the order on the part of the respondent and punishment was treated to be harsh and disproportionate, therefore, relief with monetary benefits was granted to the minor punishment.

18. **In (1997) 6 Supreme Court Cases 381 (State of Punjab and others vs Bakhshish Singh),** where the respondent a police constable was dismissed on account of absence without leave from 7.11.1986 to1.3.1988. The disciplinary rules applicable to him provided that dismissal could be resorted to, if there was a "gravest act of misconduct". The trial court dismissed the suit but the appellate court remanded the matter for reconsideration by the trial court on the point of punishment. It was held by the Supreme Court that it is for the disciplinary authority to pass appropriate punishment; the civil court cannot substitute its own view to that of the disciplinary as well as the appellate authority on the nature of the punishment to be imposed upon the delinquent officer. The appellate court, in view of its own findings, that the respondent's conduct was grave, ought not to have interfered with the decree of trial court.

19. **In (1998) 9 S.C.C. 220 (U.P.S.R.T.C. and others Vs. Har Narain Singh and others),** where a disciplinary enquiry was held against the respondent who was a bus conductor in the appellant's Corporation. The Assistant Regional Manager of the appellant himself conducted the enquiry and found that the charges against the respondent are proved and issued a show cause notice on the punishment and after considering the reply of the respondent imposed a punishment from dismissal of service on the respondent who preferred an appeal before the Regional Manager which too was dismissed. In claim before the Labour Tribunal held that it had no jurisdiction in the matter. Thereafter, the respondent preferred a writ petition before the U.P. Public Services Tribunal at Lucknow and the Tribunal dismissed the writ petition and held that there is no illegality in the conduct of the enquiry and the enquiry officer cannot be said to be perverse or against merit on the record. Against this judgment of the Tribunal the respondent filed writ petition before High Court where a Single Judge of the High Court re-appreciated the evidence led in the enquiry and quashed the order passed by the Tribunal as also the order passed by the Disciplinary Authority. The Supreme Court has held that because the High Court was not sitting in appeal over the findings given by the disciplinary authority as such the re-examination of the evidence led in the disciplinary proceedings was not warranted. The impugned judgment and order of the High Court were set aside and the order of the Tribunal was restored.

20. In (2000) 3 SCC 324, U.P. State Road Transport Corporation vs. Subash Chandra Sharma and others, the delinquent driver respondent of Corporation went in a drunken state to the Assistant Cashier in the cash room, demanded money from him and on his refusal abused and threatened to assault him held was a serious charge of misconduct and the punishment of removal awarded after the said charge was found proved in a departmental enquiry. The said punishment by stopping and payment of 50% back wages. High

Court found that the judgment of Allahabad High Court was arbitrary and was not justified. The Supreme Court found that the opinion of the High Court was erroneous in exercise of jurisdiction under Article 226 to correct the erroneous order of Labour Court as the punishment of removal was not stood as disproportionate and in order to arrive at such decision the Supreme Court consider the following judgment of the High Court in B.C. Chaturvedi v. Union of India (1995) 6 SCC 749; and Colour-Chem Ltd. v. A.L. Alaspurkar, (1998) 3 SCC 192; and Hind Construction & Engg. Co. Ltd. v. Workmen, AIR 1965 SC 917;

21. However the Supreme Court in 2000 (2) UPLBEC -1195 in another case of U.P. State Road Transport Corporation and others vs. Mahesh Kumar Mishra and others while considering the B.C. Chaturvedi's case (supra) and Colour Chem Ltd. (supra) and also in reference to the Civil appeal no. 9754 of 1995, arising out of SLP (C) No. 1960 of 1994, U.P. State Road Transport Corpn. & Another v. Om Prakash Pandey, in which the order of High Court by which interference was made with the punishment inflicted upon the delinquent employee of the Corporation was set aside. In Mahesh Kumar Misra the Supreme Court has interfered with the quantum of punishment inflicted by the Disciplinary Authority. The conductor of local city bus was dismissed from service on the allegations that all passengers were without tickets and on the dispute whether the passengers boarded at High Court or Zero Road and what tickets should be charged and what rate. In domestic enquiry no passenger was examined. In these condition the punishment on the face of highly and interference of the High Court in the quantum of punishment of dismissal was found to be justified.

22. It was held by the Supreme Court that the punishment must be commensurate to the offence vide Sardar Singh v. Union, AIR 1992 SC 417. In (1992) 2 UPLBEC -851, Girija Shanker Singh vs. General Manager U.P.S.R.T.C.-II Varanasi and another, this Court (Hon'ble M. Katju J) has interfered in the quantum of punishment of termination and directed for reinstatement of petitioner on the charge of coming late while deployed on to operate the bus and refusing to operate the bus and using insulting language to the A.R.M. and the punishment was concurrently approved by the enquiry officer, disciplinary authority and appellate authority. The finding the punishment is not consonance to the allegations and charges the same was directed and the authorities were directed to pass lessor punishment.

23. In 1998 SCC (L& S)-15, U.P.S.R.T.C. vs. Basudev Chaudhary and another, where the conductor worked in the corporation recovered fair at higher rate and entered in the bills at lower rate per head passenger and the manipulation in the fair for such misconduct and attempt to cause loss of money to the corporation. The offence was treaded to be in serious nature and punishment of removal held to be justified and not disproportionate. The Supreme Court in Basudev Chaudhary has distinguished the case of Bhagat Ram 1983 442 and Gulzar vs. State of Punjab 1986 Suppl. SCC 738. In 1996 SCC (L&S) 539, Municipal Committee Bahadurgarh vs. Krishna Bihari and others, where the respondent was convicted under Section 468 I.P.C. by Criminal court for committing forgery

and the municipal committee imposed punishment of dismissal which was reduced to stoppage of four increments by Director of Local Bodies and appeal to the Commissioner preferred by Municipal Committee the same was dismissed and writ petition filed by the Municipal Committee. In these circumstances Civil appeal preferred by the Municipal Committee before the Supreme Court while uphold the punishment of dismissal has observed that the amount misappropriate may be small or large it is the act of misappropriation i.e. relevant, therefore, the punishment was not to be interfered with. 2002 (1) U.P.L.B.E.C.-82, Sri Bhagwan Krishna Pandey Meerut vs. U.P.S.R.T.C. Meerut, where dismissal of Bus conductor for carrying eight passengers without tickets in a bus and for not collecting proper fair from the passenger, the punishment of dismissal indicated by the Enquiry Officer and affirmed by the disciplinary authority was found to be disproportionate directing the authorities replacing the punishment by a minor punishment. However, this case cannot be applied. In the facts of the case as the High Court in Bhagwan Krishna Pandey has failed to received proposed punishment was under challenged shockingly disproportionate.

24. In 2002 (3) UPLBEC 2799, State of U.P. and others vs. Ramakant Yadav, (Hon'ble G.B. Pattnayak and H.K. Sema JJ) the view of the High Court in not interfering the punishment was an error where the constable for the alleged charge of sleeping in duty to guard armoury was on an inquiry was found to be guilty and dismissed by the disciplinary authority and affirmed by the U.P. Public Services Tribunal such dismissal was interferred on preferring the writ petition. The High Court had interferred in the said punishment of dismissal with an observation that the finding of guilt is not a finding of fact and High Court has no jurisdiction to interfere in the finding and indicated that the punishment was disproportionate and was set aside the dismissal of the order with direction to reinstatement of the petitioner with a payment of 50% back wages.

25. In 2003 (1) UPLBEC 566 (SC), Director General R.P.F. v. Ch. Sai Babu, (Hon. Shivaraj V. Patil and Arijit Pasayat, JJ), where quantum of punishment from removal from service imposed for the alleged charges under Rule 153 Railway Protection Force Rules, 1987 was found proved by the enquiry report and affirmed by the disciplinary authority as well as appellate/revisional authority and the same was interfered with by the High Court by substituting dismissal from stoppage of increment with cumulative effect and reinstatement of the petitioner the decision of the High Court interfering in the punishment of removal on the ground of shockingly disproportionate was not found justifiable by the Supreme Court as it was not supported by recording of reasons.

26. In 2002 (93) FLR 616 SC (Hon. G.B. Pattanaik and Brijesh Kumar, JJ) (State of Rajasthan and others v. Sujata Malhotra), where the respondent absented from 1983 to 1987 and departmental inquiry was initiated and termination order was passed. The High Court found the punishment was grossly disproportionate and set aside the termination and reinstated the writ petitioner with 50% of back wages, in these circumstances the Supreme Court has observed that the High Court should

not have interfered with the punishment, however, since the reinstatement had taken place that order was not touched and the respondent employee did not get back wages and the period of absence were treated for retirement benefits but not for pecuniary benefits.

27. In J.T.2003 (2) 27, Regional Manager UPSRTC Etawah v. O.P. Lal and others, (Hon. Shivraj V. Patil and Arijit Pasayat, JJ) where the respondent employee conductor for dereliction of duty, for violation of employment code and misappropriation and extraction of money from the passenger for not issuing the tickets was enquired into by a retired District Judge and was found guilty and his termination was affirmed by appellate authority, the punishment too was affirmed by Single Judge of High Court, however Division Bench of the High Court while allowing the appeal of UPSRTC had set aside the order of termination leaving it open to the employer to award other punishment except termination or compulsory retirement. In those circumstances the Supreme Court held that High Court (Division Bench) has not recorded any reason for consideration of disproportionate punishment and as such there was denial of justice and mere statement that the punishment is disproportionate was not sufficient in cases where the persons deals with the public money or is engaged in financial transaction or acts in fiduciary capacity as such are to be dealt with by an iron hands. As such the order of the High Court (D.B.) was set aside and the dismissal order of the High Court (Single Judge) was upheld.

28. In J.T.2003 (2) SC 78, (Chairman and Managing Director, United Commercial Bank & Ors v. P.C. Kakkar) the Supreme Court (Hon. Shivaraj V. Patil & Arijit Pasayat, JJ) has analysed, in the matter of quantum of punishment in respect of respondent Bank Officer where he was found to be involved in financial irregularities, dereliction of duty, misappropriation of fund and whose service was dispensed with, however, the High Court found the charges proved, nevertheless accepted the plea of the respondent employee and directed the respondent Bank to impose lessor punishment with recording reason for giving lessor punishment being disproportionate. The Supreme Court held that when the High Court finds that the punishment is shockingly disproportionate and could not meet the requirement of law, therefore in the facts of the case since the charges against the respondent employee were of serious nature, therefore, the High Court was not justified in interfering the quantum of punishment and the matter was remitted to the High Court for fresh consideration only with regard to the quantum of punishment.

29. In 1996 (Vol.2) LLJ, Shri Panchanan Manna v. Indian Oil Corporation Haldia Madinapur and others, the Calcutta High Court has found the scope of judicial review in analysing the disproportionate aspect of punishment inflicted upon the writ petitioner for the misconduct and the High Court, indicating the punishment should be commensurate with the nature of misconduct alleged upon. Similar view was taken by the High Court Bombay in 1992 (Vol.1) LLJ, Abdullah A Latif Shah v. Bombay Port Trust.

30. In J.T. 2003 (2) SC 78, **Chairman and Managing Director, United Commercial Bank & Ors v. P.C.Kakkar**, (Hon. Shivaraj V. Patil & Arijit Pasayat, JJ) the observations made in paragraphs 8 10 11,12,13 and 14 read as below::-

"8." In **Om Kumar and Ors. V. Union of India** (JT 2000 (S3) SC 92=2001 (2) SCC 386 this Court observed inter alia, as follows:

"The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of justice at Luxembourg and the European Court of Human Rights at Stasbourg have applied the principle while judging the validity of administrative action. But even long before that the Indian Supreme Court has applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.

By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive, choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve." The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.

xxx xxx xxx "

But when an administrative action is challenged " arbitrary" under Article 14 on the basis of **Royappa** (1974 (2) SCR 348) (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In **G.B.Mahajan v. Jalgaon Municipal Council** (JT 1991 (1) SC 605), Venkatachalian, J. (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In **Tata Cellular v. Union of India** (JT 1994 (4) SC 532 at pp. 679-80), **Indian Express Newspapers Bombay (P) Ltd. v. Union of India** (1985 (2) SCR 287); **Supreme Court Employees' Welfare Assn. V. Union of India**, {JT 1989 (3) SC188} and **U.P. Financial Corpn. V. Gem. Cap (India) (P) Ltd.,** (JT 1993 (2) SC 226) while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a Wednesbury review always.

The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of "arbitrariness" of the order of punishment is questioned under Article 14.

xxx xxx xxx

Thus, from the above principles and decided cases, it must be held that whether an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment".

"10. In **Union of India and Anr. V. G. Ganayuthan**, (JT 1997 (7) SC 572 = 1997 (7) SCC 463) this Court summed up the position relating to proportionality in paragraphs 31 and 32 which reads as follows:

"The current position of proportionality in administrative law in England and India can be summarised as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of law have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational- in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU (1985 AC 374) principles.

"11. The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its

decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision."

"12. To put difference unless the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court/tribunal, there is no scope for interference. Further to certain litigation it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course it the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary authority or the appellate authority to reconsider the penalty imposed."

"13. In the case at hand the High Court did not record any reason as to ho and why it found the punishment shockingly disproportionate. Even there is no discussion on this aspect. The only discernible reason was the punishment awarded in **M.L. Keshwani's** case. As was observed by this Court in **Balbir Chand v. Food Corporation of India Ltd. and Ors.** (JT 1996 (11) SC 507= 1997 (3) SCC 371) even if a co-delinquent is given lesser punishment it cannot be a ground for interference. Even such a plea was not available to be given credence, as the allegations were contextually different.

"14. A bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the bank is required to all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the bank. As was observed by this Court in **Disciplinary Authority-cum- Regional Manager v. Nikunja Bihari Patnaik**, (JT 1996 (4) SC 457=1996 (9) SCC 69) it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organisation more particularly a bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charges against the employee were not casual in nature and were serious. These aspects do not appear to have been kept in view by the High Court."

31. The review of above legal position would establish that Sri S.N. Singh, Assistant Security Commissioner, Railway Protection Force, heading the raiding party himself became the inquiry and disciplinary authority, which is not fair, however, this aspect can not be only a ground of dismissal brushing aside the finding of the disciplinary authority. Mere minor infirmities in procedure of inquiry could not make inquiry and finding of the disciplinary authority absurd when the provisions of Rules, 1987 provided wide power to the Assistant Security Commissioner to act as an inquiry officer and disciplinary authority also, however, the petitioner was never taken into confidence or asked to be a member of raiding party or he was not invited at the spot to become member of the raiding party or to render assistance. The

petitioner while discharging his original assigned duty could never suo-moto was expected to come forward and participate in the activity of apprehending the criminals and obstructing the tempos taking away stolen coal bags. In any case, the charges were vague, not specific. Similar charges were against three other constables, and they were allowed to go Scott free in the revision by exonerating them and the petitioner has only been singled out, therefore, the petitioner could not be held guilty of not rendering assistance to the raiding party and removal of petitioner from service is a punishment too harse and disproportionate to the alleged charges against him, and action and quantum of punishing the petitioner is shockingly disproportionate and on the reasons stated above impugned orders dated 28.09.1999, 22.11.1999 and 29.06.2001 are not legally sustainable, therefore, these are set aside. The Senior Security Commissioner, RPF (NR), Allahabad is directed to consider the case of petitioner sympathetically and may taken decision within six months of awarding minor punishment other than removal of petitioner from service, so that, petitioner may be entitled to his post retiral and other service benefits.

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

No order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2004

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

First Appeal From Order No. 406 of 1991

U.P. State Road Transport Corporation ...Appellant

Versus

Smt. Ram Beti and others ...Respondents

Counsel for the Appellant:
Sri S.K. Sharma

Counsel for the Respondents:
Sri A.K. Singh

Motor Vehicles Act, 1988-Section 163-A, Second Schedule-Award of Compensation-Death of 12 years old child in motor accident-Award of Rs. One lac as compensation by Tribunal-Appeal-Even though award passed prior to coming into force of Second Schedule, it may be taken assistance of as a Safer guidance-As per Second Schedule taking annual income of deceased into account and applying 15 as multiplier, award, held not unreasonable.

Thus, in the case at hand I propose to take assistance as a safer guidance for arriving at the amount of compensation payable to the respondents–parents of the child. I have no hesitation in adopting multiplier of 15 in making such award. The deceased Ram Bharosey used to earn Rs. 25/- per day and with this income his annual income will come at Rs. 9,000/-. If it is multiplied with 15 then the figure comes to Rs. 1,35,000/-. There were definite prospects of the child after having grown up in the age to have further earnings but that apart if his total annual income is counted at Rs. 9,000/- only, the multiplier of 15 would be a safer figure for fixation of compensation. Out of the aforesaid amount, the pecuniary

assistance rendered to the parents would be to the extent of 2/3rd and 1/3rd would be his personal expenditure out of the aforesaid total figure. In this manner, if the personal expenditure of the deceased is deducted from the said figure of Rs. 1,35,000/-, the pecuniary loss, which can be safely said to have been incurred by the respondents–parents comes to Rs. 90,000/-. Even though, the Tribunal below has awarded a sum of Rs. 1,00,000/-, remaining sum of Rs. 10,000/- for awarding compensation can be treated to be the amount covering the compensation for expenditure of funeral etc. and the mental shock that the respondents have suffered in the death of their minor son. The award does not appear to be exorbitant or unreasonable and requires no interference in the present appeal. Para 7

Case law discussed:

2004 (1) TAC 1 (SC)
AIR 2001 SC 3218
AIR 2001 SC 3660
1913 AC 1
2004 (1) TAC 3
(2001) 2 SCC 9

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

1. A child namely Ram Bharosey met with an accident on account of having collided with Bus No. UMA 9657 belonging to the appellant–U.P. State Road Transport Corporation (in short 'U.P.S.R.T.C.'). The bus dashed against his cycle from behind on the road and the deceased child aged 12 years died on the spot. The respondents, who happened to be parents of the deceased, filed a claim petition before the Tribunal below claiming compensation of Rs. 3,30,000/-. The claim was contested by the appellant–U.P.S.R.T.C. and written statement was filed with the pleadings that the accident had not taken place with the aforesaid bus belonging to it. It also disputes the income of the child and stated that he was not employed as a Labour at any place. The Motor Accident Claims Tribunal considering the pleadings of the parties framed two issues and recorded its findings that accident had taken place with the aforesaid bus belonging to the appellant and gave an award of compensation amounting to Rs. 1,00,000/- in favour of the claimants–parents of the deceased and passed the impugned judgment.

2. Aggrieved with the aforesaid judgment of award given by the Tribunal below, the appellant has come up in this appeal.

3. I have heard the learned counsel for the parties and have gone through the materials available on the record.

4. The learned counsel for the appellant, while placing his submissions has strenuously urged that the Tribunal, in passing the award in favour of the respondents, has not adopted any rationale for fixation of the quantum of compensation in the case. No multiplier has been applied by the Tribunal for fixation of such compensation. The learned counsel has further urged that the deceased child was only 12 years of age and there was hardly any occasion for him to be of any pecuniary help to the claimants–parents, even though the Motor Vehicles Act, 1988 (for short 'the Act') in such cases of child death in accidents, has chalked out a formula in the Second Schedule. But that provision also cannot be applied because this accident is said to have taken place as back as 1989 whereas the payment of compensation on structured formula basis was provided by the Amending Act 54 of 1994, which came into effect from 14.11.1994, much

after the date of giving the impugned award dated 04.03.1991. The learned counsel has relied upon the case law of ***Maitri Koley and another Vs. New India Assurance Co. & others*** reported in ***2004 (1) T.A.C. 1 (S.C.)*** and has thus submitted that the procedure as provided in Section 163-A of the Act read with Second Schedule will not be applicable for the payment of award. The learned counsel has also submitted that the award of a sum of Rs. 1,00,000/- as given in the present case, appears to be wholly unjustified.

From the record, it is clear that the deceased child was 12 years of age on the date of accident and the claimants – parents were 35 and 40 years of age at that point of time. From the evidence, it had also stood fully proved that the child was working as a Labour in brick-kiln and was earning Rs. 25/- per day as his wages. In the case of ***Lata Wadhwa and others Vs. State of Bihar and others, A.I.R. 2001 S.C. 3218*** **and** ***M.S. Grewal and another Vs. Deep Chand Sood and others, A.I.R. 2001 S.C. 3660,*** while dealing with the issue in relation to the death of children, the Apex Court has placed reliance upon the decision of **Lord Atkinson** in ***Taff Vale Railway Company Vs. Jenkins, 1913 A.C. 1*** and has ruled that "In cases of death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parents claim and prospective loss will found a valid claim provided that the parents established that they had a reasonable expectation of pecuniary benefit if the child had lived."

5. In the present case, there was sufficient evidence to the effect that even though the deceased child was only 12 years of age but he had some earning of his own as a Labour in the brick kiln. There was definite future prospects for the child to have further pecuniary gains in his life and thus could be of financial assistance to his parents who were 35 and 40 years of age at the time of his death. The Tribunal, obviously, has not discussed the rationale or the principles on which it fixed the compensation and has also not tried to reach the final opinion as to availability of a multiplier but that would not amount to a legal ground for the appellant before this Court to negate the entire claim of compensation and to dismiss the claim petition. While dealing as First Appellate Court in a matter of First Appeal From Order, this Court has to find out on the basis of materials available on the record if some compensation is to be awarded and what would be its extent? In the case of ***Municipal Corporation of Greater Bombay Vs. Shri Laxman Iyer and another*** **reported in** ***2004 (1) T.A.C. 3 (S.C.),*** the Apex Court, while dealing with a matter of accident claim relating to the death of teenager boy-student having no earning of himself, found that the compensation to the claimants – parents was payable. Thus, in the aforesaid matter at hand if the child of 12 years having his own earning has died and his parents being 35 and 40 years of age only will definitely have some claim for compensation as they were having substantial pecuniary loss in the death of their child.

6. Now the question arises as to what should be the actual compensation payable in the present case? Section 163-A of the Act provides payment of compensation on structured formula basis and such formula is detailed in Second

Schedule of the Act. A multiplier available in the case of children upto the age of 15 years is that of 15. As already discussed above, this amendment in the Act came into effect in the year 1994 and the accident took place in the year 1989. In view of the case law of Maitri Koley (supra), the multiplier provided in the Second Schedule may not be strictly applicable in such case where accident had taken place prior to the Act coming into force but the Hon'ble Supreme Court in the case of ***Kaushnuma Begum (Smt.) and others Vs. New India Assurance Co. Ltd. and others*** reported in ***(2001) 2 SCC 9***, has permitted the structured formula to be taken assistance as a safer guidance for arriving at the amount of compensation than any other method so far. In para 22 and 23, the Hon'ble Supreme Court has observed as below: -

22. "The appellants claimed a sum of Rs. 2,36,000. But PW 1 widow of the deceased said that her husband's income was Rs. 1500 per month. PW 4 brother of the deceased also supported the same version. No contra-evidence has been adduced in regard to that aspect. It is, therefore, reasonable to believe that the monthly income of the deceased was Rs. 1500. In calculating the amount of compensation in this case we lean ourselves to adopt the structured formula provided in the Second Schedule to the MV Act. Though it was formulated for the purpose of Section 163-A of the MV Act, we find it a safer guidance for arriving at the amount of compensation than any other method so far as the present case is concerned.

23. The age of the deceased at the time of accident was said to be 35 years plus. But when that is taken along with the annual income of Rs. 18,000 figure indicated in the structured formula is Rs. 2,70,000. When 1/3rd therefore is deducted the balance would be Rs. 1,80,000. We, therefore, deem it just and proper to fix the said amount as total compensation payable to the appellants as on the date of their claim."

7. Thus, in the case at hand I propose to take assistance as a safer guidance for arriving at the amount of compensation payable to the respondents–parents of the child. I have no hesitation in adopting multiplier of 15 in making such award. The deceased Ram Bharosey used to earn Rs.25/- per day and with this income his annual income will come at Rs.9,000/-. If it is multiplied with 15 then the figure comes to Rs.1,35,000/-. There were definite prospects of the child after having grown up in the age to have further earnings but that apart if his total annual income is counted at Rs. 9,000/- only, the multiplier of 15 would be a safer figure for fixation of compensation. Out of the aforesaid amount, the pecuniary assistance rendered to the parents would be to the extent of 2/3rd and 1/3rd would be his personal expenditure out of the aforesaid total figure. In this manner, if the personal expenditure of the deceased is deducted from the said figure of Rs.1,35,000/-, the pecuniary loss, which can be safely said to have been incurred by the respondents–parents comes to Rs.90,000/-. Even though, the Tribunal below has awarded a sum of Rs.1,00,000/-, remaining sum of Rs.10,000/- for awarding compensation can be treated to be the amount covering the compensation for expenditure of funeral etc. and the mental shock that the respondents have suffered in the death of their minor son. The award does not appear to be exorbitant or unreasonable

and requires no interference in the present appeal.

8. The appeal, thus, having no force is hereby dismissed with no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.5.2004

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 16308 of 2002

Salig Ram ...Petitioner
Versus
The Labour Commissioner, U.P. Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri Anil Bhushan

Counsel for the Respondents:
S.C.

Financial Hand Book, Vol. II Part II to IV-Fundamental Rule 56 (c)-Constitution of India, Article 226, U.P. Servant (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 1995-R.4-Compulsory Retirement-Non communication of adverse entries-Petitioner's representations against adverse entries not decided in accordance with law-Non application of mind by Competent authority-Non consideration of previous and subsequent entries in ACR-Screening Committee not report about petitioner's utility after assessing his work and conduct-Hence opinion of appointing authority to retire him in public interest, held, vitiated-Further, Dy. Labour Commissioner was prejudiced against petitioner-Allegations of malafide held, proved against him-Impugned orders set aside.

For the aforesaid reasons, I find that the petitioner's representations against adverse entries were not decided in accordance with law. The competent authority did not applied his mind and that the manner and method in which the representations were decided was arbitrary and unfair. The Screening Committee did not consider the previous and subsequent entries in the annual confidential roll of the officer and only raised a question on the assessment of his work and utility to the department. It did not positively report about his utility after assessing his entire work and conduct and thus the opinion of the appointing authority to retire him inn public interest was not justified and is vitiated. I further find that Sri Ram Singh was prejudiced against petitioner and allegations of malafides are proved against him. Para 29

Case law discussed:
(1992) 2 SCC 299
AIR 1971 SC 40
(1970) 2 SCC 876
AIR 1992 SC 1020
(1993) 2 SCC 179
AIR 2001 SC 1109

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

1. Heard Sri Anil Bhushan for petitioner and learned Standing Counsel for respondents.

2. Sri Ram Singh, Deputy Labour Commissioner, Ghaziabad was impleaded as party respondent in both the writ petitions. He has filed his counter affidavit dated 24.1.2004 in writ petition No. 16308 of 2002.

3. In Writ Petition No. 16308 of 2002, the petitioner who was serving as Labour Enforcement Officer in the office of Labour Commissioner, U.P. has prayed for quashing adverse entries awarded to the petitioner for the years 1996-97, 1997-

98 and 1998-99 (for three months mid term), the order dated 6.4.2002 by which the Additional Labour Commissioner, U.P. had communicated to the petitioner that his representation against the adverse entries of the years 1996-97,1997-98 and 1998-99 has been dismissed by the Labour Commissioner, U.P., and the order dated 19.3.2002 (challenged by an amendment application) by which the Labour Commissioner, U.P. had rejected the representation. In writ petition No. 20209 of 2002, the petitioner has prayed for quashing the order dated 24.4.2002 passed by Labour Commissioner, U.P., Kanpur retiring the petitioner from service compulsorily and the consequential order dated 27.4.2003 forwarding the copy of the order dated 24.4.2002 passed by Additional Labour Commissioner, Bareilly Region, Bareilly and has also prayed for treating him in service and to pay regular salary month by month. The petitioner had attained the age of 52 years at the time when he was compulsorily retired.

Brief facts as stated in the writ petition are given as below:

4. The petitioner was appointed as a clerk in the Labour Department of the State on 4.11.1977. He was selected by U.P. Public Service Commission and was appointed as Labour Assistant on 18.1.1981 and was promoted as Housing Inspector on 11.8.1987. He was thereafter promoted as Labour Enforcement Officer on 28.9.1975 by an order passed by the Labour Commissioner in the pay scale of Rs.5000-7000 on a non-gazetted class III post. The then Deputy Labour Commissioner Bareilly Sri Ram Singh transferred the petitioner from Bareilly to Gorakhpur. The petitioner filed a Writ Petition No. 171 of 1997 against the transfer order dated 19.12.1996. This Court vide interim order dated 9.1.1997 stayed the transfer order. The Court noted the arguments that the transfer in quick succession with proper justification is nothing but malafide and that the petitioner was transferred four times in a year. The transfer order dated 19.12.1996 was directed to be kept in abeyance till further orders. The petitioner serve the stay order upon Sri Ram Singh on 9.1.1997 and made a complaint on 7.2.1997 alleging that after receiving the order of the High Court Sri Ram Singh had abused the petitioner and used improper language against the Judges of the High Court. It was also alleged in the complaint that Sri Ram Singh has not treated him properly and humiliates him by using cast relating aspersions and threats.

5. A notice was issued to the petitioner by Sri Ram Singh on 17.2.1997 to show cause with regard to the allegations made by the petitioner against him in his letter dated 7.2.1997 and to give parawise reply to the letter. The show cause notice alleged that on 5.1.1997 both Sri Ram Singh Deputy Labour Commissioner and the petitioner were on leave and that the petitioner had made false allegations with regard to the talks between them. The petitioner gave a reply to this show cause notice on 21.2.1997 reiterating the allegations. In para 3 it was submitted that the date of the talks between them was wrongly mentioned as 5.1.1997 by a typing mistake whereas this date was 5.10.1997 and once again alleged that Sri Ram Singh has not been treating petitioner fairly, and was prejudiced with petitioner's caste.

6. It is stated in the writ petition that Sri Ram Singh Deputy Labour Commissioner was transferred from Bareilly to Kanpur on 9.8.1998 and that before his transfer he gave adverse entries to the petitioner which were after thought and ante dated. These entries relate to the period 1997-98 (1.4.1997 to 31.3.1998) communicated on 17.10.1998 to which the petitioner gave his reply on 28.11.1998. The second adverse entry relate to the period 1996-97 (22.7.1996 to 31.3.1997) dated 30.6.1997 which was served on the petitioner on 8.2.1999 against which he sent representation on 6.3.1999 and the third entry dated 7.7.1999 relates to the period 1.4.1998 to 8.7.1998 (mid term) which was communicated to the petitioner on 30.8.1999 and against this entry the petitioner made his representation 18.9.1999.

7. The petitioner has made allegations of malafides against Sri Ram Singh. It is contended that all these adverse entries should have been communicated to the petitioner within 45 days in accordance with Rule 4 of the U.P. Government Servant (Disposal of Representation Against the Adverse Annual Confidential Reports and Allied Matters) Rules, 1995 (in short Rules of 1995), made under the proviso to Article 309 of the Constitution of India, and published on 10th July, 1995. By a letter dated 6.4.2002 of the Additional Labour Commissioner, Kanpur the petitioner was communicated with the order of rejection of his representations by the Labour Commissioner, U.P. dated 19.3.2002. In para 26 of the writ petition it is stated that the representations made by the petitioner to the aforesaid entries on 28.11.19989, 6.3.1999 and 18.9.1999 were decided by the Labour Commissioner on 19.3.2002, much after the period of 120 days from the date of expiry of 45 days of receipt of the representation under sub rule (3) and sub rule (4) to Rule 4 of the Rules of 1995. It is contended that according to Rule 5 of the Rules of 1995, except as provided under rule 56 of the U.P. Fundamental Rules, where adverse report is not communicated or representation against adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated as adverse for the purposes of promotion, crossing of efficiency bar, and other service matters of the government servant.

8. A Screening Committee consisting of Labour Commissioner, U.P., two Additional Labour Commissioners, the Director of Factories, U.P. and two Deputy Labour Commissioners, in its meeting dated 23.3.2002, under the Chairmanship of Labour Commissioner, U.P. considered the character roll of all those employees who had completed 50 years of age on 31.3.2002 for compulsory retirement. The Committee found that there are 47 employees against whom, there are warning/adverse entries out of whom 7 had received adverse entries of serious nature. The petitioner was considered at Sl. No. 6. The proceedings of the Committee have been annexed as annexure CA-1 to the counter affidavit of Sri A.K. Gupta, Deputy Labour Commissioner. The Committee found, while considering the matter petitioner Sri Salig Ram that he had received adverse entries in the years 1996-97, 1997-98 and 1998-99 in which notes have been made with regard to his work and conduct and his integrity has not been certified. A consideration of these adverse entries shows that the petitioner has failed to

fully discharge his duties and responsibilities which has put a question mark on the utility of the petitioner to the department and thus the committee recommended to retire him compulsory.

9. On the basis of the aforesaid assessment of the Screening Committee, the Labour Commissioner, U.P. by his order dated 24.4.2002 retired the petitioner compulsorily in public interest under Fundamental Rule 56 (c) of Financial hand Book Vol. II part II to IV making him entitled to three months salary in lieu of notice.

10. Sri Anil Bhushan counsel for the petitioner submits that the petitioner was promoted as Labour Enforcement Officer in the year 1995. The adverse entries of the year 1996-97, 1997-98 and 1998-99 which have been made the basis of compulsory retirement were communicated to the petitioner against which he made representations within 45 days under Rule 4 (2) of the Rules of 1995. These representations were pending for a long period of time and were decided on 19.3.2002, just on the eve of meeting of the screening committee dated 23.3.2004, in which recommendation was made to retire him compulsorily. He submits that the entries were not based on the relevant material and that Sri Ram Singh was prejudiced against the petitioner in giving these adverse entries after he was transferred from Bareilly. He has alleged malafide against Sri Ram Singh and has submitted that these entries were back dated to punish the petitioner in the incident in which the petitioner had served the interim order of this Court on him on 5.2.1997 and for which Sri Ram Singh had given him show cause notice on 17.2.1997.

11. Sri Anil Bhushan has also challenged these entries on merits and submits that these entries relate to the assessment of the work and were not of serious nature or consequences or for any misconduct.

12. Sri Anil Bhushan states that the entry for the year 1996-97 for the period 22.7.1996 to 31.3.1997, Sri Ram Singh, Deputy Labour Commissioner observes that on the basis of 5% randum, 43 establishment, related to the area allotted to the petitioner out of which 12 establishment were reported to be closed and inspections were made with regard to 13 establishment in which 6 prosecutions and 2 cases for directions were registered. Out of the allotted establishment 18 establishments were not inspected. With regard to inspection of Agricultural establishment 250 inspections were shown but not a single case for direction was registered. The officer did not produce the list of the establishments inspected by him to the office. The diary from November, 1996 to March, 1997 has been produced on a single day on 3.6.1997. The report of inspection of unorganized rural area has not been given. The behavior of the officer towards the officers was not proper and he makes unnecessary complaints against him. The integrity was with held and the category of work was reported to be bad.

13. With regard to the entry of the year 1996-97, the petitioner in his representation dated 6.3.1999 to the Labour Commissioner submitted that this entry has been communicated to him after two years in violation of the Rules of

1995. Sri Ram Singh is prejudiced against the petitioner, as he has given him a show cause notice on petitioner's complaint in the incident when the petitioner had served a copy of the stay order of the High Court staying his transfer on Sri Ram Singh. On the assessment of work the petitioner submitted, that on the randum list only 25 establishments were allotted to him which were inspected by him. With regard to other establishments no explanation was offered nor they are related to the petitioner's are. All the inspections were reported in the daily diary. There was no requirement or order to produce the list in the office. The petitioner had made 19 inspections in August, 1996, 37 in September, 32 in October, 35 in November, 60 in December, 30 in February, 1997 and 37 in March, 1997 and thus 250 inspections were made and the diary was produced before the Additional Labour Commissioner Sri S.K. Nigam, who used to summon the diary whenever he found it necessary. The petitioner did not produce the diary directly before the Deputy Labour Commissioner as no such instructions were given to him. Petitioner had initiated 35 prosecutions and 63 cases for directions out of the total number of 302 inspected units. The other allegations were absolutely false as there was no material for any misbehavior with senior officers.

14. In respect of the adverse entry for the year 1997-98, he submits that this entry reported, that the petitioner made 264 inspections with regard to Minimum Wages Act in the Agricultural sector, but no case was registered. The officer did not produce the prescribed diary for the year 1997, nor made inspection notes available to the office, and that the list of the inspected units which was produced only after the office required the list. For the months of October, November, December, 1997 and January and February, 1998, the inspection notes disclosed that some of the inspection notes in respect of establishment in between the list were given and no satisfactory answer was given for the same. In this assessment it was observed that the petitioner was grossly negligent towards his duties and in compliance with the orders of the officers and that he has been making complaints against the officers. The Deputy Labour Commissioner Sri Ram Singh did not certify the integrity for the year and reported that his work and conduct was bad. The report was accepted by the Additional Labour Commissioner. The petitioner's representation against this entry dated 28.11.1998 states that he was transferred from Kotdwar (Garhwal) to Bareilly and joined on 22.7.1996, but he was again transferred to Mall Road, Gorakhpur and that since he had suffered three previous transfers within one year he filed writ petition in which interim order was passed by this Court. He reiterated the incident with regard to service of stay order on Sri Ram Singh. With regard to the assessment of work, the petitioner submitted, that in all 264 inspections he found that the establishments were paying more than minimum wages and that no case was filed. The petitioner had produced the diary for the period after May 1997 to Sri S.K. Nigam, Assistant Labour Commissioner and that Sri Nigam has made signatures on these diaries. The entries certifies that the entire list was produced. He had made inspection in respect of the entire period and the office

did not make any comment in pointing out any deficiency in the inspection note.

15. It is contended that for the year 1998-99 the period under assessment was three months beginning from 1.4.1998 to 9.7.1998, and that the basis of this entry was the assessment work of previous two years. It was reported by Sri Ram Singh on 7.7.1999, after about one year, that the petitioner deliberately did not submit his work for assessment. His work and conduct in previous two years was not proper and that he had no knowledge of the Labour Rules and was irresponsible towards his work and that the non production of work for assessment amounts to disobedience. In this year integrity was found doubtful and work and conduct reported to be bad which was accepted by the Additional Labour Commissioner.

16. With regard to this entry, the petitioner in his representation dated 18.9.1999 denied that he had not produced his work for assessment. The petitioner stated that the entry was for only three months and that he had submitted entire work for assessment before the Assistant Labour Commissioner within time. He denied that his conduct and behavior was bad and that he did not know Labour Rules. In all the meetings, his work and behavior as well as knowledge of rules was appreciated by senior officers and specially by Sri Shaym Krishna, Additional Labour Commissioner. There was no incident of any misbehavior and that his work for the year 1998-99 was assessed subsequently by the Additional Labour Commissioner. The petitioner submitted that there was no justification to withholding the integrity and that on account of the prejudice and malafides the adverse entry was given to him.

17. A report was submitted by Sri D.K. Kanchan, Deputy Labour Commissioner to the Labour Commissioner on 18.3.2002. This report was prepared for assisting the Labour Commissioner for disposing of all the three representations made by the petitioner. The Deputy Labour Commissioner in his report annexed to the counter affidavit of Sri Ram Singh dated 24.1.2004 filed on 29.1.2004 reports in respect of the entry for the year 1996-97 that the list of allotment of work shows that the petitioner did not discharge his duties. The fact that petitioner stated in his representation that it was not necessary to produce the list of inspection, and the cases registered of direction, unless it was demanded, by itself shows that he was disobeying the orders and was careless in performing government duties. He observed that the report of the Additional Labour Commissioner Sri S.K. Nigam shows that the diary was not produced before him. With regard to the adverse entry for the year 1997-98, the officer reported that the work of the officer in totality was not found to be good inasmuch as he did not try to improve his work for which he was given suggestion in the previous year, and thus indirectly it is found that he did not care to comply with the orders. It was reported that since in the previous year, no justification was found to expunge the entry, the same is being treated valid also in the year 1997-98.

18. In respect of the year 1998-99 the Deputy Labour Commissioner observed in his note that the details of work produced by him did not bear the

date or signature. It cannot be ascertained whether it was produced in time or were prepared subsequently. He has not produced any document or material with regard to appreciation of his work by Sri Shyam Krishna, Additional Labour Commissioner, and since there was no ground to interfere in respect of last two entries, with regard to the allegations against Deputy Labour Commissioner. It was observed that the nature of allegation establish insubordination and thus there is no justification for expunging the entry of the year 1998-99.

19. The Labour Commissioner has put his initials just below the signature name and designation of Deputy Labour Commissioner dated 19.3.2002. There is nothing to show that he had applied his mind or had even read the report as there is no comment made by him on this report. He has not even cared to write that he had perused the report or is in agreement with the report. The making of initials below the report does not support the assertion made in the counter affidavit that the Labour Commissioner, who was competent authority to decide the representation had applied his mind or had rejected the representation. It is contended that the order of the Labour Commissioner indicating that the petitioner's representations were rejected was not based on any application of mind by the Labour Commissioner.

20. Learned Standing Counsel submits that the representations were decided before the screening committee considered the effect of the adverse entries. The initials made by the Labour Commissioner dated 19.3.2002 just below the report of the Deputy Labour Commissioner dated 18.3.2002 established that the Labour Commissioner had considered and had approved the report. It is submitted that the procedure provided in the Rules of 1995 are directory in nature and that delay in deciding the representation does not vitiate the exercise of power and that the sting of the entries is not reduced for the purpose of taking decision for compulsory retirement. The time frame given in the rules of 1995 is directory in nature. Learned Standing Counsel has relied upon the Judgment of Supreme Court in **Baikunth Nath Das Vs. Chief District Medical Officer, Baripada, (1992)2 SCC 299** in submitting that uncommunicated entries can also be relied upon for compulsory retirement, which is not a punishment and that the law of compulsory retirement is well settled.

21. I have considered the entries, the representation, the note prepared by the Deputy Labour Commissioner to assist the Labour Commissioner in disposing of the representations, and the report of the screening committee, as well as the allegations of malafide made against Sri Ram Singh and the reply of Sri Ram Singh filed in these proceedings. Before proceeding to discuss the same, it will be relevant to refer to the developments in law relating to the compulsory retirement. The order of compulsory retirement is not an order of punishment. In **Union of India Vs. J.N. Sinha, AIR 1971 SC 40, R.L. Butail Vs. Union of India, (1970) 2 SCC 876, Baikunth Nath Das Vs. Chief District Medical Officer, Baripada AIR 1992 SC 1020, Union of India Vs. Dulal Dutt (1993) 2 SCC 179,** it was held that it is prerogative of the Government based on the subjective satisfaction of the government to retire a government

servant in public interest. The principle of which the order can be subjected to judicial review have been laid down in Bainkunth Nath Das Case. These are quoted as below:

" (i) An order of compulsory retirement is not a punishment. It implies no stigma or any suggestion of misbehavior.

(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 form 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 favorable 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 the showing that while passing it uncommunicated adverse remarks were also taken into consideration. The circumstances by itself cannot be a basis for interference."

In **State of Gujrat Vs. Umedbhai M. Patel, AIR 2001 SC 1109**, the Supreme Court held that where there was no material and there were no adverse entries in confidential record and that the respondent had successfully crossed efficiency bar at the age of 50 years as well as 55 years and was placed under suspension pending disciplinary enquiry, the State Government had sufficient time to complete the enquiry. The Review Committee did not recommend the compulsory retirement and that the respondents having less than two years of retirement, the order of compulsory retirement was passed on extraneous reasons. The authorities should have waited for the conclusion of enquiry and could not have decided to dispense the services of respondent merely on the basis of allegation which were not proved on record.

22. In the present case the record shows that the petitioner was transferred three times in the year 1996. He challenged his order of transfer from Bareilly to Gorakhpur, in this Court and that this Court in writ petition No. 171 of 1997 stayed the order on the allegation of malafides. The petitioner made a complaint to Sri Ram Singh who was serving as Deputy Labour Commissioner Bareilly with regard to incident in which he had gone to serve a copy of the order upon him. On the basis of this complaint Sri Ram Singh had given a show cause

notice to the petitioner on 17.2.1997. In his counter affidavit Sri Ram Singh has denied the allegations against him with regard to the incident. In para 10 he further admits that he had given a show cause notice to the petitioner to which he had received a reply but the proceedings were not concluded. There is nothing on record to indicate as to what happened in the proceedings of show cause notice dated 21.2.1997 given by Sri Ram Singh to the petitioner. The same officer gave three adverse entries against the petitioner dated 30.6.1997, 26.6.1998 and 7.7.1999 out of which last two entries were given while sitting at Kanpur in respect of the years 1996-97 (part), 1997-98 and 1998-99(part). All these entries relate only to the assessment of work. The substance of these entries is that the petitioner is not carrying out the number of inspections required from him; did not initiate sufficient number of prosecutions and did not produce the list of inspection before him. On the basis of these assessment he concluded that the officer is negligent in performance of his duties and responsibilities.

23. The entries do not show that there were any allegation of misconduct, misbehavior, or any complaint was received against the petitioner. Apart from the assessment of work which includes the assessment inspections, and the production of diary and the list of establishment, there was no material to conclude that the petitioner's work and conduct was not satisfactory. There was no reported incident to suggest that the petitioner had misbehaved with officers. I find that there was absolutely no reason given, nor there was any material whatsoever to withhold the integrity of the petitioner. There was no other adverse entry on the service record of the petitioner except the three subject entries which were all given by Sri Ram Singh against whom there was a previous background and in which Sri Ram Singh had admitted that he had given show cause notice to the petitioner. The petitioner was promoted in the year 1995. The screening committee did not even care to consider or to even refer to the previous entries of the petitioner and the service record. The representation against the adverse entries were pending for two years. All these representations were decided in a hurry just on the eve of the meeting of the screening committee. The Deputy Labour Commissioner in his note for assisting the Labour Commissioner for disposing of the entries, did not meet the grounds taken by the petitioner in challenging the adverse entries. He relied upon a report of Sri Nigam which was not given to the petitioner. With regard to the allegations of malafides, the Deputy Labour Commissioner observed that these allegations amount to insubordination. He did not find it proper either to establish it or to call for reply from Sri Ram Singh before submitting his note to the Labour Commissioner.

24. The initials made by the Labour Commissioner on 19.3.2002 on the report of the Deputy Labour Commissioner dated 18.3.2002 do not show application of mind at all. These initials do not establish that he has either read the report, or had gone through the record. The manner and method in which the representations were decided after about two years in violation of the Rules of 1995 and just a few days before the meeting of screening committee shows a mechanical approach which does not serve the principles of natural justice and

fair play. Learned Standing Counsel is correct in his submission that even uncommunicated entries can be considered and where the representations have not been decided, the entries along with representation can also be considered by the Screening Committee, but where the representations have been decided without application of mind, and there are allegations of malafide which have not been considered and replied by persons against whom these allegations have been made, and that the proceedings in show cause notice given to the petitioner were not concluded, establish the allegations of malafide.

25. There was no complaint or material before the Deputy Labour Commissioner to with hold the integrity of the petitioner in the subject three assessment. The word 'integrity' has been defined in Webster's New Collegiate Dictionary as firm adherence to a code of esp moral arstistic value in corruptibility and is a synonym of honesty. In order to withhold integrity or not to certify integrity of an officer, there must be positive material to arrive at the conclusion. The Government Orders dated 28.12.1959, 7.10.1966, 3.7.1979, 15.12.1980, 16.5.1981 give the guidelines for with holding integrity certificates. A perusal of these Government Orders show that the award and withholding of integrity certificate is an integral part of annual confidential report of the work and conduct of Government Servant. The object of granting integrity certificate is to root out and eradicate corruption. This function is to be discharged with great care. There should be no disposition to deal with it in a casual or mechanical fashion. If the reputation of Government Servant regarding his integrity is bad, the prescribed integrity certificate must be prepared and filled in. The consequence of with holding integrity or not certifying the integrity are very serious. By Government Order dated 7.10.1966, it was provided that all those cases where integrity has been withheld twice, must be referred to Administrative Tribunal and in addition the increment must be stopped.

There must be positive material on record to support and justify the withholding or for not certifying the integrity of a government servant and such report should not be given casually. A proper enquiry should be made with regard to the circumstances which may lead to give such an entry and where the officer is at fault prompt departmental action should be taken. The integrity should not be withhold or the certification refused on the ground of suspicion or negligence and slackness in work. It means some thing more than assessment of work and has a closed relation with the honesty of the person. Whereever the integrity is withheld or not certified, the report must be based upon the material, and sufficient indication of such material must be given in recording such an entry.

26. The report of the screening committee shows that they considered only these three last entries. They did not care to find out, the previous entries of the officer or the entries subsequent to the years 1999-2000 and 2000-01. The assessment records that Salig Ram, Labour Enforcement Officer completely failed to discharge his duties and responsibilities of the post held by him, which puts a question mark on his utility to the department. I am not in complete agreement with the submission of Sri Anil Bhushan that such an assessment which

does not affirmatively considers or recognizes about the work and conduct and only raises a doubt cannot be relied upon to retire a person in public interest. The object of the compulsory retirement is chop off dead wood and to give honorable farewell to the employee before his retirement without causing stigma upon him. Such a farewell cannot be given on only raising a doubt on his ability to work.

27. A consideration of entries given to the petitioner shows that the officer recording the entries was not satisfied with the petitioner's work. That by itself is not a ground to hold that the petitioner had become a dead wood, and had lost his utility to the department. The failure to initiate required number of prosecution, directive and for timely production of diary before senior officer could not be a ground to retire him in public interest.

28. For the aforesaid reasons, I find that the petitioner's representations against adverse entries were not decided in accordance with law. The competent authority did not applied his mind and that the manner and method in which the representations were decided was arbitrary and unfair. The Screening Committee did not consider the previous and subsequent entries in the annual confidential roll of the officer and only raised a question on the assessment of his work and utility to the department. It did not positively report about his utility after assessing his entire work and conduct and thus the opinion of the appointing authority to retire him inn public interest was not justified and is vitiated. I further find that Sri Ram Singh was prejudiced against petitioner and allegations of malafides are proved against him.

29. Both the writ petitions are consequently allowed. The adverse entries to the petitioner for the years 1996-97, 1997-98 and 1998-99 and the order dated 19.3.2002 as well as communication of the order dated 6.4.2002 rejecting petitioner's representations against adverse entries and the order dated 24.4.2002 passed by the Labour Commissioner, U.P. compulsorily retiring petitioner in public interest and the consequential letter dated 27.4.2002 are set aside. The petitioner shall be given continuity of service and with all consequential benefits. The petitioner is also held entitled to Rs.5,000/- as costs of these two writ petitions.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.5.2004

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

Special Appeal No. 607 of 2004

Km. Supriya Chaturvedi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri G.K. Singh
Sri V.K. Singh

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

Constitution of India, Article 226-Practice and Procedure-Maxium-'Dura Lex Sed Lex'- Explained–law and equity-Equity to supplement laws not the law to supplant it the equity-In case of conflict between law and equity- law will prevail.

The Latin maxim "Dura Lex Sed Lex" means "The law is hard, but it is the law." Hence it must be obeyed. Once we start departing from law on equitable considerations then the rule of law gets under-mind and jeopardized. Equity can only supplement the law but cannot supplant it vide 2004 A.L.J.993- Chhetrapal Singh Vs. State of U.P. and others. If there is a conflict between law and equity, it is the law which has to prevail, even if it causes hardship to some persons. No doubt if there is some ambiguity in a rule equitable considerations may apply, but in the present case the provision of clause 3.4 is very clear. Para 12

Case law discussed:

AIR 2001 SC 1980
AIR 2001 SC 1121
(1979) 1 SCC 168
2003 (2) UPLBEC 1216
JT 1994 (1) SC 94
(1998) 9 SCC 395
1998 suppl.(1) SCC 714
2004 ALJ 993

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

1. This Special Appeal has been filed against the impugned judgment dated 17.5.2004 passed by the learned Single Judge.

2. Heard Shri R.N. Singh and G.K. Singh learned counsel for the appellant, Shri B.N. Singh learned counsel for respondents no. 2 and 3 and learned Standing Counsel for respondents no. 1 and 4.

3. The petitioner had been granted a fellowship for completing Ph.D. under the Faculty Improvement Programme. By the order dated 7.4.2004 passed by the University Grant Commission, the Fellowship awarded to the appellant for completing Ph.D. under the Faculty Improvement Programme Scheme under the 10th plan has been cancelled on the ground that on the date of submission of her application, the appellant did not possess three years' teaching experience. The learned Single Judge upheld that order, and hence this appeal.

4. Clause 3.4 of the said Scheme, copy of which is annexure 3 to the affidavit filed in support of stay application before us states:-

"3.4 The teacher should have at least 3 years of teaching experience on the date of submitting the application for award of teacher fellowship."

5. The language of Clause 3.4 is very clear. It is a settled principle of interpretation that when the language of a provision is plain and clear then the plain and literal meaning should be given to it, and the Court should not stretch or distort that meaning.

6. In Gurudevdatta Vs. State of Maharashtra, AIR 2001 S.C. 1980 the Supreme Court observed:

"It is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words

themselves best declare the intention of the law-giver."

7. Similarly, in Pattangrao Kadam Vs. Prithviraj AIR 2001 S.C. 1121 the Supreme Court observed that where the language of the provision is plain and unambiguous the same has to be given effect. It is not open to the court to first create an ambiguity and then look for some principle of interpretation.

8. Clause 3.4 uses the word "at least three years of teaching experience on the date of submitting the application". The words "at least 3 years" are sign out. The language used here is categorical.

9. Thus on the date when the appellant filed her application she should have at least 3 years teaching experience. As her teaching experience was three months short of three years hence she was not eligible as per clause '3.4'. Learned counsel for the appellant has relied upon the decision of the Supreme Court in Ram Sarup Vs. State of U.P. (1979) 1 SCC 168. That decision pertains to an employee confirmed in Govt. service as a Statistical Officer. In that case the Supreme Court has held that the appointment of the appellant as Labour-cum-Conciliation Officer though he did not possess the necessary five years experience is regular and not void.

10. In our opinion this decision is wholly distinguishable. It pertains to a different class of person and has nothing to do with the Fellowship under the Scheme. Moreover, Ram Sarup's case (supra) has been distinguished by a Division Bench of our Court in Sushil Kumar Dwivedi Vs. Basic Shiksha Adhikari, 2003 (2) U.P.L.B.E.C. 1216 (vide para 15). It was observed therein that in Ram Sarup's case (supra) it has been specifically noted in para 2 of the judgment that there was specific power in the Govt. to relax the requirement of qualification.

11. There are a large number of decisions of the Supreme court in which it was held that if a teacher does not possess the necessary qualifications on the relevant date then his appointment cannot be held to be valid merely because subsequently he acquired such qualifications, e.g. U.P. Public Service Commission Vs. Alpana –J.T. 1994(1) S.C. 94, Kishori Lal Charmakar Vs. District Education Officer, 1998 (9) S.C.C. 395, etc. In Dr. Prit Singh Vs. S.K. Mangal, 1993 Supp. (1) S.C.C. 714 the Supreme Court observed:

"If he was not eligible for appointment in terms of the prescribed qualifications on the date he was appointed by the Managing Committee subject to the approval of the Vice Chancellor, then later he cannot become eligible after the qualifications for the post were amended. As such we are in agreement with the view expressed by the High Court, that on the date of appointment the appellant did not possess the requisite qualifications and as such his appointment had to be quashed."

12. The Latin maxim "Dura Lex Sed Lex" means "The law is hard, but it is the law." Hence it must be obeyed. Once we start departing from law on equitable considerations then the rule of law gets under-mind and jeopardized. Equity can only supplement the law but cannot supplant it vide 2004 A.L.J.993-Chhetrapal Singh Vs. State of U.P. and

others. If there is a conflict between law and equity, it is the law which has to prevail, even if it causes hardship to some persons. No doubt if there is some ambiguity in a rule equitable considerations may apply, but in the present case the provision of clause 3.4 is very clear.

13. For the reasons given above, this appeal is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2004

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

Special Appeal No. 625 of 2004

Sri Vinod Kumar ...Petitioner
Versus
D.N. Agarwal, HJS Registrar (Listing) High Court, Allahabad and another ...Respondents

Counsel for the Appellants:
Sri K.R. Sirohi

Counsel for the Respondents:
Sri Satya Narain Mishra
S.C.

Principle of Natural Justice-Imposition of exemplary costs by Single Judge upon Registrar (Listing)-Special Appeal- No opportunity of hearing given before imposition of costs-Court should give opportunity before making adverse remarks-order set aside-

In our opinion directing the Registrar (Listing) of this Court to pay exemplary cost of Rs.500/- was, with great respect to the learned Single Judge, unwarranted and uncalled for, particularly when these adverse remarks was passed without giving any opportunity of hearing. The rules of natural justice require that before adverse remarks made the Court should give opportunity of hearing to the person, but no such opportunity appears to have been given to the Registrar (Listing) before passing the impugned order dated 18.5.2004. Para 6

The Registrar General is therefore directed to prepare a scheme so that in future all documents filed in the Registry are placed as soon as possible thereafter on the record so that the functioning of the Court may not suffer. Para 7

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

1. Heard learned counsel for the parties.

2. This special appeal has been filed against the impugned interim order of the learned Single Judge dated 18.5.2004 by which the Registrar (Listing) of this Court has been directed to pay exemplary cost of Rs. 500/- because some affidavit was not available on the record.

3. Since the facts are not in dispute it is not necessary to call for a counter affidavit.

4. A perusal of the impugned order dated 18.5.2004 shows that the learned Single Judge was unhappy because the affidavit dated 5.4.2004 filed by the petitioner in the Registry was not available on the record. While we fully share the concern of the learned Single Judge that the documents filed in this Court should as soon as possible be placed on the record, we cannot approve of the order directing imposition of exemplary cost on the Registrar (Listing) as well as the other personnel of the Registry.

5. It must be remembered that the Registrar General, Registrar (Listing) etc. of this Court are working under tremendous pressure in view of the heavy volume of filing of cases in this Court. The Hon'ble Judges as well as the officers in the Registry are working under the tremendous pressure of the workload, and in this situation obviously sometimes some mistake occurs and sometimes some omission takes place.

6. In our opinion directing the Registrar (Listing) of this Court to pay exemplary cost of Rs.500/- was, with great respect to the learned Single Judge, unwarranted and uncalled for, particularly when these adverse remarks was passed without giving any opportunity of hearing. The rules of natural justice require that before adverse remarks made the Court should give opportunity of hearing to the person, but no such opportunity appears to have been given to the Registrar (Listing) before passing the impugned order dated 18.5.2004.

7. In view of the above this appeal is allowed. Impugned order dated 18.5.2004 is set-aside except the direction that the earlier interim order shall continue. However, although we have allowed this appeal and set-aside the order dated 18.5.2004 we fully share the concern of the learned Single Judge that the documents filed in this Court are often not placed on record. The result is that very often when cases are taken up for hearing it is found that some affidavit or application is not on record, although learned counsel states that he had filed it in the Registry. This is happening in may cases, and a large number of cases have to be adjourned because some important document is not on record, although it was filed, and this affects the smooth functioning of the Court.

The Registrar General is therefore directed to prepare a scheme so that in future all documents filed in the Registry are placed as soon as possible thereafter on the record so that the functioning of the Court may not suffer.

This direction however, will not be treated as any adverse remark against the Registrar General or the Registrar (Listing) of this Court.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 14.5.2004

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

Civil Misc. Writ Petition No. 56783 of 2003

Kharaiti Lal and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ajit Kumar

Counsel for the Respondents:
Sri Subodh Kumar

Land Acquisition Act- Ss. 4,6,17- Acquisition of land for public purpose- writ against- plea that no vesting since possession not taken- Held, once possession taken by Government on 7.8.2001, even if owner of land resumed possession, such act can not effect the consequences of vesting.

Once possession of the land was taken by the Government even if thereafter the owner of the land entered upon the land and resumed possession such act does

not have the effect of obliterating the consequences of vesting. Para 12

In the present case it has been clearly stated by the respondents in paragraph 4,9,11,14,16 and 18 of the counter affidavit that the possession was taken over by the respondents on 7.8.2001. The possession memo which is Annexure CA 2 to the counter affidavit clearly supports the contention of the respondents. It is stated therein that the possession has been taken over by the respondent on 7.8.2001 and handed over to the Vice Chairman of Saharanpur Development Authority. In the counter affidavit filed by the respondents in relation to the application under Order 41 Rule 22 CPC the respondent no. 4 has annexed copies of the Khasra showing possession of the said respondent. In view of the aforesaid Supreme Court decisions we cannot accept the contention of the petitioner that possession was not taken by the respondents. Even if subsequently possession was retaken by the petitioner that will be immaterial. Para 13

Case law discussed:

(1994) 5 SCC 686
1998 (89) RD 130
AIR 1994 All. 38
1996 AWC 924
JT 1996 (3) SC 60
JT 1995 (6) SC 248
AIR 1975 SC 1767

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

1. By means of this writ petition the petitioner has challenged the impugned award dated 30.8.2003 Annexure 1 to the writ petition under Section 11 of the Land Acquisition Act as well as notification dated 17.5.2000 under section 4/17 and notification dated 3.5.2001 under Section 6 Annexure 3 to the writ petition.

2. The petitioners have alleged that they are owners of the land whose details are given in Annexure 4 to the writ petition.

3. A perusal of the notification under Section 4/17 copy of which is Annexure 2 to the writ petition shows that the land in question was sought to be acquired for the planed development for Saharanpur Development Authority for building a Transport Nagar.

4. So far as the purpose of the acquisition mentioned in the notification under Section 4 and 6 are concerned this is clearly for public purpose and it has to be held that there is urgency in the matter since acquisition for transport purpose must be held as a matter of urgency in view of the growing traffic problem.

5. In Amar Singh vs. State of U.P., writ petition no. 29031 of 2003 decided on 11.7.2003 a Division Bench of this Court held following several Supreme Court decisions that the question of urgency is for the subjective satisfaction of the Government and this Court cannot go into the matter. In that decision the matter has been discussed in great detail. Hence we reject the challenge to the notification under Section 4 and 6 of the Land Acquisition Act.

6. The learned counsel for the petitioner has then submitted that in view of Section 11-A of the Act the acquisition scheme has lapsed because the possession has not been taken over from the petitioner. In this connection it has been stated in paragraph 4 of the counter affidavit filed on behalf of the respondent no. 4, Saharanpur Development Authority that the possession of the land was taken over on 7.8.2001. In paragraph 4 it is also stated that the publication of the

notification under Section 6 was done on 14.5.2001 and in two newspapers on 17.5.2001. Notices was issued on 24.5.2001 inviting objection under Section 9. The respondent no. 4 has already deposited a sum of Rs. 1,88,68,763.00 and has completed all the necessary requirements under the Acquisition Act.

7. It is alleged in paragraph 6 of the counter affidavit that the work for development/establishment of the Transport Nagar as per Master Plan was in progress but in the meantime the interim order dated 13.1.2004 was passed and hence the scheme was delayed. As per the scheme regarding establishment of Transport Nagar the registration work has been completed on 31.8.2001 and thereafter about 412 registration of plots/shops etc. Copy of the booklet, master plan and chart of registration is Annexure CA I. In paragraph 7 of the counter affidavit it is stated that none of the petitioners are having their names in the revenue records nor are they in possession. In paragraph 9 of the counter affidavit it is stated that the answering respondent is already in possession of the land w.e.f. 7.8.2001 and hence Section 11-A has no application. There was urgency in the matter and the acquisition was for public purpose. The Transport Nagar is duly mentioned and approved in the master plan. The answering respondent is legally and factually bound to provide Transport Nagar as per the Master Plan. True copy of the possession certificate is Annexure CA 2 to the counter affidavit which shows that the possession was taken over by the Saharanpur Development Authority on 7.8.2001. In paragraph 11 of the counter affidavit it is stated that the mutation has been done in favour of the answering respondents vide annexures CA 3 and 4 to the counter affidavit.

8. In paragraph 12 of the counter affidavit it is stated that in a number of other district Headquarters where there are development authorities similar Transport Nagars were created which is for the benefit of the public at large.

9. In paragraph 13 of the counter affidavit it is stated that as per the G.O. dated 17.10.2001 the earlier Master Plan is enforceable till further orders or till it is not changed, modified or cancelled by a new Master Plan. The earlier Master Plan is still operative and has not been cancelled. True copy of the G.O. dated 17.10.2001 is Annexure CA 5. In paragraph 14 it is stated that Special Land Acquisition Officer has wrongly stated that the petitioners are in possession. The same SLAO has already said that the possession has already been given to the answering respondents on 7.8.2001.

10. We have also perused the rejoinder affidavit.

On the facts of the case we find no merit in this petition.

Learned counsel for the petitioner has relied on the decision of the Supreme Court in State of U.P. vs. Rajiv Gupta and another, (1994) 5 SCC 686 and the decision of this Court in Jeevan Bima Karmchari Sahkari Awas Samiti Ltd. vs. State of U.P., 1998 (89) RD 130, Ram Jiyawan vs. State of U.P., AIR 1994 Allahabad 38, and Smt. Prabha Wati Kunwar and another vs. State of U.P., 1996 AWC 924. He has urged that the possession was never taken till date and

hence the property did not vest in the state of U.P. or in respondent no. 4. He has relied on Khasra entries and irrigation slips which have been annexed with the rejoinder affidavit. He has also submitted that the Master Plan was not approved by the State Government.

11. In Balmokand vs. State of Punjab JT 1996 (3) SC 60 it was held by the Supreme Court that the normal mode of taking possession and giving delivery to the beneficiaries in the accepted mode of taking possession of the land. Subsequent thereto the retention of possession would tantamount only to illegal or unlawful possession. Hence merely because the appellant subsequent to 7.8.2001 retained actual possession of the acquired land the acquisition cannot be said to be bad in law.

12. An Awadh Bihari Yadav vs. State of Bihar, JT 1995 (6) SC 248 (vice paragraph 11) following the earlier decision in Balwant Narayan Bhagde vs. M.D. Bhagwat and others, AIR 1975 SC 1767 it was held that once possession of the land was taken by the Government even if thereafter the owner of the land entered upon the land and resumed possession such act does not have the effect of obliterating the consequences of vesting.

13. In the present case it has been clearly stated by the respondents in paragraph 4,9,11,14,16 and 18 of the counter affidavit that the possession was taken over by the respondents on 7.8.2001. The possession memo which is Annexure CA 2 to the counter affidavit clearly supports the contention of the respondents. It is stated therein that the possession has been taken over by the respondent on 7.8.2001 and handed over to the Vice Chairman of Saharanpur Development Authority. In the counter affidavit filed by the respondents in relation to the application under Order 41 Rule 22 CPC the respondent no. 4 has annexed copies of the Khasra showing possession of the said respondent. In view of the aforesaid Supreme Court decisions we cannot accept the contention of the petitioner that possession was not taken by the respondents. Even if subsequently possession was retaken by the petitioner that will be immaterial.

14. In fact due to the pendency of this petition the entire scheme for setting up a Transport Nagar has been delayed and this is not in the public interest.

15. The petitioner will get compensation for the land which has been acquired (including constructions or trees thereon) as per the provision of the Land Acquisition Act.

The petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.4.2004

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

Special Appeal No. 323 of 2004

Ram Dhyan Singh ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Appellant:
Sri Ramendra Asthana

Counsel for the Respondents:
S.C.

Constitution of India, Articles 226- Writ Petition- Maintainability–Contractual matters- Writ will lie where the parties to contract is State or an instrumentality of State- To hold that only a suit will lie in cases of non statutory contracts may make relief nugatory-matter referred to be larger Bench.

In other words, in the case of a non-statutory contract, a writ will only lie on constitutional grounds, but in the case of a statutory contract, a writ will lie on both grounds viz. constitutional as well as statutory grounds. This is really the essential distinction between the cases of a statutory and non-statutory contract. Hence it cannot be said that no writ will lie in the case of a non-statutory contract. Para 16

Case law discussed:
2003 UPLBEC 496
1994 ACJ 180
1993 (21) ALR 121
1992 (2) EFR 655
W.P. 48296 of 2003, decided on 16.3.2004
2004 ALJ 951
AIR 1978 SC 597
AIR 1979 SC 1628
(1997) 7 SCC 89 (Pr. 12)
(2004) 3 SCC 214 (pr. 17)
AIR 1996 SC 11 (Pr. 85, 86)
(1993) 1 SCC 445
(1999) 6 SCC 464
(2000) 5 SCC 287
AIR 1993 SC 929
JT 2003 (10) SC 300

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

1. This Special Appeal has been filed against the impugned judgement of the learned Single Judge dated 10.3.2004.

2. Heard Sri Ramendra Asthana learned counsel for the appellant and the learned Standing Counsel for the respondents.

3. Sri Ramendra Asthana learned counsel has informed that the respondent no. 4 has been served through registered post.

4. There is an office report that the Special Appeal is not maintainable in view of the decisions of this Court in Vajara Yojna Seed Farm, Kalyanpur M/s and others Vs. Presiding Officer, Labour Court-II, UP, Kanpur and another-2003 UPLBEC 496 and Sita Ram Lal Vs. District Inspector of Schools, Azamgarh and others- 1994 ACJ 180. These decisions have referred to Chapter VII Rule 5 of the Allahabad High Court Rules which states that an appeal lies against the judgment of a learned Single Judge under Article 226 of the Constitution except when the writ petition was filed against such judgment or order or award (a) of a tribunal court or statutory arbitrator- (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction 'under any such Act' mentioned in Chapter VIII Rule 5. In this case, the writ petition filed before the learned Single Judge was against the order of the Commissioner who decided the appeal provided for under the Government Order dated 3.7.1990. Thus the impugned judgment before the learned single Judge, was not against an order of a Tribunal or Court or Statutory Arbitrator. It was also not against an order passed in exercise of appellate or revisional jurisdiction 'conferred by some Act'. In fact, the appellate jurisdiction was conferred by a Government order and not by an act. Hence in our opinion this Special Appeal is maintainable.

5. Coming to the merits of the case, we have carefully perused the impugned judgment of the learned Single Judge dated 10.3.2004. The learned Single Judge was of the view that the writ petition was not maintainable as it was in respect of a contractual matter. The learned single Judge has referred to several decisions of this Court and the Supreme Court e.g. Shiv Mohan Lal Vs. The State of U.P. and others 1993 (21) ALR 121 and U.P. Sasta Galla Vikreta Parishad Vs. State of U.P. and others 1992 (2) EFR 655. There is also a subsequent decision of a division bench of this Court in Har Charan Sharma Vs. Nagar Panchyat and others, writ petition no. 48296 of 2003 decided on 16.3.2004 which supports the view taken by the learned Single Judge.

6. In our opinion, there is a distinction between a contract between two private persons and a contract where one of the parties is the State or an instrumentality of the State. In case of a contract where both the parties are private individuals no writ will lie in relation to such a contract (though a suit or other remedy may lie). However, where one of the parties to the contract is the State or an Instrumentality of the State, the position becomes totally different. In such a case, Article 14 and other provisions of the Constitution will clearly apply because the Government can not discriminate or act arbitrarily in respect of grant of contracts. Nowadays the Government or instrumentality of the State grants contracts often worth hundreds of crores of rupees, and therefore, it is essential that there should be totally transparency in such contracts, otherwise the public confidence will be eroded. For example, it has often been held by the Court that such contracts are ordinarily to be awarded after advertising the same in well known newspapers having wide circulation and thereafter a public auction or public tender should be held vide Zauddin v. Commissioner, 2003 A.L.J., V.K. Jaiswal vs. State of U.P.; 2004 ALJ 951 etc. The position individuals and here there is no need to advertise the contract or to hold public auction or tender. If we hold that even contracts where one of the parties is the State or the instrumentality of the State can be granted at the sweet will of the authorities to whomever they like, in whatever manner, and at whatever rate it will open the flood gates to corruption and gross financial irregularities. Moreover, it will also violate Article 14 and / or other provisions of the Constitution. It is well settled that the State Government cannot act arbitrarily vide Maneka Gandhi vs. Union of India and others AIR 1978 SC 597, Ramana Dayaram Shetty vs. International Airport Authority of India and others, AIR 1979 SC 1628 etc. Hence even in the matter of grant of contract the Government cannot act arbitrarily and its action can be challenged in writ jurisdiction if it does so.

7. In Style (Dress Land) Vs. Union Territory, Chandigarh, and another (1997) 7 SCC 89, the Supreme Court has observed (vide para 12):

"Action of renewability should be gauged not on the nature of function but public nature of the body exercising that function and such action shall be open to judicial review even if it pertains to the contractual field. The State action which is not informed by reason cannot be protected as it would be easy for the

citizens to question such an action as being arbitrary. '

8. In Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai (2004) 3 SCC 214 vide para 17 the Supreme Court has observed:

"It is not as if the requirements of Article 14 and contractual obligations are alien concepts which cannot coexist. Our Constitution does not envisage or permit unfairness or unreasonableness in State action in any sphere of activities contrary to the professed ideals in the Preamble. Exclusion of Article 14 in contractual matters is not permissible in our constitutional scheme."

9. In Tata Cellular Vs. Union of India and others AIR 1996 SC 11 (vide paras 85 and 86) it has been observed:

"It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finance of the State. It is expected to protect the financial interest of the State*. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 12 of the Constitution have to be kept in view while accepted or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

10. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus, they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

11. In Sterling Computers Ltd. Vs. M/s M & N. Publications Ltd., and others, 1993 (1) SC 445 it has been held that "State action in commercial/contractual transaction with private parties must be in consonance with Article 14 of the Constitution." In para 14 of the said judgment the Supreme Court observed:

"That action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the State can be judged and tested in the light of Article 14 of the Constitution, is settled by the judgments of this Court in the cases of Ramana Dayarama Shetty vs. International Airport Authority India, Kasturi Lal Lakshim Reddy Vs. State of J & K, Fertilizer Corpn. Kamagar Union (Regd.) Sindri Vs. Union of India, Ram and Shyam Co. Vs. State of Haryana, Hazi T.M. Hassan Rawther V. Kerla Financial Corpn., Mahabir Auto Stores Vs. Indian Oil Corpn. and Shrilekha Vidyarthi Vs. State of U.P. It has been said by this Court in Kasturi Lal: (SCC p. 13, para 14)

"It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State, such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so."

12. In M.I. Builders Pvt. Ltd. Vs. Radhey Shaym Sahu and others (1999) 6SCC 464, the Supreme Court has held that 'even in contractual matters the Municipal Corporation cannot act unreasonably or arbitrarily and there can be judicial review of its decision based on Wednesbury unreasonableness principles' A similar view was taken in Monarch Infrustructure Pvt. Ltd., Vs. Commissioner Ulhasnagar Municipal Corporation and others (2000) 5 SCC 287.

13. In Y. Srinivasa Rao Vs. J. Veeraiah AIR 1993 SC 929 it was held that a writ will be lie in relation to fair price shops. In ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd., JT 2003 (10) SC 300 the Supreme Court observed (vide para 10):

"On a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of writ under Article 226 of the Constitution. 'In this decision the Supreme Court considered several earlier decisions and held that Article 14 applies to govt. contracts, and a writ will lie if it is violated."

14. Thus, there are a plethora of decisions holding that even in contractual matters a writ will lie where one of the parties to the contract is the State or is an instrumentality of the State. In our opinion, to hold otherwise would mean that the State can grant contracts to only members of one particular religion, race, caste, sex or place of birth, thus violating the mandate of Article 15 (1) of the Constitution. To hold that only a suit will lie in cases of non-statutory contracts may well make the relief nugatory as it is well known that in our country suits take 10 or even 20 years to decide and by that time the period of the contract may well expire.

15. In Shiv Mohan Lal Vs. The State of U.P. and others (supra), and U.P. Sasta Galla Vikreta Parishad Vs. State of U.P. and others (supra), however, Full Bench decisions of this Court have taken the view that where the contract which has been entered into between the State and the person aggrieved is non-statutory, no writ under Article 226 will lie. In our opinion the aforesaid decisions and the decision of the Division Bench in Har Charan Sharma Vs. State of U.P. and others (supra) have not been correctly decided as they are inconsistent with the decisions of the Supreme Court referred to above. Hence they require to be reconsidered by a larger bench. In our opinion the distinction between cases of statutory contract and non-statutory contract is really this:

16. In the case of a non-statutory contract a writ will lie if there is violation of Article 14 or some other provision of the Constitution. However, in the case of

a statutory contract, a writ will lie not only on the above mentioned (constitutional) ground but will also lie on the ground that there is violation of the statutory provisions relating to that contract. In other words, in the case of a non-statutory contract, a writ will only lie on constitutional grounds, but in the case of a statutory contract, a writ will lie on both grounds viz. constitutional as well as statutory grounds. This is really the essential distinction between the cases of a statutory and non-statutory contract. Hence it cannot be said that no writ will lie in the case of a non-statutory contract.

17. It may be noticed that the decisions of Supreme Court referred to above in which it was held that a writ will lie in contractual matters do not appear to relate to a statutory contract. They appear to be related to non-statutory contracts, or at least no distinction was made in those decisions between statutory and non-statutory contracts but yet it was held that a writ will lie. We are of the considered opinion, therefore, that the decisions of the Full Bench of this Court in Shiv Mohan Lal Vs. The State of U.P. and others (supra) and U.P. Sasta Galla Vikreta Parishad Vs. State of U.P. and others (supra) and the decision in Har Charan Sharma Vs. Nagar Panchayat (supra) require reconsideration by a larger Bench of this Court as we are of the opinion that they were incorrectly decided. Let the papers of this case be laid before Hon'ble the Chief Justice for constitution of a larger Bench of this Court for the deciding the following questions:

"1. Whether a writ will lie even in the matter of non-statutory contract?

2. Whether a writ will lie in cases relating to fair price shops e.g. grant, cancellation, suspension, etc. of fair price shops."

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.4.2004

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

Special Appeal No. 320 of 2004

Dr. Ravindra Kumar Goel and others
...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Appellants:
Sri Chandan Sharma
Sri Suneet Kumar

Counsel for the Respondents:
C.S.C.

(A) Constitution of India, Article 21- Right to life- Includes right to get medical treatment- Right to practice medicine-Mere registration with Medical Council of India or with Board of Indian Medicine, UP or Homoeopathic Medical Council etc. not sufficient to allow to practice- Medical degree from a genuine and recognized Medical College also necessary- Medical Councils directed to be strict to scrutinize genuine or take medical degree before registration– quacks.

Under the law only a registered medical practitioner who has a degree from a recognized and genuine medical college alone can practice medicine. Even if a person has got himself registered with the Medical Council of India or with the Board of Indian Medicine, UP or Homeopathic Medical Council or some other such body, he cannot be allowed to

practice on the strength of that registration/certificate alone. He must further have a medical degree from a genuine and recognized Medial College. We think it necessary to say this because what is often happening is that persons who do not have a degree from genuine and recognized Medical Colleges get themselves registered with the Medical Council, etc. by some irregular methods and manipulation, and then they claim that they have a right to practice medicine. Para 12

We are informed that the Indian Medical Council of India, Board of Indian Medicine, U.P. Homoeopathic Central Council etc. are not strict in examining the applications of persons who want to be registered as medical practitioners, and often they register persons with fake medical degrees or degrees of Medical Colleges which are not genuine or recognized. We give a direction to all these Medical Councils (whether Allopathic, Homoeopathic, Ayurvedic or Unani) that in future they must be very strict and carefully scrutinize whether the medical degree of the applicant is from a genuine and recognized Medical College or not and they should refuse to grant registration where if finds that the degree is not of a genuine and recognized Medical College. Para 17

(B) Contempt of Courts Act-1972 Contempt jurisdiction- In exercise of , High Court can suo motu exercise writ jurisdiction by giving directions in exceptional and rare cases in case of pressing urgency or alarming situations.

He submitted that in contempt jurisdiction the learned Single Judge can either punish the contemnors for contempt or discharge them, but he cannot issue directions as if he was sitting in writ jurisdiction. In our opinion it is no doubt true ordinarily a judge who is sitting in contempt jurisdiction should not issue directions as if he was sitting in the writ jurisdiction. However, in our opinion, in exceptional and rare cases he can do so, particularly if there is some pressing urgency or alarming situation as is prevailing in U.P. in the medical profession. Para 19

(C) <u>Constitution of India-Article 226</u>-Principles of transfer-Policy matter-within domain of Government–Hence direction by Single Judge in this regard, held to be mere by recommendation and not binding directive on State Government. Para 24

In our opinion it is correct to say that the principles of transfer are policy matters, and they should ordinarily be decided by the State Government and not by this Court. Hence we modify direction no. 8 contained in the judgment of the learned Single Judge, and we hold that this directive shall be treated as a recommendation rather than a binding directive on the State Government.

(D) Constitution of India, Article 226-Writ Jurisdiction-Direction issued that a doctor having a degree in a particular branch of medicine should not be allowed to do practice in other systems of medicine.

We further direct that a doctor who has a degree in a particular branch of medicine, say Ayurvedic or Unani should not be allowed to do practice other system of medicine, e.g. Alloathic unless the law permits it. We feel it necessary to issue this direction because often it is found that a person who has a degree in Ayurvedic or Unani is practicing Allopathic medicine, which in our opinion is illegal. Para 28

<u>Case law discussed:</u>
(2000) 5 SCC 80
AIR 1995 SC 92 JT 1995 (i) SC 637
AIR 1958 All. 154 (DB)
AIR 1959 All. 675 (DB)

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

1. This case reveals the wide spread malpractices which are going on in the

State of U.P. regarding medical practice by unauthorized persons (quacks) who often have bogus degrees/certificates from bogus/fictitious so called medical colleges in various parts of the country.

2. This appeal has been filed against the order of the learned single Judge dated 28.1.2004. We have heard learned counsel for the parties and have perused the said order in great detail.

3. The impugned order of the learned single Judge reveals the great concern of the learned single Judge about the alarming and widespread malpractice prevailing in the state of Uttar Pradesh in the medical field. In fact the matter had come up before the Supreme Court in **D.K. Joshi vs. State of U.P. (2000) 5 SCC 80**. Copy of said judgment has been filed as Annexure-1 to the Special Appeal. In that case it was brought to the notice of the Supreme Court that unqualified persons are carrying on medical profession in the State of Uttar Pradesh. The Supreme Court was distressed to note that inspite of the direction to the U.P. Government to check this malpractice the District Magistrate and the Chief Medical Officers in the State had not taken effective steps to stop this menace which is hazardous to human life. The Chief Medical Officers only forwarded the names of the unauthorized medical practitioners to the District Magistrates but no follow up action was taken. It was also noted that after being warned the unqualified/unregistered Doctors have shifted to neighbouring districts. The Supreme Court therefore issued several directions in paragraph 6 of the said judgement to stop the carrying on of medical profession in U.P. by the unqualified/unregistered persons and in addition to take the following steps:-

(i) All District Magistrate and the Chief Medical Officers of the State shall be directed to identify., within a time limit to be fixed by the Secretary, all unqualified medical practitioners and to initiate legal actions against these persons immediately.

(ii) Direct all the District Magistrates and the Chief Medical Officers to monitor all legal proceedings initiated against such persons.

(iii) The Secretary, Health and Family Welfare Department shall give due publicity to the names of such unqualified/unregistered medical practitioners so that people do not approach such persons for medical treatment.

(iv) The Secretary, Health and Family Welfare Department shall monitor the actions taken by all District Magistrates and all Chief Medical Officers of the State and issue necessary directions from time to time to these officers so that such unauthorized persons cannot pursue their medical profession in the State.

4. It appears that thereafter a contempt petition was moved before the Supreme Court alleging that the directions of the Court have not been complied with. By its orders dated 8.10.2001 the Contempt petition was dismissed with the direction that petitioner should move the High Court for the relief sought for. The petitioner then filed contempt petition no. 820 of 2002 in which notices were issued to the respondents namely Chief

Secretary, UP Secretary, Health and Family Welfare, District Magistrate, Meerut and Chief Medical Officer, Meerut. Other authorities were also impleaded as parties and were required to take action. The successive Principal Secretaries, Medical Health, UP have filed their affidavit including the action taken and the reports of the Chief Medical Officers. The Court also directed the Director General of Police to submit his report.

5. During the pendency of the contempt petition the Court also directed inspection of the Community Health Centre at Karaon and Shankergarh, district Allahabad to verify the complaints regarding unauthorized practitioners. In the report submitted by the Director, Medical Health, UP it was stated that the Community Health Centre are not providing adequate medical care which was almost absent in the rural areas. The Doctor are not attending their duties and the medical equipments are either not available or are non functional. The para medical staff is wholly insensitive. Some Doctors managing long tenures at their postings have entered into a close nexus with unauthorized practitioners. The Medical Council of India was also impleaded and it filed its affidavit. Relevant extract of the affidavit has been quoted by the learned single Judge in his order.

6. The learned single Judge after considering the matter in detail issued the following directives:-

"(1) All the Hospitals, Nursing Homes, Maternity Homes, Medical Clinics, Private Practitioners, practicing medicine and offering medical and health care services, Pathology Labs, Diagnostic Clinics, whether run privately or by Firms, Societies, Trusts, Private Limited or Public Limited Companies, in the State, shall register themselves with the Chief Medical Officer of the District where these establishments are situate, giving full details of the medical facilities offered at these establishments, the names of the registered and authorized medical personnel practicing, employed or engaged by them, their qualifications with proof of their registrations, the Para Medical staff employed or engaged and their qualifications on a form (for each category) prescribed by the Principal Secretary, Medical Health and Family Welfare, Government of U.P. The prescribed proforma with true and accurate information shall be submitted, supported by an affidavit of the person providing such medical services or the person in charge of such establishment sworn before a Notary Public. The required information shall be submitted for registration by all these persons, on or before 30.4.2004.

(2) The Principal Secretary, Medical Health and Family Welfare, UP shall publish the information requiring all these persons to obtain registrations alongwith the directions given in this order, and the prescribed proforma, in all leading newspapers of the State, at least three times, in the month of February, 2004.

(3) Any change or addition in the particulars submitted shall be notified within thirty days and the registrations shall be renewed every year before 30th April of the year.

(4) On and from 1.5.2004, all those persons who have not furnished the information and obtained registration with the Chief Medical Officers of the District, shall be taken to be practicing unauthorisedly and the Chief Medical Officers, shall scrutinize and forthwith report the matter to the Superintendent/Senior Superintendent of Police of the District with information to this Court to conduct raids and to seal the unauthorized premises/establishment. All the authorized person/establishments, who fail to obtain registration, will have liberty to apply only to this Court to explain the delay and to seek permission to continue with their medical practice /profession.

(5) All those medical practitioners who desire to offer medical services in the State, in future, shall be required to submit the details in the aforesaid proforma for registration as above with the Chief Medical Officer of the district before they start medical practice.

(6) All the institutions/establishments/ colleges awarding medical degrees in the State shall apply and get themselves registered with the Principal Secretary, Medical health and Family Welfare, U.P. with full particulars of their authorization to confer such degrees/certificates, on or before 30.4.2004.

(7) The newspapers and magazines, published in Uttar Pradesh are restrained from publishing advertisements by and from unauthorized medical practitioners, persons to give proof of the qualifications and registrations. The breach shall be taken to aid and abet illegal activities violative of Magic Remedies (objectionable Advertisement) Act, 1954 and other relevant legislations.

(8) The principal Secretary, Medical Health and Family Welfare, is directed to ensure that no medical officer in the Government service is posted beyond three years in any district, and that all para medical staff serving in the Primary Health Centre/Community health Centre/District Hospitals and other hospitals run by Government of U.P. for more than five years, shall be transferred from the Centre/hospital. Any doctor in employment of State Government offering their services to the authorized medical practitioners shall face immediate disciplinary action by the State Government, and shall be prosecuted for aiding and abetting such unauthorized practice.

7. The learned single Judge in his order has observed that the above directions shall be strictly complied with and breach of these orders shall be treated as contempt of court and punished accordingly. The learned single Judge has further directed that the respondents shall continue to identify and prosecute the unauthorized medical practitioners. He observed that there is a large gap between identification of the unauthorized medical practitioners and the prosecution launched against them so far.

8. We fully agree with the directives issued by the learned single Judge in the impugned order dated 28.1.2004, except for the modification we are making in direction no. 8. Rather we share his concern with even greater emphasis. An alarming situation has arisen throughout

the State of U.P. (and perhaps in many other States) due to this widespread practice of quackery which is hazardous to the health and life of the public, apart from driving out the genuine doctors, just as bad coins drive out good coins from circulation. We are informed that in U.P. the number of quacks is several times (perhaps 10 times or more) than the genuine doctors.

9. Apart from what the learned single Judge has stated in the impugned order we would like to say that on earlier occasions we have found in several cases that persons coming from the State of Bihar are doing medical practice in Uttar Pradesh and when we enquired from them about their medical degrees they produced degrees/certificates, which appeared to us to be fake.

10. It is reported that in the State of Bihar all kinds of fake and phony institutions have mushroomed in which degrees are available for sale. In one case the Court directed investigation into 110 educational institutions in Bihar (so called medical colleges, engineering colleges, etc.) and it was found that all these 110 institutions exist only on paper. There is neither land, building, staff, teachers nor any instruction is being imparted there. However, for years such bogus teachers and other employees in these institutions are drawing salaries from these fake institutions pretending to be Principal, teachers, clerks, etc. In a large number of cases, which have come before us the fake degrees have been obtained from Bihar. It is possible that the same malady is going on in some other States also, where degrees/certificates are available for sale.

11. The citizens have a right to life under Article 21 of the Constitution and this includes the right to get medical treatment vide **JT 1995 (1) SC 637, Consumer Education And Research Centre Vs. Union of India 1995 SC 922** wherein the Supreme Court observed (vide para 26):

"The right to health and medical care is a fundamental right under Article 21 read with Articles 39 (c) 41 and 43 of the Constitution. Right to life includes protection of the health and strength and minimum requirement to enable the persons to live with dignity."

12. In U.P. the unauthorized medical practitioners (quacks) have mushroomed and spread into every nook and corner. Such unauthorized medical practitioners have been befooling the people of Uttar Pradesh for more than two decades and have been exploiting them and often endangering their health. Under the law only a registered medical practitioner who has a degree from a recognized and genuine medical college alone can practice medicine. Even if a person has got himself registered with the Medical Council of India or with the Board of Indian Medicine, U.P. or Homeopathic Medical Council or some other such body, he cannot be allowed to practice on the strength of that registration/certificate alone. He must further have a medical degree from a genuine and recognized Medial College. We think it necessary to say this because what is often happening is that persons who do not have a degree from genuine and recognized Medical Colleges get themselves registered with the Medical Council, etc. by some irregular methods and manipulation, and then they claim that they have a right to

practice medicine. In our opinion to permit this would be like permitting a person who has not got an LLB degree from a genuine and recognized Law College to practice law just because he has somehow managed to get himself enrolled with the Bar Council although he may be only High School passed.

13. Taking advantage of the poverty of the people of the State such unauthorized practitioners are deceiving them by offering their services on lower fees. They are often endangering the health of such people, apart from doing something which is illegal. We therefore, fully agree with the directions given by the learned single Judge by order dated 28.1.2004, as they are salutary and praiseworthy and were long overdone.

14. In fact many of these directions were made on suggestions of the parties, which were deliberately and readily accepted by Sri R.K. Mittal, Principal Secretary, Medical Health, U.P. and Dr. Amrendra Singh, Director General, Medical Care, U.P. as mentioned in the impugned order itself.

15. Sri U.N. Sharma learned counsel for the petitioner has submitted that the appellants are doing private practice and they are aggrieved by the first direction contained in the order dated 28.1.2004 by which they have been required to get themselves registered with the Chief Medical Officer of the district giving full details as directed. He submitted that the appellants have already been registered under the Medical Council of India Act 1986, the Indian Medicine Central Council Act, 1970, Homeopathic Central Council Act, 1973, or Board of Indian Medicine, UP and hence they should not be asked to get themselves registered again.

16. In our opinion this argument is misconceived. The object of the direction given by the learned single Judge to get registration done with the Chief Medical Officer was not that there is any need to get some statutory registration under the Indian Medical Council Act or some other Statute. The purpose was to find out who were the unauthorized practitioners so that such persons can be stopped from doing illegal medical practice in the State. We see nothing objectionable in the direction of the learned single Judge that all medical practitioners must register themselves with the Chief Medical Officer of the district. In fact, to our mind such a step was long overdue, and the time has surely come when the authorities must strictly check the medical degrees, registration certificate etc. of those who are doing medical practice in Uttar Pradesh, since a large number of quacks are illegally doing medical practice in the State.

17. As already observed above, if the Chief Medical Officer finds that the person concerned does not have a medical degree from a genuine and recognized Medical College then his medical practice must be stopped immediately even if he is registered with a Statutory body like the **Medical Council of India**. We are informed that the **Indian Medical Council of India, Board of Indian Medicine, U.P. Homoeopathic Central Council** etc. are not strict in examining the applications of persons who want to be registered as medical practitioners, and often they register persons with fake medical degrees or degrees of Medical Colleges which are not genuine or

recognized. We give a direction to all these Medical Councils (whether Allopathic, Homoeopathic, Ayurvedic or Unani) that in future they must be very strict and carefully scrutinize whether the medical degree of the applicant is from a genuine and recognized Medical College or not and they should refuse to grant registration where if finds that the degree is not of a genuine and recognized Medical College.

18. In fact it may be pointed out that the Supreme Court had itself issued directions in D.K. Joshi's case (supra) that the Secretary, Health and Family Welfare, U.P. shall take all steps necessary to stop carrying on of medical profession in the State of Uttar Pradesh by unqualified or unregistered persons. In addition the Supreme Court also directed all District Magistrate and Chief Medical Officers to identify the unqualified/unregistered medical practitioners and to take legal proceedings against them. We regret to say that despite these directives of the Supreme Court they have not been carried out by authorities.

19. Sri U.N. Sharma, learned counsel for the petitioner then submitted that the learned Single Judge has no right to give such a direction for registration of the medical practitioners before the Chief Medical Officer since he was only exercising contempt jurisdiction. He submitted that in contempt jurisdiction the learned Single Judge can either punish the contemnors for contempt or discharge them, but he cannot issue directions as if he was sitting in writ jurisdiction. In our opinion it is no doubt true ordinarily a judge who is sitting in contempt jurisdiction should not issue directions as if he was sitting in the writ jurisdiction. However, in our opinion, in exceptional and rare cases he can do so, particularly if there is some pressing urgency or alarming situation as is prevailing in U.P. in the medical profession.

20. In ***S. Barrow vs. State of U.P. AIR 1958 Allahabad 154***, a Division Bench of this Court held:

"Article 226 of the Constitution does not confine the powers of courts to issuing prerogative writs in cases where a party makes an application for the purpose, and the words of Article 226 are wide enough to authorize the High Court to quash an order suo motu."

Thus the High Court has power to issue writs suo motu without any application.

21. In ***Smt. Abida Begam vs. R.C.E.O., AIR 1959 Allahabad 675*** a Division Bench of this Court held:

"It may not be possible for us to grant a decree in the suit, but in spite of that fact, we think that this Court has jurisdiction under Article 226 of the Constitution to grant the relief as against the defendant no. 1, even though this matter had not come in its writ jurisdiction on an application under Article 226. "

22. It may be mentioned that in Abida Begam's case (supra) the Division Bench was deciding a special appeal against the judgement of a learned single Judge who had decided a second appeal under Section 100 C.P.C. Thus the Court was not exercising writ jurisdiction but the jurisdiction of second appeal. However, it was observed that even in such a jurisdiction in certain exceptional cases the Court can issue writs. Thus the

decision in Abida Begam's cases the Court can issue writs. Thus the decision in Abida Begam's case (supra) is an authority for the proposition that in exceptional cases a Judge sitting in a particular jurisdiction can issue a directive relating to another jurisdiction so as to do justice.

23. Learned counsel for the appellant then objected to the directive no. 8 in the impugned order dated 28.1.2004. By that directive the Principal Secretary, Medical Health, U.P. was directed to ensure that no Medical Officer in the Government Service is posted beyond three years in any district and that all para medical staff serving in Primary Health Centre/Community Health Centre/District Hospital for more than five years shall be transferred from that hospital and any Government doctor offering service to unauthorized medical practitioners shall face disciplinary action and shall also be prosecuted.

24. In our opinion it is correct to say that the principles of transfer are policy matters, and they should ordinarily be decided by the State Government and not by this Court. Hence we modify direction no. 8 contained in the judgment of the learned Single Judge, and we hold that this directive shall be treated as a recommendation rather than a binding directive on the State Government. However, we would like to say that we fully agree and share the concern of the learned Single Judge in this connection. Obviously what motivated the learned Single Judge in issuing such a direction was that several government doctors managed their place of posting in big cities for long period as they have connection with high ups, and such government doctors often run their private clinics also where they spend most of the time instead of attending their duties in Government hospitals. Hence it is obvious that what the learned Single Judge intended to say was that this practice should be stopped as it would not be fair to other doctors who do not have connections with high ups and remain posted in the rural areas for a long time. We fully agree with the learned Judge that there should be fair treatment to all government doctors and transparency in the matter.

25. Hence we direct the State Government to frame a scheme regarding transfer and posting of the government doctors so as to ensure fair treatment to everyone and no special benefit to those who have contacts with high ups. This scheme framed by the Statement must not only provide for fair treatment to all government doctors in the State regarding their transfer and posting, but also ensure that sufficient number of doctors are posted in rural areas in rotation, since presently the position is that even those who are technically posted in rural areas often do not go to rural areas except, say, for one or two days in a month for the sake of formality and they hardly stay there one or two hours and then come back to the cities. Because of this practice quacks have mushroomed in the rural areas because there are no government doctors usually available in the rural areas. This is not fair to the people in the rural areas who are the majority in our country. The State Government must not only do posting of government doctors in rotation to rural areas but also ensure that those who are posted in rural areas really work there during their official hours. For this purpose the State Government must

provide for suitable residential accommodation commensurate to the status of doctors near the family health center/community health center where they are posted. Also such residential accommodation must be provided water, electricity and other basic essential facilities. In the absence of these it is unrealistic to expect the Government doctors to remain in rural areas for a long period. Apart from that, we are of the opinion that the doctors who are posted in the rural areas should be given some adequate allowances because they have to usually maintain double establishment since their wives and children usually remain in cities because their children are studying in schools there.

26. The Scheme mentioned above should ensure that there should be rotation between those who are posted in urban areas and those who are posted in rural areas so that a person who is posted for, say, three or four years in a city should thereafter be sent for 3 or 4 years to a rural area. Such a scheme would be fair to gall government doctors who are conniving with the unauthorized medical practitioners (quacks) shall face disciplinary action and the scheme framed by the government should also remove the possibility of the Government doctors in developing contacts with the quacks.

27. We request the learned Single Judge (Hon'ble Sunil Ambwani, J.) who passed the impugned order to monitor the scheme framed by the State Government as directed above. Hon'ble Sunil Ambwani, J. is requested to list the case before himself, say, after every two months and call for a progress report from the State Government regarding the progress made in the last two months. We feel that this is necessary otherwise mere directives given by the Court are often forgotten unless they are regularly mentioned. The State Government must ensure that the doctors posted in the rural areas regularly work there, and if they do not do so then disciplinary action should be taken against them.

28. We further direct that a doctor who has a degree in a particular branch of medicine, say Ayurvedic or Unani should not be allowed to do practice other system of medicine, e.g. Alloathic unless the law permits it. We feel it necessary to issue this direction because often it is found that a person who has a degree in Ayurvedic or Unani is practicing Allopathic medicine, which in our opinion is illegal.

29. No doubt many of the directions issued by the learned Single Judge and by us are unconventional but extra ordinary situations require extra ordinary remedies.

30. In view of the above we uphold the impugned order of the learned Single Judge with the modification regarding direction no. 8 as stated above.

31. With this slight modification this appeal is **dismissed**.

32. Let a copy of this judgement be sent by the Registrar General of this Court to the Chief Secretary, UP Government, Lucknow, Principal Secretary Medial Health, Principal Home Secretary, Law Secretary and Director General of Police, UP who will ensure compliance of the directives of the learned single judge and of this Bench. Copy of this judgement will also be given to the learned standing counsel free of cost by tomorrow and he

will communicate it to the aforesaid authorities forthwith.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.4.2004

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

Civil Misc. Writ Petition No. 14988 of 2004

Sadgi Investment Pvt. Ltd. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.C.Sinha
Sri Arvind Kumar

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Writ Jurisdiction-Judicial review administrative functions-scope-Courts should be slow in such matters–No interference unless decision is tainted with illegality, irrationality or procedural impropriety- Impugned order states that plot No. 881 is next to main National Highway and that adjacent plot no. 883 and 884 sought to be acquired are very important for industrial area- held cannot be called arbitrary considerations-Land Acquisition Act- Ss. 4,6 and 17.

The Supreme Court observed that the Court will be slow to interfere in such matters relating to administrative functions unless the decision is tainted by any vulnerability enumerated above, like illegality, irrationality and procedural impropriety. The famous case, commonly known as the 'Wednesbury's case', is treated as the landmark in laying down various principles relating to judicial review of administrative or statutory discretion. Para 25

From the above standpoint the impugned decision of the administrative authorities in the present case (Annexure 1 to the writ petition) cannot be faulted as it cannot be said to be so outrageous in defiance of logic or accepted moral standards that no sensible person could have arrived at it. It has been stated therein that plot no. 881 is next to the main National Highway, and that adjacent plot nos. 883 and 884 are very important for the industrial area. These cannot be called arbitrary considerations. Para 27

Case law discussed:
W.P. No. 27317 of 2001 decided on 5.3.2004
(1966) 10 SCC 721
W.P. 29031 of 2003 decided on 11.7.2003
2003 (1) AWC 116
W.P. No. 24670 of 2003 decided on 2.7.2003
1993 ALJ 154 (DB)
AIR 1978 SC 515
W.P.No. 15586 of 2001 decided on 4.10.2002
(1994) 6 SCC 651
(2001) 2 SCC 386
JT 1994 (7) SC 551
(2002) 1 UPLBEC 937 (Pr.10)
AIR 1996 SC 11 (Pr. 113)
2002 (4) AWC 3221
(1994) 1 SCC 658
(1997) QB 643 (724)
AIR 1973 SC 1461 (Pr. 1547)
(2003) 2 UPLBEC 1206
(1984) 3 All ER 935

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

1. This writ petition has been filed with a prayer for mandamus directing the respondents to de- notify the land in question which was notified under the Land Acquisition Act. The petition has also prayed for a writ of certiorari to quash the impugned notification dated 31.10.2000 under Section 4/17 of the Land Acquisition Act and the notification dated 5.10.2002 issued under Section 6 and also the impugned order dated 10.3.2003 passed by the respondent no. 1 copy of which is Annexure 1 to the writ

petition. The petitioner has also prayed for a mandamus restraining the respondents from taking possession of the disputed land in pursuance of the impugned notification.

2. We are of the opinion that this petition is liable to be dismissed on the ground of laches.

3. It may be noted that the notification under Section 4/17 copy of which is Annexure 4 to the writ petition was issued on 31.10.2000 whereas the present writ petition has been filed in April 2004. Thus the challenge of the said notification is clearly belated. Similarly, the challenge to the notification dated 5.10.2002 is also belated. As regards the impugned order dated 10.3.2003 copy of which is Annexure 1 to the writ petition the challenge to this order is also belated as the writ petition has been filed in April 2004 that is more than one year after the passing of the said order. Hence this writ petition deserves to be dismissed on the ground of laches alone.

4. However, even on merits we are of the opinion that the writ petition is liable to be dismissed. A perusal of the notification dated 31.10.2000 under Section 4/17 of the Land Acquisition Act (vide Annexure 4 to the writ petition) shows that the land was being acquired for planned industrial development in district Mathura.

5. In Kaloo Ram vs. State of U.P. and others, writ petition no. 27317 of 2001 decided on 5.3.2004 the entire case law on the point has been discussed in great detail by a division bench of this Court. In that decision also the land was being acquired for planned development and it was held that this was for public purpose vide Ajai Krishna Singhal and others vs. Union of India, (1966) 10 SCC 721.

6. In Amar Singh and others vs. State, writ petition no. 29031 of 2003 decided on 11.7.2003 the Court has held that even abadi land can be acquired. The same view was taken in Manvir Singh vs. State of U.P., 2003 (1) AWC 116 and Horam Singh vs. State of U.P. writ petition no. 24670 of 2003 decided on 2.7.2003.

7. In Kashi Nath vs. State of U.P. ALJ 154 a Division Bench of this Court following the decision of the Supreme Court in Bai Malimabu vs. State of Gujrat, AIR 1978 SC 515 held that the word 'land in Section 3 (a) includes the superstructures on the land. Hence abadi land can be acquired, even if there are structures thereon, though, of course compensation has to be paid for the same.

8. In Amar Singh's case (supra) it has also been held after a detailed discussion that whether to grant exemption from acquisition or not is a purely administrative matter and this Court could not interfere. It was also held therein that directions directing disposal of the petitioner's application for exemption should not be issued by the Court as this only results in further delay of the acquisition proceedings for years and years.

9. In Ram Charittar and others vs. State of U.P., writ petition no. 15586 of 2001 decided on 4.10.2002 a similar view was taken.

10. Moreover it appears that the petitioner had earlier filed writ petition no. 46299 of 2002 which had been disposed off by a Division Bench of this Court on 28.10.2002 vide Annexure 2 to the writ petition. In that decision it was held that the notification under section 6(1) of the Act was perfectly valid.

11. As regards the prayer for exempting the land from acquisition it was held that the petitioner's representation should be decided expeditiously.

12. In the judgment dated 28.10.2002 (vide Annexure 2 to the writ petition) it has been observed that t he petitioner has constructed a boundary wall and had also laid the foundation for making construction of the building of the factory. Thus at that time admittedly there was no building on the land in question and there was only a boundary wall. However, even if there had been a building on the land it could yet be acquired vide Amar Singh v. State of U.P. (infra).

13. The petitioner's application for exemption has been rejected by the order dated 10.3.2003 Annexure 1 to the writ petition. We have already observed that the challenge to this order is belated because the petition has been filed more than one year after the order was passed. Apart from that it has been stated in the said order that the acquisition of the land was very important for the establishment of the industrial area.

14. We have already held in Amar Singh vs. State of U.P., writ petition no. 29031 of 2003 decided on 11.7.2003, Manvir Singh vs. State of U.P., 2003 (1) AWC 116 and Horam Singh vs. State of U.P. writ petition no. 24670 of 2003 decided on 2.7.2003, etc. that whether to grant exemption or not is a purely administrative matter and the Court cannot interfere with it. In Amar Singh vs. State of U.P. (supra) it was also held that even the direction that the petitioner's application for exemption should be decided should not be issued by this Court as this only resulted in further delay of the acquisition proceedings for years to years. If such direction is given and the exemption application is rejected without giving reason then immediately another writ petition is filed alleging that the order rejecting the exemption application should be quashed on the ground that no reason was given. However, if reasons are given in the said order then also a writ petition is filed alleging that the reasons are arbitrary or extraneous and once again an attempt is made to obtain a stay order from this Court and such stay order are passed and the mater lingers on for several years. In this way the entire scheme of acquisition is frustrated.

15. It may be mentioned that when a scheme for acquisition is made there is a plan for leveling the land, construction of roads, sewage system, water supply system, etc. This entire plan is frustrated if stay orders are obtained in respect of some plots in the scheme and it is well known that such stay orders often continue for years and years because of the heavy pendency in most courts. Hence this Court should exercise restraint and not interfere with the executive function of granting exemption or not granting exemption.

16. This Court cannot ordinarily interfere in administrative matter, since

the administrative authority are specialists in matters relating to the administration. The court does not have the expertise in such matters, and ordinarily should leave such matters to the discretion of the administrative authorities. It is only in rare and exceptional cases, where the Wednesbury principle applies, that the Court should interfere, vide *Tata Cellular vs. Union of India, (1994) 6 SCC 651, Om Kumar vs. Union of India, 2001 (2) SCC 386.* In *U.P. Financial Corporation V. M/s Naini Oxygen & Acetylence Gas Ltd. J.T. 1994 (7) S.C. 551 (vide para 21)* the Supreme Court observed:

"However, we cannot lose sight of the fact that the Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As such, in the discharge of its function it is free to act according to its own light. The views it forms and the decisions it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the Courts or a third party to substitute its decision, however more prudent, commercial or business like it may be, for the decision of the Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed by making the Corporation liable."

17. In *Haryana Financial Corporation and another v. M/s Jagdamba Oil Mills and another (2002) 1 UPLBEC 937* (vide paragraph 10) the Supreme Court observed:

"If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities, it follows equally that it cannot do so in the case of administrative action, it is well known that more than one choice is available to the administrative authorities. They have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action upon which there is room for reasonable course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". (per Lord Diplock in Secretary of State for Education and Science V. Metropolitan Borough Counsel of Tameside, 1977 AC 1014). The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, the Court can intervene. To quote the classic passage from the judgment of Lord Greene M.R. in Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation, 1947 (2) ALLER 630:

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyer familia with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters

which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

In *Tata Cellular vs. Union of India AIR 1996 SC 11* (vide paragraph 113) the Supreme Court observed:

(1) The modern trend points to judicial restraint in administrate action.
(2) The Court does not sit as a court of appeal over administrative decisions but merely reviews the manner in which the decision was made.
(3) The court does not have the expertise to correct an administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible."

18. In the same decision the Supreme Court observed that judicial review is concerned with reviewing not the merits of the decision but the decision making process (the Wednesbury principle). See also *Pramod Kumar Misra vs. Indian Oil Corporation 2002 (4) AWC 3221, State of Kerala vs. Joseph Antony 1994 (1) SCC 658, etc.*

As Lord Denning observed:

"This power to overturn executive decisions must be exercised very carefully, because you have got to remember that the executive and the local authorities have their very own responsibilities and they have the right to make decisions. The courts should be very wary about interfering and only interfere in extreme cases, that is, cases where the Court is sure they have gone wrong in law or they have been utterly unreasonable. Otherwise you would get a conflict between the courts and the government and the authorities, which would be most undesirable. The courts must act very warily in this matter." (See 'Judging in World' by Garry Sturgess Philip Chubb).

19. In our opinion judges must maintain judicial self restraint while exercising the powers of judicial review of administrative or legislative decisions.

"In view of the complexities of modern society," wrote Justice Frankfuter, while Professor of Law at Harvard University, "and the restricted scope of any man's experience, tolerance and humility in passing judgment on the worth of the experience and beliefs of others become crucial faculties in the disposition of cases. The successful exercise of such judicial power calls for rare intellectual disinterestedness and penetration, lest limitation in personal experience and imagination operate as limitations of the Constitution. These insights Mr. Justice Holmes applied in hundreds of cases and expressed in memorable language;

"It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seems to him to be first principles are believed by half his fellow men to be wrong."

(See Frankfuter's 'Mr. Justice Holmes and the Supreme Court').

20. In our opinion the administrative authorities must be given freedom to do experimentations and in exercising powers, provided of course they do not transgress the legal limits or act arbitrarily.

21. The function of a judge has been described thus by Lawton LJ: "A Judge acts as a referee who can below his judicial whistle when the ball goes out of play, but when the game restarts he must neither take part in it nor tell the players how to play" vide *Laker Airways Ltd. v. Department of Trade (1977) QB 643 (724).*

22. In writing a biographical essay on the celebrated Justice Holmes o the U.S. Supreme Court in the dictionary of American Biography, Justice Frankfurter wrote:

"It was not for him (Holmes) to prescribe for society or to deny it the right of experimentation within very wide limits. That was to be left for contest by the political forces in the state. The duty of the Court was to keep the ring free. He reached the democratic result by the philosophic route of skepticism-by his disbelief in ultimate answers to social questions. Thereby he exhibited the judicial function at its purest."

(See 'Essays on Legal History in Honour of Felix Frankfurter 'Edited by Morris D. Forkosch).

23. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the judges preferences. The Court must not embarrass the administrative authorities and must realize that administrative authorities have expertise in the field of administration while the Court does not. In the word 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 a 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."*

24. In administrative matters the Court should therefore ordinarily defer to the judgment of the administrators unless the decision is clearly illegal or shockingly arbitrary.

In this connection Justice Frankfurter while Professor of Law at Harvard University wrote in "The Public and its Government'—

"With the great men of the Supreme Court constitutional adjudication has always been statecraft. As a mere Judge, Marshall had his superiors among his colleagues. His supremacy lay in his recognition of the practical needs of government. The great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the life of a progressive people."

In the same book Justice Frankfurter also wrote—

"In simple truth, the difficulties hat government encounters from law do not

inhere in the Constitution. They are due to the judges who interpret it. That document has ample resources for imaginative statesmanship."

In Keshvanand Bharti v. State of Kerala, AIR 1973 SC 1461 (vide para 1547) Khanna, J. observed:

"In exercising the power of judicial review, the Court cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error."

25. In *Indian Railway Construction Co. Limited vs. Ajay Kumar (2003) 2 UPLBEC 1206 (vide para 14)* the Supreme Court observed that there are three grounds on which administrative action is subject to control by judicial review. The first ground is illegality, the second is irrationality and the third is procedural impropriety. These principles were highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service 1984 (3) All ER 935.* The Supreme Court observed that the Court will be slow to interfere in such matters relating to administrative functions unless the decision is tainted by any vulnerability enumerated above, like illegality, irrationality and procedural impropriety. The famous case, commonly known as the 'Wednesbury's case', is treated as the landmark in laying down various principles relating to judicial review of administrative or statutory discretion.

26. Lord Diplock explained irrationality as follows:

"By irrationality I mean what can be now be succinctly referred to as Wednesbury unreasonableness. It applies to a decision which is so outrageous in its definance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

27. From the above standpoint the impugned decision of the administrative authorities in the present case (Annexure 1 to the writ petition) cannot be faulted as it cannot be said to be so outrageous in defiance of logic or accepted moral standards that no sensible person could have arrived at it. It has been stated therein that plot no. 881 is next to the main National Highway, and that adjacent plot nos. 883 and 884 are very important for the industrial area. These cannot be called arbitrary considerations.

28. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.4.2004

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

Civil Misc. Writ Petition No. 8070 of 2002

Prem Chand Singh and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners.
Sri S.C. Mandhyan

Counsel for the Respondents:
S.C.

Constitution of India, Article 300-A read with U.P. Rural Development (Requisition of land) Act, 1948-lands taken without following procedure

prescribed under law- No compensation paid since 1986- clear violation of Article 300-A direction issued either to restore possession of land to petitioners by forthwith or to pay full compensation as per Act within six months- Exemplarg cost of Rs. 2 lacs emposed payable to the claimed–Land Acquisition Act- Ss 23 (1-A), 23 (2)

In case after case which is coming up before us it has come to our knowledge that the land or other property of the citizens has been taken over by the State without following the procedure prescribed under the Land Acquisition Act or any other Act. In our opinion this is wholly illegal being violative of Article 300-A of the Constitution. The State is expected to act in an exemplary manner and should set a standard of exemplary behavior for others, but in these cases which have come up before us, the State has behaved like an outlaw and has illegally grabbed the property of citizens without following the procedure of the law. If this trend is permitted it will lead to collapse of the rule of law in our country. The time has come when these illegal activities of the State must be checked and it is the duty of the Court to do this, otherwise the Court will be failing to discharge its duty under the Constitution. Para 4

This writ petition is allowed. The respondents are directed to restore the possession of the land of the petitioners to them forthwith. If the respondents do not restore the possession to the petitioner then full compensation as per the Land Acquisition Act must be paid to the petitioners within six months from today and this will be determined by the District Judge, Allahabad within four months from today. This compensation will include the full market value, additional solatium under Section 23 (1-A), Solatium under Section 23 (2), as well as interest at the rate of 15% from the date the possession was taken over till the date of its actual payment. The respondents must also pay damages/cost to the petitioners for depriving them of their land for 18 long years and they must also pay exemplary costs. In addition to above amounts, the respondents must pay to the petitioners Rs. 2 lacs as exemplary costs which shall be distributed to each of the petitioners in accordance with the area of their land, which was taken over by the respondents. Para 5

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

1. Heard counsel for the parties.

2. It appears that the possession of the petitioners' land being Khasra No. 288, 248, 223 and 292 situated in village Raghunathpur, Tehsil Phoolpur, district Allahabad was taken over by the respondent in the year 1986 but as yet no compensation has been paid for the same. Also no notification under Sections 4 and 6 of the Land Acquisition Act has been issued in respect of the same. No notification under the provisions of the U.P. Rural Development (Requisition of Land) Act, 1948 has been placed before us.

Article 300-A of the Constitution of India states:

"No person shall be deprived of his property save by authority of law".

3. In our opinion the word "law" under Article 300-A means statutory law and not a mere Government order. Therefore, Article 300-A means that no body's property can be even touched except in accordance with some procedure of a statute. It appears to us that the petitioners' land was forcibly occupied by the respondent-authorities without following the procedure of the

Land Acquisition or any other statute. All that has been stated in para 9 of the counter affidavit is that the possession of the petitioner's land has been taken to build canal and proceeding for determination of compensation is being done.

4. In case after case which is coming up before us it has come to our knowledge that the land or other property of the citizens has been taken over by the State without following the procedure prescribed under the Land Acquisition Act or any other Act. In our opinion this is wholly illegal being violative of Article 300-A of the Constitution. The State is expected to act in an exemplary manner and should set a standard of exemplary behavior for others, but in these cases which have come up before us, the State has behaved like an outlaw and has illegally grabbed the property of citizens without following the procedure of the law. If this trend is permitted it will lead to collapse of the rule of law in our country. The time has come when these illegal activities of the State must be checked and it is the duty of the Court to do this, otherwise the Court will be failing to discharge its duty under the Constitution. No doubt some times, some land may be required for some public purpose, and the State has power to acquire or requisition under its power of eminent domain, but this must be done in accordance with a statute. In all these cases which have dome before us, we find that the land has not been taken over 18 years ago without following any statutory procedure or paying compensation. It may be mentioned here that the question of payment of compensation arises, when the land is acquired after issuing notification under Sections 4 and 6 etc. of the Land Acquisition and thereafter the award is passed under Section 11 and compensation is paid after determining the market value in accordance with the legal procedure e.g. considering some exemplars etc. and paying solatium, interest, etc. as mentioned in the aforesaid Act. There is no question of compensation when the land is taken without following procedure of law. When such illegality is committed, ordinarily the Court is under duty to restore the possession to the owner and grant exemplary costs against on the State for its illegal acts. In the present case, 18 years have expired and the petitioners have been made to run hither and thither without receiving any compensation. The law has been totally violated and in fact no statutory provision has been followed before taking over possession of the petitioners' land. No citizen can feel safe is such acts are allowed.

5. This writ petition is allowed. The respondents are directed to restore the possession of the land of the petitioners to them forthwith. If the respondents do not restore the possession to the petitioner then full compensation as per the Land Acquisition Act must be paid to the petitioners within six months from today and this will be determined by the District Judge, Allahabad within four months from today. This compensation will include the full market value, additional solatium under Section 23 (1-A), Solatium under Section 23 (2), as well as interest at the rate of 15% from the date the possession was taken over till the date of its actual payment. The respondents must also pay damages/cost to the petitioners for depriving them of their land for 18 long years and they must also pay exemplary costs. In addition to above

amounts, the respondents must pay to the petitioners Rs. 2 lacs as exemplary costs which shall be distributed to each of the petitioners in accordance with the area of their land, which was taken over by the respondents. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD. 28.1.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Civil Misc. Writ Petition No. 53894 of 2003

Sunita Diwedi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Tripathi

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

U.P. Higher Education Service Commission Act 1990- Section 15 (3)- selected candidate from commission- despite of placement order of Director- management ignoring the selected candidate such state of affair- held most unfortunate-general mandamus issued– if the management fails to carriont the direction within 3 weeks- drastic action be taken against such management.

In several cases, which are coming up before this court, we have found that the candidate selected by the U.P. Higher Education Service Commission is not given appointment despite the placement order of the Director, Higher Education because for some reason the committee of management does not wish to appoint him. In our opinion, this is wholly illegal and the committee of management has to give appointment to the person selected by the Higher Education Public Service Commission, otherwise the very purpose of the selection is defeated. If the committee of management does not give appointment to the selected candidate, action must be taken against the management under Section 15 (3) of the U.P. Higher Education Service Commission Act, 1990 as well as Section 57/58 of the U.P. State Universities Act 1973. Para 6

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

1. Heard learned counsel for the petitioner and learned counsel for the U.P. Higher Education Service Commission as well as learned standing counsel.

2. It is alleged in paragraph 2 of the writ petition that the petitioner has been selected by the U.P. Higher Education Service Commission as Lecturer in Hindi for Agra College, Agra. The recommendation of the Higher Education Service Commission dated 17.6.2003 is Annexure 2 to the writ petition.

3. In pursuance of letter dated 17.6.2003, the petitioner submitted his joining before the Principal, Agra College, Agra who is also Secretary of the Managing Committee of the College on 24.7.2003, but she has not yet been allowed to join there. True copies of the joining reports are Annexure nos. 3 and 4.

4. We are distressed to note that although the recommendation, which is in favour of petitioner, was sent by the Commission to the Director, Higher Education, U.P in June 2003 the petitioner has not yet been allowed to join as Lecturer in Hindi in Agra College, Agra. College, Agra.

5. Under Section 15 (2) of the U.P. Higher Service Commission Act 1990, it is provided that if the management fails to appoint the selected candidate, who has been issued placement order by the Director, then the Director may order the management to appoint him/her as a teacher forthwith and pay him salary and the Principal has to appoint her as teacher. The salary under Section 15 (3) of the Act is liable to be recovered as arrears of land revenue by the Collector. Moreover, under Section 57 of the U.P. State Universities Act, which deals with affiliated colleges, if the management fails to appoint a teacher, the State Government can call upon the management to show cause why an order by not passed under section 58 of the Act. Under Section 58 the State Government after considering the explanation of the management, can appoint an authorized controller to take over the management.

6. In several cases, which are coming up before this court, we have found that the candidate selected by the U.P. Higher Education Service Commission is not given appointment despite the placement order of the Director, Higher Education because for some reason the committee of management does not wish to appoint him. In our opinion, this is wholly illegal and the committee of management has to give appointment to the person selected by the Higher Education Public Service Commission, otherwise the very purpose of the selection is defeated. If the committee of management does not give appointment to the selected candidate, action must be taken against the management under Section 15 (3) of the U.P. Higher Education Service Commission Act, 1990 as well as Section 57/58 of the U.P. State Universities Act 1973. The present state of affairs cannot be interacted any longer. It is defeating the very purpose of the U.P. Higher Education Service Commission Act since selected candidates are not being given appointment despite selection in a large number of cases.

Apart from the above general direction which we have issued, we also issue an interim mandamus to the committee of management, Agra College, Agra to give appointment to the petitioner as Hindi Lecturer forthwith or to show cause within three weeks. If the cause show is not satisfactory, we may have to direct that action should be taken against the committee of management as mentioned above.

List after three weeks.

7. Let the Registrar General of this Court as well as learned standing counsel send copy of this order to the Principal Secretary, Higher Education, Director, Higher Education and other concerned authorities.

8. The petitioner shall serve copy of this order on the committee of management as well as Principal, Agra College, Agra, who may file counter affidavit within ten days.

9. A copy of this order shall be given free of charge to the learned standing counsel today. A copy of this order shall also be given to learned counsel for the petitioner today on payment of usual charges.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.4.2004

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.
THE HON'BLE AMAR SARAN, J.

Criminal Writ Petition No. 2357 of 1997

Bachchey Lal ...Petitioner
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioner:
Filed by Jail

Counsel for the Opposite Parties:
Sri Vijay Shanker Misra

Constitution of India- Article 161- Exercise of power by Governor under U.P. Prisoners Release on Probation Act- Sec. 2-Jail Manual- Para 198- premature release of prisoners by Governor- Government order-against ambit of constitution relating to separation of power- Arbitrary and malafide- Hence struck down- letter petition by convict from jail for release on ground that he had served out actual jail term of more than 14 years-criteria laid down for disposal of applications for premature release time bound–Directions issued by State Government and I.G.-Prisoners to submit report on all prisoners imprisoned in various jails of U.P., who have undergone over 14 years actual imprisonment or 14 years together with rescissions in cases of conviction by Trial Court prior to 18.12.1978.

This report should contain all the information that was already furnished in the charts SCA I to the first supplementary affidavit dated 1.3.04 and SCA III to the second supplementary affidavit dated 5.4.04, i.e. the name, parentage and permanent address of prisoner, S.T. No., provision under which convicted, date of sentence by Sessions Court, designation of Court, period of sentence, status of appeal, status of Form A, status of nominal role, final order of State Government on application for premature release (if any). In addition the report should also mention age of prisoner, present condition of health if suffering from serious illness. Briefly the main reason for rejection of application for premature release could also be mentioned, in cases where it has been finally rejected. What was the date when the prisoner had undergone 14 years actual imprisonment, and the date when the applications in Form A, and Nominal Roles were forwarded. If the conviction by the Sessions Judge is prior to 18.12.78, the date when the prisoner had undergone 14 years together with remissions and became eligible for consideration for premature release, and the actual date for forwarding the applications in Form A and Nominal Roles. Whether any action for premature release taken under any other G.O. under Article 161 or otherwise, fate of such application. Para 28

Case law discussed:
2002(1) JIC 342 (All)
AIR 1980 SC 2147
(2000) 8 SCC 437
(2000) Crl. L.J. 1471

(Delivered by Hon'ble Sushil Harkauli, J.)

1. In these proceedings, which commenced on a letter petition by a convict from jail, we have been given valuable and impartial assistance by the learned Government Advocate Sri Vijay Shanker Misra considering that the petitioner is not represented and the issue is of public importance.

The Issue

2. In Mirza Moihammad Husayn V. State of U.P., (2002 (1) JIC 342 (All), a Division Bench of this Court comprising Hon'ble G.P. Mathur and Hon'ble S.K.

Jain, JJ. struck down two G.Os., dated 11.1.2000 and 25.1.2000 issued by Governor under Article 161 which inter alia directed release of all life imprisonment male prisoners over 60 years in age, and female prisoners over 50 years, if they had undergone an actual period of 3 years imprisonment on 26.1.2000. The main reasons for this order were that irrespective of the differences and seriousness of the cases, release of all prisoners, over 60, in the case males and 50 years in the case of females, who had undergone only 3 years sentenced, in cases of life imprisonment by one stroke by a blanket order without examining the individual cases amounted to an arbitrary and mala fide exercise of governor's Constitutional powers, as it set a naught well considered judicial orders.

3. In paragraph 23, the Bench has expressed its views thus "However by the government order, the sentence awarded to all the prisoners have been drastically reduced and vi ritually set aside by one stroke. This has not been done in favour an individual or a small group of prisoners but for all the convicts who were undergoing imprisonment and were confined in jail in the State of U.P. The sentence had been imposed upon them as a result of judgments delivered by Courts including superior Courts, High Court and Supreme Court on sound judicial principles. Where pardon is granted to a named individual or a small group of persons having common or identical features whose identity is known it is a case of mercy as it only affects the execution of their sentence. Where, however a general order is passed whole hog without identifying the persons and its applicability being dependent entirely upon the period of imprisonment suffered, it cannot be termed as an act of mercy of pardon, as in reality it impinges upon the judicial orders passed by the Court imposing sentences upon the convicts. The release of prisoners under this order does not take place on a particular fixed day which would normally be the case in a pardon but on different dates depending upon when they fulfil the criteria fixed in the order, namely undergoing of 2 or 3 years sentence. The power of pardon under Article 161 cannot be exercised in a manner which completely negates the scheme of constitution regarding division of powers. An essential function performed by the judiciary cannot be altered or modified or its effect taken away in garb of power of pardon by the Governor under Article 161 of the Constitution. It is a clear misuse of power which cannot be countenanced and must be struck down

4. Apart from directing re-arrest of the released accused nos. 17 to 19, under the impugned Government order in Mirza Mohammad's case, the Bench also directed in paragraph 32, that 'in larger public interest, the appropriate direction which should be issued by this Court to direct the State to put all such persons back to prison who have been granted premature release on the strength of the impugned Government Orders."

5. Like the sweeping release, this direction set in motion a flurry of re arrests. Although many of the accused were rightly rear rested who had undergone only a petty three years team of imprisonment in a case of murder, and had got their ages increased to 60 or 50 years if they were males or females, by under hand means. However in regard to a large number of the accused who had

infact undergone over 14 years actual imprisonment, or were reaching an age of 80 years, steps were initiated to rearrest such released prisoners, because of the general directions in Mirza Mohammad's case. Many of such prisoners having financial and other resources, who had undergone 14 years and had been re arrested or whose re arrest were being sought, approached the Hon'ble Supreme Court. Orders were passed by the apex Court on 5.9.03 and 30.1.04 staying re arrests or directing release of prisoners who had undergone 14 years sentence, after calling for Jail Reports, in SLP (Crl.) 5020/02, SLP (Crl.) 5006, SLP (Crl.) 5013/02., W.P. (Crl.) 7/2003, SLP (Crl.)1190/2003, Crl. M.P. and SLP (Crl.)5018/02 SLP (Crl.) No. 5005/2002, SLP (Crl.) 4259/2003 etc. and in the reported decision in Vijay Bahadur V. State of U.P., (2003) (2) JIC 457 (SC).

6. In SLP (Crl.)…./2001 connected with Crl. M.P. No. 13434/2001 the apex court passed an order on 7.1201 requiring all those petitioners who had not been in custody for than 14 years to surrender for consideration of their SLPs. However the Court made an exception in regard to one petitioner Jaipal, s/o Ramji Lal) who was shown to be aged 80 years.

7. Even in Mirza Mohmmad's case at the end of paragraph 9, the Division Bench headed by Hon'ble G.P. Mathur J. distinguished the cases of convicts who had undergone 14 years imprisonment thus. "So legislative intent is that a person sentenced to imprisonment for life should not be released unless he has served fourteen years.

8. It appears to us that such practices of releasing accused en- masse by such general Government Orders purportedly issued by the Governor under Article 161 are resorted to when no regular releases are being effected under the normal provision for premature release of prisoners contained in the Jail Manual and Sections 432 and 433 of the Code of Criminal Procedure, or under the U.P. Prisoners Release on Probation Act, 1938 and other parallel provisions, where prisoners are required to be released after detailed examination of their cases, but only prisoners with political clout are managing to secure premature releases, and jails have become over crowded . Indeed these en masse releases at one stoke, resemble the official practice of hurried spending, without application of mind to the merit of each cash in the last few days or hours of the financial year because the well considered steps needed for earmarking budgetary expenditures are not taken all the year long.

Approach needed.

9. It is thus clear that there is need to strike a middle path and to avoid the two extremes. Neither the release of prisoners almost immediately after conviction by the executive making a mockery of judicial order, nor the other extreme of allowing prisoners to languish in jails for periods as long as 20 to 25 years meet our approval. For some years the pairokars and relations visit these prisoners in Jail, but later they get embroild with the problems of their own lives or become disheartened and even stop visiting these prisoners who become forgotten numbers, bereft of hope. When the period of incarceration of prisoner in Jail is unduly prolonged, women and children are exploited and families ruined. The possibility of the prisoner eventually

being re-integrated as a socially useful purpose is served by detaining the prisoner for a longer period, as society and the relations of the victim could usually be expected to be satisfied with this adequate measures of punishment undergone by the offender, and whatever deterrent message that a punishment intended to convey would have been received by the prisoner after his long stint in jail, and indeed he has lost any potentiality of committing a future crime.

10. But the solution to this problem is not by passing general orders releasing prisoners en bloc, but by individually considering cases of prisoners for premature release in accordance with criteria laid down in relevant statutes and government orders at appropriate levels within a reasonable or prescribed time frame.

Factual background of the case

11. While examining the case of a convict Bachchey Lal who had sent a letter petition from jail to this Court in 1997 stating that he had served out an actual jail term of 14 years and 2 months on 7.7.97, we had passed an order on 5.3.2004 calling for an affidavit from the Superintendent, Central Jail Varanasi indicating the present status of the said convict. We also directed the Jail Superintendent to disclose, as to how many inmates are currently present in Varanasi Central jail who had undergone an actual period of detention as under trials. This direction was issued because we find that mostly prisoners with economic or political resources alone succeed in approaching this Court or the apex court or Government for relief. It is time that this Court throws open its doors also to the voiceless and the respondent resourceless.

12. In response the Deputy Jailor, Central Jail, Varanasi filed an affidavit dated 1.3.04 indicating that Bachchey Lal had been convicted under sections 302/323/34 IPC by judgment dated 31.7.84 in S.T. No. 219 of 1983 by the Additional Sessions Judge, Mirzapur. He was detained in Jail from 9.5.83 and was directed to be released on bail on 5.3.2000.

13. It was further pointed out that there were 108 inmates in Central Jail, Varanasi who had completed an actual term of over 14 years. A copy of the list of these inmates was also attached as Annexure SCA 1.

14. The list makes starting reading. On 24.2.04, (the date of the report), these prisoners are shown incarcerated in prison from periods ranging from 14 years 20 days to 26 years, 9 months and 19 days. In the majority of cases they have undergone jail terms from 17 to 20 years. What is more shocking is that even the appeals of 24 prisoners have not been decided up to the present date. Although most of the prisoners had been convicted by judgments passed by the concerned Sessions Judges after 1978, there were about 46 prisoners who had been convicted prior to 18.12.1978, and to whose cases the interdict of section 433 A of the Code of Criminal Procedure requiring them to serve out a minimum actual jail term of 14 years, without remissions would not apply.

15. A second supplementary affidavit dated 5.4.04 has been filed by the Deputy Jailor on 6.4.04. This affidavit

has annexed a Government order, SCA 1, dated 6.2.1992 issued by the State Government in exercise of powers conferred under Article 161 of the Constitution of India, fixing guidelines for considering prayers for reducing the sentences, commuting sentences and considering mercy petitions and effecting other remissions and modifications in sentences awarded to convicted prisoners lodged in various in the State.

16. Another annexure, SCA III, to the second supplementary affidavit, mentions steps taken by the authorities for consideration oaf the prisoner's application in Form 'A', (i.e. under the Prisoners Release on Probation Act 1938, hereafter the Probation Act), and nominal roles under Paragraph 198 of the Jail Manual. The second Supplementary affidavit points out that the cases of 24 prisoners for premature relief were not considered at all because their appeals are pending before the High Court. One convict Raj Bahadur Singh son of Surya Baksh Singh was released on 26.3.04, and one prisoner Murli son of Bhaga has been directed to be released by the State Government for which the challan has been sent. Out of the 108 convicted prisoners the Forms 'A' of 32 prisoners is pending consideration under the Probation Act, and the nominal roles of 19 prisoners forwarded under para 198 of the Jail Manual and section 432 Cr.P.C., as the prisoners have completed 14 years imprisonment together with remissions are pending consideration. The cases of 31 persons have been finally rejected by the State Government under both provisions. The dates when the Forms A, and nominal roles were forwarded, and various steps taken on these applications at different stages are not mentioned. Brief reasons for rejection of the cases are also not mentioned in the Supplementary Affidavit, or the concerned Annexure, SCA III.

A third annexure, SCA II to the second supplementary affidavit contains a G.O. dated 3.7.92 which disallows consideration of the nominal roles under the 14 years guideline for premature release under paragraph 198 of the Jail Manual, if their appeals against their convictions are still pending. The G.O. also refers to an earlier G.O. dated 22.12.75 which had already prohibited consideration of Forms A under the Prisoners Release on Probation Act of those prisoners whose appeals have not yet been decided.

17. In support of the Government Orders the learned Government Advocate has referred to the following lines in paragraph 8 of the apex Court decision in *Ashok Kumar v. Union of India*, reported in AIR 1991 SC 1792 "*The law governing suspension, remission and commutation of sentence is both statutory and constitutional. The stage for the exercise of this power generally speaking (emphasis ours) is post-judicial. I.e. , after the judicial process has come to an end. The duty to judge and to award the appropriate punishment to the guilty is a judicial function thus ends the executive function of giving effect to the Judicial verdict commences."* From these observations the learned GA would like us to conclude that so long as the judicial function survives, the executive has no role to play for suspension, commutation, remission of sentences, or even for grant of pardon. This is regardless of whether an original trial or an appeal is pending before the High Court or the apex court,

and the time consumed for the disposal of the trial or appeal is of no consequence.

Analysis of the G.Os. dated 3.7.92 and 22.12.75 barring consideration of Nominal Roles and Forms A during pendency of Appeal.

Significantly the observations in the aforesaid G.O. retraining applications for premature release are qualified by the words, ' generally speaking'. If there is a complete bar on the executive for consideration of the cases of prisoners who have undergone the statutory minimum period of 14 years for grant of any kind of remission, commutation or probation in their sentences, the restriction suffers from the danger of falling foul of Articles 21 and 14 of the Constitution of India. We find that similarly places prisoners who have undergone over 14 years in Jail, and whose convictions have been confirmed as their appeals have even been dismissed or who have not preferred any appeals, are entitled to have their cases for premature release from jail considered under various statutory or constitutional provisions. This group of prisoners whose applications in Form A and nominal roles are not being considered because of non disposal of their appeals for reasons such as poverty and absence of a pairokar, and inability of the judicial system to dispose of appeals in a reasonable length of time, in fact stand on a worse footing. Such prisoners are doubly prejudiced, first as their appeals are not heard over prolonged periods. Second, even their nominal roles and applications in Form A are not forwarded precluding consideration of their prayers for premature relief long after the passage of the statutory minimum period of 14 years.

18. Specifically so far as the U.P. Prisoners Release on Probation Act 1938 is connected, it facilitates a loose form of release from jail by licence under the guardianship of a government officer or a suitable person belonging to the same religion of the prisoner, after the prisoner has served out a prescribed minimum terms, if from his antecedents and conduct in prison, the State government is satisfied that the prisoners is likely to abstain from crime and lead a peaceable life on release. The prisoner is still treated in constructive custody and the period of licensed release counts towards his sentence. There is no sound reason here, for denying a prisoner the right to have his application for release in Form A considered under this Act, until the final disposal of his appeal. *A faortiori* there is much greater reason for releasing a prisoner on parole or licence under this Act and for observing his conduct in jail and outside, if his appeal has been wrongly held up for no fault of the prisoner over an inordinately long length of time.

19. In this regard, the Constitutional apex court bench has held in *Maru Ram v. Union of India*, AIR 1980 SC 2147, in paragraph 69, *"We, heart warmingly observe experiments in open jails, filled by lifers liberal paroles and probations, generosity of juvenile justice and licensed release or freedom under leash a law. The Uttar Pradesh Prisoners Release on Probation Act, 1938. We cannot view without gloom the reversion to the sadistic superstition that the longer a life convict is kept in a cage the surer will be his redemption. It is our considered view*

that beyond an optimum point of say, eight years we mean no fixed formula prison detention benumbs and makes nervous wreck or unmitigated brute of a prisoner.'

20. Likewise in paragraph 72 (11) the same law report again reiterates. *"The U.P. Prisoners' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14 year duration. Similar other statutes and rules will enjoy similar efficacy. "*

21. More recently in *Dadu V. State of Maharashtra*, (2000) 8 SCC 437, where the Constitutional validity of section 32-A of the Narcotics, Drugs and Psychotropic Substances Act which prohibits suspension, remission or commutation of sentences during the pendency of a appeal under that Act was assailed, an argument was raised by a petitioner that even his right to be released on parole had been taken away. The apex court rejected this contention in paragraphs 6 to 11 of the report holding that there was no suspension of sentence when a prisoner was directed to be released on parole, which could always be granted in accordance with statutes, rules, jail manual or government orders. Paragraphs 10 and 11 in Dadu's case read as follows:

"10. Again in State of Haryana v. Nauratta Singh was held by this Court as under. (SCC p. 520 para 14)

'Parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but the sentence is actually continuing to run during that period also.

11. It is thus clear that parole did not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32-A of the Act. Notwithstanding the provisions of the offending section, a convict is entitled to parole, subject however, to the conditions governing the grant of it under the statute, if any the jail manual or the government instructions. The writ Petition No. 169 of 1999 apparently appears to be misconceived and filed in a hurry without approaching the appropriate authority for the grant of relief in accordance with the jail manual applicable in the matter."

In *Poonam Lata vs. M.L. Wadhawan,* a (1987) 3 SCC, it has been observed in paragraph 8:

"*The grant of parole is essentially an executive function and instances of release of detenus on parole were literally unknown until this Court and some of the High Court in India in recent years made orders of release on parole on humanitarian considerations. Historically 'parole' is a concept known to military law and denotes release of a prisoner of war on promise to return. Parole has become an integral part of the English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals. As a consequence of the introduction of parole into the penal system, all fixed-terms sentences of imprisonment of above 18 months are subject to release on licence, that is, parole after a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as a matter of right and the*

convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty of lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody."

22. From these passages and statement of the legal position we think that the State Government was not justified in prohibiting acceptance of applications in Form 'A' under the U.P. Prisoners Release on Probation Act, 1938 during the pendency of Criminal appeals by the G.O. dated 22.12.75, as release on licence or parole on controlled conditions with a promise by the prisoner to return to jail if so required appear to be the most appropriate course of action especially when the Court was not in a position to dispose of the prisoner's appeal in any rational period of time, and the prisoner had undergone the prescribed period of imprisonment, i.e. 14 years with remissions in case of trial court convictions prior to 18.12.1978 and actual 14 years imprisonment in cases to which section 433- Cr.P.C. applied, (that is post 18.12.1978 convictions), which entitled him to move an application under Form 'A'.

Suggestion to State Government to relax G.O. dated 22.12.75 and accept applications in Form A.

23. We therefore recommend to the State Government to relax the operation of the G.O. dated 22.12.75 and to accept applications for release on licence, under the U.P. Prisoner's Release on Probation Act, 1938 during the pendency of their criminal appeals, if the prisoner is otherwise eligible to prefer the same in accordance with prescribed conditions.

Direction to the Registry to furnish details of appeals and prisoners who have not been granted bail during the pendency of appeal.

24. The Registrar-General is also directed to provide within one month, in respect of all criminal appeals in which the accused have not secured bail or have been re-arrested subsequently, with reason for re-arrest, details of the year wise break up of pending criminal appeals, offences for which convicted, number of appellants who are in jail, number of appeals which have been preferred from jail, and number of represented appeals, reasons for delay in disposal of appeal, such as difficulties in preparation of paper books, or non-appearance by counsel etc. This direction is necessary because it is absolutely imperative, and the mandate of Article 21 of the Constitution of India, that appeals where prisoners are in jail, must be decided first by this Court, and it is of no consequence that there are thousands of earlier appeals pending since 1981, but where the appellants have been released on bail.

Alternative recommendation to State Government to move application under

section 389 Cr.P.C. for permitting bail in cases where accused are in jail for over 14 years, and appeals still undisposed.

25. In the alternative we also recommend to the Government Advocate to move applications after consultation with the State Government, under section 389 Cr.P.C. requesting the High Court to consider enlarging such appellants on bail who continue to languish in jail even after 14 years or other sufficiently long period of actual imprisonment, if efforts to get their appeals decided in a few months do not bear fruit.

Direction to State Government and IG, Prisons to produce records of two prisoners released by State government and 31 prisoners whose Nominal Roles and Applications in Form 'A' finally rejected.

26. It is strange that inspite of several prisoners having undergone periods vastly exceeding 14 years actual imprisonment, only two prisoners out of the 108, have been directed to be released and cases of 31 prisoners have been finally rejected. It would therefore be desirable to call for the entire records of the aforesaid 2 prisoners, Murli son of Bhagga, and Raj Bahadur Singh son of Surya Baksh Singh whose release have been ordered, and 31 prisoners whose cases have finally been rejected, in regard to consideration of their Forms A, nominal roles under the U.P. Prisoners Release on Probation Act, Jail Manual, sections 432 and 433 Cr.P.C. and any other statutory or Constitutional provisions. These records should disclose the consideration of their cases for premature release at different levels, such as at the levels of Jailor, D.M., Probation Officer, S.P./SSP, IG, Prisons, the relevant district or State level committees and State Government as may be applicable under the relevant provisions wherein their cases have been considered, and the dates when the cases have been received by the jailor and forwarded to the different appropriate levels. The State Government and Director General of Prisons is therefore being directed to produce the complete records of the two prisoners who have been released and 31 prisoners whose prayer for premature release has finally been rejected by the State Government within a period of two months.

Direction to State Government and IG, Prisons to ensure disposal of all pending applications in respect of the 19 prisoners whose nominal roles are pending, and 32 prisoners whose Forms 'A' are pending in Varanasi Central Jail within a period of 3 months.

27. This direction has become imperative, in view of the inexcusably long period of time that has already expired for consideration of the cases of these prisoners.

Criteria for disposal of applications for premature relief

Apart from the criteria for disposal mentioned in statutory provisions such as section 2 of the U.P. Prisoners Release on Probation Act, para 198 of the Jail Manual, and in the G.O.s or guidelines issued under Article 161 of the Constitution of India or otherwise, the apex Court has approved certain criteria for premature release adopted by State Governments. In para 5 of *Laxman Naskar V. Union of India,* 2000 Cri.L.J. 1471 the following points for considering

applications for premature release have been approved:

"(i) Whether the offence is an individual act or crime without affecting the society at large;
(ii) Whether there is any chance of future recurrence of committing crime;
(iii) Whether the convict has lost his potentiality in committing crime;
(iv) Whether there is any fruitful purpose of confining this convict any more;
(v) Socio-economic condition of the convict's family."

State government and IG, Prisons to submit report on all prisoners imprisoned in different jails in Uttar Pradesh who have undergone over 14 years actual imprisonment, or 14 years together with remissions in cases of conviction by the trial court prior to 18.12.78 within 3 months.

28. This report should contain all the information that was already furnished in the charts SCA I to the first supplementary affidavit dated 1.3.04 and SCA III to the second supplementary affidavit dated 5.4.04, i.e. the name, parentage and permanent address of prisoner, S.T. No., provision under which convicted, date of sentence by Sessions Court, designation of Court, period of sentence, status of appeal, status of Form A, status of nominal role, final order of State Government on application for premature release (if any). In addition the report should also mention age of prisoner, present condition of health if suffering from serious illness. Briefly the main reason for rejection of application for premature release could also be mentioned, in cases where it has been finally rejected. What was the date when the prisoner had undergone 14 years actual imprisonment, and the date when the applications in Form A, and Nominal Roles were forwarded. If the conviction by the Sessions Judge is prior to 18.12.78, the date when the prisoner had undergone 14 years together with remissions and became eligible for consideration for premature release, and the actual date for forwarding the applications in Form A and Nominal Roles. Whether any action for premature release taken under any other G.O. under Article 161 or otherwise, fate of such application.

Superintendent Central Jail, Varanasi to submit report in one month on all life convict and other prisoners who have not been able to file appeals against their convictions and the reasons for non-filing of appeals.

29. In those cases where no appeal was filed, reasons for non-filing of the appeal may be given. The last direction is necessary because we find that in the present case of Bacchey Lal, the filing of the appeal was unduly delayed by 10 years, for which the unrepresented prisoner could not be faulted as he was in jail.

Chairman Legal Services Authority will submit a report through the Secretary of the Authority within one month on steps to be taken for assisting prisoners for filing appeals, streamling procedures for filing appeals and for aquainting prisoners about prison rights including procedure for premature release under jail manual and other provisions

30. A copy of this order will be sent forthwith by the Registrar General to the

Chairman Legal Services Authority, U.P. for compliance.

State Government and IG, Prisons to report on number of seriously ill prisoners in jail, and steps taken for their release under paragraphs 195, 196 and 197 of the Jail manual and other provisions, within 3 months.

31. List for further hearing on 21.5.2004.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.4.2004

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. writ Petition No. 17415 of 1992

Raghunandan Pandey ...Petitioner
Versus
District Inspector of Schools, Basti and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Chandra
Sri S.P. Misra

Counsel for the Respondents:
Sri S.K. Tripathi,
Sri Ashraf Ali
Sri R.C. Tiwari
Sri C.P. Gupta, S.C.
S.C.

Compassionate appointment on class 4th post–once offered by the Department and accepted by the claimant-the purpose of compassionate appointment exhausted- promotional post can not be claimed by such candidate- the promotion of petitioner on the post of clerk-cum-librarian has been cancelled without affording any opportunity- and the promotion of the claimant on the post in question- held- illegal.

It is well settled that appointment on compassionate ground is given only to tide away the sudden financial crisis which the family of the deceased employee faces because of the sudden death of the sole bread earner of the family. Thus once a member of the family of the deceased employee is given appointment on such ground, which is also accepted by the claimant, the reason for giving such appointment, which is for support to the family of the deceased employee, does not exist thereafter. The appointment under the Dying in Harness Rules cannot be made an alternate source or mode of appointment. The purpose for which the appointment had been given to Respondent no. 5, had already been exhausted on 21.1.1992 when he accepted such appointment on a class IV post. The Respondent no. 5 would thereafter be entitled for being appointed or promoted on a higher post only in due course. Para 6

Further it is not disputed that the impugned order had been passed without affording any opportunity to the petitioner. The rights of the petitioner had already accrued in his favour once he had been granted promotion on a class III post vide order dated 13.1.1992. If the respondents were to pass an order to the detriment of the petitioner, it is well settled law that the petitioner would necessarily be required to be given an opportunity of hearing, which has admittedly not been given in the present case. As such the impugned order is liable to be quashed on this ground also. Para 8

Case law discussed:
(2000) 3 UPLBEC 2522

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

1. Petitioner was appointed on a class IV post on 1.12.1969 in the college

of Respondent no. 4. He was thereafter also confirmed in service. On a post of Assistant Clerk-cum-Librarian (a class III post) having fallen vacant in the college of Respondent no. 4 on account of superannuation of the incumbent, the petitioner was promoted on such post, which, according to the petitioner, was a post falling in the quota to be filled up by promotion. The said promotion was granted to the petitioner vide order dated 13.1.1992.

2. The father of Respondent no. 5 was an Assistant Teacher in some other college, who had died in harness in June, 1988. The respondent no. 5 had filed an earlier writ petition with a prayer for being given appointment under the Dying in Harness Rules. This Court, vide its order dated 13.12.1990, disposed of the said writ petition with a direction to the District Inspector of Schools to consider his (Respondent no. 5 in the present writ petition) case and give him appointment under Dying in Harness Rules in accordance with his qualification, preferably in the college in which his father was working, or else, in case if there was no vacancy in the said college, in some other college of the district. Since there was no vacancy in the college in which the father of Respondent no. 5 was working and a vacancy on a class IV post had occurred on 13.1.1992 in the college of Respondent no. 4 on account of the promotion having been granted to the petitioner as Assistant Clerk-cum-Librarian (a class III post), the Respondent no. 5 was given appointment on class IV post in the college of Respondent no. 4 vide order dated 21.1.1992. Admittedly the Respondent no. 5 joined on the said post. By the impugned order dated 11.5.1992 passed by the District Inspector of Schools, the promotion granted to the petitioner vide order dated 13.1.1992 has been withdrawn and the Respondent no. 5 has been appointment on class III post on which the petitioner had been promoted. Aggrieved by the said order the petitioner has filed the present writ petition.

On 20.5.1992, by an interim order granted by this Court, the operation of the impugned order dated 11.5.1992 had been stayed and liberty had been granted to the District Inspector of Schools to pass a fresh order after giving an opportunity of hearing to the petitioner and if any such order was passed, the same was to be subject to the result of this writ petition.

3. Counter and Rejoinder affidavits have been exchanged between the petitioner and respondent no. 5. No counter affidavit has been filed by other respondents nor has it been stated at the Bar that any fresh order has been passed by the respondent-authorities after passing of the interim order dated 20.5.1992. Learned counsel for the petitioner has submitted that on the strength of the interim order granted by this Court, the petitioner is continuing to work on the post of Assistant Clerk-cum-Librarian in the College of Respondent No. 4.

4. I have heard Sri Satish Prakash Misra, learned counsel for the petitioner, Sri C.P. Gupta, learned Standing counsel appearing for the State Respondents and Sri S.K. Tripathi, learned counsel appearing on behalf of Respondent no. 5 and have perused the record. With the consent of learned counsel for the parties, this writ petition has been heard is being disposed of at this stage.

The challenge of the petitioner to the impugned order is three fold, namely,

(i) once the Respondent no. 5 had availed the benefit of compassionate appointment under the Dying in Harness Rules, it was not open for him to claim fresh appointment on a higher post,

(ii) no appointment on compassionate ground could be made on a post which was required to be filled up by promotion and

(iii) the said order has been passed without giving any opportunity of hearing to the petitioner.

5. Admittedly the initial appointment of respondent no. 5 had been made on 21.1.1992 on a class IV post, which had fallen vacant on account of promotion having been granted to the petitioner on a class III post. Once the respondent no. 5 had accepted the said appointment on 21.1.1992, his claim for appointment on compassionate ground under the Dying in Harness Rules cease to exist thereafter. The Apex Court in the case of **State of Rajsthan vs. Umrao Singh** 1994 (6) SCC 657 has laid down that once the appointment has been made on compassionate ground the claimant would not be entitled to get another appointment on different post simply because he is qualified for other post. A Division Bench of this Court, in the case of **Dinesh Chandra Sharma vs. District Inspector of Schools, Meerut and others** (2000) 3 UPLBEC 2522, has also taken a similar view that no one will be entitled to claim appointment under the Dying in Harness Rules more than once.

6. It is well settled that appointment on compassionate ground is given only to tide away the sudden financial crisis which the family of the deceased employee faces because of the sudden death of the sole bread earner of the family. Thus once a member of the family of the deceased employee is given appointment on such ground, which is also accepted by the claimant, the reason for giving such appointment, which is for support to the family of the deceased employee, does not exist thereafter. The appointment under the Dying in Harness Rules cannot be made an alternate source or mode of appointment. The purpose for which the appointment had been given to Respondent no. 5, had already been exhausted on 21.1.1992 when he accepted such appointment on a class IV post. The Respondent no. 5 would thereafter be entitled for being appointment or promoted on a higher post only in due course.

7. As regards the other question that the petitioner had been given promotion on a class III post which post was meant only to be filed up by promotion and not by direct recruitment, the same has been disputed by the Respondent no. 5 in his counter affidavit. Although it is a settled principle of law that appointment on compassionate ground could not be given on a post reserved for promotion, but since as has already been held, once after having already been appointed on a class IV post, the Respondent no. 5 would not be entitled for subsequent appointment on a class III post on compassionate ground, the said question, which involves disputed facts as to whether the said post was actually reserved for being filled up by promotion or not, need not be decided in this writ petition.

8. Further it is not disputed that the impugned order had been passed without

affording any opportunity to the petitioner. The rights of the petitioner had already accrued in his favour once he had been granted promotion on a class III post vide order dated 13.1.1992. If the respondents were to pass an order to the detriment of the petitioner, it is well settled law that the petitioner would necessarily be required to be given an opportunity of hearing, which has admittedly not been given in the present case. As such the impugned order is liable to be quashed on this ground also.

9. For the foregoing reasons the impugned order dated 11.5.1992 passed by the Respondent no. 1 is quashed. The writ petitioner shall be entitled to continue to work on the class III post on which he had been promoted by order dated 13.1.1992.

In the result the writ petition succeeds and is allowed. No order as to cost. Petition Allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.5.2004

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

Civil Misc. Writ Petition No. 28894 of 1996

Desh Raj Mishra ...Petitioner
Versus
Chief Medical Superintendent Officer and another ...Respondents

Counsel for the Petitioner:
Sri K.K. Singh

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

Constitution of India, Articles 14 and 16- U.P. Subordinate Offices Ministerial Staff Rules, 1985-Appointment made dehory without following procedure of Selection and appointment without any sanctioned post, held, illegal and violative of Articles 14 and 16- Petitioner not entitled to any salary- Not discriminatory.

Therefore, any appointment made by a Statutory Authority, which may be a State within the meaning of Article 12 of the Constitution, if found to have been made by a person without any competence or without following the procedure prescribed by law and in case the procedure is not prescribed and the procedure adopted by the Authority is not in consonance with Articles 14 and 16 of the Constitution, the incumbent claim any benefit as in such a case the contract of service becomes unenforceable and in executable. Para 12

If the view contrary to the above is accepted, the same would override the mandate of the Constitution also, it will take away the powers of the High Court to issue a writ of quo warranto, wherein the appointment of an incumbent can be challenged not only by an aggrieved persons but a stranger also. Invalidity of an appointment may arise not only from want of qualification, but also from the violation of such legal conditions or procedure for appointment as mandatory and as a result of which the appointment becomes void. Para 13

I have heard learned counsel for the parties. I find that there was no vacancy and the procedure prescribed by the rules relevant to the selection to the post of junior grade clerk and the appointment said to have been made was not in consonance to the provisions of relevant rules applicable, as such the selection was bad. The petitioner being beneficiary appointed as a product of spoiled system, or defective system shall have no right to the post or as such he is not entitled to the salary. The petitioner has not named any of the person

similarly situated in respect of whom he is said to have been discriminated, therefore, the petitioner could not derive any benefit on this aspect. No other point has been argued, or pressed in the writ petition. Para 17

Case law discussed:

(1995) 1SCC 138
1995 (supp) 4SCC 706
(1996) 7 SCC 118
(1997) 6 SCC 574
AIR SC 3456
AIR 1997 SC 3464
(1999) 9 SCC 573
(1999) 6 SCC 255
AIR 1992 SC 789
AIR 1992 SC 2130
AIR 1991 SC 101
(1993) 2 SCC 213
AIR 1995 SC 962
AIR 1994 SC 1654
(1998) 8SCC 99
(2001) 7 SCC 231
(1999) 7 SCC 209
(1997) 5 SCC 201
(2000) 1 SCC 600
AIR 1961 SC 1107
AIR 1965 SC 491
AIR 1975 Delhi 66
(2000) 6 SCC 554
W.P. 1648 of 1986, decided on 18.12.2003
2004 (1) ESC 444 (All) DB

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

Heard Sri K.K. Singh, learned counsel for the petitioner and the learned Standing Counsel for the respondents.

1. In this petition prayer has been made for issuance of writ of mandamus directing the respondents to pay the arrears of salary of the petitioner from the date of appointment i.e. 1.3.1993 and for payment of salary month to month.

2. Brief fact necessary for adjudication of the case is that petitioner was appointed to the post of Junior grade clerk as daily wager on 1.3.93. Thereafter his services was regularized on the same post by the order dated 28.5.93 in the pay scale of Rs. 950/- 1500/- and the petitioner has continuously been working since the date of his initial appointment but no salary is being paid to him and no heed was taken on the request and representation of the petitioner and despite t he advice of the learned Standing Counsel also to make the payment to the petitioner, he is not being paid salary.

3. According to the petitioner large number of similar situated persons are also working and being paid salary and the petitioner is being discriminated under the provisions of Articles 14 and 16 of the Constitution.

4. Counter affidavit has been filed. As contended on behalf of the respondents that two posts of lower division clerk were created on 5.3.91 in District Hospital, Sonbhadra against which two persons namely, Sri Dharmesh Kumar and Sri Virendra Kumar Singh were appointed by appointment letter dated 10.6.91. Thereafter neither any post of lower division clerk was created nor any post had fallen vacant. However, when the then Chief Medical Superintendent Officer Dr. O.N. Rai was on leave for two days i.e. On 28.5.93 and 29.5.93, an order said to have been issued on 28.5.93 by the then Senior Medical Superintendent who took over the additional charge of Chief Medical Superintendent of district hospital, Sonbhadra through which the petitioner appears to have been appointment without following the procedure of selection and appointment in an illegal and irregular manner without any sanctioned post in the office and the utter violation of the provisions of **U.P. Subordinate Offices**

Ministerial Staff Rules, 1985. When Dr. O.N. Rai came back from two days causal leave the illegality in the appointment was brought to his knowledge immediately ad such appointment order was cancelled on 1.6.93.

5. According to the respondents the Secretary, Medical Health and Family Planning, State Government of U.P. Has already imposed a ban on all irregular appointment vide circular dated 10.10.90 whereby any appointment against an existing vacancy was also to be made after obtaining against an existing vacancy was also to be made after obtaining permission/approval from the State Government. It has been emphatically asserted on behalf of the respondents that the petitioner has never worked and on the basis of the illegal and irregular alleged appointment, the petitioner cannot be paid any salary. However since the said appointment in question dehores the rules and was made without any vacancy and selection process, therefore, at the wisdom of respondents the same was cancelled.

6. The question of appointment dehors the Rules has been considered by the Supreme Court from time and again and the Court held that such appointments are unenforceable and inexecutable. It is settled legal proposition that any appointment made dehors the Rules violates the Public Policy enshrined in the rules and, thus, being void, cannot be enforced. (Vide Smt. Ravinder Sharma & Anr. Vs. State of Punjab & ors., (1995) 1 SCC 138, Smt. Harpal Kaur Chahal Vs. Director, Punjab Instructions, 1995 (suppl.) 4 SCC 706, State of Madhya Pradesh Vs. Shyama Pardhi, (1996) 7 SCC 18, State of Rajasthan Vs. Hitendra Kumar Bhat, (1997) 6 SCC 574, Patna University Vs. Dr. Amita Tiwari, AIR SC 3456, Madhya Pradesh Electricity Board Vs. S.S. Modh & ors., AIR 1997 SC 3464, Bhagwan Singh Vs. State of Punjab and ors., (1999) 9 SCC 573 and Chancellor Vs. Shankar Rao & ors. (1999) 6 SCC 255.

7. Appointment dehors the Rules violates the mandate of the provisions of Article 14 and 16 of the Constitution as held by the Supreme Court in Delhi Development Horticulture Employees' Union Vs. Delhi Administration, AIR 1992 SC 789 and *State of Haryana & ors. Vs. Piara Singh*, AIR 1992 SC 2130. In *Delhi Transport Corporation Vs. D.T.C., Mazdoor Congress & ors.* AIR 1991 SC 101, the Supreme Court recognised the public employment as public property and held that all persons similarly situated have a right to share in it though its enjoyment is subject to the recruitment rules which must be in consodnance with the Scheme of the Constitution of India.

In Dr. M.A. Haque & ors. Vs. Union of India& ors., (1993) 2 SCC 213, the Supreme Court observed as under: -

".....We cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and by passing of the Public Service Commissions are permitted, it will open a back door for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commission. It appears that since this

Court has in some cases permitted regularisation of the irregularly recruited employees, some governments and authorities have been increasingly resorted to irregular recruitments. The result had been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidate dictated by various considerations are being recruited as a matter of course."

9. Deprecating the practice of making appointment dehors the Rulesk by the State or other state instrumentalist in *Dr. Arundhati A. Pargaonkar Vs. State of Maharastra AIR 1995 SC 952*, the Court rejected the claim of the petitioner therein for regularisation on the ground of long continuous service observing as under:-

"Nor the claim of the appellant, that she having worked as Lecturer without break for 9 years' on the date the advertisement was issued, she should be deemed to have been regularised appears to be well founded. Eligibility and continuous working for howsoever long period should not be permitted to over reach the law. Requirement of rules of selection ....cannot be substituted by humane considerations. Law must take its course."

10. The Supreme Court in State of U.P. & ors. Vs. U.P. State Law Officers Association & ors. AIR 1994 SC 1654 has observed as under: -

"This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the back door have to go by the same door.... The fact that they are made by Public bodies cannot best them with additional sanctity. Every appointment made to a public office, howsoever made, is not. There is, therefore, no public interest involved in saving all appointments irrespective of their mode. From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them."

Even if there are no Statutory Rules or Bye laws of the society providing a mode of appointment, the Executive Instructions/Policy adopted by the respondent- society must be there providing for a mode of appointment. Even if no such Executive Instructions /Policy/Guidelines/Circular etc. is in existence then a fair procedure for appointment has to be adopted in consonance with the provisions of Articles 14 and 16 of the Constitution. (Vide *Nagpur Improvement Trust Vs. Yadaorao Jagannath Khumbhare, (1998) 8 SCC 99).*

11. In Ramesh Kumar Sharma & Anr. Vs. Rajasthan Civil Services Appellate Tribunal & ors. AIR 2000 SCW 4206, the Supreme Court held that ' expression ' service Rules' cannot be given a restrictive meaning in the absence of the definition of the said terms and, therefore, it would include within its sweep, the necessary government order providing the method recruitment."

12. A Constitution Bench of the Supreme Court, in *B.R. Kapoor Vs. State of Tamil Nadu,* (2001) 7 SCC 231, (Jayalalitha case) observed that it is the duty of the Court to examine whether the incumbent possesses qualification for appointment and the manner in which the

appointment came to be made or the procedure adopted was fair, just and reasonable and if not, appointment should be struck down.

13. The Supreme Court (Constitution Bench) in Ajit Singh (II) Vs. State of Punjab & ors., (1999) 7 SCC 209, has held that Articles 14 and 16 (1) are basic features of the Constitution. The same view hasd been reiterated in Ashok Kumar Gupta Vs. State of U.P. And ors. (1997) 5 SCC 201, and Indra Sawhney Vs. Union of India & ors. (2000) 1 SCC 168. Thus strict adherence is required thereto.

14. In *Kumari Shrilekha Vidhyarthi etc. Vs. State of U.P. and others*, AIR 1991 SC 537, and *A.P. Agarwal Vs. Government (NCT) of Delhi & ors.* (2000) 1 SCC 600, the Supreme Court held that every State action, in order to survive, must not be susceptible to vice the arbitrariness which is a crux of Article 14 of the Constitution and the very basis of the Rule of Law.

Therefore, any appointment made by a Statutory Authority, which may be a State within the meaning of Article 12 of the Constitution, if found to have been made by a person without any competence or without following the procedure prescribed by law and in case the procedure is not prescribed and the procedure adopted by the Authority is not in consonance with Articles 14 and 16 of the Constitution, the incumbent claim any benefit as in such a case the contract of service becomes unenforceable and in executable.

If the view contrary to the above is accepted, the same would override the mandate of the Constitution also, it will take away the powers of the High Court to issue a writ of quo warranto, wherein the appointment of an incumbent can be challenged not only by an aggrieved persons but a stranger also. Invalidity of an appointment may arise not only from want of qualification, but also from the violation of such legal conditions or procedure for appointment as mandatory and as a result of which the appointment becomes void. (vide M. Pantiah & ors. Vs. Muddddala Veeramllappa & ors. AIR 1961 SC 1107, University of Mysore Vs. C.D.Govinda Rao, AIR 1965 SC 491 and P.N. Lakhanpal Vs. A.N.Roy, AIR 1975 Del. 66). There can be no quarrel to issue that the Board is an Authority, which is a ' State' within the meaning of Article 12 of the Constitution. Thus, question of saving such an illegal appointment did not arise.

15. The instant cases are squarely covered by the judgment of the Supreme Court in Factory Manager, *Cimmco Wagon Factory Vs. Virendra Kumar Sharma & Anr.* (2000) 6 SCC 554, wherein the Supreme Court, while deciding the similar case, has observed as under:

"Assuming that the respondent was asked to work in a factory in anticipation of securing appointment, that too by an officer who was not competent to give appointment, **that did not make the respondent a workman** or regular employee of the appellant company. "

16. This Court (Hon'ble R.B. Misra, J.) by the order dated 18.12.2003 passed in writ petition no. 1648 of 1986 (*Mahendra Misra Vs. Up Nideshak (Prashasan) Rajya Krishi Utpadan Mandi Parishad and another*) after considering

large number of cases of this Court Single Bench as well as Division Bench and large number of cases of Supreme Court has held that selection/recruitment or appointment to any post if some how made and benefits/gains were derived by the beneficiary appointee illegally and if at subsequent stage it is noticed that the illegalities, irregularities, improprieties, procedural infirmities and deficiencies or defects occurred in the selection or such appointments were detected on the basis of complaint or at subsequent stage during adjudication of case and it is noticed that the out put and product of such defective and bad selection is outcome of spiled and defective system and appointment has been obtained by forgery or foul play adopted or by non observance of Act, rules, norms were made in process of selection or appointment then the beneficiary candidate, who has become output and product of such defective/bad, selection or outcome of spiled system, shall have no right or claim to the post or salary or any consequential benefits in the service by virtue of such selection or appointment or gains in any form being illegal or void or non-est and being violative of the provisions of Articles 14 and 16 of the Constitution.

17. Similarly this Court (DB) in 2004 (1) ***ESC Allahabad Page 444 (Arvind Kumar Pipal and others vs. Commissioner, Trade Tax, UP Lucknow and others***) did not interfere in the selection or the appointment made irregularly and illegally.

18. I have heard learned counsel for the parties. I find that there was no vacancy and the procedure prescribed by the rules relevant to the selection to the post of junior grade clerk and the appointment said to have been made was not in consonance to the provisions of relevant rules applicable, as such the selection was bad. The petitioner being beneficiary appointed as a product of spoiled system, or defective system shall have no right to the post or as such he is not entitled to the salary. The petitioner has not named any of the person similarly situated in respect of whom he is said to have been discriminated, therefore, the petitioner could not derive any benefit on this aspect. No other point has been argued, or pressed in the writ petition.

In these circumstances, this writ petition is dismissed. Petition dismissed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.5.2004

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

Second Appeal No. 326 of 1998

Subodh Kumar Pandey ...Petitioner
Versus
The District Judge, Maharajganj and another ...Respondents

Counsel for the Appellant:
Sri Anil Bhushan

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Service Law-Termination-Temporary employee-has no right to hold the post-Merely because District Judge took into consideration fact that appellant habitual of comes to office after drinking

liquor held, order of termination can not be said as punitive one.

Following the aforesaid decision we find no merit in this appeal. The appellant was only a temporary employee and hence has no right to the post vide Triveni Shanker Saxena v. State of U.P. AIR 1992 SC 496. The appeal is dismissed. Para 8

Case law discussed:
(2003) 2 SCC 433
2003 (2) AWC 1193
2004 (1) AWC 335
(2002) 1 SCC 520
(2003) 2 SCC 386
AIR 1992 SC 496

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

1. Heard learned counsel for the parties.

2. This Special Appeal has been filed against the impugned judgment of the learned single Judge dated 9.4.98.

3. The Petitioner was admittedly a temporary employee. He used to come to the office after drinking liquor and he would create nuisance there. His service was terminated on 27.1.98 on the ground that it was no longer required.

4. The appellant filed a writ petition which was dismissed by the learned single Judge of this Court and hence this appeal.

5. The termination order was passed by the learned District Judge, Maharajganj. The appellant was a temporary employee and he should have behaved himself. Merely because the learned District Judge has taken into consideration the fact that the appellant comes of office after drinking linger this would not make the order punitive in nature in **Union of India v. A.P. Bajpai (2003) 2SCC 433** the temporary employee was found sleeping during duty hours when he was posted at the Air Port. He frequently went on leave and absented himself. Hence, his service was terminated. It was argued on his behalf that the order was punitive in nature and hence was illegal as no enquiry was held. The Supreme Court repelled this submission and held that the order was innocuous in nature.

6. In **Mathew P. Thomas v. Kerala State Civil Supply Corporation 2003(2) AWC 1193** the Appellant was a probationer who had been warned to improve his work. Since he did not work properly he was given a show cause notice and thereafter his service was terminated. The Supreme Court held that the termination order was innocuous in nature.

7. In **U.P. State Road Transport Corporation vs. U.P. Public Service Tribunal 2004 (1) AWC 335** a division bench of this Court has considered several decisions including the decision of the Supreme Court in **Pavendra Narain Verma vs. Sanjay Gandhi Post Graduate Institute of Medical Science (2002) 1 SCC 520, Dhananjai v. Chief Executive Officer (2003) 2 SCC 386, Union of India v. A.P. Bajpai (supra)** etc. and has held that even if there are some allegations against a temporary employee that would not make the termination order punitive.

8. Following the aforesaid decision we find merit in this appeal. The appellant was only a temporary employee and hence has no right to the post vide **Triveni Shanker Saxena v. State of U.P.**

AIR 1992 SC 496. The appeal is **dismissed.** Appeal Dismissed

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.4.2004

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

Civil Misc. Writ Petition No.38453 of 1998

Rama Kant Dwivedi ...Petitioner
Versus
Presiding officer, Industrial Tribunal (I), U.P., Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri Sanjay Sharma
Sri Suresh Singh

Counsel for the Respondents:
Sri V.R. Agarwal
Sri Vivek Ratan
Sri Piyush Bhargava
S.C.

U.P. Industrial Disputes Act, 1947- Section 6 N- Applicability- Appointment of petitioner as a trainee only as pay evidence on record including appointment letter-held, he cannot be treated as a workman as no relationship of master and servant exists- Further, petitioner not appointed as apprentice/trainee under any scheme approved by State Government-Thus, he cannot be treated as an apprentice falling under definition of workman as given in Act- Therefore, provisions of S. 6-N of Act, held, not applicable.

Thus, the petitioner who was appointed as a trainee only, as has been established from the record, cannot be treated as a workman as no relationship of master and servant exists. Para 12

Applying the principle laid down in the aforesaid decisions to the facts of the present case, I find that the petitioner has not been appointed as an apprentice/trainee under any scheme approved by the State Government. Thus, he cannot be treated as an apprentice falling under the definition of the word "workman' as given in the Act and, therefore, the provisions of Section 6-N of the Act would not be applicable. Para 19

Case law discussed:
AIR 1957 SC 264
AIR 1985 SC 670
AIR 1994 SC 1824
1999 (81) FLR 222
AIR 1976 SC 66
1992 (65) FLR 203
1998 (80) FLR 399
W.P. 13481 of 1999, decided on 15.7.2003
AIR 1959 SC 1191
AIR 1979 SC 1356
AIR 1981 SC 1626
1997 (75) FLR 237
W.P.No. 3574 of 1997, decided on 13.3.1997
JT 2000 (8) SC 229
2003 (97) FLR 822
1991 (62) FLR 554

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

1. By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioner, Rama Kant Dwivedi, seeks a writ, order or direction in the nature of certiorari calling for the record of the case and to quash the award dated 26th February 1998 passed by the Industrial Tribunal (I), U.P., Allahabad, respondent no.1, said to have been communicated to the petitioner vide letter dated 28th August 1998, filed as Annexure 6 to the writ petition, and other consequential reliefs.

2. Briefly stated, the facts giving rise to the present writ petition are as follows:-

3. The petitioner claims to have been appointed as a Stenographer in the establishment of the G.E.C. Alsthom

India Limited, Naini, Allahabad, respondent no.2, on 22nd March 1992. His services came to be terminated vide letter dated 9th May 1995 with effect from 13th May 1995. According to him, one Arshad Ali was appointed as a Welder (Trainee) by the respondent no.2 whose services were also terminated on 20th December 1994. Arshad Ali raised an industrial dispute which was referred to the Industrial Tribunal, Allahabad, respondent no.1, and registered as Adjudication Case No.93 of 1994. The petitioner also raised an industrial dispute which has been referred to the Industrial Tribunal, Allahabad and registered as Adjudication Case No.57 of 1996. Before the Industrial Tribunal, both the parties filed the written statement. Documentary evidence was also filed by the parties. The Industrial Tribunal, on appreciation of evidence and material on record, came to the conclusion that the petitioner was appointed as a trainee and he did not come within the purview of "workman' and, therefore, the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") are not applicable and the retrenchment is not illegal. However, in the case of Arshad Ali, the Tribunal had held the termination to be illegal and had directed for reinstatement with all consequential benefits which has been upheld by this Court.

4. I have heard Sri Suresh Singh, learned counsel holding the brief of Sri Sanjay Sharma, on behalf of the petitioner, and Sri V.R. Agrawal, learned Senior Counsel, assisted by Sri Vivek Ratan, on behalf of the respondent no.2.

5. The learned counsel for the petitioner submitted that even though in the appointment letter the respondent no.2 had mentioned the appointment of the petitioner as a Trainee but the nature of work which the petitioner was required to do, clearly made him fall under the category of the workman and, therefore, the provision of the Act was applicable. He further submitted that the petitioner was covered under the Employees State Insurance Act, 1948 as also under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 as the amount of his contribution towards the Employees State Insurance and the Provident Fund was being deducted by the respondent no.2. He submitted that the nature of employment of a person is the determinative factor for considering as to whether such a person is a workman or not and mere label or wording in the appointment letter issued by the employer would not have any effect. In support thereof, he relied upon the following decisions:-

(i) Dharangadhara Chemical Works Ltd. v. State of Saurashtra and others, AIR 1957 SC 264;

(ii) The workmen of the Food Corporation of India v. M/s Food Corporation of India, AIR 1985 SC 670;

(iii) S.K.Maini v. M/s Carona Sahu Company Limited and others, AIR 1994 SC 1824; and

(iv) M/s Reptakos Brett & Co. v. The Labour Court (Vth), Kanpur and others, 1999 (81) FLR 222.

He further submitted that even an apprentice is covered under the provisions of the "workman", as defined in the Act and, therefore, the provisions of Section 6-N of the Act ought to have been complied with before retrenching the

petitioner. In support of his submission, he relied upon the following decisions:-

(i) The Employees' State Insurance Corporation and another v. The Tata Engineering & Co., Locomotive Co. Ltd. and another, AIR 1976 SC 66;

(ii) Karuna Shankar Tripathi and others v. State of U.P. and others, 1992 (65) FLR 203;

(iii) Ram Dular Paswan and others v. P.O., Labour Court, Bokaro Steel City and others, 1998 (80) FLR 399; and

(iv) U.P. State Electricity Board and another v. Presiding Officer, Labour Court, IV, U.P., Kanpur and another, Civil Misc. Writ Petition No.13481 of 1999, decided on 15th July 2003;

6. He further submitted that the Industrial Tribunal ought to have confined itself to the dispute referred to it for adjudication and could not have gone beyond the reference. According to him, in the present case the dispute which was referred for adjudication to the Industrial Tribunal, was as to whether the termination of the services of the petitioner with effect from 13th May, 1995 is illegal or not and the relief, if any, which he is entitled? According to him, the Industrial Tribunal had gone beyond the scope of the reference by holding that the petitioner is a trainee and the employers cannot be asked to create a post or keep a person unless they require such person. There should be a post and the requirement of a trainee who had taken the training in the organization, and he cannot compel the establishment to employ him as a regular workman. In support of the aforesaid submission, he relied upon the following decisions:-

(i) The Calcutta Electric Supply Corporation Ltd. v. The Calcutta Electric Supply Workers' Union and others, AIR 1959 SC 1191;

(ii) Factory Mazdoor Panchayat v. The Perfect Pottery Co. Ltd. and another, AIR 1979 SC 1356; and

(iii) M/s Firestone Tyre and Rubber Co. of India (P) Ltd. v. The Workmen Employed represented by Firestone Tyre Employees' Union; AIR 1981 SC 1626.

7. Sri Singh further submitted that in the case of Arshad Ali who was appointed as a Welder (Trainee) by the respondent no.2 and whose services was terminated on 20th December 1994, the Industrial Tribunal, Allahabad had held him to be a workman and had further held that the retrenchment is illegal. Against the said award, the respondent no.2, i.e., the employer, approached this Court by filing Civil Misc. Writ Petition No.34469 of 1998 which had been dismissed by this Court vide judgment and order dated 3rd July 2003. He, thus, submitted that the Industrial Tribunal had committed a manifest error in holding the petitioner to be a trainee and not a workman and the retrenchment to be legal. According to him, similar treatment ought to have been given to the petitioner.

8. Sri Vijay Ratan Agrawal, learned Senior Counsel, on the other hand, submitted that the petitioner, as established clearly from the letter of appointment dated 22nd March 1992, was appointed as a trainee in the establishment of the respondent no.2. His term was extended from time to time on his request and vide order dated 9th May 1995, when his term was going to expire on 12th May 1995, he was informed that he may collect

his dues as he will be completing his training on 12th May 1995. According to him, there was no retrenchment in the present case and the petitioner ceased to be under training after the expiry of his term on 12th May 1995. He further submitted that the petitioner was not appointed under the provisions of the Apprentice Act, 1961 or under any scheme sponsored or approved by the State Government and, therefore, by any stretch of imagination he cannot be treated to be a workman falling under the provisions of the Act. According to him, merely because the provident fund and the employees state insurance contribution had been deducted from the emolument paid to the petitioner, he would not become a workman under the provisions of the Act. In support of his submission, he relied upon the following decisions:-

(i) M/s U.P. State Spinning Mills Co. (No.II) Ltd. v. Labour Court, Allahabad and another, 1997(75) FLR 237;

(ii) U.P. State Electricity Board, Kanpur v. Smt. Suman and another, Civil Misc. Writ Petition No.3574 of 1997, decided on 13th March 1997;

(iii) The Factory Manager, CIMMCO Wagon Factor etc. v. Virendra Kumar Sharma and another etc., JT 2000(8) SC 229;

(iv) U.P. State Electricity Board v. Ashok Kumar Shukla and another, 2003 (97) FLR 822;

(v) M/s G.E.C. of India Ltd., Naini, Allahabad v. Its Workmn, Prakash Narain Pandey, 1991(62) FLR 554 (Industrial Tribunal, I, U.P., Allahabad).

9. Having heard the learned counsel for the parties, I find that the petitioner was appointed as a trainee. In the appointment letter dated 22nd March 1992 issued by the respondent no.2, it has been specifically provided that they are pleased to offer training to him for a period of six months with effect from 26th March 1992 on an all inclusive stipend of Rs.750.00 p.m. during the period of training, which was to be subject to the provisions of the certified Standing Orders of the company. The term of the training period was extended from time to time, the last being upto 12th May 1995. He was undergoing training as a Typist/Stenographer (Hindi and English). Even though it is claimed that the officers of the respondent no.2 had recommended for granting a permanent appointment in the pay scale of Rs.190.00 p.m. Staff Grade III plus dearness allowances, there is nothing on record to show that the petitioner was given any permanent appointment.

10. In the case of Dharangadhara Chemical Works Ltd. (supra), the Hon'ble Supreme Court has held as follows:-

"14. The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at page 23 in Mersey Docks and Harbour Board v. Coggins & Griffith (Leverpool) Ltd., and Another, (1947) 1 A.C. 1, 23, "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question"

16. The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer or to use the words of Fletcher Moulton, L.J., at page 549 in Simmons v. Health Laundry Co. (1910) 1 K.B. 543, 549, 550:-

"In my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the ground for holding it to be a contract of service and similarly, the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service."

In the case of the **Food Corporation of India** (supra), the Hon'ble Supreme Court has held as follows:-

"The expression "employed' has at least two known connotations but as used in the definition, the context would indicate that it is used in the sense of a relationship brought about by express or implied contract of service for which he is engaged by the employer and the latter agrees to pay him in cash or kind as agreed between them or statutorily prescribed. It discloses a relationship of command and obedience. The essential condition of a person being a workman within the terms of the definition is that he should be employed to do the work in that industry and that there should be, in other words, an employment of his by the employer and that there should be a relationship between the employer and him as between employer and employee or master and servant. Unless a person is this employed there can be no question of his being a "workman' within the definition of the term as contained in the Act."

In the case of **S.K. Maini** (supra), the Hon'ble Supreme Court has held as follows:-

"It has been rightly contended by both the learned counsel that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the nature of duties of the concerned employee and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do."

In the case of **M/s Reptakos Brett & Co.** (supra), this Court has held as follows:-

"The nature of employment is not judged by the terms of the letter issued by the employer but by the nature of duty performed and if contractual employment is resorted to as a mechanism to frustrate the claim of the workman to become regular or permanent against a job which was continuous or the nature of duty is such that colour of contractual agreement is given to take it out from the provisions of the Act, such an agreement cannot be regarded as fair or bona fide. The periodical renewals if are made to avoid regular status to workman they are to be ignored as such. A practice which has been adopted as a camouflage to

circumvent the provisions of the Act which confers the benefit of permanency of workers who worked continuously for a period of more than 240 days cannot be allowed to be availed of by the employers."

11. Thus, it is well established that the nature of employment has to be seen for determining as to whether a person is a workman or not and not the wordings mentioned in the appointment letter, yet, in the present case, I find that the petitioner has failed to establish the duties which he was assigned and the work which he was doing was that of a regular workman. From the record it is absolutely clear that the petitioner was only appointed as a trainee or, in other words, as an apprentice. The Hon'ble Supreme Court in the case of Employees' State Insurance Corporation (supra) has held that in ordinary acceptation of the term "apprentice', a relationship of master and servant is not established under the law. It has held as follows:-

"5. The word "apprentice' is not defined in the Act, nor is it specifically referred to in the definition of "employee' by either inclusion or exclusion. We are unable to hold that in ordinary acceptation of the term apprentice a relationship of master and servant is established under the law. Even etymologically, as a matter of pure English, "to serve apprenticeship means to undergo the training of an apprentice" (Chambers's Dictionary). According to the Shorter Oxford English Dictionary apprentice is "a learner of a craft; one who is bound by legal agreement to serve an employer for a period of years, with a view to learn some handicraft, trade, etc. in which the employer is reciprocally bound to instruct him." Stroud's Judicial Dictionary puts it thus:-

"In legal acceptation, an apprentice is a person bound to another for the purpose of learning his Trade, or calling; the contract being of that nature that the master teaches and the other serves the master with the intention of learning".

While dealing with the nature of the relationship of master and servant in comparison with other relationships in Halsbury's Laws of England, Third Edition, Volume 25, the following passage appears at para 877, pages 451-452:

"By a contract of apprenticeship a person is bound to another for the purpose of learning a trade or calling, the apprentice undertaking to service the master for the purpose of being taught, and the master undertaking to teach the apprentice. Where teaching on the part of the master or learning on the part of the other person is not the primary but only an incidental object, the contract is one of service rather than of apprenticeship; but, if the right of receiving instruction exists, a contract does not become one of service because, to some extent, the person to whom it refers does the kind of work, that is done by a servant or because he receives pecuniary remuneration for his work."

6. The heart of the matter in apprenticeship is, therefore, the dominant object and intent to impart on the part of the employer and to accept on the part of the other person learning under certain agreed terms. That certain payment is made during the apprenticeship, by whatever name called, and that the apprentice has to be under certain rules of discipline do not convert the apprentice to

a regular employee under the employer. Such a person remains a learner and is not an employee. An examination of the provisions of the entire agreement leads us to the conclusion that the principal object with which the parties enter into an agreement of apprenticeship was offering by the employer an opportunity to learn the trade or craft and the other person to acquire such theoretical or practical knowledge that may be obtained in the course of the training. This is the primary feature that is obvious in the agreement."

12. Thus, the petitioner who was appointed as a trainee only, as has been established from the record, cannot be treated as a workman as no relationship of master and servant exists.

So far as the question as to whether the apprentice comes within the definition of "workman' under the Act is concerned, it may be mentioned here that Section 2 (a) of the Act defines "apprentice' to mean a person employed in an industry for the purpose of training therein in accordance with a scheme prepared in that behalf and approved by the State Government. Under Section 2 (z) of the Act, the word "workman' has been defined to include an apprentice also.

Sections 2(a) and 2(z) of the Act are reproduced below:-

"2. Definitions. - (a) "Apprentice' means a person employed in an industry for the purpose of training therein in accordance with a scheme prepared in that behalf and approved by the State Government;"

"(z) "Workman' means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person–

(i) who is subject to the Army Act, 1950 or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem, or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

13. From a reading of the aforesaid provisions, it is clear that in order that an apprentice, if he is to be treated as a workman, has to establish that he has been employed in the concerned industry for the purpose of training in accordance with a scheme prepared in that behalf and approved by the State Government.

This Court in the case of **Karuna Shankar Tripathi** (supra) has held as follows:-

"Thus the main question which crops up for decision in this writ petition is that

if an apprentice has been appointed under the provisions of Apprentices Act, 1961, then he cannot be treated as workman and after the completion of the training period he is not entitled to be retained in service and the provisions of Industrial Disputes Act would not be attracted to him. But if an apprentice is not appointed in accordance with the provisions of Apprentices Act then he would be an apprentice in accordance with the general terms and would come within the ambit and scope of the definition of "workman' contained in Section 2 (z) of the U.P. Industrial Disputes Act."

14. In the case of **Ram Dular Paswan** (supra), the Patna High Court has held as follows:-

"The apprentices are mere trainees who are given training in specified trade. They are not employees of the person, who has engaged them. So long as they act as trainees they will be governed by the Apprentices Act and the I.D. Act cannot be applied to them. But if an apprentice does "any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward", he will be a workman to whom I.D. Act will apply and, therefore, will not be governed by the Apprentices Act, even if he was enrolled as an apprentice trainee. It is not the label a person has, but the type of work which he does, which is relevant criteria for determining as to whether he is or is not a workman."

15. In the case of **M/s U.P. State Spinning Mills Co.** (supra), this Court has held as follows:-

"8. Since apprentice has been defined in Section 2 (a), reference of apprentice in Section 2 (z) cannot have any other meaning than that has been ascribed in Section 2 (a). In view of the definition of apprentice given in the Act the apprentice included in the definition of workman cannot be interpreted to mean an apprentice other than apprentice defined in Section 2 (a). If any such interpretation is made in that event, it would be contrary to the scheme of the U.P. Act itself. Now that the definition of workman in the Central Act includes apprentice but the word "apprentice' has not been defined in the said Act, therefore, though an apprentice who may not be an apprentice as defined in Section 2 (a) may be included in the definition of workman as defined in Section 2 (s) of the Central Act. But in cases where U.P. Act applies, such an interpretation cannot be given because of the maxim "Generalia Specialibus non-derogant". Inasmuch as a general statute must yield to a special statute. The U.P. Act is a special statute applicable only to U.P. been enacted under the concurrent legislative power provided under the Constitution would prevail upon the general definition. Therefore, the apprentice included in the definition of "workman' in Section 2(z) of the U.P. Act includes apprentice defined in Section 2(a) of the said Act and not otherwise."

16. In the case of **U.P. State Electricity Board, Kanpur** (Civil Misc. Writ Petition No.3574 of 1997, decided on 13th March 1997) (supra), this Court followed the decision given in the case of the **U.P. State Spinning Mills Limited** (supra) and has held that it is not all apprentice who will be workmen under the Act but only those apprentices who are employed in an industry for training in accordance with the scheme prepared by the State Government under Section 2 (a) of the Act.

In the case of **The Factory Manager, CIMMCO Wagon Factory Etc**. (supra), the Hon'ble Supreme Court has held as follows:-

"12. Assuming that the respondent was asked to work in the factory in anticipation of securing employment, that too by an officer who was not competent to give appointment, did not make the respondent workman or a regular employee of the appellant company. We have no hesitation to say that the Division Bench was not right in raising presumption under Section 103 of the Act in order to say that the respondent was a workman in relation to an industrial dispute for the purposes of any proceedings under the Industrial Disputes Act, 1947."

17. In the case of the **U.P. State Electricity Board v. Ashok Kumar Shukla** (supra), this Court has held that if a person has been engaged for a period of three years and was getting stipend and did not raise an issue during the period of his engagement, he has acquiesced and cannot be permitted to raise any dispute regarding his status and is disentitled for any relief before the Labour Court.

18. In the case of **U.P. State Electricity Board** (Civil Misc. Writ Petition No.13481 of 1999, decided on 15th July 2003) (supra), this Court after considering the various decisions on the subject, had summed up the position regarding apprentice as follows:-

"From the various decisions, referred to above, the following propositions of law appear to be well settled:-

(i) If a person has been engaged as an Apprentice under the provisions of the 1961 Act, he would not be treated as a workman in view of the provisions of Section 18 of the 1961 Act and he would only be treated as trainee;

(ii) Such a person would not be treated as a workman under the provisions of Section 2(z) of the U.P. Act as he is only a trainee and has not been employed to do any manual, unskilled, skilled, technical operation, clerical or supervisory for hire or reward;

(iii) If a person is not an Apprentice under the provisions of the 1961 Act, so far the State of U.P. is concerned, in order to be treated as a workman, as defined under Section 2(z) of the U.P. Act., he has to fulfill the requirement of Section 2(a) of the U.P. Act., which defines "Apprentice', i.e., he is to be employed in an industry for the purpose of training therein in accordance with a scheme prepared in that behalf and approved by the State Government;

(iv) Even if a contract of Apprenticeship entered into between the person and the employer has not been registered, as required under Section 4(4) of the 1961 Act, it would be treated as a binding contract and such a person would fall under the provisions of the 1961 Act."

19. Applying the principle laid down in the aforesaid decisions to the facts of the present case, I find that the petitioner has not been appointed as an apprentice/trainee under any scheme approved by the State Government. Thus, he cannot be treated as an apprentice falling under the definition of the word "workman' as given in the Act and, therefore, the provisions of Section 6-N of the Act would not be applicable.

20. The petitioner cannot derive any advantage from the fact that his share of contribution of provident fund and Employees State Insurance was deducted from his emoluments in as much as under Section 2 (8) of the Employees' State Insurance Act, 1948 and under Section 2 (f) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, the word "employee' includes any person engaged as an apprentice not being an apprentice engaged under the Apprentices Act, 1961. The petitioner who was engaged as an apprentice/trainee not under the Apprentices Act, 1961 was, thus, rightly covered under the aforementioned two Acts.

So far as the question regarding the scope of reference is concerned, I find that the following dispute was referred for adjudication before the Industrial Tribunal:-

"KYA SEWAYOJAKO DWARA APNE SHRAMIK RAMA KANT DWIVEDI PUTRA SRI KARE DEEN DWIVEDI KI SEWAYEN DINANK 13-5-95 SE SAMAPT KER DIYA JANA UCHIT TATHA/ATHAWA VAIDHANIK HAI? YADI NAHI TO SAMBANDHIT SHRAMIK KYA HITLABH/ANUTOSH (RELIEF) PANE KA ADHIKARI HAI EVAM ANYA KIS VIVRAN SAHIT ?"

21. As held by the Hon'ble Supreme Court in the case of the **Calcutta Electric Supply Corporation Ltd., Pottery Mazdoor Panchayat and M/s Firestone Tyre & Rubber Co. (supra)**, the Labour Court cannot travel beyond the scope of reference. The question still is as to whether in the present case the Industrial Tribunal has exceeded its jurisdiction or has traveled beyond the scope of the reference or not. Before the Industrial Tribunal the question was as to whether the termination of the petitioner's services with effect from 13th May 1995 was justified and legal or not. The Industrial Tribunal has on the material and evidence on record, found that the refusal to extend the period of training cannot be termed as illegal retrenchment. The Industrial Tribunal had further recorded a categorical finding that the extension was being granted on the request of the petitioner and if in holding that the retrenchment cannot be said to be illegal, the Industrial Tribunal had made certain observations that the employers cannot be directed to create a post or keep a person unless they require such a person, cannot be said to mean that the Industrial Tribunal has exceeded its jurisdiction or gone beyond the scope of the reference.

22. So far the analogy drawn by the petitioner from the case of Arshad Ali is concerned, it may be mentioned here that the Industrial Tribunal in the case of Arshad Ali had recorded a finding that the workman was not a trainee but was already well trained and possessed certificates and the management indulged in unfair labour practice by using nomenclature of trainee. This Court while dismissing the writ petition filed by the employer, has held as follows:-

"A perusal of the award of the Labour Court shows that it has taken into consideration the appointment letters, statement of witnesses of the management and has recorded a categorical finding that the management had indulged in unfair labour practice by using the nomenclature of "Trainee". The Labour Court found that the workman was already well trained and

possessed certificates to that effect which was filed before the Labour Court. The explanation of the management that the training was under some scheme but the management did not also file any such scheme before the Labour Court and there was also nothing on record to show as to the nature of the alleged training being given to the workman. The alleged period of training has stretched to about four years. The petitioner has been unable to show that the award suffers from any perversity and the award is based on finding of facts."

23. No benefit or advantage can be derived from the aforesaid case of Arshad Ali as in the present case, the Tribunal on the basis of material and evidence on record before it, had recorded a categorical finding that the petitioner is merely a trainee.

24. In view of the foregoing discussions, I do no find any legal infirmity in the award passed by the Industrial Tribunal. The writ petition lacks merit and is dismissed.

Petition Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.4.2004

BEFORE
THE HON'BLE MUKTESHWAR PRASAD, J.

Criminal Appeal No. 1310 of 1981

Girjapati ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri O.P. Misra
Sri Brijesh Sahai
Sri Sanjay Kumar Pandey

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

Probation of offenders Act-S. 4-Grant of benefit incident took place in 1974-Appellant found guilty by Trial court in 1981- Appellant contended that in view of long gap between date of incident and date of hearing it would not be just and proper to send him to prison again- held, said contention has force- Since injured was a public servant and was assaulted by appellant at his official residence, he is not entitled to benefit of S. 4 of the Act.

It has also been urged that the incident in question took place in the month of August, 1974 and since then about thirty years have elapsed. Moreover, the appellant was found guilty by the court below on 12.5.81. Therefore, in view of the long gap between the date of incident, date of conviction and the date of hearing it would not be just and proper to send him to prison again. I find force in this contention. Since the injured was a public servant and was assaulted at the hands of the appellant at his official residence, I am not inclined to extend him the benefit of Section 4 of the Probation of Offenders Act. Para 17

(Delivered Hon'ble Mukteshwar Prasad, J.)

1. Accused Girjapati has filed this appeal against the judgment and order dated 12.5.81 passed by Sri G.S.N. Tripathi, the then Additional Sessions Judge, Basti whereby he convicted the accused under Sections 201, 324 and 452 of the Penal Code and sentenced him to suffer rigorous imprisonment for a period of six months, two years and one year respectively thereunder. All the sentences were ordered to run concurrently.

2. In brief, the facts of the prosecution case as revealed from the record are as under.

P.W.2 Shambhoo Lal was posted as Amin in the canal department at Naugarh (Basti) in the year 1974. On 17.8.74, he was going for inspection of Ban Ganga Canal. He found the accused driving his bullock cart on the canal road in an unauthorized manner. He, therefore, challaned the accused under Section 70 of the Canal Act. Consequently, the accused was annoyed with him.

3. On 24.8.74, Shambhoo Lal (the informant) was doing official work in the outer Verandah of his official residence built in the campus of inspection house. At about 10-00 a.m., accused Girjapati arrived there in the Verandah, used filthy language to Shambhoo Lal and threatened to kill him. He took out a knife from his pocket. The informant was terrified and raised alarm. Accused dragged him from his cot and brought him down and stabbed him twice in his chest. On hearing alarm, Ramdeo, Ganga Prasad, Nageshwar, all Patrauls, and Chulhyee, Beldar who were waiting for Ziledar at the inspection house reached there and intervened. The informant was wearing a Baniyan, which was stained with blood. Accused tore out the Baniyan and took out from informant's body. He sprinkled kerosene oil upon it from the lamp kept there and burnt it. Since he was having a knife in his hand, none dared to catch him. Before leaving the scene of the incident, the accused threatened the informant/the injured not to report the incident to the police.

4. The informant reached Tetari Bazar and prepared a report of the incident in his own handwriting. He handed over his report to the police and a case was registered under Sections 307/323/201/452/426 I.P.C. and all papers were sent to P.S. Chilhiya.

P.W.1 Dr. O.B. Agarwal, Medical Officer, PHC Naugarh, examined the injuries of Shambhoo Lal at 7-30 p.m. on 24.8.74 and found two incised wounds skin deep on the right and left side of the chest.

In the opinion of the doctor, both the injuries were simple and caused by some sharp edged cutting weapon. The injuries were about half day old at the time of examination and could be caused at about 10-00 a.m. on 24.8.74.

5. The papers were received at P.S. Chilhiya on 25.8.74 at 2-30 p.m. and an entry was made. On the same day, S.I. Ram Raj Singh, the then S.O. started investigation and interrogated witnesses and after inspection of scene of incident prepared a site-plan. After completing investigation, he submitted charge-sheet against the accused.

6. Accused Girjapati was charged under Sections 307/452/201 I.P.C. on 5.8.80. He pleaded not guilty to the charges and claimed to be tried.

In order to substantiate its allegations, the prosecution examined P.W.1 Dr. O.B. Agarwal, who examined the injuries of Shambhoo Lal on 24.8.74 at 7-30 p.m. at P.H.C. Naugarh (Basti), P.W.2 Shambhoo Lal, the informant and the injured, P.W.3 Ganga Prasad, an eye witness, P.W.4 Nageshwar, who is also said to be eye witness and P.W.5 S.I. Ram Raj Singh, I.O. of the case.

7. Accused in his statement under Section 313 Cr.P.C. totally denied all accusation levelled against him by the prosecution and pleaded that he was falsely implicated in the case on account of enmity. The defence version was that accused was attending the court of S.D.M., Naugarh at Basti and was present there at 10-00 a.m. on the impugned date. Accused examined Anwar Ali Khan, the then Reader of the court of S.D.M., Naugarh in defence.

8. After close scrutiny of the entire evidence on record led by the parties learned Judge found the accused guilty for the offences punishable under Sections 452, 324 and 201 I.P.C. and convicted and sentenced him as mentioned above. Hence this appeal.

I have heard appellant's learned counsel at length and learned A.G.A. also. I have gone through the record of the lower court carefully.

9. Learned counsel for the accused-appellant has urged vehemently that inordinate delay took place in lodging the F.I.R. and F.I.R. was not lodged at P.S. Chilhiya. There is no explanation on record as to why F.I.R. was lodged at Tetari Bazar. The prosecution produced P.W.3 Ganga Prasad and P.W.4 Nageshwar who were colleagues of the injured and no independent public witness was examined by the prosecution. P.W. 4 Nageshwar turned hostile. It was also urged that both Nageshwar and Ganga Prasad were chance witnesses and the learned Judge erred in placing reliance on their testimony. It was also submitted that the accused pleaded alibi and the court below committed error in not accepting the plea of alibi. It was not proved by reliable evidence that offence took place inside the Verandah, as alleged by the prosecution, and the I.O. found no ash/evidence of burning Bandi of the injured in the Verandah and as such, the appellant could not be convicted under Sections 452, and 201 of the Penal Code.

10. On the other hand, learned A.G.A. supported the judgment passed by the court below and has urged that the appeal is liable to be dismissed.

11. I have considered the arguments advanced on behalf of the parties and have gone through the record also. Fist of all, I find that there was a motive for the appellant to commit the offence in question. P.W.2 Shambhoo Lal, the injured, testified in clear words that he found the appellant driving his bullock cart on the canal road on 17.8.74 and had filed a complaint against him. This statement of the injured was not challenged in cross-examination. It is, therefore, obvious that the appellant had a motive to cause injuries to Shambhoo Lal.

12. I further find that no delay took place in lodging the F.I.R. and reporting the incident to the police. The impugned incident took place on 24.8.74 at about 10-00 a.m. in the compound of the inspection house. The injured himself prepared a report and handed over his report to the police at P.S. Tetari Bazar. He did not go to P.S. Chilhiya on account of fear of the accused. He reiterated his statement on this point in cross-examination also and added that the village of the appellant intervened in between the place of incident and P.S. Chilhiya. The F.I.R. was lodged at 4-00 p.m. on the same day. In this view of the matter, I find that incident was reported to

the police promptly. Similarly, no delay took place in medical examination of the injuries also and the injuries were examined by a Government doctor at 7-30 p.m. on the same day.

13. So far the witnesses examined on behalf of the prosecution are concerned, P.W.2 Shambhoo Lal fully supported the prosecution story and stated categorically that on the impugned date at about 10-00 a.m. he was doing official work in the Verandah of his residence and the appellant arrived there with a Rampuri knife in his hand and threatened to kill. He tried to catch the knife but appellant gave him knife blows and caused injuries in his chest. He was cross-examined at length on behalf of the accused but in my opinion nothing material could be elicited in his cross-examination. In cross-examination also, the witness gave out that incident took place in the Verandah.

P.W.3 Ganga Prasad, a Patraul, who is named in the written report as an eye witness corroborated the testimony of the injured and gave out that he was waiting for Ziledar at the inspection house and from there he reached the scene of occurrence on hearing the alarm raised by the injured. He saw the appellant assaulting Shambhoo Lal with a knife. He added that Nageshwar and Ramdeo had also reached there. He too disclosed that Shambhoo Lal was assaulted in the Verandah.

P.W.4 Nageshwar, another eye witness named in the F.I.R., turned hostile. He, however, supported the prosecution version partly and testified that he saw Shambhoo Lal in the injured condition and some drops of blood had fallen on the floor. He further admitted that he reached there on hearing the alarm raised by Shambhoo Lal. He admitted presence of Ganga Prasad (P.W.3) at the scene of incident.

14. It was contended on behalf of the appellant that P.W.3 Ganga Prasad is a chance witness. I find no force in this contention. He disclosed on oath that he was waiting for Ziledar at the inspection house.

15. So far as the defence version is concerned, the appellant did not disclose in his statement recorded under Section 313 Cr.P.C. that he attended the court of S.D.M. Naugarh at 10-00 a.m. on the impugned date. No doubt learned counsel for the accused suggested to Shambhoo Lal as well as Ganga Prasad that accused was present in the court of S.D.M., Naugarh at Basti on the impugned date. It is noteworthy that appellant examined D.W.1 Anwar Ali Khan but in my opinion he could not help the appellant. He admitted that on 24.8.74 the S.D.M., Naugarh had gone to inspect flood affected areas in the district. He further disclosed that one Girjapati had signed the order-sheet but he could not say that the appellant had signed the order-sheet. He testified in clear words that he did not identify the appellant. In this view of the matter, the testimony of defence witness does not help the appellant. P.W.2 Shambhoo Lal and P.W.3 Ganga Prasad stated that appellant had torn Bandi of the injured, sprinkled kerosene oil thereon and burnt. The I.O. who inspected the scene of incident on 25.8.74 itself found no ash or evidence of burning Bandi of the injured on the spot. In my opinion, this part of the prosecution story does not inspire confidence and cannot be accepted.

16. In view of the foregoing discussion, I hold that learned Judge rightly found the appellant guilty for the offences punishable under Sections 452 and 324 of the Penal Code. I, however, hold that charge framed against the accused under Section 201 I.P.C. was not proved by reliable and convincing evidence. Consequently, the appellant is entitled to be acquitted of the charge framed under Section 201 I.P.C.

17. It has also been urged that the incident in question took place in the month of August, 1974 and since then about thirty years have elapsed. Moreover, the appellant was found guilty by the court below on 12.5.81. Therefore, in view of the long gap between the date of incident, date of conviction and the date of hearing it would not be just and proper to send him to prison again. I find force in this contention. Since the injured was a public servant and was assaulted at the hands of the appellant at his official residence, I am not inclined to extend him the benefit of Section 4 of the Probation of Offenders Act.

18. In the result, the appeal is partly allowed. The conviction of the appellant under Sections 452 and 324 I.P.C. is affirmed and he is sentenced to the period already undergone by him and to pay a fine of Rs. 1000/- under Section 452 I.P.C. The appellant is further sentenced to pay a fine of Rs. 1500/- under Section 324 I.P.C. He is acquitted of the charge framed under Section 201 of the Penal Code and his conviction and sentence under this Section are hereby set aside. The appellant is allowed to deposit the total fine amounting to Rs. 2500/- within a period of three months from today. In default, he is directed to suffer rigorous imprisonment for a period of two months and two months under each count.

19. The appellant is in jail. He shall be released forthwith if he is not wanted in any other crime.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.04.2004

BEFORE
THE HON'BLE MUKTESHWAR PRASAD, J.

Criminal Appeal No. 454 of 1995

Darbari and Keshav Raj ...Appellants
(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri H.N. Singh
Sri Keshav Srivastava
Sri S.N. Tripathi
Sri Rajeev Chaddha

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

Narcotic Drugs and Psychotropic Substances Act, 1985—S.20-Conviction under-Appeal-Hostile Witness-Both public witnesses denied recovery of Charas from possession of appellants in their presence, non they were arrested-Witnesses turned hoside-In cross examination by State Counsel witnesses asserted that their signatures were obtained on blank papers-no evidence of independent public witnesses on record to support prosecution story-Hence conviction and sentences set aside.

The prosecution produced two public witnesses Ram Prasad and Ishaque and both stated categorically that no Charas was recovered from the possession of

the appellants in their presence nor they were arrested. They turned hostile. In cross-examination by the State Counsel they asserted that their signatures were obtained on blank papers. Thus, there is no evidence of independent public witnesses to support the prosecution story. Para 18

Case law discussed:
1999 JT (SC) 595
2004 (48) ACC 610
2004 (48) ACC 265
1994 Crl.L.J. 1
2001 (43) ACC 170

(Delivered by Hon'ble Mukteshwar Prasad, J.)

1. Two accused Darbari and Keshavraj filed this appeal against the judgment and order dated 10.3.95 passed by Sri M.P. Gupta, the then Additional Sessions Judge, Gorakhpur in S.T. No. 188 of 1992 whereby he convicted both the accused under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act') and sentenced each of them to undergo rigorous imprisonment for a term of ten years and to pay a fine of rupees one lac. In default in payment of fine, they were ordered to suffer further rigorous imprisonment for a period of two years.

2. In brief, the facts of the case which led to the prosecution of the appellants are as under.

P.W.3 S.I. Ram Nagina Singh and P.W.4 constable Shanker Prasad were posted as Station Officer and constable respectively at P.S. Nichlaul (Mahrajganj) in the month of December, 1989. On 8th December, 1989, the Station Officer reached Jhulnipur Barrier by a Government vehicle (Jeep) driven by constable Bal Chandra Yadav. The Mukhbir informed him that at about 9-00 p.m., two persons coming from Nepal would go towards Nichnaul after crossing Amripur Bridge. Believing this information to be correct, the Station Officer collected H.C. Rajan Mishra and three constables, including Shanker Prasad. He picked up two public witnesses Ram Prasad and Ishaque also in the way. He accompanied by Mukhbir, police force and public witnesses reached Amripur Bridge and the entire force concealed themselves. At about 9-15 p.m., two persons arrived there. Mukhbir pointed out towards them whereupon they were intercepted. They tried to run away but both were apprehended towards south of Amripur Bridge.

3. On enquiry, they disclosed their names as Darbari and Keshavraj. They were searched upon and from their personal search Charas weighing about 250 grams. kept in bags were recovered. Both were found carrying Charas in bags. The arresting officer kept the recovered Charas in the bags of the accused and sealed the bags on the spot. He took out samples of Charas and samples were also sealed. A seizure memo was prepared on the spot and signatures of the witnesses and police constables were obtained. A copy of Fard was given to both the accused.

4. Both the accused alongwith recovered Charas were brought to the police station where they were detained in the lock up and Charas was deposited in the Malkhana. Head constable Kameshwar Singh prepared Chik report on the basis of seizure memo at 11-00 p.m. on the same night. An entry was made in the G.D. at serial no. 34.

5. The case was investigated by S.I. Brij Raj Singh. He started investigation, interrogated the witnesses and prepared a site-plan on 9.12.89. Samples were sent to Forensic Science Laboratory, Lucknow for chemical examination and both samples were found to be Charas. After completing investigation, the I.O. submitted two charge-sheets against the accused.

6. Both the accused were charged under Section 60 of the Excise Act and Section 20 of the N.D.P.S. Act on 9.9.92. They pleaded not guilty to the charges and claimed to be tried.

7. At the trial, the prosecution examined P.W.1 Ram Prasad and P.W.2 Ishaque, who are public witnesses and had signed the seizure memo also, P.W.3 S.I. Ram Nagina Singh is the arresting officer and proved seizure memo, P.W.4 constable Shanker Prasad had also accompanied the arresting officer on the fateful night and is a witness of fact and P.W.5 H.C. Kameshwar Singh had prepared Chik report.

8. Both the accused in their statements given under Section 313 Cr.P.C. totally denied their arrest and recovery of Charas in the manner and from the place, as alleged by the prosecution, and pleaded their false implication on account of enmity. They, however, led no evidence in defence.

9. After close analysis and scrutiny of the evidence on record led by the prosecution learned trial Judge found both the accused guilty of the offence punishable under Section 20 of the Act and convicted and sentenced them as noted above. Hence this appeal.

10. I have heard learned counsel for the appellants at length, learned A.G.A. and have gone through the record carefully.

11. Learned counsel for the accused appellants has assailed the judgment under appeal mainly on the grounds that both the public witnesses who were allegedly associated with the arrest and recovery turned hostile and did not support the prosecution version. The Charas, which was allegedly recovered was not weighed and no sample of Charas was, in fact, taken out on the spot. There has been no compliance of the provisions of Section 50 of the Act and no link evidence was produced in the trial court. The investigating officer was not examined by the prosecution. It was also contended that recovered Charas was not produced in the court and the prosecution could not establish by reliable evidence that sample which was taken out on the spot was actually sent for chemical examination.

12. Learned counsel for the appellants has placed reliance on the decisions of the Apex Court in ***State of Punjab Vs. Baldev Singh 1999 J.T. 595, Smt. Krishna Kanwar @ Thakuraeen Vs. State of Rajasthan [2004 (48) ACC 610], State of Orissa Vs. Kanduri Sahoo [2004 (48) ACC 265, Valsala Vs. State of Kerala 1994 CRI.L.J. 1 and Koluttumottil Razak Vs. State of Kerala [2001 (43) ACC 170].***

13. On the other hand, learned counsel for the State has supported the judgment and has urged that court below committed no illegality in convicting the appellant and the appeal is liable to be dismissed.

14. I have considered the respective contentions of the parties and what I feel is that the trial court was not justified in convicting the appellants for possessing Charas. First of all, I find that mandatory provisions of Section 50 of the Act were not complied with by the arresting officer. It transpires from perusal of the seizure memo that the arresting officer had prior information from the Mukhbir that two persons coming from Nepal would go to Nichlaul and they were carrying Charas. The arresting officer decided to take action and apprehend the culprits. The alleged recovery and arrest was made from a public place. The arresting officer was, therefore, required under the law to apprise the appellants of their valuable right that if they so desired they could be taken to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate for personal search. In the present case, there is not even a whisper that the accused were apprised of their right to be searched before a Gazetted Officer or a Magistrate. It is correct that the arresting officer tried to strengthen the prosecution case by saying in the court that both the appellants were given an option to be searched before the Gazetted Officer. He, however, could not disclose that they were apprised of their right that they could be taken to the nearest Magistrate also. P.W.4 Shanker Prasad, a constable also tried to support the prosecution on this point but in view of the fact that recovery memo is totally silent on this point, I am not prepared to accept the testimony of the arresting officer as well as P.W.4 Shanker Prasad in this regard and I hold that there has been no compliance of mandatory provisions of Section 50 of the Act. The law is well settled on the point that in case it is found that there has been non-compliance with the requirement of Section 50 of the Act it is difficult to sustain the conviction and sentence of the appellants. Consequently, the appellants are entitled to be acquitted on this score.

15. I find from perusal of the Fard recovery as well as testimony of the arresting officer and the constable that recovered Charas was never weighed by the police. The arresting officer has not mentioned in the seizure memo that he took out samples from both bags being carried by the appellants. Contrary to this, S.I. Ram Nagina Singh testified in the court that a portion of the recovered Charas was separated and sealed. The arresting officer proved the recovered Charas from the possession of the appellants in the court but he could not face the test of cross-examination on this point. He gave out in the opening line of his cross-examination that he had not sealed the recovered Charas in the 'Gamcha' and according to him, the Charas was sealed in the 'Gamcha' by the employee's of the Forensic Science Laboratory. It is noteworthy that samples of the contraband are sent for chemical examination and not the whole contraband article. S.I. Ram Nagina Singh further demolished the prosecution case by admitting that there was no distinguishing mark on the bag on the basis of which he could say that the bag was the same which was sealed on the spot.

P.W.4 Shanker Prasad further gave a death blow to the prosecution story by saying that recovered Charas was not sealed in the cloths which was produced in the court. He further clarified that he could not say that the bag produced in the court was same bag, which was sealed on

the spot. In his own words "NIYALAYA ME UPLABDH BAG KO DHEKHKAR GAWAHN NE BATAYA KI MAI NAHI BATA SAKTA HOO KI YAH BAG MAUKE PAR BARAMAD HOOYA THA YA NAHI". Constable Shanker Prasad gave out that except Charas and bag nothing was recovered from the possession of the appellants. This statement of the witness does not inspire confidence. The appellants were coming from Nepal and were going to Nichlaul. They must be having some money in their pockets to meet the necessary expenses.

16. I further find that no link evidence was produced by the prosecution to show that the samples taken out by the arresting officer were actually sent to the Forensic Science Laboratory and the same samples were actually examined.

17. The prosecution has further failed to explain as to why the investigating officer was not examined in the trial court.

18. The prosecution produced two public witnesses Ram Prasad and Ishaque and both stated categorically that no Charas was recovered from the possession of the appellants in their presence nor they were arrested. They turned hostile. In cross-examination by the State Counsel they asserted that their signatures were obtained on blank papers. Thus, there is no evidence of independent public witnesses to support the prosecution story.

19. In view of the infirmities and discrepancies in prosecution case/evidence on record, I hold that the learned trial court committed error in appraisal of the evidence on record as well as in the application of relevant law. Consequently, I hold that the conviction of the appellants is not sustainable and is liable to be set aside.

20. In the result, the appeal is allowed and the conviction and sentence passed by the trial court against the appellants are set aside and they are acquitted. The appellant no 1 is on bail. His bail bonds are cancelled and sureties are discharged. The appellant no.2 is in jail. He will be reliesed forthwith if his not wanted in any other crime.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.4.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No.1358 of 1984

Smt. Sarwari Begum ...Petitioner
Versus
VII Additional District Judge and others ...Respondents

Counsel for the Petitioner:
Sri Navin Sinha
Sri Ashish Srivastava

Counsel for the Respondents:
Sri Chandjra Prakash
S.C.

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972- S. 21(1) (a)- Release application by landlady for her own and her son's residence after making additional constructions- the need of land lady, held, bonafide and genuine- Petitioners could not be saddled to live in one room of which she is not full owner- She is entitled to stay in premises in which she is admittedly sole owner- Thus plaintiff, held entitled to relief claimed in her

release application- petitioner will suffer greater hardship, if her release application is rejected.

The petitioner has contended that if the accommodation is released, she will make additional constructions to meet the need of her family requirement. In my view the need of the petitioner is bonafide and genuine. The petitioner could not be saddled to live in one room of which she is not the full owner. The petitioner has only 1/9th share in an accommodation comprising of two rooms. Therefore, even though she is occupying one room, she is not the full owner of that one room. The petitioner cannot be forced to stay in an accommodation in which she is not the full owner. She is entitled to stay in the premises in which she is admittedly the sole owner of that premises. Thus the petitioner is entitled to the relief claimed in her release application. Para 10

On the question of hardship, I find that the petitioner shall suffer greater hardship in the event the release application is rejected. The tenant can always shift to another accommodation. It is not expected that the petitioner being a landlady and owner of the premises in question, herself takes on rent another accommodation in order to meet the need of her growing family. Para 11

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner is the landlady and owner of the premises in question which consist of a room, a varandah and an open space. Respondent No. 3 is the tenant in the premises in question. The petitioner moved an application under Section 21(1) (a) of the U.P. Act No.13 of 1972 for the release of the accommodation in question on the ground that the premises in question was required for the purpose of residence for herself and for her sons who are members of her family. The petitioner alleged that she was presently residing in the house of her brother as a licensee in a single room on the ground floor and that her brother was residing on the first floor, which also consisted of one room. The family of the petitioner's brother comprises of his wife and three sons. The family of the petitioner's brother was growing and he was having difficulty to adjust his family in one room. On the other hand the petitioner alleged that she also has 3 sons, two of them are married and the third son is still studying in college. The petitioner contended that she was finding it difficult to accommodate her family in the present accommodation and if the premises in question is released she could accommodate her family after making necessary constructions.

2. The tenant contested the application for release mainly on the ground that the petitioner is the owner of the single room where she is residing at the present moment and that her brother was not the exclusive owner of the said house. It was alleged that the petitioner was living on the ground floor as owner and not as a licensee.

3. In support of her contention, the petitioner filed the affidavits of her brothers, namely Qadir Ahmad and Sharif Ahmad stating therein that Sharif Ahmad is the owner of the premises in which the petitioner was residing and that the petitioner had relinquished her share in it.

4. The prescribed authority allowed the release application and held that the need of the petitioner was bonafide and genuine and that the need of the petitioner was greater than that of the tenant. The prescribed authority found that the petitioner had relinquished her share in

the premises in question and that her brother, Sharif Ahmad was the sole owner of the premises. The prescribed authority further held that the petitioner was residing in that premises as a licensee.

5. Aggrieved by the order of the prescribed authority, the tenant filed an appeal before the District Judge under Section 22 of the Act. The Additional District Judge allowed the appeal and the order of the prescribed authority was set aside. The appellate court found that the petitioner did not relinquish her share in the premises in which she was residing and that she was a co-owner and therefore the need of the petitioner was not bonafide.

6. Heard Sri Ashish Srivastava, the learned counsel holding the brief of Sri Navin Sinha, Senior Advocate. No one appears on behalf of the respondents.

7. In my view the approach adopted by the appellate court was not correct. The appellate court had presumed that the bonafide need of the petitioner did not exist merely on the ground that she was a co owner having 1/9th share in the premises in which she was residing. Assuming that the petitioner was a co owner of the premises in which she was residing, the appellate court ought to have considered whether the premises in which she was residing was sufficient for her need and for her family members. The appellate court should have considered as to whether the petitioner required additional accommodation.

8. Without going into the question as to whether the appellate court was right in holding that the petitioner did not relinquish her share in the premises in which she was residing, this court is proceeding with the assumption that the petitioner is a co owner to the extent of 1/9 share in the premises in which she is presently residing.

9. The question that arises is whether $1/9^{th}$ share in the premises was sufficient for the petitioner's need and for her family members. At the present moment the petitioner and her son are living in one room. Two of her sons are already married and living elsewhere. They need to visit their mother from time to time.

10. The petitioner has contended that if the accommodation is released, she will make additional constructions to meet the need of her family requirement. In my view the need of the petitioner is bonafide and genuine. The petitioner could not be saddled to live in one room of which she is not the full owner. The petitioner has only 1/9th share in an accommodation comprising of two rooms. Therefore, even though she is occupying one room, she is not the full owner of that one room. The petitioner cannot be forced to stay in an accommodation in which she is not the full owner. She is entitled to stay in the premises in which she is admittedly the sole owner of that premises. Thus the petitioner is entitled to the relief claimed in her release application.

11. On the question of hardship, I find that the petitioner shall suffer greater hardship in the event the release application is rejected. The tenant can always shift to another accommodation. It is not expected that the petitioner being a landlady and owner of the premises in question, herself takes on rent another

accommodation in order to meet the need of her growing family.

12. In the result, the writ petition succeeds and is allowed. The order of the appellate court dated 20.10.1983 is quashed and the order of the prescribed authority dated 21.8.1981 is restored. In the circumstances of the case there shall be no order as to cost. Petition allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.4.2004

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

First Appeal No. 319 of 1997

M/s Nadeem Apartment Private Ltd. and another ...Appellants
Versus
State of U.P. and others ...Respondent

Counsel for the Appellants:
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Sri G.N. Verma
Sri S.A. Gilani
Sri W.H. Khan
Sri J.H. Khan
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Sri Ravi Sinha
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Sri A.K. Gaur

Code of Civil Procedure, 1908- 0.39 R. (2) proviso (as amended by U.P. Act 57 of 1976)-Permanent injunction- Grant of under said proviso no injunction shall be granted to stay proceedings for recovery of any dues recoverable as arrears of land revenue unless adequate- Relief of permanent injunction–sought without complying with said provision- Hence civil court has no jurisdiction to grant such relief.

In this connection when we go through the provisions of the Civil Procedure Code we find that in the State of U.P. in Rule 2 (2) of Order 39 the following provision has been added by U.P. Act no. 57 of 1976:- "provided that no such injunction shall be granted ...(g) to stay the proceedings for the recovery of any dues recoverable as land revenue unless adequate security is furnished. Para 19

In the instant case there is absolutely no material to show that any security was furnished by the appellants in connection with the recovery certificate which was issued by the Uttar Pradesh Financial Corporation against them. The non-compliance of above provision coupled with the fact that the adjustment of Rs. 17,68,450.00 claimed by the appellants is without any payment of any Court fee, in the suit for the relief leave no doubt that the civil court has no jurisdiction unless there is compliance of the provisions of the Civil Procedure Code. The relief of permanent injunction has been sought without complying with this provision. In view of this we are of the view that the Civil Court has no jurisdiction to grant such relief. The result of the above discussion is that this appeal has no force. Accordingly, it is dismissed. Para 20

Case law discussed:
1977 AWC 115(FB)
1972 ALJ 861
JT 1994 (2) SC 604
(2004) 2 SCC 283

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

1. This appeal has been filed against a judgment and decree dated 14.8.1997 passed by Ist Additional Civil Judge (Sr.

Division), Meerut dismissing the original suit no. 549 of 1985 with costs.

2. The history giving rise to his first appeal is that the original suit no. 549 of 1985 was filed by the appellants against the respondents. In the above suit it was pleaded that the appellants took a commercial loan of Rs. 11.70 lacs and an additional loan of Rs. 3.50 lacs for M/s Rasolia Cold Storage Pvt. Ltd. from Uttar Pradesh Financial Corporation in the year 1979-1980 executing agreements. The amounts of the above loans were not paid by the appellants, and consequently a recovery certificate was sent to the District Magistrate, defendant no.2 by the Uttar Pradesh Financial Corporation. On the basis of the aforesaid recovery certificate defendant no.2, District Magistrate, Meerut appointed defendant no.3 Potato Development Officer as Receiver of the above Rasolia Cold Storage and possession of the same was taken over by the Receiver. The appellants in their above suit challenged the appointment of defendant no.3 as Receiver and pleaded that the possession taken over by the Receiver was illegal. They alleged to have suffered loss worth rupees several lacs on account of misappropriation of the articles including machinery, potato bags, furniture's etc of the Cold Storage. The further contention raised in the suit was that the Receiver did not maintain any account after taking over possession and misappropriated 37279 bags of potato belonging to the farmers, furniture's and other articles all amounting to Rs. 17,68,450.00. Appellants filed Misc. Civil Writ Petition No. 10627 of 1984 against the respondents before this Court challenging the appointment of the Receiver and by virtue of an order passed in that writ petition possession of the Cold Storage was ordered to be restored back to the appellants on their depositing Rs. 1.00 lac. Rs. 1.00 lac was deposited and the Cold Storage in question was restored back to the plaintiffs.

3. According to the plaint case, after taking over possession of the Cold Storage, the respondents misappropriated many articles and did not give any proper list of articles while handing over its possession back to the appellants. As per the plaint case the respondents in collusion with each other managed to sell the property of the Cold Storage worth Rs. 1.00 crore for an amount of Rs. 17.00 lacs only to the defendant nos. 5 to 7. They claimed the relief of setting aside the above sale and claimed adjustment of the loss suffered by them on account of appointment of the Receiver. The following reliefs were prayed for by appellants:-

(i) That an amount of Rs. 17,68,450.00 suffered by way of loss by them be declared to be adjustable against their loan dated 23.12.1990 and 30.3.1979.

(ii) That the defendant-respondents be restrained from realising the amount of loan by way of arrears of land revenue or through any process by adopting coercive measure or by auction of the pledged property till the amount of Rs. 17,68,450.00 is adjusted or any other amount found to be paid by the plaintiffs to the defendants stands adjusted.

(iii) That the order passed by defendant no.2 confirming the sale and the other proceedings relating to that, passed in favour of defendant nos. 5 to 7 pertaining

to Rasolia Cold Storage be set aside and declared void.

4. Before the lower court all the defendants filed their written statement and contested the suit.

5. In a joint written statement filed by respondent nos. 1,2,3 & 4 it was pleaded that on the receipt of the recovery certificate for Rs. 23,10,416.00 which was found to be due against the appellant, the proceedings for recovery under the U.P.Z.A. and L.R. Act were taken and therefore, the suit filed by the appellant was barred by section 287-A and 331 of the U.P.Z.A. & L.R. Act. In their written statement the question of jurisdiction of the civil court to try the suit was also raised by them. They denied to have misappropriated any article of the Cold Storage in question and pleaded that the appellants have not suffered any loss. They contended that the Receiver had found the record of the Cold Storage incomplete at the time of taking over the possession of the Cold Storage and the entries of the records were found to be fake and manipulated. They challenged the claim of adjustment of more than Rs. 17.00 lac denying their any liability for any loss.

6. The defendant no.2 contested the suit and filed a separate written statement wherein it was pleaded that the proceedings under the provisions of U.P.Z.A. & L.R. Act were initiated in accordance with law, and therefore, the suit was not maintainable. They challenged the rights of the appellants to get the adjustment of the amount of Rs. 17,68,450.91.

7. Defendant nos. 5,6 & 7 contested the suit filing their written statement separately. In their written statement they pleaded that an auction was proposed to be held by opening tenders and the appellants have no right to challenge the highest tender accepted for the auction. The question of maintainability of the suit was also raised by them.

8. On the basis of the pleadings of the parties the lower court framed in all 12 issues for the decision of the suit and after considering the evidence both oral and documentary led by the parties the trial court passed the impugned judgment and decree. Feeling aggrieved against this judgment and decree this appeal has been filed. We have heard the learned counsel for both parties at length and have given our careful consideration to the materials available on the record. In the instant appeal the following points arise for decision:-

(i) Whether the appointment of defendant no.3 as Receiver by defendant no.2 was illegal? If so, its effect?

(ii) Whether the Receiver after his appointment caused loss/damage to the Cold Storage to the extent of Rs. 17,68,450/- as pleaded in the plaint?

(iii) Whether the plaintiff is entitled to adjustment of Rs. 17,68,450/- or any amount towards loss?

(iv) Whether the auction of the Cold Storage is illegal and collusive and is for inadequate amount, if so, its effect?

(v) Whether the civil court has jurisdiction to grant the relief claimed?

9. We have heard the learned counsel for both the parties at length and have also gone through the record.

10. On the first point it is argued from the side of the appellants that the trial court did not finally adjudicate the issue framed on this point and has observed only this much that the controversy relating to this point was involved in C.M.W.P. 10627 of 1984 before the High Court, and therefore, when that writ petition was pending this issue cannot be decided by it. The contention from the side of the appellants before this Court is that the above writ petition no. 10627 of 1984 had been disposed of by this Court as early as on 11.2.1986 whereas the trial court decided the suit on 14.8.1997, and therefore, the above observations of the trial court are factually incorrect. His argument is that in absence of any finding recorded by the trial court on the above issue the case of the appellants has been prejudiced. When we go through the record we find that there is absolutely not aniota of evidence (oral or documentary) to show that the above writ petition had been disposed off on 11.2.1986. Even in the oral evidence led by the appellants before the trial court not a single word has come for the disposal of the above writ petition. Learned counsel for the appellants has pointed out that an affidavit enclosing a copy of the order of this Court passed in above writ petition was brought on the record before the lower court, therefore, the trial court has committed error in not considering this affidavit on above issue. It cannot be disputed that the provisions of Civil Procedure Code as they stood on the date of decision of above suit provided for adducing oral and documentary evidence for the decision of a suit. In any suit the documents which are not certified copies or are not proved by leading cogent oral evidence cannot be read in evidence. Also when oral evidence was led by both the parties evidence in the form of affidavit could not be led. Therefore, in absence of any provision to permit the appellants to lead evidence in the form of affidavit and in any certified copy of judgment of petition above argument advanced from the side of the appellants cannot be taken to be helpful to draw an inference that the trial court has committed an error in deciding the above issue no.1. In view of all the above facts and circumstances, the trial court cannot be blamed for not deciding this point. Moreover, when we consider the contention raised from the side of the appellant we find that there is no denial of the fact that the above writ petition was dismissed by this Court recording the statement of the counsel for the petitioner that the petition has become infructuous. Thus there was no decision by this Court in above writ petition on merits on above point. As such the above decision of the writ petition is therefore of no help in coming to any conclusion on this point.

11. Now we proceed to examine whether the appointment of defendant no.3 as Receiver by defendant no.2 is illegal. Admittedly a recovery certificate of Rs. 23,10,416.91 was issued by the Uttar Pradesh Financial Corporation against the appellants and after the receipt of this recovery certificate under the provisions of Section 279 (i) (g) and 286-A of the U.P.Z.A. & L.R. Act the District Magistrate appointed defendant no.3 as receiver for the Cold Storage in question. Learned counsel for the appellants had relied on the decision in **M/s R.B.Lachhmandas Sugar & General**

Mills (P) Ltd. and another Vs. State of Uttar Pradesh and others 1977 AWC page 115 (Full Bench) and **Diamond Sugar Mills Ltd. and anotherVs. State of U.P. and others** 1972 ALJ page 861. A perusal of the decision in M/s R.B. Lachhmandas Suger & General Mills (P) Ltd. (supra) shows that in that case this Court took the view that "A Collector exercising powers under section 286-A of U.P.Z.A. & L.R. Act has to objectively consider whether it is just and proper to appoint a Receiver after giving opportunity of hearing to the defaulter but he is not bound to exhaust the modes of realization contained in Clause (a) to (f) of Section 279 of the said Act before appointing a Receiver under Section 286-A of the Act." From this Full Bench decision it is clear that the Collector has been empowered to appoint a Receiver under Section 286-A of the aforesaid Act but the only requirement is that he has to give a notice to the defaulter before such appointment of Receiver and has to consider objectively such appointment. In the instant case on the record there is not a single word in the oral evidence adduced from the side of the appellants before the trial judge that no such show cause notice was ever issued by the Collector to the appellants before the appointment of the Receiver. When the recovery was for an amount of more than Rs. 23.00 lacs payable to the Uttar Pradesh Financial Corporation and as per above Full Bench decision the Collector has power to appoint a Receiver without exhausting other modes of recovery. In absence of any cogent and reliable evidence from the side of the appellant that no notice was given to the appellants before appointing the Receiver or that the Collector did not consider the matter objectively in doing so in our view the Collector cannot be said to have exercised his power illegally in appointing the Receiver for the Cold Storage. The other ruling cited from the side of the appellants **Diamond Sugar Mills Ltd. and another** (supra) is a case in which on the basis of a report of the D.G.C. (Civil) the Receiver was appointed for a running the business of the petitioner exparte without any notice. In that case this Court took the view that "The reasoning given in Smt. Vimla Rani's case Civil Misc. Writ Petition No. 3264 of 1971 decided on 18.5.2004 is suggestive that the receiver should, normally be appointed only in case the other processes are insufficient for the recovery of the arrears." Therefore, in the circumstances of this case this ruling is not applicable. In the instant case there is also no evidence to suggest that there was any malafide intention on the part of the Collector in appointing the Receiver. The appellants had taken loan and failed to pay the same as per terms of the agreement. Only thereafter was the recovery certificate was issued.

12. Considering all above facts we are of the view that the appointment of the Receiver by the Collector cannot be held to be illegal or malafide.

13. Now coming to point nos. 2 & 3 when we go through the record we find that the appellants have claimed damages for the loss of the articles of the Cold Storage including several bags of potato. In the plaint before the trial court in schedule A & B a list of the properties which were shown to have been misappropriated are given. In schedule A loss on account of various items have been valued to the tune of Rs.2,96,400.00 whereas loss in the schedule B is shiun as

Rs.14,72,000.00 which included the misappropriation of potato bags stored in the Cold Storage. The respondents denied that they omitted any misappropriation. The burden lies upon the appellants to prove that the articles of schedule A & B were misappropriated by the respondents. To discharge this burden the appellants have not adduced any reliable oral or documentary evidence to prove that when the Receiver took over the possession of the Cold Storage the above articles were available in the Cold Storage. While discussing the evidence led by the parties, on this point the trial court has observed that in the evidence adduced before it, it has come that due to non-availability of sufficient number of staff the verification of the number of potato bags could not be done on 11.8.1984 and the Cold Storage was sealed in the morning hours with a view to get its physical verification completed later on. The trial court has also noted that the evidence was available to the effect that on the request of the Receiver approval was made by District Magistrate by issuing notice to the owners of the Cold Storage to remain present till the panel physically verified the bags containing the potatoes. This direction was issued and the verification of the store by the panel was done who found only 22882 bags of potato whereas 8347 bags had been found to have been taken out from the store by that time. Against this in the record of the appellants 43331 bags were shown in the store and 6052 bags were shown to have been taken out. The trial court has noted on the basis of evidence led by the parties that on the point of entries about the exact stock position till 22.2.1984, 11300 bags had been shown in the stock register and thereafter before handing over the register to the Receiver fake entries in that register without mentioning any rack numbers where the bags were kept were made by the appellants although the respondents had been able to get photocopies of that store register prepared immediately after taking over the possession of the Cold Storage. The trial court has also observed that these photocopies of the said register do go to show that there was no mention of the rack numbers against the entries but subsequently with a view to justify these entries these rack numbers were entered in the register to show complete entries of the register. These cogent factual materials undoubtedly go to show that the appellants not only failed to establish the exact stock position of the Cold Storage but they manipulated entries in the register later on. Apart from this, on the rest of the page numbers of the register of the stock, cutting and re-writing had also been found by the trial court and all these created doubt about the maintenance of the register in normal course of the business. On the record there is sufficient evidence to show that there was discrepancy in the number of bags shown in the bills of the Cold Storage for the period 25.2.1984 to 6.8.1984 and the letter dated 15.4.1984 sent to the Collector also failed to explain about the above material discrepancies. Thus from the above discussion we are of the opinion that the misappropriation as pleaded by the appellants has rightly been not accepted by lower court.

14. In the judgment of the trial court it is stated that the evidence shows that the panel deputed for the physical verification found only 22.8.1982 bags out of which 6052 bags had already been taken out. There is a proper discussion of the evidence by the trial court on this points. The lower court has also observed

that the appellants were informed in writing to be for present at the time of physical verification of the articles of the Cold Storage but they deliberately absented and did not participate in the physical verification. As regards the other articles of the Cold Storage, the respondents got noted the articles when the possession of the Cold Storage was returned back to the appellants. At that time also no such discrepancy was pointed out by the appellants. In view of these materials there is absolutely no evidence to accept the case set up by the appellants about the misappropriation of the articles as pleaded by them. Accordingly, we hold that the trial court has rightly considered the evidence led by parties on this point.

15. Apart from the above discussions there is no denial of the fact that the dues for which the recovery certificate was issued were in respect of the loan taken by the appellants from Uttar Pradesh Financial Corporation. In this connection it is worth noting that there is no evidence worth the name to show that the respondents 2 to 4 have concern with Uttar Pradesh Financial Corporation, therefore, the reliefs claimed by the appellants for adjustment of any loss alleged to have been caused by above respondents 2 to 4, can not be granted in connection with the loan advanced by the Uttar Pradesh Financial Corporation.

16. In the light of aforesaid discussion the question of adjustability of the sum of Rs. 17,68,450.00 by way of loss, if any, towards the loan in question has rightly been decided by the lower court against appellants. Accordingly, we decide points 2 & 3 against the appellants.

17. Now coming to point no.4 we find that in the instant case the contention of the appellants is that the circle rate of the land of the Cold Storage in question is Rs. 1500.00 per sq. yard, and therefore the price of the land of the Cold Storage comes to Rs. 55-56 lacs. According to the appellants there were machineries etc. worth Rs. 50.00 lacs in the said Cold Storage. The respondents in collusion with each other managed to sell the said Cold Storage for a sum of Rs. 17 lacs only in favour of respondents 5 to 7. In this connection the counsel for the appellants has drawn the attention of this Court towards copy of the judgment in Civil Revision no. 867 of 1990 connected with Civil Revision no. 1079 of 1990 M/s Noor Jahan Cold Storage Vs. State of U.P. through Collector, Meerut and others decided on 18.4.1991 wherein the learned Single Judge of this Court observed that "the fact that according to the memo circle rate fixed by the A.D.M. (Finance), Meerut the value of the Cold Storage is not less 55.00 lacs and the agreement has been executed at Rs.17 lacs. There is no explanation prima facie for selling the property at such low price. Hence without making any observations on merits it cannot be said that the plaintiff has no case when he has alleged that the Uttar Pradesh Financial Corporation has acted arbitrarily and may be fraudulently in disposing of the property to M/s Noor Jahan Cold Storage for such a paltry sum when the value of the land besides structure, machinery etc. would also not be less than Rs. 50 lacs or so."

18. The learned Single Judge by making these observations (emphasis on the underlined portion) has not finally expressed his opinion about the value of the property of the Cold Storage however,

when we consider the various pronouncements of Hon'ble Supreme Court we find that circle rate can never be taken to be the proper rate to assess the actual market value of the landed property. Circle rate is meant only for registration of the sale deeds for imposing stamp duty by the Revenue Authorities. In this connection reliance can be placed on the **Jawajee Nagnatham Vs. The Revenue Divisiona; Pffocer. Ado;anad. A.P., etc.** JT 1994 (2) S.C. 604 and **Krishi Utpadan Mandi Samiti, Sahaswan, District Badaun Trough Its Secretary Vs. Bipin Kumar And Another** (2004) 2 SCC 283. In the light of these discussions when we go through the evidence led by the parties before the lower court we find that there is absolutely no reliable evidence from the side of the appellants to show that the market value of the Cold Storage in question was worth Rs. 1.00 crore including the price of land machinery etc. Therefore, the observations made by the learned Single Judge in the aforesaid revision do not help the appellants. The learned trial Judge has rightly observed that the circle rate is only meant for the realization of the stamp duty for the purposes of registration and it has nothing to do with the actual market value of the property. The trial court has also observed that the appellants failed to adduce any evidence to prove that the market value of the land of the Cold Storage was Rs. 1500.00 per sq. yard on the date of its sale. There is nothing on the record to disagree with the trial court on this point. It has also come in the judgment of the Court below that the appellants themselves valued the land of the Cold Storage in question in 1978 to the tune of Rs. 16,250.00 only and in a letter written to the District Magistrate, Meerut the price of the land in question was mentioned as Rs. 200.00 per sq. Yard. On the other hand the respondents led their evidence in the form of sale deed dated 6.4.1987 of the village Jahidpur to show that the land in that village in the year 1987 was sold at the rate of Rs. 66.00 per sq.yard or Rs. 300.00 per sq.yard. Apart from the above material the trial court has observed that in the evidence led by the parties before it the appellants themselves valued their entire project including building, machinery etc. of the Cold Storage to the tune of Rs. 18,50,000.00., Therefore, if the value of the building and machinery etc. has fetched Rs. 17 lacs in its sale to defendants 5 to 7, this value cannot be taken to be inadequate on account of any collusion amongst the respondents. The result of this discussion is that this point no. 4 has to be decided against the appellants. Accordingly, this point is decided.

19. The last point which requires decision is whether the Civil Court has jurisdiction to grant the relief claimed by the appellants. In this connection when we go through the provisions of the Civil Procedure Code we find that in the State of U.P. in Rule 2 (2) of Order 39 the following provision has been added by U.P. Act no. 57 of 1976:- "provided that no such injunction shall be granted …….(g) to stay the proceedings for the recovery of any dues recoverable as land revenue unless adequate security is furnished.

20. In the instant case there is absolutely no material to show that any security was furnished by the appellants in connection with the recovery certificate which was issued by the Uttar Pradesh

Financial Corporation against them. The non-compliance of above provision coupled with the fact that the adjustment of Rs. 17,68,450.00 claimed by the appellants is without any payment of any Court fee, in the suit for the relief leave no doubt that the civil court has no jurisdiction unless there is compliance of the provisions of the Civil Procedure Code. The relief of permanent injunction has been sought without complying with this provision. In view of this we are of the view that the Civil Court has no jurisdiction to grant such relief. The result of the above discussion is that this appeal has no force. Accordingly, it is dismissed. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.4.2004

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

Civil Misc. Writ Petition No.27625 of 2001

Ram Pratap Singh ...Petitioner
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioner:
Sri H.S.N.Tripathi
Sri P.S. Tripathi

Counsel for the Opposite Parties:
Sri R.P. Goyal, Adv. General
Sri R. K. Awasthi, S.C.
Sri S. K. Rai
Sri Yashwant Verma

Constitution of India-Article 14-U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974- Compassionate appointment-Petitioner seeking compassionate appointment-At relevant time he was a minor-Hence not eligible for appointment-Petitioner also failed to establish that family of deceased employee is in distress to –Further, Dying in Harness Rule, held, hit by Article 14 of Constitution-Doctrine of legitimate expectations explained.

There is no justification for the Government to make compassionate appointments of a dependant of an employee dying in harness ignoring families of those eligible candidates waiting in open market and whose families may be in still graver. Para 44

Compassionate appointment, in a way create reservation within reservation and it should be so high so as to destroy and make concept of equality guaranteed by Article AIR 1964 SC 179 and AIR1967 SC1283 Constitution of India, merely illusory. Reference may be made to AIR 1963 SC 649. Para 45

To sum up-(i) petitioner has failed on the facts of the present case, as discussed above, to prove 'distress' which could warrant compassionate appointment to mitigate hardship immediately to the family of deceased employee in question; and, (ii) in the light of the discussion made above, Dying in Harness Rules do not stand the fest of valid classification and, therefore, the Rules contemplating compassionate appointments are hit by Article 14 and 16, Constitution of India. (iii) Respondents are directed to activate Compassionate Fund Rule and The U.P. Benevolent Fund Scheme 1997, and to make it real, purposive and effective so as to achieve solemn object for which they are framed (iv) A copy of this judgement shall be sent to Chief Secretary for bringing the matter to the concerned and the State Government is mandated to take appropriate action in the light of the above. Para 59

Case law discussed:
(1994) 6 SCC 282, (1994) 4 SCC 138, AIR 1996 SC 2445 (Pr. 5,6), AIR 1973 SC 2602, AIR 1964 SC 1573, AIR 1971 SC 2486, JT 2001 (1) SC 536, AIR 1996 SC 2184 (Pr.10), AIR 2001 SC 1203 (Pr. 11), (1991) 4 SCC 139,

(2000) 5 SCC 488:2000 AIR SCW 2037: AIR 2000 SC 2264: 2000 Crl.L.J 2971, (197) 1 SCC 19 (Pr. 29, 31), (1975) 3 SCC 76, AIR 1956 SC 486, (1989) 2 SCC 145, (1997) 2 SCC 65 (Pr. 15,16), (1994) 2 SCC 718, JT 1994 (3) SC 525, (1996) 2 UPLBEC 843 (Pr.9), (1994) SCC 192, (1998) 2 SCC 412 (Pr. 5), (1998) 5 SCC 192, AIR 1963 SC 649, AIR 1964 SC 179, AIR 1967 SC 1283, JT 2003 (5) SC, JT 2003 (6) SC 37, W.P. 29194 of 2001, W.P. 1437 (SS) of 2001, AIR 1993 SC 477

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

1. Notice of the Writ Petition was received by the office of the Chief Standing Counsel, High Court, Allahabad, on July 19, 2001. Case was listed before the Court on several occasions but no counter affidavit filed by the Respondents. No request made to file it till this stage of hearing.

2. Learned Counsels for the parties agreed that the writ petition be decided finally at the admission stage as contemplated under Chapter XXII Rule 2-IInd Proviso, Rules of Court, 1952.

FACTS:-

3. One Anil Kumar Singh (father of the petitioner) working as Assistant Bhumi Sanrakshak Inspector in Government Department of State of Uttar Pradesh, died on 15.10.1998. His son, Ram Pratap Singh (petitioner before us), sought compassionate appointment on the ground of his father 'dying in harness' by filing an application on 5.4.1999 addressed to Soil Conservation Officer, Sharda Nahar Pranali, Pilibhit under relevant Rules, e.g. "THE UTTAR PRADESH RECRUITMENT OF DEPENDENTS OF GOVERNMENT SERVANT DYING IN HARNESS RULES, 1974 (Annexure –1 to the writ petition without the enclosures mentioned in it). The petitioner urged that, apart from him and his mother, he had two minor brothers namely, Ikshvaku Singh and Vineet Singh and that his family was in pitiable financial condition.

4. Petitioner sent another representation dated 26.4.2001 addressed to the Director, Agricultural U.P. stating that he had applied on 5.4.1999 for appointment under 'Dying in Harness' quota and also that in the past he had sent reminders dated 25.11999, 19.4.2000, 19.8.2000 and 13.12.2000 to the concerned department but to no avail (Annexure- 2 to the writ petition).

5. Commissioner/ Administrator, Sharda Sahayak Samadesh Kshettra Vikas Pariyojana U. P. Lucknow/ Respondent no.3 sent letter dated 27.1.1998 to the Bhumi Sanrakshak Adhikari Sharda Nahar Pranali Bilsanda, Pilibhit directing for payment of pension, gratuity, Insurance, Provident Fund, etc. after submitting requisite papers in required proforma. Matter of compassionate appointment, according to him, was to be dealt by the concerned Agriculture Department to which the deceased employee belonged. The respondent no.4/ Soil Conservation Officer, Sharda Nahar Pranali, also sent a letter to the Director Agriculture U.P for consideration of petitioner's application for compassionate appointment in Government Service on compassionate ground under relevant Rules (Annexure 4 to the writ petition).

6. Similar letter dated April 29, 2000 was written by Agriculture Directorate, U.P. to Bhumi Sanrakshak Adhikari/ Respondent no.4 and certain queries were made but no reply received.

7. Being aggrieved, petitioner filed present writ petition under Article 226, Constitution of Indian on the ground, inter alia amongst others, that he be appointed in the Department of Agriculture the State Government on compassionate ground; inaction on the part of the respondents in the matter was arbitrary, illegal and violative of Article 14, 19 (1) and (g), 21, 256 and 300 A of the Constitution of India.

The petitioner, in the writ petition, prays:-

"*(a) to issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to issue letter of appointment in favour of petitioner for the post of accountant in view of his qualification on compassionate ground and to allow him to join and pay salary along with other emolument permissible under law.*

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

(c) to award the cost of the writ petition to the petitioner. "

REASONS + CONCLUSIONS:-

8. Petitioner is not entitled to the aforesaid reliefs for following reasons.

9. In the affidavit (sworn in July 2001 by Ram Pratap Singh-the petitioner himself) filed in support of the present writ petition, the petitioner has mentioned his age- 'about 20 years'. It shows that the petitioner was aged about 17 years only when his father died in October, 1998, i.e. minor and, therefore, not eligible to seek appointment at the relevant time. In addition to this, it is to be noted that 'copy of the High School Certificate', though mentioned as 'enclosures no.3' to the application (Annexure 1 to the writ petition) has not been filed on record and with-held from the Court; consequently it is not possible for the Court to ascertain otherwise date of birth of the petitioner and whether he was at all eligible to get 'compassionate appointment' when his father died in the year 1998.

10. Besides the above, 'Mark sheet of B. Com part III Examination 2001 dated 2.7.2001 (Annexure 6 to the Writ Petition) shows that petitioner pursued three year course and passed B. Com Examination-2001 from Deen Dayal Upadhyay Gorakhpur University, Gorakhpur. Aforementioned facts disclosed by the petitioner show that he could afford to pursue his graduation and completed B. Com course from Gorakhpur University in the year 2001. It could not be possible, if the family was in distress requiring immediate mitigation. In none of the representations petitioner mentioned that there was no other source of income.

11. The petitioner therefore fails to establish that the family of the deceased employee (father of the petitioner) was/is in distress to justify 'compassionate appointment' under law.

Re. constitutional validity of Compassionate Appointment-

One, Rakesh Tripathi on 10.8.2001 filed Civil Misc. Application No.74162 of 2001 under Chapter XXII, Rule 5-A, Rules of Court, 1952 praying for permission to be heard in opposition to the writ petition contending, that in case 'vacant posts' are filled on 'compassionate ground', without following normal procedure under relevant rules of

appointment, valuable rights of other eligible candidates, including the applicant who are available and desirous for being considered for appointment in Government/ Public undertaking/ Local bodies/ Corporation etc. on merit, shall be seriously prejudiced, it tends to erode 'legitimate expectation' of such eligible candidates since they are altogether excluded and denied even an opportunity of seeking employment in government department and the like. According to him, even if there are 'Dying in Harness Rules' compassionate appointments are ultravires of the constitution being violative of Article 14 & 16 of the Constitution of India. This application was allowed on 13.8.2001 subject to the objection, if any, but no objection, however, filed/raised against the said application by any of the parties to the writ-petition.

12. Sri S. K. Rai, Advocate, appearing on behalf of Rakesh Tripathi, argued that appointments made on compassionate ground, ignoring other available eligible candidates is arbitrary and violates Article 14 and 16 of the Constitution of India because there is no nexus with the object sought to be achieved; eligible available candidates are denied 'opportunity of being considered in public employment', completely erodes 'legitimate expectations' of such candidates and has no 'logic' or 'rationale' since such compassionate appointment is made ignoring that family of some such available candidate may be in 'greater distress' requiring 'more-immediate-mitigation' than a family of an employee 'Dying in Harness'. Learned counsel submits that on the ground of 'sympathy' no separate class can be legally carved out nor it is permissible in the matter of public employment under Article 14, Constitution of India. Article 14, of the Constitution permits classification provided it is based on intelligible differentia having nexus with the object sought to be achieved, now a settled 'criterion of classification' laid down by the Apex Court–in the catena of its decisions.

13. It is contended that 'misplaced' reason is no 'reason'. To say that the only solution to 'mitigate hardship' and to ensure that family of a deceased employee is able to overcome 'distress (caused by cessation of income due to death of employee) is to give compensate appointment is a trite.

'Mini-classifications based on micro-distinctions' are illusory, unreal and not warranted. Over doing of classifications is paradox of 'Equality'. The Court has to function always as a sentinel on the qui vive".

In the case of **T. R. Kothandaraman Vs. T. N. Water Supply and Drainage B.D.--(1994) 6 S.C.C. 282 (para 2),** Apex Court observed ".....*the guarantee of equality is precious and the theory of classification may not be allowed to be extended so as to subvert or submerge the same. Of course, while being called upon to decide whether the classification in question is constitutionally permissible, excellence in service has also to be borne in mind; so too the fact that excellence and equality are not friendly bedfellows. A pragmatic approach is, therefore, required to harmonise the requirements of public services with the aspirations of public servants.*"

14. According to the learned counsel appearing for Rakesh Tripathi aforesaid essential ingredients are conspicuously absent; no 'class' can be carved on the ground of 'sympathy' and the Rules, even, if framed shall be ultravire the Constitution hit by Article 14 & 16 of the Constitution of India. It is argued that no one can carve out a 'class' which is otherwise not permissible by Article 14, Constitution of India.

15. It is further argued that the observations of the Supreme Court in the case of ***Umesh Kumar Napal Versus State of Haryana,(1994)4 Supreme Court Cases 138*** **and** ***State of Haryana Versus Rani Devi, A.I.R 1996 Supreme Court 2445*** are 'per incuriam' and hence not binding 'precedents'. None of these decisions contain discussion or reasons on the point 'whether 'classification' on the ground of 'sympathy' is legally permissible under Article 14 of the Constitution.

16. Learned Counsel, to elaborate his argument, contend that the 'object' is to provide succor to a family of deceased employee in distress'. In Supreme Court judgements reason given is that the only way to achieve said object is to give 'job' to one of the dependent. Learned counsel vehemently argued that it is misplaced to say that the only 'option' is to give 'appointment' to one of the dependent of 'deceased employee'. What is to be compensated is the 'income'. Learned counsel submits that 'reservation' on compassionate ground has traces of 'employment on the ground of inheritance which has been held to be bad by the Apex Court itself.

17. Sri Yaswant Verma, Advocate, appointed 'Amicus curie' by the Court, submits that compassionate appointments are unconstitutional and arbitrary since based on artificial classifications which has no 'rational basis' or nexus with the object sought to be achieved. According to the learned counsel, the 'only object', in case of an employee 'Dying in Harness' is to mitigate hardship in case of "distress in family", of an employee 'Dying in Harness'. It is argued that said object can be achieved by extending 'financial-support'. And therefore, to give 'job', by circumventing normal rule of appointment, is uncalled for.

18. This raises a Constitutional question i.e. 'whether a compassionate appointment is hit by Article 14 and 16 of the Constitution of India'?

19. Sri H.S.N. Tripathi, Advocate, appearing on behalf of the petitioner, has adopted submissions made by the counsels representing the respondents as dealt hereinunder.

20. The Standing Counsel, on behalf of the respondents, submitted that one of the principle of interpretation namely, 'reading down' is that in case a statutory provision is capable of two interpretations, the one which saves it from the attack of its being absurd or unconstitutional, should be adopted. The Court must look to the context, its back ground and the purpose sought to be achieved through the rules in question. In that context reference is made to Rules 5, 6, 8 (2) and 9 of the Rules.

21. This argument is out of context in as much as in the case in hand there is

no such contingency of two interpretations.

It is also argued, referring to the decisions reported in **AIR 1973 Supreme Court 2602- Hari Prasad Mulshankar Trivedi Versus V. B. Raju and others (para 23), and AIR 1964 SC 1573-- B. Rajgopal Naidu Vs State,** wherein held that it is a wise tradition that Court do not adjudicate a constitutional question unless it is absolutely necessary to the disposal of the case in hand.

22. This proposition is also not relevant since the constitutional question in this case, has been urged and pressed by the learned counsel representing Rakesh Tripathi-applicant-Opposite party.

23. On behalf of the respondents, standing counsel referred to the following:

(i) AIR 1971 Supreme Court 2486–
Madhu Limaye and another Versus Sub Divisional Magistrate, Monghyr and others.

This case is not relevant and distinguishable on facts.

(ii) JT 2001(1) SC 536 (Pr 9)—
Union of India V. Elphinstone Spinning and Weaving Company Limited and others.

24. The court provided guide line as to how a statute is to be construed, there is presumption that legislature has not exceeded its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates- is always on the person who challenges its vires.

(iii) AIR 1996 Supreme Court 2184 (Pr 10)-
S. Gopal Reddy Versus. State of Andhra Pradesh.

25. Held-. It is a well known rule of interpretation of statutes that the text and the context of entire Act must be looked into while interpreting any of the expression used in Statute.

(iv) AIR 1999 Supreme Court 1149 (Pr.10)-

Ms. Githa Hariharan and another Versus Reserve Bank of India and another- Hold that- "It is well settled that if a given statute will become unconstitutional, whereas on another construction, which may be open, the statute remains within the constitutional limits, the court will prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the Constitutionality of the statutory provision."

26. Following questions emerge in the background of the submissions made by the learned counsels for the parties-

(A) One whether the observations made by the Apex Court in the leading cases on compassionate appointment are 'binding precedent' or '*per-incuriam*' ?

On the aspect of '*per-incuriam*', reference is made to the following decisions:-

1. AIR 2001 Supreme Court 1203, para 11---

M/s A-One Granites Versus State of U.P. and others. Apex Court observed:-

"11. *This question was considered by the Court of Appeal in Lancaster Motor Company(London) Limited V. Bremith Limited. (1941) 1KB 675, and it was laid down that when no consideration was given to the question, the decision cannot be said to be binding and precedents sub*

silentio and without arguments are of no moment.

In State of U.P. V. Synthetics and Chemicals Limited., (1991)4 SCC 139, reiterating the same view, this Court laid down that such a decision cannot be deemed to be a law declared to have binding effect as it contemplated by Article141 of the Constitution of India and observed thus:

"A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141."

In the case of Arnit Das v. State of Bihar, 2000(5) SCC 488: (2000 AIR SCW 2037: AIR 2000 SC 2264: 2000 Cri LJ 2971), while examining the binding effect of such a decision, this Court observed thus (Para 20):

"A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined."

2. (1991) 4 Supreme Court Cases 139 –State of U.P. and Another Versus Synthetics and Chemicals Limited and another. For ready reference Court observations reproduced below:

"40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young V. Bristrol Aeroplance Company Limited) (1944) 1KB 718: (1944) 2 All ER 293. Same has been accepted, approved and adopted by this Court while interpreting Artilce 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law ? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. " A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court of present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Limited. V. Bremith Limited. (1941) 1 KB 675, 677: (1941) 2 All ER 11 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'.....The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated

by Article 141.....Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

(Note: Judgement underline to lay emphasis)

27. It is to be noted that not a single decision is cited before me, wherein the question of such compassionate appointments being ultra vires of the Constitution being raised and considered by this Court or the Apex Court and this fact fairly conceded by the learned counsels for the parties.

(B) what is a valid classification under Article 14 of Constitution of India ?' Reference may be made to the following decisions:-

1. (1974) 1 Supreme Court Cases 19 (pr 29 and 31)-
The State of Jammu and Kashmir Versus Shri Triloki Nath Khosa and others-:-

" 29. This argument, as presented, is attractive but it assumes in the Court a right of scrutiny somewhat wider than is generally recognized. Article 16 of the Constitution which ensures to all citizens equality of opportunity in matters relating to employment is but an instance or incident of the guarantee of equality contained in Art. 14. The concept of equal opportunity undoubtedly permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension. But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.

31. Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restrains; or else, the guarantee or equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterized by different and distinct attainments. Classification, therefore, must be truly found on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved."

(underlined to lay emphasis)

2. 1975(75) 3 SCC 76,--**Mohd. Shujat Ali V. Uniion of India, pr 25 and 26 of the judgement read:-**

25.. " But the question is: what does this ambiguous and crucial phrase " similarly situated" mean? Where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. There should be no discrimination between one person or thing and another, if as regards the subject-matter of the legislation their position is substantially the same. This is some times epigrammatically described by saying that what the constitutional

code of equality and equal opportunity requires is that among equals, the law should be equal and that like should be treated alike. But the basic principle underlying the doctrine is that the Legislature should have the right to classify and impose special burdens upon or grant special benefits to persons of things grouped together under the classification, so long as the classification is of persons or things similarly situated with respect to the purpose of the legislation, so that all persons or things similarly situated are treated alike by law. The test which has been evolved for this purpose is—and this test has been consistently applied by this Court in all decided cases since the commencement of the Constitution—that the classification must be founded on an intelligible differentia which distinguishes certain persons or things that are grouped together from others and that differentia must have a rational relation to the object sought to be achieved by the legislation.

26. *But we have to be constantly on our guard to see that this test which has been evolved as a matter of practical necessity with a view to reconciling the demand for equality with the need for special legislation directed towards specific ends necessitated by the complex and varied problems which require solution at the hands of the Legislature, does not degenerate into rigid formula to be blindly and mechanically applied whenever the validity of any legislation is called in question. The fundamental guarantee is of equal protection of the laws and the doctrine of classification is only a subsidiary rule evolved by courts to give a practical content to that guarantee by accommodating it with the practical needs of the society and it should not be allowed to submerge and drown the precious guarantee of equality. The doctrine of classification should not be carried to a point where instead of being a useful servant, it becomes a dangerous master, for otherwise, as pointed out by Chandrachud, J. in State of Jammu & Kashmir v. Triloki Nath Khosa, " the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well-marked classes characterised by different and distinct attainments". Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the guarantee of equality of its spacious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality: the fundamental right to equality before the law and equal protection of the laws may be replaced by the overworked methodology of classification. Our approach to the equal protection clause must, therefore, be guided by the words of caution uttered by Krishna Iyer, J. in State of Jammu & Kashmir v Triloki Nath Khosa: (at SCC p. 42)*

Mini-classification based on micro-distinctions are false to our egalitarian faith and only substantial and straightforward classification plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality.

(underlined to lay emphasis)

3. AIR 1956 SC 486--

Biri Supply Company Versus Union of India,*. Paras *14 and 31, for ready reference, reproduced below:-

"14. It is elementary that no two things are exactly alike and it is equally obvious many things have features that are common. Once the lines of demarcation are fixed, the resultant grouping is capable of objective determination but the fixing of the lines is necessarily arbitrary and to say that Governments and legislatures may classify is to invest them with a naked and arbitrary power to discriminate as they please. Faced with the inexorable logic of this position, the learned Judges who apply this test are forced to hedge it round with conditions which, to my mind, add nothing to the clarity of the law.

I will pass over the limitations with which the classification test is now judicially surrounded, namely that it must be "reasonable", it must not be "discriminatory" or "arbitrary", it must not be "hostile"; there must be no 'substantial discrimination" and so forth and will proceed at once to a rule that is supposed to set the matter at rest. The rule is taken from the American decisions and was stated thus in State of West Bengal V. Anwar Ali Sarkar, 1952 S.C. 75(93): (AIR V 39 (E).

" In order to pass the test, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.
Mukherjea J. (as he then was) said at page 88 ibid that

"the classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect to which the classification is made and classification made without any reasonable basis should be regarded as invalid."

In another case Ram Prasad Narayan Sahi v. State of Bihar, 1958 SC 215 (AIR V 40) (F), the same learned Judge said at page 219—

"but such selection or differentiation must not be arbitrary and should rest upon a rational basis, having regard to the object which the legislature has in view."

(underlined to lay emphasis).

4. (1989) 2 Supreme Court Cases 145-- Deepak Sibal Versus Punjab University and another, Court again :-

"14. It is difficult to accept the contention that the government employees or the employees of semi-government and other institutions, as mentioned in the impugned rule, stand on a different footing from the employees or private concerns, insofar as the question of admission to evening classes is concerned. It is true that the service conditions of employees of government/semi-government institutions etc. are different, and they may have greater security of service, but that hardly matters for the purpose of admission in the evening classes. The test is whether the employees of private establishments are equally in a disadvantageous position like the employees of government/semi-government institutions etc. in attending morning classes. There can be no doubt and it is not disputed that both of them stand on an equal footing and there is no

difference between these two classes of employees in that regard. To exclude the employees of private establishments will not, therefore, satisfy the test of intelligible differentia that distinguishes the employees of government/semi-government institutions etc. grouped together from the employees of private establishments. It is true that a classification need not be made with mathematical precision but, if there be little or no difference between the persons or things which have been grouped together and those left out of the group, in that case, the classification cannot be said to be a reasonable one.

20 In considering the reasonableness of classification from the point of view of Article 14 of the Constitution, the court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable. In the instant case, the foregoing discussion reveals that the classification of the employees of government/semi-government institutions etc. by the impugned rule for the purpose of admission in the evening classes of three year L.L.B. Degree Course to the exclusion of all other employees, is unreasonable and unjust, as it does not subserve any fair and logical objection.

(under lined to lay emphasis)

5. (1997) 2 Supreme Court 65 (para 15 and 16)Thapur Institute of Engineering and `Technology Versus State of Punjab and another, the Apex Court held that in the matter of admission 'reservation for wards' of University Employee was not permissible and held that there was no rationale nexus with the object sought to be achieved.

Reference be now made to the leading cases of compassionate appointments decided by the Apex Court.-

1. (1994) 2 Supreme Court Cases 718 (prs. 10, 11, 13 and 15)--

Life Insurance Corporation of India Vs. Asha Ramchhandra Ambekar.

"10. Of late, this Court is coming across many cases in which appointment on compassionate ground is directed by judicial authorities. Hence, we would like to lay down the law in this regard. The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration.

Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that law is that embodiment of all Wisdom. Justice according to law is a principle as old as the hills. The Courts are to administer law as they find it, however, inconvenient it may be.

11. At this juncture we may usefuly refer t o Martin Burn Limited. V Corporation of Calcutta- AIR 1966SC 529: (1966) 1 SCR 543. AT page 535 of the Report the following observations are found:

"A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what is considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not."

The Courts should endeavour to find out whether a particular case in which sympathetic considerations are to be weighed falls within the scope of law.

Disregardful of law, however, hard the case may be, it should never be done.

12.....
13. It is true that there may be pitiable situations but on that score, the statutory provisions cannot be put aside.

2. JT 1994(3) S.C. 525 (para 2)- Umesh Kumar Nagpal Versus State of Haryana and others

"2. The question relates to the considerations, which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependents of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased."

3. AIR 1996 SC 2445(paragraphs 5 and 6).

State of Haryana & others Versus Rani Devi and another-

"5. The question of appointment of one of the dependants of an employee of the State or Central Government who dies while in service has of late assumed importance and subject matter of controversy before different courts. This court in the case of Smt. Sushma Gosain v. Union of India, AIR 1989 SC 1976: (1989) 4 SCC 468, after referring to the Government Memorandum under which the appointment on compassionate ground was being claimed observed that the purpose of providing appointment on compassionate ground is to mitigate the hardship due to the death of the bread-earner in the family. It cannot be disputed that appointment on compassionate ground is an exception to the equality clause under Article 14 and can be upheld if such appointees can be held to form a class by themselves, otherwise any such appointment merely on the ground that the person concerned happens to be a dependant of an ex-employee of the State Government or the Central Government shall be violative of Articles 14 and 16 of the Constitution. But this Court has held that if an employee dies while in service then according to rule framed by the Central Government or the State Government to appoint one of the dependants shall not be violative of Articles 14 and 16 of the Constitution because it is to mitigate the hardship due to the death of the bread-

earner of the family and sudden misery faced by the members of the family of such employee who had served the Central Government or the State Government. It appears that this benefit has also been extended to the employees of the authorities which can be held to be a State within the meaning of Article 12 of the Constitution. But while framing any rule in respect of appointment on compassionate ground the authorities have to be conscious of the fact that this right which is being extended to a dependant of the deceased employee is an exception to the right granted to the citizen under Articles 14 and 16 of the Constitution. As such there should be a proper check and balance. Of late, if appears the right to be appointed on compassionate ground is being claimed as a right of inheritance irrespective of the nature of service rendered by the deceased employee.

6. It need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the ground that he was a dependant employee. Strictly this claim cannot be upheld on the touchstone of Articles 14 and 16 of the Constitution. But this Court has upheld this claim as responsible and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16."

4. (1996)2 UPLBEC 843 (prs. 9)-- Haryana State Electricity Board Versus Naresh Tanwar and another

9. It has been indicated in the decision of Umesh Kumar Nagpal(supra) that compassionate appointment cannot be granted after a long lapse of reasonable period and the very purpose of compassionate appointment, as an exception to the general rule of open recruitment, is intended to meet the immediate financial problem being suffered by the members of the family of the deceased employee. In the decision of this Court in Jagdish Prasad's case, it has been also indicated that the very object of appointment of dependent of deceased-employee who died in harness is to relieve immediate hardship and distress caused to the family by sudden demise of the earning member of the family and such consideration cannot be kept binding for year.

***5. (1994) 1 Supreme Court Cases 192 Auditor General of India and others Versus. G. Ananta Rajeswara Rao* ,it is held:-**

"5. A reading of these various clauses in the Memorandum discloses that the appointment on compassionate grounds would not only be to a son, daughter or widow but also to a near relative which was vague or undefined. A person who dies in harness and whose members of the family need immediate relief of providing appointment to relieve economic distress from the loss of the bread-winner of the family need compassionate treatment. But all possible eventualities have been enumerated to become a rule to avoid regular recruitment. It would appear that these enumerated eventualities would be breeding ground for misuse of appointments on compassionate grounds. Therefore, the High Court is right in holding that the appointment on grounds of descent clearly violates Article 16(2) of

the Constitution. But, however, it is made clear that if the appointments are confined to the son/daughter or widow of the deceased government employee who dies in harness and who needs immediate appointment on grounds of immediate need of assistance in the event of there being no other earning member in the family to supplement the loss of income from the bread-winner to relieve the economic distress of the members of the family, it is unexceptionable. But in other cases it cannot be a rule to take advantage of the Memorandum to appoint the persons to these posts on the ground of compassion. Accordingly, we allow the appeal in part and hold that the appointment in para 1 of the Memorandum is upheld and that appointment on compassionate ground to a son, daughter or widow to assist the family to relieve economic distress by sudden demise in harness of government employee is valid. It is not on the ground of descent simpliciter, but exceptional circumstance for the ground mentioned.."

6. (1998) 2 Supreme Court Cases 412(Pr.5)-
State of U.P. and others Versus Paras Nath

5. *The purpose of providing employment to a dependant of a government servant dying in harness in preference to anybody else, is to mitigate the hardship caused to the family of the employee on account of his unexpected death while still in service. To alleviate the distress of the family, such appointments are permissible on compassionate grounds provided there are Rules providing for such appointment. The purpose is to provide immediate financial assistance to the family of a deceased government servant. None of these considerations can operate when the application is made after a long period of time such as seventeen years in the present case.*

7. (1998) 5 Supreme Court Cases 192(Pr 8 and 10)-
Director of Education (Secondary) and another Vs. Pushpendra Kumar and others-
(Referring to AIR 1989 Supreme Court 1976, Sushma Gosain and another Vs Union of India and others and AIR 1991 Supreme Court 469 - Smt. Phoolwati Versus Union of India and others,) Apex Court observed:-
"8. *The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care*

has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the post which would have been available to them.....

10. The construction placed by the High Court on the Regulations governing appointment of dependants of teaching/non-teaching staff in non-government recognised aided institutions dying in harness without result in all the vacancies in Class III posts in non-government recognised aided institutions which are required to be filled by direct recruitment being made available to the dependants of persons employed on the teaching/non-teaching staff of such institutions who die in harness and the right of other persons who are eligible for appointment to seek employment on those posts by direct recruitment would be completely excluded. On such a construction, the said provision in the Regulations would be open to challenge on the ground of being violative of the right to equality in the matter of employment inasmuch as other persons who are eligible for appointment and who may be more meritorious than the dependants of deceased employees would be deprived of their right of being considered for such appointment under the rules. A construction which leads to such a result has to be avoided....."

(Note -above judgments underlined to lay emphasis)

28. The Apex Court, noted that such appointment on the ground of sympathy shall be unconstitutional and hit by Article 14 and 16, Constitution of India (See Nagpal Supra). The Apex Court, as seen from the above quoted decisions, approved of compassionate appointment by way of exception to Article 14, Constitution of India with a sole object to mitigate hardship caused due to sudden death of deceased employee, the sole 'bread earner' in the family.

29. Element of 'Equality' lie in the heart of Article 14, Constitution of India and it is the basic fibre which cannot be scarified in the garb of artificial and micro classifications based on hypothetical reasoning no justified by offering ill mentioned excuse.

30. In the case of **Auditor General of India (Supra), Apex Court, - observed** "who needs immediate appointment....." against its "to supplement the loss of income from the bread winner to relieve the economic distress of the members of the family.....". This shows that entire premise in view of the 'object sought to be achieved' is not to give appointment but to extend financial support.

31. The Supreme Court itself categorically observed that compassionate appointment, unless 'Rules' are framed, for compassionate appointment, shall not be valid. The issue is-how Rules, can be made to serve such appointment from being unconstitutional if the 'classification' itself does not satisfy validity criterion.

32. The broad issue is–'Whether offering 'appointment' on compassionate ground (i.e. sympathy) is the only option/solution to mitigate 'hardship and distress of the family of an employee

dying in harness? Answer is an emphatic 'No'. Firstly, the Rules, as such, contain no provision to ensure that the dependent who gets appointment shall continue to maintain other dependents.

33. The object for granting compassionate appointment is to enable family in 'distress' of a deceased employee 'Dying in Harness' who happened to be sole bread earner and to tide over sudden financial crisis precipitated due to 'sudden death' of such an employee purely out of humanitarian consideration and at best provide 'livelihood' to make two ends meet their 'affairs'. It is, therefore, more than apparent that the object is not to substitute 'bread-earner' with 'bread earner' but to ensure 'livelihood' (i.e. food, clothing, education of dependants and medical aid) to a family in distress-because of the 'Bread earner'-'Dying in Harness'. Loss of 'person' due to the death of an employee in service, cannot be made good by any mechanism. Family of such an employee if in 'distress' can be re-compensated by financial aid. It is true that perfect compensation is hardly possible and money cannot renew a physique frame that has been better and shattered. Object is to provide means to place claimant-family of an employee Dying in Harness is to place the fame as far as possible in the same position financially as it was before the death of the bread earner.

34. It is the financial loss, if an employee dies in service, which can be made good by ensuring financial support for the period, deceased employee may have been in service. It is, with respect, anomalous and hard to believe and, therefore, not possible to hold that offering job to a dependent alone is the solution.

35. The above view finds support from the observation made by Apex Court in the case of Director of Education (Secondary) and another Versus Pushpendra Kumar and others (Supra). The Apex Court itself observed:- ".....having regard to the fact that unless some source of livelihood is provided, the family would not be able both the ends meet.....".

To achieve the said object Apex Court did not say- 'give a post for a post (see Nagpal supra).

A 'welfare state' like ours is free to initiate effective welfare scheme/s- and no one will be in a position to oppose.

It is well settled that sympathy cannot be allowed to over ride statutory provisions and/or Constitutional provisions, particularly when it is quality of the question of Welfare of the entire society and/or question of Governance.

36. The State, like ours is free to is wedded to 'solemn object' to serve the society at large, purely according to the mandate under Constitution of India. State cannot be allowed to look after 'welfare' of its own employees and their families alone.

37. In this context one may refer to **"The Uttar Pradesh Benevolent Fund Scheme, 1997**" which was floated with identical Aim, Object and purpose as the Compassionate Appointment Rules. Members of the scheme are provided financial assistance, subject to terms and conditions contained in the said Rule,

including grant of advance by way of financial assistance to a member in case of permanent disability resulting in discontinuance of service of an employee.

38. U.P. Government issued Government order dated 25.9.1985 (referring to Government order dated 3rd October, 1978) which accompanied copy of the Rules for creation and regulation of U.P. Anukampa Nidhi. The said 'Compassionate Fund Rules' incorporated exhaustive provisions to ensure financial assistance in a deserving case, including care of education of the dependents and marriage of daughters of a deceased employee. Government also issued many more Government orders viz. dated 26.6.1989, 28.5.1993 and 16.6.1994, available in the Manual of Government orders.

39. The Government or its instrumentalities under Article 12, Constitution of India, can be required by statutory provisions to establish a Compassionate Fund with reasonably adequate corpus created by requiring nominal contribution from the concerned employee. 'Statutory Fund' so created can be used to ensure transfer of enough fund in the account of eligible person in the family of a deceased employee on the basis of summary scrutiny by a competent authority viz. Local highest authority or Head of the Department, and such transferred fund shall be good enough to give dividends in the form of interest equivalent to the wages of a deceased employee and what he should have notionally earned from time to time till the age of superannuation or till a member of his family gets employment, whichever may be earlier, and capital transferred amount should be required to get automatically reverted to the 'corpus' of the fund. Family will became, on attaining notional superannuation of the decease employee, entitled to payment of family pension, gratuity etc. in accordance with relevant service rules and statutory conditions.

40. Underlying idea is to make sure that in case of 'distress' of a family of a 'deceased employee', immediate succor is provided to mitigate hardship and pull out such family members from 'distress' without affecting quality of 'governance' by making compassionate appointments-without following normal procedure of selection and in complete negation of merit ignoring, though available, more suitable and meritorious candidates.

41. There is one more aspect. For illustration, there may be a family in 'Distress' when the 'bread earner' who happened to be an Employee of the government, etc. died in harness but here is no eligible person/s as his dependant (say all are minor). How the Rules contemplating Compassionate appointment shall achieve the object and family shall remain in distress.

42. A dependent of a deceased employee who is eligible for compassionate appointment under Dying in Harness Rules, if bright in studies, forced to accept compassionate appointment on a Class III or Class IV posts and thus compelling a talent to be wasted or mis-utilised, by forcing a bright boy to accept a clerical/ministerial job. Proper course would be to give financial assistance at the right time to such bright boy to complete his academic education and it is likely that he may prove in future a successful Doctor, Engineer, Lawyer or

Professor, etc. or otherwise an asset to the nation.

43. On the other hand a dependant of a Government employee, who dies because of his erratic and undisciplined ways of life (like excessive consumption of alcohol or drugs and/or an employee who is guilty of financial irregularities, misconduct etc., also get job on compassionate ground as 'premium' of one's misdeeds.

44. There is no justification for the Government to make compassionate appointments of a dependant of an employee dying in harness ignoring families of those eligible candidates waiting in open market and whose families may be in still graver.

45. Employment in the State or its 'authorities' must be on merit alone as the interest of third party (namely, 'society' at large) is also involved.

46. Compassionate appointment, in a way create reservation within reservation and it should be so high so as to destroy and make concept of equality guaranteed by Article 14, Constitution of India, merely illusory. Reference may be made to AIR 1963 SC 649,

AIR 1964 SC 179 and AIR 1967 SC 1283.

47. Compassionate appointments, as noted above, make reservation beyond permissible limit of 50%, approved by the Apex Court. By exceeding this limit, inefficiency in administration and governance is bound to seep in. Appointments, ignoring merit in public service, are bound to 'adversely' effect administrative efficiency' and as a result of it entire society is bound to suffer irreparably.

48. Long experience of 'compassionate appointments', in the Government establishments corporate/local bodies and Education institution, is not only sad but it has also completely belied the expediency of such appointment in the context of 'quality of service'/'quality of administration'. 'Compassionate appointment' of one of the dependent of the family of an employee 'Dying in Harness' has failed to achieve 'solemn object'/'purpose' for which the Rules were framed, namely to maintain other dependants in the family. It is a matter of common experience that whenever a dependant get job and as soon as his own family, he neglects others in the family.

49. The issue requires a fresh look and reconsideration bereft of 'emotions' and 'personal whims' or prejudices; since the issue concerns the 'society at large'. Compassionate appointment, in case death of an employee, of a State Government or a Corporation, etc., has done more harm than good to the Society at large.

50. A good law once upon a time in the past, may be rendered bad or irrelevant with the passage of time. **See JT 2003 (5) SC-Kapila Hingorani Versus State of Bihar and JT 2003 (6) SC 37 John. Vallamttar Versus Union of India.**

51. Short-cut 'charity' and popularity measures are to be avoided and endeavour to made to accomplish interest of the larger community. Pubic necessity is

subservient to individual necessity – **"*Necessitas Public Major Et Quem Privata"***.

52. Introduction of compassionate appointment in case of an employee 'Dying in Harness', with an object to mitigate distress and hardship of a family of a deceased employee is commendable but not approved in law. It is a matter of common experience that a thing invented takes time to be perfected--**"*Nihil simul inventum est et perfectum."*** Hence the 'object' of compassionate appointment can still be achieved by ushering valid and legal statutory schemes other than by making 'compassionate appointments.

53. We cannot loose sight of the fact that there can be no mechanism to ensure that a family of 'Government employee' will never be in distress. For example, financial assistance of a family of a Government employee, who has attained the age of superannuation and eligible for pension, may be as bad as another employee Dying in harness. There is no reason why a citizen who is similar situated or even worst is deprived of public employment and a dependant of an employee dying in harness be given appointment on preferential basis dehors statutory Rules of regular and normal appointment. 'Compassionate Appointments' in the State have become a virtual scam. Suitability is rarely assessed under Dying in Harness Rules. To illustrate the point reference may be made to the record of **Writ Petition No.29194 of 2001- Smt. Geeta Devi Mishra Versus. State of U.P. and others** wherein wife of deceased employee filed suit for declaration and partition against the other wife of the same employee claiming that moveable assets be given to the Defendant 1st Wife and benefit under relevant compassionate appointment under Dying in Harness Rules be given by the department concerned to the Plaintiff's Second wife. Amazingly said suit was got decreed on the basis of compromise. Said writ petition was filed to issue 'Mandamus' to force authorities to give compassionate appointment in pursuance to Civil Court decree.

54. There are hundreds of cases coming before Court on the ground of forged 'Adoption', will etc or belated claims on fabricated allegations and documents. Government authorities have no agency or instrumentality to hold requisite enquiry and find out whether family of deceased employee is in distress or sometime employers own employees/officers/authority/ collude for extraneous reasons and it has become a source of corruption in this state.

55. In another case of **Hari Karan Nath Misra Versus Director, Basic Education U.P. Lucknow and others, Writ Petition no.1437 (SS) of 2001**, petitioner claimed that his daughter Smt. Mamta was married to one Kuldeep Kumar Bajpai, she was murdered by her husband due to demand of dowry, husband obtained certificate of being legal heir of Smt. Mamta and on that basis obtained job under Dying in Harness Rules which was opposed by the father of said deceased, Smt. Mamta, through aforementioned writ petition. One cannot shut his eyes to the hard facts, and of which this Court takes judicial notice, that provisions of compassionate appointment under Dying in Harness Rules are being put to sheer misuse with a volt face.

56. Compassionate appointment, in the State of U. P. in spite of Apex Court holding otherwise, become a job-security by succession inheritance in the contingency of death of a Government/Corporation employee.

57. Justice Ratnavel Pandian J, in the case of **I*ndra Sawhney Versus Union of India, AIR 1993 SC 477*** observed:-

" *No one can be permitted to invoke the constitution either as sword for an office or as a shield for anticipatory defence, in the sense that no one under the guise of interpreting the Constitution can causes irreversible injustice and irredeemable inequalities to any section of the people or can protect those unethically claiming unquestionable dynastic monopoly over the constitutional benefits".*

Justice H. R. Khanna in the Book **'*Judging the Judges*'** by Gyan Publishing House- New Delhi—1999 Edition—in the chapter **"The Role of the Judiciary"** page 28—commented—".....Judicial decisions have to be backed by well reasoned arguments. You cannot say- no judge of the highest court can say, well look here I have given the decision that no constitutional law of land can challenge.
It is not out of place to mention that it is also now settled that what was 'legal' in the past, may by passage of time, in the context of changed circumstances in future become 'illegal'.

59. To sum up-(i) petitioner has failed on the facts of the present case, as discussed above, to prove 'distress' which could warrant compassionate appointment to mitigate hardship immediately to the family of deceased employee in question; and, (ii) in the light of the discussion made above, Dying in Harness Rules do not stand the fest of valid classification and, therefore, the Rules contemplating compassionate appointments are hit by Article 14 and 16, Constitution of India. (iii) Respondents are directed to activate Compassionate Fund Rule and The U.P. Benevolent Fund Scheme 1997, and to make it real, purposive and effective so as to achieve solemn object for which they are framed (iv) A copy of this judgement shall be sent to Chief Secretary for bringing the matter to the concerned and the State Government is mandated to take appropriate action in the light of the above.

CONCLUSIONS

60. Writ Petition, consequently lacks merit and hence dismissed subject to the directions given above.
No order as to costs. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.4.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 5767 of 1988

Smt. Ram Kunwar & others ...Petitioners
Versus
IInd Additional District Judge, Banda and others ...Respondents

Counsel for the Petitioners:
Sri R.R.K. Trivedi
Sri S.K. Shukla,
Sri R.K. Pandey
Sri Ramji Pandey

Counsel for the Respondents:
Sri J.B. Singh
S.C.

Constitution of India- Article 226- U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972- S. 20(2) C- suit for eviction on ground of material alteration- Finding by both courts below that construction of a kiosk in front of building has caused material alteration and has dismissed its value- Findings of material alteration by courts below are finding of fact- same cannot be interfered in writ petition- Hence liable for eviction.

Both the courts below have held that the construction of a kiosk in front of the building has caused material alteration and has diminished its value and has also disfigured it. The finding of the material alteration given by the courts below are findings of fact, which cannot be interfered in the writ petition. Therefore, the petitioners are also liable to be evicted from the premises in question. Para 15

Case law discussed:

1978ARC 103
1978 AWC 552
1997 (2) ARC 459

(Delivered by Hon'ble Tarun Agarwala, J.)

1. By means of this petition, the petitioners have challenged the order dated 1.7.1987 passed by the Judge Small Causes Court, Banda, and the revisional order dated 23.3.1988 whereby the suit of the landlady for eviction of the petitioners on the ground of subletting and material alteration was decreed.

2. The facts of the case are that the landlady, respondent no.3 filed a suit for ejectment of the petitioners alleging that the petitioner no.1 was the tenant and that he was in arrears of rent w.e.f. 30.12.1981 and that he did not pay the rent inspite of repeated demands. It was also alleged that the tenancy of the petitioner No.1 was for residential purposes, but the accommodation was being used for business purposes. It was also alleged that the petitioner no.1 had sublet the premises in question to petitioner no.2, who was using the premises for his business purposes in the name and style of "Rai Light House". The landlady further submitted that the petitioner no.1 had constructed a kiosk in front of the house and thereby, caused material alteration, which not only diminished the value of the building, but also disfigured it.

3. The petitioners contested the suit and filed a joint written statement denying all the allegations made by the landlady. The petitioners submitted that the tenancy was both for residential as well as for business purposes and that no material alteration in the building was ever caused by them. It was also submitted that the petitioner No.2 is the uterine brother of petitioner No.1 and that he had been living with petitioner No.1 since birth and that the business in the name of Rai Light House was being done by the petitioner No.1 with the help of his sons along with the petitioner No.2 and, therefore, there was no question of any subletting. The petitioners further submitted that there was no default in the payment of the rent. The rent was being sent by Money Order, which was refused by the landlady.

4. The Judge Small Causes Court decreed the suit for ejectment on the ground of subletting and on the ground of material alteration. The Judge Small Causes Court held that the petitioner No.1 was not a defaulter in the payment of rent and that the premises was not given exclusively for residential purposes. However, the Judge Small Cause Court held that the notice given by the landlady terminating the tenancy was valid and that

the defendant no.2 had sub-let the premises to the petitioner no.2. The trial court further held that the construction of the kiosk caused material alteration and had disfigured and diminished the value of the building.

5. Aggrieved by the order of ejectment passed by the Judge Small Causes Court, the petitioners filed a revision, which was also dismissed.

6. The question that arises for consideration in the present writ petition is whether the petitioner no.1 had sub-let the premises to the petitioner no.2 and whether the construction of the kiosk had caused material alteration in the building or not?

7. Heard Sri S.K. Shukla, the learned counsel for the petitioners and Sri J.B. Singh, the learned counsel for the landlady-respondent No.3.

8. The learned counsel for the petitioners submitted that there was no question of subletting the premises inasmuch as the petitioner No.2 was the uterine brother of petitioner No.1 and that the petitioner No.1 was doing the business in the name of Rai Light House along with the help of his sons and petitioner No.2. The learned counsel for the petitioners submitted that the construction of a kiosk in front of the building did not cause any material alteration nor it diminished the value of the building nor disfigured it.

9. The contention raised by the learned counsel for the petitioners is wholly devoid of any merit and is liable to be rejected. It may be stated that Section 20 of the Uttar Pradesh Urban Buildings (Regulation Of Letting, Rent And Eviction) Act, 1972 (hereinafter referred to as the 'Act') imposes a restriction on the rights of the landlord to institute a suit for eviction of the tenant except on certain grounds as provided therein. Section 20(2)(c) and Section 20(2)(e) of the Act reads as under:-

"20(2)(c) *that the tenant has without the permission in writing of the landlord made or permitted to be made any such construction or structural alteration in the building as is likely to diminish its value or utility or to disfigure it;*

(e) that the tenant has sub-let, in contravention of the provisions of Section 25, or as the case may be, of the old Act the whole or any part of the building;"

Thus, a tenant can be evicted on the ground of raising construction without seeking previous permission in writing from the landlord and which has caused material alteration in the building or where the tenant has sublet the building in contravention of the provisions of Section 25 of the Act. Section 25 of the Act reads as under:-

"25. Prohibition of sub-letting.- (1) No tenant shall sub-let the whole of the building under his tenancy.

(2) The tenant may with the permission in writing of the landlord and of the District Magistrate, sub-let a part of the building.

Explanation.- For the purposes of this section,-

(i) where the tenant ceases, within the meaning of clause (b) of sub-section (1) or sub-section (2) of Section 12, to occupy the building or any part thereof he shall be deemed to have sub- let that building or part;

(ii) lodging a person in a hotel or a lodging house shall not amount to sub-letting."

Section 12(1)(b) of the Act reads as under:-

"12. Deemed vacancy of building in certain cases-(1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if-

(2) he has allowed it to be occupied by any person who is not a member of his family,"

10. From the aforesaid provisions of the Act, it is clear that where a tenant of the building has allowed it to be occupied by any person, who is not a member of his family, the tenant ceases to occupy the building or any part thereof and the tenant shall be deemed to have sub-let that building.

11. From the evidence led by the parties, is it clear that the petitioner no.1 was the tenant of the landlady and petitioner no.2 was the uterine brother of petitioner no.1. It has also come on record that the petitioner no.1 was not residing in the premises in dispute and was working in Jhansi and that the petitioner no.2 was doing the business in the name and style of Rai Light House from the premises in question as a sole proprietor.

12. The question that is to be considered is whether the petitioner no.2 being a brother of petitioner no.1 is a member of the family as contemplated under Section 3 (g) of the Act, which reads as under:

"3(g) "family" in relation to a landlord or tenant of a building, means, his or her-
(i) spouse,
(ii) male lineal descendants,
(iii) such parents grant-parents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her,

and includes, in relation to a landlord, any female having a legal right of residence in that building."

13. Admittedly the tenancy was in the name of petitioner no.1. It is not a case that the tenancy was inherited by the petitioners. Therefore, uterine brother does not come within the meaning of word "family" as defined under Section 3 (g) of the Act. In Smt. Ram Sarni Devi Vs.Smt. Raisa Begum and others, 1978 ARC 103, it has been held that the brother of the tenant is not a member of the family. Similar view was expressed in 1978 AWC 552, Mahendra Sen Jain and another V. Ratanlal and another and in 1997 (2) ARC 459 Shahid Ali and others Vs. Judge Small Causes Court, Moradabad.

14. In view of the aforesaid, even though the petitioner no.2 is a uterine brother of petitioner No1, he could not come under the parameters of a "member of the family" as defined under Section 3 (g) of the Act. It is also an admitted position that the petitioner no.2 was doing

the business in the capacity of a proprietor. It has also come on record that the petitioner no.1 was not residing in the premises in dispute and was working in Jhansi. Thus it is a clear case that the petitioner No.1 has sublet the premises to petitioner no.2 in violation of the provision of Section 25 of the Act and was therefore the petitioners were liable for eviction under Section 20(e) of the Act.

15. Both the courts below have held that the construction of a kiosk in front of the building has caused material alteration and has diminished its value and has also disfigured it. The finding of the material alteration given by the courts below are findings of fact, which cannot be interfered in the writ petition. Therefore, the petitioners are also liable to be evicted from the premises in question.

16. In view of the aforesaid, there is no merit in the writ petition and is dismissed with cost. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.4.2004

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition 13974/2004

Dhanesh Kumar Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.K. Bhardwaj

Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act, 1921-Regulation 2 of Chapter II- U.P. Secondary Education Services Selection Board Act, 1982 (As amended by Amendment Act, 2001)-Ss. 16 and 18-Senior most teacher allowed to work as officiating principal- His right cannot be defeated on ground that he was unable to carry on functions for some period on account of illness- Second Senior most teacher took over charge but resigned on g round of domestic circumstances-Third Senior most teacher declined to accept office as he was going to retire shortly-By this time the senior most teacher recovered from illness and requested to be appointed as officiating principal-his right, held, cannot be defeated only on ground that in past, expressed his inability–Neither any agreement in writ petition- nor any material on record to show unsuitability or disqualification for any act of misconduct- Held, can not be denied from working as officiating Principal.

Where a senior most teacher was found suitable and was allowed to work as officiating principal, his right cannot be defeated on the ground that he was allowed and was unable to carry on functions as officiating principal for some period of time. In the present case, respondent no. 5 gave in writing that he is unable to officiate as principal on account of illness. The second senior most teacher took over the charge but resigned on the ground of domestic circumstances and third senior most teacher declined to accept the office as he was going to shortly retire. By this time respondent no. 5 recovered from illness and requested to be appointed as officiating principal. His right cannot be defeated only on the ground that he was ill at the time when he expressed his inability to continue on account of ill health. Once he has recovered and has requested to accept the responsibility, his right cannot be defeated on the ground that he had in the past, expressed his inability to continue on the ground of illness. There is no averment

in the writ petition and any material on record to show that he was unsuitable or was disqualified for any act of misconduct or otherwise, after he declined to continue on the ground of illness. The petitioner has not pressed any principle of law which may disqualify respondent no. 5 to assume charge as officiating principal. Para 7

Case law discussed:

1995AWC 122
1990(1) UPLBEC 116
W.P.No. 169 of 1987 decided on 7.12.1987
1986 Educational cases 44
1992 (i) UPLBEC

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

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

2. The respondent no. 5 is senior most teacher in lecturer's grade in the institution. On the retirement of permanent principal, he took over charge as officiating principal in July, 2002. In April, 2003, he gave in writing that on account of illness, he shall not be able to continue as officiating principal and thus the second senior most person namely Sri Subhash Chandra Gupta was appointed as officiating principal. Sri Subhash Chandra Gupta resigned on 25.11.2003 on the ground of some domestic circumstances after which the third senior most person Sri Adarsh Kumar was offered to officiate as principal. Sri Adarsh Kumar declined to accept the office of officiating principal as he was going to retire on 30.6.2004. In these circumstances, the authorised controller handed over charge of the officiating principal to the 4th senior most teacher on 25.11.2003. It is at this stage the respondent no. 5 again appeared before the District Inspector of Schools and requested to officiate as principal on the ground that he has recovered from illness. By impugned order, the District Inspector of Schools has disapproved the proposal of the authorised controller to allow the petitioner, who is the 4th senior most teacher to officiate as principal and has accepted the representation of the respondent no. 5 to resume charge of officiating principal.

3. Counsel for petitioner submits that once the officiating principal has resigned, he cannot be thereafter permitted to assume charge as officiating principal. The petitioner has relied upon judgment of this Court in **Satya Beer Singh Vs. District Inspector of Schools, Buland Shaher** reported in 1995 AWC 122. This judgment upheld the contention that once senior most teacher declines the offer as officiating principal, she cannot claim right subsequently to be appointed as officiating principal in the institution. This judgment is based upon a decision in the Special Appeal No. 141/1993 between Smt. Sudesh Kakkar Vs. Regional Inspectress of Girls School, 1st Region, Meerut and others. I have gone through the paragraphs no. 11, 12 and 13 of the judgment. Neither the judgment of special appeal nor learned single judge has given any reason to hold that once the senior most teacher declines to hold or to continue with the office, she cannot be subsequently appointed as officiating principal.

4. The facts and circumstances of this case are different. The petitioner took over and was functioned as officiating principal from July, 2002 to April, 2003 and thereafter expressed his inability to continue due to illness. After he recovered from illness and the office again fell vacant he requested to be appointed as officiating principal.

5. The letter dated 25.4.2003 sent by respondent no. 5 was conditional. This letter cannot be treated to be a resignation, and inability to function as officiating principal forever. It was written on the ground that he was not keeping good health. The petitioner had given adequate and bonafide reasons, to decline to function as officiating principal. Once the stated disability was removed he requested to be considered to officiate as Principal. The judgment in Satya Veer Singh's case (supra) does not give any reason or state any principle of law to arrive at a conclusion that once senior most teacher declines, he cannot be subsequently appointed as officiating principal.

6. Regulation 2 of Chapter-II of the Regulations made under the U.P. Intermediate Education Act 1921 provides that the post of head of the institution, shall except as provided in Sub Clause-2 (where the institution is raised from High School to Intermediate Colleges) be filled by direct recruitment after reference to the Selection Committee constituted under Sub Section 1 of Section 16-F or as the case may be under Sub Section 1 of Section 16-FF. Sub Regulation 3 provides that temporary vacancy on the post of head of institution for a period not exceeding 30 days should be filled by the senior most teacher in the highest grade, but he shall not be entitled to pay in the scale higher than the scale of pay in which he is drawing salary as a teacher. The U.P. Secondary Education Services Selection Board Act 1982 provides in Section 16 that notwithstanding anything to the contrary contained in the Intermediate Education Act 1921 or the Regulations made thereunder but subject to the provisions of 12, 18, 21-B, 21-C, 21-D, 33, 33-A to 33-F, every appointment of a teacher shall on or after the date of commencement of the U.P. Secondary Education Services Selection Board (Amendment) Act 2001 be made by the Management only on the recommendation of the Board. The teacher here includes the Principal. Section 18, however, provides for adhoc appointment on the post of teachers as well as Principal or Head Master until a candidate recommended by the Board joins on the post. This Court has held in **Kumari Bandana Banerjee Vs. Administrator, Arya Kanya Pathshala 1990 (1) UP LBEC 116** that the appointment of a junior teacher as Principal against a senior teacher is against the Act under Regulations and that the provisions of Chapter-II of Regulations framed under the U.P. Intermediate Education Act for promotion includes the provision for filling of the post of Head of institution due to retirement temporary by promoting the senior most qualified teachers. In **Ram Murti Singh Vs. D.I.O.S.** (Writ Petition No. 169/1987 decided on 7.12.1987) and **Yogendra Prasad Chaturvedi Vs. Additional Commissioner** 1986 Educational Cases 44, as well as **Tribhuvan Misra Vs. D.I.O.S. Azamgarh 1992 (1) UPLBEC 716** it was held that senior most teacher should not necessarily be appointed as adhoc principal. Where, However, the Management wishes to supercede the senior most teacher, he must be given a show cause notice by the Management stating the charges against him and the proposal to supercede him. This, however, can be done in cases where the senior most teacher may be involved in the acts of misconduct drawing and is not

otherwise suitable to act as adhoc principal.

7. Where a senior most teacher was found suitable and was allowed to work as officiating principal, his right cannot be defeated on the ground that he was allowed and was unable to carry on functions as officiating principal for some period of time. In the present case, respondent no. 5 gave in writing that he is unable to officiate as principal on account of illness. The second senior most teacher took over the charge but resigned on the ground of domestic circumstances and third senior most teacher declined to accept the office as he was going to shortly retire. By this time respondent no. 5 recovered from illness and requested to be appointed as officiating principal. His right cannot be defeated only on the ground that he was ill at the time when he expressed his inability to continue on account of ill health. Once he has recovered and has requested to accept the responsibility, his right cannot be defeated on the ground that he had in the past, expressed his inability to continue on the ground of illness. There is no averment in the writ petition and any material on record to show that he was unsuitable or was disqualified for any act of misconduct or otherwise, after he declined to continue on the ground of illness. The petitioner has not pressed any principle of law which may disqualify respondent no. 5 to assume charge as officiating principal.

8. For the aforesaid reasons, I do not find any error in the order of District Inspector of Schools, Buland Saher. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.5.2004

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

Civil Misc. Writ Petition (Tax) No. 648 of 2004

Sri Ram Shyam Shukla and others ...Petitioner

Versus

Assistant Collector, Collection, Trade Tax, Sikandrabad ...Respondents

Counsel for the Petitioners:
Sri M. Manglik
Sri Santosh Misra

Counsel for the Respondents:
S.C.

U.P. Tax Act-Doctrine of Separate Corporate entity-Exceptions-Doctrine of lifting viel of Corporate personality-Applicability Petitioners claiming to be directory of Company-Yet no disclosure about assets of Company against which impugned recovery can proceed, names of other directions, shareholders, Managing Director-Hence presumption that petitioners have diverted assets of Company for their own benefit for evasion of trade tax recovery petitioners are seeking to use component character of company for evading Tax-Applying doctrine of piercing vail of Corporate personality, held, petitioners are not entitled to protection of doctrine of separate entity of Corporation-Directior held liable to pay tax.

In our opinion, the veil of separate entity of the company should be lifted in the present case. The petitioners claims to be the Directors of the Company but they have not mentioned in the writ petition whether there are any assets of the Company against which the impugned recovery can proceed. They have also not

mentioned who are the other Directors and shareholders of the Company and who really runs and controls the Company. In the absence of these facts, which have been suppressed by the petitioners, we can reasonably assume that the assets of the Company have been diverted or siphoned off by the petitioners for their own benefit. Tax dues have to be paid and we will not permit the use of the doctrine of corporate personality to help anyone to evade tax recoveries. Para 15

On the facts of the present case we are of the opinion that the petitioners were really managing the Company and had control over its operations. They are only seeking to use the corporate character of the Company for evading tax. Para 16

The Supreme Court has held in some of the above decisions that in tax matters the veil of corporate personality can be lifted so that the tax dues can be realized. The doctrine of piercing the veil of corporate personality has an expanding horizon. We are therefore expanding this doctrine and declare that ordinarily if there are tax dues against the corporate personality they can be realized from the Directors, or others who control the company. This is necessary because in our country what is happening is that huge tax dues are often being evaded by unscrupulous businessmen under cover of the doctrine of corporate personality. The time has come when this widespread malpractice which is seriously harming the national economy must be stopped. The Government cannot run, and it cannot carry on its welfare programmes, if it does not respondent receive taxes. As observed by the Supreme Court in Asst. Collector of Central Excise Vs. Dunlop India Ltd., AIR 1985 SC 330 (vide para 7).

'No government business or for that matter no business of any kind can be run on mere bank guarantees. Liquid cash is necessary for the running of a Government or indeed any other enterprise.'

Thus the petitioners are not entitled to the protection of the principle laid by kthe decision in Salomon vs. Salomon and Co. Ltd. (supra). Para 18

Case law discussed:

1897 AC 22 (HL)
(2000) 3 SCC 312
AIR 1998 SC 1651
(1995) 1 SCC 478
(1996) 4 SCC 622
AIR 1967 SC 819
AIR 1969 SC 932
AIR 1965 SC 40
(1964) 6 SCR 895
(1988) 4 SCC 59
W.P. 37833 of 2002, decided on 24.9.2002
JT 2003 (6) SC 20
(1997) 1 SCC 134
2004 ALJ 924
AIR 1985 SC 330 (Pr.7)
W.P. 1039 of 2003, decided on 5.9.2003
W.P. 382 of 2003, decided on 13.3.2003

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

1. This writ petition has been filed for a writ of certiorari quashing the impugned recovery proceedings initiated against the petitioners under the U.P. Trade Tax Act.

2. Heard learned counsel for the parties.

3. The petitioners are the Directors of M/s Sikandrabad Chemicals Private Limited which is a limited liability Company. For the assessment year 1995-96 against the aforesaid Company under the Central Sales Tax Act a demand of Rs.7,66,072/- was raised by the Assessing Officer and pursuant thereto the recovery proceedings were initiated against the petitioners.

4. It is alleged by learned counsel for the petitioners Sri M. Manglik that the petitioners being Directors of the Company are not personally liable to pay the dues of the Company.

5. We have carefully considered the submissions of the parties. It is true that the legal principle is that a Company is a separate legal entity distinct from its Directors and shareholders vide *Solomen vs. Solomin & Co. Ltd. 1897 AC 22 (HL).* However, the principle of piercing the veil of corporate personality has also been evolved by the Courts vide *Subhra Mukherjee vs. Bharat Coking Coal Ltd. 2000 (3) SCC 312. Calcutta Chromotype Ltd. Vs. Collector of Central Excise AIR 1998 SC 1651. New Horzons Limited vs. Union of India 1995 (1) SCC 478. Delhi Development Authority vs. Skipper Construction Co. Pvt. Ltd. 1996 (4) SCC 622, CIT vs. Minakshi Mills AIR 1967 SC 819, Juggilal Kamapat Vs. CIT AIR 1969 SC 93, etc.*

6. In the *Delhi Development Authority case (supra),* the Supreme Court following its decision in *Tata Engineering and Locomotive Company Ltd. Vs. State of Bihar AIR 1965 SC 40* observed:

"The law as stated by Palmer and Gower has been approved by this Court in *Tata Engineering and Locomotive Company Limited vs. State of Bihar (1964) 6 SCR 895: (AIR 1965 SC 40.* The following passage from the decision is apposite (para 27 of AIR)

"Gover has classified seven categories of cases where the veil of a corporate body has been lifted. But it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporate personality should be lifted or not. Broadly, where fraud in intended to be prevented, or trading with enemy is sought to be defeated, the veil of corporate is lifted by judicial decisions and the shareholders are held to be persons who actually work for the corporation."

7. In the same decision the Supreme Court also observed that the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look ate the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The Supreme Court also observed quoting 'Gower's Modern Company Law'- "Where the protection of public interest is of paramount importance or where the company has been formed to evade obligation imposed by the law, the Court will disregard the corporate veil."

8. In *State of U.P. vs. Remesagar Power Co. 1988 (4) SCC 59* the Supreme Court observed:

"It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. *The horizon of the doctrine of lifting of corporate veil is expanding."*

9. In *Tata Engineering's case (supra)* the Supreme Court observed that doctrine of the lifting of the veil thus marks a change in the attitude that the law had originally adopted towards the concept of the separate entity or personality of the Corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognized exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems the theory about the personality of the corporation may be confined more and more.

10. Thus the Supreme Court itself has stated that with the passage of time the exceptions to the rule of corporate personality can grow in number to meet the new requirements, and these exceptions have an expanding horizon.

11. The aforesaid decisions have been followed by this Court in a Division Bench decision in *Civil Misc. Writ Petition No. 37833 of 2002 Sanjay Kumar Gupta vs. District Magistrate, Fatehpur, decided on 24.9.2002.*

12. We may mention that the principle that a Company (or Society) is a district legal entity was evolved to encourage business and industry since many businessmen feared to start new businesses or ventures because if the said business/venture failed (due to competition, recession etc.) their personal assets e.g. house, car, furniture, clothing savings etc. could be attached and sold for the recovery in respect of the dues against the company or society. This principle was not made to help tax evaders as stated in the aforesaid decisions. As observed by the Supreme Court in *Tata Engineering's case (supra)*, the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purposes of committing illegality or for defrauding others the court will ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The Supreme Court also observed that where the protection of public interest is of paramount importance, or where the company has been formed to evade obligation imposed by the law, the Court will disregard the corporate veil.

13. In *State of U.P. vs. Renusagar Power Co. (supra)* the Supreme Court observed ' 'the horizon of the doctrine of lifting of corporate veil is expanding. '

14. The doctrine of the lifting of the veil thus marks a change in the attitude that the law had originally adopted towards the concept of the separate entity or personality of the Corporation. The Supreme Court has evolved many exceptions to the principle that a company is a distinct legal entity and it has observed in the above case that these exceptions may grow in number to meet the requirement of different economic problems. And the theory about the personality of the corporation may be confined more and more.

15. In our opinion, the veil of separate entity of the company should be lifted in the present case. The petitioners claims to be the Directors of the Company

but they have not mentioned in the writ petition whether there are any assets of the Company against which the impugned recovery can proceed. They have also not mentioned who are the other Directors and shareholders of the Company and who really runs and controls the Company. In the absence of these facts, which have been suppressed by the petitioners, we can reasonably assume that the assets of the Company have been diverted or siphoned off by the petitioners for their own benefit. Tax dues have to be paid and we will not permit the use of the doctrine of corporate personality to help anyone to evade tax recoveries.

16. On the facts of the present case we are of the opinion that the petitioners were really managing the Company and had control over its operations. They are only seeking to use the corporate character of the Company for evading tax.

17. Moreover writ is a discretionary remedy vide JT 2003 (6) SC 20, 1997 (1) SCC 134, 2004 ALJ 924. We are not inclined to exercise our discretion under Article 226 in favour of such persons like the petitioners who wish to evade tax. The decision cited by the petitioners are in our opinion distinguishable for the reasons given above.

18. The Supreme Court has held in some of the above decisions that in tax matters the veil of corporate personality can be lifted so that the tax dues can be realized. The doctrine of piercing the veil of corporate personality has an expanding horizon. We are therefore expanding this doctrine and declare that ordinarily if there are tax dues against the corporate personality they can be realized from the Directors, or others who control the company. This is necessary because in our country what is happening is that huge tax dues are often being evaded by unscrupulous businessmen under cover of the doctrine of corporate personality. The time has come when this widespread malpractice which is seriously harming the national economy must be stopped. The Government cannot run, and it cannot carry on its welfare programmes, if it does not respondent receive taxes. As observed by the Supreme Court in Asst. Collector of Central Excise Vs. Dunlop India Ltd., AIR 1985 SC 330 (vide para 7).

"No government business or for that matter no business of any kind can be run on mere bank guarantees. Liquid cash is necessary for the running of a Government or indeed any other enterprise."

Thus the petitioners are not entitled to the protection of the principle laid by the decision in Salomon vs. Salomon and Co. Ltd. (supra).

19. This Court has taken the same view in Sri Ram Gupta vs. The Assistant Collector (Collection) Trade Tax. Writ Petition No. 1039 of 2003, decided on 5.9.2003 and in Naresh Chandra Gupta vs. The District Magistrate, Writ Petition No. 382 of 2003, decided on 13.3.2003.

20. Following the aforesaid decisions this petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Second Appeal No. 935 of 1980

Riyasat Khan ...Plaintiff
Versus
Union of India and others ...Respondents

Counsel for the Appellant:
Sri Radhey Shyam
Sri R. Dwivedi

Counsel for the Respondents:
Sri A.K. Sinha
S.C.

Public Premises (Eviction of Unauthorised Occupants) Act, 19971-S.15-Suit for eviction-Expiry of lease-unauthorised occupation of land-Jurisdiction of Civil Court barred-

A bare perusal of Section 15 quoted above clearly oust jurisdiction of the civil court in this view of the matter the finding of the trial court affirmed by the lower appellate court that a suit is barred by the provision of Section 15 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 does not require any interference by this Court. Para 6

Case law discussed:
2003 (51) ALR 700 (Pr. 37)

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

1. Heard learned counsel for the parties.

2. The plaintiff-appellant filed a suit before the trial court injunction to the effect that defendants may be restrained from evicting the plaintiff from plot no. 61/1 measuring 811 acres situate in cantonment area Shahjahanpur. It is admitted case of the parties that the property belongs to respondent no 1 i.e. Union of India. The plaintiff has set up his case that since the land was leased out by the defendant for a period of five years up to 31st May, 1974 and since the plaintiff has not vacated the land a notice was served upon him dated 29th April 1977 directing the plaintiff to remove his effects from the land in dispute and hand over vacant possession by 16th May, 1977 because the plaintiff's lease has not been renewed from 16th May 1977. The plaintiff's case in short is that after expiry of the lease period since the defendants have accepted rent they cannot evict him. As already stated the trial court dismissed the holding that in view of provisions of Section 15 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 the suit itself is barred as the trail court has no jurisdiction to try the suit. On merits also the trial Court has recorded a finding that no lease is subsisting in favour of the plaintiff and after expiry of lease period his occupation over the land is that of an unauthorized occupant for which a notice was also issued on 29th April, 1977 directing the plaintiff to vacate the land by 16th May 1977. Having not being done so the plaintiff cannot now be granted injunction prayed for. The suit was therefore, dismissed.

3. Aggrieved thereby the plaintiff preferred an appeal before the lower appellate court. The lower appellate court maintained the findings recorded by the trial court and dismissed the appeal.

4. Before this Court the learned counsel for the appellant has reiterated the

same arguments and has relied upon a case reported in 2003 (51) ALR 700 (Para 37) Section 15 of Public Premises (Eviction of Unauthorised Occupants) Act, 1971 is reproduced below which clearly bars a suit-

15. Bar of Jurisdiction- No court shall have jurisdiction to entertain any suit or proceeding in respect of-

(a) the eviction of any person who is in unauthorized occupation of any public premises or

(b) the removal of any building structure of fixture or goods cattle or other animal from any public premises under Section 5-A or

(c) the demolition of any building or other structure made or ordered to be made, under Section 5-B or

(cc) the sealing of any erection or work or of any public premises under Section 5-C, or

(d) the arrears of rent payable under sub-section (1) of Section 7 or damages payable under sub-section (2) or interest payable under sub-section (2-A), of that section, or

(e) the recovery of-

(i) costs of removal of any building structure or fixture or goods, cattle or other animal under Section 5-A, or

(ii) expenses of demolition under Section 5-B, or

(iii) costs awarded to the Central Government or statutory authority under sub-section (5) of Section 9, or

(iv) any portion of such rent damages costs of removal, expenses of demolition or costs awarded to the Central Government or the statutory authority"

6. A bare perusal of Section 15 quoted above clearly oust jurisdiction of the civil court in this view of the matter the finding of the trial court affirmed by the lower appellate court that a suit is barred by the provision of Section 15 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 does not require any interference by this Court.

In view of what has been stated above this appeal is dismissed.